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ARTICLE

Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?

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Abstract—The article addresses the recent trends in investment arbitration, focusing on the evolution of international investment agreements from the perspective of the right of the States to regulate in public interest, as well as of the provisions concerning environment, health, and corporate social responsibility. These issues have been chosen because they highlight areas where the tension between sovereign and private interests is evident, as well as where States often face resistance in implementing public policy. Furthermore, the discussion is opportune as the mandate entrusted to the UNCITRAL Working Group III concerned with investor-State dispute settlement reform is limited to procedural aspects of such reform, leaving to the discretion of the States, as treaty-makers, the regulation of the substantive issues concerning foreign investments. The analysis of the international investment agreements concluded between January 2018 and December 2020 demonstrates that treaty language is constantly evolving to protect and expand the scope of States' regulatory autonomy. The article concludes that investor-State dispute settlement remains the framework in which environmental, human rights and corporate social responsibility obligations can be smoothly integrated within the international investment law, allowing both States and investors to take advantage of and be held accountable for their respective obligations.

I. INTRODUCTION

The evolution of international investment law in silos has contributed to frequent clashes between investor protections offered in international investment agreements (IIAs), on the one hand, and concerns around sustainable development and human rights, on the other.[4] It is understandable that during negotiations of IIAs, States face

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[4] Silvia Steininger, 'What's Human Rights Got to Do with It? An Empirical Analysis of Human Rights References in Investment Arbitration' (2018) 31 LJIL 34 ('Human rights scholars and civil society, on the other hand, argue that foreign investors and governments do not prioritize the obligation to respect and protect fundamental human rights, thereby systematically undermining human rights standards').

the dilemma of guaranteeing predictability and security to the foreign investor, while also retaining a degree of policy autonomy for themselves.[5]

This tussle has played out in numerous investor-State dispute settlement (ISDS) cases where tribunals have held the host State liable for violations of the obligations, despite the State attempting to raise arguments that the measure falls within its regulatory space and exists in pursuance of legitimate public interest concerns. In *SAUR International v Argentina*, for example, the Tribunal stated:

> The fundamental right to water and the right of the investor to benefit from the protection offered by the APRI operate on different levels: in its sovereignty, the public administration has special powers to guarantee the enjoyment of the fundamental right to water; but the exercise of these powers is not absolute and must, on the contrary, be combined with respect for the rights and guarantees granted to the foreign investor under the APRI.[6]

At the same time, some tribunals such as those in *Feldman v Mexico* and *Methanex v USA* paved the way for tribunals to respect the margin of appreciation granted to States in pursuing public policy objectives.[7]

The respect for States' regulatory space is gaining momentum in the ongoing ISDS reform process. For instance, reform options pertaining to 'Dispute Prevention and Mitigation' currently being discussed at the UNCITRAL Working Group III identify procedural mechanisms through which States can restore their predominant position in ISDS.[8] Likewise, as 'masters of treaties', States are attempting to include language in IIAs that safeguards and furthers the policy autonomy that they enjoy in regulating foreign investments in accordance with public policy objectives.[9]

[5] Karsten Nowrot, 'How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law' (2014) 15 JWIT 622 ('It hardly needs to be emphasized that stipulating restrictions on the 'policy space' of host states on the basis of international legal obligations and thus providing conditions of legal certainty for foreign investors are among the central—and in principle indispensable—purposes of IIAs. However, it also has to be recalled in this connection, that the regulatory autonomy enjoyed by host states is very far from being merely an end in itself. Rather, it is first and foremost a means to pursue—and indeed even finds its justification and legitimation exclusively in the pursuit of—the promotion and protection of public interest concerns, among them human rights, development needs, environmental issues as well as social and labor standards').

[6] *SAUR International SA v Republic of Argentina*, ICSID Case No ARB/04/4, Decision on Jurisdiction and Liability (6 June 2012) para 331.

[7] *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1, Award (16 December 2002) para 103 ('The Tribunal notes that the ways in which governmental authorities may force a company out of business, or significantly reduce the economic benefits of its business, are many. In the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regulatory regimes, among others, have been considered to be expropriatory actions. At the same time, governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this'); *Methanex Corporation v United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) pt IV, ch D, paras 9, 15 ('Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons […] For reasons elaborated here and earlier in this Award, the Tribunal concludes that the California ban was made for a public purpose, was non-discriminatory and was accomplished with due process').

[8] UNCITRAL, 'Working Group III: Investor-State Dispute Settlement Reform' <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 3 March 2023.

[9] Mary E Footer, 'BITs and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment' (2009) 18 MichSJIL 33, 37–42 ('Many existing BITs are of the first generation, concluding somewhere between 1959 and the early 1990s. By and large they reflect the demands of the major capital-exporting states in the developed, industrialized world, which were previously situated in the Northern hemisphere. An almost exclusive emphasis on the protection of the foreign investment was served by the conclusion of BITs that provided for the substantive protection and promotion of investment […] It is becoming increasingly common for states to expand on their legitimate right to regulate for social

The purpose of this article is to identify trends in the treaty formulations adopted by States in three areas: the right to regulate, environment and health regulation and corporate social responsibility (CSR). We have chosen these three issues because they highlight areas where the tension between sovereign and private interests is evident, as well as where States often face the most resistance in implementing public policy.

(i) The broad 'right to regulate' can be enshrined in IIAs in several forms, some contentious, others not. The regulatory language used in IIAs is the basis for States to retain policy autonomy in their treatment of investors and investments.
(ii) Environment and health regulation, a subset of the right to regulate, has been the subject of intense scrutiny because it impacts citizens' rights and their quality of life. Global concerns such as climate change and sustainable development bring into focus States' efforts at addressing these concerns in their IIAs.
(iii) The inclusion of CSR in IIAs is a unique proposition because it expressly imposes obligations on investors in the text of the IIA itself; historically IIAs have been restricted to State obligations.

Our analysis looks at IIAs concluded between January 2018 and December 2020, in comparison with trends identified prior to 2018. The selection of this period is not arbitrary. One may recall that in 2015, UNCITRAL, at its 48th session, noted the debate surrounding investor-State arbitration and the challenges and proposals for reform formulated by several organisations. Based on the Notes prepared by the UNCITRAL Secretariat,[10] at its 50th session, UNCITRAL decided to entrust Working Group III with a broad mandate to work on the possible reform of ISDS. The Working Group proceeded to: (i) identify and consider concerns regarding ISDS; (ii) consider whether reform was desirable in light of any identified concerns; (iii) if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to UNCITRAL.

The first phase of the mandate of Working Group III covered the 34th session (27 November–1 December 2017) and the 35th session (23–27 April 2018). The 36th session held in Vienna (29 October–2 November 2018) focused on the second phase of the mandate of Working Group III, with the member States discussing whether reform was desirable in light of any identified concerns. The debate was structured on three main concerns, as identified in the previous sessions: (i) concerns pertaining to consistency, coherence, predictability and correctness of arbitral awards; (ii) concerns pertaining to arbitrators and decision makers; and (iii) concerns pertaining to the cost and duration of ISDS cases (with a focus on arbitration proceedings). The work of UNCITRAL on the third phase of the mandate commenced

or environmental purposes by imposing restrictions in one of two ways. One is for governments to provide exceptions to the general prohibition on the imposition of performance requirements in many IIAs […] The other means of restriction, which is common to some third generation BITs, is a so-called "non-lowering of standards" clause').

[10] See UNCITRAL, 'Possible Future Work in the Field of Dispute Settlement: Concurrent Proceedings in International Arbitration' (3–21 July 2017) UN Doc A/CN.9/915; UNCITRAL, 'Possible Future Work in the Field of Dispute Settlement: Ethics in International Arbitration' (3–21 July 2017) UN Doc A/CN.9/916; UNCITRAL, 'Possible Future Work in the Field of Dispute Settlement: Reforms of Investor-State Dispute Settlement (ISDS)' (3–21 July 2017) UN Doc A/CN.9/917. See also the Compilation of Comments by States and international organisations on UNCITRAL 'Investor-State Dispute Settlement Framework' (3–21 July 2017) UN Doc A/CN.9/918 and addenda.

with the 38th session of Working Group III in October 2019 and is ongoing.[11] As such, it is sensible to assume that the concerns identified for Working Group III—even those raised but not retained for the purpose of the Working Group, as being outside of its mandate—could or should have been commenced to be addressed by States in their newly concluded IIAs as early as 2018.

This analysis also places this review of the 2018–20 IIAs in the broader context of the evolution of the IIAs in the above-identified areas. We have noted that during this period some States have updated their model bilateral investment treaties (BITs). Although not the specific focus of this article, such model BITs have been taken into consideration where relevant and to the extent necessary to highlight an evolution in the IIAs.

On the methodology, we have considered 38 IIAs signed between January 2018 and December 2020, which include provisions concerning investment protection and promotion.[12] These IIAs include BITs as well as chapters in trade agreements.

[11] See UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Eighth Session' (Vienna, 14–18 October 2019) UN Doc A/CN.9/1004.

[12] Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment (signed 1 December 2018, not yet entered into force); Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates (signed 16 April 2018, not yet entered into force); Agreement between the Government of the Republic of Korea and the Government of the Republic of Armenia for the Promotion and Reciprocal Protection of Investments (signed 19 October 2018, entered into force 3 October 2019); Peru–Australia Free Trade Agreement (signed 12 February 2018, entered into force 11 February 2020) ch 8; Treaty between the Republic of Belarus and the Republic of India on Investments (signed 24 September 2018, not yet in force); Agreement between the Government of the Republic of Belarus and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments (signed 14 February 2018, not yet in force); Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation (signed 11 April 2018, not yet entered into force); Cooperation and Investment Facilitation Agreement between the Federative Republic of Brazil and the Co-operative Republic of Guyana (signed 13 December 2018, not yet entered into force); Cooperation and Investment Facilitation Agreement between the Federative Republic of Brazil and the Republic of Suriname (signed 2 May 2018, not yet entered into force); Agreement between the Government of the Republic of Turkey and the Government of the Kingdom of Cambodia on the Reciprocal Promotion and Protection of Investments (signed 21 October 2018, not yet entered into force); Agreement between the Government of Canada and the Government of the Republic of Moldova for the Promotion and Protection of Investments (signed 12 June 2018, entered into force 23 August 2019); Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, entered into force 30 December 2018), ch 9; Investment Protection Agreement between the European Union and Its Member States, of the One Part, and the Republic of Singapore, of the Other Part (signed 15 October 2018, not yet entered into force); Comprehensive Economic Partnership Agreement between the Republic of Indonesia and the EFTA States (signed 16 December 2018, entered into force 1 November 2021); Agreement between Japan and the Republic of Armenia for the Liberalisation, Promotion and Protection of Investment (signed 14 February 2018, entered into force 15 May 2019); Agreement between Japan and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investment (signed 27 November 2018, entered into force 1 August 2020); Agreement between Japan and the United Arab Emirates for the Promotion and Protection of Investment (signed 30 April 2018, entered into force 26 August 2020); Agreement between the Government of the Republic of Kazakhstan and the Government of the Republic of Singapore on the Promotion and Mutual Protection of Investments (signed 21 November 2018, not yet entered into force); Agreement between the Government of the Republic of Kazakhstan and the Government of the United Arab Emirates on Promotion and Reciprocal Protection of Investments (signed 24 March 2018, not yet entered into force); Republic of Korea and Central America Free Trade Agreement (signed 21 February 2018, entered into force 1 March 2021) ch 9; Singapore–Sri Lanka Free Trade Agreement (signed 23 January 2018, entered into force 1 May 2018) ch 10; United States–Mexico–Canada Agreement (signed 30 November 2018, entered into force 1 July 2020), ch 10; Armenia-Singapore Agreement on Trade in Services and Investment (signed 1 October 2019, not yet entered into force) ch 13; Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China (signed 26 March 2019, entered into force 17 January 2020); Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments (signed 5 April 2019, entered into force 23 January 2022); Agreement between the Government of the Republic of Belarus and the Government of Hungary for the Promotion and Reciprocal Protection of Investments (signed 14 January 2019, entered into force 28 September 2019); Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the United Arab Emirates (signed 15 March 2019, not yet entered into force); Agreement between the Government of Hungary and the Government of the Republic of Cabo Verde for the Promotion and Reciprocal Protection of Investments (signed 28 March2019, entered into force 2 May 2020); Investment Protection Agreement between the European Union and Its Member States, of the One Part, and the Socialist Republic of Vietnam, of the Other Part (signed 30 June 2019, not yet entered into force); Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Arab Emirates for the Promotion and

Twenty-two IIAs were signed in 2018, 11 in 2019 and five in 2020.[13] For each aspect described above, we have reviewed the provisions contained in the IIAs to understand the language used to further these interests. We have then made a frequency distribution to analyse how often certain treaty formulations have been relied on. Comparing the language in IIAs across the three years may indicate the evolution of treaty provisions in furthering the right to regulate, environmental and health considerations and CSR. On a broader aspect of this analysis, an overview of these IIAs may indicate States' approach to a more comprehensive international investment law and ISDS reform, outside the UNCITRAL Working Group III forum.

The next three sections of this article analyse the language of the 2018–20 concluded IIAs with respect to the right to regulate, environment and health regulation and CSR. Section V summarises the findings of this analysis, while Section VI considers the IIAs, experiences and the trajectories of some States in the context of the analysed topics. It should be noted here that environment and health regulation cannot be seen in isolation from the broader context of the right to regulate. Thus, this article will first provide a trend analysis on the inclusion of general regulatory powers in IIAs in Section II, before delving into the trend analysis specific to environment and health regulation.

II. THE RIGHT TO REGULATE: UNDERSTANDING THE PREVALENT TREATY FORMULATIONS

The right to regulate forms the basis of any and all regulatory activity that a host State may undertake. This principle is the foundation that permits States to exercise their sovereign powers and impose measures on investments in the interest of public welfare.[14] The right to regulate is the overarching source that guides the imposition of all regulatory measures, from CSR provisions to regulation of investments through prudential, taxation and anti-corruption measures.

The earlier IIAs, in particular first- and second-generation IIAs, espoused the interests of capital-exporting countries and included safeguards that would ensure

Reciprocal Protection of Investments (signed 16 June 2019, entered into force 6 March 2020); Bilateral Investment Treaty between the Government of the Kyrgyz Republic and the Government of the Republic of India (signed 14 June 2019, not yet entered into force); Agreement between the Government of the Republic of Singapore and the Government of the Republic of the Union of Myanmar on the Promotion and Protection of Investments (signed 24 September 2019, not yet entered into force); Agreement between the Government of the Republic of Uzbekistan and the Government of the Republic of Korea for the Reciprocal Promotion and Protection of Investment (signed 19 April 2019, not yet entered into force); Indonesia-Australia Comprehensive Economic Partnership Agreement (signed 4 March 2020, entered into force 5 July 2020) ch 14; Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India (signed 25 January 2020); Agreement between the Kingdom of Morocco and Japan for the Promotion and Protection of Investment (signed 8 January 2020, entered into force 23 April 2022); Regional Comprehensive and Economic Trade Agreement (signed 15 November 2020, entered into force 1 January 2022) ch 10; Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part (signed 30 December 2020, entered into force 1 May 2021).

[13] The data is taken from the UNCTAD website <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 3 March 2023.

[14] Dr Crina Baltag, 'Investment Arbitration and Police Powers: Emerging Issues' (2020) EILA Rev ('The doctrine of police powers has established itself as a State defence which provides that an act of the State, amounting to non-discriminatory taking of property, without compensation, and for public interest, could be lawful under public international law. The doctrine of police powers represents an attempt by investment tribunals to reconcile the sovereign right of the State, as the guardian of the general public interest, to regulate economic activities on its territory with its treaty or contractual obligations').

the protection of foreign investments.[15] Gradually, there arose a need for the high investor protection standards to be counterbalanced by sufficient powers to regulate investments, a change which has been reflected in third-generation IIAs.[16] Third-generation IIAs have also benefited from prior ISDS awards which shed light on the necessity of the host State's ability to be able to regulate foreign investments in a non-discriminatory manner to pursue legitimate objectives.[17]

The analysis in this section focusses on the common provisions across recent BITs that give expression to a State's right to regulate investments across various categories.

A. *Pre-2018 Trends*

Before looking at recent trends, we wanted to explore existing research for prior periods to see how the right to regulate was addressed. We begin by looking at the *Yearbook on International Investment Law and Policy* (Columbia Centre on Sustainable Investment, 2015–16, ch 2), which researched the prevalent treaty formulations on the right to regulate.[18] The research attributed its increased frequency to the necessity to overcome the 'regulatory chill' States faced in apprehension of negative outcomes of investor claims, coupled with the need to preserve their regulatory space to address global challenges such as climate change.[19] During this period, the right to regulate was protected through preambular clauses, non-precluded measures clauses, general provisions and non-lowering of standards clauses.[20]

For example, the 2016 Slovakia–Iran BIT utilised this language in the preamble:

> Acknowledging the rights and responsibilities of the Contracting Parties to regulate investment within their territories in order to meet own policy objectives.[21]

Similarly, article 8.9 of the 2016 CETA provides as follows:

[15] See Footer (n 8); Nowrot (n 4) at 620 ('The previous transition period from what might be labeled "first generation" BITs concluded since the end of the 1950s to the "second generation" investment agreements entered into mostly in the previous two decades was overall characterized by an enhancement of the legal protection of foreign investors and their activities based on a broad political consensus recognizing this protective aims as the sole—or at least primary—purpose pursued by respective agreements. This treaty practice, aimed at establishing and fostering an "'international investment protection law" in the true sense of the meaning, saw the introduction of improved levels of substantive guarantees for investors as well as—and particularly noteworthy—also the stipulation of investor-state dispute settlement provisions that were far from common in older BITS').

[16] Nowrot (n 4) 624 ('the currently visible transition phase from the "second generation" of investment agreements to the rise of a new "third generation" of investment policies that increasingly also finds its manifestation in treaty practice is overall characterized by various efforts of states to regain some of their policy space vis-à-vis foreign investors; intended to establish a new balance between host states and investors by stipulating additional limits to the international legal benefits enjoyed by the later').

[17] See eg *Biwater Gauff v Tanzania*, ICSID Case No ARB/05/22, Award (24 July 2008) para 434 ('Further, in deciding how best to address the crisis, including how to carry out the repossession of the leased assets at DAWASA's request, the Republic was entitled to a measure of appreciation. Water and sanitation services are vitally important, and the Republic has more than a right to protect such services in case of a crisis: it has a moral and perhaps even a legal obligation to do so').

[18] Jesse Coleman, Lise Johnson and others, 'International Investment Agreements, 2015–16: A Review of Trends and New Approaches' (2015–2016) YB Intl Investment L & Pol 42.

[19] ibid 72 ('In recent years, references to the "right to regulate" have appeared more frequently in the policy positions and public statements of negotiating states, in the texts of IIAs and new models, and more generally in the debate on reform of the international investment regime').

[20] ibid 74 ('This development goes beyond inclusion of provisions that indirectly concern the right to regulate. As discussed below, several agreements include more explicit references to the right to regulate in addition to, or aside from, the inclusion of general exception clauses, non-lowering of standards provisions, or clarifications of specific treaty standards that strongly impact regulatory space').

[21] Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (signed 19 January 2016, entered into force 30 August 2017) preamble.

1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.
2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.[22]

This provision expressly asserts the States' right to regulate and also outlines that regulatory activity would not be in breach of obligations. This is important for investors to align their expectations of the investment environment.

B. *A Wide Array of Forms that Regulatory Takings May Take: Looking at Developments in 2018–2020*

Regulatory language in IIAs in the relevant period (January 2018–December 2020), saw clauses that took on the following shape and form:

- *Preamble*—States might sometimes include reference to the right to regulate in the preambulatory clause. By reserving policy space within the preamble itself, the furthering of the right to regulate becomes an overarching theme in the interpretation of the IIA itself. For instance, an example of regulatory language can be seen in the 2019 Australia–Hong Kong IPA:

  RECOGNISING their right to regulate and resolving to preserve their flexibility to set legislative and regulatory priorities, safeguard public welfare and protect legitimate public welfare objectives.[23]

- *General provisions*—Some IIAs include a broad reference to States' regulatory powers within a 'general provisions' clause. The purpose of such a clause is to clarify that the mere exercise of a State's regulatory powers does not amount to a breach of investor rights, provided it was done to achieve legitimate public policy objectives. The 2018 EU–Singapore Investment Protection Agreement (IPA) uses the following language:

  1. The Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment or public morals, social or consumer protection privacy and data protection and the promotion and protection of cultural diversity.[24]

[22] Comprehensive Economic and Trade Agreement between Canada and the European Union (signed 30 October 2016, provisionally entered into force 21 September 2017) (CETA).

[23] Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China (signed 26 March 2019, entered into force 17 January 2020) Preamble.

[24] Investment Protection Agreement between the European Union and Its Member States, of the One Part, and the Republic of Singapore, of the Other Part (signed 15 October 2018, not yet entered into force) art 2.2.

- *National treatment (NT)*—While recognising obligations such as NT, certain IIAs also qualify an obligation by allowing States to exercise their right to regulate, provided the substance of investor rights is not diluted. The inclusion of such a clause is an attempt at balancing State obligations and investor rights. The 2020 Japan–Morocco BIT includes the following clause in its NT provision:

  Paragraph 1 shall not be construed to prevent a Contracting Party from adopting or maintaining a measure that prescribes special formalities in connection with investment activities of investors of the other Contracting Party in its Territory, provided that such special formalities do not impair the substance of the rights of such investors under this Agreement.[25]

- *Transfers*—This is one of the most common regulatory provisions seen in IIAs that we looked at . Transfers relating to any investment within a State's territory would be generally permitted. Such transfers would be restricted only in the exercise of regulatory powers and the domestic rule of law. The 2018 Canada–Moldova BIT qualifies the transfers provision with this clause:

  Notwithstanding paragraphs 1 and 2, a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its domestic law relating to:
  (a) bankruptcy, insolvency, or the protection of the rights of a creditor;
  (b) issuing, trading, or dealing in securities;
  (c) a criminal or penal offence;
  (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or
  (e) ensuring compliance with an order or judgment in judicial or administrative proceedings.[26]

- *Taxation measures*—The purpose of this clause is to harmoniously construe States' obligations under IIAs with those under other tax agreements. To that end, this clause reserves powers of States to regulate issues of tax. The 2019 EU–Vietnam IPA includes the following language:

  Nothing in this Agreement shall be construed as preventing the adoption or enforcement of any measure aimed at preventing the avoidance or evasion of taxes pursuant to the tax provisions of agreements to avoid double taxation or other tax arrangements or domestic fiscal legislation.[27]

- *Prudential measures*—Similar to the previous clause, this provision too safeguards the right to regulate in the interest of a State's economic health. For example, the 2019 EU–Vietnam IPA includes a useful provision:

  1. Nothing in this Agreement shall be construed as preventing a Party from adopting or maintaining measures for prudential reasons, such as:

[25] Agreement between the Kingdom of Morocco and Japan for the Promotion and Protection of Investment (signed 8 January 2020, entered into force 23 April 2022) art 3.4.
[26] Agreement between the Government of Canada and the Government of the Republic of Moldova for the Promotion and Protection of Investments (signed 12 June 2018, entered into force 23 August 2019) art 11.
[27] Investment Protection Agreement between the European Union and Its Member States, of the One Part, and the Socialist Republic of Vietnam of the Other Part (signed 30 June 2019, not yet entered into force) art 4.4.

(a) the protection of investors, depositors, policy-holders or persons to whom a fiduciary duty is owed by a financial service supplier; or
(b) ensuring the integrity and stability of a Party's financial system.
2. The measures referred to in paragraph 1 shall not be more burdensome than necessary to achieve their aim.[28]

- *Anti-corruption*—This clause usually takes the form of enjoining States to impose measures tackling corruption, even if such corruption originates from foreign investments. The 2018 Brazil–Guyana Cooperation and Facilitation Investment Agreement (CFIA) uses the following language:

1. Each Party shall maintain measures to prevent and fight corruption, money laundering and terrorism financing with regard to matters covered by this Agreement, in accordance with its laws and regulations.
2. Nothing in this Agreement shall require any Party to protect investments made with capital or assets of illicit origin or investments in the establishment or operation of which illegal acts have been demonstrated to occur and for which national legislation provides asset forfeiture.[29]

- *Performance requirements*—This provision is most commonly seen in regional trade agreements (RTAs) and free trade agreements (FTAs), and ensures that States may impose performance requirements in very limited circumstances, generally pertaining to the TRIPS Agreement, or when imposed by the State's judicial system. For instance, the USMCA uses the following provision:

Paragraphs 1(f), 1(h), 1(i), and 2(e) do not apply:

(i) if a Party authorizes use of an intellectual property right in accordance with Article 3115 of the TRIPS Agreement, or to a measure requiring the disclosure of proprietary information that falls within the scope of, and is consistent with, Article 39 of the TRIPS Agreement, or
(ii) if the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority, after judicial or administrative process, to remedy an alleged violation of competition laws.[30]

- *Consistency with IIA obligations*—This clause recognises States' powers to regulate investments by imposing measures consistent with obligations in the IIA. Generally, this clause enables States to regulate to achieve environmental and health objectives. For example, the 2018 CPTPP includes the following clause:

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers

[28] ibid art 4.5.
[29] Cooperation and Investment Facilitation Agreement between the Federative Republic of Brazil and the Cooperative Republic of Guyana (signed 13 December 2018, not yet entered into force) art 16.
[30] United States–Mexico–Canada Trade Agreement (signed 30 November 2018, entered into force 1 July 2020) art 14.10.3.

appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.[31]

- *Non-precluded measures*—These clauses recognise exceptional situations in which it would be permitted for States to impose measures that may impair investor rights. This is one of the most common forms of regulatory language seen in IIAs of 2018–20. The 2018 Argentina–UAE BIT, for example, states:

  Nothing in this Agreement shall prevent the implementation by either Party of measures it deems necessary in order to:

  (a) maintain public order;
  (b) protect its own national interests, including its essential security interests;
  (c) fulfil its obligations with respect to the maintenance or restoration of international peace and security;
  (d) protect human, animal and plant life or health;
  (e) protect and preserve the environment, including living and non-living natural resources;
  (f) protect national treasures or monuments having artistic, cultural, historical and archaeological value.[32]

- *Exemptions*—Usually in the context of indirect expropriation, this treaty formulation exempts States from liability for breach of obligations when regulating to achieve environment and health objectives. For example, the 2018 Belarus–Turkey BIT includes the following text:

  Non-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation.[33]

The last three treaty formulations, ie, consistency with IIA obligations, non-precluded measures and exemptions, are also discussed in the substantive analysis on environment and health regulation as their language is specific to these concerns.

Figure 1 and Table 1 provide the frequency of various treaty formulations that emphasise regulatory language in IIAs.

It is clear from Figure 1 and Table 1 that the non-precluded measures provision and the transfers provision have become the most common of the treaty formulations. References in the exemptions, prudential measures, taxation measures and preambulatory clauses of the IIAs are also popular. However, the imposition of performance requirements and conditions to the NT obligations are rare, as is the reference to the 'consistency with IIA obligations' clause. Provisions such as these are simple

[31] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, entered into force 30 December 2018) ch 9, art 9.16.

[32] Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates (signed 16 April 2018, not yet entered into force) art 18.

[33] Agreement between the Government of the Republic of Belarus and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investment (signed 14 February 2018, not yet entered into force) art 6(2).

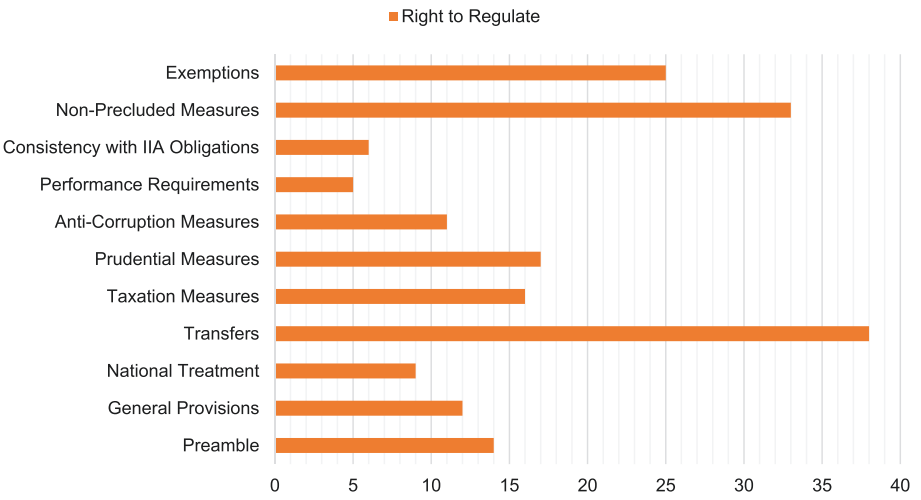

Fig. 1. Frequency of right-to-regulate language (2018–20)

Table 1. Frequency of right-to-regulate language (2018–20)

Right to regulate	2018 (%)	2019 (%)	2020 (%)
Preamble	22.72	63.63	40
General provisions	27.27	36.36	40
NT	27.27	18.18	20
Transfers	100	100	80
Taxation measures	50	27.27	40
Prudential measures	40.9	45.45	60
Anti-corruption measures	31.81	9.09	60
Performance requirements	18.18	0	20
Consistency with IIA obligations	18.18	9.09	20
Non-precluded measures	86.38	90.9	80
Exemptions	63.63	63.63	80

mechanisms of retaining the right to regulate and achieving public policy objectives without breaching investor rights, rendering it strange that States are not adopting this language more openly.

Table 1 demonstrates a pertinent point: treaty formulations for right to regulate did not develop much from 2018 to 2020. While only the language pertaining to taxation measures, prudential measures and anti-corruption measures has significantly grown, most other provisions are yet to catch on among States. Additionally, while transfers and non-precluded measures clauses are the most popular and have been frequently adopted, there is a dip in their usage from 2018 to 2020.

Furthermore, Brazil and Japan have adopted a strong leaning towards incorporating the right to regulate as a fundamental facet of their IIAs. During the relevant period, all BITs of Japan and all CFIAs of Brazil utilised almost all the treaty formulations outlined above.

Table 2. Population of right-to-regulate provisions across investment chapters in FTAs (2018–20)

Investment chapters	*Preamble*	*General provisions*	*NT*	*Transfers*	*Taxation measures*	*Prudential measures*	*Anti-corruption measures*	*Performance requirements*	*Consistency with IIA obligations*	*Non-Precluded measures*	*Exemptions*
Armenia–Singapore FTA				•		•				•	
Australia–Indonesia FTA				•				•	•		•
Australia–Peru FTA				•					•	•	•
CPTPP				•				•	•		•
Ecuador–EFTA FTA											
Indonesia–EFTA EPA		•		•	•					•	
RoK–Republic of Central America FTA				•				•			•
Regional Comprehensive and Economic Partnership Agreement				•			•			•	•
Singapore–Sri Lanka FTA				•						•	•
UK–EU Trade and Cooperation Agreement		•			•	•				•	
USMCA				•				•	•		•

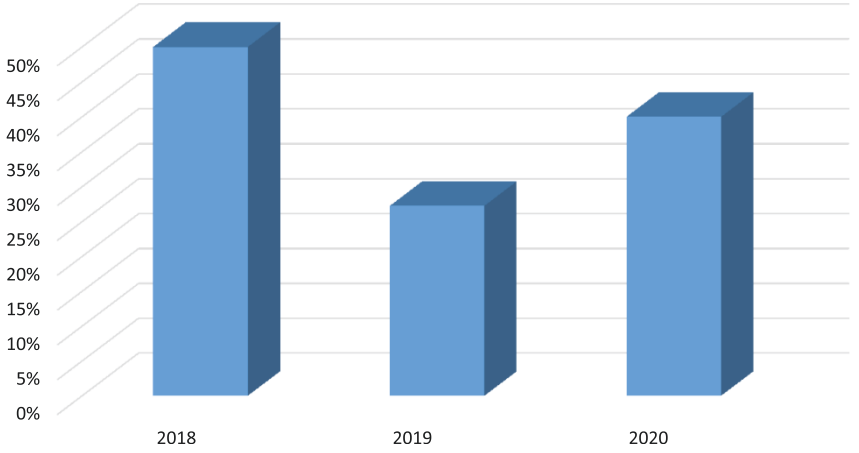

Fig. 2. Taxation measures

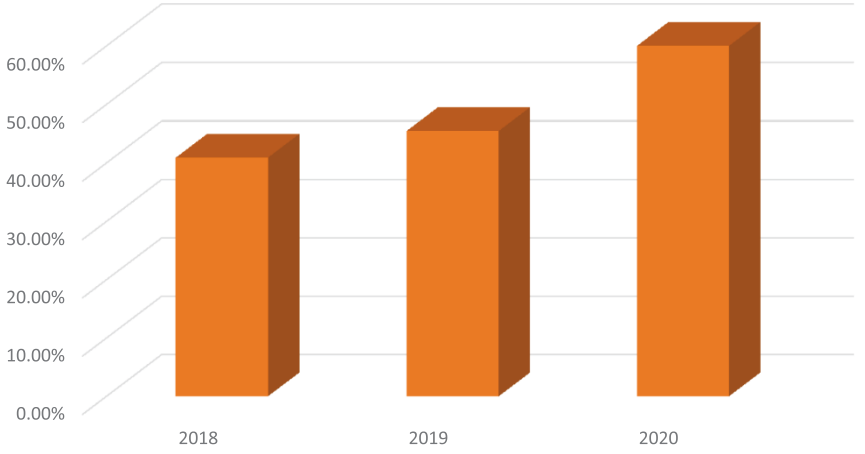

Fig. 3. Prudential measures

States signing FTAs still appear reluctant to incorporate the right to regulate in a substantial way. Most States have resorted solely to transfers, non-precluded measures and exemptions provisions, to the exclusion of anti-corruption measures, preambulatory and general provisions. While the focus of this study remains on regulatory language within the investment chapter of FTAs, it is pertinent to note that certain FTAs do incorporate the right to regulate in a substantive manner elsewhere as well. For instance, the 2018 Peru–Australia FTA specifically secures the policy space to regulate in support of sustainable development.[34] Similarly, Chapter 19 of

[34] Peru–Australia Free Trade Agreement (signed 12 February 2018, entered into force 11 February 2020) ch 22.

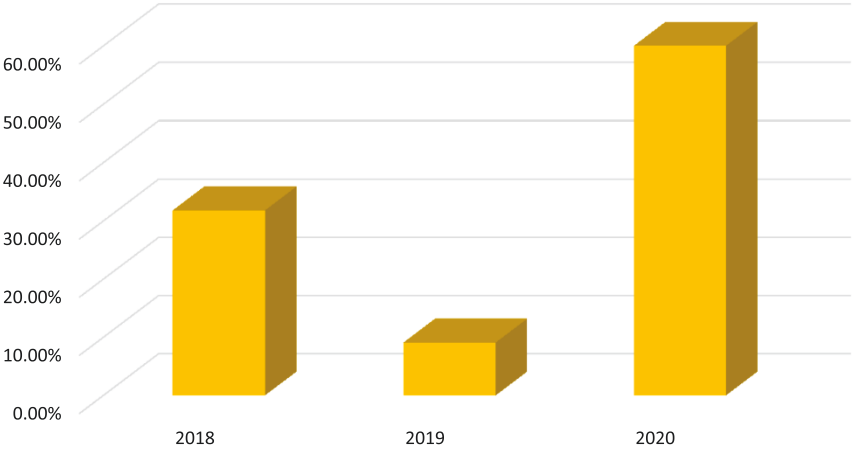

Fig. 4. Anti-corruption measures

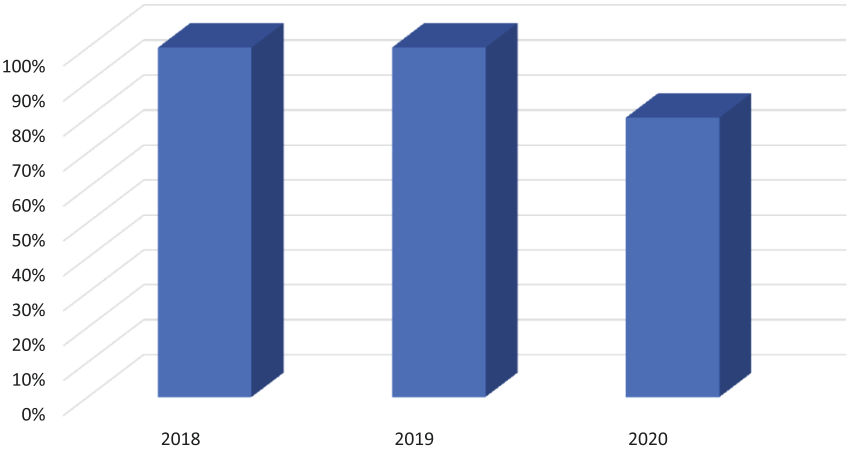

Fig. 5. Transfers

the CPTPP recognises States' obligation to comply with internationally recognised labour rights.[35]

C. *Comparing the Trends*

The necessity for States to overcome the 'regulatory chill' has persisted from pre-2018 up to the 2018–20 period. In order to secure their regulatory autonomy and policy space to align investments with their agenda, States have adopted more and more treaty formulations for protecting their right to regulate. There has been an explosion

[35] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, entered into force 30 December 2018) ch 19. See also Free Trade Agreement between the Republic of Korea and the Republics of Central America (signed 21 Feburary 2018, entered into force 1 March 2021) ch 16; United States–Mexico–Canada Agreement (signed 30 November 2018, entered into force 1 July 2020) ch 23.

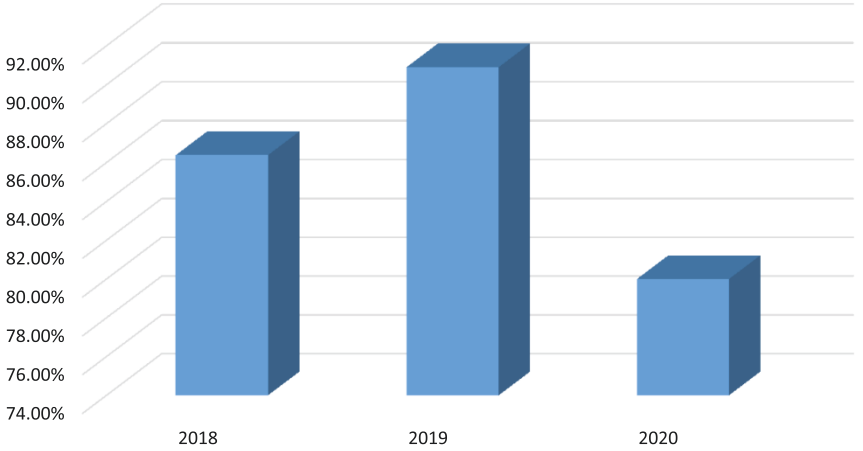

Fig. 6. Non-precluded measures

in the variety of clauses at the disposal of States, from broadly preambulatory and non-precluded measures clauses in the pre-2018 period to seven other forms such as taxation measures, anti-corruption measures and performance requirements, among others, for 2018–20.

One might argue that this development may be credited to the uncertainty raised by absence of specific and express language in the IIAs guaranteeing that States' right to regulate will be recognised. It cannot be denied that there is established arbitral practice acknowledging that even where the underlying IIA does not expressly include reference to the regulatory powers of States, tribunals can rely on article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) in upholding the application of these powers. In *Marfin v Cyprus*, the Tribunal held that even in the absence of an express provision in the applicable IIA, the doctrine of the regulatory powers of a State is applicable as part of customary international law.[36] In *Philip Morris v Uruguay*, the Tribunal held that the packaging measures implemented by Uruguay were a valid exercise of the State's police powers, with the consequence of defeating the claim of expropriation, even in the absence of an express provision.[37] However, express language in the applicable IIA, in particular that pertaining to exemptions clauses, may ensure that the intention of the State to regulate is upheld by the tribunal. In this context, it is pertinent to highlight that ISDS critiques often refer to the award in *Santa Elena v Costa Rica*,[38] where the Tribunal reached the conclusion that

[36] *Marfin Investment Group v Republic of Cyprus*, ICSID Case No ARB/13/27, Award (26 July 2018) para 827 ('The Tribunal notes that Article 4 of the Treaty is drafted in broad terms and does not include any exception for the exercise of a State's regulatory powers. However, the provisions of the Treaty must be interpreted in accordance with Article 31 (3)(c) of the VCLT, i.e., in light of "[a]ny relevant rules of international law applicable in the relations between the parties". These rules include customary international law').

[37] *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7 (formerly FTR Holding SA, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay), Award (8 July 2016) para 307 ('In light of the foregoing, the Tribunal concludes that the Challenged Measures were a valid exercise by Uruguay of its police powers for the protection of public health. As such, they cannot constitute an expropriation of the Claimants' investment. For this reason also, the Claimants' claim regarding the expropriation of their investment must be rejected').

[38] *Compañia del Desarrollo de Santa Elena SA v Republic of Costa Rica,* ICSID Case No ARB/96/1, Final Award (17 February 2000).

States must pay compensation for expropriation, even where an investor's property is expropriated for environmental purposes, whether domestic or international:

> While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference.
>
> Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a State may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the State's obligation to pay compensation remains.[39]

At the same time, there have been instances where express regulatory language in the text of an FTA has been the subject-matter of adjudication. For example, in the 2010 EU–Korea FTA (chapter 13 on trade and sustainable development) contains an obligation to *respect, promote and realise* fundamental labour rights 'in accordance with obligations deriving from membership of the International Labour Organization (ILO)'.[40] On 20 January 2021, a panel of experts constituted under this FTA found South Korea in breach of this obligation as the impugned domestic labour legislation did not meet the minimum standards of freedom of association as defined in the ILO Constitution.[41] Thus, the right to regulate can serve as a double-edged sword if not exercised judiciously.

The onset of the Covid-19 pandemic has only prompted States to reassert their regulatory powers.[42] States have imposed a wide range of measures such as export restrictions, FDI screening and nationalisation in exercising their regulatory space to control the spread of the pandemic.[43] It is possible that these could fall foul of obligations in IIAs. It remains to be seen how investment tribunals approach matters

[39] ibid paras 71 and 72.

[40] Free Trade Agreement between the European Union and Its Member States, of the One Part, and the Republic of Korea, of the Other Part (signed 6 October 2010, entered into force 1 July 2011) art 13.4.3 ('The Parties, in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely: (a) Freedom of association and the effective recognition of the right to collective bargaining; (b) The elimination of all forms of forced or compulsory labour; (c) The effective abolition of child labour; and (d) The elimination of discrimination in respect of employment and occupation. The Parties reaffirm the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the European Union have ratified respectively. The Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as "up-to-date" by the ILO').

[41] *Report of the Panel of Experts constituted under Article 13.15 of the EU–Korea Free Trade Agreement* (20 January 2021) para 107 ('Having considered all the arguments and submissions on this point, the Panel decides that the phrase "the obligations deriving from membership of the ILO" in the context of the first sentence of Article 13.4.3 has the effect of creating a legally binding commitment on both Parties in relation to respecting, promoting and realising the principles of freedom of association as they are understood in the context of the ILO Constitution. The EU–Korea FTA reaffirms the existing obligations of the Parties under the ILO Constitution, and has incorporated these obligations, as they are defined within the ILO system, as separate and independent obligations under Chapter 13 of the Agreement').

[42] Kabir Duggal, Rekha Rangachari and Kanika Gupta, 'Consequences of Crisis and the Great Rethink: COVID-19's Impact on Energy Investment, Sustainability and the Future of International Investment Agreements' (2021) JWEL & B.

[43] KPMG, 'Government and institution measures in response to COVID-19', <https://assets.kpmg.com/content/dam/kpmg/bb/pdf/2020/04/Government%20and%20institution%20measures%20in%20response%20to%20COVID-19%20-%20Update%2024.pdf> accessed 3 March 2023.

arising out of Covid-19 restrictions, and balance the right to regulate with investor protection.

III. ENVIRONMENT AND HEALTH REGULATION: A SPECIFIC EXERCISE OF THE RIGHT TO REGULATE

This section of the article analyses the specific treaty formulations that further environmental and health concerns in IIAs within the broad context of the right to regulate.

A. *Pre-2018: Environment and Health Language as It Was*

Environment and health language has not always found explicit space in IIAs. However, trends prior to 2018 shed light on how States began to gradually include such treaty formulations, especially after becoming cognizant of the impact of investment activities on citizens' human rights.

The 2011 OECD survey *Environmental Concerns in International Investment Agreements* ('OECD Survey'),[44] studied 1,623 IIAs pertaining to 49 States. The scope of the OECD Survey was to understand the extent, type and frequency of environment language in IIAs, which at the time tended to address health considerations. Some of the findings of the OECD Survey in the pre-2018 era are as follows:

(i) While the frequency of treaty formulations pertaining to environmental (and health) concerns has definitely increased since its first occurrence in the 1985 China–Singapore BIT,[45] such growth has not been monotonic. The 1990s and 2000s saw a year-on-year decline in the references to environment and health in IIAs, until the trend picked up again in later years.[46]

(ii) A limited number of environmental concerns found expression in IIAs. Pressing issues such as climate change and biodiversity had not yet seeped into treaty language.[47]

(iii) Language referring to environment and health was more common in FTAs than BITs.[48] For example, of the 20 IIAs at the time that reserved policy space for environmental and health measures, 16 were FTAs and only four were BITs.[49]

[44] Kathryn Gordon and Joachim Pohl, 'Environmental Concerns in International Investment Agreements: A Survey' (2011) OECD Working Papers on International Investment 2011/01.

[45] China and Singapore Agreement on the Promotion and Protection of Investments (signed 21 November 1985, entered into force 7 February 1986, terminated 16 October 2019).

[46] Gordon and Pohl (n 43) 6 ('The frequency of the use of environmental language in IIAs has generally increased over time, but this increase is not monotonic. Over the long term, the proportion of IIAs that contain references to environmental concerns has increased. However, during the early 1990s and the early 2000s, the frequency of some approaches to include references to environmental concerns suffered a relative decline year-on-year').

[47] ibid ('The set of environmental concerns that receive an explicit mentioning in IIAs is limited and has hardly evolved over time. The language that characterises environmental concerns is either generic, or, where individual aspects are mentioned, dates back to the text of the 1948 General Agreement on Tariffs and Trade. More recent concerns, such as climate change and biodiversity, have not penetrated this closed set of issues').

[48] ibid 5 ('Language referring to environmental concerns is rare in BITs but common in non-BIT IIAs. In the treaty sample, 133, or 8.2%, of the IIAs contain a reference to environmental concerns. All 30 non-BIT IIAs contain such references, but only 6.5% of BITs do').

[49] ibid 19 ('A small set of treaties reserve policy space for specific, limited purposes, thus distinguishing this group from the comprehensive scope that the reservations described in the preceding subsection cover. Nineteen treaties fall in this category—16 FTAs and only 4 BITs—and 19 focus on performance requirements while one concerns exceptions to national treatment').

(iv) How States chose to include environment and health language in IIAs varied significantly. With treaty formulations such as preambulatory clauses, non-relaxation clauses, non-precluded measures clauses at the disposal of States, the permutations and combinations of adopting such language varied significantly among States.[50]

At the time of the survey, Egypt, the United Kingdom and Germany seemed particularly reluctant to include environmental and health language in IIAs.[51] Countries such as Canada, New Zealand, Japan, the United States of America and Finland embraced such considerations in IIAs.[52]

One should also add to the OECD Survey, the 2015 UNCTAD's Investment Policy Framework for Sustainable Development.[53] The UNCTAD paper suggests several points for lawmakers to consider when drafting and negotiating IIAs, in order to align these agreements with the sustainable development objectives, such as incorporating concrete commitments to promote and facilitate investment for sustainable development;[54] balancing State commitments with investor obligations;[55] and ensuring an appropriate balance between protection commitments and regulatory space for development.[56] Outside the international investment law and ISDS framework, there were, of course, numerous developments pre-2018, all with a view to promoting sustainable development, environmental protection and balanced regulatory powers of States, together with increased transparency of these areas of concern. On this latter point, one should consider, for example, the Aarhus Convention and its role on enhancing participatory rights of the public in the context of environmental protection.[57]

The next section sets out our substantive analysis of environment and health language relative to the 2018–20 period.

B. *From 2018 to 2020: Environment and Health Language as It Is*

For the purposes of this analysis, each individual provision in IIAs furthering the regulatory autonomy of States was termed a 'form'. However, the '*approach*' of an IIA to environmental and health considerations can be seen only in combination with these 'forms'. Therefore, the higher the number of 'forms' in an IIA, the more robust and distinct the 'approach' of States to preserving their policy space specific to environment and health regulation.

(i) 'Forms'

[50] ibid ('Much idiosyncratic variation, limited number of policy themes addressed, but major strategic differences among countries in terms of their positioning with respect to these themes. Although significant variance can be observed in the details of the provisions and identical language across treaties is rare, almost all these provisions are variations on a limited number of themes addressing distinct policy purposes. Nevertheless, treaties show significant variation with respect to their treatment of these themes—some include only preamble language while others feature extensive language on more specific issues such as performance requirements and indirect expropriation').

[51] ibid 8–9 ('Some countries only very occasionally include such language. For example, Egypt, the United Kingdom and Germany have just one treaty with environmental language out of 73, 98 and 122 treaties in the sample, respectively').

[52] ibid 9 ('Countries with relatively high propensities to include such language include: Canada (83% of its sample treaties), New Zealand (3 out of its 4 treaties in the sample), Japan (61% of its treaties), the United States (34%), and Finland (26%)').

[53] UNCTAD, 'Investment Policy Framework for Sustainable Development' (2015) <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf> accessed 1 March 2020.

[54] ibid 77.

[55] ibid 77–78.

[56] ibid 78.

[57] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (signed 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention).

IIAs signed between 2018 and 2020 incorporated the following forms of furthering environmental and health concerns:

- *Preamble*—States often incorporate their commitment to environment and health considerations in the preamble to the IIAs. Preambles play an important role in the interpretation of the IIAs and outlining of the States' priorities. For example, the 2019 Agreement between the Government of the Republic of Singapore and the Government of the Republic of the Union of Myanmar on the Promotion and Protection of Investments states in the Preamble:

  > Reaffirming the Parties' right to regulate and to introduce new measures, such as health, safety, and environmental measures relating to investments in their territories in order to meet legitimate public policy objectives.[58]

- *Non-relaxation clause*—Recent IIAs have come to include language that ensures that States cannot attract foreign investment by lowering existing health and environmental standards. This ensures that States do not feel obligated to sacrifice the interests of their population in order to attract foreign investment. For example, the 2018 Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment utilises the following text:

  > Each Contracting Party recognises that it is inappropriate to encourage investment by investors of the other Contracting Party and of a non-Contracting Party by relaxing its health, safety or environmental measures, or by lowering its labour standards. To this effect, each Contracting Party should not waive or otherwise derogate from such measures or standards as an encouragement for the establishment, acquisition or expansion of investments in its Area by investors of the other Contracting Party and of a non-Contracting Party.[59]

- *Consistency with IIA obligations clause*—This treaty formulation enjoins States to regulate the investment environment through measures that comply with IIA obligations. This helps harmonise public policy objectives and investor rights. The 2019 Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China provides:

  > Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its Area is undertaken in a manner sensitive to environmental, health or other regulatory objectives.[60]

[58] Agreement between the Government of the Republic of Singapore and the Government of the Republic of the Union of Myanmar on the Promotion and Protection of Investments (signed 24 September 2019, not yet entered into force) Preamble.

[59] Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment (signed 1 December 2018, not yet entered into force) art 22.

[60] Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China (signed 26 March 2019, entered into force 17 January 2020) art 15.

- *Performance requirements clause*—Provisions of this form allow States to impose requirements specific to certain investment activities. These can be in the pre-admission as well as the operational phases of the investment. For instance, the 2018 Agreement between the Government of Canada and the Government of the Republic of Moldova for the Promotion and Protection of Investments incorporates the following performance requirements clause:

  > A measure that requires an investment to use a technology to meet generally applicable health, safety, or environmental requirements is not inconsistent with subparagraph 1(f).[61]

- *Non-precluded measures clause*—For the purpose of the non-precluded measures clause, IIAs tend to include the language of Article XX of the GATT. The exceptions outlined in this form permit States to impose measures and excuse the consequent violation of treaty obligations in order to achieve certain public policy objectives. A typical non-precluded measures clause is drafted in the following form:

  > Nothing in this Treaty shall be construed to prevent the adoption or enforcement by a Party of measures of general applicability applied on a non-discriminatory basis that are necessary to: […] protect human, animal or plant life or health; […] protect and conserve the environment, including all living and non-living natural resources.[62]

- *Exemptions clause*—In certain limited circumstances, States might be exempted from the fulfilment of their obligations if the measure is imposed to the end of achieving these legitimate public policy concerns. Exemptions offer a form of immunity to the State. The 2019 Hungary–Cabo Verde BIT uses the following language for an exemptions clause:

  > Non-discriminatory measures that the Contracting Parties take for reason of public purpose including for reasons of public health, safety, and environmental protection, which are taken in good faith, which are not arbitrary, and which are not disproportionate in light of their purpose, shall not constitute indirect expropriation.[63]

Figure 7 demonstrates the total number of times 'forms' have been relied on to preserve the regulatory autonomy of the States in environmental and health regulation in IIAs in the 2018–20 period. It is appropriate to note here that environmental and health considerations are, more often than not, addressed together. However, a few provisions in certain IIAs choose to address one or the other.[64]

[61] Agreement between the Government of Canada and the Government of the Republic of Moldova for the Promotion and Protection of Investments (signed 12 June 2018, entered into force 23 August 2019) art 9.2.

[62] Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Government of India (signed 25 January 2020, not yet entered into force) art 23.

[63] Agreement between the Government of Hungary and the Government of the Republic of Cabo Verde for the Promotion and Reciprocal Protection of Investments (signed 28 March 2019, entered into force 2 May 2020) art 6.4(c).

[64] See eg Republic of Korea—Central America Free Trade Agreement (signed 21 February 2018, entered into force 1 March 2021) art 9.11 ('Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns').

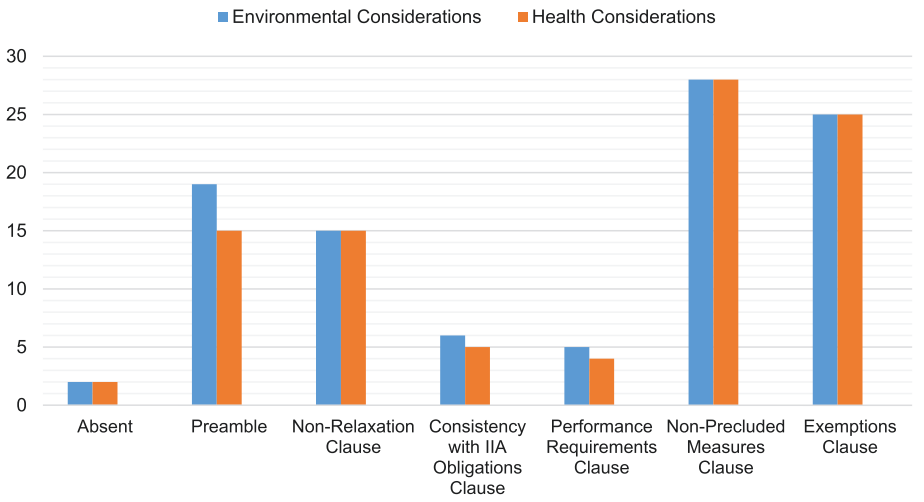

Fig. 7. Frequency of 'forms' (2018–20)

Looking at Figure 7, a few observations can readily be made. First, two IIAs are conspicuous inasmuch as they lack any mention of environmental or health regulation.[65] Coincidentally, the UAE is a contracting party to both these IIAs. Second, preambulatory provisions are more likely to represent environmental considerations as opposed to health considerations. Third, the forms of 'Non-Precluded Measures' and 'Exemptions' are overwhelmingly favoured to protect the regulatory space of States in the spheres of environment and health.

Exceptions in non-precluded measures clauses tend to follow the language of the general exceptions in Article XX of the GATT, by permitting States to take measures to *protect human, animal or plant life or health, as well as conserve exhaustible natural resources.* Exemptions, on the other hand, attach themselves only to certain obligations, most commonly the prohibition on expropriation. For example, Annex B of the Australia–Uruguay BIT mentions the following:

> Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.[66]

Preambulatory and non-relaxation clauses are almost equally popular. The former ensures that States bear in mind environmental, health and other public interest considerations while attracting and promoting foreign investments. The latter discourages States from competing with each other by waiving essential requirements in order to encourage foreign investments into their States.

[65] Agreement between the Government of the Republic of Kazakhstan and the Government of the United Arab Emirates on Promotion and Reciprocal Protection of Investments (signed 24 March 2018, not yet entered into force); Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Arab Emirates for the Promotion and Reciprocal Protection of Investments (signed 16 June 2019, entered into force 6 March 2020).

[66] Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments (signed 5 April 2019, entered into force 23 January 2022) Annex B, 3(b).

Table 3. Environment: frequency of forms (2018–20)

Form	2018 (%)	2019 (%)	2020 (%)
Absent	4.5	9.09	0
Preamble	45	72.72	40
Non-relaxation	45.45	27.27	40
Consistency with IIA obligations	18.18	9.09	20
Performance requirements	18.18	0	20
Non-precluded measures	68.18	90.9	80
Exemptions	63.63	63.63	80

Table 4. Health: frequency of forms (2018–20)

Form	2018 (%)	2019 (%)	2020 (%)
Absent	4.5	9.09	0
Preamble	36.36	54.54	40
Non-relaxation	45.45	27.27	40
Consistency with IIA obligations	13.63	9.09	20
Performance requirements	13.63	0	20
Non-precluded measures	68.18	90.09	80
Exemptions	63.63	63.63	80

Thus, the forms that States have come to rely on heavily in environmental and health regulation are non-precluded measures, exemptions, preambles and non-relaxation clauses.

Tables 3 and 4 compare the frequency of forms across 2018, 2019 and 2020 for environmental and health concerns respectively. The purpose is to understand how reliance on these forms has evolved over a three-year period by studying the data for each individual year.

Tables 3 and 4 put the absolute numbers in perspective, ie in light of the number of IIAs signed in a specific period. For instance, the usage of exemptions clauses to further environmental and health considerations saw a steady increase from 63.63% in 2018 and 2019 to 80% in 2020.

Similarly, the non-relaxation clause (for both environmental and health interests) witnessed a dip from 45.45% in 2018 to 27.27% in 2019 and a subsequent rise to 40% in 2020.

A comparable trend was also witnessed in the imposition of performance requirements for environmental considerations.[67]

Lastly, reliance on preambulatory clauses for both environmental and health interests saw a rise from 2018 to 2019, but a subsequent fall in 2020.[68]

[67] The percentage of performance requirements provisions for environment considerations was 18.18 in 2018, 0 in 2019 and 20 in 2020.

[68] The percentage of preambulatory clauses for environment considerations was 45 in 2018, 72.72 in 2019 and 40 in 2020. The percentage of preambulatory clauses for health considerations was 36.36 in 2018, 54.54 in 2019 and 40 in 2020.

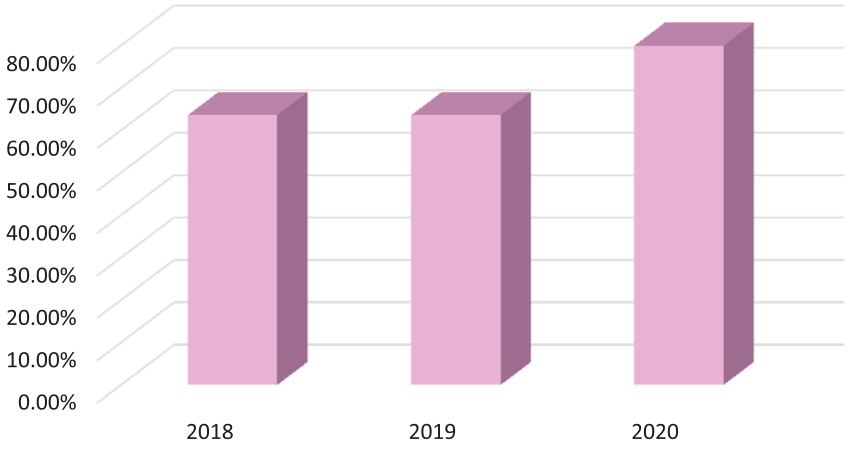

Fig. 8. Environment: Exemptions

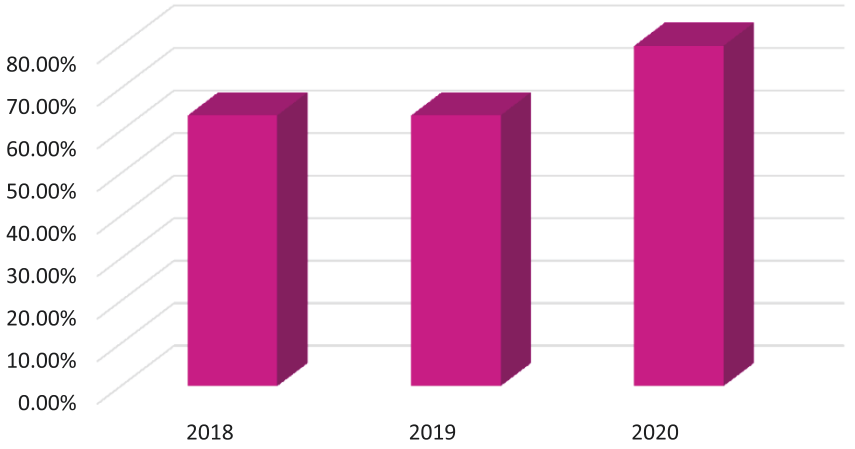

Fig. 9. Health: Exemptions

Thus, the treaty language has been evolving to offer States an increasing degree of regulatory space in the realms of environmental and health considerations, especially through the means of exemptions, non-relaxation, performance requirements and non-precluded measures clauses.

(ii) 'Approaches'

An isolated analysis of the forms/provisions incorporated in an IIA is not sufficient to gauge the commitment of States to regulation in the interest of environment and health or any trend in this direction in the past years. The direction of an IIA with respect to these concerns can be assessed through a combination of the forms adopted in the treaty provisions. This becomes the 'approach' of the IIA.

To this end, the following are the popular approaches identified from the analysis of the 2018–20 IIAs:

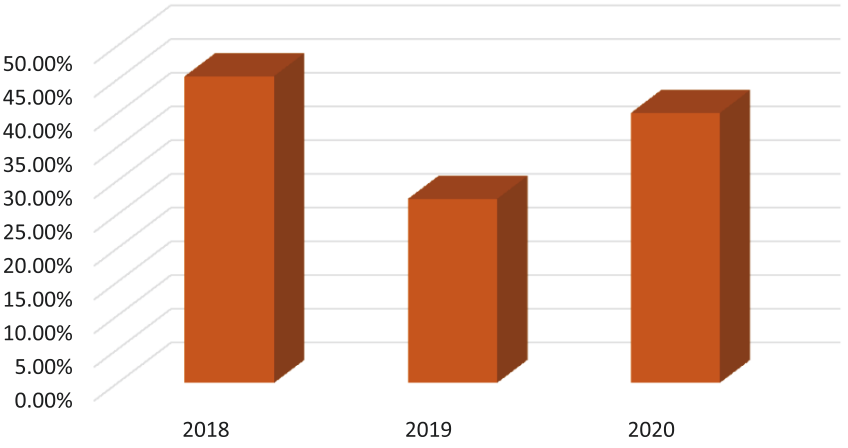

Fig. 10. Environment: Non-Relaxation

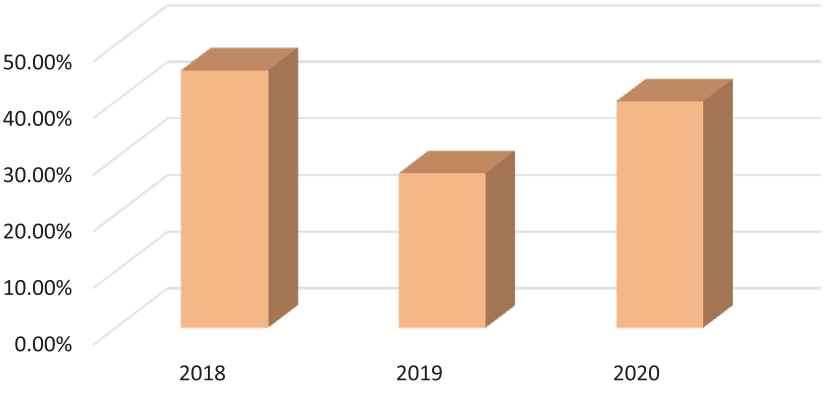

Fig. 11. Health: Non-Relaxation

A—Combination of provisions requiring *consistency with IIA obligations, performance requirements* and *exemptions clauses*
B—Combination of *preamble, non-relaxation, non-precluded measures* and *exemptions clauses*
C—Combination of *preamble, non-relaxation* and *non-precluded measures clauses*
D—Combination of *preamble, non-precluded measures* and *exemptions clauses*
E—Combination of *non-relaxation* and *non-precluded measures clauses*
F—Combination of *non-precluded measures* and *exemptions clauses*

Figure 16 assesses the popularity of the 'approaches' to the inclusion of environment and health considerations in IIAs. The figure demonstrates the frequency of the combination of provisions utilised across 2018–20, individually for environmental considerations and health considerations.

By far, approach D, consisting of preamble, non-precluded measures and exemptions clauses, is the most preferred. The approval of approach D as an effective means of securing State interests can also be linked to the popularity of the individual forms making up this approach as well. In addition, approaches B and F have also been often

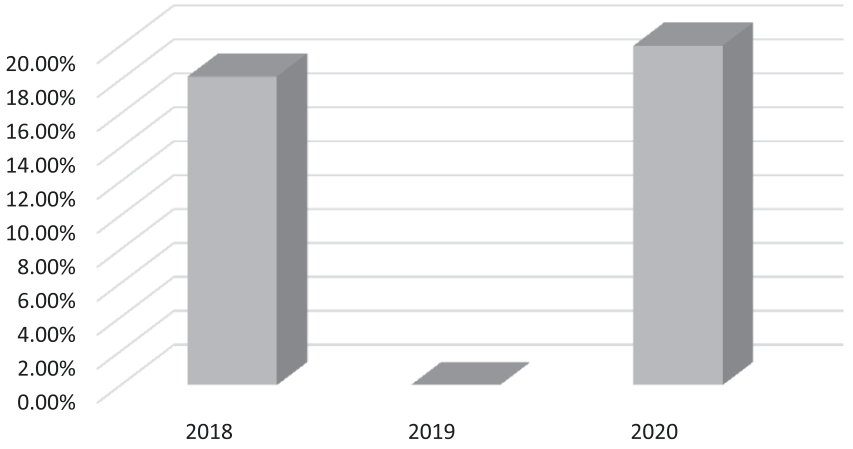

Fig. 12. Environment: Performance requirements

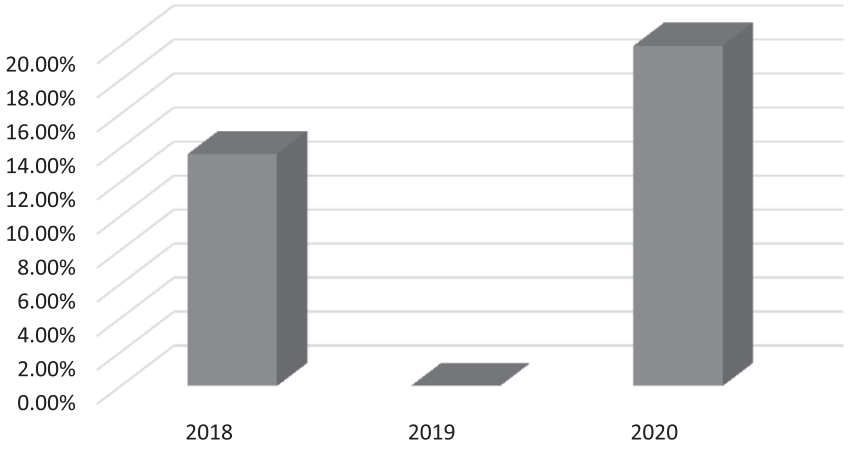

Fig. 13. Health: Performance requirements

resorted to. Common to these approaches is the use of non-precluded measures and exemptions language in the IIAs. These effectively reduce the liability exposure of States imposing measures to achieve public policy objectives.

Thus, the approach of IIAs to environmental and health considerations is increasingly becoming more sophisticated in that numerous IIAs are adopting a combination of forms to successfully protect the State's regulatory space.

Tables 5 and 6 tease out the implications of the adoption of specific approaches in IIAs. These tables provide a comparative analysis of the evolution of treaty language from 2018 to 2020.

As with the analysis of the 'forms', the number of IIAs signed in each year must be factored in to understand the frequency of the approaches as well. Tables 5 and 6 outline the percentages for each approach in 2018, 2019 and 2020. Approaches A (consistency with IIA obligations, performance requirements and exemptions

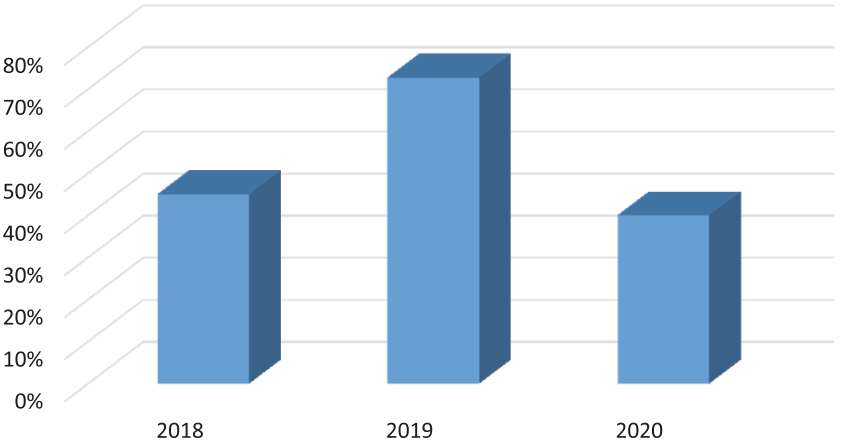

Fig. 14. Environment: Preamble

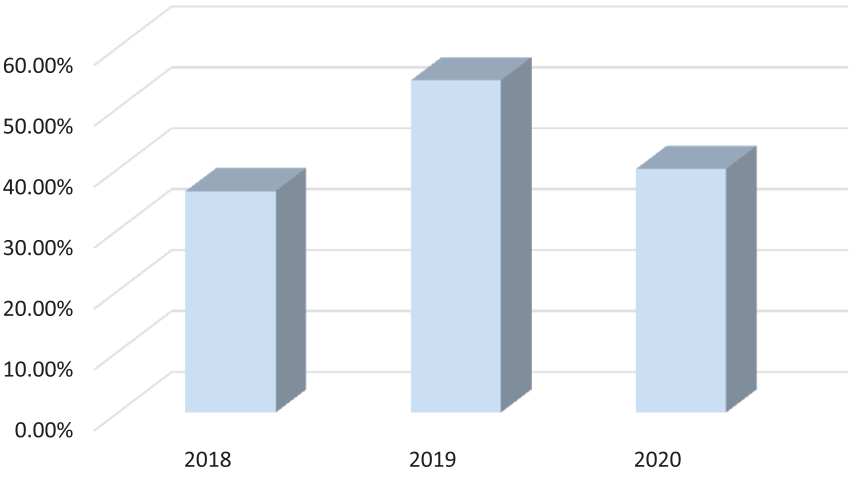

Fig. 15. Health: Preamble

clauses),[69] B (preamble, non-relaxation, non-precluded measures and exemptions clauses)[70] and F (non-precluded measures and exemptions clauses)[71] show a uniformly favourable trend across environmental and health language.

Among the 38 IIAs included in this study, the 2019 EU–Vietnam IPA stands out for its uniquely progressive approach to public policy objectives. The provision in the Preamble is as follows:

[69] The percentage of approach A for environmental considerations was 13.33 in 2018, 0 in 2019, and 33.33 in 2020. The percentage of approach A for health considerations was 14.28 in 2018, 0 in 2019 and 33.33 in 2020.
[70] The percentage of approach B for environmental considerations was 13.33 in 2018, 25 in 2019 and 33.33 in 2020. The percentage of approach B for health considerations was 7.14 in 2018, 25 in 2019 and 33.33 in 2020.
[71] The percentage of approach F for environmental considerations was 20 in 2018, 0 in 2019 and 33.33 in 2020. The percentage of approach F for health considerations was 21.4 in 2018, 12.5 in 2019 and 33.33 in 2020.

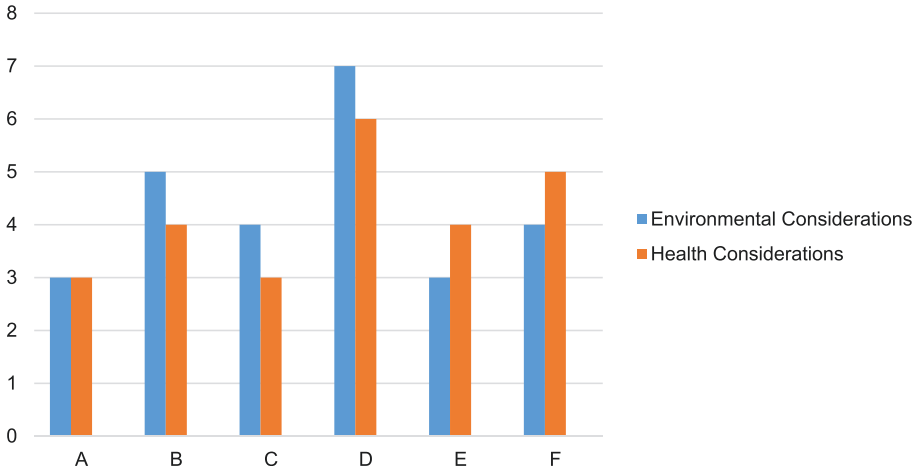

Fig. 16. Frequency of approaches (2018–20)

Table 5. Environment: Frequency of approaches (2018–20)

Approach	2018 (%)	2019 (%)	2020 (%)
A	13.33	0	33.33
B	13.33	25	33.33
C	20	12.5	0
D	13.33	62.5	0
E	20	0	0
F	20	0	33.33

Table 6. Health: Frequency of approaches (2018–20)

Approach	2018 (%)	2019 (%)	2020 (%)
A	14.28	0	33.33
B	7.14	25	33.33
C	21.42	0	0
D	14.28	50	0
E	21.4	12.5	0
F	21.4	12.5	33.33

DETERMINED to strengthen their economic, trade and investment relationship in accordance with the objective of sustainable development, in its economic, social and environmental dimensions, and to promote investment under this Agreement in a manner mindful of high levels of environmental and labour protection and relevant internationally recognised standards and agreements.[72]

[72] Investment Protection Agreement Between the European Union and Its Member States, of the One Part, and the Socialist Republic of Vietnam, of the Other Part (signed 30 June 2019, not yet entered into force) Preamble.

The provision pertaining to exceptions in the non-precluded measures clause imitates the language of Article XX of the GATT. The exemptions clause is as follows:

> Non-discriminatory measures or series of measures by a Party that are designed to protect legitimate public policy objectives do not constitute indirect expropriation, except in the rare circumstances where the impact of such measure or series of measures is so severe in light of its purpose that it appears manifestly excessive.[73]

While it has become commonplace for IIAs to address considerations of environment and health to varying degrees, the treaty formulations of the EU-Vietnam IPA are conscious of the need for sustainable development and set a unique threshold of 'manifest excessiveness' in the exemptions clause. Most IIAs have yet to adopt language that reflects such concerns while also guarding against extreme regulation.

C. *Comparative Analysis: Environment and Health Language*

Comparing the pre-2018 trends with those from 2018–20, it is clear that there is a significant increase in the utilisation of environment and health language in IIAs. A steady growth in the broad utilisation of forms and approaches in 2018–20 demonstrates that States are warming up to addressing these concerns in IIAs across the board.

The 2011 OECD Survey also commented that, at the time, environmental language was more common in RTAs and FTAs than in BITs. For example, the now replaced NAFTA provided:

> Nothing in this [Agreement/Treaty/Chapter] shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.[74]

As per the 2011 OECD Survey, a standard non-precluded measures clause in BITs in the pre-2018 period followed this language:

> Each Contracting Party shall, in its State territory, promote as far as possible investments made by investors of the other Contracting Party and admit such investments in accordance with its national laws and regulations. However, this Agreement shall not prevent a Contracting Party from applying restrictions of any kind or taking any other action to protect its essential security interests or public health or to prevent diseases or pests in animals or plants.[75]

However, in the period of analysis, such treaty formulations appear in all forms of IIAs across the board, be they BITs or investment chapters in RTAs or FTAs. Additionally, there also appears to be a limited amount of variation among States in how they choose to incorporate environmental and health interests in IIAs.

[73] ibid, annex 4.
[74] North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) (NAFTA) art 1114(1).
[75] Agreement between the Government of the Republic of Mauritius and the Government of Romania on the Promotion and Reciprocal Protection of Investments (signed on 20 January 2000, entered into force 20 December 2000) art 2.

A recent study by the World Bank demonstrates the positive correlation between environment and health language in RTAs and FTAs, and its impact on the environmental degradation.[76]

The 'approaches' analysis demonstrates that there is an increasing convergence towards certain permutations and combinations of treaty formulations that States believe further environment and health concerns in international investment law. As noted, there is a preference for approach D (consisting of preamble, non-precluded measures and exemptions clauses). We will elaborate below on the right of States to regulate and on the evolution of corresponding provisions in the IIAs. As such, it may suffice to note here that the popularity of this approach may come from the need of the States to include specific and express language in the IIAs that ensures their right to regulate in the public interest.

Finally, IIAs continue to lag behind in tackling pressing issues of biodiversity and climate change. A lot is left to be desired in harnessing the potential of IIAs to effect positive change in the area of sustainable development. Through the instrument of IIAs, States can nudge corporations and other stakeholders to adopt environment-conscious processes. Such efforts could be initiated at global meetings such as the UN Climate Change Conference. The 2019 UN Climate Change Conference (COP25) was held in December 2019 with the objective of enhancing sustainable development commitments and enforcing the goals of the Paris Agreement.[77] It is possible that commitments made at conferences such as this will trickle their way down to the treaty language of IIAs and further enable States to meet their commitments on environment and health objectives.[78]

The issue of whether and how IIAs should incorporate human rights into their text is the subject of great debate. Current discourse is of the view that in addition to including positive language in the treaty text, there should be provision for investment tribunals to exercise jurisdiction over human rights matters connected to investment disputes.[79] This ought to be coupled with an effort to ensure that tribunals hearing human rights issues have the necessary expertise to adjudicate justly.[80]

[76] Ryan Abman, Clark Lundberg and others, 'The Effectiveness of Environmental Provisions in Regional Trade Agreements' World Bank Policy Research Working Paper 9601 (2021) 1, 26 ('In this paper we evaluate the effectiveness of forest-related RTA provisions at limiting deforestation arising from trade liberalization. We find no changes in net annual deforestation following implementation of agreements that include provisions aimed at protecting forest and/or biodiversity while agreements without these provisions see substantial increases in net forest loss, i.e. provisions reduce forest loss relative to RTAs that do not include them').

[77] United Nations Climate Change 'UN Climate Change Conference—December 2019' (United Nations Climate Change, 2 - 13 December 2019) <https://unfccc.int/conference/un-climate-change-conference-december-2019> accessed 3 March 2023.

[78] See eg Agreement in Principles between the European Union and the Mercosur Association (28 June 2019).

[79] Megan Wells Sheffer, 'Bilateral Investment Treaties: A Friend or Foe to Human Rights' (2020) 39 Denv J Intl L & Pol 483, 505 ('States should provide investment tribunals with broader jurisdiction to include human rights-related matters. BITs should include that an investment tribunal "is competent to decide matters of public international law or human rights law that might arise in the course of an arbitration". Specifically, a Host-State should be able to raise as a defense that the Host-State's action was necessary to prevent the investor from harming its citizenry or that the actions were necessary pursuant to the Host-State's human rights obligations under international law. This concept should include more specific guidance in BITs regarding the scope of the Police Powers and a State's ability to regulate public health, the environment, and labor rights, as discussed above').

[80] ibid 505–06 ('States should provide in BITs that when a human rights-related matter arises, the arbitration tribunal must incorporate appropriate expertise into the decision-making process. As discussed above, one problem in BIT arbitrations is that arbitrators may lack the necessary expertise to deal with human rights-related matters. To deal with this issue, many commentators have suggested two solutions. First, BITs should require that arbitration tribunals dealing with human rights-related claims include at least one arbitrator with knowledge of human rights law. Secondly, arbitrators should be allowed, encouraged, or perhaps even required to consult outside experts or specialized agencies regarding human rights related issues implicated in a case').

Thus, while the period relevant for this analysis (2018–20) witnessed an increased use of certain forms and approaches in IIAs, there are some further steps that can be taken to effectively voice environment and health considerations in the ISDS regime.

IV. CSR: A GROWING TREND IN IIAS

One of the most common means through which States impose obligations on investors through IIAs is the CSR clause. The CSR clause is an amalgamation of social and economic regulation of foreign investors' economic activity. CSR obligations, as a 'normative guiding idea', are a means of ensuring that foreign investors adhere to bare minimum standards in the institution and operation of their investments.[81]

This section begins by setting the context in terms of trends in CSR provisions prior to 2018, before proceeding to the substantive analysis of the provisions from January 2018 to December 2020.

A. *CSR Pre-2018: The Prevalence of Soft-Law Clauses*

In December 2016, the European Centre for Development Policy Management produced a research on the typology of CSR provisions in IIAs.[82] Until then, CSR provisions were broadly 'double-soft' in nature: soft language utilised for the private sector's voluntary CSR engagement.

Treaty formulations from the pre-2018 era took on three forms:

(i) 'to cooperate …'
(ii) 'to encourage …'
(iii) 'to facilitate …'

The first option recognised 'joint cooperation' among the Contracting Parties to the IIAs. Initially, these tended to be restricted to the realm of labour activities.[83] The second option aimed at encouraging corporations to adopt CSR initiatives voluntarily in line with internationally recognised principles and guidelines.[84] The third option appears more substantial than the first two, inasmuch as it facilitated and promoted investment that is compliant with CSR measures.[85]

[81] Nowrot (n 4) 639 ('A third category of provisions addressing the issue of investors' obligations in investment agreements are characterized by their function to signal a commitment by the contracting parties to the normative guiding idea of corporate social responsibility. It is in particular this regulatory approach that is gaining ground in current treaty practice').

[82] Rafael Peels and Elizabeth E Manrique, 'CSR in International Trade and Investment Agreements' (December 2016–January 2017) 5(6) Great Insights Magazine of the ECDPM 29.

[83] United States-Peru Trade Promotion Agreement (signed 12 April 2006, entered into force 1 February 2009) Annex 17.6 art 2(o) ('regional cooperation activities on labour issues, may include, but need not be limited to dissemination of information and promotion of best labour practices, including corporate social responsibility, that enhance competitiveness and worker welfare').

[84] Free Trade Agreement between the EFTA States and Montenegro (signed 14 November 2011, entered into force 1 November 2012) Preamble ('importance of good corporate governance and corporate social responsibility for sustainable development, and affirming their aim to encourage enterprises to observe internationally recognized guidelines and principles in this respect, such as the OECD Guidelines for Multinational Enterprises, the OECD Principles of Corporate Governance and the UN Global Compact').

[85] Free Trade Agreement between the European Union and Its Member States, of the One Part, and the Republic of Korea, of the Other Part (sifned 6 October 2010, entered into force 1 July 2011) art 13.6(2) ('the Parties shall strive

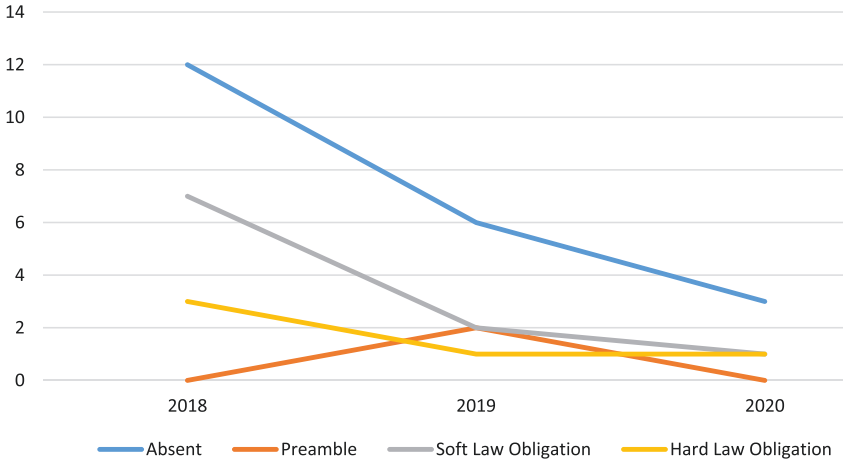

Fig. 17. CSR Provisions (2018–20)

Despite the usage of these seemingly mild treaty formulations in IIAs, it is acknowledged that corporations had human rights commitments towards communities in host States, a principle that has since been reaffirmed in 'The Hague Rules on Business and Human Rights'.[86]

B. *CSR in 2018–2020: The Entry of the Hard-Law Obligation*

Recent treaty practice points towards the inclusion of two sets of CSR norms: a soft-law obligation or a hard-law obligation.[87] The basic soft-law obligation entails purely voluntary initiatives that an investor can implement to further legitimate human rights objectives. The hard-law obligation, on the other hand, imposes specific responsibilities on foreign investors in the conduct of their business within the host State. These could range from encouraging local capacity building through cooperation with the local community to refraining from seeking or accepting exemptions that are not established in the legal or regulatory framework relating to human rights, environment, health, security, work, tax system, financial incentives or other issues.[88]

Figure 17 analyses the occurrence of CSR provisions in the relevant IIAs.

It appears from Figure 17 that States are still warming up to the inclusion of these provisions in IIAs. CSR provisions are absent in more than half the IIAs signed between January 2018 and December 2020. Among the IIAs that did include such

to facilitate and promote investment and trade in goods that contribute to sustainable development, including goods that are the subject of schemes such as fair and ethical trade and those involving corporate social responsibility and accountability').

[86] Center for International Legal Cooperation, 'The Hague Rules on Business and Human Rights' (December 2019).

[87] Ying Zhu, 'Corporate Social Responsibility and International Investment Law: Tension and Reconciliation' (2017) 1 Nord J Comm L 90, 92–93 ('Nonetheless, the effectiveness of these CSR provisions is questionable, as a result of the traditional role of foreign investors as third-party beneficiaries in investment treaties, the "soft law" nature of CSR norms, and the unclear definition of CSR in these provisions […] On the other hand, states have enacted hard rules enforcing social and environmental responsibilities of corporations through domestic legislation and administration. These hard rules on CSR issues have been in tension with states' international investment obligations as a result of their adverse impacts on foreign investments, while the soft CSR initiatives, in the recent years, have been incorporated into investment treaties to reconcile this tension').

[88] Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation (signed 11 April 2018, not yet entered into force) art 14.

obligations, all the hard-law provisions were in treaties to which Brazil is a contracting party. It appears that the strict regulation of investments is a conscious trend implemented by Brazil, a point that will be developed in the following section. As a preliminary point, however, one must consider these treaties with caution, as they are not traditional IIAs, and in particular, lack provision for an ISDS mechanism.

Currently, States seem to prefer the soft-law obligation to promote CSR. Based on a conspectus of provisions across the 38 IIAs, a standard soft-law CSR provision would follow this language:

> Investors and their enterprises operating within its territory of each Party shall endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles may address issues such as labour, the environment, human rights, community relations and anti-corruption.[89]

The ambiguous language fails to clearly inform investors of the extent of their obligations, thereby rendering these provisions aspirational.[90] To start off with, it could be argued that it would be beneficial to include a concrete threshold for compliance with these obligations, along with establishing a regular audit system to ensure compliance with these norms. States may also formulate detailed requirements in the annexes to the IIAs that would specify further requirements based on the size and business activities of the industry. This would avoid claims of discrimination, unfair treatment, etc.[91] A step in the right direction appears to be the recent initiative of the European Union in the Directive on Corporate Sustainability Due Diligence.[92] The annex to the Directive specifically lists instances of human rights violations which companies will have a responsibility to identify and prevent. It is likely that the clarity reflected in this Directive will find its way into the IIAs negotiated by the European Union going forward.

C. *Comparative Analysis: CSR Clauses*

CSR treaty formulations have substantially evolved from the 'double-soft' language in the pre-2018 era to the combination of soft-law and hard-law obligations in the 2018–20 period. While a majority of the IIAs do continue to omit references to CSR, there has been a positive shift since the pre-2018 period. It remains to be seen how States adopt the CSR requirements within the IIAs' ecosystem.

[89] Bilateral Investment Treaty between the Government of the Kyrgyz Republic and the Government of India (signed 14 June 2019, not yet entered into force) art 12.

[90] Prince Uche Amadi, 'Redefining the Obligatory Contours of Human Rights in Bilateral Investment Treaties: A New Frontier for Investment Protection and Human Rights' (2019) King's Stud LR 32 ('Additionally, including such an obligation does not consider the relational issues between international and domestic law in determining what amounts to human rights obligations within the investment law context. If customary international human rights law come[s] to form the benchmark, then the issue becomes to what extent those rights have been internalised within the national system of the state parties such that they form the gamut of laws to be respected by the investor. So, a proper integration level of human rights needs to be ascertained to formulate a proper benchmark for compliance. The benchmark should be sufficiently provided for in the BIT to give the investor a clear idea of the extent of its human rights obligations').

[91] Zhu (n 86) 98 ('Investment tribunals conducting discrimination assessment need to first determine whether the investors being treated differently are "in like circumstances". Many investment tribunals held that two investors are comparable under the non-discrimination clause if they are in a competitive relationship, i.e., in the "same business or economic sector". However, states' regulation on CSR issues usually uses a different basis of comparison. For example, it is not uncommon that states' regulation in social and environmental realms may distinguish between different groups of enterprises based on their size and activities').

[92] Directive 2022/0051 (COD) on Corporate Sustainability Due Diligence.

The United Nations Global Compact is a global movement that focusses on creating sustainable and responsible businesses.[93] The purpose of the UN Global Compact is to inculcate certain best practices and principles in the realm of human rights, labour, environment and anti-corruption within a company's ethos. By creating a culture of sustainable company operations and CSR, the aim is to include the tenets of the Universal Declaration of Human Rights, the ILO's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the United Nations Convention Against Corruption.

One example of a more elaborate CSR provision, albeit a soft-law one, included more broadly in the sustainable development provisions, is presented in the proposal to modernise the Energy Charter Treaty (ECT) and defines the context and objectives of sustainable development, and focuses on the right to regulate and the levels of environmental and labour protection, climate change and transparency, among others. Specifically, the proposal refers to the following:

> Sustainable development—Responsible Business Practices
>
> The Contracting Parties recognise the importance of responsible business practices in contributing to the goal of sustainable development. Accordingly, they shall promote the uptake of corporate social responsibility or responsible business conduct, in line with relevant international instruments, such as the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and the UN Guiding Principles on Business and Human Rights.[94]

The Netherlands Model BIT (2010) includes many innovative provisions that highlight the progressive trend of explicitly expressing human rights concerns in IIAs.[95] The Model BIT was the outcome of the prevalent discourse regarding reforming the ISDS regime.[96] In addition to recognising gender equality, the Model BIT also includes a hard-law CSR obligation that requires investors to comply with domestic requirements on human rights, environmental law and labour law, as well as internationally recognised guidelines on CSR standards and principles.[97] The most

[93] United Nations Global Compact 'The Ten Principles of the UN Global Compact' <www.unglobalcompact.org/what-is-gc/mission/principles> accessed 3 March 2023.

[94] Energy Charter Secretariat, 'Report of the Modernisation Group on Progress Made in Fulfilling the Negotiations Mandate, 31st Meeting of the Energy Charter Conference' (16 December 2020) <https://www.euractiv.com/wp-content/uploads/sites/2/2020/12/ECT-report-on-progress-made_FS.pdf> accessed 3 March 2023.

[95] UNCTAD, Netherlands Model Investment Agreement (22 March 2019).

[96] Kabir Duggal and Laurens Hubert van de Ven, 'The 2019 Netherlands Model BIT: Riding the New Investment Treaty Waves' (2019) 35 Arb Intl 353 ('The former Dutch Minister of Trade and Development Ms Lilianne Ploumen decided to respond to the criticisms surrounding BITs. In 2016, she called for a new type of trade agreements that offer "more honest, more transparent and non-discriminatory" trade rules, focus on a fairer division of profit, environment and climate, and contribute to the realization of the global goals. Under the Minister's lead, the Netherlands advocated for reform of the ISDS system within the TTIP-dominated discussions in the EU, where it advocated for preservation of policy space, quality and independence standards, ethical standards for arbitrators, and prohibition of forum shopping. Simultaneously, pending BIT negotiations were suspended while the Government started the drafting process for the 2018 Draft Model BIT. The current Minister of Trade and Development Ms Sigrid Kaag has continued her predecessor's course').

[97] Netherlands Model BIT (n 94) art 7 ('1. Investors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labor laws. 2. The Contracting Parties reaffirm the importance of each Contracting Party to encourage investors operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party, such as the OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights, and the Recommendation CM/REC(2016) of the Committee of Ministers to Member States on human rights and business. 3. The Contracting Parties reaffirm the importance of investors conducting a due diligence process to identify, prevent, mitigate and account for the environmental and social risks and impacts of its investment. 4.

innovative aspect of this Model BIT is the clause pertaining to business-related human rights abuses and corporate liability for the same. Article 5(3) provides:

> As part of their duty to protect against business-related human rights abuse, the Contracting Parties must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy. These mechanisms should be fair, impartial, independent, transparent and based on the rule of law.[98]

V. SUMMARY OF FINDINGS

The analysis conducted in this article demonstrates that treaty language is constantly evolving to protect and expand the scope of States' regulatory autonomy.

1. The State's right to regulate is largely expressed in the transfers, non-precluded measures and exemption clauses. In addition to these, this right is increasingly reflected in the prudential measures, taxation measures and anti-corruption clauses of IIAs.
2. Specifically, the IIAs of Brazil and Japan signed in this period demonstrate a strong leaning towards heavily safeguarding the right to regulate.
3. It appears that States enjoy greater flexibility in protecting the right to regulate in BITs than in investment chapters in FTAs/RTAs.
4. Non-precluded measures, exemptions and preambulatory clauses are the currently favoured forms of provisions to incorporate environment and health considerations.
5. There is an upward trend in the reliance on performance requirements and non-relaxation clauses to protect regulatory autonomy in the environmental and health space.
6. The most common approach to express environmental and health considerations consists of preambulatory, non-relaxation, non-precluded measures and exemptions clauses. The combined use of the non-relaxation and non-precluded measures clauses is also fast gaining approval.
7. CSR provisions have yet to gain traction among States as binding obligations. Currently, the soft-law form of provision is favoured.

VI. FOCUS ON INDIA, JAPAN AND BRAZIL

This last section focuses on the three States which have presented, in the period analysed, unique approaches to rights-oriented language in their IIAs. This section considers the interests and motivations of these States in choosing to include particular language in their IIAs.

Investors shall be liable in accordance with the rules concerning jurisdiction of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state. 5. The Contracting Parties express their commitment to the international framework on Business and Human Rights, such as the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, and commit to strengthen this framework').

[98] ibid art 5(3).

A. *India*

India makes for an interesting case study in the realm of ISDS: it is one of the most common respondents in investor-State proceedings, with 25 cases against it.[99] This, combined with the decision in *White Industries*,[100] prompted India to terminate and renegotiate treaties following the issuance of a new model BIT.

India's tryst with BITs began post-liberalisation in 1991. India's first BIT was with the United Kingdom in 1994, which was based on the model followed by developed countries at the time.[101] In consequence, provisions tended to tilt in favour of investors rather than safeguarding India's right to regulate. Consequently, this resulted in a rapid growth in the number of arbitrations instituted against India, the most notable of them being *White Industries*.

The *White Industries* Award was a watershed moment in India's BIT history: a claim under the India–Australia BIT resulted in a US$4.08 million award against India. White Industries' claim was successful because the wording of the most-favoured nation (MFN) provision in the India–Australia BIT permitted the importation of standards from other BITs. The Tribunal permitted the importation of another provision via the MFN standard in the India–Kuwait BIT to hold India liable.

This award was the trigger that caused India to rethink and revisit its BITs. After a public consultation including input from the Law Commission of India, India published its 2016 Model BIT. Some of the salient features of the 2016 Model BIT relevant for this analysis are:

(i) Limited investor protections: only full protection and security (FPS) and NT provisions find expression in the BIT. MFN treatment and fair and equitable treatment obligations have been omitted.
(ii) Increase in investor obligations and regulatory language: The Model BIT contains a comprehensive CSR provision[102] as well as elaborate regulatory language comprising almost the entire gamut of regulatory language that secures India's policy space.

India's prominent treaty based on the 2016 Model BIT is with Brazil,[103] which is regulatory language-heavy, with the inclusion of numerous provisions to protect the States' regulatory space. However, India does not seem to be out of the woods yet:

[99] UNCTAD, 'IIA Issues Note: Investor-State Dispute Settlement, Review of Developments in 2017' (2018) 2 IIA Issues Note 3.

[100] *White Industries Australia Ltd v Republic of India*, UNCITRAL, Final Award (30 November 2011).

[101] Nishith Desai Associates, 'Bilateral Investment Treaty Arbitration and India: With Special Focus on India's Model BIT 2016' (February 2018) 7 ('India signed her first BIT with United Kingdom in 1994, with the clear objective of attracting and incentivizing foreign investment. India's first BIT was based on a Model created by a developed country—where emphasis lied on protection of foreign investment, rather than internationally recognized regulatory powers of the State').

[102] Model Text of India's Bilateral Investment Treaty (2016) art 12 ('Investors and their enterprises operating within its territory of each Party shall endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles may address issues such as labour, the environment, human rights, community relations and anti-corruption').

[103] Tejas Shiroor, 'The Year of 2016 for India—Of New Beginnings and Not-So-Happy Endings?' (*Kluwer Arbitration Blog*, 28 December 2016) <http://arbitrationblog.kluwerarbitration.com/2016/12/28/the-year-2016-for-india-of-new-beginnings-and-not-so-happy-endings/> accessed 3 March 2023 ('While sceptics have wondered just how much success India will have in negotiations based on this rather protectionist Model BIT, India seems to have found a friend in its main trading partner in Latin America, and BRICS counterpart—Brazil').

it still has to contend with the recent adverse awards in the *Vodafone*[104] and *Cairn*[105] arbitrations, as well as attempt to conclude its broad-based trade and investment agreement with the EU.

B. *Japan*

Japan has built its IIA regime slowly and steadily from 1977. Data from Japan's Ministry of Economy, Trade and Industry shows that up to August 2008, 21 IIAs with Japan had entered into force, of which 13 were BITs and eight were investment chapters in FTAs.[106] Traditional BITs in the 1980s and 1990s contained provisions that secured the bare minimum investor protection. For example, the 1992 Japan–Turkey BIT contemplated NT, MFN and FPS protections and compensation for expropriation, but did not include any environmental and health considerations, CSR provisions or regulatory language.

This changed with IIAs in the 2000s and early 2010s, which sought to liberalise investment along with fleshing out investor protections. For instance, the 2017 Israel–Japan BIT recognised substantial investor protections in articles 2–4 of the BIT. The commitment to liberalisation of investment was also reflected in the Preamble itself.[107] In terms of regulatory language, BITs in the pre-2018 era began upping the ante by expanding the scope of policy space reserved for States to pursue public policy objectives. The 2016 Japan–Kenya BIT contains almost the entire gamut of regulatory language.

This trend has also continued in the 2018–20 period. The five BITs that Japan signed in this period are regulatory-heavy, while simultaneously attempting to address investor considerations.[108] For example, in addition to including staple regulatory language such as transfers and anti-corruption clauses, the 2020 Japan–Morocco BIT also provides for 'temporary safeguard measures', similar to a prudential measures clause:

> 1. Notwithstanding Article 11, a Contracting Party may adopt or maintain measures relating to cross-border capital transactions as well as payments or transfers for transactions related to investments:
>
> a) In the event of serious balance of payments and external financial difficulties or threat thereof; or

[104] *Vodafone International Holdings BV v Government of India*, PCA Case No 2016–35.
[105] *Cairn Energy plc & Cairn UK Holdings Ltd v Government of India*, PCA Case No 2016–7.
[106] Ministry of Economy, Trade and Industry of Japan, '2008 Report on Compliance by Major Trading Partners with Trade Agreements: WTO, FTA/EPA and BIT'.
[107] Agreement between the State of Israel and Japan for the Liberalisation, Promotion and Protection of Investment (signed 1 February 2017, entered into force 5 October 2017) Preamble ('Recognizing the growing importance of the progressive liberalization of investment for stimulating initiative of investors and for promoting prosperity in both Contracting Parties').
[108] Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment (signed 1 December 2018, not yet entered into force); Agreement between Japan and the Republic of Armenia for the Liberalisation, Promotion and Protection of Investment (signed 14 February 2018, entered into force 15 May 2019); Agreement between Japan and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investment (signed 27 November 2018, entered into force 1 August 2020); Agreement between Japan and the United Arab Emirates for the Promotion and Protection of Investment (signed 30 April 2018, entered into force 26 August 2020); Agreement between the Kingdom of Morocco and Japan for the Promotion and Protection of Investment (signed 8 January 2020, entered into force 23 April 2022).

b) In cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.

2. Measures referred to paragraph 1:

a) shall be consistent with the Articles of Agreement of the International Monetary Fund, so long as the Contracting Party taking the measures is a party to the said Articles;
b) shall not exceed those necessary to deal with the circumstances set out in paragraph 1;
c) shall be temporary and shall be eliminated as soon as conditions permit;
d) shall be promptly notified to the other Contracting Party; and
e) shall avoid unnecessary damages to the commercial, economic and financial interests of the other Contracting Party.

3. Nothing in this Agreement shall be regarded as altering the rights enjoyed and obligations undertaken by a Contracting Party as party to the Articles of Agreement of the International Monetary Fund.[109]

The 2018 Argentina–Japan BIT includes the following paragraph in the NT clause:

2. Paragraph 1 shall not be construed to prevent a Contracting Party from adopting or maintaining a measure that prescribes special formalities in connection with investment activities of investors of the other Contracting Party in its Area, provided that such special formalities do not impair the substance of the rights of such investors under this Agreement.[110]

Japan is also an active presence in UNCITRAL Working Group III. It is interesting to note, for example, that Japan, working together with Chile and Israel, and later with Mexico and Peru, was the driving force behind the current working plan of Working Group III, assisting in grouping the reform options as presented and advancing the proposal of working through them in a systematic manner.[111] Further, also in the context of the UNCITRAL Working Group III discussion, Japan took a clear position with respect to the concerns to be identified and retained for reform. As such, Japan has noted that 'we need to identify well-founded perceptions, that it was founded on facts and empirical evidence and identify the other perceptions founded on false allegations and misunderstanding'. Therefore, 'if we can see that the public perceptions do not refer to reality, what we have to do is not to distract attention but to engage in genuine dialogue with the public in good faith'.[112]

[109] Agreement between the Kingdom of Morocco and Japan for the Promotion and Protection of Investment (signed 8 January 2020, entered into force 23 April 2022) art 12.

[110] Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment (signed 1 December 2018, not yet entered into force) art 2.

[111] See Submission from the Governments of Chile, Israel, Japan, Mexico and Peru, 'Possible Reform of Investor-State Dispute Settlement (ISDS)' UNCITRAL, UN Doc A/CN.9/WG.III/WP.182 of 2 October 2019, <http://undocs.org/en/A/CN.9/WG.III/WP.182> accessed 3 March 2023. See also, 'Possible Reform of Investor-State Dispute Settlement (ISDS)' UNCITRAL, UN Doc A/CN.9/WG.III/WP.166/Add.1 of 30 July 2019 <http://undocs.org/en/A/CN.9/WG.III/WP.166/Add.1> accessed 3 March 2023.

[112] Anthea Roberts and Zeineb Bouraoui, 'UNCITRAL and ISDS Reforms: What Are States' Concerns?' *(EJIL:Talk!*, 5 June 2018) <www.ejiltalk.org/uncitral-and-isds-reforms-what-are-states-concerns/> accessed 3 March 2023.

C. *Brazil*

Brazil has had a turbulent relationship with investment agreements. However, despite never having ratified an IIA until 2015, it has been the recipient of large inflows of foreign direct investment.[113] In the five years between 1994 and 1999, Brazil entered into 14 IIAs, of which six were submitted to the Congress for approval and none ultimately ratified.[114] Brazil's Congress had significant reservations with these 'first-generation BITs', and discussions in 2002 were surprisingly prescient of the current discourse on ISDS.[115]

Things changed in 2015 with the publication of Brazil's Model CFIA, which outlined limited investor protections, increased investor obligations and provided a greater scope for State regulation.[116] Fourteen IIAs were concluded based on the Model CFIA, including that with India.

A defining feature of the Model CFIA (and Brazil's subsequent CFIAs) is the emphasis on the right to regulate in the interest of strengthening human rights and other development objectives. There has been a positive trend in the expansion of regulatory language in IIAs with anti-corruption, CSR clauses and prudential measures being included in more recent IIAs.[117]

Brazil's investment agreements in the pre-2018 period included only the bare minimum in regulatory language. For instance, the 2015 Brazil–Malawi CFIA proposed environment and health considerations only in the Preamble. Non-precluded measures, exemptions and other commonly accepted language was omitted from the CFIA. A CSR hard-law obligation and a transfers provision were the only strictly regulatory provisions that found expression. The MFN and NT rights guaranteed in the CFIA come with a unique string attached:

[113] Xavier Carim, 'International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa' in Kavaljit Singh and Burghard Ilge (eds), *Rethinking Bilateral Investment Treaties* (Both Ends, Madhyam & SOMO, 2016) 57 ('Brazil, a receiver of substantial FDI, does not hold any ratified BIT agreements. Similarly, numerous countries that have ratified BIT agreements are having difficulties attracting FDI, particularly in sub-Saharan Africa. Recognising the significance of these trends, the report concludes, "a BIT is not a necessary condition to receive FDI"').

[114] Samy Reis and Kabir Duggal, 'The Evolution of Brazilian CFIAs from 2015 to 2020: Like Wine, Does It Get Better with Time' (2021) 38 J Intl Arb 216 ('Between 1994 and 1999, the Brazilian government even signed no fewer than fourteen BITs to support its economic liberalization policies and plans to attract investments. However, only six BITs were ever submitted to the Brazilian Congress for approval, and none of them eventually entered into force. These treaties were part of the "first-generation BITs", including relatively broad provisions: containing wide definitions of "investment" and "investors", and providing broad language for the substantive protections granted to investors. Absent also were express provisions maintaining a State's regulatory and police powers').

[115] ibid 217 ('These BITs faced strong opposition in and outside of the Brazilian Congress. They were received with perplexity and defiance by a cohesive branch of the leftist opposition and a few nationalist members of the government coalition. Their critiques focused notably on the dispute settlement provisions contained in these investment treaties, which provided for international arbitration as a forum to resolve investor-State disputes, and were seen as a threat to Brazil's sovereignty […] The Brazilian Congress's debates around the first-generation BITs occurred in the 1990s, yet they sound oddly modern. They echo the current concerns formulated by both activists and States against the investor-State arbitration system in the past few years').

[116] ibid 219 ('Brazil defined three pillars for the 2015 Model CFIA: (1) non-controversial normative clauses, such as the National Treatment clause, as well as basic controls on direct expropriation; (2) the maintenance of joint committees with thematic agendas for cooperation and facilitation of investments; and (3) a focus on risk mitigation and conflict prevention. Certain other significant characteristics arise out of these treaties, including (i) the relatively strict definition of 'investors' and "investment"; (ii) the focus on the safeguarding of home States' regulatory power; (iii) the inclusion of innovative provisions setting out obligations for investors; and (iv) the establishment of an innovative dispute prevention system, overseen by institutions (Joint Committee and Focal Points) and providing for State-to-State arbitration as a last resort').

[117] ibid 238 ('As such, the first four CFIAs signed did not incorporate both the Model's anticorruption and corporate social responsibility clauses, which allow host States to exclude investments made through illegal means from treaty protection, and provisions safeguarding the enactment and enforcement of environment, labour affairs, and health protection measures. Similarly, three of the first four CFIAs left out the 2015 Model CFIA's national security and public order, and the prudential measures clauses, which protect the States' efforts to maintain respectively national security and their financial systems. These provisions have become customary in subsequent CFIAs').

> 5. This article shall not be interpreted as an obligation of one Party to give to an investor from the other Party, concerning its investments, the benefit of any treatment, preference or privilege arising out of any free trade zone, tariff union or common market, current or future, of which each Party is a member or adheres to in future.[118]

However, the recent 2019 Brazil–UAE CFIA includes the entire range of regulatory language, from taxation measures and anti-corruption measures to non-precluded measures and non-waiver clauses. The analysis in Sections III–V of this article demonstrates that Brazil's current approach to regulatory language in IIAs is significantly broader than that of other countries.

As noted, Brazil's CFIAs are not typical IIAs, and Brazil's resistance to implementing traditional BITs is notorious. Further, Brazil's position on ISDS was vocally expressed in the UNCITRAL Working Group III:

> There were many reasons why Brazil decided not to have ISDS in its agreements. Some of them coincide with the general critique that many organizations and scholars make regarding ISDS, which is the fact that it may be considered discriminatory against national investors who do not have the chance to resort to international arbitration and must tackle any issues within the domestic courts… So from our perspective, ISDS is intrinsically flawed. No reforms would be enough to redeem the system.[119]

VII. CONCLUDING REMARKS: LIGHT AT THE END OF THE TUNNEL?

During UNCITRAL Working Group III, member and observer States, as well as observer NGOs, raised their concern around the absence of investors' obligations in IIAs, in particular with respect to environmental and human rights obligations.[120] However, the UNCITRAL Working Group III reiterated that its mandate is limited to procedural aspects of the identified concerns.[121]

In this context, it is even more important for States—and investors alike—to identify opportunities to address their concerns outside the UNCITRAL Working Group III discussions. It is undisputed that ISDS has become a 'stable institution of transnational governance',[122] and that evolution is inevitable. At the same time, those involved in this reform process—UNCITRAL-led or not—must acknowledge that there are at least two important challenges when dealing with reforms on the topics analysed in this article.

[118] Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the Republic of Malawi (signed 25 June 2015, not yet entered into force) art 10.5.

[119] Reis and Duggal (n 113).

[120] UNCITRAL 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Seventh Session' (New York, 1–5 April 2019) UN Doc A/CN.9/970, paras 34–35 ('The Working Group then considered proposals with respect to whether obligations of investors (for example, in relation to human rights, the environment as well as to corporate social responsibility) warranted further consideration. It was noted that that aspect was closely related to the question of allowing counterclaims by States as well as claims by third parties against investors. In that context, the general understanding was that any work by the Working Group would not foreclose consideration of the possibility that claims might be brought against an investor where there was a legal basis for doing so').

[121] ibid para 26. UNCITRAL, 'Report Dated 26 February 2018 of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session—Part II' (Vienna, 27 November–1 December 2017) UN Doc A/CN.9/930/Add.1/Rev.1 para 3.

[122] Stephan W Schill, 'Conceptions of Legitimacy of International Arbitration' in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* by (OUP 2016) 110, 117–22.

First, investors are not parties to IIAs; any obligations imposed on them must be considered through the lens of this particularity.

Second, States are treaty-makers and treaty-takers. In a different perspective, one could also refer to this as States being both home and host States of investors. The former highlights the fact that States have the absolute power to rule on the 'what' and the 'how' of IIAs. The latter reminds States that there are not only capital-exporting but also capital-importing States and the provisions in the IIAs they are negotiating are a double-edged sword.

With these challenges in mind and based on the findings above, one can conclude that States could do more with their IIAs while awaiting the outcome of the UNCITRAL Working Group III reform.[123] Such side reforms in IIAs may include a thorough discussion on the rule of law and environmental and fundamental human rights, as well as balancing the right to regulate with investors' rights.[124] Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model, for example, includes, in its Preamble a broad language covering the right to regulate,[125] mirrored in Article 3 of the FIPA which refers to:

> the right of each Party to regulate within its territory to achieve legitimate policy objectives, such as with respect to the protection of the environment and addressing climate change; social or consumer protection; or the promotion and protection of health, safety, rights of Indigenous peoples, gender equality, and cultural diversity.

Article 16 of the FIPA also includes an obligation on investors and their investments towards responsible business conduct, including the obligation to comply with domestic laws and regulations on human rights and environmental protection and labour.[126]

It can be inferred that, even in the absence of revolutionary changes in the new IIAs, States can still resort to additional tools to ensure that concerns are addressed

[123] Currently, discussions in the Working Group are planned to conclude in 2025. See UNCITRAL, 'Workplan to Implement Investor-State Dispute Settlement (ISDS) Reform and Resource Requirements' UN Doc A/CN.9/WG.III/WP.206. Following the resumed 40th session 4–5 May 2021 of the Working Group, the proposal is to extend the workplan another year, and finalise the discussions in 2026.

[124] See eg Crina Baltag and Ylli Dautaj, *Investors, States, and Arbitrators in the Crosshairs of International Investment Law and Environmental Protection* (Brill 2020).

[125] Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng> accessed 3 March 2023 ('Reaffirming the importance of promoting responsible business conduct, cultural identity and diversity, environmental protection and conservation, gender equality, the rights of Indigenous peoples, labour rights, inclusive trade, sustainable development and traditional knowledge, as well as the importance of preserving the Party's right to regulate in the public interest').

[126] FIPA, art 16 ('(1) The Parties reaffirm that investors and their investments shall comply with domestic laws and regulations of the host State, including laws and regulations on human rights, the rights of Indigenous peoples, gender equality, environmental protection and labour. (2) Each Party reaffirms the importance of internationally recognized standards, guidelines and principles of responsible business conduct that have been endorsed or are supported by that Party, including the OECD Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights, and shall encourage investors and enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate these standards, guidelines and principles into their business practices and internal policies. These standards, guidelines and principles address areas such as labour, environment, gender equality, human rights, community relations and anti-corruption. (3) Each Party should encourage investors or enterprises operating within its territory to undertake and maintain meaningful engagement and dialogue, in accordance with international responsible business conduct standards, guidelines and principles that have been endorsed or are supported by that Party, with Indigenous peoples and local communities. (4) The Parties shall cooperate on and facilitate joint initiatives to promote responsible business conduct').

in the interim, making use, for example, of the interpretative statements under article 31(3)(a) VCLT.[127]

The burden cannot be on the States only. Tribunals, undoubtedly, may make use of appropriate tools to address the issues put before them in an appropriate manner: for example, by making good use of the rules of treaty interpretation recorded in VCLT article 31(3)(c), or when determining whether the State has acted within its regulatory power or not, to address the issue of proportionality which 'mandates inquiry into the "suitability" of the measure under review'.[128]

ISDS is probably the unmistakable framework in which one can observe the complexity of the interaction between promotion and protection of investments, on the one hand, and the interests of host States, including environmental protection, human and labour rights and CSR, on the other. While dealing with the fragmentation of public international law,[129] one must also deal with the integration of environmental, human rights and CSR obligations within the framework of international investment law and ISDS, as an expression of the rule of law. This will allow States and investors equally to take advantage of and be held accountable for their respective obligations.

[127] See also *ADF Group Inc v United States of America*, ICSID Case No ARB (AF)/00/1, Award (9 January 2003) para 177.

[128] Jud Mathews and Alec Sweet Stone, 'All Things in Proportion? American Rights Review and the Problem of Balancing' (2011) 60 Emory LJ 797–875.

[129] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law—Report of the Study Group of the International Law Commission' (13 April 2006) UN Doc A/CN.4/L.682, as corrected by UN Doc A/CN.4/L.682/Corr.1 (11 August 2006) (finalised by Martti Koskenniemi).