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International Investment Obligations and Industrial Policy: Evolution in Treaty Practice

Mark Feldman

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Think Piece



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Contents

ABBREVIATIONS	IV
EXECUTIVE SUMMARY	V
1. INTRODUCTION	1
2. A FRAMEWORK FOR EVALUATING THE INTERNATIONAL INVESTMENT AGREEMENT-INDUSTRIAL POLICY RELATIONSHIP	2
2.1 Regulatory, National Security, and Strategic Aspects of Industrial Policy Measures	2
2.2 Significance of the Regulatory, National Security, and Strategic Aspects of Industrial Policy Measures under International Investment Law	3
2.3 Deference to be Accorded to Strategic Measures Aimed at Advancing Economic Development in the Host State	4
2.4 Deference to be Accorded to Strategic Measures Aimed at Advancing Sustainable Development in the Host State	6
3. EVOLUTION IN TREATY PRACTICE: SILENT, WTO, AND WTO-PLUS APPROACHES TO THE INTERNATIONAL INVESTMENT AGREEMENT-INDUSTRIAL POLICY RELATIONSHIP	7
3.1 Silent Approach	7
3.2 WTO Approach	9
3.3 WTO-Plus Approach	10
4. APPLYING A WTO-PLUS APPROACH TO STRATEGIC INDUSTRIAL POLICY MEASURES	13
5. CONCLUSION	14
REFERENCES	15
ANNEX 1. RECENT INTERNATIONAL INVESTMENT AGREEMENT PRACTICE ON INDUSTRIAL POLICY MEASURES: DISCIPLINES AND EXCEPTIONS	17

Abbreviations

AANZFTA	ASEAN–Australia–New Zealand Free Trade Area
BIT	bilateral investment treaty
CETA	Comprehensive Economic and Trade Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HFCS	high-fructose corn syrup
IIA	international investment agreement
KORUS	Korea–US
NAFTA	North American Free Trade Agreement
NL	Province of Newfoundland and Labrador, Canada
SADC	Southern African Development Community
SAFTA	Singapore–Australia Free Trade Agreement
SDGs	Sustainable Development Goals
TRIMs	Agreement on Trade-Related Investment Measures
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

Executive Summary

Industrial policies, which can be understood generally as policies affecting the “economic structure of an economy,” have become both widespread and controversial. As one example, China’s Made in China 2025 plan, which sets out strategies for the development of certain high-tech industries in China, has received intense scrutiny from many jurisdictions. As states face greater scrutiny of their industrial policies, they now also face a competing, and strengthening, influence: rapidly forming international law and policy on the need to advance sustainable development. The ascendancy of sustainability as a policy priority has, in turn, focused attention on industrial policy measures, which can play a central role in achieving such policy goals. Given the heightened expectations for achieving sustainable development, together with the heightened scrutiny of industrial policy measures, the relationship between international investment agreements (IIAs) and industrial policy measures has taken on particular importance.

With respect to industrial policy measures, IIAs generally have moved towards greater specificity. Beginning with a silent approach to industrial policy measures (under which investors must turn to other existing IIA obligations for protection), some IIAs then adopted a World Trade Organization (WTO) approach (which incorporates industrial policy measures under the Agreement on Trade-Related Investment Measures (TRIMs) into IIA disciplines) and, more recently, a WTO-plus approach (which addresses industrial policy measures beyond the scope of WTO disciplines). The overall shift in IIAs towards greater specificity with respect to industrial policy measures generally can be seen as limiting policy space, in particular by imposing disciplines on certain categories of performance requirements. Yet specificity can, at the same time, create policy space through the use of exceptions.

Many recent treaties illustrate how IIAs can constrain (through disciplines) and support (through exceptions) industrial policy measures. Such guidance through treaty practice can be valuable for investors when considering potential investments abroad and for investment arbitration tribunals when attempting to strike an appropriate balance between scrutiny of industrial policy measures and support for economic development, including sustainable development. By adopting a WTO-plus approach to industrial policy measures—which addresses industrial policy measures beyond the scope of WTO disciplines—policymakers can provide such detailed guidance in IIAs.

The IIA–industrial policy relationship is particularly unsettled—and in particular need of clarification—in two respects: first, how IIA obligations should be applied to strategic industrial policy measures aimed at advancing economic development; and second, how the policy goal of sustainability should inform analysis of the application of IIA obligations to strategic industrial policy measures. Future guidance by policymakers on the sustainability issue should include consideration of how the ascendancy of sustainability as a policy priority has blurred distinctions between strategic and regulatory measures.

This paper addresses the IIA–industrial policy relationship in light of the competing forces of heightened scrutiny of industrial policy measures and heightened expectations for sustainable development. Such analysis requires consideration of the regulatory, national security, and strategic aspects of industrial policy measures, and the legal significance of those differences under international investment law. This paper develops a framework for analysing the different aspects of industrial policy measures and the legal consequences that flow from those distinctions.

Applying that framework to the silent, WTO, and WTO-plus approaches to industrial policy reflected in IIAs, this paper finds that a WTO-plus approach allows policymakers to address the aspects of the IIA–industrial policy relationship that are most in need of clarification: the extent to which deference should be accorded to strategic industrial policy measures aimed at advancing economic development generally and sustainable development specifically. The need for such guidance has increased significantly given that tribunals are applying IIAs to industrial policy measures with greater frequency. Providing such guidance can reduce uncertainty for states agreeing to IIA obligations and for investors considering potential investments abroad.

1. Introduction

The 2018 United Nations Conference on Trade and Development (UNCTAD) World Investment Report, entitled *Investment and New Industrial Policies*, observes that industrial policies “have become ubiquitous” (128). Although definitions of industrial policy “vary across studies ... there is agreement they include government policies directed at affecting the economic structure of the economy” (UNCTAD 2018, 126, citing Rodrik 2004). One high-profile example of recent industrial policy initiatives, China’s Made in China 2025 plan (State Council of the People’s Republic of China 2015), sets out strategies for the development of certain high-tech industries in the country. That plan has received intense scrutiny from many jurisdictions.¹ As industrial policies become more widespread and controversial, the relationship between industrial policy measures and international investment agreements (IIAs) has taken on particular importance.

As states face greater scrutiny of their industrial policies, they now also face a competing, and strengthening, influence: rapidly forming international law and policy on the need to advance sustainable development. As stated by UNCTAD

(2018, 129), “the drive for sustainable development and inclusive growth at the global level—as embodied in the Sustainable Development Goals (SDGs)—adds further pressure on governments to steer industrial development.”

Thus, with respect to IIAs, policymakers must simultaneously consider heightened scrutiny of industrial policy measures and heightened expectations for achieving sustainable development. Those two competing influences are reflected in many recent IIAs, which have addressed industrial policy measures in some detail. That recent treaty practice illustrates how IIAs can indeed “both support and constrain industrial policy” (UNCTAD 2018, 163). With respect to industrial policy measures, IIAs generally have moved towards greater specificity. Beginning with a silent approach to industrial policy measures (under which investors must turn to other existing IIA obligations for protection), some IIAs then adopted a World Trade Organization (WTO) approach (which incorporates on industrial policy measures under the Agreement on Trade-Related Investment Measures (TRIMs) into IIA disciplines) and, more recently, a WTO-plus approach (which addresses industrial policy measures beyond the scope of WTO disciplines). The overall shift in IIAs towards greater specificity with respect to industrial policy measures generally can be seen as limiting policy space, in particular by imposing disciplines on certain categories of performance requirements. Yet specificity can, at the same time, create policy space through the use of exceptions.

This paper addresses the IIA–industrial policy relationship in light of the competing forces of heightened scrutiny of industrial policy measures and heightened expectations for sustainable development. Analysing the IIA–industrial policy relationship requires consideration of the regulatory, national security, and strategic aspects of industrial policy measures, and the legal significance of those differences under international investment law. This paper develops a framework for analysing the different aspects of industrial policy measures and the legal consequences that flow from those distinctions.

¹ See e.g. Office of the US Trade Representative, Initiation of Section 301 Investigation, 82 Fed. Reg. 40213 (24 August 2017): “The acts, policies and practices of the Government of China directed at the transfer of US and other foreign technologies and intellectual property are an important element of China’s strategy to become a leader in a number of industries ... as reflected in China’s ‘Made in China 2025’ industrial plan, and other similar industrial policy initiatives ... [such] acts, policies, and practices reportedly deprive US companies of the ability to set market-based terms in licensing and other technology-related negotiations with Chinese companies”; and Hsu (2017): “A report released by the European Union Chamber of Commerce in China on Tuesday, and other foreign manufacturers, have taken issue with the [Made in China 2025] program as it provides government assistance to Chinese industries, thus reducing the competitiveness of foreign firms operating in China.”

Applying that framework to the silent, WTO, and WTO-plus approaches to industrial policy reflected in IIAs, this paper finds that a WTO-plus approach allows policymakers to address the aspects of the IIA–industrial policy relationship that are most in need of clarification: the extent to which deference should be accorded to strategic industrial policy measures aimed at advancing economic development generally and sustainable development specifically. The need for such guidance has increased significantly given that tribunals are applying IIAs to industrial policy measures with greater frequency. Specific guidance with respect to the relationship between strategic industrial policy measures and sustainable development would be particularly valuable, given that the ascendancy of sustainability as a policy priority has blurred distinctions between strategic and regulatory measures. Providing such guidance can reduce uncertainty for states agreeing to IIA obligations and for investors considering potential investments abroad.

2. A Framework for Evaluating the International Investment Agreement–Industrial Policy Relationship

The 2018 World Investment Report observes that definitions of industrial policy “vary across studies” but “there is agreement they include government policies directed at affecting the economic structure of the economy,” covering “a range of policies aimed at enabling a country to achieve its strategic objectives by enhancing domestic productive capabilities and international competitiveness” (UNCTAD 2018, 126, citing Rodrik 2004).

Indeed, many industrial policy measures can be viewed as strategic measures aimed at advancing a host state’s economic development. But in some

instances industrial policy measures can also be seen as regulatory or national security measures. As discussed below, those distinctions have legal significance under international investment law.

This paper develops a framework for analysing the IIA–industrial policy relationship; this framework considers the different aspects of industrial policy measures and the legal consequences of those distinctions. The framework, which is set out in the next section, consists of four elements: first, the regulatory, national security, and strategic aspects of industrial policy measures; second, the significance under international investment law of characterising a measure as a regulatory, national security, or strategic measure; third and fourth, the deference to be accorded to strategic industrial policy measures aimed at advancing economic development generally, and sustainable development specifically, in the host state.

2.1 Regulatory, National Security, and Strategic Aspects of Industrial Policy Measures

Depending on the context, industrial policy measures can be seen as regulatory, national security, or strategic measures. In an international investment law context, industrial policy measures normally could be characterised as strategic measures adopted by a host state aimed at advancing economic development in that host state. The *Mobil v. Canada* case, brought under the North American Free Trade Agreement (NAFTA) investment chapter, illustrates such use of strategic industrial policy measures by a host state. *Mobil* involved parallel federal and provincial legislation, the Accord Acts, which governed the “conduct of petroleum projects in the offshore area” of the Province of Newfoundland and Labrador (NL).² The “main purpose” of the Accord Acts was “to provide a legal regime for resource management, and revenue sharing

² *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum [22 May 2012], para. 35.

to promote economic growth and development”³ in NL in particular and in Canada generally. The particular measure challenged in *Mobil* concerned requirements that investors in offshore petroleum projects in the NL offshore area make certain expenditures for research and development in NL.⁴

The recent rise of green industrial policy further illustrates the strategic nature of industrial policy measures. As characterised by Wu and Salzman (2014, 401, 404), “green industrial policies” involve “the application of traditional industrial policy instruments to spur the development of renewable energy and environmentally friendly industries.” Thus, green industrial policy measures are intended to advance both regulatory goals (protecting the environment) and strategic goals (developing green industries). As stated by Cosbey (2017, 137), “... by definition green industrial policy measures aim to achieve both environmental objectives and economic objectives.” Green industrial policy measures have been at issue in dozens of claims concerning regulatory adjustments to incentives in the renewable energy sector made by certain European Union (EU) member states, which have been submitted to arbitration under IIAs.⁵

Export restrictions on rare earths provide an example of an industrial policy measure that, depending on the context, could be viewed as a strategic, regulatory, or national security measure:

- strategic—when advancing economic development in the host state⁶

- regulatory—when protecting the environment by limiting mining activity⁷
- national security—when securing a reliable supply of an important input for military products.⁸

Such distinctions between regulatory, national security, and strategic measures are significant under international investment law, as discussed in the next section.

2.2 Significance of the Regulatory, National Security, and Strategic Aspects of Industrial Policy Measures under International Investment Law

With respect to regulatory and national security measures, international investment law is well developed and, to a certain extent, predictable: if challenged by investors under IIAs, such measures normally should be accorded significant deference by tribunals. In the context of a challenged environmental measure—a ban on the pesticide lindane—a finding by the *Chemtura v. Canada* tribunal is illustrative: a measure taken by a state acting “within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by

³ *Mobil* Decision on Liability, para. 35.

⁴ *Mobil* Decision on Liability, para. 1.

⁵ See e.g. Behn (2016): “... more than three dozen investment treaty arbitrations that have been initiated to date in relation to the revocation or modification of PV solar incentivization schemes among select EU Member States.”

⁶ See e.g. Yatsu (2017): “... rare earth elements play a critical role in our daily life—in both the economic and security domains. These elements are key components of a vast array of products, including smart phones, computers, light bulbs, electric cars, [and] wind turbines.”

⁷ In the context of challenged export restrictions on rare earths, China argued before the WTO that its export restrictions were justified under the General Agreement on Tariffs and Trade (GATT) Article XX(b) (necessary to protect human, animal, or plant life or health) and XX(g) (relating to the conservation of exhaustible natural resources). See WTO Appellate Body Reports, China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (7 August 2014), para. 1.5.

⁸ See e.g. Yatsu (2017), noting that rare earth elements are “key components” in “satellites, cruise missiles, and stealth aircrafts.”

lindane for human health and the environment ... is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation."⁹ Provisions in many recent IIAs include similar language providing for significant deference to regulatory measures.¹⁰

National security measures also are accorded a significant level of deference under international investment law. As stated by UNCTAD (2009, 3):

Undoubtedly, it is the sovereign right of host countries to regulate foreign investment, and this includes the option to impose restrictions for national security reasons. It is also up to host countries to decide how they define "national security", and under what circumstances they consider this interest to be at risk.

In connection with national security concerns, the customary international law defence of necessity is available to states and—although subject to "stringent conditions" that must be met—the defence "has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population."¹¹ In addition, IIAs often include exceptions for national security measures.¹²

⁹ *Chemtura Corporation v. Canada*, UNCITRAL, Award (2 August 2010), para. 266.

¹⁰ See e.g. Canada–China BIT Annex B.10(3): "Except in rare circumstances, such as if a measure or series of measures is so severe in light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, a non-discriminatory measure or series of measures of a Contracting Party that is designed and applied to protect the legitimate public objectives for the well-being of citizens, such as health, safety and the environment, does not constitute indirect expropriation."

¹¹ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries. 2001. *Yearbook of the International Law Commission*, 2001. II, 83.

¹² See e.g. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Article 29.2 ["Security

Unlike regulatory and national security measures, however, the relationship between strategic measures and international investment law obligations is not well developed and is difficult to predict. As discussed below, that lack of predictability increases the need for policy guidance on the deference to be accorded, under a particular IIA, to strategic measures aimed at promoting economic development generally and sustainable development specifically.

2.3 Deference to be Accorded to Strategic Measures Aimed at Advancing Economic Development in the Host State

With respect to industrial policy measures, IIAs generally have moved towards greater specificity; that specificity has at times constrained, and at times supported, the adoption of industrial policy measures.

Industrial policy measures often are addressed in IIAs through disciplines on performance requirements, defined by UNCTAD (2003, 2) as "stipulations, imposed on investors, requiring them to meet certain specified goals with respect to their operations in the host country." As noted by Chaisse (2016, 269–270): "In essence, PRs [performance requirements] are imposed by host countries to seek certain benefits associated with foreign investment." In a WTO context, the TRIMs agreement includes an illustrative list of performance requirements that are inconsistent with the General Agreement on Tariffs

Exceptions"): "Nothing in this Agreement shall be construed to ... preclude a Party from applying measures that it considers necessary for the ... protection of its own essential security interests"; Comprehensive Economic and Trade Agreement (CETA) Article 28.6(2) ("National security"): "Nothing in this Agreement shall be construed ... to prevent a Party from taking an action that it considers necessary to protect its essential security interests [as described in the provision]."

and Trade (GATT) Article III (national treatment of imported products) and Article XI (prohibition on quantitative restrictions on imports or exports). This list includes requirements to “purchase or use ... products of domestic origin or from any domestic source”¹³ and restrictions on “the exportation or sale for export by an enterprise of products,”¹⁴ in both instances “whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.”¹⁵ Disciplines on performance requirements are included in many recent IIAs, including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Among other disciplines, the CPTPP performance requirements provision limits the ability of a party to “impose or enforce any requirement ... to achieve a given level or percentage of domestic content.”¹⁶

But specificity in treaty practice also has supported industrial policy measures, often through the use of exceptions to performance requirements disciplines. Many of those exceptions concern regulatory activity by states. For example, the performance requirements provisions in the CPTPP, the Additional Protocol to the Framework Agreement of the Pacific Alliance (Pacific Alliance Agreement), and the Singapore–Australia Free Trade Agreement (SAFTA) include exceptions incorporating language that resembles the GATT general exceptions provision, Article XX. In particular, those exceptions to performance requirements disciplines address measures necessary to protect human, animal, or plant life or health, and measures related to the conservation of living or non-living exhaustible natural resources.¹⁷ The CPTPP performance requirements provision

also includes a limited exception for measures that protect legitimate public welfare objectives.¹⁸

In some instances, however, recent IIAs have supported industrial policy measures by including exceptions for what could be characterised as strategic, rather than regulatory, activity by states. For example, the performance requirements provisions in CPTPP and SAFTA include an exception that allows a party to condition the receipt of an advantage “on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.”¹⁹ The Pacific Alliance Agreement and the Comprehensive Economic and Trade Agreement (CETA) include similar exceptions.²⁰ Additional exceptions under the CPTPP and Pacific Alliance agreements cover another form of strategic government activity: imposing local management requirements under which a majority of the board of directors of an enterprise in the host state must be nationals or residents of the host state.²¹

Recent treaty practice constraining, and supporting, industrial policy measures—in both regulatory and strategic contexts—is discussed in greater detail in Section 4 addressing the WTO-plus approach to industrial policy measures. As discussed in the next section, the question of deference to be accorded to strategic industrial policy measures is complicated further when strategic measures are intended to advance not merely economic development, but in particular sustainable development.

¹³ TRIMs Annex, para. 1(a).

¹⁴ TRIMs Annex, para. 2(c).

¹⁵ TRIMs Annex, paras 1(a) and 2(c).

¹⁶ CPTPP Article 9.10(1).

¹⁷ See CPTPP Article 9.10(3)(d); SAFTA Article 7(3)(c); Pacific Alliance Article 10.8(5).

¹⁸ CPTPP Article 9.10(3)(h).

¹⁹ CPTPP Article 9.10(3)(a); SAFTA Article 7(3)(a).

²⁰ See Pacific Alliance Article 10.8(3); CETA Article 8.5(3).

²¹ CPTPP Article 9.11(2) states: “A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.” Pacific Alliance Article 10.9(2) includes similar language.

2.4 Deference to be Accorded to Strategic Measures Aimed at Advancing Sustainable Development in the Host State

States continue to pursue industrial policies to advance their economic development; with increasing frequency, however, industrial policies are aimed at advancing sustainable development in particular. As noted by UNCTAD (2018, 129), “[T]he drive for sustainable development and inclusive growth at the global level—as embodied in the Sustainable Development Goals (SDGs)—adds further pressure on governments to steer industrial development.” In 2015, the United Nations General Assembly adopted the 17 SDGs that are to be met by 2030.²² As stated in this document: “We will adopt policies which increase productive capacities, productivity and productive employment[,] ... sustainable industrial development ... [and] universal access to affordable, reliable, sustainable and modern energy services ...”²³ In addition, “the means required for implementation” of the SDGs will include “capacity-building and the transfer of environmentally sound technologies to developing countries on favourable terms, including on concessional and preferential terms, as mutually agreed.”²⁴

Industrial policies can advance sustainable development in many ways, as observed by Johnson (2016, 15):

[P]olicies aimed at achieving certain SDGs call for a combination of (1) efforts to support development of domestic capacity and (2) efforts to effectively leverage foreign investment to increase the quantity and quality of employment,

²² *Transforming Our World: The 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015 (2030 Agenda), A/RES/70/1.

²³ *2030 Agenda* para. 27.

²⁴ *2030 Agenda* para. 41.

promote economic diversification, develop critical infrastructure, and increase technology transfer and innovation.

Recent treaty practice on industrial policy has developed alongside recent treaty practice on sustainability. The amended Southern African Development Community (SADC) Protocol on Finance and Investment obligates Parties to promote use of their natural resources “in a sustainable and an environmentally friendly manner.”²⁵ CETA includes an entire chapter on “Trade and Sustainable Development.” Article 6 of the 2018 Netherlands Model bilateral investment treaty (BIT), entitled “Sustainable Development,” includes a commitment to “promote the development of international investment in such a way as to contribute to the objective of sustainable development.”²⁶

Sustainability, as a policy goal, can blur distinctions between regulatory and strategic measures; strategic industrial policy measures (e.g. measures concerning capacity building and technology transfers) can play a central role in advancing sustainable development, but sustainability, at the same time, reflects core regulatory concerns of protecting health, safety, and the environment. As discussed above, green industrial policy measures in particular have blurred distinctions between regulatory and strategic measures, by seeking to achieve both regulatory (environmental protection) and strategic (green industry development) goals.

The SADC Protocol on Finance and Investment further illustrates how sustainability goals can blur distinctions between regulatory and strategic measures. That agreement includes a provision including sustainable development within the sovereign right to regulate; the first paragraph of the provision, which is entitled “Right of a State Party to Regulate,” states:

²⁵ Annex I (Cooperation on Investment) of the SADC Protocol on Finance and Investment, as amended, Article 10.

²⁶ 2018 Netherlands Model BIT Article 6(1).

In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.²⁷

Thus, in the context of a provision addressing a state's right to regulate, the SADC Protocol on Finance and Investment considers the need to advance sustainable development as well as "other legitimate social and economic policy objectives," which would appear to extend not only to regulatory but also to strategic considerations.

Because sustainability, as a policy goal, can reflect both regulatory and strategic considerations, industrial policy measures aimed at advancing not only economic development, but sustainable development in particular, merit special consideration. Accordingly, with respect to the IIA–industrial policy relationship, policymakers should consider strategic industrial policy measures in two separate contexts: first, strategic measures aimed at advancing a host state's economic development; and second, strategic measures aimed at advancing a host state's sustainable development. In a sustainability context, strategic measures often will include a significant regulatory component and will require consideration of a rapidly forming body of law and policy on sustainability.

As discussed in Section 3, in broad terms IIAs have adopted three approaches to industrial policy measures: a silent approach, a WTO approach, and a WTO-plus approach. Notably, of these three approaches, only a WTO-plus approach allows policymakers to provide detailed guidance on the deference to be accorded to strategic industrial policy measures. For that reason, this paper recommends that a WTO-plus approach to industrial policy

measures be adopted in future IIAs, which would allow policymakers to provide valuable guidance on the deference to be accorded to strategic measures aimed at advancing economic development generally and sustainable development specifically.

3. Evolution in Treaty Practice: Silent, WTO, and WTO-Plus Approaches to the International Investment Agreement–Industrial Policy Relationship

With respect to industrial policy measures, IIAs have adopted one of three broad approaches: a silent approach (in which IIAs are silent on industrial policy measures and instead provide relevant protections under other substantive obligations), a WTO approach (which incorporates TRIMs disciplines on industrial policy measures into IIAs), and a WTO-plus approach (which imposes disciplines on industrial policy measures that exceed the scope of TRIMs disciplines). Each of these approaches is discussed below.

3.1 Silent Approach

IIAs have addressed industrial policy measures in a range of provisions, including (i) limitations on performance requirements,²⁸ (ii) limitations on nationality-based appointments of board members and senior management,²⁹ and (iii) market access

²⁸ See e.g. CPTPP Article 9.10 (1), limiting the ability of a party to "impose or enforce any requirement ... to achieve a given level or percentage of domestic content."

²⁹ See e.g. CPTPP Article 9.11(1): "No Party shall require that an enterprise of that Party that is a covered investment appoint to a senior management position a natural person of any particular nationality."

²⁷ SADC Protocol on Finance and Investment Article 12.

provisions.³⁰ But many IIAs do not include provisions that directly address industrial policy measures. Indeed, with respect to disciplines on performance requirements in particular, the International Institute for Sustainable Development has observed that the “vast majority of BITs make no reference to [performance requirements]” and has characterised the approach of not referring to performance requirements in BITs as the “majority traditional” approach (Nikièma 2014, 7).

Such IIAs can, then, be seen as reflecting a silent approach to industrial policy measures, under which an investor, for protection, must turn to substantive obligations that do not directly address industrial policy measures. Two such substantive obligations that often will provide investor protections are national treatment and fair and equitable treatment.

A national treatment obligation, for example, provided important protections in the three high-fructose corn syrup (HFCS) claims brought by US investors against Mexico under the NAFTA investment chapter.³¹ The challenged measure concerned a tax on products containing sweeteners other than cane sugar. In each of the HFCS cases, the investors argued that the tax violated the NAFTA investment chapter limitation on performance requirements.³² At the same time, the investors argued that the tax violated the national

treatment obligation under the NAFTA investment chapter, on grounds that the measure accorded more favourable treatment to domestic companies (which used cane sugar) than to US companies (which used HFCS).³³ Although the NAFTA investment chapter does not reflect a silent approach to industrial policy measures (given the inclusion of a performance requirements provision), the three HFCS cases illustrate how, in an industrial policy context, a national treatment obligation can provide important protections.

A fair and equitable treatment obligation also can provide important protections for investors in an industrial policy context. The claimants in *Cargill v. Poland* relied on the fair and equitable treatment obligation under the US–Poland BIT when challenging restrictive quotas on the production of the sweetener isoglucose. The US–Poland BIT, like the NAFTA investment chapter, includes a performance requirements provision and thus does not reflect a silent approach to industrial policy measures. But like the HFCS cases, *Cargill v. Poland* illustrates how widely available substantive obligations under IIAs can provide important protections to investors alleging harm caused by industrial policy measures. In *Cargill v. Poland*, in addition to arguing that the restrictive quotas constituted prohibited performance requirements,³⁴ the claimant relied on the fair and equitable treatment obligation to argue that Cargill had legitimate expectations that any quota imposed

³⁰ See e.g. CETA Article 8.4 (1): “A Party shall not adopt or maintain with respect to market access through establishment by an investor of the other Party ... a measure that ... restricts or requires specific types of legal entity or joint venture through which an enterprise may carry out an economic activity.”

³¹ *Cargill, Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009); *Corn Products International, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility (15 January 2008); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/05, Award (21 November 2007).

³² The claimants in *Cargill* and *Archer Daniels Midland* argued that the measure conditioned the receipt of a tax advantage—specifically, avoidance of the tax on sweeteners—on the use of domestically produced cane sugar, and thus

constituted a prohibited performance requirement. See *Cargill Award* para. 306; *Archer Daniels Midland Award* para. 215. The argument in *Corn Products International* alleging a violation of the NAFTA investment chapter performance requirements provision was less well developed. See *Corn Products International Decision on Responsibility* para. 80.

³³ See *Cargill Award* para. 185; *Corn Products International Decision on Responsibility* para. 100; *Archer Daniels Midland Award* para. 186.

³⁴ Specifically, the claimant argued that the expansion and operation of Cargill’s investment was conditioned on the export of goods, given that any production of isoglucose exceeding the applicable quota had to be exported outside Poland. *Cargill, Inc. v. Poland*, UNCITRAL, Final Award (5 March 2008), para. 532.

by Poland would not be less than Cargill's production capacity and thus would not interfere with the operation of Cargill's investment.³⁵

As illustrated by *Cargill v. Poland* and the HFCS cases, regardless of whether an IIA includes provisions that specifically address industrial policy measures, the widely available national treatment and fair and equitable treatment obligations can provide important protections to investors in industrial policy contexts.

3.2 WTO Approach

For IIAs that include provisions on performance requirements,³⁶ one approach has been to incorporate WTO disciplines on performance requirements, in particular disciplines under the TRIMs Agreement. As noted above, the TRIMs Agreement includes an illustrative list of performance requirements that are inconsistent with GATT Article III (national treatment of imported products) and Article XI (prohibition on quantitative restrictions on imports or exports).

As stated in one forceful articulation of the policy concerns driving the adoption of TRIMs disciplines (Edwards and Lester 1997, 169–70):

TRIMs are government measures that require or encourage specific behavior by private investors... Such policies represent a departure from the free market paradigm that ideally governs investment decisions. In the absence of TRIMs, foreign direct investors rely on market signals to determine where and how to invest, procure inputs, and sell products. TRIMs, however, change the factors influencing those decisions ... governments' use of TRIMs distorts international trade flows and reduces social welfare in the host country and in the world economy as a whole.

³⁵ *Cargill v. Poland* Final Award para. 421.

³⁶ The International Institute for Sustainable Development has characterised the inclusion of provisions prohibiting performance requirements in BITs as the "growing minority" approach (Nikièma 2014, 7).

The TRIMs Agreement, which recognises "that certain investment measures can cause trade-restrictive and distorting effects,"³⁷ ultimately is limited in scope and reflects a compromise that was reached following challenging negotiations:

The Uruguay Round negotiations on trade-related investment measures were marked by strong disagreement among participants over the coverage and nature of possible new disciplines... The compromise that eventually emerged from the negotiations is essentially limited to an interpretation and clarification of the application to trade-related investment measures of GATT provisions on national treatment for imported goods (Article III) and on quantitative restrictions on imports or exports (Article IX).³⁸

The China–Canada BIT provides one example of an IIA that adopts a WTO approach to industrial policy measures by incorporating TRIMs disciplines on performance requirements. Under Article 9 of the treaty, entitled "Performance Requirements," the parties "reaffirm" their obligations under the TRIMs Agreement and incorporate the TRIMs illustrative list of prohibited measures into their investment treaty. The China–New Zealand FTA and the Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area (AANZFTA) include similar TRIMs provisions.³⁹ By incorporating TRIMs disciplines into

³⁷ TRIMs Agreement, preamble.

³⁸ WTO, Trade and Investment: Technical Information, Agreement on Trade Related Investment Measures, www.wto.org/english/tratop_e/invest_e/invest_info_e.htm.

³⁹ See China–New Zealand FTA Article 140 ("Performance Requirements"): "The Parties agree that the provisions of the WTO Agreement on Trade-Related Investment Measures are incorporated *mutatis mutandis* into this Agreement and shall apply with respect to all investments falling within the scope of this Chapter."; AANZFTA Article 5 ("Prohibition of Performance Requirements"): "No Party shall apply in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party in its territory any measure which is inconsistent with the Agreement on Trade-Related Investment Measures in Annex 1A to the WTO Agreement."

IAs, private investors are able to enforce TRIMs disciplines on performance requirements directly by submitting claims to investor–state arbitration under the treaties.

But TRIMs disciplines do not extend to key categories of performance requirements, including requirements involving technology transfers and services.⁴⁰ To address such performance requirements in an IIA, a WTO-plus approach—under which an IIA incorporates provisions on industrial policy that extend beyond the scope of WTO disciplines on performance requirements—must be adopted.

3.3 WTO-Plus Approach

Many recent IAs adopt a WTO-plus approach to industrial policy measures, which allows states to engage in rulemaking that extends beyond the compromise on performance requirements disciplines reached in the TRIMs Agreement. Such treaty practice normally includes provisions on performance requirements, but IAs reflecting a WTO-plus approach also have addressed industrial policy measures in provisions on market access and senior management. A WTO-plus approach also allows a state to engage in rulemaking that creates policy space for industrial policy measures, often through the use of exceptions.

Disciplines: performance requirements provisions

In addition to expanding disciplines on performance requirements to include services,⁴¹ IAs adopting a WTO-plus approach to industrial policy often include

⁴⁰ A separate WTO agreement, the General Agreement on Trade in Services (GATS), includes certain disciplines on local content requirements that affect trade in services, but the disciplines are limited in scope (market access and national treatment) and are subject to the GATS “positive list” approach, under which GATS obligations apply only to the extent that a “WTO Member has affirmatively ‘scheduled’ the relevant services sector in its Schedule of Commitments” (Johnson 2016, 17).

disciplines on performance requirements involving technology transfers. Performance requirements provisions in CETA and SAFTA limit the ability of a party to require an investor to “transfer a technology, a production process or other proprietary knowledge”⁴² to a person in its territory. The CPTPP and Pacific Alliance agreements include similar limitations.⁴³ CPTPP performance requirements provisions also impose additional technology-related limitations which prevent a party from requiring an investor “to purchase, use or accord a preference to, in its territory, technology of the Party or of a person of the Party...”⁴⁴

Disciplines: market access provisions

IAs adopting a WTO-plus approach also have addressed industrial policy measures in market access provisions. For example, the CETA market access provision imposes disciplines on measures placing limitations on certain investment activities, such as participation of foreign capital, employment of natural persons, and “total number of operations.”⁴⁵ The provision also imposes disciplines on measures restricting or requiring enterprises to carry out certain economic activities through “specific types” of legal entities, such as joint ventures.

Disciplines: senior management provisions

A WTO-plus approach to industrial policy in IAs also has been reflected in senior management provisions,

⁴¹ See e.g. CPTPP Article 9.10(1)(a), prohibiting parties from imposing requirements “to export a given level or percentage of goods or services”; SAFTA Article 7(1)(g), prohibiting Parties from imposing requirements to “supply exclusively from the territory of the Party the goods that such investment produces or the services that such investment supplies to a specific regional market or to the world market.”

⁴² CETA Article 8.5(1)(f); Singapore–Australia FTA Article 7(1)(f).

⁴³ CPTPP Article 9.10(1)(f); Pacific Alliance Article 10.8(1)(f).

⁴⁴ CPTPP Article 9.10(1)(h).

⁴⁵ CETA Article 8.4.

which address measures imposing local management requirements. For example, Article 7 of the Canada–China BIT, entitled “Senior Management, Boards of Directors and Entry of Personnel,” prohibits a contracting party from requiring an enterprise in its territory to appoint “individuals of any particular nationality to senior management positions.”⁴⁶ The CETA, CPTPP, Korea–US (KORUS), and Pacific Alliance agreements include similar provisions.⁴⁷

As illustrated by the examples above, IIAs adopting a WTO-plus approach to industrial policy measures have relied on a range of provisions—including performance requirements, market access, and senior management provisions—to impose disciplines on industrial policy measures. Annex A includes a chart outlining the use in several recent IIAs of various disciplines that have limited policy space for industrial policy measures; a second chart outlines the recent use in IIAs of exceptions that have increased policy space for industrial policy measures. As illustrated by Annex A, recent treaty practice has been active in both limiting and increasing policy space in the area of industrial policy.

With respect to increasing policy space for industrial policy measures, recent IIAs have relied on a range of provisions, including (i) use of exceptions, (ii) language encouraging certain forms of industrial policy measures, and (iii) language on sustainability, corporate social responsibility, and the right to regulate. Each of those approaches is discussed below.

Creating policy space for industrial policy: use of exceptions

Policy space for industrial policy measures can be expanded in IIAs through use of a range of exceptions,

including both general exceptions⁴⁸ and exceptions tied to particular obligations.⁴⁹ Policymakers can provide targeted support for industrial policy measures by including exceptions to performance requirements obligations.⁵⁰ Such exceptions can address particular categories of performance requirements, including research and development, employee training, location of operations,⁵¹ and local management,⁵² as well as particular contexts in which

⁴⁸ The Canada–China BIT, for example, includes certain forms of regulatory activity within a General Exceptions provision; see its Article 33(2).

⁴⁹ Expropriation obligations, for example, often include exceptions for regulatory activity. See e.g. AANZFTA Chapter 11, Annex on Expropriation and Compensation.

⁵⁰ The CPTPP performance requirements provision, for example, includes exceptions for certain forms of regulatory activity. See CPTPP Article 9.10(3)(d); CPTPP Article 9.10(3)(h). See also India–Kuwait BIT Article 4.4: “Once established, investment shall not be subjected in the host Contracting State to additional performance requirements which may hinder or restrict their expansion or maintenance or adversely affect or be considered as detrimental to their viability unless such requirements are deemed vital for reasons of public order, public health or environmental concerns and are enforced by law of general application.” Particularly with respect to public health measures, the performance requirements provisions in the CPTPP, Pacific Alliance, and SAFTA agreements permit state authorisations of the use of intellectual property rights permitted under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Article 31. See CPTPP Article 9.10(3)(b); Pacific Alliance Article 10.8(4); SAFTA Article 7(3)(b).

⁵¹ For all three see e.g. CPTPP Article 9.10(3): “Nothing in paragraph 2 [of Article 9.10(3), which imposes limitations on certain performance requirements] shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage ... on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.”

⁵² See e.g. KORUS Article 11.9(2): “A Party may require that a majority of the board of directors ... of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.”

⁴⁶ Canada–China BIT Article 7.

⁴⁷ See CPTPP Article 9.11; CETA Article 8.8; Pacific Alliance Article 10.9; KORUS Article 11.9.

performance requirements might apply, including export promotion, foreign aid,⁵³ and government procurement.⁵⁴ The SADC Protocol on Finance and Investment includes a broad exception that reserves significant policy space for industrial policy measures: under the treaty's "Non-Discrimination" obligation, state parties are permitted to "grant preferential treatment to domestic investments and investors in order to achieve national development objectives."⁵⁵

Creating policy space for industrial policy: language encouraging certain industrial policy measures

Policy space for industrial policy measures can also be expanded through use of language encouraging certain forms of industrial policy measures. The SADC Protocol on Finance and Investment and the Morocco–Nigeria BIT, for example, include language encouraging technology transfers.⁵⁶ The SADC Protocol on Finance and Investment includes language that could be read as encouraging, in certain settings, capacity building through nationality-based preferences in hiring decisions. Specifically, under Article 9 of that agreement, entitled "Sourcing of Requisite Skills," state parties are not obligated to "permit investors to engage key personnel and other necessary human resources of their choice, regardless of nationality," unless three conditions are met: (i) the skills do not exist in the host state and the region, (ii) the states parties are satisfied that such sourcing of

skills will be in compliance with regional policies, and (iii) such sourcing "would enhance the development of local capacity through skills transfer."

Creating policy space for industrial policy: sustainability

Incorporating language on sustainability provides an additional option for creating policy space in an industrial policy context. A number of recent IIAs include such language; those sustainability provisions often are reinforced by language on corporate social responsibility. CETA, for example, includes a "Trade and Sustainable Development" chapter in which the parties "reaffirm their commitment to promoting the development of international trade in such a way as to contribute to the objective of sustainable development, for the welfare of present and future generations."⁵⁷ In particular, under that chapter, the parties "shall strive to promote trade and economic flows and practices that contribute to enhancing decent work and environmental protection, including by ... encouraging the development and use of voluntary best practices of corporate social responsibility by enterprises."⁵⁸ The Morocco–Nigeria BIT similarly incorporates language on sustainable development and corporate social responsibility: under Article 24, entitled "Corporate Social Responsibility," "investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through high levels of socially responsible practices."

Sustainability can also be addressed in the context of a host state's right to regulate. Under Article 12 of the SADC Investment Protocol, entitled "Right of a State Party to Regulate," a host state "has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development." The Morocco–Nigeria BIT includes the same language.⁵⁹

⁵³ For both see e.g. KORUS Article 11.8(3), identifying limitations on performance requirements that "do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs."

⁵⁴ See e.g. CPTPP Article 9.10(3) (identifying limitations on performance requirements that "shall not apply to government procurement").

⁵⁵ SADC Protocol on Finance and Investment Article 6(3).

⁵⁶ See SADC Protocol on Finance and Investment, preamble (referring to "the facilitation and stimulation of investment flows and technology transfer and innovation into the Region"); Morocco–Nigeria BIT Article 25 providing that the "Home State should assist the Host State in the promotion and facilitation of foreign investment in particular by their own investors... Such assistance may include ... technology transfer."

⁵⁷ CETA Article 22.1.

⁵⁸ CETA Article 22.3.

⁵⁹ See Morocco–Nigeria BIT Article 23.

As discussed above, advancing goals of sustainability can reflect both regulatory and strategic considerations, as illustrated by green industrial policy measures that seek to achieve both regulatory (environmental protection) and strategic (green industry development) goals. The 2030 Agenda also recognises the regulatory⁶⁰ and strategic⁶¹ considerations supporting sustainable development. Accordingly, while incorporating language on sustainability in IIAs can create policy space for industrial policy measures, the extent to which such language should expand policy space for strategic (as distinguished from regulatory) industrial policy measures merits further clarification. The need for policy guidance on the deference to be accorded to strategic industrial policy measures under IIAs is discussed in Section 4.

4. Applying a WTO-Plus Approach to Strategic Industrial Policy Measures

The silent and WTO approaches to the IIA–industrial policy relationship do not provide significant guidance on the deference that should be accorded to strategic industrial policy measures. Under a silent approach,

⁶⁰ See e.g. *2030 Agenda* para. 33: “We recognize that social and economic development depends on the sustainable management of our planet’s natural resources. We are therefore determined to conserve and sustainably use oceans and seas, freshwater resources, as well as forests, mountains and drylands and to protect biodiversity, ecosystems and wildlife.”

⁶¹ See e.g. *2030 Agenda* para. 27: “We will adopt policies which increase productive capacities, productivity and productive employment ... sustainable industrial development ... [and] universal access to affordable, reliable, sustainable and modern energy services”; *2030 Agenda* para. 41: “... the means required for implementation” of the SDGs will include “capacity-building and the transfer of environmentally sound technologies to developing countries on favourable terms, including on concessional and preferential terms, as mutually agreed.”

disputing parties and tribunals can work with existing obligations such as national treatment and fair and equitable treatment and established doctrines that accord deference to regulatory and national security measures. But such sources do not provide significant guidance on how to evaluate strategic industrial policy measures. A WTO approach under IIAs allows investors to directly enforce TRIMs disciplines on performance requirements, but those disciplines provide only limited policy guidance with respect to a relatively small set of industrial policy measures.

Without guidance from policymakers on how to evaluate strategic industrial policy measures, the relationship between such measures and IIA obligations will be unpredictable for both investors and tribunals. Notably, tribunals have been applying, and will continue to apply, IIAs to industrial policy measures with great frequency, given that the need to advance sustainable development “adds further pressure on governments to steer industrial development” (UNCTAD 2018, 129) and “modern industrial policies often directly promote SDG-related industries [e.g. clean energy, electric cars, ecotourism, health care]” (UNCTAD 2018, 168). Indeed, claims submitted to arbitration under IIAs concerning regulatory adjustments to incentives in the renewable energy sector made by certain EU Member States have required tribunals, on dozens of occasions, to apply IIAs in an industrial policy context.⁶² Although tribunals can offer some guidance with respect to the relationship between strategic measures and IIA obligations, guidance on that relationship provided directly by policymakers in treaty text would achieve greater levels of predictability for investors.

As discussed above, IIAs adopting a WTO-plus approach to the IIA–industrial policy relationship have, in many instances, provided detailed guidance on what deference, if any, should be accorded to strategic industrial policy measures. Imposing disciplines on certain forms of strategic measures can provide guidance by clarifying the limits of policy space for particular areas of industrial policy. The CPTPP

⁶² See Behn (2016).

agreement, for example, includes a number of such limitations, imposing disciplines on, among other forms of performance requirements, export, domestic content, and technology transfer requirements.⁶³

Guidance on the deference to be accorded to strategic industrial policy measures can also be provided by exceptions that provide support for such measures. The CPTPP, SAFTA, Pacific Alliance, and CETA agreements include exceptions allowing parties to condition the receipt of an advantage on compliance with a range of strategic requirements, including worker training and carrying out research and development.⁶⁴ Regarding local management, the CPTPP and Pacific Alliance agreements include exceptions permitting a party to require that a majority of the board of directors of an enterprise be of a particular nationality or resident in the territory of the party, so long as the requirement does not materially impair the ability of an investor to exercise control over its investment.⁶⁵ Under the SADC Protocol on Finance and Investment, states parties can “grant preferential treatment to domestic investments and investors in order to achieve national development objectives.”⁶⁶ The India Model BIT recognises that international law accords deference to states “with regard to their development and implementation of domestic policies.”⁶⁷

A WTO-plus approach allows policymakers to provide detailed guidance on the IIA–industrial policy relationship, in particular with respect to the two aspects of the relationship that are most in need of clarification: the extent to which deference should be accorded to strategic industrial policy measures aimed at advancing economic development generally and sustainable development specifically.

⁶³ CPTPP Article 9.10(1)(a) (export requirements); Article 9.10(1)(b) (domestic content requirements); Article 9.10(1)(f) (technology transfer requirements).

⁶⁴ See CPTPP Article 9.10(3)(a); SAFTA Article 7(3)(a); Pacific Alliance Article 10.8(3); CETA Article 8.5(3).

⁶⁵ See CPTPP Article 9.11(2); Pacific Alliance Article 10.9(2).

⁶⁶ SADC Protocol on Finance and Investment Article 6(3).

⁶⁷ India Model BIT Article 14.9.

5. Conclusion

As industrial policies become more widespread and controversial, the relationship between IIAs and industrial policy measures has taken on particular importance. With respect to the IIA–industrial policy relationship, states are facing two competing—and strengthening—influences: heightened scrutiny of industrial policy measures and heightened expectations for achieving sustainable development.

Many recent treaties illustrate how IIAs can constrain (through disciplines) and support (through exceptions) industrial policy measures. Such guidance through treaty practice can be valuable for investors when considering potential investments abroad and for tribunals when attempting to strike an appropriate balance between scrutiny of industrial policy measures and support for economic development, including sustainable development. A WTO-plus approach to industrial policy measures—which addresses industrial policy measures beyond the scope of WTO disciplines—allows policymakers to provide such detailed guidance in IIAs and should be adopted in future treaty practice. In particular, a WTO-plus approach allows policymakers to provide guidance on those aspects of the IIA–industrial policy relationship that are most in need of clarification: the extent to which deference should be accorded to strategic industrial policy measures aimed at advancing economic development generally and sustainable development specifically. The need for such guidance has increased significantly given that tribunals are applying IIAs to industrial policy measures with greater frequency. Specific guidance with respect to the relationship between strategic industrial policy measures and sustainable development would be particularly valuable, given that the ascendancy of sustainability as a policy priority has blurred distinctions between strategic and regulatory measures.

By providing guidance on the relationship between IIA obligations and strategic industrial policy measures—including guidance on how policy goals of sustainability affect that relationship—policymakers can reduce uncertainty for states agreeing to IIA obligations and for investors considering potential investments abroad.

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Annex 1. Recent International Investment Agreement Practice on Industrial Policy Measures: Disciplines and Exceptions

Discipline	International investment agreement									
	AANZFTA	Canada–China BIT	CETA	CPTPP	India model BIT	Japan–Republic of Korea–China	KORUS	Morocco–Nigeria BIT	Pacific Alliance	SADC
TRIMs (WTO)	•	•				•				
Local content (goods)			•	•			•		•	
Local content (services)			•	•			•		•	
Export requirements			•	•		•	•		•	
Technology transfers			•	•		•	•		•	
Purchase of technology				•						
Local equity requirements			•							
Joint venture requirements			•							
Local management		•	•	•			•		•	
Local employment			•							

Exception	International investment agreement									
	AANZFTA	Canada–China BIT	CETA	CPTPP	India model BIT	Japan–Republic of Korea–China	KORUS	Morocco–Nigeria BIT	Pacific Alliance	SADC
Regulatory measures	•	•	•	•	•	•	•	•	•	•
Train/employ workers			•	•			•		•	
Research and development			•	•			•		•	
Location of operations			•	•					•	
Use of intellectual property rights/TRIPS Article 31 ^a				•			•		•	
Ensure fair competition/remedy anti-competitive practices			•	•			•		•	
Local management		•		•			•		•	
Export promotion			•	•			•		•	
Foreign aid			•	•			•		•	
Government procurement			•	•			•		•	
Qualify for preferential tariffs/quotas		•	•	•			•		•	
Sustainability (preamble)	•	•	•	•	•		•	•	•	•
Sustainability (text)			•		•			•		•
Right to regulate (preamble)		•	•	•	•			•		

Exception	International investment agreement									
	AANZFTA	Canada-China BIT	CETA	CPTPP	India model BIT	Japan-Republic of Korea-China	KORUS	Morocco-Nigeria BIT	Pacific Alliance	SADC
Right to regulate (text)			•					•		•
Corporate social responsibility (text)			•	•	•			•		
Deference accorded to development objectives					•			•		•

^a TRIPS Agreement, Agreement on Trade-Related Aspects of Intellectual Property Rights.

Jointly implemented by the International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB), the RTA Exchange works in the interest of the sharing of ideas, experiences to date, and best practices to harvest innovation from RTAs and leverage lessons learned towards progress at the multilateral level. Conceived in the context of the E15 Initiative, the RTA Exchange creates a space where stakeholders can access the collective international knowledge on RTAs and engage in dialogue on RTA-related policy issues.

