LEGAL INNOVATION IN INVESTMENT LAW: RHETORIC AND PRACTICE IN EMERGING COUNTRIES

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1. INTRODUCTION

Until the 1990s, foreign investors seeking protection for their investments found limited support in international law. In that decade, the landscape changed dramatically as capital exporting nations pressed for Bilateral Investment Treaties (BITs) that protected investors against both expropriation and other measures that significantly impaired the value of their investments. Today, we are entering yet another era in international investment law.

Traditional BITs include a system of Investor-State Dispute Settlement (ISDS) under which an aggrieved investor may submit a claim against the host government directly to an arbitral panel. These panels have the power to award damages if the host government's actions are found to have impeded upon protections guaranteed by the treaty. Capital importing countries initially rushed to sign BITs. Amidst significant competition for foreign investment, capital importing countries believed that signing BITs would help attract much needed foreign cash inflows. They paid little if any attention to the possible risks associated with ISDS. Over three thousands of such agreements were signed creating what some consider to be a *de facto* global regime.

After two decades of experience with BITs, developing countries began to question the value of many aspects of the regime constructed through this web of bilateral agreements. The benefits from BITs are in doubt and their potential social, political and economic costs are becoming increasingly apparent. On the benefit side, some have questioned whether signing BITs really increases the flow of investment, pointing to Brazil as a counter-narrative narrative. Although it flirted with BITs in the 1990s, Brazil never ratified any treaty. Yet, over the past twenty years, it has been one of the top developing country recipients of foreign direct investment.[1] At the same time, as decisions against host countries by ISDS arbitration panels accumulate, and significant damages are awarded, concerns

[1] *See The World Factbook: Country Comparison, Stock of Direct Foreign Investment*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2198rank.html [https://perma.cc/9ACR-F33G] (ranking Brazil as the 14th recipient of foreign direct investment (FDI) worldwide based on 2016 estimates of FDI stock. The only emerging country receiving more FDI is China.); *see also* United Nations Conference on Trade and Development, *World Investment Report 2016, Country Fact Sheet: Brazil*, http://unctad.org/sections/dite_dir/docs/wir2016/wir16_fs_br_en.pdf [https://perma.cc/9ZKM-2RLS] (comparing Brazil's FDI flows and stock to other emerging countries).

over costs of the treaties for host countries are mounting. Emerging countries fear the effects of the BITs regime on their policy making capacities, leading them to rethink their commitment to the regime that was established in the 1990s.

Several factors contribute to such a policy move. To some degree, it is part of a general shift away from unqualified embrace of globalization by both governments and industry North and South.[2] But probably the biggest driver has been a reaction to the raft of decisions by arbitrators who have used the often vague language of treaties to craft rulings that pose a threat to the regulatory autonomy of host countries beyond what signatory states expected when they signed onto BITs. These include use of the concept of "indirect expropriation" to challenge regulatory actions that investors claim significantly diminished the value of their investments. In the so-called "indirect expropriation" scenario, the investor claims that, although the host state did not engage in an outright expropriation or taking of the investment, it took some regulatory measure that had the effect of significantly diminishing or even entirely wiping out the value or the expected value of the investment. Expropriation claims

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2 *See The Retreat of the Global Company*, THE ECONOMIST, Jan. 28, 2017, https://www.economist.com/news/briefing/21715653-biggest-business-idea-past-three-decades-deep-trouble-retreat-global [https://perma.cc/2UHD-N4PS].

in response to regulatory controls[3] range from the telecommunication sector,[4] banking and finance,[5] public health,[6] the environment,[7]

3 *See* M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 201 (2015) ("[N]umerous control devises . . . were instances of control that the administrative state increasingly employed.").

4 *See generally* Republic of Ghana v. Telekom Malaysia Berhad, HA/RK 2004.778, PCA Case Repository 2003-03, (Perm. Ct. Arb. 5 Nov., 2004), https://www.italaw.com/sites/default/files/case-documents/ita0922.pdf [https://perma.cc/2EMX-8J6G].

5 *See generally* Rafat Ali Rizvi v. Republic of Indonesia, ICSID Case No. ARB/11/13, Award on Jurisdiction (July 16, 2013), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1560/DC4512_En.pdf [https://perma.cc/R5NL-YBBT]; Abaclat and Others v. The Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0236.pdf [https://perma.cc/A3CM-99Y7].

6 *See generally* Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction (July 2, 2013), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1000/DC3592_En.pdf [https://perma.cc/4LVM-8CC7]; Achmea B.V. v. The Slovak Republic, PCA Case No 2013/12 (Perm. Ct. Arb. May 20, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw3207.pdf [https://perma.cc/ZQT9-TGXR]; United Nations Commission on International Trade Law, Les Laboratoires Servier, S.A.A., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland, https://www.italaw.com/cases/1179 [https://perma.cc/RX4Q-HBZX]. Pharmaceutical companies have also claimed expropriation or breach of fair and equitable treatment against host countries with mature regulatory environment including Canada and the United States; *see generally* Eli Lilly and Co. v. Gov't of Canada, ICSID Case No. UNCT/14/2, Final Award (Mar. 16, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw8546.pdf [https://perma.cc/KAB6-X5HV] and Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1 (2012), http://investmentpolicyhub.unctad.org/ISDS/Details/456 [https://perma.cc/X24W-NFN7].

7 *See generally* Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica, ICSID Case No. ARB/96/1, Final Award (Feb. 17, 2000), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C152/DC539_En.pdf [https://perma.cc/NL2F-E2U6], 5 ICSID Rep. 157 (2002) (involving a tourist site development project by US investors in a biodiversity rich area of Costa Rica. The land had been purchased for close to $400,000 and various studies were undertaken for a tourist resort development that was never started. Some eight years after the original purchase, Costa Rica issued several environmental decrees culminating with decrees extending the neighboring nature and wildlife conservation national park to include the land under development and expropriated the land with compensation amounting to $1.9 million.).

access to water,[8] the protection of cultural property,[9] the taxation power of the host state,[10] and socio-economic policies.[11] Many cases of this type have been brought in recent years and arbitrators awarded damages in several instances. In 2012 India received an unfavorable decision in *White Industries v. India*. This decision, which was based on delays in the Indian judiciary, caused a major stir in India. In its wake, India faced seventeen further notices of arbitrations.[12] Even when the claim is dismissed, litigation is costly for the host country. Concepts of "fair and equitable treatment" and

[8] *See generally* Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (24 July, 2008); Aguas del Tunari S.A. v. Republic Of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (Oct. 21, 2005), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C67/DC1589_En.pdf [https://perma.cc/5MMB-Y8CC]; Damon Vis-Dunbar & Luke Eric Peterson, *Bolivian Water Dispute Settled, Bechtel Forgoes Compensation*, INV. TREATY NEWS (Jan. 20, 2006), http://www.iisd.org/itn/wp-content/uploads/2010/10/itn_jan20_2006.pdf [https://perma.cc/NC54-LWDA].

[9] *See generally* Malaysian Historical Salvors Sdn, Bhd v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award of Jurisdiction (May 17, 2007), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C247/DC654_En.pdf [https://perma.cc/WM73-7NV6]; Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (Sept. 11, 2007), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C252/DC682_En.pdf [https://perma.cc/EK7F-V4BD]; VALENTINA VADI, CULTURAL HERITAGE IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (2014).

[10] *See generally* Señor Tza Yap Shum v. La Republica del Perú, ICSID Case No. ARB/07/6, Laudo (Sept. 11, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0881.pdf [https://perma.cc/S6JD-TWSK].

[11] *See generally* Piero Foresti et al. v. The Republic of South Africa, ICSID Case No. ARB/07/1, Award (Aug. 4, 2010), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C90/DC1651_En.pdf [https://perma.cc/YV95-2K33]; CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award (May 12, 2005), 44 ILM 1205 (2005); Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim) (Aug. 2, 2004), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3/DC502_En.pdf [https://perma.cc/PGQ6-FXD3]; Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C8/DC694_En.pdf [https://perma.cc/W9HY-U7UN].

[12] Grant Hanessian & Kabir Duggal, *The 2015 India Model BIT: Is This the Change the World Wishes to See?*, 30 ICSID REV. 729 (2015) ("In 2012, however, India received an unfavourable decision in *White Industries v India* . . . Shortly after it was decided, India received another 17 notices of dispute over claims ranging from the cancellation of licenses to the review of Supreme Court decisions.").

"full protection and security" also received expansive readings. Additionally, a number of arbitrations not involving emerging countries sent legal and political signals that increased the angst of developing host states. This is particularly true with respect to arbitrations that expanded the reach of dispute settlement clauses included in BITs and restricting the scope of safeguards created to protect the domestic jurisdiction of the host state[13] involved a claim by an Argentine national against Spain, where the investor had not fulfilled the waiting period in the jurisdictional clause of the Argentine–Spain BIT.[14] The tribunal agreed with him that a jurisdictional clause of the Chile–Spain BIT,[15] which did not have such a waiting period, could be applied instead because it was a more favorable clause which could be imported thanks to the Argentine-Spain BIT's most favored nation (MFN) clause.[16] More recently, *RosInvestCo*[17] went even further by using an MFN clause to broaden the types of claims that could be brought under a BIT when another BIT signed by the host state included coverage for a wider range of claims.[18]

Although ISDS defenders are quick to point out that investors lost a number of these claims,[19] developing countries remain con-

13 *See generally* Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Award (Nov. 13, 2000), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C163/DC566_En.pdf [https://perma.cc/SCD6-6WH6], 5 ICSID Rep. 419 (2002).

14 For details about the Argentina-Spain BIT, *see generally* Agreement between the Argentine Republic and Kingdom of Spain on the Reciprocal Promotion and Protection of Investments, Arg.–Spain, Oct. 3, 1991, 1699 U.N.TS 202.

15 *See generally* Agreement between the Kingdom of Spain and the Republic of Chile on the Reciprocal Protection and Promotion of Investments, Chile-Spain, Oct. 2, 1991, 1774 U.N.T.S 25.

16 *Id.* at art 4.2.

17 *See generally* RosInvestCo UK Ltd. v. The Russian Federation, Arbitration Institute of the Stockholm Chamber of Comerce Case No. V079/2005, Final Award (Sept. 12, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0719.pdf [https://perma.cc/QT2P-2KY3].

18 *See id* (adjudicating argument for jurisdiction based on the MFN clauses in Article 3 of the UK-Soviet BIT in connection with the Denmark-Russia BIT).

19 *See, e.g.*, Plama v. Bulg., ICSID Case No. ARB/03/24, Decision on Jurisdiction, (Feb. 8, 2005), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C24/DC521_En.pdf [https://perma.cc/8PVE-FYFD], 20 ICSID Rev.—FILJ 262 (2005) (finding that investors misrepresented their identy and qualifications, which was material to the investment authorization); Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Inte-

cerned about the chilling effect that the specter of arbitration imposes on their policy autonomy, the resources involved in defending arbitrations against well-endowed investors, and the unstable climate created by uncertainty and at times inconsistency in decisions regarding awards.

Arbitration awards are only binding on the parties thereto; arbitrators regularly come down with conflicting awards and a number of awards remain confidential. Nonetheless, the body of publically available awards forms a reservoir of arguments and analyses that arbitrators and negotiators draw from and may use. As a result, even though investor–state arbitration awards are technically devoid of *stare decisis* effect, they do have a role in shaping international investment law beyond the individual case at hand.[20]

The nature of resistance to the traditional BITs regime varies. Some states are withdrawing from existing agreements[21] or related

grales del Agua S.A. v. The Argentice Republic, ICSID Case No. ARB/03/17, Decision on Liability, ¶¶ 151, 217-218, https://www.italaw.com/sites/default/files/case-documents/ita0813.pdf [https://perma.cc/E566-JZKW] (finding no expropriation but deciding that the state had breached its obligations regarding fair and equitable treatment by refusing to renegotiate the tariff rates for water); LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 248 (Oct. 3, 2006), 21 ICSID Rev.—FILJ 203 (2006), https://www.italaw.com/sites/default/files/case-documents/ita0460.pdf [https://perma.cc/4BSF-XBJU] (rejecting the claims that the Respondent had directly or indirectly expropriated Claimants' investments and denied the Claimants' investments full protection and security).

20 *See, e.g.*, Renta 4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation, Arbitration Institute of the Stockholm Chamber of Commerce, Award on Preliminary Objections, ¶ 16 (Mar. 20, 2009), https://www.italaw.com/documents/Renta.pdf [https://perma.cc/AX8M-LNAT] ("The arbitrators do not in any event operate in a hierarchical and unitary system which requires them to follow precedents. They are nevertheless attentive to prior decisions brought to their attention. They are bound to do so as part of their basic duty to consider the Parties' arguments."). *See generally* Stephan W. Schill, *The Multilateralization of International Investment Law: Emergence of a Multilateral System of Investment Protection on Bilateral Grounds*, 2(1) TRADE L. & DEV. 59 (2010); STEPHAN SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW (2009).

21 Indonesia and South Africa's policy is to notify partners of its intent not to renew BITs that reach the ten or fifteen-year period for initial validity. The first South African treaties to lapse under this type of sunset clause were the BITs with the Belgium-Luxembourg Economic Union (2012), with Switzerland (2013), with the Netherlands (2013), with Spain (2013), with Germany (2014), with Austria (2014), with France (2014) and with Denmark (2014). South Africa also plans to reconsider its BIT with China when the initial ten-year validity period comes to term (in 2018). Indonesia has terminated BITs with Norway (2001), Egypt (2014), Bul-

systems such as the World Bank's International Center for the Settlement of Investment Disputes (ICSID), others call for changes in the scope of new BITs, and yet others promote radical alternatives. For instance, South Africa enacted a Protection of Investment Act in 2015, which seeks to replace bilateral treaties with domestic legislation stipulating the rights and obligations of the government and of all investors, both local and foreign.[22] Brazil, which has traditionally relied on domestic law to manage foreign investment, has now adopted a new form of bilateral treaty called Cooperation and Investment Facilitation Agreements (CIFAs) which defines investment more narrowly than traditional BITs, limits the scope of protection, stresses investment facilitation and dispute avoidance, and eschews ISDS. In 2012, Indonesia undertook a review of its international investment agreements in reaction to high profile arbitration claims in the banking and mining sectors. Meanwhile, India and others have released new model BITs which depart from the traditional framework quite significantly. China, after evolving through several model BITs, now proceeds largely on an *ad hoc* basis.

Additionally, governments from emerging countries and civil society alike question a system in which claims against states are handled by arbitrators in the North who have wide discretion to interpret general clauses in ways that can severely limit host states' regulatory competence. But, here again, emerging countries respond to the problem in different ways. Some accept the basic elements of the existing structure, including traditional investor-state arbitration, embrace strict protection for their outward investment, but wish to preserve policy space domestically. Some seek to change the scope of coverage for both parties, carve out exceptions to preserve policy space, and add measures to better ensure that arbitrators are not biased. Others accept the idea of international arbitration of investor-state claims, but want to create a new institutional structure based in and controlled by developing countries. More radically, some refuse to participate in the ISDS system altogether while offering a very different approach to foreign investments emphasizing facilitation over protection.

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garia (2015), China (2015), France (2015), Italy (2015), Lao People's Democratic Republic (2015), Malaysia (2015), Netherlands (2015), Slovakia (2015), Cambodia (2016), Romania (2016), Turkey (2016) and Vietnam (2016). Additionally, the Indonesia-Argentina BIT was terminated by mutual agreement.

[22] *See generally* Protection of Investment Act 22 of 2015 (S. Afr.).

These trends influence the overall debate about BITs, particularly when they intersect with critiques from the United States, the European Union (EU) and other traditionally outward investment zones. While emerging economies have been the most vocal critics, some in capital-exporting countries also question the agreements now that they find themselves on the receiving end of investment, playing the role of host state. As emerging economies become capital exporters, developed countries face challenges to their own regulatory autonomy and are coming under pressure from multinational corporations. For example, in the debates over the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP), strong voices in the United States and Europe spoke out against the use of ISDS. With opposition to the BITs regime developing in both the North and the South, it may be that a broader global shift is underway that could lead to new standards of foreign investment regulation.

This article first explores the discourse of South-South cooperation as a driver for revisiting investment regulation (Part I) and investigates how that actually translates into legal instruments that shift the balance of investor and host-states' rights and obligations (Part II). Part III analyzes legal positions and proposals from the global South for investor-state dispute settlement and Part IV looks at prospects for the investment regime in light of resistance in the South, critiques from the North, and the US withdrawal from TPP and TTIP negotiations.

2. A DISCOURSE OF SOUTH-SOUTH COOPERATION

Some developing countries have heralded the need for South-South investment relationships that are cooperative, compared to what they perceive as the unbalanced, investor-controlled framework arising out of traditional BITs. Some have even decried traditional BITs as a tool of post-colonial anti-communist policies.[23] China's first major foray into foreign investment in the 1990s was often characterized by a rhetoric of cooperation and mutual assis-

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[23] *See, e.g.*, Mohammad Mossallam, *Process Matters: South Africa's Experience Exiting its BITs*, THE GLOBAL ECON. GOVERNANCE PROGRAMME (Jan. 2015), http://ssrn.com/abstract=2562417 [https://perma.cc/EX3H-VRFD] (arguing that the majority of BITs reflect texts developed to promote anti-communist, post-decolonisation protection agendas of the 1960s).

tance. Brazil's new Cooperation and Investment Facilitation Agreements (CIFAs) are also firmly anchored in a discourse of South-South cooperation. However, whether the discourse of cooperation and developmental solidarity actually finds application in legal instruments calls for a nuanced answer. In practice, China blurred the boundaries between aid and development financing, on the one hand, and foreign direct investment (FDI), on the other hand, in new ways that are now becoming entrenched in the Asian Infrastructure Investment Bank and perhaps the BRICS Bank. Brazil's CIFAs, by contrast, reflect a return to a more diplomacy-led approach to foreign investment relations.

2.1. Investment for Development, Respect for Sovereignty

Overall, emerging economies are seeking to differentiate themselves from traditional BITs policies in the framing of foreign investment. Some treaties emphasize investment as a vector for development, understood in a more holistic way than simply a matter of increasing gross domestic product or other aggregate economic benchmarks. In that sense, investment is seen as embedded in social and economic development policies, rather than strictly in the business and finance environment. Additionally or alternatively, some countries prioritize, at least in the discourse, mutual respect for sovereignty and non-interference in domestic policy choices of the parties.

The Preamble to the South African Development Community Model Bilateral Investment Treaty ("SADC Model BIT") released in July 2012 provides an illustration: "Recognizing the important contribution investment can make to the sustainable development of the State Parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human rights and human development . . . Reaffirming the right of the State Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives, and—taking into account any asymmetries with respect to the measures in place—the particular need of developing countries to exercise this right . . ."[24] This approach is

[24] *See* S. AFR. DEV. CMTY., SADC Model Bilateral Investment Treaty Template with Commentary art. 20–22, July 2012, http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-ModelBIT-Template-Final.pdf

also reaffirmed in the operative, numbered provisions of the treaty such as Article 1: "The main objective of this Agreement is to encourage and increase investments [between investors of one State Party into the territory of the other State Party] that support the sustainable development of each Party, and in particular the Host State where an investment is to be located."[25] Also in Africa, the guiding principles for the Pan African Investment Code (PAIC) currently being negotiated under the auspices of the African Union include: "(i) suit the national policies in order to scale up and maintain the Domestic Investment; (ii) create conducive business environment for sustainable growth; (iii) promote African integration process; (iv) ensure that the PAIC tackles the issue of Social Corporate and Environmental responsibility; and (v) attract FDI as one of the vehicles to sustain the development."[26]

The changes in the framing of the India Model BIT over time reveal underlying policy motivations. The Preamble of the 2003 Model BIT was very much in line with traditional BITs. It stated:

> [d]esiring to create conditions favourable for fostering greater investment by investors of one State in the territory of the other State; [r]ecognising that the encouragement and reciprocal protection under International agreement of such investment will be conducive to the stimulation of individual business initiative and will increase prosperity in both States . . .[27]

By contrast, the Draft 2015 Model BIT emphasized sovereignty and development:

> [d]esiring to promote bilateral cooperation between the Parties with respect to foreign investments; and [r]eaffirming the right of Parties to regulate Investments in their territory in accordance with their Law and policy objectives including

[https://perma.cc/NV4E-M6P2].

25 *See id.* at art. 1.

26 *See* Third Conference of African Ministers in charge of Integration (COMAI III) held in Abidjan, Côte d'Ivoire, on 22-23 May 2008, excerpted in Press Release, Pan-African Investment Code: African Independent Legal Experts kicks off in Djibouti, PRESS RELEASE Nº 292/2014, (Oct. 30, 2014) (on file with author) (describing the gathering of experts to "discuss and review the Pan African Investment Code").

27 Indian Model Text of BIPA, http://www.italaw.com/sites/default/files/archive/ita1026.pdf [https://perma.cc/L2YK-3Z95].

> the right to change the conditions applicable to such Investments; and [s]eeking to align the objectives of Investment with sustainable development and inclusive growth of the Parties . . .[28]

The final 2016 Model BIT scales back on some of this language and adds the protection of investments as a core feature on par with investment promotion:

> [r]ecognizing that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable development, [r]eaffirming the right of Parties to regulate investments in their territory in accordance with their law and policy objectives.[29]

A clause in the Draft Model BIT to safe-harbor "the rights of either Party to formulate, modify, amend, apply or revoke its Law in good faith," "[e]ach Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, including discretion regarding allocation of resources and establishment of penalties," was dropped in the final version. The evolution echoes economic and political developments since the 2003 Model BIT, as India has continued to liberalize conditions of establishment and ownership for foreign investors. The Modi administration, emanating from the more conservative Bharatiya Janata Party that came into power in 2014, has aggressively positioned itself as business-oriented.

While Chinese BITs drafted in the 1980s merely included a brief reference to "principles of equality and mutual benefit" in their preambles and emphasized the business relationship between the host and home countries,[30] the following decade inaugurated a shift. The

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28 Model Text for the Indian Bilateral Investment Treaty, http://www.jurisafrica.org/html/pdf_indian-bilateral-investment-treaty.pdf [https://perma.cc/5TMG-VK37] [hereinafter Indian Draft Model BIT].

29 Preamble, Government of India, Ministry of Finance, Department of Economic Affairs, Office memorandum, F. No. 26/5/2013-IC, Annex, Dec. 28, 2015 [hereinafter 2016 Indian Model BIT].

30 *See, e.g.*, Agreement Between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments, China-Sri Lanka, Mar. 13, 1986, http://investmentpolicyhub.unctad.org/Download/TreatyFile/781

China-Bolivia BIT signed in 1992 provides an illustration. Its Preamble notes that the Parties enter into the agreement

> [d]esiring to encourage, protect and create favorable conditions for investment by investors of one Contracting State in the territory of the other Contracting State based on the principles of mutual respect for sovereignty, equality and mutual benefit and for the purpose of the development of economic cooperation between both States.[31]

Variants of this language appear in the 1990 China-Pakistan BIT, the 1989 China-Ghana BIT, the 1991 China-Mongolia BIT, the 1992 China-Philippines BIT and others ratified at various points during the decade.[32] However, not all Chinese BITs reflect the shift in language. Some of the 1990s BITs use the preambular language of the 1980s focused on business relations.[33]

[https://perma.cc/6UCR-FCUC] (indicating that the parties desire "to create favourable conditions for greater economic co-operation between them and in particular for investments by nationals and companies of one State in the territory of the other State based on the principles of equality and mutual benefit" and recognize "that reciprocal encouragement, promotion and protection of such investments will be conducive to stimulating business initiative and increasing prosperity in both states . . . .").

31 Agreement Between the Government of the People's Reprblic [sic] of China and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investments, Bol.-China, May 8, 1992, http://investmentpolicyhub.unctad.org/Download/TreatyFile/449 [https://perma.cc/2DQE-9VPH].

32 Agreement Between the Government of the Islamic Republic of Pakistan and the Government of the People's Republic of China Concerning the Encouragement and the Reciprocal Protection of Investment, Dec. 2, 1989, http://investmentpolicyhub.unctad.org/Download/TreatyFile/766 [https://perma.cc/KS83-N82P]; Agreement Between the Government of the People's Republic of China and the Government of the Republic of Ghana Concerning the Encouragement and the Reciprocal Protection of Investment, China-Ghana, Dec. 2, 1989, http://investmentpolicyhub.unctad.org/Download/TreatyFile/737 [https://perma.cc/24HE-E7HJ]; Agreement Between the Government of the People's Republic of China and the Government of the Mongolian People's Republic Concerning the Encouragement and the Reciprocal Protection of Investment, Aug. 8,1991, http://investmentpolicyhub.unctad.org/Download/TreatyFile/760 [https://perma.cc/LYH8-Z5TV]; Agreement Between the Government of the People's Republic of China and the Government of the Republic of the Philippines Concerning the Encouragement and the Reciprocal Protection of Investment, July 20, 1992, http://investmentpolicyhub.unctad.org/Download/TreatyFile/769 [https://perma.cc/HJH7-5VLV].

33 *See, e.g.*, Agreement Between the Government of the Republic of Chile and the Government of the People's Republic of China Concerning the Encouragement and the Reciprocal Protection of Investment, Chile-China, May 23, 1994, http://investmentpolicyhub.unctad.org/Download/TreatyFile/664

Brazil's CIFAs also reflect this new trend of framing South-South investment relations as more development-oriented and more mindful of each partner's sovereign policy choices than the traditional BITs framework. Since 2015, Brazil has signed CIFAs with Angola, Chile, Colombia, Malawi, Mexico, Mozambique and Peru and has conducted negotiations with South Africa, Algeria, India, Morocco, Nigeria, Thailand, and Tunisia.[34] For example, the Acordo de Cooperação e Facilitação de Investimentos entre o Governo da República Federativa do Brasil e o Governo da República de Moçambique (hereinafter "Mozambique CIFA") preamble affirms the development grounding and sovereign autonomy spirit of the agreement: "Recognizing the essential role of investment in promoting sustainable development, economic growth, poverty reduction, job creation, expansion of productive capacity and human development; . . . [r]eaffirming its legislative autonomy and space for public policies," followed by Article 1 stating, "This Agreement aims at the cooperation between the Parties to facilitate and promote mutual investment."[35] The recently signed agreement with Mexico,

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[https://perma.cc/4WP2-3PM4]; Agreement Between the Government of the People's Republic of China and the Government of the Republic of Georgia Concerning the Encouragement and the Reciprocal Protection of Investment, China-Geor., June 3, 1993, http://investmentpolicyhub.unctad.org/Download/TreatyFile/735 [https://perma.cc/EJ4M-4AZR]; Agreement Between the People's Republic of China and the Republic of Turkey Concerning the Encouragement and the Reciprocal Protection of Investment, China-Turk., Nov. 13, 1990, http://investmentpolicyhub.unctad.org/Download/TreatyFile/789 [https://perma.cc/C7VE-EA54]; Agreement Between the Government of the People's Republic of China and the Government of the Oriental Republic of Uruguay Concerning the Encouragement and the Reciprocal Protection of Investment, China-Uru., Dec. 2, 1993, http://investmentpolicyhub.unctad.org/Download/TreatyFile/794 [https://perma.cc/AR8F-QNTH] (all of the above detailing efforts improve the financial wellbeing of both countries through "economic cooperation").

34 *Brazil: Bilateral Investment Treaties (BITs)*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT: INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/IIA/CountryBits/27 [https://perma.cc/6FZE-RR36] (identifying the countries with which Brazil has signed Cooperation and Investment Facilitation Agreements (CIFAs)).

35 Acordo de Cooperação e Facilitação de Investimentos entre o Governo da República Federativa do Brasil e o Governo da República de Moçambique, Braz.-Mozam., Mar. 30, 2015, http://investmentpolicyhub.unctad.org/Download/TreatyFile/4717 [https://perma.cc/RPN3-YBSA] [hereinafter Mozambique CIFA]; Acuerdo de Cooperacion y de Facilitación de las Inversiones entre la República Federativa del Brasil y los Estados Unidos Mexicanos, Braz.-Mex., May 26, 2015, http://investmentpolicyhub.unctad.org/Download/TreatyFile/4718 [https://perma.cc/BS88-G57P], authors' translation outlining the CIFA between Brazil and Mexico).

Acuerdo de Cooperacion y de Facilitación de las Inversiones entre la República Federativa del Brasil y los Estados Unidos Mexicanos (hereinafter "Mexico CIFA"), has identical language.

For China and Brazil , the South-South cooperation approach goes beyond investment treaties and involves a multi-faceted strategy ranging from overseas development assistance to investment through development finance, infrastructure building, subsidized loans, technical cooperation, and scholarship and cultural exchanges.[36]

2.2. Diplomatic Recourses and Domestic Remedies

Beyond the policy discourse underpinning an increasing number of BITs from emerging countries, certain features of the agreements also seek to move away from traditional investor-led, adversarial dispute settlement processes. Part III below explores the range of reforms and technical fixes to the traditional framework that have been proposed in some recent model BITs, but it is noteworthy that some emerging countries seek to by-pass investor-state arbitration altogether. Adverse arbitration decisions, or even the mere fact of having to defend arbitration claims, has led a number of major developing countries to reconsider investor state arbitration, to pull out of BITs including such recourse, or to withdraw from investor-state arbitration fora such as ICSID.

For instance, South Africa has been in the process of terminating BITs since 2013, either by letting treaties lapse per their sunset clauses or by treaty denunciation. A number of prominent host countries are not parties to the ICSID Convention (including Brazil, India, South Africa, Mexico and Venezuela). As with the framing of investment agreements, two trends seem to dominate, either concurrently or separately: the quest for a process that allows more space for developmental policies and the concern for perceived loss of sovereign autonomy. The first is illustrated by initiatives in the

[36] For Brazil, *see, e.g.*, Paolo de Renzio, Geovana Zoccal Gomes, João Moura E. M. da Fonseca & Amir Niv, *Brazil and South-South Cooperation: How to Respond to Current Challenges* (BRICS Pol'y Ctr. Centro de Estudos e Pesquisas, BPC Policy Brief V. 3 N. 55, May 2013), http://bricspolicycenter.org/homolog/uploads/trabalhos/6780/doc/1583232112.pdf [https://perma.cc/BTF7-EFNK] (describing Brazil's role in South-South development cooperation and the agencies that work in conjunction with the Brazilian agency for development cooperation).

Union of South American Nations (UNASUR) context (Section 1). The second is reflected by the return to diplomatic processes institutionalized in Brazil's CIFAs (Section 2) or reliance on domestic judicial and administrative remedies as the sole avenue for resolving foreign investor grievances (Section 3).

2.2.1. UNASUR: Withdraw from ICSID and Propose a South-Based Alternative

Over the past two decades, over a third of ISDS arbitrations have involved Latin American host states. Although Argentina accounts for the bulk of these cases, Venezuela, Mexico and Ecuador have also seen their measures, often considered a matter of public policy, challenged in ICSID arbitrations. The result has been an attack on ICSID and BITs by some Latin American countries, withdrawal from the system by several, and proposals to create a regional arbitration system as an alternative.

For at least some countries in the region, the attack on BITs and ICSID includes ideological as well as practical issues and is embedded in a broader effort to create an anti-capitalist, anti-imperialist bloc. At the core of this initiative is ALBA, the Bolivarian Alliance for the Peoples of Our America and ALBA-TCP, ALBA's proposed Trade Agreement for the People. Started by Cuba and Venezuela, the Alliance has been joined by Bolivia, Nicaragua, Honduras, Ecuador, and several Caribbean Islands. ALBA seeks to create an independent socialist economic space in Latin America. Among other initiatives, ALBA has launched an attack on BITs, claiming that they are tools of capitalist imperialism. The 2013 Summit Declaration testifies to this perspective:

> . . . we are currently witnessing the emergence of new forms of exploitation, by means of the imposition of tools such as bilateral investment protection and the functioning of international institutions such as ICSID arbitration, which put the interests of capital the interests of society, nature, and the very democratic institutions in the context of the proliferation of Free Trade Agreements (FTAs). It is . . . these new mechanisms [of] domination that threatens the stability of

our countries."[37]

Several ALBA members have sought to withdraw from ICSID, citing serious flaws in the regime. Bolivia took the lead. In 2006, the Morales government nationalized the hydrocarbon industry. Shortly thereafter, Bolivia formally denounced the ICSID Convention. Bolivia's stated reasons were that the regime is biased in favor of investors, uses an unclear and arbitrary methodology, is closed and non-transparent, is very costly, lacks an appeals system, does not allow states to file claims against companies and the Convention violates the Bolivian Constitution.[38] Bolivia also announced that it would seek to renegotiate existing BITs. Although the Venezuelan National Assembly recommended withdrawal from ICSID in 2008, the government has yet to notify ICSID of its withdrawal. Additionally, Venezuela has sought to withdraw from some BITs. Ecuador was keen to eliminate ICSID jurisdiction in disputes relating to natural resource investments, including oil, gas and minerals. Ultimately, it formally notified ICSID of its denunciation of the Convention, effective January 7, 2010. Nicaragua considered denouncing the Convention but later announced that it would no longer enter into investment agreements providing for ICSID as a competent tribunal.

These and other concerns about ICSID have led Latin American nations to explore the idea of a regional arbitration center run by Latin Americans, for Latin Americans. Although the initiative came from Ecuador, a core ALBA member, this idea has been adopted by UNASUR, a broader organization that includes all nations in South America. A draft proposal includes a number of provisions reflecting developing country concerns, particularly protections for policy space, requirements for exhaustion of remedies and preservation of the authority of domestic tribunals, measures to avoid arbitrator bias, an exclusivity requirement limiting forum shopping, rules for participation by non-parties, transparency, and an appeals system

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[37] Alianza Bolivariana para los Pueblos de Nuestra América, Declaration from the Pacific XII ALBA-TCP Presidential and Government Summit, July 30, 2013, http://cancilleria.gob.ec/wp-content/uploads/2013/07/declaracion-alba-guayaquil-julio-2013-english.pdf [https://perma.cc/ECL3-KH33].

[38] *See* Silvia Karina Fiezzoni, *The Challenge of UNASUR Member Countries to Replace ICSID Arbitration,* 2 BEIJING L. REV. 134, 137-38 (2011) (highlighting the critical perspective held by Latin Americans towards the International Center for Settlement of Investment Disputes (ICSID) and efforts seeking to replace ICSID arbitration).

with a system of precedents.[39] This proposal has been under discussion for a number of years and it is not clear whether and when it might be implemented. However, even if it never materializes in the form outlined, the UNASUR proposal is a clear reflection of the resistance of developing countries to the classic 1990s BITs regime and constitutes a source of ideas for any reform that may emerge.

Although ALBA's campaign against ICSID and several countries' withdrawal from the Convention are influenced by ideological trends and form part of a larger geo-political project,[40] there is a practical element shared by other developing countries which do not necessarily agree with ALBA's ideological position. Fiezzoni summarizes the Latin American concerns: linkage to the World Bank may affect countries' credit rating if they challenge ICSID; policy space is too restricted and national interest in protecting health and the environment are not taken into account; there is a total lack of transparency; arbitrators show bias in favor of investors; decisions are inconsistent and unpredictable (different tribunals have looked at similar facts and reached different conclusions); there is no appeal; arbitrators give no consideration to a government's need to deal with economic crises; and the cost of defending claims is prohibitive.[41]

2.2.2. Brazil: Reject ISDS, Emphasize Investment Facilitation and Dispute Avoidance, Rely on Diplomatic Espousal of Claims

Unlike traditional BIT procedures, the new Brazil agreements envision a state-to-state dispute settlement process that is similar to traditional diplomatic protection whereby a private entity aggrieved by a foreign state must call upon the state of its nationality to seek redress on its behalf from the foreign state. Such a move bucks the trend of judicialization of foreign investment law and the concomitant growing role of private entities (natural persons or le-

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[39] *Id.*

[40] Larry Catã Backer & Augusto Molina, *Cuba and the Construction of Alternative Global Trade Systems: Alba and Free Trade in the Americas*, 31 U. PA. J. INT'L L. 679, 679 (2014) (examining the Bolivarian Alliance for the Peoples of Our America (ALBA) as a system of free trade, including the relevant ideology and institutionalization associated with it).

[41] Fiezzoni, *supra* note 38, at 134.

gal persons) in international law over the past century. It is therefore quite a radical response to emerging countries' demand for the protection of their "policy space" against norms of international economic law perceived to be at times incompatible with their development models.[42] This section takes the Brazil-Mozambique CIFA as an illustrative model; agreements with Brazil's other partners are essentially similar.

The Agreement establishes a Joint Committee composed of government representatives appointed by each State. The Committee is expected to meet at least once annually, under alternating presidency to discuss implementation, work towards deeper coordination and cooperation, and help to resolve disputes.[43] Moreover, an Annex that forms integral part of the Agreement lists priority topics of cooperation for the Joint Committee.[44] Alongside the Committee, the States are each to designate a domestic "Focal Point," which is a specific government agency tasked with offering support to investors of the other State. The Focal Points implement the Joint Committee's guidelines and liaise with other governmental authorities domestically and with its counterpart in the other State.[45]

Brazilian CIFAs do not include investor-state arbitration. Instead, they rely on the Focal Point agencies (also called "Ombudsman"), backed by the Joint Committee, to assist in the conciliatory settlement of disputes.[46] Despite the use of the term "Ombudsman," then, this process does not designate a neutral independent person to help resolve disputes.[47]

Anecdotal evidence suggests that the "Ombudsman" model was

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42 In the Brazil-Mozambique and (Brazil-)Angola contexts, this issue may be less salient because of the history of trade and investment relations between the two countries. Additionally, Brazilian investors may not be concerned about over-reach by these African states as they appear to be comfortable with this new approach to investment protection. Whether such a model would operate equally well in other circumstances remains an open question.

43 Mozambique CIFA, *supra* note 35 at art. 4.

44 *Id.*, annex.

45 Other features of the CIFAs include provisions for engagement of the private sector and civil society and Corporate Social Responsibility. For example, the Brazil-Mozambique CIFA creates opportunities for including the private sector at large (beyond the protected investors) and civil society at the policy coordination level, at the implementation stage, and in dispute resolution efforts and the main text of the treaty and a detailed annex spell out principles for corporate social responsibility of investors. Although not worded as a strict obligation, its inclusion in the treaty is remarkable because it is atypical.

46 Mozambique CIFA, *supra* note 35 at art. 15.

47 *Id.*

initially inspired by the Korean institution of a Foreign Investment Ombudsman, established in 1999, and which has enjoyed a vast success in resolving disputes outside of formal judicial or arbitral proceedings. The office of the Ombudsman was created as a one-stop service to handle grievances by foreign investors in Korea. The office of the Ombudsman's focus is on post-investment services for foreign investors in areas covering finance, taxation, accounting, intellectual property rights, construction and labor. The Ombudsman is the head of the grievance settlement body. Grievances are resolved through the Home Doctor System by the direct deployment of licensed and experienced experts to business sites and indirectly by taking pre-emptive measures to prevent future grievances through systemic improvements and legal amendments. The Ombudsman is commissioned by the President on a recommendation of the Minister of Trade, Industry & Energy, through the deliberation of the Foreign Investment Committee.

Since 2010 the Ombudsman has been the Chair of the Korea's Regulatory Reform Committee and also sits on the Presidential Council on National Competitiveness (PCNC), thus ensuring that the opinions of foreign investors are heard at the highest levels of policy-making within Korea. Since 2010, the Ombudsman has been empowered to directly contact heads of ministries and government agencies for requests and recommendations. Through its membership in the PCNC, the Ombudsman is able to address investor grievance issues directly to various ministers and heads of relevant government authorities in the presence of the President at monthly meetings of the PCNC.

The Brazilian Ombudsman/Focal Point system, however, differs substantially from the Korean model. The role is not embodied by a person, but rather is envisioned as a committee with interministerial representation. While the agreements establish a process to encourage settlement of disputes, only the governments may trigger these procedures.[48] In the Mozambique agreement, a dispute must be officially initiated by the State Party of the investor by filing a request to the Joint Committee.[49] The latter then has 60 days, renewable by mutual agreement, to present relevant information and to invite representatives of the investor, as well as of governmental and

48 *Id.*

49 *Id.*

non-governmental entities involved in the dispute. Following meetings as necessary to resolve the situation, the procedure may be closed by request of either State Party. If the dispute has not been resolved, the State Parties may then proceed to arbitration. Joint Committee actions and documents remain mostly confidential.

The early CIFAs did not provide any details concerning the nature of arbitration, other than to make clear that it was limited to State-to-State disputes. Subsequent agreements signed with Latin American countries have added substantial detail, although the agreements are rather varied. Thus the Mexico and Colombia agreements specify that the arbitral tribunal for State-to-State disputes may determine damages and award compensation,[50] while others are silent. All provide a general framework for arbitration covering the number of arbitrators, use of WTO rules on conduct of arbitrators, and time limits for the arbitral proceedings. However, they vary in the procedures for the arbitration and other aspects.

2.2.3. Relying on Domestic Remedies

A number of BITs have historically included a "fork in the road" provision allowing the investor to pursue either domestic judicial remedies or international arbitration. Additionally, a number of investor-state disputes that ultimately resulted in arbitration involved some domestic proceedings, often initiated by the state, such as tax recovery law suits, appeals regarding licenses, permits, land rights or use, etc. Affected third parties, such as environmental or social groups, local communities, or competitors, might also bring suits against foreign investors and since they are not bound by any treaty-based or contractual arbitration clause, they typically elect a domestic forum that is either logistically convenient or strategically useful. Even in the aftermath of an investor-state arbitration, a victorious investor may find itself pursuing domestic remedies to obtain recognition and enforcement of the arbitration award against specific assets. Therefore, despite the frequent use of BIT-based investor-state arbitration clauses, there are a number of circumstances when foreign investors will find themselves embroiled in domestic litigation

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50 *See* Acordo de Cooperação e Facilitação de Investimentos Entre a República Federativa Do Brasil e a República da Colômbia, Braz.-Colom., arts. 19.2, 23, Oct. 10, 2015 [https://perma.cc/EN73-86EX] (hereinafter "Colombia CIFA") (providing examples of early CIFAs).

in the host state, home state or even elsewhere.

Some developing host states have implemented an even stricter approach in favor of domestic remedies by excluding investor-state arbitration altogether. Brazil, South Africa and Indonesia are the most prominent examples. With the exception of the new CIFA-based diplomatic recourse discussed above, Brazil only offers domestic judicial and administrative remedies to investors in disputes with the state. Inasmuch as they are withdrawing from BITs, South Africa and Indonesia are mostly reverting to domestic remedies, with some important caveats discussed below. The 2015 South African Protection of Investment Act specifically excludes investor-state arbitration and South Africa is considering new BITs without an investor-state arbitration clause, particularly with countries where it is exporting. Indonesia has also denounced a slew of BITs and is drafting a new model BIT though it is unclear whether it plans to exclude investor-state arbitration from its new approach.

With respect to South Africa and Indonesia, a number of claims may nevertheless survive the termination of BITs and still be eligible for investor-state arbitration. Indeed, survival clauses in some of the lapsed BITs may continue to protect existing investments for a number of years after the treaty has been terminated, though the period varies by treaty. For instance, the South African BIT with Belgium and Luxembourg extends the coverage of the treaty for existing investments for a period of ten years following termination of the treaty,[51] as does the BIT with Denmark[52] and Spain.[53] The latter explicitly includes dispute settlement provisions within the ambit of the survival clause. The South Africa-China BIT has a ten-year survival clause. The term of the survival clause for the BIT with the

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51 Accord entre l'Union économique belgo-luxembourgeoise et la République d'Afrique du Sud concernant l'encouragement et la protection réciproques des investissements, Belg.-Lux. – S.Afr., art. 12(2), Aug. 14, 1998, 2218 U.N.T.S. 3 [hereinafter Belgium-Luxembourg – South Africa BIT] (providing that investments made prior to the expiry of the agreement shall remain subject to for a period of ten years from that date onward).

52 Agreement Between the Kingdom of Denmark and the Republic of South Africa Concerning the Promotion and Reciprocal Protection of Investments, Den.-S. Afr., art 16.2, Feb. 2, 1996, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3521 [https://perma.cc/N29N-NHXQ].

53 Acuerdo para la Promoción y Protección Recíproca de Inversiones Entre el Reino de España y la República de Sudáfrica, Spain-S. Afr., art XII.3, Sept. 30, 1998, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2276 [https://perma.cc/H3TT-GSTD].

Netherlands is fifteen years.[54] The BIT with Austria provides a survival clause of twenty years[55], as does the BIT with France[56] and with Switzerland.[57] With respect to these treaties, South Africa may be subject to investor-state arbitration until as late as 2024, should a dispute arise regarding an investment made before 2014 and protected by a treaty denounced in 2014 with a twenty year survival clause. Terminated Indonesian BITs also include survival clauses: ten years for Cambodia, China, Italy, Lao, Malaysia, Norway, Romania, Slovakia, Turkey and Vietnam. The Indonesia-Netherlands BIT includes a fifteen years survival clause. The Indonesia-France BIT is remarkable for its indefinite survival clause: Article 10 provides that in the case of termination, the provisions of the treaty shall continue to apply to investments covered by the treaty and approved by the parties prior to the denunciation.[58] The possibility of disputes being brought under expired treaties using survival clauses is not merely a theoretical one. Indonesia notified India of its intent not to renew the BIT between those two countries and the termination took effect in April 2016. In the intervening period, Indian Metals & Ferro Alloys (IMFA) Limited initiated arbitration proceedings against Indonesia under the lame duck BIT in November 2015 for USD 560 million.[59]

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[54] Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of South Africa and the Kingdom of the Netherlands, S. Afr.-Neth., art. 14.3, May 1, 1999, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2082 [https://perma.cc/MTL2-Q9YC].

[55] Abkommen Zwischen der Regierung der Republik Österreich und der Regierung der Republik Südafrika Über die Förderung und den Gegenseitigen Schutz Von Investitionen Samt Protokoll, Austria-S. Afr., art. 12(3), Nov. 28, 1996, http://investmentpolicyhub.unctad.org/Download/TreatyFile/220 [https://perma.cc/GF36-TVYZ].

[56] Accord entre le gouvernement de la République française et le gouvernement de la République d'Afrique du Sud sur l'encouragement et la protection réciproques des investissements, Fr.-S. Afr., art. 11, Nov. 11, 1996, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1280 [https://perma.cc/MQ4H-VY3U].

[57] Accord entre le gouvernement le Conseil fédéral suisse et le gouvernement de la République d'Afrique du Sud sur l'encouragement et la protection réciproques des investissements, Switz.-S. Afr., art. 13(2), June 27, 1995, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2278 [https://perma.cc/9CNX-56SU].

[58] Belgium-Luxembourg – South Africa BIT, *supra* note 51, at art. 10 ("Au cas où le présent Accord viendrait à prendre fin, ses dispositions continueront à s'appliquer aux investissements couverts par ledit Accord et agréés par la Partie contractante préalablement à la dénonciation de cet Accord.").

[59] Randy Fabi, *Indian Metals and Ferro Alloys miner files $560 mln claim*

With the issue of survival clauses now squarely in the limelight, other countries seeking to denunciate BITs should carefully consider the limited effect of such moves with respect to existing investments. It may be argued that in practice, an investment that has gone trouble-free for several years is less likely to result in a major investor-state dispute decades later. At the same time, it may be that legislators in host states, thinking themselves free of the constraints of denunciated BITs and the related exposure to arbitral claims, may take regulatory actions that are in fact still likely to trigger arbitral proceedings under the various survival clauses. Together with the often poor tracking of the type, origin and nature of foreign investment in developing host countries, it may be very difficult for the government to ascertain the possible consequences of regulatory measures that could be seen as indirect expropriation under lapsed BITs. That landscape may be even further complicated by investors who reincorporate and nominally recast their investment to fall within the ambit of another treaty, which might not yet have been denunciated, or might offer a longer survival clause.

South Africa and Indonesia's moves also offer important lessons in treaty drafting for those countries that are crafting new model BITs or currently negotiating investment agreements (bilaterally or as part of regional trade agreements). A number of options could be considered. First, survival clauses may be excluded altogether or dramatically shortened. Second, survival clauses could be neutralized by mutual agreement at the time of denunciation or termination of the treaty. This technique was deployed by the Czech Republic[60] and was also utilized by Indonesia and Argentina.[61] Third, survival clauses could extend to substantive rights and obligations, but not to the arbitration clause. It may also be prudent to exclude the MFN clause from the ambit of any survival clause in order to avoid *Maffezini*-type imports of dispute settlement provisions from other

against Indonesia, REUTERS, (Nov. 18, 2015 1:38 PM), http://in.reuters.com/article/indonesia-imfa-idINKCN0T70O320151118 [https://perma.cc/PQ9B-VTL9] ("'We are being sued for 7.7 trillion rupiah ($560 million) because they are unable to carry out production,' Heriyanto [Director for Legal Affairs at Indonesia's mining Ministry] told reporters.").

60 Luke Eric Peterson, *Czech Republic Terminates Investment Treaties in Such a Way as to Cast Doubt on Residual Legal Protection for Existing Investments*, IAREPORTER, (Feb. 1, 2011).

61 Luke Eric Petereson, *Indonesia Ramps Up Termination of BITs – and Kills Survival Clause in One Such Treaty – But Faces New $600 Mil. Claim from Indian Mining Investor,* BILATERALS.ORG (Dec. 7, 2015), http://www.bilaterals.org/?indonesia-ramps-up-termination-of [https://perma.cc/K754-DMZ4].

BITs.[62]

The discourse of South-South cooperation and resistance to the neoliberal framework of the 1990s has certainly led to shifts both in lexicon and in investment policy in a number of emerging countries. Some of the moves may be more effective than others as demonstrated by survival clauses in BITs.

3. SEEKING A NEW BALANCE OF RIGHTS AND OBLIGATIONS FOR INVESTORS

From the treaty coverage to the nature of the rights and obligations of host and home states as well as investors, recent BITs signed by emerging countries and the model BITs they have developed offer a departure from the consensus of the 1990s and early 2000s. The process for defining negotiating positions also has evolved to be more inclusive and more deliberative.

The new Indian Model BIT illustrates these trends. In 2015, the Indian government published a draft Model BIT and requested comments from the public. The draft Model BIT deviated significantly from prior Indian Models and from BITs already signed by India. Observers noted that the draft Model represented a radical policy shift by the Indian National Congress-led government that had worked on it until May 2014. Faced with claims based on very liberal readings of the original BITs, the government seemed to wish to assert a narrower meaning for key terms, in response to the flood of claims filed since 2012.[63] Noting that the draft severely restricts the potential impact of ISDS on policy space, some argued that the goal

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[62] In 2000, the tribunal in *Maffezini v. Spain* applied a BIT's most-favored nation obligation (MFN) to procedural issues relating to jurisdiction. The award shaped some subsequent treaty negotiations as well as other ICSID arbitrations. *See generally* Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Award (Jan. 25, 2000), 5 ICSID Rep. 396 (2002). More recently, *RosInvest v. Russia*, a Stockholm Chamber of Commerce arbitration, went even further by using an MFN clause to broaden the types of claims that could be brought under a BIT when another BIT signed by the host state included coverage for a wider range of claims. *See generally* RosInvestCo UK Ltd. v. The Russian Federation, Arbitration Institute of the Stockholm Chamber of Commerce Case No. V079/2005, Award on Jurisdiction (Oct., 2007).

[63] *See* Grant Hanessian & Kabir Duggal, *The 2015 India Model BIT: Is This the Change the World Wishes to See?*, 30 ICSID REV. 729, 731 (2015) (proliferation of claims after 2012 "caused the Indian establishment to consider redrafting its model BIT . . . .").

was to foreclose the kinds of claims the country had faced recently.[64] It is no surprise, therefore, that it inspired a rather heated debate and submission of formal comments from groups as diverse as the Indian Law Commission and the US National Association of Manufacturers (NAM). The NAM compared the draft Indian Model to "global standards" and found it sorely lacking in almost every way.[65] The NAM's brief claims that India had departed from established international investment standards: The coverage of investment was much too narrow; compulsory licensing of intellectual property would undermine efforts to attract high quality investment; exclusion of a broad commitment for fair and equitable treatment violated international norms and created a lower standard for investors under any new agreements signed in the future than existed under current agreements; the definition of expropriation was too narrow and was "far below international standards"; and ISDS deviated from global best practice as illustrated by the US Model BIT because of an exhaustion of remedies requirement, jurisdictional limits, and exclusion of review of Host State use of exceptions.[66] The final version of the Model, amended under the Modi administration, addresses a number of these industry concerns, and realigns India to some degree with more traditional BIT drafting practices. Some commentators argue that the adopted 2016 Model BIT, while ostensibly still seeking to reclaim policy space for regulators and limit exposure to arbitration, fails on both counts.[67]

This section explores changes to key aspects of investment

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64 *See* DMD Advocates, *Why India's Draft Model Bilateral Investment Treaty Is a Bit of a Misnomer*, LEGALLYINDIA (May 11, 2015), http://www.legallyindia.com/views/entry/why-india-s-draft-model-bilateral-investment-treaty-is-a-bit-of-a-misnomer [https://perma.cc/82JH-Y7E4] ("The changes brought in the Draft Model BIT grant minimal protection to investors and are more protective of India's interests than of the investors.").

65 *See* NAT'L ASS'N OF MFRS., COMMENT ON DRAFT INDIAN MODEL BILATERAL INVESTMENT TREATY 1 (2015), http://www.nam.org/Issues/Trade/ISDS/NAM-Comments-on-Draft-India-Model-Bilateral-Investment-Treaty-Joint-US-EU-Business.pdf [https://perma.cc/545V-WN68] ("[T]he NAM finds that there are many aspects of the draft Indian Model BIT that deviate substantially from global standards . . . .").

66 *See id.* at 2-7 (listing "the most concerning aspects" of the draft Model Indian BIT).

67 *See* Prabhash Ranjan and Pushkar Anand, *The 2016 Indian Model Bilateral Investment Treaty: A Critical Deconstruction*, 38 NW. J. INT'L L. & BUS. (forthcoming 2018), https://ssrn.com/abstract=2946041 [https://perma.cc/R2DK-TUZV] (discussing how India has not been able to balance investment protection with the host State's right to regulate in the 2016 Model BIT).

agreements: the definition of investments and investors (A), the rights and protections granted to investors (B), exceptions and derogations to protect host states' regulatory prerogative (C), and obligations of investors and home states (D).

3.1. Redefining Investment and Investor

FDI might have been understood in the 1980s and 1990s as a brick-and-mortar establishment into a host country funded and managed by a company located and operating in another country, but the current reality of foreign investment is considerably different. Today, much of what counts as foreign investment consists in intangible assets such as intellectual property and financial instruments such as stocks and bonds.[68] The nature of investors, too, has changed as various shell subsidiaries are typically used to route investment through several countries in order to decrease tax exposure, take advantage of favorable regulatory frameworks, limit legal liability, and fulfill other strategic motivations. Traditional treaty terms are now interpreted to include these ever-broadening and increasingly amorphous notions of investment and investor, far beyond what the original negotiations had envisioned.

A number of emerging countries that have traditionally been in the host-country position now question the implications of the diversification of conduits for foreign investment and the treaty protections these investments receive. In an emerging policy consciousness, these states wish to attract and protect only certain types of investment. One set of issues relates to what does and should qualify as a foreign investment. The debate often focuses on the purported investment's contribution to the local economy. If the investment is short term, precarious, or purely a pass-through entity, should it really be considered as an investment and benefit from the full range of treaty protections? At a more fundamental level, if the investment does involve some real and long-term local assets, but the benefits to the local economy are minimal or negative, should

[68] GLOBAL INVESTMENT TREND MONITOR 2 (UNCTAD ed., 2005), http://unctad.org/en/PublicationsLibrary/webdiaeia2016d1_en.pdf [https://perma.cc/7EU2-9RZJ] (noting that 2015 marked the strongest year for FDI flow since the 2008-2009 economic crisis, but these flows "lack[ed] productive impact," as they mostly consisted in mergers and acquisitions and other corporate reconfigurations, rather than greenfield investment projects).

the operation be treated differently than investments that have a positive local impact or at least deliver what they were contractually bound to produce? Is it appropriate to extend BIT benefits to investments and investors that may be of a considerably different nature than those the treaties were originally drafted to protect? In response, new model BITs from India, Brazil, and elsewhere engage in efforts to restrict the definition of investment and investors.

This section analyzes the solutions offered to these challenges by a number of new model BITs or other investment instruments from India, China, the SADC, Brazil and South Africa. This list offers a full spectrum of approaches to foreign investment regulation: India uses a full-fledged model BIT; China now negotiates BITs on an *ad hoc* basis, but had model BITs until about a decade ago; the SADC offers a looser model consisting of menus of options for each typical provision; Brazil customizes its CIFAs; South Africa relies on domestic legislation.

3.1.1. India

Compared to older Indian BITs, the 2016 Model uses a much more specific definition of investment, alongside a list of exclusions, and more detailed criteria regarding the definition of an investor. Most of the criteria and exclusions are aimed at covering greenfield investments and other investments that involve a real and productive economic activity in the host state with a genuine and direct link to the home state of origin of the investor. The detailed definition provisions are clearly meant as a rollback on the expansive interpretations of terms in traditional BITs and a response to some of the investor-state litigation and arbitration proceedings, such as those involving government bonds in Argentina.

An investment is defined as "an enterprise constituted, organized and operated in good faith by an investor in accordance with the law of the Party in whose territory the investment is made, taken together with the assets of the enterprise, has the characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for the development of the Party in whose territory the investment is made."[69] Additional qualifiers of the

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[69] 2016 India Model BIT, *supra* note 29, art. 1.4.

term "enterprise" from the draft model BIT have been abandoned. These included the requirement that an enterprise had "its management and real and substantial business operations in the territory of the Host State."[70] The following did not count for purposes of showing "real and substantial business operations": presence and arrangements mainly for purposes of avoiding tax liabilities; passive holding of financial instruments, land, or other property; and ownership or lease of real or personal property in a trade or business.[71] Conversely, a real and substantial business operation required at least "a substantial and long term commitment of capital in the Host state," a "substantial number of employees" locally, the assumption of "entrepreneurial risk," and "a substantial contribution to the development of the Host State through its operations [along with] transfer of technological knowhow, where applicable."[72]

The draft Model BIT attempted to tackle the issue of investments nominally owned by a shell company set up in a country with a BIT solely for purposes of taking advantage of favorable treaty provisions, avoiding certain legal liabilities, evading taxes, etc. An "investor" was required to conduct "real and substantial business operations" in the Home State if it was a legal entity or to be a natural person of the home state.[73] It also addressed the problem of natural persons who possess several nationalities: The test was the "dominant and effective nationality,"[74] in alignment with the general public international law principle recognized by the International Court of Justice in the Nottebohm case.[75] The 2016 Model BIT does away with these requirements[76] and does not address the question of dual citizens. Provisions excluding dual citizens from the ambit of the treaty protections are typically meant for two purposes. First, they serve to exclude the application of a BIT vis-à-vis two dual citizens of the host and home state. Second, in the case of dual citizens of the home state and a third state, they restrict the treaty's application

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70 India Draft Model BIT, *supra* note 28, art. 1.2(ii).

71 *Id* at art. 1.2.2.

72 *Id.* at art. 1.2.1.

73 *Id.* at art. 1.9.

74 *Id.* at art. 1.12.

75 *See* Nottebohm Case (Liech. v. Guat.), Judgement, 1955 I.C.J Rep. 4 (Apr. 6) (establishing nationality by the presence of a real link between the naturalized person and the naturalizing state).

76 2016 India Model BIT, *supra* note 29, art. 1.5.

to situations where the home state citizenship is the effective nationality. This limits a dual citizen's ability to engage in treaty shopping. Since India does not allow dual citizenship,[77] the first scenario would not arise in practice and the second scenario would only come up when India is the host state.

The 2016 Model BIT does, however, categorically exclude a long list of "assets" from the definition of an investment. As a result, the listed tangible and intangible properties and interests are excluded from the ambit of the treaty and may not benefit from its provisions, including dispute settlement clauses. Such assets would presumably be solely covered by domestic law and potentially any residual customary international law protection not displaced by the treaty. The list of exclusions covers government bonds and other debt instruments (likely in reaction to the 2001 Argentina debt default[78]), portfolio investments, any pre-establishment expenditures (likely in response to claims such as *Santa Elena SA v. Costa Rica*[79]), claims resulting from commercial contracts for the sale of goods or services,

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77 *See* INDIA CONST. art. 9 ("No person shall be a citizen of India . . . if he has voluntarily acquired the citizenship of any foreign State.").

78 Amongst the dozens of claims and proceedings, the following cases garnered the most attention: CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005), 44 I.L.M. 1205 (2005); CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic (Sept. 25, 2007), *available at* http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4/DC505_En.pdf http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4[https://perma.cc/DV4U-ZD93]; LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), 21 ICSID Rev. 203 (2006); Enron Corp. Ponderosa Asset, L.P. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/01/3, Award (May 22, 2007), *available at* http://ita.law.uvic.ca/documents/Enron-Award.pdf [https://perma.cc/WC33-HA4M]; Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), *available at* https://www.italaw.com/sites/default/files/case-documents/ita0770.pdf [https://perma.cc/28SA-63VP]. *See generally* William W. Burke-White, The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System, 3 ASIAN J. WTO & INTL HEALTH L. & POL'Y 199 (2008); José E. Alvarez & Kathryn Khamsi, The Argentine Crisis and Foreign Investors – A Glimpse in the Heart of the Investment Regime, 2008-09 YEARBOOK INTL INVEST L. & POL'Y. 379 (2009).

79 Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica, ICSID Case No. ARB/96/1, Final Award (Feb. 17, 2000), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C152/DC539_En.pdf [https://perma.cc/NL2F-E2U6], 5 ICSID Rep. 157 (2002), *supra* note 7.

the likes of goodwill, brand value, market shares (perhaps in response to claims by Philip Morris in Australia[80] and elsewhere where the intellectual property claims were really a proxy for protection of the brand), and money judgment or arbitral award recovery.[81]

3.1.2. China

China has historically defined investment and investor rather broadly in BITs to which it subscribed (first generation spanning 1982 to 1998 and second generation from 1998 to 2008) and the most recent investment agreements as well as the draft 4th model BIT mostly carry on that tradition with respect to the definition of investment. However, some argue that a number of other clauses are drafted more restrictively.[82] Third generation BITs or recent FTAs addressing investment sometimes exclude certain types of business transactions, such as commercial contracts for the sale of goods or services, and certain classes of assets, such as certain loans and debts.[83] However, China tends to retain a fairly broad definition of investment even in its third generation agreements. For instance,

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80 Philip Morris Asia Ltd. (H.K.) v. Austl., PCA Case Repository 2012-12 (Perm. Ct. Arb., 2012), https://www.pcacases.com/web/view/5 [https://perma.cc/9GXZ-WHU5]. *See generally* Inaê Siqueira de Oliveira, Corporate Restructuring and Abuse of Rights: PCA Tribunal Deems Philip Morris's Claims Against Austrailia's Tobacco Plain Packaging Rules Inadmissible, INV. TREATY NEWS (Aug. 10, 2016), https://www.iisd.org/itn/2016/08/10/philip-morris-asia-limited-v-the-commonwealth-of-australia-pca-case-no-2012-12/ [https://perma.cc/6XCQ-T5PY] (providing a summary of the case).

81 2016 India Model BIT, *supra* note 29, art. 1.4.

82 *See* Elodie Dulac, *Chinese Investment Treaties: What Protection for Foreign Investment in China*, *in* DISPUTE RESOLUTION IN CHINA 237, 242-43 (Michael Moser, ed. 2012).

83 *See* Elodie Dulac, *Chinese Investment Treaties: What Protection for Foreign Investment in China*, *in* DISPUTE RESOLUTION IN CHINA 237, 256 (Michael Moser, ed. 2012); Karl Sauvant & Michael D. Nolan, *China's Outward Foreign Direct Investment and International Investment Law*, 18 J. INT'L ECON. L. 893, 918 (2015) (discussing China's exclusions in its new definition of investments). *See, e.g.*, Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, Can.-China, art. 1.k, Sept. 9, 2012, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3476 [https://perma.cc/QZD2-77C6] (applying exclusions to the term "investment").

the fourth draft model BIT defines investments broadly and provides a non-exhaustive illustrative list that includes shares, stocks, debts, rights under contracts, intellectual property rights, rights conferred by concessions or licenses and other tangible and intangible property.[84] Recent Chinese BITs and trade agreements including an investment chapter reflect this broad definition.[85]

3.1.3. SADC Model BIT

Rather than draft a model BIT strictly speaking, the SADC developed a range of recommended drafting options, with a commentary detailing some of the pros and cons of each option. With respect to the definition of investment, it offers three formulae: an enterprise-based definition that focuses on corporate establishment or acquisition (inspired by the commercial presence definition in the WTO's General Agreement on Trade in Services), an asset-based definition with a limitative, exhaustive list of qualifying assets (based on the Canadian model BIT) and a broader asset-based definition with an illustrative, non-exhaustive list (based on the U.S. model BIT). The commentary ultimately recommends the first option (enterprise-based definition) as being more likely to "promote investment that is supportive of sustainable development, which development policy suggests means business that brings constructive

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84 *See* Draft New Model BIT, China, art. 1.3, *reprinted in* NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE app. V (2009) [hereinafter China Draft Model BIT].

85 *See, e.g.*, Accord de Cooperation entre le Gouvernement de la République du Congo et le Gouvernement de la République Populaire de Chine sur la Promotion et la Protection des Investissements, China-Congo, art. 1, Mar. 20, 2015, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3586 [https://perma.cc/8CWJ-4HDY]; Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China, Austl.-China, art. 9.1, June 17, 2015, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3453 [https://perma.cc/MT8Y-P6NQ]; Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Korea, China-S. Korea, art. 12.1, June 1, 2015, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3462 [https://perma.cc/KA2V-EAAR]; Agreement Among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Faciliation and Protection of Investment, Japan-S. Korea-China, art. 1, May 17, 2014, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2633 [https://perma.cc/2ULN-AS3J].

economic and social benefits."[86] By contrast, it strongly advises against the third option (open list of assets) because it gives much discretion to arbitral tribunals in determining what qualifies as an investment, typically playing out in favor of the investor, and creating much uncertainty for the host state.

Like the Indian draft Model BIT (but unlike the 2016 India Model BIT), the SADC text provides some language regarding long-term establishment, and attempts to prevent shell corporations from benefiting from treaty provisions. The recommendation is a slightly modified version of the *Salini* arbitration award[87] stating that "[i]n order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the [substantial] commitment of capital or other resources, the expectation of gain or profit, the assumption of risk and a significance for the Host State's development." Although the language is not as pointed as in the Indian version, the objective of limiting treaty protection to "productive" investment is common to both texts and reflects language promoted by UNCTAD.

With respect to investors, the SADC proposals also aims to protect only genuine investors of the home state, rather than pass-through, shell entities incorporated in a particular state only for legal convenience. Investors who are dual citizens must be "predominantly a resident of the Home State," and the SADC model also suggests excluding dual citizens who hold the citizenship of the host state. Regarding juridical persons, the SADC text proposes a number of alternative clauses. The first relies on the simple formality of incorporation in the home state, which would not resolve issues relating to investment or taxation treaty shopping. Three other proposals add to legal incorporation a requirement of effective ownership and control by a juridical person of the home state, and possibly a requirement of substantial business activity in the home state. The commentary makes it clear that states concerned about treaty shopping should adopt one of the more robust versions, rather than the simple incorporation test.

Although it references the Common Market for Eastern and Southern Africa (COMESA) as an example of a legal framework for an investor definition that includes the substantial business test, the

86 SADC, SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE WITH COMMENTARY 13 (2012) [hereinafter SADC Model BIT].

87 Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001), 42 I.L.M. 609 (2003).

1993 Treaty Establishing the COMESA[88] does not include such a definition and in fact adopts a very traditional and investor-friendly approach to the definition of investment.[89] Negotiations currently under way at the African Union to design a Pan African Investment Code that would likely result in a text that is closer to the features of the SADC model than to Chapter Twenty-Six of the COMESA Treaty. The hope is that such a text would also serve as model for regional groupings and BITs involving African countries.

3.1.4. Brazil CIFAs

The new series of Brazilian Cooperation and Investment Facilitation Agreements ("CIFAs") appears to experiment with slightly varying investor and investment definitions. The Brazil-Angola agreement stands out as it leaves the definition of investment and investor to be determined under the domestic law of the respective countries.[90]

The Mozambique CIFA, the first of the series, indicates that to qualify an investment must involve the establishment of a long-lasting enterprise that will produce goods and services.[91] As in the India Model BIT, portfolio investments, sovereign debts and money claims arising out of commercial contracts for the sale of goods and services are excluded. This language is reflected in other CIFAs, with the exception of Angola, noted above.[92] The intent seems to be

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88 Treaty establishing the Common Market for Eastern and Southern Africa, Nov. 5, 1993, 2314 U.N.T.S 265.

89 *See id.* art. 159.2 (listing the activities to be condidered as investments under the agreement).

90 Acordo de Cooperação e Facilitação de Investimentos entre o Governo da República Federativa do Brasil e o Governo da República de Angola, Braz.-Angl., art. 3, Apr. 1, 2015, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/4720 [https://perma.cc/8N5J-X27X] [hereinafter Angola CIFA].

91 Mozambique CIFA, *supra* note 35 at art.3.1.

92 Investment Cooperation And Facilitation Agreement Between The Federative Republic Of Brazil And The Republic Of Malawi, Braz.-Malawi, art. 2.1, June 25, 2015, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/4715 [https://perma.cc/PTL6-CKHV] [hereinafter Malawi CIFA] (stating in Article 2 that the term "investment" does not include debt securities issued by a government, portfolio investments, or claims to money arising solely from commercial contracts).

to limit coverage to new investments that expand the nation's productive capabilities. Intellectual property is not explicitly included in the illustrative list of assets that may constitute an investment, but nor is it excluded either in the CIFAs with Mozambique and Malawi. The later CIFAs with Mexico, Colombia, and Chile do include intellectual property as a possible investment asset and incorporates by reference the WTO's Trade-Related Aspects of Intellectual Property Rights ("TRIPS") Agreement for purposes of determining what qualifies as intellectual property.[93]

The definition of investor varies perhaps more significantly across CIFAs. The Mozambique CIFA merely relies on formal incorporation criteria for juridical entities: The state of incorporation suffices to determine whether an entity qualifies as an investor under the treaty.[94] The Mexico CIFA adopts a somewhat more stringent approach, requiring formal establishment in the territory of the parties, as well as having "its headquarters and the center of its economic activities in the territory of that Party,"[95] and the Malawi CIFA adds a third requirement that the "property or effective control belongs, directly or indirectly, to nationals or permanent residents of the parties."[96] A slightly different approach prevails in the Colombia CIFA requiring juridical investors to have substantial business activities in the territory of the home state party,[97] as does the Chile CIFA.[98] Hence, while the Mozambique treaty would not exclude shell entities set up for purposes of treaty shopping, the Malawi, Chile, Colombia and Mexico CIFAs would make it harder for such entities to be used. It is likely that the drafting changed after the first CIFA with Mozambique was released and critiqued. Only one CIFA addresses the dual nationality issue for natural persons: The Colombia CIFA excludes investors who hold the nationality of both parties, except if they have been continuously maintained their

93 Mexico CIFA, art. 3.1.2(e); Colombia CIFA, art. 3.1.2(e); Acuerdo de Cooperación y Facilitación de Inversiones entre la República Federativa del Brasil y la República de Chile, Braz.-Chile, art. 1.1.4(f), Nov. 24, 2015, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/4712 [https://perma.cc/E7UT-HY7S] [hereinafter Chile CIFA].

94 Mozambique CIFA, art. 3.2.

95 Mexico CIFA, art. 3.1.3.

96 Malawi CIFA, art. 2.1.

97 Colombia CIFA, art. 3.1.5.

98 Chile CIFA, art. 1.1.7.

residence outside of the state party where they are making the investment.[99]

3.1.5. South Africa

With respect to countries not covered or no longer covered by a BIT, South Africa's Protection of Investment Act provides a domestic law framework governing pre- and post-establishment matters, many of which traditionally would have been addressed by a BIT. Under section two, an investment within the meaning of the Act requires the establishment of an enterprise under South African law, which "commit[s] resources of economic value over a reasonable period of time, in anticipation of profit."[100] Share in such an enterprise also qualifies as an investment. That language can be interpreted broadly or narrowly, and therefore does not offer much guidance to investors. For instance, it is unclear whether preliminary scoping and feasibility studies would qualify as "resources of economic value," such as to trigger the protection of the law. Resources expanded to conduct environmental impact assessments or other surveys in anticipation of obtaining permits have been used to trigger investor state arbitration claims under BITs in the past, but the Act's language is ambiguous in that respect. The Indian model BIT, by contrast, specifically excludes such expenditures from the ambit of the investment definition. The "reasonable period of time" for the investment is also a looser standard than the long-term requirements present in some other models. Particularly if pre-establishment surveying and business model studies are included as a qualifying "resource of economic value," and are used to demonstrate the "anticipation of profit," the mere amount of time needed to obtain such studies, typically over one year, may arguably also satisfy the "reasonable period of time" criterion. In that scenario, the proposed law might serve little to change investors' behavior, compared to traditional BITs.

The investors seem to be equated with "an enterprise making an

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99 Colombia CIFA, art. 3.1.4.1.

100 Protection of Investment Act 22 of 2015 § 2 (S. Afr.) *available at* https://www.gov.za/sites/www.gov.za/files/39514_Act22of2015ProtectionOfInvestmentAct.pdf [https://perma.cc/4HJ8-GGXG] (including lawful enterprises in South Africa within the definition of "investment").

investment in the Republic regardless of nationality,"[101] and an enterprise is further defined as "any natural person or juristic person whether incorporated or unincorporated."[102] The law intends to regulate domestic and foreign investors alike, so long as they make an investment in South Africa. Dual nationality issues where the investor is South African and holds another citizenship are therefore inapposite.

3.1.6. Common Trends

Although a number of different strategies are emerging in recent BITs and model BITs drafted by emerging countries, a common trend is the attempt to circumscribe who qualifies as an investor and what counts as a protected investment. As we have seen, under many new style agreements in several countries, investors, which used to qualify merely on the basis of incorporation in the home state (and, at times, an additional requirement that the seat of the company be in the home state), are now subject to the additional requirement of conducting substantial business activity in the home state, or of being owned or controlled by nationals of the home state.[103] Such restrictions may also apply if an investor seeks arbitration under the ICSID Convention, thereby facing the jurisdiction requirements of Article 25(1)[104] and its jurisprudence, including the *Salini* test discussed above. Like India, the SADC and others, China implements such restrictions to avoid the treaty shopping phenomenon, where shell companies are set up solely for purposes of qualifying under a taxation treaty, a BIT or a free trade agreement including an investment chapter.

Moreover, there is some clear learning patterns, where states take stock of arbitral developments, particularly, but not exclusively

101 *Id.* at §1 (S. Afr.).

102 *Id.*

103 Dulac, *supra* note 80, at 250.

104 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 25(1), Mar. 18, 1965, 17 U.S.T 1270, T.I.A.S 6090, 575 U.N.T.S 159, ("The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [or any constituent subdivision or agency of a Contracting State designated to the Centre by that State] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.").

those involving them directly, and are aware of other states' practice on the issues of investor and investment definitions. This is suggested, for instance, in the evolution of the Brazil CIFA drafting, which incorporated more specific language in later drafts in line with the type of provisions or at least issue awareness prevalent in other emerging country BITs. Regional and international organizations, in particular UNCTAD, also play a key role in sharing and disseminating current practices.[105]

It is noteworthy that the push in a number of emerging countries towards narrowing the definitions of investors and investment in BITs or investment chapters in FTAs is also reflected in the 2004 US Model BIT. The EU-Canada Trade Agreement ("CETA") also reflects this trend. It specifies that investment means "[e]very kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk," followed by a non-exhaustive list of assets.[106] Like several of the newer emerging country models discussed above, the CETA also excludes from qualifying investment "claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party, domestic financing of such contracts, or any related order, judgment, or arbitral award."[107] Regarding investors, the CETA specifies that juridical investors must be enterprises that are "constituted or organised under the laws of that Party and [have] substantial business

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105 *See e.g.*, UNCTAD, Rep. of the Investment, Enterprise and Development Commission on Its Seventh session, ¶ 3, 8-10, TD/B/C.II/31, (2015), *available at* http://unctad.org/meetings/en/SessionalDocuments/ciid31_en.pdf [https://perma.cc/7GN6-BTGH] (providing an example of the UNCTAD's role in signaling arbitral developments); *see generally* Investment Policy Framework For Sustainable Development, UNCTAD/DIAE/PCB/2015/5 (UNCTAD, ed., 2015), *available at* http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf [https://perma.cc/32XT-BFNQ]; Rep. of the Expert Meeting on the Transformation of the International Investment Agreement Regime: The Path Ahead, TD/B/C.II/EM.4/3 (UNCTAD, ed., 2015), *available at* http://unctad.org/meetings/en/SessionalDocuments/ciiem4d3_en.pdf [https://perma.cc/5YEM-LZB6].

106 Comprehensive and Economic Trade Agreement, Can.-EU, art. 8.1, Oct. 30, 2016, *available at* http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/ [https://perma.cc/J5WN-UA5H].

107 *Id.*

activities in the territory of that Party; or an enterprise that is constituted or organised under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under paragraph (a)."[108]

3.2. Defining and Constraining Investor Protections

This section analyzes the spectrum of positions taken by emerging economies on the nature and extent of the protections offered to investors. As we found for the definition of investment and investor, these provisions can be found in several sources, ranging from the familiar formal of bilateral investment treaties (India, China and SADC), to alternative investment instruments (Brazil) and domestic approaches (South Africa).

3.2.1. India

The 2016 Model BIT spells out rights and protections for investors in great detail. Article 2.3 appears to displace customary international law by limiting parties' obligations to those explicitly stated in the treaty (and in some cases, the treaty terms do incorporate customary international law by reference).[109] This can be seen as an effort to control efforts by arbitrators to expand the scope of otherwise broad terms such as "fair and equitable treatment."

Standard of treatment

Unlike most traditional BITs, the draft India Model BIT did not include a general guarantee of "fair and equitable treatment" or of "full protection and security." Instead, Article 3 on standard of treatment protected foreign investments from denial of justice under customary international law, "egregious violations of due process," and "manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment."[110] This eliminated the

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108 *Id.*

109 Model Bilateral Investment Treaty, India, art. 2.3.

110 2016 Model Bilateral Investment Treaty, India, art. 3 *supra* note 28.

possibility of using the fair and equitable treatment language to create a right to protection of "legitimate expectations." The 2016 India Model BIT does include "full protection and security," albeit limited to "a Party's obligations relating to physical security of investors and to investments made by the investors of the other Party and not to any other obligation whatsoever."[111] Additionally, Article 4 provides for national treatment but indicates that the assessment of "like circumstances" depends on "the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate regulatory objectives.[112] These circumstances include, but are not limited to, (a) the goods or services consumed or produced by the investment; (b) the actual and potential impact of the investment on third persons, the local community, or the environment, (c) whether the investment is public, private, or state-owned or controlled, and (d) the practical challenges of regulating the investment".[113]

There is no most-favored nation section in the India Model BIT and no explanation for its absence. This is probably the result of the *White Industries v. India* arbitration where an Australian investor used a clause in the India-Kuwait BIT to expand protection for an Australian company. It reflects a general concern among emerging economies of the use of MFN to expand jurisdiction and substantive content beyond the intended scope of a specific BIT.

Also absent from the 2016 India Model BIT is an umbrella clause guaranteeing that the parties will abide by their contractual commitments with foreign investors. Breach of contracts between the host state and the foreign investors would not typically be actionable under a treaty but some ICSID arbitrations interpreted umbrella clauses to elevate contractual breaches to treaty breaches. Such a reasoning allowed investors to circumvent choice of forum clauses in the underlying contract (particularly where the designated forum was a domestic court of the host state) and bring instead an investor-state arbitration claim under the treaty.[114]

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111 *Id.* at art. 3.2.

112 *Id.* at art. 4.

113 *Id.* at fn 2.

114 *See e.g.*, SGS Société Générale de Surveillance S.A. v. The Republic of Para., ICSID Case No.ARB/07/29, (Feb. 10, 2012), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1525.pdf [https://perma.cc/ZR5N-RLZN]. *But see* SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan, ISCID Case No ARB/01/13, Decision on Objections to Jurisdiction, (Aug. 6, 2003), 8 ICSID Rep. 406 (2005) (holding that Article 11 of the

Last, the Model treaty's standard of treatment clause must be read in the context of provisions regarding the state's ability to apply its law. Article 2.3 excludes from the ambit of the treaty claims "arising our of events which occurred, or claims which have been raised prior to the entry into force of this Treaty."[115] Additionally, Article 2.4 carves out from the treaty local government measures, which is a vast exclusion for a federal state like India, any measure related to taxation and a number of other issues such as compulsory licenses of intellectual property rights, government procurement, and subsidies.[116] The draft Model BIT included the same exclusions and safe-harbored existing laws and regulations or their progeny from challenges under the treaty.[117]

Expropriation and compensation

The 2016 India Model BIT narrows the concept of expropriation. The draft follows prior practice by stating that a party shall not nationalize or expropriate or take "measures having an effect equivalent to expropriation" except for a public purpose, in accordance with the procedure established by law and "on payment of adequate compensation."[118] While "public purpose" cannot be defined specifically, the Model offers a non-exhaustive list, whereby certain measures are automatically considered to constitute a public purpose: non-discriminatory measures (including "awards by judicial bodies") to protect public health, safety and the environment[119] and

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Pakistan-Switzerland BIT, which deviated from standard umbrella clause formulations, did not permit to elevate the contractual breach to a treaty claim), *available at* http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C205/DC622_En.pdf [https://perma.cc/TP5K-FHCL]; Compania de Aguas del Acqunija SA et al v. Arg., ICSID Case No. ARB/97/3, Award, (Nov. 21, 2000), 40 ILM 426 (2001); Compania de Aguas del Acqunija SA et al v. Arg., ICSID Case No. ARB/97/3, Decision on Annulment, (Mar. 3, 2001) and Award (Aug. 20, 2007), 6 ICSID Rep. 340 (2004) (finding that contractual violations do not necessarily amount to a BIT breach), *available at* https://www.italaw.com/sites/default/files/case-documents/ita0215.pdf [https://perma.cc/MX67-SQSC]; CMS Gas Transmission Company v Arg., ICSID Case No. 01/08, Award (May 12, 2005), 44 I.L.M 1205 (2005).

115 2016 Indian Model BIT, *supra* note 29, at art. 2.3.

116 *Id.* at art. 2.4 (stating that the treaty does not apply to local government measures).

117 Indian Draft Model BIT, art. 2.1, *supra* note 28 (mirroring the exclusions to local government measures of the 2016 Model BIT).

118 2016 Indian Model BIT, *supra* note 29, India, art. 5.1.

119 *Id.* at art. 5.5.

measures relating to land that conform to the law relating to land acquisition (for India).[120] Public purpose is defined by implication in contrast to "action[s] taken by a Party in its commercial capacity",[121] which are deemed not to count as "public purpose."

Further, the 2016 Model BIT establishes strict limits on what constitutes a "Measure. . .equivalent to expropriation," which aims at circumscribing claims for indirect expropriation. An indirect expropriation occurs if a state's measure "substantially or permanently deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment.[122] However, the mere fact that a state measure has an adverse economic impact on an investment is not sufficient to prove that an indirect expropriation has occurred.[123]

Monetary awards for expropriation and other claims by investors are circumscribed to "the loss suffered by the investor," reduced by any mitigating factors including restitution made by the state, repeal or modification of the measures at stake, and possibly "current and past use of the investment, the history of its acquisition and purpose, compensation received by the investor from other sources, any unremedied harm or damage that the investor has caused to the environment or local community or other relevant considerations regarding the need to balance public interest and the interests of the investor."[124]

No doubt that experiences such as oil concessional developments in the Niger delta in Nigeria and in the Amazon region of Ecuador, or the Bhopal industrial disaster in India, with their devastating social and environmental impact on the local communities, loomed large in the drafters' minds with respect both to the scope of legitimate expropriations and to the measure of compensation. The difficulty that aggrieved communities and individuals have had in vindicating their claims[125] clearly militates for an ex-ante treatment

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[120] *Id.* at art. 5.1; *Id.* fn 3.

[121] *Id.* at art. 5.4.

[122] *Id.* at art. 5.3(a)(ii).

[123] *Id.* at art. 5.3(b)(i).

[124] *Id.* at art. 26.3; *Id.* fn 4.

[125] *See e.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (holding that a claim that corporate actors aided human right abuses did not fall within the Alien Tort Claims Act); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (holding that the United Kingdom was a more appropriate forum for a claim involving human rights violations in Nigeria by companies with more substantial business contacts with the UK than with the United States); *Chevron v.*

of the issue at the BIT and establishment level, combined with the possibility for the host state to intervene post-establishment, should the need arise. The Model BIT does not address the possibility of the "mitigating factors" resulting in a negative valuation of compensation, i.e., where the investor would be found to owe money, rather than the host state.

Whereas the draft Model BIT implicitly posited foreign investment as a privilege that may be revoked or curtailed if it is exercised in a way that adversely impacts the local socio-economic or environmental context, the 2016 final version oft he Model BIT is less insistent on balancing investment protection and the host state's socio-economic development, including encouraging investments aligned with its priorities and discouraging investments that bring little or no developmental value. Nonetheless, some of the more controversial language of the draft was maintained in the final version, albeit in footnotes.[126]

3.2.2. China

The content of investor protection in China's three generations of BITs and from one individual BIT to another varies to some degree. Likewise, China's treatment of references to international law in BITs has evolved over time. Reluctance to accept customary international law wholesale has been a long-standing position of China, which views international law as largely the product of capitalist imperialist legal systems.[127]

Standard of Treatment

The inclusion and treatment of fair and equitable clauses illustrates these dynamics. Some Chinese BITs omit such clauses altogether,[128] a number include a commitment to treat investments fairly and equitably, without specifying what such treatment might entail.[129] Starting in 2001, some Chinese BITs refer to international law

Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (holding that the Racketeer Influenced and Corrupt Organizations Act (RICO) could be applied extraterritorially due to substantial contacts with the United States).

126 *Compare* 2016 India Model BIT footnote 4, *supra* note 29 *with* Draft Model BIT, *supra* note 28 at art. 5.6, 5.7 and related Explanatory Notes.

127 Dulac, *supra* note 80.

128 *Id* at 266.

129 *See, e.g.*, Agreement Between the Government of the Republic of India

in reference to fair and equitable treatment, in different formulae ranging from a restrictive "fair and equitable treatment in accordance with applicable principles of international law recognized by both Contracting Parties,"[130] to a more general but ambiguous "fair and equitable treatment, in accordance with principles of international law."[131] The more recent China-Mexico BIT (2008) inaugurates an even broader recognition of fair and equitable treatment and full protection and security, defined as the protection required "by the international law minimum standard of treatment of aliens as evidence of State practice and *opinio juris*."[132] The clear reference to international customary law was subsequently reinforced in the 2009 China-Peru BIT.[133] The joint phrasing for fair and equitable treatment and full protection and security in reference to customary law, as illustrated by the China-Mexico BIT, is fairly typical of third generation Chinese BITs[134] and is reflected in the latest draft Model BIT.[135]

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and the Government of the People's Republic of China for the Promotion and Protection of Investments, China-India, art. 3.2, Nov. 21, 2006, http://investmentpolicyhub.unctad.org/Download/TreatyFile/742 [https://perma.cc/PSF7-ZQGY] ("Investments . . . shall at all times be accorded fair and equitable treatment.").

130 Agreement Between the Government of the Hashemite Kingdom of Jordan and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments, China-Jordan, art. 3.2, Nov. 15, 2001, http://investmentpolicyhub.unctad.org/Download/TreatyFile/748 [https://perma.cc/N3MS-H8L7] (not in force).

131 Accord Sur la Promotion et la Protection Réciproques des Investissements entre le Gouvernement de la Republique de Madagascar et le Gouvernement de la République Populaire de Chine, China-Madag., art. 3.1, Nov. 21, 2005, http://investmentpolicyhub.unctad.org/Download/TreatyFile/758 [https://perma.cc/9DR5-7LRM] ("[C]hacune des Parties Contractantes s'engage à assurer, sur son territoire défini plus haut, un traitement juste et équitable, conformément aux principes du Droit international, aux investissements des nationaux et sociétés de l'autre Partie Contractante et à faire en sorte que l'exercice du droit ainsi reconnu ne soit entravé en droit, ni en fait.").

132 Agreement Between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, China-Mex., art. 5.2, July 11, 2008, http://investmentpolicyhub.unctad.org/Download/TreatyFile/759 [https://perma.cc/EY2K-HNDZ].

133 Free Trade Agreement Between the Government of the Republic of Peru and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments, April 4, 2009, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2586 [https://perma.cc/LE5B-Q7WA].

134 Dulac, *supra* note 80, at 270.

135 Draft New Model BIT, China, art. 3, *reprinted in* NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE app. V (2009)

While older BITs, especially second-generation treaties from the late 1990s and 2000s, often include an umbrella clause, which extends protection to contracts entered into between the investor and the Host government,[136] the more recent third-generation BITs make no such undertaking.[137] This position, held in common with some other emerging countries, is likely in reaction to arbitral interpretations elevating contractual violations to treaty breaches through the use of umbrella clauses.[138]

Most favored nation treatment clauses have been a relatively common feature of Chinese BITs, with varying language.[139] The 2003 Model BIT's National Treatment clause reads: "Neither the Contracting Party shall subject investments and activities associated with such investments of the other Contracting Party to treatment less favorable then that accorded to the investments and associated activities by the investors of any third State."[140] China is clearly aware of the *Maffezini* line of cases and the controversy about whether to use MFN clauses to import broader dispute resolution clauses from other BITs. The investment chapter of the 2008 China-New Zealand Free Trade Agreement explicitly excludes dispute resolution from the ambit of the MFN clause.[141] This approach, and other exclusions, is also reflected in the new draft Chinese Model

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[hereinafter China Draft Model BIT].

136 For a history and interpretation of umbrella clauses in Chinese first and second generations BITs, see Dulac, *supra* note 80, at 277-79; Wenhua Shan, *Umbrella Clauses and Investment Contracts Under Chinese BITs: Are the Latter Covered by the Former?*, 11 J. WORLD INV. & TRADE 135, 136-45 (2010) (discussing umbrella clauses in Chinese BITs and their legal implications).

137 *See* Sauvant & Nolan, *supra* note 81, at 919 (noting that China has followed the example of the USA and other nations in abandoning umbrella clauses).

138 *Id.* (discussing how China has revised its model dispute settlement clause in response to claimants' attempts to elevate contract breaches to international treaty violations).

139 *See Id.* at 922 ("It was the regular practice of drafters of China's BITs . . . to include a most-favored nation (MFN) clause."); John Savage & Elodie Dulac, *Chinese Investment Treaties and the Dispute Resolution Opportunities Offered by Most Favored Nations Provisions*, STOCKHOLM INT'L ARB. REV., no. 3, 2008, at 1, 10, 29-33 (discussing the various wordings of MFN clauses in Chinese BITs).

140 Chinese Model BIT Version III, China, art. 3, *reprinted in* NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE app. IV (2009) [hereinafter 2003 China Model BIT].

141 *See* Free Trade Agreement Between the Government of New Zealand and the Government of the People's Republic of China, China-N.Z., art. 139.2, Apr. 7, 2008, 2590 U.N.T.S. 101 ("[T]he obligation in this Article does not encompass a requirement to extend . . . dispute resolution procedures . . . .").

BIT.[142]

By contrast to the relatively ubiquitous and traditional MFN clauses, China resisted national treatment clauses in its early BIT negotiating history. Such clauses became more standard since the late 1990s, though at times with the restrictive note that such treatment is only granted "in accordance with [China's] laws and regulations."[143] Moreover, national treatment is often restricted to post-establishment treatment, even where the treaty also covers admission of the foreign investment. The 2003 Model BIT's National Treatment clause states: "Without prejudice to its laws and regulations, each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favorable than that accorded to the investments and associated activities by its own investors."[144] Although the 2003 Model BIT mentions that the parties "shall encourage investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws and regulations,"[145] the remainder of the treaty obligations focus on post-establishments rights and protections. By contrast, the subsequent draft Model BIT would extend national treatment protection to the admission of investments to the extent of a yet-to-be drafted Annex.[146]

With respect to standards of treatment, then, the current Chinese BIT policy seems to be more aligned with the traditional BITs framework, albeit with some modifications to take account of recent arbitral developments. Overall, though, China seems to be increasing the scope of protection for foreign investors in its agreements, which represents a move away from its earlier more restrictive position. In this sense, China seems to be bucking the trend among emerging economies, many of which are trying to restrict the scope of their BITs. However, the picture is quite complex because China's current policy is to negotiate on a case-by-case basis, which may account for the variety of drafting approaches in its latest BITs.

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142 China Draft Model BIT, *supra* note 135, at arts. 4.2 & 4.3 (excluding treatment granted in regional trade agreements and "arrangements for facilitating small scale frontier trade in boarder (sic) areas.").

143 Dulac, *supra* note 80, at 285; Cai Congyan, *China-US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications*, 12 J. INT'L ECON. L. 457, 471 (2009).

144 2003 China Model BIT, *supra* note 140, at art. 3.2.

145 *Id.* at art. 2.1.

146 China Draft Model BIT, *supra* note 135, at art. 5.2.

Expropriation and Compensation

A comparison of the 2003 Model BIT and the subsequent draft Model suggests increased caution on the part of China in preserving regulatory space, particularly in light of arbitral trends on indirect expropriation. Whereas the 2003 Model included standard language on expropriation, nationalization, or "other similar measures," guaranteeing compensation, non-discrimination, due process and that expropriation could only be for the "public interests" (undefined),[147] the subsequent draft Model specifically defines "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" as not amounting to an indirect expropriation.[148] Here, China's policy is much closer to the positions taken by India in its 2015 Draft Model BIT.[149] The 2011 China-Uzbekistan BIT reflects the draft model. While Article 6.1 includes indirect expropriation, defined as "[m]easures the effects of which would be equivalent to expropriation or nationaization," within the ambit of the treaty, Article 6.3 states that "[e]xcept in exceptional circumstances, such as the measures adopted severely surpassing the necessity of maintaining corresponding reasonable public welfare, non-discriminatory regulatory measures adopted by one Contracting Party for the purpose of legitimate public welfare, such as public health, safety and environment, do not constitute indirect expropriation."[150]

Compensation is calculated as "the fair market value of the expropriated investment immediately before the expropriation occurred."[151] The draft does not include mitigations of monetary awards such as those defined in the India Model BIT,[152] nor does it

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147 2003 China Model BIT, *supra* note 140, at art. 4.1.

148 China Draft Model BIT, *supra* note 135, at art. 7.3.

149 Indian Draft Model BIT, *supra* note 28, at art. 5.4 ("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 shall not constitute expropriation).

150 Agreement Between the Government of the People's Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments, China-Uzb., arts. 6.1 & 6.3, Apr. 19, 2011, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3476 [https://perma.cc/69SB-GHD9].

151 China Draft Model BIT, *supra* note 135, at art. 7.2(a).

152 Indian Draft Model BIT, *supra* note 28, at art. 5.7 (describing various mitigating factors, including the current and past use of the investment, that reduce

specify how future profits or past expenses should be taken into account in the calculation of the fair market value. The 2011 China-Uzbekistan BIT illustrates such positions,[153] as does the China-Canada BIT.[154]

3.2.3. SADC

Standard of Treatment

The SADC Model BIT focuses mostly on post-establishment rights and obligations. The only clause dealing with admission of foreign investors references domestic law as the applicable framework.[155] While such a provision appears to fully protect state regulatory autonomy, its inclusion in the treaty might allow investors to elevate a violation of domestic law by state authorities, normally only challengeable in domestic fora, to a treaty breach subject to remedies available under the treaty and customary international

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compensatory damages).

153 Agreement Between the Government of the People's Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments, China-Uzb., art. 6.4, Apr. 19, 2011, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3357 [https://perma.cc/69SB-GHD9] ("The compensation mentioned in Paragraph 1 of this Article shall be equivalent to the fair market value of the expropriated investments immediately before the expropriation is taken or the impending expropriation becomes public knowledge, whichever is earlier. The compensation shall also include interest at a reasonable commercial rate until the date of payment. The compensation shall be made without unreasonable delay, be effectively realizable and freely transferable.").

154 Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, Can.-China, at art. 10, Sept. 9, 2012, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3476 [https://perma.cc/M83S-JQ2T] ("Covered investments or returns of investors of either Contracting Party shall not be expropriated, nationalized or subjected to measures having an effect equivalent to expropriation or nationalization in the territory of the other Contracting Party (hereinafter referred to as "expropriation"), except for a public purpose, under domestic due procedures of law, in a non-discriminatory manner and against compensation. Such compensation shall amount to the fair market value of the investment expropriated immediately before the expropriation, or before the impending expropriation became public knowledge, whichever is earlier, shall include interest at a normal commercial rate until the date of payment, and shall be effectively realizable, freely transferable, and made without delay.").

155 SADC Model BIT, *supra* note 84, at art. 3 ("The State Parties shall promote and admit Investments in accordance with their applicable law, and shall apply such laws in good faith.").

law. The SADC Commentary also notes that including such a clause may hinder the host state's ability to modify the conditions of admissions (such as excluding sensitive sectors) subsequent to entering into a BIT.[156] The overall recommendation, therefore, is not to include such a clause, and the language is only provided for illustrative purposes should a state choose to include some pre-establishment provision.

Article 4 guarantees national treatment for post-establishment protection, but requires an assessment of a number of factors related to the nature and impact of the foreign investment which could result in the foreign investment not being comparable to a domestic investment and hence warranting a different treatment.[157] In contrast, the Model omits MFN treatment. It also excludes the export of the Model BIT provisions to existing bilateral or regional trade or investment agreements. Hence, more favorable treatment in other treaties cannot be imported under the Model BIT (classic MFN situation), nor can any advantage or concession from the Model BIT be exported to other treaties that might have an MFN clause. Should a state still wish to include an MFN clause in its treaty, the SADC Drafting Committee still recommends excluding legal exports to other treaties as it does with respect to national treatment.[158] This would essentially result in a one-way MFN clause, where investors under the Model BIT could benefit from advantages granted under other trade and investment agreements, but the parties to the latter would not be able to benefit from treatment granted under the Model BIT.

Like India and China, the SADC Drafting Committee is wary of general "fair and equitable treatment" clauses. In response to arbitral awards that have expanded the concept, the recommendation is not to include such a clause and to prefer instead a "Fair Administrative Treatment" clause.[159] This is an innovative approach that limits protections to due process guarantees in domestic administrative, legislative, and judicial proceedings. Should a country nonetheless choose to include a more traditional fair and equitable treatment clause, the proposed drafting circumscribes such treatment in

[156] *Id.* at 16 (noting that certain investment liberalization clauses may restrict a state's ability to close or restrict entry into a sector once it has been opened to foreign investors).

[157] SADC Model BIT, *supra* note 84, at arts. 4.1 & 4.2.

[158] *Id.* at art. 4.1.

[159] *Id.* at art. 5, option 2.

reference to "customary international law on the treatment of aliens." This fairly traditional formulation[160] leaves space for evolving interpretations of what norms might be–or become–part of customary law.

Expropriation and Compensation

Article 6 of the SADC Model BIT sets out the general framework for expropriation:

> "6.1. A State Party shall not directly or indirectly nationalize or expropriate investments in its territory except:
>
> (a) in the public interest;
>
> (b) in accordance with due process of law; and
>
> (c) on payment of fair and adequate compensation within a reasonable period of time."[161]

The interpretation of "fair and adequate compensation," however, is where opinions differ, with the Model BIT offering three options ranging from the "equitable balance between the public interest and interest of those affected" taking into account all circumstances and context, to "fair market value of the expropriated investment immediately before the expropriation took place" with or without reference to the public interest and surrounding circumstances regarding the investment and the expropriation.

A few terms and carve-outs are noteworthy. First, the Model BIT states "Awards that are significantly burdensome on a Host State may be paid yearly over a three-year period."[162] Some governments from developing countries and practitioners working on their behalf caution, however, that overly onerous awards might simply not be paid, thereby shifting the burden on investors to try to overcome sovereign immunity and seek attachment or seizure of state assets abroad. Since this would likely be a futile endeavor, the threat of non-payment really acts as a message to arbitrators and investors alike that overly generous awards may amount to purely pyrrhic victories for investors. Second, the Model BIT confirms state's right

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160 The wording may be traced to Neer v. Mexico, 4 R.I.A.A. 60 (General Claims Commission 1926).

161 SADC Model BIT, *supra* note 84, at art. 6.

162 Id at art. 6.4.

to issue compulsory licenses and other restrictions on intellectual property rights made in accordance with international law and the corollary that these would not be considered an expropriation. Third, Article 6.7 narrows the scope of indirect expropriation by excluding from its ambit "measure of a State Party that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment."[163]

Lastly, although the SADC Model BIT did not recommend including an ISDS clause as a general matter, it does provide the right of investors affected by an expropriation to seek "review by a judicial or other independent authority of that State Party of his/its case and the valuation of his/its investment in accordance with the principles set out in this Article."[164] In other words, the preferred recourse, according to SADC, is for investor to vindicate their rights in domestic courts or arbitration in the host country and that body would apply and interpret the BIT provisions.

3.2.4. Brazil

Article 11 of the Brazil-Mozambique Treaty guarantees that foreign investors will be allowed to establish their investment and conduct business on terms no less favorable than those available to domestic investors.[165] Non-discrimination between domestic and foreign investors is also provided with respect to restitution, indemnification or compensation in the case of losses suffered as a result of exigent circumstances including war and uprising.[166]

Standard of Treatment

Brazilian CIFAs exclude fair and equitable treatment, full protection and security, and umbrella clauses, and also limit the scope of protection to national treatment and a most-favored nation provision. The MFN clauses are carefully circumscribed. Investors of one of the Parties will not be treated less favorably than other for-

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163 *Id.* at art. 6.7.

164 *Id. supra* note 84, at art. 6.8.

165 *Id.* at art. 11.

166 *Id.* at art. 12.

eign investors with respect to conditions of establishment and conduct of business. However, most-favored nation treatment does not include any benefit or preferential treatment that accrues to other investors under a free trade agreement, customs union or common market scheme, or double taxation treaty in force that may be entered into by Brazil or Mozambique in the future. The MFN clause is designed to avoid any ratcheting effect of present and future treaties that might include more liberal concessions.

Expropriation and Compensation

The Brazilian agreements signed so far include commitments by State Parties to not nationalize or expropriate without adequate and effective compensation, which is defined as the fair market value of the expropriated investment immediately before the expropriation, to be provided in a liquid and transferable payment method (Article 9).[167] The instruments referred to may in some cases include public bonds with practical limitations on liquidity and transfer that are required by Brazilian constitutional law. Balance of payments considerations may be taken into account under some agreements.

Brazilian agreements limit the concept of expropriation to direct takings. Early agreements did not explicitly exclude indirect expropriation (as the US Model BIT of 2012 does) but the omission of the term was taken to mean it was not covered. Subsequently, in the Chilean agreement, a clause explicitly excluding indirect expropriation was included.

3.2.5. South Africa

The two main changes that will be brought about as a result of the 2015 Protection of Investment Act are i) the exclusion of the principle of fair and equitable treatment (FET) as it was deemed to be too widely framed and subject to controversial interpretation; and ii) reformulation of investor protection from expropriation in line with provisions of the South African Constitution.

Omitting any mention of FET does not, however, absolve South Africa of any obligation in this area. International customary law on

[167] Brazil Bilateral Investment Treaties, UNCTAD Investment Policy Hub, *available at* http://investmentpolicyhub.unctad.org/IIA [https://perma.cc/J5AH-DM9B].

minimum standards of treatment would still apply, as the Act recognizes in Clause 9.[168] Moreover, since the content of customary law is shaped by state practice and *opinio juris*, it is possible that the formulation of FET in bilateral and multilateral agreements and its interpretation in arbitrations[169] would now be considered to form part of customary law and thus still bind South Africa to a higher standard than the Act suggests. South Africa's active stance in terminating BITs and rejecting broad notions of FET could perhpas be cast as a persistent objection to such a development. In practice, though, this may provide little solace to either investors or South Africa as a host country since the contours of minimum standards of treatment under customary law are in flux and the outcomes of litigation or arbitration on the issue are highly uncertain.[170]

By contrast, Clause 10 on the "Legal protection of investment" guarantees that "[i]nvestors have the right to property in terms of Section 25 of the Constitution." The latter provides:

> (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
>
> (2) Property may be expropriated only in terms of law of general application—
>
> (a) for a public purpose or in the public interest; and
>
> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
>
> (3) The amount of the compensation and the time and man-

168 Clause 9 on "Physical security of property" assures that foreign investors and their investments will be provided the level of physical security "as may be generally provided to domestic investors in accordance with minimum standards of customary international law and subject to available resources and capacity." Protection of Investments Act 22 of 2015 §9 (S. Afr.).

169 OECD, *Fair and Equitable Treatment Standard in International Investment Law* 8-22 (OECD Working Papers on International Investment 2004/03, 2004).

170 *See generally* IOANA TUDOR, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 54-63 (Oxford University Press ed., 2008) (discussing the customary framework of the FET along with the international minimum standard that defines the rights states are obliged to extend to foreigners.).

ner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including-

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(e) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section-

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).

(9) Parliament must enact the legislation referred to in subsection (6).[171]

The public interest standard is typical for expropriations and the requirement that the expropriation be carried out pursuant to a law of general application and provides some safeguards against discriminatory targeting of foreign investors. However, the standard for compensation is very flexible and does not reflect customary international law. As with FET, it may be that South Africa is in fact bound by a more stringent international obligation with respect to compensation for the expropriation or nationalization of foreign investments than is enshrined in its Constitution. The issue then becomes how international customary law and treaty obligations interact with the South African Constitution and legislation. South Africa's incorporation of international law in its domestic legal order is bifurcated: Treaties appear to be incorporated in a dualist fashion whereas customary international law "is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."[172] Customary international law standards regarding minimum standards of treatment, expropriation and compensation are therefore of direct application in South Africa, but subordinated to the Constitution and legislation. However, Section 39, which applies to all the Bill of Rights provisions including those on expropriation, provides that "a court, tribunal or forum – . . .(b) must consider international law." Overall, then, the Protection of Investment Act and the South African Constitution make it very difficult to ascertain how much and what kind of protection foreign investors and their investments would be awarded and how that compares with the treatment of their domestic counterparts.

3.3. Extending or Creating Carve-Outs and Exceptions

This section analyzes the spectrum of positions taken by emerging countries, ranging from the familiar form of bilateral investment treaties (India, China and SADC), to alternative investment instruments (Brazil) and domestic approaches (South Africa).

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171 S. AFR. CONST., 1996, Chapter 2, Section 25.

172 *Id.* at ch. 14, §232.

3.3.1. India

The 2016 India Model BIT lists topics that are excluded from the definition of indirect expropriation. The list includes government procurement, subsidies, grants, taxation, and compulsory licenses of intellectual property.[173] In addition, Article 32 on General Exceptions appears to be loosely inspired by Article XX of the GATT. It states that "[n]othing 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" deemed necessary to maintain public morals or public order, protect human, animal or plant life or health, conserve the environment and natural resources, protect cultural artifacts, or manage a Party's financial system, including exchange rate policies.[174]

3.3.2. China

Chinese BITs recently entered into force offer a range of carve-outs and exclusions. Some carve-outs are designed to limit the rights of foreign investors under national treatment or MFN clauses. For instance, the China-Congo BIT, the China-Mali BIT and the China-Uzbekistan BIT exclude investors of one party from benefitting from any advantage or privilege deriving from customs unions, free trade zones, international tax agreements and agreements facilitating cross-border trade with neighboring countries that may be signed by the other party.[175] This provision would appear to cover

173 2016 India Model BIT, *supra* note 29, at art. 2.4. *See supra* Section II.B.1.

174 *Id.* at art. 32.

175 Accord de coopération entre le Gouvernement de la République du Congo et le Gouvernement de la République Populaire de Chine sur la promotion et la protection des investissements, China-Congo, Mar. 20, 2015, art. 3(4); Accord sur la promotion et la protection réciproques des investissements entre le Gouvernement de la République du Mali et le Gouvernement de la République Populaire de Chine, China-Mali, Feb. 12, 2009, art. 3(4); Agreement Between the Government of the People's Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments, China-Uzb., Apr. 19, 2011, art. 4.2; Agreement Between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, China-Mex., July 11, 2008, Art. 10; Accord entre le Gouvernement de la République française et le Gouvernement de la République Populaire de Chine sur l'encouragement et la protection réciproques des investissements, China-Fr., Nov. 26, 2007, art. 4. *See also* Agreement Between the Government

export processing zones and the special status of territories such as Hong Kong. Similarly, the China-Canada BIT excludes from the ambit of its MFN clause:

> (a) treatment by a Contracting Party pursuant to any existing or future bilateral or multilateral agreement:
>
> (i) establishing, strengthening or expanding a free trade area or customs union; or
>
> (ii) relating to aviation, fisheries, or maritime matters including salvage;
>
> (b) treatment accorded under any bilateral or multilateral international agreement in force prior to 1 January 1994.[176]

Non-discriminatory treatment is also at times excluded with respect to government procurement and subsidies, including government-supported loans, guarantees and insurances, and grants.[177] Other clauses protect existing non-conforming measures and their future amendments or renewals.[178]

The China-Canada BIT includes a GATT Article XX-type list of general exceptions, though limited to measures "(a) necessary to ensure compliance with laws and regulations. . ., (b) necessary to protect human, animal or plant life or health; or (c) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on

of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investment, Can.-China, Sept. 9, 2012, art. 14 [hereinafter Canada-China BIT] (regarding certain tax exclusions).

176 Canada-China BIT, *supra* note 175, at art. 8(1).

177 *Id.* at art. 8(5).

178 *Id.* at art. 8(2).

domestic production or consumption."[179] Additionally, a prudential exception relating to financial markets[180] most likely reflects Canada's recent policy orientations with respect to BITs and an exception for measures relating to "cultural industries," which caters to China's state censorship and other forms of control over publications and broadcastings.[181]

Several China BITs include a denial-of-benefits clause for investments that are only nominally held by an entity of the BIT signatory countries.[182] This is a response to the forum-shopping trend

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179 *Id.* at art. 33(2).

Compare Id. with Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Annex 1A, 1867 U.N.T.S. 187; 33 I.L.M. 1153 [hereinafter GATT] Art. XX ("nothing in this Agreement shall be construed to prevent the adoption or enforcement by any [Member] of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

(c) relating to the importations or exportations of gold or silver;

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions

of this Agreement, [. . .];

(e) relating to the products of prison labour;

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement [. . .]

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan [. . .];

(j) essential to the acquisition or distribution of products in general or local short supply [. . .].").

180 Canada-China BIT, *supra* note 175, at art. 33(3). *See also* Canada-China BIT Art. 33(4) (concerning other restrictions to protect monetary and exchange rate policies); Canada-China BIT art. 33(6)(a) (regarding the confidentiality of customers of financial institutions). *But see* Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the People's Republic of China, China-Colom., Nov. 22, 2008, art. 13 (discussing the prudential measures in the financial sector).

181 Canada-China BIT, *supra* note 175, at art. 33(1).

182 Agreement Between the Government of the People's Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments, China-Uzb., Apr. 19, 2011, art. 10(1)(c), (2); Canada-China BIT, *supra* note 175, at art. 16.

amongst investors that look for the treaty offering them the most favorable terms and incorporating a shell corporation in a state party to that treaty in order to benefit from the BIT while really controlling the investment from another country that might not have a BIT with the host country or might have a less favorable BIT.

Alongside these varied and sophisticated clauses designed to preserve regulatory autonomy of the host state, some China BITs are rather bareboned. For instance, the 2009 China-Malta BIT is traditional and unremarkable in its drafting.[183] The 2009 China-Mali BIT is also fairly representative of traditional BITs, as are the 2008 China-Mexico BIT and the 2007 China-France BIT. Some provisions are in direct conflict with some more recent Chinese BITs, for instance those provisions regarding whether treaty provisions apply if diplomatic relations between the signatory states are interrupted.

The range of drafting of China BITs over the past ten years supports China's claim that it tailors treaties to each particular negotiation, and is amenable to using the model BIT of the other party if need be. However, BITs signed around and after 2012 demonstrate much more detailed exceptions and safeguard clauses to protect regulation of the host state. Still, there is little consistency across these newer BITs about what exceptions are included. Overall, most of the exception and exclusion clauses reflect current debates about preserving policy space, in particular debates on subject matters such as public health, thwarting investor forum shopping strategies, and the effect of MFN clauses from other economic law agreements.

3.3.3. SADC

The Model SADC BIT encourages states to create a schedule of non-conforming measures that might violate the non-discrimination provision and would be excluded from scrutiny under that clause.[184] Similarly, the Model BIT provides for the negotiation of a schedule of sectors or subsectors to be excluded from national treatment. National treatment would also be restricted to any investments protected under the BIT and would not be extended to other BITs or free trade agreements signed by the parties.

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[183] Agreement Between the Government of the People's Republic of China and the Government of Malta on the Promotion and Protection of Investments, China-Malta, Feb. 22, 2009.

[184] Model SADC BIT, *supra* note 24, at art. 4.3.

The capital and profits repatriation clause includes a number of exclusions to the principle of the freedom of repatriation, mostly dealing with moneys connected to a public interest (taxes, public or other compulsory retirement schemes, money judgments, etc.).[185] Additionally, the host states reserve the right to enact restrictions on the movement of capital for balance of payment purposes and other macro-economic and exchange rate management difficulties (known as safeguard provisions). This language may result from the lesson learned in the Argentinian crisis arbitrations, where Argentina relied on general non-preclusion measures clauses to defend its debt restructuration. Under the SADC Model BIT, such a situation would be covered with more certainty by these safeguard provisions.

Lastly, Article 25 provides more general exceptions to non-discrimination provisions and expropriation and compensation disciplines. The exceptions to non-discrimination are somewhat reminiscent of GATT Article XX, inasmuch as they cover measures

> "(a) to protect public morals and safety;
>
> (b) to protect human, animal or plant life or health;
>
> (c) for the conservation of living or non-living exhaustible natural resources; and
>
> (d) to protect the environment."[186]

Measures the state considers necessary to maintain or protect international peace and security or to protect its national security interests are also exempted from treaty obligations. It is noteworthy that the necessity standard is cast as a subjective one (under the Model SADC the state determines necessity), rather than the objective test that has been developed in WTO case law to interpret several GATT Article XX clauses.

3.3.4. Brazil

Brazilian CIFAs include a right to regulate national security, the environment, health, labor, and other areas. They also allow restrictions on transfers of profits and other payments out of the host

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185 *Id.* at art. 8.

186 *Id.* at art. 25.

country in the case of crises or serious difficulty affecting the balance of payments. Due process and non-discrimination safeguards remain in place should such restrictions be implemented. These types of clauses are not out of the ordinary in BITs generally, but are also not a standard feature in all agreements. Recent model BITs from emerging countries show a renewed interest in including such an exception.[187]

3.3.5. South Africa

Although no provision of the Promotion of Investment Act is explicitly framed as an exception, Clause 12 on the "Right to regulate" creates a framework for safe-harboring government regulation from potential indirect expropriation claims or other challenges from investors. The subject matters covered include, but are not limited to:

(a) redressing historical, social and economic inequalities and injustices;

(b) upholding the values and principles espoused in Section 195 of the Constitution;

(c) upholding the rights guaranteed in the Constitution;

[187] Bilateral Agreement for the Promotion and Protection of Investments Between the Republic of Colombia and (blank), August 2007, https://www.italaw.com/documents/inv_model_bit_colombia.pdf [https://perma.cc/XGL8-NXSQ] (allowing restrictions on transfers for balance of payment purposes, as do the proposed Model Text for the Indian Bilateral Investment Treaty (a change from the earlier 2003 Model), and the SADC Model BIT.); 2016 Indian Model BIT, art. 6.4, *supra* note 29; Model SADC BIT, *supra* note 24. US treaties normally do not have such provisions: a rare exception is found in the Treaty Between the United States of America and the Democratic Socialist Republic of Sri Lanka. Treaty Between the United States of America and the Democratic Socialist Republic of Sri Lanka Concerning the Encouragement and Reciprocal Protection of Investment, Sri Lanka-U.S., Sept. 20, 1991. BITs signed by France often include such a provision. *See* Agreement Between the Government of the Republic of France and the Government of the United Mexican States on the Reciprocal Promotion and Protection of Investments, Fr.-Mex, Nov. 12, 1998; Agreement Between the Government of the Federal Republic of Ethiopia and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments, Eth.-Fr., June 25, 2003; Agreement Between the Government of the Republic of France and the Government of the Republic of Uganda on the Reciprocal Promotion and Protection of Investments, Fr.-Uganda, Jan. 3, 2003. However, Australian BITs do not typically feature a balance of payments safeguard clause.

> (d) promoting and preserving cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage;
>
> (e) fostering economic development, industrialisation and beneficiation;
>
> (f) achieving the progressive realisation of socio-economic rights; or
>
> (g) protecting the environment and the conservation and sustainable use of natural resources.[188]

Unlike the SADC Model, this list of carve-outs is not inspired by the GATT, but rather by the South African Constitution. Clause 11(2) resembles the more traditional non-preclusion measures clauses of bilateral investment treaties.[189]

Emerging economies are now quite intentional and reflective in the negotiation and drafting of exceptions clauses in BITs. Still, the range of drafting techniques and approaches reflects speaks to a global regulatory laboratory rather than the emergence of a new gold standard or even a range of best practices.

3.4. Investor and Home State Obligations

Several new BITs from emerging countries include not only rights but also robust obligations for investors. Beyond fairly obvious (and likely redundant) obligations to comply with the law of the host state, new investor obligations typically cover corporate governance, anti-corruption and corporate social responsibility.

3.4.1. India

Perhaps the most innovative feature of the 2016 Indian Model

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188 Promotion of Investment Act 22 of 2015 §12(1) (S. Afr.).

189 *See Id.* at §12(2) ("The government or any organ of state may take measures that are necessary for the fulfilment of the Republic's obligations in regard to the maintenance, compliance or restoration of international peace and security, or the protection of the security interests, including the financial stability of the Republic.").

BIT is Chapter III on investor obligations. Such undertakings include anti-corruption obligations for the investors and their investments,[190] general legal and administrative compliance and specific tax compliance with the law of the host state.[191] Article 12 includes a best efforts obligation for investors to incorporate "internationally recognized standards of corporate social responsibility in their practices and internal policies. . . These principles may address issues such as labour, the environment, human rights, community relations and anti-corruption."[192] The draft Model included an additional best efforts provision obligating foreign investors to "strive, through their management policies and practices, to contribute to the development objectives of the Host State. In particular, Investors and their Investments should recognise the rights, traditions and customs of local communities and indigenous peoples of the Host State and carry out their operations with respect and regard for such rights, traditions and customs."[193]

While many of these obligations would previously have been part of domestic law, India's strategy elevates them to treaty obligations. This strategy may result in creating a defense for India not to give to investors or investments in breach of such obligations the protections of the treaty. Hence, while investors are traditionally third-party beneficiaries to BITs, the 2016 Indian Model BIT also makes them third-party obligors in a much stronger sense than they might have been previously. However, disputes regarding these provisions are excluded from investor-state dispute settlement.[194] Two possible processes could ensue for arbitral tribunals when India as a host state argues that the investor has breached its Chapter III obligations. First, arbitrators could stay the arbitration pending resolution of the Chapter III breaches in domestic venues, and take judicial notice of any outcome in adjudicating any remaining Chapter II claims brought by the investor. Second, the arbitrators could dismiss the host state's arguments for lack of jurisdiction, if Article 13.2 is interpreted to strip them of jurisdiction on any Chapter III counterclaim, justifications or defense. It is therefore uncertain whether India could claim that a breach of Chapter III obligations by the investor justifies its actions, or justifies a reduction in the

190 2016 Indian Model BIT, *supra* note 29, at art. 11(ii).

191 *Id.* at art. 11(iii).

192 *Id.* at art. 12.

193 2016 Indian Model BIT, *supra* note 29, at art. 12.2.

194 *Id.* at art. 13.2.

amount of compensation that might be awarded by the tribunal.

3.4.2. SADC

The Model BIT devotes an entire Part 3 to the "Rights and Obligations of Investors and State Parties." The main topics addressed therein cover anti-corruption measures, environmental protection, corporate governance, human rights and labor standards, and development and investor liability.

Investors would need to complete environment and social impact assessments pre-establishment (Art. 13) meeting the most stringent of either the host state, the home state or the International Finance Corporation.[195] Article 15 on "Minimum Standards for Human Rights, Environment and Labour" uses a similar approach when it prohibits investors from managing or operating "investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher."[196] The reference to the most stringent regulatory framework of the home state, the host state or an international organization, is an original device to avoid regulatory races to the bottom and the exploitation of lower environmental and labor standards by investors. At the same time, it could resolve the issue of investors puzzling whether to comply with home state laws with uncertain extraterritorial reach.[197] Such an approach could be deployed beyond impact assessments to topics including corruption, corporate governance (fiduciary duties and accounting), and data protection, for instance.

Quite uniquely amongst the new wave of BITs and model BITs from developing countries, Article 21 on the "Right to Pursue Development Goals" reflects a number of debates that have unfolded in recent years about potential clashes between foreign investors'

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[195] SADC Model BIT, *supra* note 24, at art. 13.

[196] *Id.* at art. 15.

[197] *See, e.g.*, Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir., 1993) (holding that presumption against application of statutes exterritorialy does not apply when the conduct occurs primarily in the United States); EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) (holding that Title VII does not apply American employers that employ American workers overseas); Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (holding that detention by the Saudi Government was not "based upon a commercial activity" within the Foreign Sovereign Immunities Act).

expectations and developmental state policies.[198] This provision of the SADC Model BIT provides three main avenues for developmental objectives:

> The provision allows exceptions to non-discrimination clauses in order to implement regional development goals. The now defunct Article 8.2.b of the WTO's Agreement on Subsidies and Countervailing Measures also allowed an exception to disciplines for subsidies meant to foster regional development. The EU was and still is a major user of regional subsidies to promote the economy of disadvantaged or vulnerable regions. Developing countries are now seeking to follow that path, too.
>
> The provision also allows the state to impose certain requirements designed to "support the development of local entrepreneurs" and increase the local workforce capacity through requirements imposed on investors at the time of establishment. This provision is a response to the longstanding critique of the often limited benefits of foreign investment to assist the local workforce in moving up the corporate ladder and eventually help develop a more sophisticated local business community, rather than merely use the local workforce as a source of cheap, low-qualified labor.
>
> Last, the provision enshrines the ability of the state to "take measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the signing of this Agreement."[199] This clause seems particularly tailored in response to post-apartheid reforms in South Africa and the investment arbitration challenges some of these policies have led to in recent years.

3.4.3. Brazil

The new Brazilian agreements include a section on the responsibility of investors. Some versions are very detailed. For example,

[198] SADC Model BIT, *supra* note 24, at art. 21.

[199] *Id.* at art. 21.

the Brazil-Chile agreement[200] states that the parties should encourage companies to follow policies of sustainability and corporate responsibility that will further the development of the host country and use best efforts to comply with the OECD Guidelines for Multinationals, including respecting human rights; building local capacity and developing human capital in the host country; following best practices in corporate governance; protecting whistleblowers; and other duties. Although phrased only as best efforts commitments, these obligations could be taken into account in efforts at dispute settlements, including State-to-State arbitration.

In conclusion, recent evolutions in the drafting of definitions, rights and obligations in BITs and other investment agreements involving emerging countries reflect common trends towards a better control by the states of who and what assets may benefit from treaty protection. Much of this may be interpreted as a reaction to expansionary tendencies in arbitral interpretations.

4. Preserving Domestic Judicial Power and Reforming Investor State Arbitration

In some cases, the backlash against BITs does not focus on a particular developmental policy but rather on the perceived intrusion they create on the normal functioning of domestic institutions, including the judiciary. For instance, the vast number of BITs that India has entered into only garnered attention after a number of arbitration proceedings found not only against Indian regulatory measures, but more specifically against decisions of the Indian judiciary.[201] A number of emerging countries are therefore exploring procedural rules to limit access to ISDS (A) and substantive rules regarding arbitrators' competence to offer better guarantees of impartiality (B).

200 Chile CIFA, *supra* note 93.

201 *See* Prabhash Ranjan & Deepak Raju, *Bilateral Investment Treaties and the Indian Judiciary*, 46 GEO. WASH. INT'L L. REV. 809 (2014) (offering three ways to avoid these conflicts: exclude judicial actions from the ambit of treaty-based arbitrations, exclude judicial actions from the ambit of substantive treaty protections, or require exhaustion of local remedies).

4.1. Limiting Access to Arbitration by Investors

As discussed in Section I.B.3 above, "fork in the road provisions" giving investors the choice to use domestic legal remedies in the host state or ISDS have been a feature of BITs for some time. In practice, investors typically prefer ISDS. Some BITs also have waiting periods after investors raise a grievance but before they can engage in litigation or arbitration, presumably to give the parties a chance to work out a settlement. More drastically, requirements to exhaust local remedies create an even greater hurdle for investors to initiate arbitration proceedings. Limiting arbitral jurisdictions to certain claims is another way to constrain the scope of international investment arbitration. These steps, and other measures taken by developing countries, are illustrated below.

4.1.1. India Model BIT

The long and detailed Chapter IV on disputes between investors and a state party reflects the government's effort both to narrow the scope of ISDS claims as well as to improve its procedures. India's reservations concerning ISDS are also clear from the fact that it is not a member of ICSID. Nonetheless, India has been a respondent in some twenty investment arbitrations since 2003. Nine of these settled (all involved the financing of the Dabhol energy project in Maharashtra), one was decided in favor of the investor and ten are pending.[202] Indian investors were involved in three cases, one of which settled, one that had an unknown status and one that is pending.[203] They held arbitrations at the PCA under the UNCITRAL rules[204] with a single or three arbitrators, presumably *ad hoc*, under

202 India Country Case, UNCTAD INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/ISDS (Click "India") [https://perma.cc/7BRR-T3HA].

203 *Id.*

204 Indian Metals & Ferro Alloys Ltd v. Republic of India., PCA Case No. 2015-40, UNCTAD INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/ISDS/Details/682 [https://perma.cc/EL66-LR9R]; Louis Dreyfus Armateurs SAS v. The Republic of India, PCA Case No. 2014-26, UNCTAD INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/ISDS/Details/600 [https://perma.cc/PT3B-BNVX]; CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India, PCA Case No. 2013-09, UNCTAD

UNCITRAL rules.[205] The 2016 Model BIT allows arbitrations under the ICSID Convention "provided that both the Parties are full members of the Convention" (which seems inapplicable since India is not a party) or the "Additional Facility Rules of ICSID "provided that

INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/ISDS/Details/484 [https://perma.cc/4SCF-YSM3]; Tenoch Holdings Limited et al. v. The Republic of India, PCA Case No. 2013-23, UNCTAD INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/ISDS/Details/491 [https://perma.cc/B36E-THQA].

205 South Asia Entertainment Holdings Limited v. India, UNCTAD INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/ISDS/Details/735 [https://perma.cc/QX4Y-629S]; All Asia Networks v. India; Vedanta Resources plc v. India, UNCTAD INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/ISDS/Details/733 [https://perma.cc/J6P3-3R77]; Cairn Energy PLC v. India, PCA Case No. 2016-7, UNCTAD INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/ISDS/Details/691 [http://investmentpolicyhub.unctad.org/ISDS/Details/691]; Vodafone International Holdings BV v. India, PCA Case No. 2016-35, UNCTAD INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/ISDS/Details/581 [http://investmentpolicyhub.unctad.org/ISDS/Details/581]; Deutsche Telekom v. India, UNCTAD INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/ISDS/Details/550 [https://perma.cc/HL6X-N7QR]; Khaitan Holdings Mauritius Limited v. India, UNCTAD INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/ISDS/Details/553 [https://perma.cc/8WX2-CDFT]; White Industries Australia Limited v. The Republic of India, UNCTAD INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/ISDS/Details/378 [https://perma.cc/T49P-S2SY]; ABN Amro N.V. v. Republic of India, UNCTAD INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/ISDS/Details/149 [https://perma.cc/DS76-V5EV]; ANZEF Ltd. v. Republic of India, UNCTAD INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/ISDS/Details/151 [https://perma.cc/TUT3-3JWU]; BNP Paribas v. Republic of India, UNCTAD INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/ISDS/Details/147 [https://perma.cc/X5AP-F36Y]; Credit Lyonnais S.A. (now Calyon S.A.) v. Republic of India, UNCTAD INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/ISDS/Details/148 [https://perma.cc/J654-VL5W]; Credit Suisse First Boston v. Republic of India, UNCTAD INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/ISDS/Details/150 [https://perma.cc/D3FE-S7TD]; Erste Bank Der Oesterreichischen Sparkassen AG v. Republic of India, UNCTAD INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/ISDS/Details/141 [https://perma.cc/J4WW-J8KQ]; Offshore Power Production C.V., et al. v. Republic of India, UNCTAD INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/ISDS/Details/139 [https://perma.cc/92VJ-PS6H]; Standard Chartered Bank v. Republic of India, UNCTAD INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/ISDS/Details/152 [https://perma.cc/CZP7-TF88]; Bechtel Enterprises Holdings, Inc. and GE Structured Finance (GESF) v. The Government of India, UNCTAD INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/ISDS/Details/104 [https://perma.cc/X85K-3QBE].

either Party. . .is a member of the ICSID Convention."[206]

The restrictive nature of ISDS under the 2016 Indian Model BIT comes from the interaction of two features: exhaustion of domestic remedies and immunity of domestic court decisions. On the one hand, the Model requires that investors must exhaust remedies available under domestic law that cover "the same measure or similar factual matters for which a breach of [the] Treaty is claimed"[207] for at least five years from the date when the investor first knew of the measure[208] before proceeding with investor-state arbitration under the BIT. However, if no domestic recourse exists or no resolution was reached within the five-year period, investors may proceed to arbitration,[209] subject to another six-month negotiation period,[210] but only if less than six years have elapsed since the investor first knew or should have known of the measure.[211] On the other hand, the Model BIT states that arbitration tribunals lack the jurisdiction to "review the merits of a decision made by a judicial authority of the Parties."[212] In practice, then, it appears that investors must first vindicate their grievances in Indian courts; if they win, they will not need ISDS. If they lose, they will be precluded from resorting to ISDS on those same issues because the tribunal cannot take up an issue once decided by a court. In any case, investors have a six-months window, to make a claim, after five years and six months have elapsed but before six years after they first knew or should have known of the measure. Referring to similar requirements in the draft Model BIT, the Law Commission of India commented:

> This provision renders the entire BIT unworkable. . .Pursuing domestic remedies would entail an interaction with the judicial authorities of the Host State, which would result in . . .decisions on the merits. However. . .any finding by a local Court [acts] as a jurisdictional bar in as so far as the Arbitral Tribunal is concerned. It is hard to contemplate too many scenarios where an investor would comply with the provision for exhaustion of local remedies and yet overcome

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206 2016 Indian Model BIT, *supra* note 29, at art. 16.1.

207 *Id.* at art. 15.1.

208 *Id.* at art. 15.2.

209 *Id.* at art. 15.2.

210 *Id.* at art. 15.4.

211 *Id.* at art. 15.5 (i).

212 *Id.* at art. 13.5.

the jurisdictional bar imposed by Article 14.2(2).[213]

4.1.2. China

BITs involving China at times include procedural and substantive limitations or pre-requisites to investor-state arbitration but no systematic drafting strategy transpires from a review of recently negotiated BITs. A number of recent BITs include a "cooling off" period of six months since the events giving rise to the claim before the investor may submit an arbitral claim.[214] Moreover, a notice period to the contracting party may be required declaring the investor's intent to file for a claim, and it is unclear whether it runs concurrently with the cooling off period (see, e.g., four-month notice period and six-month since the events giving rise to the claim in the China-Canada BIT).

With respect to forum, China signed on to ICSID in 1990 and ratified it in 1993 but restricted ICSID tribunals' jurisdiction to claims regarding compensation for expropriation. Moreover, not all BITS signed by China after its ICSID ratification refer to ICSID jurisdiction, which some commentators interpret as a continued reluctance from China to embrace ICSID proceedings.[215]

Some BITs provide for an exhaustion of certain local remedies. For instance, the China-Malta BIT requires investors to go through "the administrative review procedures according to the laws of the

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[213] Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty, Report No. 260, Law Commission of India, *available at* http://lawcommissionofindia.nic.in/reports/Report260.pdf [https://perma.cc/55P6-DPSW]. The Commission accepts the provision that bars the Arbitral Tribunal from reviewing the merits of a judicial decision but believes Tribunals should be able to determine if such a decision, taken as a final and irreversible government act, violates some provision of the treaty. The jurisdictional bar could make this impossible. The US National Association of Manufacturers argues that these provisions foreclose "any ISDS cases in areas that might be covered by judicial action, including the very important area of intellectual property protection." NATIONAL ASSOCIATION OF MANUFACTURERS, COMMENTS ON DRAFT INDIAN MODEL BILATERAL INVESTMENT TREATY, 7 (2015) http://www.nam.org/Issues/Trade/ISDS/NAM-Comments-on-Draft-India-Model-Bilateral-Investment-Treaty-Joint-US-EU-Business.pdf [https://perma.cc/545V-WN68]

[214] *See e.g.*, Canada-China BIT, *supra* note 175, at art. 21.2(b) ("at least six months have elapsed since the events giving rise to the claim.").

[215] NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES – POLICIES AND PRACTICE 39 (2009).

[PRC]" prior to submitting an arbitration claim. Similarly, Malta requires Chinese investors to exhaust local judicial or arbitral recourses prior to undertaking international investor-state arbitration.[216] While the language may be straightforward, navigating the requirements in practice may be much more complicated since it requires research and interpretation of the local law regarding which local administrative or judicial proceedings are required in each legal system. This may be all the more so the case for China, where local, regional and central administrations amounts to as many layers of potential administrative proceedings.

Substantive restrictions typically either exclude certain sectors from arbitration or seek to protect the host state's prudential and regulatory authority. For instance, the China-Canada BIT provides that a contracting party may respond to an arbitral claim by invoking Article 33(3), which in turn may trigger a state-to-state arbitration between the BIT signatories. The investor-state proceedings are stayed while the state-to-state claim is adjudicated.[217] Article 33(3) states:

> Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining reasonable measures for prudential reasons, such as:
>
> (a) the protection of depositors, financial market participants and investors, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution;
>
> (b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and
>
> (c) ensuring the integrity and stability of a Contracting Party's financial system.[218]

It may be that Canada was the party advocating for such a provision, though the treaty was signed in 2012, when the 2008 financial crisis would still have been very much at the forefront of regulators' priorities. Argentina's financial and economic crisis of the early 2000s, and the ensuing string of arbitrations that revealed the very

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216 Agreement Between the Government of the People's Republic of China and the Government of Malta on the Promotion and Protection of Investments, China-Malta, art. 9, Feb. 22, 2009, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3368 [https://perma.cc/C25H-SMZU].

217 Canada-China BIT, *supra* note 175, at arts. 20.2(a), 33(3).

218 *Id.* at art. 33(3).

limited safeguards to protect prudential measures may also have been a motivation behind Article 33.

By contrast, some Chinese BITs are mostly free of procedural or substantive limitations to arbitration.[219] Ultimately, how much of a recourse an investor-initiated arbitration against China would be is questionable. Relationships with government officials may be more critical to the redress of grievances. A breakdown in such relationships, by contrast, means that even if arbitration leads to a victory for the investor, it may be a hollow one. Conversely, outwards investments where Chinese investors seek arbitration against a host state may play out differently depending whether the investor has the support of the Chinese government.

4.2. Moving Away from the pro-Investor Bias

Investor-state arbitration has fallen prey to increasingly vocal critiques regarding bias in favor of investors due to shortcomings in the vetting mechanism for arbitrators, procedures for arbitration and a culture of skepticism regarding the legitimacy of states' regulatory measures when they adversely affect foreign investments. These concerns have taken on all the more visibility with the European Union advocating for a permanent international investment court in lieu of ISDS.[220] The topic is therefore no longer solely a sore point for emerging countries but a shared issue for many developed and developing countries alike. This section reflects on some proposals from emerging countries to improve the legitimacy of investor-state dispute resolution.

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[219] *See e.g.*, Agreement Between the Government of the People's Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments, China-Uzb., art. 12, Apr. 19, 2011, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3357 [https://perma.cc/X5S3-2E9Z] (requiring only a 6-month negotiation period for certain claims).

[220] *See e.g.*, European Commission Press Release MEMO/16/4350, EU-Canada Trade and Investment Negotiations, Dec. 13, 2016 http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm [https://perma.cc/GK9P-ECDV] ("The European Commission and the Canadian Government are working together to establish a multilateral investment court"); European Commission Press Release IP/15/5651, TTIP Negotiations with the UN, Sept. 19, 2015, available at http://europa.eu/rapid/press-release_IP-15-5651_en.htm [https://perma.cc/LE4U-E72F] ("The European Commission has approved its proposal for a new and transparent system for resolving disputes between investors and states – the Investment Court System").

4.2.1. India

The 2016 India Model BIT includes detailed sections on qualifications and on selection of arbitrators and transparency of procedures. Article 18.1 lists the fields of expertise acceptable for arbitrators.[221] Articles 18.1 and 19 specifies how the arbitrators and the parties should deal with arbitrators' potential conflicts of interests.[222] Despite their length, the provisions still leave much to interpretation and to the appreciation of the parties and the arbitrators alike. Article 19.10 does list specific circumstances in which a "justifiable doubt as to an arbitrator's independence or impartiality or freedom from conflicts of interests shall be deemed to exist."[223] Additionally, other unlisted events or circumstances may also give rise to a "justifiable doubt" regarding an arbitrator's suitability. Most have to do with arbitrator's connections with the parties or their attorneys, for instance if the arbitrator is in the same law firm as one of the counsels. Arbitrators are required to disclose in writing any potential conflict of interest[224] and the existence of such circumstances are grounds for a challenge by a party to the dispute.[225]

The 2016 Model BIT also includes provisions on the dismissal of "frivolous claims" defined as "a claim submitted by the investor [. . .]: (a) not within the scope of the Tribunal's jurisdiction, or (b) manifestly without legal merit or unfounded as a matter of law."[226] Meritless suits brought by investors primarily to put pressure on host states have been a recurrent concern of developing host countries, particularly because of the limited resources they have at their disposal to defend claims.

In response to another critique often leveled at the ISDS system, the Model BIT includes a transparency provision,[227] which creates a presumption that key legal documents relating to investor state arbitrations will be made publicly available, including the notice of arbitration, written submissions by the parties, transcript of the

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221 2016 Indian Model BIT, *supra* note 29 at art. 18.1.

222 *Id.* at arts. 18.1. and 19.

223 *Id.* at art. 19.10.

224 *Id.* at art. 19.2.

225 *Id.* at art. 19.3.

226 *Id.* at art. 21.1.

227 *Id.* at art. 22.

hearings and awards of the tribunal. This constitutes a radical departure from the traditional ISDS framework.

4.2.2. SADC

A recurring critique of traditional investor state dispute settlement models is that only the investor has the ability to trigger arbitration procedures. Arguably, a host state could contract with the investor for a reciprocal arbitration clause in any contract made between the state and the investor (such as concession contracts), or simply use its domestic courts in any disputes with the foreign investor. The problem with the latter is that investors increasingly tend to challenge domestic court decisions in BIT arbitrations, at times frustrating the finality of domestic court judgments. BITs and Model BITs from developing countries offer a variety of responses to this phenomenon.

The SADC Model BIT explicitly affirms the right of host state to present counterclaims in arbitrations initiated by foreign investors.[228] In addition, host state may initiate domestic proceedings against the investor in its home state, under the domestic law of that home state.[229] Such an avenue dovetails with other provisions in the SADC Model BIT on environmental impact assessment, and labor and human rights standards which are to be taken from the host or home state (or an international organization), whichever is the most stringent. Moreover, it avoids the issue of foreign judgment recognition if the host state was to win its case in its domestic courts but sought to enforce the judgment in the home state, presumably because the investor has assets there. Along the same lines, the ability to sue directly in the investor's home state makes recovery against the investor's local assets much more likely, as domestic attachment measures to prevent assets from fleeing the jurisdiction are much easier to obtain than so-called Mareva injunctions[230] to prevent the

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[228] SADC Model BIT at art. 19.

[229] *Id.* at art. 19.4.

[230] Worldwide Mareva injunctions refer to the freezing of assets outside of the court's jurisdiction. *See, e.g.*, Obégi v. Kilani, 2011 ONSC 1636 (Can.) (discussing whether the court could assume jurisdiction on the matter regarding the freezing of assets in Ontario). *See generally* David Capper, *Worldwide Mareva Injunctions*, 54 MODERN L. REV. 329 (1991) (examining worldwide Mareva injunction cases and obstacles posed to asset freezing).

transfer of assets located in another jurisdiction. Despite the many potential benefits of Article 19.4, a number of hurdles may frustrate its purpose. First, the home state domestic law might not provide standing for the host state to sue. Second, the host state, by initiating proceedings, would be relinquishing its sovereign immunity and may expose itself to counterclaims from the investor. Third, the trend of "reverse incorporations" for tax shielding purposes may make it difficult to identify the home state of an investor, or may result in the home state not having any assets of the investors, if it used merely as a nominal incorporation location.

4.2.3. UNASUR

As mentioned earlier, UNASUR countries have declared their opposition to ICSID as a forum and some members have sought to develop an alternative arbitral forum in Latin America. More radically, the "Bolivarian Alternative for the Peoples of Our America" (ALBA) strongly opposes the traditional ISDS system. Principle 16 of the Fundamental Principles of the Peoples' Trade Treaty (TCP) provides "[t]he exigency that foreign investment respects national laws. Unlike FTAs which impose a series of advantages and guarantees in favour of transnational companies, the TCP looks for a foreign investment that it respects the laws, reinvest the utilities and solves any controversy with the State like any national investor."[231] Bolivia and Ecuador, two member countries of ALBA and TCP now have constitutional provisions prohibiting the respective governments from entering into treaties where the domestic judiciary would be displaced by international arbitration.[232]

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[231] Fundamental Principles Of The Peoples' Trade Treaty, BOLIVARIAN ALLIANCE FOR THE PEOPLES OF OUR AMERICA [ALBA], http://alba-tcp.org/en/contenido/governing-principles-tcp [https://perma.cc/MV4B-9BKX].

[232] CONSTITUCIÓN DE ECUADOR, Sept. 2008, art. 422 (Ecuador); REPÚBLICA DE BOLIVIA – CONSTITUCIÓN DE 2009, Feb. 7, 2009, art. 366 (Bol.). *See also* INTERNATIONAL INVESTMENT LAW IN LATIN AMERICA / DERECHO INTERNACIONAL DE LAS LAS INVERSIONES EN AMÉRICA LATINA: PROBLEMS AND PROSPECTS / PROBLEMAS Y PERSPECTIVAS, 180-81 Attila Tanzi et al. (eds., 2016) ("It may be noted that both Bolivia and Ecuador have recently amended their own constitutions in the sense of banning international arbitration.").

5. CONCLUSION: LESSONS FROM EMERGING ECONOMIES

There is no single strategy for investment governance in emerging countries. Positions seem to range from China's embrace of the BITs system, at least as far as its outbound investments are concerned, to ALBA's categorical and vitriolic rejection of BITs. The debates over international investment law are on-going and the system is in flux. Emerging economies have sent a signal that they are no longer willing to accept the system as it emerged twenty years ago. The impact of this message in ongoing bilateral, regional and multilateral negotiations remains an open question.

The debate over BITs goes beyond technical legal issues. Different views of development strategy and the role of FDI in a successful development model are at stake. At one end of the spectrum are those who want to create a fully integrated global economic space in which capital, unfettered by regulation, will seek its highest and best use. From this point of view, it makes sense to keep foreign investment free of as many restrictions as possible. There is no tradeoff between promoting investment on the one hand, and regulation in the name of development strategy on the other. From this viewpoint, most restrictions are economically inefficient and the best strategy is to allow unfettered FDI. At the other end are those, like ALBA, that see FDI as part of an imperialist project that will undermine inclusive development and should be limited to the extent possible.

The approach in most emerging economies lies between these two poles. In what we might consider the consensus view, FDI is neither good nor bad, *a priori*. Everything depends on the nature of the investment and the rules that govern it. Host countries want to maintain their ability to regulate investments so they conform to development priorities. That leads to the demand for policy autonomy and for an increased space for domestic debate regarding the articulation of socio-economic development strategies and investment policy. It is fair to say that all countries insist on greater protection for policy space. Countries, like India and China, that accept ISDS preserve regulatory capacity by carving out exceptions and spelling them out with great specificity. The Brazil CIFAs reaffirm "legislative autonomy and space for public policies" but do not contain specific carve-outs. It would seem that Brazil expects to handle that more by ensuring that it can maintain control of any dispute settlement process than by specific language.

Recent developments suggest that resistance by emerging economies, as well as concerns of developed countries who are themselves facing ISDS claims by investors (including investors from emerging countries), may lead to major changes in the BITs regime. In a recent report, UNCTAD proposed an Investment Policy Framework for Sustainable Development listing eleven core principles for investment policymaking for sustainable development.[233] The report recommends incorporating concrete commitments to promote and facilitate investment for sustainable development: requiring investors to comply with investment-related domestic laws of the host state, including regulation regarding environmental cleanup; formulating a fair and equitable treatment clause as an exhaustive list of state obligations; limiting full protection and security provisions to physical security and protection only and; including carefully crafted exceptions to protect human rights, health, core labor standards and the environment.[234]

Similar ideas are being put forth in the context of the debates over the mega-regionals. The United States agreed to public health exceptions in the draft for ISDS in the TPP before withdrawing from the project. The EU made a number of suggestions for the ISDS section of the proposed TTIP, now also shelved by the United States. For example, the EU sought to restrict the concept of fair and equitable treatment to exclude the "legitimate expectations" standard. The EU also wanted to ensure that the concept of full protection and security was limited to physical protection and security, not the protection of intangibles such as intellectual property. Finally, the EU proposed a court-like system to replace private arbitration and create greater certainly concerning prevailing norms. To some extent, these proposals are congruent with some of the concerns from emerging countries. While the TTIP appears to be either dead or in cold storage, and the TPP (minus the United States) is in flux, another mega-regional agreement is emerging in Asia that may become the next arena for the construction of international investment law. The Regional Comprehensive Economic Partnership (RCEP), led by China and involving the ten ASEAN members, Australia China, India, Japan, South Korea and New Zealand,[235] will include

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233 WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES 107 (UNCTAD, ed. 2012).

234 *Id.* at 135-141.

235 *See generally*, Regional Comprehensive Economic Partnership, AUSTRALIAN GOVERNMENT, DEPARTMENT OF FOREIGN AFFAIRS AND TRADE,

an investment chapter. While negotiations are still ongoing, drafts of the investment chapter that have emerged so far suggest that some of the innovations being pushed by emerging economies are on the agenda and may end up in the final version of the agreement. Proposals reportedly have been put forward to include ISDS but details are not available and a final decision on this section has not been reached.[236] One observer, noting that China has accepted ISDS in numerous BITs, believes that RCEP will include ISDS of some type.[237] Finally, even if any of these mega-regional agreements fail to come about, bilateral negotiations will likely be infused by the range of concerns and drafting experimentation of the past decade.

http://dfat.gov.au/trade/agreements/rcep/Pages/regional-comprehensive-economic-partnership.aspx [https://perma.cc/3ZBW-7EE4] (Description of the RCEP including interest, benefits, and relevant news).

236 A 2015 leaked draft chapter on investment does not mention ISDS. RCEP Draft Investment Text India (based on Draft investment Text October 2015), http://www.bilaterals.org/IMG/pdf/rcep-draft-investment-text-india.pdf [https://perma.cc/9W89-W7E5].

237 *Id.*; Heng Wang, *The RCEP and its Investment Rules: Learning from Past Chinese FTAs*, 3 CHINESE J. GLOBAL GOVERNANCE 2 (2017).