A NEW AUSTRIAN MODEL BIT: LOOKING FOR ALTERNATIVE MODELS
A New Austrian Model BIT: Looking for alternative models

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<td>Bilateral Investment Treaty</td>
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<td>CEPA</td>
<td>Closer Economic Partnership Arrangement</td>
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<td>CETA</td>
<td>Comprehensive Economic and Trade Agreement</td>
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<td>CFIA</td>
<td>Cooperation and Facilitation Investment Agreement</td>
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<td>CPTPP</td>
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1.0. Introduction

Austria is party to 60 bilateral investment protection treaties (BITs). In its Foreign Trade Strategy 2018, the Austrian government announced a process to review its 2008 Model Bilateral Investment Treaty (BIT). The model text is intended to serve as a basis for negotiations of future BITs as well as for the modernisation of existing BITs. To contribute actively to the review process once it begins, the Austrian Chamber of Labour has engaged the International Institute for Sustainable Development (IISD) to conduct a study on the priorities that the Chamber has identified. These are as follows:

0.) The Chamber of Labour is strongly opposed to investor–state dispute settlement (ISDS) because of the various negative effects it has on society (such as regulatory chill and high damages awards). Accordingly, the Chamber requests that this study provide an overview of alternatives that other governments have adopted to old-generation ISDS mechanisms and explore options that could be available for Austria.

1.) The Chamber of Labour wishes to support the Austrian government in drafting the new Model BIT in the least harmful way possible. The Chamber therefore would like to see this study present various approaches and model clauses that governments have adopted in drafting substantive investment protection obligations as a response to the expansive and unpredictable interpretations of arbitral tribunals.

2.) The Chamber of Labour is of the view that foreign investors should not only have rights, but also obligations, and therefore requests that this study introduce different approaches and model clauses on investor obligations on human rights, labour rights, climate protection, sustainable development, and other important policy areas.

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2.0. Background

2.1. Objectives and Rationale of Investment Protection Treaties and ISDS

The current regime of international investment agreements (IIAs) comprises over 3000 investment protection treaties and chapters, with over 2600 currently in force, and most of which include investor-state dispute settlement (ISDS) clauses. These treaties have given rise to more than 1000 known cases against host states, mostly over the last 10 to 15 years. Typically, treaties impose a range of obligations on host states that foreign investors may ask an international arbitral tribunal to enforce. The same treaties do not, by contrast, impose obligations on investors and their investments in relation to their business conduct in the host country. As a result, ISDS claims can be brought by only one stakeholder group—foreign investors—while states are always respondents. The regime was intended to target specific measures such as nationalization and expropriation, but over time arbitral tribunals widened undefined standards to include regulatory changes, even when these changes are made for a public purpose. These regulatory decisions could include, for example, phase-outs of nuclear energy or coal, or permit denials for environmental reasons or due to opposition by local or indigenous communities. Investment arbitration awards may give rise to significant amounts of damages, often in the hundreds of millions or even billions of Euros.

In return, capital-importing countries entered into investment treaties with the expectation that these agreements would stimulate foreign capital inflows, specifically by showing foreign investors that they would have legally enforceable protections if they chose to invest in that country. In turn, the capital-importing country would be able to use this influx of capital to achieve its development objectives. Additionally, these countries expected various indirect benefits from these investments, such as by having access to the technology and knowledge that foreign investors brought with them.

However, there is a growing body of research which indicates that these expectations remained largely unmet, predominantly for two reasons. First, investment flows are primarily influenced by the particular characteristics of host states, such as an abundance of natural

7 See id., p. 47.
8 See id.
resources or cheap labour, rather than the existence of an investment treaty. Second, the impact of investment flows depends on the type of investment and the economic sector concerned, an aspect not addressed in most investment treaties, since treaties treat all investments without distinction.

The effects of FDI on host states also depend on various domestic factors. Accordingly, assessing the effects of IIAs can become complicated, as it is difficult to separate these effects from the host states' investment climate. Regarding home states, the benefits of the investment tend to go to the investing firms, and it is difficult to measure how much of these benefits also accrue to home states.

IIAs put foreign investors in a better position when compared to domestic investors because these agreements provide foreign investors with additional dispute settlement options at the international level. These agreements also allow foreign investors to avoid domestic courts altogether if they wish. This preferential treatment is generally defended by the fact that investors might be at a disadvantage when operating in a foreign state. However, studies show that foreign investors are not generally discriminated against by host states because of their foreign status.

### 2.2. The Mounting Discontent with ISDS

Over the past few years, criticism of the investment treaty regime, and particularly ISDS, has continued to grow among governments, parliaments, and civil society. For the first time, in 2017 and again in 2019, IIA terminations outnumbered the signing of new treaties. Despite an increase in the termination of older-generation investment treaties, an overwhelming number of investment treaties today remain older-generation treaties that have not incorporated new priorities. Currently, most arbitration cases are brought under this type of investment treaty. In response to the mounting discontent among countries with the investment treaty regime and ISDS, the United Nations Conference on Trade and

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9 See id., p. 166.
10 See id., p. 46-9.
12 See id., p. 16.
13 See Id. p. 5.
16 Id., p. xii.
International Institute for Sustainable Development

Development (UNCTAD) has proposed reviewing existing IIAs that have led and are leading to a large number of cases (UNCTAD’s proposed phase 2 of reform). Accordingly, countries around the world are embarking on renegotiating or terminating out-dated treaties and developing new national investment treaty models and guidelines.\(^\text{17}\)

In negotiating or renegotiating new treaties, governments have pursued a range of strategies to address ISDS-related problems. UNCTAD’s 2018 review of IIAs shows that states are either: (1) retracting from the ISDS system by deleting clauses from the treaties or giving states the right to withhold their consent to ISDS, (2) replacing the ISDS arbitration mechanism with a standing ISDS tribunal or rosters of arbitrators, (3) limiting access to ISDS by requiring the exhaustion of local remedies, and (4) improving ISDS procedures by regulating third-party interventions and the impartiality of arbitrators. However, certain treaties have retained their existing ISDS mechanisms intact.\(^\text{18}\)

More recently, in 2017, the United Nations Commission on International Trade Law (UNCITRAL) decided to explore reform options in relation to ISDS. It granted its Working Group III a broad mandate in three stages: (1) to identify concerns regarding ISDS, (2) to consider whether reform is desirable, and (3) if so, to develop solutions for recommendation to the commission.\(^\text{19}\) During its first working sessions, the Working Group established a list of identified concerns classified in four categories: (i) lack of consistency, coherence, predictability, and correctness of arbitral decisions by ISDS tribunals; (ii) issues concerning arbitrators and decision makers; (iii) cost and duration of ISDS proceedings; and (iv) other concerns, such as third-party funding.\(^\text{20}\) The Working Group also considered it important to take into account other cross-cutting issues, including dispute prevention and alternative methods to resolve disputes, exhaustion of local remedies, third-party participation, counterclaims, regulatory chill, and the calculation of damages.\(^\text{21}\)

\(^{17}\) See UNCTAD, supra note 14, p. 100. For example, in 2018 the Netherlands and Saudi Arabia published their new model BITs.

\(^{18}\) See id., p. 106.


\(^{21}\) See id., para. 6.
3.0. Alternatives to the Current Investor–State Arbitration Regime

States have approached concerns regarding ISDS in different ways, with some no longer agreeing to include such clauses in new treaties, others disallowing the notion of advance consent, and still others circumscribing access to ISDS.

3.1. Circumscribed and Improved Investor–State Arbitration

a. Exhaustion of Local Remedies

Some states are concerned about the fact that ISDS mechanisms allow foreign investors to circumvent domestic judicial processes entirely by initiating international arbitration, rather than trying first to resolve the issue through domestic channels. This practice deviates from the customary international law rule of exhaustion of local remedies. Pursuant to this rule, international dispute settlement can be initiated only after going through the respondent state’s domestic administrative and judicial system. However, according to arbitral practice in international investment law, this rule has been dispensed with through the doctrine of advance consent in investment treaties. Through this doctrine, arbitral tribunals have considered that host states give advanced consent within investment treaties to any dispute an investor brings, without needing to go through their domestic legal system first, regardless of whether this is explicitly stated in the treaty. Accordingly, academics and arbitral tribunals have taken the view that unless the treaty expressly demands the exhaustion of local remedies, this requirement is waived.

Although absent from most investment treaties, certain BITs of the 1990s and 2000s include mandatory exhaustion of local remedies, such as those treaties signed by Argentina, Romania, India, Turkey, the United Arab Emirates, and Uruguay. In addition, more recent treaties have

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23 See id.

included this requirement, as seen with the United States–Mexico–Canada Agreement (USMCA).

This trend is also apparent with some of the newer model treaties, such as the Indian Model BIT. For example, the 2018 India–Belarus BIT, following the approach of the Indian model BIT, requires investors to submit investment disputes to the domestic judicial or administrative system for at least five years before they can then access arbitration. The investor is excused from this obligation only if they can demonstrate that there was no available domestic relief for their claim or if five years have passed without receiving a satisfactory remedy. Similarly, the U.S. and Mexico agreed that under the USMCA, NAFTA’s successor, investors from their respective countries must exhaust or pursue local remedies in the other country for a minimum of 30 months before they can access ISDS arbitration. This requirement does not, however, apply to disputes involving Canada or Canadian investors.

By way of contrast, Brazil has taken a unique route to dispute resolution through its Cooperation and Facilitation Investment Agreements (CFIAs). These treaties propose a dispute prevention procedure through an Ombudsperson and a joint committee. Foreign investors must exhaust these procedures before submitting the dispute to an ad hoc arbitral


26 See India–Belarus BIT (2018), art. 15.


28 See United States-Mexico-Canada Agreement (USMCA), (2018), Annex 14-D.
tribunal. Finally, South Africa’s act governing investment imposes the exhaustion of domestic remedies before the government may consent to international arbitration.

b. Specific Consent

Treaties typically define the terms “investment” and “investor” very broadly. For this reason, the pool of potential claimants under ISDS is similarly broad and highly unpredictable, especially since indirect investors are often unknown to the host state. Ordinarily, parties to a contract or a dispute can agree in an arbitration agreement to settle a dispute outside of court. This agreement can be made either before the dispute arises or after. While the exact nature of the dispute may or may not be known at the time of the agreement, a party would know whom it is agreeing to go to arbitration with. The international investment arbitration system therefore differs significantly from this traditional approach to investment.

In addition to a contract between an investor and the host government containing a written arbitration agreement between them, international arbitration can also be based on a domestic investment law/code or an international investment treaty containing an ISDS clause. Here, tribunals have frequently held that the host state provides consent to arbitration in advance, albeit without knowing who the potential claimant might be.

To move away from this uncertainty, some treaties require states to give specific consent to investment arbitration on a case-by-case basis. For example, pursuant to Article 34.2 of the 2001 New Zealand–Singapore FTA, the respondent state must agree to international arbitration for any claim to proceed. South Africa’s Protection of Investment Act also has a specific consent provision in its Article 13(5). Furthermore, Indonesia is considering including in its BITs a requirement for separate consent as a prerequisite for investors to access arbitration on a case-by-case basis. This type of approach allows the host government to refer disputes to international arbitration while retaining control over consent vis-à-vis the investor.

c. ISDS Carve-outs and Limited Scopes of Application

While some governments are concerned with the broad definitions and wide scope of the concepts of “investment” and “investor,” other governments are also worried about the wide scope of the application of investment treaties. Investment treaties typically cover all sectors and all types of measures taken at all levels of government, including by the executive, legislative, and judicial branches.

To avoid the risk of investors being able to challenge a large range of measures via arbitration, some governments have limited the scope of ISDS through carve-outs. In certain instances, they have barred investors from being able to access ISDS. For example, older Chinese and Russian investment treaties typically limit ISDS to the determination of the amount of compensation to be awarded for an expropriation (quantum), excluding the question whether expropriation indeed occurred (merits).32 A more recent example is the Canada–European Union (EU) Comprehensive Economic and Trade Agreement (CETA), which does not extend ISDS to all obligations pertaining to pre-establishment and market access investment provisions.33 The USMCA limits ISDS further in certain respects, extending ISDS only to direct expropriation and non-discrimination, but not to other obligations, such as minimum standard of treatment.34 Additionally, after a three-year transition period, ISDS will only be available between Mexico and the United States.35

The CETA and the Dutch model BIT also limit the scope of application of ISDS in certain cases, including when the investor acquired the investment through fraud or corruption, or to avoid treaty shopping. The Dutch model BIT provides:

Article 16 Scope of application

... 
2. The Tribunal shall decline jurisdiction if the investment has been made through fraudulent misrepresentation, concealment, corruption, or similar bad faith conduct amounting to an abuse of process.

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32 See China–Syria BIT (1996), art. 9(3); See United Kingdom–Russia BIT (1991), art. 8.
35 See id. Annex 14.D.
3. The Tribunal shall decline jurisdiction if an investor ..., which has changed its corporate structure with a main purpose to gain the protection of this Agreement at a point in time where a dispute had arisen or was foreseeable. ...36

Governments can also limit ISDS to certain sectors, or explicitly exclude certain sectors from coverage. For example, the USMCA grants full access to ISDS only to foreign investors that are “party to a covered government contract”37 and belong to one of the “covered sectors”38 (i.e., oil and gas, power generation, telecommunications, transportation, and infrastructure39). All other investors can only use ISDS to enforce claims of direct expropriation, national treatment, and most favoured nation treatment. In a similar way, states could therefore also exclude the oil and gas sector from ISDS for climate reasons.

In contrast to the situation under the preceding NAFTA, Canada is not a party to the investor-state provisions under the UMSCA. As there are no other treaties with ISDS provisions in force between the U.S. and Canada, this effectively means that investors from Canada and the U.S. will not have access to ISDS in those countries once the “legacy claims” provision that allows for disputes to continue under NAFTA expires in 2023.40 Investors from the US and Mexico, however, will retain access to ISDS under the new agreement.

To sum up, states are free to narrow the scope of ISDS however they wish, but they must do so clearly and explicitly. They can introduce limitations by sectors, types of measures (for example, tax measures or by whom they are taken), or by the host state obligations set out in the treaty. Alternatively, the scope of the treaty itself could be reduced, rather than just the scope of ISDS.

36 Dutch Model BIT (2018), art. 16.
38 Id.
d. Denial of benefits

In addition to expressly limiting access to ISDS within the treaty, negotiators may decide to grant states the power to deny the benefits of investment protection provisions and ISDS at any time after the treaty has entered into force. States are free to determine at what exact stage such a decision to deny benefits can be made. They may, for instance, decide that the power is limited to the time before a claim is being brought, or, alternatively, even extend the power to situations where a claim has already arisen. The CPTPP, for example, provides that contracting parties “may elect to deny the benefits of [the investment protection provisions], with respect to claims challenging a tobacco control measure”41. It goes on to state that such a claim shall either not be submitted to arbitration, or, where the claim has already been submitted, that such a claim shall be dismissed. In other instances, states have reserved the right to deny benefits to investors that are controlled by persons of a non-party, i.e., a third state, or where the controlling person has no substantial business activity in their territory42. The power to deny benefits to certain investors may be limited by a set of requirements, frequently involving prior notice or consultations between the contracting states.43

e. Screening Processes and Advisory Opinions on Human Rights, Labour Rights, and Other Matters

Investor-state tribunals are sometimes considered ill-suited to deal with issues involving certain sectors or measures, such as tax. Accordingly, some treaties instruct government authorities of the state parties to resolve the issue, and only if these authorities cannot reach a resolution should the case continue to ISDS. Such procedures have been established in relation to taxation measures in the CPTPP and other agreements that build on the U.S. Model BIT. In the CPTPP, it would be up to the designated authorities in each party to determine jointly whether a tax measure is an expropriation.44 These authorities have six months to come to such determination.45 Only if the designated authorities fail to agree that the measure is not an expropriation can the investor submit its claim to ISDS.46 Similar processes could be considered for other areas as well.

42 See Japan-Peru EPA (2011), art. 164; see Korea-Peru FTA (2010), art. 9.14; see China-Peru FTA (2009), art. 113; see Canada-Peru FTA (2008), art. 815.
44 See CPTPP supra note 41, art. 29.4.
45 See id.
46 See id.
Another possibility could be to instruct arbitral tribunals to submit preliminary questions to domestic courts, human rights bodies, or other institutions when faced with a question touching on a relevant subject matter. An inspiration could be the role of the European Court of Justice, which can receive such queries, stay domestic judicial proceedings while it produces a response (preliminary rulings), and then allow the domestic courts to use that reasoned decision to finally adjudicate the dispute. This type of approach could complement tribunals’ lack of expertise on specific areas, such as human rights and labour rights.

f. Third-Party Participation

Investor–state disputes often affect third parties, that is, actors that are not disputing parties. These may include creditors of claimants, local government bodies whose right over land or regulatory powers are at issue in the case, local communities or users of public services affected by the investment in dispute, groups with competing claims to the property at stake, and adverse parties in parallel domestic litigation.

While arbitral tribunals have the discretion to accept submissions of third parties as amicus curiae (“friends of the court”), these submissions do not give third parties any rights or an opportunity to defend their position. Instead, amicus briefs are generally used to assist the tribunal’s decision-making by giving additional factual or legal information.

In most cases, amici curiae also lack access to case-related files, such as statements of claim or defence, procedural requests and procedural orders, hearing protocols, decisions of the administering arbitral institution, and arbitral correspondence. This lack of access severely impairs their ability to demonstrate in a compelling way that the interests they present should indeed alter the outcome of the case.

To safeguard the rights of third parties, governments could include in their investment treaties specific clauses providing for and organizing third-party rights in ISDS. They could encourage participation of third parties through intervention, joinder, or interpleader; dismiss

49 See id., p. 6.
these claims where the third parties are unwilling or unable to intervene; or reframe the claims where circumstances require.50

3.2. Replacing Investor–State Arbitration with Other Types of Investor–State Dispute Settlement: Rosters, courts, and appellate mechanisms

In terms of dispute resolution, alternatives to arbitration are now gaining traction among different countries and within the UNCITRAL Working Group III process. These include forming rosters of arbitrators, setting up investment court systems or a multilateral investment court, and creating an appellate mechanism.

Currently arbitrators are chosen by the parties to the dispute, with the president nominated in different ways depending on the applicable arbitration rules. In its most recent treaties, the EU has moved away from this traditional arbitration approach and introduced a so-called list procedure approach in which the treaty parties nominate adjudicators to three different lists or rosters.51 Here, adjudicators are appointed at random when a case arises. To accompany its roster system, the EU also applies rules to avoid conflicts of interest and strengthen adjudicator independence, for example by disallowing adjudicators to act as counsel in investment treaty disputes while they are listed on a roster (to avoid the problem of “double-hatting”):

ARTICLE 8.30   Ethics

1. … [U]pon appointment, they [the Members of the Tribunal] shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement.

By way of contrast, the Dutch model BIT does not apply a roster system, but instead relies on appointing authorities once a dispute has arisen. It also includes a prohibition of double-hatting, which is narrower than under the CETA in that it only covers the role of counsel (not the role of party-appointed experts or witnesses).

Another approach that could inspire a permanent roster system for investor–state disputes is the one taken in NAFTA and USMCA for settling state–state disputes. Under that approach,

50 See id., p. 7.
51 See European Commission, supra note 33, art. 8.27-8.29; EU – Singapore Investment Protection Agreement, art. 3.9-3.10; EU – Vietnam Investment Protection Agreement, art. 3.38-3.39.
the roster is composed of up to 30 professionals, who are required to have legal expertise or experience and to be independent of the governments of Canada, Mexico, and the United States. Roster members maintain their position for at least three years, have the possibility to be reappointed, and can only leave the roster when there is a replacement. Should a dispute arise, a five-person panel is formed out of members of the roster. The parties try to appoint the panel chair and, in the absence of an agreement, use a default appointment process. They then choose two panellists, each of a different USMCA nationality than their own.

Finally, the EU is pursuing the creation of a permanent investment court with an appellate mechanism. This is currently one of the options that states are discussing in UNCITRAL WG III. Another option that states are considering in that forum is the creation of an appellate mechanism, either as part of a permanent court or independently.

While all these initiatives are important for addressing some of the concerns relating to the consistency of interpretation, impartiality and independence, and costs, they leave many issues unaddressed. These include all issues relating to substantive law, as well as some procedural issues. For instance, in the case of the latter, an issue that the states have not addressed under these initiatives is the lack of equal treatment for domestic investors and third parties. Foreign investors can bring direct claims against a state via ISDS, in which third party interventions are severely limited. The only option of domestic investors is recourse to the domestic courts.

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53 See id., p. 10.

3.3. Alternatives to Investor–State Dispute Settlement

The section above provides for alternative models of ISDS. Some states, however, prefer not to adhere to ISDS at all for resolving investment disputes, pursuing instead other options, including state–state dispute settlement; alternative mechanisms, such as the function of ombudspersons and mediation; and domestic administrative and judicial processes.55

a. State–state Dispute Settlement

Most other treaties include both state–state as well as investor-state dispute settlement mechanisms. However, some investment treaties do not include ISDS clauses at all, providing for state–state dispute settlement only. For example, Brazil has never ratified any traditional investment protection treaties with ISDS. However, since 2015, Brazil has started signing CFIA. Unlike BITs, CFIA focus on investment cooperation and facilitation rather than protection, and on dispute prevention rather than dispute settlement.56 The CFIA model incorporates certain elements that are common in investment protection agreements, but limits these to direct expropriation and some forms of non-discrimination. The CFIA model explicitly excludes the fair and equitable treatment standard. Where disputes arise, states can settle them through ad hoc state–state arbitration.57 However, this is only possible after the exhaustion of all dispute prevention avenues.58

b. Ombudsperson

Some countries, like South Korea, have set up the function of ombudspersons to assist in and prevent disputes arising between investors and government authorities.59 In 1999, Korea established the Office of the Investment Ombudsman. Its role is to hear grievances from

55 In addition to these options, protecting investment and addressing a harm caused to an investor can also be dealt with through risk insurance and through investor–state contracts, though this falls outside the scope of this paper.
57 See Dietrich Brauch, M., *supra* note 21, p. 17.
foreign investors, advise them, and take pre-emptive measures. This office also reports on the issues to the Committee on FDI, with the objective of preventing future disputes.\textsuperscript{60} This Committee consists of representatives of various agencies, ministries, and local authorities with a broad mandate for policy decisions concerning foreign direct investment. Brazil has incorporated this approach directly in its investment CFIs, where partners commit to setting up national focal points (ombudspersons) and joint committees, which have the role of helping investor–state interaction and avoiding disputes through communication. Dispute prevention is sought via two mechanisms. First, an ombudsperson examines requests and inquiries made by investors and, jointly with the public agency responsible for the matter, provides answers or practical solutions.\textsuperscript{61} The second mechanism is operated by a joint committee.\textsuperscript{62} The party claiming that a measure constitutes a breach can submit a written request to the other party presenting its allegation. The joint committee examines it and issues a report identifying the measure, the breach (if any), and the affected investments.

These national-level dispute prevention processes complement state-state dispute settlement at the international level. The investor can access these processes directly, in addition to the regular domestic judicial and administrative processes. This approach is more likely to have positive effects on host states’ ability to retain investments and ensure a welcoming investment climate, relative to ISDS.

c. Domestic Processes for Settling Investment Disputes

The protection standards typically included in investment treaties are not extraordinary in and of themselves. They are reflected in domestic constitutions and laws around the globe and enforced through domestic administrative and judicial processes. The way in which arbitral tribunals have interpreted these standards and read as a basis for high compensation awards, however, deviates from and goes well beyond national systems, both in developed and developing states.

With this realization, some states have moved away from BITs altogether, choosing instead to strengthen their domestic legal systems. For example, South Africa has put in place

\textsuperscript{60} See Nicolas, F., Thomsen, S. & Bang, B., \textit{supra} note 59, p. 24.
\textsuperscript{61} See Vieira Martins, J., \textit{supra} note 58.
domestic legislation that specifically regulates investment and dispute settlement. Part of this domestic legislation was the Protection of Investment Act, which ensures that most traditional investment standards found in BITs that are consistent with the South African Constitution and existing legal framework while confirming the government’s desire to remain open and supportive to foreign investment. In South Africa, courts and statutory bodies settle investment-related disputes.

The Act provides different options to resolve disputes, including mediation as a dispute resolution mechanism in addition to domestic courts. The Regulations on Mediation Rules, published in 2017, govern the mediation process. According to these regulations, “mediation means a process in which the parties to a dispute, with the assistance of a mediator identify the issues in dispute, develop options, consider alternatives and endeavour to reach a settlement.” Mediation requires the involvement of a third party, the mediator, who supervises discussions between parties and offers solutions. However, the mediator does not adjudicate and cannot force the parties to take a particular option. The mediator’s role is to aid the parties in finding a mutual agreement. South Africa’s Department of Trade and Industry (DTI) selects mediators, who are required to have “recognised competence in fields of law, commerce, industry or finance.” Under the Regulations, a party can request a mediator’s recusal only on impartiality or independence grounds. Should the mediator resist the request, the DTI is charged with appointing another mediator to hear the case.

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63 See South Centre, supra note 31, p. 140.
64 See id.
68 See Leon, P. and Müller, E., supra note 66.
4.0. Substantive Investment Protection Obligations: Modern approaches and models

4.1. Post-Establishment Investment Protection

a. Definition of Investment

How a treaty establishes the definition and scope of the term “investments” affects whether the treaty can be applied in a predictable way, while setting the limits to its application. Most treaties use a broad, so-called asset-based definition, which goes beyond the capital that crossed into the host state’s borders in order to create an enterprise and instead includes any of the enterprises’ assets. This would include portfolio investment and intangible assets, such as intellectual property. Arbitral tribunals have interpreted this definition broadly, and it is difficult or even impossible to predict who will benefit from treaty rights. Tribunals have held that even government bonds purchased by foreign bondholders qualify as an investment under this definition. In one case, for instance, a tribunal construed an asset-based definition of investment in the Argentine Republic - Italy BIT broadly and decided that the sale of sovereign bonds on a secondary market qualified as investment.69

Article 1 of the 2008 Austrian Model BIT defines investment in a similarly broad fashion, as

> every kind of asset in the territory of one Contracting Party, owned or controlled, directly or indirectly, by an investor of the other Contracting Party. Investments are understood to have specific characteristics such as the commitment of capital or other resources, or the expectation of gain or profit, or the assumption of risk.70

To avoid unintended expansions of the term, some treaties have limited the scope through exhaustive lists of assets covered or negative lists of assets not covered by the treaty.71

Another solution is to use enterprise-based definitions. This definition is linked to the traditional concept of a direct investment which excludes portfolio investment and real estate. A recent example is the one used in Article 1 of the 2015 Indian Model BIT, which defines investment as

69 Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic, ICSID Case No. ARB/07/5
70 Austrian Model BIT (2008), art. 1.
71 Id., p. 15.
an enterprise constituted, organised, 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.\textsuperscript{72}

Importantly, this definition is followed by a set of exceptions including, notably, debt securities, pre-operational expenditures, or claims to money arising solely from commercial contracts.

\textbf{b. Expropriation}

Expropriation clauses are meant to allow governments the possibility to seize foreign investments for public purposes so long as the investor is given adequate and effective compensation. Most investment treaties cover both direct expropriation and indirect expropriation. Indirect expropriation has been the subject of controversy, as investors have used the vague formulations of this term in treaties to bring claims against any non-discriminatory regulations that have had negative consequences on investments. In effect, many treaties, and models, including the 2008 Austrian Model BIT, do not define indirect expropriation.\textsuperscript{73}

For this reason, most modern treaties, including those now negotiated by the EU, restrict indirect expropriation clauses through more precise definitions of indirect expropriation. For example, in its Annex 8-A, CETA clarifies:

3. For greater certainty, [...] non-discriminatory measures of a Party [...] to protect legitimate public welfare objectives, such as health, safety, and the environment, do not constitute indirect expropriations.\textsuperscript{74}

Another, clearer approach is to list what regulatory measures cannot give rise to indirect expropriation. For example, the 2015 Indian Model BIT provides that:

\textsuperscript{72} Indian Model BIT (2015), art. 1.  
\textsuperscript{73} See Austrian Model BIT (2008), art.7.  
\textsuperscript{74} See European Commission, \textit{supra} note 33, art. 8.12(1), Annex 8-A.
Non-discriminatory regulatory measures by a Party or measures or awards by judicial bodies of a Party that are designed and applied to protect legitimate public interest or public purpose objectives such as public health, safety and the environment shall not constitute expropriation under this Article.\textsuperscript{75}

Finally, some treaties expressly exclude indirect expropriation:

For avoidance of doubt, this Article only provides for direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or ownership rights, and does not cover indirect expropriation.\textsuperscript{76}

c. Fair and Equitable Treatment

Due to its broad and vague wording, the fair and equitable treatment (FET) standard is notorious for having been stretched by arbitral tribunals into a costly, extensive, and unpredictable obligation. For example, Article 3 of the Austrian Model BIT (2008) simply states: “Each Contracting Party shall accord to investments by investors of the other Contracting Party fair and equitable treatment and full and constant protection and security.”\textsuperscript{77} Tribunals have found a wide range of state measures, regardless of whether they were justified by public policy, to breach such unqualified FET clauses.\textsuperscript{78} Often, tribunals relied on the notion of investors’ legitimate expectations, and found that the measure at issue breached this expectation and the guarantee of a stable and predictable framework as a part of the FET standard.

To avoid these broad interpretations, several states have clarified in their treaties that the standard required a breach of customary international law, which is defined through the widespread repetition by states of a certain practice, and which requires that the practice occur out of a sense of obligation (\textit{opinio juris}). However, tribunals have disregarded this guidance as well, so that even definitions of FET linked to customary international law have led to very wide applications.

\textsuperscript{75} Indian Model BIT (2015), art. 5.5.
\textsuperscript{76} Brazil–Guyana BIT (2018), art. 7(6), retrieved from https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5763/download (link verified on March 19, 2021).
\textsuperscript{77} Austrian Model BIT (2008), art. 3.
\textsuperscript{78} See Brauch, M. D., Bernasconi-Osterwalder, N., \textit{supra} note 79, p. 3.
In response to these developments, another solution emerged: defining the FET standard through a list of situations amounting to a breach of the standard. This approach was first taken in the CETA: 79

1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 6.

2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:
   (a) denial of justice in criminal, civil or administrative proceedings;
   (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
   (c) manifest arbitrariness;
   (d) targeted discrimination on manifestly wrongful grounds, such as gender, race, or religious belief;
   (e) abusive treatment of investors, such as coercion, duress, and harassment; or
   (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article. 80

However, this still leaves host states at risk of broad interpretations of the elements of such a list since some remain broad and open-ended. For example, even with its restrictive definitions, the CETA includes a broad reference to legitimate expectations in its FET clause. No written promise is required for the state to be bound by a representation of a government actor, and arbitrators evaluate the investor’s reliance on the statement on a subjective rather than objective basis. 81 The reference to “arbitrariness” under (c) is equally vague, again leaving room for tribunals to expand the scope of the FET clause to areas not intended by the treaty drafters.


80 European Commission, supra note 33, art. 8.10.

Building on the EU approach, the 2015 Indian Model BIT avoids the words “fair and equitable” and “legitimate expectations,” instead offering investors protection from denials of justice, fundamental breaches of process, discrimination, or abusive treatments. It is therefore more predictable than the CETA approach. The Indian Model BIT in Article 3 also includes a reference to customary international law and explains what it means. Finally, it clarifies that a breach of another agreement cannot be seen as a breach of the ‘treatment’ clause:

Article 3
Treatment of investments

3.1 No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law through:
(i) Denial of justice in any judicial or administrative proceedings; or
(ii) fundamental breach of due process; or
(iii) targeted discrimination on manifestly unjustified grounds, such as gender, race, or religious belief; or
(iv) manifestly abusive treatment, such as coercion, duress, and harassment.
...
[FN1] For greater certainty, it is clarified that “customary international law” only results from a general and consistent practice of States that they follow from a sense of legal obligation.

3.3 A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.
...

The SADC model template recommends avoiding FET clauses in IIAs, or at least adopting a narrow version of these clauses. It also proposes a clause on the treatment of investments anchored on fair administrative treatment and due process, rather than using the international law language on FET, in order to distance itself from the uncertain jurisprudence

82 See Dietrich Brauch, M., Bernasconi-Osterwalder, N., supra note 79, pg 12; 2015 Indian Model BIT, art 3.
83 Indian Model BIT, Art. 3.
surrounding the FET standard.\textsuperscript{85} Finally, Brazil’s CFIAs expressly exclude the FET and full protection and security standards altogether.\textsuperscript{86}

d. Most-Favoured-Nation Treatment

Most-favoured-nation (MFN) Treatment clauses prohibit discrimination between host state investors and other foreign investors. Some arbitral tribunals have interpreted these clauses to allow investors to “import” substantive and procedural provisions from other investment treaties. Others have come to opposing conclusions, leading to inconsistent jurisprudence. As states generally did not intend to allow for the importation of rights granted under other treaties in ISDS, recent treaties clarify that the MFN clause does not allow such an import. For example, the CETA clarifies that the MFN clause does not permit the import of substantive obligations and procedural obligations under other investment treaties:

1. Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory. [...]

4. For greater certainty, the “treatment” referred to in paragraphs 1 and 2 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute “treatment”, and thus cannot give rise to a breach of this Article [...].\textsuperscript{87}

The 2004 Canadian Model BIT also excludes prior treaties and certain sectors from its scope:

1. Article 4 shall not apply to treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into of this Agreement.

\textsuperscript{85} See id.
\textsuperscript{86} See Morosini, F. and Ratton Sanchez Babin, M., \textit{supra} note 70.
\textsuperscript{87} European Commission, \textit{supra} note 33, art. 8.7. ec.europa.eu/doclib/docs/2011/march/tradoc_147755.pdf.
2. Article 4 shall not apply to treatment by a Party pursuant to any existing or future bilateral or multilateral agreement:

1. (a) establishing, strengthening, or expanding a free trade area or customs union;
2. (b) relating to:
   1. (i) aviation;
   2. (ii) fisheries;
   3. (iii) maritime matters, including salvage.88

The 2015 Indian Model BIT does not include an MFN provision at all, in response to the arbitral award in the *White Industries v. India* case, in which the tribunal allowed the importation of a substantive provision from another treaty.89

e. Umbrella Clauses

Umbrella clauses allow investors to bring before arbitral tribunals claims for breaches of any obligation that a host state has entered into regarding foreign investors or investments. A foreign investor could bring a claim for a breach of a contract or domestic law. For example, Article 11(1) of the Austrian Model BIT imposes on host states the following obligation:

> to observe any obligation it may have entered into with regard to specific investments by investors of the other Contracting Party. This means, inter alia, that the breach of a contract between the investor and the host State or one of its entities will amount to a violation of this treaty.90

This expands the ability of investors to bring claims to international arbitration dramatically, with the result being that umbrella clauses have grown less frequent in IIAs.91 According to UNCTAD, 28 out of 29 treaties concluded in 2018 omitted umbrella clauses.92

88 See Canada Model BIT (2004), Annex III.
89 See Dietrich Brauch, M., Bernasconi-Osterwalder, N., *supra* note 79, p. 4.
90 Austrian Model BIT (2008), art.11(1)
91 See *id.*; UNCTAD, Mapping of IIAs, retrieved from: https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping (link verified on March 29, 2021.
f. Right to Regulate

States are increasingly concerned about the regulatory chill that the threat of investment arbitration can have on policymaking, given the high number of investor–state disputes challenging new laws and regulations adopted for the public interest. As a consequence, governments are now including new clauses reaffirming the state’s right to regulate. This is done by providing for general exceptions clauses, circumscribing the treaty’s scope, and limiting and clarifying the traditional treaty standards. Ideally, individual treaty standards are already formulated in a way that ensures the state’s right to regulate by avoiding open-ended and vague terms and clearly defining the host state’s obligations. However, following the approach taken in trade law, such as in the WTO’s General Agreement on Tariffs and Trade (GATT) and General Agreement on Trade in Services (GATS), states are increasingly relying on general exceptions clauses in investment treaties to protect the right to regulate. According to UNCTAD, all 29 agreements reviewed in 2018 have these types of clauses, including for the protection of human rights and the environment.

To be effective, the right to regulate clause needs to make clear that measures taken for public policy objectives will not be subject to compensation even where an investment is negatively affected. A useful example of such a clause can be found in the SADC Model BIT:

1. In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.
2. Except where the rights of a Host State are expressly stated as an exception to the obligations of this Agreement, a Host State’s pursuit of its rights to regulate shall be

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94 See UNCTAD, supra note 23, p. 105.
95 See id., p. 105.
96 The general exceptions provisions of the GATT and GATS are Article XX and Article XIV, respectively. The applicability of these provisions are linked to fulfilling certain conditions, as specified in those articles.
97 See id., p. 105.
understood as embodied within a balance of the rights and obligations of Investors and Investments and Host States, as set out in this Agreement.

3. For greater certainty, non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Agreement. 98

In contrast, so-called “non-lowering of standards” clauses do not protect a government’s policy space. For example, the Austrian Model BIT provides, in Articles 4 and 5 respectively, that “it is inappropriate to encourage an investment by weakening domestic environmental laws”99 and “labour laws.” These clauses are narrowly formulated and by their nature address the issue of transnational investment as a potential “race to the bottom.”

g. Calculation of Damages

The amounts claimed and awarded in investment arbitration over the past few years have steadily increased. It is not unusual that amounts awarded are in the hundreds of millions or even billions of Euros. The largest award to date was USD 40 billion in *Hulley v. Russia*, and there are now 46 known cases where damages exceeded USD 100 million.100 There are few guiding principles to aid with the calculation of damages. Tribunals generally agree that they should apply the principles of international law on the reparation of internationally wrongful acts, which impose on states the obligation to make full reparation of any injury.101 Expropriation is an exception, where it is either explicitly mentioned in most treaties that compensation must be equal to fair market value, or the language of the treaty is interpreted to mean the same thing. Fair market value is understood to mean “the price that a willing buyer would pay a willing seller” for the investment in question at the date of the expropriation.102 Most treaties require this payment to be made promptly and with a

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98 See SADC Model BIT (2012), art. 20.
99 Austrian Model BIT (2008), arts. 4, 5; also see CPTPP, Chapter 20, Article 20.4, sub-paragraph 6, which states “without prejudice to paragraph 2, the Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protection afforded in their respective environmental laws. Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the Parties”, retrieved from https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tppt-texte/20.aspx?lang=eng (link verified on April 26, 2021).
101 See id., p. 12.
commercially reasonable rate of interest. However, few IIAs go beyond this principle to give more guidance on how to calculate this sum.

After applying these basic principles, the tribunal must determine what the investor’s financial position would have been had the treaty not been breached. This is done by using different valuation techniques, from which arbitral tribunals have the discretion to choose. Tribunals have shown a preference for techniques that lead to high compensation amounts, in contrast to other international and domestic courts, who are traditionally much more conservative in terms of calculating damages. Additionally, arbitral investment jurisprudence varies when it comes to the circumstances where it is acceptable to calculate damages based on future profits, the type and quality of evidence required to prove future profits, and how arbitrators factor in risks to the investment when calculating future profits. These factors lead to unusually high damages being awarded in international law proceedings, which are difficult to predict at the time of the investment. Many times, the amount of compensation awarded has exceeded the initial investment made by the investor. Additionally, these amounts are generally much higher than the benefit received by the host state.

To avoid exorbitant awards that are not in line with other areas of international law, and to make outcomes more predictable and just, some treaty models have begun addressing damages calculation more carefully.

For example, the SADC Model BIT offers three different options when it comes to calculating the compensation for expropriation claims as well as specific clauses concerning general compensations. Instead of focusing only on “fair market value” as the benchmark for compensation, the Template introduces the notion of ‘fair and adequate compensation’ that would be based on an equitable balance between the public interest and interest of those affected, having regard for all relevant circumstances, and taking into account the current and past use of the property, the history of its acquisition, the fair market value of the property,

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of Argentina, ICSID Case No. ARB/01/8, Final Award, para. 402 (May 12, 2005), cited in Bonnitcha, J. and Brewin, S., supra note 110, p. 7.

103 See Bonnitcha, J. and Brewin, S., supra note 110, p. 10-11.
104 See id., p. 18.
105 See id., p. 3.
106 See id., p. 4.
107 See id., p. 25.
108 See id.
the purpose of the expropriation, the extent of previous profit made by the foreign investor through the investment, and the duration of the investment.\footnote{SADC Model BIT Template, art. 6. Option 1, retrieved from https://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf (link verified on March 19, 2021).}

Some treaties also explicitly refer to “simple” interest to counter the trend of arbitral tribunals to apply “compound” interest.

Academic research is now increasingly looking for potential creative solutions. One option proposed by Aisbett and Bonnitcha calculates compensation by offering investors the lesser of two amounts: either the benefit the host state receives from the investment or the amount the investor spent on his investment.\footnote{See Aisbett, E., Bonnitcha, J. (2018), “Compensation under investment treaties – As if host interests mattered”, UNSW Law Research Paper, 18–80 retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3281334 (link verified on March 19, 2021).} This calculation method results in giving investors no compensation when their investment does not confer any benefit on the host state.\footnote{See Bonnitcha, J., Brewin, S., supra note 110, p. 27, providing model language.}

Third-party funding is a point of contention in ISDS, with many governments asking for the practice to be regulated or prohibited.\footnote{See UNCTAD, supra note 60, p. 15-16.} While there are many types of third-party funding, the most problematic one is the practice where investors have third parties finance their litigation in exchange for an interest in the litigation outcome.\footnote{See Güven, B. and Johnson, L. (June 2019), “Third-party funding and the objectives of investment treaties: friends or foes”. Investment Treaty News 10(2), retrieved from: https://www.iisd.org/itn/2019/06/27/third-party-funding-and-the-objectives-of-investment-treaties-friends-or-foes-brooke-guven-lise-johnson/ (link verified on March 19, 2021).} This interest often includes the third party’s right to remain involved in litigation and sometimes goes as far as to grant them the right to control and manage the claim.\footnote{See id.} Third-party funding can lead to an increase in the number of claims and in the amounts claimed.\footnote{See id.} It also contributes to further accentuating the imbalance between the disputing parties because it is only available to investors, not to states.\footnote{See Garcia, F. J. (2018). “Third-party funding as exploitation of the investment treaty system”. Boston College Law Review, 59, 2911, p. 2930; Garcia, F. J. (2018, July 30). “The case against third-party funding in investment arbitration. Investment Treaty News”, 9(2), p. 7–9, retrieved from https://www.iisd.org/itn/2018/07/30/the-case-against-third-party-funding-in-investment-arbitration-frank-garcia (link verified on March 19, 2021).} Finally, it has the potential to act as a barrier to attempts to prevent disputes or settle claims outside of arbitration because the interests of the third-party funder are dependent on an arbitration outcome.\footnote{See Güven, B. and Johnson, L., supra note 125.} In the same vein, third-party funding can also
impact investors’ decisions whether to remain in the host state or to bring a claim and leave, given that litigation is in the interests of the funder.\textsuperscript{118} Finally, third-party funding can influence the development of investment law in a specific direction, since it develops marginal claims that could push the interpretation of investment treaty standards in favour of the investors.\textsuperscript{119} All of these impacts have led investors to view third-party funding to make money out of investment claims, rather than to seek justice and find sustainable solutions.\textsuperscript{120}

To address these problems, certain types of third-party funding could be restricted through the investment treaty, while others could be subject to increased transparency. UNCITRAL WG III has extensively discussed these problems and is examining options to restrict third-party funding and increase transparency.

The International Council for Commercial Arbitration (ICCA)–Queen Mary Task Force Report on Third-Party Funding offers some principles on disclosure and conflicts of interest, such as the revelation of third-party funding agreements and the identity of any funders, either as a result of an order of the arbitrators or due to the parties’ voluntary disclosure. Arbitrators then have the option to discuss potential conflicts of interests and take any action necessary to respect due process rights.\textsuperscript{121}

Alternatively, in the context of the UNCITRAL Working Group III reform process, a draft text concerning third-party funding was submitted by IISD, the Columbia Center on Sustainable Investment, and the International Institute for Environment and Development. In addition to disclosure, the proposed language limits certain types of third part funding:

\[...\text{, a disputing party shall not accept or receive third-party funding provided to it on a non-recourse basis in exchange for a success fee or other form of monetary remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding, or a portfolio of proceedings when such portfolio includes the proceeding.}\]

\textsuperscript{122}

\textsuperscript{118} See id.
\textsuperscript{119} See id.
\textsuperscript{120} See Garcia, F. J., supra note 128, p. 7–9.
\textsuperscript{121} See Brekoulakis, S., Park, W. W. and Rogers, C. A. (April 2018), “Report of ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration”, ICCA Reports No. 4, p. 188.
5.0. Investor Obligations: Approaches and model clauses on investor obligations

Investor obligations were not included in traditional BITs, and even in the rare cases in which they are present in more modern BITs, they tend to be modest. However, there are strong policy reasons to impose them, such as to influence investors’ actions and the quality of investments and to promote public policy interests, such as sustainable development, human rights, environmental protection, and anti-corruption. They are also an efficient way to level the playing field of rights and obligations in investment treaties between investors and host states. If appropriately coupled with procedural avenues and remedies, they also allow governments to hold corporations accountable for their actions and reinforce the influence of domestic law on the international level.

Some treaties explicitly define investment as investment made in accordance with the law. This explicit formulation has ensured that tribunals only have jurisdiction when investments were legally made. Accordingly, investments made through corruption and fraud do not merit protection under these agreements. The Islamic Republic of Iran – Japan BIT, for instance, defines investment as asset invested “in accordance with the laws and regulations” of the host state. A fortiori, under the Morocco – Nigeria BIT (2016), investors are obliged not to engage in corruption additionally imposes a duty on states to prosecute and penalize such behaviour.

While tribunals have sometimes examined investor behaviour when evaluating arbitration claims, even in absence of any reference in the applicable treaty, including express guidance in treaties would strengthen the trend towards sustainable investment and make legal consequences more predictable. For example, the CETA excludes from ISDS any claims involving investments made through corruption, fraud, and other types of misconduct:

For greater certainty, an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.

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124 Id., p. 5.
126 See Morocco – Nigeria BIT (2016), art. 17.
127 European Commission, supra note 33, art. 8.18(3).
Some recent BITs have gone further and started to include investor obligations. For example, the 2016 Morocco–Nigeria BIT includes human rights and social performance obligations on investors, as well as an enforcement mechanism should these obligations be breached. Building on the 2015 Indian Model BIT, the 2018 India–Belarus BIT also includes investor obligations regarding corruption and the disclosure of information. These examples show that it can be legally and politically possible to impose investor obligations.\footnote{See Bernasconi-Osterwalder, N., Dommen, C., Abebe, M., Mann, H., Zhang, J., supra note 123, p. 8.}

Other treaties include Corporate Social Responsibility (CSR) provisions. These are typically very weak, using hortatory non-binding language and addressing host states only.\footnote{See Austria – Indonesia CEPA (2019), art. 14.17.} Some treaties only refer to CSR in the preamble\footnote{See EFTA – Indonesia CEPA (2018), preamble; Belarus – Hungary BIT (2019), preamble.}, whereas others contain standalone provisions in a separate article. The Austria – Indonesia CEPA (2019), for instance, provides that

\[
\text{[e]ach Party reaffirms the importance of encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.}\footnote{Supra note 129, art. 14.17.}
\]

These general, non-binding versions must be contrasted with treaty provisions that are more meaningful, addressing investors and their investment directly. The Dutch Model BIT, for example, explicitly requires investors to “comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labour laws.”\footnote{Supra note 36, art. 7.} Notably, the same article also states that investors incur liability for “acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state”\footnote{Id.}. 

\begin{itemize}
\item \footnote{See Bernasconi-Osterwalder, N., Dommen, C., Abebe, M., Mann, H., Zhang, J., supra note 123, p. 8.}
\item \footnote{See Austria – Indonesia CEPA (2019), art. 14.17.}
\item \footnote{See EFTA – Indonesia CEPA (2018), preamble; Belarus – Hungary BIT (2019), preamble.}
\item \footnote{Supra note 129, art. 14.17.}
\item \footnote{Supra note 36, art. 7.}
\item \footnote{Id.}
\end{itemize}
6.0. Concluding Remarks

The current regime of international investment agreements bears significant risks for host states. The expansive interpretation of treaty provisions by arbitral tribunals heavily favours foreign investors, exposing states to liability that frequently involves the payment of excessive amounts of compensation. Beyond the traditional protection against nationalisation and expropriation, this expansive interpretation has allowed investors to challenge a wide range of sovereign regulatory decisions. At the same time, a growing body of research shows that IIAs miss the objective of stimulating foreign investment flows, largely depending on other external factors. This has led many states to seek reform of investment treaties, as evidenced in the work of UNCTAD. Finally, there is also a mounting discontent with the current system of investor-state dispute settlement, manifesting itself inter alia in the on-going efforts conducted under the auspices of UNCITRAL Working Group III to address issues of arbitrator independence, coherence, and cost.

Recent examples from investment treaty practice clearly demonstrate that viable options for reform exist. Firstly, specific changes to the existing ISDS regime could address some of the abovementioned concerns. They include obliging investors to (partially) exhaust local remedies, requiring specific state consent to arbitration on a case-by-case basis, limiting the scope of application of ISDS, granting the state power to deny benefits in certain circumstances, reinforcing investment screening processes, and increasing participatory rights of third parties. Secondly, some states are currently exploring alternatives to conventional arbitration for investor-state disputes, such as whether to establish rosters of arbitrators, create a multilateral investment court, or introduce appellate mechanisms. Lastly, some states are exploring options that fundamentally differ from ISDS, such as using state-state dispute settlement, establishing an ombudsperson, or prioritising other domestic processes for the settlement of investment disputes.

1. In addition to reforming the dispute resolution provisions of investment treaties, modern approaches to treaties’ substantive elements would be worthy of consideration. Good examples of such substantive provisions include using more restrictive definitions of “investment” and “expropriation,” as well as narrowing or avoiding provisions on fair and equitable treatment, most-favoured-nation treatment, or umbrella clauses. Furthermore, recent examples showcase the possibility for states to include clauses expressly safeguarding their right to regulate, reigning in the calculation of excessive amounts of damages, and restricting third-party funding. Lastly, including investor obligations in treaties is advisable and is already becoming widespread practice. Such obligations could, for instance, include a requirement on
investors to comply with domestic laws and regulations of the host state, and, where not available, comply with international standards such as on human rights, environmental protection, and labour. This would help hold investors accountable and ensure that foreign investment contributes to sustainable development.
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