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China and India's Differing Investment Treaty and Dispute Settlement Experiences and Implications for Africa

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This Article examines China's and India's differing investment treaty and dispute settlement experiences and the resulting implications for Africa. It attempts to answer the question of whether there is evidence of China's and India's attempt to take advantage of the default structural imbalance enabled by centuries of international investment laws and institutions that favor the investor. The Article begins by presenting the background of the current economic reality and trends that necessitate the evaluation of the existing rules and institutions. It then presents a detailed assessment of this phenomenon by focusing on the investment cases brought against India for context, followed by a critical appraisal of India's reaction to the perceived deficiencies of the existing system as evidenced by its new BIT Model Text and the text's implications for Africa. Next, the Article evaluates the most important body of evidence that comes in the form of bilateral investment treaties, i.e., China's and India's investment treaties with African states. Finally, it offers a summary of conclusions.

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INTRODUCTION

The story of mankind over the last 500 years, as historian Philip Snow aptly describes, "has been in very large measure the story of the response of Asia and Africa to the alien culture of Europe and, lately, the United States."[1] In the middle of the last decade, progressing this narrative further, Martin Wolf of the *Financial Times* characterized the economic rise of China and India as "the most important story of our age. It heralds the end, in the not too distant future, of as much as five centuries of

1. PHILIP SNOW, THE STAR RAFT, CHINA'S ENCOUNTER WITH AFRICA xiii (Cornell Univ. Press, 1988).

domination by the Europeans and their colonial offshoots."[2] Other scholars have suggested that "[t]he WTO [World Trade Organization] deadlock demonstrates that the conventional wisdom is changing, namely that the powerful developed countries, leaving aside the differences among themselves, can no longer easily impose their common will upon developing countries."[3]

As the centuries' old economic and power hierarchy gradually showed notable variability and the flow of investment increasingly defied traditional patterns, it raised the question of whether such variability and change set in motion a shift in the normative milieus. The economic shift is empirically demonstrable,[4] but the shift in the ground rules and the implications for contemporary world economic order requires a systematic investigation.[5]

Among other matters, this scrutiny must answer the question of

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2. Muthucumarswamy Sornarajah & Jiangy Wang, *Introduction and Overview*, *in* CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER 1 (Muthucumarswamy Sornarajah & Jiangy Wang eds., 2010) (citing Martin Wolf, *Asia's Giants Take Different Routes*, FIN. TIMES (Feb. 23, 2005), https://www.ft.com/content/1caa807a-8510-11d9-a172-00000e2511c8?mhq5j=e5).

3. *Id.* at 3.

4. *See GDP Long-Term Forecast*, OECD, https://data.oecd.org/gdp/gdp-long-term-forecast.htm (last visited Jan. 2, 2018) (the share of China and India is also predicted to make a significant increase, with China's GDP already leading the pack, and India's GDP expected to exceed that of the fifteen-country eurozone and the United States by approximately 2050). The OECD Economics Department has also reported:

> Persistent growth differentials between OECD and emerging non-OECD economies will lead to a major shift of economic balance towards the non-OECD area, particularly to Asian and African economies. As a result, by 2060 the share of non-OECD countries in world GDP will significantly exceed that of the current OECD members.

OECD ECONOMICS DEPARTMENT, SHIFTING GEARS: POLICY CHALLENGES FOR THE NEXT 50 YEARS, POLICY NOTE NO. 243 (July 2014), http://www.oecd.org/eco/growth/Shifting%20gear.pdf. *See also id.* at 4 ("Economic interdependency among non-member economies and between OECD and non-OECD countries is likely to increase. By 2060, about 50% of world trade will take place among current non-OECD economies, up from 25% today.").

5.
> Five years ago, voices critical of the investment regime became more vocal and States begin to reform their model investment agreements. Today, people march in the streets against "private investment courts" and sign petitions against trade agreements with investment protection chapters. The defenders of the status quo first ignored the protest, then belittled it, and now claim that the protesters are missing the point. At the heights of a heated public debate about the future of international investment law, academia should provide room for an honest, conservative, but also fact-based reflection and exchange of ideas.

Preface to SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED (Steffen Hindelang & Markus Krajewski eds., 2016 [hereinafter SHIFTING PARADIGMS]. Many of the chapters included in this book offer timely perspectives on the shifting paradigm. For example, Gus Van Harten's contribution critiques the European Commission's and United Nations Conference on Trade and Development's ("UNCTAD") reform agendas of the investor-state arbitration system of the beginning of this decade as insufficient to ensure independence, openness, and fairness. Gus Van Harten, *The European Commission and UNCTAD Reform Agendas: Do They Ensure Independence, Openness, and Fairness in Investor-State Arbitration?*, *in* SHIFTING PARADIGMS, *supra*, at 128–41.

whether the international investment rules and institutions historically designed to govern North-South[6] relations[7] are adaptable to South-South relations.[8] An important part of this inquiry pertains to whether existing rules and institutions could serve the investment relations of China and India with Africa in any meaningful way. The old investment rules and institutions are a reflection of power relationships. Considering this, a subcategory of the question more specifically asks whether there is evidence of China's and India's desire and effort to systematically maintain the structural advantages that such rules and institutions fortuitously bestow onto them as their investors "go abroad" and compete with or even replace Africa's traditional investors from the North.

Understandably, for reasons of Africa's unfavorable historical experience and subordinate economic and political relationship with the Western world, the Asian giants' (China and India) relationship with Africa is being observed with a considerable degree of curiosity, and even suspicion. The theoretical pillar of this suspicion is found in the school of thought that implicitly admits that the evolution of the West's historic relationship with Africa is a natural one. This school deems it necessary

6. In development discourses, the terms "North" and "South" are typically used to signify the level of development of countries. All African countries, China, and India ordinarily fall under the South category. *See, e.g.*, U.N. CONF. ON TRADE & DEV., ECONOMIC DEVELOPMENT IN AFRICA REPORT 2010: SOUTH-SOUTH COOPERATION—AFRICA AND THE NEW FORMS OF DEVELOPMENT PARTNERSHIP 24–25 (June 18, 2010), http://unctad.org/en/Docs/aldcafrica2010_en.pdf [hereinafter UNCTAD, ECONOMIC DEVELOPMENT IN AFRICA REPORT] (discussing the terms generally and focusing on "southern" or developing countries working collaboratively to overcome obstacles in modernization/development).

7. It is sometimes argued that the rules protecting foreign investment were developed specifically to constrain poor countries. That is simply wrong. It is certainly true that LDCs [Least Developed Countries] played no role in developing the traditional rules and were, in fact, constrained by them. But the rules were developed and applied first within Europe, where they were widely accepted. Only later were they extended to Africa, Asia, and Latin America.

CHARLES LIPSON, STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES 12 (Univ. of California Press 1985). Once they were exported to Africa, Asia, and Latin America, however, they changed their character from reciprocity to one-sided protection of Northern capital in the South. *See, e.g.*, Kate Miles, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDS OF CAPITAL 21 (Cambridge Univ. Press 2013) (arguing that such extension moved from "a base of reciprocity, to one of imposition"). The normative regime has since been evolving in that direction. No attempt is made to document the evolution here, as that task has been undertaken by this author in a forthcoming article.

8. The existing international law at the end of World War II – what one might call the "*ancien regime*" – failed to adequately protect the foreign investments of their [capital exporting] nationals from injurious actions by host country governments. The need for such protection was heightened by the prospect of post-War economic expansion and *the decolonization of territories that had previously been under the control of the capital-exporting states.*

Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 436–37 (2010) (emphasis added).

that the Asian giants attempt to replicate this "natural" state of affairs.[9] Framed in investment law terms, the question asks whether China and India, collectively or individually, would attempt to take advantage of what some critics call "the law of greed"[10] because of their "investor" status vis-à-vis Africa. International investment law in its current formulation is criticized as the law of greed "because of the fact that it is built on accentuating only one side of the picture of foreign investment so as to benefit the interests of the multinational corporations which exist to seek profits for their shareholders."[11]

At the theoretical level, this Article investigates whether there is evidence of this school of thought underpinning China's and India's individual and collective contemporary relations with Africa. In economic terms, Africa still measurably lags behind both China and India.[12] It will continue to be a junior economic partner to the Asian giants for the foreseeable future, as it had been vis-à-vis the developed

9. *See, e.g.*, Mackson Woshamunu, *Clinton warns against "new colonialism" in Africa*, REUTERS (June 11, 2011), http://www.reuters.com/article/us-clinton-africa-idUSTRE75A0RI20110611 ("Africa must beware of new colonialism as China expands ties there and focus instead on partners able to help build productive capacity on the continent, Secretary of State Hillary Clinton said.") (internal quotations omitted).

10. M. Sornarajah is credited for this label. *See* Marie-Claire Cordonier Segger & Avidan Kent, *Promoting Sustainable Investment through International Law*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 771, 772 (Marie-Claire Cordonier Segger et al. eds., Kluwer Law International 2011) (quoting M. Sornarajah, *A Law for Need or a Law for Greed?: Restoring the Lost Law in the International Law of Foreign Investment*, 123 INT'L ENVIRON. AGREEMENTS 329, 331 (2006) (critiquing the lack of transparency in international law that grants little, if any, standing to public interest representatives, or attention to public policy goals)).

11. *Id.* at 772. A comparative look at the number of investment cases brought against states since the establishment of the International Centre for Settlement of Investment Disputes ("ICSID") offers evidence of this imbalance. For example, while India has been named as a respondent state in at least twenty cases with only two of its corporations initiating arbitration against a host state, the United Kingdom has been named a respondent only once, although its companies have initiated arbitration against other states in at least sixty-four cases. *Compare* Investment Policy Hub, *United Kingdom - as Home State*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/CountryCases/221?partyRole=1 (last visited Oct. 17, 2017) (detailing the number of cases on the UNCTAD Investment Hub Website for UK), *with* Investment Policy Hub, *India – as Respondent State*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/CountryCases/96?partyRole=2 (last visited Oct. 20, 2017) (reporting the number of cases for India). The statistics for the United States are equally interesting. While American companies have initiated arbitral proceedings in at least 145 cases, the United States has only been named as a respondent state in sixteen cases. Investment Policy Hub, *United States of America – as Home State*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/CountryCases/223?partyRole=1 (last visited Oct. 20, 2017).

12. One such indicator is the latest World Bank data on Gross Domestic Product ("GDP"). WORLD BANK, WORLD DEVELEOPMENT INDICATORS DATABASE (Apr. 17, 2017), http://databank.worldbank.org/data/download/GDP.pdf (showing China ranking second with a GDP of approximately USD $11 trillion and India ranking seventh with a GDP of approximately USD $2 trillion).

Western world for much of its history. The perennial practical question that this Article seeks to answer is thus: Will the rules of the game continue to reflect the power imbalance? Or will the complicated contemporary world order produce a more balanced and equitable framework to manage contemporary economic relations and support sustainable development for all? Stated differently, this Article attempts to answer the question of whether there is evidence of China's and India's attempt to take advantage of the default structural imbalance enabled by centuries of international investment laws and institutions that favor the investor.

To answer these fundamental questions, this Article proceeds in five parts. Part I presents the background of the current economic reality and trends that necessitate the evaluation of the existing rules and institutions. The evidence of China's and India's approach toward Africa can only be accurately evaluated in light of the evolution and status of their own relationships with the Western World (North-South relations). Part II presents a detailed assessment of this phenomenon by focusing on the investment cases brought against India[13] for context, followed by Part III, which critically appraises India's over-reaction to the perceived deficiencies of the existing system as evidenced by its new BIT Model Text and the text's implications for Africa. Part IV evaluates the most important body of evidence that comes in the form of investment treaties, i.e., China's and India's investment treaties with African states. Part V offers a summary of conclusions.

I. CHINA, INDIA, AND AFRICA: THE POLITICAL RHETORIC, THE ECONOMIC REALITY, AND THE LEGAL INFRASTRUCTURE

Although the legal infrastructure designed to order the economic relations of the developing nations of the South with the developed world of the North has gradually evolved from outright imposition,[14] to

13. This Article focuses more on India than China because India has more investor-state cases and recently adopted a new BIT Model Text. Other writings by this author have previously focused on China. *See, e.g.*, WON KIDANE, CHINA-AFRICA DISPUTE SETTLEMENT: THE LAW, ECONOMICS AND CULTURE OF ARBITRATION (Kluwer Law Int'l ed., 2011) [hereinafter KIDANE, CHINA-AFRICA DISPUTE SETTLEMENT] (explaining the nature and magnitude of increasing China-Africa economic relations in recent years); Won Kidane, *China's Bilateral Investment Treaties with African States in Comparative Context*, 46 CORNELL INT'L L.J. 141, 142–69 (2016) [hereinafter Kidane, *China's Bilateral Investment Treaties*] (discussing the primary legal instruments that govern China-Africa investment relations, bilateral investment treaties ("BIT"), in light of a 2014 China-Canada BIT).

14. *See, e.g.*, Louis T. Wells, *Preface* to THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS xv, xvi (Jose E. Alvarez & Karl P. Sauvant eds., 2011) (suggesting that in the past, powerful nations occasionally used military actions and other forms of coercion to protect the economic interests of their investors aboard).

involuntary acquiescence,[15] to voluntary association,[16] neither the original design nor the evolution contemplated robust contemporary South-South economic relations.[17] To the extent the existing normative regime governs South-South relations, it does so, in large measure, by pure accident of history.[18] This accident of history is, however, not value-neutral, as its structure is inherently hierarchical, favoring those on the top of the economic hierarchy regardless of their identity.

South-South economic relations also have hierarchy.[19] A good example of this is Africa's relationship with China and India. This Section defines this economic hierarchy to set the stage for the evaluation of the legal regime that governs Africa's economic relations with China and India in subsequent sections.

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15. *See, e.g.*, ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 536–37 (2d ed. 2008) (noting how in the 1960s decolonization of Asia and Africa necessitated a more legitimate means of resolution of disputes and how the World Bank proposed the International Centre for the Settlement of Investment Disputes ("ICSID") as a means of resolving investor-state disputes). The history of ICSID is well documented and it shows the concerns of the former colonies and how they gradually accepted the mechanism with some suspicion. *See, e.g.*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND FORMULATION OF THE CONVENTION 306–13 (1968) (showing as an example the concerns of the Latin American countries during consultations with the World Bank).

16. *See* Salacuse, *supra* note 8, at 436–37 (noting that post WWII economic expansion and decolonization required the reformulation of the old regime). Professor Peter Muchlinski has also written:

> First generation agreements, with their emphasis on investor rights and host state obligations, are said to be past their best and should give way to new agreements that seek to balance investor rights and duties, preserve the State's right to regulate in the public interest and to acknowledge the importance of not only economic but also social and environmental goals in their design.

Peter Muchlinski, *Negotiating New Generation International Investment Agreements: New Sustainable Development Orientated Initiatives*, *in* SHIFTING PARADIGMS, *supra* note 5, at 41–64.

17. *See* Joost Pauwelyn, *Rational Design or Accidental Evolution? The Emergence of International Investment Law*, *in* ZACHARY DOUGLAS, JOOST PAUWELYN, AND JORGE E. VINUALES, THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 15 (Oxford Univ. Press 2014) (emphasizing the incremental and accidental nature of the evolution).

18. *See, e.g.*, LOWENFELD, *supra* note 15, at 536–37 (noting that it is principally "the wave of decolonization in Africa and parts of Asia" and the associated take-overs of investments of former colonial powers that necessitated the involvement of the World Bank and its establishment of ICSID).

19. The economic progress of the last two decades in China, India, and Africa has created complex economies that can no longer be adequately regulated through traditional and informal means. *See, e.g.*, Randall Peerenboom, *Law and Development in China and India*, *in* CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER, *supra* note 2, at 491–92 [hereinafter Peerenboom, *Law and Development*] (suggesting that although laws and a functional legal system are necessary to allow economic development, these systems are not the only institutional pillars that are required to drive growth).

A. Political Rhetoric

Unlike Africa's relationship with the West, historically, both in reality and by perception, Africa's relationship with China and India could be described as egalitarian or horizontal because of the absence of a vertical colonial relationship. Preoccupied with their own colonial and quasi-colonial struggles of the nineteenth and twentieth centuries, until the beginning of the post-colonial era, China and India never had a meaningful opportunity to freely and fully interact with each other and Africa for mutual benefit. The commencement of the contemporary economic relationship hence required a political explication of why it took this long for them to freely trade.[20] Neither China nor India has had any difficulty formulating its own political narrative that unifies each with Africa, building on a common historical trauma that each suffered and overcame. Both China and India present the narrative with a touch of cultural distinctiveness. For example, during the first China-Africa summit in China in 2000, President Jiang Zemin of the Peoples Republic of China presented it this way:

> The 20th century has witnessed earth-shaking changes in both China and Africa. The Chinese and African peoples once fought courageously for their national independence and freedom. They have since made strenuous efforts for peace and development. They have scored remarkable achievements and made historical progress in building up their countries. During the Second World War, the Chinese people and the African people fought an anti-Fascist war bravely on their respective fronts and contributed tremendously to the final victory of the war. Having smashed the shackles of the colonial rule that lasted for several centuries, the African people won their national liberation and independence. They have since registered gratifying progress in social and economic development. The Chinese people did away with imperialism, feudalism and bureaucrat-capitalism, known as the "three big mountains" weighing down on the backs of the Chinese people.[21]

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20. *See, e.g.*, SNOW, *supra* note 1, at xiv ("Any Asian interest in Africa, any African sympathy with Asia has been seen as constituting an implicit threat to the West's supremacy. This unease had its origin in the colonial times. European settlers tended to think of Africa as their exclusive preserve.").

21. Jiang Zemin, President, People's Republic of China, Address at the Opening Ceremony of the Forum on China-Africa Cooperation Ministerial Conference: China and Africa-Usher in the New Century Together (Oct. 10, 2000), http://www.focac.org/eng/ltda/dyjbzjhy/SP12009/t606804.htm. This section continues:

> And founded the People's Republic of China where the people become the masters of the country. They have finally found a development path of building socialism with Chinese characteristics and have been marching along this path confidently. We have come to the conclusion after a review of the history of the past one hundred years that the Chinese people and the African people both treasure independence, love peace and long for development and that they are both important forces for world peace and

Similarly, during the 2015 India-Africa summit, Indian Prime Minister Narenda Modi put it in the following manner:

> A very warm embrace of welcome and friendship from India. Today, it is not just a meeting of India and Africa. Today, the dreams of one-third of humanity have come together under one roof. Today, the heartbeat of 1.25 billion Indians and 1.25 billion Africans are in rhythm. We are among the world's oldest civilisations [sic]. We are each a vibrant mosaic of languages, religions[,] and cultures. Our histories have intersected since ages. Once united by geography, we are now linked by the Indian Ocean. The currents of the mighty ocean have nurtured the ties of kinship, commerce, and culture through centuries.[22]

Both China and India emphasize the unequal status that they had endured in the last centuries and promise to usher in a more collaborative, respectful, and mutually beneficial future. They have created platforms of collaboration and dialogue. China's principal platform is the Forum for China Africa Cooperation ("FOCAC")[23] and India's principal platform is India-Africa Summit Forum ("IASF").[24]

B. Economic Reality

i. China's Contemporary Economic Relations with Africa

China's investment footprint in Africa is difficult to accurately quantify, but there is no doubt that it is a game-changer. David Dollar, in his 2016 Brookings Institution research paper, writes:

> China's investment in Africa is big relative to its investments elsewhere. The world as a whole has six times as much direct

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> common development. It is the unremitting efforts made by the people throughout the world, including the Chinese and African peoples, that forces for world peace have kept growing and the world development cause has made considerable progress. *Id.*

22. *See* India-Africa summit: Read full text of PM Narendra Modi's speech, TIMES OF INDIA (Oct. 29, 2015), http://timesofindia.indiatimes.com/india/India-Africa-summit-Read-full-text-of-PM-Narendra-Modis-speech/articleshow/49577890.cms (providing a transcript of Indian Prime Minister Narenda Modi's statements at the Inaugural Ceremony of the Third India-Africa Forum Summit). The rest of the paragraph reads:

> Generations of Indians and Africans have travelled to each other's land in search of their destiny or by the force of circumstances. Either way, we have enriched each other and strengthened our ties. We have lived in the long shadow of colonialism. And, we have fought for our liberty and our dignity. We have struggled for opportunity, and also for justice, which, the African wisdom describes, is the prime condition of humanity. We have spoken in one voice in the world; and, we have formed a partnership for prosperity among ourselves." *Id.*

23. *See* FORUM ON CHINA-AFRICAN COOPERATION, http://www.focac.org/eng/ (last visited Oct. 20, 2017) (providing documents and comprehensive information about FOCAC).

24. *See* INDIA-AFRICA FORUM SUMMIT, REINVIGORATED PARTNERSHIP – SHARED VISION, (Oct. 26-29, 2015), http://mea.gov.in/india-africa-forum-summit-2015/index.html (offering information about the latest summit and beyond).

> investment in the United States as in Africa, reflecting the fact that most FDI [foreign direct investment] goes to advanced economies. China's pattern of investment has been different. As of end-2014, China had about as much ODI [outward direct investment] in Africa (USD $32 billion) as in the United States (USD $38 billion). So, China's relative focus on Africa is large. . . .[25]

Although Dollar's paper is interesting for its comparison of Chinese investment in the United States and Africa, it appears to grossly underestimate the volume of investment. There are several reasons for the lack of accurate statistics on Chinese investment in Africa. The China-Africa Research Initiative ("CARI") of the Johns Hopkins University School of Advanced International Studies has done a useful analysis of the existing data pertaining to Chinese investment in Africa. Its data puts the total Chinese investment between 2003 and 2014 at approximately USD $124 billion.[26] CARI admits that it is almost impossible to know exactly how much China invested in Africa because the official figures[27] tend to ignore Chinese investment made from offshore locations, which is a very common way of channeling investment.[28] As such, CARI's spreadsheet appears to be a conservative estimate. For example, the American Enterprise Institute and the Heritage Foundation's China Global Investment Tracker puts China's total investment in Sub-Saharan Africa alone at USD $241.75 billion and the Middle East and North Africa's investment at USD $126.6 billion.[29] By comparison, out of a

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25. DAVID DOLLAR, CHINA'S ENGAGEMENT WITH AFRICA: FROM NATURAL RESOURCES TO HUMAN RESOURCES 34 (Brookings Institution ed., 2016).

26. *See* DATA: CHINESE INVESTMENT IN AFRICA, JOHNS HOPKINS SCHOOL OF ADVANCED INT'L STUDIES: CHINA AFRICA RESEARCH INSTITUTE (CARI), http://www.sais-cari.org/data-chinese-and-american-fdi-to-africa (last visited Oct. 7, 2016) [hereinafter DATA: CHINESE INVESTMENT IN AFRICA] (providing an excel spreadsheet breaking down China-Africa FDI data from 2003-2015 by country).

27. *See, e.g.*, Xi Jinping, President, People's Republic of China, Address at the China-Africa Business Forum in Johannesburg: Working Together to Write a New Chapter In China-Africa Cooperation (Dec. 4, 2015), http://www.focac.org/eng/ltda/dwjbzjjhys_1/zyjh/ (noting President Jinping put the total amount of Chinese investment in Africa at USD $101 billion as of 2014. He also said that there were 3,100 Chinese companies doing business in Africa. He puts the volume of trade as of 2014 at USD $221.9 billion).

28. CARI has also reported:

> But the numbers are understated because they don't include Chinese money that is parked in an offshore financial center (British Virgin Islands, Cayman Islands, even Hong Kong), they don't capture smaller investors, and they don't record acquisitions that include African assets, but that took place in another jurisdiction (i.e. the purchase of Addax at over $7 billion: Addax has several African properties, and properties in Iraq, but the investment appears as Switzerland which is where Addax was domiciled.

DATA: CHINESE INVESTMENT IN AFRICA, *supra* note 26 (internal quotations omitted).

29. CHINA GLOBAL INVESTMENT TRACKER, AMERICAN ENTERPRISE INST., https://www.aei.org/china-global-investment-tracker/ (last visited Oct. 7, 2017).

total of USD $1.3 trillion of outward investment, China's investment in the United States and Europe is USD $134.36 billion and USD $202.96 billion respectively.[30] In addition to this, CARI estimates that China has loaned approximately USD $86 billion to African states during the same time period (2001 to 2014).[31]

Chinese money in Africa finances projects from railways,[32] to powerplant transmissions,[33] to ports[34] and hospitals.[35] Apart from the quantity of work, a recent study by a researcher affiliated with the Johns Hopkins University School of Advanced International Studies concluded that the quality of Chinese firms' work in Africa is similar to the quality of work done by contractors from Organisation for Economic Co-operation and Development ("OECD") countries.[36] Finally, as to forecasts, a 2015 report by Baker and McKenzie projects that China will invest up to USD $1 trillion in Africa in the next decade or so.[37]

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30. *See id.* (providing information regarding the United States and Europe).

31. DATA: CHINESE INVESTMENT IN AFRICA, *supra* note 26.

32. *See* Agence France-Presse, *Next stop the Red Sea: Ethiopia opens Chinese-built railway to Djibouti*, THE GUARDIAN (Oct. 5, 2016), https://www.theguardian.com/world/2016/oct/06/next-stop-the-red-sea-ethiopia-opens-chinese-built-railway-to-djibouti ("The new $3.4bn railway, with its red, yellow and green trains evoking the Ethiopian flag, was 70% financed by China's Exim Bank and built by China Railway Group and China Civil Engineering Construction.").

33. As once reported:

> A new International Energy Agency report shows that Chinese companies are leading the way in the electrification of sub-Saharan Africa. . . . A substantial proportion of Chinese power projects in sub- Saharan Africa are aimed at expanding access to electricity. Over the period 2010 to 2020, a total of 120 million people will gain access to electricity through the power grid, enabled by grid development and increasing power generation capacity, of which Chinese contractors are responsible for 30%. Expanded access to electricity can in turn facilitate industrialization and economic development. China also supports rural off-grid solutions with solar energy kits donated in countries like Rwanda and Comoros.

The Chinese in Africa–An Electrifying Story, MODERN POWER SYSTEMS (Aug. 29, 2016), http://www.modernpowersystems.com/features/featurethe-chinese-in-africa-an-electrifying-story-4991516/.

34. *See* David Smith, *China Denies Building Empire in Africa*, THE GUARDIAN (Jan. 12, 2015), https://www.theguardian.com/global-development/2015/jan/12/china-denies-building-empire-africa-colonialism (reporting that Chinese firms are carrying out a USD $653 million (£430 million) expansion of the main airport in Nairobi, Kenya).

35. *See, e.g.*, *Africa: China to Build 100 Hospitals, Clinics in Africa*, ALLAFRICA (Oct. 7, 2015), http://allafrica.com/stories/201510070976.html (reporting that the Chinese government has offered to build one hundred hospitals and clinics across Africa to improve the existing health system and position the country to be better able to respond to future disease outbreaks).

36. Jamie Farrell, *How Do Chinese Contractors Perform in Africa? Evidence from World Bank Projects* 1–3 (SAIS China Africa Research Initiative, Working Paper No. 3, Feb. 2016), http://static1.squarespace.com/static/5652847de4b033f56d2bdc29/t/573c970bf8baf3591b05253f/1463588620386/Working+Paper_Jamie+Farrell.pdf.

37. A report from *The Economist* stated:

> The role of Asia-based DFIs looms large. Although they did not provide official numbers

ii. Indian Investment in Africa

Indian investment in Africa is also significant, although, just like China's, the volume is difficult to measure. According to a 2013 joint study by the Confederation of Indian Industry ("CII") and the World Trade Organization ("WTO"), trade between Africa and India grew from USD $5.3 billion in 2001 to USD $63 billion in 2011, surpassing India's trade with the United States, and is projected to reach USD $176 billion in 2016.[38] Indian investment in Africa is also difficult to measure, but the CII-WTO study estimates that it grew from USD $9.2 billion in 2008–09 to USD $14.1 billion in 2011; however, the study also cites to other sources that put the total amount at approximately USD $32 billion in both Greenfield and Brownfield investments—mainly in telecommunications, energy, computer services, power, and automobiles sectors.[39] A table summarizing some of the big-ticket investments in recent years shows Indian companies' acquisition of African interests in energy for USD $2 billion, telecom for USD $450 million, metal and ores for USD $750 billion, and chemicals and fertilizers for USD $290 million.[40]

The real figures are likely to be much higher, not only because no one seems to be keeping systematic records, but also because some of India's investments in Africa are channeled through Mauritius, as are African investments in India, because of favorable tax treaties. Indeed, the Mauritian factor seems to skew all India-Africa investment statistics. The CII-WTO report shows that Mauritian companies invest USD $64.17 billion in India, which makes African investment in India greater than

> for this report, China-based DFIs, in particular, are estimated to be the largest single source of funding, contributing over USD $13.4bn in Africa in 2013 alone, according to the ICA. Chinese support for Africa based infrastructure has been weighted towards industries in the transportation sector: rail, roads, airports and seaports. However, China-based DFIs are also funding beneficiation and production platforms, such as commodity-processing and manufacturing facilities in African countries. The role and influence of China-based DFIs in Africa are likely to increase. China-based DFIs and policy banks, such as China Exim, have committed to as much as USD $1trn over the next decade or so, in support of Africa-based investments of Chinese companies and the foreign-policy objectives of the Chinese government.

THE ECONOMIST CORPORATE NETWORK, SPANNING AFRICA'S INFRASTRUCTURE GAP: HOW DEVELOPMENT CAPITAL IS TRANSFORMING AFRICA'S PROJECT BUILD-OUT (Nov. 2015), http://ftp01.economist.com.hk/ECN_papers/Infrastructure-Africa.

38. *See* WORLD TRADE ORGANIZATION (WTO) & CONFEDERATION OF INDIAN INDUSTRY, INDIA-AFRICA: SOUTH-SOUTH: TRADE AND INVESTMENT DEVELOPMENT 15 (2013), https://www.wto.org/english/tratop_e/devel_e/a4t_e/global_review13prog_e/india_africa_report.pdf (stressing that although no such systematic study was conducted in 2016, the forecast appears correct as the assumed rate of growth did materialize).

39. *Id.* at 49.

40. *See id.* at 50, tbl.27 (detailing Indian investments in Africa made in years prior to 2011).

Indian investment in Africa. The reality is, however, that such investment includes investment routed from advanced economies of the North, including the United States, through Mauritius.[41] In any case, the occasional smaller investments are not included in major studies. News reports regularly carry stories such as the following:

> The Tata Group, an India-based multinational conglomerate, earlier this year unveiled a USD $1.7 billion Greenfield investment aimed at boosting automobile and hospitality businesses in the African continent. Furthermore, Vedanta Resources, India's largest mining and non-ferrous metals company, recently reported that it had invested USD $4 billion over the past nine years in Africa's mining sector.
>
> In 2010, India's largest cellular service provider, Bharti Airtel, made a foray into the African telecommunications market by acquiring Zain Telecom's operations in fifteen countries. The company recently unveiled plans to take over Warid Telecom Uganda, thus strengthening its footprint in the continent.[42]

C. Legal Infrastructure

The economic progress of the last decade in China, India, and Africa created complex and interdependent economies that could no longer be adequately regulated through the exchange of diplomatic notes or traditional and informal norms. As Randell Peerenboom notes:

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41. The WTO report further found:

> Mauritius is the largest investor in India with total FDI inflows of USD $64.17 billion [and] accounts for [approximately] 40% of total FDI inflows to India. Some estimates suggest that over 50% of US companies route their investments to India through Mauritius, taking advantage of an exemption in [the] capital gains clause.

Id. at 30. *See also* Alioune Ndiaye, *India's Investment in Africa: Feeding Up an Ambitious Elephant*, INT'L CENTRE FOR TRADE AND SUSTAINABLE DEV. (Sept. 15, 2016), http://www.ictsd.org/bridges-news/bridges-africa/news/india%E2%80%99s-investment-in-africa-feeding-up-an-ambitious-elephant:

> As of 2013, Africa accounted for 16 percent of India's foreign direct investment (FDI) stock for a total of US$13.6 billion. Surprisingly enough, Africa's FDI stock in India is five times higher, amounting to US$ 65.4 billion in the same year, which represents 26 percent of the country's total inward FDI stock. One should mention, however, that a large part of this FDI is done through Mauritius. The double taxation avoidance agreement (DTAA) signed between India and Mauritius makes it very attractive for investors to funnel their investment through the island. Outward Indian FDI into Africa follows the same logic. . . . Even though the actual investment is often taking place in a different country, it is always funnelled through a head office that is registered in Mauritius. *Id.*

42. *See, e.g.*, Murali Krishnan, *Indian Investment in Africa Soars*, DW (July 15, 2013), http://www.dw.com/en/indian-investment-in-africa-soars/a-16951164 (describing the mounting rivalry between India and China in the pursuit for trade supremacy in Africa, and the resulting disparity between these countries).

> There is less need for formal legal institutions in predominately rural economies where contracting parties are bound together in tight social networks and there are informal mechanisms for enforcing contracts. . . . As economies develop and become more complex and diversified, the need for rule of law and formal legal institutions increases. Economic growth provides the resources to support institutional development. Not surprisingly, there is a high correlation between wealth and rule of law and other good governance indicators.[43]

In the case of China, India, and Africa, formalization means subscribing to the existing international investment rules and institutions created to manage their respective relationships with the North. China and India began their respective voluntary, but cautious, opening up of their economies approximately a decade apart, with China doing so at the beginning of the 1980s and India at the beginning of the 1990s.[44] By the year 2000—although India had by then experienced significant economic growth—critics, including Jeffrey Sachs, had noted that India lagged behind because of its inadequate reform efforts.[45]

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43. Peerenboom, *Law and Development*, *supra* note 19, at 492.

44. *See* Sornarajiah, *India, China and Foreign Investment*, *in* CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER, *supra* note 2, at 132 (noting the dearth of comprehensive studies on the subject of the legal aspects of China's and India's domestic and foreign investment regimes); *see also* WENHUA SHAN, THE LEGAL FRAMEWORK OF EU-CHINA INVESTMENT RELATIONS (Wenhua Shan et al. eds., 2005) (analyzing Asia's open-door policy as a precedent to the liberalization of trade practices); DAVID SMITH, THE DRAGON AND THE ELEPHANT: CHINA, INDIA AND THE NEW WORLD ORDER (Douglas & McIntyre ed., 2007) (explaining China's and India's rise in view of the past and present, and assessing where both countries are headed and what impact they may have on the world); Rohit Sachdev, *Comparing the Legal Foundations of Foreign Investment in India and China: Law and the Rule of Law in the Indian Foreign Direct Investment Context*, 2006 COLUM. BUS. L. REV. 167, 214 (2006) (exploring the defining characteristics that have led to greater disparity between China and India in spite of similar economic and demographic characteristics); Nirupam Bajpai and Jeffrey D. Sachs, *Foreign Direct Investment in India: Issues and Problems* 5–8 (Harvard Inst. for Int'l Dev., Discussion Paper No. 759, 2000), www.cid.harvard.edu/india/pdf/759.pdf [hereinafter *Bajpai and Sachs*] (identifying the issues and problems associated with India's current foreign direct investment regime).

45. As Jeffrey Sachs and Nirupam Bajpai wrote in the abstract of their article:

> [W]e have attempted to identify the issues and problems associated with India's current foreign direct investment regime, and more importantly the other associated factors responsible for India's unattractiveness as an investment location. Despite India offering a large domestic market, rule of law, low labor costs, and a well working democracy, her performance in attracting FDI flows has been far from satisfactory. A restrictive FDI regime, high import tariffs, exit barriers for firms, stringent labor laws, poor quality infrastructure, centralized decision-making processes, and a very limited scale of export processing zones make India an unattractive investment location.

Bajpai and Sachs, *supra* note 44, at intro. Ilan Strauss and Vasiliki Mavroeidi, at the Columbia Center on Sustainable Investment, also reported on their research:

> Between 1995-2011, domestic value-added in China's manufacturing exports rose from 52% to 60%. In contrast, India's declined from (an unsustainably high) 87% to 64%. This decline will eventually need to be arrested. Between 1992-2014, China's high technology manufacturing exports quadrupled as a share of manufacturing exports, from

For both China and India, the legal reforms that accompanied general economic opening up included the conclusion of bilateral investment treaties ("BITs") and the addition of investment chapters in free trade agreements.[46]

Although China began its BIT program earlier than India, it followed a more cautious and phased approach.[47] The most notable features of this evolution pertain to the progressive addition of national treatment and acceptance of the arbitrability of the merits of investment claims. The first generation of Chinese BITs had limited arbitrability to the quantum of compensation.[48]

According to the United Nations Conference on Trade and Development ("UNCTAD") Investment Policy Hub, China is currently a party to 129 bilateral investment treaties and nineteen other treaties with investment provisions.[49] So far, China has been named as a respondent state in only two known investment arbitration cases, while four Chinese parties have initiated claims against other respondent states.[50]

In terms of investment treaty practice, unlike China, it appears that "India's BIT has not changed much from the mid-1990s when India was essentially a capital-importing country to the late-2000s when India

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> 6% to 25%; India's only doubled, from 4% to 8.5%. This is partly due to foreign investors playing a more transformative role: between 2000-2013, foreign firms increased their share in China's domestic research-and-development (R&D) expenditures from 18% to 24%, and their share of foreign technology acquisitions from 21% to 61%.

Ilan Strauss and Vasiliki Mavroeidi, *How India Can Benefit from FDI: Lessons from China*, 194 COLUM. FDI PERSPECTIVES 1 (Feb. 27, 2017), http://ccsi.columbia.edu/files/2016/10/No-194-Strauss-and-Mavroeidi-FINAL.pdf.

46. *See* Sornarajiah, *India, China and Foreign Investment*, *in* CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER, *supra* note 2, at 133–34 (examining the domestic investment laws and policies in China and India, including the admission of investment, privatization programs, post-entry national treatment, performance requirements, environment protection versus property protection, corporate accountability and foreign investment protection, as well as the bilateral and regional investment treaties concluded by the two economies).

47. *See generally* Kidane, *China's Bilateral Investment Treaties*, *supra* note 13, at 142–69 (explaining China's BIT approach).

48. *See id.* at 144–53 (detailing the first generation of Chinese BITs that followed the adoption of China's open-door policy). *See generally* NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE (Oxford Univ. Press 2009) (giving a more comprehensive discussion of the evolution of Chinese BITs).

49. Investment Policy Hub, UNCTAD, http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchBITResults (last visited Oct. 21, 2017).

50. Investment Policy Hub, *Investment Dispute Resolution Navigator: China as a Respondent State*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/CountryCases/42?partyRole=2 (last visited Oct. 21, 2017) (listing the two cases in which China appears as a respondent state, including Ansung Housing Co., Ltd. v. People's Republic of China, ICSID Case No. ARB/14/25, and Ekran Berhad v. People's Republic of China, ICSID Case No. ARB/11/15).

started to emerge as a capital-exporting country."[51]

According to official Indian government sources, India has signed eighty-three BITs, called Bilateral Investment Promotion and Protection Agreements ("BIPA"), of which seventy-two are in force.[52] UNCTAD record shows that India is a party to thirteen additional treaties with investment provisions.[53] India's earliest BIT was with the United Kingdom, signed on March 14, 1994, and entered into force on January 6, 1995.[54]

Although, unlike China, India is not a member of ICSID,[55] it has ratified the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Award,[56] and has adopted an arbitration law modeled after the UNCITRAL Model Law.[57] China has adopted its own alternative to the UNCITRAL Model.[58]

Professor Sornarajah offers some thoughts about the similarities and

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51. Prabhash Ranjan, *Bilateral Investment Treaties and Public Health: Comparative Insight from China and India*, *in* SOCIO-ECONOMIC RIGHTS IN EMERGING FREE MARKETS: COMPARATIVE INSIGHTS FROM INDIA AND CHINA 304–26 (Surya Deva ed., 2016).

52. *See List of Countries with whom Bilateral Investment Promotion and Protection Agreements (BIPA) has been signed (as on December, 2013)*, GOV'T OF INDIA DEP'T OF ECON. AFFAIRS, http://dea.gov.in/bipa (last visited Oct. 24, 2017) (listing all official records and BITs signed by India).

53. *See International Investment Agreements*, UNCTAD, http://investmentpolicyhub.unctad.org/IIA (last visited Oct. 21, 2017) (tracking the record of international investment agreements to promote international investment rules that effectively foster the sustainable development and inclusive growth of global investment).

54. *See* Investment Policy Hub, *International Bilateral Investment Agreements Navigator: India*, UNCTAD, http://investmentpolicyhub.unctad.org/IIA/CountryBits/96#iiaInnerMenu (last visited Oct. 18, 2017) (listing the countries India shares BITs with, the documenting status of those treaties, and the dates on which the treaties were signed and took effect).

55. *See Database of ICSID Member States*, INT'L CTR. FOR SETTLEMENT OF INVESTMENT DISPUTES, https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (last visited Oct. 21, 2017) (listing the ratification status of ICSID Member States, including China, which ratified the ICSID Convention on January 7, 1993, and India, which has never even signed the Convention).

56. *See Contracting States*, NEW YORK ARBITRATION CONVENTION, http://www.newyorkconvention.org/list+of+contracting+states (last visited Oct. 21, 2017) [hereinafter N.Y. ARB. CONVENTION] (listing contracting states, including China, which ratified the New York Convention on January 22, 1987, and India, which ratified it much earlier on July 13, 1960).

57. *See Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, UNCITRAL SECRETARIAT, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited Oct. 21, 2017) (listing countries that modeled their arbitration laws after the UNCITRAL Model Law).

58. *Arbitration Law of the People's Republic of China*, MINISTRY OF COMMERCE PEOPLE'S REPUBLIC OF CHINA (Dec. 20, 2013) http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201312/20131200432698.shtml.

differences of Chinese and Indian foreign investment approaches. While their differences are mainly explained in terms of their differing political systems and the political and economic choices they have made over the last couple of decades,

> a shared colonial experience in which foreign investment and international trade were the basis of subsequent political domination of the two states is the most important of the similarities. India underwent some three centuries of British colonial rule during which period its economy was subservient to the interests of the colonial power. The role of foreign investment in the colonial era was significant. China was no different. It was not subject to colonialism but subtle controls were exercised through power.[59]

Owing to this historical experience and their current standing as both recipients and exporters of significant capital, India's and China's "treaty practice demonstrates an ambivalent attitude."[60]

Although India is not a member of ICSID, it has had twenty different investment claims against it by mostly European companies, with the majority still pending.[61] Most of the claimants are from the United Kingdom and other developed countries and route their investments through Mauritius. They claim violations of the India-UK BIT and India-Mauritius BIT.[62] Indian companies have also initiated three investment cases of their own against foreign states.[63] This is not surprising because,

59. Sornarajah, *India, China, and Foreign Investment*, *in* CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER, *supra* note 2, at 135.

60. *Id.* at 157; *see* Sornarajah, *India, China and Foreign Investment*, *in* CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER *supra* note 2, at 135–36 (offering a similar account about China's dilemma in the following terms: "With the end of the Opium Wars and treaties such as the Treaty of Nanjing, a system of extraterritoriality was introduced into China making the Chinese writ not applicable to European traders in the port cities. The indignity that was involved in the system could not easily be erased"); *see also* Mark B. Baker, *Awakening the Sleeping Giant: India and Foreign Direct Investment in the 21st Century*, 15 IND. INT'L & COMP. L. REV. 389, 412, n.155 (2005) ("India was sensitive to foreign domination; fearful that something similar to the Raj would occur again, and as a result, adopted these protective governmental policies, even once the period of colonialism had ended.").

61. *See* Investment Policy Hub, *India as a Respondent State*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/CountryCases/96?partyRole=2 (last visited Oct. 2016) (listing cases and links to the available information beginning in 2003, in which India has ten pending investment claims against it as of October 2016; while one case was concluded through an award in favor of the claimant, the remaining nine were settled).

62. *See id.* (indicating the Mauritian parties are mostly affiliates of major multinational corporations); *see also* Press Release, Bechtel Corp., Bechtel and GE File Arbitration Over Dabhol Power Company (Sept. 23, 2003), http://www.bechtel.com/newsroom/releases/2003/09/bechtel-ge-file-arbitration-dabhol-power-company/ (detailing the context under which these companies made systematic attempts to resolve legal and contractual claims leading to arbitration).

63. *See* Investment Policy Hub, *India as a Home State*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/CountryCases/96?partyRole=1 (last visited Oct. 21, 2017) (indicating the respondent states are the United Kingdom, Germany, and Indonesia on the

as the 2016 U.S. Department of State Investment Climate Statement notes, "Indian conglomerates and high technology companies are generally equal in sophistication and capability to their international counterparts, while certain industrial sectors, such as information technology, telecommunications, and engineering are globally recognized for their innovation and competitiveness."[64]

In any case, because of the relatively high volume of treaty-based investment claims against it, India, which joined the international investment regime reluctantly by signing BITs a decade later than China, has recently announced that it would overhaul its existing BIT regime.[65] To that effect, not only did India serve notice of termination to fifty-seven countries—including the United Kingdom—and seek to clarify ambiguities with the remaining twenty-five treaties—including with China[66]—India also came up with its own new BIT Model Text.[67] The following Section assesses China's and India's respective investment treaty experiences with the developed economies of the North before their relationship with Africa is appraised.

D. Conclusion

China's and India's contemporary political narratives—a function of the recognition of Africa's economic potential, as it were—is distinguishable from the Western narrative that often depicted Africa as a mere recipient of foreign aid, not foreign investment. China began highlighting Africa's potential as a legitimate economic partner in the late 1990s, and the old aid-dependency narrative started to recede.[68] Indeed, the economic conditions in Africa also began to show remarkable

basis of India's BITs in each instance).

64. *Bureau of Economic and Business Affairs: Investment Climate Statements 2016*, U.S. DEP'T OF STATE (July 5, 2016), https://www.state.gov/e/eb/rls/othr/ics/2016/sca/254479.htm.

65. *See* Kavaljit Singh and Burghard Ilge, *India Overhauls Its Investment Treaty Regime*, FIN. TIMES (July 15, 2016), https://www.ft.com/content/53bd355c-8203-34af-9c27-7bf990a447dc (describing developments in India to replace existing BITs with a new set of treaties designed to strike a balance between investor rights, regulatory space, and investor responsibilities).

66. *See id.* (describing India's departure from earlier approaches to provide protection to foreign investors by limiting circumstances under which this protection is afforded).

67. *See* Model Text for the Indian Bilateral Investment Treaty, MYGOV (March 2015) https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf [hereinafter Draft BIT Text] (displaying India's first Draft BIT Text unveiled in March 2015 for comment and consultations); *see also* India's Model Bilateral Investment Treaty Text, GOVERNMENT OF INDIA (Dec. 28, 2015), http://finmin.nic.in/sites/default/files/ModelTextIndia_BIT%20%281%29.pdf?download=1 [hereinafter Model BIT Text] (displaying a significantly modified model of BIT Text adopted in December 2015).

68. *See generally* KIDANE, CHINA-AFRICA DISPUTE SETTLEMENT, *supra* note 13 (providing an overview of China-Africa economic relations in recent years).

progress to the point where it became the fastest-growing continent in 2013.[69]

The legal infrastructure mainly constituted of BITs, mostly borrowed and almost completely outdated, is clearly inadequate to meaningfully regulate the growing complex modern relationship. More importantly, because the BITs—especially those with India—are mostly replicas of existing models designed to govern a different kind of relationship, a careful and systematic customization is necessary to lend meaningful support to growing economic relations.

II. CHINA'S AND INDIA'S INVESTMENT TREATY EXPERIENCE WITH DEVELOPED NATIONS OF THE NORTH

A. China and the North

Over the decades, the developed world has begrudgingly embraced China as an equal economic partner. While China's political system is always viewed with a considerable degree of suspicion, the legal safeguards put in place by domestic legal reforms and investment treaties have enabled economic pragmatism in what is often called a political vacuum. Despite continued liberalization and opening up of China, however, the latest Investment Climate Statement of the U.S. Department of State concludes:

> China employs a more restrictive foreign investment regime than its major trading partners, including the United States. While China was the world's top destination for foreign direct investment (FDI) in 2015, broad sectors of the economy remain closed to foreign investors. China relies on a Foreign Investment Catalogue to encourage foreign investment in some sectors of the economy, while restricting or prohibiting investment in many others. China's investment approval regime shields inefficient and monopolistic Chinese enterprises from competition—especially those companies China attempts to cultivate as national champions.[70]

69. *See e.g.*, *The World's Fastest Growing Continent: Aspiring Africa,* THE ECONOMIST (Mar. 2, 2013), http://www.economist.com/news/leaders/21572773-pride-africas-achievements-should-be-coupled-determination-make-even-faster (describing Africa's flourishing current state, in which most of its "countries are at peace . . . fewer children bear arms and record numbers go to school. . . . HIV infections have fallen by up to three-quarters. Life expectancy rose by a tenth in the past decade and foreign direct investment has tripled. Consumer spending will almost double in the next ten years; the number of countries with average incomes above $1,000 per person a year will grow from less than half of Africa's 55 states to three-quarters").

70. *Bureau of Economic and Business Affairs: Investment Climate Statements 2016: China*, U.S. DEP'T OF STATE (2016), http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dlid=254271.

In any case, China has for many years been the top recipient of investment from the developed world. Although the available data does not classify the sources of the invested capital with complete accuracy, it is clear that China is one of the top recipients of foreign direct investment, ranking second only to the United States for many years.[71] In 2015, for example, Hong Kong and the People's Republic of China ("PRC") attracted a combined USD $311 billion direct foreign investment, ranking second and third (with Hong Kong attracting USD $175 billion and PRC attracting USD $129 billion). First ranking, the United States attracted foreign direct investment amounting to USD $380 billion.[72] Interestingly, nearly two-thirds of foreign direct investment in China comes from Hong Kong.[73]

China has a special arrangement with Hong Kong for the recognition of arbitral awards under the New York Convention, but for obvious reasons does not have an investment treaty.[74] China has investment

71. *See e.g.*, *UNCTAD, World Investment Report 2016: Investor Nationality: Policy Challenges*, U.S. DEP'T OF STATE (2016), http://forms.fdiintelligence.com/report2016/files/The_fDi_Report_2016.pdf (illustrating the sources and destination of FDI in Figure 3, indicating that according to MOFCOM's 2015 China Commerce Yearbook, the top five destinations for China's Outward Direct Investment from 2004–2014 are Hong Kong, British Virgin Islands, Cayman Islands, United States, and Australia).

72. *See id.* (indicating that two-way investment between China and the United States is small given the size of their economies); *see generally* David Dollar, *United States-China Two-way Direct Investment: Opportunities and Challenges*, JOHN L. THORNTON CHINA CENTER, BROOKINGS INST. 1 (Jan. 1, 2015), https://www.brookings.edu/wp-content/uploads/2016/06/us-china-two-way-direct-investment-dollar.pdf (concluding little cross investment exists between the U.S. and China, the two largest restrictions on direct investment in many sectors important to U.S. firms, and indicating that the relatively small amount of Chinese investment in the U.S. can also be traced to two factors: first, much of the initial impetus for Chinese firms to go out was to secure natural resources, while the U.S. is not a resource-rich country relative to its GDP or population; and second, the national security reviews of the Committee on Foreign Investment in the U.S. have soured many Chinese investors on the U.S. market).

73. *See China: Foreign Investment*, SANTANDER, TRADEPORTAL, https://en.portal.santandertrade.com/establish-overseas/china/foreign-investment (last visited Oct. 29, 2017) (listing FDI stocks by country and inflows by industry indicating the following in 2016: Hong Kong 73.4 percent; Singapore 5.5 percent; Taiwan 3.5 percent; South Korea 3.2 percent; Japan 2.5 percent; United States 2 percent; Germany 1.2 percent; and France 0.9 percent).

74. *See generally Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and Hong Kong, China Law*, U.S. DEP'T OF JUSTICE, http://www.doj.gov.hk/eng/topical/pdf/mainlandmutual2e.pdf (last visited Oct. 24, 2017) (detailing the particular arrangement as a subject of curiosity and extensive commentary, because of the one-country two-systems arrangement between the PRC and Hong Kong, the PRC has extended the application of the New York Convention to Hong Kong but the two have a special arrangement for the enforcement of each other's arbitral awards). *See* Mauricio J. Claver-Carone, *Post-Handover Recognition and Enforcement of Arbitral Awards Between Mainland China and Hong Kong SAR: 1999 Agreement vs. New York Convention*, 33 L. & POL'Y INT'L BUS. 369 (2002) (detailing the challenges presented by current Chinese law concerning the enforceability in Mainland China of Hong Kong arbitral awards); Odysseas G. Repousis, *On Territoriality and International Investment Law: Applying China's Investment Treaties to Hong Kong and Macao*, 37

treaties in force with four of the top eight investors: Singapore, with 5.5 percent of the total investment, has had a BIT with China since February 2, 1986; South Korea, with 3.2 percent, since December 12, 2007; Japan, with 2.5 percent, since May 14, 1989; and Germany, with 1.2 percent, since November 11, 2005. The remaining three are Taiwan, the United States, and France.[75]

As stated above, China has only twice been named as a respondent state in an investor-state arbitration. The first arbitration, initiated by Malaysia's Ekran under the China-Malaysia BIT in 2011, was settled. The second one, initiated by South Korea's Ansung Housing in 2014,[76] has just been concluded with a final award in favor of China.[77]

MICH. J. INT'L L. 113 (2015) (addressing the application of China's IIAs to Hong Kong and Macao by examining the territorial application of China's IIAs and analyzing IIAs entered into by Hong Kong and Macao, thus lending itself to examination of certain aspects of treaty interpretation and other territorial considerations). *See also* Weixia Gu, *15 Years of the Handover: The Rise, Discontent, and Positive Interaction of Cross Border Arbitration in Hong Kong with Mainland China*, 9 E. ASIA L. REV. 42 (2013) (analyzing the dual challenges of balancing Hong Kong's need to facilitate a cross-border arbitration regime which is compatible with Mainland China under the principle of "one country, two systems"); Weixia Gu, *The Changing Landscape of Arbitration Agreements in China: Has the SPC-Led Pro Arbitration Move Gone Far Enough?*, 22 N.Y. INT'L L. REV. 1 (2009) (exploring ad hoc arbitration and its implications absent a current legal framework); Jiali (Keli) Huang, *One Country, Two Systems: Hong Kong's Unique Status and the Development and Growth of Arbitration in China*, 18 CARDOZO J. CONFLICT RESOL. 423 (2017) (tracing the tentative recovery phase of greenfield FDI and highlighting the trajectory of India, which has surpassed China in terms of its capital investment).

75. *See* Investment Policy Hub, *China: Bilateral Investment Treaties (BITs)*, UNCTAD, http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu (last visited Oct. 24, 2017) (describing China's initial BIT with France that was subsequently terminated and listing the current status of BITs in China).

76. *See* Investment Policy Hub, *Known Treaty-Based Investor-State Arbitrations*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS (last visited Oct. 29, 2017) (illustrating investor-state arbitrations, pending and concluded, including the outcomes of those concluded).

77. *See Case Details:* Ansung Housing Co., Ltd. v. People's Republic of China, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (Mar. 9, 2017), https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/14/25 (describing the case in which a Korean investor brought a claim that was time-barred, but sought to import a permissive rule from another China BIT through the MFN provision of the China-Korea BIT, which was the basis of the claim). In the Final Award, the Tribunal (composed of Professor Lucy Reed, President, Dr. Michael Pryles, Arbitrator, and Professor Albert Jan van den Berg, Arbitrator) not only rejected all of the South Korean investor's claims, including the MFN claim, but also awarded China most of the costs and legal representation fees. *Id.; see also* Ansung Housing Co., Ltd. v. People's Republic of China, ICSID Case No. ARB/14/25, Final Award, ¶¶ 136–44, § X (Mar. 9, 2017):

> (1) Dismiss[ing] with prejudice all claims made by Claimant, Ansung Housing Co., Ltd., in its Request for Arbitration, pursuant to ICSID Arbitration Rule 41(5); [and] (2) Award[ing the] Respondent, the People's Republic of China, its share of the direct costs of the proceeding in the amount of USD $69,760.55, plus 75 percent of its legal fees and expenses in the amount of USD $4853.25 plus EUR 267,443.10 plus CNY 1,387,500, plus interest at the rate of three-month LIBOR plus two percent, compounded quarterly, such interest to run from the 90th day after the date of dispatch of this Award on any

B. India and the North

The 2016 World Investment Report ranks India as the tenth-top destination for foreign direct investment for 2014 and 2015, attracting a total of USD $44 billion.[78] Later that year, the FDI Intelligence of the *Financial Times* reported that "[t]he big FDI story of the past year is India. After a long period of trailing behind China, the South Asian country is now racing past its formidable rival."[79] The report stated the total amount of committed resources to India was USD $63 billion.[80]

According to *Forbes*, the United States is the top investor in India; the other investors, in descending order, are: Japan, the UK, Germany, United Arab Emirates, France, Switzerland, Spain, the Netherlands, Singapore, Sweden, China, and South Korea.[81] Of the top thirteen investors, India does not have investment treaties with five of them, including its top two investors, the United States and Japan.[82]

As indicated above, India has so far been named in at least twenty known investment arbitration claims: five from the UK; five from Mauritius; three from France; three from the Netherlands; and one from each of the following nations: Germany, Switzerland, Australia, Russian Federation-Cyprus, and Austria.[83]

C. China's Precautions and India's Disappointments

China began its BIT program in the early 1980s and has since employed three generations of its own model—although it has not always

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unpaid portion of the amounts due under this Award until the date of payment. *Id.*

78. *See* UNCTAD: WORLD INVESTMENT REPORT 2016, INVESTOR NATIONALITY: POLICY CHANGES, 5, Figure I.4 (2016), http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf (listing the top twenty host companies for 2014 and 2015).

79. *See* FDI INTELLIGENCE, THE FDI REPORT 2016: GLOBAL GREENFIELD INVESTMENT (Fin. Times ed., 2017), https://www.fdiintelligence.com/Landing-Pages/fDi-Report-2016/The-fDi-Report-2016 (attributing India's increased FDI to project growth and capital investments).

80. *Id.*

81. *See generally Top 15 Countries Investing in India*, FORBES (Aug. 24, 2016) https://www.forbes.com/pictures/54f4e700da47a54de82440c4/top-15-countries-investin/#f563aad77102 (listing the countries with the most corporations making investments in India).

82. *See* Investment Policy Hub, *supra* note 54 (listing date of signature and current status of India's BIT agreements). The other three top investors which India does not have BITs with are Spain, Singapore, and South Korea. *Id.* India has had BITs with the United Kingdom since January 6, 1995, with Germany since July 13, 1998, with United Arab Emirates since August 21, 2014, with France since May 17, 2000, with Switzerland since February 16, 2000, with the Netherlands since December 1, 1996, with Sweden since April 1, 2001, and with China since August 1, 2007. *Id.*

83. *See* Investment Policy Hub, *Investment Dispute Settlement Navigator*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/CountryCases/96?partyRole=2 (last visited Jan. 31, 2017) (listing the cases in which India was sued in a civil action).

been as systematic or linear as the United States in its BIT program.[84] India entered the foray of bilateral investment treaties more than a decade after China, but adopted the UK's model and essentially duplicated it for more than a decade, signing the same model with its economic partners from the North[85] and the South without any meaningful adaptations.[86] For comparison, China ratified the New York Convention in January 1987,[87] joined ICSID in February 1993,[88] cautiously adopted its own model of domestic legislation in August 1994,[89] created its own arbitral institutions,[90] and was named in only three cases as a respondent state in investment matters.[91] China's approach was incremental, cautious, and steady. India's approach, on the other hand, appears rather erratic and fearful. It refused to join ICSID. It ratified the New York Convention in

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84. *See* Kidane, *China's Bilateral Investment Treaties*, *supra* note 13, at 175–76 (asserting that China's use of BITs does not present a discernible or intentional pattern).

85. Investment Policy Hub, *supra* note 54. India's BITs with the developed economies of the North shows variability. *Id.* The dispute settlement provisions are good indicators. *See, e.g.*, Investment Policy Hub, *Investment Dispute Settlement Navigator: India-Germany BIT*, art. 9 UNCTAD (terminated 1995), http://investmentpolicyhub.unctad.org/IIA/country/96/treaty/1688 (emphasizing conciliation); India-Australia BIT, art. 12 (terminated 1999), http://investmentpolicyhub.unctad.org/IIA/country/96/treaty/209 (adopting the United Kingdom's model).

86. *See supra*, Part I.B.ii (discussing Indian investment in Africa). All the Indian BITs with the African states discussed above are examples of the South-South genre. *Id.*

87. N.Y ARB. CONVENTION, *supra* note 56. China ratified the New York Convention on January 22, 1987. *Id.*

88. INT'L CTR. FOR SETTLEMENT INV. DISP., DATABASE OF ICSID MEMBER STATES, https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (last visited Oct. 20, 2017). China ratified the ICSID Convention on February 6, 1993. *Id.*

89. Zhonghua Renmin Gongheguo Zhongcai Fa (中华人民共和国仲裁法) [Arbitration Law], (promulgated by Order No. 31 of the P.R.C. Laws, Aug. 31, 1994, effective Sept. 1, 1995), http://www.wipo.int/wipolex/en/text.jsp?file_id=182634.

90. *Id.* For example, China's model is fairly unusual in its creation of quasi-governmental arbitral commissions:

> Article 10 Arbitration commissions may be established in municipalities directly under the Central Government and in cities that are the seats of the people's governments of provinces or autonomous regions. They may also be established in other cities divided into districts, according to need. Arbitration commissions shall not be established at each level of the administrative divisions. People's governments of the cities referred to in the preceding paragraph shall arrange for the relevant departments and chambers of commerce to organize arbitration commissions in a unified manner. The establishment of an arbitration commission shall be registered with the administrative department of justice of the relevant province, autonomous region or municipality directly under the Central Government.

Id. at art. 10.

91. Investment Policy Hub, *supra* note 50. The most current case is *Hela Schwarz v. China*, filed in 2017 and currently pending. *Id.* The second most recent is *Ansung Housing v. China*, initiated under the China-Republic of Korea BIT in 2014 and decided in favor of China. *Id.* The oldest case is *Ekran v. China*, initiated under the China-Malaysia BIT in 2011 and settled under undisclosed terms. *Id.*

July 1960[92] and adopted the UNCITRAL Model in 1996.[93] It was criticized for some modifications. It revised it again.[94] Then it was named in at least twenty known investor-state arbitration matters as a respondent state, and decided to terminate some of its BITs and renegotiate others on the basis of a new BIT Model Text that it revealed at the end of 2015.

The question remains whether the new BIT Model Text will help India get over its frustration, streamline its efforts, and produce better results. Before the Model Text is critically assessed, it is important to take a closer look at the available information on the twenty cases that caused India's frustration.

D. India as a Respondent State

As indicated above, India has been named in at least twenty known investment cases as of this writing. Because India is not a member of ICSID, all of these cases are ad hoc arbitrations under the UNCITRAL Rules. The UNCTAD investment hub database contains basic information on all, and detailed information on some, of these cases. Of the twenty cases, one has been decided with a final award, nine have been settled, and ten are still pending. India's experience is similar to the

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92. N.Y. ARB. CONVENTION, *supra* note 56. India ratified the New York Convention on July 13, 1960 within a couple of years of its adoption. *Id.*

93. *See* The Arbitration and Conciliation Act, 1996 No. 26, Acts of Parliament, http://www.wipo.int/wipolex/en/text.jsp?file_id=207821 (adopting the UNCITRAL Model Law on International Commercial Arbitration in 1985).

94. *See* Sumit Rai and Naresh Thacker, *The Asia-Pacific Arbitration Review 2016: India*, GLOBAL ARBITRATION REVIEW (May 18, 2015), http://globalarbitrationreview.com/chapter/1036907/india. India adopted the UNCITRAL Model Law on International Commercial Arbitration, 1985 (Model Law) through the Arbitration and Conciliation Act, 1996 (1996 Act). The Indian legislature decided to have one statute governing domestic and international arbitration, enforcement of foreign awards, and conciliation. Other than the modifications necessary to adapt to this wider scope, the 1996 Act virtually imported the Model Law text with minor amendments. It was widely believed that this would ensure India's entry into the international arbitration arena with a position of strength, coinciding with the economic reforms that were first initiated in 1991. However, as years rolled by, hope turned to despair. Over the years, interpretation of certain provisions of the 1996 Act led to strange results, often prolonging the time parties spent in court. The general perception that awards will be considered final and not reviewed on the merits was soon dispelled, at least in the case of domestic arbitration involving all Indian parties. *Id.* (citing Oil & Natural Gas Corporation v. Saw Pipes (2003) 5 SCC 705 (India)). The commentary further adds:

> As if this was not enough, India's reputation in the international arbitration community suffered a severe setback when the Supreme Court of India allowed a foreign award to be challenged in Indian courts under the 1996 Act. India received a lot of flak in the international sphere and the general sentiment among foreign investors was a distrust of the dispute redressal mechanism under the 1996 Act.

Id. (citing Venture Global Engineering v. Satyam Computer Services Ltd. (2008) 4 SCC 190 (India)).

experiences of many African countries in this regard.[95] This Section examines the available data on each case to provide background.

i. Decided Cases

White Industries Australia Limited v. Republic of India is the only one of the twenty cases that was decided on the merits.[96] The 140-page award offers a useful insight into the realities of the typical treaty-based investor-state dispute settlement that makes states question the wisdom of signing onto investment treaties. The *White Industries* case has all the hallmarks of a North-South investment arbitration. To begin with, it was a case initiated by an Australian investor against India in July 2010 on the basis of a BIT that Australia and India signed in February 1999.[97] The Australian investor, White Industries, represented by Australian lawyers with the firm of Mallesons Stephen Jaques,[98] claimed that India breached its international obligations under several provisions of the Australia-India BIT. India, represented by UK lawyers in collaboration with an Indian firm, denied the allegations.[99] The Tribunal was composed of the Honorable Charles Brower of the United States (claimant's appointee), Christopher Lau of Singapore (India's appointee), and William Rowley of Canada (selected by the party-appointed arbitrators as chair).[100] Before the Tribunal's analysis of the treaty claim is discussed, it is important to take a brief look at what gave rise to the treaty claim.

An Indian state-owned enterprise, Coal India, hired White Industries for the development of a coal mine in Piparwar, India, including the

95. *See generally* Won Kidane, *The China-Africa Factor in the Contemporary ICSID Legitimacy Debate*, 35 U. PA. J. INT'L L. 559, 564 (2014) (arguing that the ICSID was never designed for, nor has it ever meaningfully served, South-South disputes, which China-Africa disputes technically are).

96. White Industries Australia Ltd. v. The Republic of India, Final Award, at ¶ 1 (UNCITRAL Arb. Nov. 30, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf; *see generally* Investment Policy Hub, *White Industries Australia Limited v. The Republic of India*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/Details/378 (last visited Oct. 30, 2017) (listing general information about the arbitration).

97. *See White Industries*, UNCITRAL, Final Award, at ¶¶ 1.1, 1.2 (alleging that India breached its obligations under Articles 3, 4, 7, and 9 of the BIT).

98. *Id.* at ¶ 1.4.1. The lawyers for the claimant were Professor Max Bonnell, Jason Clapham, and Herman Pintos-Lopez. *Id.* After its merger with the Chinese firm of King Wood, the firm is now called King Wood Mallesons. *See, e.g.*, Carolina Bolado, *King & Wood, Mallesons Merger to Create Asian Superfirm,* LAW360 (Dec. 15, 2011), https://www.law360.com/articles/293811/king-wood-mallesons-merge-to-create-asian-superfirm. (discussing the merger which created the largest law firm headquartered outside of the United States and the United Kingdom).

99. *White Industries*, UNCITRAL, Final Award, at ¶ 1.4.2. The Indian firm is Fox Mandel and Company. *Id.* The Indian lawyers include: Som Mandel, Mamta Tiwari, and Shaiwal Srivastava. *Id.* The UK lawyers were Toby Landau, QC, and Salim Moollan. *Id.*

100. *Id.* at ¶ 1.5.1.

supply of equipment for the contract price of USD $206.6 million.[101] The contract contained a bonus-penalty scheme that mandated a bonus to White Industries if it exceeded a minimum production target; and, as a corollary, it imposed a penalty if it failed to meet the minimum production requirements.[102] A dispute subsequently arose in connection with this bonus-penalty scheme. Coal India believed that White Industries' output of production failed to meet the quantitative and qualitative requirements of the contract and sought to impose a penalty. White Industries, on the other hand, believed that it exceeded the quantitative requirement and asked for a bonus to be paid.[103]

Coal India then cashed a Bank Guarantee in the amount of USD $2.77 million.[104] That caused White Industries to initiate an International Chamber of Commerce ("ICC") arbitration, which was the mechanism of dispute settlement that the two had contractually agreed upon.[105] The ICC Tribunal was composed of Trevor Marling (an Australian nominated by White Industries), Jevon Reddy (an Indian nominated by Coal India), and Max Abrahamson (an Irishman appointed by the ICC.)[106] Because the contract did not indicate the seat of the arbitration, the ICC Court decided it would be Paris, but the actual hearing took place in London upon the agreement of the parties for reasons of convenience.[107]

The essence of the dispute in the ICC arbitration pertained to the quality and quantity of production. The claimant said it exceeded targets, but the respondent argued that the claimant failed to meet the target and that the quality of what was produced did not meet contractual specifications.[108] The Tribunal had to decide which of the parties was correct on the basis of the factual record submitted to it. In the treaty-based investment dispute, however, the Tribunal had to accept all of the factual determinations of the ICC Tribunal, and indeed began by saying: "[w]ith few exceptions, the factual matrix out of which this dispute arises is either agreed or not seriously disputed."[109] The ICC Tribunal decided in favor of the claimant, White Industries, by a majority vote of two

101. *Id.* at ¶ 3.2.13.

102. *Id.* at ¶¶ 3.219–21.

103. *Id.* at ¶¶ 3.2.24–29.

104. *Id.* at ¶ 3.2.28.

105. *Id.* at ¶ 3.2.29.

106. *Id.* at ¶ 3.2.29. The award does not indicate that Max Abrahamson was appointed by the ICC; *but see* White Industries Australia Limited v. Coal India Limited, Case No. 2004-5-10, Final Judgment, at ¶ 2 (Calcutta HC 2004), http://www.the-laws.com/Encyclopedia/Browse/Case?CaseId=504002613000.

107. *White Industries*, UNCITRAL, Final Award, at ¶¶ 3.2.30-31.

108. *Id.* at ¶¶ 3.2.24–25.

109. *Id.* at ¶ 3.1.1.

arbitrators, with the nominee of the respondent, Coal India, dissenting.[110] Coal India challenged the ICC appointed chair, Abrahamson, on grounds of bias, but the ICC Court rejected this argument.[111] Hence, when the Tribunal stated the facts were not disputed, it did not mean that the parties in the ICC arbitration accepted the facts as determined by the ICC Tribunal. Rather, the nature of the investment dispute did not allow a review of the facts because the dispute only pertained to allegations of violations of certain treaty obligations under the BIT between the host state and the home state of the investor.[112]

The Tribunal considered eight treaty-based claims: (1) whether White Industries met the definition of an "investor" and whether its operations counted as "investment" for purposes of protection; (2) the Tribunal's jurisdiction; (3) whether India failed to encourage and promote favorable conditions; (4) whether India breached the fair and equitable treatment standard; (5) whether India breached the "effective means of asserting claims" standard; (6) whether India had expropriated investment belonging to White Industries; (7) whether India disallowed the free transfer of funds in violation of the BIT standard; and (8) if violation was proven, whether White Industries should be compensated.[113]

White Industries' claims, which required a response to each one of the above-listed claims, arose out of Coal India's attempt to get the ICC Tribunal's award set aside by the Indian courts and the approximately nine-year delay of the process.[114] The Tribunal decided that White Industries qualified as an investor and that its operations also qualified as investment under the BIT.[115] It also ruled that it had the jurisdiction to adjudicate the claims.[116] The Tribunal rejected all of White Industries' claims, including the denial of fair and equitable treatment and the related claim of denial of justice.[117] Having rejected all of those claims, however,

110. *Id.* at ¶¶ 3.2.33–34. In fact, the Tribunal found that the Coal Preparation Plant produced 172,749 tons less than the production target and, as such, Coal India was entitled to a penalty of USD $969,060; but then it also found that "the performance of the Coal Preparation Plant and the Coal Handling Plant were not such as to constitute a total filature of consideration." *Id.* at ¶¶ 3.2.33(a)–(b). Finally, White was awarded a bonus and a return of the Bank Guarantee that Coal India had cashed, i.e., a total of approximately USD $4 million. *Id.* at ¶¶ 3.2.33(c)–(e).

111. *Id.* at ¶ 3.2.32.

112. *Id.* at ¶ 1.1.1 (finding the India-Australia BIT to be controlling).

113. *Id.* at ¶ 6.1.1.

114. *See id.* at ¶ 10.4 (discussing denial of justice as result of the delay).

115. *See id.* at ¶ 7.4.19 (citing White's substantial financial and work-based commitments, along with the duration and risk of those commitments, as evidence).

116. *See id.* at ¶ 8 (concluding that the evidence does not support White's contention that the conduct of Coal India is properly attributed to India).

117. *See id.* at ¶¶ 9–10, 12. The core of the legal dispute and the applicable legal principles are very well summarized under footnote 69 of the Final Award by one of the arbitrators, Hon. Charles

the Tribunal took an interesting position and found that India violated its

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Brower. It is reproduced below for context:

> Although there is Supreme Court authority for the proposition that Indian courts can maintain an application for the setting aside of an award which was not made in India, the relevant cases have been heavily criticized, and some judges of the Supreme Court are themselves clearly open to persuasion the other way. While the point is accordingly not settled, it is evident that, at the time White made its application challenging the jurisdiction of the Calcutta High Court to entertain Coal India's setting aside application, it could not be decided in White's favor at any level lower than that of a three-judge bench of the Supreme Court.

Arbitrator Brower is of the view that it is not surprising that the India courts have been subject to criticism since, to his mind, the clear consensus among States is that only the courts of the seat of arbitration—*i.e., "the country in which . . . th[e] award was made"* (*see* Article V (1) (e) of the New York Convention)—are competent to set aside a foreign arbitral award. *See, e.g., Steel Corp. of the Philippines v. International Steel Services, Inc.,* U.S. District Court for the Western District of Pennsylvania, 6 Feb. 2008 (United States); *Empresa Colombiana de Was Ferreas v. Drummond Ltd.,* Colombian State Council, 24 Oct. 2003 and 22 Apr. 2004 (Colombia); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* High Court of the Hong Kong Special Administrative Region, 27 Mar. 2003 (Hong Kong). He refers to Professor van den Berg's authoritative treatise on the New York Convention ("The New York Arbitration Convention of 1958" at 350) which explains that:

> The "competent authority" as mentioned in Article V(1)(e) [of the New York Convention] for entertaining the action of setting aside the award is virtually always the court of the country in which the award was made. The phrase "or under the law of which" the award was made [in Article V(1)(e) of the New York Convention] refers to the theoretical case that on the basis of an agreement of the parties the award is governed by an arbitration law which is different from the arbitration law of the country in which the award was made.

Arbitrator Brower concludes that, contrary to the Indian courts' findings, a choice of Indian law as the law governing the contract is not considered under the New York Convention to imply a choice of Indian arbitration law displacing the arbitration law of the seat of arbitration. "The New York Arbitration Convention of 1958" at 293.

> If the parties provide a general choice of law clause, they intend to give a directive to the arbitrator as to which law he has to apply to the substance. The distinction between substance and procedure would then preclude that the directive given to the arbitrator would also be an "indication" of a choice of the law governing the arbitration. It would therefore seem that the latter can be achieved only by a distinct express agreement. . . . Thus if a contract contains a general choice of law clause and provides in the arbitral clause that arbitration is to be held in a country with a different law, the latter indication [(i.e., "that the choice of law clause for the contract in general is not sufficient as choice of law for the arbitral clause")] must be deemed to prevail over the former [(i.e., that the choice of law clause for the contract in general "also applies to the arbitral clause")]. *Id.*

For Arbitrator Brower, the 1996 Act cannot justify the actions of the Indian judiciary since, as explained by Professor van den Berg, the New York Convention supersedes domestic law concerning the enforcement of foreign arbitral awards:

> [S]ome courts still seem to have difficulties in applying the Convention's principle that it supersedes domestic law concerning the enforcement of foreign awards. . . . The grounds for refusal of enforcement mentioned in Article V, or, as the case may be, in the corresponding Article in the implementing Act, are exclusive if the enforcement is governed by the Convention, and do not leave any room for reference to the law of the forum on this point. *Id.* at 268.

White Industries, UNCITRAL, Final Award, at ¶ 10.4.11 n.69.

obligation to provide "effective means of asserting"[118] and "enforcing" claims.[119] Technically, that provision is not even a part of the applicable India-Australia BIT, but the Tribunal imported this standard from the India-Kuwait BIT through the most favored nation treatment ("MFN") provision contained in the Australia-India BIT.[120] Substantively, the Tribunal ruled that India violated this principle mainly because of the delay in its court system.[121] In the Tribunal's own words:

> In these circumstances, and even though we have decided that the nine years of proceedings in the set aside application do not amount to a denial of justice, the Tribunal has no difficulty in concluding the Indian judicial system's inability to deal with White's jurisdictional claim in over nine years, and the Supreme Court's inability to hear White's jurisdictional appeal for over five years, amounts to undue delay and constitutes a breach of India's voluntarily assumed obligation of providing White with "effective means" of asserting claims and enforcing rights.[122]

Although the Investment Tribunal arrived at this conclusion through lengthy and complicated legal reasoning, the decision is essentially a judgment on the quality of the judicial system in India. At the technical level, through intricate legal reasoning, the Investment Tribunal found itself reviewing the grounds of refusal of enforcement under the New York Convention and the relevant Indian law that incorporated those principles, and it concluded that none of the grounds of refusal applied.[123]

Indeed, this goes to the heart of the classic dilemma in international investment law about the superior treatment of foreign nationals and interests. At the end of the day, India found itself having to live with two arbitral decisions that it did not consider fair or appropriate. In the ICC arbitration, it challenged the ICC-appointed chair on grounds of bias, but the ICC Court rejected its claim. The ICC Tribunal made a factual determination by a majority vote which included the arbitrator who was challenged. India obviously did not think those determinations were right. It sought a review by its own courts. Another Tribunal held that it failed

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118. *See White Industries*, UNCITRAL, Final Award, at ¶ 11.4.19 (explaining India's violation).

119. *See id.* at ¶ 11.4.4 (analyzing "enforcing" separately).

120. *See id.* at ¶ 11.1.1 (noting Art. 4(2) of the India-Australia BIT contains the MFN clause); *see also id.* at ¶ 11.1.4 (noting the India-Kuwait BIT at art. 4(5) contains the "effective means of asserting and enforcing rights" standard).

121. *See id.* at ¶ 11.4.5 (noting that the proceedings were conducted in an untimely manner starting with Coal India being allowed to file its initial reply and formal objections in an untimely manner and continuing to "drag[] on" in this manner).

122. *Id.* at ¶ 11.4.19. The Tribunal finally held that "India is in breach of Article 4(2) of the BIT." *Id.* at ¶ 11.4.20.

123. *See id.* at ¶¶ 2.33–14.2.66 (examining the application of the grounds of refusal).

to provide meaningful judicial remedy, i.e., that the Indian judicial system was inadequate for the Australian investor. The Tribunal's summary of the facts and India's arguments make it clear that Coal India believed that White Industries failed to meet its contractual obligations and was disappointed when a tribunal that it thought was biased held against it by a majority vote containing the allegedly biased arbitrator, who was appointed by the ICC.[124] It is important to remember that the only Indian in the whole saga did not agree with the Australian investor. India sought to remedy the injustice it felt by going to court, but then another tribunal held that the way the Indian courts handled the matter violated its international obligations.

Despite its resistance to joining the ICSID Convention, India ended up getting a tribunal that looked entirely like an ICSID tribunal as a result of the BITs that it had reluctantly signed. Again, it joined the BIT program late, but it was not spared of the disappointments. Unfortunately for India, White Industries was just the beginning.

ii. Settled and Pending Cases

So far, India has settled at least nine known investment claims. Although detailed information on each is not publicly available, the available information offers additional background on India's disappointment and its decision to renegotiate its BITs on the basis of a new Model.

By far the most publicized and highly complicated claims that India has faced related to the USD $2.9 billion Dabhol Power Project.[125] The participants of the project ranged from an Indian local government, to Enron, to the United States government. When in 1992 the Indian government revealed its interest in partnering with foreign investors for the development of its power sector, it received enthusiastic and capable supporters, including Enron, which quickly raised USD $1.9 billion in project debt from banks, offshore commercial lenders, and others, including Bechtel and General Electric.[126] The United States' Overseas Private Investment Corporation ("OPIC") provided an additional USD $160 million, with added coverage of $200 million for political risk.[127]At that time, although India approached the World Bank for additional

124. *Id.* at ¶ 5.

125. *See* Kenneth Hansen, Robert C. O'Sullivan and W. Geoffrey Anderson, *The Dabhol Power Project Settlement: What Happened? And How?*, INFRASTRUCTURE J. (2005), https://ijglobal.com/articles/30062/the-dabhol-power-project-settlement-what-happened-and-how (summarizing the history of the project and the various arbitrations and settlements).

126. *See id.* at 1 (explaining Enron's financing interests).

127. *Id.*

financing, the World Bank refused, concluding that the Dabhol project was "not economically viable."[128] Sure enough, "the predictions that the project consisted of too much, too soon proved . . . to be prescient. It was clear by 2001 that MSEB [the Maharashtra State Electricity Board] neither needed, nor could afford the energy it had committed to buy from the project."[129]

Indeed, the Dabhol debacle led to no fewer than thirty arbitrations and judicial proceedings, including a state-to-state arbitration that the United States initiated against India.[130] As commentators noted:

> The looming $6 billion Bechtel and GE arbitration, the USG [United States government] arbitration, the offshore banks' threatened arbitrations under bilateral investment treaties, the shortage of power in Maharashtra, and even general frustration and the size of mounting expenses may all have contributed to the sudden change in the Indians' negotiating position in March 2005, and all therefore continued to the comprehensive commercial settlement that was achieved.[131]

The investment case listed as *Bechtel v. India* under the India-Mauritius BIT[132] grew out of the same circumstances that gave rise to one of the reported ICC arbitrations: *Capital India Power Mauritius I & Energy Enterprises (Mauritius) Company v. Maharashtra Power Development Cooperation.*[133] In that case, an ICC Tribunal composed of James H. Carter, Louis A. Craco, and Jonathan Rosner awarded more than USD $125 million to the Mauritian subsidiaries of the U.S.-based Bechtel Enterprises and General Electric.[134] The UNCTAD Investment

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128. *Id.*

129. *Id.* at 2. The passage continues:

> The October 2000 payment due from MSEB went unpaid until January 2001 when the state Government stepped in to bail out the cash-strapped MSEB. Months of slow payments, and non-payments followed. By June, the properties had collapsed. By December 2001, Enron was no longer capable of maintaining its core operations, much less prepared to invest in the defense of a large, troubled project. Thus, by late 2001, the fate of the world's largest independent power project and the largest foreign investment in India was put in the hands of creditors, minority investors, defaulting governmental stakeholders and lawyers. *Id.*

130. *Id.* at 4.

131. *Id.*

132. *See* Investment Policy Hub, *Bechtel v. India*, UNCTAD, http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchBITResults (last visited Oct. 30, 2017) (comparing the circumstances between different BIT cases).

133. Capital India Power Mauritius I & Energy Enterprises (Mauritius) Company v. Maharashtra Power Development Corporation, Case No. 12913/MS (ICC Int'l Ct. Arb.), https://www.italaw.com/documents/Dabhol_award_050305.pdf [hereinafter *Mauritius* Award].

134. *See* Luke Eric Peterson, *Bechtel Subsidiary Wins Arbitration with Indian State of Maharashtra*, INVEST-SD: INVESTMENT LAW AND POLICY NEWS BULLETIN (May 5, 2005), http://www.iisd.org/itn/wp-content/uploads/2010/10/investment_investsd_may5_2005.pdf (explaining the Mauritian award).

hub database shows that India settled the investment claim for USD $160 million.[135] The ICC Tribunal did issue a final award in *Capital India Power*.[136] Although the case was initiated by many shareholders against the Indian shareholder, Maharashtra Power Development Cooperation, the only claimant that lasted until the issuance of the award was Energy Enterprises (Mauritius) Company ("EEMC"), a Bechtel subsidiary. The Indian shareholder refused to participate in the arbitral proceedings, failing to accept the Tribunal's jurisdiction. However, the claimant managed to have a tribunal formed[137] and a favorable award issued to it all without the respondent's participation.[138] Having held that the Indian

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135. *See id.* (noting India's settlement).

136. *Mauritius* Award, Case No. 12913/MS. The Indian Shareholder or Party, as the Tribunal described it, is:

> Respondent Maharashtra Power Development Corporation Limited ("MPDCL") is also a party to the DPC Shareholders Agreement. It is a special purpose entity, having been created under circumstances that will be later discussed for the sole purpose of holding shares in DPC on behalf, it is alleged, of the Maharashtra State Electricity Board ("MSEB"). *Id.* at 3.

137. The Award further held:

> On October 26, 2003, the federal court in New York granted a default judgment compelling MPDCL to participate in this proceeding. MPDCL neither obeyed the order nor designated an arbitrator. Accordingly, as contemplated by the Shareholders Agreement, EEMC petitioned the Chief Judge of the United States District Court for the Southern District of New York to exercise the jurisdiction conferred by the United States Federal Arbitration Act (9 U.S.C. section 206) to designate an arbitrator in lieu of MPDCL. The petition was granted, and on February 19, 2004, the Court appointed Jonathan Rosner to act as co-arbitrator. On March 26, 2004, the ICC Court confirmed Mr. Carter and Mr. Rosner as co-arbitrators. On April 28, 2004, the ICC Court confirmed Louis A. Craco as Chairman, upon the joint nomination of the co-arbitrators. *Id.* at ¶ 11–12.

138. *Id.* at 30–31. On the basis of these findings, the arbitral Tribunal concluded:

> First, MPDCL violated Section 2.5(a) of the Shareholders Agreement, which required the shareholders to vote for each other's nominees in order to ensure the election of each shareholder's designated members, by failing to vote in concert with the other shareholders to constitute a functioning board of directors in May 2002 and thereafter.
>
> Second, MPDCL repeatedly violated section 5.4 of the Shareholders Agreement by failing to act in good faith in the best interest of DPC in matters in which its Affiliates, MSEB and SOM, were involved adversely to DPC, and by acting instead in the best interests of those Affiliates.
>
> Third, MPDCL repeatedly violated section 8.1 of the Shareholders Agreement by initiating and maintaining judicial and administrative proceedings adverse to DPC and its other shareholders instead of submitting such matters to international arbitration as it was required to do; by maintaining proceedings in such forums designed to frustrate such arbitral proceedings, including the instant case, when they had properly been initiated by DPC or the other shareholders; and by disobeying the orders of the United States District Court for the Southern District of New York, rendered pursuant to Section 8.1 and 8.2 of the Shareholders Agreement compelling it to arbitrate the instant dispute before this Arbitral Tribunal.

shareholder engaged in total expropriation of the claimant's interests, the Tribunal awarded a total of USD $94.9 million, plus interest, as well as costs of the Tribunal and costs of representation.[139] The Indian shareholder's level of frustration in this case was such that it refused to participate. A tribunal with little mercy was appointed and blamed the project failure on it, even calling it expropriation when it was clear that the project's failure was the fault of all parties.

In addition to the composition of the Tribunal, a few more things are interesting in this case. The selected law was that of New York and the appointing authority was given to a district court in New York. Furthermore, because it was an ICC arbitration, it fell under the ICC Court's "oversight" jurisdiction, which confirmed the arbitrators. The Indian party did everything wrong in negotiating an arbitration agreement, not an uncommon misstep in developing countries. It is entirely possible that the Indian party had not given the dispute settlement provision careful thought.

In these and more than thirty cases that arose out of the Dabhol debacle, India suffered the consequences of poor project appraisal that all parties were guilty of, yet it disproportionately bore those consequences. Clearly, the investors were able to use arbitration not only as a means of dispute settlement, but also as a means of extracting concessions. At the

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> Fourth, MSEB and SOM are "Affiliates" of MPDCL, and of each other, as that term is defined in the Shareholders Agreement.
>
> Fifth, MSEB and SOM by their acts described above separately and taken as a course of conduct each breached the provisions of Project Contracts, including the PPA, the SOM Guarantee and the SSA. Pursuant to the terms of Section 7.2 of the Shareholders Agreement, MPDCL is liable to the Claimant for its losses and damages arising out of those wrongful acts and course of conduct.
>
> Sixth, MPDCL was the agent and alter ego of SOM and MSEB, and, accordingly, they are liable to Claimant for the damages for which MPDCL is itself found liable in this proceeding.
>
> Seventh, the coordinated course of conduct, including the several breaches found above, are all in violation of the Shareholders Agreement, the law of the State of New York which governs that contract, and the applicable standards of international law requiring recognition of written agreements to submit to international arbitration and forbidding uncompensated expropriation of Claimant's property.
>
> Eighth, the coordinated course of conduct, including the several breaches found above, operated as a total expropriation of the Claimant's investment in the Project, and resulted in depriving Claimant of its fundamental rights in the Project and the entire benefit of its investment therein. *Id.*

139. *See id.* at 32–34 (analyzing the Tribunal's partial grant and partial denial of damages in favor of Claimant).

end of the day, although it is difficult to say whether India's decision to sign the BITs helped it attract investment or not, as commentators note, at least in this instance:

> There can be little doubt . . . that, all else equal, the existence of Dabhol makes investors wiser and slower in committing their resources to India. The attraction is still there, but the calculation today has to compensate for risks that, before Dabhol, would not have been given as much weight.[140]

Standard Bank also initiated separate investment arbitrations on the basis of the India-UK BIT. The case settled after two arbitrators were appointed (Schreuer, C.H., and Greenwood, C.) but before the case was considered.[141] Seven more cases initiated by investors from various countries arising out of the same Dabhol project failure also settled.[142] The details of the settlements are not publicly known, but it is clear that India must have been frightened not only by the sheer volume of the cases filed against it and the amount of money claimed, but also the composition of the tribunals, which consisted of almost no one from India or even other developing countries who would be sympathetic to the predicaments of governments of developing countries.

Between 2012 and 2016, ten more investment claims were filed against India. Unlike the nine Dabhol project-related cases, most of the ten cases filed since 2012 did not arise out of related factual circumstances.

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140. Hansen, O'Sullivan and Anderson, *supra* note 125.

141. Investment Policy Hub, *Standard Chartered Bank v. India*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/Details/152 (last visited Oct. 30, 2017).

142. These cases include: *Offshore Power v. India* (2004) under the India-Netherlands BIT (1995), Arbitrators: Marc Lalonde (Canada) and Lord Cooke, *see* Investment Policy Hub, *Offshore Power v. India*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/Details/139 (last visited Oct. 30, 2017); *Erste Bank v. India* (2004) under the India-Austria BIT (1999), *see* Investment Policy Hub, *Erste Bank v. India*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/Details/141 (last visited Oct. 30, 2017); *Credit Suisse v. India* (2004) under the India-Switzerland BIT (1997), Arbitrators: Christoph H. Schreuer (Austria) and Christopher Greenwood (UK), *see* Investment Policy Hub, *Credit Suisse v. India*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/Details/150 (last visited Oct. 30, 2017); *Credit Lyonnas v. India* (2004) under the India-France BIT (1997), Arbitrators: Christoph H. Schreuer (Austria) and Christopher Greenwood (UK), *see* Investment Policy Hub, *Credit Lyonnas v. India*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/Details/148 (last visited Oct. 30, 2017); *BNP Paribas v. India* (2004) under the India-France BIT (1997), Arbitrators: Christoph H. Schreuer (Austria) and Christopher Greenwood (UK), *see* Investment Policy Hub, *BNP Paribas v. India*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/Details/147 (last visited Oct. 30, 2017); *ANZEF v. India* (2004) under the India-UK BIT (1994), Arbitrators: Schreuer, C. H. and Greenwood, C., *see* Investment Policy Hub, *ANZEF v. India*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/Details/151 (last visited Oct. 30, 2017); *ABN Amro v. India* (2004) under the India-Netherlands BIT (1995), Arbitrators: Christoph H. Schreuer (Austria) and Christopher Greenwood (UK), *see* Investment Policy Hub, *ABN Amro v. India*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/Details/149 (last visited Oct. 30, 2017).

Chronologically, the first of the ten is *Tenoch Holdings v. India.*[143] The case was filed by a foreign investor in the telecom sector under the India-Russian Federation BIT (1994) and the India-Cyprus BIT (2002) for alleged violations of the fair and equitable treatment principle, denial of justice, and discrimination, among others.[144] The investor claimed damages in the amount of USD $400 million. The arbitrators were Bernardo Sepulveda Amor (Mexico), the Honorable Charles Brower (United States), and Brigitte Stern (France).[145]

In *Devas v. India*, the investor sought USD $1 billion in compensation for indirect expropriation and other alleged violations of standards contained in the India-Mauritius BIT.[146] In this PCA-administered UNCITRAL case, the arbitrators were: Marc Lalonde (Canada), David R. Haigh (Canada), and Anil Dev Singh (India). The claimant was represented by Skadden, Arps, Slate, Meagher & Flom LLP, and the respondent was represented by Curtis, Mallet-Prevost, Colt & Mosle LLP.[147]

In *KHML v. India*, Khaitan Holding Mauritius Limited ("KHML") claimed USD $1.4 billion for alleged violations of the India-Mauritius BIT because of actions taken by the Indian Supreme Court in cancelling a telecom license.[148] In this UNCITRAL ad hoc arbitration, the arbitrators were Francis Xavier (appointed by the claimant) and Brigitte Stern (appointed by the respondent). The chair was not identified.[149]

In *Deutsche Telekom v. India*, a German-based telecom company initiated an UNCITRAL arbitration claiming an undisclosed amount of compensation for violations of the 1995 India-Germany BIT.[150] The facts of this case are related to the *Devas* case, as Deutsche had invested with Devas. The arbitrators in this case were: Gabriele Kaufmann-Kohler (Switzerland, president), Brigitte Stern (France, respondent's appointee), and Daniel M. Price (United States, claimant's appointee).[151]

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143. Tenoch Holdings Limited, Maxim Naumchenko, & Andrey Poluektov v. The Republic of India, PCA Case No. 2013–23 (2012), https://www.pcacases.com/web/view/6.

144. For a basic discussion, see Investment Policy Hub, *Tenoch Holdings v. India*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/Details/491 (last visited Oct. 30, 2017).

145. *Id.*

146. CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telecom Devas Mauritius Limited v. Republic of India, PCA Case No. 2013-09 (2013), http://www.pcacases.com/web/view/46.

147. *Id.*

148. Investment Policy Hub, *Khaitan Holdings Mauritius Limited v. India*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/Details/553 (last visited Oct. 30, 2017).

149. *See id.* (identifying the arbitrators).

150. Investment Policy Hub, *Deutsche Telekom v. India*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/Details/550 (last visited Oct. 30, 2017).

151. *See id.* (naming the arbitrators).

In *Vodafone v. India*, the investor initiated the UNCITRAL arbitration under the 1995 India-Netherlands BIT, objecting to the Indian government's imposition of certain taxes.[152] The arbitrators were Yves Fortier (Canada, claimant's appointee) and Oreamuno Blanco (Costa Rica, respondent's appointee replacing former Chief Justice of India, R.C. Lahoti).[153] The chair is not known. The government was represented by Curtis, Mallet-Prevost, Colt & Mosle.[154]

In *LDA v. India*, the French claimant alleged violations of some principles of the 1997 BIT between India and France arising out of a construction project.[155] In this PCA-administered UNCITRAL arbitration, the arbitrators were: Jean E. Kalicki (president), Julian D.M. Lew (claimant's appointee), and Christopher Thomas (respondent's appointee).[156] The claimant was represented by Vaughan Lowe and Tariq Baloch in London and J. Sagar Associates in Mumbia.[157] The respondent was represented by Foley Hoag's Washington office.[158]

Cairn v. India concerned a claim arising out of a tax assessment in the oil and gas industry.[159] The claimant, Cairn, alleged violations of some principles of the 1994 India-UK BIT and claimed compensation in the amount of USD $1 billion.[160] The arbitrators were Laurant Levy (Switzerland, president) Stanimir A. Alexandrov (United States/Russia, claimant's appointee), and Christopher Thomas (Canada, respondent's appointee.)[161]

Similarly, in *Vedata v. India*, the claimant sought USD $3 billion in compensation for a tax assessment pertaining to the company's oil and gas operations that it denied it owed and alleged violations of certain provisions of the 1994 India-UK BIT.[162] The arbitrators were Michael

152. Investment Policy Hub, *Vodafone International BV v. India*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/Details/581 (last visited Oct. 30, 2017).

153. *Id.*

154. *See Vodafone, Gov't Agree to Extend Date for Selection of Third Arbitrator*, BUS. STANDARD (Sept. 16, 2014), http://www.business-standard.com/article/pti-stories/voda-govt-agree-to-extend-date-for-selection-of-3rd-arbitrator-114091601079_1.html (identifying the representative parties).

155. Louis Freyfus Armoteurs SAS v. The Republic of India, PCA Case No. 2014-26 (2014), http://www.pcacases.com/web/view/113 (Ms. Jean E. Kalici served as the presiding arbitrator).

156. *Id.*

157. *Id.*

158. *Id.*

159. Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India, PCA Case No. 2016-7 (2016), https://www.italaw.com/cases/5709; Investment Policy Hub, *Carin v. India*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/Details/691 (last visited Oct. 30, 2017).

160. *Cairn Energy*, PCA Case No. 2016-7.

161. *See id.* (explaining the parties and claims).

162. Investment Policy Hub, *Vedanta Resources PLC v. India*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/Details/733 (last visited Oct. 30, 2017).

Hwang (United Kingdom/Singapore, president), James Spigelman (Australia, claimant's appointee), and McRae, D.M. (Canada, respondent's appointee).[163]

South Asia Entertainment Holdings Limited v. India is based on the India-Mauritius BIT for allegations of unfair and biased criminal investigations by the government.[164] In this UNCITRAL arbitration, the claimant appointed Peter Leaver (UK).[165] No other information is available as of this writing.

The last case is *Astro All Asia Networks v. India*. This case was initiated under the India-UK BIT but was based on the same factual

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163. *Id.*; *see also* Press Release, Vedanta Resources PLC: Notice of Claim served under Bilateral Investment Treaty (Mar. 27, 2015) https://www.cairnindia.com/sites/default/files/press_releases/2015-03-27_RNS_VED%20_BIT-Claim.pdf. The press release issued by the claimant states the following:

> 27 March 2015
>
> Vedanta Resources plc
>
> Notice of Claim served under Bilateral Investment Treaty
>
> As notified on 13 March 2015, Cairn India Limited ("Cairn India"), a subsidiary of Vedanta Resources Plc ("Vedanta"), has received an assessment order from the Indian Income Tax Department regarding a decision by the Government of India ("GOI") in 2012 to amend the Indian Income Tax Act 1961 to impose retrospective tax on various prior transactions. In this respect, Vedanta's Board of Directors has instructed counsel to file a Notice of Claim against the GOI ("Notice") under the UK-India bilateral investment treaty (the "BIT") in order to protect its legal position and shareholder interests.
>
> The Notice relates to the retrospective tax legislation passed by the GOI and a related tax demand made against Cairn India, an Indian company in which Vedanta has an approximate 59.9% interest. The tax demand is for an alleged failure to deduct withholding tax on alleged capital gains arising during 2006–07 in the hands of Cairn UK Holdings Limited, Cairn India's erstwhile parent company, a subsidiary of Cairn Energy Plc. The sums demanded from Cairn India total INR 204,947,284,528 (equivalent to approximately USD $3,473,642,264 of "tax", and the same amount again as "interest". If enforced, such tax demand would have serious consequences for Cairn India and therefore Vedanta's investment in Cairn India. Vedanta understands that a parallel tax demand has also been made by the Indian Income Tax Department on Cairn UK Holdings Limited. The Notice was served under, and is the first step required prior to the commencement of international arbitration pursuant to, the BIT. The BIT provides that the GOI is obliged, amongst other things, to accord fair and equitable treatment to investors and to provide full protection and security to investments. Vedanta and Cairn India have been advised by leading international counsel that the retrospective tax legislation passed is a violation of protections accorded to investors under the BIT and constitutes a serious impairment of the treaty rights of Vedanta. Vedanta and Cairn India will continue to take all necessary steps to protect their interest and the interest of their shareholders.

164. Investment Policy Hub, *Astro and South Asia Entertainment Holdings Limited v. India*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/Details/735 (last visited Oct. 30, 2017).

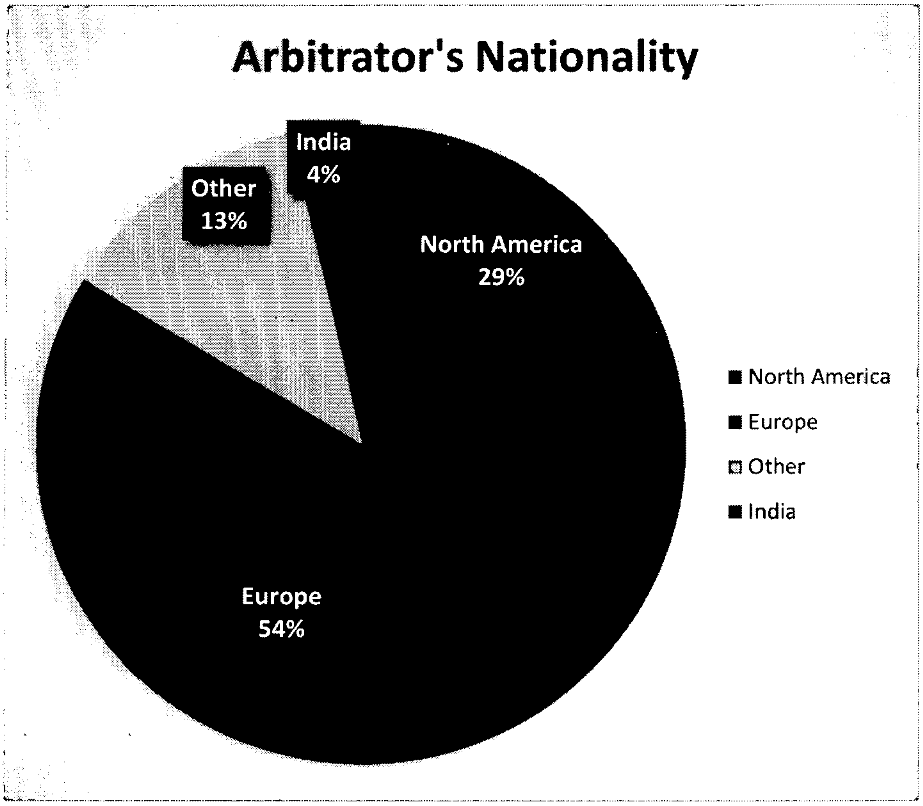
165. *Id.*

allegations of unfair and biased criminal investigation by the government.[166] The claimant appointed Peter Leaver (UK).[167] No other information is available as of this writing.

Case Name	Arbitrator Name	Arbitrator Nationality
Capital India Power Mauritius I & Energy Enterprises Company v. India	Dame Rosalyn Higgans; Lord Cooke Thorndon; Martin Hunter	New Zealand; UK
Offshore Power v. India	Marc Lalonde and Lord Cooke of Thorndon	Canada; New Zealand
Erste Bank v. India	Christoph Schreuer; Christopher Greenwood	Austria; UK
Credit Suisse v. India	Christoph Schreuer; Christopher Greenwood	Austria; UK
Credit Lyonnas v. India	Christoph Schreuer; Christopher Greenwood	Austria; UK
BNP Paribas v. India	Christoph Schreuer; Christopher Greenwood	Austria; UK
ANZEF v. India	Christoph Schreuer; Christopher Greenwood	Austria; UK
ABN Amro v. India	Christoph Schreuer; Christopher Greenwood	Austria; UK
Tenoch Holdings v. India	Bernardo Sepúlveda-Amor; Charles N. Brower; Brigitte Stern	Mexico; United States; France
CC/Devas Ltd., Devas Employees Mauritius Private Limited, and Telecom Devas Mauritius Limited v. India	Marc Lalonde; David Haigh; Shri Anil Dev Singh	Canada; India
KHML v. India	Francis Xavier; Brigitte Stern	Singapore; France
Deutsche Telekom v. India	Brigitte Stern; Daniel Price; Lévy Kaufmann-Kohler	France; United States; Switzerland
Vodafone v. India	Yves Fortier; RC Lahoti; Rodrigo Oreamuno; Frank Berman	Canada; India; Costa Rica; UK

166. *Id.*
167. *Id.*

Louis Dreyfus Armateurs SAS v. India	Jean Kalicki; Julian D.M. Lew; Christopher Thomas	United States; UK; Canada
Cairn v. India	Lévy Kaufmann-Kohler; Stanimi Alexandrov; Christopher Thomas	Switzerland; United States; Canada
Vedanta v. India	Michael Hwang; James Spigelman; Donald McRae	Singapore; Australia; Canada
South Asia Entertainment Holdings Limited v. India	Peter Leaver; Michael Moser; Reed, L.	UK; United States
Astro Asia Networks v. India	Peter Leaver; Michael Moser; Reed, L.	UK; United States
White Industries v. India	J. William Rowley; Charles Brower; Christopher Lau	UK; United States; Singapore
Standard Charted Bank v. India	Christoph Schreuer; Christopher Greenwood	Austria; UK
Bechtel v. India	Charles Renfrew; David Jay; Robert Layton	United States
Rakia v. India	Case Still Pending as of 2016 (No Information on Arbitrators)	



E. Conclusion

India seems to have done everything wrong. First, unlike China, it failed to make its own alternative to the UK BIT Model, replicating it over and over again with almost all of its partners from the North and the South. It earned a poor reputation for refusing to join ICSID, but did not avoid ICSID-like arbitral proceedings. In the twenty cases in which India was named as a respondent state, the composition of nearly all of the tribunals was unfavorable, with 83 percent from the developed world of the North. The results have been a total disappointment.

China, on other hand, adopted its own alternative BIT Model, modifying it as its economy progressed. It joined ICSID on its own schedule, and despite the enormity of the investment that it attracted from the North over the last three decades, it avoided upsetting arbitral cases—even winning the only case that proceeded to final disposition.[168]

168. *See* Ansung Housing Co., Ltd. v. People's Republic of China, ICSID Case No. ARB/14/25, Final Award (Mar. 9, 2017) (highlighting China's victory).

To add to India's follies, it is now seeking to renegotiate almost all of its existing and future BITs on the basis of an unusual BIT Model Text—a strategy that is unlikely to meaningfully address its intractable problems. The next Section critically appraises India's new BIT Model Text as an example of the contemporary backlash against the existing system and the implications for future South-South relations; particularly, its implications for Africa's relations with the Asian giants.

III. THE NEW INDIAN BIT MODEL TEXT AND ITS IMPLICATIONS FOR AFRICA

As indicated in Section II, India was highly suspicious of the international investment legal regime dominated by ICSID from the very beginning, deciding not to join. It could not, however, avoid the worst consequences of the investor-state dispute settlement system. Highly disappointed by its record of arbitral decisions against it, India decided to reverse course and come up with a new BIT model purporting to remedy the perceived inequities and shortcomings of the borrowed existing Model. This Section critically appraises the new Indian BIT Model Text in light of its implications for Africa.

A. Evolution of the Draft and the Final Model Text: A Comparative Look

Before settling on the existing draft, India circulated a draft for comments and consultation, which informed the substance of the final draft. The present Model Text is a product of comments from interested parties on the previous draft,[169] unveiled in March 2015 ("Indian Draft BIT Model Text" or "Draft BIT Text").[170] This Section outlines the salient features of India's overreaction in the Draft BIT Text and its retraction of some of the unusual provisions in the approved Final BIT Model Text ("Indian Final BIT Model Text" or "Final BIT Model")[171] for purposes of assessing its implications for Africa.

169. *See* Grant Hanessian & Kabir Duggal, *The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?*, 32 ICSID REV. – FOREIGN INV. L.J. 216, 216, n.6 (2017) (citing LAW COMM'N OF INDIA, ANALYSIS OF THE 2014 DRAFT MODEL INDIAN BILATERAL INVESTMENT TREATY REPORT NO. 260 (Aug. 2015)). *See also* Jane Kelsey, *India's New Model BIT: A Comparative Analysis*, MADHYAM (May 6, 2016) http://www.madhyam.org.in/indias-new-model-bit-a-comparative-analysis/ (explaining India's new model BIT).

170. Model BIT Text, *supra* note 67.

171. *See* Press Release, Press Information Bureau, Government of India, Cabinet, Model Text for the Indian Bilateral Investment Treaty (Dec. 16, 2015) http://pib.nic.in/newsite/PrintRelease.aspx?relid=133411 (noting the revised Indian Model BIT). On December 16, 2015, the Press Information Bureau of the Government of India announced:

> The Union Cabinet chaired by the Prime Minister Shri Narendra Modi has given its approval for the revised Model Text for the Indian Bilateral Investment Treaty. The

B. Fundamental Assumptions

Over the years, BITs have generally been promoted as a means of encouraging foreign direct investment. As the role they play in attracting foreign investment came under increasing scrutiny,[172] perambulatory texts in investment treaties began to demonstrate some variation. The Indian Draft BIT Model Text and the Final BIT Model Text are demonstrations of this variability. The Draft BIT Text begins with this preamble:

> Reaffirming the right of Parties to regulate Investments in their territory in accordance with their Law and policy objectives including the right to change the conditions applicable to such Investments; and Seeking to align the objectives of Investment with sustainable development and inclusive growth of the Parties.[173]

The focus is entirely on the state's right to regulate and promote sustainable development. By contrast, the old UK Model that India has used over the years focuses on the investor and promotion of investment and the investor's rights. The text of the preamble demonstrates the contrast well:

> Desiring to create conditions favourable for fostering greater investment by investors of one State in the territory of the Other State; recognising 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.[174]

While the Draft BIT Text espoused a notable departure from the original BIT assumptions, the Final BIT Model settled for the following compromise language:

> Desiring to promote bilateral cooperation between the Parties with respect to foreign investments; and Recognizing that the promotion and

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> revised Indian model text for Bilateral Investment Treaty (BIT) will replace the existing Indian Model BIT. The revised model BIT will be used for re-negotiation of existing BITs and negotiation of future BITs and investment chapters in Comprehensive Economic Cooperation Agreements (CECAs) Comprehensive Economic Partnership Agreements (CEPAs) Free Trade Agreements (FTAs). *Id.*

See also Draft BIT Text, *supra* note 67. For the official approved and signed final BIT Model Text see F. No. 26/5/2013–iC, Department of Economic Affairs (Investment Division), Ministry of Finance, Government of India (Dec. 28, 2015).

172. *See, e.g.*, KARL P. SAUVANT AND LISA E. SACHS, THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS (Karl P. Sauvant & Lisa E. Sachs eds., 2009) (expressing doubts about the impact of BITs on investment attraction).

173. Draft BIT Text, *supra* note 67, at pmbl.

174. Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments, India-UK, Mar. 14, 1994, 27 India Cm 2797, pmbl. [hereinafter India-UK BIT].

> 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, Reaffirming the right of Parties to regulate investments in their territory in accordance with their law and policy objectives.[175]

India's overreaction was such that the Draft interestingly omitted "protection" from the preamble, a concept considered the main pillar of the whole investment regime.

C. Substantive Rules

Both the Draft BIT Text and the Final Indian BIT Model Text covers most substantive and procedural areas commonly covered by investment treaties of all types, including the meaning of investment itself, the treatment of investment, expropriation and consequences, and dispute settlement. The important provisions are discussed below in comparative context.

i. Meaning of Investment

The Draft BIT Text replaces the definition of investment and investor with a more detailed and substantially different formulation:

> "Investment" means an Enterprise in the Host State, constituted, organised and operated in compliance with the Law of the Host State and owned or controlled in good faith by an Investor:
>
> (i) in accordance with this Treaty; and (ii) that is at all times in compliance with the obligations in Articles 9, 10, 11 and 12 of Chapter III of this Treaty.[176]

The most notable additions here are the requirement of "good faith" and compliance with certain other independent obligations enumerated in other provisions that are not typically associated with the meaning of "investment." For example, Article 9 imposes an obligation not to engage in corrupt activities and sets forth detailed rules on what is prohibited, including what looks like lobbying. Technically, therefore, violation of the anti-corruption provision would deny the protection of the bilateral investment by not considering it a covered "investment" in the first place. The violations of Article 10 (failure to disclose required information), Article 11 (failure to comply with tax obligations), and Article 12 (failure to comply with host state laws, including minimum wage requirements) have a similar effect of denial of protection. This proposal was draconian even by the contemporary standards that counsel caution. For example, consider the application of Article 12:

175. Model BIT Text, *supra* note 67, at pmbl.

176. Draft BIT Text, *supra* note 67, at art. 1.6.

> 12.1 Investors and their Investments shall be subject to and comply with the Law of the Host State. This includes, but is not limited to, the following: (i) Law concerning payment of wages and minimum wages, employment of contract labour, prohibition on child labour, special conditions of work, social security and benefit and insurance schemes applicable to employees; (ii) information sharing requirements of the Host State concerning the Investment in question and the corporate history and practices of the Investment or Investor, for purposes of decision making in relation to that Investment or for other purposes; (iii) environmental Law applicable to the Investment and its business operations; (iv) Law relating to conservation of natural resources; (v) Law relating to human rights; (vi) Law of consumer protection and fair competition; and (vii) relevant national and internationally accepted standards of corporate governance and accounting practices.

Read in conjunction with the Draft Text's definition of investment, any violation of this provision would deny protection by excluding whatever capital is invested from the definition of "investment." This could cover any failure to comply with "law[s] relating to human rights" or "relevant national and internationally accepted standards of corporate governance and accounting practices." In practical terms, this would mean that an alleged violation of any one of these provisions would have to be litigated to determine whether there is a protected investment in the first place. This very unusual provision would have likely generated more—not fewer—disputes. In any case, the Final BIT Model omitted all the cross-references to the other provisions that conditioned meaning on compliance with other requirements. It defines "investment" simply as:

> [A]n 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.[177]

This is a classic adaptation of what is commonly referred to as the Salini test[178] for investment that requires territorial nexus, some level of permanency, and contribution to the host state.

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177. Model BIT Text, *supra* note 67, at art. 1.4.

178. Salini et. al. (Italy) v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 16 (July 23, 2001), 42 I.L.M. 609 (2003). This case attempted to formulate what looks like a set of common definitional criteria and introduced the elements of putting capital at risk for a certain duration and contribution to the development of the host state. *Id.* at ¶ 52. *See generally* Julian Davis Mortenson, *The Meaning of "Investment": ICSID's* Travaux *and the Domain of International Investment Law*, 51 HARV. INT'L L.J. 257, 269–76 (2010) (discussing the difficulty of defining "investment").

A related concept that both the Draft Text and the Final Model define is "investor." The Draft text defines "an investor" as: "(i) A legal entity constituted, organized and operated in compliance with the Law of the Home State, owned or controlled by a Natural Person or a legal entity of the Home State and conducting real and substantial business operations in the Home State."[179] The Final BIT Model omitted "real" but maintained "and substantial business operations," adding indirect ownership.[180] This is another example of retraction in the face of pressure.

ii. Treatment of Investment

The Draft BIT Text formulated standards of treatment differently. The most unusual provision is the first provision on the standard of treatment. It expressly states that the parties agree to avoid the "denial of jûstice under customary international law." Having expressly incorporated customary international law on denial of justice as a rule of decision, it tightens the standards on violations of due process and abusive treatment by adding adjectives such as "egregious" for violations and "manifestly" for abuse.[181] It subjects "denial of justice" to customary international law and adds stricter standards for violations and abuse. This appears almost meaningless because by so doing the Draft Text necessarily incorporates the "denial of justice" doctrine and jurisprudence developed over the last half-century by reference and renders the other stricter provisions redundant. That is because an investor who cannot demonstrate an "egregious violation" or "manifestly abusive" host-state behavior could still prove a denial of justice under customary international law. Indeed,

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179. Draft BIT Text, *supra* note 67, at art. 1.9.

180. Model BIT Text, *supra* note 67, at art 1.5:

> "Investor" means a natural or juridical person of a Party, other than a branch or representative office, that has made an investment in the territory of the other Party; For the purposes of this definition, a "juridical person" means:
>
> > (a) a legal entity that is constituted, organized and operated under the law of that Party and that has *substantial* business activities in the territory of that Party; or (b) a legal entity that is constituted, organized and operated under the laws of that Party and that is directly or indirectly owned or controlled by a natural person of that Party or by a legal entity mentioned under sub clause (a) herein.

Id. (emphasis added).

181. Draft BIT Text, *supra* note 67, at art. 3:

> Standard of Treatment 3.1 Each Party shall not subject Investments of Investors of the other Party to Measures which constitute: (i) Denial of justice under customary international law (ii) Un-remedied and egregious violations of due process; or; (iii) Manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment. 3.2 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. *Id.*

there would be no point for the investor to even attempt to show egregiousness or manifest abuse to the extent that these standards are not required by customary international law.[182] This is an example of the drafter's dilemma in trying to stay within the acceptable limits of international law while addressing the fear of abuse that India believed it had experienced.

The Final BIT Model Text somewhat remedies this unclear formulation by stating the principle more clearly as follows:

> 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.[183]

Unlike the Draft Text, the BIT Model Text formulates a unitary test of whether the alleged act or omission violates customary international law through one of the enumerated grounds, such as denial of justice, violation of due process, discrimination, abuse, or duress—concepts that it tightens by adding qualifiers such as "targeted" and "manifestly."

Both the Draft BIT Text and the Final BIT Model Text eliminate the Most Favored Nation Treatment ("MFN") standard altogether but keep the National Treatment ("NT") standard. The Draft BIT Text does so in a profusely disturbed manner.[184] The elimination of the MFN provision is not surprising given the brutally creative way that tribunals have used MFN to important all sorts of investor benefits into bilateral investment treaties, including dispute settlement provisions as discussed in the *White Industries* case in Section II above. But certain additions to the NT standard in the Draft BIT Text rendered it inept. Two additions support this conclusion. The first is the addition of direct intent to harm or willfulness of the denial of benefits, and the second is the exemption of decisions of local authorities.[185] This was also clearly a reaction to India's

182. *See* JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (Cambridge Univ. Press 2005) (addressing the concept of denial of justice under human rights and investment treaties in great detail).

183. Model BIT Text, *supra* note 67, at art. 3.1.

184. *See* Draft BIT Text, *supra* note 67, at art. 4 (contrasting reasons for keeping the National Treatment standard).

185. Draft BIT Text, *supra* note 67, at art. 4:

> 4.1. Each Party shall not apply to Investments, Measures that accord less favourable treatment than that it accords, in like circumstances, to domestic investments with respect to . . .
>
> 4.2 A breach of Article 4.1 will only occur if the challenged Measure constitutes intentional and unlawful discrimination against the Investment on the basis of nationality

experience with arbitral tribunals interpreting the national treatment provisions of the previous model.

The BIT Model Text remedies some of these problems. It provides the following:

> 4.1 Each Party shall not apply to investor or to investments made by investors of the other Party, measures that accord less favourable treatment than that it accords, in like circumstances, to its own investors or to investments by such investors with respect to the management, conduct, operation, sale or other disposition of investments in its territory.
>
> 4.2 The treatment accorded by a Party under Article 4.1 means, with respect to a Sub-national government, treatment no less favourable than the treatment accorded, in like circumstances, by that Sub-national government to investors, and to investments of investors, of the Party of which it forms a part.[186]

The Final BIT Model Text eliminates the requirement of intentionality and willfulness and moderates the exemption of local authorities by simply providing that they should treat foreign investors the same way that they treat investors from other localities of India—a modified most favored treatment within the same country. In practical terms, it would mean that an investor from Australia in Kolkata must be treated the same way as one from Bangalore. This is a reasonable compromise that respects the autonomy of the local authorities while at the same time eliminating the potential inconsistencies and even capriciousness that unlimited local powers in the Draft BIT Text might have invited.

iii. Expropriation and Compensation

The Draft BIT Text's expropriation provision also unusually modifies the standard formulation in most investment treaties by adding numerous unusual provisions. This appears to be an overreaction due to India's unfavorable experience with arbitral interpretation of the expropriation provision in the UK Model that it adopted three decades prior.[187]

> to domestic investments with respect to the management, conduct, operation, sale or other disposition of Investments in its territory.
>
> 4.3 This Article shall not apply to any Law or Measure of a Regional or local Government. *Id.*

186. Model BIT Text, *supra* note 67, at art. 4.

187. Draft BIT Text, *supra* note 67, at art. 5:

> 5.1 Neither Party may nationalize or expropriate an Investment (hereinafter "expropriate"), or take Measures having an effect equivalent to expropriation, except for reasons of public purpose.
>
> 5.2 The determination of whether a Measure or a series of Measures have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, and usually requires evidence that there has been: in accordance with the procedure established by

The most important change from the UK Model pertained to the allocation of jurisdiction or competence for the determination of whether any taking is for public purpose. The Draft BIT Text assigned such authority exclusively to the Indian courts. It made that choice clear in at least two provisions. In the first one, it adds a footnote to the standard provision which reads: "Neither Party may nationalize or expropriate an Investment (hereinafter "expropriate"), or take Measures having an effect equivalent to expropriation, except for reasons of public purpose in accordance with the procedure established by Law, and on payment of adequate compensation."[188] Although this is not the exact language of the Hull Formula, as it omitted "effective and prompt," it is nonetheless not an uncommon formulation. The addition that made it somewhat unusual was the inclusion of a footnote on "public purpose," which reads:

> For the avoidance of doubt, where India is the expropriating Party, any Measure of expropriation relating to land shall be for the purposes as set out in its Law relating to land acquisition and any questions as to "public purpose" and compensation shall be determined in accordance with the procedure specified in such Law.[189]

Another provision made it clear that the decision regarding whether an expropriation was for public purpose was to be made by the Indian courts—not by arbitral tribunals.[190]

This is remarkably similar to the old Chinese model discussed in Section I that restricted arbitration to the quantum of damages. It is interesting to see that while China moved away from that approach, India wanted to move in that direction decades later. It is without a doubt a reflection of the countries' respective experiences with investment

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Law, and on payment of adequate compensation.

(i) permanent and complete or near complete deprivation of the value of Investment; and

(ii) permanent and complete or near complete deprivation of the Investor's right of management and control over the Investment, (iii) an appropriation of the Investment by the Host State which results in transfer of the complete or near complete value of the Investment to that Party or to an agency or instrumentality of the Party or a third party; and

5.3 For the avoidance of doubt, the Parties agree that an action taken by a Party in its commercial capacity shall not constitute expropriation or any other measure having similar effect.

5.4 For the avoidance of doubt, the parties also agree that, 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. *Id.*

188. Draft BIT Text, *supra* note 67, at art. 5.1.

189. *Id.* at art. 5.1 n.3.

190. *See* Draft BIT Text, *supra* note 67, at art. 5.5 (articulating that decisionmaking lies with Indian courts).

arbitration. As indicated above, China seems to have fared better in all respects by avoiding the kind of adverse experience that India has endured with investment arbitration. Moreover, the Draft BIT Text did not leave total discretion to arbitral tribunals regarding the assessment of the quantum of damages. Rather, it set forth detailed provisions discussing what factors the tribunal must consider in its assessment of damages.[191] This was another reflection of India's distrust of arbitral decisionmaking.

A commentary on this approach is offered under Section E below; however, it is important to note that the Final BIT Model Text made substantial changes to the initial formulation, which was a better indicator of India's frustration and what exactly India wanted to do. The compromise Final BIT Model Text reads as follows:

> 5.1 Neither Party may nationalize or expropriate an investment of an investor (hereinafter "expropriate") of the other Party either directly or

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191. Draft BIT Text, *supra* note 67, at arts. 5.6.–5.8:

> 5.6 Compensation provided under this Article shall be adequate and reflect the fair market value of the expropriated Investment, as reduced after application of relevant mitigating Factors. The amount of compensation shall not vary based on whether an expropriation has complied with the criteria of Article 5.1.
>
> 5.7 Mitigating Factors under Article 5.6 include:
>
> > (a) current and past use of the Investment, including the history of its acquisition and purpose; (b) the duration of the Investment and previous profits made by the Investment; (c) compensation or insurance payouts received by the Investor or Investment from other sources; (d) the value of property that remains subject to the Investor or Investment's disposition or control, (e) options available to the Investor or Investment to mitigate its losses, including reasonable efforts made by the Investor or Investor towards such mitigation, if any; (f) conduct of the Investor that contributed to its damage; (g) any obligation the Investor or its Investment is relieved of due to the expropriation[;] (h)[ ]liabilities owed in the Host State to the government as a result of the Investment's activities[;] (i) any harm or damage that the Investor or its Investment has caused to the environment or local community that have not been remedied by the Investor or the Investment[;] and (j) any other relevant considerations regarding the need to balance the public interest and the interests of the Investment.
>
> 5.8 Any payment of compensation shall be made in a freely convertible currency. Interest on payment of compensation, if any, shall be paid in simple interest at the LIBOR rate from the date of expropriation until the date of actual payment. On payment, compensation shall be freely transferable in accordance with Article 6.

In addition to the detailed guidance on the assessment of damages, the Draft BIT Text adds the following two "Explanations":

> Explanation I: The computation of the fair market value of the property shall exclude any consequential or exemplary losses or speculative or windfall profits claimed by the Investor, including those relating to moral damages or loss of goodwill.
>
> Explanation II: The valuation date for computation of compensation shall be the day immediately before the expropriation takes place. In no event the valuation date shall be moved to any future date.

Draft BIT Text, *supra* note 67, at art 5.7.

> through measures having an effect equivalent to expropriation, except for reasons of *public purpose* [footnote omitted], in accordance with the *due process of law* and on payment of adequate compensation. Such compensation shall be adequate and be at least *equivalent to the fair market value of the expropriated investment immediately on the day before the expropriation takes place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.*[192]

The expropriation provision of the Final BIT Model Text demonstrably shifted in significant ways from the Draft Model Text. The first important change pertains to the allocation of jurisdiction to decide whether the taking is for public purpose. This is basically jurisdiction to decide on the lawfulness or legality of the expropriation itself. The Draft BIT Text, as indicated above, granted exclusive jurisdiction to the Indian courts.[193] The Final BIT Model changed it in the following way:

> 5.6 In considering an alleged breach of this Article, *a Tribunal shall take account of* whether the investor or, as appropriate, the locally-established enterprise, pursued action for remedies before domestic courts or tribunals prior to initiating a claim under this Treaty.[194]

The Draft Text's grant of jurisdiction to the Indian courts to decide the lawfulness of the expropriation was changed to the above formulation, according to which an arbitral tribunal, in determining the lawfulness of the expropriation, must take account of judicial proceedings that might have preceded the arbitration. Although this might appear to constrain the tribunal's jurisdiction, in essence, the Final BIT Model Text, unlike the Draft BIT Text, preserves the arbitrability of the lawfulness of the expropriation. Although the difference that it makes on the quantum of damages is a difficult question and may require a case-by-case

192. Model BIT Text, *supra* note 67, at art. 5.1 (emphasis added).

193. Draft BIT Text, *supra* note 67, at art. 5.5. The most pertinent provision of the Draft BIT Text is 5.5. It reads:

> If an Investor alleges that its Investment:- [*sic*] (a) has been expropriated, (b) payment of compensation has not been awarded, or (c) payment of compensation awarded is not adequate in violation of Article 5.1, it may submit a claim for determination of those issues and an award of adequate compensation pursuant to and in accordance with the terms of Article 14. However, *a tribunal constituted under Article 14 or 15 shall not have authority to review the Host State's determination of whether a Measure was taken for a public purpose or in compliance with its Law*." *Id.* (emphasis added).

194. Model BIT Text, *supra* note 67, at art. 5.6 (emphasis added). The BIT Model Text does, however, exempt land-takings cases from arbitral decisionmaking. Model BIT Text, *supra* note 67, at n.3. This rule remained unchanged from the Draft BIT Text. *See* Draft BIT Text, *supra* note 67, at n.4 (outlining the responsibilities of tribunals).

analysis,[195] it saves India from the embarrassment of going back to an era that China abandoned decades ago without any adverse consequences.

The other important change in the Final BIT Model Text pertains to the assessment of damages. While the Draft BIT Text focused on mitigating factors, the Final BIT Model Text, consistent with standard BIT language, emphasizes the computation of fair market value as of the time the measure of expropriation became public knowledge.[196]

D. Investor and Home State Obligations

The Draft BIT Text was also unusual in adding elaborate provisions on home state and investor obligations. These investor obligations included compliance with anti-corruption laws[197] and disclosure of information about the investor and its investments, including the sources of its finances,[198] labor and employment laws,[199] and environmental, human rights, and tax laws.[200] As intriguing as the inclusion of these provisions in a bilateral investment treaty might have seemed, what was quite remarkable was the linkage that the Draft BIT Text made between the violation of any of these provisions and the definition of investment discussed in Section III above. Any violation of any of these obligations would essentially have made the protections under any bilateral investment treaty modeled after this Draft BIT Text inapplicable.

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195. The question of whether, if at all, and how, the unlawfulness of the expropriation would affect the quantum of damages is a subject of controversy in "international arbitral jurisprudence" to the extent such a corpus exists. Notable demonstrations are the three Libyan Oil cases of the 1970s in which opinion was split on whether and how a finding of unlawfulness of the expropriation affects the quantum of damages. The three cases are: British Petroleum Exploration Co. (Libya) v. Government of the Libyan Arab Republic, 53 INT'L L. REP. 297 (ICC Int'l Ct. Arb. 1973); Libya American Oil Co. (LIAMCO) v. Government of the Libyan Arab Republic, 20 I.L.M. 1 (ICC Int'l Ct. Arb. 1977); Texas Overseas Petroleum Co. v. Government of the Libyan Arab Republic, 55 INT'L L. REP. 354 (ICC Int'l Ct. Arb. 1975) (consolidated with the case of California Asiatic Oil Company (CALASIATIC)). For a summary of these cases, see KIDANE, CHINA-AFRICA DISPUTE SETTLEMENT, *supra* note 13, at 126–29. For a fuller discussion see generally Robert Von Mehren & Nicholas P. Kourides, *International Arbitration between States and Private Parties: The Libyan Nationalization Cases*, 75 AM. J. INT'L L. 476 (1981).

196. *See* Model BIT Text, *supra* note 67, at art. 5.1 (discussing the process for determining the valuation criteria in the event of expropriation).

197. *See* Draft BIT Text, *supra* note 67, at art. 9 (discussing the investor obligations against corruption).

198. *See* Draft BIT Text, *supra* note 67, at art. 10 (discussing financial disclosure requirements the investor must make to the host state).

199. *See* Draft BIT Text, *supra* note 67, at art. 12 (stating the investor's responsibility and the manner in which their investments must be subject to and comply with labor and employment laws, disclosure requirements as a matter of due diligence, environmental law, human rights law, consumer law, standards of corporate governance and accounting practices, and general contribution to the development objectives of the host state).

200. *See* Draft BIT Text, *supra* note 67, at art. 11 (stating the investor's responsibility to comply with the host state's law on taxes, the environment, and human rights).

Unsatisfied with all of these changes, in the Draft BIT Text India sought access to the home state's judicial process to hold the investor accountable for actions and omissions in the home state, presumably with effect in the host state.[201]

The Final BIT Model Text departed from this unusual formulation by eliminating all but two provisions in modified form. The two provisions relate to compliance with laws and corporate social responsibility. The "compliance with law" provision, in addition to the basic compliance with all laws and regulations of the host state requirement, incorporates the anti-corruption and tax liabilities rules of the Draft.[202] Anti-corruption rules are usually matters of independent or criminal statutes and are rarely, if at all, found in BITs. As indicated in various sections of this Article, BITs are fundamentally perceived as instruments for the protection of investors against arbitrary or unlawful host government actions, not as means of holding unscrupulous investors responsible. The latter is often considered a matter for domestic laws. India's frustration with arbitral decisions that appeared to excuse reckless risk-taking or even illegal investor behavior might have prompted the inclusion of this provision to give notice to future investors and prescribe rules for arbitral tribunals to hold investors liable for violations of law in the same forum as the arbitration of other claims.

The Final BIT Model Text maintains a considerably weakened and permissive provision on corporate social responsibility. It states:

> Investors and their enterprises operating within its territory of each Party shall endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles may address

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201. Draft BIT Text, *supra* note 67, at art. 13. Although the purpose of this provision is clearly to allow the State of India to sue the investor in its home state, for jurisdictional purposes, the provision is not clear about who must do what and where for courts of the host state to have jurisdiction and for the State of India to have standing. The exact wording of the provision is as follows:

> 13.1 Without prejudice to the jurisdiction of the Courts located in the Host State, Investors and its Investments shall be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Home State in relation to the Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State.
>
> 13.2 The Home State shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before their domestic courts relating to the civil liability of Investors and Investments for damages resulting from alleged acts, decisions or omissions made by Investments or Investors in relation to their Investments in the territory of the Host State. *Id.*

202. *See* Model BIT Text, *supra* note 67, at art. 11 (stating the investor's responsibility and requirement that investments comply with the host state's tax law).

issues such as labour, the environment, human rights, community relations and anti-corruption.[203]

The Draft BIT Text would have redefined the basic premise of BITs by incorporating some serious legal responsibilities of investors, subjecting them to claims and counterclaims, which in turn would have given BITs a degree of mutuality. Although it is clear that India showed interest in redefining the essence of the investor-state relationship in the Draft BIT Text, it appears that it could not withstand the pressure from its economic partners to herald a significant departure. It is also possible that India's decision to cut back on social responsibility and counterclaims provisions of the Draft might have been influenced by its own growing status as a capital-exporting state with its own entities investing in other developing countries in Africa and elsewhere. In any case, no matter whether India made those changes because of pressure from its Northern investors or pressure by its own multinational corporations investing abroad, India has finally chosen the status quo.

E. Investor-State Dispute Settlement ("ISDS")

The main reason India wanted to rewrite the BIT Model it had used for decades is because of its dissatisfaction with its many arbitral encounters. The various arbitral decisions, discussed in Section II, interpreted substantive rules contained in the 1994 BIT Model in ways that India did not appreciate. It must have felt that it could partially remedy the problem by redefining doctrine. Realizing that redefining substantive rules alone would not redress its grievances, it also sought to significantly restructure the dispute settlement provisions.

The Draft BIT Text's dispute settlement provision contained many notable features. First, it prohibited the use or threat of arbitration to demand monetary or other types of gains.[204] Developing countries often dread arbitration, and it is commonly understood that some investors threaten arbitration to gain certain concessions, but India is perhaps the first to attempt to prohibit the threat of arbitration in a treaty. The Draft BIT Text did not provide details of what exactly was prohibited, but it charts the basic premise nonetheless.

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203. *See* Model BIT Text, *supra* note 67, at art. 12 (describing the ways in which investors and their investments must comply with the laws of the host state).

204. *See* Draft BIT Text, *supra* note 67, at art. 14.1:

> Without prejudice to the rights and obligations of the Parties under Article 15, this Article establishes a mechanism for the settlement of Investment Disputes. An Investor shall not use or threaten to use this Article in order to obtain money, property, or any other thing of value from the Host State, or otherwise compel the Host State to act or refrain from acting.

The other important characteristics in the Draft were the requirements of exhaustion of domestic judicial remedies or showing of futility after "diligent" pursuit,[205] as well as complying with strict temporal limitations.[206] Once the exhaustion hurdle had been passed, the Draft BIT Text set forth detailed provisions on the submission of the claim for arbitration and the constitution of the tribunal. The process is nothing remarkable. Each side appointed one arbitrator and the two selected the chair. It accords the default appointment authority to the Secretary General of the Permanent Court of Arbitration ("PCA"), but if he or she happens to be a national of one of the parties, appointment authority is given to the President of the International Court of Justice, the Vice President, or the next most senior judge, in that order.[207] The qualifications were also limited to expertise, impartiality, and independence, about which the Draft Text added elaborate provisions.[208]

Interestingly, the Draft BIT Text called for ICSID arbitration, if both parties were members, and ICSID Additional Facility, if only one party was a member. But more realistically, because India is not a member of ICSID, it adopted the UNCITRAL Rules and permitted the parties to agree on a seat, failing which it gave the tribunal the authority to decide the seat with preference given to a seat in the host country.[209] The lack of a definitive selection of the seat in the host country is surprising given all the precautionary measures that the Draft Text seems to adopt.

The transparency provision in the Draft BIT Text was robust, allowing the disclosure of all the pleadings and hearing transcripts with few limitations authorized by law.[210] Other notable provisions include

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205. *See* Draft BIT Text, *supra* note 67, at art. 14.3 (stating that the investor must exhaust domestic remedies through the host state before attempting other remedies, and setting forth the specific requirements that must be met prior to commencing a proceeding under Article 14.3 by transmitting a Notice of Dispute to the Respondent Party).

206. *See* Draft BIT Text, *supra* note 67, at art. 14.4 (discussing timeline limitations for submitting a claim to arbitration).

207. *See* Draft BIT Text, *supra* note 67, at art. 14.5 (discussing the composition and manner in which arbitrators are appointed to the tribunal, and specifically noting the order of appointing authority in the event a tribunal has not been appointed within 120 days from the date a claim was submitted for arbitration).

208. *See* Draft BIT Text, *supra* note 67, at art. 14.6 (detailing the initial procedure and challenges of the prevention of a conflict of interest of arbitrators, in addition to the ongoing protocol of disclosure and party challenges to an arbitrator's alleged impartiality).

209. *See* Draft BIT Text, *supra* note 67, at art. 14.7 (stating arbitrations shall be conducted under the Arbitration Rules of the United Nations Commission on International Trade Law; agreement on seat and location of arbitration and consideration given in the event of disagreement; tribunal decisions on preliminary question of objections by Respondent Parties; and production of documents and evidence).

210. *See* Draft BIT Text, *supra* note 67, at art. 14.8 (addressing transparency in arbitral proceedings regarding document disclosure, oral arguments, award of a tribunal, and non-disputing party oral and written submissions).

counterclaims and costs. While the Draft Text permitted counterclaims by the respondent state for violations of investor responsibilities,[211] it required, as a default rule, that each party bear its own costs while giving the tribunal the discretion to reallocate costs on a case-by-case basis.[212] Given some of the other changes the Draft BIT Text made that are emblematic of India's discomfort and suspicion toward the arbitral process, the decision to have the parties bear their own costs as a matter of general rule was surprising.

Although the Final BIT Model Text maintains most of the provisions of the Draft Text on dispute settlement, including the exhaustion requirements, it makes certain important modifications. First, it eliminates the counterclaims provision that would have allowed the host state to proceed against the investor for violations of the investor's responsibilities in such areas as corruption, taxation, disclosure, and general compliance with the laws of the host state.[213] The elimination is not surprising in light of the minimization of investor responsibilities in the Final BIT Model Text. This again could be due to a realization of the technical difficulties surrounding investor consent in investment treaties, or the realization of India's changing role as a significant investor abroad.

The second important modification is the addition of a provision for the dismissal of frivolous claims. Although India is wearing its recipient-of-FDI hat on this matter, it is nonetheless a very important provision. It mandates that tribunals decide jurisdictional questions first, as well as identify frivolous claims and dismiss them as expeditiously as possible. The relevant provision reads in part:

> 21.1 Without prejudice to a Tribunal's authority to address other objections, a Tribunal shall address and decide as a preliminary question any objection by the Defending Party that a claim submitted by the investor is: (a) not within the scope of the Tribunal's jurisdiction, or (b) manifestly without legal merit or unfounded as a matter of law.[214]

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211. *See* Draft BIT Text, *supra* note 67, at art. 14.11 (discussing the matters that give rise to counterclaims, which are violations of art. 9 (obligations against corruption), art. 10 (disclosure), art. 11 (taxation), and art. 12 (compliance with laws of host state) of Chapter III).

212. *See* Draft BIT Text, *supra* note 67, at art. 14.12 (stating that both parties shall share the costs of arbitration, with arbitrator fees, expenses allowances and other administrative costs, in which each party is responsible for its own costs related to arbitral representation costs; however, the tribunal has discretion to shift costs by either requiring one party to pay a higher proportion or the entire cost of proceedings, and may even award all costs in addition to damages in favor of the respondent).

213. *See* Draft BIT Text, *supra* note 67, at art. 14.11 (stating the conditions under which a party can initiate a counterclaim against the investor and the resulting monetary assessment for appropriate compensation).

214. *See* Model BIT Text, *supra* note 67, at art. 21.1 (explaining the ability both parties have to request consultations on any issue regarding interpretation, application, implementation, execution or another matters contained therein).

This provision avoids a common problem of merging jurisdictional decisions with the merits,[215] which prolongs the process and structurally increases costs. It also discourages frivolous claims by denying the opportunity to use the threat of arbitration to extract concessions outside of the arbitral process.

By far the most interesting addition of the Final BIT Model Text is the inclusion of the possibility of establishing an appellate mechanism. Although it is, as of yet, just a placeholder and at best aspirational, it is an indication of the recognition of the new trend toward institutional discipline. It provides:

> The Parties may by agreement or after the completion of their respective procedures regarding the enforcement of this Treaty may establish an institutional mechanism to develop an appellate body or similar mechanism to review awards rendered by tribunals under this chapter. Such appellate body or similar mechanism may be designed to provide coherence to the interpretation of provisions in this Treaty.[216]

Although it is interesting and certainly trendy, its utility for the purpose for which it is conceived is doubtful in a bilateral setting. The trending appellate mechanism in international investment law is to bring order and coherence and ensure accountability. Most of the proposals are in multilateral settings, such as the Trans-Atlantic and Trans-Pacific arrangements. To make economic sense, the anticipated bilateral relationship has to be expected to generate at least a handful of disputes between the parties covered under the bilateral arrangement. The statistics of the disputes that India has been involved in so far do not show that there is a problem of inconsistent jurisprudence as between the same two parties covered by the same treaty. The incoherence that exists in the application of many bilateral treaties cannot be remedied by an appellate mechanism established by a bilateral treaty. In that sense, the BIT Model Text's inclusion of the possibility of a bilateral appellate mechanism is unlikely to be a meaningful solution to India's suspicion of arbitral decisionmaking. If the parties are willing to travel that route, the BIT

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215. *See* WON L. KIDANE, THE CULTURE OF INTERNATIONAL ARBITRATION 43–61 (Oxford Univ. Press 2017) (providing a good example of tribunals' tendency to merge jurisdictional decisions with the consideration of the merits of the claim in the *Salini v. Ethiopia* case).

216. *See* Model BIT Text, *supra* note 67, at art. 29:

> In developing such a mechanism, the Parties may take into account the following issues, among others: a) the nature and composition of an appellate body or similar mechanism; b) the scope and standard of review of such an appellate body; c) transparency of proceedings of the appellate body; d) the effect of decisions by an appellate body or similar mechanism; e) the relationship of review by an appellate body or similar mechanism to the arbitral rules that may be selected under Articles 20.1 of this Treaty; and f) the relationship of review by an appellate body or similar mechanism to existing domestic laws and international law on the enforcement of arbitral awards.

could have easily provided for ad hoc bilateral first-instance and appellate court systems populated by bilateral state-appointed ad hoc judges on a case-by-case basis. India's problem, as will be elaborated in the conclusion below, is its misidentification of the problem. The main problem is not the substantive rules or the procedures; it is the limited pool of arbitrators plagued by conflicts of interest, ideological bias, favoritism, secrecy, and condescension, just to name a few.[217] Any modification that does not address the main problem will not bring the kind of comfort India seeks.

F. Conclusion

There is sufficient evidence to conclude that, unlike China, India has not been systematic, intentional, or coherent in its BIT program,[218] which could be partially blamed for the disappointing scorecard of the number of cases that it had to arbitrate and/or settle. The questions that need to be asked now are: Will the BIT Model Text remedy India's ISDS problems? What does it mean for India's relations with the North? How about with the South?

The newly released BIT Model Text makes significant changes both to the substantive and the procedural rules of the model that India used since it signed its first BIT with the UK in 1994. Its disappointment with numerous investor-state cases over the years prompted its decision to renegotiate its existing BITs and use a new model for future BITs.

It appears that the Draft BIT Text was an extreme form of over-reaction to the traumatic experience of having the essence of its sovereign functions questioned, including the soundness of its judiciary all the way up to its Supreme Court. India rolled back some of the extreme provisions contained in the Draft BIT Model Text, but whether India will succeed in convincing other states to agree to some variation of this model—and if so, whether this new Model will remedy India's real and perceived problems with the previous UK model that it utilized—remains to be seen. However, a few observations can be made from the outset. First, it

217. *See generally* KIDANE, *supra* note 215 (providing a more systematic discussion of these issues).

218. *See* Hanessian & Duggal, *supra* note 169, at 217 (quoting Kavaljit Singh, *An Analysis of India's New Model Bilateral Investment Treaty*, *in* RETHINKING BILATERAL INVESTMENT TREATIES: CRITICAL ISSUES AND POLICY CHOICES 71 (Kavaljit Singh & Burghard Ilge eds., Both Ends, Madhyam and Somo (2016)) ("[N]egotiations on investment chapters of FTAs were handled [by] the Ministry of Commerce while standalone BITs were negotiated by the Ministry of Finance. This indeed is a welcome development as there have been several instances of differences on investment issues between these two ministries resulting in a lack of policy coherence.") For example, even within the Indian government, it appears the two different agencies—one responsible for the BIT program and another responsible for investment provisions in trade agreements—followed inconsistent paths. *Id.*

appears that the BIT Model Text treats the wrong patient. That is a strong statement, but the underlying reason is the fundamental assumption that the BIT Model Text makes about why India suffered the consequences of its previous model. It assumes that the substantive provisions and the arbitral procedures were to blame for its disappointing experiences on the arbitral front. It further assumes that changing the principles and burdening the arbitral process with temporal and exhaustion requirements will ease or eliminate the problem of unfair, unjust, or even biased outcomes. Those are not completely correct assumptions.

Consider, for example, what the Tribunal did in the *White Industries* case,[219] discussed in Section II above. Although the dispute was between India and an Australian investor, and the India-Australia BIT did not contain the concept of "effective means of asserting"[220] and "enforcing" claims,[221] as discussed in Section II, that did not prevent the Tribunal from importing this standard from the India-Kuwait BIT through the MFN provision contained in the Australia-India BIT.[222] The *White Industries* Tribunal found a creative way to hold India liable for violations of a principle that India did not include in its BIT with Australia.[223] It is possible, and indeed quite likely, that a tribunal composed slightly differently (say, a majority from developing countries) could have avoided this kind of legal virtuosity to justify a particular desired outcome. That is to say, principles are what people who interpret them say they are. In essence, the exact formulations of the principles are less important than the people who interpret them. The most serious problem with the ISDS that India has suffered is less about the principles than about the people who interpreted them. India's new Model BIT changes the principles but changes nothing about the pool of people who will interpret them. That is why the Model is treating the wrong patient. The simple solution would have been to make rules regarding who should serve as an arbitrator.

The rules that the BIT Model Text contains are a rehashing of the most obvious impartiality and independence principles, but those are not

219. Investment Policy Hub, *White Industries Australia Limited v. The Republic of India*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/Details/378 (last visited Nov. 30, 2017).

220. In the Matter of an UNCITRAL Arbitration in Singapore under the Agreement between White Industries Australia Limited and The Republic of India, Final Award, ¶ 11 (Nov. 30, 2011) (discussing an effective means of asserting claims in the India-Australia BIT in which a reference to the India-Kuwait BIT is made).

221. *See id.* at ¶ 11.4.4 (analyzing the enforcement proceedings in terms of the history of these proceedings and the practice of "enforcing" separately).

222. *See id.* at ¶ 11.1.1 (stating that Art. 4(2) of the India-Australia BIT contains the MFN clause); *see also id.* at ¶11.1.4 (stating that the India-Kuwait BIT at art. 4(5) contains the "effective means of asserting and enforcing rights" standard).

223. *See id.* at ¶ 11.4.5 (describing the procedural history of the case as "less than ideal").

sufficient. A meaningful rule should go to the heart of the problem. It should disrupt the monopoly build on pretention. It may appear difficult, but all it takes is recognition that there is no reason why a select few arbitrators who are mostly ideologically biased against developing countries sit in judgment of the quality of the judicial systems and other rules and institutions of developing countries. For example, there is no reason why, in a dispute between India and Australia, the majority of the arbitrators should be Western. A simple solution would be to seek fair representation on investment tribunals and even demand a majority from developing countries. This might be a provocative solution, but there is no reason why the BIT cannot make that a condition in a reciprocal way; i.e., if the respondent state is a developing country, the majority of the arbitrators should be from developing countries, and if the respondent state is a developed country, the majority of the arbitrators should be from developed countries, or any variation of such formulation to avoid the kind of ideological and other types of biases that host states often suffer by being forced to choose from a limited pool of arbitrators.[224] Redefining principles alone does not prevent the theoretical sophistry of the type seen in *White Industries*. No matter what the principles say and what the facts appear to be, skilled and sophisticated arbitrators can plausibly justify their preferred outcome. This is the most serious problem that makes most developing countries dread international arbitration. India's Final BIT Model Text conspicuously does nothing to aid the representational deficit that plagues international investment arbitration today.[225]

IV. CHINA'S AND INDIA'S BIT APPROACHES TOWARD AFRICA

Both China and India are linked with many African countries by a web of bilateral investment treaties. China has signed BITs with thirty-five African states, and sixteen of them are in force as of this writing.[226] Similarly, India has signed thirteen BITs with African states, out of which seven are in force.[227] China and India have five overlapping BITs that are

224. *See generally* KIDANE, *supra* note 215 (providing a comprehensive discussion of the issue of bias in international arbitral decisionmaking and the need for diversification of the pool).

225. Some useful steps could have been taken to alleviate the representational deficit by, for example, requiring a certain number of arbitrators from the developing world.

226. *See* Investment Policy Hub, *International Investment Agreements Navigator-China*, UNCTAD, http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu (last visited Jan. 3, 2018); *see generally* Won Kidane, *China's Bilateral Investment Treaties with African States in a Comparative Context*, 49 CORNELL INT'L L.J. 141 (2016) (noting the number of China's BITs with African nations).

227. *See* Investment Policy Hub, *International Investment Agreements Navigator-India*, UNCTAD, http://investmentpolicyhub.unctad.org/IIA/CountryBits/96 (last visited Jan. 3, 2018)

in force with African states. These are BITs with Egypt, Mauritius, Morocco, Mozambique, and Sudan. China and India have many overlapping BITs with developed countries of the North, including the UK. The five overlapping African BITs are evaluated in the next section in light of China's and India's BITs with the UK for comparative context.

A. Substantive Protections

Chinese and Indian BITs with African states are essentially adaptations of their respective BITs with their traditional partners from the North. The details are worth exploring, however. This Section first looks at the substantive provisions, followed by dispute settlement provisions in comparative context.

i. Investment Protection

The benchmark used here is the China-UK and India-UK BITs. Temporally, the two BITs are nearly a decade apart, with the China-UK BIT coming into force on May 15, 1986 (the day it was signed in London), and the India-UK BIT coming into force on January 6, 1995 (nearly a year after it was signed in London in March 1994).[228]

The two BITs enshrine the standard investment rules with slightly differing formulations. Although the definition of "investment" is almost identical, curiously, the provision in the India-UK BIT on claims to money under contact qualifies it as "rightful claims." The Chinese BIT does not contain the term "rightful." The Indian version reads in full: "rightful claims to money or to any performance under contract having a financial value."[229] This addition would have been more significant if the dispute settlement provisions contained in these treaties were switched. That is because under the China-UK treaty, the jurisdiction of arbitral tribunals is limited to the adjudication of the quantum of damages, presumably with liability being determined by the local courts.[230] The India-UK BIT permits the arbitration of both liability and quantum. That

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(showing India's BITs including the treaties in force: Egypt, Libya, Mauritius, Morocco, Mozambique, Senegal, and Sudan); *see also* Kidane, *China's Bilateral Investment Treaties*, *supra* note 13 (providing a comparative study of these treaties).

228. India-UK BIT, *supra* 174; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China concerning the Promotion and Reciprocal Protection of Investments with Exchange of Notes, China-UK, UNCTAD, http://investmentpolicyhub.unctad.org/Download/TreatyFile/793 (May 15, 1986) [hereinafter China-UK BIT].

229. *Compare* China-UK BIT, *supra* note 228, at art. (1)(a)(iii) (" . . . claims to money or to any performance under contract having a financial value"), *with* India-UK BIT, *supra* note 174, at art. 1(b)(iii) (". . . rightful claims to money or to any performance under contract having a financial value.").

230. *See infra* Section IV.B (comparing dispute settlement provisions of the China-UK BIT and the India-UK BIT with Chinese and Indian BITs with four African states).

means in the latter case, the element of "rightfulness" would have to be determined by arbitral tribunals. The addition of "rightfulness" would have made more sense if it were added to the Chinese BIT because of the bifurcation of jurisdiction.

The provisions on promotion and protection of investment, although titled exactly the same, contain significantly differing mechanics of substantive protection. The hierarchy with domestic laws and interactions with dispute settlement mechanisms are most notable. The distinctions are also important to compare with the formulations of these rules in the relevant African BITs discussed later. The China-UK BIT provides:

> ARTICLE 2
>
> Promotion and Protection of Investment
>
> (1) Each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party for investments in the territory and, subject to its right to exercise powers conferred by its laws, shall admit such investment.
>
> (2) Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy the most constant protection and security in the territory of the other Contracting Party. Each Contracting Party agrees that without prejudice to its laws and regulations, it shall not take any unreasonable or discriminatory measures against the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.[231]

The corresponding India-UK BIT presents the rule pertaining to promotion and protection as follows:

> ARTICLE 3
>
> Promotion and Protection of Investment
>
> (I) Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory, and admit such investments in accordance with its laws and policy.
>
> (2) Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.
>
> (3) Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party, provided that dispute resolution under Article 9 of

231. *See* China-UK BIT, *supra* note 228, at art. 2 (outlining the manner in which parties shall encourage and create favorable conditions for investments and proceed according to fair and equitable treatment of all parties).

this Agreement shall only be applicable to this paragraph in the absence of a normal local judicial remedy being available.[232]

As these provisions show, the rules on admission are formulated differently. The China-UK provision explicitly subjects admission to the local rules, while the India-UK rule seems to focus on admission rather than the power to exclude. Indeed, it reads: "shall admit . . . in accordance with its laws and policy." Again, the emphasis is on admission, not exclusion.

The fair-and-equitable-treatment and full-protection-and-security provisions are laid out in more or less the same language, but the China BIT adds a non-discrimination rule subject to its own laws that might permit discrimination and puts emphasis on permanency of the protection and security by adding "the most constant protection."[233] Finally, and interestingly, the Indian BIT denies the arbitrability of claims arising out of the promotion-and-protection provision unless local judicial remedies are deemed unavailable, which itself could be a subject of dispute.

While both BITs accord Most Favored Nation ("MFN")[234] and National Treatment ("NT") to each other's investors, the China-UK BIT qualifies for NT by adding the phrase "to the extent possible."[235]

As already mentioned, China and India have BITs in force with the same five African states: Egypt, Mauritius, Morocco, Mozambique, and Sudan. Furthermore, China and India also have BITs which have not come into force as of this writing with six additional African states: Djibouti, Ethiopia, Ghana, Libya, Seychelles, and Zimbabwe.[236] Of the

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232. India-UK BIT, *supra* note 174, at art. 3. Article 2 of the same treaty makes the treaty applicable to investments made prior to the coming into force of the treaty. Incidentally, the China-UK BIT does not contain an equivalent provision.

233. *See, e.g.*, Agreement Between the Government of the Arab Republic of Egypt and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments, China–Egypt, art. 2(2), UNCTAD (Apr. 21, 1994), http://investmentpolicyhub.unctad.org/Download/TreatyFile/730 [hereinafter China-Egypt BIT] (explaining that the phraseology also appears in some other China-Africa BITs, suggesting it is probably a Chinese formulation).

234. *See* China-UK BIT, *supra* note 228, at art. 3(1-2) (discussing the treatment of investments by both parties, indicating that each party must not treat the other party less favorably than other nationals or companies of any third State); *see also* India-UK BIT, *supra* note 174, at art. 4(1) (stating that each contracting party must accord treatment to the other party that is not less favorable than that of its own investors or investors of any third State).

235. *See* China-UK BIT, *supra* note 228, at art. 3(3) ("In addition to the provisions of paragraphs (1) and (2) of this Article each Contracting Party shall, *to the extent possible*, accord treatment with the stipulations of its laws and regulations to the investments of companies of the other Contracting Party the same as that accorded nationals or companies.") (emphasis added); *see also* India-UK BIT, *supra* note 174, at art. 4(1) (illustrating the absence of the aforementioned qualification).

236. See Investment Policy Hub, *China, Bilateral Investment Treaties (BITs)*, UNCTAD, http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu (last visited Oct. 27,

five BITs in force, the texts for three are publicly available.[237] The publicly available BITs are China's and India's BITs with Egypt, Mauritius, and Sudan. Of the six BITs not in force, the text for some are publicly available, but the BITs with Ghana are selected for this study because of geographic distribution. Indeed, the China-Ghana BIT is in force, but the India-Ghana BIT is not.

Beginning with China's and India's individual BITs with Egypt,[238] the definitions of investment are more or less the same, with some inconsequential differences such as "claims to money" in the China-Egypt BIT and "rights to money" in the India-Egypt BIT.[239]

The promotion and protection of investment provisions mimic the China-UK and India-UK provisions in the China-Egypt BIT and the India-Egypt BIT discussed above. The respective phraseologies are "subject to its right to exercise powers conferred by its laws"[240] and "admit such investments in accordance with its laws and policy."[241] While the fair and equitable treatment in the India-Egypt BIT is simple and is exactly the same as the corresponding India-UK BIT provision, the China-Egypt BIT adds the common Chinese provision of "shall enjoy the most constant protection and security in the territory of the other contracting party."[242]

Two observations could be made here. The first is that the text of the Indian BIT with Egypt is almost exactly the same as that of the India-UK BIT. This is not surprising, because India used the same UK model across the board. The Chinese BIT with Egypt is also almost exactly the same as the Chinese BIT with the UK. This is also not surprising, because

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2017) (providing a list of China's BITs and links to full-text copies where available).

237. The text of the China-Sudan BIT is not available on the UNCTAD website, but it is available on the website of the Chinese Ministry of Commerce of the People's Republic of China Department of Treaty and Law. Department of Treaty and Law, Agreement Between the Government of the Republic of Sudan and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments, (Feb. 5, 2010, 9:44 PM), http://tfs.mofcom.gov.cn/aarticle/h/aw/201002/20100206778964.html.

238. The China-Egypt BIT came into force on April 1, 1996. Investment Policy Hub, *China – Egypt BIT (1994)*, UNCTAD, http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/894 (last visited Oct. 30, 2017). The Egypt-India BIT came into force on November 22, 2000. Investment Policy Hub, *Egypt – India BIT (1997)*, UNCTAD, http://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/1353 (last visited Oct. 30, 2017). *See also* Agreement between the Government of the Arab Republic of Egypt and the Government of the Republic of India for the Promotion and Reciprocal Protection of Investments, Egypt-India, terminated Mar. 29, 2016, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1078 [hereinafter Egypt-India BIT].

239. *Compare* China-Egypt BIT, *supra* note 233, at art. 1(c), *with* Egypt-India BIT, *supra* note 238, at art. 1(b)(iii) (differentiating between claims to money and rights to money).

240. China-Egypt BIT, *supra* note 233, at art. 2(1).

241. Egypt-India BIT, *supra* note 238, at art. 2(1).

242. China-Egypt BIT, *supra* note 233, at art. 2(2).

China used its own model across the board. It is clear that while India seems to have signed the UK model, China pursued its own BIT regime that appears to have been executed indiscriminately. The indiscriminate nature of the regime is important to note. As will be shown further below, the Chinese BITs do not have North-South or South-South variability.

ii. Expropriation and Compensation

The China-UK BIT expropriation provision prohibits both direct and indirect expropriation of investment, except when it is for "public purpose . . . and against reasonable compensation."[243] In terms of valuation, the rule the BIT adopts is "the real value of the investment expropriated immediately before the expropriation or the impending expropriation became public knowledge."[244] It also provides that the compensation must be provided "without undue delay, be effectively realisable and freely transferable."[245]

The corresponding India-UK BIT[246] adopts a similar rule with slight variation on the exact formulation of the rule. Instead of "reasonable

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243. China-UK BIT, *supra* note 228, at art. 5(1). The entire provision reads as follows:

(1) Investments of nationals or companies of either Contracting Party shall not be expropriated, nationalised or subjected to measures having effect equivalent to expropriation or nationalisation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Contracting Party and against reasonable compensation. Such compensation shall amount to the real value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge, shall include interest at a normal rate until the date of payment, shall be made without undue delay, be realisable and be freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee reasonable compensation in respect of investment to such nationals or companies of the other Contracting Party who are owners of those shares.

244. *Id.*

245. *Id.*

246. India-UK BIT, *supra* note 174, at art. 5. Sections (1–2), reads as follows:

(1) Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal requirements for regulating economic activity on a non-discriminatory basis and against fair and equitable compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest

compensation," it provides for "fair and equitable compensation;" instead of "fair value," it provides for "genuine value;" and instead of "undue delay," it provides for "without unreasonable delay."[247]

The use of terminologies and the general frame of the China-UK and India-UK BITs allow the conclusion that China used its own version of expropriation and compensation with African states, but India used the UK's model in its relations with Africans states. The texts of Chinese BITs show some minor inconsequential variability, but India's texts are almost identical.

The China-Egypt BIT adopts the rules on expropriation that are similar to China's BIT with the UK, but these rules are different from the UK's BIT with India, as well as India's BIT with the African states under review. They do, however, employ slightly differing terminology. The China-UK BIT uses "reasonable compensation . . . without undue delay." Such expression does not appear in the China-Egypt BIT. The latter simply says, "without unreasonable delay." In terms of valuation, the China-UK BIT uses the term "real value," while the China-Egypt BIT uses the term "equivalent to the value of the expropriated investments."[248]

The India-Egypt BIT's expropriation provisions essentially mimic the India-UK BIT's "fair and equitable compensation," "genuine value," and "without unreasonable delay" formulation. The sequence of the provisions and the substantive formulation show that the text of the India-Egypt BIT is almost certainly taken from the India-UK BIT, which came earlier in time.[249]

The expropriation provisions of the Chinese BITs use similar terminology, and the Indian BITs also use similar terminology with minor variations. This can be seen from the China-Mauritius and India-Mauritius, China-Sudan and India-Sudan, and China-Ghana and India-Ghana BITs. The texts of the treaties make it clear that China has used its own text and India has used the UK's text.[250] Although there are some

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at a fair and equitable rate until the date of payment, shall be made without unreasonable delay, be effectively realizable and be freely transferable.

(2) The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph. The Contracting Party making the expropriation shall make every endeavor to ensure that such review is carried out promptly.

247. *See id.* at art. 5(1) (contrasting formulations of the rule).

248. China-UK BIT, *supra* note 228, at art. 5(1); China-Egypt BIT, *supra* note 233, at art. 4(2).

249. India-UK BIT, *supra* note 174, at art. 5(1); Egypt-India BIT, *supra* note 238, at art. 4(1).

250. *Compare* Agreement between the Government of the Republic of Mauritius and the Government of the People's Republic of China for the Reciprocal Promotion and Protection of Investments, China-Mauritius, May 4, 1996 [hereinafter China-Mauritius BIT], at art. 6, *with*

minor variations in the China-Africa BITs, almost all of the India-Africa BITs have almost identical formulation with the India-UK BIT with respect to nearly all provisions, including the expropriation provision under review in this Section.

Perhaps the most important evidence supporting the conclusion that, while China has used its own model with some variations depending on which temporal model is applied, India has used the same UK model without any meaningful variations, is found in the dispute settlement provisions of the various BITs. This is discussed in the next Section.

B. Dispute Settlement

The most important indicator of the background and generational status of BITs is the dispute settlement provision. This Section surveys and compares the dispute settlement provisions of the China-UK and India-UK BITs with Chinese and Indian BITs with four African states: Egypt, Mauritius, Ghana, and Sudan.

The China-UK BIT's dispute settlement provision is the Chinese first-generation BIT, adopted prior to China's membership in ICISD. Its distinctive feature is the limitation of arbitrability to the quantum of damages and exclusion of the arbitrability of the merits of the case.[251] The default rule that the BIT selects is the UNCITRAL Rules, presumably with all the default appointment provisions.[252]

The India-UK BIT takes a tiered escalation approach, but when matters progress from the consensual to the mandatory, it permits the investor to

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Agreement between the Government of the Republic of Mauritius and the Government of the Republic of India for the Promotion and Protection of Investments, India-Mauritius, June 20, 2000 [hereinafter India-Mauritius BIT], at art. 6, *and* Agreement between the Government of the People's Republic of China and the Government of the Republic of Ghana concerning the Encouragement and Reciprocal Protection of Investments, China-Ghana, Oct. 12, 1989 [hereinafter China-Ghana BIT], at art. 4, *and* Agreement between the Government of the Republic of India and the Government of the Republic of Ghana for the Reciprocal Promotion and Protection of Investments, India-Ghana, June 23, 2000 [hereinafter India-Ghana BIT], at art. 5, *and* Agreement between the Government of the Republic of Sudan and the Government of the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investments, China-Sudan, 2007 [hereinafter China-Sudan BIT], at art. 4, *and* Agreement between the Government of the Republic of India and the Government of the Republic of Sudan for the Promotion and Protection of Investments, India-Sudan, Oct. 22, 2003 [hereinafter India-Sudan BIT], at art. 5.

251. *See* China-UK BIT, *supra* note 228, at art. 7 ("(1) A dispute between a national or company of one Contracting Party and another Contracting Party concerning an amount of compensation which has not been amicably settled after a period of six months from written notification of that dispute shall be submitted to international arbitration.").

252. *See id.* at art. 7(3) ("If after a period of three months the dispute is referred to arbitration under paragraph (2) above there is no such agreement, the parties to the dispute shall be bound to submit it to arbitration under the arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.").

submit a claim to ICSID, when and if both India and the UK become members of ICISD, or ICSID Additional Facilities by consent when the membership requirement is not met. Most importantly, however, if all else fails, it permits either party to submit the matter to an ad hoc arbitral tribunal under the UNCITRAL Rules, with the default appointing authority residing in the office of the president of the International Court of Justice.[253] Most notably, the India-UK BIT contains an express provision on the allocation of cost of the arbitration, as well as representation. It specifically states that "[e]ach party concerned shall bear the cost of its own arbitrator and its representation in the arbitral proceedings." It also requires each party to pay an equal share of the co-arbitrators' and chair's fees, while leaving some discretion to the tribunal "to direct that a higher proportion of costs shall be borne by one of the two parties. . . ."[254]

Evidently, China used its own model with African states with generational modifications, and India used the UK model with African states without notable modification. Their respective BITs with Egypt, Mauritius, and Ghana demonstrate this observation.

First, although the China-Egypt BIT was signed in 1994, and the China-Sudan BIT was signed in 1997, China used the same model, which only permitted the arbitrability of the quantum of compensation.[255] Interestingly, however, the China-Sudan BIT provides for ad hoc arbitration under the guidance of ICSID rules, with the default appointment authority given to the ICSID Secretary General.[256] The only change that China made to the dispute settlement provision of its BIT with the UK was the addition of ICSID rules; it did not, however, go so far as to use ICSID or ICSID Additional Facilities. This was China's second-generation BIT.

India, on the other hand, transposed the exact same text of its BIT with the UK to its BIT with Egypt. The dispute settlement provision remained almost identical (i.e., if both join ICSID, the dispute shall be referred to ICSID). If only one is a member of ICSID and both agree, the dispute shall be referred to ICSID Additional Facility, under which the dispute shall be referred to an ad hoc arbitration pursuant to the UNCITRAL

253. *See* India-UK BIT, *supra* note 174, at art. 9(1–3) (explaining the tiered escalation approach).

254. *Id.* at art. 9(c)(vii).

255. China-Egypt BIT, *supra* note 233, at art. 9; China-Sudan BIT, *supra* note 250, at art. 9. The most notable part in both BITs states: "If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in paragraph 1 of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal."

256. China-Sudan BIT, *supra* note 250, at art. 9(4).

Rules, with the ultimate appointing authority given to the "President, the Vice-President or the next senior judge of the International Court of Justice."[257]

The China-Mauritius BIT, which was signed in 1996, adopted the Chinese model that limited arbitration to the quantum of compensation, with the final appointment authority given to the Chairman of the International Arbitration Institute of the Stockholm Chamber of Commerce.[258]

The 1998 India-Mauritius BIT's dispute settlement provision mimics the India-UK's corresponding provision almost entirely, which begins with ICSID when both become members, ICSID Additional Facility if both agree, and then ad hoc under UNCITRAL Rules with appointing authority given to "the President, the Vice-President or the next senior judge."[259]

The 1989 China-Ghana BIT also follows China's model, which limits arbitrability to the quantum of compensation and grants appointment authority to the Chairman of the Arbitration Institute of the Stockholm Chamber of Commerce.[260] The China-Sudan BIT's dispute settlement provision is more or less the same, permitting arbitration on quantum of compensation only assigning the appointment authority to the ICSID Secretary General.[261]

Yet again, India's BIT with Ghana is a copy of the text of its BIT with the UK. The dispute settlement provision is almost identical, with the usual start of referring disputes to ICSID when both become members, to ICSID Additional Facility if both agree, and then ad hoc arbitration under the UNCITRAL Rules with appointment authority granted to the "president, Vice-President or the next senior judge of the International Court of Justice."[262]

It is clear, therefore, that although India opened up nearly a decade later, it was less systematic about it. This is evidenced by its consistent use of the exact same text for more than a decade with all types of partners, ranging from the UK to Mauritius. On the other hand, China has its own model and has pursued it with more intentionality than India. There is no evidence that either country attempted to use BITs "offensively" against African states. If anything, neither seems to have acted on the appreciation of BITs' historic North-South formulation. The

257. *See* Egypt-India BIT, *supra* note 238, at art. 8(3)(c)(i) (illustrating the dispute settlement provision).

258. China-Mauritius BIT, *supra* note 250, at arts. 13(3) & (5).

259. India-Mauritius BIT, *supra* note 250, at art. 8(2).

260. China-Ghana BIT, *supra* note 250, at art. 10(1–2).

261. China-Sudan BIT, *supra* note 250, at art. 9(4).

262. India-Ghana BIT, *supra* note 250, at art. 9(3).

BITs reviewed here show an element of randomness across North-South and South-South spectrums, and preclude the conclusion that either India or China contemplated an "offensive" or "defensive" use of BITs.

Be that as it may, however, as by origin, BITs that are of a North-South, and hence, an "offensive" variety structurally favor the investor over the host state. That means, to the extent the investment flows from China to Africa and from India to Africa, the Africans are always on the receiving end. However, because of India's own experience with BITs—i.e., at least twenty claims against it in the last decade, as indicated in Section II, above—it is now seeking to renegotiate everything. It is the beginning of a new era for BITs and other types of investment treaties. This time, the prime mover is not China, it is India.

C. Conclusion

The existing evidence does not show that either China or India varied its BIT content on the basis of the Northern or Southern status of the other party. India's approach is easily discernable, as it used the same UK model without any modification. China used different models with different parties, but its selectivity is merely temporal or generational, meaning that there is no evidence that it used a particular model for African countries.

What is also evident is that while China has succeeded in employing its own model and avoided serious adverse consequences, India is attempting to do that almost half a century later. Even then, it could not withstand the pressure. While the Draft BIT Text showcased its real desire, it settled for a realistic approach. The Final Model BIT Text is by no means revolutionary.

Undeniably, however, Chinese and Indian investors in Africa benefit from the inherent structural imbalance built into the fabric of BITs. The more traditional the BIT, the more beneficial to the investor, not the host state. Neither China nor India is seriously seeking to fundamentally alter the very essence of what some call "the law of greed." At the heart of that hesitation is perhaps the realization that they too are significant investors in a foreign land. As for Africa, the days of being a passive counterparty are gone. It has begun to confront its own dilemmas. The recently unveiled Draft Pan-African Investment Code is one example.[263]

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263. United Nations Economic Commission for Africa (2016–03), Draft Pan-African investment code. UN. ECA Committee of Experts (35th: 2016, Mar. 31–Apr. 2: Addis Ababa, Ethiopia); AU Committee of Experts Meeting (2nd: 2016, Mar. 31–Apr. 2: Addis Ababa, Ethiopia); UN. ECA Joint Annual Meetings of the African Union Specialized Technical Committee on Finance, Monetary Affairs, Economic Planning and Integration (9th: 2016, Mar. 31–Apr. 2: Addis Ababa, Ethiopia). Addis Ababa. © UN.ECA, (Mar. 26, 2016), http://repository.uneca.org/bitstream/handle/10855/23009/b11560526.pdf?sequence=1. United

V. SUMMARY OF CONCLUSIONS

International investment law invites the home state of the investor to police affairs in the host state of the investment. The last time this happened in modern history, the host state's invitation was not necessarily voluntary—both in the context of the direct colonial rule that India endured and the quasi-colonial treatment of extraterritoriality that China experienced.[264] By the time they regained the autonomy to voluntarily invite investment, China and India had economically fallen so far behind that their volition was not entirely unconstrained. To attract capital from more advanced economies, they had to make concessions in the form of granting certain substantive rights to investors and allowing decisionmaking by arbitral tribunals outside of their territory by arbitrators largely from advanced economies; Africa's story is no different.

As a matter of fact, this system has never sat comfortably with capital-receiving host developing states anywhere; including, of course, China and India, which have viewed ISDS with a considerable degree of suspicion from the very beginning. As stated previously, China avoided serious disappointments by systematically guarding itself from jurisdictional intrusion. India has not been as systematic and intentional as China, and it faced serious disappointments that led to a radical overcorrection, demonstrated by its recent decision to renounce and renegotiate its many BITs and its introduction of the BIT Model Text discussed in Section III, above.

The BITs that China and India have already entered into with African states examined in Section IV do not demonstrate any discernable pattern of intention to take advantage of their better economic standing for the benefit of their investors in Africa. A number of factors might have contributed to the apparent absence of intentionality. First, neither China nor India has in its recent history had the experience of being a dominant power outside of their immediate region—neither was ever a part of the legal architecture that entrenched the structural imbalance in the international investment regime.

The second reason appears to be the convenience of replicating text and incorporating doctrine by following a charted path rather than reinventing the wheel. This might ordinarily be called path-dependency. But when China and India inherit the whole system, they (perhaps

Nations Economic and Social Council, Economic Commission for Africa Committee of Experts, 35th mtg., Draft Pan-African Investment Code, U.N. Doc. E/ECA/COE/35/18 (Mar. 26, 2016), http://repository.uneca.org/bitstream/handle/10855/23009/b11560526.pdf?sequence=1. The Draft Pan-African Investment Code is the subject of another article by this author to be published subsequent to this Article.

264. *See* Sornarajah, *supra* note 44, at 136 (explaining voluntary host state invitations).

unwittingly) do so with all of its historical baggage. To the extent the system favors those on the upper-end of the hierarchy, China and India have become accidental beneficiaries of the imbalance. However, as China and India are still on the defensive side vis-à-vis their Northern partners, as demonstrated in the more than twenty cases against India discussed in Section II, the modifications they attempt to make to the international investment regime, if successful, may ironically benefit Africa.[265]

Thirdly, in this day and age, any attempt to use different models based on the economic standing of the partner would not be politically acceptable, not only because the African states would naturally resist a different treatment, as they now have the capacity and the negotiating power to do so, but also because Africa will likely have support from bigger economies. A good demonstration of the latter point is the extreme and immediate reaction of the major powers to any perceived misdeed by Chinese companies operating in Africa.[266]

Finally, the complexities of modern life are redefining traditional hierarchies in ways that will sooner or later render the fundamental premises of international investment law more or less obsolete. Consider this, for example:

> The top 100 MNEs in UNCTAD's Transnationality Index have, on average, more than 500 affiliates each, across more than 50 countries. They have 7 hierarchical levels in their ownership structure (i.e. ownership links to affiliates could potentially cross 6 borders), they have about 20 holding companies owning affiliates across multiple jurisdictions, and they have almost 70 entities in offshore investment hubs.[267]

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265. China and India could not be discussed in the same category in this regard, because China has not made any significant changes to its most recent BIT model, and has never used differing models on the basis of Northern and Southern economic status of its partners. Although India has also never varied its BITs on the basis of the economic standing of its partners, its new model is decidedly defensive; were it to become successful in implementing the new Model Text across the board, African states, and indeed other less developed countries where Indian investors invest would probably appreciate the defensive posturing. This appears to be a conscious and pragmatic choice that India has made in rendering its new Model Text. Although many highly sophisticated Indian companies invest substantial capital and resources in the developing world, including Africa, India's Model Text offers evidence of India's greater concern over the treatment of foreign investors in India rather than Indian investors abroad.

266. *See, e.g.*, David Smith, *Hillary Clinton Launches African Tour with a Veiled Attack on China*, THE GUARDIAN (Aug. 1, 2012 12:46 PM) https://www.theguardian.com/world/2012/aug/01/hillary-clinton-africa-china (illustrating African support from larger economies and noting the United States' approach to dealing with China).

267. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2016: INVESTOR NATIONALITY: POLICY CHALLENGES xiii (2016), http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf.

And indeed, "[m]ore than 40 percent of foreign affiliates worldwide have multiple 'passports.' These affiliates are part of complex ownership chains with multiple cross-border links involving on average three jurisdictions. The nationality of investors in and owners of foreign affiliates is becoming increasingly blurred."[268]

International investment treaties are predicated on the simple assumption that there is a host state bent on mistreating a foreign investor who requires the protection of its home state, and the host state's legal processes are either inferior or unfair. Even assuming that the need for home state protection is a valid assumption in modern economic relations, the traditional rules and institutions are increasingly less adaptable to contemporary cross-border business transactions of the type that the UNCTAD Report cited above describes. As indicated in Section IV, a simple look at publicly available statistics suggests that there is more African investment in India than Indian investment in Africa because large amounts of investment from wealthy nations, including the United States, are rerouted to India through Mauritius.

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268. *Id.* at xii–xiii:

> Multiple passport affiliates are the result of indirect foreign ownership, transit investment through third countries, and round-tripping. About 30 per cent of foreign affiliates are indirectly foreign owned through a domestic entity; more than 10 per cent are owned through an intermediate entity in a third country; [and] about 1 per cent are ultimately owned by a domestic entity. These types of affiliates are much more common in the largest MNEs: 60 per cent of their foreign affiliates have multiple cross-border ownership links to the parent company . . . Rules on foreign ownership are ubiquitous: 80 per cent of countries restrict majority foreign ownership in at least one industry. The trend in ownership-related measures is towards liberalization, through the lifting of restrictions, increases in allowed foreign shareholdings, or easing of approvals and admission procedures for foreign investors. However, many ownership restrictions remain in place in both developing and developed countries. The blurring of investor nationality has made the application of rules and regulations on foreign ownership more challenging. Policymakers in some countries have developed a range of mechanisms to safeguard the effectiveness of foreign ownership rules, including anti-dummy laws, general anti-abuse rules to prevent foreign control, and disclosure requirements. Indirect ownership structures and mailbox companies have the potential to significantly expand the reach of IIAs. About one third of ISDS claims are filed by claimant entities that are ultimately owned by a parent in a third country (not party to the treaty on which the claim is based). Some recent IIAs try to address the challenges posed by complex ownership structures through more restrictive definitions, denial of benefits clauses and substantial business activity requirements, but the vast majority of existing treaties does not have such devices. Policymakers should be aware of the de facto multilateralizing effect of complex ownership on IIAs. For example, up to a third of apparently intra-regional foreign affiliates in major (prospective) megaregional treaty areas, such as the Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP), and the Regional Comprehensive Economic Partnership (RCEP), are ultimately owned by parents outside the region, raising questions about the ultimate beneficiaries of these treaties and negotiations.

For all of these reasons, the attempt to redraft existing BIT texts, modify substantive provisions, and reform ISDS processes may in some ways be seeking an old solution to a new set of problems. China and India must rethink old assumptions and models, and approach their growing economic relations with Africa with a fresh set of ideas that take into account their respective unique needs and the contemporary phenomenon of multiple passports and borderless pluralism. That future might be a future without investment treaties.

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