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Reconceptualizing International Investment Law from the Global South

An Introduction

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The international investment regime (IIR) is under attack. Critics argue that international investment agreements (IIAs) constrain the right of host countries to regulate in the public interest and that the investor-state dispute settlement (ISDS) clause grants foreign investors alone the opportunity to bypass local, state, or federal domestic administrative bodies and courts. This legitimacy crisis of the IIR is generalized, affecting countries in the North and South of the globe, but the bulk of scholarly discussion to date has been to a great extent concentrated in the North, which accounts for only limited versions around the same story.

As policymakers worldwide look for alternatives to the current regime, insufficient attention is paid to contributions originating from the Global South,[1] which has not traditionally been viewed as a laboratory for legal innovation. This book presents original empirical research documenting legal reform in international investment law in the most important emerging economies, looking at Brazil, India, China, and South Africa, but also in Chile and Australia – a middle-income economy in the geographical South undergoing major reforms in its trade and investment regulation for reasons that cannot be captured by the standard Northern or Southern narratives in the field.

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[1] See B. S. Chimni, "Third World Approaches to International Law: A Manifesto" (2006) 8 *ICLR* 3, 27.

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This book argues that the current reform in investment regulation is part of a broader attempt to transform the international economic order.[2] Countries in the North and South are currently rethinking how economic order ought to be constituted in order to advance their national interests and preferred economic orientation. While some countries in the North seek to create alternative institutional spaces in order to promote neoliberal policies more effectively, some countries in the South are increasingly skeptical about this version of economic order and are experimenting with alternative versions of legal order that do not always sit well with mainstream versions promoted by the North. While we recognize that there are differences in approaches to the investment regimes proposed by countries in the South, we identify commonalities that could function as the founding pillars of an alternative economic order. Unlike investment regulation currently being produced in the North that presses for the maintenance of the status quo and introduces changes to the system mostly focused on procedure, some countries in the South are attempting to reconceptualize investment regulation. They contest the unbalanced foundations of investment regulation that overprotect investors at the expense of the home state's regulatory space. In turn, developing countries try to create an economic order that, while recognizing the importance of foreign direct investment (FDI) for their economic development, seeks to preserve state autonomy to regulate in the public interest. This book showcases selected countries in the Global South where investment law reform is currently underway, and explores the potential and limitations of an alternative order coming from the South.

This book contributes to our understanding of how the transformation of investment regulation in the Global South is shaping the broader debate in the field. The main finding of the book is that some developing countries have created new model investment agreements and/or reformed existing national laws to respond to the legitimacy crisis of the investment regime in ways that differ substantially from the manner in which most developed countries have chosen to respond. We focus on the similarities of approaches in the Global South to foster our claim of an alternative economic order originating from the South. The book aims to understand the reasons for the changes in international investment law in selected developing countries and how some countries – mostly emerging economies – might offer alternatives to the existing debate currently dominated by the United States and the

[2] On the potential of countries from the South to change the global order, see Andrew Hurrell, *On Global Order: Power, Values, and the Constitution of International Society* (OUP, Oxford 2007) 104, 117, Hurrell and Sandeep Sengupta, "Emerging powers, North–South relations and global climate politics" (2012) 88 *IA* 463, 484, Hurrell, "Narratives of emergence: Rising powers and the end of the Third World?" (2013) 33 *BJPE* 203, 221 and Anne Orford, "Constituting order" in James Crawford, Martti Koskenniemi, and Surabhi Ranganathan (eds), *The Cambridge Companion to International Law* (CUP, Cambridge 2012).

European Union. In sum, it hopes to inspire other countries to also design regulatory tools that meet their developmental needs.

There are at least two reasons why a book on Global South alternatives to investment regulation is both timely and important. First is the uncontested existence of a legitimacy crisis of the international investment regime and the universal quest for solutions.[3] The magnitude of this legitimacy crisis cannot be underestimated, since most of the countries in the world have implemented FDI policies as part of their overall developmental strategies, either as recipients of FDI, exporters, or both. By the end of 2015, existing data reported the existence of 2,946 bilateral investment treaties (BITs) and 358 other treaties with investment provisions.[4] The investment regime, even if lacking a multilateral framework, has a direct impact on development promotion in developed and developing countries.

The current investment regime faces structural challenges, which are rooted in different and interrelated explanations. One factor associated with such crisis is the increasing discomfort about the actual effects of international investment agreements (IIAs) in promoting FDI. A second factor relates to the controversial nature of investment agreements that unduly protect private property at the expense of the right of host countries to regulate in the public interest.[5] Third, there is a growing demand for a more balanced approach between investors and states, imposing more obligations on the former. Finally, the legitimacy crisis of the investment regime is linked to the contested benefits of investor-state dispute settlement (ISDS), which is grounded on the potential disparity of treatment between foreign investors and domestic investors, arbitrator's bias, lack of arbitrator accountability, lack of transparency, absence of *amicus curiae* and third-party participation, inconsistency of awards, absence of an appeals mechanism and constraint on policy space. While these structural challenges affect both developed and developing countries, their responses vary according to the size of their markets and developmental needs, and their leverage in the international investment regime. Thus, a book that looks at the so-called legitimacy crisis from the perspective of developing countries is both timely and necessary.

[3] See *inter alia*: Michael Waibel, Asha Kaushal, Kyo-Hwa Chung, and Claire Balchin (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer Law & Business, New York 2010) and UNCTAD, "Reform of Investor-State Dispute Settlement: In Search of A Roadmap" (2 IIA Issues Note 2013) <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf> accessed September 28, 2016.

[4] UNCTAD, World Investment Report 2016 – Investor Nationality: Policy Challenges (United Nations, Geneva 2016) 101.

[5] See N. Perrone, "The international investment regime and foreign investors' rights: another view of a popular story" (Ph.D. Thesis, The London School of Economics and Political Science 2013) and Perrone, "The International Investment Regime after the Global Crisis of Neoliberalism: Rupture or Continuity?" (2016) 23 *IJGLS* (forthcoming).

As a result of the legitimacy crisis in the investment regime, many countries or groups of countries are currently considering alternatives to investment policymaking. Reactions emerge from different levels of regulation – multilateral, regional, bilateral, and national – and they vary in scope. While much of the international debate has been concentrated on new investment rules created in megaregional agreements, such as the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP), less attention is paid to changes in national laws and model investment agreements. By the end of 2015, at least 110 countries have reviewed their national and/or international investment policies since 2012 and a smaller number of countries have developed new model IIAs.[6] In essence, national level reforms are ways to tackle the challenges linked to the crisis of the investment regime.

This book contributes to the debate on changes in investment regulation and looks beyond the debate currently conducted by academics in the developed world, looking for alternatives in the Global South. Authors were asked to contextualize recent changes in their countries' investment regulations based on internal and external factors. The major claim of the book is that attempts to transform the economic order are underway, some of which are emerging from the Global South.

While we do not claim that investment law reforms in the countries studied in this book "reinvent the wheel," we argue that there is a good degree of innovation pursued by some of these developing countries by the inclusion of new elements and in the way that they make new combinations of existing investment provisions to advance their own development goals. These innovations tend to take place in two main areas of investment regulation. The first is dispute settlement, where some developing countries are replacing ISDS with state-to-state arbitration or local courts, and making mediation between the disputing parties mandatory before starting dispute settlement proceedings. The second area of investment regulation where some countries of the Global South are innovating concerns enlarged regulatory space for host countries. Countries like Brazil have excluded fair and equitable treatment and limited compensation only to direct expropriation, attempting to enlarge host countries' policy space. South Africa, on the other hand, began to terminate its investment treaties and revise domestic laws after realizing that certain provisions of existing BITs were in violation of its constitution and circumscribed the government's policy space.[7] China showed its flexibility in relation to regulatory space and dispute resolution in the China-Australia Free Trade Agreement.[8] But

[6] UNCTAD, "Taking Stock of IIA Reform" (1 IIA Issues Note 2016) <https://www.tralac.org/images/docs/9186/taking-stock-of-iia-reform-unctad-march-2016.pdf> accessed September 28, 2016.

[7] IISD, "Report of the Ninth Annual Forum of Developing Country Investment Negotiators" (Rio de Janeiro, November 16–18, 2015) <www.iisd.org/project/annual-forum-developing-country-investment-negotiators> accessed September 28, 2016.

[8] See Bath (China), this volume.

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other innovations take place "inside" the ISDS system. India has recently issued a new model BIT without most-favored-nation (MFN) provisions and requiring the exhaustion of local remedies before triggering ISDS. Recent Chilean IIAs give to states more policy space and control over investment claims and include provisions enhancing transparency and consistency in arbitral proceedings.

We conclude that the developing countries selected in this book take different approaches to investment regulation, ranging from conformity with regulation originated from developed countries, as is the case of Chile, to selected resistance in central provisions such as the right to regulate in the public interest and alternatives to ISDS. These approaches can be used to challenge more traditional forms of investment regulation and inspire change in like-minded countries, notably in the developing world.

The desirability and degree of reform in each of the countries studied vary according to the size of their economies, which determines their leverage in international negotiations, and the role investment flows play in their developmental policies. This book addresses investment regulation in five Global South countries and Australia.

China's regulatory strategy for investment agreements is inextricably tied to its ambitions in relation to the development of outbound trade and investment, both inbound and outbound. Its negotiating format maintains traditional BIT provisions, including ISDS, but its recent agreements with developed and developing countries demonstrate considerable negotiating flexibility. China has followed the world trend of preferential trade agreements (PTAs) with investment disciplines and is now engaged in an active program of negotiating PTAs with its trade partners. China is also pursuing the goal of a high quality BIT with the United States, which will include pre-establishment national treatment and a negative list, while at the same time pursuing the domestic liberalization policies which will make it possible for China both to grant and to ask for greater concessions in relation to market access. Left out of the TPP negotiations, China is pushing an alternative megaregional project, the Regional RCEP, involving the ten members of the Association of South East Asian Nations (ASEAN), Japan, Korea, India, Australia, and New Zealand. China is also promoting an even more ambitious initiative, the One Belt One Road (or New Silk Road), which involves massive infrastructure investment and related trade projects with sixty-four countries, mostly developing, through Central Asia to Europe and Africa and through the South China Sea to southeast Asia. With these countries China appears to be pursuing a different, more diplomatically based, strategy in relation to investment protection.

A second type of developing country studied in this book gathers the emerging economies of Brazil, India, and South Africa. Traditionally recipients of FDI, these countries have also become capital exporters over the past two decades. Unlike

China, they are countries with sufficient leverage to challenge existing investment rules, but not enough to develop an alternative system. In other words, these countries need to accommodate their interests within the existing system, adopting occasional detours to promote their own developmental policies.

A third type of developing country explored in this book is that of a small developing country economy that strongly relies on an open trade and investment strategy to promote development, illustrated by the Chilean case. Chile portrays a narrative of a country that unilaterally reduces barriers to trade and increases foreign investment protection; with limited bargaining power to negotiate alternative investment rules, Chile has a settled position of accepting the terms of the agreements proposed by the United States and the European Union – to a large extent replicated in its agreements with other developed and developing countries – and a slim record of cases brought against it by foreign investors (and with a majority of outcomes in favor of the respondent state). Such characteristics help to explain the country's decision to deepen a web of BITs and free trade agreements (FTAs), in many cases including investment disciplines. Additionally, it also explains why Chile is not in a position to challenge the existing regulatory framework that so far has worked in its favor. Despite the small size of Chile's economy, adherence to mainstream trade and investment forms of regulation should be factored in the equation to explain the country's stable flux of capital in and out of the country.

The last country studied in this book is Australia, a Global South country only by means of geography. Australia is a middle-level economy, a major exporter to developing countries and a recipient of substantial amounts of investment from both developed and developing countries. Given its special circumstances, investment regulation produced by Australia differs from the types of laws traditionally produced in the developed or developing world. This book relies on the Australian narrative to offer alternatives that might be considered by developing countries in relation to investment dispute settlement and the right to regulate in the public interest. First, Australia has decided to take a case-by-case approach in relation to investment dispute settlement. ISDS is no longer the default rule – and, when agreed to, Australia's recent ISDS clauses are heavily negotiated. The decision to reconsider the indiscriminate use of ISDS is to a great extent related to the controversial *Plain Packaging* case, which challenged Australia's health regulations based on the Australia-Hong Kong BIT, as well as to significant popular resistance to the concept. Second, although very pro-investment, Australia has developed a system of screening FDI that may or may not enter the country, based on the country's national interest. These and other lessons can be considered by other developing countries, especially those with greater bargaining power.

This book is a product of a joint research project conducted by a group of legal scholars from Brazil, India, South Africa, Chile, and Australia on

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"Southern Alternatives to Trade and Investment Regulation." The execution of this project started in 2013 with a panel entitled "The Interplay between Trade and Investment Measures in South-South Relations" in the 2014 Global Conference of the Society of International Economic Law (SIEL). At that point, the group was interested in exploring innovation in trade and investment regulation in their respective countries and their explanations based on internal and external factors, particularly in the context of South-South relations. In 2015, the group organized a second panel – "Southern Alternatives on Trade and Investment Relations: Emerging Regulatory Models, Actors, and Institutions" – and convened in the Annual Conference of the Law & Society Association, in Seattle. Participants were asked to explore the socio-legal dimensions of their respective countries' economic regulation, by, *inter alia*, focusing on the process of legal change and how particular institutions and actors shaped legal innovation in their countries. At that stage of the project, participants concentrated their analysis on the strategies adopted by their countries in order to reshape foreign investment law, a field subject to heated debates as countries around the globe undergo the process of reviewing their national policies and international commitments. This project was finalized in the 2016 Global Conference of SIEL, in Johannesburg, with a panel entitled "Recalibrating International Investment Agreements: What Are the Contributions of the BICCS countries?," which asked participants to explore the extent to which their countries' legal reforms in the area of foreign investment law could be qualified as alternatives to mainstream forms of regulation – traditionally U.S.- or EU-based -, and which material and normative factors support their countries' reforms.

The rest of this chapter proceeds in four sections. Section 1.1 puts international investment law in the context of economic order, explaining how this body of law has developed and dealt, over time, with the struggle between property rights of investors versus the rights of sovereignty of host countries. It argues that one narrative of economic order, the neoliberal narrative, has prevailed for many years, but now faces uncertainties. Section 1.2 starts by addressing the issue of the constitution of alternative economic order, looking at the case of TPP as the prime example of countries designing alternative forums in order to reinforce the neoliberal version of investment regulation and order in general. It then focuses on the countries of the Global South studied in this book and explains what factors underpin investment policy shift in each of these countries. Section 1.3 approaches the Global South as a laboratory for alternative economic order and focuses on recent changes in their approaches to crafting policy space and designing alternative dispute settlement mechanisms within investment agreements. Section 1.4 outlines the structure of the book.

PROOF

1.1 INTERNATIONAL INVESTMENT LAW AS ECONOMIC ORDER

Global economic order is defined as a set of rules – international, national, and transnational – that governs economic relations within and across countries, and encompasses areas such as trade, investment, and finance. Rules governing foreign direct investment emerged from the demands of a group of countries with traditionally developed economies looking to protect property owned by their nationals in politically unstable economies, most likely developing countries. The most important defining feature of this body of law has been, since its inception, the struggle between protecting property rights of investors versus sovereignty rights of host states to regulate in the public interest. What has varied over the years is the forum in which countries elect to advance their interests – the UN, BITs, PTAs, megaregionals – and the position that they take in relation to what interest should prevail – property versus more regulatory space – according to where they stand in relation to investment flows. Roughly speaking, countries that are mostly sources of FDI tend to demand investor-protective rules, whereas host countries are more likely to advocate for regulation that secures their policy space. While this divide was clear-cut in the early years of investment law, in today's world countries that were capital importers have also become major exporters of FDI and the opposite is also true. Thus, regulating foreign direct investment in a manner that meets the interests of developed and developing countries has become even more complex.

International investment law was first regulated by customary international law, in what came to be known as its era of infancy (1950s–64).[9] During this period the debate that divided developed and developing countries concerned the proper interpretation of customary international law and the content of international minimum standards of treatment. From its inception, the investment law narrative was mostly organized towards the development of a system that protected investors. In 1962, the UN General Assembly approved Resolution 1803 on Permanent Sovereignty over Natural Resources,[10] which, supported by developed and developing countries, intended to put an end to the long-lasting debate between the Calvo Doctrine[11] and the Hull Rule.[12] Under Resolution 1803, a foreign investor is entitled to "appropriate

[9] UNCTAD, World Investment Report 2015 – Reforming International Investment Governance (United Nations, Geneva 2015) 121.

[10] UNGA Res 1803 (XVII) (December 14, 1962).

[11] The Calvo Doctrine stated that "[a]liens who established themselves in a country are certainly entitled to the same rights of protection as nationals, but they cannot claim any greater measure of protection." See M. Sornarajah, *The International Law on Foreign Investment* (3rd edn Cambridge University Press, Cambridge 2010) 21.

[12] Under the Hull Rule, foreign investors were entitled to compensation according to an external standard. In Hull's formulation, "no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment thereof." See Sornarajah, *The International Law on Foreign Investment*, 36.

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compensation," in accordance with the law of the host state and with international law, to be decided upon exhaustion of local remedies and, provided states and other parties concerned consent, to international adjudication or arbitration.[13]

From 1965 to 1989, investment regulation entered its binary phase.[14] Its early moves privileged the expansion of international investment agreements intended to consolidate and enlarge the level of investment protection so far only available in contested customary international law. Inclusion of ISDS clauses in investment agreements occur in this period, based on developed countries' lack of trust in the judicial systems of developing countries. In response to this single-narrative perspective of how investment law should be constituted, a group of developing countries proposed a "New International Economic Order" (NIEO) in the 1970s. Gathered within the UN General Assembly, these countries organized a concerted resistance against the private property discourse prevailing in investment agreements and practice. Instead, these countries proposed a series of resolutions designed to strengthen states' permanent sovereignty over natural resources and to impose responsibilities on investors. General Assembly Resolution 3171, *inter alia*, strengthened the inalienable rights of states to permanent sovereignty over all their natural resources, stating that "each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each state carrying out such measures."[15] General Assembly Resolution 3281, known as the Charter of the Economic Rights and Duties of States (CERDS), while reaffirming Resolution 3171, provided that controversies over compensation due to nationalization of expropriation shall be settled by the national tribunal of the host state.[16] The legal status of these resolutions has given rise to heated debates and has also been subject to arbitrations which concluded that they do not constitute customary international law relating to expropriation.[17] The true value of these resolutions therefore lies in their political significance. For the first time, developing countries acted in concert to contest the prevalence of the property discourse in investment affairs and the marginal role accorded to their sovereignty.

NIEO proved short-lived, watering down the hopes for a more balanced investment regulation. While developing countries pushed for alternative international investment rules at the UN General Assembly, trying to safeguard their sovereignty,

[13] UNGA Res 1803 (XVII) (December 14, 1962).
[14] UNCTAD, World Investment Report 2015 – Reforming International Investment Governance 122.
[15] UNGA Res 3171 (XXVIII) (December 17, 1973).
[16] UNGA Res 3281 (XXIX) (December 12, 1974) UN Doc A/RES/29/3281.
[17] See Robert B. von Mehren, "International Arbitral Tribunal: Award on the Merits in Dispute Between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic (Compensation for Nationalized Property)" (1978) 17 *ILM* 1, 37.

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at the bilateral level they gradually started to enter into investment agreements with capital-exporting countries that, as suggested by Guzman, ended up hurting their interests.[18] As later empirically documented by Elkins, Guzman & Simmons, developing countries rushed into signing BITs due to competitive economic pressure within developing countries to attract foreign capital.[19]

From 1990 to 2007, the era of proliferation, 2,663 new international investment agreements were signed – most of which are BITs – in marked contrast to 367 during the 1965–89 phase.[20] BITs soon became a form of de facto global investment regulation embedded in the neoliberal approach,[21] rooted in the principles of free-market and capitalism.[22] BITs were still mostly constrained within the developed/developing countries divide[23] and they carried standard provisions that, by and large, promoted the protection of foreign investors without consideration of host countries' regulatory space.

Unlike the previous phase when only one ISDS dispute was documented, the 1990–2007 period gave rise to 291 new ISDS disputes. It did not take long for the investment regime to capture the public attention. Up until this period, regulation of FDI was a matter of interest to a limited number of constituents – mostly foreign investors, governments competing for capital, and a handful of international organizations. Several factors turned investment regulation into a matter of public concern in the developed and developing world. First, in terms of content, BITs were designed under an absolute investment protection rationale. Enforcement of these treaties in several jurisdictions negatively impacted some host countries' ability to

[18] See A. Guzman, "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" (1998) 38 *VJIL* 639, 688.

[19] Zachary Elkins, Andrew T. Guzman, and Beth A. Simmons, "Competing for capital: The diffusion of bilateral investment treaties, 1960–2000" (2006) 60 *IO* 811, 846. Sornarajah, on the other hand, notes that the increase in investment treaties in the 1990s is directly linked to the acceptance of neoliberal principles by states. See Sornarajah, *The International Law on Foreign Investment*, 13.

[20] UNCTAD, World Investment Report 2015 – Reforming International Investment Governance 123.

[21] The tenets of the neoliberal approach relevant to foreign investment were liberalization of the flows of inward FDI, privatization of state-owned enterprises, deregulation of barriers to entry and exit, free transfers of funds, stability of the legal architecture within which foreign investment functions, respect for property rights and contractual commitments, and neutral dispute settlement mechanisms to settle investor-state disputes. See Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP, Cambridge 2015) 12,13, and Perrone, "The International Investment Regime after the Global Crisis of Neoliberalism: Rupture or Continuity?"

[22] Within these two broad principles, the economy should be organized around global trade and financial markets, free flow of goods, services, and labor, transnational corporations, offshore financial centers, etc. See Manfred B. Steger and Ravi K. Roy, *Neoliberalism: A very short introduction* (OUP, Oxford 2010) 12.

[23] Note, however, that India and China were already transitioning from being recipients of foreign capital to also becoming sources of FDI. See *Steager and Roy*, *Neoliberalism: A very short introduction* 123.

regulate in the public interest in crucial matters such as right to water,[24] right to health,[25] the protection of cultural sites,[26] the protection of the rights of indigenous people,[27] the right to medicine, and similar public policy issues.[28] Some countries in the Global South, as this book demonstrates, were more negatively affected by this regulatory chill, given their primary role as recipients of FDI.[29] In short, investment regulation was not designed with their best interests at heart. Under BITs, recipient countries were subject to a range of obligations but had very few rights against investors. However, some countries in the North also felt potentially impacted by investment agreements that compromised their regulatory power. The United States, for instance, after becoming a major destination of FDI, amended its model investment agreement in 2004 to include carve-outs to accommodate greater regulatory space.[30] Additionally, constituents within the Global North, such as NGOs and other members of the civil society became highly critical about the activities of multinational

[24] See e.g., Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. *v* Argentine Republic, "Award" ICSID Case No. ARB/97/3 <www.italaw.com/cases/309> accessed September 28, 2016, Aguas del Tunari S.A. *v* Republic of Bolivia, ICSID Case No. ARB/02/3 (discontinued), Biwater Gauff (Tanzania) Ltd. *v* United Republic of Tanzania, "Award" ICSID Case No. ARB/05/22 <www.italaw.com/cases/157> accessed September 28, 2016, Bayview Irrigation District No 11 and others *v* Mexico, "Award" ICSID Case No ARB/05/1 <www.italaw.com/cases/134> accessed September 28, 2016.

[25] See e.g., Shell Brand International AG and Shell Nicaragua SA *v* Republic of Nicaragua, ICSID Case No. ARB/06/14 (discontinued), Ethyl Corporation *v* The Government of Canada, "Award on Jurisdiction" NAFTA/UNCITRAL 24 Jun 1998 <www.italaw.com/cases/409> accessed September 28, 2016, Chemtura Corporation *v* Government of Canada, "Award" NAFTA/UNCITRAL Aug 2, 2010 <www.italaw.com/cases/249> accessed September 28, 2016, Philip Morris Asia Limited *v* The Commonwealth of Australia, "Award on Jurisdiction and Admissibility" PCA Case No. 2012-12 17 Dec 2015 <www.italaw.com/cases/851> accessed September 28, Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. *v* Oriental Republic of Uruguay, "Award" ICSID Case No. ARB/10/7 08 Jul 2016 <www.italaw.com/cases/460> September 28, 2016.

[26] See e.g., Parkerings-Compagniet AS *v* Republic of Lithuania, "Award" ICSID Case No ARB/05/8 28 September 2016 <www.italaw.com/cases/812> accessed September 28, 2016, Compañia del Desarrollo de Santa Elena S.A. *v* Republic of Costa Rica, "Award" ICSID Case No. ARB/96/1 17 Feb 2000 <www.italaw.com/cases/3413> accessed on 28 September 2016, Southern Pacific Properties (Middle East) Limited *v* Arab Republic of Egypt, "Award" ISCID Case No ARB/84/3 20 May 1992 <www.italaw.com/cases/3300> accessed September 28, 2016.

[27] See e.g., Glamis Gold Ltd *v* United States of America, "Award" NAFTA/UNCITRAL 8 Jun 2009 <www.italaw.com/cases/487> accessed September 28, 2016, Grand River Enterprises Six Nations Ltd et al *v* United States of America, 'Award' NAFTA/UNCITRAL 12 Jan 2011 <www.italaw.com/cases/510> accessed September 28, 2016.

[28] Sornarajah, The International Law on Foreign Investment 7.

[29] For an argument against regulatory chill, see Christian Tietje and Freya Baetens, "The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership" (MINBUZA-2014.78850 2014) <https://www.rijksoverheid.nl/documenten/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip> accessed September 28, 2016.

[30] The Government of the United States of America, "2004 Model BIT" (2004) <www.state.gov/documents/organization/117601.pdf> accessed September 28, 2016.

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corporations in the developing world, voicing their discontent with violation of other norms of international law, particularly in environmental and human rights matters.

The procedure of ISDS also became increasingly problematic and harder to defend as the number of cases increased. As a practice that evolved from private commercial arbitration, ISDS was accused of lacking in transparency and being biased in favor of investors. Critics demanded open public hearings, publication of related legal documents, the right of nondisputing parties and stakeholders to submit amicus briefs to arbitral tribunals, and a code of conduct for arbitrators to end, or at least reduce, any bias. More recently, critical voices in the North have protested against the inclusion of ISDS in investment treaties because they grant foreign investors alone the right to bypass local courts, undermining the rule of law.[31]

On top of the problems related to content and procedure of investment regulation, the 2008 global financial crisis – caused by a lack of regulatory control over the lending practices of financial institutions – affected countries in the North and South. The magnitude of this crisis made countries rethink their regulatory regimes in relation to economic matters. Most importantly, the crisis caused a number of countries to reconsider the desirability of neoliberalism as a prevailing approach dictating economic regulation. BIT-type regulation is very much a product of this approach, which advocates for free flows of capital, limited government intervention – especially from host countries – and overprotection of corporate interests against other legitimate interests not within the tenets of the neoliberal approach.[32]

In sum, global contestation of neoliberalism along with growing discontent about how investment relations should be regulated both as a matter of content and of procedure gave rise to a legitimacy crisis in this aspect of the global economic order. In response to the crisis in the investment regime, countries in the North and South are currently undergoing a process of experimentation. In this context, the old struggle between the property rights of investors versus the rights of sovereignty of host countries has been reignited, opening the possibility of a reinvention of the system or confirmation of the status quo. We argue that within this generalized crisis, the critical voices of the Global South become stronger and more relevant. What emerges, then, are alternative versions of investment law as economic order: some countries in the North pushing for yet another neoliberal round in megaregional regulation

[31] See Laurence H. Tribe et al., "220+ Law and Economics Professors Urge Congress to Reject the TPP and Other Prospective Deals that Include Investor-State Dispute Settlement (ISDS)" (September 7, 2016) <https://www.citizen.org/documents/isds-law-economics-professors-letter-Sept-2016.pdf> accessed September 28, 2016.

[32] On the crisis around the paradigm of neoliberalism see generally Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (Farah, Straus and Giroux, New York 2014).

such as TPP-type policies, and other countries, mostly in the South, attempting to reclaim their policy space and hoping for the economic order to, once and for all, properly balance property and sovereignty rights.

1.2 INTERNATIONAL ECONOMIC ORDER AND ITS INVESTMENT ALTERNATIVES

1.2.1 *TPP as Proxy of the New Neoliberal Version of Global Economic Order*

Responses to the legitimacy crisis in the investment regime come from different fronts. While some countries still prefer to regulate investment through bilateral investment treaties, this practice seems to be on the decline. Recently, several countries, including the United States and Europe, have shifted fora and are now negotiating investment agreements as part of preferential trade agreements (PTAs) or megaregional agreements, such as the TPP and the Transatlantic Trade and Investment Partnership (TTIP). In this context, the most recent innovations in terms of investment regulation involving these countries are no longer discussed as stand-alone treaties, of which BITs are the most common form, but they take place within a broader regulatory scope, involving trade and investment.[33]

These new megaregional agreements, by and large, are the latest formulation of neoliberal regulation, designed to bypass developing country resistance within the World Trade Organization (WTO).[34] As a product of a neoliberal agenda, these agreements intend to liberalize trade beyond existing WTO law in areas such as intellectual property, competition policy, the digital economy, state-owned enterprises, and government procurement. Within the context of the WTO, developing countries have grown skeptical about the developed countries' true intentions, given that trade liberalization in sectors sensitive to the Global South has not been matched by developed countries' liberalization in agriculture.[35] Such skepticism was later transformed into a coalition of developing countries aiming to block this neoliberal agenda in the WTO. In response to this blockage, certain developed countries have designed alternatives to advance their agendas and bypass limitations created in the WTO, as part of a "divide and conquer" strategy.[36] Certain megaregionals became

[33] See UNCTAD, World Investment Report 2016 – Investor Nationality: Policy Challenges 101, 102.

[34] See Robert Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary" (2016) 27 *EJIL* 9, 77.

[35] Kristen Hopewell, *Breaking the WTO: How Emerging Powers Disrupted the Neoliberal Project* (Emerging Frontiers in the Global Economy Series, SUP, Stanford 2016).

[36] See Eyal Benvenisti "Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law" (2016) IILJ Working Paper 2016/2 MegReg Series <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2646882> accessed September 29, 2016.

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the most compelling form for neoliberalism, given that, if approved, TPP, TTIP, and RCEP together should cover 67.7 percent of world GDP.[37]

Investment is part of the megaregional regulation. For the most part, the TPP investment chapter is an attempt to perpetuate the investor-protective approach in investment agreements, which, through broad investment definition and related provisions, advance the property rights of investors, now increasingly contested in international arbitration and in recent reforms of investment regulation in some countries in the Global South. As a general matter, TPP follows the U. S. and NAFTA approach to investment regulation, with some innovations.[38] Even if we do recognize that the United States' decision to pull out of the agreement severely reduces the chances of TPP moving forward, we use it as a proxy for investment regulation embedded in the neoliberal approach.

The property rights–based approach to investment regulation is visible in the traditional standards of treatment available to investors in the TPP, which includes national treatment, most-favored treatment, and most importantly the minimum standard of treatment and treatment in case of armed conflict or civil strife. The minimum standard of treatment involves treatment in accordance with customary international law principles, including the highly contested fair and equitable treatment standard and full protection and security, both qualified in the agreement.[39] In addition to the full protection and security clause, TPP includes yet another clause addressing treatment in case of armed conflict or civil strife.[40]

The agreement reiterates the standard U.S. and NAFTA practice in relation to expropriation and compensation for expropriation, and transfers. The latter shall be made freely and without delay, not providing a balance of payment exception, an issue now strongly advocated by several countries in the Global South. Additionally, TPP prohibits its members from including any performance requirement obligation. Performance requirements, especially those related to transfer of technology

[37] See Jeffrey J. Schott, Cathleen Cimino-Isaacs, and Euijin Jung, "Implications of the Trans-Pacific Partnership for the World Trading System" (2016) PIIE Policy Brief 16–8 <https://piie.com/system/files/documents/pb16-8.pdf> accessed September 28, 2016 12.

[38] See generally Jarrod Wong, Karen L. Kizer, Fabio Morosini, and Ko-Yung Tung, "Forum Non-Concurrence in the Resolution of Investment Treaty Disputes" 110 Asil Proc. (forthcoming).

[39] Trans-Pacific Partnership (adopted February 4, 2016) art. 9.6 (2)(a): "fair and equitable treatment includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."

[40] Trans-Pacific Partnership (adopted February 4, 2016) art. 9.7: "each Party shall accord to investors of another Party and to covered investments non- discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife."

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and local content rule have been used as a developmental tool in some developing countries.

The TPP – following a trend adopted by the United States since its 2004 Model BIT – created a regulatory space exception based on environmental, health, and safety reasons. This has occurred largely in reaction to the United States becoming a major recipient of FDI and related fear of being challenged before investment arbitration within and beyond NAFTA.[41] In addition, a vaguely drafted corporate social responsibility clause is included in the agreement in order to address mounting criticism from civil society in relation to human rights violations perpetrated by some multinational corporations operating in the Global South and to respond to the more general discontentment directed at the low level of obligations imposed on investors. As we demonstrate in the following section, the quest for policy space in the developing world goes beyond the correction of these negative externalities, and aims at the heart of a country's development model, exemplified by Brazil's attempt to use IIAs as part of a comprehensive policy to promote certain national champions abroad, or at the promotion of fundamental civil rights, as showcased by South Africa's struggle to redress past legacies of the apartheid rule.

Finally, in relation to dispute settlement, TPP adopts ISDS, even if the agreement accepts carve-outs. The TPP investment chapter has tried to respond to the mounting criticism directed at the ISDS system. Some key areas were emphasized in the text: transparency, format for dispute settlement, third-party participation, and leaving open the possibility of some form of appeals process down the road.[42] What remains to be answered is the extent to which these reforms in the ISDS system proposed by TPP satisfactorily respond to different groups of constituents, within and outside TPP. Additionally, certain groups within members of the TPP have already negatively reacted to ISDS more generally. Recently in the United States, more than 220 law and economics professors have urged Congress to reject TPP and any other prospective deals that contain ISDS, because it allows foreign investors to challenge governments for actions that allegedly violate loosely defined investor rights, and allows multinational corporations to bypass local courts.[43]

[41] It should be noted that this approach also reflects the aspirations of the other TPP parties even if the form comes from the U.S. document.

[42] See generally Jarrod Wong, Karen L. Kizer, Fabio Morosini, and Ko-Yung Tung, "Forum non-Concurrence in the Resolution of Investment Treaty Disputes" 110 Asil Proc. (forthcoming).

[43] Laurence H. Tribe et al., "220+ Law and Economics Professors Urge Congress to Reject the TPP and Other Prospective Deals that Include Investor-State Dispute Settlement (ISDS)."

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1.2.2 *Global South Responses as Alternative Economic Order: Law Reform and Its Drivers*

The past decade has witnessed great changes in the investment regulatory fabric of the most important countries in the Global South. China perhaps has the most intriguing strategy. It has maintained its position of key player with its large web of BITs and has embarked on FTA negotiations with investment chapters. In addition to that, given its geo-economic stature and global ambitions, China is a leading supporter of negotiations to create a new megaregional – the Regional Comprehensive Economic Partnership (RCEP) – and the initiator of the less formal One Belt One Road (OBOR) initiative. Brazil, India, and South Africa have recently issued new model investment agreements largely contesting the standard BIT formulation. Australia has changed its approach in relation to dispute settlement, ensuring that it maintains autonomy over the screening and admission of investment, and making ISDS no longer the default rule. Chile, on the other hand, has maintained its policies to take part of investment agreements as proposed by its partners.

This section explores the factors underpinning investment policy changes in China, Brazil, India, South Africa, Chile, and Australia. It identifies similarities and differences behind each country's investment policy shift and argues that a proposed alternative economic order is emerging from some of these countries.

1.2.2.1 China

China has been an active participant in international investment law since opening up its economy. However, normative and material factors have dictated Chinese investment policies. Since the year 2000, China has decided to further integrate with the liberal economic order, which included joining the WTO and signing legalized investment agreements with more enforceable obligations.[44]

More recently, this change in approach is accompanied and partially explained by the increasing presence of Chinese corporations abroad – the largest of which are state-owned enterprises (SOEs) – and an increased emphasis on investor protection. China is the top recipient of FDI among emerging markets and the second largest exporter of FDI in the world, after the United States. Chinese investment strategy has proven successful in terms of encouraging development of the Chinese economy through the import of capital and in the last ten years, exporting capital

[44] Jing Tao, "China's Integration into the Liberal International Economic Order and Its Changing Policies on Legalized Bilateral Investment Treaties" Law and Development Colloquium, NYU Law School, November 23, 2015 <www.law.nyu.edu/academics/colloquia/lawanddevelopment> accessed September 28, 2016.

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and acquiring assets overseas. While in 2001 China's outward FDI was only fifteen percent of its inward FDI, in 2014 this ratio has changed to ninety-six percent.[45]

Given China's clear position in relation to the construction of its domestic regulation of investment, both inbound and outbound, and its integration into China's overall economic strategy, one would expect that the country would have a consistent negotiating strategy in relation to the its international investment agreements. In the last ten years, however, China's negotiated agreements, although completely consistent with China's domestic objectives in relation to investment (particularly in connection with pre-establishment concessions and market access) have shown considerable flexibility and, indeed, inconsistency in such areas as fair and equitable treatment, performance requirements, and other aspects. Indeed, analysts suggest that China has been accepting the terms of the text proposed particularly by its developed country partners with surprisingly few carve-outs.[46] As Chapter 2 of this book shows, however, China's investment and FTA/PTA negotiations are part of China's overall economic strategy, which is focused on a combination of globalization of trade, increased investment market access for China's outbound investment, and liberalization of domestic investment as an integral part of the open economy reforms. In advancing this agenda, China is negotiating on a number of different fronts: a BIT with the United States which, it has been agreed, will include pre-establishment market access on a negative list basis, which will also be incorporated into China's other agreements, starting with Australia and Korea, and a range of FTAs in which China has shown its willingness to accommodate the concerns and interests of other parties, both developing and developed. The balance struck in the final version of the investment chapter of the RCEP, with its range of negotiating partners, will be of particular interest in reflecting the compromises which states such as China, Australia, and India are prepared to make.

It should also be observed that China's policy in relation to international investment disputes and difficulties is essentially pragmatic. China has very limited practical experience with ISDS, as either host or home state. China has a very large number of older-style BITs, particularly with developing countries, many of which are along the One Belt One Road. The content of most of these agreements is very limited and gives very little scope for ISDS. In addition, the Chinese government often supports investments by Chinese companies in states with low levels of governance and high levels of political risk. In dealing with potential disputes, therefore, as Chapter 2 outlines in more detail, China is not reliant solely on its network of international investment agreements or international investment law.

[45] Karl P. Sauvant, "China, the G20 and the International Investment Regime" (2016) 24 *CWE* 73, 92.

[46] Alex Berger, "Hesitant Embrace: China's Recent Approach to International Investment Rule-Making" (2015) 16 *JWIT* 843, 68.

Within the context of international investment law, however – notwithstanding its flexibility and willingness to accommodate the interests of other states, particularly in such areas as regulatory space, where China itself maintains a strong view that it will protect its own rights and interests as a host state – it can be concluded that China is not particularly interested in creating a new international order. To the contrary, China's policy of giving concessions under the North-South treaty structure in order to attract investment and, more recently, negotiating for better market access and more investor protections in its role as an exporter of FDI, shows that China has been able to work very successfully within the current international investment regime. Although it does see itself as a developing state, and it is both a generous provider of aid and an active investor in other developing states, it has not become a proponent of major changes to the existing regime.

1.2.2.2 Brazil, India, and South Africa

Historically, Brazil resisted participation in bilateral investment agreements.[47] But this is changing at a fast pace. Since March 2015, Brazil has signed seven agreements on investment cooperation and facilitation (ACFIs) with other developing countries: Mozambique, Angola, Mexico, Malawi, Colombia, Chile, and Peru.[48]

The standard narrative of signing investment agreements to attract FDI does not explain the emergence of Brazil's new policy. Brazil, much like China, has been a net recipient of FDI for many years.[49] Its large consumer market and a reliable judicial system have been sufficient to attract and maintain FDI in the country even in the absence of international agreements. However, since the year 2000, as a consequence of a successful industrial policy that provided state-led financing to selected sectors and companies, Brazil also became a capital-exporting country, witnessing the emergence and consolidation of Brazilian multinational corporations. In addition, around the same time, the government initiated a foreign policy favoring South-South relations.

[47] See generally Daniela Campello and Leany Lemos, "The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation" (2016) 4 *RIPE* 1055, 1086.

[48] The texts to the agreements are available for consultation at UNCTAD's international investment agreements database, available at http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu, accessed September 28, 2016. For another appraisal by the authors on them, see Morosini and Badin, "The Brazilian Agreement on Cooperation and Facilitation of Investment (ACFI): A New Formula for International Investment Agreements?" ITN, August 4, 2015 <https://www.iisd.org/itn/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements/> accessed September 29, 2016.

[49] According to the World Investment Report of 2016, Brazil accumulated the third position for inward foreign direct investment in the 1990–2015 period, behind China and Hong Kong. See UNCTAD, World Investment Report 2016 – Investor Nationality: Policy Challenges Annex Table 1.

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The presence of Brazilian multinational enterprises (MNEs) in the Global South, especially in Africa and Latin America, pressured the government to create an investment agreement that responds to the demands of Brazil's private sector, especially the need to create communication channels inside the countries where Brazilian MNEs invest, to prevent disputes. Another important factor that contributed to the development of a new investment policy in Brazil is the country's bureaucracy. Brazil's Ministry of Development, Industry, and Commerce, in collaboration with the Ministry of External Relations and the Ministry of Finance, within the framework of CAMEX, put forward an ambitious program in the shadow of former President Dilma Rousseff's erratic economic policies. As a result, Brazil created a new model investment agreement, known as Agreement on Cooperation and Facilitation of Investments (ACFI), which moves away from the standard investor-protective treaty, by, *inter alia*, limiting the definition of investment/investor, excluding key standards of treatment clauses such as fair and equitable treatment, and ruling out ISDS.[50]

In mid-December 2015, India's Union Cabinet approved a new model BIT. India, like China, is far from a newcomer in the world of investment agreements. In the 1990s, when India opened up to the liberal economic order, the country rushed to sign several BITs with capital-exporting countries to attract investment in the country, not paying sufficient attention to their content and impact on India's policy space. It saw BITs as a way to signal to the world that India is a trustworthy economic partner. During the first two decades of existence, BITs were not on the government's or the larger constituency's radar.[51] This is surprising given India's strong advocacy for policy space within the WTO, which can also be a result of the internal organization of India's trade and investment negotiating bodies.[52] India seemed so at ease with the structure of the BITs that it negotiated similar investment treaties with other developing countries to protect India's outward FDI.

India's position in relation to the regulation of FDI only changed when it started to face challenges by foreign investors against measures taken by its government

[50] See Sanchez-Badin and Morosini, this volume; and also Morosini and Sanchez-Badin, "The Brazilian Agreement on Cooperation and Facilitation of Investment (ACFI): A New Formula for International Investment Agreements?"

[51] Prabhash Ranjan offers three explanations for the lack of interest in the relationship between BITs and regulatory space in India: first, the one-dimensional approach towards BITs that were only perceived as instruments to attract FDI, second, lack of legal expertise in international investment law in India, and third, the lack of legal challenges raised by foreign investors against India. See Ranjan, "India and Bilateral Investment Treaties – A Changing Landscape" (2014) 29 *IR* 419, 450.

[52] While India's trade agreements, including FTAs with investment chapters, are negotiated by the experienced Ministry of Commerce, stand-alone BITs are negotiated by the Ministry of Finance, which lacks expertise in international economic affairs. See Ranjan, "India and Bilateral Investment Treaties – A Changing Landscape" 438.

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that allegedly violated investors' rights according to the terms of BITs. The most prominent dispute to date is *White Industries Australia versus India*,[53] but other investors have also brought claims against India's cancellation of telecom licenses and imposition of retrospective taxes and review of Supreme Court decisions.[54] The four-million-dollar condemnation of India before an arbitral tribunal in the *White Industries* case and the threat of similar outcomes in future disputes triggered public attention and fostered claims for reform. In 2011, the Ministry of Commerce issued a white paper entitled "International Investment Agreements between India and Other Countries" that served as the basis for a reform agenda in India.[55] It soon became clear to the Indian government that BITs can not only limit India's policy space but also cause significant hardship to the country's finances as a result of arbitral awards against the government. Consequently, India created a new model investment agreement, which, while maintaining a more traditional investment treaty template, attempts to enlarge India's policy space and protect the country against future legal challenges. It does so often by qualifying standard BIT provisions, such as fair and equitable treatment and ISDS, limiting the discretion of arbitral tribunals to interpret India's investment treaties.

South Africa's new investment act, which has just swiftly been assented to by the president, sets out the government's intention of not renewing the so-called first generation BITs and to restrict the country from entering into new BITs, unless there are compelling economic and political reasons for doing so.[56] The strongest normative justification behind South Africa's new approach is the country's objective of redressing the legacy of apartheid rule, which deprived black South Africans of land ownership. In the wake of South Africa's new constitutional order and its Black Economic Empowerment Act,[57] the country is undergoing a process of restructuring its investment regulation to align it with South Africa's constitution. Some of the land where foreign investment projects are currently located was forcibly taken away, without compensation, from the black community.

Similar to India, South Africa rushed into BITs with capital-exporting countries in the 1990s as part of a strategy to attract FDI and to hint at its commitment

[53] White Industries Australia Limited *v* The Republic of India "Final Award dated 30 November 2011" UNCITRAL <www.italaw.com/sites/default/files/case-documents/ita0906.pdf> accessed September 28, 2016.

[54] See Grant Hanessian and Kabir Duggal, "The 2015 Indian Model BIT: Is this Change the World Wishes to See?" [2015] *IR* 1, 12.

[55] See Ranjan, "India and Bilateral Investment Treaties – A Changing Landscape" 439.

[56] IISD, "Meeting Report: Investment Treaties in a State of Flux: Strategies and opportunities for developing countries" (Rio de Janeiro, November 15–16, 2015) <www.iisd.org/sites/default/files/meterial/IISD%209th%20Annual%20Forum%20Meeting%20Report%20English.pdf> accessed September 28, 2016.

[57] See The Constitution of the Republic of South Africa of 1996 and Act No. 53, 2003.

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to international agreements. The country did not critically evaluate the negative externalities of BITs on South Africa's policy space until much later, when private investors brought a claim against South Africa, challenging its new Mineral and Petroleum Development Act and Mining Charter which, *inter alia*, allegedly expropriated investment in order to honor the Black Economic Empowerment Act.[58] The outcome of the *Foresti* case that constrained South Africa from fully pursuing its intended policies[59] and the risk of other similar claims brought by foreign investors made the government reconsider its approach to investment regulation. In 2009, South Africa issued a position paper – a first of its kind to critically evaluate investment policies in South Africa – suggesting rebalancing investor rights and regulatory space, which served as the basis for the new South African model investment agreement.[60] In 2015, South Africa issued a new model investment agreement embracing substantive changes, including limiting the definition of investment/investor, exclusion of fair and equitable treatment to foreign investors, and replacing ISDS for South African courts.

1.2.2.3 Chile

Chile evolved from a policy of unilateral openness that started in 1973, to a closed Latin American regionalism represented by the Economic Complementation Agreements (ECAs) signed under the umbrella of the Latin American Integration Association (LAIA) in the early 1990s. In the middle of the same decade, Chile evolved towards the implementation of a policy of open or additive regionalism, negotiating preferential trade agreements (PTAs) – mostly FTAs – with all its major trading partners, a policy that continues today, without abandoning multilateralism, mainly under WTO Agreements.

The chief regulatory differences between Chilean strategies of "closed" and "open" regionalism are that ECAs were mainly focused on the reduction of tariffs whereas PTAs have been more broad and comprehensive, including disciplines

[58] Attempting to encourage greater ownership of mining industry assets by historically disadvantaged South Africans (HDSA), the Mining Charter required mining companies to achieve 26% HDSA ownership of mining assets and publish employment equity plans directed towards achieving a baseline 40% HDSA participation in management. See Piero Foresti, Laura de Carli and Others *v* The Republic of South Africa, "Award" ICSID Case No. ARB(AF)/07/01 <www.italaw.com/sites/default/files/case-documents/ita0337.pdf> accessed September 28, 2016 56.

[59] The parties reached an agreement whereby investors would be deemed to have complied with the Mining Charter by making a 21% beneficiation offset and providing a 5% employee ownership program for employees of the investors. See See Piero Foresti, Laura de Carli and Others *v* The Republic of South Africa, "Award" 79.

[60] Republic of South Africa, "Bilateral Investment Treaty Policy Framework Review," Government Position Paper (2009) <www.dtps.gov.za/documents-publications/category/94-vodacom.html?download=441:annexure-c_repofsa_bit-policy-framework_june2009> accessed September 28, 2016.

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beyond trade in goods, as trade in services, intellectual property, and investment, among others. Although ECAs were signed only with other developing countries, FTAs have not been exclusively negotiated with developed countries. In fact, after the first Chilean FTA – with Canada in 1996 – Chile signed an FTA with Mexico in 1998, and from that date, subsequent PTAs have followed a similar structure, regardless of whether it has been negotiated with a developed or a developing country.

Regarding investment agreements, Chile adopted an active policy of negotiating and signing BITs in the 1990s, which typically included broad definitions for investors and investment, MFN, national treatment (NT), and fair and equitable treatment (FET), full compensation for direct and indirect expropriation, and unrestricted access to investor-state arbitration. Since 2003, almost all Chilean IIAs have been included as part of PTAs. These chapters are longer and more complex than BITs, with detailed definitions of certain standards, notably FET, full protection and security (FPS), and indirect expropriation. They also include provisions on performance requirements, filter mechanisms, exceptions and carve-outs (notably for financial services), and more detailed ISDS proceedings (like rules on transparency, consolidation, and treaty interpretation).

There are no major differences in the content of IIAs whether they were signed with "Northern" or "Southern" countries. In fact, the majority of BITs and IIAs concluded by Chile (including the investment chapters in PTAs), are with developing countries. Some of the few differences we can find are related to ISDS, but they do not always play in favor of the investor. On the one hand, some BITs with developed countries include exceptions to the "fork-in-the-road" provisions that are considered in the majority of Chilean BITs, or include "umbrella clauses," both features that could be considered as "pro-investor"; but on the other hand, certain investment chapters in Chilean PTAs with developed countries include a more restricted definition of "investor" if compared to IIAs signed with developed countries, which it could be considered as a "pro-state" feature.

In general, Chile follows a model of trade and investment agreement that is influenced by treaties previously signed with Northern developed countries. With respect to investment treaties, both the fifty-three Chilean BITs and the Chilean Model BIT generally follow what has been characterized by some as the "Dutch Model," that reflects, in general, the European approach to investment treaties.[61] With some minor variations, like a reduced consideration of umbrella clauses and of the FPS standard, Chile has used this framework in the negotiations of BITs with other developing countries.

[61] On the Dutch model of BIT, see Chester Brown, *Commentaries on Selected Model Investment Treaties* (OUP, Oxford 2013) 583.

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In the case of trade agreements, the NAFTA model has clearly served as a blueprint for the negotiation of the issues contained in later Chilean agreements – especially if we consider that the first two FTAs signed by Chile are with NAFTA members (Canada and Mexico) and there existed an explicit intention of becoming part of that trade bloc. However, Chile has also contributed to promoting legal innovation in IIAs, as evidenced in the subsequent diffusion of features of the investment chapter of the Chile-United States FTA, especially those innovations on transparency, definitions of FET, FPS, and indirect expropriation, and in general on ISDS served as an outline for future investment chapters in PTAs signed both by Chile and the United States. Innovations are also found in Chilean agreements with countries in the Global South, which then have been diffused in subsequent agreements. For example, the FTA with Colombia was the first negotiated by Chile and a South American country that included chapters on environment and labor. Similarly, clarifications on the scope of pre-establishment protection included in the FTAs with Peru and Colombia found their way into subsequent agreements, notably the Pacific Alliance Protocol and the TPP.

The consideration of sustainable developmental policies is clearly different in each type of Chilean trade and investment agreement. Neither ECAs nor BITs include environmental or labor provisions, or in general anything related to sustainable development. In the framework of a tendency to include some labor and environmental provisions among South-South PTAs, several Chilean agreements consider such provisions, although only some in their investment chapter. There is a significant degree of variation in the way these provisions are included, as certain PTAs consider detailed commitments while others merely mention labor and environmental concerns as policy references. If we review the Chilean PTAs with developed or developing countries, there is no important change in the treatment of sustainable development issues, although the most comprehensive PTAs with respect to labor and environment issues are the FTAs with Canada and the United States and the TPP; fewer agreements with developing countries include detailed commitments in this regard, notably the agreements with Colombia and China.

The TPP will be decisive for the future developments of trade and investment treaties by Chile, as involve both developed (Australia, Brunei, Canada, Japan, New Zealand, Singapore, and the United States) and developing (Malaysia, Mexico, Peru, and Vietnam) countries. It has also been the only trade and investment agreement that has generated high levels of debate and controversy in Chilean society, although it largely follows (and deepens) a model of agreement that has been negotiated by Chile in the past twenty-five years, with the support of a large political consensus. Up to now, Mexico and Peru have been the other countries of the Latin American region embracing similar regulatory policies to the ones previously advanced by Chile in trade and investment.

The eventual entry into force of the TPP would be a confirmation of Chile's traditional trade and investment foreign policy and would allow us to assess whether regulatory changes fostered by TPP are also replicable in other countries, as part of the spillover effect on subsequent agreements concluded by TPP members. If TPP is not ratified, that will probably imply an important revision of Chilean trade and investment policy, although a total abandonment of that policy is unlikely, due to the large number of agreements that are involved, and because criticisms against TPP have not been replicated in similar agreements that do not implicate developed countries (like the Pacific Alliance Protocol).

1.2.2.4 Australia

In 2011, the Australian government announced that it would no longer include investor-state dispute settlement clauses in its investment agreements, following the recommendation of the Australian Productivity Commission on trade agreements[62] and immediately prior to the anticipated institution of investor-state arbitration against Australia by Philip Morris Asia in June 2011 under the 1993 Hong Kong-Australia BIT, challenging the government's Tobacco Plain Packaging Act 2011, a measure intended to create disincentives to smoking. The absolute nature of this decision took many specialists by surprise,[63] and brought Australia's policies closer to reactions currently taking place in the Global South, despite Australia's tradition of alignment with economic policies and regulations of the North, as demonstrated in Australia's twenty-one BITs. The trade policy makes clear that the ability to preserve regulatory space in relation to social, environmental, and economic matters – particularly with regard to tobacco regulation – was a primary consideration, as well as a view that foreign businesses should not receive greater rights than those available to domestic investors.

With the change of government in 2013, the government moved to a case-by-case approach to ISDS, and as a result most of Australia's subsequent FTAs have included an ISDS provision. However, as is the case in the TTP, Australia's obligations are heavily moderated to ensure both that Australia's screening policy for FDI is protected from challenge and to allow regulatory space, particularly for public health and welfare concerns. It should be noted, however, that Australia's FTA with the United States negotiated in 2004 did not contain such a provision, and subsequent agreements with Malaysia and Japan do not include such a provision either.

[62] Australian Government, "Bilateral and Regional Trade Agreements: Productivity Commission Research Report" (2010) <www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf> accessed September 28, 2016.

[63] Jurgen Kurtz, "Australia's Rejection of Investor–State Arbitration: Causation, Omission and Implication" (2012) 27 *IR* 65, 86.

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Australian investors, however, have shown an increasing interest in utilizing ISDS provisions, with cases against India, Pakistan, and Indonesia under various BITs.

Normatively, Australia's reservations in relation to ISDS are not very different from those triggering decisions by India and South Africa – they are driven by demands for enlarged regulatory space. Australia's approach to its BITs did not include a critical evaluation of their potential negative impact on domestic policies. Indeed, the Philip Morris Asia arbitration under the BIT with Hong Kong is the only investor-state arbitration that has been brought against Australia. It only came to reconsider its position when the government started exploring alternative trade agreements as a result of the declining success of WTO negotiations. Many of these alternative agreements took the form of free trade agreements and included investment chapters containing investor protections generally included in BITs.

1.2.3 *Summary*

Despite significant differences between the countries showcased in this book, we argue that the similarities between each country's investment policy shift are greater than one would initially have expected. What most of these countries have in common is that they used international investment agreements, mostly in the BIT version, as a tool to attract FDI in the 1990s, without critically evaluating their negative externalities. Their perception about investment regulation began to change as some of them started facing complaints brought by private investors challenging measures that they had taken in the name of public policy goals, such as health regulation, or even the functioning of their judiciary. They soon realized that the supposedly attraction of FDI through BITs was impairing their overall regulatory space. Not only that, the threat of mass condemnation of a state for violating the terms of the BITs alerted governments to their significant impacts on the state's finances.[64] The one exception to this is China, which was particularly cautious in the 1980s and 1990s in relation to its commitments due to its need to preserve its own restrictive domestic regime, and only began carefully to widen its negotiating approach in the twenty-first century in parallel with its domestic liberalization program in order both to encourage investment and to provide protection for its own investors. In fact, as Berger notes, the move toward flexible and divergent terms in its recent agreements potentially opens it up to more risk under its most-favored-nation clauses in some respects.[65] In addition, another element that made some countries in the South

[64] In Occidental *v* Ecuador, for example, the tribunal awarded the investor $1.9 billion (U.S. billion) in damages against Ecuador. See Occidental Petroleum Corporation and Occidental Exploration and Production Company *v* The Republic of Ecuador, ICSID Case No. ARB/06/11 <www.italaw.com/cases/767> accessed September 28, 2016.

[65] Berger, "Hesitant Embrace: China's Recent Approach to International Investment Rule-Making" 868.

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change their investment policies is the transition from being recipients of FDI to also becoming sources of investment, through newly created multinationals, some of which are state-financed. Such a transition encourages some countries to develop regulation that protects their investments abroad, while not necessarily employing the same approach developed by the North.

1.3 THE GLOBAL SOUTH AS LABORATORY FOR ALTERNATIVE ECONOMIC ORDER

1.3.1 *Crafting Regulatory Space in Investment Regulation*

1.3.1.1 Definition of Investment/Investor

It has become a common feature of model IIAs in the Global South to restrict the definition of investment and investors as a way to limit the scope of application of the agreements and, consequently, enlarge the host country's regulatory space. In moving away from BIT-type broad definitions of investment/investor, some similar definitions emerge in the countries showcased in this book. First, some of these countries have adopted an enterprise-based definition and introduced a "substantive business activity" requirement. This has been a common feature of India and South Africa and a number of China's post-2008 IIAs. In the case of China, recent treaties often require that an investment have the "characteristics" of an investment, such as the commitment of capital. They do generally include a requirement in relation to business activities in relation to the exclusion of letter box (mailbox) companies, usually included in the denial of benefits clause.[66] A second common feature of some of these agreements is the definition of investment according to the domestic laws of the parties. This is the approach taken by Brazil in its investment agreement with Angola and Colombia,[67] and is the general approach adopted by South Africa.[68]

1.3.1.2 Standards of Treatment

It is fair to say that standards of treatment are at the heart of investment protection, which explains the emphasis and level of detail that BITs have traditionally put on these provisions. In the new wave of agreements proposed by the Global South, some of which are moving away from an investment protection approach, it is not only the new qualifications to standard levels of investor protection that call one's

[66] Berger, "Hesitant Embrace: China's Recent Approach to International Investment Rule-Making."

[67] See Brazil-Angola Cooperation and Investment Facilitation Agreement (adopted April 1, 2015) art. 3 and Brazil-Colombia Cooperation and Investment Facilitation Agreement (adopted October 9, 2015) art. 3 1.2

[68] See Act No. 22 of 2015: Protection of Investments Act, 2015 art. 2.

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attention, but the absence of some of the most controversial clauses in many of these new agreements. The immediate outcome and intention of governments, even if at the risk of scaring investors away from certain host countries, is the greater level of state autonomy to pursue public policy goals.

All the countries studied in this book generally agree to some version of the national treatment (NT) clause, which guarantees that foreign investors will be treated in the same way as locals. In pursuing greater regulatory autonomy, countries in the Global South are moving from unconditional NT to qualified versions and carve-outs. China, India, and South Africa have chosen to prevent excessive interpretations of NT clauses by arbitral tribunals by following the NAFTA formulation of "in like circumstances" criteria.[69]

India and South Africa have taken steps to further limit the scope of application of the NT clause. In the case of India, the new model investment agreement provides that violation of NT will only occur "if the challenged Measure constitutes intentional and unlawful discrimination against the investment on the basis of nationality."[70] Interestingly, India excludes the application of NT obligation from measures taken by a regional or local government.[71] In what appears to be a direct response to the *White Industries* case, India provides that exercises of discretion – including decisions regarding whether, when, and how to enforce or not to enforce a law – shall not violate a state's NT obligation. Finally, India exempts from NT obligation any measures taken in pursuance of public policy objectives, such as protection of health, the environment, and safety.[72] In the case of South Africa, the government is exempted from the extension of NT obligations, thus enabling the government to continue offering beneficial treatment related to, *inter alia*, taxation, government procurement, subsidies or grants, laws or measures intended to redress the legacies of the apartheid rule, and measures or laws whose purpose is to promote and preserve cultural heritage, traditional knowledge, and biological resources.[73]

China and Australia have both been very cautious in relation to pre-establishment national treatment. China traditionally has not agreed to it at all, in order to preserve its regulatory space, although it is in the process of reforming the domestic system and moving toward pre-establishment negative list commitments. Australia

[69] See North America Free Trade Agreement (adopted December 17, 1992, entered into force January 1, 1994) art. 1102. Note, however, that South Africa went one degree further and spelled out its "like circumstances" criteria. See Act No. 22 of 2015: Protection of Investments Act, 2015 art. 8.2.

[70] Government of India, "Model Text for the Indian Bilateral Investment Treaty" <https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf> accessed September 28, 2016 art. 4.2.

[71] Government of India, "Model Text for the Indian Bilateral Investment Treaty" art. 4.3.

[72] Government of India, "Model Text for the Indian Bilateral Investment Treaty" art. 4.5.

[73] Act No. 22 of 2015: Protection of Investments Act, 2015 art. 8.4.

does give pre-establishment national treatment, but maintains protections for its screening and admission system from ISDS.

The pursuit of greater policy space at the expense of reduced investor protection is well illustrated by a radical move performed by some countries in the Global South in relation to the most-favored-nation (MFN) obligation. South Africa and India moved away from their previous BITs, which included MFN clauses, and excluded it altogether from its new model treaties. In the case of India, this is a direct reaction to the *White Industries* case, which extended to the Australian investor a substantive provision contained in a BIT between India and Kuwait, by relying on the MFN clause of India's BIT with Australia.

Other countries, while maintaining a version of the MFN obligation, have chosen to reduce its scope. Brazil, for instance, has decided to hold on to MFN clauses in its new investment agreements, but has excluded its application in relation to dispute settlement provisions. This is because Brazil wants to avoid being subject to an investor-state arbitration. China and Australia, as in the case of the NT clause, prevent excessive interpretation of its MFN obligation by adding the NAFTA "like circumstances" requirement.[74]

The Fair and Equitable Treatment obligation has proven to be the most controversial standard in investor-state arbitrations, impairing, or threatening to impair, the regulatory space of host countries.[75] Reactions to the effects of the FET clause vary greatly in the developing world, but they converge in accepting that at least some qualification is needed in order to safeguard their policy space.

China presents some variation of the use – or lack thereof – of the FET obligation, which confirms Berger's thesis that the formulation of the terms of Chinese

74 Berger, "Hesitant Embrace: China's Recent Approach to International Investment Rule-Making."

75 See Técnicas Medioambientales Tecmed, S.A. *v* The United Mexican States, "Award" ICSID Case No. ARB (AF)/00/2 19 May 2003 <www.italaw.com/cases/1087> accessed September 28, 2016. According to UNCTAD: "Focus on the stable legal and business framework. The classic statement of the permissive position is found in the tribunal's award in Tecmed v. Mexico. This approach would require that the host country authorities act consistently, without ambiguity and transparently, making sure the investor knows in advance the regulatory and administrative policies and practices to which it will be subject, so that it may comply. The list is indeed demanding and nearly impossible to achieve."See UNCTAD, "*Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II*" (United Nations, New York and Geneva 2012) 64–65. Many often-cited other cases have followed this approach: e.g. CMS Gas Transmission Company *v* The Republic of Argentina, "Award" ICSID Case No. ARB/01/8 12 May 2005 <www.italaw.com/cases/288> accessed September 28, 2016, Enron Corporation and Ponderosa Assets, L.P. *v* Argentine Republic, 'Award' ICSID Case No. ARB/01/3 27 May 2007 <www.italaw.com/cases/401> accessed September 28, 2016, Occidental Petroleum Corporation and Occidental Exploration and Production Company *v* The Republic of Ecuador, "Award" ICSID Case No. ARB/06/11 05 Oct 2012 <www.italaw.com/cases/767> accessed September 28, 2016, PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim *v* Ticaret Limited Sirketi *v* Republic of Turkey, "Award" ICSID Case No. ARB/02/5 19 Jan 2007 <www.italaw.com/cases/880> accessed September 28, 2016.

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IIAs depends on the priorities of the partner countries.[76] In general, however, post-2008 treaty practice evidences China's move toward[77] the so-called recalibrated NAFTA approach.[78] Most recently (and surprisingly), China agreed to the NAFTA language referring to customary international law in its agreement with Korea.[79] India has moved away from the unqualified approach to FET, replacing it with a list of state obligations under customary international law: (1) denial of justice under customary international law, (2) un-remedied and egregious violations of due process, and (3) manifestly abusive treatment involving continuous, unjustified, and outrageous coercion or harassment.[80] Brazil and South Africa,[81] on the other hand, have excluded FET from their new model investment treaties.

1.3.1.3 Expropriation and Compensation

Fear of expropriation has been one of the main drivers of IIAs. Since the early years, capital-exporting countries aimed to protect their property abroad by designing provisions that would limit the grounds for expropriation and providing for compensation in the event expropriation is unavoidable. These provisions were broadly drafted, and, coupled with similarly broad definitions of investments and standards of treatment, have created a regime that overly protects investors and leaves limited room for host countries to promote their policies free from facing investors' claims. This has been particularly true in cases of indirect expropriation, where a measure adopted by a host country does not nationalize a foreign investment, but deprives the investor of the value of its investment. By and large, any regulatory change within a host country that can potentially deprive the investor of the value of its investment – say, revoking a license for environmental and safety reasons – might

[76] Berger, "Hesitant Embrace: China's Recent Approach to International Investment Rule-Making" 859.

[77] See Berger, "Hesitant Embrace: China's Recent Approach to International Investment Rule-Making" 857 arguing that China's careful convergence to NAFTA's qualified MFN can only be explained by its "historical hostility to the concept of customary international law, which Chinese policy-makers have long dismissed as a "Western' concept that potentially disregards the interests of developing countries."

[78] See Berger, "Hesitant Embrace: China's Recent Approach to International Investment Rule-Making" 857. FET does "not require treatment in addition to or beyond that which is required by the customary international law minimum standard of aliens" and that a "determination that there has been a breach of another provision on the NAFTA, or of a separate international agreement, does not establish that there has been a breach of art. 1105 (1)." The exceptions are China's BITs with Switzerland and Malta.

[79] China-South Korea Free Trade Agreement (adopted June 1, 2015, entered into force December 20, 2015) Annex 11-A.

[80] Government of India, "Model Text for the Indian Bilateral Investment Treaty" art. 3.1.

[81] South Africa has also chosen to preserve its policy space by introducing a new formulation of the Full Security and Protection clause. It states that South Africa "may accord foreign investors and their investments a level of physical security as may be generally provided to domestic investors in accordance with minimum standards of customary international law and subject to available resources and capacity." See Act No. 22 of 2015: Protection of Investments Act, 2015 art. 9.

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give rise to an indirect expropriation claim. Over the years, investment arbitration practice confirmed that IIAs containing broad expropriation provisions impose regulatory costs to host governments and considerably limit their regulatory space.

Consequently, countries started drafting qualified versions of expropriation clauses to safeguard their policy space. The United States pioneered such initiatives when it became a major destination of FDI – in addition to the being the top capital-exporting country. Annex B to the 2004 U.S. Model BIT created objective criteria for evaluating whether an indirect expropriation has occurred and provided an important carve-out to safeguard the environment and public health.[82] China's recent treaty practice is also moving towards this approach to indirect expropriation.[83]

India has taken a further step to qualify indirect expropriation according to its national interests. First, the new model investment agreement raises the threshold for indirect expropriation claims, including evidence of permanent and complete or near complete deprivation of the value of investment.[84] This criterion alone is harder to meet than the undefined "economic impact" standard of the 2012 U.S. Model BIT.[85] Second, it empowers national law and domestic decision making. In articulating the standards to be followed by a government before an expropriation measure, the new model text replaces the "due process" standard with the requirement that the expropriation be "in accordance with the procedure established by Law." In other words, it is for the law of the place of expropriation to determine it. In addition, the model text excludes the possibility of an arbitral tribunal second guessing whether the measure adopted by the host country was taken for a public purpose or in compliance with its law.[86]

As for compensation, the new Indian model investment agreement, while maintaining the "adequate" and "fair market value" standard, has crafted a list of mitigating factors, such as conduct of the investor contributing to the damage of the investment, liabilities owed in the host country resulting from the investment's activities, any harm that the investor or its investments have caused to the environment and local community, and an even more open clause concerning "any other relevant considerations regarding the need to balance the public interest and the private interest of the investment."[87] We read it as an enlargement of policy space and as

[82] "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations." The Government of United States of America, "2004 Model BIT" (2004) <www.state.gov/documents/organization/117601.pdf> accessed September 28, 2016, Annex B, 4(b).

[83] Berger, "Hesitant Embrace: China's Recent Approach to International Investment Rule-Making" 859. See also China-South Korea Free Trade Agreement (adopted June 1, 2015, entered into force December 20, 2015) Annex 11-B.

[84] Government of India, "Model Text for the Indian Bilateral Investment Treaty" art. 5.2.

[85] The Government of United States of America, "2004 Model BIT" Annex B, 4(a)(i).

[86] Government of India, "Model Text for the Indian Bilateral Investment Treaty" art. 5.6.

[87] Government of India, "Model Text for the Indian Bilateral Investment Treaty" art. 5.7.

a clear indication of India's attempt to rebalance investor/host country obligations, traditionally tilted in favor of investors with minor obligation vis-à-vis the state.[88]

South Africa and Brazil have chosen a different route to safeguard their policy space and excluded indirect expropriation altogether from its model investment agreements, as a direct reaction to the *Foresti* case. But, most importantly, indirect expropriations are excluded in the Constitution of South Africa since indirect expropriations are regarded as deprivation of property, which in the South African context does not attract compensation because the state does not acquire ownership of the concerned property. In the case of Brazil, the exclusion of indirect expropriation results from the government's goal to foster a policy environment with limited foreign intervention, avoiding negative reactions of the type that took place in Congress in the 1990s.[89]

Another similarity between Brazil and South Africa is in the area of compensation for direct expropriation. Both countries reject international law standards and adopt a domestic/constitutional law approach. The South African text provides that investors have the right to property according to section twenty-five of the Constitution,[90] which offers a qualified version of compensation criteria, including the following mitigating factors: the history of the acquisition and use of property, and South Africa's commitment to land reform and access to land on equitable basis,[91] that is, taking into account the goal of redressing the legacies of the apartheid regime. In the case of Brazil, although there is no direct reference to the constitutional text, the language employed in the ACFIs is the same as in the Constitution and responds to congressional demands based on discussions that took place during the BIT negotiations in the 1990s.[92]

1.3.1.4 Transfers

The guarantee of free transfers of capital originated from the investment activity in the host country has been another key provision of BITs. Countries that rushed into signing BITs in the 1990s accepted provisions providing for free transfers without dully reflecting on the potential negative impact such commitments might have on the host country's macroeconomic management, particularly monetary and exchange rate policies.

[88] See also the Indian Act provisions on anticorruption, disclosures, and compliance with the law of the host state: Government of India, "Model Text for the Indian Bilateral Investment Treaty" arts. 9, 10, and 12.

[89] See Sanchez-Badin and Morosini, this volume.

[90] Act No. 22 of 2015: Protection of Investments Act, 2015 art. 10.

[91] Act No. 22 of 2015: Protection of Investments Act, 2015 art. 12.

[92] See Sanchez-Badin and Morosini, this volume.

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Given the frequently unstable and fragile nature of developing countries' economies, exceptions to the guarantee of free transfers have become a rule in their model investment agreements. China no longer fits into the definition of a fragile economy, and its exception to free transfers begs a different justification. Historically China has maintained a heavily regulated exchange rate regime and strong capital controls. Not surprisingly, IIAs with China have reflected this policy concern and the Chinese government has chosen to address it by subjecting the transfer of investment-related funds to domestic law.[93] After the year 2000, as a result of China's "go global" policy and its desire to integrate with the liberal international economic order, China has adopted a less restrictive approach, abandoning reference to national law. Much like other countries in the Global South, China started including certain exceptions to free transfers, the most common being one based on the balance-of-payment (BoP) crisis.[94] BoP exceptions to free transfers can also be found in Brazil[95] and India's model agreements.[96]

In addition to the BoP exception to free transfers, India includes a long list of situations that shall not preclude a party from conditioning or preventing transfers, including compliance with labor obligations; social security, public retirement, or compulsory savings schemes; and compliance with tax laws. South Africa has not provided a provision on transfer with the same level of detail that India does, simply stating that an investor may repatriate funds "subject to taxation and other applicable legislation."[97] The open reference to "other applicable legislation" could be a source of uncertainty to investors.

1.3.2 *Summary*

Demands for enlarged policy space are at the center of our claim for an alternative legal order originating from the Global South. Countries in the Global South first experienced investment regulation from the perspective of capital-importing countries during a period where: (1) developing countries were competing for foreign capital as a way to promote local economic development, and (2) BITs were presented as necessary tools to attract foreign investment. The combination of both factors gave rise to a race to signing BITs without host states critically evaluating their

93 Berger, "Hesitant Embrace: China's Recent Approach to International Investment Rule-Making" 860.
94 See China-South Korea Free Trade Agreement (adopted June 1, 2015, entered into force December 20, 2015) art. 11.8 and Annex 11-C.
95 See, for example, Brazil-Angola Cooperation and Investment Facilitation Agreement (adopted April 1, 2015) art. 14.2.
96 Government of India, "Model Text for the Indian Bilateral Investment Treaty" art. 6.
97 Act No. 22 of 2015: Protection of Investments Act, 2015 art. 10.

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negative externalities to these countries' regulatory space. It was only recently that some countries in the South started to challenge the unlimited benefits of BITs in light of concrete limitations on their policy space, as illustrated by cases such as *Plain Packaging*, *Foresti*, and *White Industries*. Because countries in the Global South do not question the importance of FDI to their economies, their new dilemma became how to properly balance attraction of FDI without compromising their ability to regulate in the public interest. Some countries in the Global South have responded to this dilemma with alternative versions of investment treaties featuring greater regulatory autonomy to accommodate their interests beyond FDI attraction. They have drafted treaties that reduce the definition of investor and investment, restrict the standards of protection of investors, crafted their own version of what constitutes expropriation and in some cases eliminating indirect expropriation from the scope of application of their treaties, and carved out balance of payment exception to free transfers in order to take into account macroeconomic instability within developing countries.

While we recognize that countries in the Global North have also implemented changes in their investment treaties to respond to the demand from certain groups for greater policy space, we suggest that the motivations behind change in the North are different from the motivations in the South. The right to regulate debate in the Global North is focused on correcting negative externalities, illustrated by health, safety, and environmental exceptions. In some countries of the Global South, however, the right to regulate debate is directly related to their ability to achieve fundamental constitutional mandates, such as the South African civil rights attempt to redress past legacies of the apartheid rule, or the Brazilian experimentation with a new investment treaty model that promotes selected champions, fulfilling Brazil's developmental interests. The cases of Brazil, India, and South Africa also evidence that they are experimenting with new versions of the investment regime in order to properly balance the right to property right with the right to regulate. In other words, they are attempting to reduce the asymmetries of the investment regime, at the same time as they emerge as capital-exporting countries.

1.3.3 *Designing Dispute Settlement Alternatives*

The need to reform the dispute settlement mechanism is probably one of the few areas of consensus among the international investment community. Generally, reactions to the current dispute settlement mechanism address contested issues raised by a regulatory model dominated by investor-state dispute settlement (ISDS), including the impartiality of arbitrators, transparency of arbitral proceedings, the lack of a review mechanism, and the participation of third parties and *amicus curiae*. The

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answers to these questions, however, vary from North to South and from within these two major groups.[98]

In the North, the debate has been captured by dispute resolution mechanisms proposed by TPP versus the European alternative available in the EU proposal to TTIP,[99] CETA,[100] and EU-Vietnam FTA.[101] While the United States and the other TPP countries push for a revised ISDS system, the EU has proposed the creation of an international investment court, which is inspired by the WTO dispute settlement mechanism.[102] Neither options are free of criticism. To illustrate, in September 2016, a group of law and economics professors urged the U.S. Congress to reject TPP because ISDS grants foreign investors the right to challenge a measure adopted by a state in an arbitral tribunal, bypassing local courts and administrative bodies.[103] A similar claim was made by the Association of German Magistrates in the context of the EU proposal.[104] José Alvarez, who favors ISDS, makes a case that the proposed international investment court is no better alternative than ISDS. According to him, there are reasons to be skeptical that the proposed court would in fact correct the alleged biases of ISDS or simply create new sources of complaint, causing a new backlash.[105]

Where the debate in the North tends to focus narrowly on issues of process, developing countries are more interested in the relationship between process and substance: for them the choice between the appropriate dispute settlement

[98] See generally Jarrod Wong, Karen L. Kizer, Fabio Morosini, and Ko-Yung Tung, "Forum non-Concurrence in the Resolution of Investment Treaty Disputes" 110 Asil Proc. (forthcoming).

[99] European Commission, "Commission draft text TTIP – investment" (12 September 2015) <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> accessed September 28, 2016.

[100] European Commission, "CETA: EU and Canada agree on new approach on investment in trade agreement" (Press release, February 29, 2016) <http://europa.eu/rapid/press-release_IP-16-399_en.htm> accessed September 28, 2016.

[101] European Commission, "EU-Vietnam Free Trade Agreement" (2016) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> accessed September 28, 2016, Chap 13.

[102] European Commission, "Establishment of a Multilateral Investment Court for investment dispute resolution" (DG Trade – F2 1 August 2016) < http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf > accessed September 28, 2016.

[103] Tribe et al., "220+ Law and Economics Professors Urge Congress to Reject the TPP and Other Prospective Deals that Include Investor-State Dispute Settlement (ISDS)."

[104] Ben Knight, "German judges slap TTIP down" Deutsche Welle" (Berlin February 4, 2016) <www.dw.com/en/german-judges-slap-ttip-down/a-19027665> accessed September 28, 2016.

[105] Alvarez challenges the impartiality of the process to select international judges and criticizes the EU option for selecting judges who are not experts in international investment law. See Payam Akhavan, "Open Letter from International Law Experts to Majority Leader McConnell, Minority Leader Reid, Speaker Boehner, Minority Leader Pelosi, and Ambassador Froman" (April 7, 2015) <https://www.mcgill.ca/fortier-chair/isds-open-letter#_ftn1> accessed September 28, 2016. See also Stephan W. Schill, "The European Commission's Proposal of an 'Investment Court System' for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?" (2016) 20 AI <https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping> accessed September 28, 2016.

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mechanism – whether it is ISDS, state-to-state arbitration, national courts, and so forth – is part of a broader claim for enlarged regulatory space. Many of them see ISDS as tool to constrain their right to regulate.

Historically, developing countries have primarily been recipients of FDI. In the search for more FDI, many signed BITs without fully realizing the potential impact of ISDS on their capacity to regulate. As disputes began to arise and arbitrators began to interpret the treaties, it became clear that pro-investor interpretations could limit home states' ability to regulate in the public interest.[106] Given the risk that ISDS could limit regulatory space, many countries began to rethink their commitment to ISDS.

By the end of 2015, at least 110 countries had reviewed their national and/or international investment policies and a smaller number of countries had developed new model international investment agreements.[107] Several of the most important emerging economies have produced narratives that differ from the EU and U.S. approaches, while others have not.

Two major categories of investment dispute settlement regulation emerge from the countries studied in this book: (1) status quo countries, that is, countries that, for different reasons, have chosen to adopt mainstream forms of investment regulation, especially ISDS, and (2) countries that react to the establishment and propose alternatives in order to safeguarhtd their policy space.

1.3.3.1 Status Quo Countries

Two countries studied in this book fall under the category of status quo countries. China and Chile, for different reasons, have taken steps to adopt and gradually update their ISDS provisions in order to advance their domestic interests and/or abide by the terms proposed by their partners.

Like the majority of countries in the Global North, China has opted to regulate its investment disputes through ISDS, although the scope of application of these clauses has varied over time and can be categorized into three main phases.[108] First, during the 1980s and the 1990s, China's BITs limited ISDS to disputes concerning

[106] Gus Van Harten et al., "Public Statement on the International Investment Regime" (August 31, 2010) <www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/> accessed September 28, 2016. See also Erwin Chemerinsky et al., "Letter from Alliance for Justice to Majority Leader McConnell, Minority Leader Reid, Speaker Boehner, Minority Leader Pelosi, and Ambassador Froman" <www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf> accessed September 28, 2016, and Akhavan, "Open Letter from International Law Experts to Majority Leader McConnell, Minority Leader Reid, Speaker Boehner, Minority Leader Pelosi, and Ambassador Froman."

[107] UNCTAD, "Taking Stock of IIA Reform."

[108] Manhiao Chi and Xi Wang, "The Evolution of ISA Clauses in Chinese IIAs and Its Practical Implications" (2015) 16 *JWIT* 869, 98 See also Wenhua Shan and Norah Gallagher, *Chinese Investment Treaties: Policies and Practices* (OUP, Oxford 2009) 35,41.

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the amount and mode of payment of compensation. Arguably, these clauses could be expanded to cover disputes related to the occurrence and legality of expropriation. Although the treaties contained investment protections, these were not the subject of ISDS provisions. In the 1990s, China gradually began to increase the scope of investment protections, by, for example, including a national treatment clause. ISDS with China did not cover central investment provisions, such as FET and Full Security and Protection. These narrow ISDS clauses can be explained by three interrelated factors: (1) China's position as a net recipient of FDI, (2) China's limited participation in FDI outflow, and (3) China's restrictive domestic regime in relation to investment, economic liberalization, and currency control. The third phase of China's approach to ISDS clause commenced in the late 1990s, following China's accession to the Washington Convention and gradual inclusion in its agreements of ISDS clauses referring to ICSID arbitration, and China's commitments in connection with its accession to the WTO. During this period, ISDS clauses became broader in scope. China, now fully engaged in joining the international economic order and also desiring both to encourage inbound investment and to expand its outside investments to protect its investors abroad, renegotiated a substantial number of its earlier and restricted BITs with developed countries and negotiated a number of new BITs. In these treaties, the ISDS clauses were based on the investment relevance requirement,[109] the legal nature requirement,[110] or a combination of both. As a direct consequence, this type of clause removes obstacles to ISDS. It should be noted that this type of clause was extensively utilized in China's BITs with capital-exporting countries during that period and is still today its preferred formulation with developing countries.[111] Undoubtedly, the greater the scope of the ISDS clause, the broader is the protection offered to investors – provided the terms of the BITs are favorable to investors. What Berger describes as the fourth phase of China's approach to ISDS started in 2008. Treaties negotiated from this time have included ISDS clauses which are individually negotiated, often very detailed, and may be broken down into a number of different provisions. They may also include procedural aspects, such as transparency of proceedings, conduct of arbitrators, and applicable law.[112] This type of formulation is similar to how the United States and other NAFTA countries regulate ISDS. However, their contents may vary widely

[109] The investment-relevance requirement says that "any dispute concerning an investment may be submitted to international arbitration" and covers "any dispute arising out of an investment." See Chi and Wang, "The Evolution of ISA clauses in Chinese IIAs and Its Practical Implications" 884.

[110] This requirement covers legal disputes arising between "an investor of one Contracting Party and the other Contracting Party[.]" See Chi and Wang, "The Evolution of ISA clauses in Chinese IIAs and Its Practical Implications" 885.

[111] Chi and Wang, "The Evolution of ISA clauses in Chinese IIAs and Its Practical Implications" 888.

[112] Chi and Wang, "The Evolution of ISA clauses in Chinese IIAs and Its Practical Implications" 895.

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from agreement to agreement, reflecting China's respect for regulatory space and its willingness to cooperate with its negotiating partners in order to reach an acceptable agreement. There is, for example, a considerable difference between the terms of the ASEAN-China Investment Agreement, with its limited scope and broad exceptions, and the Korea-China FTA, with its detailed, NAFTA-like provisions.

Chile is another example of a country from the Global South that chose not to contest mainstream models of dispute settlement mechanisms, but for a different set of reasons. Compared to China or other emerging markets, Chile is a small economy. Partly because of its size, the country has opted to align with the prevailing economic narrative and fully embraced neoliberal economic policies. As part of the package, Chile signed several investment agreements with countries from North to South. Because trade and investment is a fundamental element of Chile's model of development, the country believed that the signing of these agreements would increase its standing in the region as a trustworthy destination of foreign capital. This strategy proved successful for Chile, because in 2012, despite the size of Chile's economy, the country ranked among the top twenty economies for inward and outward FDI.[113] Unlike other countries in the Global South, Chile's policies have only seldom been challenged in arbitral proceedings for supposedly violating investment agreements, the MTD case being the only case decided against Chile to date.[114] Unlike India, Australia, and South Africa, losing a case in an investment arbitration did not generate the same kind of public outcry – partly because the Chilean government chose not to make the award available in Spanish.

1.3.3.2 Countries Seeking Alternative Investment Dispute Settlement Models

Brazil, India, South Africa, and Australia have taken different approaches in relation to ISDS, varying from complete rejection to exhaustion of local remedies before initiating an investor-state arbitration. These countries have in common a desire to use investment dispute settlement strategically in order to preserve their policy space.

India has provided a fully fledged dispute settlement chapter within its model agreement. It follows the main trends in the regulation of investment dispute settlement by providing rules governing the appointment of arbitrators, a code of conduct for arbitrators, rules on transparency in arbitral proceedings, and counterclaims by parties. However, unlike countries that make a more deliberate use of ISDS, India has chosen to condition recourse to ISDS to exhaustion of local remedies in relevant domestic courts or administrative bodies.[115] Moreover, if the dispute reaches

[113] See Polanco, this volume.

[114] MTD Equity Sdn. Bhd. and MTD Chile S.A. *v* Chile, "Award" ICSID Case No. ARB/01/7 25 May 2004 <www.italaw.com/cases/717> accessed September 28, 2016.

[115] Government of India, "Model Text for the Indian Bilateral Investment Treaty" art. 14.3.

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an arbitral tribunal, the tribunal shall not have jurisdiction to: (1) re-examine any legal issue that has been finally settled by a judicial authority of the host state,[116] and (2) review the merits of a decision made by a judicial authority of the host state.[117] Notwithstanding India's option for ISDS, the model agreement also governs state-to-state arbitration, limited to the interpretation or application of the treaty, and to whether there has been compliance with obligations to consult in good faith in relation to the obligation to exhaust local remedies.[118]

In 2010, the Australian Productivity Commission conducted an extensive study concerning the country's participation in bilateral and regional trade agreements. Part of the commission's report examined the mechanisms used in these treaties to settle investment disputes. The report was sensitive to three sets of problems associated with ISDS:[119] (1) limitation of Australia's policy space to pursue legitimate objectives (regulatory chill), (2) the granting of procedural rights to foreign investors that are not granted to domestic investors, amounting to discrimination against national investors, and (3) concerns with the process of arbitration, including lack of transparency, institutional biases, and conflicts of interest. The Tobacco Plain Packaging Act 2011 – a new health regulation directed at cigarettes – was passed by the Australian parliament in 2011, following a recommendation by the National Preventative Taskforce in 2009 and an announcement by the government in 2010.[120] This act gave rise to a constitutional challenge against the legislation, multiple complaints against Australia in the WTO,[121] and an investment arbitration under the Australia-Hong Kong BIT.[122] The report by the Productivity Commission and the

[116] Government of India, "Model Text for the Indian Bilateral Investment Treaty" art. 14.2.ii.a.

[117] Government of India, "Model Text for the Indian Bilateral Investment Treaty" art. 14.2.ii.b.

[118] Government of India, "Model Text for the Indian Bilateral Investment Treaty" art. 15.1.

[119] Australian Government, "Bilateral and Regional Trade Agreements: Productivity Commission Research Report."

[120] Senate Community Affairs Legislation Committee, "Final Report Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009" (2011) <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2008–10/plain_tobacco_packaging_09/report/index> accessed September 28, 2016.

[121] See Australia – Certain Measures Concerning Trademarks, and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (May 30, 2016) DS434, Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (May 5, 2014) DS435, Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (May 5, 2014) DS441, Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (May 5, 2014) DS458 and Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (May 5, 2014) DS467.

[122] Philip Morris Asia Limited *v* The Commonwealth of Australia, "Award" PCA Case No. 2012-12 17 December 2015 <www.italaw.com/cases/851> accessed September 28, 2016.

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anticipation of the initiation of ISDS by Philip Morris Asia were both factors in the decision of the then government that it would not subsequently agree to ISDS, an approach followed in the FTA with Malaysia. This approach was later modified when the government changed, and the decision of the government in relation to ISDS has, since 2013, been taken on a case-by-case approach. In practice, although the Economic Partnership Agreement with Japan does not include ISDS, Australia has agreed to ISDS in all of its other treaties, including the TPP, although it has been subject to heavy negotiation and the inclusion of protections for Australia's screening process and carve-outs for public welfare, particularly public health.

Brazil developed an alternative, combining mandatory negotiation and state-to-state dispute settlement. The model agreement creates a system based on a single national office on each party to the agreement to handle all issues ("ombudsperson") and a joint committee, constituted by government representatives of each party. Provided that the complaining party has exhausted mediation through the ombudsperson and the joint committee without satisfactorily resolving the dispute, parties can initiate arbitral proceedings between states. Brazil's election to move away from ISDS is based on several factors. First, ISDS was vigorously rejected in Congress during attempts to ratify a series of BITs in the 1990s. Opponents argued that BITs with ISDS provisions would allow investors to bring claims against the state without exhausting local remedies, and give investors – and not states – the possibility of challenging Brazil's public policy in light of what is best for investors.[123] Brazil's rejection of ISDS should also be read as both a response to the generalized discontentment with ISDS in the Global South and to demands from the Brazilian private sector for an alternative system based on dispute prevention. Business was more interested in the establishment of communication channels with foreign governments throughout the investment relation than on after-the-fact remedies. More importantly, due to Brazil's state-supported investment policy, which involves low-interest loans and other incentives for outward investment, the government is especially concerned with ensuring the success of investments. This makes it likely that the Brazilian government will play a central role in helping resolve disputes, and makes ISDS less important for Brazilian industry.

South Africa has replaced ISDS with a system that combines mediation, local courts, and state-to-state arbitration. Mediation may take place upon the request of an investor in respect of action taken by the government, who will appoint the mediator. Unlike the approach taken by Brazil, mediation in the South African model agreement is not mandatory. An investor may opt to bring a claim directly before

[123] Morosini and Ely Caetano Xavier Junior, "Regulação do Investimento Estrangeiro Direto no Brasil: Da Resistência aos Tratados Bilaterais de Investimento à Emergência de um Novo Modelo" (2015) 12 *RDI* 400, 428.

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a competent court, independent tribunal, or statutory body within South Africa. Finally, an investor may still choose to arbitrate its dispute with the South African government, provided the South African government consents to arbitration, the investor is espoused by his/her government, and local remedies are exhausted.

1.3.4 *Summary*

China and Chile are examples of Global South countries that, for different reasons, have chosen to continue to include investor-state dispute settlement as their main way to resolve disputes arising from their IIAs. In the case of China, this option is justified by the fact that, in addition to being a net recipient of FDI, more recently this country has also become a major capital exporter. As a result, ISDS is potentially an effective way to protect the interests of its investors abroad, although China's only outbound ISDS case (*Ping An Insurance v Belgium*) resulted in a defeat for the investor.[124] China is concerned in its negotiations with preserving its regulatory space in relation to ISDS. In practice, however, it has had very little practical experience being the respondent to an investor-state arbitration. Chile has also opted not to challenge the predominance of ISDS as the main mechanism to resolve investment disputes, but for different reasons. What drives Chile's acceptance of ISDS is its intention to integrate the liberal economic order, where ISDS is part of an integrated package. The country is known for accepting to negotiate a great number of economic agreements with varied partners in order to promote its economic outlook. In this process, Chile believes that its has managed to accumulate more gains from accepting liberal economic rules than losses. Chile has only been a respondent state in three cases and with minor repercussions.[125] For these reasons, China and Chile are not countries that are attempting to transform the international investment regime by resisting ISDS.

Brazil, India, South Africa, and Australia, on the other hand, are resisting mainstream formulations of investment dispute settlement in order to increase their policy space, and thus attempting to promote an alternative economic order grounded on greater policy space to host countries. These countries have in common the fact that they either reject the standard formulation of ISDS clauses and opt for a qualified version of it – as is the case with India – they accept it sometimes in a highly qualified form – as is the case with Australia– or they reject it altogether, reflecting the position of Brazil, Australia, and South Africa. Brazil's option reflected its unwillingness to, first,

[124] Ping An Life Insurance Company and Ping An Insurance (Group) Company *v* Kingdom of Belgium, "Award" ICSID Case No. ARB/12/29 <www.italaw.com/cases/3088> accessed September 28, 2016.

[125] See Polanco, this volume.

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offer foreign investors treatment that was not extended to its nationals and, second, to submit the country's public policy decisions to the scrutiny of private arbitrators. This position has been sustained by different governments in Brazil, and grew stronger after increased global criticism in relation to ISDS. India, South Africa, and Australia began to oppose ISDS – or at least its standard formulation – after losing cases brought by private investors in investor-state settings. They have realized that ISDS can function as a tool to advance the interests of investors at the expense of reducing the host country's regulatory space in matters that are central to their governments, such as addressing past legacies of racial discrimination, promoting health interests, or not submitting the functioning of its institutions to the assessment of private arbitrators.

1.4 STRUCTURE OF THE BOOK[126]

Chapter 2: *The South and Alternative Models of Trade and Investment Regulation: Chinese Investment and Approaches to International Investment Agreements*

Vivienne Bath, University of Sydney School of Law

As a major participant in international investment, both inbound and outbound, and a very active participant in international investment regulation, China has the potential to have an important influence on the development of the international investment regime. It embarked on a program of negotiating bilateral investment treaties in 1982 and, more recently, has focused on omnibus free trade agreements which generally include investment chapters. This program of engagement with international investment law is closely related both to China's decision in 1978 to utilize foreign direct investment (FDI) as a major instrument in its economic development program, and subsequently to the institution of the move to "go global" by increasing China's outbound investment in the late 1990s. As a major developing country and a strong proponent of the Global South, China's participation in the international investment regime can be expected to have a strong influence on the shaping of the international economic order. Nevertheless, although China is an active participant in international investment and in negotiating and signing international investment agreements (IIAs), its treaty activity does not demonstrate major dissatisfaction with the current regime or strong synergies with the other members of the Global South whose policies are discussed in this book. This chapter looks at the following issues: China's international investment agreements, the rapid changes in China's domestic policies on inbound and outbound investment and their effect on international investment relations, China's approach in

[126] See Polanco, this volume.

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this sphere to developing states, and China's overall approach to IIAs. This chapter then discusses what conclusions can be drawn in relation to China's role in international investment law.

Chapter 3: *The Chilean Experience in South-South Investment and Trade Agreements*

Rodrigo Polanco, University of Chile School of Law

This chapter analyzes the main features of Chilean investment and trade treaties, examining if there is a Chilean pattern in the regulation of investment and trade flows or if it is influenced by agreements signed by Chile with developed countries. The chapter also scrutinizes if there are differences between the treaties signed by Chile and other Southern developing countries and those negotiated with Northern developed economies, if sustainable development concerns are part of the negotiations of investment and trade agreements by Chile, and the legitimacy and specificity of these policies in Chile. The chapter concludes that Chilean investment and trade agreements have been largely concluded under the influence of treaties previously negotiated with Northern developed countries – particularly the United States and western European countries. Additionally, in the majority of the Chilean trade agreements there are no key differences between the preferential trade agreements (PTAs) signed by Chile with other developing countries and those negotiated with developed economies. However, certain differences based on the development status of the other contracting party may be found in Chilean PTAs, especially in issues like market access in the trade of goods, trade in services, and investment. Similarly, regulatory strategies in relation to sustainable developmental policies are different, as Chilean investment treaties and PTAs with Southern developing countries tend to include fewer provisions on labor and environmental issues. Finally, although there has been a large support and consensus on the model of investment and trade agreements in the past twenty-five years, the recent negotiation of the TPP has opened the door to a debate that partially challenges certain aspects of this model, particularly with respect to investor-state arbitration.

Chapter 4: *Australia and the Asia-Pacific: The Regulation of Investment Flows into Australia and the Role of Free Trade Agreements*

Vivienne Bath, University of Sydney School of Law

Australia, as a developed country with a strong economy, cannot be placed in the category of a Southern developing country. Australia is now, however, both a capital-exporting and an importing country, with massive investments increasingly coming

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in from the developing world. This flow of investment, although generally welcome, presents issues for the Australian government and public which are very similar to the issues confronted by developing countries dealing with inflows of FDI – the need to protect regulatory space, the balance between investors and the interests of the host state, and the issues presented by the fact that Australia is medium-sized economy with a relatively small population. This chapter discusses Australian policy responses and its recent negotiations in relation to two important issues: control over the admission of FDI and the preservation of regulatory space in the context of investor-state dispute settlement (ISDS). It considers the lessons that Australia's experience and practice may offer to developing countries attempting to cope with the inflow of investment funds, particularly from developing countries. It concludes that although Australia has held firm on its right and ability to control the admission and terms of admission of foreign investment, as well as the preservation of regulatory space particularly in relation to public health, it has made a number of compromises in relation to investment when negotiating trade and services access which have had an unsatisfactory impact on domestic investment policy.

Chapter 5: *India's Trade and Investment Agreements: Striking a Balance between Investor Protection Rights and Development Concerns*

James Nedumpara, Jindal Law School

The Indian economy has opened up significantly in the last two decades, especially since the initiation of the economic reforms in 1991. Domestic opposition within India to its joining international economies treaties such as the World Trade Organization (WTO) resulted in India aggressively pushing for various flexibilities in areas such as public health and access to drugs, food security, environmental standards, and trade remedies. In recent times, India has signed comprehensive economic partnership agreements with developed economies such as Japan, South Korea, and Singapore. Currently, India is negotiating a trade and investment agreement with the EU and an ambitious Regional Comprehensive Economic Partnership (RCEP) with the ASEAN economies and its six major partners. Most of these concluded agreements and the agreements in the pipeline have investor protection clauses. However, the implications of including strong investor protection clauses in India's trade agreements and bilateral investment promotion agreements (BIPAs) or bilateral investment treaties (BITs) is a relatively underexplored topic. In the last twenty years, India has signed eighty-two BIPAs of which seventy-three are in force. India's BIPAs were relatively uncontroversial until White Industries, an Australian Company, won an arbitral award against the Government of India in 2011 for $4 million under the Australia-India BIPA. Furthermore, the recent

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notices of disputes against the Government of India in the wake of the retrospective tax amendment relating to the Vodafone tax dispute and the cancellation of the 2G telecom licenses by the Supreme Court of India have put increasing focus on India's BIPAs. This chapter examines how India could retain development space while protecting investor rights in its ongoing trade and investment negotiations including BIPAs. By undertaking a review of the substantive provisions of its existing comprehensive economic partnership agreements, as well as BIPAs/BITs, this chapter examines what flexibility India should retain in its future investment treaties. Recently, the Department of Economic Affairs (DEA) in the Ministry of Finance has prepared a model BIT as a template for future negotiations. In suggesting a development-friendly framework, the chapter examines and analyses various flexible terms used by Southern countries in their BIPAs and trade agreements. Based on this approach, this chapter seeks to contribute to the project that attempts to compare and contrast the multiple strategies adopted by Southern countries in regulating trade and investment.

Chapter 6: *Navigating between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (ACFIs)*

Michelle Ratton Sanchez Badin, FGV Direito SP, and Fabio Morosini, Federal University of Rio Grande do Sul

From March to June 2015, Brazil signed seven agreements on investment cooperation and facilitation (ACFIs) with Mozambique, Angola, Mexico, Malawi, Colombia, Chile, and Peru. Brazil currently negotiates similar agreements with South Africa, Morocco, Algeria, and Tunisia. Although Brazil is an emerging economy and has traditionally been one of the top recipients of FDI, it has historically played a different regulatory card in a world dominated by a web of BITs. In this chapter we argue that the ACFIs can be considered a pragmatic response to the current liberal international economic system, based on Brazil's domestic needs and geo-economic aspirations. The ACFI model was designed taking into consideration the economic specificities of a developing country such as Brazil – a historical recipient of investment and a latecomer exporter of capital. The chapter contextualizes the catalysts of these agreements, relating their new elements to the clauses and the legal language used in the Brazilian ACFI model. We also present our understanding of the Brazilian ACFIs as a product of cross-fertilizing narratives: host countries' contestation movements against unequal economic relations crystallized in traditional-type BITs, the search for alternatives to the hotly debated reengineering of the current international investment regime, and an attempt to create a genuinely Brazilian

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model investment agreement that is sensitive to internal constitutional limitations and responsive to Brazil's aspirations as an emerging economy.

Chapter 7: *The New South African Protection of Investment Act: Striking a Balance between Attraction of FDI and Redressing the Apartheid Legacies*

Malebakeng Agnes Forere, University of the Witwatersrand

On November 1, 2013, the South African government released a bill on investment titled Promotion and Protection of Investment Bill (PPI) for public comment, which closed in February 2014. The bill was assented to by the President in December 2015, and it has become an act (Protection of Investment Act). The act was a move by the South African government to not renew its bilateral investment treaties (BITs), especially the so-called first generation BITs, which were often criticized for lacking precision. The key provisions in the act include but are not limited to: the South African government's sovereign right to legislate in the public interest, expropriation and compensation, and the right to refer disputes to international arbitration. Specifically, with regard to the sovereign right to legislate, the act is intended to give the South African government policy space to redress, notably "historical, social and economic inequalities" and "achieve the progressive realization of socio-economic rights." With regard to expropriation and compensation, the act deviates from standard practice as derived from customary international law in that it provides a narrow scope of expropriation and provides that expropriation will be done in accordance with the South African Constitution. Further, it adopts a different standard for awarding compensation from customary international law in that under the constitution as incorporated by the act, compensation will be "just and equitable" instead of "prompt, adequate and effective" which is a standard under customary international law. Lastly, on the right to refer disputes to international arbitration, the act bars complainants from instituting claims with international arbitration institutions but allows them to refer their complaints to the South African courts, and limits international arbitration to the state-to-state dispute settlement mechanism. After the bill was released, governments, diplomats, and commentators raised concerns against the bill, fearing that the bill would negatively affect FDI inflows in South Africa; such concerns still stand even after parliament made concessions as reflected by the current act, which differs significantly from the original bill. Against this background, this chapter determines whether the provisions of the Protection of Investment Act have deterrent effects on investment. In so doing, the chapter determines if there are real or apparent differences between South Africa's investment treaties and the Protection of Investment Act in relation to the core provisions of the act and the South Africa's BITs.

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Chapter 8: *Experimenting with International Investment Law: Initiatives from the Global South*

Andrew Lang, London School of Economics, and
Nicolás Marcelo Perrone, Durham University

This concluding chapter reviews the material covered in the earlier chapters, and assesses whether any enduring change is likely to emerge from the current period of experimentation with international investment rules in the Global South. We argue that any window of opportunity for meaningful change is rapidly closing, as a result of at least two major developments: the potential emergence of a new suite of major FTAs which follow a relatively traditional model – such as the TPP and CETA, and potentially the TTIP – and the recent shift in global commodity prices. With this broader story in mind, the chapter addresses three specific issues that emerge from the material covered in this book: (1) standards of investment protection, (2) dispute settlement and institutional architecture, and (3) the role of China in the future evolution of international investment law.

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