CONSTRUCTION AND (RE)CONSTRUCTION OF MODEL BITS IN THE GLOBAL SOUTH: CONTEXTUALIZING THE POLICY PREFERENCES OF INDIA, BRAZIL AND THE SADC

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ABSTRACT

The Global North has traditionally dominated the negotiation and construction of model bilateral investment treaties ("**Model BIT(s)**"). However, this dominance has been increasingly called into question by the Global South through the proliferation of their own Model BITs that offer textual as well as policy-based alternatives to the core investment protection measures and dispute resolution mechanisms engendered by the Models BITs of the Global North. The reconstruction of Models BITs in the Global South was accelerated due to the explosion of investment arbitrations against developing nations and the expanding flow of capital from the Global South to the North. Consequently, nations forming part of the Global South have developed distinct Model BITs based on the unique historical and socio-political circumstances in which they have found themselves. This diversity may be perceived as betraying a lack of coherence among developing nations regarding the avowed objectives of their BIT programs which in turn erodes their effectiveness. By way of this thesis, I argue that despite the development of novel dispute settlement procedures and varying textual formulations of common standards of investment protections across the Model BITs of developing nations, there exists coherence in the policy preferences underlying the construction of such investment instruments. These coherent policy preferences are centred around the inclusion of narrow and inward-looking provisions in Model BITs, for preserving the sovereign's right to regulate and suppressing traditional standards of treatment accorded to foreign investors. To demonstrate this, I shall be examining the provisions relating to the characterization of 'investment', dispute settlement, and minimum standards of treatment of the Models BITs of India, Brazil, and the South African Development Community ("**SADC**"). I shall then seek to demonstrate that such Model BITs are unable to posit themselves as viable alternatives to the Model BITs of the Global North, because the policy preferences underlying such instruments, can be traced to the larger issues of capacity and expertise plaguing the bureaucracies of developing nations. These

issues range from inefficient decision-making structures to a lack of understanding of the symbolic effects of BITs on foreign investors.

INTRODUCTION

The object of my thesis is twofold. First, I shall argue that the Model BITs of India, Brazil, and SADC, despite their textual variations, are coherent when it comes to the basic objectives which their draftsmen sought to achieve while drafting these instruments. In particular, they all converge on common policy preferences aimed at avoiding investor-state dispute settlement ("**ISDS**") claims at all costs and, circumscribing the scope of discretion of arbitral tribunals to the greatest extent possible, to concretely establish the sovereign's right to regulate, at the cost of fairly common standards of investment afforded to investors. Second, I shall argue that such policy preferences inhibit the acceptance of, and diffusion of Model BITs of the Global South, as effective counter-models to the Model BITs of the Global North[1], because they originate from exaggerated responses to adverse arbitral awards, protracted bureaucratic structures, excessive reliance on foreign resources, and a failure to project positive signals regarding the attractiveness of a state's investment regimes to foreign investors.

Background

In the realm of international investment law ("**IIL**"), Model BITs are non-binding instruments meant to capture a state's legal and socioeconomic preferences and provide templates for negotiations with other states. Treaty construction and negotiations in the field of international investment have been primarily dominated by the Global North. The Model BITs proffered by developed states successfully gained global acceptance in the closing decades of the 20th century due to the concentration of investors in these states.[2] The underlying aim of these Model BITs was the protection of the assets and interests of investors in states hosting their

[1] The terms 'Global North' and 'Global South' shall be synonymously used to refer to developed nations and developing nations (including least-developed and emerging nations).
[2] Todd Allee & Clint Peinhardt, 'Evaluating Three Explanations for the Design of Bilateral Investment Treaties' (2014) World Politics 66(1) 47, 82.

investments. They were largely offered to low-income developing states on a "*take it or leave it*" basis.[3] In fact, a former Attorney General of Pakistan has admitted that BITs involving his country were signed "*without any negotiation or consideration of the consequences*" in the past.[4] The Global South wanted to attract as much foreign investment as possible, which in turn would bolster their economies and the standards of living of their populace. This competition for capital among developing nations made them susceptible to acceptance of BITs which were detrimental to their interests.[5] Developing nations failed to fully grasp the attendant risks of investor-state dispute settlement ("**ISDS**"). According to the World Investment Report 2022 released by the United Nations Conference on Trade and Development ("**UNCTAD**"), the majority of new cases (about 65 percent) were brought against developing nations.[6] Further, as of December 2020, arbitral tribunals have awarded compensation to the tune of $100 million in 50 disputes and more than $1 billion in eight disputes. This was partly on account of the expansive interpretations of the vague, investor-friendly provisions included in old-generation BITs (*which in turn can be traced back to Model BITs of developed nations*) by arbitral tribunals.[7] Consequently, developing nations became increasingly cynical of the neoliberal investment regime as the legal and monetary costs of entering old-generation BITs mounted and the domestic policy space of states became increasingly circumscribed.

Notwithstanding the explosion of investment arbitrations, outward foreign investment flows from the Global South also increased. Large corporations from developing nations started capturing dominant positions in the markets of developed as well as developing nations by

[3] Andreas Buser, 'Recalibrating Policy Space in Bilateral Investment Treaties: Is There a Common B(R)ICS Approach?' in Congyan Cai, Huiping Chen & Yifei Wang eds., *The BRICS in the International Legal Order on Investment: Reformers or Disruptors* (Brill Nijhoff 2020) 177.
[4] Alison Ross, 'Former Pakistan AG Opens Up About Investment Treaties' (2011) 17 Global Arbitration Review.
[5] Zachary Elkins, Andrew Guzman & Beth Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties. 1960-2000' (2006) 60(4) International Organization 811.
[6] UNCTAD, *World Investment Report 2022: International Tax Reforms and Sustainable Investment* (UNCTAD/WIR/2022) 74.
[7] Anthea Roberts, 'Investment Treaties: The Reform Matrix' (2018) 112 American Journal of International Law Unbound 191.

bringing in a lot of foreign investment.[8] Developing nations increasingly saw themselves as donning the hats of capital exporters and accordingly sought to employ BITs to provide safe harbours for their outward investments. Contemporaneously, developed nations were increasingly becoming capital importers and sought to re-calibrate their BITs to preserve their sovereign regulatory prerogatives (*this concern was traditionally attributable to only developing nations*).[9] Thus, the Global North was interested in the formulation of BIT models which primarily offered strong protections to investors but left enough breathing space for the exercise of regulatory powers in furtherance of essential public interests. On the other hand, the Global South was primarily interested in the formulation of BIT models, which preserved the exercise of regulatory powers but offered protections for the investments which originated in their territories.

The theoretical assumption behind the Model BITs of developed states was that *more investment treaties lead to more foreign investment*. This theory has increasingly come under attack since it is purportedly based on unsound assumptions and has perpetuated market failures in different parts of the world.[10] The unworkability of this theory, coupled with exorbitant awards rendered by arbitral tribunals, has subdued the enthusiasm for investment protection that emerged in the neoliberal era. In the last two decades, efforts have been made by various developing nations such as India, Brazil, South Africa, and Indonesia and inter-governmental organizations such as the South African Development Community ("**SADC**") to develop alternative models to the BITs[11] formulated by developed states such as the United States of

[8] Asif Qureshi & [Unknown] Zeigler, *International Economic Law* (3rd edn, Sweet & Maxwell 2011) 490.
[9] Roberts (n 7) 191.
[10] Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen & Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press 2017).
[11] 2012 US Model Bilateral Investment Treaty <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> [US Model BIT]; 2021 Model Foreign Investment Promotion Agreement <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng#sec-a> [Canadian Model BIT]; [Draft] Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of [] for the Promotion and Protection of Investments <

America ("**US**"), United Kingdom ("**UK"**) and Canada. These models offer alternative interpretations of minimum standards of protection accorded to investors, and at least on paper, seek to promote the establishment of dispute settlement mechanisms that are neutral to investors as well as host states. They also reflect the reformulations of economic and power structures between the Global North and South. In terms of the substantive rights conferred to investors, obligations imposed on host states, and the nature of dispute settlement procedures included, these models signify a departure from the neoliberal consensus dominating IIL in the 1990s and 2000s. Moreover, the active invocation of Model BITs by developing nations also signals a change in their negotiating positions and makes treaty construction processes much more inclusive and participatory than before. However, it remains to be seen whether developing nations shall be able to successfully transform their Model BITs into successful bilateral instruments that anchor bilateral investment negotiations. Until now, this role has been traditionally attributable to the Model BITs of developed nations.

The BIT models adopted by developing nations are quite diverse. This diversity is attributable to the unique socio-economic, geo-political, and historical circumstances of each nation. Such unique circumstances instigate the formulation of idiosyncratic investment policies and instruments (*more particularly, BITs*), which are prone to taking contradictory positions on common standards of investor protection and dispute settlement mechanisms. Such contradictory positions militate against the formulation of a common BIT model. As developing nations continue to assert themselves in the sphere of international investment relations, the newer generation of BITs offers more pluralist rather than coherent outcomes.[12] Thus, the BIT models of the Global South symbolize a "*global regulatory laboratory rather*

https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2847/download> [U.K. Model BIT].

[12] Anthea Roberts, 'UNCITRAL and ISDS Reform: Pluralism and the Plurilateral Investment Court' (EJIL: *Talk!,* 12 December 2017) <*https://www.ejiltalk.org/uncitral-and-isds-reform-pluralism-and-the-plurilateral-investment-court/*> accessed 12 April 2023.

than the emergence of a new gold standard or even a range of best practices."[13] Such a phenomenon may exacerbate the development of knowledge about the efficacy of different BIT models and investment protection approaches given the lack of expertise that still exists in this area. By way of this thesis, I seek to contribute to the development of knowledge in this area by arguing that common policy preferences indeed exist among BIT programs of the Global South but reduce their competitiveness against their Global North counterparts, given certain institutional and bureaucratic constraints which plague their proponents.

Methodology

I shall undertake a comparative analysis of the provisions governing the characterization of 'investment', standards of treatment, and dispute settlement, of the Model BITs formulated by India, Brazil, and SADC ("**Comparators**") to extract the common policy preferences underlying the development of these BITs. Consequently, I shall examine the nature of institutional expertise and the decision-making structures involved in the articulation of such policy preferences. I have chosen the Comparators to capture the diversity in the BIT models adopted in the Global South. Namely, India employs a full-blown Model BIT; Brazil employs a cooperation and investment facilitation agreement ("**CIFA**") and customizes it in accordance with the negotiating positions of other states; the SADC promotes an open-ended BIT which offers a range of options for each provision. Further, one of the members of SADC, South Africa chose to terminate all its existing BITs and promulgate a domestic legislation that exclusively governs foreign investment.

[13] Sonia Rolland & David Trubek, 'Legal Innovation in Investment Law: Rhetoric and Practice in Emerging Countries' (2017) 39(2) University of Pennsylvania Journal of International Law 355, 418.

Outline

The first chapter of this thesis shall be devoted to analysing the following provisions included in the Model BITs of each of the Comparators - (a) definition of 'investment'; (b) nature of dispute settlement; and (c) standards of treatment accorded to investors such as most-favoured nation ("**MFN**"), fair and equitable treatment ("**FET**") etc. I have chosen to analyse these provisions since they constitute the *basic structure* of any instrument governing foreign investment. Further, they form the *matrix* within which systemic reforms were undertaken by the Comparators for revamping their investment treaty models. The first chapter aims is to demonstrate that notwithstanding the distinct BIT models developed by the Comparators, one can observe glaring commonalities – *a provincial view of 'investment', reassertion of the right to regulate by the host state, suppression of ISDS,* and *a rejection of the traditional standards of investment protection enshrined under the customary international law*. Thus, there exists a unity in the policy preferences underlying the formulation of distinct BIT models by the Comparators.

The second chapter shall be devoted to studying the origins of the policy preferences underlying the models BITs developed not only by the Comparators but also by other nations of the Global South. I shall argue that these Model BITs converge in terms of the policy preferences which they engender since they are constructed by bureaucracies that lack specialized knowledge about investment arbitration, have disparate decision-making structures, and fail to understand the signalling effects of such instruments on foreign investors. This chapter aims to demonstrate that Model BITs of the Global South do not translate into advanced and effective models by virtue of the existence of the above-mentioned institutional and bureaucratic deficiencies.

Clarifications

It would be pertinent to clarify that the Model BITs of developed nations are examined as a family rather than as nuclear stand-alone investment instruments because this thesis underscores an appraisal of the investment treaty models of developing nations and the underlying institutional structures and bureaucratic expertise responsible for their construction and re-construction.

In terms of the choice of Comparators, I have selected certain members of the Global South, namely, India, Brazil, and the SADC, because of the modular diversity as explained in the *Methodology*, and the significant role played by cross-border capital inflows in the articulation and execution of their developmental policies.[14] I have tried to import specific instances of institutional and bureaucratic constraints plaguing other BIT programs in the Global South, to demonstrate the general application of the common policy preferences traced from the Model BITs of the Comparators, to the BIT programs in the Global South as a whole. I have refrained from extending the scope of this thesis to China, which has also witnessed rapid industrialization of its economy. China's BIT regime has undergone a complete transformation from a conservative state-centric approach, which accorded rudimentary investment protections and eschewed ISDS, to a neoliberal approach that mirrors the older-generation BITs preferred by developed nations.[15] However, China's treaty practice is marred by inconsistency and betrays an *ad-hoc* approach that presupposes the adoption of distinct stances regarding a specific investment protection measure or the nature of ISDS in distinct treaty negotiations with other states.[16] Thus, it would be difficult to locate a distinct approach in the multiple Model BITs and widely contrasting active BITs entered into by China.

[14] Fabio Morosini & Michelle Ratton Sanchez Badin (eds), 'An Introduction' in *Reconceptualizing International Investment Law from the Global South* (2017, Cambridge University Press) 1-46.
[15] Roberts (n 7) 195.
[16] Congyan Cai, 'Balanced Investment Treaties and the BRICS' (2018) 112 American Journal of International Law Unbound 217.

This thesis only encompasses a specific type of investment instrument i.e., Model BITs. It does not delve into the active BITs unless deemed necessary. This is largely due to the dearth of active BITs which are based on the Model BITs of India and SADC. It also does not analyze the active BITs of the member states of the SADC because the investment protection provisions of the former cannot be specifically attributed to the SADC Model BIT given the latter offers a plethora of drafting options for each substantive obligation of the host state, instead of favouring certain interpretations and textual formulations.

EXTRACTING THE COMMON POLICY PREFERENCES

In this chapter, I shall expose the common policy preferences underlying the Model BITs of the Comparators, which tilts the delicate balance between investment protection and the sovereign's right to regulate, in favour of the latter. Based on a comparative analysis of the provisions governing the characterization of 'investment', dispute settlement, and standards of treatment of foreign investors, I shall demonstrate that although the drafting techniques and the text of the actual provisions of the Comparators' Model BITs differ, the aim underlying the utilization of these techniques and construction of the actual provisions is similar. This aim is to create more policy space for the host state and exacerbate the non-arbitrability of executive discretion. It is achieved by extremely narrow characterizations of 'investment,' erection of jurisdictional barriers to discourage recourse to ISDS, and subjugation of standards of treatment traditionally accorded to foreign investors, before the regulatory prerogatives of the sovereign. This exercise is undertaken to support my hypothesis in the second chapter i.e., the common policy preferences emanate from the inefficient institutional structures and bureaucratic expertise underlying the negotiation and drafting of Model BITs, and a lack of understanding of the symbolic effects of Model BITs, in the Global South.

Characterization of "Investment"

The Indian Model BIT

The Indian Model BIT is the culmination of a comprehensive review of India's BIT program by the Indian government.[17] In comparison to the erstwhile 2003 model[18], the 2016 Indian Model BIT seems to be very detailed and contains thirty-eight articles divided across 7

[17] Model Text for the Indian Bilateral Investment Treaty 2016 <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf> [Indian Model BIT].

[18] 2003 Indian Model Text of Bilateral Investment Promotion and Protection Agreement <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2871/download> accessed 9 April 2023.

chapters. Most old-generation Indian BITs prescribed an expansive asset-based definition of the term 'investment.' Every asset which possessed economic value and was established or acquired by a foreign investor was construed as an investment. The 2016 Indian Model BIT departs from an asset-based definition in favor of an enterprise-based definition. As per the new definition, an investment is "*an enterprise that has been constituted, organized, and operated in good faith by an investor*" in accordance with the domestic laws of the host state.[19] In other words, only those enterprises established validly under Indian domestic laws can bring ISDS claims. Neither does this definition specify the meaning of "*good faith*" nor clarify whether the above-mentioned characteristics need to be satisfied by the enterprise or the assets under its control or both. The inclusion of an enterprise-based definition betrays a policy preference to narrow the scope of 'investments' protected under BITs, and thereby reduce the propensity of ISDS claims being filed against India.

The 2016 Indian Model BIT also mandates the satisfaction of certain characters, colloquially known as the *Salini criteria*,[20] for an enterprise to be classified as an investment – (a) commitment of capital; (b) certain duration; (c) expectation of gain or profit; (d) assumption of risk; and (e) significance for the development of the host state.[21] It also expressly excludes any "*pre-operational expenditure relating to the admission, establishment . . . incurred before the commencement of substantial business operations of the enterprise . . . from the purview of investment*."[22]

The Brazilian Model CFIA

Brazil also came out with a new Model BIT, called the Cooperation and Facilitation Investment Agreement ("**CFIA**") in 2015. Since then, Brazil has entered into CFIAs with a few nations

[19] Indian Model BIT (n 18) Article 1.4.
[20] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001).
[21] ibid.
[22] Indian Model BIT (n 18) Article 1.4.

including Mozambique, Angola, Algeria, Malawi, Morocco, Chile, Mexico, Thailand, India, and the United Arab Emirates.[23] Most of the active CFIAs include a similar asset-based definition for 'investment' with certain qualifications. First, the investment must be in furtherance of "*establishing lasting economic relations*" between the host state and the home state.[24] Second, the investment must relate to the "*production of goods and services*" in the host state. In other words, the investment must be long-lasting and involve a productive activity. Even though such qualifications were not part of the 2015 Model CIFA, they still found their way into all CFIAs, which Brazil subsequently entered into. The rationale was to restrict the scope of investment to only new investments that increased the productive capacities of the host state.[25] Lastly, similar to the Indian approach,[26] portfolio investment and sovereign claims emanating from commercial contracts concerning the sale of goods and services are also excluded.[27] The only aberration is the CFIA signed between Brazil and Angola. This CFIA provides for the definition of investment to be determined in accordance with the domestic laws of Brazil and Angola.[28]

The SADC Model BIT

The SADC Model BIT was released in 2012 to provide member states with a "*basis for developing their own specific Model Investment Treaty or as a guide through any given investment negotiation,*" and also train government officers responsible for the negotiation and

[23] Nathalie Potin & Camila Brito de Urquiza, 'The Brazilian Cooperation and Facilitation Investment Agreement: Are Foreign Investors Protected?' (Kluwer Arbitration Blog, 29 December 2021) <https://arbitrationblog.kluwerarbitration.com/2021/12/29/the-brazilian-cooperation-and-facilitation-investment-agreement-are-foreign-investors-protected> accessed 17 April 2021.

[24] Brazil-Mozambique CFIA, Article 3.1; Brazil-Mexico CFIA, Article 3.1(ii); Brazil-Malawi CFIA, Article 1.1; Brazil-Colombia CFIA, Article 3.1(ii); Brazil-Chile CFIA, Article 1.1(iv); Brazil-Ethiopia CFIA, Article 1.1(iii); Brazil-Suriname CFIA, Article 1.3(i).

[25] José Augusto Fontoura Costa & Vivian Daniele Rocha Gabriel, 'Investor Protection in Cooperation and Investment Facilitation Agreements: Prospects and Limits' (R. d. Tribunais, 2017) 13 Journal of Arbitration and Mediation [Translated from Portuguese] 127-155.

[26] Indian Model BIT (n 18), Article 1.4.

[27] ibid.

[28] Brazil-Angola CFIA, Article 3.

drafting of BITs.[29] It offers a variety of model provisions that could be included by member states in their Model BITs, accompanied by a commentary that specifically highlights the merits and demerits of each provision. In relation to the definition of 'investment,' the Model BIT provides for three varying definitions: (a) a narrow asset-based definition with an exhaustive list of assets that may be classified as 'investment' (*based on the 2004 Canadian Model BIT*); (b) an expansive asset-based definition with a non-exhaustive asset list (*based on the US Model BIT*); and (c) an enterprise-based definition that relies on establishment and acquisition of the corporate entity bringing the investment to the host state (*based on the definition of 'commercial presence' in the World Trade Organization's General Agreement on Trade in Services*).[30] The commentary annexed to the SADC Model BIT recommends the enterprise-based definition since it may promote investment that is "*supportive of sustainable development*".[31] While the second and third approaches explicitly call for the satisfaction of the *Salini criteria*, the commentary also advocates for the inclusion of the same for the first approach, to achieve greater consistency and certainty. It strongly advises against the second approach, since the determination of 'investment' would again depend on the discretion of arbitral tribunals and thereby militates against the interests of the host state. Further, the draftsmen envisaged that an enterprise-based definition is more likely to secure the long-term economic interests of the host state.[32]

A Long-lasting Requirement?

As discussed above, both the Indian and the SADC Model BITs call for the satisfaction of the *Salini criteria* for an enterprise to be classified as an 'investment'. Treaty practice in relation to the incorporation of the *Salini criteria* is extremely fragmented. The US Model BIT, the

[29] SADC, SADC Model Bilateral Investment Treaty Template with Commentary (2012) [SADC Model BIT], Article 2.
[30] ibid, Article 2.
[31] ibid, 13.
[32] ibid, 12-14.

Comprehensive Economic and Trade Agreement ("**CETA**"), and the Trans-Pacific Partnership Agreement ("TPP") refer to the *Salini criteria*. However, they refrain from mentioning the "*significance for the development of the host state.*"[33] Model BITs of various European nations and recent Japanese BITs do not refer to the *Salini criteria* at all.[34]

Further, no guidance is provided for the determination of the *actual meaning* of the various elements of the *Salini criteria*, especially "*significance for the development of the host state*," under either the Indian or SADC Model BIT. Arbitral practice does not offer any benchmarks against which the "*significance*" of development may be tested.[35] While certain arbitral tribunals are satisfied in so far as the investment contributes to the development in some way[36], other tribunals require the contribution to be "*significant*" without offering much guidance on what the term entails.[37] Thus, the determination of "*significance*" would ultimately depend on the idiosyncrasies of the arbitral tribunal. Such a characterization of 'investment' increases the propensity of prospective interference by a privately appointed tribunal with the public functions of the host state. Further, the requirement to establish '*significance*' purportedly excludes those investments which may be perceived as modest in terms of pure economic value, in comparison to large investments, which usually pertain to public infrastructure, extraction of natural resources etc. It should not be made necessary for foreign investors to establish '*significance*' because it lacks any definite import and its substance is implicitly subsumed by the first three requirements of the *Salini criteria* i.e., commitment of capital,

[33] US Model BIT, Article 1; CETA (30 October 2016), Article 8.1; TPP (4 February 2016), Article 9.1.
[34] Japan-Iran BIT (2 May 2016), Article 1.1; Japan-Ukraine BIT (2 May 2015), Article 1.1; U.K Model BIT, Article1(a); Federal Ministry for Economics and Technology, Treaty between the Federal Republic of Germany and (. . .) concerning the Encouragement and Reciprocal Protection of Investments, Article 1.1 (2008); Draft Agreement between the Government of the Republic of France and the Government of the Republic of (. . .).
[35] Prabhash Ranjan & Pushkar Anand, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction' (2017) 38(1) Northwestern Journal of International Law & Business 1, 22.
[36] *Mr. Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Annulment Proceeding, (9 February 2004) ¶ 33.
[37] *Malaysian Historical Salvors v. Malaysia*, ICSID Case No ARB/05/10, Award on Jurisdiction (17 May 2007) ¶ 124.

certain duration, and expectation of gain or profit.[38] To illustrate, a company engaged in the exploration of oil, under a profit-sharing arrangement with the host state, invariably commits financial and human resources towards the project. If the company is unable to discover oil, it arguably fails to significantly contribute towards the development of the host state. However, if one applies the first three elements of the *Salini criteria,* the project should still be classified as an 'investment'. Consequently, '*significance*' for the development of a host state is a consequence of an investment, rather than one of its constitutive elements.[39] Therefore, inclusion of such a requirement neither contributes towards any credible protection for foreign investors nor curbs prospective interference with the sovereign's right to regulate, by arbitral tribunals.

Unlike the Indian and SADC Model BITs, neither the Brazilian Model CFIA nor any of the active Brazilian CFIAs presuppose the satisfaction of the *Salini criteria* for an investment to fall under the protective umbrella of the CFIA. At first glance, this approach seems to be more appealing to foreign investors than the Indian/SADC approach, since it makes the determination of 'investment' an objective exercise and does not leave much to the imagination of the host state. Consequently, it seems to strike a fairer balance between investment protection and the right of the sovereign to regulate. However, the requirement to establish long-term economic relations about the production of goods and services in the host state obfuscates the judicial characterization of 'investment'. This requirement is identical to the following elements of the *Salini criteria* - "*significance for the development of the host state*" and "*certain duration.*" For example, the establishment of a production facility for automobiles by a foreign investor in the host state signifies the intention to establish long-term economic relations

[38] Emmanuel Galliard, 'Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford, 2009) 414 - 416.
[39] ibid.

through the production of goods in the host state. It entails a contribution to the development of the host state and will last a certain duration since it is a time-consuming and labor-intensive capacity that would evolve the creation of a local workforce and permanent fixtures. Hence, this requirement has the potential to re-introduce certain elements of the *Salini criteria* which have been explicitly excluded in both the Model CIFA and the active CFIAs.

Thus, it should be noted that the characterization of 'investment' under the treaty models of all three Comparators is rather narrow or inward-looking, by being restricted to only those economic ventures that are long-lasting and contributes to the productive capacities of the host state.

Standards of Treatment

The Indian Model BIT

In contrast to the older generation BITs, the Indian Model BIT does not contain full-blown FET and full protection and security ("**FPS**") obligations. Article 3 merely provides foreign investors guarantees against violations of customary international law through "*denial of justice in any judicial or administrative proceedings,*" "*fundamental breach of due process,*" "*targeted discrimination on manifestly unjust grounds. . .,*" and "*manifestly abusive treatment such as coercion, duress, and harassment*."[40] A notable exclusion is a guarantee of legitimate expectations created by specific representations made by the host state to the investor. The Indian Model BIT does contain a standalone obligation of FPS. Further, its scope is restricted to the physical security of investors and does not encompass other obligations such as regulatory and legal security.[41]

[40] Indian Model BIT (n 18), Article 3.1.
[41] Indian Model BIT (n 18), Article 3.2.

The most notable omission from the Indian Model BIT is the MFN provision. This omission was a response to the adverse arbitral award rendered against India in *White Industries v. India*[42], where the tribunal allowed an Australian investor to import a guarantee relating to "*effective means of asserting claims and enforcing rights*" found in the India-Kuwait BIT, into the India-Australia BIT by relying on the broadly worded MFN provision of the latter.[43] Lastly, the Indian Model BIT excludes certain measures relating to taxation, compulsory licenses, subsidies, intellectual property rights, or measures taken by local governments from the scope of application of the above-mentioned guarantees.[44]

The Brazilian Model CFIA

The CIFAs exclude FET, and FPS and circumscribe the scope of the MFN provision by excluding ISDS. The host state may not discriminate between investors having different nationalities regarding the establishment and operation of the investment.[45] However, the host state can accord preferential treatment to investors insofar as it accrues under a double taxation treaty, customs union, or a free trade agreement.[46] The national treatment and MFN provision mirror its counterparts from WTO's General Agreement on Tariffs and Trade and the US Model BIT (*barring the exclusion of ISDS*) as they confer (a) equal treatment to foreign and domestic investors within the territory of the host state; and (b) treatment to foreign investors *which is not less favorable* than the treatment accorded by host states to foreign investors of third states, both, in *like circumstances*.[47]

[42] *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award (30 November 2011) [The White Industries Award].
[43] ibid, ¶ 16.1.1(a).
[44] Indian Model BIT (n 18), Article 2.4.
[45] Brazil-Mozambique CFIA (n 24) Article 11.3.
[46] Brazil-Mozambique CFIA (n 24) Article 11.3.
[47] General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) Annex 1A, 1867 U.N.T.S. 187 [GATT 1994], Articles I & III; US Model BIT, Article 4.

Another notable feature is the divergences among the CFIAs in relation to the scope of protection afforded to foreign investment. The CFIAs entered into with African nations expand the scope of protection offered to investments, by way of the application of non-discrimination provisions such as MFN and NT, to the pre-establishment stage. On the other hand, CFIAs entered with other Latin American nations preclude pre-establishment activities and restrict the scope of protection to the operation and expansion of foreign investments.[48]

The SADC Model BIT

The SADC Model BIT largely provides for post-establishment obligations for foreign investors. It only imposes a pre-establishment obligation on host states to admit foreign investments in accordance with the *good faith* application of their domestic law.[49] However, the draftsmen recommend the non-inclusion of such a clause so that host states have the flexibility to modify conditions of admission of foreign investment (*such as the exclusion of certain industrial sectors or imposition of sectoral caps on the quantum of investment*), after the adoption of a BIT.[50] Like the Indian BIT, the MFN provision is omitted. Thus, the more favorable treatment accorded to investors under BITs with third nations cannot be imported under the SADC Model BIT. Notwithstanding the omission, states willing to include an MFN provision should restrict its scope, specifically, to the importation of more favorable standards of treatment accorded to foreign investors under other BITs or investment instruments.[51]

The SADC Model BIT provides for the inclusion of a "*fair administrative treatment*" ("**FAT**") standard rather than a FET standard.[52] The rationale for such an inclusion is to avoid expansive interpretations of unpredictable FET standards by arbitral tribunals. According to the drafting committee, a FAT standard focuses on standards of good governance rather than the rights of

[48] Costa & Gabriel (n 25).
[49] SADC Model BIT (n 29), Article 3.
[50] SADC Model BIT (n 29), Article 28, Commentary.
[51] SADC Model BIT (n 29), Article 4.1, Commentary.
[52] SADC Model BIT (n 29), Article 5, Option 2.

foreign investors.[53] Thus, it curbs arbitral discretion and still provides meaningful protection to investors, by restricting the scope of protection to due process guarantees only. Notwithstanding, states still willing to rely on the traditional FET standard should include explicit references to the "*international minimum standard of treatment*" ("**IMS**") that was articulated in *Neer v. Mexico* since it constitutes *customary international law regarding the treatment of aliens*. [54][55]

A Rejection of the Traditional Standards of Treatment for Protection of Investors?

The Indian, Brazilian, and SADC Model BITs seek to explicitly reject or proffer novel formulations of the normative content of the FET standard, which is found in most BITs. Some arbitral tribunals, like the one in *Glamis Gold v. USA*[56], have stated that the normative content of the FET standard is a reflection of the IMS developed in *Neer*.[57] Others have ruled that the FET standard is constantly evolving and has traversed *Neer*.[58] A third possible view, which has been taken, is that the FET standard is autonomous and not dependent on any IMS, whether articulated in *Neer* or subsequently.[59] The Indian, Brazilian, and SADC Model BITs seek to resist this indeterminacy of the IMS enshrined in the FET obligation by not including explicit references to FET (*the Brazilian approach*) or replacing the same with alternate formulations such as "*minimum standard of treatment*" (*the SADC approach*) or explicitly defining the normative content of the FET obligation (*the Indian approach*).[60]

[53] SADC Model BIT (n 29), Article 5, Commentary.
[54] SADC Model BIT (n 29), Article 5, Option 2.
[55] Neer v Mexico, Opinion (15 October 1926) 4 RIIA (1926) 60 [Neer].
[56] *Glamis Gold v. The United States of America*, UNCITRAL, Award (8 July 2009) [Glamis Gold Award] ¶ 614.
[57] Neer (n 55).
[58] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (9 January 2003) ¶ 179; *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award (31 March 2010) ¶¶ 205-11; *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award (26 January 2006) ¶ 193.
[59] Rudolf Dolzer & Christoph Schreuer, *Principles of International Law* (Oxford University Press 2012) 134.
[60] Ranjan & Anand (n 35) 28.

The intention of the draftsmen of the Indian and SADC BITs to re-invent the wheel in relation to the FET obligation is also apparent from the exclusion of the concept of "*legitimate expectations*" from the text of the relevant provisions of both Model BITs. A large panoply of arbitral awards construe legitimate expectations as an intrinsic part of the FET obligations.[61] The Indian and SADC Model BITs seek to depart against this established arbitral jurisprudence. The draftsmen could have adopted the narrow interpretation afforded to the concept in *Glamis Gold Award*. According to the tribunal, the concept would be applicable only in the event that hosts states induce foreign investment by providing specific representations to investors, which are then relied upon by them to establish the investment, but eventually become infructuous due to subsequent actions of the host state.[62] Such an interpretation strikes a fair balance between the unfettered exercise of discretion by arbitral tribunals and investors' concerns regarding the frustration of legitimate expectation created by host states, instead of making the host states' exercise of regulatory power completely unrestrained. Lastly, it remains an open question whether arbitral tribunals could still successfully invoke the concept of legitimate expectations by citing the same as a "*general principle of law recognized by civilized nations*."[63]

Another effort to reject the traditional standards of treatment of foreign investors is apparent from the non-inclusion or substantial circumscription of the MFN clause, in the Model BITs of the Comparators. It is submitted that outright rejection of the MFN clause by India and SADC may not be the most conducive approach for balancing investment protection and the

[61] *Técnicas Medioambientales Tecmed, S.A v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003); *Occidental Exploration & Production Co. v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award (1 July 2004) ¶ 190; *Enron Corporation and Ponderosa Assents, L.P. v. The Argentine Republic*, ICSID Case No ARB/01/3, Award (22 May 2007) ¶ 260; *PSEG Global et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award (19 January 2007) ¶¶ 252–253; *Duke Energy v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) ¶ 340.

[62] Glamis Gold Award (n 56) 621.

[63] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 U.N.T.S. 993, Article 38(1)(c); Elizabeth Snodgrass, 'Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle' (2006) 21(1) ICSID Review - Foreign Investment Law Journal 1,56.

sovereign's right to regulate. It is essential to include an MFN clause in a BIT to discourage host states from offering more preferential treatment to investors from certain nations over investors from third nations, through the application of domestic executive or legislative measures. For example, country X offers tax rebates and sovereign guarantees to investors from country Y. Such benefits are not offered to investors from country Z. Absence of an MFN clause in a BIT between X and Z shall preclude X's investors from asking for the benefits granted to Y's investors. The MFN clause in the Brazilian Model CFIA (*and the CETA*), which does not apply to ISDS, more effectively alleviates concerns of host states regarding the extensive importation of substantive and procedural measures from other instruments, while also safeguarding investors from blatant discrimination through internal measures. The MFN clause in the Brazilian Model CFIA obliges host states to not accord less favorable treatment to investors from a particular state, than what is accorded in, like circumstances, to investors from third states, in relation to the establishment, expansion, conduct etc. of investment.[64] The CETA goes a step further than the Brazilian Model CFIA by excluding not just ISDS, but also substantive obligations found in other investment agreements from the scope of the MFN provision.[65] It is further clarified that investors cannot employ the MFN provision to import favorable substantive obligations from other investment agreements, unless they can demonstrate that the host state has promulgated domestic legislation or measures, to specifically effectuate the substantive BIT obligations found in other investment agreements.[66] Such a clause prevents host states from introducing domestic measures which accord unfavorable treatment based on the nationality of foreign investors. Thus, although the Brazilian CFIAs provide for a better formulation of the MFN than its Indian and SADC

[64] Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and _____ [2015 Model CFIA] <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download> accessed 8 June 2022, Article 6; EU-Canada CETA, Article 8.7(1).
[65] EU-Canada CETA, Article 8.7(4).
[66] ibid.

counterparts, it still leaves some space for the host states to enact localized measures for discriminating between foreign investors based on nationality.

Investor-State Dispute Settlement

The Indian Model BIT

The Indian Model BIT contains an ISDS provision, which functions as a standing offer by the host state to submit disputes, arising out of allegations of breach of substantive obligations, to arbitration.[67] However, recourse to ISDS is limited by various qualifications. Firstly, a foreign investor can only bring a claim against the host state for breach of the latter's obligations under Chapter II of the Indian Model BIT.[68] Essentially, a foreign investor can only raise disputes about certain standards of treatment, such as MFN, expropriation, national treatment, compensation for losses in times of war, natural disasters etc., and capital transfers[69]. Secondly, the Indian Model BIT categorically excludes disputes emanating from breach of contracts between host states and investors, from the scope of ISDS.[70] Such disputes shall be resolved in accordance with domestic law or the dispute resolution process envisaged in the contract in question.[71] The Indian Model BIT does not contain an *umbrella clause* that elevates contractual breaches by the host state to breaches of BIT obligations.[72] Thirdly, and perhaps most significantly, the consent of the host state is contingent upon the exhaustion of local remedies by the investor, for at least five years prior to the commencement of arbitration.[73] This

[67] Indian Model BIT (n 18), Article 13.2.
[68] ibid.
[69] Indian Model BIT (n 18), Article 7.
[70] Indian Model BIT (n 18), Article 13.2.
[71] ibid.
[72] Thomas Walde, 'The 'Umbrella Clause' in Investment Arbitration: A Comment on Original Intentions and Recent Cases' (2005) 6 Journal of World Investment and Trade 183.
[73] Indian Model BIT (n 18), Article 15.2.

qualification does not apply if the investor can demonstrate that "*no available legal remedies are capable of reasonably providing any relief*" in relation to the disputed host state measure.[74]

The Indian Model BIT also prescribes some additional qualifications which further limit the recourse to ISDS. Upon the exhaustion of local remedies, the investor should transmit a "*notice of dispute*" to the host state prior to commencement of arbitration.[75] Post the submission of the notice, the investor and host state should undertake negotiations, mediation, or other meaningful procedures for an additional period of six months to seek resolution of the dispute.[76] In the absence of an amicable settlement, the investor may submit his claims to an arbitral tribunal provided: (a) "*not more than six years have elapsed since the disputing investor first acquired, or should have first acquired, knowledge*"[77] of the measure in question and accompanying losses; (b) "*not more than twelve months have elapsed from the date on conclusion of domestic proceedings*";[78] (c) at least ninety days have elapsed from the submission of a "*notice of arbitration*" to the host state;[79] and (d) the investor must explicitly waive any rights to initiate or continue proceedings in accordance with the applicable domestic laws of the host state.[80] Further, the arbitral tribunal cannot review the merits of a judgement rendered by a domestic judicial institution.[81]

The Brazilian Model CFIA

Brazil's CIFAs prescribe a state-to-state dispute settlement mechanism that is reminiscent of diplomatic protection, a concept under customary international law.[82] Diplomatic protection entails the espousal of a claim by a state against another state, on behalf of an investor who is

[74] Indian Model BIT (n 18), Article 15.2.
[75] ibid.
[76] Indian Model BIT (n 18), Article 15.4.
[77] Indian Model BIT (n 18), Article 15.5(i).
[78] Indian Model BIT (n 18), Article 15.5(ii).
[79] Indian Model BIT (n 18), Article 15.5(v).
[80] Indian Model BIT (n 18), Article 15.5(iii).
[81] Indian Model BIT (n 18), Article 13.5(i).
[82] Sonia Rolland, 'The Return of State Remedies in Investor-State Dispute Settlement: Trends in Developing Countries' (2017) 49(2) Loyola University Chicago Law Journal 387, 396.

a national of, or incorporated in the former, and aggrieved by the actions of the latter. I shall consider the Brazil-Mozambique CFIA as the relevant benchmark, given the similarity of the dispute resolution mechanisms of the subsequent CFIAs.[83] Further, the Brazil-Mozambique CFIA was the first treaty entered into by Brazil, post the publication of its 2015 Model CFIA,[84] and does not contain any substantial departures in terms of the dispute resolution mechanism envisaged under the 2015 Model CFIA.

The Brazil-Mozambique CFIA entails the establishment of (a) domestic focal points ("**Focal Points**"), which are specific government bodies providing one-stop services for resolution of investor grievances and liaising with other domestic government bodies as well as its counterpart from the other state; and (b) Joint Committees comprising of government representatives of each state, responsible for bringing about deeper coordination among the states.[85] In the first instance, the Focal Points shall seek to resolve disputes amicably between investors and the host state.[86] In case the Focal Points fail, the Joint Committees shall engage in negotiations and consultations between the disputing parties.[87] Only the home state of the investor has the power to initiate this procedure involving the Joint Committee.[88] The Joint Committee is expected to issue a report containing recommendations within a fixed time period (*extendable by mutual agreement*).[89] If the home state is still not satisfied, it may call for state-to-state arbitration (*on behalf of the aggrieved investor*) with the host state.[90] Thus, the Focal Points and Joint Committees are expected to prevent the dispute from being subject to arbitration. Only when all efforts to resolve the disputes amicably have been exhausted, should

[83] Brazil-Mozambique CFIA (30 March 2015) Article 5, < https://edit.wti.org/document/show/c9fd85ab-2190-467a-a063-4ad7c3c98fbd?page=1> accessed 22 April 2023 [Brazil-Mozambique CFIA].
[84] 2015 Model CFIA (n 64).
[85] Brazil-Mozambique CFIA (n 83) Article 4.
[86] Brazil-Mozambique CFIA (n 83) Article 15.1.
[87] Brazil-Mozambique CFIA (n 83) Article 15.2.
[88] Brazil-Mozambique CFIA (n 83) Article 15.3.
[89] Brazil-Mozambique CFIA (n 83) Article 15.3(ii)-(iv).
[90] Brazil-Mozambique CFIA (n 83) Article 15.6.

the home state of the aggrieved investor file a request for arbitration against the home state, as *a last resort.*

Brazil's CFIAs with Angola, Malawi, and Mozambique do not contain any provisions in relation to the arbitral procedure including the nomination of a specific arbitral institution, constitution of the arbitral tribunal, the manner of appointment of arbitrators and requisite qualities which they should possess.[91] On the other hand, Brazil's CFIA's with Colombia, Chile, Ecuador, Guyana, Mexico, Suriname, Ethiopia, Morocco, India, and the United Arab Emirates contains provisions specifying the arbitral procedure in detail.[92] The latter group of CFIAs also specifies that the object of the arbitration is to bring non-confirming host states in conformity with the provisions of the concerned CFIAs.[93] Accordingly, the arbitral tribunal may not assess damages and award compensation, unless specifically agreed upon by parties. Only the Brazil-India CFIA makes the tribunal's lack of judicial standing to award compensation completely non-derogable.[94]

The SADC Model BIT

The SADC Model BIT includes provisions related to both ISDS and state-state dispute settlement.[95] However, the drafting committee explicitly recommends the exclusion of ISDS by member states. According to the Drafting Committee, the inclusion of provisions of state-state dispute settlement reflects the "*concrete application*" of the right of diplomatic protections conferred to investors, under customary international law.[96] It points towards the treaty practice

[91] Brazil-Mozambique CFIA, Article 15.6; Brazil-Angola CFIA, Article 13.6; Brazil-Malawi CFIA, Article 15.6.
[92] Brazil-Colombia CFIA, Article 23; Brazil-Chile CFIA, Article 24, Annex I; Brazil-Ecuador CFIA, Article 25; Brazil-Guyana CFIA, Article 25; Brazil-Mexico CFIA, Article 19; Brazil-Suriname CFIA, Article 25; Brazil-Ethiopia CFIA, Article 24; Brazil-Morocco CFIA, Article 20; Brazil-India CFIA, Article 19; Brazil-United Arab Emirates CFIA, Article 25.
[93] ibid.
[94] Brazil-India CFIA, Article 19.2.
[95] SADC Model BIT (n 29), Articles 28 & 29.
[96] SADC Model BIT (n 29), Article 28, Commentary.

of South Africa and Australia which have already opted out or are in the process of opting out of ISDS.[97]

Article 28 of the SADC Model BIT provides for two pathways for undertaking state-state dispute settlement – (a) a state may claim damages on behalf of an investor for an alleged BIT violation; or (b) a state may raise a dispute with the other state regarding the application or interpretation of the treaty.[98] The SADC Model BIT also prescribes a three-tiered dispute resolution procedure. First, state parties shall undertake consultations for a period of six months.[99] Upon failure of such consultation, either state party may request the commencement of non-binding mediation. Both state parties should cooperate in good faith and may seek the assistance of a recognized institution or the good offices of either party.[100] If state parties are not able to settle, then either state party may request the claim to be submitted to arbitration. The SADC Model BIT also calls for the exhaustion of local remedies by investors prior to the initiation of a claim by the state on behalf of the investor. Furthermore, this requirement does not apply in the event no local remedies are available.[101]

Article 29 governs ISDS and has been drafted in accordance with the ISDS provisions of the US and Canadian BITs and existing arbitral rules.[102] The ISDS mechanism also prescribes a three-tiered dispute resolution procedure[103] and is contingent on the satisfaction of various conditions, including – (a) at least six months should have elapsed since the commencement of mediation and submission of an arbitration claim; and (b) exhaustion of local remedies.[104]

[97] SADC Model BIT (n 29), Article 29, Special Note.
[98] SADC Model BIT (n 29), Article 28, Commentary.
[99] SADC Model BIT (n 29), Article 28.2.
[100] ibid.
[101] SADC Model BIT (n 29), Article 28.4.
[102] SADC Model BIT (n 29), Article 29, Special Note.
[103] SADC Model BIT (n 29), Articles 29.1 & 29.3.
[104] SADC Model BIT (n 29), Articles 29.4(b).

A Renunciation of Investor-State Dispute Settlement?

The ISDS mechanism espoused by the Indian BIT becomes extremely restrictive and contradictory if one cohesively reads the requirement to exhaust local remedies for the "*same measure . . . for which a breach of Treaty is claimed*" and the lack of jurisdiction of arbitral tribunals over the merits of domestic judicial decisions.[105] To illustrate, if foreign investors are successful in getting redress from Indian courts, they would not require ISDS. If they are unsuccessful, they are essentially prevented from taking recourse to ISDS because Indian courts have already authoritatively ruled on the measures underlying the treaty breach by rendering a judgement on merits.[106] Further, the numerous temporal and procedural qualifications introduced by the Indian Model BIT are meant to ensure that domestic courts get the first, and arguably, the only opportunity to redress investor grievances. While potentially improving the internal accountability within various departments of the Indian government, these qualifications make access to ISDS extremely difficult, if not impossible, for foreign investors.[107] This makes ISDS system exclusionary and ineffectual.[108] The Law Commission of India has also taken note of this contradiction and recommended a complete revision of the ISDS provision in the Indian Model BIT.[109]

The dispute settlement systems espoused by Brazil's CFIAs and the SADC Model BIT, for their part, can be perceived as a radical response against the purported incompatibility of international norms of investment protection with the developmental needs of emerging economies and the concomitant protection of their regulatory prerogatives.[110] They seem to be

[105] Indian Model BIT (n 18), Articles 15.2 & 13.5.
[106] Rolland (n 13) 425.
[107] Stephan Schill and Geraldo Vidigal, 'Cutting the Gordian Knot: Investment Dispute Settlement à la Carte' (2018) RTA Exchange, Geneva: International Centre for Trade and Sustainable Development and Inter-American Development Bank 18.
[108] ibid.
[109] Law Commission of India, *Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty* (Report No. 260, 2015) paras 5.3.2-5.3.6.
[110] Rolland (n 13).

largely modelled on the WTO dispute settlement mechanism since only state parties can bring a dispute at the WTO, once all efforts to reach an amicable resolution have proved infructuous.[111] Further, like the WTO's dispute settlement system, they do not create any rights for investors. This policy choice militates against the fundament purpose of installing an ISDS system i.e., depoliticization of investor-state disputes and private enforcement of BIT claims.[112] In the event of a breach of the relevant treaty by the host state, investors shall be unduly dependent on their home states to not only initiate arbitral proceedings but also enforce favorable arbitral awards, against the host state in question. Thus, extra-judicial considerations would come into play, and the home state may not objectively appreciate the merits of an investor's claim.

Thus, the dispute settlement systems of all Comparators preclude investors from accessing avenues of *international review* through the explicit (*in the case of Brazil and SADC*) or implicit (*in the case of India*) renunciation of ISDS. One should await the emergence of practice to assess whether the suppression of ISDS in favor of purely domestic or state-state dispute settlement systems will ensure effective redressal of treaty-based claims put forth by investors.

The Common Policy Preferences

By way of this chapter, I have tried to extract the common policy preferences underlying the BITs of the Comparators. These common policy preferences include extremely narrow constructions of the definition of 'investment,' and the standards of treatment afforded to foreign investors. Further, the jurisdictional space available to arbitral tribunals for issuing rulings is sought to be completely nullified or narrowed down to the greatest extent possible, to purportedly limit the exposure of the host state to exorbitant compensation awards. In the

[111] Schill & Vidigal (n 107) 19.
[112] ibid.

next chapter, I shall seek to establish the roots of these common policy preferences, by arguing that they emanate from certain structural and expertise-related constraints plaguing the bureaucracies articulating these preferences, rather than conscious political choices to reduce the openness of the Global South's foreign investment regimes.

CONTEXTUALIZING THE COMMON POLICY PREFERENCES

In the same conference in which the former Attorney General of Pakistan candidly declared that his country used to sign BITs without any negotiations or risk assessments, he also accepted that Pakistan's foreign, finance, and legal ministries had no inputs to give, on the content of the BITs which were negotiated with its trading partners.[113] In Mexico, two different government departments were responsible for negotiating the same cross-border investment obligations. One department was responsible for negotiating investment obligations under the erstwhile North American Free Trade Agreement ("**NAFTA**"), while the other was responsible for negotiating investment obligations with Mexico's other trading partners. Mexican officials accepted the lack of any dialogue between the two departments regarding the need to articulate a common strategy for negotiating such obligations. They further ruminated that this institutional setup was not reviewed until the 2000s, despite Mexico being hit by a couple of adverse awards under NAFTA.[114]

These confessions betray a lack of proper understanding of the BIT commitments, and a lack of coordination, among the relevant arms of the governments in the Global South which are responsible for the negotiation of BITs. This is attributable to the failure to develop domestic expertise and streamline decision-making structures while mounting defences against ISDS claims, which translates to an inability to effectively revise Model BITs based on the experience purportedly gained during investment arbitrations.[115] This chapter focuses on establishing linkages between the above-mentioned lack of expertise, the common policy preferences

[113] Ross (n 4).
[114] Lauge N. Skovgaard Poulsen, 'Sacrificing Sovereignty by Chance: Investment Treaties, Developing Countries and Bounded Rationality' (Doctor of Philosophy thesis, London School of Economics and Political Science 2011) 246.
[115] Jeremy K. Sharpe, 'Control, Capacity, and Legitimacy in Investment Treaty Arbitration' (2018) 112 American Journal of International Law Unbound 261, 265.

established in the first chapter, and the institutional structures underlying the creation of Model BITs in the Global South.

Reaction to Investment Arbitration

I shall demonstrate that the BIT programs in the Global South were revamped in response to actual or prospective compensation awards, which were issued by arbitral tribunals based on the rudimentary provisions of the older-generation BITs anchoring these programs. A jurist interviewed many officials who were involved in the BIT programs of the Global South in the 1990s and early 2000s. His interviewees accepted that they were unable able to appreciate the "*serious and far-reaching*" implications of BITs, especially the expansive ISDS provisions of the older-generation BITs until the first ISDS claims hit.[116] Thereafter, the relevant departments negotiating BITs became much more risk-averse and started adopting conservative positions regarding the scope of ISDS included in newer-generation BITs.[117] For example, treaty negotiators in South Africa did not realize the sensitive legal ramifications of entering into BITs with many capital-exporting nations during the 1990s. They only took note, in the early 2000s when South Africa was hit by a major ISDS claim. A group of Italian miners and Belgian investors took recourse to investment treaty arbitration under the Italy-South Africa BIT. They claimed that the affirmative action measures forming part of a new mining statute amounted to expropriation, discrimination, and unfair treatment, and asked for US$350 million in compensation.[118] South African officials surmised that this claim, if successful, could embolden other foreign investors to challenge the redistributive policies of the post-apartheid African National Congress regime. Consequently, a flurry of ISDS claims could result in

[116] Poulsen (n 114) 239-249.
[117] ibid.
[118] *Piero Foresti, Laura de Carli and others v. the Republic of South Africa*, Award, ICSID Case no. ARB(AF)/07/1 (4 August 2010).

"*potentially unquantifiable liability*" for the South African government.[119] Thereafter, the South African BIT programme slowed down considerably, until it came to a grinding halt in 2012.[120]

The White Industries Award (*US$ 4.10 million in compensation was awarded to the claimant*), along with a host of other ISDS claims, took the Indian bureaucracy by surprise. They had never envisaged such a broad application of the MFN provision included in most active Indian BITs.[121] In fact, the award was perceived as an "*attack on the sovereignty of the Indian judiciary.*"[122] The White Industries Award marked the beginning of a phase of *backlash* in India's BIT programme. The Indian government started reviewing the 2003 Indian Model BIT and concluded that its provisions conferred too much discretion to arbitral tribunals. Subsequently, India terminated 58 active BITs and adopted the 2016 Indian Model BIT.[123] As discussed in the first chapter, the current Indian Model BIT does not include an MFN provision and heavily circumscribes access to ISDS. It signifies a shift from the laissez-faire-oriented approach of India's BIT programme until 2010, to an economic nationalism-oriented approach, which seeks to limit access to ISDS and promote domestic resolution of investor-state disputes, at all costs. Such paradigmatic shifts in the BIT programmes of developing nations reveal time lags between the demand for expertise and its supply. In other words, developing nations start developing expertise and seriously reviewing their BIT programmes, only as a reaction to the admission of ISDS claims against them.[124]

[119] Brendan Ryan, 'Offshore Investors May Sue SA Government' (Miningm[x,] 2005) <https://www.miningmx.com> accessed 8 June 2022.
[120] Department of Trade and Industry, Republic of South Africa, *Government Position Paper on Bilateral Investment Treaty Policy Framework Review* (2009).
[121] Prabhash Ranjan, 'India and Bilateral Investment Treaties - A Changing Landscape' (2014) 29(2) ICSID Review 419, 444.
[122] P Rajeeve, Member of Parliament (India), *Transcript to the Proceedings of the Rajya Sabha* (22 May 2012).
[123] Prabhash Ranjan, 'Conclusion: Throw the Bathwater, but Keep the Baby!' in *India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash* (Oxford Academic, 2019) 358.
[124] Mihaela Papa, 'Emerging Powers in International Dispute Settlement: From Legal Capacity Building to a Level Playing Field' (2013) 4(1) Journal of International Dispute Settlement 83, 87.

Reliance on Foreign Resources

As discussed in the first chapter, the common policy preferences reveal a disillusionment with ISDS. This is an outcome of the unpleasant experiences of representatives yearning to defend their home states in ISDS proceedings.[125] These experiences are in turn attributable to the capacity constraints and excessive reliance on extraneous resources which developing nations are subjected to when defending ISDS claims. The following examples help in contextualizing this claim.

The Solicitor General of Argentina used to visit Washington D.C., days before he was slated to represent his country before tribunals established under the auspices of the ICSID Convention[126], to conduct research and find useful precedents. In fact, he had to commit his own funds to purchase the most relevant arbitration treatises. The Attorney General of Seychelles, one of the member states of SADC, has admitted that he had to defend against an ISDS claim, without access to a stable internet connection, legal data analysis tools such as Westlaw and Lexis-Nexis, or even the most basic commentaries on ISDS or the ICSID Convention. Further, officials from least developed nations (*including SADC members*), during interviews with a jurist, have surmised that they either had no access to sources of primary law and arbitral jurisprudence or had to go to great lengths to obtain it.[127] Thus, it cannot be assumed that developing nations have unhindered access to arbitral jurisprudence or the relevant expertise necessary to defend effectively against ISDS claims.[128]

Consequently, they take recourse to foreign expertise for mounting effective defences against ISDS claims and also updating their BIT programmes. A case in point is the stakeholders

[125] Poulsen (n 114).
[126] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (adopted on 18 March 1965, entered into force on 14 October 1966) 575 UNTS 159 [ICSID Convention].
[127] Eric Gottwald, 'Levelling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations in Investment Treat Arbitration', (2007) 22(2) American University International Law Review 238, 240.
[128] ibid, 252.

involved in the drafting of the SADC Model BIT. Only nine out of 16 SADC members were involved in the drafting of the SADC Model BIT. Further, technical support was given by the International Institute of Sustainable Development and a research project run by the German government and funded by the European Union ("**EU**").[129] On the other hand, developed nations usually possess trained legal experts within their government departments, who can mount an effective defence against ISDS claims and craft effective Model BITs. For example, the *Office of the Assistant Legal Adviser for International Claims and Investment Disputes* is a specialized division of the US Department of State, which represents "*coordinates activities within and outside the Department concerning all aspects of international claims and investment disputes*."[130] The Investment Trade Policy Division at Global Affairs Canada is responsible for the modernization of Canada's Model BIT, and exclusively coordinated consultations with all stakeholders, regarding the revision of Canada's Model BIT and updating its provisions to reflect the textual innovations and policy stances reflected in the free trade agreements ("**FTAs**") recently entered into, by Canada.[131]

Emerging nations such as Brazil and India have been involved in WTO and ISDS disputes, as both claimants and respondents. While indigenous expertise has been developed in domestic policy spaces, foreign lawyers and law firms are predominantly relied upon, to articulate litigation strategies when it comes to WTO and ISDS disputes.[132] For example, trade and investment literature points towards the *de facto monopoly* of large law firms based out of the

[129] SADC Model BIT (n 29), Introduction.
[130] US Department of State, 'Office of the Assistant Legal Adviser for International Claims and Investment Disputes' [Office of the Assistant Legal Adviser] <state.gov/international-claims-and-investment-disputes/> accessed 3 June 2023.
[131] '2019 Consultation report and FIPA review' (Government of Canada, 2019) <https://www.international.gc.ca/trade-commerce/consultations/fipa-apie/report-rapport.aspx?lang=eng> accessed 8 June 2023.
[132] ibid, 88.

US and the UK.[133] For example, *Sidley Austin LLP* has been involved in more than 50% of the disputes heard at the WTO and has "*one of the largest dockets of high-profile*" ISDS cases.[134]

Thus, a significant barrier against the development of domestic expertise is the reliance on foreign law firms to mount defences against ISDS claims. For developing nations, hiring foreign law firms offer significant advantages in comparison to the development of local expertise. First, lawyers involved in the litigation of ISDS cases accumulate experience and connections, more than any other stakeholder involved in the dispute (*including officials from developing nations themselves*).[135] Second, these law firms build up "*significant institutional memory*" about arbitral awards, procedural rules, appointment of arbitrators, and litigation strategies.[136] Further, insights gained from past unpublished arbitral awards or settlements give leverage to foreign investors against those states, which have very minimal experience in ISDS and are more prone to accepting exorbitant settlement offers.[137] Thus, hiring foreign lawyers helps developing nations in counteracting this leverage. Third, these firms have unrestricted access to precedents and other sources of legal authorities, by way of elaborately maintained in-house libraries, informal professional circles etc.[138] Thus, states who would not hire foreign counsel could not gain access to these "*hidden awards*," or other sources of precedent, which can provide essential guidance as to how BIT provisions have been interpreted in similar factual circumstances.

Many nations who cannot afford to hire foreign law firms end up relying on defence strategies, formulated by inexperienced lawyers who may not be well versed in the selection of

[133] Lee M. Caplan, 'Making Investor-State Arbitration more Accessible to Small and Medium-Sized Enterprises' in Catherine A. Rogers and Roger P. Alford eds., *The Future of Investment Arbitration* (Oxford University Press 2009)
[134] Sidley Austin, Investment Treaty Arbitration <https://www.sidley.com/en/services/global-arbitration-trade-and-advocacy/investment-treaty-arbitration> accessed 2 June 2023.
[135] Gottwald (n 127) 255-258.
[136] Gottwald (n 127) 252.
[137] Luke Eric Peterson, *Bilateral Investment Treaties and Development Policy-Making* (International Institute for Sustainable Development, November 2004) 16.
[138] ibid.

appropriate precedents. Consequently, they end up citing too many precedents, without developing the arguments underlying the use of such precedents. Strategically, equivocal application of precedents to BIT provisions would make developing states (*with less bargaining power*) more prone to settling fallacious ISDS claims, rather than bear the risk of exposure to a financially adverse arbitral award.[139] Moreover, to resist the indeterminacy of open-ended BIT provisions and anticipate compliance with host state obligations, developing nations often try to exhaustively define vague standards of treatment. As discussed in the first chapter, the Indian Model BIT explicitly defines the normative content of the FET standard while the SADC Model BIT replaces the FET standard with a new FAT standard. Draftsmen in both nations sought to resist the indeterminacy of the FET standard. However, they might have ended up exacerbating the indeterminacy by introducing new formulations which have not yet been fully tested before arbitral tribunals, and whose interpretation is again dependent on arbitral discretion and effective advocacy. Thus, the jurisprudence created, as a result of such strategies militates against the interests of prospective claimants and respondents and further tarnishes the record of IIL.[140]

Inefficient Decision-Making Structures

The ability to take strategic decisions in the sphere of BIT construction and negotiation has been constrained due to disparate policymaking structures and diverging *policy visions* of various government departments in developing nations, which seem to be working in silos. The common policy preferences discussed in the first chapter emanate from a lack of constructive dialogue between the relevant government departments, which have conceptualized their own policy visions, regarding investment protection and promotion. Taking India's example, the

[139] Gottwald (n 127) 260.
[140] Anna Joubin Bret, Establishing an International Advisory Centre on International Disputes (The E15 Initiative, December 2015) <https://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-Joubin-Bret-Final.pdf> accessed 2 June 2023.

negotiation approaches for BITs and FTAs differ.[141] The Indian FTAs primarily focus on investment liberalization. The Indian Model BIT seeks to strike a fair balance between investment protection and the sovereign's right to regulate. However, as demonstrated in the first chapter, the Indian Model BIT fails to achieve this balance by prescribing a narrow definition of 'investment,' heavily restricting access to ISDS and excluding MFN and FET obligations, altogether. On the other hand, the investment chapters of India's FTAs provide a strong textual basis for effectively reconciling investment protection with the sovereign's right to regulate. They provide for a much broader *asset-based* definition, in comparison to the much narrower *enterprise-based* definition of the Indian Model BIT, and also include intellectual property rights, portfolio investments, business concessions etc.[142] Notwithstanding sectoral exceptions, the MFN provisions forming part of Indian FTAs allow foreign investors to transplant more favorable substantive provisions from comparable third-country FTAs and BITs.[143] In contrast to the Indian Model BIT, the Indian FTAs also do not require the exhaustion of local remedies prior to accessing ISDS.[144]

Such textual and policy-based divergences arise by virtue of the involvement of two different government departments in the negotiation of BITs and FTAs, respectively. The Ministry of Finance is responsible for the negotiating and drafting of all model and active BITs, while the Ministry of Commerce is responsible for the negotiation and drafting of all FTAs, including the investment-related chapters of the FTAs.[145] However, there is practically no coordination between both ministries. Thus, "*India's BIT programmes on two legs*" i.e., conservative stand-

[141] FTAs are comprehensive economic agreements aimed at a much deeper economic integration than FTAs. Such agreements cover trade in both goods and services, intellectual property arrangements and investment.
[142] India-Japan FTA, Article 3(i); India-Malaysia FTA, Article 10.2(d); India-Korea FTA, Article 10.1; India-Singapore FTA, Article 6.1 (1).
[143] India-Japan FTA Articles 87 & 90.
[144] India-Japan FTA, Article 90; India-Malaysia FTA, Chapter 14; India-Korea FTA, Chapter 14; India-Singapore FTA, Article 6.21.
[145] Prabhash Ranjan, 'Finmin v Commerce Ministry' (The Financial Express, 14 June 2010) <https://www.financialexpress.com/archive/finmin-vs-commerce-ministry/633260/> accessed 28 May 2023.

alone active BITs and relatively liberal investment chapters in FTAs.[146] Further, the Ministry of External Affairs ("**MEA**") also plays a major role in the BIT negotiation and drafting process. The Economic Diplomacy Division of the MEA is responsible for the correspondence with other nations regarding BIT negotiations, by way of various diplomatic instruments such as note verbales etc.[147] The Legal and Treaties Division of the MEA provides authoritative legal opinions on provisions included in the BITs negotiated by India and also assists the Ministry of Finance in treaty negotiations and mounting defences against ISDS claims.[148] Further, the nodal points for handling ISDS disputes are inter-ministerial groups, which are chaired by officials from the relevant ministries to which the dispute pertains. These groups also include officials from the MEA and the Ministry of Finance.[149] Thus, one can observe at least three parallel tracks of decision-making when it comes to the negotiation and construction of BITs.

The above-mentioned institutional structures betray a lack of clarity and clearly defined allocation of responsibilities between various arms of the government, which in turn take contradictory positions in relation to investment protection measures and dispute resolution mechanisms. This is also evident from textual and cognitive dissonances between the Indian Model BIT, the active BITs, and FTAs.[150] One can also observe the lack of production of knowledge in the deliberations between the relevant committees of the Indian Parliament and the relevant government ministries. Identical observations are made by the committees and standard replies are given by the ministries. No effort by either party to bring about actual

[146] Prabhash Ranjan, 'Object and Purpose of Indian Investment Agreements: Failing to Balance Investment Protection and Regulatory Power' in Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution: Law and Practice in Asia* (Routledge 2011) 192.
[147] Committee on External Affairs (2020-2021), 17th Lok Sabha, *India and Bilateral Investment Treaties* (10th Report, 2021) para 1.18.
[148] ibid, para 1.19.
[149] Committee on External Affairs (n 147), para 2.6.
[150] Committee on External Affairs (n 147), para 4.7

changes in the Model BIT or India's investment policy.[151] On the other hand, in the US, the Office of the Assistant Legal Adviser and the US Trade Representative are the focal points for dealing with ISDS claims, and the construction and negotiation of BITs (*including the Model BITs*), respectively. Both institutions jointly coordinate the flow of inputs, both from within and outside the US government. While the US Trade Representative takes the lead on the negotiation of BITs and trade agreements containing investment chapters, the Assistant Legal Advisor's Office takes the lead in representing the US in all ISDS claims and justifies the current ISDS regime in the process.[152] Thus, investment treaty construction and negotiation is much more streamlined in the US, than in India, given two specialized institutions jointly control all US policy responses to IIL, and all negotiations pertaining to BITs.

Lack of Understanding of Signalling Effects

In the Global South, Model BITs have traditionally been considered mere "*photo opportunities*" or "*pieces of paper*" which politicians and ambassadors sign on overseas trips.[153] Government officials have systematically failed to appreciate that BITs are not just meant to convey positive collaborative signals to partner states, but also relay to foreign investors, the host state's willingness to accept the private enforcement of commitments made by them to secure capital. In other words, BITs are tools to "*codify and communicate the policy of investment promotion and protection.*"[154] They reveal the host state's proposals regarding the provisions which should be included in concluded BITs, to foreign investors and their home states. To illustrate, Italy drafted its Model BIT in English, without releasing an official version

[151] Committee on External Affairs (2021-2022), 17th Lok Sabha, *Action Taken by the Government on the Observations contained in the Tenth Report of the Committee on External Affairs on the subject 'India and Bilateral Investment Treaties'* (14th Report, 2022) para 1.18.
[152] Rebecca L. Katz, 'Modeling an International Investment Court After the World Trade Organization Dispute Settlement Body' (2016) 22 Harvard Negotiation Law Review 163, 169.
[153] Poulsen (n 114) 287, 289.
[154] Ranjan (n 123) 358.

in Italian.[155] Similarly, Argentina purportedly drafted its 1989 Model BIT to apprise capital-exporting nations of its newly promulgated investment liberalization policy, rather than bolster its bargaining power during negotiations.[156] These examples signify that the primary audiences were meant to be external actors intending to forge investment relations with the host state, rather than domestic actors. The creation of a Model BIT is one among multiple mechanisms (*enactment of local legislation, the efficacy of the host state's judiciary etc.*) which are employed to govern investment relations. BITs are attractive because they also function as confidence-building measures offering comfort to investors who seek to invest in jurisdictions that may have a history of political instability, internal policy contradictions, or ineffective judicial systems. As demonstrated in the first chapter, recent evolutions in the drafting of the definitions of 'investment,' standards of treatment of foreign investors, and dispute resolution mechanisms suggest that the Model BITs of emerging nations are converging on common policy preferences, which allows the nations to tightly control the treatment of foreign investors.

By way of introducing narrow conceptions of ISDS and standards of treatment in Model BITs, emerging nations are communicating to foreign investors a policy preference for the conservation of the sovereign's right to regulate and the dilution of traditional investment protection standards. In fact, an eminent jurist has postulated that South Africa's position of exercising restraint when it comes to the execution of BITs or Venezuela's outright rejection of IIL sends even stronger signals, regarding their stance against the primacy of ISDS, than the execution of BITs based on the SADC Model BIT, the Indian Model BIT etc.[157] A possible

[155] Federico Ortino, 'Italy' in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013) 321, 325.
[156] Facundo Pérez-Aznar, 'Bilateral Investment Treaty Overview – Argentina' in *Investment Claims* (Oxford University Press, 2016) A1.
[157] Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015) 362.

justification for refraining to communicate extremely strong signals may be to demonstrate continued engagement with ISDS, especially to protect the interests of capital exporters hailing from such nations. Even the Model BITs of developed nations presuppose the conservation of sovereign power to regulate, but not to the extent observed in the models of developing nations.[158] US and Canada started diluting the "*framework of absolute protection*" created for foreign investors, through their Model BITs in the early 2000s.[159] The US 2004 and 2012 Model BITs seek to preserve a carefully calibrated balance between strong investment protection measures and the preservation of sovereign regulatory space. These Model BITs were arguably drafted in response to the ever-increasing capital inflows from emerging economies such as China, India etc and ISDS claims against the US under the NAFTA.[160]

The BIT models of developing nations also profess the preservation of a carefully calibrated balance between investment protection and conservation of the host state's regulatory space.[161] However, one can notice tensions in the textual formulations and policy choices recorded in the Model BITs developed by India, Brazilian, and SADC Model BITs and the US, UK, and Canadian Model BITs. The Model BITs of the developed countries do not call for the establishment of "*significance for the development of the host state*" or "*long-term economic relations*" unlike their counterparts.[162] As demonstrated in the first chapter, the inclusion of such requirements circumscribe the scope of 'investment' by introducing the consideration of uncertain temporal and qualitative aspects. Further, the BIT models of developed nations largely prescribe international arbitral review as the preferred method of dispute settlement. In stark contrast, the Indian Model BIT's heavily qualified access to ISDS, the SADC Model BIT's clear preference for state-state dispute settlement, and the absence of ISDS altogether in

[158] Sornarajah (n 157) 351-352.
[159] ibid, 349.
[160] ibid.
[161] Indian Model BIT (n 16), Preamble; SADC Model BIT (n 27), Preamble; 2015 Model CFIA (n 64), Preamble.
[162] Article 1, US Model BIT; Article 1(a), U.K. Model BIT; Article 1, Canadian Model BIT.

the Brazilian CFIAs signify that these nations have practically renounced from the current ISDS system.

More specifically, about ISDS, none of the BITs of developed countries prescribe for the exhaustion of local remedies prior to the submission of an ISDS claim.[163] The need for the exhaustion of local remedies heavily qualifies access to ISDS by foreign investors and allows the domestic judiciary to determine the contours of the justiciability of the host state's right to regulate. Further, the inclusion of this requirement in the Model BITs of emerging nations betrays a failure by the draftsmen, to understand the larger context in which such a provision may be perceived by foreign investors. To illustrate, the White Industries Awards against India emanated from an inordinate delay by Indian courts to recognize and enforce an arbitral award that the claimant had obtained after initiating international commercial arbitration against an Indian company.[164] Hence, asking foreign investors to exhaust local remedies before a judicial system, which is infamous for its massive backlogs and untimely enforcement of contracts erodes any semblance of faith in the institutional structures established to protect and promote foreign establishment.[165] Therefore, such Model BITs do not strike any balance at all and function as confidence-reducing measures, instead of confidence-building measures, when it comes to foreign investors. It can be said that these instruments have failed to achieve the dual purposes of safeguarding foreign investment and conserving the domestic regulatory space, for which they were conceptualized.

To further contextualize the inherently negative signals that the conservative Model BITs of the Comparators are sending to foreign investors, one needs to be aware of the fact that such nations are not perceived to be the friendliest places on Earth for doing business. The "*ease of*

[163] Section B, US Model BIT; Article 8, U.K. Model BIT; Section E, Canadian Model BIT.
[164] White Industries Award (n 42).
[165] Pratik Dutta & Suyash Rai, 'How to Start Resolving the Indian Judiciary's Long-Running Case Backlog' (Carnegie Endowment for International Peace, 2021) <https://carnegieendowment.org/2021/09/09/how-to-start-resolving-indian-judiciary-s-long-running-case-backlog-pub-85296> accessed 4 June 2022.

doing business" rankings released by the World Bank support this. India's rank is 63 among 191 nations, while Brazil's rank is 124.[166] Further, certain members of the SADC such as the Democratic Republic of Congo, Angola, Zimbabwe, and Mozambique are ranked 183, 173, 140, and 138, respectively.[167] When it comes to critical parameters such as the enforcement of contracts and registration of property, which are key concerns for foreign investors, the rankings of the above-mentioned nations are even more abysmal.[168] Coupled with instances of radical policy decisions, such as the Indian government's decision to withdraw 86% of the total currency in circulation,[169] the promulgation of a new expropriations bill in South Africa[170] etc., the Model BITs exacerbate the atmosphere of regulatory uncertainty, which already exists in these jurisdictions. Such signals to foreign investors do not portend well for the inflow of foreign capital to these nations. In my view, it is extremely remote that any developed nation would enter into a BIT, based on the Model BITs proffered in the Global South.

Lack of interest in the Model BITs is also evident from the inability to actively execute BITs, which are based on their Model BITs. After the promulgation of the Indian Model BIT, India has only been able to sign BITs with four nations (*Brazil, Kyrgyzstan, Taiwan, and Belarus*) and release joint interpretative statements with Bangladesh and Columbia.[171] India has been unable to negotiate a BIT with any developed country/regional bloc, including the EU, the US, and the UK (*despite negotiations being conducted for a long time*). Both the EU and the US are squeamish about the Indian Model BIT's infructuous ISDS provisions and lack of MFN

[166] The World Bank, 'Ease of Doing Business rankings' (Doing Business Archive, 2019) <https://archive.doingbusiness.org/en/rankings> accessed 5 June 2022.
[167] ibid.
[168] ibid.
[169] Justin Rowlatt, 'Why India wiped out 86% of its cash overnight' (BBC News, 14 November 2016) <https://www.bbc.com/news/world-asia-india-37974423> accessed 5 June 2022.
[170] Staff Writer, 'New land expropriation laws for South Africa are coming' (BusinessTech, 15 February 2023) <https://businesstech.co.za/news/government/664969/new-land-expropriation-laws-for-south-africa-are coming/> accessed 5 June 2022.
[171] Committee on External Affairs (n 147) 2.

provisions.[172] Although Brazil has signed 12 BITs based on its Model CFIA, only 2 out of the 12 BITs are currently in force.[173] Further, most of the signatories are African and Latin American nations, which import capital from Brazil. Until the present day, none of the members of the SADC seem to have entered active BITs or launched their Model BITs, based on the SADC Model BIT, or adhere to the prescriptions made in its Commentary.

Lastly, nations like India and Brazil have become major exporters of capital. For 2021, Brazil's and India's foreign direct investment outflows were US$ 23,082.83 million and US$ 15,522.35, respectively.[174] Consequently, BITs and the nature of access to ISDS underscored by them, should become increasingly significant for investors established in such nations. This can be gauged from four significant ISDS claims involving Indian investors. In 2014, an Indian investor recovered €17.9 million in damages from Poland, under the India-Poland BIT. The arbitral tribunal held that Poland had expropriated the concerned investment and denied FET, by having illegally terminated a set of lease agreements granted in favor of the investor's indirect Polish subsidiary.[175] In 2015, an Indian mining corporation unsuccessfully sued Indonesia to recover US$ 599 million in damages, under the India-Indonesia BIT, after some regulatory issues arose regarding the corporation's coal mining permits.[176] In 2020, Indian investors sued North Macedonia and Mozambique, under India's BITs with the two nations, for alleged expropriation of concessions awarded for mining and construction, respectively.[177]

[172] Committee on External Affairs (n 147) 14-15, 31.
[173] UNCTAD Investment Policy Hub, 'Brazil – Bilateral Investment Treaties' (UNCTAD, 2023) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil> accessed 6 June 2022.
[174] UNCTAD STAT, 'India & Brazil – General Profiles' (UNCTAD, 2021) <https://unctadstat.unctad.org/countryprofile/generalprofile/en-gb/356/index.html> accessed 6 June 2022.
[175] *Flemingo Duty Free Shop Private Limited v. the Republic of Poland*, UNCITRAL, Award (12 August 2016).
[176] *Indian Metals & Ferro Alloys Limited (India) v. The Government of the Republic of Indonesia*, PCA Case No. 2015-40 (29 March 2019).
[177] *Patel Engineering Limited (India) v. The Republic of Mozambique*, PCA Case No. 2020-21, Notice of Arbitration (20 March 2020); UNCTAD Investment Policy Hub, 'Binani v. North Macedonia (II)' (UNCTAD, 2020) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1229/binani-v-north-macedonia-ii-> accessed 7 June 2022.

CONCLUSION

By way of this thesis, I have demonstrated that the Model BITs of India, Brazil, and SADC presuppose common policy preferences such as the promotion of narrow formulations of the concept of 'investment,' rejection of the standards of treatment traditionally accorded by host states to foreign investors, and the erection of lofty jurisdictional barriers for accessing ISDS. Such policy preferences are centred around the exercise of greater control by host states over the admission, expropriation, and private enforcement of BIT obligations. Thereafter, I have demonstrated that the origins of these common policy preferences can be traced back to the various bureaucratic and institutional constraints afflicting the BIT programmes of the Global South as a whole. These constraints can be broadly categorized as knee-jerk reactions to adverse arbitral awards by the bureaucracies tasked with the creation of such Model BITs, the dearth of domestic expertise and the consequent reliance on foreign resources, the paradoxical decision-making structures among different government departments, and a failure to appreciate the negative signals being sent to foreign investors in terms of the openness of the developing nations' investment regimes.

Therefore, I conclude by drawing attention to the development of capacity and expertise amongst the bureaucracies of the developing nations, as the biggest challenge faced by the Global South, when it comes to the construction and proliferation of their Model BITs as effective counter-models to the Models BITs created in the Global North. Development of domestic capacity and expertise is an intrinsic part of the legitimacy of IIL since a state's ability to comprehend BIT commitments, launch effective defences against ISDS claims, and influence the development of investment law principles ultimately affects how positively it perceives the actions and reactions of other stakeholders in the world of IIL.[178] Developing

[178] Sharpe (n 111) 65.

nations should eschew their anxieties evident in the creation of inherently conservative Model BITs and seek to build up domestic resources, for strategically employing the "*textual open-mindedness*" of BIT provisions beyond individual disputes, and proactively striking a fair balance between the conservation of regulatory space and protection of foreign investors and their investments. Formation of singular specialized institutions tasked with spearheading BIT programmes and coordinating inputs from all relevant stakeholders, gradually building up in-house capacity through the recruitment of specialist lawyers, and, preventing high turnovers of government officials working in BIT programmes, may go a long way in the diffusion of expertise and building up institutional memory in the sphere of BIT construction and negotiation.

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