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ARTICLE

Tussle for policy space in international investment norm setting: The search for a middle path?

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Abstract The issue of international investment norm making has been the subject of considerable discussion and debate. The steady growth of bilateral investment treaties (BITs) along with investment norm setting in large mega regional trade agreements combined with recurring investor state disputes under these agreements bring out the growing relevance of this area of international economic law. States have begun to realise the importance of balancing their policy objectives with the rights of investors. Some of these approaches include the right to regulate provisions, increasing obligations on investors, departing from the original Investor-State dispute resolution mechanisms, etc. These approaches can be seen in the Trans-Pacific Partnership, the European Union proposal in the Trans-Atlantic Trade and Investment Partnership, Indian Model BIT, China–Australia Free Trade Agreement, and the Brazilian Co-operation and Investment Facilitation Agreements, which are the focus of the article. This article shows varying approaches and narratives on some of the core issues involved in investment disciplines and asks the question if there is a middle path in international investment norm making.

Keywords International investment law · Policy space · Regulatory space in international investment agreements · Investor obligations · FET

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1 Introduction

The issue of international investment norm[1] making has been the subject of considerable discussion and debate. Being viewed both as a *sine qua non* for attracting foreign investment as well as a serious encroachment on state sovereignty, it has die-hard supporters as well as bitter critics. Nevertheless, the steady growth of Bilateral Investment Treaties (BITs) along with investment norm setting in large mega-regional trade agreements combined with recurring investor state disputes under these agreements bring out the growing relevance of this area of international economic law. While the proliferation of BITs has been extensively studied, investor state disputes[2] under these agreements rekindle the debate surrounding the need for reform of these treaties. International Investment Agreements[3] (IIAs) have a diversified norm-setting context from purely bilateral arrangements to mega-regional partnerships. The diversified nature is not only in terms of the form but also in terms of approaches and understanding of what constitutes a balance between investor rights and state sovereignty.

The World Investment Report 2016 (WIR 2016)[4] of the United Nations Conference on Trade and Development (UNCTAD) notes that at the end of 2015 there were a total of 2946 BITs in operation. These treaties were entered into both by developed and developing countries. Along with the numerous overlapping bilateral agreements, mega-regional trade agreements have also attempted to shape global norms in various spheres including investment. The conclusion of negotiations of the Trans-Pacific Partnership (TPP), the on-going Trans-Atlantic Trade and Investment Partnership (TTIP) and Regional Comprehensive Economic Partnership (RCEP) negotiations, all with substantial investment chapters, highlight the importance of international investment law making in the context of comprehensive trade agreements. Further, a number of countries are revising their model BITs based on experience gained over the years as well as learning from experiences of third countries. This has led to model texts that are proposed to be used for future investment negotiations.

Within the international investment regime, Investor-State Dispute Settlement (ISDS) has specifically been a source of constant debate and criticism. Such investment agreements usually have a provision for investors to stake a claim directly against the host state thus providing a direct access to adjudication to safeguard investments from alleged discriminatory state action. While opposition to ISDS ranges from outright rejection to the need for reform, international investment norm setting has shown various strands of approaches on dispute resolution.

[1] By international investment norm making we refer to disciplines covering investment in bilateral investment treaties, investment chapters of bilateral or plurilateral trade agreements and multilateral investment rule making.

[2] There have been six hundred and ninety six ISDS claims until 2015 involving hundred and seven respondent states.

[3] International Investment Agreements may take the form of Bilateral Investment treaties or investment chapters of free trade agreements.

[4] UNCTAD, *World Investment Report, 2016: Investor Nationality and Policy Changes* (2016), Sales No. E.16.II.D.4 [hereinafter UNCTAD Report].

Investment norm setting in the multilateral setting has not received as much traction as other areas like intellectual property or government procurement. Trade and investment issues had been discussed in the context of the World Trade Organization (WTO). However, no outcome on disciplines have taken place. The Organization of Economic Co-operation and Development (OECD) and UNCTAD also occupy the international space in discussing and providing inputs on investment promotion, facilitation and policy making. However, there is no clarity on what scope or character a multilateral investment agreement should take, even though there have been calls for a Multilateral Investment Agreement (MIA).[5] There lack of clarity on the need for such multilateral disciplines, the appropriate forum that has to house it as well as the content of any such initiative.

IIAs have been seen as a major tool for boosting investment and promoting a stable investment climate in countries seeking to encourage foreign investment. IIAs are viewed as providing an assurance to foreign investors of a minimum level of protection and application of the rule of law to their investments against arbitrary state actions. A strong investment protection framework is positioned as a fundamental requirement to induce foreign investment. It is used as a mechanism to encourage, promote and protect investments, reducing both the risks and costs of investing abroad.[6]

It is evident that there is a legitimacy crisis that international investment discipline making is facing over the years. This stems from the fear that such agreements severely restrict the state's authority to regulate various legitimate policy objectives. It is viewed as an infringement of state sovereignty wherein the state's power to make laws and regulations in the interests of health, environment and other objectives may be curtailed by investors challenging such measures. In addition, the direct avenue of private foreign investors to challenge measures in international tribunals against the state is also viewed as being an infringement of state sovereignty when such similar avenues are not provided to domestic investors. ISDS is being seriously questioned not only in terms of state sovereignty but also in terms of the nature of the process itself. It is a manifestation of the friction between a state's economic obligations to investors and their investments *vis a vis* its obligations to govern and regulate various aspects of economic and social well being. The issue of conceding regulatory space to arbitral tribunals and foreign investors as well as the threat of regulatory chill is often heard in policy circles in relation to these agreements. This has led to the debate for striking a better balance between investor's rights and state's obligations under such agreements.[7] What that balance is and how it is achieved is open to debate and experimentation.

Strikingly, there is both an increase in engagement as well as sparks of disengagement in investment norm making over the past few years. In 2016 itself, there

[5] Anders Aslund, *The World Needs a Multilateral Investment Agreement*, PETERSON INST. INT'L ECON. (2013), https://piie.com/publications/policy-briefs/world-needs-multilateral-investment-agreement.

[6] Rodolphe Desbordes, *Foreign Direct Investment and Bilateral Investment Treaties: An International Political Perspective*, 37 J. COMP. ECON. 373 (2009).

[7] Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 OXFORD J. INT'L ECON. L. 1042 (2010).

were twenty new BITs signed by countries.[8] The year 2015 has also seen major draft models from India and the European Union (EU). The Trans Pacific Partnership's (TPP) investment chapter is also seen as a major watershed in evolving a "gold standard" in investment rule making.

Resentment with the system and reaction to state's regulatory power being fettered has also erupted in varying ways. Withdrawal from the ISDS has been one such approach. The spark was ignited after Bolivia, Venezuela and Argentina withdrew their consent from the International Centre for Settlement of Investment Disputes (ICSID). states have been sued under the ISDS for taking policy measures that seek to put an end to hazardous chemical manufacturing plants,[9] deny permission for setting up nuclear reactors and for plain packaging of cigarettes.[10] The development of an alternative state-to-state dispute settlement approach has been viewed as another way of questioning the legitimacy of the ISDS.

Evidence of countries leaving the ISDS mechanism is used to argue that governments believe that investment arbitration is a threat to their right to regulate and leads to a state of "regulatory chill". This claim is supported by evidence from countries like South Africa[11] that terminated BITs with Belgium, Luxemburg and Germany. Additionally, Indonesia[12] decided to terminate sixty of its existing BITs with the UK, China and Singapore, amongst others. This regulatory chill is seen as not only a result of states losing in ISDS (as they have prevailed more often that they have lost), but from the irregularities in the decision making by arbitral tribunals. This structural damage to the legitimacy[13] of these tribunals has also led to a rethink. However, there exists a view contrary to this argument, which purports that the very nature of international law is that it curbs the sovereignty of nations. There is no doubt a convention creating an obligation places a restriction on the exercise of the sovereign rights of that state, in the sense that it requires them to be exercised in a certain way. However, the right to enter into such international engagements that restrict policy space is in itself an attribute of state sovereignty.[14]

The challenges of achieving a balance between investor rights and state sovereignty have been met, to varying degrees (consciously and unconsciously), by adopting divergent approaches to rule making in international investment law.

[8] UNCTAD Report, *supra* note 4, at 20.

[9] *Dow AgroSciences LLC v. Government of Canada*, Settlement Agreement, ¶ 3.

[10] *Philip Morris Brand Sarl v. Uruguay*, ICSID Case No ARB/10/7, Decision on Jurisdiction (July 2, 2013), ¶ 201.

[11] *South Africa Terminates its Bilateral Investment Treaty With Spain: Second BIT Terminated, as Part of South Africa's Planned Review of its Investment Treaties*, HSF ARB. NOTES (Aug. 21, 2013), http://hsfnotes.com/arbitration/2013/08/21/south-africa-terminates-its-bilateral-investment-treaty-with-spain-second-bit-terminated-as-part-of-south-africas-planned-review-of-its-investment-treaties/.

[12] Luke Eric Peterson, *Indonesia Ramps Up Termination of Bits—And Kills Survival Clause in One Such Treaty—But Faces New $600 Mil. Claim From Indian Mining Investor,* BILATERALS.ORG (Dec. 7, 2015), http://bilaterals.org/?indonesia-ramps-up-termination-of.

[13] Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005).

[14] Christian Tietje & Freya Baetens, *The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership*, 45 MINISTRY OF FOREIGN AFFAIRS, THE NETHERLANDS, Ref: MINBUZA-2014.78850 (2014).

These are reflected not only in substantive provisions that deal with investment protection but also in procedures involving dispute settlement. The last two years especially have seen a radical shift in approaches that warrant special attention.

A significant number of states have recognised the need to address the legitimacy challenge of the system through both substantive and procedural innovations. It remains to be seen if the recent approaches achieve the objective of saving the international investment law regime from the legitimacy crisis it currently experiences.[15]

2 Objectives and methodology of this paper

The objective of this paper is to analyse key developments in some major initiatives on international investment norm setting that have taken place during the last couple of years that provide a possible narrative of differing approaches to address the question of regulatory space in investment law. The paper will look at recent investment rule setting (either agreements in force, agreements yet to be ratified, model texts or textual proposals) to categorise broad approaches that different countries have taken with respect to some of the questions of legitimacy that have arisen in the context of investment norm setting. Based on this analysis, the paper raises the question whether there is a middle path approach of addressing the regulatory deficit with appropriate provisions as reflected in these diverse approaches. The analysis of these provisions has been done in the context of the policy space debate that has engulfed investment norm setting more generally. The following agreements are analysed in this article.

2.1 The investment chapter of the Trans-Pacific Partnership (TPP)[16]

The TPP is a regional free trade agreement with Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore, the United States and Vietnam as parties. These negotiations concluded on October 6, 2015. The agreement is yet to enter into force at the time of writing this piece. The TPP is a trade agreement having 30 chapters covering areas ranging from the traditional areas of market access for goods, rules of origin services, trade remedies, intellectual property, cross border services, investment, sanitary and phytosanitary measures to emerging areas like small and medium enterprises, electronic commerce, development, labour and State-Owned Enterprises. The pact aims to deepen economic ties between these nations, slashing tariffs and fostering trade to boost growth. Member countries are also hoping to foster a closer relationship on economic policies and regulation.[17]

[15] *Dow AgroSciences LLC v. Government of Canada*, Settlement Agreement.

[16] *Trans-Pacific Partnership Agreement,* Office of the United States Trade Representative, Chapter 9, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text [hereinafter TPP].

[17] *BBC News, TPP: What is it and Why Does it Matter?*, BBC NEWS (July 27, 2016), http://www.bbc.com/news/business-32498715.

2.2 The European Union (EU) textual proposal on investment in the Trans-Atlantic Trade and Investment Partnership (TTIP)[18]

The TTIP is a proposed trade agreement between the EU and the United States. It is still under negotiation. The EU has proposed, inter alia, an investment chapter, which is under consideration in this analysis. The EU proposal on Investment in the TTIP negotiations is the EU's initial proposal for legal text on investment in TTIP. They are tabled for discussion with the United States in negotiating rounds. The actual text in the final agreement will be a result of negotiations between the EU and US.

2.3 The model Indian Bilateral Investment Treaty (Indian BIT)[19]

The model Indian BIT was finalised in December 2015. The Indian model text is intended to replace the existing Indian Model BIT. The revised model BIT is also proposed to be used for re-negotiation of existing BITs and negotiation of future BITs and investment chapters in Comprehensive Economic Cooperation Agreements (CECAs)/Comprehensive Economic Partnership Agreements (CEPAs)/Free Trade Agreements (FTAs) that India engages in.[20]

2.4 The Brazil Mozambique Co-operation and Investment Facilitation Agreement[21] and Brazil Angola Co-operation and Investment Facilitation Agreement (CIFA)[22]

Brazil and Mozambique signed on March 30, 2015 the first Cooperation and Investment Facilitation Agreement (CIFA) based on Brazil's new model bilateral investment treaty (BIT). The second was signed on April 1, 2015 between Brazil and Angola. Unlike traditional BITs, which are geared towards investor protection, the CIFAs focus primarily on cooperation and investment facilitation. They promote amicable ways to settle disputes and propose state–state dispute settlement and do not include provisions on investor–state arbitration.

[18] *Transatlantic Trade and Investment Partnership*, EUROPEAN COMMISSION, DIRECTOR GENERAL OF TRADE, http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf [hereinafter TTIP].

[19] *Model Text for the Indian Bilateral Investment Treaty*, GOVERNMENT OF INDIA, https://www.mygov.in/sites/default/files/master_image/model text for the indian bilateral investment treaty.pdf. [hereinafter Indian BIT].

[20] *Id.*

[21] Press Release 99: *Brazil-Mozambique Cooperation and Investment Facilitation Agreement (CIFA)*, MINISTRY OF FOREIGN AFFAIRS (Mar. 30, 2015), http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=8511&catid=42&Itemid=280&lang=pt-BR [hereinafter Brazil-Mozambique CIFA].

[22] Press Release 104: *Brazil-Angola Cooperation and Investment Facilitation Agreement (CIFA)*, MINISTRY OF FOREIGN AFFAIRS (Apr. 1, 2015), http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=8520:acordo-brasil-angola-de-cooperacao-e-facilitacao-de-investimentos-acfi-luanda-1-de-abril-de-2015&catid=42&lang=pt-BR&Itemid=280 [hereinafter Brazil-Angola CIFA].

2.5 The investment chapter of the China Australia Free Trade Agreement (CHAFTA)[23]

Australia and China entered into a bilateral free trade agreement which came into force in December 2015. The agreement covers investment. The analysis of key substantive and procedural provisions in these agreements, models and proposals would be made in the context of juxtapositioning different approaches to investment rule making in order to present a better understanding of positions that countries envision. The next section examines the above agreements, models and proposals in greater detail with respect to certain provisions that signify the tension between the state's right to regulate on policy objectives and investor rights. It also analyses the dispute settlement provisions that have a bearing on this debate.

3 Policy space and investment norm setting: an analysis of some recent developments

This section would analyse key provisions in agreement/investment chapters/proposals/model texts outlined in the previous section that reflect various approaches to address the question of state's regulatory power *vis a vis* investor's rights. The policy space debate is analysed through the prism of a set of provisions[24] with a view to lay down the diversity of approaches and understandings that exist in these texts.

3.1 Preamble and specific provisions relating to the right to regulate for legitimate policy objectives

The first arsenal in the hands of the states is the preamble of a treaty. Preambular clauses aim to ensure that the objectives of the treaty include the protection and conservation of the state's policy space. However, when compared to the substantial articles of the IIAs, the preamble normally may not have much weight in terms of treaty interpretation. Therefore, when two provisions conflict, it is not necessary that the preambular clause would supersede the conflicting clause in the substantive part of the IIA.[25]

Article 31(2) of the Vienna Convention on the Law of Treaties (VCLT) states that context for the purpose of interpretation of a treaty shall comprise, inter alia, of the preamble. However, it does not clearly mention whether a preambulatory clause can supersede another operative clause in the treaty. Tribunals in the past have interpreted the preambulatory clauses in a narrow and cautious manner. Their

[23] *China Australia Free Trade Agreement*, DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, (Dec. 15, 2015), http://dfat.gov.au/trade/agreements/chafta/official-documents/Documents/chafta-agreement-text.pdf [hereinafter CHAFTA].

[24] Substantive provisions include the right to regulation, the definition of Investment, fair and equitable treatment provision, general exception provisions, Investor Obligations and Dispute Settlement.

[25] Christina L. Beharry, *Going Green: Managing the Environment Through International Investment Arbitration*, 30 AM. U. INT'L L. REV. 383 (2015).

justification for it stems from the poor drafting associated with the preamble and thus they conclude that the preamble makes little contribution in deciphering the objects of the treaty.[26] It was noted by the Tribunal in *Philip Morris* v. *Republic of Uruguay* that:

> the reference in the Preamble…appears too general to permit the drawing of definitive conclusions regarding the need for the investment to contribute to the host state's economic development.[27]

Due to growing concerns threatening the right of states to regulate aspects related environment, public health and other objectives, states are re-inventing their approach to IIAs. The IIAs seek to carve out policy spaces for the states, either through the preamble, or through devoting specific articles of the IIAs for such a purpose. For example, the model Indian BIT in its preamble carves out a potentially huge policy space for the Government. The preamble reads "[r]eaffirming the right of arties to regulate investments in their territory in accordance with their law and policy objectives".[28] This does not refer to any particular policy objective field but a general principle of prevalence of a state's policy objective in accordance with domestic law and objectives.

In contrast, the TPP does not have any preambular language pertaining to legitimate policy objectives. It nevertheless has a specific provision dealing with regulatory space. Article 9.15 of the Investment Chapter of the TPP titled "Investment and Environmental, Health and other Regulatory Objectives" states that:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.

Thus, TPP states can regulate if the said measure relates to "environmental, health or other regulatory objectives". However, the measure cannot be inconsistent with other provisions of that chapter.

Another approach can be deciphered by looking at the provisions in the EU TTIP proposal[29] relating to regulatory objectives. Article 2.1 and 2.2 stand out in this regard envisioning the right to regulate. Article 2.1 states that the provisions relating to investment protection in the agreement shall not affect the right of the parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of "public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural

[26] Aditya Vora, *Environmental Disputes in Investor-State Arbitration—A Need for Change*, 46 ENVT'L. POL'Y. & L. 134 (2016).

[27] *Philip Morris Brand Sarl v. Uruguay*, ICSID Case No ARB/10/7, Decision on Jurisdiction, (July 2, 2013), ¶ 201.

[28] Indian BIT, *supra* note 19, at Preamble.

[29] TTIP, *supra* note 18.

diversity". Thus, there is a wider sway of public policy objectives with an inclusive definition of what constitutes legitimate policy objectives. Article 2.2 further elaborates that there is no commitment from a state party to the agreement not to change the legal or regulatory framework including in a manner that may negatively affect the operation of covered investments or the investor's expectations of profits. Thus, the interpretation and import of various provisions related to investment protection would not imply that the state party cannot change its regulatory or legal frameworks even to the extent of negatively effecting a covered investment. This is a significant provision in the context of policy space and the right to make changes to regulatory framework.

The CHAFTA Investment chapter neither has a preambular mandate for legitimate regulatory objectives nor specific provisions in respect of policy objectives apart from the General Exception clause that will be discussed later.

The Brazilian-Mozambique CIFA has preambular language that recognises the need for regulatory space. It reaffirms the Parties legislative autonomy and public policy space. How it will play out in dispute settlement is debatable. A generic recognition pitted against a specific violation of an obligation under the agreement may assume lesser significance. Considering the overall objective and structure of the Brazilian CIFA to facilitate investment and co-operation rather than investment protection, the lack of specific provisions on regulatory space is perhaps understandable and less damaging.

We see both preambular and specific provisions that seek to address the concern of legitimate policy space reflecting the tension between state sovereignty and investor rights under the agreement. Depending on what policy objectives countries negotiating wish to achieve with the IIA in relation to their investment strategy, the clauses move from the general to the specific in creating policy space. Therefore, the Indian BIT comparatively creates a huge policy space for the government, whereas CHAFTA has no such clauses in the Agreement.

3.2 Definition of investment

The definition of the term "investment" in IIAs is critical in understanding the tussle for policy space and the right to regulate. The definition of investment goes to the heart of a treaty by addressing what is protected by the treaty. The definition largely determines the scope of the protection available in terms of the forms of interests that are protected and the extent to which the state party would be liable in terms of an arbitration claim. Again, there are no uniform approaches in defining what an investment means in these agreements, models and proposals.

The definition of "investment" in the Indian Model BIT, departs from previous definitions adopted in already concluded BITs India has signed. The 2015 Model has an "enterprise-based" definition of investment rather than the broader "asset-based" definition. The "enterprise-based" approach to defining investment is adopted to narrow the scope of investments and likewise to seek to reduce the possibility of claims by reducing the investors covered under the Model. "Investment" is defined under the Indian Model BIT as an "enterprise" that is "constituted, organised and operated in good faith by an investor". "Enterprise" is

designated as "any legal entity constituted, organised and operated in compliance with the law of a Party, including any company, corporation, limited liability partnership or a joint venture". Such an enterprise has to have assets having

> "characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for the development of the party in whose territory the investment is made".

Thus, only foreign enterprises legally constituted in India can bring a BIT claim. However, assets held by the foreign enterprise have been included in the definition of investment.[30]

Traditionally, Indian BITs have used an asset-based definition of investment. This can cover a virtually unlimited range of assets such as portfolio investments, debts and loans, immovable and movable property, intellectual property rights and other rights. An asset-based definition has been the subject of multiple controversies in the past as every kind of asset, irrespective of its size and value, has been provided the protection of a treaty. To overcome these limitations an enterprise-based definition of investment has been incorporated. It has been argued[31] that the model also aligns the investment treaty regime with the global regime on Foreign Direct Investment (FDI) and reflects the objective of establishing a lasting interest by a resident enterprise. The definition further has clear exceptions. It does not include: (i) "portfolio investments",[32] (ii) "pre-operational expenditure", (iii) "goodwill, brand value, market share", (iv) claims of money arising solely from "extension of credit in connection", (v) "an order or judgment sought or entered in any judicial, administrative or arbitral proceeding" and a broad overarching clause that (vi) "any other claims to money that do not involve the kind of interests or operations set out in the definition of investment in this Treaty".

This "enterprise" based definition is in contrast to the "asset" based definition found in all other agreements, models and proposals under study here. The CHAFTA, EU TTIP proposal, TPP and the Brazil–Mozambique BIT have "asset-based" definitions of investment. There is no prerequisite of an investment to satisfy the definition of an enterprise. In fact, an enterprise is one of the forms of an asset in this definition. The asset-based definition covers a wider canvas and does not limit the scope of the protection to enterprises that are established in the host state. Protection-oriented IIAs that seek to safeguard the interests of the investors or

[30] Prabhash Ranjan, *India Seeks Protection With New Model Bilateral Investment Treaty*, THE WIRE (Feb. 26, 2016), http://thewire.in/22423/india-seeks-protection-with-new-model-bilateral-investment-treaty/.

[31] Saurabh Garg, et al., *The Indian Model Bilateral Investment Treaty: Continuity and Change, in* RETHINKING BILATERAL INVESTMENT TREATIES: CRITICAL ISSUES AND POLICY CHOICES 78 (Kavaljit Singh et. al. eds., 2016).

[32] This rather long definition of investment has been made to reduce the claims to only those investors who are contributing to the Indian economy. As if an Investor has made an investment into the shares of a company, that he owns or controls, the Investor would have significant interest in that said company and would want it to make profits. He/she would hire employees and train them, leading to human resource development of the Indian workforce. This attitude of the Investor would be in stark contrast if he/she were merely a Portfolio Investor wanting to make money on a short-term basis.

promote foreign investment by safeguarding investors' rights tend to adopt the asset-based definition of investment. As already noted, the broad asset-based definition is dominant in the vast majority of IIAs and has been subject of significant arbitral interpretation. The TPP states that investment includes "every asset that that an investor owns or controls",[33] suggesting that the term embraces everything of economic value, virtually without limitation.

Lastly, a novel approach has been taken in the Brazil-Angola BIT is by not defining investment it at all. Article 3 of the BIT states that "for the purposes of this Agreement, the definitions of investment, investor and other definitions inherent to this subject matter will be regulated by the respective laws of the parties".

In terms of policy space, the enterprise based definition and asset based definition are on either side of the pendulum, made to either indicate a willingness to engage with a broader asset based definition or to indicate a reticence to allow an umbrella definition by adopting an enterprise based definition, perhaps to curb avoidable litigation.

3.3 Fair and equitable treatment provision

Another shift in the recent trend of IIAs has been in defining investment protections under the fair and equitable treatment (FET) standard. IIAs ensure investors FET, however, they barely explain the meaning of the term.[34] As most IIAs were silent on the definition, it was left to the arbitral panels to decide what constituted a denial of FET. It soon became the most frequently invoked provision in ISDS. This led to complicated cases and has subsequently led to express clarifications from the states on the meaning of the term.[35] The scope and definition of FET clauses has been the subject matter of debate, specifically whether it's meaning should be restricted to the customary international law standard or whether the term has a broader, autonomous meaning.[36] As a consequence, this has an implication for the policy space debate.

The TPP's FET provisions mirror the 2012 US Model BIT.[37] Article 9.6 states that each TPP Party shall accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security. It suggests that foreign investors would be accorded no less favourable treatment in accordance with the "minimum standard of treatment" under customary international law.[38] It has been argued that there is a material difference between the present "minimum standard of treatment" under the TPP (a different version of the same is also included in the

[33] TPP, *supra* note 16, Article 9.1.

[34] *Id.*, Article 9.6.

[35] TTIP, *supra* note 18, Article 3.

[36] UNCTAD, *Fair and Equitable Treatment Series on Issues in International Investment Agreements* 7 (2012).

[37] *U.S. Model Bilateral Investment Treaty*, UNITED STATES TRADE REPRESENTATIVE (2012), Articles 5.1, 5.2, 5.3. https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

[38] TPP, *supra* note 16, Article 9.6(2).

Indian Model BIT) and the autonomous, undefined version of FET standard. Efforts to define FET standard in terms of the "minimum standard treatment" may still reflect the will of the TPP signatories to narrow the scope of the FET standard. Article 9.6(4) of the TPP also, for "greater certainty", states that merely because a host state's act or omission is "inconsistent with an investor's expectations", it does not constitute a violation of the standard, "even if there is loss or damage to the covered investment as a result". This is an additional caveat that strengthens the state's capacity to act in a regulatory context overcoming the legitimate expectations of the investor, the violation of which could have been an abrogation of the FET standard in the normal course.

The E.U.'s proposal for the text of the TTIP takes a new approach to FET. It builds on from other BITs to provide instances[39] when there would be a breach of FET. Denial of justice, fundamental breach of due process, manifest arbitrariness, targeted discrimination, harassment or coercion have been listed as constituting a breach of the FET obligation. This limits the scope of the arbitral tribunal to determine what constitutes a violation of the FET standard while at the same time providing a number of circumstances under which state action could be questioned.

It is interesting to note that the Indian Model BIT does not refer to the FET standard. The justification for doing away with the clause *per se* is to provide no interpretative discretion to the tribunals. The FET clause was replaced by a narrower "standard of treatment" clause, which refers to measures which amount to "violation of customary international law". Thus, Article 3.1 of the Indian BIT seeks to replace the FET standard with the customary international law standard of protection and an exhaustive list of circumstances through which this violation occurs. The circumstances are evidently narrower than the EU TTIP proposal. The visible change that can be seen is the removal of the protection of investors' legitimate expectations, which is widely viewed as fundamental to the FET standard. The Model BIT seeks to limit investors' protection to particular and defined breaches of customary international law and to guard itself against any frivolous and long shot claims relying on the expansive interpretations of the FET standard and violations of customary international law. Thus, it is evident that there are varying forms of FET provisions in the above analysis that reflects the emerging thinking on restricting the impact of the omnibus clause on investment protection. However, it still remains to be seen as to how these provisions would be interpreted by the tribunals. Textual drafting could address ambiguities to a large extent. However, interpretation of provisions in particular fact situations carry with them uncertainties of their own.

3.4 General exceptions

General exception clauses are the overarching clauses that provide rights to the state parties to regulate irrespective of the provisions of the treaty. They are viewed as a major source of preserving state regulatory power and autonomy. Many general exception clauses in IIAs are modelled after the General Agreement on Tariffs and

[39] TTIP, *supra* note 18, Article 3(2).

Trade (GATT) Article XX exceptions. This usually centers on key policy objectives. Thus, rather than directing the tribunal in the preamble to balance the competing rights of the investor against social and environmental protection, exception clauses exclude regulations entirely from the agreement's coverage.

General exceptions exempt measures taken by the government that are designed to protect "public order" or to "protect human, animal, or plant life or health". The measure must also be necessary, relating to, or 'designed and applied' to achieve the policy objective. These principles emerge from WTO jurisprudence. The WTO Appellate Body has in *EC-Seal* case,[40] stated that a measure that aims to be exempted has to prove that it not only meets the substantial nexus of protection to "human, animal or plant life", etc. but also is non-discriminatory. Additionally, WTO jurisprudence mandates that any such measure taken must also be "necessary" to achieve its stated purposes. The WTO Appellate Body has held that the measure be so effective that without it the object cannot be achieved.[41] The TTIP, CHAFTA and the Indian BIT make use of such general exception articles to ensure that the governments can pursue legitimate public policy measures that are non-discriminatory and not a disguised restriction on trade.[42] The EU TTIP provides exceptions for measures that are necessary to protect public security, public order, human, animal or plant life or health, conservation of exhaustible natural resources and conservation of national treasures that are of artistic, historic or archaeological value. These exception clauses also help counteract the harm caused by regulatory chill. The TPP, however, does not incorporate all the exceptions as stipulated under Article XX of the GATT 1994. It restricts the exceptions to protection of "environmental, health and other regulatory objectives" that would be outside the scope of the ISDS. Thus, general exceptions clause can be viewed as another tool of regulatory space that states have in investment norm making. However, it does not provide a blanket cheque to engage in any kind of action that can be justified. Whether general exceptions could be truly considered to be a newfound policy tool for regulatory sovereignty is still debatable.

3.5 Investor obligations: corporate social responsibility

The rationale for investor obligations in investment agreements stem from the view that investment agreements tend to tilt the balance in favour of foreign investors. IIAs tend to be asymmetrical in nature, establishing a range of protections for investors while placing significant obligations on states.[43] Reform of the traditional model to provide for inclusion of investor obligations has been highlighted as a means of correcting this asymmetry, promoting compliance with host state's laws,

[40] WTO Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/AB/R (adopted July 22, 2011) ¶ 5.101.

[41] WTO Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc. WT/DS161/AB/R (adopted Jan. 10, 2001), ¶ 161.

[42] Indian BIT, *supra* note 19, at Article 32, Indian BIT; CHAFTA, *supra* note 23, at Article 9.8; TTIP, *supra* note 18, at Article 2.

[43] UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (2015), Sales No. E.15.II.D.5, 158.

and encouraging responsible investment that contributes to sustainable development.[44] Increased consensus on the responsibility of investors to respect human rights and conduct business in a responsible manner is evident in the proliferation of soft law standards that address these issues.[45]

The Indian Model BIT has created a new benchmark in this sense as it includes both positive and negative binding obligations relating to corruption, corporate social responsibility and human rights. Article 12[46] of the Indian BIT lays out the ambit of corporate social responsibility expected from foreign investors. There is a positive obligation to endeavour to incorporate internationally recognised standards in areas such as labour, environment, human rights, community relations and anti-corruption. What these standards are and to what extent they need to be incorporated are unclear. Corporate Social Responsibility (CSR) has not been defined in the Indian BIT. Most notably, Article 13.4[47] of the Indian BIT bars a claim to arbitration under the dispute settlement system if corruption or similar illegal mechanisms have been used to make the investment. From an Indian perspective, it has been stated that[48] investment treaties are not just instruments of investor protection, but also a valid tool to promote development goals, transparency in corporate dealings and prevent unethical business practices. The provisions on investor obligations require foreign investors to comply with domestic laws on corruption, disclosures and transparency. Having these objectives is seen as an affirmation of the principle that IIAs can serve as a tool for incentivizing good corporate conduct. It also opens the vistas for reciprocal obligations on the investor.

The TPP also has best endeavour provisions referring to CSR. Article 9.16 reaffirms the importance in encouraging enterprises to:

> voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that party.

Thus, the obligations is on the state party to encourage its enterprises operating within its territory to 'voluntarily' incorporate principles of CSR that have been endorsed by that state party. The EU proposal on TTIP and CHAFTA, surprisingly, have no provisions relating to investor obligations.

[44] *Id.*, at159.

[45] UN Human Rights Council (HRC), *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, in* GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK (2011), UN Doc. HR/PUB/11/04.

[46] "Investors and their enterprises operating within its territory of each Party shall endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles may address issues such as labour, the environment, human rights, community relations and anti-corruption."

[47] Indian BIT, *supra* note 19, Article 13.4: "An investor may not submit a claim to arbitration under this Chapter if the investment has been made through fraudulent misrepresentation, concealment, corruption, money laundering or conduct amounting to an abuse of process or similar illegal mechanisms".

[48] TTIP, *supra* note 18.

On the other hand, provisions dealing with CSR are prominently found in the Brazil-Mozambique BIT and Brazil Angola BIT. Article 10 of the Brazil Mozambique BIT states that "the investors and their investments shall strive to carry out the highest level possible of contributions to the sustainable development of the host state and the local community". Under Annex-II, the Brazil-Mozambique BIT makes reference to a detailed list of what these voluntary principles and standards are, in contrast to vaguely defined and unreferenced principles in other agreements.

Annex II of the Brazil Mozambique BIT lists out eleven principles of conduct that are expected of investors under the BIT. The investors and their investments are expected to employ their best efforts to comply with a responsible business conduct and in accordance with the laws adopted by the state party hosting the investment. They cover areas of sustainable development,[49] human rights,[50] strengthening local capacities,[51] creating job opportunities,[52] abstaining from seeking undue exemptions,[53] developing good practices in corporate governance,[54] practices for mutual trust between enterprises and societies,[55] worker awareness through professional capacity building programmes,[56] abstaining from discriminatory or disciplinary action against workers in certain circumstances,[57] encouraging business partners to follow the same principles set out above[58] and respecting local political processes.[59]

[49] Brazil-Mozambique CIFA, *supra* note 21, at Annex II: "Incentivizing economic, social and environmental progress with the aim of achieving sustainable development".

[50] Brazil-Mozambique CIFA, *supra* note 21, at Annex II: "Respecting human rights of those involved in the activities of the companies, consistent with the international obligations and commitments of the host Party".

[51] Brazil-Mozambique CIFA, *supra* note 21, at Annex II: "Stimulating the strengthening of local capacities through close cooperation with the local community".

[52] Brazil-Mozambique CIFA, *supra* note 21, at Annex II: "Incentivizing the formation of human capital, particularly creating job opportunities and facilitating the access of workers to professional qualification".

[53] Brazil-Mozambique CIFA, *supra* note 21, at Annex II: "Abstaining from seeking or accepting exemptions other than those established in the law of the host Party with respect to the environment, health, safety, labour, financial incentives or other matters".

[54] Brazil-Mozambique CIFA, *supra* note 21, at Annex II: "Supporting and maintaining principles of sound corporate governance, as well as developing and applying good practices in corporate governance".

[55] Brazil-Mozambique CIFA, *supra* note 21, at Annex II: "Developing and applying effective self-regulated practices and management systems that foster a relationship of mutual trust between the enterprises and the societies in which they carry out their operations".

[56] Brazil-Mozambique CIFA, *supra* note 21, at Annex II: "Promoting the knowledge of workers regarding company policies through the appropriate publication of these policies, including through recourse to professional capacity building programs".

[57] Brazil-Mozambique CIFA, *supra* note 21, at Annex II: "Abstaining from discriminatory or disciplinary actions against workers who report severe occurrences to the management or, when appropriate, to the competent public authorities, of practices in breach of the law or standards of sound corporate governance to which the enterprise is subjected".

[58] Brazil-Mozambique CIFA, *supra* note 21, at Annex II: "Encouraging, whenever possible, the business partners, including suppliers and outsourced services, to apply principles of business conduct consistent with the principles provided for in this Article".

[59] Brazil-Mozambique CIFA, *supra* note 21, at Annex II: "Respecting local political processes and activities".

Thus, in terms of intent and specifics, the Brazilian Model goes far beyond the provisions of the other agreements, models and proposals analysed here.

Provisions of CSR can be viewed through the prism of reciprocal obligations on investors. However, to what extent they are implemented and enforced would be a critical element in determining their role in asserting a balance in investment agreements.

3.6 Dispute settlement

Dispute settlement features prominently in all forms of investment norm setting. IIAs have predominantly adopted the ISDS model wherein a private foreign investor can take the state party to arbitration for breach of its obligations under the IIA. Unlike dispute settlement in the WTO, which is state-to-state, investment arbitration has primarily been between the private investor and the state. This has been a major cause of criticism of the system. However, there are divergences in approaches even within the ISDS model which provide some insights into the balance sought between investor's and state's rights in an agreement.

Various IIAs restrict the forum that an investor can approach by insisting on the need to exhaust local remedies before opting for ISDS or having fork-in-the-road clauses that restrict forum shopping and multiplicity of claims. Apart from these, the other remedies opted by states are analysed below.

3.6.1 State-to-state versus ISDS

Dispute settlement provided in the Indian BIT, TPP, EU TTIP proposal and CHAFTA are all based on the ISDS model. Each of these agreement/investment chapters/proposals/model texts have provisions dealing with arbitration tribunals. Provisions of appointing ad-hoc arbitrators are made in the Indian Model BIT,[60] TPP[61] and CHAFTA.[62] The EU TTIP proposal makes a departure in this respect and creates an Investment Court System (ICS) consisting of fifteen judges.[63] Under Article 9 of its proposal the EU proposes a Tribunal of First Instance consisting of fifteen judges appointed for a six-year term. This is in contrast to three arbitrators appointed for specific arbitration disputes under the other agreements/investment chapters/proposals/model texts in this analysis.

The Brazilian model does not incorporate the ISDS model by advocating a state-to-state dispute settlement model more akin to the WTO dispute settlement mechanism. Article 15 lays down the process of a state-to-state arbitration mechanism that does not involve the investor filing an arbitration claim against the state. The CIFA has a detailed structure of a Joint Committee consisting of government representatives from both the state parties. One of the responsibilities and competences of this Joint Committee is to seek consensus and resolve amicably

[60] Indian BIT, *supra* note 19, at Article 18.

[61] TPP, *supra* note 16, at Article 9.21.

[62] CHAFTA, *supra* note 23, Article 9.15.

[63] TTIP, *supra* note 18, at Article 9.

any questions or conflicts regarding the investments of the parties. Thus, the Joint Committee has a significant role in resolving, through dialogue and conciliation, disputes of foreign investors in the host state. Emphasis is given to negotiation and consultations to amicably resolve the dispute in the Joint Committee. A detailed procedure is laid out wherein the interests of the investor can be addressed in the Joint Committee even involving the possible participation of the investor in the meetings of the Joint Committee.

In addition to the Joint Committees, the CIFA envisions the appointment of Ombudsmen (Focal Points) in both parties whose functions, *inter alia*, include to act directly to prevent disputes and to facilitate their resolution in coordination with the competent government authorities and in collaboration with the appropriate private entities. If this two stage structure fails to resolve the dispute, state-to-state dispute resolution is envisaged under Article 15.6 of the Brazil Mozambique CIFA. The CIFA does not lay down a state-to-state mechanism but states that if it is not possible to resolve the dispute, the state parties may resort to mechanisms of arbitration, between states to be developed by the Joint Committee, when the parties deem it convenient. In short, (a) any dispute is considered a state-to-state dispute; (b) it is highly doubtful that there is binding consent to arbitration—certainly not in the Brazil-Mozambique CFIA; and (c) there are no further provisions on the details of how the state-to-state arbitration should take place—neither a choice of rules nor a method for appointing a tribunal.[64] Thus, while traditional models of ISDS represent an adversarial approach to dispute resolution through investor state arbitration, the Brazilian model reflected in the CIFA is a point of substantial departure. It signifies not only a collaborative, conciliatory approach but also marks a departure from the present system of investor-state dispute resolution. One could argue that the traditional models of ISDS severely restricted policy space of state parties wherein a foreign investor could challenge state measures in an arbitration while the state-to-state model remedies that restriction. Brazil asserts that BITs should be the basis for a permanent inter-governmental dialogue to both promote and protect FDI.[65] State-to-state arbitration is a solution consistent with a paradigm of FDI relations where states recover part of their prominent role. It has been asserted that even though state-to-state arbitration is mentioned in the CIFA, it shall not be the foremost mechanism for settling disputes.[66]

[64] Pedro Martini, *Brazil's New Investment Treaties: Outside Looking…Out?*, KLUWER ARB. BLOG (June 16, 2015), http://kluwerarbitrationblog.com/2015/06/16/brazils-new-investment-treaties-outside-looking-out-2/.

[65] Nicolás M. Perrone and Gustavo Rojas de Cerqueira César, *Brazil's Bilateral Investment Treaties: More Than a New Investment Treaty Model?*, COLUM. FDI PERSP. (Oct. 26, 2015), http://ccsi.columbia.edu/files/2013/10/No-159-Perrone-and-C%C3%A9sar-FINAL.pdf.

[66] Fabio Morosini, et al., *The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?*, INVESTMENT TREATY NEWS (Aug. 4, 2015), https://www.iisd.org/itn/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements/.

3.6.2 Exhaustion of local remedies

The issue of access to a foreign investor to the international investment arbitration system is seen as a major question on state autonomy and credibility of its domestic legal systems. The ability of foreign investors to claim violations of obligations of an IIA directly in an international arbitration setting is also viewed as a restriction of policy space and regulatory independence. The exclusion of other remedies, particularly domestic, is almost a default in most IIAs.

The ICSID Convention allows parties to require exhaustion of local remedies by the host state's domestic court as a condition precedent to arbitration. Even though allowed, it has not been a common practice.[67] In addition, allowing for both these remedies to co-exist, would make the ISDS an 'appeal' from the domestic fora and further violate the state's sovereignty.

The agreement/investment chapters/proposals/model texts under analysis have dealt with the issue of exhaustion of local remedies differently. The Indian BIT addresses the issue in Article 15 of the BIT. It makes a claim before a domestic court or administrative body a condition precedent for initiating an arbitration under the Agreement. This requirement of exhaustion of local remedies is not applicable where the investor can show that there were no available domestic remedies capable of reasonably providing any relief. Further, if after exhaustion of all judicial and administrative remedies for a period of 5 years, no satisfactory resolution has been reached, the investor may begin arbitration proceedings under the BIT. It has been noted that the need for foreign investors to exhaust local remedies before proceeding for international arbitration might not be a very attractive proposition due to the heavy backlog of cases in the domestic system.[68] On the other hand, it has been argued that this model merely strengthens the rule of exhaustion of local remedies by making it mandatory for the investor to litigate the claim before domestic courts for a minimum period of five years.[69]

The TPP does not provide for any requirement of exhaustion of local remedies before an investor can embark on an arbitration under the Agreement. It only states that in the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation. However, there is no binding requirement of exhausting the local judicial or administrative procedures of the state party. The EU proposal in TTIP and CHAFTA also do not mandate the exhaustion of local remedies before initiating an arbitration dispute under the Agreement.

The Brazil–Mozambique CIFA provides a very different template for arbitration with the Ombudsmen and Joint Committee playing a role in resolving disputes

[67] DOLZER & SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 215 (2008).

[68] Prabhash Ranjan, *India's Bilateral Investment Treaty Programme—Past, Present and Future, in* RETHINKING BILATERAL INVESTMENT TREATIES: CRITICAL ISSUES AND POLICY CHOICES 78 (Kavaljit Singh et. al. eds., 2016).

[69] Saurabh Garg, Ishita G. Tripathy & Sudhanshu Roy, *The Indian Model Bilateral Investment Treaty: Continuity and Change, in* RETHINKING BILATERAL INVESTMENT TREATIES, *supra* note 31 at 76.

before there is a decision for a state-to-state arbitration. However, there is a reference to exhaustion of local remedies in Article 16 of the Brazil–Mozambique CIFA. It states, *inter alia*, that the present CIFA shall not be invoked to question any dispute previously resolved by exhaustion of domestic judicial remedies. Thus, the exhaustion of local remedies in terms of resolution of a dispute acts as a bar on invoking the arbitration proceedings under the CIFA. Thus, exhaustion of local remedies is a tool that is used in varying forms to maintain state autonomy and control over the process. The degree to which it is required for initiation of arbitration determines the extent of its criticality in an arbitration proceeding.

3.6.3 Appellate review

One of the criticisms of the ISDS has been the ad-hoc nature of arbitral tribunals and the lack of coherence in the jurisprudence of these panels. Unlike the WTO dispute settlement system, which has an Appellate Body, there is no such remedy available in most of the IIAs. This is seen as a major impediment restricting the rights of states to appeal against arbitral awards in favour of investors. An independent appellate process is viewed as a possible correction to the inadequacies of the present system.

A look at the Indian BIT, CHAFTA and TPP shows that there is no appeal process in place. Article 29 of the Indian BIT however refers to an "Appeals Facility" wherein state parties that may establish an institutional mechanism to develop an appellate body or similar mechanism to review awards rendered by tribunals. Such appellate body or similar mechanism is intended to provide coherence to the interpretation of provisions in the BIT. Thus, there is a future vision to have an appellate mechanism if the state parties so agree to pursue. Similarly, CHAFTA also provides a mandate[70] to commence negotiations on an appellate mechanism to review arbitral awards made under the Agreement within three years of the entry into force of the Agreement. The TPP neither makes a mention of an appellate mechanism nor does it mandate a future negotiation for one.

Departing from the above lukewarm approach to appellate mechanisms in IIAs, the EU TTIP proposal is the first clear effort to put in place an appellate mechanism for ISDS. The Appellate mechanism proposed has a close resemblance to the Appellate Body system in the WTO.[71] The proposal provides for a "Tribunal of First Instance" (Article 9) and an 'Appeal Tribunal' (Article 10) for investment disputes. The proposal seeks to establish a permanent Appeal Tribunal to hear appeals from the awards. The Appeal Tribunal is to be composed of six Members, of whom two shall be nationals of a Member State of the EU, two shall be nationals of the US and two shall be nationals of third countries. Thus, like the seven member Appellate Body of the WTO, the Appeal Tribunal is a permanent court of six judges.

[70] CHAFTA, *supra* note 23, at Article 9.23 (envisions the Appellate mechanism to review only question of law like the Appellate Body in the WTO.

[71] Many of the features of the Appeal Tribunal bear close resemblance to the Appellate Body of the WTO.

The criteria for the selection of judges (Articles 9.4, 10.7 and 11) are elaborately set, giving very little manoeuvrability to ensure the impartiality of judges.

The EU proposal on an appellate mechanism is considered a watershed event in the journey of norm setting in international investment dispute settlement. It provides an additional forum wherein states or investors could agitate the incoherent interpretation of tribunals. Whether it is an adequate answer or a red herring to address the criticisms of curtailment of a state's policy space is another debate.

3.6.4 Frivolous complaints

IIAs can be designed in a fashion that prevents "bad faith" recourse to arbitration. The EU, has through its TTIP proposal, advanced such an improvement.[72] Frivolous claim safeguards reduces the probability that investors would make such claims, especially in order to force developing countries into a settlement. In order for the safeguard to be more effective, the denial of a remedy should be coupled with costs to be borne by the investor if the claims are found to be frivolous.

Most systems of arbitration have procedures to dispense with unwarranted complaints, and a substantial number of cases do get dismissed due to such reasons, with tribunals apportioning legal fees against claimants where they see abuse. Additionally, governments can further limit the ambit of such claims to get room to manoeuvre and exclude genuine policy measures from being tried in ISDS. Thus, the general trend that appears through the IIAs under question is to dismiss frivolous complaints expeditiously. Article 21 of the Indian BIT, paragraph 9.28.4 of the TPP and Article 9.16.7 of CHAFTA allow for a similar remedy, like the TTIP for frivolous complaints. For example, Article 21 of the 2015 Indian Model BIT requires the tribunal to dismiss any claim that does not fall within the "scope of the Tribunal's jurisdiction, or is manifestly without legal merit or unfounded as a matter of law". Thus, provisions related to frivolous complaints in the above instances do tend to depict a uniform standard providing for states to challenge investor complaints at the preliminary stage itself.

In conclusion, it is important to summarise the above approaches to get a coherent view of the possible middle path for policy space. As for the preambulatory clauses, definition of investment and general exceptions, the argument seems simple. If a state wishes to encourage greater rights to the investor, it would want to give them better protection. On the other hand, the restrictive clauses would help protect the state from litigation and give it breathing space to implement public policy. However, for FET clauses, investor obligations and dispute settlement, it is difficult to identify a clear trend. These provisions recently have been more inventive than having an "either", "or" answer. Like the dispute settlement provisions, the Brazil CIFA has a state-to-state dispute settlement, a huge shift from the very foundation of investment arbitration. The EU TTIP proposal, however, creates a two-layered investment court system, leading

[72] TTIP, *supra* note 18, at Article 14, 16 and 17; *See Fact Sheet: Investment Protection and Investor-to State Dispute Settlement in EU Agreements*, EUROPEAN COMMISSION 8 (2013), http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf.

to a claim of more transparency. Lastly, the TPP and CHAFTA contain the traditional ISDS mechanism. The same applies for FET clauses wherein the EU TTIP Proposal has an elaborate and exhaustive definition of FET, the TPP has included FET under the "Minimum Standard of Treatment" clause and the Indian Model BIT has the "Treatment of Investments" clause. A similar analysis can be made for investor obligation clauses as well. The Brazil CIFA has an elaborate CSR requirement, the Indian Model BIT has a requirement of being corruption free and not breaking any municipal laws. However, the EU TTIP proposal, the TPP, and CHAFTA have not mentioned about investor obligations.

4 Challenges ahead: the search for a middle path

International investment norm setting has seen diversity of approaches and motivations in the context of the provisions analysed in the preceding section. The international investment law and policy regime is in flux.[73] Countries have experimented from varying narratives in designing and executing investment rules through bilateral, plurilateral or multilateral settings. Experience, not entirely positive, in arbitration disputes has been a factor in designing particular approaches. Concerns have repeatedly been raised on the complexity and haziness of investment disciplines in the international context due to the multipolarity of norm making. The spaghetti bowl phenomenon of regional trade agreements equally applies to investment rule making.

The study of recent investment norm setting does provide illuminating lessons in approaches to address the delicate balance of investor rights and state's regulatory authority. Arriving at a suitable international investment regime presents multiple challenges. There are a multiplicity of approaches as reflected in the varying provisions relating to policy space analysed in the previous section of this study. The question is whether there is a middle path that states can subscribe to? How do states determine this middle path? How do policy makers decide on a particular approach? Is it a rigid, straightjacketed line or is it fluid based on a state's level of development and conceptions of reality? Is there a uniform answer or are there varied realities depending on experiences and developmental realities? The purpose here is not to prescribe a middle path but to lay out the varying approaches that could help in assessing where that middle path lies.

Some of the approaches identifiable include preambular provisions for laying down the right to regulate in the context of treaty obligations, fluidity in the definition of investment, a lack of consensus on the need for inclusion of the FET standard as a core obligation and the variations in approach, inclusion of general exceptions to obligations for exercise of legitimate regulatory objectives, an endeavour to include investor obligations to balance Investor-State obligations, the trend to reform the structure of ISDS with permanent tribunals and appellate structures, to emphasise on the need for exhaustion of local judicial and

[73] For a detailed policy prescription on the trade and investment regime, *see* Ricardo Meléndez-Ortiz & Richard Samans, *The E15 Initiative: Strengthening the Global Trade and Investment System in the 21st Century,* WORLD ECONOMIC FORUM, http://www3.weforum.org/docs/E15/WEF_Full_Report_Strengthening_Global_Trade_Investment_System_21st_Century.pdf.

administrative remedies before a claim of arbitration can be brought and to adopt a traditional state-to-state model of dispute settlement for investment arbitration along with more state-led negotiation and conciliation approaches.

International investment norm-setting is also faced with other challenges in the present decade. It is evident that there is no single forum where this discussion and development of disciplines is taking place today. While bilateral and plurilateral initiatives at norm setting is the standard practice, there are multilateral efforts to analyse and offer solutions in this complex arena. It is often the concern in international norm setting as to who sets the rules and who the rule-receivers are. To avoid the acceptance of rules emanating from large mega-regional trading arrangements as a fait accompli, it is often argued that developing countries[74] and least developed countries must be engaged actively in rule-making to influence its contours. This would ensure adequate participation in rule-making as well as the ability and opportunity to set the agenda. It is interesting to note that some of the divergent norms[75] in this field are being put forth by emerging economies like India, Brazil and China. The concomitant challenge for developing and least developed countries would be to navigate the complexities in this dynamic and pertinent area of international economic law. Understanding the long term implications of various approaches, their impact on immediate and strategic policy goals and the ability to manoeuvre to achieve legitimate policy objectives would continue to pose a challenge as well as an opportunity.

The possibility of a middle path approach in many contentious areas of investment norm setting is open to debate and contour setting. This study shows varying approaches and narratives on some of the core issues involved in investment disciplines. A middle path approach would essentially balance investor protection with the ability of states to meaningfully regulate legitimate policy objectives along with the ability to attract foreign investment for sustainable development. Where that balance is and where the line would be drawn is not always clear and forthcoming. Many developing countries are also foreign investment exporting countries. Whether that would or should influence the way they perceive investment protection and disciplines is a pertinent question. An assessment needs to be undertaken keeping in view strategic interests, level of development as well as the overall policy objectives that are sought to be achieved. However, the recognition that there indeed needs to be a middle path with varying, competing interests to be accounted for is in itself a result worth aspiring for. As long as states continue to represent diverse stakeholders and interests, with a mission of encouraging foreign investment with adequate protection and responsibilities, the debate on what the middle path should be will continue to pervade policy debates. What is certain is that these approaches as discussed above would help trigger a move towards a middle path for each state depending on its priorities. However, whether the tussle for policy space will be addressed and settled as a result of these approaches will only be known in the near future.

[74] Justin Yifu Lin, *China's Chance to Lead on Development*, PROJECT SYNDICATE, (Aug. 4, 2016), https://www.project-syndicate.org/commentary/china-g20-summit-investment-framework-by-justin-yifu-lin-2016-08.

[75] Catharine Titi, *International Investment Law and the Protection of Foreign Investment in Brazil*, 2 TRANSNAT'L DISPUTE GMT 2 (2016).