

# Rebalancing the Asymmetric Nature of International Investment Agreements?

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In the context of the backlash against investor-state dispute settlement (“ISDS”), one of the main criticisms is the asymmetric nature of investment treaties, which impose numerous obligations on the States, but do not seem to hold corporations accountable for the social, environmental and economic consequences of their activities. Some recent developments reflect a redirection away from a sole focus on investor protection, and a move towards a more balanced approach, by respecting States’ regulatory space and introducing a more tenable link between business and human rights and investment treaty instruments.

One attempt to balance between investment protection and the right to regulate is to provide a carve-out for regulatory measures. For instance, some recent treaties, including in Trans-Pacific Partnership (“TPP”)[fn]Annex 9-B of the TPP.[/fn], The Canada-European Union (EU) Comprehensive Economic and Trade Agreement (“CETA”)[fn]Article 28 of the CETA.[/fn], China-Korea Free Trade Agreement[fn]Annex 12-B, 3(b) of the China-Korea Free Trade Agreement.[/fn], exempt non-discriminatory regulatory measures for lawful public welfare objectives (public health, safety and environment) from the indirect expropriation obligations. China-Australia Free Trade Agreement (“ChAFTA”)[fn]Article 9.11 of the ChAFTA.[/fn] takes a step further to provide that non-discriminatory measures

for legitimate public welfare objectives are not subject to the ISDS claims. If the respondent deems that its disputed measure falls within such a carve-out, it could deliver a notice elaborating the basis for its position to the claimant and non-disputing party, which is referred to as the “public welfare notice”. This notice will lead to a 90-day consultation between the respondent and non-disputing party, during which the dispute resolution procedure will be suspended. The public welfare notice contained in the ChAFTA is an innovative approach and serves as a strong safeguard for State’s regulatory autonomy.

Another development is the emphasis on corporate social responsibility (“CSR”), human rights and sustainable development in some recent treaties. For instance, the Dutch model BIT 2004 in its preamble recognizes that “the development of economic and business ties will promote internationally accepted labour standards” and that “these objectives can be achieved without compromising health, safety and environmental measure of general application”<sup>[fn]</sup>Preamble of the Austrian Model BIT 2010.<sup>[/fn]</sup>. The Dutch government has also linked the OECD guidelines to export credits. Investors that want to have their capital needs insured by the government are obliged to sign a declaration of intent that they will endeavor to implement OECD guidelines.

The Austrian Model BIT 2010 states the commitment to “achieving these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognised labour standard”, and emphasizes “the necessity for all governments and civil actors alike to adhere to UN and OECD anti-corruption efforts, most notably the UN Convention against Corruption (2003)”. It further acknowledges that “investment agreements and multilateral agreements on the protection of environment, human rights or labour rights are meant to foster global sustainable development and that any possible inconsistencies there should be resolved without relaxation of standards of protection”.<sup>[fn]</sup>See “Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad”.<sup>[/fn]</sup>

Since 2010, Canada has also included a voluntary CSR provision in the Bilateral Investment Treaties (“BITs”) it signs, emphasizing that “each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of CSR their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the

environment, human rights, community relations, and anti-corruption”.

The India Model BIT (draft) issued in March 2015 (“The Indian Model BIT March Draft”) goes further by providing for positive obligations on investors and their investments, in terms of obligation against corruption, obligation to comply with the provisions of Host State’s law on taxation, obligation to compliance with the Law of Host State, including, among other things, environmental law applicable to the investment and its business operations; law relating to conservation of natural resources, law relating to human rights; relevant national and internationally accepted standards of corporate governance and accounting practices.<sup>[fn]</sup>Articles 9, 11 and 12 of the Indian Model March Draft.<sup>[/fn]</sup> Compliance with these positive obligations is necessary to benefit from the provisions of this Treaty.<sup>[fn]</sup> Article 9 of the Indian Model March Draft. <sup>[/fn]</sup> Significantly, it also allows the State to initiate a counterclaim against the Investor or Investment for a breach of these positive obligations before a tribunal and seek as a remedy suitable declaratory relief, enforcement action or monetary compensation.<sup>[fn]</sup> Article 14.11 of The Indian Model March Draft.<sup>[/fn]</sup>

In December 2015, the Indian Ministry of Finance released an updated and approved version of the Indian Model Bilateral Investment Treaty (“Indian Model BIT December Version”). The final December 2015 model took a number of steps back from the March 2015 draft by diluting or entirely removing several noteworthy provisions, although a few interesting features remain. For instance, CSR provision is incorporated, though in a much softer language, providing that “investors and their enterprises operating within its territory of each Party shall endeavour to voluntarily incorporate internationally recognized standards of CSR 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.”<sup>[fn]</sup>Article 12 of the Indian Model BIT December Version.<sup>[/fn]</sup> The Ministry of Finance confirmed that the Indian Model BIT will be used as the starting point for the negotiation of all standalone BITs and the investment chapters of Free Trade Agreements.

Norway first attempted to incorporate by reference a CSR-style provision in its draft Norwegian Model BIT (2007), stating that “parties agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines on Multinational Enterprises and to participate in the UN Global

Compact”.[fn]Article 32 of the draft Norwegian Model BIT 2007.[/fn] Subsequently, the government withdrew its draft Model BIT in 2009, following widespread public criticism. Built on the previous draft in 2007, Norway reintroduced its new draft Model BIT in May 2015. The shift from a sole focus on investment protection is reflected in the preamble of the Norwegian Model BIT 2015, which emphasized the “importance of CSR”, and reaffirmed “their commitment to democracy, the rule of law, human rights and fundamental freedoms in accordance with their obligations under international law, including the principles set out in the United Nations Charter and the Universal Declaration of Human Rights”, as well as the commitment to prevent and combat corruption. The Norwegian Model BIT 2015 expressly preserves the States’ right to regulate for the protection of health, safety, human rights, labour rights, resource management or environmental concerns, and precludes states from waiving or derogating from such measures as an encouragement of investment. It also reserves the state’s right to adopt or enforce measure necessary to protect public morals or to main public order; to protect human, animal or plant life or health, and to protect the environment.[fn] Articles 12, 11 and 24 of the draft Norwegian Model BIT 2015.[/fn]

The above developments propose some novel reforms, reflecting the aim of promoting alignment of international investment agreements with sustainable development objectives. It remains to be seen whether these countries or their treaty partners will seek to incorporate those more progressive features in the forthcoming treaty negotiations, how foreign investors will react to these instruments, and what the potential business costs of doing this are.

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