Model International Investment Treaties: Outlining the Future Landscape of International Investment Law

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International treaties are often the result of lengthy and stressful negotiations between states. In an effort to reduce the time and effort put into such negotiations, states adopt pro-forma templates for international treaties. This is the case with International Investment Agreements ('IIAs'). IIAs may take the form of a Bilateral Investment Treaty ('BIT') or the investment chapter in more comprehensive agreements such as Free Trade Agreements. Many states have adopted a 'Model BIT' as a template for negotiating their IIAs. The advantages of adopting a Model BIT range from mere practicality during negotiations to serving as a statement of a state's understanding of current International Investment Law ('IIL'). In the midst of the current 'winds of

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change' in IIL, several states, both capital-exporting and capital-importing, have updated their Model BITs to serve the latter purpose. This article summarises some of the salient features shared by a selection of recently published Model BITs.

The Sample of Model BITs

The sample consists of the latest Model BITs of the Netherlands (2019), the Belgium-Luxembourg Economic Union ('BLEU') (2019), Colombia (2017) and India (2015) (the 'Models'). The Netherlands and BLEU Model BITs are some of the latest to be made publically available from capital-exporting countries, and hold significant weight considering that these three economies are amongst the most active home-states for claimants.[1] The Colombian Model BIT, in contrast, offers some of the latest views of a capital-importing economy to be made public and the Indian Model BIT was included in this sample for its reputation as one of the most ambitious from the 'defensive' point of view of a host state.[2] This sample, while not necessarily reflecting what the future will bring, at the very least provides a rough outline of the future landscape of IIL.

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Common Features in the Four Model BITs: More Regulation, Less Wiggle Room

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One common feature that stands out is the level of detailed regulation these Models foresee. The Models show that states are moving to fill in the blanks left by current IIAs, a task that has traditionally been carried out by arbitral tribunals. Thus, the Models contain a large number of articles (more than 20 in the four Models, even more in the case of the Colombian Model) compared to earlier IIAs where the number of articles seldom exceeded 15. Future IIAs are likely to grant less and less margin of appreciation to arbitrators not only when deciding the merits of a dispute, but also when handling procedural issues that may arise during the course of an investment arbitration.

A War Declared Against Nationality Planning (or at least against shell companies)

Regarding the definition of a 'covered investment' the concurrence in approach towards corporate investors is remarkable. All four Models coincide in incorporating a 'substantial business activities' element into the definition of covered investor when referring to companies.[4] This definition is intended

1 Dutch (the second most active worldwide after investors from the United States), Luxembourgish and Belgian investors have been claimants in 169 out of 983 investment arbitrations. See United Nations Conference on Trade and Development ('**UNCTAD**'), Investment Policy Hub, Investment Dispute Settlement Navigator, available online at https://investmentpolicy.unctad.org/investment-dispute-settlement.

2 See e.g., LOYA MODANI, Kshama, 'Why India's model bilateral investment treaty needs a thorough relook' Business Standard, 31 December 2018, available online at https://www.business-standard.com/article/economy-policy/why-india-s-model-bilateral-investment-treaty-needs-a-thorough-relook-118123100150_1.html.

3 E.g., the Comprehensive Economic and Trade Agreement, 2016 ('**CETA**'); and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 2018 ('**CPTPP**').

4 See Article 1(b)(ii) of the Netherlands Model BIT: *'any legal person constituted under the law of that Contracting Party and having substantial business activities in the territory of that Contracting Party'*; and Article (1.9) of the Indian Model BIT: *'A legal entity constituted, organized and operated in compliance with the Law of the Home State, owned or controlled by a Natural Person or a legal entity of the Home State and conducting real and substantial business operations in the Home State'*.

to exclude corporate investors whose only purpose is to grant treaty-nationality to themselves and their investments. For this reason, if future IIAs follow this approach (as has already happened with the CPTPP),[5] it will significantly complicate nationality planning operations. This policy choice may have an impact on investment flows as transactional costs rise.

More Detailed Standards of Treatment

The Models coincide in their approach towards the Fair and Equitable Treatment ('FET') standard. Whilst the Indian Model goes to the extreme of doing away with FET, it does state that denial of justice under customary international law, egregious violations of due process or manifestly abusive treatment may result in a breach to the IIA.[6] However, the approach followed by the BLEU,[7] the Netherlands[8] and Colombia[9] is quite similar, providing a closed list of situations that give rise to a breach of the FET standard, mirroring the approach taken in the CETA.[10] This approach clearly intends to reduce the host state's exposure to a finding of a breach of the FET standard, which tends to be the most common cause of awards against states in investment arbitration.[11]

It is also worth noting how the Most Favourable Nation ('MFN') standard has been subject to severe limitations. While previous IIAs have sought to exclude the use of the MFN standard to modify procedural/jurisdictional rules after the famous *Maffezini* case,[12] it appears that states have now moved to limit the use of MFN to import standards of treatment.[13] The Indian Model does not even contain a MFN clause. The Colombian[14] and Netherlands[15] Models establish that MFN may not be used in regards to substantial treatment in other IIAs, similar to the CETA's approach to the issue.[16] For its part, the BLEU Model excludes MFN's application to previous IIAs.[17]

5 CPTPP, Article 9(1).

6 Indian Model BIT, Article 3 ('*Standard of Treatment*').
7 BLEU Model BIT, Article 4.
8 The Netherlands Model BIT, Article 9.
9 Colombian Model BIT, Article 'Trato Justo y Equitativo.'
10 CETA, Article 8(10). Note however that the CPTPP does not follow this approach. See CPTPP, Article 9(6).

11 The FET standard was the basis of favourable awards to claimants in 125 out of 191 cases according to UNCTAD. See UNCTAD, Investment Policy Hub, Investment Dispute Settlement Navigator, available online at https://investmentpolicy.unctad.org/investment-dispute-settlement/advanced-search.
12 Emilio Agustín Maffezini v Kingdom of Spain, ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000).

13 Such as in Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan, ICSID Case No ARB/05/16, Award, para 575 (29 July, 2008), where the MFN standard in the base IIA was used to import the FET standard from another IIA signed by the respondent state.
14 Colombian Model BIT, Article '*Nación más Favorecida*', para 4; Article '*Disposición General sobre Trato Nacional y Nación Más Favorecida.*'
15 The Netherlands Model BIT, Article 8.
16 CETA, Article 8(7)(4). Note however that the CPTPP does not follow this approach: see CPTPP, Article 9(5).
17 BLEU Model BIT, Article 6(4)(a).

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Hard Stance on Corruption

All Models coincide in their hard stance towards corruption. While the extent to and ways in which corruption is addressed in each Model vary, they all exclude investors or investments that are involved with corrupt practices from the protection granted by the IIA and the corresponding investor-state arbitration.[18] This shows the importance of this issue for the global community and may indicate a common stance as to how IIL should respond to corrupt investors.

Reform to Investor-State Arbitration Through IIAs

As reform to procedural rules takes place both in the International Centre for Settlement of Investment Disputes ('ICSID') and in the United Nations Commission on International Trade Law, states have included procedural rules in their own IIAs. All Models share common ground in their approach to investor-state dispute settlement. The first notable common feature is that all Models foresee a highly detailed notice of dispute in order to trigger dispute-settlement proceedings.[19] This will require claimants to provide extensive information on the facts and legal basis of their claims, as well as the expected reparations.

Another feature common to the four Models is that they all provide for a statute of limitations –ranging from five to three years– to request consultations, counting from the time an investor had or should have had knowledge of the facts giving rise to the dispute.[20] While this is not a novel feature, it is noteworthy that there is consensus in adopting statutes of limitations for these kinds of claims, which were not always subject to such conditions under older IIAs.

18 BLEU Model BIT, Article 19(A)(2); Netherlands Model BIT, Article 16(2); Colombia Model BIT, Article 'Ámbito de Aplicación,' (3); India Model BIT, Articles 1(6) and 9.

19 BLEU Model BIT, Article 19(B)(4); the Netherlands Model BIT, Article 18(2); Colombia Model BIT, Article *'Consultas entre el Inversionista Cubierto y la Parte Contratante y presentación de Notificaciones'*; India Model BIT, Article 14(3).

20 BLEU Model BIT, Article 19(B)(5); Netherlands Model BIT, Article 18(4); Colombia Model BIT, Article *'Requisitos para someter un Reclamo a Consultas,'* para 2; India Model BIT, Article 14(4)(i)(A)(a).

Arbitrators are also regulated in all four Models. They coincide in setting out the qualifications arbitrators must have in order to sit on a tribunal constituted under the IIAs.[21] The BLEU, Netherlands and Colombia Models all refer to the International Bar Association Guidelines on Conflict of Interest in International Arbitration.[22] These provisions may impact the pool of potential arbitrators, so their effects on diversity and on how challenges are decided should both be scrutinised.

21 BLEU Model BIT, Article 19(G)(4); Netherlands Model BIT, Article 20(5); Colombia Model BIT, Article *'Composición del Tribunal Arbitral'*; India Model BIT, Article 14(5).

22 BLEU Model BIT, Article 19(G)(5); Netherlands Model BIT, Article 20(6); Colombia Model BIT, Article *'Composición del Tribunal Arbitral.'*

Closing Remarks: Diverging Approaches Persist

In spite of the common features found in the four Models —they all evidence a shift away from earlier IIAs, where the investor was the focal point of the treaty, towards a more balanced approach to managing states' right to regulate and investor protection—, they diverge in the extent of this shift.

As noted, the Indian Model, which does away with the FET and MFN standards and ICSID for investor-state arbitration,[23] has been received by commentators and practitioners as fairly aggressive towards investors. Meanwhile, Colombia's Model, which for example adopts a strong denial-of-benefits clause[24] and very precisely regulates certain procedural issues such as standard of proof,[25] evidences Colombia's experience as a respondent in investment arbitration[26] and its desire to reduce the amount of unfavourable decisions against the responding state.

These changes and innovations are not present in the European Models, which show a more nuanced evolution (in line with recent practice of the European Union when negotiating IIAs and their position as investment-exporting countries). Additionally, the European Models reflect an intention to refer cases based on these models to a future Multilateral Investment Court that has been championed by the European Union.[27] The Indian and Colombian Models remain silent on this issue.

Ultimately, the future landscape of IIL will be determined by each state's ability to negotiate and convince their counterparts to adopt their own approach; hence, the precise contours of our outline remain blurred. It is important to note, however, that there are important areas where common ground has been achieved and that will have a significant impact on IIL in the years to come.

23 Indian Model BIT, Article 14(7).

24 Colombian Model BIT, Article *'Denegación de Beneficios'*

25 Colombian Model BIT, Article *'El Laudo,'* para 2.

26 GARCÍA MATAMOROS, Laura, 'La relación entre las políticas de inversión extranjera en Colombia y los acuerdos internacionales de inversión' 12 Anuario Colombiano de Derecho Internacional 85 (2019).

27 European Commission, 'The EU moves forward efforts at UN on multilateral reform of ISDS.' Available online at https://trade.ec.europa.eu/doclib/press/index.cfm?id=1972&title=The-EU-moves-forward-efforts-at-UN-on-multilateral-reform-of-ISDS