# EXHAUSTION REQUIREMENTS AND DISPUTE RESOLUTION REFORM IN BILATERAL INVESTMENT TREATIES

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## I. INTRODUCTION

International trade tensions—trade wars, tariffs, trade deficits, and more—dominated global news in the late-2010s, stoking the imagination of not only politicians and economists but also the average citizen. This phenomenon was part of the public reaction to the changing policies on a global level surrounding international trade and investment relationships. Beginning in the latter-half of the twentieth century and accelerating after the end of the Cold War, the world's states broke down barriers to international trade and investment through multilateral treaty systems such as the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO).[1] These multilateral systems did not regulate, though, Foreign Direct Investment (FDI), the transfer of capital across international borders.[2] Instead, the various states individually regulated FDI through a collection of treaties between usually two states that provided protection for the investments of a citizen of one state in the other.[3] These treaties are known as Bilateral Investment Treaties (BITs).[4]

Most BITs offered protection to investors through the abrogation of the Rule of Local Remedies (the RLR), a doctrine of customary international law that requires international claims be resolved in the host state's local courts.[5] Under these BITs, investors could file claims against the host state directly before an international tribunal in an arbitral proceeding known as "Investor-State Dispute Settlement" (ISDS).[6] Since the global financial crisis in 2008, though, political leaders questioned the viability of such liberalized trade policies.[7] Beginning around 2015, international political leaders renegotiated BITs to be more

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[1] RALPH H. FOLSON ET AL., PRINCIPLES OF INTERNATIONAL BUSINESS TRANSACTIONS 385–88 (4th ed. 2017).

[2] *Id*. at 721.

[3] *Id*. at 765–70.

[4] *Id*.

[5] *See generally,* Henok Gabisa, *The Fate of International Human Rights Norms in the Realm of Bilateral Investment Treaties (BITs): Has Humanity Become a Collateral Damage?*, 48 THE INT'L LAW. 153 (2014) (explaining the role of BITs as a transformation of transnational investment and as a legal document protecting investors in a foreign country).

[6] U.N. Conference on Trade and Development, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, 108, U.N. Doc. UNCTAD/ITE/IIT/2006/5 (Jan. 31, 2007) [hereinafter *BITs 1995-2006*].

[7] U.N. Conference on Trade and Development, *World Investment Report 2015: Reforming International Investment Governance*, 24–25, U.N. Doc. UNCTAD/WIR/2015 (Jun. 25, 2015) (characterizing post-2008 policies toward BITs as an "[e]ra of re-orientation" with governments "evaluating the costs and benefits of [BITs] and reflecting on their future objects and strategies as regards these treaties").

protectionist, including reviving the RLR and limiting the availability of ISDS.[8] This Note will examine these reforms offered in BITs negotiated in the late-2010s to determine whether they accomplish the goals of reformers and whether other legal doctrines in the international investment regime will frustrate these reforms.

Part I of this Note discusses the political and legal underpinnings that led to the reform of BITs in the late-2010s. Part II discusses the policy interests that motivated reformers when drafting 2010s BITs. Part III examines the choice of fora and exhaustion clauses in individual BITs to determine whether they fulfil the policy interests that reformers sought. Part IV offers a cursory exploration of pitfalls that the reformed dispute resolution systems face when brought before international tribunals. Part V offers concluding thoughts on how these BITs and their dispute resolution clauses may affect the international investment regime and the law of ISDS tribunals.

### *A. Contemporary Issues in International Investment Law: The ISDS Regime*[9]

Many of the reform efforts taken in the late-2010s stem from the failure of the Doha Round of multilateral trade negotiations in the mid- to late-2000s.[10] After the 1999 WTO Ministerial Meeting in Seattle failed to start a new round of trade negotiations, the Doha Round of the WTO also stalled as middle-income countries such as Brazil, Russia, India, China, and South Africa sought concessions to bolster their geopolitical and geo-economic positions and interests.[11] In the Doha Round, the WTO had expected to conclude an international FDI treaty, but this effort failed when the Doha Round collapsed in the mid-2000s.[12] Among the

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[8] *See* Matthew C. Porterfield, *Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?*, 41 YALE J. INT'L L. ONLINE 1, 1, 3 (2015).

[9] The application of *realpolitik* to the realm of international trade and investment laws inform and nuance many of the arguments advanced in this Note. *See*, *e.g.*, HENRY KISSINGER, DIPLOMACY 832 (1994) ("If the principles of the [WTO] in fact prevail, the Western Hemisphere will be a major participant in global economic growth. If discriminatory regional groupings dominate, the Western Hemisphere, with its vast market, will be able to compete effectively . . . . In a world where America is often obliged to strike a balance between its values and its necessities, it has discovered that its ideals and its geopolitical objectives mesh substantially."); GEORGE C. HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776, at 926 (2008) ("[i]n embassies across the world, diplomats turned their attention to economics" as the Cold War ended, NAFTA was passed, and the WTO emerged).

[10] DAVID A. GANTZ, LIBERALIZING INTERNATIONAL TRADE AFTER DOHA: MULTILATERAL, PLURILATERAL, REGIONAL, AND UNILATERAL INITIATIVES 28, 34 (2013).

[11] *Id*. at 33–36.

[12] World Trade Organization, Ministerial Declaration of 14 November 2001, ¶¶ 20–22, WTO Doc. WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002). The WTO dropped these efforts as

reasons proffered to explain the failure of the Doha Round, scholars point to: divergence in the objectives of developing states, the fear of Chinese economic growth, lack of political will, the expansion of government regulation of climate change, and the lack of strong support from business stakeholders.[13] With regard to the lack of support from business stakeholders, the business stakeholders wanted reforms in services, investment, and e-commerce, while the WTO and other political stakeholders focused on tariff and non-tariff barrier reduction.[14]

From the ashes of WTO-led negotiations, bilateral (e.g., BITs)[15] and plurilateral (e.g., NAFTA, USMCA) preferential trade agreements on more limited issues emerged, backed by global business interests.[16] While these agreements more immediately addressed the needs of the business community, they created a complex patchwork of inconsistent protections, obligations, and other regulations.[17] While some commentators and academics retained hope in the early-2010s that there would be a multilateral solution to the problem of FDI regulation,[18] mid-decade shifts in political mores made this increasingly unlikely.

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early as 2004, suggesting that, had the Doha Round proceeded further, a multilateral investment treaty or protocol would not have been in the final agreements. *See The Doha Declaration Explained*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#investment (last visited Feb. 11, 2021). It is reasonable to assume that such an agreement would follow the course of other attempted multilateral investment frameworks and end without a deal. *See* Trishna Menon & Gladwin Isaac, *Developing Country Opposition to an Investment Court: Could State-State Dispute Settlement be an Alternative?*, WOLTERS KLUWER: KLUWER ARB. BLOG (Feb. 17, 2018), http://arbitrationblog.kluwerarbitration.com/2018/02/17/developing-country-opposition-investment-court-state-state-dispute-settlement-alternative/; Organization for Economic Co-Operation and Development, *The Multilateral Agreement on Investment: Draft Consolidated Text*, at 7, OECD Doc. DAFFE/MAI(98)7/REV1 (Apr. 22, 1998) (embodying a draft document for a multilateral FDI treaty prepared for the failed Seattle Round).

[13] GANTZ, *supra* note 10, at 38–44.

[14] *Id*. at 41–43; *see also* Daniel Pruzin & Gary G. Yerkey, *WTO Talks Crashed When Developing Nations Balked at Taking Up Some 'Singapore Issues'*, INT'L TRADE REP. (Sept. 18, 2003) (reporting out failure of the WTO conference appeared to stem from unwillingness of developing countries to "move away from agricultural issues to the so-called Singapore issues").

[15] *See* Pruzin & Yerkey, *supra* note 14 (quoting Frank Vargo, former U.S. government official and then-National Association of Manufacturers' Vice President for International Economic Affairs: "I wouldn't be surprised if [the United States] puts much more emphasis on bilateral trade talks without giving up on the WTO.").

[16] Andrew L. Stoler, *Addressing 21st Century "WTO-Plus" Issues in the Multilateral Trading System*, *in* THE FUTURE AND THE WTO: CONFRONTING THE CHALLENGES 42 (Ricardo Meléndez-Ortiz, Christophe Bellmann & Miguel Rodriguez Mendoza eds., July 2012), https://edisciplinas.usp.br/pluginfile.php/79786/mod_resource/content/1/the-future-and-the-wto-confronting-the-challenges.pdf.

[17] *Id*. at 44.

[18] *See, e.g.*, *id*.

While the collapse of the Doha Round created the legal backdrop for FDI and BIT reform, the political will for this reform stems from policies associated with the candidacy and election of Donald Trump to the U.S. Presidency. During the 2016 U.S. presidential campaign, Donald Trump and his advisors made largely protectionist economic promises.[19] In May 2016, then-Trump supporter and later-Secretary of Commerce Wilbur Ross expressed concerns about the rising economic power of China and its state-controlled debt and currency markets.[20] As the election progressed, investors began to fear major drops in Asian stocks following a Trump victory, citing as an important factor "'unpredictable' foreign policy" that may produce beneficial individual outcomes through negotiation but would aggregate into substantial losses or underperformance across Asia.[21] Campaign bluster quickly turned into action after inauguration, with Trump taking executive action to withdraw the United States from the Trans-Pacific Partnership and reorienting U.S. international trade and investment policy.[22]

World leaders prepared for a vacuum in global political leadership as soon as President Trump was elected.[23] Under the Trump Administration, U.S. strategy shifted towards using bilateral pacts with individual states and unilateral tariffs to effect Trump's trade, investment, and foreign policy objectives, harnessing the United States' strategic and economic heft to prevent concessions granted during earlier plurilateral and multilateral negotiations.[24] By mid-2017, these tactics

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[19] Maggie Haberman, *Donald Trump Says He Favors Big Tariffs on Chinese Exports*, N.Y. TIMES (Jan. 7, 2016, 11:21 AM), https://www.nytimes.com/politics/first-draft/2016/01/07/donald-trump-says-he-favors-big-tariffs-on-chinese-exports/.

[20] Dimitra DeFotis, *Q&A: Wilbur Ross on China, Yuan, Debt & Trump*, BARRON'S (May 25, 2016, 10:00 AM), https://www.barrons.com/articles/q-a-wilbur-ross-on-china-yuan-debt-trump-1464184849.

[21] Nomura, *What a Trump Presidency Means for Asian Stocks*, BARRON'S (July 26, 2016), https://www.barrons.com/articles/what-a-trump-presidency-means-for-asian-stocks-1469502034.

[22] Jack Caporal, *Trump Takes Executive Action Withdrawing U.S. from TPP, Collapsing Deal*, INSIDE U.S. TRADE'S WORLD TRADE ONLINE (Jan. 23, 2017, 2:03 PM), https://insidetrade.com/daily-news/trump-takes-executive-action-withdrawing-us-tpp-collapsing-deal.

[23] *See* Zachary Burdette, *Today's Headlines and Commentary*, LAWFARE: HARD NAT'L SEC. CHOICES (Nov. 9, 2016, 2:49 PM), https://www.lawfareblog.com/todays-headlines-and-commentary-1186 (summarizing the reactions to Trump's election by international leaders as reported in major news outlets the day after the U.S. election); *see also Across the World, Shock and Uncertainty at Trump's Victory*, N.Y. TIMES (Nov. 9, 2016), https://www.nytimes.com/2016/11/09/world/europe/global-reaction-us-presidential-election-donald-trump.html (reporting economic concerns in China and Mexico); Santiago Pérez & José de Córdoba, *Donald Trump's Win Goes Down Hard in Mexico: Country Scrambles to Shore Up Support for Peso As Its Frequent Attacker Secures the U.S. Presidency*, WALL ST. J. (Nov. 9, 2016), https://www.wsj.com/articles/donald-trumps-win-goes-down-hard-in-mexico-1478678362 (reporting the weakening of the Peso in after-hours trading due to the election and the precarious position of Mexican fiscal policy).

[24] William Mauldin, *Trump's Big Gamble: Luring Countries Into One-on-One Trade Deals*, WALL ST. J. (Jan. 27, 2017, 5:39 PM), https://www.wsj.com/articles/trumps-big-

launched a "trade war" between the United States and China that forms the backdrop to the topic of this Note.[25]

Political disruption from this shift spurred a cascade of new BIT negotiations, giving states and political actors an opportunity to revisit the legal underpinnings of the international investment system.[26] As states faced new political and diplomatic tensions caused by such adjustments, business stakeholders similarly faced new legal and economic challenges. Business interests globally faced populist pressure to consider a broader range of stakeholders when making business decisions, driving business leaders to pledge to take increased responsibility for the public good.[27] Additionally, governments considered new regulations on technology, energy, and other sectors of the economy, further disrupting traditional business activities.[28] This panoply of economic and political forces drove actors' interests in and commitment to the international trade and investment negotiations in the late-2010s, and the BITs' efficacy must be evaluated in light of those commitments.

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gamble-luring-countries-into-one-on-one-trade-deals-1485483628. Shortly before the election, key Trump advisors outlined Trump's Asia strategy, which comprised both prioritizing U.S. economic clout over foreign policy goals and bolstering military presence in the region to enforce peace. Alexander Gray & Peter Navarro, *Donald Trump's Peace Through Strength Vision for the Asia-Pacific*, FOREIGN POL'Y (Nov. 7, 2016, 2:14 PM), https://foreignpolicy.com/2016/11/07/donald-trumps-peace-through-strength-vision-for-the-asia-pacific/.

[25] *See* Dan Burns, Jonas Ekblom, & Andrea Shalal, *Timeline: Key Dates in the U.S.-China Trade War*, REUTERS (Sep. 5, 2019, 12:00 PM), https://www.reuters.com/article/us-usa-trade-china-timeline/timeline-key-dates-in-the-us-china-trade-war-idUSKCN1VQ24Y (summarizing key events that escalated international trade tensions in 2017).

[26] Daniel C.K. Chow et al., *The Revival of Economic Nationalism and the Global Trading System*, 40 CARDOZO L. REV. 2133, 2166–67 (2019) (discussing the role of economic protectionism in FDI regulation in the late-2010s).

[27] *See* Business Roundtable, *Statement on the Purpose of a Corporation*, (Aug. 19, 2019), https://opportunity.businessroundtable.org/wp-content/uploads/2019/09/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures-1.pdf (pledging to commit to the wellbeing of "all" stakeholders); Nicholas Lemann, *When Corporations Changed their Social Role—and Upended Our Politics*, WALL ST. J. (Sept. 6, 2019, 11:02 AM), https://www.wsj.com/articles/when-corporations-changed-their-social-roleand-upended-our-politics-11567782178.
*But see* Richard J. Shinder, Opinion, *The Business Roundtable's Recipe for Confusion: When Companies Try to Do the Government's Job, Inefficiency and Uncertainty Result*, WALL ST. J. (Sept. 17, 2019, 6:42 PM), https://www.wsj.com/articles/the-business-roundtables-recipe-for-confusion-11568760132?mod=hp_opin_pos_2 (arguing that putting anyone over shareholders is a costly mistake).

[28] *See, e.g.*, Frank Ready, *Facing Regulation Tech Companies are Rolling the Dice with Self-Regulation*, LAW.COM: LEGALTECH NEWS (Sept. 27, 2019), https://www.law.com/legaltechnews/2019/09/27/facing-legislation-tech-companies-are-rolling-the-dice-with-self-regulation/.

### *B. The Rule of Local Remedies*

Unless abrogated by a BIT, the Rule of Local Remedies (the RLR) is the default customary rule of international law that controls whether a foreign investor can seek remedies from an international tribunal for claims arising out of FDI. The RLR requires claimants for international or treaty wrongs to vindicate their rights in domestic tribunals before seeking a remedy in an international tribunal.[29] The International Court of Justice recognized this customary doctrine in the *Interhandel* case, noting that "[b]efore resort may be had to an international court . . . it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system."[30] While it originated in the context of diplomatic protection of aliens, the RLR took on a role in additional areas of international dispute.[31]

There are two fundamental views on the RLR. One view would give the RLR substantive weight, requiring that a claimant show exhaustion of local remedies before bringing a claim to an international tribunal.[32] The other view characterizes the RLR as being merely procedural, allowing the respondent state the opportunity to adjudicate the claim in its domestic courts but not requiring exhaustion as part of the international cause of action.[33]

The RLR "is founded on the principal premise that the host or respondent state must be given the opportunity of redressing the alleged injury, to an alien or individual, which constitutes an international wrong."[34] The RLR emerged out of the recognition of the sovereignty interests of the respondent state.[35] However, as the RLR was developed in its application, it was "influenced and somewhat modified by the consideration of interests other than those of the host or respondent state, and particularly by taking into account the position of the alien or of the individual in the settlement of what may be regarded as an international dispute."[36]

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[29] CHITTHARANJAN FELIX AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 3–4 (2d ed. 2004).

[30] Interhandel (Switz. v. U.S.), Judgment, 1959 I.C.J. 6, 27 (Mar. 21).

[31] AMERASINGHE, *supra* note 29, at 35–42 (summarizing the development of the Rule in the twentieth century outside of diplomatic protection contexts into human rights, agreements between international organizations and states, and FDI).

[32] *Id*. at 391.

[33] *Id*. at 388.

[34] *Id*. at 13.

[35] *Id*. at 58.

[36] *Id*. at 13.

Among scholars, the majority view is that the RLR is a procedural rule.[37] This characterization of the RLR relies heavily upon the balancing of interests protected by the RLR between the sovereignty interests of the state and the fundamental fairness to the individual claimant, and any application of the RLR must be based upon a choice among the competing interests that it protects.[38] A consequence of a procedural character for the RLR may be that international adjudicatory bodies would be more willing to waive the RLR or apply a good faith or estoppel doctrine to its invocation.[39]

A minority view among scholars and international adjudicatory bodies is that the RLR represents a substantive requirement of seeking relief for an international wrong.[40] Under this theory, a potential international claim becomes justiciable at the international level only after the respondent state denies a remedy for the underlying internationally illegal act.[41] This theory of the RLR places much greater emphasis on the sovereignty interests of the respondent state and would not balance that interest against the interests of the claimants.[42] This theory more strongly protects the respondent state.

In the context of ISDS, categorization of the RLR as procedural or substantive will influence decisions of international tribunals to either bypass or uphold exhaustion requirements. As BITs developed in the late twentieth century, they tended to waive the RLR because of the belief held by mostly developed countries that the administration of justice and legal systems in predominantly developing countries was prejudiced against foreign interests.[43] As this Note will

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[37] *Id*. at 416 ("This survey of what courts, tribunals and judges have done when faced with an objection that local remedies had not been exhausted shows that the evidence conclusively favours the view that the rule of local remedies is procedural and neither substantive nor a combination of the two. Judges or states may have made statements supporting the view that the rule is substantive, but the practice of judicial bodies relating to the rule leads overwhelmingly to the conclusion that the rule has not been treated as substantive or as both substantive and procedural but as solely procedural in character."); *see also* George K. Foster, *Striking a Balance Between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration*, 49 COLUM. J. TRANSNAT'L L. 201, 210 (2011) ("Most modern authorities describe the exhaustion of local remedies rule as procedural in nature, because it has the effect of barring the admissibility of a claim even if it is valid on the merits.").

[38] AMERASINGHE, *supra* note 29, at 62–64.

[39] AMERASINGHE, *supra* note 29, at 400–02. *See also* NOAH RUBINS, THOMAS-NEKTARIOS PAPANASTASIOU & N. STEPHAN KINSELLA, INTERNATIONAL INVESTMENT, POLITICAL RISK, AND DISPUTE RESOLUTION: A PRACTITIONER'S GUIDE 311–12 (2d ed. 2020) (in practice, the Rule embodies a requirement of jurisdiction rather than substance).

[40] *Id*. at 389. Foster, *supra* note 37, at 238–43 (recognizing that some specific claims arising under a BIT may require a showing that local remedies were exhausted or were inadequate as part of the merits of that claim).

[41] AMERASINGHE, *supra* note 29, at 391.

[42] *Id*. at 397.

[43] *Id*. at 41.

explore, beginning in the mid-2010s, states reconsidered the policy implications of waiver of the RLR in BIT negotiations. Examining a sampling of the BITs negotiated in the late-2010s, many states attempted to reimpose the RLR, reflecting a stronger policy preference toward the host states' sovereignty interest. However, other doctrines and litigation tactics that developed among practitioners and the arbitral panels impose uncertainty on the ultimate efficacy of these more recent BITs that reimpose the RLR.

## II. BITS STATUS QUO

### *A. Geopolitical and Geo-Economic Forces Guiding BITs from 1994 to 2015*

Prior to the failure of the Doha Round of the WTO in the mid-2000s, liberalization of trade and increasing globalization were important factors in the development of international trade law.[44] These narratives also impacted the development of international investment law and BIT negotiations. Modern BITs originated in the 1950s and 1960s largely between developed Western European countries and developing countries. These early BITs heavily favored the developed countries from which the FDI originated, a trend that continued through to BITs negotiated after the Uruguay Round.[45] Some governments saw BITs as providing much-needed clarity to the largely unregulated sphere of international investment law.[46] Other governments, particularly those of developing states, associated signing BITs with foreign investment flowing into their countries.[47] However, empirical studies suggest a lack of any connection between BITs and the flow of foreign direct investment.[48]

After the conclusion of the Uruguay Round of WTO negotiations in 1994, the BIT regime expanded.[49] While each BIT is unique in some way, negotiations generally begin with a model BIT proffered by a developed nation to use as a

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[44] GANTZ, *supra* note 10, at 16–26.

[45] MARIA A. GWYNN, POWER IN THE INTERNATIONAL INVESTMENT FRAMEWORK 47 (2016).

[46] *Id*.

[47] *Id*.

[48] *Id*. at 127–35; *see also* Jennifer Tobin & Susan Rose-Ackerman, *Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties* 2 (Yale L. Sch. Ctr. for Law, Econ. & Pub. Pol'y, Research Paper No. 293, 2005) (finding a very weak relationship between BITs and FDI).

[49] *See BITs 1995–2006*, *supra* note 6, at 143.

template.[50] The use of templates results in BITs that, while not identical, contain extremely similar language and terms.[51]

Due to the imbalance of bargaining power between developed states and developing states,[52] most of the treaties entered into immediately after the Uruguay Round slanted power towards the developed states.[53] This was in part because of the ISDS international arbitration provisions.[54] Contrary to the customary RLR, international arbitration became a primary rather than a subsidiary means of adjudicating disputes, with very few BITs including strict exhaustion requirements.[55] Many BITs gave the investors the right to initially choose between different dispute resolution regimes and then be bound to their choice, in what are known as "fork-in-the-road" clauses.[56] Other BITs gave the investors unequivocal access to international arbitration.[57] A handful created unique arbitral systems within the treaty itself.[58]

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[50] *Id*. at 91.

[51] *Id*. at 91–92.

[52] *See generally* GWYNN, *supra* note 45, at 43–83 (surveying historical BITs and the power struggle between developed and developing countries).

[53] *Id*. at 117–18.

[54] *Id.* at 117.

[55] *BITs 1995-2006*, *supra* note 6, at 108.

[56] *See, e.g.*, 2008 Austrian Model BIT, art. 14(1), *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 39 (Chester Brown ed., 2013) [hereinafter COMMENTARIES]; Chinese Model BIT, art. 9(2), in COMMENTARIES at 172; Colombian 2009 Model IIA, art. IX.7, *in* COMMENTARIES, *supra*, at 231; Switzerland–Cambodia BIT, art. 11(4), *in* COMMENTARIES, *supra*, at 692 n.316; *cf.* 2003 Italian Model Bilateral Investment Treaty, art. X(3), *in* COMMENTARIES 340–41 (embodying a fork-in-the-road provision that is not "strict" because the options "do not seem to be exclusive"); UK Model IPPA (2008), art. 8, *in* COMMENTARIES, *supra*, at 743–44 (providing a "Preferred" and an "Alternative" option). Many of these and other treaties are not titled as a "Bilateral Investment Treaty"; however, they all deal with the regulation of FDI and unless placed within the context of a larger economic treaty such as NAFTA are collectively referred to as BITs.

[57] *See*, *e.g.,* Canadian Model FIPA, art. 26, in COMMENTARIES, *supra* note 56, at 108; German Model BIT (2009), art. 10, *in* COMMENTARIES, *supra* note 56, at 316–17; Netherlands' Model Agreement on Encouragement and Reciprocal Protection of Investments (2004), art. 9, *in* COMMENTARIES, *supra* note 56, at 580; Singapore Present IGA, art. 13(2), *in* COMMENTARIES, *supra* note 56, at 644; United States 2012 Model BIT, art. 24, *in* COMMENTARIES, *supra* note 56, at 821–22.

[58] *See, e.g.,* Latvia Model BIT, art. 10, *in* COMMENTARIES, *supra* note 56, at 456–58 (setting out rules for arbitral tribunal creation); NAFTA Chapter 11, art. 1116, *in* COMMENTARIES, *supra* note 56, at 500.

### *B. Policy Interests at Stake*

#### *i. Economic Protectionism*

The return of economic protectionism as a legitimate policy objective marks a major policy change in BITs negotiated in the late-2010s.[59] Before the election of Donald Trump to the U.S. Presidency legitimized economic protectionism as a policy choice in international economic law, states and commentators expressed wariness toward ISDS arbitral tribunals convened by private parties with the power to disrupt domestic regulatory systems.[60] Some advocated a resurrection of the RLR in the realm of the ISDS to avoid this critique.[61] Economic protectionism is the preeminent driving force in the movement towards the resurrection of the RLR. However, other more nuanced concerns of both policy and business leaders that emerged during the failure of the Doha negotiations also influence the round of BITs renegotiations that emerged in the second half of the 2010s.

#### *ii. Legitimacy Crisis*

A legitimacy crisis, real or perceived, of the ISDS system also influences the BIT negotiations. At the beginning of the 2010s, scholars of the international trade and investment regime came together to criticize the ISDS system on a number of grounds.[62] While recognizing that "[a]ll investors . . . should have

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[59] *See supra* notes 20–28 and accompanying text.

[60] *See* Vera Korzun, *The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs*, 50 VAND. J. TRANSNAT'L L. 355, 382 (2017) ("[Investor–state dispute settlement] allows *foreign* corporations to interfere with the *host* government's ability to regulate, constraining the state's capacity to function for the benefit of the public."); Stephan W. Schill, *Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review*, 3 J. INT'L DISP. SETTLEMENT 577, 578 (2012) (collecting criticisms regarding investor-state dispute settlement as "intrud[ing] into the regulatory space of host states"); George K. Foster, *Investor-Community Conflicts in Investor-State Dispute Settlement: Rethinking "Reasonable Expectations" and Expecting More from Investors*, 69 AM. U. L. REV. 105, 108 n.3 (2019) (collecting "Community Conflict Cases" where foreign investors have sought damages through international arbitration for the cancellation of development projects after community backlash due to water contamination, destruction of sacred sites, or endangerment of plants or wildlife).

[61] *See*, *e.g.*, Porterfield, *supra* note 8, at 1–3.

[62] *Public Statement on the International Investment Regime*, OSGOODE HALL L. SCH. (Aug. 31, 2010), https://www.osgoode.yorku.ca/public-statement-international-investment-

access to an open and independent judicial system," the scholars wanted to balance this interest with an understanding that international arbitration for ISDS settlement was "a means to the end of advancing the public welfare and must not be treated as an end in itself."[63] These scholars perceived that the ISDS system favored too heavily the protection of investors and undermined the states' fundamental rights.[64] Specifically, they argued that the ISDS system needed to become more transparent and that investment contracts needed to be "concluded and implemented in accordance with the principles of public accountability and openness and should preserve the state's right to regulate in good faith and for a legitimate purpose."[65]

Arbitrators who sit on these ISDS arbitral tribunals likewise face key questions that lead to issues of legitimacy. Greater generality and ambiguity of BITs and other international agreements lead to more judicial discretion, which affects the rights and obligations of the states.[66] However, the arbitrators themselves may prefer restraint in their pronouncements, to either the chagrin or benefit of the states or parties involved, because of the inherent uncertainty and discretion inherent in certain areas of international law.[67]

At least one commentator suggests that a solution to this legitimacy crisis is increased diplomatic discourse and negotiations as a means of dispute settlement, both through formal mechanisms in the provisions of BITs and informally though other channels and mechanisms.[68] While this system may greatly appeal to states, investors fear the efficacy of these systems to properly protect their reliance interest as such systems restrict investors' ability to vindicate their rights under BITs.[69]

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regime-31-august-2010/. These legitimacy questions are not new. In 1988, the late Professor Philippe Fouchard lamented the plague of misconduct and procedural disputes that characterized the field of international arbitration. Phillippe Fouchard, *Où va l'arbitrage international?* [*Where Is International Arbitration Going?*], 34 MCGILL L.J. 435, 450 (1989).

[63] *Public Statement on the International Investment Regime*, *supra* note 62.

[64] *Id*.

[65] *Id*.

[66] ANDRÉS RIGO SUREDA, INVESTMENT TREATY ARBITRATION: JUDGING UNDER UNCERTAINTY 9 (2012) (citing Elihu Lauterpacht, *The Development of the Law of International Organization by the Decisions of International Tribunals*, 152 RECUEIL DES COURS 377, 389 (1976)). International arbitral bodies do not have a rule of *stare decisis* as Anglo-American courts do. Instead, the strength of prior international decisions is generally assessed by the persuasiveness of their justification. Instead, future international tribunals have discretion to rely on the logical justifications, policy considerations, or even the members of previous panels in making decisions. *Id.* at 11.

[67] *Id*. at 19.

[68] Matilde Recanati, *Diplomatic Intervention and State-to-State Arbitration As an Alternative Means for the Protection of Foreign Investments and Host States' General Interests: The Italian Experience*, *in* GENERAL INTERESTS OF HOSTS STATES IN INTERNATIONAL INVESTMENT LAW 422, 424 (Giorgio Sacerdoti et al. eds., 2014).

[69] *See infra* Part IV.

At the beginning of the 2010s, the United Nations Conference on Trade and Development (UNCTAD) suggested model clauses for BIT dispute resolution procedures as a solution to the legitimacy crisis.[70] UNCTAD explored increasing opportunities for amicable or diplomatic resolution and promoting alternative dispute resolution.[71] However, UNCTAD strongly advocated the return to viewing international resolution as an extraordinary measure by reasserting the importance of the RLR.[72] Specifically, UNCTAD suggested that state parties should convert "fork-in-the-road" treaty provisions into "no-U-turn" clauses and toll statutes of limitations while investors exhaust their claims in local courts.[73]

### *iii. Fair and Equitable Treatment—Reliance Interests and Legitimate Expectations*

The "Fair and Equitable Treatment" (FET) clause that is a standard term in most BITs, also known as the "International Minimum Standard," provides another important policy interest in negotiating BITs.[74] Policymakers, scholars, and international tribunals often disagree regarding the scope of this term and its application to ISDS.[75] Textually, FET clauses provide a balancing test, weighing fairness toward the investor with a rule of law principle and interacting with the particular interests and expectations of foreign investors.[76] Arbitration panels must interpret these provisions on a case-by-case basis, defining the normative content of the standard in the context of individual treatments.[77]

In tackling the FET balancing standard, arbitration panels point to interests such as: Protection of the "basic expectations that were taken into account by the foreign investor to make the investment"; the expectation that "the host State . . . act in a consistent manner"; and the expectation that "the State . . . use the legal

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[70] *See* U.N. Conference on Trade and Development, *Investor-State Dispute Settlement*, U.N. Doc. UNCTAD/DIAE/IA/2013/2 (Dec. 2013), at 173–91.

[71] *Id*. at 175–76, 195–97.

[72] *Id*. at 177–78.

[73] *Id*. at 178.

[74] As reflected in BITs negotiated in the late-2010s, there is a dispute among practitioners as to whether FET provisions equate to the American concept of due process of law, but scholars and commentators generally consider "Fair and Equitable Treatment" provisions, customary "International Minimum Standard," and the conceptual term "due process of law" to be related. *See* Mara Valenti, *The Protection of the General Interests of Host States in the Application of the Fair and Equitable Treatment Standard*, *in* GENERAL INTERESTS OF HOSTS STATES IN INTERNATIONAL INVESTMENT LAW 26, 29–32 (Giorgio Sacerdoti et al. eds., 2014).

[75] *See id*. at 54–56.

[76] *Id*. at 34–35 (citing DOMINIQUE CARREAU & PATRICK JUILLARD, DROIT INTERNATIONAL ÉCONOMIQUE 463 (2007)).

[77] *Id*. at 35–38.

instruments . . . in conformity with the function usually assigned to such instruments."[78] Panels focus heavily on the concept of "legitimate reasonable expectations" as well as the stability, consistency, predictability, and transparency of the regulatory framework.[79] When addressing claims under FET standards, the arbitral tribunals ultimately weigh the "State's legitimate right to regulate the relevant economic sector [against] the behaviour taken by the foreign investor itself."[80]

Unresolved in FET arbitration is whether the protections of the FET standard extend to procedural rules of ISDS. Some panels have interpreted FET standards to allow a claim notwithstanding exhaustion requirements because of a breach of notions of due process.[81] In *Lemire v. Ukraine*, an arbitration arising out of an allegedly unfair administrative procedure toward the foreign investor, the panel allowed a FET claim even though the complaining foreign investor had not pursued available local judicial remedies.[82] The panel interpreted the applicable FET clause as a balancing test that required only reasonableness in the claimants decision not to pursue local remedies weighed against the state's sovereignty interests and the investor's other legitimate expectation.[83] Ultimately in that arbitration, the panel concluded that there was inequitable treatment toward the foreign investor under the FET standard in the administrative regulation and licensing of radio frequencies.[84]

While the reasoning and persuasiveness of *Lemire* is uncertain, policy concerns advocate extending the protections of FET provisions to cover procedural interests so that the FET provisions impose substantive requirements on the ISDS procedure. The 2004 U.S. Model BIT implicated such policy concerns when it obliged procedural rules "not to deny justice . . . in accordance with the principle of due process embodied in the principal legal systems of the world."[85] These due process standards often include substantive requirements for procedure on top of purely procedural protections.[86]

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[78] Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, ¶ 154 (May 29, 2003), 19 ICSID Rev. FILJ 158 (2004).

[79] *See* Valenti, *supra* note 74, at 39–40.

[80] *Id*. at 52.

[81] *See, e.g.*, Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (Jan. 14, 2010).

[82] *Id*. ¶ 277.

[83] *Id*. ¶¶ 282, 284–85.

[84] *Id*. ¶¶ 419–21. A factor that seemed to weigh heavily on the panel's decision was the opaqueness of the administrative law principles at work in the circumstances that led to the controversy before the panel. *See id*. ¶¶ 293–317.

[85] 2004 U.S. Model BIT, art. 5.2(a), https://ustr.gov/archive/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (last visited Mar. 16, 2021).

[86] *See, e.g.*, Int'l Shoe v. Washington, 326 U.S. 310, 316 (1945) (declaring that due process requires that procedure "not offend traditional notions of fair play and substantial justice").

The FET standard may also incorporate the idea that investment treaties and their dispute settlement mechanisms should "give legal protection to the investor's expectations created by the host state's representation or conduct."[87] While arbitration panels often apply an equitable view of protection to the "legitimate reasonable expectations" of the investors, the panels have not applied such a view consistently.[88]

Another conceptualization of the FET standard suggests that it protects reliance interests in the international investment regime by functioning in a promissory estoppel-type manner.[89] While the proposal does not address the substantive goal of furthering development through international investment law, it presents an interesting argument for rethinking remedies under international trade law, suggesting that remedies should protect reliance-based interests rather than expectancy-based interests.[90] Under this theory, the protected interest is only the investment rather than including its potential profits, shifting risk from the host country to the investor in any particular investment.[91]

When addressing the issues within the investor-state dispute settlement regime, drafters, statesmen, and other practitioners must consider, consistent with the developed FET jurisprudence, the fairness upon which investors rely when making private investment decisions. The promissory estoppel-like reliance theory of the FET standard is an explicit recognition of the importance of the reliance interests that investors hold in the international investment regime. Resort to investor-state dispute settlement in the form of international arbitration encapsules part of that reliance interest, although the perceived benefits of international arbitration may stem from deeply rooted biases.[92] Removal of procedural rights that investors perceive as preferable may undermine the whole international investment system and the reliance interest implicit in the FET standard.

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[87] TEERAWAT WONGKAEW, PROTECTION OF LEGITIMATE EXPECTATIONS IN INVESTMENT TREATY ARBITRATION: A THEORY OF DETRIMENTAL RELIANCE 3 (2019).

[88] *See generally id.*; *see also* Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 7.75 (Nov. 30, 2012) (protecting legitimate reasonable expectations is the "most important function of the fair and equitable treatment standard"); Int'l Thunderbird Gaming v. United Mexican States, Separate Opinion of Thomas Wälde, ¶ 37 (Dec. 2006), https://www.italaw.com/sites/default/files/case-documents/ita0432.pdf (finding "a self-standing subcategory and independent basis for a claim [based upon a theory of detrimental reliance upon reasonable expectations] under the 'fair and equitable standard'").

[89] *See generally* WONGKAEW, *supra* note 87.

[90] *Id.* at 233–64.

[91] *Id*. at 264.

[92] *See* AMERASINGHE, *supra* note 29, at 41–42 (suggesting that while developing states have legitimate reasons to disfavor waiver of the Rule of Local Remedies, investors from developed states will consider international arbitration more favorable because of the sophistication of the arbitrators appointed and a forum that has intrinsic biases towards themselves).

## III. EXAMINATION OF BITS

This Note examines a sample of BITs and sorts them into general categories to discuss the structure of their dispute settlement clauses and their implications with regard to the changing role of the RLR and exhaustion. Unfortunately, very few claims have come before an arbitration panel arising under BITs negotiated in the late-2010s, such that no panel has analyzed these dispute settlement clauses. Their contrasting textual language, though, implicates divergent interests that inform a normative assessment of these BITs.

Perhaps more interesting than the contrasts between different states' agreements are internal inconsistencies, where individual states agreed to differing obligations in different BITs. In this sampling for example, the UAE agreed to BITs with the traditional "fork-in-the-road" provision, a limited "fork-in-the-road" provision, automatic international arbitration, and a treaty-established tribunal.[93] These inconsistencies alone may indicate a structural policy issue with increasingly individualized BITs. The failure to establish a multilateral solution to issues in international investment law led to a sometimes-inconsistent patchwork of BITs, straining the international arbitration infrastructure to establish policy solutions.[94]

In light of the policy issues discussed above, these inconsistencies undermine the policy aims of reformers, potentially introducing more distrust of the international law system, apprehension from investors, and inequitable treatment between states.

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[93] *Compare* Acuerdo Entre Los Emiratos Árabes Unidos y La República Oriental Del Uruguay para La Promoción y Protección Recíprocas de Inversiones, U.A.E.-Uru., art. 11(4), Oct. 24, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5813/download [hereinafter UAE-Uruguay BIT], *with* Agreement Between Japan and the United Arab Emirates for the Promotion and Protection of Investment, Japan-U.A.E., Apr. 30, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5741/download [hereinafter Japan-UAE BIT], *and* Agreement Between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Arab Emirates for the Promotion and Reciprocal Protection of Investments, art. 8(5), H.K.-U.A.E., June 16, 2019, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5865/download [hereinafter Hong Kong-UAE BIT], *and* Cooperation and Facilitation Investment Agreement Between the Federative Republic of Brazil and the United Arab Emirates, art. 1, Braz.-U.A.E., Mar. 15, 2019, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5855/download [hereinafter Brazil-UAE BIT].

[94] *See* Stoler, *supra* note 16.

### *A. Extreme Exhaustion Requirements*

Treaties based upon the 2016 India Model BIT generated the most discussion in the BIT negotiations of the late-2010s because they impose a strict exhaustion requirement for dispute resolution in local courts.[95] While India's previous model BIT contained a typical "fork-in-the-road" provision,[96] the new model BIT requires complete exhaustion of local remedies before an international arbitration panel may hear an investor's dispute.[97] Prior to adopting this model BIT, India had been served numerous notices for international arbitration of ISDS after a foreign corporation won an arbitration award relying on a term of one Indian BIT that promised "effective means of asserting claims and enforcing rights."[98] India's narrowing of international arbitration is, in many respects, a reaction to this explosion of arbitration.[99] Concluded BITs include this provision. For example, the Belarus-India BIT adopts a strict five-year exhaustion requirement, which, while not indefinite as in the model BIT, is effectively indefinite.[100]

India's model BIT generated much debate, with commentators expressing skepticism about the exhaustion requirements. Brookings India released a responsive report on the developments in India's international trade and investment policy, with the subtitle questioning "*Is India Too Risk Averse?*"[101] Some commentators suggested that the document does not truly cure the issues India sought to address, as indicated and compared to a March 2015 draft model BIT which had included obligations on investors to comply with host state laws,

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[95] Model Text for the Indian Bilateral Investment Treaty (2016), art. 14.3, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf [hereinafter 2016 India Model BIT].

[96] Indian Model Text of BIPA (2003), art. 9(2), https://www.italaw.com/sites/default/files/archive/ita1026.pdf.

[97] 2016 India Model BIT, *supra* note 95.

[98] *See* White Indus. Austr. v. Republic of India, Final Award (Nov. 30, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf; *see also* PRABHASH RANJAN ET AL., INDIA'S MODEL BILATERAL INVESTMENT TREATY: IS INDIA TOO RISK AVERSE? 8–9 (2018) (summarizing India's backlash against BITs and investor-state dispute settlement generally).

[99] RANJAN, *supra* note 98, at 8–9. The Model BIT also narrows other traditional BIT terms such as the FET standard and the Most-Favored Nation provisions. *Id*. at 20–28. Circumscribing the FET standard may push the India BIT beyond the pale for investors or even state partners who might fear rampant protectionism or could push international arbitration panels to craft a customary solution notwithstanding the plain meaning of the text.

[100] Treaty Between the Republic of Belarus and the Republic of India on Investments, Belr.-India, art. 15.2, Sep. 24, 2018, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5724/download.

[101] RANJAN, *supra* note 98, at 1.

transparency and anti-corruption standards, and imposed severe consequences for breach of those obligations.[102] The March 2015 draft had also included several provisions protecting the host state's regulatory space and broadened some exceptions to the BIT.[103] These provisions sought to cure the issues identified over the course of the *White Industries* and subsequent international arbitration.

Others commented upon the inability of India to disengage from the ISDS system, despite the new model BIT significantly altering the terms of India's engagement.[104] Still other industry professionals and commentators noted that this model BIT and India's foreign investment policy lacked a "robust framework for protection of investors and investments."[105] They indicated desire for more fundamental change: "What India awaits is a legal and regulatory framework that is not adversarial or difficult for the foreign investor but instills confidence and faith in order to nurture smooth and beneficial economic relationships towards effective and sustainable development of both – the foreign investor and the Republic of India."[106]

While this extreme form of the exhaustion requirement does protect the sovereignty interest and expands the state's ability to regulate FDI, commentators' reactions indicate that such requirements scare investors. This alone undermines the efficacy of BITs with strict exhaustion requirements in encouraging investments.

### *B. Traditional Fork-in-the-Road*

Some states chose to retain the traditional "fork-in-the-road" dispute settlement provisions, giving potential litigants the choice of fora.[107] The pertinent provisions of these BITs do not vary significantly from the older BITs that

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[102] Jesse Coleman & Kanika Gupta, *India's Revised Model BIT: Two Steps Forward, One Step Back?*, OXFORD L. CTR.: INV. CLAIMS (Oct. 4, 2017), https://oxia.ouplaw.com/page/631.

[103] *Id*.

[104] Ranjan, *supra* note 98, at 38.

[105] NISHITH DESAI ASSOCS., BILATERAL INVESTMENT TREATY ARBITRATION AND INDIA: WITH SPECIAL FOCUS ON INDIA MODEL BIT, 2016 51 (Feb. 2018), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Bilateral_Investment_Treaty_Arbitration_and_India-PRINT-2.pdf.

[106] *Id*. at 51.

[107] *See, e.g.*, Agreement Between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments, Austl.-Uru., art. 14(5), Apr. 5, 2019, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5853/download [hereinafter Australia-Uruguay BIT]; UAE-Uruguay BIT, *supra* note 93, at art. 11(4); Accord Entre le Gouvernement de la Republique du Mali et le Gouvernement de la Republique de Turquie Relatif a la Promotion et la Protection Reciproques des Investissements, Mali-Turk., art. 10(2), Mar. 2, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5740/download [hereinafter Mali-Turkey BIT].

contained these provisions.[108] This model allows the foreign investor to retain significant control over the ISDS process. In many ways, this bucks against the interests driving the current round of BIT renegotiations. Perhaps, though, this model demonstrates a pragmatic understanding of the limitations of many features present in the system designed to protect host state interests.[109]

### *C. Fork-in-the-Road with Limitations*

As discussed above, a traditional "fork-in-the-road" clause allows investors to choose the body that will adjudicate disputes arising under the given BIT. The choice an investor makes may or may not be binding and limit their ability to bring disputes before alternative bodies. In BIT negotiations in the late-2010s, some states limited traditional "fork-in-the-road" provisions by only allowing international tribunals to exercise limited subject matter jurisdiction.[110]

One exemplar agreement, the Indonesia-Australia BIT, strongly prefers resolution in Indonesia's domestic courts if Indonesia is the disputing Party.[111] The Turkey-Cambodia BIT only allows investment activities that received the permission of the Turkey legislature to initiate international arbitration, and the

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[108] *Compare, e.g.*, Australia-Uruguay BIT, *supra* note 107, at art. 14(5) ("A claimant may submit a claim . . . under one of the following alternatives: (a) to a competent court of the Party in whose territory the investment is made . . . or (b) the ICSID Convention . . . or (c) the ICSID Additional Facility Rules . . . or (d) the UNCITRAL Arbitration Rules; or (e) by agreement, to any other arbitral institution or any other arbitration rules."), *with, e.g.*, 2008 Austrian Model BIT, *supra* note 56, at art. 14 (allowing investors to submit claims to a competent court of the party, previously agreed dispute settlement procedure, the ICSID, under UNCITRAL, or to the ICC). This provides an example of continuity among BITs negotiated after the Uruguay Round and BITs negotiated in the late-2010s.

[109] *See infra* Part IV.

[110] *See, e.g.*, Indonesia-Australia Comprehensive Economic Partnership Agreement, Austl.-Indon., at ch. 14, Feb. 6, 2020, https://www.dfat.gov.au/sites/default/files/iacepa-chapter-14-investment.pdf [hereinafter Indonesia-Australia BIT]; Agreement Between the Government of the Republic of Turkey and the Government of the Kingdom of Cambodia on the Reciprocal Promotion and Protection of Investments, Cambodia-Turk., Oct. 21, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5833/download [hereinafter Turkey-Cambodia BIT]; Accord Entre le Gouvernement du Royaume du Maroc et le Gouvernement de la Republique du Congo sur la Promotion et la Protection Reciproques des Investissements, Congo-Morocco, Apr. 30, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5809/download [hereinafter Morocco-Congo BIT]; Japan-UAE BIT, *supra* note 93; Accord Relatif a la Promotion et la Protection Reciproques des Investissements Entre le Gouvernement de la Republique du Mali et Le Gouvernement des Emirats Arabes Unis, Mali-U.A.E., Mar. 6, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5770/download [hereinafter Mali-UAE BIT].

[111] Indonesia-Australia BIT, *supra* note 110, at art. 14.25(1)(a).

agreement excludes any dispute related to "property and real rights upon the real estates" from international arbitration.[112] In the Morocco-Congo BIT, an investor cannot submit a dispute to international arbitration if it has been submitted to domestic courts and decided without significant delay.[113] In the Japan-UAE BIT, a party may not "appeal" a final decision of a domestic court or administrative tribunal to an international arbitration panel.[114] In the Mali-UAE BIT, a contracting party—the state—may demand that domestic courts hear the investor-state dispute.[115]

These deviate from earlier "fork-in-the-road" forum selection clauses by placing more control over the choice of arbitral forum in the hands of the host state. Many of these agreements also contain language to limit the effects of other doctrines on the area of dispute settlement, such as the incorporation of dispute resolution clauses from other BITs through a most-favored nation clause.[116]

A dispute arising under these BITs may still attempt to reach an international tribunal through investor-state dispute resolution. The arbitral tribunal, if it applies a procedural theory of the RLR, may be more willing to waive the exhaustion requirements that the state parties attempted to impose in these BITs.[117] However, these states have attempted to impose a stronger policy favoring sovereignty in the very text of the BITs with respect to the RLR by, for example, excluding the application of the Most Favored Nations doctrine to forum choice and including political actors in the forum selection for investor-state dispute settlement. While some panels have followed these limitations on BITs,[118] other panels may apply additional doctrines that would limit the effectiveness of these clauses.

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[112] Turkey-Cambodia BIT, *supra* note 110, at art. 9(4)(a)–(b).

[113] Morocco-Congo BIT, *supra* note 110, at art. 9(2)(c).

[114] Japan-UAE BIT, *supra* note 93, at art. 17(5)(a).

[115] Mali-UAE BIT, *supra* note 110, at art 11(3).

[116] *See*, *e.g.*, Indonesia-Australia BIT *supra* note 110, at art. 14.5(3) ("For greater certainty, the [Most-Favored Nation Treatment provision] shall not encompass international dispute resolution procedures . . . ."); Turkey-Cambodia BIT, *supra* note 110, at art. 3(4)(c) (Most-Favored Nation treatment "shall not apply in respect of dispute settlement provisions"); Morocco-Congo BIT, *supra* note 110, at art. 3(2) (stating that Most-Favored Nation treatment will not apply with respect to the right of an investor to submit a dispute to any other dispute settlement procedure"); Japan-UAE BIT, *supra* note 93, at art. 4(6) (Most-Favored Nation-Treatment "does not include treatment accorded to investors of a non-Contracting party and their investments concerning the settlement of investment disputes").

[117] AMERASINGHE, *supra* note 29, at 400–02.

[118] *See also* ICS Inspection & Control Servs. v. Argentine Republic, PCA Case No. 2010-9, Award on Jurisdiction, ¶¶ 243–73, 280 (Perm. Ct. Arb. 2012), https://www.italaw.com/sites/default/files/case-documents/ita0416.pdf (arbitral panel interpreting similar language in a BIT as a substantive limitation on a state's consent to the panel's jurisdiction).

### *D. No Exhaustion: Always Have the International Option*

Other states chose to retain a continuous option of international arbitration in their BITs, always allowing foreign investors to take disputes to the international level.[119] These BITs, which have a strong default preference for international arbitration, may appeal more to the investor who wants the international option to vindicate his rights. This liberal grant of arbitral jurisdiction would provide more certainty as to where the disputes will end up in the investor-state dispute settlement regime.

### *E. Treaty-Established Tribunal*

Other states established unique tribunal or arbitral systems through BITs.[120] These provisions allow states, in crafting their investment obligations, to tailor the scope of their international liability and exposure. These provisions also generally place the burden on the state parties to pursue international arbitration against their trading partners, rather than allowing foreign investors—private parties—to pursue international remedies.[121] Other BITs may allow private

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[119] *See*, *e.g.*, Hong Kong-UAE BIT, *supra* note 93, at art. 8(5); Agreement Between the Argentine Republic and Japan for the Promotion and Protection of Investment, art. 25(4), Arg.-Japan, Dec. 1, 2018, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5799/download [hereinafter Argentina-Japan BIT]; Agreement Between Japan and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investment, art. 23(4), Japan-Jordan, Nov. 27, 2018, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5808/download [hereinafter Japan-Jordan BIT].

[120] *See*, *e.g.*, Investment Protection Agreement Between the European Union and Its Member States, of the One Part, and the Socialist Republic of Viet Nam of the Other Part, art. 3.33, Eur.-Viet., June 30, 2019, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5868/download [hereinafter E.U.-Vietnam BIT]; Economic Partnership Agreement Between the CARIFORUM States, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part, art. 202-07, C.A.R.I.F.O.R.U.M.-U.K., Mar. 22, 2019, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5822/download [hereinafter CARIFORUM-UK BIT]; Free Trade Agreement Between Brazil and Chile, Braz.-Chile, ch. 21, Nov. 21, 2018, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5821/download [hereinafter Brazil-Chile BIT].

[121] *See* CARIFORUM-UK BIT, *supra* note 120, at art. 206 (only Parties allowed to initiate the special arbitration procedure allowed under the BIT); Brazil-Chile BIT, *supra* note 120 (establishing an administrative agency for the resolution of disputes between the investor of one state and the other state).

investors to bring international arbitration but only under a procedure and tribunal as established under the BIT.[122]

### *F. Diplomatic Process*

In its BITs, Brazil pioneered a new form of dispute settlement.[123] These treaties disallow the foreign investor bringing arbitration; instead, the dispute resolution and prevention mechanisms in these BITs contemplate only resolution through diplomatic process between the state parties.[124] These BITS do not grant the foreign investor a cause of action to bring either before an international arbitral tribunal or domestic courts and instead rely upon the good will of diplomatic process to enforce the BIT's substantive protections.[125] Importantly to this study, the clauses severely limit the scope of consent to arbitration compared to more traditional BIT provisions. A state party may only initiate arbitration after exhausting diplomatic negotiations.[126] Even then, the agreement limits arbitration to "determin[ing] the conformity with [the] Agreement of a measure that a Party claims to be not in conformity with the Agreement." unless the Parties mutually execute a separate instrument.[127]

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[122] *See* EU-Vietnam BIT, *supra* note 120, at art. 3.38 (establishing a tribunal to hear all claims under the BIT).

[123] *See* Brazil-UAE BIT, *supra* note 93 at art. 1; Cooperation and Investment Facilitation Agreement Between the Federative Republic of Brazil and the Co-Operative Republic of Guyana, art. 1, Braz.-Guy., Dec. 13, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5763/download [hereinafter Brazil-Guyana BIT]; Agreement Between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation, art. 2, Braz.-Eth., Apr. 11, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5717/download [hereinafter Brazil-Ethiopia BIT]; Cooperation and Facilitation Investment Agreement Between the Federative Republic of Brazil and the Republic of Suriname, art. 1, Braz.-Surin., May 2, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5715/download [hereinafter Brazil-Suriname BIT].

[124] *See* Brazil-UAE BIT, *supra* note 93, at art. 24; Brazil-Guyana BIT, *supra* note 123, at art. 24; Brazil-Ethiopia BIT, *supra* note 123, at art. 23; Brazil-Suriname BIT, *supra* note 123, at art. 24.

[125] *See, e.g.*, Brazil-UAE BIT, *supra* note 93, at art. 24(3) ("If the measure in question affects a specific investor . . . (a) the initial submission shall identify the affected investor; and (b) representatives of the affected investor may be invited to appear before the Joint Committee.").

[126] *See*, *e.g.*, *id.* at art. 25(1) ("Once the procedure under Paragraph 2 of Article 24 has been exhausted and the dispute has not been resolved, either *Party* may submit the dispute to an ad hoc Arbitral Tribunal . . . .") (emphasis added).

[127] Brazil-UAE BIT, *supra* note 93, at art. 25(2); Brazil-Guyana BIT, *supra* note 123, at art. 25(2); Brazil-Suriname BIT, *supra* note 123, at art. 25(2). *See also*, *e.g.*, Brazil-UAE BIT,

This extreme limitation, while similarly restrictive compared to the severe exhaustion requirements found in India's BITs, strikes at many of the issues that concern states in international investment law. It removes agency from the investors and places the states themselves in control of the dispute settlement process. Lack of recourse to the international tribunals for investors may help reduce the prercieved abuse of arbitral process by foreign investors as a means to extract concessions from the host state.[128]

These treaties are largely unproven in practice at the time of this writing, and the effects of alternative doctrines and exceptions to the RLR may frustrate these treaty provisions. Additionally, the extremely limited right of recourse to any treaty violation that invetors have under these treaties would seem to negate a reliance interest that the investor has with respect to its treatment by the host state. Indeed, these treaties attempt to disclaim any FET standard in the host state's conduct.[129] Instead, the treaties attempt to lay out specific guarantees, although these also include broad standards similar to FET such as "due process."[130] This does leave open the possibility that an adjudicatory body could impose the customary FET standard into these treaties through those broad guarantees that touch upon similar policy concerns as FET clauses and FET jurisprudence.[131]

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*supra* note 93, at art. 25(13) (contemplating side agreements for arbitration of discrete issues such as damages that would otherwise fall outside of article 25's grant of arbitral jurisdiction).

[128] *See* Emmanuel Gaillard, *Abuse of Process in International Arbitration*, 32 ICSID REV. FOREIGN INV. L.J. 1, 3 (2017) (describing potentially abusive litigation by investors).

[129] Brazil-UAE BIT, *supra* note 93, at art. 4(3) ("For greater certainty, the standards of 'fair and equitable treatment' and 'full protection and security' are not covered by this Agreement and shall not be used as interpretive standards in investment dispute settlement procedures."); Brazil-Guyana BIT, *supra* note 123, at art. 4(4) ("For greater certainty, the standards of fair and equitable treatment and full protection and security shall not be used or raised by either Party to this Agreement as a ground for any dispute settlement procedure in relation to the application or the interpretation of this Agreement."); Brazil-Suriname BIT, *supra* note 123, BIT at art. 4(3) ("For greater certainty, the standards of 'fair and equitable treatment' and 'full protection and security' are not governed covered by this Agreement and shall not be used as interpretive standards in investment dispute settlement procedures.").

[130] Brazil-UAE BIT, *supra* note 93, at art. 4(2) (guarantees against "(i) Denial of access to justice in any judicial or administrative proceedings; (ii) Breach of due process; (iii) Targeted discrimination . . . ; (iv) Manifestly abusive treatment . . . ; [and] (v) Discrimination against investments of investors of the other Party in law enforcement and the provision of public security"); Brazil-Guyana BIT, *supra* note 123, at art. 4(1) (employing the exact same language as the Brazil-UAE BIT); Brazil-Ethiopia BIT, *supra* note 123, at art. 4(2) ("Each Contracting Party shall grant to investments and investors of the other Contracting Party treatment according to the due process of law."); Brazil-Suriname BIT, *supra* note 123, at art. 4(2) ("In line with the principles of this Agreement, each Party shall ensure that all measures that affect investment are administered in a reasonable, objective and impartial manner, in accordance with the due process of law and their respective legislation.").

[131] *See*, *supra* notes 86–87 and accompanying text.

## IV. LIMITATIONS OF THIS TREATY FRAMEWORK

While many of the newly-negotiated BITs attempt to resolve on a state-by-state basis the issues with the international investment system, the system itself presents limitations which dilute the efficacy of any one of these individual BITs. Particularly, the doctrines of futility, emergency measures, and effects of Most-Favored Nation clauses, as well as legal "x-factors" such as interference by courts or diplomacy, may limit the effects of any of these individual BITs. Some BITs have specifically attempted to reduce the impact of these doctrines;[132] however, the BITs negotiated in the late-2010s are, at the time of this writing, largely untested, such that the efficacy of these attempts to reduce the impact of other doctrines is unclear.

### *A. Futility Doctrine*

Under the futility exception to the RLR, investment tribunals excused non-compliance with exhaustion in domestic courts.[133] The futility exception allows a litigant to bypass the customary requirements of exhaustion of local remedies when pursuing those remedies would be futile because of some issue or inherent inequality in the local judicial systems.[134] While this exception is theoretically "exceptional," only some tribunals strictly apply the exception, with others being more lenient or somewhere in between.[135] While some commentators insist that

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[132] *See*, *e.g.*, Indonesia-Australia BIT, *supra* note 110, at art. 14.5(3) ("For greater certainty, the [Most-Favored Nation Treatment provision] shall not encompass international dispute resolution procedures . . . ."); Turkey-Cambodia BIT, *supra* note 110, at art. 3(4)(c) (Most-Favored Nation treatment "shall not apply in respect of dispute settlement provisions . . . ."); Morocco-Congo BIT, *supra* note 110, at art. 3(2) (["Most-favored-nation treatment will not apply with respect to the right of an investor to submit a dispute arising out of this Agreement to any dispute settlement procedure other than as provided in this agreement."]); Japan-UAE BIT, *supra* note 93, at art. 4(6) (Most-Favored Nation treatment "does not include treatment accorded to investors of a non-Contracting Party and their investments by provisions concerning the settlement of investment disputes").

[133] Zachary Mollengarden, *The Utility of Futility: Local Remedies Rules in International Investment Law*, 58 VA. J. INT'L L. 403, 405 (2019).

[134] *Id*. at 415.

[135] *Id*. at 38–41.

the proper standard should be more restrictive "obvious futility,"[136] tribunals invoke this exception in a wide variety of controversies.[137]

### *B. Emergency Measures and Other Crises*

Some BIT protections are unenforceable in times of economic crisis or other emergencies.[138] Most BITs contain some form of "essential security clause," which tends to undermine the FET guarantees in BITs by allowing states to take emergency actions without regard to treaty obligations. Measures taken by states in emergency circumstances are thus not ordinarily subjected to the rigors and standards laid out in BITs. Such emergency measures may constitute an exception to the usual case that states use the renegotiated ISDS processes to protect their interests.

The most well-known invocation of emergency measures which disrupted BIT protections were Argentina's defenses for actions it took during its economic crisis of 2001.[139] When Argentina defaulted on its sovereign debt, Argentina's creditors resorted to ISDS.[140] In the arbitral proceedings, Argentina's government attempted to assert the defense of necessity to the economic emergency.[141] The panel adopted the necessity jurisprudence of the WTO, which narrowed the protections of BITs for the host state in crisis by imposing a demanding test for necessity.[142] According to some scholars, such a solution "hamper[s] the ability of governments to balance creditor demands and regulatory objectives."[143]

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[136] *Id*. at 430.

[137] *Id*. at 438–41.

[138] *See* El Paso Energy Int'l v. Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶¶ 614–15 (Oct. 31, 2011) (holding that stability established by a BIT cannot be total, "especially when extraordinary circumstances appear"). *See generally* Giorgio Sacerdoti, *The Application of BITs in Time of Economic Crisis: Limits to Their Coverage, Necessity and the Relevance of WTO Law*, *in* GENERAL INTERESTS OF HOST STATES IN INTERNATIONAL INVESTMENT LAW (Giorgio Sacerdoti et al. eds., 2014). Measures taken in times of economic crises can affect foreign investors in particular and disproportionately, especially when governments make dramatic structural changes to their economy to reinforce domestic industries. *Id.* at 1, 6.

[139] *See* Sacerdoti, *supra* note 138, at 14–19; Stephen Kim Park & Tim R. Samples, *Tribunalizing Sovereign Debt: Argentina's Experience with Investor–State Dispute Settlement*, 50 VAND. J. TRANSNAT'L L. 1033, 1054–58 (2017).

[140] For a succinct reporting of this history, see Sacerdoti, *supra* note 138, at 14–19.

[141] *Id*. at 14–15.

[142] *Id*. at 17–18.

[143] Park & Samples, *supra* note 139, at 1062. Park and Samples also noted that these arbitrations opened "a new frontier in the already fragmented global sovereign debt market . . . presenting new challenges to sovereign autonomy in the global financial system." *Id*. The panels' interpretations of the Argentine BITs are comparable to the challenges facing India before

However, panels have been inconsistent and unclear when interpreting the necessity standard.[144] Practically, then, "this defense is difficult to invoke except in the most exceptional and desperate circumstances."[145]

Argentina in those proceedings did not invoke—or at least the panels did not review—an "essential security" argument that others may seek to invoke to effect a more protectionist trade and investment policy or to skirt unfavorable BIT requirements. In 2019, though, a WTO panel addressed the interpretation of the GATT national security exception in its *Russia—Traffic in Transit* report.[146] Some ISDS arbitral panels had already incorporated existing WTO jurisprudence regarding emergency measures and essential security exceptions into their BIT jurisprudence.[147] The WTO panel held that the national security exception found in GATT article XXI was narrower than previously thought and invoked.[148] Because ISDS tribunals had already adopted the WTO necessity jurisprudence and because of international law's policy goal of interpreting treaties to conform with other standards of international law, investment dispute tribunals may adopt this new standard of necessity.[149] However, imposing this WTO jurisprudence wholesale into the BIT context would not fully take into account the policy implications that the parties to BITs had.[150]

### *C. MFN Provisions*

The application of the Most-Favored Nation (MFN) provisions to ISDS generates significant uncertainty in the efficacy of BITs negotiated in the late-2010s. MFN provisions date to the beginnings of international law and international commercial agreements.[151] They assure that one contracting state party receives the most favorable tariff rates and any other trade benefits granted by the other

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it reexamined its BIT program to invoke more severe restrictions on international arbitration. *See supra* note 99 and accompanying text.

144 *See* Sacerdoti, *supra* note 138, at 19.

145 *Id*.

146 *See* Panel Report, *Russia—Measures Concerning Traffic in Transit*, ¶ 7.20, WTO Doc. WT/DS512/7 (adopted Apr. 26, 2019).

147 *See*, *e.g.*, Continental Casualty v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶ 194 (Sep. 5, 2008) (citing Report of the Panel, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 7.104, WTO Doc. WT/DS332/R (adopted June 12, 2007)).

148 *Russia—Traffic in Transit*, *supra* note 146, ¶ 7.33 (interpreting the national security exception to the GATT as requiring an objective crisis in international affairs).

149 *See* Sacerdoti, *supra* note 138, at 19–23.

150 *Id*. at 22–23.

151 *See generally* S. Hornbeck, *The Most-Favored-Nation Clause*, 3(4) AM. J. INT'L L. 797 (1909).

party to any other state.[152] In the context of international trade law, the GATT's MFN provision multilateralizes trade benefits without necessitating individual negotiations among contracting parties.[153]

States adopted MFN provisions in the realm of international investment law to augment substantive provisions granting preferential investment allowances.[154] However, some litigants have attempted to secure procedural benefits through MFN provisions by bypassing exhaustion requirements through the incorporation of more liberal forum choice provisions in other BITs.

The first arbitration panel to endorse the view that MFN provisions covered dispute resolution procedures was *Maffezini v. Spain*.[155] There, Emilio Agustín Maffezini, an Argentine national, submitted a request for arbitration to the arbitral tribunal against the Kingdom of Spain without complying with exhaustion requirements in the Argentina-Spain BIT.[156] Rather, Maffezini argued that he had the right to access international arbitration under the Chile-Spain BIT, incorporated through the MFN provision of the Argentina-Spain BIT.[157] Spain counterargued that dispute resolution procedures fell outside of the purview of the MFN clause because the dispute resolution provisions were not core substantive provisions.[158] The tribunal concluded that dispute settlement procedures were "inextricably related to the protection of foreign investors" and "were essential for the adequate protection of the rights they sought to guarantee."[159] The

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[152] *See id.* at 797.

[153] *See* GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 58 (6th ed. 1994). *But see* GILBERT R. WINHAM, THE EVOLUTION OF INTERNATIONAL TRADE AGREEMENTS 107–31 (1992) (offering an early criticism of MFN provisions in the context of GATT trade negotiations because of the rising importance of regional and strategic preferential trade agreements under GATT art. XXIV).

[154] Berschader v. Russian Fed'n, SCC Case No. 080/2004, Award of Apr. 21, 2006, ¶ 179 (Arbitration Inst. of the Stockholm Chamber of Commerce) (declaring that "it is universally agreed that the very essence of an MFN provision in a BIT is to afford investors all material protection provided by subsequent treaties"). An interesting debate in this realm regards to what extent these individual clauses incorporate the history and customary international law of MFN provisions. *Compare* Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2(1) J. INT'L DISP. SETTLEMENT 97, 99–101, 108–13 (2011) (arguing that States considered the customary significance of the MFN terms of art), *with* Stephanie L. Parker, *A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties*, 2 ARB. BRIEF 30, 43–44 (2012) (arguing that under the Vienna Convention of the Law of Treaties the primary means of interpreting treaties is a textual ordinary meaning in light of object and purpose reading).

[155] Emilio Agustin Maffezini v. Kingdom of Spain, ICSID No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (Jan. 25, 2000).

[156] *Id.* ¶ 26 ("Claimant admits that the dispute was not referred to a Spanish court prior to its submission to the Centre.").

[157] *Id.* ¶¶ 38–40.

[158] *Id.* ¶ 40.

[159] *Id.* ¶ 54.

*Maffezini* panel decision on jurisdiction leads a line of reason that has been followed by other arbitral panels.[160]

The leading panel decision in opposition to *Maffezini* is *Tecmed v. Mexico*.[161] There, the panel declined to follow the reasoning of the *Maffezini* panel where the claimant asked the panel to allow a claim through the applicable BIT's MFN clause.[162] The panel considered the dispute resolution provisions negotiated by the parties to the operative BIT to be substantive in nature and reflect key policy choices by the negotiating state parties.[163] The reasoning of the *Tecmed* panel has been adopted by a minority of panels in a line of cases rejecting the *Maffezini* holding that would incorporate provisions of other BITs through MFN clauses.[164]

The holding of the *Maffezini* panel and subsequent panels in its line of reasoning is consistent with the view that the RLR is procedural in its nature.[165] The *Maffezini* panel did not delve into a policy discussion on Spain's sovereign interest as Spain invited it to, but the panel did weigh heavily policy equities that favored the claimant.[166] Likewise, the procedural theory of the RLR is more likely to be "influenced and . . . modified by the consideration of interests other

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[160] *See*, *e.g.*, Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶¶ 103, 109 (Aug. 3, 2004) (following the *Maffezini* panel in applying the MFN clause to dispute resolution procedures, finding that any public policy considerations in favor of a stronger Rule of Local Remedies were inapplicable); Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Award, ¶ 108 (June 21, 2011) (noting there has been "near-unanimity in finding that the [MFN] clause covered the dispute settlement rules" in cases where the clause referred to "'all matters' or 'any matter' regulated in the BIT"); *see also* Andreas R. Ziegler, *Most-Favoured-Nation (MFN) Treatment*, *in* STANDARDS OF INVESTMENT PROTECTION 67–74 (August Reinsisch ed., 2008) (tracing the history of these arbitration panels considering the MFN implications to procedural qualities).

[161] Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), 19 ICSID Rev. FILJ 158 (2004).

[162] *Id*. ¶ 69.

[163] *Id*.

[164] *See*, *e.g.*, Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, ¶ 172 (Dec. 8, 2008) ("The requirement of [recourse to local courts] can only be dispensed with by some 'legitimate' extension of rights and benefits by means of the operation of the (MFN) Clause – that is to say when the text of the MFN clause . . . permits the interpreter of the treaty to conclude that this was the clear and unambiguous intention of the Contracting Parties."); ICS Inspection and Control Services (United Kingdom) v. Republic of Argentina, PCA Case No. 2010-9, Award on Jurisdiction, ¶¶ 263–82 (Feb. 10, 2012), https://www.italaw.com/sites/default/files/case-documents/ita0416.pdf (finding that there was no compelling reason to disregard the restrictions of jurisdiction of the international arbitration tribunal made by the contracting parties to the BIT). Adherents to this analytical framework include dissenting opinions in the *Maffezini* line of cases. *See*, *e.g.*, Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern (June 21, 2011).

[165] AMERASINGHE, *supra* note 29, at 416.

[166] Maffezini, *supra* note 155, at ¶¶ 54–56.

than those of the host or respondent state."[167] Consistent with the acceptance of the RLR as a procedural requirement, the *Maffezini* line of reasoning with respect to the application of MFN clauses to procedural rights is the majority view among investor-state dispute settlement arbitration panels.[168] In contrast, the line of reasoning endorsed by the *Tecmed* panel supports broadly the substantive theory of the RLR. The substantive theory of the RLR values the state's sovereignty interest above any other policy equity.[169] The policies considered by the *Tecmed* panel reflect this preference for enforcement of the state's sovereignty interest in the choice of forum clause.[170]

This division in the authority from the investment tribunals generates uncertainty among the BITs negotiated in the late-2010s, which in many ways responded to this division in authority. Some of the BITs negotiated in the late-2010s have specific carve-outs within their MFN provisions to attempt to foreclose a panel applying the *Maffezini* line of reasoning.[171] Even in the face of a strong textual imperative, a panel holding to the procedural theory of the RLR will likely be inclined to find a waiver or exception to the RLR in favor of a claimant, weighing the policy interests of the claimant over the policy interests of the state.

### *D. "X-Factors"—Non-Traditional or Non-Legal Frustrations of BITs*

The use of non-traditional or non-legal means to gain an advantage or pursue other interests present the most unpredictable limitation upon the international investment system grounded in BITs. Such "x-factors" can have a chilling effect upon the foreign investor or dramatically raise transaction costs for either making and managing investments or vindicating the rights of both the foreign investor and the host state.

One such "x-factor" is the invocation of local or third-party courts after an arbitral award to frustrate the enforcement of ISDS awards. A well-known example of this tactic is the saga of BG Group, PLC's arbitration against the Republic of Argentina under the Argentina-UK BIT.[172] Following Argentina's 2001

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[167] AMERASINGHE, *supra* note 29, at 13.

[168] *See* RUBINS ET AL., *supra* note 39, at 262–63 (recognizing ambiguity in the authorities regarding whether an MFN provision applies to procedural rights but supporting *Maffezini* as representing the majority rule).

[169] *Id*. at 397.

[170] Tecmed, *supra* note 161, ¶ 69.

[171] *E.g.* Indonesia-Australia BIT, *supra* note 110, at art. 14.5(3) ("For greater certainty, the [MFN clause] shall not encompass international dispute resolution procedures . . . .").

[172] *See* Arturo C. Porzecanski, *The Origins of Argentina's Litigation and Arbitration Saga, 2002-2016*, 40 FORDHAM INT'L L.J. 41 (2016) (giving an extensive history of the scope of the legal challenges Argentina faced between 2002 and 2016).

economic crisis and its default on its sovereign debt, BG Group initiated international arbitration proceedings against the Republic of Argentina on April 25, 2003.[173] The arbitration panel convened in 2004 in Washington, D.C. and New York, and held proceedings through 2006, with a unanimous panel ruling in BG Group's favor on December 24, 2007.[174] As part of its legal conclusions, the arbitration panel concluded that BG Group could bypass the requirement to exhaust local remedies, rejecting Argentina's reliance on its state of emergency to exonerate it from liability.[175] On March 21, 2008, Argentina filed a petition to vacate or modify the arbitration award in the U.S. District Court for the District of Columbia, claiming a right to relief under the Federal Arbitration Act ("FAA").[176] On June 7, 2010, the D.C. District Court issued a ruling in BG Group's favor, finding that the arbitration award did not present any issue that the court could adjudicate under the FAA.[177] On January 27, 2012, the U.S. Court of Appeals for the D.C. Circuit reversed, finding that the courts could review the arbitration award's discussion of jurisdiction *de novo* because the parties had not consented to the jurisdiction of the arbitrators.[178] The U.S. Supreme Court ultimately reversed on March 5, 2014, finding the arbitrators' determinations lawful.[179]

While U.S. court system ultimately affirmed the arbitration panel's decision, Argentina's litigation frustrated the outcome of the arbitration for six and a half years beyond the panel's award judgement. BG Group's litigation, initiated in April 2003 and concluded March 2014, is not an outlier in international arbitration jurisprudence. Argentina's "rogue behavior" in its attempts to frustrate the ISDS system and other mechanisms of international economic law no longer seem out of the ordinary.[180] In addition, while the U.S. Supreme Court's decision

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[173] Republic of Arg. v. BG Grp. PLC, 715 F.Supp.2d 108, 114 (D.D.C. 2010).

[174] *Id*.

[175] *Id*.

[176] *Id*. at 112, 114.

[177] *Id*. at 126. The D.C. District Court accepted that it had the power to review the arbitral award under the U.S. Congress's authorization of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, but quoted the rule that "a court must confirm an arbitration award where some colorable support for the award can be gleaned from the record." *Id.* at 116.

[178] Republic of Arg. v. BG Grp. PLC, 665 F.3d 1363, 1370, 1373 (D.C. Cir. 2012).

[179] BG Grp. PLC v. Republic of Arg., 572 U.S. 25, 45 (2014).

[180] *Compare* Porzecanski, *supra* note 172, at 68–77 (documenting how Argentina departed from international economic "best practices" through "emergency measures" and litigation strategies), *with* Editorial Board, *Two Bills to Defend Free Trade: Congressional Action to Rein in Presidential Tarriff Power is Overdue*, WALL ST. J. (Feb. 7, 2019, 7:31 PM), https://www.wsj.com/articles/two-bills-to-defend-free-trade-11549585914 (conservative-leaning editorial staff arguing that Congress should rein in the U.S President's unilateral tariff authority in light of unpredictable behavior), *and* Editorial Board, *The National Security Tariff Ruse: Commerce Relies on Bad Data and Can't Even Persuade the Pentagon*, WALL ST. J.

would seem to bolster the finality of the decisions of international arbitration bodies, parties seeking to avoid the effects of arbitral awards often invoke U.S. domestic courts to attack awards.[181]

Diplomacy can also frustrate the BIT system and international trade and investment generally. While some BITs place emphasis on some peaceful or diplomatic dispute resolution, the *ad hoc* negotiations that occurred in the United States-China negotiations in the late-2010s lacked an adequate resolution framework, and an abundance of distrust strained negotiations and relationships.[182] Further, those negotiations struggled to gather the support of the U.S. business community, which then-U.S. President Trump viewed as essential to the success of the negotiations.[183] This diplomatic space, though, can offer many benefits to the states by increased control over the dispute and dispute resolution process. To take advantage of such potential benefits, states must understand their role in ISDS and the BIT regime.

Under the international investment treaty framework, States are inherently both parties and respondents to actions brought under them. Thus, BITs and the ISDS process are neither purely public international law nor private commercial agreements and arbitration. If BITs are purely public international law, treaty parties can, at any time, undermine not only investors' expectation but also tribunals' dispute resolution powers.[184] However, if considered purely private

(Mar. 12, 2018, 7:28 PM), https://www.wsj.com/articles/the-national-security-tariff-ruse-1520897310 (arguing U.S. President's unilateral trade actions constitute executive overreach).

[181] *E.g.*, Hardy Expl. & Prod. (India) v. Gov't of India, Ministry of Petroleum & Nat. Gas, 314 F. Supp. 3d 95 (D.D.C. 2018).

[182] *See* Rachel Brown & Preston Lim, *SinoTech: U.S. and China Delay Bilateral Summit as Negotiators Work on Trade Deal*, LAWFARE: HARD NAT'L SEC. CHOICES (Mar. 20, 2019, 2:13 PM), https://www.lawfareblog.com/sinotech-us-and-china-delay-bilateral-summit-negotiators-work-trade-deal (exploring the twists and turns of that week's negotiation progress as the United States maintained the threat of tariffs while insisting on further concessions from China).

[183] *See* Jeff Stein et al., *Trump Retaliates in Trade War by Escalating Tariffs on Chinese Imports and Demanding Companies Cut Ties with China*, WASH. POST (Aug. 23, 2019, 7:10 PM) (quoting an August 23, 2019 Tweet from Trump's currently-suspended account which "order[ed] all carriers" to diminish trade and investment in China); *cf.* Scott Moore, *Trump's Techno-Nationalism*, LAWFARE: HARD NAT'L SEC. CHOICES (Aug. 15, 2019, 8:00 AM), https://www.lawfareblog.com/trumps-techno-nationalism (arguing that it is against the interests of the U.S. business community to participate in strong-arm negotiations that the Trump Administration demands). Interests within the business community that run against the interests of diplomats and general disinterest among the business community with liberalizing trade negotiations have been cited as bearing at least partial responsibility for the failure of the Doha Round of WTO negotiations among the academic community. *See supra* notes 14–18 and accompanying text.

[184] Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 183 (2010) ("If the treaty parties could agree at any time on a binding interpretation of the treaty, they could use that authority to undermine not only investors' expectations but also tribunals' dispute resolution powers.").

arbitrations, dispute settlement mechanisms can "assert and establish new legal norms, often in unintended ways."[185] Although states largely delegated interpretive power over BITs to international tribunals, the states also attempted to retain and exercise this power—to disparate ends.[186] One commentator argued that states and parties should engage in an interpretive dialogue on the interpretation of treaties within the international investment arbitration regime.[187] The limitations of this approach stem from the reality that few BITs include the textual mechanisms by which parties may express an opinion on the interpretation of the BITs before or during ISDS arbitration.[188] However, as international investment law evolves, dissatisfied states may demand greater influence in the ISDS system.[189] Thus, as states increase their power in the international investment system, states and investors will likely resort to diplomatic approaches to resolution and a dialogue approach to the interpretation of these BITs.

## V. CONCLUSION

By the beginning of the 2020s, many states had renegotiated BITs and as part of the global reorientation of international trade and investment law and the return of economic protectionism as a legitimate policy interest. Specifically in the BITs negotiated in the late-2010s, states attempted to reimpose the RLR and claw back liberal grants of arbitral authority to the ISDS system. These steps were a reaction to the abuse of ISDS by investors at the beginning of the twenty-first century and the perceived encroachment on state sovereignty interests by the arbitral panels. Where BIT negotiations in the wake of the Uruguay Round and founding of the WTO stressed the liberalization and globalization of the international economy,[190] states negotiating BITs in the late-2010s were more conscious of the potential shortfalls of BITs and ISDS.

As evidenced by the sampling of BITs studied in this Note, the policy equities considered by the states negotiating these BITs led to a more confusing framework. For example, an investor from the UAE has startling different rights in a dispute depending on whether the investment is in Hong Kong, Japan, Mali,

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[185] *Id*. at 184 (quoting Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457, 459 (2000)).

[186] *Id*. at 180–81 (describing the NAFTA parties' attempt to assert power over the interpretation of NAFTA through the FTC statement of July 31, 2000).

[187] *Id.* at 223–24.

[188] *Id*. at 216.

[189] *Id.* at 192.

[190] *See World Investment Report 2015*, *supra* note 7, at 123–24.

Uruguay, or Brazil.[191] The continued failure to conclude a multilateral treaty governing (or at least setting a framework for) the international investment regime has resulted in a system that undermines the system's goals of encouraging FDI.

Especially within treaty frameworks such as those of Brazil or India, investors may lose confidence in the state and its commitment to cooperation in the preservation and promotion of FDI. Without a robust procedure for the protection of the investors' expectations, there is a significant opportunity for opportunistic behavior by state actors after FDI is made. Thus, investors will have to factor in this potential for opportunistic behavior into their economic calculations when deciding to engage in FDI.

Of course, international tribunals and other forms of ISDS could import additional protections to investors and FDI through customary international law doctrines such as the FET standard[192] or through MFN clauses. Tribunals also may be less willing to accept the imposition of the RLR in these BITs or more willing to find customary exceptions to the RLR. In the majority theory of the RLR, the RLR is merely procedural and may be waived under customary international law through a balancing test that weighs the sovereignty interest of the host country against the fairness and reliance of the foreign claimant.[193] Implicit in the ISDS forum choice clauses of many of the BITs discussed in this Note is a policy favoring the sovereignty interests of the host state. They in effect ask tribunals to accept the substantive view of the RLR—the minority view.[194] This could lead to a frustration of the interests behind BITs that favor the interests of the host state's sovereignty.

Ultimately, though, it is the further erosion of the investors' reliance that is the greatest shortcomings of the BITs negotiated in the late-2010s. While intrinsic bias in the BIT system and abuse by investor-litigants in the ISDS system revealed the issues in the international investment system at the beginning of the twenty-first century, the swing in economic policy towards protectionism that is inherent in many BITs negotiated in the late-2010s is to the detriment of FDI. As explored in this Note, both investors and states have tactics and strategies to frustrate the FDI system without protectionist treaties through doctrines such as national security and emergency as well as litigation games and old-fashioned

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[191] *See* Hong Kong–UAE BIT, *supra* note 93, at art. 8(5) (liberal grant of arbitral jurisdiction); Japan–UAE BIT, *supra* note 93, at art. 17(5)(a) (limited grant of arbitral jurisdiction); Mali–UAE BIT, *supra* note 110, at art. 11(3) (limited grant of arbitral jurisdiction); UAE–Uruguay BIT, *supra* note 93 (traditional fork-in-the-road clause); Brazil–UAE BIT, *supra* note 93 at art. 25(2) (largely disallowing ISDS).

[192] *Compare* Brazil–UAE BIT, *supra* note 93, at art. 4(3) (disallowing FET to be sued as a an "interpretive standard[] in investment dispute settlement procedures"), *with id.* at art. 4(2) (guaranteeing "access to justice" and "due process"). The concept of "due process" is part of the FET standard. *See supra* note 111–12 and accompanying text.

[193] *See* AMERASINGHE, *supra* note 29, at 62–64.

[194] *Id*. at 389.

diplomacy. The restrictions to the procedural protections made in many BITs negotiated in the late-2010s are not necessary for the ends they seek. Contemporaneously to some of those BITs negotiations, trade commentators feared that they would stem the flow of FDI.[195] The BITs that place extreme limitations upon the procedural rights of the foreign investors are unfavorable because of the detrimental impact they will have on the foreign investors' reliance interests and unwise because of the other doctrines of international law that will serve to frustrate them.

[195] *See supra* notes 126–31 and accompanying text.