Investor-State Arbitration and Human Rights

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ABSTRACT

After decades of growth and popularity, the international investor-state dispute settlement (ISDS) regime has come under intense criticism recently—particularly concerning the perceived chilling effect the regime imposes on states' ability to regulate in the public interest. This Article seeks to contextualize this criticism by examining the historical antecedent of ISDS in international law: the law of diplomatic protection. It proceeds to focus on the flexibility of ISDS as a critical advance over diplomatic protection, and shows how ISDS has evolved over time—particularly as developed states have moved from approaching the regime from a predominantly investment-exporting perspective to a more balanced perspective that accounts for inbound foreign investments. In concrete terms, the inherent flexibility of ISDS has permitted it increasingly to protect states' interests in regulating in the public interest, while at the same time protecting foreign investment against inappropriate governmental interference. The Article ultimately argues that the ISDS system should be permitted to continue to evolve to arrive at the appropriate equilibrium for its time.

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I. INTRODUCTION

The investor-state dispute settlement (ISDS) regime[1] has come under severe criticism in recent years, especially in terms of the perceived limits it places on states' abilities to regulate in the public interest.[2] Concerns about the system have encouraged states to reduce their participation in it or to withdraw from it altogether.[3]

This Article explores the current dissatisfaction with ISDS and reactions to this dissatisfaction through the lens of the historical antecedent of ISDS: the law of diplomatic protection. While both are mechanisms that enable investors to obtain redress for internationally wrongful acts, ISDS is nimble and flexible in comparison to the law of diplomatic protection. ISDS agreements are negotiated between states, mostly on a bilateral basis, and this gives the state-parties the ability and flexibility to craft agreements that can, and do, changed over time to meet new imperatives. The pace of change in recent years, culminating for purposes of this Article in the United States-Mexico-Canada Agreement,[4] has been dramatic and represents a reclaiming power on the part of states to regulate in the public interest with minimized fears of large claims brought by investors. Whether this

1. While ISDS includes investment treaty arbitration, investor-state dispute resolution provisions in investment contracts, and such provisions in domestic investment laws, the focus of this Article concerns ISDS as expressed in investment treaty arbitration. *See generally* EUR. COMMISSION, INVESTOR-TO-STATE DISPUTE SETTLEMENT (ISDS): SOME FACTS AND FIGURES 3–4 (2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf [https://perma.cc/Z8W8-4VXU].

2. *See, e.g.*, Cecilia Malmström, *Investments in TTIP and Beyond - Towards an International Investment Court*, EUR. COMMISSION (May 5, 2015), http://ec.europa.eu/commission/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court_en [https://perma.cc/V7MM-AXHS] ("So, the basic idea behind these agreements is sound. However, these agreements have come under increasing criticism. . . . My assessment of the traditional ISDS system has been clear - it is not fit for purpose in the 21st century. I want the rule of law, not the rule of lawyers. I want to ensure fair treatment for EU investors abroad, but not at the expense of governments' right to regulate.").

3. *See* Kathryn Gordon & Joachim Pohl, *Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World* 6–7 (Org. for Econ. Cooperation & Dev. (OECD) Working Papers on Int'l Inv., No. 2015/02, 2015), http://dx.doi.org/10.1787/5js7rhd8sq7h-en [https://perma.cc/5ER3-WZF6].

4. United States-Mexico-Canada Agreement, Can.-Mex.-U.S. [hereinafter USMCA], https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico [https://perma.cc/Q937-TQQM] (last visited Oct. 27, 2018) (not yet entered into force).

represents a high-water mark, or simply anticipates further steps in this direction, remains to be seen, but what is certain is that the inherent flexibility of ISDS will ensure that it will change as the demands of the market change.

Part II of this Article discusses what ISDS is, giving some historical context for the regime's building blocks—that is, investment treaties. It proceeds to discuss the role and shortcomings of the antecedent of ISDS that prompted the rise of ISDS in the first place. Part III discusses the basic drivers of investment treaty arbitration, including the question of what motivates states to enter into these international commitments, and, importantly, how and why these motivations change over time. By reference to the US Model BIT program, this Article will show how, as the motivations of states change, ISDS changes. The Article concludes with Part IV, and by reference to the latest treaties, shows that the flexibility of ISDS is evolving towards treaties that distinctly favor increasing states' abilities to legislate in the public interest, including in relation to issues of human rights. Indeed, the latest iteration—the United States-Mexico-Canada Agreement—indicates continued dramatic change that may either upend the system or ensure its long-term viability.

II. WHAT IS ISDS AND WHERE DID IT COME FROM?

The very name—investor-state dispute settlement—indicates the direct settlement of disputes between investors and the foreign states in which they invest. Settlements between states and investors can occur through arbitration or some other form of dispute resolution.[5]

ISDS has become so much a part of the international legal landscape in recent decades that it is easy to forget that its original purpose was to provide a better and more efficient alternative to a pre-existing international law regime: the law of diplomatic protection.[6]

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5. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 1, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S 159 [hereinafter ICSID Convention]. Other methods of dispute resolution are conciliation, "early neutral evaluation, facilitated negotiation and/or mediation." *See Other Alternative Dispute Resolution Mechanisms*, INT'L CTR. FOR SETTLEMENT INV. DISPUTES (ICSID), https://icsid.worldbank.org/en/Pages/process/Other-ADR-Mechanisms.aspx [https://perma.cc/S74C-KY9X] (last visited Oct. 10, 2018).

6. *See* Arseni Matveev, *Investor-State Dispute Settlement: The Evolving Balance Between Investor Protection and State Sovereignty*, 40 U. W. AUSTL. L. REV. 348, 356 (2015). The law of diplomatic protection dates back to 1758, when the Swiss jurist Emmerich Vattel wrote that "[w]hoever ill-treats a citizen indirectly injures the State, which must protect that citizen." Emer de Vattel, *The Law of Nations or the Principles of Natural Law* (Charles G. Fenwick trans., 1758), *in* 4(3) THE CLASSICS OF INTERNATIONAL LAW 136 (James Brown

The law of diplomatic protection worked well enough in the context of investment disputes to have dominated the legal landscape from the late nineteenth century well into the latter part of the twentieth century.[7]

The diplomatic protection regime was very much a product of its time, when the prevailing view of international law was that it regulated relations between states themselves, not between citizens and states. For example, under the law of diplomatic protection, if a US citizen invested in France, and France took steps against that investor or its investment that amounted to an internationally wrongful act[8] and refused to make reparations, that US citizen would have needed to complain to the US government. In turn, if the US government was motivated to do so, it would espouse its citizen's claim and approach France on a state-to-state basis to seek reparations for the internationally wrongful act.[9]

Scott ed., 1912); *see also* John Dugard, *Articles on Diplomatic Protection,* AUDIOVISUAL LIBR. INT'L L. (2006), http://legal.un.org/avl/ha/adp/adp.html [https://perma.cc/CEC9-5SZL].

7. *See* Dugard, *supra* note 6 ("The principle that a State was entitled to protect a national injured abroad became a central feature of relations between Western European States and the United States on the one hand and Latin American States on the other during the latter part of the nineteenth century and the early part of the twentieth century. . . . After World War II two developments had an impact on the law of diplomatic protection. First, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965, and a myriad of bilateral investment treaties (BITs) facilitate the protection of foreign investment. . . . Secondly, the advent of the human rights treaty has seen the conferral of rights on individuals which may be asserted not only against an individual's own State but also against other States, without the intervention of the individual's national State. Many have argued that this makes diplomatic protection redundant. Diplomatic protection is therefore today not the only instrument of international law that may be used by an individual whose personal or property rights have been unlawfully violated abroad by a foreign government. BITs provide protection for the investments of foreigners and human rights treaties offer remedies for the violation of personal human rights. But diplomatic protection remains a mechanism of international law that is still employed by States to secure just treatment for their nationals abroad. Moreover it has largely lost its reputation as a procedure used by rich, developed nations to interfere in the domestic affairs of developing nations. This is evidenced by the manner in which developing nations have not hesitated to invoke international law's oldest mechanism for the protection of aliens abroad.").

8. "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State." Int'l Law Comm'n, Rep. of the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 26 (2001) [hereinafter ILC Report] (presenting Draft Articles on Responsibility of States for Internationally Wrongful Acts).

9. For example, in the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice declared in 1924 that "[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law." Mavrommatis Palestine Concessions (Greece v. U.K.), Judgment, 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30).

From the investor's perspective, this was not a very satisfactory process for a number of reasons. First, claimants in such a setting are obliged to exhaust local remedies, or to demonstrate that exhaustion would be futile (often a costly and time-consuming process) before their claims could be espoused.[10] Second, once the state decides to espouse the claim, it becomes the state's claim as a matter of international law, and thus the investor-claimant loses control of its claim.[11] Third, if successful in its negotiations, the United States—in the above example—is not obliged under international law to convey any compensation it receives to the citizen investor.[12] Usually, the protecting state would at least keep a portion of any compensation paid as an administrative fee for its efforts.[13]

Finally, worst of all for investors, the process takes a significant amount of time. In addition to the time spent satisfying the exhaustion requirement, the process of then determining whether a particular claim was eligible for espousal is itself a multi-year process, involving gathering the facts of the case, interviewing claimants, and conducting legal research to determine whether the foreign state has committed internationally wrongful acts in relation to the investment.[14] Once the state espouses the claim, it necessarily controls whether and when to pursue the claim, considering its relations with the foreign government. In cases that involve postwar and postconflict settlements, negotiations

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10. *See, e.g.*, U.S. DEP'T OF STATE, 7 FOREIGN AFFAIRS MANUAL § 671(g)–(h) (2012) ("As with private commercial disputes, however, a United States citizen/national engaged in an investment dispute with a host government bears the primary responsibility for pursuing its resolution. Before the USG takes a position on the merits of the investor's dispute with the host government, normally the investor must pursue all available local remedies on its behalf.").

11. Maximilian Koessler, *Government Espousal of Private Claims Before International Tribunals*, 13 U. CHI. L. REV. 180, 182 (1946) ("It has been generally accepted that the moment a state has officially declared that it will 'espouse' the claim or assume 'diplomatic protection' of its national, the 'pro foro externo' control of the claim belongs exclusively to the protecting government. This means two things: first, that in so far as the procedure is concerned, the government is the sole and independent party-plaintiff, so that any procedural step or declaration can be made only by the government; second, that in so far as the defendant or opponent state is concerned any substantive disposition of the claim, including discharge or compromise, may be made only by the protecting state, with binding effect upon the interested private person, irrespective of his assent or protest.").

12. *See, e.g.*, Int'l Law Comm'n, Rep. of the Work of Its Fifty-Eighth Session, U.N. Doc. A/61/10, at 21 (2006) (presenting Draft Articles on Diplomatic Protection) ("*Recommended Practice*: A State entitled to exercise diplomatic protection according to the present draft articles, *should:* . . . (c) [t]ransfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions." (emphasis added)).

13. *Id.*

14. For a description of this process, see Gordon A. Christenson, *International Claims Procedure Before the Department of State*, 13 SYRACUSE L. REV. 528, 534 (1962).

are typically only possible after the normalization of relations between the states concerned; the process of normalization itself can take decades.[15]

It is worth noting that long before the ascendancy of ISDS, the pros and cons of diplomatic protection over an ISDS-like system were hotly debated in the US Congress. One of the arguments raised in 1949 against establishing the International Claims Commission as a permanent claims body was based on part of the post-World War II Marshall Plan—the Economic Cooperation Act of 1948 (ECA).[16] Under a provision of the ECA, states that received US aid were required to pledge to arbitrate any disputes relating to US citizens' investments in those states.[17] On the basis of this provision, Congressman John Martin Vorys argued, presciently, as follows:

> There is general agreement as to the importance of encouraging private investment in foreign lands as a postwar policy. In the ECA law steps were taken towards encouraging such investment by requiring protection of United States investors. In section 115b(10) each participating country must agree to submit for the decision of an international tribunal mutually agreed upon case—"involving compensation of a national of the United States for governmental measures affecting his property rights, including contracts with or concessions from such country." This bill heads in the opposite direction; instead of our Government's insisting upon impartial arbitration of claims for seizure and nationalization of American property, our Government is to make a practice of wholesale diplomatic "settlements" of such claims, with the proceeds to be parceled out to American claimants by a State Department agency without giving the claimant a chance to be heard in court either in the foreign country or here at home. This may encourage nationalization in foreign countries; it will certainly not encourage American investment abroad.[18]

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15. *See, e.g.*, U.S. DEP'T OF JUSTICE, FOREIGN CLAIMS SETTLEMENT COMM'N OF THE U.S., 2016 ANNUAL REPORT 12 (2017), https://www.justice.gov/fcsc/page/file/984371/download [https://perma.cc/7SD4-4W7U] ("As part of the process toward normalization of diplomatic relations, the United States and Libyan Governments concluded an agreement on August 14, 2008, that included a provision for the settlement of U.S. nationals' claims against Libya arising out of certain terrorist incidents occurring prior to June 30, 2006. The Agreement provided for a lump-sum payment of $1.5 billion in settlement of all claims of U.S. nationals arising out of these incidents." (citation omitted)). The claims settled in the agreement between the United States and Libya included claims from two decades earlier resulting from the April 1986 bombing of the LaBelle disco in Berlin. *See id.* at 19–20.

16. *See generally* Economic Cooperation Act of 1948 (Marshall Plan), Pub. L. No. 80-472, 62 Stat. 137 (1948).

17. *Id.* § 115(b). Countries participating in the bilateral agreements had to agree to submit "for the decision of the International Court of Justice or of any arbitral tribunal mutually agreed upon any case espoused by the United States Government involving compensation of a national of the United States for governmental measures affecting his property rights, including contracts with or concessions from such country." § 115(b)(10).

18. FOREIGN AFFAIRS LITIGATION IN UNITED STATES COURTS 157 (John Norton Moore ed., 2013) (citing *Economic Cooperation Act of 1948 (ECA): Hearing on H.R. 4406*, 81st Cong., part 2, at 3 (June 30, 1949) (statement of the minority view by Congressman Vorys)).

Congressman Vorys' statement succinctly lays out some of the frustrations with the system of diplomatic protection—specifically in terms of its ability to protect foreign investment and to provide effective redress in the event of illegal actions on the part of the host state. At the same time, he highlights the benefits of an alternative system that permits the investors themselves to bring direct claims against the offending government in a neutral, international forum. Congressman Vorys was ahead of his time in seeking a mechanism that would permit investors to make direct claims against foreign governments; notwithstanding his argument, the International Claims Commission, a vehicle of US diplomatic protection, was established by Congress in 1949.[19]

The derivation of ISDS from the diplomatic protection framework is also indicated by article 27(1) of the International Center for the Settlement of Investment Disputes (ICSID) Convention, which provides that "[n]o Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention . . . ."[20] Thus, ISDS was intended to replace diplomatic protection in the foreign investment arena and, in doing so, was designed to avoid the problems inherent in diplomatic protection.[21] Moreover, ISDS had an added goal of "depoliticiz[ing]" these kinds of disputes between states.[22] The key aspect of ISDS is that it permits—by the consent of the state-parties to

19. *See* Zvonko R. Rode, *The International Claims Commission of the United States: August 28, 1950–June 30, 1953*, 47 AM. J. INT'L L. 615, 618–19 (1953). Under Reorganization Plan No. 1 of 1954, the War Claims Commission and the International Claims Commission were abolished, and their functions transferred to the US Foreign Claims Settlement Commission (FCSC). *See About the Commission*, U.S. DEP'T JUST. (July 10, 2015), https://www.justice.gov/fcsc/about-commission [https://perma.cc/7Y9H-WYWP]. The commission continues to serve a vital function in relation to the satisfaction of large-scale claims made by US citizens against foreign governments, most recently in connection with the claims of US victims of international terrorism and mass claims. *See* U.S. DEP'T OF JUSTICE, *supra* note 15, at 2. Interestingly, the United Kingdom counterpart to the FCSC—the "Foreign Compensation Commission" —was "[wound] up" on the grounds that it was "last active in the administration of a claims programme in 1994." *See* Foreign Compensation Commission (Winding Up) Order 2013, 2013 No. 236, Explanatory Memorandum ¶ 7.2 (Eng.), http://www.legislation.gov.uk/uksi/2013/236/pdfs/uksiem_20130236_en.pdf [https://perma.cc/35YC-TWVM] ("Its continuing cost, as considered against its long-standing inactivity and the perceived unlikelihood of it being required in the future, indicate that its sustained existence cannot be justified.").

20. ICSID Convention, *supra* note 5, art. 27(1).

21. CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 415–17 (2d ed. 2009).

22. *Id.* at 416.

agreements[23]—private parties (i.e., investors) to bring claims directly against a sovereign state for prescribed kinds of wrongs.[24] The issues no longer are "irritants" between states, but are treated as legal disputes to be resolved through an independent law-based mechanism.[25]

The workhorse of the ISDS system is investment treaty arbitration; the treaties between states that define and describe the reciprocal rights and obligations of the state-parties vis-à-vis each other and their investors. These treaties come in a variety of forms, including bilateral investment treaties (BITs) between two states[26] and multilateral investment treaties (MITs) between more than two states, including multilateral trade agreements with investment chapters—like the North American Free Trade Agreement (NAFTA).[27] According to the United Nations Conference on Trade and Development (UNCTAD), there are well over 2,600 of these treaties in force today across the globe.[28]

Two key attributes differentiate investor-state treaties from their progenitors. First, and most importantly, they are individually negotiated between the contracting parties, whether two or more. In other words, they are bespoke agreements. This attribute is an important departure from the law of diplomatic protection, which draws on the full range of "customary and conventional international law,"[29] insofar as it permits the contracting parties to describe and define the protections they mutually agree to accord to each other's investors. It also permits the parties to terminate the agreements as per their terms,[30] and, naturally, as with any contract, to renegotiate the terms

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23. *See id.*

24. *See id.*

25. KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION 427–37 (2010).

26. *See, e.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Afg.-Ger., Apr. 20, 2005, 2554 U.N.T.S. 119.

27. *See* North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

28. *See International Investment Agreements Navigator*, U.N. CONF. TRADE & DEV.: INV. POL'Y HUB, http://investmentpolicyhub.unctad.org/IIA [https://perma.cc/JR42-ZDXB] (last visited Oct. 4, 2018).

29. *See* ILC Report, *supra* note 8, at 31.

30. *See, e.g.*, NAFTA, *supra* note 27, art. 2205 ("A party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties."). For an example of the termination provisions in BITs, see the agreement between the Kingdom of Spain and the Republic of Albania. Agreement on the Promotion and Reciprocal Protection of Investments, Alb.-Spain, art. 13, ¶ 2, May 6, 2003, http://investmentpolicyhub.unctad.org/Download/TreatyFile/32 [https://perma.cc/3WX3-

at any time.[31] The advent of investment agreements thus not only replaced the law of diplomatic protection, it ushered in an era where the particular rules were specified and agreed to by the contracting parties and could be adjusted as necessary by those contracting parties to achieve the appropriate balance sought. Second, the commitments contained in the agreements are reciprocal: they apply equally to both parties. As discussed below, the reciprocal nature of the commitments has a disciplining effect on both parties over time, as their economies and experiences evolve. In other words, states understand better with experience that what was once viewed as a positive, investor-friendly provision today can just as easily be seen as a regulatory-hampering provision tomorrow.

Thus, the fundamental nature of BITs and MITs as reciprocal agreements permits adjustments that have the goal of striking the right balance between investor rights and government regulations. In other words, the system itself is able to make adjustments to meet the criticisms it faces, and as will be shown in the Sections that follow, has made significant progress in this regard.

III. THE BASIC DYNAMICS OF INVESTMENT TREATY ARBITRATION

Historically, two basic and complementary motivations prompt states to enter into these investment agreements.[32] On the one hand, states seek to encourage their citizens to invest in foreign countries and to promote these agreements that protect the ability of theses citizens to make those investments without governmental interference.[33] On the other hand, some states want to attract investment and demonstrate a safe environment for foreign investments by entering into BITs that require them to adhere to certain agreed standards of

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9JHE] ("[T]his Agreement may be denounced at any time by either Party giving twelve month's written notice to the other Party.").

31. *See, e.g.*, Kevin Liptak, Jeremy Diamond & Katie Lobosco, *US and Mexico Reach a Preliminary Trade Deal That Could Replace NAFTA*, CNN (Aug. 27, 2018, 5:05 PM), https://www.cnn.com/2018/08/27/politics/mexico-us-trade-deal/index.html [https://perma.cc/ML8S-BEMJ] (detailing the recent renegotiation of the NAFTA treaty). The NAFTA parties have renegotiated the agreement as of the writing of this Article, while the existing agreement remains in full effect. *See* USMCA, *supra* note 4.

32. RODERIK ABBOTT, FREDERIK ERIXON & MARTINA FRANCESCA FERRACANE, EUROPEAN CTR. FOR INT'L POLITICAL ECON., DEMYSTIFYING INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) 6 (2014), http://ecipe.org//app/uploads/2014/12/OCC52014__1.pdf [https://perma.cc/ZKP4-Y6V2].

33. *Id.* at 6*; see also* SHAYERAH ILIAS AKHTAR & MARTIN A. WEISS, CONG. RESEARCH SERV., R43052, U.S. INTERNATIONAL INVESTMENT AGREEMENT: ISSUES FOR CONGRESS 4 (2013) ("In the beginning, BITs were drafted by capital-exporting states with the primary purpose of protecting their investors from unfair foreign treatment.").

treatment. Simply put, the main focus of states entering into these agreements is to attract investment—oftentimes with little appreciation of the potential ramifications of the commitments they are entering into.[34] Moreover, these investment-seeking states—usually those with less-developed economies than investment-exporting states[35]—historically have not had much leverage in negotiating BITs, and have often simply accepted the arguably offensively minded BITs offered by the investment-exporting state.[36]

This has been a basic dynamic of the system; however, this dynamic is not set in stone. Many states, like the United States, started out as investment exporters—with an outward-looking, or "offensive," approach to negotiating BITs.[37] However, the distinction between investment-exporting states and investment-seeking states has become less sharp over the past few decades, forcing states to reconsider their positions in terms of these treaties.[38] The United States provides an example of how the flexibility of the ISDS system can, and has, evolved

34. Gordon & Pohl, *supra* note 3, at 10 ("[C]ountries that, at one time and for various reasons, had not given in-depth consideration to investment treaties' language prior to adoption – or that realised only later how the language in the treaty was understood by tribunals – may now feel a need to adjust treaty practice . . . .").

35. ABBOT, ERIXON & FERRACANE, *supra* note 32, at 5 (stating that the first BIT was concluded between Germany, a developed economy, and Pakistan, a developing economy, in 1959); *see also* Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 209 (1988) ("Unlike the modern FCNs, which were directed primarily at developed countries, the [US] BITs were targeted at developing countries."). Of the forty-seven BITs entered into by the United States, only five are with developed countries (Czech Republic, Estonia, Latvia, Lithuania, and Slovakia). *See United States of America: Bilateral Investment Treaties*, U.N. CONF. TRADE & DEV.: INV. POL'Y. HUB, http://investmentpolicyhub.unctad.org/IIA/CountryBits/223#iiaInnerMenu [https://perma.cc/3S9M-DBUK] (last visited Oct. 2, 2018); *see also World Economic and Financial Surveys*, INT'L MONETARY FUND, https://www.imf.org/external/pubs/ft/weo/2018/01/weodata/groups.htm [https://perma.cc/HMF6-V67Z] (listing the criteria for, and names of, developed countries) (last visited Oct. 10, 2018).

36. Jason Webb Yackee, *Do States Bargain Over Investor-State Dispute Settlement? Or, Toward Greater Collaboration in the Study of Bilateral Investment Treaties*, 12 SANTA CLARA J. INT'L L. 277, 290–91 (2013) ("Most capital exporting states develop model investment treaties that serve as the beginning, and perhaps more or less the end, of most BIT negotiations.").

37. *See* Vandevelde, *supra* note 35, at 209–10 ("The BITS had three purposes: (1) to provide greater protection for United States investment in those countries with which the United States negotiated BITs, (2) to reaffirm that the protection of United States foreign investment remained an important element of United States foreign policy, and (3) to establish a body of practice to support the United States view of international law governing the protection of foreign investment.").

38. Gordon & Pohl, *supra* note 3, at 9 ("As the distinction between capital-exporting and capital-importing countries continues to fade—many countries now are 'a bit of both'—countries' perceived self-interests in relation to investment treaties may have evolved.").

towards a more balanced regime—particularly into areas that preserve the states' abilities to regulate in the public interest.[39]

Since 1977, the United States has based its BIT program on the development and publication of a "model" BIT, which formed the basis for its negotiations with other countries.[40] As noted above, the basic purposes of this program were offensive; that is, to provide greater protections for US investors investing overseas, to reinforce that the protections the United States sought were an important part of its foreign policy, and to establish a body of practice to support the US view of investment protection in international law.[41] The United States completed its first model text in 1981, the text of which drew from European BITs made with developing countries that had been in place since the very late 1950s.[42] The United States' first agreement, based on its 1981 model, was negotiated and signed in 1982 with Panama.[43]

The US models continued to evolve; moreover, there were several modest revisions of the US Model BIT in the 1980s that culminated in the 1984 model.[44] During that time, the main substantive investor protections contained in the US Model BIT were extensive, while the "carve-outs" that permitted government action were few. Thus, the 1984 model included, among other things, the following investment-friendly provisions:

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39. A shift from being an investment exporter to an investment importer is not the only driver of a state's motivation to adjust its ISDS policy positions. *Id.* Other motivations are readily apparent: the shock of a BIT claim—especially the first such claim—often prompts, on the part of the targeted State, a review of the commitments in BITs and follow-on adjustments. *Id.* at 10. Relatedly, gaining the legal capacity—especially on the part of developing states—and experience necessary to fully appreciate the implications of commitments made in BITs can prompt an overall review of treaty practice. *Id.* at 9. Nonetheless, the US experience in adjusting its ISDS positions in anticipation of increased inbound investment highlights the critical flexibility of the ISDS system as a whole. *See generally id.* (discussing the reasons why states reconsider ISDS positions).

40. *See* Vandevelde, *supra* note 35, at 209–10.

41. *See id.*

42. MARTIN A. WEISS, CONG. RESEARCH SERV., RL33978, THE U.S. BILATERAL INVESTMENT TREATY PROGRAM: AN OVERVIEW, at summary, 6 (2007).

43. Treaty Concerning the Treatment and Protection of Investments, Pan.-U.S., Oct. 27, 1982, S. TREATY DOC. NO. 99-14 (1986); *see also* Vandevelde, *supra* note 35, at 210.

44. Vandevelde, *supra* note 35, at 210–11 ("Developing a model text was also a continuous process. Experience in the early rounds of negotiations, primarily with Egypt and Panama, suggested the need for improvements in the December 1981 model text. The United States negotiating team produced a series of revised models through 1982, resulting in a model dated January 21, 1983 ('the 1983 draft'). . . . Experience with the 1983 draft revealed the need for further improvements, particularly to simplify some of its wordier passages. Accordingly, the United States negotiators developed a streamlined model dated February 24, 1984 ('the 1984 draft').").

- A guarantee to the investor of the better of national treatment or most favored nation treatment for the full life cycle of investment.[45] This means the foreign investor is entitled to be treated as favorably as the host party treats its own investors and their investments, or investors and investments from any third country, whichever is most favorable;
- A treaty-based commitment to accord "fair and equitable" treatment to investors and their investments. In other words, treatment greater than that afforded under customary international law;[46]
- An "umbrella clause" that requires each state to observe any obligation it has assumed with respect to investors of other states: "Each Party shall observe any obligation it may have entered into with regard to investments."[47] This is designed to be a catch-all provision that can, for example, convert what was up to this point a contract claim into a BIT claim;[48]
- Provisions on the expropriation of investments that require "prompt, adequate and effective" compensation when an expropriation takes place;[49]
- The right to submit an investment dispute with the treaty partner's government to international arbitration.[50]

There was only one significant carve-out that would permit the state-parties to act against the interests of foreign investors without the risk of triggering liability under the BIT: the "essential security

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45. *Text of the U.S. Model Treaty Concerning the Reciprocal Encouragement and Protection of Investment of February 24, 1984*, 4 BERKELEY J. INT'L L. 136, 137 art. II(1) (1986) [hereinafter *Text of 1984 Model Treaty*].

46. *Id.* at 137–38 art. II(2). Investor-State tribunals have recognized that treaty-based (or "autonomous") standards for "fair and equitable treatment" are not limited by customary international law. *See, e.g.*, Glamis Gold, Ltd. v. United States, Award, ¶¶ 607–08, 611 (NAFTA Ch. 11 Arb. Tri. June 8, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0378.pdf [https://perma.cc/B9AD-8HZK] ("Ascertaining custom is necessarily a factual inquiry, looking to the actions of States and the motives for and consistency of these actions. By applying an autonomous standard, on the other hand, a tribunal may focus solely on the language and nuances of the treaty language itself and, applying the rules of treaty interpretation, require no party proof of State action or *opinio juris*.")

47. *Text of 1984 Model Treaty*, *supra* note 45, at 137–38 art. II(2).

48. *See* Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and Divide Between Developing and Developed Countries in Foreign Disputes*, 14 GEO. MASON. L. REV. 137, 139, 147 (2006).

49. *Text of 1984 Model Treaty*, *supra* note 45, at 138–39 art. III(1).

50. *Id.* at 140–41 art. VI.

exception."[51] The essential security exception permitted the United States and its BIT partners to take measures necessary for the fulfillment of their national obligations with respect to the protection of their own essential security interests.[52]

Considering the investment protections and the relatively narrow carve-out, these early model US BITs were clearly designed with the United States' offensive, investment-exporting goals in mind.

The first major shift in the other direction for the United States occurred when it was considering an agreement that included other sophisticated economies: the NAFTA. The agreement was negotiated for several years, and came into law in the United States in December 1993.[53] Chapter 11 of NAFTA contains the ISDS provisions, and subsequent experience with the agreement included an increasing realization of the potential for claims against the United States:

> In the decade since the NAFTA's passage, concerns emerged in both Canada and the United States about the extent of investor coverage, especially in cases of indirect expropriation, or government regulation that under the Agreement might be subject to dispute settlement. Unlike other U.S. BITs, where the United States is the primary foreign investor, NAFTA guaranteed investor protection between two developed countries (Canada and the United States), with significant amounts of cross-border investment.[54]

Following from the NAFTA experience, the US Model BIT program sought to better balance the need to protect investors abroad, but also to protect the government's ability to regulate.[55] Model BITs were published in 1994, 2004, and 2012—each one more progressive in this regard.[56]

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51. *Id.* at 142 art. X ("This Treaty shall not preclude the application by either Party of measures necessary in its jurisdiction for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.").

52. *See id.*

53. *See* WEISS, *supra* note 42, at 12; *North American Free Trade Agreement*, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta [https://perma.cc/KJC5-SCK8] (last visited Oct. 10, 2018); David Alire & Michael O'Boyle, *The Rocky History of NAFTA*, REUTERS (Sept. 1, 2017, 12:12 PM), https://www.reuters.com/article/us-trade-nafta-timeline/the-rocky-history-of-nafta-idUSKCN1BC5IL [https://perma.cc/D5K9-8TUE].

54. *See* WEISS, *supra* note 42, at 12.

55. *See id.* ("[R]esponding to U.S. concerns that the types of protection granted to foreign investors by NAFTA may have been written too broadly, and that foreign investors may receive more favorable treatment for their NAFTA investor-state dispute claims than Americans would under U.S. law, Congress directed the Executive Branch in the Trade Act of 2002 (P.L. 107-126) to revise various provisions in its investments agreement negotiations to reach a better balance allowing U.S. sovereignty to legislate in its national interest.").

56. *See, e.g.*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2012 U.S. MODEL BILATERAL INVESTMENT TREATY (2012) [hereinafter 2012 U.S. MODEL BIT]; *see also* Kenneth

A comparison of the investment protections and carve-outs in the 1984 Model BIT and the 2012 Model BIT[57] neatly tells the story. The 2012 Model BIT includes the following major protections:

- National and most favored nation treatment (similar to 1984);[58]
- Fair and equitable treatment tied to the customary international law standard[59]—more restrictive than the free standing, or "autonomous," standard set forth in the 1984 Model;[60] clear limits on the expropriation of investments and, in particular, for indirect expropriation involving government actions.[61] Annex B to the 2012 Model sets forth factors that are to be considered by an investment tribunal when determining whether there has been an indirect expropriation.[62] The 2012 Model sets forth detailed standards on compensation[63] and exempts compulsory licenses granted in accordance with the TRIPS Agreement.[64]

Aside from this tightening of the main protections that are a standard part of BITs, the 2012 Model BIT does not include other protections that existed in the 1984 Model—there is no requirement on the part of the host state to provide an effective means of asserting claims, and no "umbrella" clause.[65]

Of more significance to the issue of ensuring greater regulatory space for governments are the carve-outs. The 2012 Model includes an "essential security exception" that is now self-judging, and therefore not subject to the interpretation of an arbitral tribunal: "Nothing in this

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J. Vandevelde, *A Comparison of the 2004 and 1994 U.S. Model BITs: Rebalancing Investor and Host Country Interests*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2008/2009, 283 (Karl P. Sauvant ed., 2009).

57. *Compare* 2012 U.S. MODEL BIT, *supra* note 56, *with Text of 1984 Model Treaty*, *supra* note 45.

58. *Compare* 2012 U.S. MODEL BIT, *supra n*ote 56, arts. 3, 4, *with Text of 1984 Model Treaty*, *supra* note 45, at 137 art. II(1).

59. 2012 U.S. MODEL BIT, *supra n*ote 56, art. 5(1).

60. *Text of 1984 Model Treaty*, *supra* note 45, at 137–38 art. II(2).

61. *See* 2012 U.S. MODEL BIT, *supra n*ote 56, art. 6.

62. *Id.* annex B.

63. *Id.* art. 6.

64. *Id.* art. 6(5). "TRIPS" is the international agreement on the Trade-Related Aspects of Intellectual Property Rights. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; *Trade-Related Aspects of Intellectual Property Rights*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/trips_e.htm [https://perma.cc/8BYC-62N5] (last visited Sept. 29, 2018).

65. *See supra* notes 47–50 and accompanying text.

Treaty shall be construed . . . to preclude a Party from applying measures *that it considers necessary* for the fulfillment of its obligations with respect to . . . the protection of its own essential security interests."[66]

The 2012 Model also includes what is known as a "prudential exception" with regard to financial services. As set forth in the 2012 Model, this provides that "a Party shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons, including for the protection of investors, depositors, policy holders . . . or to ensure the integrity and stability of the financial system."[67]

Relatedly, the 2012 Model provides further regulatory space in the form of the monetary policy exception, which provides that "[n]othing in this Treaty applies to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies."[68]

The 2012 US Model also has exceptions for government procurement[69] and taxation,[70] and has extensive provisions designed to ensure that the system is transparent and accountable.[71] The model adds provisions on investment and the environment that give the government discretion to act notwithstanding the other commitments.[72] For example, article 12.3 of the Model BIT provides that "[t]he Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to . . . other environmental matters determined to have higher priorities."[73]

Finally, there are extensive provisions in article 13 that address investment and labor.[74] Fundamentally, these seek to ensure that the state-parties do not take measures that weaken or reduce the protections under domestic labor laws and their commitments under the International Labor Organization (ILO) Declaration on

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66. 2012 U.S. MODEL BIT, *supra* note 56, art. 18 (emphasis added).

67. *Id.* art. 20(1).

68. *Id.* art. 20(2). To ensure that any tribunal seized of a claim concerning articles 20.1 and 20.2 will stay within the intended confines of these articles, article 20.3 sets forth separate requirements for dispute resolution. *See id.* art. 20(3).

69. *Id.* art. 14(5).

70. *Id.* art. 21.

71. *Id.* art. 11.

72. *Id.* art. 12.

73. *Id.* art. 12(3).

74. 2012 U.S. MODEL BIT, *supra* note 56, art. 13.

Fundamental Principles and Rights at Work.[75] These provisions of the 2012 US Model BIT affirm, in the context of these investment treaties, the importance of basic human rights initiatives—including the abolition of child and all forced labor, discrimination, and acceptable work conditions.[76]

Seen in this historical light, the evolution of the US BIT program has been dramatic in terms of the regulatory space it now accords to the state-parties as compared to 1984, including in the area of human rights. This evolution will continue; indeed, as discussed in the Section that follows, initiatives of the European Union, and developing countries themselves, go significantly further than the United States in this regard, and it will only be a matter of time before we see a new US model BIT.

IV. THE ISDS LANDSCAPE CONTINUES TO EVOLVE IN FAVOR OF GREATER ROOM FOR STATES TO LEGISLATE AND REGULATE IN THE PUBLIC INTEREST

Other forces continue to shape the ISDS landscape. These include increased unilateralism, which is reflected in the US negotiating position in the current NAFTA 2.0 negotiations.[77] This is the greatest danger that the ISDS system faces. Other forces include numerous dissatisfactions with the system, such as—for example—lack of accountability of the arbitrators. As noted earlier, the shock of huge awards against states cannot be overestimated; for example, Canada[78] and Europe have been greatly impacted by these awards. For example, a widely reported award against the Czech Republic roughly amounted to the republic's entire annual public health budget.[79] In many cases,

75. *See id.* art. 13.

76. *See* Int'l Labour Org. [ILO], *Declaration on Fundamental Principles and Rights at Work* (June 1988), https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang—en/index.htm [https://perma.cc/WF9X-VANT].

77. *See* Mireya Solís, *'America First' Is a Losing Strategy on Trade,* BROOKINGS (Oct. 24, 2017), https://www.brookings.edu/blog/order-from-chaos/2017/10/24/america-first-is-a-losing-strategy-on-trade/ [https://perma.cc/2TPR-XELS].

78. *See* WEISS, *supra* note 42, at 12 ("Several major cases have been brought before the NAFTA tribunals, some of which have led to monetary damage awards against Canada and Mexico."); Nikesh Patel, Note, *An Emerging Trend in International Trade: A Shift to Safeguard Against ISDS Abuses and Protect Host-State Sovereignty*, 26 MINN. J. INT'L L. 273, 291 ("Canada is the most sued country under NAFTA . . . .").

79. *See* CME Czech Republic BV v. Czech Republic (Neth. v. Czech), UNCITRAL, Final Award, at 161 (Mar. 14, 2003), 9 ICSID Rep. 264 (2006); Peter S. Green, *Czech Republic Pays $355 Million to Media Concern*, N.Y. TIMES (May 16, 2003), https://www.nytimes.com/2003/05/16/business/czech-republic-pays-355-million-to-media-concern.html [https://perma.cc/LHS6-3VX3].

developing countries are increasingly rejecting the "common wisdom" that BITs are necessary to attract foreign direct investment.[80]

In the face of all of this criticism, further aggressive evolution of ISDS—which is designed, among other things, to increase the ability of states to regulate in the public interest—has emerged. On September 21, 2017, the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada came into force provisionally.[81] CETA lays down the gauntlet in the first provision of its Section D, "Investment Protection," and article 8.9, "Investment and Regulatory Measures":

> 1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.
>
> 2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects and investment or interferes with an investor's legitimate expectations, including its expectation of profits, does not amount to a breach of an obligation under this Section.[82]

Indeed, CETA is replete with the phrase "for greater certainty."[83] The message here, to appointees of CETA Tribunals, is that the contracting parties have specific instructions as to how its provisions are to be interpreted, and an expectation that they will be so interpreted. In other words, the will of the contracting parties, rather than the preferences of arbitrators, must prevail. To reinforce this requirement, CETA has revolutionized ISDS by providing for an

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80. *See* Trishna Menon & Gladwin Issac, *Developing Country Opposition to an Investment Court: Could State-State Dispute Settlement Be an Alternative?*, KLUWER ARB. BLOG (Feb. 17, 2018), http://arbitrationblog.kluwerarbitration.com/2018/02/17/developing-country-opposition-investment-court-state-state-dispute-settlement-alternative/?print=pdf [https://perma.cc/FPF7-93V8] ("In recent years, countries including Brazil, India and South Africa have significantly rethought their approach to investment protection, leading to many policy innovations. . . . Other states that are attempting to disengage from the bonds of traditional BITs and the ISDS regime are . . . Bolivia, Ecuador, Venezuela, South Africa and Indonesia. The reason for this is that many countries concluded BITs without fully understanding their implications. When Pakistan was first sued in 2001, based on a 1995 BIT with Switzerland, no one in the government could find the text and had to ask Switzerland for a copy. . . . Argentina, Brazil, India, Japan and some other countries have reportedly rejected the initiative to establish a multilateral investment court. This suggests that some of the strongest opposition to the ICS is likely to come from developing countries . . . .").

81. *See EU-Canada Trade Agreement Enters into Force*, EUR. COMMISSION (Sept. 20, 2017), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1723 [https://perma.cc/JTG4-UMNV].

82. Comprehensive Economic and Trade Agreement (CETA), art. 8(9), Oct. 30, 2016, 2017 O.J. (L11) 23 [hereinafter CETA].

83. This phrase appears twenty-one times in the investment chapter. *See id.* ch. 8.

"Appellate Tribunal" to review awards rendered under the ISDS chapter (chapter 8).[84]

In the event that CETA's first-instance tribunals and the Appellate Tribunal continue to interpret provisions in a way not intended by the contracting parties, the Agreement provides for a mechanism to review and correct the course. Thus, for example, in article 8.10, CETA defines and describes in detail the content of the "fair and equitable treatment" obligation.[85] Article 8.10.3 then provides:

> The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialized committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision.[86]

This kind of revision is both revolutionary, in terms of BIT practice to date, but it is also entirely consistent with the flexibility inherent in ISDS that permits states to review and revise their agreements to reach a proper balance at any point in time.

An even more dramatic revision of ISDS can be found in the recent revisions of NAFTA—the newly minted, but not yet signed, United States-Mexico-Canada Agreement (USMCA).[87] While the text of the agreement warrants serious study, some initial conclusions may be drawn. First, the USMCA includes an article on corporate social responsibility, reaffirming the following:

> [T]he importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines, and principles of corporate social responsibility that have been endorsed or are supported by that Party, which may include the OECD Guidelines for Multinational Enterprises. These standards, guidelines, and principles may address areas such as labor, environment, gender equality, human rights, indigenous and aboriginal peoples' rights, and corruption.[88]

While this is clearly not a "hard" obligation, it is a provision that cannot be found in earlier US agreements, including the 2012 Model BIT.

However, the USMCA significantly curtails ISDS. With respect to disputes between US and Mexican investors, ISDS is limited to the following sectors: oil and gas activities; the supply of power generation services to the public; the supply of telecommunications services to the

84. *See id.* art. 8.28.

85. *See id.* art. 8.10.

86. *Id.* art. 8.10(3).

87. The investment chapter of the revised NAFTA (the USMCA) is now chapter 14 of the USMCA (the investment chapter of the 1994 NAFTA was Chapter 11). *See* USMCA, *supra* note 4, ch. 14.

88. *Id.* art. 14.17.

public; the supply of transportation services to the public; and the ownership and management of infrastructure, such as roads, railways, canals, or dams.[89] It also limits the kinds of claims that may be brought. For example, while article 14.6 lays out the parties' agreement to accord to investors of the other party "treatment in accordance with customary international law, including fair and equitable treatment and full protection and security," annex 14-D article 3 precludes the possibility of bringing a claim in arbitration for a violation of this protection.[90]

There is no provision for ISDS involving Canada. Thus, the USMCA places ISDS on a precipice: Can it continue to evolve in a way that preserves the ability of investors to bring direct claims against foreign governments for violations of international law standards of treatments of aliens? Or will we continue to see an erosion of the system to the point that it fades into obscurity? Again, the fundamental flexibility of the system is likely to ensure its continuing relevance and use.[91]

In any event, the story will not be told without input from developing countries. As noted above, ISDS has presented a uniquely sensitive challenge to developing states with limited governing and regulatory capacity. Developing states appear to be ready now to start to define the kinds of agreements that best reflect their own legal systems, cultures, and needs. For example, a signed but not-yet-in-force BIT between Morocco and Nigeria from December 2016 illustrates the extra measures developing states are including in BITs to maintain the proper balance of government control.[92] Like CETA—and even the USMCA—the text of this BIT clearly establishes the parties' intent to preserve the ability of the states to regulate in its article 23, "The Right of States to Regulate."[93] Article 15, "Investment, Labour and Human Rights," includes reciprocal commitments by the contracting parties to achieve "high levels" of labor and human rights protections, and to ensure that domestic laws and regulations meet international standards in regards to human and labor rights.[94] While these

89. *Id.* annex 14-E(6).

90. *Id.* art. 3, annex 14-D.

91. As if to underline that flexibility, USMCA annex 14-E(6) provides that "the Annex Parties may agree to modify or eliminate this Annex." *Id.* annex 14-E(6).

92. *See* Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, Morocco-Nigeria, Dec. 3, 2016, http://investmentpolicyhub.unctad.org/Download/TreatyFile/5409 [https://perma.cc/2DD5-6CV7] (not yet entered into force) (last visited Oct. 22, 2018).

93. *See id.* art. 23.

94. *See id.* art. 15.

provisions are, as of now, largely aspirational and leave much to the discretion of any future tribunals interpreting these provisions, developing country to developing country BITs will be an important area to watch for future ISDS development.[95]

In conclusion, the historical arc of ISDS demonstrates that the system has evolved dramatically in favor of states' abilities to regulate in the public interest and specifically in the area of human rights. If ISDS is to persist and succeed, it is essential that this evolution continues to address the continuing legitimate concerns of the users of the system.

95. *See* AXEL BERGER, FED. MINISTRY FOR ECON. COOPERATION & DEV., DEVELOPING COUNTRIES AND THE FUTURE OF THE INTERNATIONAL INVESTMENT REGIME 1, 25 (2015), https://www.die-gdi.de/uploads/media/giz2015-en-Study_Developing_countries_and_the_future_of_the_international_investment_regime.pdf [https://perma.cc/5XYY-P5PQ].