

Developing and Negotiating Based on a Model Investment Treaty

*Background Note to the IISD Webinar Series
on Investment Law and Policy*



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October

Sarah Brewin



Background

The well-documented explosion in investment treaty arbitrations starting in the early 2000s and peaking in 2015 has prompted many countries to rethink their approaches to international investment governance, including bilateral investment treaties (BITs). States' responses have ranged from widescale termination of BITs to excluding the investor–state dispute settlement (ISDS) mechanism or denouncing the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). Against this background, some states have chosen to develop a model BIT seeking to correct the problematic language found in earlier iterations, to provide stronger sustainable investment elements and to limit access to ISDS. Countries such as Bolivia, Brazil, Canada, Colombia, Ecuador, India, the Netherlands and Nigeria have all recently reviewed or developed or are in the process of reviewing or developing national models.

The third session of [IISD's Webinar Series on Investment Law and Policy](#) takes place against the backdrop of these recent developments in model investment treaties. Expert presenters from government and academia will provide insights on the policies and practical implications of developing a model and then taking it to the negotiating table. The webinar will also provide an opportunity for participants to discuss and share views on the utility of a model agreement, the challenges it poses, and other critical issues of particular interest to developing country investment negotiators and policy-makers.

Expert presenters

- Dr. Jonathan Bonnitcha, Senior Lecturer, University of New South Wales, and Associate, IISD
- Ms. Patience Okala, Deputy Director and Legal Adviser, Nigerian Investment Promotion Commission

Recent developments in model investment agreements

Countries developing national model investment treaties is not a new phenomenon: the United Nations Conference on Trade and Development's (UNCTAD's) database shows countries publishing models as early as the 1990s.¹ The *World Investment Report 2015* noted that at “least 50 countries or regions are currently revising or have recently revised their model international investment agreements.”² Part of what makes the issue of model treaties particularly topical in 2018 is *who* is updating their national models, *how* they are doing it and *what* they are including in their models.

Who is updating their model BIT?

[Canada](#) and the [Netherlands](#) are both formally reviewing their investment treaty models. Both are high-income, capital-exporting countries that have actively used investment treaties as a key component of their trade and investment agenda for many years, and that have together concluded a total of 147 BITs. Dutch BITs are particularly widely used in ISDS; a [recent report](#) found that 12 per cent of all publicly known ISDS cases are filed by investors who claim the Netherlands as their home country, and 17.5 per cent of total claims are made by allegedly Dutch investors, even though the Netherlands is party to only 3 per cent of all investment treaties.³ This makes the Netherlands the second most popular home state—after the United States—in ISDS claims.

¹ E.g. the German model BIT (1991) and UK model BIT (1991); UNCTAD Investment Policy Hub search results for “model agreements”: <http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchIRIResults>

² UNCTAD. (2015). *World investment report 2015: Reforming international investment governance* (p. 108). Retrieved from http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf

³ Knottnerus, R., Van Os, R., Verbeek, B.-J., Dragstra, F., & Bersch, F. (2018, January 13). 50 jaar ISDS. Een mondiaal machtsmiddel voor multinationals gecreëerd en groot gemaakt door Nederland. Amsterdam: TNI, SOMO, BothEnds, Milieudéfensie. Retrieved from <https://www.somo.nl/nl/50-jaar-isds-een-mondiaal-machtsmiddel-voor-multinationals>



Canada's 2004 model foreign investment promotion and protection agreement (known as FIPA) has been used primarily for BITs negotiated with developing countries, with a particular focus on mineral-rich African countries.⁴ Canada has concluded 20 BITs and nine free trade agreements (FTAs) since 2004, involving 25 developing country partners. Canadian companies have sued governments based on BITs and investment chapters in FTAs 45 times, and the largest award against a developing country so far was [USD 1.2 billion](#).⁵

The fact that these two countries recognize deficiencies with their previous models and are signalling a willingness to renegotiate treaties concluded on the basis of those models is in itself momentous.

But developing new model treaties is not the exclusive domain of capital-exporting countries.

India and Nigeria are two major emerging economies that have been burned by old-generation BITs and are leading the pack in developing new-generation national models. Brazil has never ratified any traditional BIT but has instead developed its own approach of Cooperation and Facilitation Investment Agreements (CFIA). Meanwhile, Africa is at the cutting edge of new-generation model treaties at a regional level.

India signed 84 BITs based on its 1993 model BIT and subsequently faced a number of treaty-based claims from mid-2000 onwards, leading it to review its model BIT and develop a new comprehensive model that was adopted in 2016.⁶ India has since negotiated using its new model as a base text with both developing and developed countries.

Following oil spills and massive environmental degradation in the Niger Delta and ISDS cases brought against Nigeria, the Nigerian government started considering the quality and not just quantity of investment. Nigeria conducted a review of its model BIT to balance investor rights and obligations, reference the country's sustainable development goals and protect the right to regulate. The new model was adopted in 2016 and was the basis for the Nigeria–Morocco BIT⁷ signed in the same year, described as one of the most innovative and balanced BITs ever concluded.⁸

Although **Brazil** signed 14 traditional BITs between 1994 and 1999, strong political opposition from the congress meant that they were never ratified, and the country resisted signing any more. Instead, Brazil developed its [innovative CFIA model](#), using it to sign agreements with [Angola](#), Chile, Colombia, Ethiopia, [Malawi](#), [Mexico](#), [Mozambique](#), Peru and Suriname since 2015. The intra-MERCOSUR (the common market for South America) Investment Facilitation Protocol concluded in 2017 was also inspired by the Brazilian approach.⁹

At a regional level, **Africa** has been a laboratory for innovative approaches for a relatively long time, including model treaties (for example, the Southern African Development Community [SADC] Model BIT template and the [Pan African Investment Code](#)) and strong rules ([Common Market for Eastern and Southern Africa Common Investment Area Agreement](#)).

⁴ Benin (2013), Tanzania (2013), Cameroon (2014), Nigeria (2014), Senegal (2014), Mali (2014), Côte d'Ivoire (2014), Burkina Faso (2015), Guinea (2015).

⁵ Bernasconi, N. (2018). *A progressive investment agenda for Canada: Going beyond nice words*. Winnipeg: IISD.

⁶ Investment Treaty News. (2016, August 10). India takes steps to reform its investment policy framework after approving new model BIT. IISD. Retrieved from <https://www.iisd.org/itn/2016/08/10/india-takes-steps-to-reform-its-investment-policy-framework-after-approving-new-model-bit/>

⁷ Morocco–Nigeria BIT (2016): <http://investmentpolicyhub.unctad.org/IIA/treaty/3711>

⁸ Gazzini, T. (2016). The 2016 Morocco–Nigeria BIT: An important contribution to the reform of investment treaties. Retrieved from <https://www.iisd.org/itn/2017/09/26/the-2016-morocco-nigeria-bit-an-important-contribution-to-the-reform-of-investment-treaties-tarcisio-gazzini/>

⁹ The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements? Investment Treaty News <https://www.iisd.org/itn/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements/> 2015.



How are countries updating their model BITs?

Also remarkable in this new wave of models is the increasingly transparent and consultative process by which the text is developed and adopted. Both Canada and the Netherlands have conducted or are conducting public consultation processes. The Canadian consultation is currently underway. It was launched before the presentation of a draft model with questions posed to the public. The Dutch draft model text was posted online for comment. India conducted a public consultation for its 2016 model BIT using its [innovative online citizen engagement platform MyGov.in](#). In Norway, public consultation on a draft model investment treaty in 2007 and 2008 ended in the government [shelving the text entirely](#).¹⁰ Following public concern about the ISDS clause proposed for the Transatlantic Trade and Investment Partnership (TTIP) agreement with the United States, the EU launched a public consultation on that instrument.¹¹ While this general move toward transparency is a positive development, not all consultations allow for a debate that goes beyond the technical issues. This precludes a broader debate on the more fundamental questions that arise in relation to international investment treaties.

What is contained in new model BITs?

The contents of new models vary by country and region, and an analysis of the substance is beyond the scope of this briefing paper. However, in general, the new wave of investment treaty models seeks to do three things:

1. To tighten and refine language around standards of protection to avoid overly broad arbitral interpretations that interfere with public policy objectives.
2. To include elements that seek to make an active contribution to the country's sustainable development agenda, for instance investor obligations and commitments regarding the environment, corporate social responsibility and human rights.
3. To limit the use of the ISDS mechanism and provide for alternative forms of dispute resolution. Most new models contain a mix of these elements.

For instance, the Nigerian model still has investor protections—including free transfer of funds, most-favoured-nation (MFN) treatment, national treatment and expropriation—but in more careful, circumscribed language and with more safeguards and carve-outs. The model also includes obligations on corporate social responsibility, labour, anti-corruption and human rights, and establishes a joint commission for dispute prevention. Brazil's CFIA's protect only foreign direct investment (not portfolio investments) and give carefully limited protections against discrimination, but do not protect against indirect expropriation. Instead of ISDS, the CFIA's require each state party to establish a centralized mechanism to hear investors' queries and grievances and create a Joint Committee for state–state cooperation and dispute prevention. Some CFIA's provide for state–state arbitration but never ISDS.¹²

The below infographic from the 2018 *World Investment Report*, although not specifically focused on model agreements, indicates the evolution in the content of investment treaties and chapters from 2000 to 2017, reflected in many countries' model treaties.

¹⁰ Damon Vis-Dunbar, 'Norway shelves its draft model bilateral investment treaty,' International Institute for Sustainable Development <https://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/>

¹¹ 'Reply to the European Commission's Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)' June 2014 https://www.iisd.org/sites/default/files/publications/iisd_reply_eu_isds_ttipp.pdf

¹² Martins, J. H. V. (2017). Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and recent developments. *Investment Treaty News*. Retrieved from <https://www.iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/>



Table III.4. Reform-oriented provisions in IIAs concluded in 2000 and in 2017

2000											2017												
	1	2	3	4	5	6	7	8	9	10	11		1	2	3	4	5	6	7	8	9	10	11
Austria-Bangladesh BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Argentina-Chile FTA	<input checked="" type="checkbox"/>															
Belarus-Singapore BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	ASEAN-Hong-Kong, China Investment Agreement	<input type="checkbox"/>										
Brunei Darussalam-China BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Burundi-Turkey BIT	<input checked="" type="checkbox"/>										
Chile-Dominican Republic BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	China-Hong Kong, China Investment Agreement	<input type="checkbox"/>										
Cuba-Paraguay BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Colombia-United Arab Emirates BIT	<input checked="" type="checkbox"/>										
Ethiopia-Turkey BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Intra-MERCOSUR Investment Facilitation Protocol	<input checked="" type="checkbox"/>										
Greece-Mexico BIT	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Israel-Japan BIT	<input checked="" type="checkbox"/>										
India-Lao People's Democratic Republic BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Jordan-Saudi Arabia BIT	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Italy-Libya BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Mozambique-Turkey BIT	<input checked="" type="checkbox"/>										
Malaysia-Saudi Arabia BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Pacific Agreement on Closer Economic Relations Plus	<input checked="" type="checkbox"/>										
Mongolia-Philippines BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Rwanda-United Arab Emirates BIT	<input checked="" type="checkbox"/>										
Nigeria-Switzerland BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Turkey-Ukraine BIT	<input checked="" type="checkbox"/>										
Rwanda-South Africa BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Turkey-Uzbekistan BIT	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Legend: Yes No Not applicable

Selected aspects of IIAs

- References to the protection of health and safety, labour rights, environment or sustainable development in the treaty preamble
- Refined definition of investment (e.g. reference to characteristics of investment; exclusion of portfolio investment, sovereign debt obligations or claims to money arising solely from commercial contracts)
- Circumscribed fair and equitable treatment (with reference to customary international law (CIL), equated to the minimum standard of treatment of aliens under CIL or clarified with a list of State obligations)
- Clarification of what does and does not constitute an indirect expropriation
- Detailed exceptions from the free-transfer-of-funds obligation, including balance-of-payments difficulties and/or enforcement of national laws
- Omission of the so-called "umbrella" clause
- General exceptions, e.g. for the protection of human, animal or plant life or health; or the conservation of exhaustible natural resources
- Explicit recognition that parties should not relax health, safety or environmental standards to attract investment
- Promotion of corporate and social responsibility standards by incorporating a separate provision into the IA or as a general reference in the treaty preamble
- Limiting access to ISDS (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from ISDS, limiting time period to submit claims, omitting an ISDS mechanism)
- Specific proactive provisions on investment promotion and/or facilitation

The scope and depth of commitments in each provision varies from one IA to another.

Source: UNCTAD, 2017.

Key questions for discussion

The following are the key questions that the webinar will seek to address, with ample time to explore further questions raised by participants:

- What are the benefits and risks associated with having a national model investment agreement?
- What are the key considerations for the process of developing a national model?
- What are the strategies for negotiating based on a model?
- How to determine the negotiable provisions versus the red lines?

Background reading

- In-depth discussions about investment treaty models, in particular the Brazilian, Colombian, Indian and Nigerian models, took place at the 11th Annual Forum of Developing Country Investment Negotiators in Nairobi, Kenya in February 2018. See the Forum [Report](#). On development of the model, see in particular Session 3: Drilling down on the substantive scope of agreements, starting on page 9. On negotiating with a model, see in particular Session 4: Substantive scope and negotiating challenges: Experience sharing, starting on page 13.
- Nathalie Bernasconi (2018), [A progressive investment agenda for Canada: Going beyond nice words](#). IISD.
- Bart-Jaap Verbeek & Roeline Knottnerus (2018), [The 2018 Draft Dutch Model BIT: A critical assessment](#). *Investment Treaty News*, IISD.
- Tarcisio Gazzini (2016), [The 2016 Morocco-Nigeria BIT: An important contribution to the reform of investment treaties](#). *Investment Treaty News*, IISD.
- José Henrique Vieira Martins (2017), [Brazil's Cooperation and Facilitation Investment Agreements \(CFIA\) and recent developments](#). *Investment Treaty News*, IISD.

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