Belgium's Model Bilateral Investment Treaty: A review

Draft for Discussion

Nathalie Bernasconi-Osterwalder
Lise Johnson

March 2010

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1.0 Introduction

For the past 50 years, countries have entered into treaties aiming to protect and promote foreign investments. The first such international investment agreement (IIA) was concluded in 1959 between Germany and Pakistan. There are now nearly 3000 of these agreements, most of which were concluded over roughly the past 15 years. The most common form of IIA is the bilateral investment treaty (BIT), but countries are increasingly negotiating investment protection provisions in their free trade agreements (FTAs). Moreover, regions have also begun adopting investment protection instruments. A key driver of these IIAs has historically been the desire of developed, capital-exporting states to ensure that their nationals are financially and legally protected when investing in developing, capital-importing states. Consequently, the majority of IIAs are between developed countries and developing countries or economies in transition.

Until the late 1990s, these treaties stayed very much unnoticed outside of diplomatic circles. Often, concluding an IIA was seen by contracting states as a photo opportunity and primarily had a symbolic, rather than a legal function. No disputes were decided under any BITs until 1990 – over 30 years after Germany and Pakistan signed the first such agreement. And it was not until the first cases were brought under the 1994 North American Free Trade Agreement (NAFTA) between Canada, the United States and Mexico – a free trade agreement that includes a chapter on investment protection – that governments, investors, and the broader public really began to realize that these treaties are not mere friendly diplomatic instruments, but are actually treaties with real "teeth" that can expose host states to significant liability for their breach of obligations toward investors.

As the number of IIAs began to increase in the late nineties, and lawyers became aware of the tool that they had at hand to seek relief for losses suffered by their transnationally active clients, the number of disputes increased accordingly. The number of investor-state disputes grew from just six known cases in 1995 to 226 known cases only 10 years later. That rapid growth has continued and even further accelerated: By the end of 2008, the total number of known treaty-based cases had risen to 317 (the exact number is unknown because many cases are never made public). Reflecting and likely to reinforce that trend, investment arbitration, a field of study almost unknown in academia just a decade ago, is now taught in universities and Master's programs.

As the United States and Canada – countries which had thought of themselves primarily as capital-exporting states – began getting sued by foreign investors under the investment treaties they had negotiated, they realized that these treaties could seriously limit their own policy space as host states. They concluded that they needed to protect and safeguard their rights to regulate and adapted their model and new investment treaties accordingly. For example, they added specifications and limitations to the most far-reaching substantive obligations relating to expropriation and "fair and equitable treatment" in order to safeguard environmental and social policies. They also adopted new rules to ensure that disputes are conducted in a more transparent manner, with all non-confidential documents and hearings open to the public, and opportunities for submissions by the public to the arbitral tribunal (in the form of so-called amicus curiae briefs).

Most European states, by contrast, continue to use IIA models aimed at providing the most extensive protection possible for the foreign investor, i.e. the European investor investing abroad, thereby imposing far-reaching obligations on the country receiving the investment (the host country). The European models typically do not incorporate notions of sustainable development, and, despite their name, do not contain any provisions actively promoting investment. Rather they focus solely on the protection of the investor. It is possible that this approach continues to be pursued in Europe because most European states have not been challenged under their IIAs so far – unlike the United States and Canada, who, as of the end of 2008, had 12 and 13 cases, respectively, brought against them by foreign investors, with several cases involving challenges to environmental regulations.

With the increased number of IIAs and the global investment flows changing – investments from India and China, among others, are no longer a rarity in Europe – it is likely that challenges against European states will also increase. Moreover, major European law firms are now realizing the business opportunities that U.S. firms had discovered with the NAFTA. We are already getting a glimpse of this new situation with the dispute initiated by the Swedish investor Vattenfall against Germany. In that dispute, the investor is seeking EUR1.4 billion (plus interest and legal expenses) as compensation for alleged harms arising out of environmental requirements government authorities imposed on Vattenfall's proposed major coal fired power plant in the city of Hamburg. The investor brought its claim under investment protection provisions contained in the Energy Charter Treaty – a move that demonstrates investors will use international arbitration under IIAs instead of, or in addition to, well-functioning European legal systems because the IIAs provide procedural and substantive rights and guarantees beyond those available at the national level.

2.0 History and Overview of Belgian BITs

As of June 1, 2009, Belgium had signed investment agreements with 90 countries – the vast majority of which are developing countries or countries in transition. It signed its first BIT in 1964 with Tunisia and shortly thereafter entered into a number of similar agreements with other African and Asian developing countries. In the late 1980s, with the collapse of communism and fall of the Soviet Union, Belgium began entering into BITs with a number of Eastern European countries, and in the 1990s it expanded its BIT program further, concluding agreements with countries in Central and South America.

The agreements have stayed fairly consistent over time, and generally follow the "traditional" European model: they are short and without much detail; broadly define investments; prohibit host governments from discriminating against foreign investments in favour of domestic investments or investments from third states; require governments to provide foreign investments fair and equitable treatment; obligate host governments to allow foreign investors to transfer funds and repatriate capital; require prompt and adequate compensation for expropriation of foreign investors' property; and allow investors to seek relief for alleged harms by bringing direct claims against host states through international arbitration.

Belgium has recently concluded some agreements, however, such as its 2005 BIT with Madagascar, that contain additional principles and details, the most notable of which are provisions addressing the relationship between investment protection and protection of labour rights and the environment. Belgium has also incorporated references to environmental protection and labour rights in BITs it has renegotiated, such as the BIT it signed with Korea in 2006 (which replaced the parties' 1976 BIT), and the BIT it signed in 2005 with the Democratic Republic of the Congo (which replaced the parties' 1977 BIT).

These provisions regarding labour rights and the environment are also included in the 2002 Belgian Model Bilateral Investment Treaty (the Belgian Model BIT). Otherwise, however, the Belgian Model BIT tracks Belgium's previous practices in that it generally follows the "traditional" European model. Thus, while this latest model BIT does contain some provisions evidencing an attempt to ensure contracting parties' investment policies and environmental and labour policies are mutually supportive, the text still lacks many important revisions and refinements that are important for promoting sustainable development and preserving policy space. Briefly, such specifications that could have been included are, among others, provisions explicitly stating that regulatory measures taken to further public policy goals do not constitute expropriations; provisions narrowing the scope of the "fair and equitable treatment" requirement; flexibilities with respect to the free transfer of funds; and provisions providing for transparency in investor-state dispute settlement.

This review discusses these issues in more detail below, focusing on the following key aspects of the Belgian Model BIT:

1. Provisions addressing investor-state dispute settlement
2. The agreement's scope
3. Foreign investors' rights and the corresponding obligations imposed on host countries
4. Provisions specifically addressing environmental protection and labour rights
5. Absence of obligations on home states and investors.

3.0 Investor-State Dispute Settlement

Most IIAs now include provisions establishing a mechanism for settling disputes between investors and host states. These provisions allow investors to challenge the host state under the treaty before international tribunals. This is perhaps the single most important element of investment treaties, as these provisions mark the difference from other economic treaties. While the WTO, for instance, allows one state party to challenge another state party for violation of a WTO treaty, the WTO does not allow affected exporters or other private parties to bring a claim directly to the WTO dispute settlement body. By contrast, investment treaties do just that: they allow investors to challenge host states directly in international tribunals. Moreover, unlike human rights instruments, which also often allow private parties to bring claims against governments, investment treaties typically do not require the prior exhaustion of local remedies. An investor can therefore circumvent domestic courts altogether, bringing its claims against the host government directly to an international tribunal.

Some countries, however, are contemplating adopting an exhaustion of remedies requirement or have already done so. For example, the recent Southern African Development Community Protocol on Finance and Investment requires the exhaustion of local remedies. Countries such as Brazil – a country that to date has not ratified a single investment treaty – believe that the exhaustion of remedies is necessary for the development of a strong domestic rule of law because it promotes the use of and reliance on domestic courts and administrative bodies, limits claims to those based on host governments' final actions and determinations (as opposed to mere policy statements or preliminary decisions) and helps ensure appropriate deference is afforded to government measures.

Some agreements, while not containing an exhaustion of remedies clause, contain mandatory waiting periods, consultations and/or negotiations. These can limit the number of claims filed against host states by facilitating the informal resolution of disputes. Some agreements also contain limitations periods requiring investors to bring actions within a certain period. These provisions can similarly help host states control the number of claims filed against them, and can also help host states gauge, account for and address their potential liability for any given measure.

Notably, the Belgian Model BIT's article on investor-state dispute settlement, Article 12, contains negligible restrictions on investors' ability to pursue international arbitration. It requires only that the "Parties to the dispute … endeavour … as far as possible … to settle the dispute through amicable negotiations" (Art. 12(1)). If the dispute cannot be settled amicably within three months, the investor can choose whether to submit the dispute to the host state's jurisdiction or international arbitration (Art. 12(2)). The agreement explicitly provides that the contracting parties "waive the right to demand that all domestic administrative or judiciary remedies be exhausted" (Art. 12(2)). It also contains no time limit within which claims must be brought. The Belgian Model BIT's provisions thus do not provide contracting parties much of a buffer against investors' arbitration claims, nor inducements for investors to first pursue those claims in the host country.

A further peculiarity of investor-state arbitration is the very opaque manner in which it can be conducted. Unlike other international judicial processes, such as under the WTO or the International Court of Justice, an investor-state dispute can remain entirely unknown to the public from beginning to end, even if the state is forced to pay significant monetary penalties to the investor. This lack of transparency runs contrary to widely accepted principles of good governance and sets back efforts to promote government and corporate accountability. The secrecy of the proceedings not only hinders (or excludes) the public's awareness and understanding of particular disputes, but also reduces its understanding of the implications of the broader investment law framework, as those implications are significantly shaped by the resolution of investment disputes.

The lack of transparency in investor-state dispute settlement is primarily due to arbitration rules normally applied in the proceedings, which are usually either the set of rules developed under the World Bank's International Centre for Settlement of Investment Disputes (ICSID), or the United Nations Commission on International Trade Law (UNCITRAL). While ICSID rules provide for a greater degree of openness than those under UNCITRAL (because under ICSID rules, both the commencement and the outcome of a case are registered and posted online), both sets of rules are essentially silent on whether, when, and how information relating to the proceedings should be disclosed. Given the rules' silence on transparency, tribunals often address the issues on an ad hoc, case-by-case basis. The decision in *Biwater v. Tanzania* illustrates how the tribunal's wide discretion in this area might impact governments' rights and obligations regarding public disclosure: In that case, the tribunal imposed a gag order on the respondent state that restricted the government's ability to make statements and disclose information relating to the proceedings despite (and, notably, also due to) the significant public interest in the case.

In light of the lack of transparency under most arbitration rules, and due to growing awareness of the public interest implications of investment disputes, states are increasingly taking steps to ensure openness of the proceedings by including provisions on the issue in their IIAs. Examples include the United States and Canadian Model BITs, US, Canadian, Australian BITs and FTAs, and a major internal African investment treaty (the Common Market for Eastern and Southern Africa (COMESA) investment agreement).

The Belgian Model BIT, in contrast, contains no language to ensure that investor-state claims, proceedings or decisions are made public.

The Belgian Model BIT also fails to address other problems inherent to investor-state dispute settlement, such as issues relating to arbitrators' conflicts of interests and the absence of any process fostering sound decision-making and predictability, such as an appeals mechanism.

4.0 Scope

The scope of an investment treaty determines which investors and investments are protected under the treaty and to whom and for what duration host states owe obligations. As is discussed further below, key factors affecting the scope of an investment treaty include the definitions of "investment" and "investor" and the question of whether obligations not included in the investment treaty are brought under the realm of the treaty through so-called "umbrella clauses." Examining these features in the Belgian Model BIT indicates that its scope – and the potential liabilities it entails for host states – is very broad.

A. Defining "Investment"

One approach to defining investment in investment treaties has been to use a broad, asset-based formulation which provides coverage to "any kind of asset," followed by a non-exhaustive list of the forms such assets may take. The list commonly includes a wide range of assets and interests, such as movable and immovable property, shares or stock in a company, futures, options, derivatives, contract rights, and intellectual property rights including trademarks and copyrights. This approach has frequently been used in BITs based on the 1990s' models for such agreements, and the Belgian Model BIT does the same.

The problem with this approach is that "any kind of asset" means to a large extent what it says, i.e. any kind of asset, ranging from money in a bank account to a holiday home, may be an investment under the treaty. Similarly, the sale of goods and services may qualify as an investment, thereby bringing assets under the coverage of the treaty and its dispute settlement provisions that were probably not intended by the contracting parties. Indeed, the decisions of investment treaty tribunals interpreting the investment definition and the uncertainty that is inherent in such broad provisions have led a number of states to either create alternatives to the broad asset-based formulation or to narrow its scope. Some investment treaties, for instance, require that investments must represent lasting or significant interests in a foreign enterprise, or be made in order to obtain economic benefit.[1] Restrictions may also aim to ensure foreign investments' compliance with host states' laws, or to protect host states' economic and national security.[2]

[1] Article 1 of the United States' most recently concluded BIT – the BIT with Uruguay which was signed November. 4, 2005 and entered into force November 1, 2006, for example, states that to be covered by the agreement, the asset must have "the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." *See also* Australia-Chile FTA, Ch. 10, Art 10.1(j) requiring "investments" to have those same characteristics (negotiations concluded in 2008 but the agreement is not yet in force). The investment chapter of the FTA between Canada and Peru, which entered into force August 1, 2009, similarly states that "real estate or other property, tangible or intangible" will only be an investment if it was "acquired in the expectation or used for the purpose of economic benefit or other business purposes" Canada-Peru FTA, Ch. 8, Art.

The Belgian Model BIT protects investments irrespective of whether they are significant, lasting, contribute to the host country's economic development or are made in accordance with the host country's laws.[3]

B. Defining "Investor"

Similar to definitions of "investments," definitions of "investors" are often broad, stating that an "investor" is a national or enterprise of one contracting state that is in the process of making or has made an investment in the other contracting state.[4] Those broad definitions, however, have led to situations where investors have attempted to manufacture or alter their nationality specifically in order to obtain rights and protections under particular IIAs.[5] In order to prevent investors from expanding the scope of an IIA's protections beyond that intended by the parties to the treaty, some states have begun more carefully identifying who qualifies as covered "investors" by, for example, denying protections to so-called "mailbox companies" (i.e., companies that establish only a minimal presence such as a post office box in the home country).[6]

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847. The Canada-Peru FTA further specifies that although a loan to and debt security of an enterprise may qualify as an investment, to do so the original maturity of the loan or debt security must be at least three years Canada-Peru FTA, Ch. 8, Art. 847.

2 An example of the former type of restriction can be found in the definition of an "investment" set forth in the BIT between the Republic of Korea and El Salvador, which states in relevant part, "'Investment' means every kind of asset or rights invested by investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party." *Id*., Art. 1 (signed July 6, 1998, entered into force May 25, 2002). It should be noted that to limit an IIA's protections to investments made in accordance with the host country's laws (i.e., to deny protection to investments illegally made such as investments made through bribery or fraud) countries can contain provisions to that effect in other parts of their IIAs. *See, e.g., Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, Aug. 2, 2006. An example of the latter type of provision can be seen in the investment chapter of the Canada-Peru FTA, which disqualifies any loan to or debt security of a state enterprise from the definition of an "investment." Canada-Peru FTA, Ch. 8, Art. 847.

3 Article 16 of the Belgian Model BIT does require that, to be protected, investments made *before* the agreement entered into force be made in accordance with the host country's laws and regulations.

4 See, e.g., Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore, Ch. 6, Art. 6.1 (signed June 29, 2005, entered into force Aug. 1, 2005); U.S.-Uruguay BIT, Art. 1;

5 See, e.g., Phoenix Action Ltd. V. Czech Republic, ICSID Case No. ARB/06/5, Award, April 9, 2009. In this case, the tribunal rejected jurisdiction on the grounds that the investor created the investment in order to improperly obtain protections afforded by the IIA. It should be noted, however, that this case turned on the definition of an "investment," not the definition of an "investor."

6 Some agreements, such as the Investment Agreement for the COMESA Common Investment Area state, for example, that for a "juridical person" to be a covered investor, it must be "duly constituted or otherwise organized under the applicable laws and regulations of a Member State… [A] juridical person owned or controlled by foreign nationals shall not qualify as a COMESA investor unless it maintains substantial business activity in the Member State in which it is duly constituted or organized" Art. 1(4).

The Belgian Model BIT allows companies to manipulate their nationality solely in order to claim rights under the agreement (treaty shopping).[7] Limits only apply to domestic investors claiming to be foreign.

C. Umbrella Clauses and Broad Dispute Settlement Clauses

Investment agreements from early on have included so-called "umbrella clauses." These clauses elevate host states' contractual and other undertakings toward foreign investors to treaty obligations. A 2004 survey found that of the roughly 2500 BITs then in existence, approximately 40 per cent contained such provisions expressed in a variety of different formats.[8] They can, however, be grouped in two broad categories.

First, sometimes treaties state that the host state must observe any obligation it has assumed with regard to the covered investments. This means that host states must comply both (1) with obligations explicitly agreed to in the treaty, such as obligations not to discriminate against foreign investors, which are discussed in more detail below, and (2) with any other obligations as well, including promises the host governments have made in specific contracts with the investor or obligations the host governments have under domestic law. As a result, these clauses can bring host states' contractual duties under the "umbrella" of the relevant investment treaty. Contract-based claims are, in effect, elevated to treaty-based claims. This can have the consequence that the obligations that would have to be settled in domestic courts or in some other predetermined way can be brought directly to international arbitration under the treaty.

Second, broad dispute settlement provisions can also operate as umbrella clauses. For example, several treaties state that the agreement's dispute settlement mechanisms apply to any dispute arising out of or related to covered investments. Again, this has the effect that not only disputes regarding obligations under the treaty can be brought directly to international tribunals but any dispute relating to the investment.

Tribunals have approached the interpretation of umbrella provisions in very different and, at times, conflicting ways. As a consequence, the clauses' impacts are largely unpredictable because there is no way to know how they will be interpreted. In fact, interpretation will depend entirely on the composition of the tribunal judging the matter. Since some tribunals have greatly expanded the

[7] Article 1(1) defines as an "investor" any (a) "national" who is citizen of one of the contracting parties, and (b) any "company" that is incorporated or constituted in accordance with the laws of the home state, and that has a registered office in its territory. It also states that a corporate entity incorporated "under the law of one Contracting Party but effectively controlled, directly or indirectly, by nationals or companies of the other Contracting Party, shall be treated as a company of the latter Contracting Party."
[8] Gill, Gearing & Birt, *Contractual Claims and Bilateral Investment Treaties: A Comparative Review of the SGS Cases* (2004) 21:5 J. INT. ARB 397 at n. 31.

scope of application of the treaty, accepting jurisdiction under the treaty even where contractual or domestic law was at issue, rather than treaty obligations, countries run the risk that the scope of the treaties they have entered into may be expanded beyond expectation.

The only certain way to avoid such developments is to avoid incorporating umbrella clauses and to narrowly formulate dispute resolution clauses. Many investment treaties do not use umbrella clauses, and, due to evolving case law and the uncertainty inherent in these types of clauses, a number of agreements that do include them expressly attempt to limit their scope. The Belgian Model BIT, in contrast, includes a typical umbrella clause without any limitations whatsoever. In fact, it contains both an umbrella clause as well as a broad dispute settlement clause.[9]

[9] Article 11 reads: "Each Contracting Party undertakes to ensure at all times that the commitments it has entered into in respect of the investment by investors of the other Contracting Party shall be observed. In its dispute settlement provision (Article 12), the Belgian Model BIT additionally extends investor-state disputes to "[a]ny dispute relating to an investment between an investor of one Contracting Party and the other Contracting Party."

5.0 Host Country Obligations

Contracting parties agree in IIAs to grant foreign investors various rights and to comply with corresponding obligations. Most IIAs contain provisions protecting foreign investors against discrimination in favour of the host country's nationals (national treatment protection) or nationals of third countries (most favoured nation or MFN protection). Other common provisions include (1) expropriation clauses barring host states from taking investors' property without paying compensation; (2) clauses requiring host states to accord investors "fair and equitable treatment" (FET); and (3) clauses guaranteeing foreign investors and investments rights to freely transfer funds out of the host country.

As referred to above, beginning in the 1990s, growing numbers of investors have initiated arbitration actions arguing that host states (both developed and developing) violated their obligations to foreign investors under governing IIAs. Among their claims, investors have alleged that host countries breached their duties by taking various regulatory, administrative and other actions including making public statements regarding investors' operation of important public services, requiring mining companies to take certain steps to rehabilitate the environment, and rejecting an investment on the grounds that it would negatively impact the preservation and character of an historic old town. These suits and others have highlighted the scope of governments' potential liability to investors under broad IIA provisions, and have raised and exacerbated concerns that IIAs may undesirably restrict governments' efforts to implement legitimate environmental, social welfare and other policy goals. Some of the important issues raised by these IIA obligations, and countries' resulting modifications to their IIAs, are described in more detail below.

A. Non-discrimination: Most Favoured Nation and National Treatment

Like the great majority of investment treaties, the Belgian Model BIT contains obligations to provide foreign investors most-favoured nation (MFN) treatment, meaning that the host state is to treat the investor of the home state no less favourably than it treats investors from other countries. In the earlier cases, this provision raised no particular concerns. More recently, however, investors have successfully argued that the MFN clause allows them to "import" commitments from other agreements to which the host state is a party, including from any IIA that the host country had signed.[10] This might lead to a situation where a hard fought negotiation of a BIT could be made largely irrelevant because an investor could rely on the more favourable provision in another treaty, thereby bypassing the provisions of the applicable BIT. Case law and certain academics are of the

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[10] See, e.g., Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, Jan. 25, 2000.

view that not only substantive guarantees could be imported, but also procedural issues, such as the provisions on investor-state dispute settlement.[11]

To avoid outcomes that are not desired by the parties to an IIA, one possible approach is to avoid the MFN clause altogether. The investment chapter in the recently concluded India-Korea Comprehensive Economic Partnership Agreement (CEPA),[12] for example, completely omits the MFN provision.[13] Another possible approach is to provide for certain exceptions or limitations to the MFN provision and to clarify the relationship between the investment treaty and other treaties, including other investment treaties. Some treaties already do this.[14] The Belgian Model BIT, however, does not contain any such exceptions or limitations.

The Belgian Model BIT's MFN article is also broad in that, like many other European treaties, it could arguably allow tribunals to compare dissimilar situations when determining whether or not one investor is treated more favourably than another. This is because the MFN provision in the Belgian Model BIT simply prohibits discrimination between "investors." In contrast, some IIAs, including many US and Canadian agreements, only prohibit discrimination between investors in "like circumstances."[15] As decisions by arbitral tribunals have revealed, this "like circumstances" language can be key for ensuring that governments are able to implement measures distinguishing between investors and investments in appropriate circumstances such as when investment projects pose different threats to environmental protection.[16]

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[11] See, e.g., Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, Jan. 25, 2000; Siemens v. Argentina, ICSID Case No. ARB/02/8, Decision on Jurisdiction, Feb. 3, 2004.

[12] This agreement, which entered into effect January 1, 2010, is available at http://commerce.nic.in/trade/INDIA%20KOREA%20CEPA%202009.pdf.

[13] See also Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore, ch. 6, June 29, 2005 (entered into force Aug. 1, 2005) (similarly omitting the MFN obligation from the investment chapter).

[14] See, e.g., Free Trade Agreement between New Zealand and China, Ch. 11, Art 139, April 7, 2008 (entered into force Oct. 1, 2008):

1. Each Party shall accord to investors, investments and activities associated with such investments by investors of the other Party treatment no less favourable than that accorded, in like circumstances, to the investments and associated activities by the investors of any third country with respect to admission, expansion, management, conduct, operation, maintenance, use, enjoyment and disposal.
2. For greater certainty, the obligation in this Article does not encompass a requirement to extend to investors of the other Party dispute resolution procedures other than those set out in this Chapter.

[15] See, e.g., 2004 U.S. Model BIT, Art. 4(1) ("Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in *like circumstances* [emphasis added], to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.").

[16] See, e.g., Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Arb. Case No. ARB/05/8, Award, Sept. 11, 2007, paras. 392-396 (looking at environmental, cultural, economic and legal aspects of the investments when determining whether investors were in "like circumstances").

Similar considerations with respect to "like circumstances" also apply in the national treatment context. The national treatment obligation also has the potential of raising market access issues. This is particularly true when a BIT's national treatment provision covers the pre-establishment phase. For example, the US model BIT stipulates:

> Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the *establishment, acquisition, expansion* [emphasis added], management, conduct, operation, and sale or other disposition of investments in its territory.

This means that if a sector is open to national investors, it must also be opened to foreign investors. Consequently, this type of provision can restrict host countries' abilities to apply screening mechanisms determining when and under what conditions foreign investors may enter and invest in the country; this could also prevent contracting countries from taking steps to support and promote growth of domestic enterprises.[17] Recognizing these issues, some countries that extend their national treatment provision to the pre-establishment phase limit it in certain ways, including by narrowing its scope through positive or negative lists of sectors covered or excluded.

European investment treaty models, like the Belgian Model BIT, typically do not extend their national treatment provisions to the pre-establishment phase. This is primarily because, until today, market access issues were dealt with at the Community level, rather than that of the member state. The national treatment obligation in the Belgian Model BIT, however, does raise at least a couple of issues regarding pre-establishment rights. For one, other IIAs commonly (1) guarantee national treatment to investments, and/or (2) guarantee it to investors with respect to specific types of activities such as the management, use, and disposal of their investments. The Belgium BIT however, (1) grants national treatment to both investors and investments, and (2) does not contain any limitations confining investors' national treatment rights to post-establishment matters.[18] Thus, although there are no specific provisions extending the treaty to pre-establishment issues, there are also no provisions limiting the national treatment obligation to post-establishment matters. In this respect, the Belgian national treatment provision seems to adopt a unique approach; and it is unclear how such a provision would be interpreted if an investor were to use it to claim discrimination in its pre-establishment activities.

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[17] Art. 3(2).

[18] The 2002 BIT between the Russian Federation and Thailand, for example, specifically limits the obligation to provide national treatment to investors to post-establishment matters. It states, "Each Contracting Party shall in its territory accord investors of the other Contracting Party, as regards management, maintenance, use, enjoyment or disposal of their investments, treatment no less favourable than that which it accords to its own investors or investors of any third State, whichever is more favourable" *Id.*, Art. 3(2).

Moreover, Article 2(1) of the Belgian Model BIT might provide grounds for arguing that the treaty provides some elements of market access rights. It reads:

> Each Contracting Party shall promote investments in its territory by investors of the other Contracting Party and shall admit such investments in accordance with its legislation.

This clause, if coupled with a dispute settlement provision in the BIT, makes compliance with existing host state law "justiciable" under the BIT for admission of investments. It constitutes a pre-establishment right where domestic law grants pre-establishment rights, but does not otherwise do so. Nor does it create an anti-roll back commitment in the law to correspond with a treaty schedule as, e.g., the General Agreement on Trade in Services does, or require penalties for changes.

It can be argued that this kind of language maintains state flexibility and does not necessarily limit future policy space because the host government remains free to regulate admission. At the same time, it provides potential investors with a guarantee (of sorts) of fair treatment under the law. This type of provision may become more common where countries do not wish to commit to full-fledged liberalization. It could be seen as a kind of a compromise text for future negotiations.

B. Expropriation

Article 7 of the Belgian Model BIT, like most investment treaties, allows states to expropriate an investment only under certain circumstances and with payment of compensation. More specifically, it states that the parties to the treaty may not expropriate investments unless "reasons of public purpose, security or national interest require a derogation." In those cases, expropriation needs to take place under due process of law, be non-discriminatory and not contrary to any specific commitments, and, as noted above, accompanied by adequate, effective and prompt compensation.

Like most IIAs, the Belgian Model BIT specifies that "indirect" expropriation, too, must be compensated. Indirect expropriation includes regulatory measures that harm, affect or interfere with the investment to such a degree that they effectively take the investors' property even if the investors still technically retain ownership.

In investor-state disputes, investors have challenged a wide range of government actions and measures, ranging from taxation to environmental regulation, arguing that they amounted to indirect expropriations, and therefore required payment of compensation. Tribunals have approached the assessment of indirect expropriation in different ways. Some tribunals have applied the so-called "sole-effects" test. Under that test, tribunals look only at the effect of the measure on the investment, deeming irrelevant the intent of host states. Other tribunals, however, have looked at the intent of the government and have consequently held that measures to protect the environment and human health and the like were not expropriatory in the first place and were therefore not subject to compensation. Still other tribunals have suggested that the importance of regulatory measures needed to be weighed against effects on the investment.

Because it is essentially impossible to know what approach a tribunal will take, it is extremely difficult for host states and investors to accurately predict whether an applicable investment treaty will require compensation for the impacts that regulatory measures have on foreign investors. This legal uncertainty and the potentially far-reaching consequences on host governments' ability to enact environmental, social welfare or other important laws and regulations without having to "buy out" foreign investors has led some countries such as the United States to explicitly carve out bona fide regulatory measures (e.g., measures enacted for a legitimate purpose and not as a disguised attempt to harm the investor/investment) from the definition of "expropriations" in their investment treaties.[19] Similarly, ASEAN's 2009 Comprehensive Investment Agreement explicitly rules out the sole-effects doctrine ("the fact that an action … has an adverse effect on the economic value of an investment, standing alone, does not establish that expropriation has occurred"), and continues:

> Non-discriminatory measures of a Member State that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation.[20]

These carve-outs and specifications help provide host states and investors certainty regarding governments' regulatory rights, yet are absent from many earlier IIAs and model IIAs including the Belgian Model BIT.

The Belgian Model BIT is also broad and could unduly restrict host countries' regulatory authority due to the specific language it uses to express the prohibition against unlawful expropriation. For one, as noted above, IIAs commonly state that expropriations are lawful if, among other conditions, they are done for a public purpose.[21] The Belgian Model BIT, in contrast, states that expropriations are only lawful if "require[d]" for a public purpose.[22] In the event of a challenge by an investor, the agreement's apparently anomalous use of that word "require" may result in tribunals applying relatively strict scrutiny to governments' actions when determining whether those actions were in fact necessary and lawful.

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[19] See, e.g., U.S.-Uruguay BIT, Art. 6 & Annex B(4)((b) ("Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.").

[20] Annex 2, Article 4, ASEAN Comprehensive Investment Agreement.

[21] See, e.g., NAFTA, Art. 1110; India-Singapore BIT, Art. 6.5(1).

[22] Art. 7(2)

The Belgian Model BIT's expropriation provision is also more demanding on governments than expropriation provisions in other IIAs because it adds a vague and apparently wide-reaching requirement to the commonly stated list of conditions under which governments may lawfully take investors' property. More specifically, in addition to the usual requirements that measures must not be discriminatory, must be taken in accordance with due process of law, and must be accompanied by payment of compensation, the Belgian text also dictates that the measures must not be "contrary to any specific commitments" made by the host state to the investor.

A final issue with the Belgian Model BIT's expropriation provision is that appears to require payment of compensation even for measures necessary for "security or national interest."[23] In contrast, many other IIAs explicitly excuse governments from their treaty obligations (including obligations to pay compensation) in circumstances when they have to take measures necessary to protect their essential or national security interests.[24]

C. Fair and Equitable Treatment

Many investment treaties oblige host states to accord fair and equitable treatment (FET) to investors. This is also the case with the Belgian Model BIT.[25] The FET obligation has recently been a prominent feature in investors' actions against host states and has in numerous cases allowed investors to succeed where their expropriations and other claims have failed. It has thus become a kind of "catch-all" clause. Host states have, for example, been found to violate it for a failure to act in a transparent manner in administrative decision–making. Other violations have been found in the inconsistent actions of host state agencies vis–à–vis the investor, such as the encouragement and approval of the investment by one agency and the denial of the necessary zoning permits by another. While these actions are surely not desirable, it is significant that they can result in international liability of a state.

An important element that tribunals have considered in determining whether there was a violation of the fair and equitable treatment standard is the notion of the "legitimate expectations of the investor." The tribunal in ICSID case *Tecmed v. Mexico,*[26] for example, stated that the host state must provide to the investor "treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."[27] The tribunal continued:

[23] Art. 7(2).
[24] This is also seen by some tribunals and scholars to be the rule under customary international law.
[25] Article 2.2.
[26] Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, ICSID Arb. Case No. ARB(AF)/00/2.
[27] *Id.*, para. 154.

> The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.[28]

This type of interpretation sets a very high standard of conduct for host states vis-à-vis foreign investors. In order to avoid an overly stringent interpretation such as this one, states are increasingly including language in their treaties linking the FET standard to customary international law. Pursuant to the customary international law standard on the treatment of aliens, tribunals have tended to find the fair and equitable treatment obligation violated only where host states have treated foreign investors egregiously or outrageously.

The language of an IIA is therefore important in determining which interpretation a tribunal will apply. Many agreements, like the Belgian Model BIT, state simply that each party is to provide covered foreign investments/investors "fair and equitable treatment."[29] In contrast, other agreements such as the recently concluded Central American Free Trade Agreement (CAFTA) state that each party is required to "accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment."[30] Similarly, the very recent free trade agreement between India and Korea provides that "The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[31] To some extent, this language insulates states from overbroad interpretation of the FET obligation, though there is no consensus on what exactly the customary international law standard is, either.

To avoid ambiguity completely, the investment chapter of the 2005 trade agreement between Singapore-India omits the FET clause.

D. Transfers

Provisions requiring host countries to guarantee the free transfer of payments related to investments are nearly universal in IIAs as a key protection for foreign investors and investments and are thus not surprisingly also contained in the Belgian Model BIT. The Belgian Model BIT, however, differs from some other IIAs in that it contains no exceptions provisions. Such provisions, which may be important to allow the contracting parties to give effect to and comply with legitimate national laws

[28] *Id.*
[29] Belgian Model BIT, Art. 2.
[30] CAFTA, Art. 10.5(1).
[31] Art. 10.4(1).

and policies, include provisions allowing host countries to restrict transfers in accordance with bankruptcy laws, in order to secure payment criminal fines or to protect the stability of domestic currency. Indeed, the importance of such exceptions is especially apparent in light of the ongoing global financial crisis, as provisions in IIAs guaranteeing investors and investments transfer rights might unduly restrict governments' efforts to prevent, respond to and mitigate such serious economic meltdowns (or might expose governments to liability for taking those actions).[32]

But the Belgian Model BIT is not alone in providing an unqualified guarantee relating to the transfer of funds. Many other European states have adopted similar provisions. The European Court of Justice, however, has decided that this must change, holding that the provision cannot be reconciled with European law. In 2009 the Court ruled against Sweden, Austria and Finland for including free transfer of capital provisions in their BITs. The Court ruled that these countries had to renegotiate all their BITs containing non-compliant provisions to bring them into compliance with EU law. This ruling implies that all other EU member states with similar provisions, too, would have to renegotiate their BITs, including Belgium.

[32] See, e.g., Kevin P. Gallagher, "U.S. BITs and financial stability," Columbia FDI Perspectives, No. 19, February 23, 2010. Reprinted with permission from the Vale Columbia Center on Sustainable International Investment (www.vcc.columbia.edu). Based on studies showing that it is important for countries (particularly developing countries) to be able to exercise control over their capital accounts in certain circumstances, especially during balance-of-payments crises, Gallagher advocates excepting measures taken in response to such crises from investor-state dispute settlement.

6.0 Provisions Specifically Addressing the Environment, Labour and Sustainable Development

A growing number of agreements now contain provisions proclaiming the general principle that investment agreements and the foreign investments they protect should promote sustainable development; specifying that governments are not to relax and/or fail to enforce environmental and labour measures as an incentive to encourage investment; affirming that states have the right to implement laws and regulations aiming at environmental and labour protection; clarifying that the IIA does not excuse compliance with pre-existing international commitments to protect the environment and labour rights; and directing the contracting parties to cooperate in enhancing their efforts in these policy areas.

These types of provisions are contained in preambular or introductory language, separate "side agreements" and/or within the main text of the IIA. The FTA signed by United States and Columbia in 2006, for instance, states in the preamble that the parties should implement the "[a]greement in a manner … [that] promote[s] sustainable development."[33] An example of provisions on the environment and/or labour contained within an agreement's main articles can be seen in the investment chapter of the FTA between Canada and Peru. That agreement contains a specific article titled "Health, Safety and Environmental Measures" that states, "[I]t is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor."[34] Similar provisions can be found in the NAFTA and other FTAs and BITs concluded by the United States and Canada.[35] The Investment

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[33] U.S.-Columbia FTA (signed Nov. 22, 2006, not yet entered into force). See also Canada-Columbia FTA (signed Nov. 21, 2008, not yet entered into force) (stating in the preamble that the countries resolve to "promote sustainable development").

[34] Canada-Peru FTA, Ch. 10, Art. 809 (entered into force Aug. 1, 2009); Economic Partnership Agreement between the CARIFORUM States, of the One Part, and the European Community and its Member States, of the Other Part (signed Oct. 15, 2008) (considering, in the preamble, "the need to promote economic and social progress for their people in a manner consistent with sustainable development by respecting basic labour rights in line with the commitments they have under taken within the International Labour Organisation and by protecting the environment in line with the 2002 Johannesburg Declaration")

[35] See*,* e.g., Canada-Columbia FTA, Ch. 8, Art. 815; NAFTA, Ch. 11, Art. 1114(2); U.S.-Uruguay, Arts. 12 & 13 (entered into force Nov. 1, 2006). These agreements also often include a mechanism for addressing and resolving issues where one state may be improperly encouraging investment. Canada-Peru FTA, Ch. 8, Art. 809. *See also*, NAFTA, Ch. 11, Art. 1114(2); U.S.-Uruguay BIT, Arts. 12(1) & 13(1). Some FTAs Canada has concluded also contain an article titled "Corporate Social Responsibility" in their investment chapters. These articles state, in part, that the "Parties remind those enterprises" "operating within [their] territor[ies] or subject to [their] jurisdiction" of "the importance of incorporating … corporate social responsibility standards" addressing "issues such as labour, the environment, human rights, community relations and anti-corruption" "in their internal policies." See*,* e.g., Canada-Peru FTA, Ch. 8, Art. 810.

Agreement for the COMESA Common Investment Area takes yet a different approach. It includes a provision in its "General Exceptions" article stating that nothing in the agreement "shall be construed to prevent the adoption or enforcement by any Member State of measures … designed and applied to protect the environment" or "human, animal or plant life or health."[36]

Generally, preambular language provides the weakest integration of environmental, labour, and sustainable development goals in IIAs, while measures integrated within the main part of the IIA text (as opposed to in a separate annex or agreement) may provide the strongest. Nevertheless, preambular language can play an important role for the interpretation of treaty language. This has been particularly striking in WTO dispute settlement.

The Belgian Model BIT contains specific provisions on environmental and labour measures, and includes them in the main portion of its text. It thus forms part of the current trend in IIAs to ensure the agreements help promote synergies and avoid conflicts between investment promotion and other important policy goals; and its provisions in Articles 5 ("Environment") and 6 ("Labour") are important in that they help prevent "races to the bottom" in contracting parties' environmental and labour protection. Nevertheless, as is detailed further below, the Belgian Model BIT's environmental and labour articles are weak in several respects.

A. The Environment Article

Article 5, the Environment article, states:

1. Recognising the right of each Contracting Party to establish its own levels of domestic environmental protection and environmental (development) policies and priorities, and to adopt or modify accordingly its environmental legislation each Contracting Party shall strive to ensure that its legislation provides for internationally agreed levels of environmental protection and shall strive to continue to improve its legislation.
2. The Contracting Parties recognise that it is inappropriate to encourage investment by relaxing domestic environmental legislation. Accordingly, each Contracting Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an investment.

[36] Art. 22(1)(b) & (c) (adopted May 2007 at the Twelfth Summit of COMESA Authority of Heads of State and Government); *see also* U.S.-Columbia FTA, Ch. 10, Art. 10.9(3)(c) (signed Nov. 22, 2006, not yet in force) (stating, in the investment article on performance requirements, that provisions "shall not be construed to prevent a Party from adopting or maintaining … environmental measures … necessary to protect human, animal, or plant life or health" or "related to the conservation of living or non-living exhaustible natural resources").

3. The Contracting Parties reaffirm their commitments under the international environmental agreements which they have accepted. They shall strive to ensure that such commitments are fully recognised and implemented by their domestic legislation.

One issue with the above text is that each paragraph imposes only aspirational obligations, requiring simply that parties "*strive to*" [emphasis added] implement and adhere to environmental measures. While this tracks language used in similar articles in several other model agreements and IIAs,[37] some agreements do use stronger wording, stating, for instance, that parties "*shall* [emphasis added] adopt, maintain, and implement … measures to fulfill" certain environmental protection obligations, and "shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from" environmental measures in order to encourage investment.[38] Moreover, some of those model texts and IIAs that do use softer "strive to" language nevertheless reference a mechanism to help ensure compliance with the parties' environmental commitments.[39] The Belgian Model BIT, however, contains no such provision.[40]

Additional issues arise due to Article 5's use of the term, "environmental legislation." Article 5(1) recognizes parties' rights to implement "environmental legislation," thereby protecting states' policy space; and Article 5(2) states that parties must strive to refrain from relaxing their "environmental legislation" in order to attract investment, thereby preventing "races to the bottom." The effectiveness of those two provisions, however, is limited because the BIT narrowly defines what is covered as "environmental legislation." It states in Article 1 that "environmental legislation" is "any legislation … the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health through" three specific types of efforts: (a) regulation of "pollutants or environmental contaminants," (b) regulation of hazardous or toxic substances, or (c) protection of wild flora or fauna (and habitat) in the contracting party's territory. This definition thus arguably excludes many types of measures through which environmental aims are often implemented, including policies, regulations and administrative decisions; it also apparently excludes measures not falling within the BIT's three-item list of appropriate efforts including, presumably, the parties' extraterritorial measures addressing, for instance, transboundary pollution or

[37] See, e.g., India-Korea CEPA , Ch. 10, Art. 10.16(2); Canada-Chile FTA, Ch. G, Art. G-14(2); U.S. Model BIT, Art. 12(1).
[38] See, e.g., U.S.-Columbia FTA, Art. 18.2 & 18.3(2); U.S.-Peru FTA, Art. 18.2 & 18.3(2) (entered into force Feb. 1, 2009).
[39] See, e.g., India-Korea CEPA , Ch. 10, Art. 10.16(2); Canada-Chile FTA, Ch. G, Art. G-14(2); U.S. Model BIT, Art. 12(1).
[40] If the Belgian Model BIT were to add a provision for consultation and cooperation, it may also want to make clear that such process was not the parties' exclusive recourse, and did not prevent the parties or investors from raising issues relating to Article 5 in investor-state dispute settlement. *Cf.* U.S.-Uruguay BIT, Arts. 24(1) & 37(5) (excluding the parties' commitments on environmental protection from the agreement's investor-state dispute settlement mechanism and its state-state dispute settlement mechanism).

protection of the global commons. How, for example, would this article apply to climate change related measures taken by the host state? Could climate measures fit comfortably into one of these categories?

A final issue with the Belgian Model BIT's environmental provisions is that, unlike a number of IIAs entered into by Belgium, the United States, Canada and other countries, the Model BIT does not contain provisions (1) strengthening the parties' cooperation on promotion and protection of the environment, or (2) allowing non-governmental organizations and other interested persons to raise allegations of violations of the environmental commitments.[41] The 2003 investment agreement between Belgium-Luxembourg and Zimbabwe provides an example of the first type of provision. It adds to its Environment article, which is otherwise nearly identical to the Model BIT's Environment article, the following statement and obligation: "The Contracting Parties recognize that co-operation between them provides enhanced opportunities to improve environmental protection standards. Upon request by either Contracting Party, the other Contracting Party shall accept to hold expert consultations on any matter falling under the purpose of this Article."[42] The FTA between Columbia and the United States provides an example of the latter type of provision, setting forth several procedures through which persons can file written submissions raising issues relating to contracting parties' implementation of their environmental commitments, and requiring responses to those submissions in appropriate cases.[43]

B. The Labour Article

While both environmental legislation and regulation have been the focus of several public investor-state disputes, labour issues have apparently not yet given rise to similar claims. That picture, however, may be changing, as is illustrated by a currently pending investor-state arbitration brought by foreign investors against the government of South Africa. In that case, *Foresti v. South Africa*, the investors claim "that a series of obligations imposed upon mining companies" under a new domestic law, including the obligation to hire "'historically disadvantaged South Africans', violates treaty undertakings by South Africa to provide fair and equitable treatment to foreign investors."[44] This

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[41] These provisions are often not limited to the investment chapters of FTAs, but are applicable to both the trade and investment portions of the agreements and may be set forth in side agreements to the main text. See*, e.g.,* U.S.-Peru FTA, Ch. 18.6 (entered into force Feb. 1, 2009); U.S.-Columbia FTA, Art. 18.6; Canada-Columbia FTA, Ch. 17, Art. 1703 and Agreement on the Environment between Canada and the Republic of Columbia (signed Nov. 21, 2008, not yet entered into force); New Zealand-China FTA, Art. 177 (entered into force Oct. 1, 2008).
[42] Art. 5(4).
[43] U.S.-Columbia FTA, Ch. 18, Arts. 18.7, 18.8 & 18.9.
[44] Luke Eric Peterson, *Arbitration Watch: More Details Emerge of Miner's Case Against South Africa*, INVESTMENT TREATY NEWS (ITN), 30 Nov. 2007, available at http://www.iisd.org/pdf/2007/itn_nov30_2007.pdf. The same issue of the ITN also contains an article, *EU Envoy Says Malaysian Race-Based Affirmative Action Policies Hindering Trade Talks*, which notes issues that Malaysia's affirmative action policies (including hiring requirements) were creating for free trade negotiations with the EU and US.

case highlights the importance of adequately addressing labour issues in IIAs and clarifying the scope of governmental authority to enact labour measures protecting and promoting workers' rights.

As noted above, Article 6 represents a trend in IIAs to ease tensions between, on the one hand, promotion and protection of foreign investments and, on the other hand, protection and promotion of labour rights. Briefly, Article 6(1) protects and promotes states' authority to implement "labour legislation;" Article 6(2) prevents "races to the bottom" in labour legislation as a means of encouraging investment; and Article 6(3) recognizes parties' commitments to promote internationally recognized labour rights and their obligations to ensure their labour legislation supports those rights. The article states:

1. Recognising the right of each Contracting Party to establish its own domestic labour standards, and to adopt or modify accordingly its labour legislation, each Contracting Party shall strive to ensure that its legislation provides for labour standards consistent with the international labour standards set forth in [the Agreement's definition of "labour legislation"] and shall strive to improve those standards in that light.
2. The Contracting Parties recognise that it is inappropriate to encourage investment by relaxing domestic labour legislation. Accordingly, each Contracting Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an investment.
3. The Contracting Parties reaffirm their obligations as members of the International Labour Organisation and their commitments under the International Labour Organisation Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Contracting Parties shall strive to ensure that such labour principles and the international labour standards set forth in [the Agreement's definition of "labour legislation"] are recognised and protected by domestic legislation.

Article 1 defines "labour legislation" as:

> [L]egislation of the Contracting Parties, or provisions thereof, that purports to give effect to the following international labour standards as defined by the International Labour Organisation:
>
> a. the right of association;
> b. the right to organise and bargain collectively;
> c. a prohibition on the use of any form of forced or compulsory labour;
> d. a minimum age for the employment of children;
> e. acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

These provisions raise issues similar to the Environment article. For one, the language in Article 6 is weak in that it is only aspirational. In contrast, other texts, including the FTA between the United States and Columbia, state more forcefully that parties "*shall*" [emphasis added] ensure adherence to labour laws and international labour standards.[45]

Also, like the Environment article, problems exist in the Labour article due to the definition of "labour legislation" incorporated in it. More specifically, the definition of "labour legislation" in Article 1 of the Belgian Model BIT encompasses legislation aiming to protect *some* internationally recognized core labour rights such as the right to association, but fails to cover measures relating to other rights such as the right to freedom from discrimination. Because the list of protected rights in Article 1 appears to be exclusive, it may cause important government laws regulating discrimination in hiring, firing, and treatment of employees to fall outside the agreement's definition of "labour legislation." The definition of "labour legislation" also does not appear to include labour policies, regulations or administrative decisions. The FTA between the United States and Columbia is an example of an agreement that differs on both points: (1) it provides that each state party "shall adopt and maintain in its *statutes and regulations, and practices thereunder*" [emphasis added] (2) each of International Labour Organization's core labour rights, including the right to non-discrimination in employment.[46]

The Belgian Model BIT also does not include any provisions for the parties to consult or cooperate on labour matters, or for third parties such as non-governmental organizations to bring claims alleging non-compliance with relevant issues.[47]

45 See U.S.-Columbia FTA, Ch. 17, Arts. 17.2(1)-(2) & 17.3(1)(a)-(b).
46 U.S.-Columbia FTA, Ch. 17, Art. 17.2.
47 See*,* e.g.*,* U.S.-Oman FTA, Ch. 16 (entered into force Jan. 1, 2009); U.S.-Peru FTA, Ch. 17 (entered into force Feb. 1, 2009); Canada-Columbia FTA and Agreement on Labour Cooperation (signed Nov. 21, 2008, not yet entered into force); New Zealand-China FTA, Art. 177 & Memorandum of Understanding on Labour Cooperation (entered into force Oct. 1, 2008).

7.0 Home State and Investor Obligations

Investment treaties typically impose obligations on host states, but not on the home state or the foreign investor.[48] Commentators and governments are increasingly calling for incorporating these provisions as a strategy for better ensuring that IIAs contribute to sustainable development.[49] With respect to home state obligations, IIAs could, for instance, include provisions requiring developed home states to promote foreign investment in developing host countries, and to cooperate with developing countries to transfer technology to and build capacity in those developing countries to host *and* benefit from foreign investment.

With respect to investor obligations, IIAs could include provisions that specifically require investors to, among other goals, respect or promote policies on good corporate governance, consumer protection, environmental protection, and human rights. While such provisions are generally absent from most IIAs, there are some clauses in a number of existing agreements that arbitral tribunals have relied on to ensure investors comply with their obligations under host countries' domestic laws, the applicable IIA, or international law. Tribunals, for instance, have held that a provision stating that the IIA protects investments made "in accordance with [the host state's] legislation" means that the IIA does not protect illegal investments such as those made through bribery or fraud.[50] However, in the absence of these or more specific provisions, tribunals' willingness to recognize and enforce investors' obligations is unpredictable and uncertain, and can lead to inconsistent decisions. To avoid such uncertainty and inconsistency, and to ensure foreign investments made or maintained in violation of relevant laws and policies do not inappropriately receive protections under IIAs, the agreements should explicitly incorporate investor obligations.

The Belgian Model BIT, like the current majority of texts, addresses host state conduct, but is essentially silent on home state and investor obligations. Article 2 of the Belgian Model BIT does state that "[e]ach Contracting Party … shall admit such investments in accordance with its

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[48] The recent Investment Agreement for the COMESA Common Investment Area provides an example of what may be a new trend of agreements recognizing investor obligations. It includes an article titled "Investor Obligation" that states, "COMESA investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made." *Id.*, Art. 13; *see also* Economic Partnership Agreement between the CARIFORUM States, of the One Part, and the European Community and its Member states, of the Other Part, Art. 72 (stating in part that state parties shall take steps to ensure that "[i]nvestors act in accordance with core labour standards" and "do not manage or operate their investments in a manner that circumvents international environmental or labour obligations….").

[49] See*,* e.g., UNCTAD, *World Investment Report 2003: FDI Policies for Development: National and International Perspectives*, at 155 (2003) ("In future IIAs consideration should especially also go to home countries … to encourage FDI flows to developing countries and help increase the benefits from them.")

[50] See, e.g., Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award, August 2, 2006.

legislation." In a case initiated against El Salvador (*Inceysa v. El Salvador*)[51] similar wording contained in the treaty's article on protection of investments was interpreted as limiting the protections contained in the investment treaty to only those investments that were made legally (i.e., not investments made through fraud). It is not clear, however, that other tribunals will follow *Inceysa's* interpretation of the "in accordance with its legislation" language because, in that case, the parties' treaty negotiations clearly reflected their intent to limit the entirety of the BIT's protections to investments legally made.

[51] *Id.*

8.0 Conclusion

The Belgian Model BIT is based on a model that was created before the majority of investment disputes emerged over the past decade. It is with these disputes that the limitations of the 1990s model became clear and that some countries – particularly capital exporting countries that were themselves challenged under their investment treaties – began to rethink the function and goals of their investment treaties. Perhaps because Belgium has not yet faced an investor-state arbitration, less emphasis was placed on revising this model.

The first set of issues that Belgium may wish to rethink in its international investment framework relates to the investor-state dispute settlement process. The past decade of experience in this area has demonstrated that at least three issues need to be addressed urgently: (i) transparency; (ii) arbitrator independence; and (iii) predictability and coherence. All three of these governance issues will benefit host and home states, investors, and citizens.

The second set of issues relates to the current model of substantive obligations. The current model provides far-reaching rights to investors and imposes correspondingly far-reaching obligations on the host countries. At least two considerations are important here. First, the line between capital exporting and importing countries is not always clear and will get less and less clear in an increasingly globalized world. The current Belgian Model BIT may be seen as the perfect model to protect Belgium's investors abroad, yet because flows of foreign investment into Belgium have grown to be roughly equal to (if not, as in some recent years, greater than) flows of foreign investment out of Belgium, Belgium faces increasing potential liability under its own BITs as a host state. Even the most sophisticated legal systems no longer provide a guarantee against challenges by investors, as the *Vattenfall v. Germany* case ably demonstrates.

Second, Belgium may wish to rethink the substantive obligations under its investment treaties because of the way the same or similar obligations have been interpreted by various investment tribunals. Does Belgium wish to impose obligations on itself and its treaty partners that significantly exceed the protections provided under its own national laws? Does Belgium feel comfortable with the contradicting interpretation of essentially the same obligations, or would it prefer to give guidance to tribunals on how certain provisions should be interpreted?

Finally, Belgium may wish to consider an entirely new model for its investment treaties that deals with issues such as corruption, as well as exploring concrete ways to promote sustainable investment in developing countries.