Foreign Direct Investment as a Vehicle for Sustainable Development

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INTRODUCTION

Foreign direct investment (FDI) is one of the most prominent methods of transferring wealth and technology between developing and developed countries. Through FDI, multinational corporations have the potential to drastically improve the welfare of many societies. The extent to which this is possible depends largely on the purpose and values held by a particular company, but also the domestic regulations and International Investment Agreements (IIAs) that control FDI. In the past few decades, there has been an explosion of investment treaties intended to accelerate FDI.[1] Since the first bilateral investment treaty was formed between Germany and Pakistan,[2] these treaties have largely been written with the intention of protecting investors' rights in the host country on the premise that these protections would attract investment.[3] There has been a significant trend to include trade liberalization measures in these treaties.[4] As a result, developing countries have often seen little benefit, failed to attract investment, and substantially sacrificed sovereignty in the process.

There is a recent movement in the international community to establish principles that balance the interests of business, states, and people.[5] These principles have been incorporated into various guides for private firms and governments entering into IIAs. While identifying these principles as goals for FDI is progress in itself, fostering sustainable development requires the

[1] Howard Mann, *Reconceptualizing International Investment Law: Its Role in Sustainable Development*, 17 LEWIS & CLARK L. REV. 521, 524 (2013).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *See, e.g.,* OECD, *Declaration on International Investment and Multinational Enterprises*, *updated* May 25, 2011.

resolute commitment of both government and the private sector in addition to legal framework and remedies for enforcing those principles. This paper will begin by examining the past regimes that governed FDI, namely bilateral investment treaties, free trade agreements, and the WTO's Agreement on Trade Related Investment Measures. The next section will highlight the deluge of efforts to reform the regulatory structure to promote sustainable development and focus on the common elements between them. The final section will analyze the significance that these new approaches will have for different developing regions that have mixed experiences with foreign investment, specifically India, Africa, and South America.

I

PAST REGULATORY REGIMES OF FDI

Multinational enterprises operate in foreign countries in a variety of different manners. Joint ventures with local firms, subsidiaries, and contracting are all methods of FDI.[6] Operating in foreign environments often presents political risk. In an effort to reduce such risk and improve investments and returns in emerging markets, countries have created treaties that primarily serve to protect the interests of investors. Arbitration, trade liberalization, and a prohibition on incentives are all themes that appear throughout such agreements.

Bilateral Investment Treaties

Bilateral investment treaties (BITs) are the original method for FDI cooperation.[7] The first was created between Germany and Pakistan in 1959.[8] The purpose was to account for

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[6] *See* Daniel Chudnovsky & Andres Lopez, *Globalization, Foreign Direct Investment, and Sustainable Human Development*, *in* THE EARTHSCAN READER ON INTERNATIONAL TRADE AND SUSTAINABLE DEVELOPMENT 45, 50 (Kevin P. Gallagher & Jacob Werksman eds., 2002).
[7] Mann, *supra* note 1, at 523

political instability in the wake of decolonization.[9] Since that first treaty, BITs have proliferated, predominantly in the last two decades.[10] There are now over 3000 treaties in force around the world.[11]

There are two prominent criticisms of BITs. The first is that they infringe upon a State's sovereignty by limiting its ability to enact legitimate legislation for the welfare of its people or environment without creating liability for a claim by a private company. This occurs when a state measure is construed as unlawful expropriation, discrimination, or other violation of an IIA, whether or not it was the intention of the legislation.[12] Claims are often brought to binding arbitration provided for in the BIT, typically under the jurisdiction of the International Centre for Settlement Disputes (ICSID).[13] ICSID was recently the center of controversy after Venezuela denounced its obligations under the treaty, becoming the third to do so after Bolivia and Ecuador, highlighting the potential for conflict with respect to developing nations.[14] The infringement on ability to govern is a criticism that has been leveled at all treaties that address investment protections.[15]

The second criticism is the trade liberalization measures that are a standard inclusion in BITs.[16] These measures mutually prohibit trade barriers such as tariffs or subsidies.[17] However, developing countries are less likely to have the industry and infrastructure to take advantage of

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[8] *Id.*
[9] *Id.*
[10] Barnali Choudhary, *International Investment Law as a Public Good*, 481 LEWIS & CLARK L. REV. 481, 490 (2013).
[11] *Id.*
[12] *See* Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT'L L. 825, 835 (2006).
[13] Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints From Alternative Evidence*, 51 VA. J. INT'L L. 397, 403-05 (2011).
[14] Segey Ripinsky, *Venezuela's Withdrawal From ICSID: What It Does and Does Not Achieve*, INVESTMENT TREATY NEWS, April 13, 2012, http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/.
[15] Mann, *supra* note 1, at 532.
[16] *Id.* at 524-25.
[17] JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK 62 (2007).

such trade liberalization through exports and are often unable to develop industries that can compete with imports domestically.[18]

Developing countries have accepted these provisions as a necessary component of attracting investment, but research suggests they do little to attract investment.[19] A survey of general counsel for large corporations provides evidence that it is not a consideration.[20] Moreover, for companies whose line of business includes providing insurance for political risk, BITs do not significantly effect the risk calculation in a given country.[21] While ICSID has been criticized by developing countries, a number of meager arbitration awards to adversely effected investors demonstrates that binding arbitration provided by BITs is not a guarantee of total investment protection.[22]

Free Trade Agreements

Like BITs, free trade agreements (FTAs) are playing an increasingly important role in politics as well as business. The European Coal and Steel Community (ECSC) was the precursor to the modern free trade area in addition to the European Union itself.[23] Although the Community went through a number of iterations, its original purpose was to regulate and ensure access to the vital coal and steel industries in the wake of the devastation of World War II.[24] The ECSC prohibited government subsidies, quantitative restrictions, duties on imports and exports,

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[18] *Id.* at 70.
[19] *See generally* Yackee, *supra* note 11.
[20] *Id.* at 429.
[21] *Id.* at 422.
[22] *Id.* at 403.
[23] Hon. John P. Flaherty & Maureen E. Lally-Green, *The European Union: Where Is It Now?*, 34 DUQ. L. REV. 923, 932 (1996).
[24] *See id.*

regulations that discriminated among producers, purchasers, or consumers, and division of markets.[25]

Today, FTAs are present on every part of the globe and range in the degree of economic cooperation. While the Eurozone is the most integrated, including an economic and monetary union, there are also several common markets and customs unions, but the most common form is multilateral free trade agreements.[26] Some prominent examples include the South African Development Community, the ASEAN Free Trade Area, the Asia-Pacific Trade Agreement, Southern Common Market (MERCOSUR), and the controversial North American Free Trade Agreement (NAFTA).[27] NAFTA was created as the impact of globalization began to take root, and more importantly, was an FTA between three countries of widely different levels of development.[28] While the United States is the largest economy in the world, Canada is developed but has much smaller FDI flows, and Mexico remains a developing economy by most metrics.[29]

Although NAFTA may not have been the disaster that some anti-globalization activists predicted, it has nonetheless had a number of negative consequences.[30] Many lawsuits have emerged as a result of what may be considered legitimate legislation in the public interest, parallel to the concerns associated with BITs. So-called *maquiladoras* have also had questionable impacts.[31] Many large, American corporations like Honeywell, Ford, and Hewlett-Packard built factories near the border, which critics say have poor working conditions that exploit the impoverished population, not to mention the instances of assault that occur near these

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[25] *Id.*
[26] *List of All RTAs*, WTO (updated Oct. 21, 2013), http://rtais.wto.org/UI/PublicAllRTAList.aspx.
[27] *Id.*
[28] STIGLITZ, *supra* note 15, at 61.
[29] *Id.*
[30] *Id.* at 62.
[31] *Id.* at 65.

factories.[32] Meanwhile, the U.S. government has been hypocritical with respect to 'dumping' under NAFTA.[33] Shortly after NAFTA came into effect, Florida tomato growers objected to the low price of Mexican tomatoes, due to the low cost of labor, which prompted the Department of Commerce to step in and set a minimum price.[34] Yet the U.S. continues to subsidize corn, lowering the price so that Mexican farmers are not able to compete with U.S. exports, putting thousands out of work.[35] It also took two decades for the U.S. to permit Mexican trucks to enter the country as specified in NAFTA.[36] The U.S. cited concerns over safety, although protecting American jobs was likely a significant factor.[37]

Many free trade agreements have been created in order to promote regional trade integration, uniting countries at varying levels of development.[38] A developed country may provide economic and technical assistance that lowers the implementation costs of an IIA.[39] With its comprehensive rules on membership and diverse composition, the European Union is perhaps the best case study for the efficacy of such assistance.[40] The issues arising under NAFTA perhaps better serve to exemplify the disparate benefits of free trade that arise with BITs as well. This is not to say that they cannot occur with other FTAs: the Trans-Pacific Partnership, currently being negotiated by the U.S., Japan, Canada, Australia, and several other developing

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[32] Evelyn Nieves, *To Work and Die in Juarez*, MOTHER JONES (May/June 2002), http://www.motherjones.com/politics/2002/05/work-and-die-juarez.

[33] 'Dumping' refers to either selling a product in a foreign market at a lower price than in the domestic market, or at a price below the cost of production. Juscelino F. Colares & John W. Bohn, *NAFTA's Double Standards of Review*, 42 WAKE FOREST L. REV. 199, 204 (2007).

[34] Michael Marizco, *The Tomato Trade Wars*, FRONTERAS (Sept. 17, 2012), http://www.fronterasdesk.org/content/tomato-trade-wars.

[35] Elizabeth Becker, *U.S. Corn Subsidies Said to Damage Mexico*, N.Y. TIMES (Aug. 27, 2003), http://www.nytimes.com/2003/08/27/business/27CORN.html.

[36] Christopher Sherman, *Mexican Truck is First in U.S. Under Delayed NAFTA Program*, NBC NEWS (Oct. 21, 2011), http://www.nbcnews.com/id/44995603/.

[37] *See Id.*

[38] C. O'Neal Taylor, *Regionalism: The Second-Best Option?*, 28 ST. LOUIS U. PUB. L. REV. 155, 158-59 (2008).

[39] *Id.* at 160.

[40] *See, e.g.,* Stergio Babanassis, *Greece: Lessons in Her Performance in the European Union*, p. 5 (2005), http://www.international.ucla.edu/cms/files/greece05.pdf.

and developed countries, has been accused of incorporating many of the negative aspects of NAFTA.[41] Because it is still years away from being concluded, it is hard to predict what the impact will be.

Agreement on Trade Related Investment Measures

The Agreement on Trade Related Investment Measures (TRIMS Agreement) was created under the General Agreement on Tariffs and Trade, GATT, the predecessor to the WTO, to address restrictions on investment that had an impact on trade.[42] Examples of such restrictions are local content requirement, trade-balancing requirements, foreign-exchange requirements, and export restrictions (domestic sales requirements).[43] The TRIMS Agreement allowed developed countries to phase out such measures over two years, while developing countries had five years to do so.[44] All members of the WTO signed onto the Agreement: it was concluded in 1994 and came into force in 1995.

The TRIMS Agreement did little to impact FDI, as it did not address several key issues, notably right of establishment, repatriation of profits, or technology transfer.[45] In addition, many of the issues in the TRIMS Agreement were included in GATT, and only 6% of overseas affiliates of U.S. companies were subject to trade related investment measures.[46] The Agreement nonetheless serves as a guide for legislation in developing countries.

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[41] ,*Trans-Pacific Partnership*, CITIZENS TRADE CAMPAIGN (last accessed Oct. 25, 2013), http://www.citizenstrade.org/ctc/trade-policies/tpp-potential-trade-policy-problems/.
[42] Kevin C. Kennedy, *A WTO Agreement on Investment: A Solution in Search of a Problem?*, 24 U. PA. J. INT'L ECON. L. 77, 135 (2003).
[43] *Id.* at 136.
[44] *Id.* at 138.
[45] *Id.* at 138-39.
[46] *Id.* at 139.

II

EFFORTS TO PROMOTE SUSTAINABLE DEVELOPMENT THROUGH FDI

Many policy advisors and economists have argued that growth is ultimately good for environmental protection, suggesting an environmental Kuznet curve.[47] This view posits that some environmental degradation is necessary for a developing economy, but environmental protections will follow eventually.[48] As climate change, deforestation, pollution, and poverty persist, international organizations have taken notice and prescribed objectives to be associated with FDI. Voluntary private guidelines have also been created for addressing these issues. Although they will only be described briefly here, they are illustrative of the effort to align the goals of private enterprise with sustainable development.

The Equator Principles is a benchmark intended for the financial industry in assessing and managing environmental and social risks in projects.[49] There are currently 78 financial institutions, predominantly banks, which are members, or Equator Principle Financial Institutions.[50] They include many of the largest banks in the world.[51] Membership entails a reporting requirement of a bank's implementation of the Equator Principles.[52] However, there is

[47] A Kuznet curve refers to the visual representation of the hypothesis that income inequality rises with a growing economy, but ultimately decreases when average income improves. *See* Marc R. Poirier, *It Was the Best of Times, It Was the Worst of Times…: Science, Rhetoric and Distribution in a Risky World*, 53 CASE W. RES. 409, 417 (2002); *see also Biodiversity*, ECONOMIST DEBATES (Sept. 17, 2013), http://www.economist.com/debate/overview/259.

[48] *Id.*

[49] *Equator Principles*, *available at http://www.equator-principles.com/resources/equator_principles_III.pdf.*

[50] *Members & Reporting*, EQUATOR PRINCIPLES (last accessed Nov. 19, 2013), http://www.equator-principles.com/index.php/members-reporting.

[51] *Id.*

[52] *Reporting Requirements*, EQUATOR PRINCIPLES (last accessed Nov. 19, 2013), http://www.equator-principles.com/index.php/members-reporting/reporting-requirements.

little accountability aside from the reporting standards and no possible sanctions for breaching the *Principles*, making it largely aspirational.[53]

The *Sustainable Companies Project* at the University of Oslo seeks to bridge the gap between private initiatives and government regulation. The project is designed to create workable proposals for company/corporate law that would require externalities be addressed through the internal decision-making processes within companies.[54] While these would be incorporated into domestic law, intergovernmental organizations have taken initiatives to link sustainable development policies with FDI.

Principles for Responsible Investment

The Principles for Responsible Investment (PRI) Initiative is 'an international network of investors working together to put the six Principles for Responsible Investment into practice.'[55] The six Principles emphasize incorporating environmental, social, and corporate governance issues into investment decisions and promoting responsible practices.[56] They were created by a group of international investors in a process that was convened by the United Nations Secretary-General.[57] The Initiative is co-funded by the European Commission, while management and governance for the PRI Initiative falls to a 16-person Advisory Council that includes elected representatives from signatories as well as two representatives from the U.N.[58] The Initiative

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[53] *See id.*
[54] Department of Private Law, *Project Description*, UNIVERSITY OF OSLO (last accessed Nov. 19, 2013), http://www.jus.uio.no/ifp/english/research/projects/sustainable-companies/project-description/.
[55] *About the PRI Initiative*, PRINCIPLES FOR RESPONSIBLE INVESTMENT (last accessed Nov. 19, 2013), http://www.unpri.org/about-pri/about-pri/.
[56] *The Six Principles*, PRINCIPLES FOR RESPONSIBLE INVESTMENT (last accessed Nov. 19, 2013), http://www.unpri.org/about-pri/the-six-principles/.
[57] *Id.*
[58] *PRI Governance*, PRINCIPLES FOR RESPONSIBLE INVESTMENT (last accessed Nov. 19, 2013), http://www.unpri.org/about-pri/pri-governance/.

includes implementation support and guidance specific to a wide range of asset classes.[59] Since 2006, the number of signatories has grown from just under 100 to nearly 1200, while the corresponding assets under management have gone from $3.4 trillion to $34 trillion.[60]

U.N. Guiding Principles on Business and Human Rights

In 2011, the U.N. endorsed the Guiding Principles on Business on Human Rights.[61] They are the product of six years of research, including 47 consultations and site visits in more than 20 countries, intended to create standards that outline how States and businesses should implement the U.N.'s 'Protect, Respect, Remedy' Framework.[62] The Framework focuses on the role that government and business has in protecting human rights: governments have a duty to protect against human rights abuse by third parties, business have a responsibility to avoid infringing on others' rights and address harms if they do occur, and States must provide appropriate remedies for any abuses through legislative, judicial, administrative, or other means.[63] The Guiding Principles elaborates on these duties in several ways. It recommends that governments communicate obligations with businesses, enforce laws to protect human rights, and incorporate these objectives into any economic policies that they adopt.[64] It then prescribes the internal policies that businesses should adopt in order to protect against human rights violations, including executive operational awareness, due diligence in the supply chain, and gauging the

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[59] *Implementation Support*, PRINCIPLES FOR RESPONSIBLE INVESTMENT (last accessed Nov. 19, 2013), http://www.unpri.org/areas-of-work/implementation-support/.
[60] *About the PRI Initiative*, *supra* note 55.
[61] *Guiding Principles*, BUSINESS & HUMAN RIGHTS CENTRE (last accessed Nov. 19, 2013), http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples.
[62] *New Guiding Principles on Business and Human Rights Endorsed by the UN Human Rights Council*, United Nations Human Rights (last accessed Nov. 19,2013), http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11164.
[63] *U.N. Protect, Respect, Remedy Framework*, *available at* http://www.reports-and-materials.org/Ruggie-protect-respect-remedy-framework.pdf.
[64] *See U.N. Guiding Principles on Business and Human Rights* 4-12, *available at* http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

potential consequences of their activities.[65] Finally, the Principles recommend that governments remove barriers to judicial remedies, facilitate non-State based grievances, and make it possible for grievance to be addressed quickly and directly.[66]

OECD Declaration and Decisions on International Investment and Multinational Enterprises

The OECD Declaration was first adopted in 1976 but has been updated five times since, most recently in May of 2011.[67] The Declaration consists of four elements: the Guidelines for Multinational Enterprises, National Treatment, Conflicting Requirements, and International Investment Incentives and Disincentives.[68] All 34 OECD countries and 11 non-OECD countries have subscribed to the declaration.[69]

The Guidelines for Multinational Enterprises are recommendations by adhering governments to multinational enterprises operating in or from those countries.[70] In its general policies, the Guidelines specify sustainable development and human rights as objectives that enterprises should adopt.[71] There are specific sections on human rights and environment that give more deliverable steps that enterprises should take. With respect to human rights, aside from not incurring or contributing to human rights violations, it recommends companies create specific policies and perform due diligence for human rights.[72] Under the environment section, the Guidelines recommend having emergency plans, implementing best technological practices to reduce environmental impact, and contributing to environmental public policy through initiatives

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[65] *See id.* at 16-26.
[66] *See id.* at 28-35.
[67] *Investment Policy*, OECD (last accessed Oct. 26, 2013), http://www.oecd.org/daf/inv/investment-policy/oecddeclarationanddecisions.htm.
[68] *Id.*
[69] *Id.*
[70] OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 3 (OECD 2011), *available at* http://dx.doi.org/10.1787/9789264115415-en.
[71] *Id.* at 19.
[72] *Id.* at 31.

and partnerships, just to name a few.[73] The Guidelines also include sections related to transfer of technology and industrial relations, with which multinationals have had a mixed record.[74]

Multinational enterprises have obvious disincentives for openly transferring intellectual property and assisting local competition, despite 'spillover' being a highly touted benefit of FDI.[75] Intellectual property protections contained in Trade-Related Aspects of Intellectual Property, a multilateral treaty formed under the WTO, and other IIAs often adversely affect developing countries for the benefit of large corporations in developed countries.[76] Although recognizing the issue is an initial step in correcting this disparity, much greater reform is needed to improve the inequity in international intellectual property law.

The unique aspect of The Guidelines for Multinational Enterprises is its implementation procedure and obligation to provide a platform for grievances in adopting countries. Governments must create National Contact Points, through which any party may submit a grievance for noncompliance, known as a specific instance.[77] The predominant subject matter of specific instances is employment and industrial relations, covering about 61% of claims, while environment is second at 26% of claims.[78] The manufacturing industry is the primary source of complaints, representing 32%, with mining and quarrying following at 20%.[79] These specific instances have been part of the Guidelines since the year 2000 updates, and about 300 have been submitted to date.[80]

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[73] *Id.* at 42-43.
[74] OECD, THE IMPACT OF FOREIGN DIRECT INVESTMENT ON WAGES AND WORKING CONDITIONS 9 (2008), *available at* http://www.oecd.org/daf/inv/mne/40848277.pdf.
[75] *See* Chudnovsky & Lopez, *supra* note 6, at 49-51.
[76] *See* STIGLITZ, *supra* note 17, at 105.
[77] *Specific Instances*, OECD (last accessed Oct. 26, 2013), http://mneguidelines.oecd.org/specificinstances.htm.
[78] *Database of Specific Instances*, OECD (last accessed Oct. 26, 2013), http://mneguidelines.oecd.org/database/#d.en.217490.
[79] *Id.*
[80] *Id.*

UNCTAD Investment Policy Framework for Sustainable Development

The Investment Policy Framework for Sustainable Development [hereinafter IPFSD] was created by a team of experts under the auspices of the U.N. Conference on Trade and Development (UNCTAD).[81] After a series of expert group meetings, review, and discussion at several intergovernmental meetings, including the International Investment Agreements Conference and the Ministerial Round Table at the World Investment Forum 2012 (WIF2012) and UNCTAD XIII in Doha, Qatar, the IPFSD was published in July 2012.[82] It is a set of core principles and investment policies intended to serve as a reference for policymakers in formulating investment policies, negotiating investment agreements, or revising existing ones.[83]

IPFSD begins by emphasizing the role of governments in shaping IIAs and economic policy, and the importance of emerging economies in international investment.[84] Within the 11 core principles, it identifies several governance issues and guiding concerns, including: 1) promotion of inclusive growth and sustainable development, 5) balancing rights of investors and the State, 6) right of the state to regulate for the common good, 10) promotion of corporate social responsibility and best practices, along with several others dealing with implementation and review of regulations.[85]

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[81] UNCTAD, INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT iv (2012), *available at* http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf.
[82] *Id.*
[83] *Id.* at iii.
[84] *Id.* at 3.
[85] *Id.* at 11.

Southern African Development Community Model Bilateral Investment Treaty Template

The South African Development Community Model Bilateral Investment Treaty Template was created in July 2012 following 18 months of consultation and revision.[86] It is an effort to harmonize the approaches of the 15 members of the SADC in individual and collective negotiations of international investments agreements. The IPFSD served as technical assistant in its creation.

The commitment to sustainable development is outlined in the objectives but is extrapolated throughout the text.[87] A significant departure from past IIAs is the position against inclusion of investment liberalization provisions.[88] And while it does address investor protection, a standard component that is controversial among developing countries, it recommends avoiding a fair and equitable treatment provision.[89] It provides a narrowly constructed alternative for consideration.[90] The investor obligations portion also reflects the greater emphasis on the role that multinationals should play in supporting sustainable development. Obligations mirror those of the *Guidelines for Multinational Enterprises*.[91] With respect to a breach of those obligations, the treaty template allows for civil liability and jurisdiction in the home State, liability under domestic law, and possible jurisdiction under a tribunal.[92] The template also explicitly provides for a State's right to regulate, reinforcing sovereignty.[93]

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[86] Howard Mann, *The SADC Model BIT Template*: *Investment for Sustainable Development*, INVESTMENT TREATY NEWS (Oct. 30, 2012), http://www.iisd.org/itn/2012/10/30/the-sadc-model-bit-template-investment-for-sustainable-development/.
[87] *Id.*
[88] SOUTH AFRICAN DEVELOPMENT COMMUNITY, SADC MODEL BILATERAL TREATY TEMPLATE WITH COMMENTARY art. 3 (2012), *available at* http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf.
[89] *Id.* art. 5.
[90] *Id.*
[91] *See id.* art. 10-18.
[92] *Id.* art. 17.
[93] *Id.* art. 20.

Commonwealth Secretariat's International Investment Agreements: A Guide for Developing Countries

The Commonwealth is a voluntary association of 53 countries, many former British colonies.[94] Spanning five continents, these countries include both large and small countries as well as rich and poor.[95] The Commonwealth Secretariat's Guide for Developing Countries was created through expert-group process to assist developing countries in negotiating international investment agreements. Launched in October 2012, it closely parallels the purpose of the SADC's Model Bilateral Investment Treaty and goes as far as analyzing every potential article of an IIA. However, as it was intended to serve as a resource for negotiators and policy makers, it goes into greater detail on the links between investment and sustainable development and the different options available for countries.

The *Guide* acknowledges that IIAs are not guaranteed to attract investment. Many countries, Brazil being one, have had success without many treaties in place. Among some of the other issues that are analyzed in detail:[96]

- Do IIAs contribute to economic growth?
- How can IIAs contribute to sustainable development?
- How can IIAs encourage investment more effectively?
- What is the impact of IIAs on regulatory sovereignty?
- How can investors' home states be engaged to support sustainable development in host states?
- Can IIAs be used to implement international human rights obligations and promote corporate social responsibility?
- How do IIAs interact with WTO obligations, other investment agreements and domestic policy?

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[94] *About Us*, THE COMMONWEALTH (last accessed Oct. 28, 2013), http://thecommonwealth.org/about-us.
[95] *Id.*
[96] Veniana Qalo, *Integrating Sustainable Development Into International Investment Agreements: A Commonwealth Guide for Developing Country Negotiators*, INVESTMENT TREATY NEWS (Jan. 14, 2013), http://www.iisd.org/itn/2013/01/14/integrating-sustainable-development-into-international-investment-agreements-a-commonwealth-guide-for-developing-country-negotiators/.

Emerging Trends

These publications described above contain a number of common elements. They retain several of the features of former FDI regulatory regimes, specifically investor protection, most favored nation and national treatment clauses, but they also introduce a greater emphasis on the triple bottom line. There are a number of ways they do this. Expanding investor obligations is perhaps the most visible, while retaining the right to regulate and protection of sovereignty is also reinforced. They have also attempted to counteract the negative aspects of previous IIAs, specifically mandatory arbitration and equitable treatment.

Although the publications emphasize coordinating domestic policy with IIA policy, these agreements do not incorporate specific commitments to sustainable development goals. This makes them more broadly applicable, but the rate of adoption for certain environmental standards will likely not improve, and the potential for maintaining lax standards to attract investment remains. They are also vulnerable to the criticism that they are not binding and generally lack enforcement measures. However, the intergovernmental declarations may be effective in encouraging companies to preemptively adopt more stringent sustainability policies. Companies often find it more cost-effective to implement their own standards, and will do so if they feel regulation is forthcoming, typically in hopes of avoiding such regulation.[97] Despite the potential pressure for self-regulation, these IIAs clearly do not override the need for comprehensive environmental and social norms in the international legal community.

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[97] *See* Robert J. Bush, Comment, *Stimulating Corporate Self-Regulation*, 87 NW. U. L. REV. 597, 597-98 (1993).

III

POTENTIAL FOR DEVELOPING REGIONS

The efficacy of IIAs cannot be evaluated in a vacuum. These efforts should be analyzed in the context of specific countries. The following are developing countries that are representative of their regions and pose unique challenges to promoting sustainable development.

Brazil

Brazil is the largest country in South America and the sixth largest in the world with a population of approximately 201 million. With strong industries such as agriculture, manufacturing, and services, Brazil recovered quickly from the 2008 recession.[98] A member of the BRICs economies,[99] Brazil has been a popular destination for FDI for the last decade.[100] Despite its economic success, there are concerns over environmental degradation, poverty, infrastructure, and corruption. Soy and cocoa farming has led to deforestation,[101] and Brazil has been in the news for riots protesting corruption, healthcare, education, and costs of living in anticipation of both the World Cup and Summer Olympics, highlighting the divide between the wealthy and impoverished in the country.[102] These issues indicate that there is tremendous potential for growth in the country.

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[98] CIA, *Brazil*, WORLD FACTBOOK (last accessed Oct. 28, 2013), https://www.cia.gov/library/publications/the-world-factbook/geos/br.html.

[99] BRICs refers to the developing economies of Brazil, Russia, India, and China, whose growths has had substantial impact on the world economy. *See* THE ECONOMIST DEBATES, *Is the Fastest Period of Emerging-Market Growth Behind Us?* (Aug. 2013), http://www.economist.com/debate/overview/257.

[100] *Foreign Direct Investment, Net Inflows*, WORLD BANK (last accessed Oct. 28, 2013), http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD

[101] *Environmental Problems in Brazil*, WWF (last accessed Oct. 28, 2013), http://wwf.panda.org/who_we_are/wwf_offices/brazil/environmental_problems_brazil/.

[102] Tariq Panja & David Miller, *Riots Threaten World Cup as Nation Prepares for Games*, BLOOMBERG (Oct. 23, 2013), http://www.bloomberg.com/news/2013-10-23/brazil-world-cup-disruption-seen-outcome-of-rio-violent-protests.html.

Brazil is not a member of the ICSID Convention and has only 15 BITs in force, yet it has had remarkable success attracting FDI, with around $76 billion in inflows in 2012.[103] It has not had the acrimonious experience with foreign investment that other countries in South America have had, specifically Venezuela, Ecuador, and Bolivia. There are a few possible reasons that relations with foreign investors have been superior to other South American countries. One is that oil is a more significant part of the other aforementioned economies. Oil concentrates revenue and is detrimental to the environment, leading to contentious relationships between state-owned companies, foreign investors, and governments. The economy of Brazil is more diverse and has a stronger middle class. Another reason is governance. Brazil has 23 states and a national congress, whereas other countries tend to experience concentration of power with the central government.

Considering the demographic and economic structure of Brazil, IIAs would not serve to attract FDI,[104] but the dearth of current IIAs and substantial FDI inflows make Brazil the ideal candidate for the next generation of IIAs. Brazil recently passed the Clean Company Act, which makes companies, not just individuals, liable for corruption at home and abroad.[105] The anti-bribery and corruption provisions of the model IIAs presented would complement these efforts and support compliance across all sectors. The environmental sections would encourage importing best practices in agriculture, but also better protect the sovereignty of local governments in creating legislation intended to protect the environment. Finally, international investment policies that seek to reduce inequality and improve local infrastructure would support

[103] *See* WORLD BANK, *supra* note 98.
[104] IIAs would not in themselves attract FDI because Brazil has successfully attracted FDI without many IIAs in force. *See* WORLD BANK, *supra* note 98. Moreover, they do not have significant unexploited natural resources that multinationals are seeking to extract, such as oil in other South American countries or minerals in Africa, and have a strong services sector that reduces the reliance on foreign services and lessens the need for protections under IIAs. *See* CIA, *supra* note 96.
[105] TRANSPARENCY INTERNATIONAL, *Brazil* (last accessed Oct. 28, 2013), http://transparency.org/country#BRA_Overview.

domestic policies that did the same. The recent riots in Brazil suggest that the country is ready to adopt such values.

India

At 1.2 billion people, India is the world's largest democracy.[106] Its national schools produce an unparalleled number of qualified graduates, many in information technology, which has attracted many multinational enterprises to outsource computer programming, data analysis, and customer support to India.[107] Recently, India has faced problems attracting investment,[108] and suffered from its currency being substantially devalued.[109] In April 2013, the finance minister of India set out to attract investment in an effort to address a record trade deficit.[110] India has also been plagued by extreme poverty, weak infrastructure, and perceptions of corruption.[111] While it has tremendous potential to become one of the world's most significant economies, evidenced by its inclusion in BRICs,[112] India is not without its challenges.

India currently has 61 BITs in force,[113] and in 2011, its FDI inflow was around $32 billion.[114] Like Brazil, India is not a party to the ICSID convention, yet in its BITs, ICSID is

[106] CIA, *The World Factbook: India* (last accessed Oct. 28, 2013), https://www.cia.gov/library/publications/the-world-factbook/geos/in.html.
[107] Saritha Rai, *Business Analytics Outsourcing to India Is Gaining Momentum*, TECH REPUBLIC (Oct. 3, 2013), http://www.techrepublic.com/blog/asian-technology/business-analytics-outsourcing-to-india-is-gaining-momentum/.
[108] John Helyar, *Outsourcing: A Passage Out of India*, BUSINESS WEEK (March 15, 2012), http://www.businessweek.com/articles/2012-03-15/outsourcing-a-passage-out-of-india
[109] Rebecca Clancy, *Indian Rupee Plunges Most in 20 Years to Record Low*, THE TELEGRAPH (Aug. 28, 2013), http://www.telegraph.co.uk/finance/currency/10270740/Indian-rupee-plunges-most-in-20-years-to-record-low.html.
[110] *India Considers Allowing More Foreign Investment*, N.Y. TIMES (April 15, 2013), http://www.nytimes.com/2013/04/15/business/global/india-considers-allowing-more-foreign-investment.html?_r=0
[111] CIA, *supra* note 59.
[112] *See* ECONOMIST DEBATES, *supra* note 65.
[113] *Treaties of India*, ICSID (last accessed Oct. 28, 2013), https://icsid.worldbank.org/ICSID/FrontServlet.
[114] *Foreign Direct Investment, Net Inflows*, WORLD BANK (last accessed Oct. 28, 2013), http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD

specified as a permissible forum for arbitration of any investment disputes by consent of the parties.[115]

The economy of India has been in transition from mixed to open over the last two decades.[116] Although over half of the work force works in agriculture, predominantly in low output village farming, services is the country's most significant industry.[117] Information technology and customer services have been the predominant attraction for multinational enterprises.

Because of the volume of BITs that India has signed, new IIAs in themselves would do little to attract investment. Corruption has always been a concern in India, and the country currently ranks 94th in the corruption perception index.[118] 54% of respondents in a survey admitted to paying a bribe, compared with only 4% in Brazil.[119] Although IIAs may address corruption and would prohibit investors' involvement in practices such as bribery, it does little to curb the practice within the government and domestic firms. Additionally, while an IIA might encourage local partnerships and transferring technical skills to employees, this cannot impact the disparity in education, healthcare, and sanitation that is so deeply embedded in the caste system. India's best possibility for achieving sustainable development is to reform many of the issues associated with its institutions before looking to foreign investment.

South Africa

South Africa exemplifies the challenges African nations following decolonization. A strategic stopover point for trade between Asia and Europe, South Africa was first a Dutch

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[115] *See, e.g.,* Treaty for the Protection of Investments art. 9, Ind.-Belg. (Oct. 21, 1997).
[116] CIA, *India*, WORLD FACTBOOK (last access Oct. 28, 2013).
[117] *Id.*
[118] *India*,TRANSPARENCY INTERNATIONAL (last accessed Oct. 28, 2013), http://transparency.org/country#IND.
[119] *Compare India*, *supra* note 78, *with Brazil*, *supra* note 65.

colony and then fell under the control of the British.[120] The country was heavily segregated and ruled by apartheid, deeply affecting the population to this day.[121] South Africa, like many other countries in Africa, is an emerging market with an abundant supply of natural resources.[122] For this reason, it is vital that these resources be managed responsibly and for the benefit of the population as a whole.

South Africa is much smaller than Brazil and India with a population of 48 million. Its economy has suffered more than the others following the 2008 global recession.[123] Its GDP fell nearly 2%, and now nearly 25% of its workforce is unemployed.[124] Power and grid reliability has also been a concern.[125] Yet South Africa has well-developed financial, legal, communication, and energy sectors and a modern infrastructure, making it viable for foreign capital.

In 2012, South Africa's net FDI inflow was just $5.8 billion.[126] It has signed 41 BITs.[127] Given this number and the infrastructure of the country, additional IIAs would not necessarily serve to attract new investment.[128] However, South Africa would be the ideal country to implement the *Model Bilateral Treaty Template* created by the SADC. The clauses in the template deal directly with the exploitation of resources involved in mining and the expropriation issues that often arise when state-owned enterprises are involved in many different industries, and South Africa has both mining operations and state-owned companies. Furthermore, if foreign investment is able to reduce unemployment, inequality, and the social problems that plague the

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[120] CIA, *South Africa*, WORLD FACTBOOK (last accessed Oct. 28, 2013), https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html
[121] Rich Elfers, *Apartheid Impacts Are Still Seen in South Africa*, ENUMCLAW COURIER-HERALD (Oct. 17, 2012), http://www.courierherald.com/opinion/174619881.html.
[122] CIA, *supra* note 118; *see also* Chudnovsky & Lopez, *supra* note 6, at 45.
[123] CIA, *supra* note 118.
[124] *Id.*
[125] *Id.*
[126] *See* WORLD BANK, *supra* note 60.
[127] *Treaties of South Africa*, ICSID (last accessed Oct. 28, 2013), https://icsid.worldbank.org/ICSID/FrontServlet.
[128] *See* Athanasios Arvanitis, *Foreign Direct Investment in South Africa: Why Has It Been So Low?* 64 (2006), *available at* http://www.imf.org/external/pubs/nft/2006/soafrica/eng/pasoafr/sach5.pdf. Note: this is an article in an IMF publication, just can't tell which one.

country, other African nations could learn from South Africa's experience. Economic growth would then permeate between neighboring countries, help stabilize portions of the continent, and thereby create a positive feedback loop between economies, investment, and governments.

CONCLUSION

The approaches to FDI outlined above represent a coordinated effort to shift the purpose of IIAs. Whereas investor protection was originally seen as the sole purpose of creating IIAs, investors rarely considered them in making investment decisions, instead relying on contractual protections.[129] Many intergovernmental organizations have recognized the need for greater restrictions on investment to prevent exploitation of labor or environment. However, IIAs cannot in themselves guarantee sustainable development.

The *Guidelines for Multinational Enterprises* illustrates the need for a company to internalize these purposes in its governance and policies. It is difficult to ascribe positive duties on enterprises through IIAs, and similarly difficult to facilitate legal challenges to operations in countries where corruption has not been eliminated and legal redress has not been fully institutionalized. Moreover, while ensuring best practices for a large enterprise can be done efficiently, companies often establish joint ventures or create cottage industries around their manufacturing. It is more challenging to regulate these offshoots, both for the multinational company and local regulators.

The next generation of IIAs should be used as a tool for domestic and international policy coordination. The lofty goals and principles of these model IIAs are ineffective without domestic policy to enforce their provisions. In the wake of the global economic crisis, many countries have leaned towards protectionism. It is of vital importance for countries to adhere to their

[129] Yackee, *supra* note 11.

obligations under these IIAs and manage foreign investment responsibly. Coordinated domestic policy across the globe will also encourage multinational enterprises to adopt best practices that comply with international regulations in any region. IIAs are just the first step in investment policy that encourages sustainable development. As these IIAs begin to shape and improve local communities, countries and corporations alike will see the benefit in a commitment to responsible investing, and foreign direct investment will at last fulfill its potential of fostering sustainable development.