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How Developing Countries can Adapt Current Bilateral Investment Treaties to Provide Benefits to Their Domestic Economies

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HOW DEVELOPING COUNTRIES CAN ADAPT CURRENT BILATERAL INVESTMENT TREATIES TO PROVIDE BENEFITS TO THEIR DOMESTIC ECONOMIES

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I. INTRODUCTION

Bilateral investment treaties (hereinafter "BIT") have been created with the goal of promoting economic prosperity through the facilitation of international investment flows.[1] The idea was to facilitate these investment flows by the opening up of secure channels for foreign direct investment (hereinafter "FDI"),[2] stabilizing the investment climate,[3] granting protective investment guarantees,[4] and providing neutral dispute mechanisms for "injured" investors.[5]

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[1] Kenneth J. Vandevelde, *The Economics of Bilateral Investment Treaties,* 41 HARV. INT'L L.J. 469, 471 (2000).

[2] *Id.*

[3] Andrea K. Bjorklund, *Introduction*, 12 U.C. DAVIS J. INT'L L. & POL'Y 1, 2 (2005).

[4] Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future*, 12 U.C. DAVIS J. INT'L L. & POL'Y 47,

Since their inception in 1959,[6] BITs have experienced a "massive and sudden proliferation . . . which has been . . . a 'remarkable' event in international law[,]"[7] and as of the end of 2008, there were over 2,600 BITs in circulation.[8] Many of these treaties have been signed between developed countries and developing countries for the purpose of encouraging FDI capital to come into the developing countries and stimulate their markets, economies, and infrastructures.[9] Unfortunately, while this seems to be plausible and desirable in theory, the reality is that these BITs have effectively taken control of the developing countries' markets, resources, and capital and provided little to no benefit in return.[10] Fortunately, current global factors are providing a prime opportunity for developing countries to re-shape their current BITs through slight de-liberalization in order to help facilitate the desired FDI inflow while ensuring that the investments do in fact improve their economies.

The following paper will attempt to show that a pseudo-interventionist approach to BIT provisions coupled with the promotion of the recent changes to the alternative dispute resolution (hereinafter "ADR") mechanisms already in place can help developing countries entice FDI while actually promoting domestic markets and improving domestic economies. Furthermore, this paper will explain how the present economic situation can help encourage these de-liberalized actions and defeat the problem of collective action, by providing an ideal atmosphere for developing countries to work together without the fear of discouraging desired FDI.

II. AN OVERVIEW OF BITS

"One of the most remarkable phenomena in international law during the past fifteen years has been the extraordinary increase in the number of agreements concluded relating to the protection or liberalization of foreign investment."[11]

BIT agreements got their start during the Post-Colonial Era when decolonization was occurring after World War II and many newly independent and economically

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48 (2005) ("These [BITs] act like economic bills of rights, which grant foreign investors substantive protections and procedural rights to facilitate investment.").

[5] Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT'L REV. L. & ECON. 107, 108 (2005).

[6] Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 169 (2005).

[7] Jason Webb Yackee, *Are BITs Such a Bright Idea? Exploring the Ideational Basis of Investment Treaty Enthusiasm*, 12 U.C. DAVIS J. INT'L L. & POL'Y 195, 195 (2005).

[8] Luke E. Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law within Investor-State Arbitration*, INVESTING IN HUMAN RIGHTS v. 3 pp. 11 (Rights & Democracy 2008), *available at* http://www.dd-rd.ca/site/_PDF/publications/globalization/HIRA-volume3-ENG.pdf.

[9] Ginsburg, *supra* note 5, at 108; Franck, *supra* note 4, at 48-49, 52-53.

[10] *See* Vandevelde, *supra* note 1, at 484, 490 ("BITs liberalize capital movements in only one direction—outward"); *BITs*, BILATERALS.ORG, http://www.bilaterals.org/rebrique-print.php3?id_rubriquie=29 (last visited Apr. 2, 2011) (BITs constrain governments from being able to regulate investment and general economic functions).

[11] Vandevelde, *supra* note 6, at 157.

undeveloped countries were formed.[12] At that time the General Agreement on Tariffs and Trade (GATT) had established itself as the principle forum for regulating and protecting international trade, but there was no equal organization for investments.[13] Furthermore, in the 1970s the U.N. General Assembly declared that each state has the right to expropriate foreign property.[14] Therefore, with the unpredictability of newly formed economies, no protective organization for investments and the right to expropriate developed countries sought to establish a way to protect their investors and investments. It was BITs that offered potentially the most effective means for achieving this protection.[15]

The first BIT was concluded between Germany and Pakistan in 1959, and within seven years, France, Switzerland, the Netherlands, Italy, Belgium-Luxembourg, Sweden, Denmark, and Norway had established BIT programs of their own.[16] Ten years later, the United Kingdom, Austria, Japan, and the United States followed suit.[17] However, these BITs were signed fairly irregularly[18] until the Global Era of 1980, where there was "an explosion in the number of BITs [signed]."[19] This is partially due to the debt crisis in 1980, where developing countries needed capital finance development and did not have much alternative other than to seek out BITs with developed countries.[20] By the 1990s, BIT signings became the "thing to do" for developing countries, with over 1,000 being signed;[21] by the middle of 2008, an estimated 2,600 BITs were in circulation.[22]

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[12] *Id.* at 166.

[13] *Id*. at 162.

[14] *Id.* at 168.

[15] *Id.* at 168-69.

[16] Vandevelde, *supra* note 6, at 169. The BIT programs started in France in 1960, Switzerland in 1961, the Netherlands in 1963, Italy and Belgium-Luxembourg in 1964, Sweden and Denmark in 1965, and Norway in 1966. *Id.*

[17] *Id.* at 170. The BIT programs started in the United Kingdom in 1975, Austria in 1976, Japan in 1977, and the United States in 1977. *Id.*

[18] The irregularity was due in part by the developing countries' fear of western exploitation and the soviet bloc's ideals that economic development can be best achieved through extensive state regulation. *Id.* at 166-67.

[19] *Id.* at 177. 211 BITs were signed during the 1980s as opposed to 86 in the 1970s. Antonio R. Parra, *ICSID and the Rise of Bilateral Investment Treaties: Will ICSID be the Leading Arbitration Institution in the Early 21st Century?*, 94 AM. SOC'Y INT'L PROC. 41, 42 (2000).

[20] Vandevelde, *supra* note 6, at 177-78. By signing these BITs, it showed foreign investors that the signatory country had a desire to provide a secure, liberal environment for investment. *Id.* at 179.

[21] Ginsburg, *supra* note 5, at 117; Parra, *supra* note 19 (the estimate in number is anywhere between 960 and 1,300 BITs forming between 1990 and 1998). By the mid-1990s, BITs were being signed at a "rate of one every other day." Vandevelde, *supra* note 1, at 469.

[22] Peterson, *supra* note 8, at 11. Partially due to the fact that by the 1980's most countries were following the United State's Model BIT. Ginsburg, *supra* note 5, at 111.

Although there are over 2,600 different BITs currently in force, most of them are surprisingly uniform in their provisions and protections.[23] Some of the basic protections these treaties provide investors are: compensation for expropriation; freedom from unreasonable or discriminatory measures; national treatment; assurances of fair and equitable treatment of investment; promises that investments will receive full protection and security that is no less favorable than that accorded under international law; the sovereign's commitment to honor and uphold its obligations under the treaty;[24] free capital repatriation; and most favored nation requirements.[25]

Furthermore, almost all of these treaties provide ADR provisions that allow states to bring claims regarding the interpretation or application of a treaty provision, as well as allow investors to bring claims against states for treaty violations, often referred to as Investor-State Arbitration.[26] These ADR methods are often international arbitration proceedings that are governed mostly by either the International Centre for Settlement of Investment Disputes (ICSID), United Nations Center for International Trade Law (UNCITRAL), or the International Court of Commerce (ICC).[27] However, the ICSID is the most widely used arbitration mechanism in investment treaty enforcement with over 30% of current BITs providing for its use.[28]

III. HOW BITS HARM DEVELOPING COUNTRIES' ECONOMIES

"Marxist economists have . . . characterized foreign investment as the recolonization of host states."[29] The reason for this characterization is that BITs provide foreign control over domestic economies by redistributing domestic wealth and power through the transfer of control over local assets to foreign entities. As stated by Kenneth Vandevelde, "control . . . is a key element of the rationale for establishing foreign direct investment."[30] Furthermore, BITs do not serve their

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[23] Vandevelde, *supra* note 1, at 469.

[24] Franck, *supra* note 4, at 53.

[25] Ginsburg, *supra* note 5, at 109; Parra, *supra* note 19, at 41.

[26] Franck, *supra* note 4, at 53-54. These investor-state dispute mechanisms grant private investors, corporations, or individuals the right to sue a sovereign state in an international tribunal and receive binding awards of compensation from the state. Isabelle Van Damme, *Eighth Annual WTO Conference: An Overview*, 12 J. INT'L ECON. L. 175, 176 (2009).

[27] Franck, *supra* note 4, at 54. The ICSID was formulated under the World Bank and it is situated at the World Bank headquarters in Washington, D.C. Ronald A. Brand, *Convention of the Settlement on Investment Disputes between States and Nationals of Other States: Introduction & Bibliography*, I.E.L. VIII-A (1991).

[28] THE WORLD BANK- THE WORLD BANK GROUP-ICSID, 3 L. of Int'l Trade §79:16 (Lillian V. Blageff, ed., 2009); Franck, *supra* note 4, at 56 (stating that the ICSID administers the majority of the investment treaty cases). However, ICSID does not arbitrate itself but mostly provides Conciliators and Arbitrators that can be appointed to a case through consent of the disputing parties. Brand, *supra* note 27.

[29] Vandevelde, *supra* note 1, at 484.

[30] *Id.* at 476.

purpose of facilitating FDI flows to developing countries but only serve the purpose of providing high levels of investment protection and liberalization to unstable markets.[31]

Generally, the control is derived from BITs allowing foreign investors to enter into developing countries and purchase various domestic assets, which is basically granting control over a domestic resource to a non-domestic entity.[32] This is not necessarily undesirable because theoretically it can provide a developing country with (1) foreign capital, (2) jobs, (3) technology, (4) increased domestic production, and (5) more developed domestic markets or market participants/corporations. Additionally, provisions requiring ADR allow for a neutral body to settle disputes, which ideally would provide for quick and accurate decisions regarding BITs and the signatory parties' responsibilities under them. Unfortunately, this is not what is happening.

First, FDI does not increase domestic capital. It is argued that FDI will help to bring in a flow of foreign currency into the developing economies; however, this is often not the case.[33] For example, FDIs tend to only acquire existing capital stock, thereby merely shifting control over currently existing capital and not bringing in any new capital.[34] Additionally, they may create a local subsidiary of the parent corporation, as opposed to joint ventures with local companies, and therefore, finance the investment locally with existing domestic capital.[35] Furthermore, this establishment of a local subsidiary also helps to bypass trade barriers, transaction costs, and import taxes, thus denying funds that would typically contribute to the host countries' liquid assets.[36]

Moreover, BITs act as the catalyst to the exodus of "hot money" from the developing countries that can leave the country's economy with even less capital then it started with.[37] This is possible because of the provisions allowing for the free repatriation of foreign investments. Free repatriation allows for investors to quickly "take their money and run" at any sign of political, social, or economic distress without any monetary ramifications or consequences.[38]

Second, BITs do not necessarily promote the increase of domestic jobs and could even decrease them. This is often the case because FDIs tend to bring in highly

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[31] *See generally id.*; Ginsburg, *supra* note 5, at 118.

[32] Vandevelde, *supra* note 1, at 484.

[33] Yackee, *supra* note 7, at 196.

[34] *See* Vandevelde, *supra* note 1, at 481. For BITs to have control, investments do not need to contribute to capital formation; they may just move the control of assets from domestic investors to foreign ones. *See id.* at 492.

[35] *Id.* at 481-82.

[36] *See generally id.* at 474-75.

[37] *See* Ginsburg, *supra* note 5, at 112. "BITs only liberalize outward movements in capital." *See generally* Vandevelde, *supra* note 1, at 489.

[38] *See* Ginsburg, *supra* note 5, at 111-112. This fleeing of "hot money" was partially responsible for the Asian economic collapse in the late 90s. *Id.*

trained employees from abroad to fill open positions or use these outside employees to replace local management.[39]

Third, BITs do not promote or require the transfer of technology to developing countries.[40] Often, a foreign investor will develop the technology in the home state and ship it to a subsidiary that is run almost solely by non-domestic employees.[41] Additionally, FDIs can even help investors to shield technology from developing countries because investors can use their own technology without licensing it out to a corporation since they can establish a local branch, operated by foreign employees, to operate the specific technology.[42]

Fourth, BITs do not help to promote increased production, which is vital to the development of a stable, self-sufficient economy.[43] Productivity is created by capital, natural resources, and labor.[44] As stated above, BITs do not increase capital but rather change the entity in control of it or decrease it through repatriation.[45] BITs do not increase labor or its productivity because FDIs may just bring in employees from abroad.[46] Furthermore, BITs do not help increase the return on natural resources because they increase the levels of investment protection, which lower the price of the natural resources and thus decrease the return on the resources to the developing country.[47]

Fifth, BITs do not help to develop local markets or market participants. BITs do not ensure that the market they are liberalizing is functioning properly before it liberalizes it. Therefore, it may allow in investments that the market cannot handle, thereby preventing any potential development.[48] This is because FDI may provide for low prices or set specific standards of quality that domestic competitors cannot compete with and thus be forced to close, leaving no local competition[49]

As for the ADR mechanism, the investor-state arbitration system, provided for under most BITS, hinders developing countries because it undermines local governance and diverts government funds from the public to cover administrative fees, legal fees, and provide for typically large monetary compensations that can and have been awarded to investors by the arbitration tribunals. Investor-state arbitration undermines local governance because its unpredictability and inconsistency expose developed countries to unknown potential litigation risk every time they attempt to

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[39] Vandevelde, *supra* note 1, at 482.

[40] *Id.* at 492.

[41] *Id.* at 482-83.

[42] *See id.* at 474-75.

[43] *See id.* at 483. However, development is still more important than production for developing countries. *Id.*

[44] Vandevelde, *supra* note 1, at 478-79.

[45] *See id.* at 481; *see also* Ginsburg, *supra* note 5, at 112.

[46] Vandevelde, *supra* note 1, at 479, 482.

[47] Ginsburg, *supra* note 5, at 118.

[48] *See* Vandevelde, *supra* note 1, at 490.

[49] *See id.* at 481.

exercise their sovereign legislative and regulatory powers.[50] Past decisions by arbitration tribunals regarding violations of investment treaties have been vastly inconsistent, including some situations where different tribunals have come to completely different results regarding nearly identical textual treaty rights.[51] Such inconsistencies inhibit the developing state from making informed decisions about regulations and legislations that effect investment treaty provisions because there is no consistent, predictable interpretation regarding the scope or application of the BIT provisions.[52]

This unpredictability and inconsistency stems from the fact that these arbitration proceedings were highly secretive, and therefore, one tribunal would not have any idea what another tribunal's decision was or the reasoning behind it.[53] This prevents any legal precedent to form and forces an already ad hoc tribunal to make ad hoc decisions without any guidance.[54] Furthermore, investor-state arbitration forces developing countries to divert funds from use for public benefit to payment of administrative fees, legal fees, and dispute settlement awards.[55] For starters, administrative fees and legal fees on their own can reach into the millions.[56] Additionally, the average claim is for damages in excess of $100 million,[57] with multiple claims for a violation potentially reaching into the billions.[58] For example, in *Methanex v. U.S.*, the cost of arbitration was 2 million dollars and the legal fees

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[50] Franck, *supra* note 4, at 57-58. "Grant Kesler, Metalclad's former CEO, said that 'the [arbitration] process [i]s too . . . indeterminate.'" This was said after the same arbitration awarded his company over 16.5 million in compensation. Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 131 (Aug. 30, 2000); Jack J. Coe, Jr., *Toward a Complementary Use of Conciliation in Investor-State Disputes: A Preliminary Sketch*, 12 U.C. DAVIS J. INT'L L. & POL'Y 7, 9-10 (2005).

[51] Franck, *supra* note 4, at 55-56. For example, Mr. Lauder, a U.S. Citizen, brought a claim against the Czech Republic under the U.S./Czech Republic BIT, but he has his investment restructured under a Dutch Investment group. Upon the alleged violation of the Czech Republic Mr. Lauder and the Dutch firm each brought a separate claims under the applicable BIT. These identical claims resulted in different conclusion on all but one point. *Id.* at 60-61.

[52] *Id.* at 51-52. For example, the terms "investment" and "investor" are not properly defined and have often been understood to have broad definitions thereby allowing for a vast array of potential claims to be brought against a sovereign. *See generally id.* at 62. *See also* Brand, *supra* note 27; Vandevelde, *supra* note 1, at 491-92.

[53] *See* Franck, *supra* note 4, at 73-75.

[54] Coe, *supra* note 50, at 21-22 (stating that arbitral tribunals are ad hoc adjudicators).

[55] *See UNCTAD Reviews Investor-State Dispute Settlement Cases and Draws Implication for Developing Countries*, UNCTAD (Feb. 5, 2006) *available at* http://www.unctad.org/Templates/Webflyer.asp?docID=6967&intItemID =4712&lang=1 (stating that arbitration poses a challenge for developing countries due to the potentially high costs of conducting such procedures and the potential impact of awards on budgets and national reputations as location for investment.).

[56] Bjorklund, *supra* note 3, at 3-4.

[57] Franck, *supra* note 4, at 62.

[58] *Id.* at 49.

for the U.S. alone were nearly 3 million dollars.[59] Additionally, in the situation of Argentina, arguably one of the largest defaults in history, the claims aggregated in the multi-billions.[60] These claims not only direct needed public funds towards non-public interests,[61] but also any potential benefit that a developed country may have received from the additional FDI brought in by the BIT could be easily nullified by one large award. This, therefore, makes a BIT essentially worthless.

"[D]eveloping countries should be cautious about taking too uncritical an attitude toward the benefit of FDI . . . . [T]ransfer of control may not always benefit the host country . . . ."[62] As shown, BITs on their face may seem beneficial and almost necessary for developing countries, but in reality they simply allow FDI to take control of local markets without doing anything to help them improve and then sue when they are not getting their way.

IV. DELIBERALIZATION APPROACHES THAT CAN TURN INEFFECTIVE BITS INTO A CATALYST FOR ECONOMIC DEVELOPMENT

As it stands, BITs do not appear to help anyone other then the rich investor from the powerful developed countries, and the poor undeveloped countries are left on the periphery. However, BITs do not need to be simply accepted "as-is," nor do they need to be scrapped completely. By taking an interventionist's approach of implementing a few deliberalizing regulations as well as supporting and promoting the trend of added transparency within the investor-state arbitration proceedings, developing countries can use BITs to not only influence and protect FDI, but to stabilize and develop their sovereign economies.

The remainder of this paper will first acknowledge the issue of collective action that naturally rises from the idea of countries deliberalizing without scaring off foreign investments or shifting their share to another more liberalized developing economy.[63] This will be followed by a presentation of some of the regulations and actions the developing countries should implement and how they will benefit these countries.

A. The Problem of Collective Action

The suggestions being made below will, continuously, have the issue of collective action looming over it like a black cloud. This collective action problem will stem from the fact that the suggestions to be made will be thought to potentially hinder FDI flow into the developing country. More so, developing countries will be

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[59] Bjorklund, *supra* note 3, at 3-4.

[60] Franck, *supra* note 4, at 49.

[61] Andrea J. Menaker, *Benefiting from Experience: Developments in the United States' Most Recent Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 121, 124 (2005) ("[A]ny award [or fee] in favor of the investor will be paid out of the public fisc . . . .").

[62] Prakash Loungani & Assaf Razin, *How Beneficial is Foreign Direct Investment for Developing Countries?*, 38 FIN. & DEV. (June 2001), *available at* http://www.imf.org/external/pubs/ft/fandd/2001/06/loungani.htm.

[63] As will be shown, the problem of collective action will arise due to the attempt of some developing countries to not de-liberalize and thereby attract an uneven share of the FDI, even though, as shown above, this share of FDI will continue to hurt the countries' economies.

weary of deliberalizing, even slightly, due to the fear that other developing countries will "cheat" by offering foreign investors more extensive liberal protections, even at their own harm, in order to get a larger share of the available FDI.[64]

Although the problem of collective action is an issue that could not be covered or solved in an entire case book, rather than one paper, it should be stated that at the present time the ability for developing countries to implement the suggestions below is ideal due to the weakened global economy. The weakened global economy provides a prime opportunity for deliberalization because the risk of losing initial FDI is minimal since there has been a significant decrease in obtainable FDI, anyway.[65] Specifically, after hitting a record $1.8 trillion in 2007, FDI flows decreased drastically in 2008 and 2009 with a slowed but continued decline in 2010.[66] As stated by UNCTAD,"[the present financial crisis] could lead to major structural changes in the world economy."[67] So why can't these structural changes benefit the developing world as well as the developed one? It does not always have to be a one-sided gain.

Furthermore, although it is argued that deliberalizing will hinder potential FDI,[68] if the regulations are customary and consistent throughout the developing markets, then the FDI flow will not be discouraged because there will not be any more drastically liberal markets available to it in the developing world. Since FDI will still need to seek markets present in these developing economies, it will have to adhere to those regulations.

Finally, as an aside, common sense should be noted that if the developing markets prosper and grow, then larger markets will be available for the developed countries' FDI. This would allow FDI to prosper in spite of the de-liberalized regulations. As a result, if developing countries can universally apply some of the below regulations, then all will benefit.

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[64] Vandevelde, *supra* note 1, at 485 (stating that interventionist measures may risk discouraging desirable FDI); Yackee, *supra* note 7, at 197 ("[D]eveloping countries also face individual incentives to 'cheat' by offering foreign investors more extensive protections, in order to capture outsized portions of available investment."). Although it is argued that de-liberalizing will hinder potential FDI, consistent regulations throughout the markets of developing economies will actually force FDIs to continue investing in them, because there will be no "more liberal" market available to it and the FDI will still need to seek markets present in these developing economies.

[65] *See* UNCTAD, Assessing the Impact of the Current Financial and Economic Crisis on Global FDI Flows (Feb. 4, 2009), http://www.unctad.org/Templates/Page.asp?intItemID=4712&lang=1. Furthermore, this view of risk has caused many companies to drastically curtail their investment portfolios. *See id.*

[66] *See id.;* Michael Gestrin, *International Investment Limps into 2011*, OECD Investment News, Issue 14 (Nov. 2010), *available at* http://www.oecd.org/dataoecd/13/60/46419425.pdf (stating that after significant declines in 2008 and 2009, "international investment remain[ed] flat" at the end of 2010").

[67] UNCTAD, *supra* note 65.

[68] *See* Vandevelde, *supra* note 1, at 485.

B. Suggestions for Deliberalized Regulations

The suggested deliberalizing actions are based off of the interventionist model of BIT regulations. This model calls for "state regulation of foreign investment to ensure that the investment has the desired consequences."[69] This is opposed to the currently used Liberal Model, which calls for "free flow of capital"[70] and has led to some of the problems listed above (e.g. the exodus of "hot money" at the slightest scare). Such interventionist actions include the (1) instating of performance-based requirements, (2) the prohibition of undesirable FDI, (3) the imposition of exchange controls, (4) the promotion of portfolio investment, and (5) textual clarification of BIT treaty provisions.

1. Performance-Based Requirements

Performance-based requirements are probably the most powerful regulation method that developing countries do not use.[71] This stems from the fact that the United States Model BIT, the most widely followed model, promotes substantial liberalization by prohibiting the imposition of performance requirements on investments.[72] However, these can be the strongest means of controlling what FDIs come in, how it comes in, and what they do when it gets in. Some particularly beneficial regulations would be to require FDIs to: (1) maintain partial domestic ownership or joint ventures with locals as opposed to subsidiaries to the parent corporation; (2) hire locally; (3) provide advanced job training to locals; (4) use locally produced inputs; and (5) provide technology transfers or limitations on technology-licensing fees.[73]

The maintenance of partial domestic ownership or pursuing joint ventures as opposed to exclusively foreign-run subsidiaries would allow for the creation of local jobs, provide a domestic influence in the investment's performance that would help the FDI to maintain a relationship with the developing country's culture, and create a push for purchasing locally produced goods as opposed to imported goods from the parent.[74] This would provide a direct flow of capital to the domestic markets, as well as grant employment to locals, thereby increasing the income per capita.

The requirement to hire locally and to provide advanced job training to locals can increase the sophistication of local employees, which they could thereby pass to other locals and create a more sophisticated employee pool for outside or domestic

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[69] *Id.* at 478.

[70] *Id.*

[71] By definition, performance requirements are the "direct regulation of foreign investment" by the host government. *Id.* at 495.

[72] Ginsburg, *supra* note 5, at 109. The United States' prohibition on performance requirements makes perfect sense because, without performance requirements, investors can exploit the markets, obtain quick capital, and leave without consequences, being fully protected.

[73] These performance regulations are not exhaustive and many other types can and should be considered while determining specific needs of individual states.

[74] Vandevelde, *supra* note 1, at 486.

employers.[75] Furthermore, this increased sophistication could lead to some employees opening up ventures of their own, and in doing so, create new domestic markets.[76] All of this, including the mere increase in employment, allows for more capital already present in the market to flow to the domestic economy as opposed to the parent corporation as well as allow for new markets to bring in capital not already coming into the developing country.

The requirement to use locally produced inputs, when available, will ensure that FDIs do not merely ship goods that they get from their parent overseas merely because they may be cheaper, due to increased resource availability and greater production efficiency in the parent's more mature market. These local input requirements will, just like the other suggested requirements, ensure that capital stays local and does not export back to the home country[77] because foreign investors will have to purchase their needed resources from local markets or produce the goods locally, which would force capital to be input into the developing market.

A developing country should require technology transfers or limitations to technology-licensing fees.[78] This helps to produce new markets, increase the sophistication within present markets, and increase efficiency and production within new or current domestic markets[79] because it would allow for the developing country to use, acquire, produce, and adapt the sophisticated foreign technology the FDIs expose it to without having to expend large amounts of non-existent time and money on research and development.

2. Prohibition of Undesirable FDI

A developing country should retain the right to prohibit undesirable FDI from coming into its market. This would allow for more control over what sections of the market FDI can become a part of. Such market areas that may want to protect are ones that have cultural importance, affect the military sector, or are relatively new sectors that are especially susceptible to exploitation or corruption.[80]

3. Exchange Controls

Exchange controls should be put in place to prevent foreign investors from transferring returns on investments out of the host state as well as prevent "hot money" from drastically fleeing the country at the slightest sign of social, political,

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[75] *See id.* at 479-80.

[76] *See id.*

[77] The constant push to increase domestic capital follows from recognition that it is a leading factor in enhancement of domestic production. *See id.* at 479. For example, it has been assessed that growth in capital represents fifty to ninety percent of fiscal development in the economies of non-Western countries. *Id.*

[78] *See* Vandevelde, *supra* note 1, at 485. Technology transfers are typically not placed in BIT agreements because FDIs do not trust the security or quality control of their technology with anyone other than themselves. *See id.* at 475.

[79] *See id.* at 480.

[80] *See id.* at 484.

or economic downturn.[81] This would help provide economic stability as a whole and would ensure that FDI would be more grounded and less speculative in regards to the desired return.

4. Portfolio Investments

Developing countries should promote portfolio investment as opposed to traditional FDI. Portfolio investment is the investment in existing domestic entities, similar to the way a person would invest in a company's stock.[82] Portfolio investment provides a solid return on investments for foreign investors without these same investors having control over a domestic company.[83] Furthermore, this helps investors reduce risk because they can geographically diversify their investments by investing in multiple companies that are located in different regions or invest in one company that has subsidiaries in multiple regions.[84] This will decrease a developing country's risk of total FDI withdrawal. When an economic downturn occurs in a specific region and an investor gets nervous and chooses to flee, it may only pull money out of the specific region and not the entire country.

5. Textual Clarifications and Definitions

The textual provisions in the BITs need to be better clarified. This clarification will help provide developing countries with predictability as to potential BIT violations when they are exercising their sovereign and regulatory powers.[85] Clarifications would provide a high degree of predictability if the textual contractors followed the legislative approach.[86] This approach focuses on the changing of treaty text to provide greater clarity about the content and scope of particular investment rights, typically through the recommendation that detailed definitions be provided in regards to treaty terms.[87]

Since almost all BITs have fairly uniform rights, the definitions and textual specificity will provide greater predictability universally.[88] This has already begun to occur within the United States Model BITs.[89] In 2004, the United States modified its Model BIT to clarify the standards, "National Treatment," "Minimum Standard of Treatment," and "Expropriation."[90] "National Treatment" can now have policy

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[81] *See id.* at 484-85 (referring to the prevention of capital flight); Ginsburg, *supra* note 5, at 112.

[82] *See* Vandevelde, *supra* note 1, at 476.

[83] *Id.*

[84] *Id.*

[85] *See* Franck, *supra* note 4, at 57-58.

[86] *See id.* at 84-85.

[87] *See id.* at 84.

[88] *See id.* at 86.

[89] Meg Kinnear & Robin Hansen, *The Influence of NAFTA Chapter 11 in the BIT Landscape*, 12 U.C. DAVIS J. INT'L L. & POL'Y 101, 113-14 (2005).

[90] *See* Menaker, *supra* note 61, at 121-24. This clarification is a result of the many arbitration proceedings brought against the United State pursuant to NAFTA Chapter 11,

consideration included when developing the scope of its application.[91] "Minimum Standard of Treatment" now incorporates customary international law on the minimum standard of treatment into its definition.[92] Additionally, "Expropriation" can now be interpreted in congruence with customary international law and further requires that there be a taking of property or interest in property.[93] However, provisions such as "Investment," "Fair and Equitable Treatment," etc., have yet to be defined in the same manner and therefore more textual clarification is necessary to ensure a high level of predictability.[94]

C. Suggestions for Arbitration Rules

Investor-state dispute resolution claims have been growing in number dramatically over the past few years, and, therefore, a body of law is starting to originate to help formulate the boundaries of BIT provisions and protections.[95] However, as shown above, these arbitration rulings are inconsistent and unpredictable, thereby failing to provide the necessary precedent used to help evaluate scope and application of BIT provisions, as well as unfairly benefiting the investor.[96] The unpredictability leads to unfair and arbitrary results, hinders the formulation of a necessary body of law, and creates inefficient and lengthier rulings. This, in turn, can result in increased administrative and legal fees and can place developing countries at risk of suffering huge financial losses resulting from a violation they were not aware of committing.[97] Many of these problems can be solved through (1) the promotion of the current trend of increased transparency, (2) the providing of quality legal assistance to parties to an investor-state dispute, and (3) the promotion of the parallel use of conciliation.[98]

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which regulates investments. The United States pursued more clarified definitions that derived from NAFTA case law to help keep its potential for liability predictable. *Id.* at 121, 123-24. The United States, in turn, applied these clarifications to BITs so it can have the same predictability throughout the globe. Kinnear & Hansen, *supra* note 89, at 115.

[91] Kinnear & Hansen, *supra* note 89, at 113.

[92] *Id.* at 114 (this definition was a result of *Loewen Group, Inc. (Can.) v. United States*); Menaker, *supra* note 61, at 123.

[93] Kinnear & Hansen, *supra* note 89, at 114; Menaker, *supra* note 61, at 124. Although the scope and application of Expropriation has not changed, the United State made the changes to the text of the provision to provide more clarity. *Id.*

[94] Brand, *supra* note 27; Dr. Stephen W. Schill, *Ioana Tudor: The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, 20 EUR. J. INT'L L. 236, 236 (2009) (book review).

[95] Bjorklund, *supra* note 3, at 1; Parra, *supra* note 19, at 43 (by the end of 1996, only 9 cases had been decided by the arbitration proceedings; however, in the three years following that, over 30 cases had been brought before tribunals); UNCTAD, *supra* note 55 (by the end of 2005, approximately 230 investor-State claims had been brought before arbitration tribunals).

[96] *See* Text and Authority, *supra* Part II.

[97] *See* Text and Authority, *supra* Part II.

[98] This list is meant to be illustrative of some main methods of improving BIT arbitration proceedings; however, it is not exhaustive.

1. Promotion of Current Trend to Increase Transparency in Arbitration Proceedings

Traditionally, investor-state arbitrations conducted under BIT provisions were secret matters where little to no disclosure of documents, awards, or decisions occurred.[99] However, "[o]ne of the more remarkable trends evident in recent years has been the appreciable increase in process transparency and public scrutiny associated with investor-state arbitration . . . ."[100] Decisions are now being released to the public and becoming subjected to more and more critique and skeptical scrutiny.[101]

This trend led the ICSID, on April 10th, 2006, to amend its rules to provide for more transparency of its arbitrations.[102] These rules allowed for the submission and acceptance of amicus curiae briefs, subject to certain conditions, and made the public disclosure of awards mandatory.[103] This trend is exceptionally beneficial to developing countries because "greater public attention is likely to lead to decisions of better quality as arbitrators are required to explain clearly their reasons for coming to conclusions," and this greater quality of decisions will lead to more developed law, which reciprocally means more predictable and consistent law.[104] Thus, developing countries need to ensure that the transparency requirements are listed in the BIT, either through requiring ICSID to govern ADR or, if another tribunal system governs, requiring the transparency laws listed in the ICSID to be expressly stated in the dispute resolution provisions.

2. Legal Assistance

Another method of improving the arbitration and its results is to have an even playing field before the arbitration even begins. Having international organizations provide legal assistance or legal training in the areas of complex investment arbitrations can do this.[105] This will allow developed countries to obtain legal assistance that is knowledgeable about BIT arbitrations and the body of law that

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[99] Andrew de Lotbiniere McDougall & Ank Santens, *ICSID Amends its Arbitration Rules*, INT. A.L.R., 9(4), 119, 119 (2006).

[100] Coe, *supra* note 50, at 26-27.

[101] Bjorklund, *supra* note 3, at 1-2. This distributional explosion of decisions has been facilitated by the Internet as well as the government's growing realization that these international tribunal's decisions "almost inevitably" affect the public. *Id.*

[102] McDougall & Santens, *supra* note 99. This is in part a result of the increased transparency required for arbitration commencing under NAFTA Chapter 11, which spurred the United States and Canada to change their Model BIT provisions to increase transparency of arbitration proceedings. Kinnear & Hansen, *supra* note 89, at 110.

[103] Kinnear & Hansen, *supra* note 89, at 120-21.

[104] Bjorklund, *supra* note 3, at 3-4.

[105] Franck, *supra* note 4, at 93. The idea that arbitrations were not on a "fair playing field" is in regard to the tactics engaged by investors in arbitration proceeding and these tactics as of late have been subject to a high level of scrutiny due to the higher degree of transparency allowing the pubic to observe and critique said tactics. *See* Bjorklund, *supra* note 3, at 4.

comes with it.[106] Additionally, with the rapid increase in the number of investment claims being brought to arbitration, a qualified investment arbitrator will not only know how to conduct himself or herself during the arbitration, but will be aware of the trends in the law and will be able to stay up to date on arbitration decisions.[107] This will allow developing countries to have the same quality legal assistance as the investors, who have the time and the money to obtain similar quality legal assistance.[108]

Additionally, this same organization should provide legal training in the areas of arbitration and investment treaties.[109] This would allow for developing countries to eventually have their own pool of qualified lawyers to not only arbitrate on the state's behalf but to also negotiate future BITs or negotiate for necessary changes to the BIT's provisions similar to the ones stated above. Therefore, legal assistance and legal training will not only help create a fair arbitration that will more than likely obtain the best decision, but will also provide developing countries with the knowhow to negotiate future BITs and BIT provisions in order to make them beneficial to both parties.

3. Parallel Conciliation

The use of conciliation, alongside with, or parallel to, investor-state arbitration can help reduce cost, increase efficiency, maintain investor-state relationships, control caseloads, etc.[110] Conciliation is basically "facilitated negotiation" that operates based on mutual agreement, collaboration, and cooperation.[111]

This method is an ideal mate for BIT arbitration because it can "transform a legal dispute into a restructured relationship, enlarging the value of the relationship to each [party]."[112] Conciliation helps to reduce cost not only by reducing legal fees and administrative fees but by providing potential decreased compensation amounts, since it is normal for settlements to be "cheaper" then judgments.[113] It also helps to control the caseload of states being subject to multiple arbitrations at once since they

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[106] *Id.*

[107] *Id. See* Bjorklund, *supra* note 3, at 1; Parra, *supra* note 19, at 43; UNCTAD, *supra* note 55. NAFTA's Chapter 11 arbitrations are creating a relatively large body of international investment case law and these cases/arbitrations are significantly influencing non-NAFTA investment disputes and decisions. Kinnear & Hansen, *supra* note 89, at 101, 110, 115.

[108] Including the fact that investors will typically only be in one arbitration at a time, where as States can get caught up in multiple proceedings, which can cause a decreased amount attention and resources to be devoted to each. *See* Coe, *supra* note 50, at 22-23 (stating that one way implementing conciliation can help is to control the caseloads of foreign sovereigns whom are facing multiple cases, thereby allowing a state to focus more energy and resources towards the cases that go to arbitration).

[109] Franck, *supra* note 4, at 93.

[110] *See generally*, Coe, *supra* note 50.

[111] *Id.* at 14-15. Basically, it is a settlement mechanism because a dispute will not end on conciliation unless both parties agree to the resulting settlement. *Id.* at 15.

[112] *Id.* at 15.

[113] *Id.* at 33.

can designate some cases as being settlement prone and thus place more resources on the cases that are less likely to settle.[114] Furthermore, conciliation will increase efficiency because it can help end cases before they go through the long process of arbitration and decrease the overall arbitration caseload at the same time.

Therefore, with conciliation playing as a complement to BIT arbitration proceedings, developing countries can be provided with more options to end disputes quickly, accurately, and cost effectively.

V. CONCLUSION

In conclusion, this paper has attempted to show that BITs are everywhere. While the purpose of BITs is to facilitate FDI flows into foreign sovereigns, thereby improving that country's economy, what these BITs really do is provide FDIs with the ability to control the markets and economies of developing countries while simultaneously being fully protected from harm, whilst providing little to no benefit to these developing countries in return. However, with this vast network of BITs, the idea of just nullifying them seems to be impossible. Fortunately, the ending of all BITs is not necessary or even prudent. All that needs to occur is for developing countries to slightly deliberalize their respective agreements through the implementation of certain regulations as well as promote and improve upon the current trends in arbitration protocol. Furthermore, the problem of collective action can be beat due to the present global economic state, because a country's fear of losing potential FDI by deliberalizing their BIT agreements should be at a minimum since there is a decreased amount of potential FDI available (thereby making it less beneficial for other states to "cheat" to obtain a higher share of FDI).

Developing countries can benefit from FDI so long as they work together to ensure that FDI helps their respective economies. Further, deliberalizing all present BITs to ensure that there is mutual benefit for both investors and states, rather than a unilateral inventor benefit, can do this.

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[114] *Id*. at 22-23, 33.