

NOTE

Colombia's 2017 Model IIA: Something Old, Something New, Something Borrowed

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I. INTRODUCTION

In 2017, Colombia adopted a new model International Investment Agreement ('IIA') which will form the basis for upcoming negotiations of new international investment agreements and the renegotiation of existing agreements (the '2017 model IIA' or the 'model').⁵ While this is a new model and it may take some time before an agreement is negotiated on its basis,⁶ certain innovations envisaged in this model, as well as the underlying goal to effectively balance investment protection while maintaining a State's regulatory powers, will likely be of interest to academia, practitioners, and even other countries. Indeed, the model comes at a time when several countries are debating the appropriate structure for investment protection. Colombia offers an interesting take that is worthy of consideration.

Towards that end, this note is divided into the following sections: first, we provide an overview of the context in which the 2017 model IIA was prepared in Section II. Then, we examine how the model addresses jurisdictional issues in Section III, and this is followed by a discussion on the standards of protection in Section IV. The dispute resolution mechanism is discussed in Section V, while in Section VI, we highlight some innovations of the 2017 model IIA.

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⁵ Colombia Model BIT (2017) Ministry of Trade, Industry and Tourism of Colombia <<http://www.mincit.gov.co/temas-interes/documentos/model-bit-2017.aspx>> accessed 12 June 2018. The 2017 model IIA does not have section numbers at this stage, so in this article we refer to the section numbers using this format: "2017 model IIA, name of the Article, art [xxx]"

⁶ Currently, Colombia's negotiating team is engaged with some of their counterparts to modernise the existing investment treaties in effect.

II. BACKGROUND LEADING TO THE 2017 MODEL IIA

Colombia was a latecomer to the implementation of IIAs in Latin America.⁷ One explanation for the delay is a 1996 decision of the Constitutional Court of Colombia where the Court concluded that the Constitution of Colombia did not permit compensation for expropriation in all situations, which is a requirement in IIAs.⁸ Indeed, the bulk of Colombian IIAs were negotiated post 2003 after the Constitution of Colombia was amended.⁹ The Colombian experience is unique

⁷ The term 'implementation' is used here as Colombia began negotiating IIAs in the 1960s, when it negotiated the Treaty Between the Federal Republic of Germany and the Republic of Colombia on the Promotion and Reciprocal Protection of Capital Investments (1965) <http://apw.cancilleria.gov.co/Tratados/adjuntosTratados/ALEMANIA_B-PROTECCIONDEINVERSIONESYSUPROTOCOLO1965-TEXTO.PDF> accessed 12 June 2018. After a hiatus, which followed Latin America's general endorsement of the Calvo Doctrine until the 1990s, Colombia also negotiated Bilateral Investment Treaties ('BITs') with Peru (1994), Cuba (1994), the United Kingdom (1994) and Spain (1995). See Jose Antonio Rivas, '5. Colombia' in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP 2013), 183, fn 51; Denise Manning-Cabrol, 'The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors' (1995) 26(4) *Law & Poly Intl Bus* 1169, 1186-7.

⁸ *Decisión No C-358/96* de la Corte Constitucional de Colombia [Constitutional Court of Colombia] (14 August 1996) declared that the BIT between Colombia and the United Kingdom signed in 1994 could not be ratified as it contravened Article 58 of the Constitution. Article 58 states, inter alia: '[However, the Legislature may determine cases in which, for equity reasons, there is no place for a compensation, through the favorable vote of the absolute majority of the members of both Chambers. The reasons of equity, as well as those of public utility or social interest that are invoked by the Legislature may not be judicially controverted.] (*Con todo, el legislador, por razones de equidad, podrá determinar los casos en que no haya lugar al pago de indemnización, mediante el voto favorable de la mayoría absoluta de los miembros de una y otra cámara. Las razones de equidad, así como los motivos de utilidad pública o de interés social, invocados por el legislador, no serán controvertibles judicialmente*).' This constitutional provision was subsequently derogated pursuant to Legislative Act 01 of 1999, art 1.

⁹ Colombia has signed the following IIAs: Free Trade Agreement between the United Mexican States and the Republic of Colombia (signed 13 May 1994, entered into force 1 January 1995) (Mexico (1994)), Agreement between the Republic of Colombia and the Kingdom of Spain for the promotion and reciprocal protection of investments (signed 31 March 2005, entered into force 22 September 2007) Spain (2005), Agreement Between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (signed 17 May 2006, entered into force 6 October 2009) Switzerland (2006), Colombia-United States Trade Promotion Agreement (signed 22 November 2006, entered into force 15 May 2012). United States (2006), Free Trade Agreement between the Republic of Chile and the Republic of Colombia (Additional Protocol to ACE 24) (signed 27 May 2006, entered into force 8 May 2009) Chile (2006), Agreement Between the Republic of Colombia and the Republic of Peru on the Promotion and Reciprocal Protection of Investments, (signed 11 December 2007, entered into force 30 December 2010) Peru (2007), Free Trade Agreement between the Republic of El Salvador, Republic of Guatemala, Republic of Honduras and the Republic of Colombia (signed, entered into force) El Salvador, Guatemala and Honduras: Tratado de Libre Comercio entre la República de Colombia y las Repúblicas de El Salvador, Guatemala y Honduras, (signed 8 September 2007; entered into force for Guatemala 13 November 2009, for El Salvador 1 February 2010, for Honduras 27 March 2010) El Salvador, Guatemala and Honduras (2007), Agreement for the Promotion and Protection of Investments between the Republic of Colombia and the Government of the People's Republic of China (signed 22 November 2008, entered into force 3 July 2013) China (2008), Free Trade Agreement between Canada and the Republic of Colombia (signed 21 November 2018), entered into force 15 October 2011) Canada (2008), Agreement for the Promotion and Protection of Investments between the Republic of Colombia and the Republic of India (signed 10 November 2009, entered into force 3 July 2012) India (2009), Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Colombia (signed 17 March 2010, entered into force 10 October 2014) United Kingdom (2010), Agreement between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment (signed 12 September 2011, entered into force 11 September 2015) Japan (2011), Agreement between the Republic of Colombia and the Republic of Singapore for the promotion and reciprocal protection of investments (signed 17 July 2013, not yet in force) Singapore (2013), Agreement between the Government of the Republic of Korea and the Government of the Republic of Colombia for the Promotion and Protection of Investments (signed 6 July 2010, not yet in force) Korea (2013), Free Trade Agreement between the Republic of Costa Rica and the Republic of Colombia (signed 22 May 2013, entered into force 1 August 2016) Costa Rica (2013), Free Trade Agreement between the Republic of Panama and the Republic of Colombia (signed 20 September 2013, not yet in force) Panama (2013), Free Trade Agreement between the Republic of Israel and the Republic of Colombia (signed 30 September 2013, not yet in force) Israel (2013), Additional Protocol to the Framework Agreement of the Pacific Alliance (Mexico, Peru and Chile) (signed 10 February 2014, entered into force 1 May 2016) Pacific Alliance (Mexico, Peru, and Chile) (2014), Agreement between the Republic of Colombia and the Republic of France for the promotion and reciprocal protection of investments (signed 10 July 2014, not yet in force) France (2014), Agreement between the Republic of Colombia and the Republic of Turkey for the promotion and reciprocal protection of investments (signed 28 July 2014, not yet in force) Turkey (2014), Agreement on the Cooperation and Facilitation of Investments between the Federative Republic of Brazil and the Republic of Colombia (signed 31 March 2005, not yet in force) Brazil (2015),

because it updates its model IIA every few years. Indeed, Colombia has had five such models: the first one in 2003,¹⁰ a second one in 2006,¹¹ a third one in 2009, a fourth revision in 2011,¹² and, finally, the 2017 model IIA.

The decision to review the 2017 model IIA was taken in 2015. By then, the 2011 model IIA was ripe for revision. Indeed, developments abroad also indicated that it was important for Colombia to be part of the global dialogue on how to reform the international investment regime. For example, in 2015, the United Nations Conference on Trade and Development ('UNCTAD') dedicated its World Investment Review issue of that year to the reform of international investment governance,¹³ while India adopted a new model IIA in 2015.¹⁴ Similarly, three mega-regional agreements were being negotiated around this time (i.e. the Trans-Pacific Partnership ('TPP'), the Comprehensive Economic and Trade Agreement ('CETA'), and the Transatlantic Trade and Investment Partnership ('TTIP')),¹⁵ and even though these negotiations were initially kept private, there were hints of innovative approaches such as the creation of an investment court in lieu of the traditional investor-State arbitration model.¹⁶ For Colombia, this meant that more than half of its investment partners would have models based on newer realities. Therefore, Colombia decided to embark on its own review process.

At the same time, Colombia started receiving disputes under the old IIAs—Colombia's baptism by fire. For example, Colombia was a respondent in the first investor-State case in 2015¹⁷ and there are currently 13 cases

Bilateral Agreement for the Promotion and Protection of Investments between the Government of the Republic of Colombia and the Government of the United Arab Emirates (signed 12 November 2017, not yet in force) United Arab Emirates (2017). Those that were not ratified or terminated are not included. See United Nations Conference on Trade and Development ('UNCTAD') 'International Investment Agreements Navigator, Colombia' <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/45/colombia>> accessed 12 June 2018.

¹⁰ Rivas (n 7) 193. ('This pre-2006 model was a text comprised of short clauses close to the European model following a principle-based approach. In contrast to the model drafted in 2006, which evolved into the 2009 Model IIA and is 17 pages long, the 2003 Model IIA was 8 pages long.')

¹¹ Rivas (n 7) 195. ('With the experience gained during the Colombia-US FTA negotiations, the Colombian Investment Negotiating Team realized the importance of having detail-oriented provisions... After negotiating the FTA with the US, it was clear that the Colombian IIA Model required a thorough revision. In March 2006, the Investment Negotiating Team... held a series of discussions to draft a new IIA model. These discussions considered the 2003 IIA Model, relevant constitutional provisions and previous negotiating experiences of BITs and—notably—the investment chapter of the Colombia-US FTA. This process was also fed by a review of ICSID awards and jurisdictional decisions, and consultations with UNCTAD officials concerning relevant clauses of other States and IIAs. These meetings in May of 2006 resulted in the Investment Negotiating Team's adoption of the Colombian 2006 Model IIA.')

¹² Colombia Model BIT (2011) Ministry of Trade, Industry, and Tourism of Colombia, <<http://www.mincit.gov.co/temas-interes/documentos/model-bit-2017.aspx>> accessed 12 June 2018.

¹³ See UNCTAD, 'World Investment Report 2015: Reforming International Investment Governance' (United Nations Publications 2015).

¹⁴ See India Model BIT (2015) Ministry of Finance, <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf> accessed 6 June 2018. See also Grant Hanessian and Kabir Duggal, 'The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?' (2017) 32(1) ICSID Rev—FILJ 216.

¹⁵ See generally Trans-Pacific Partnership ('TPP') (26 January 2016) <<https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/text-of-the-trans-pacific-partnership/>> accessed 12 June 2018; Comprehensive Economic and Trade Agreement between Canada and the European Union (signed 30 October 2016, provisionally entered into force 21 September 2017) (CETA) <ec.europa.eu/trade/policy/in-focus/ceta/> accessed 12 June 2018; Transatlantic Trade and Investment Partnership (signed 4 February 2016) ('TTIP') <<http://ec.europa.eu/trade/policy/in-focus/ttip/>> accessed 12 June 2018.

¹⁶ Commission, 'Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court' (Concept Paper) <trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 6 June 2018.

¹⁷ See *Cosigo Resources, Ltd, Cosigo Resources Sucursal Colombia, Tobie Mining and Energy, Inc v Republic of Colombia*, UNCITRAL.

pending.¹⁸ While Colombian authorities were aware that a new model IIA would not necessarily impact the ongoing disputes, the first-hand experiences from this new role—from spectator to actor—would also grant valuable insight into what needs change, or even innovation in IIAs or clarify issues in light of arbitral jurisprudence. Thus, even if it is not the main driver behind the 2017 model IIA, Colombia's experience in investor-State dispute settlement ('ISDS') had helped inform its drafting.

III. JURISDICTION

The 2017 model IIA provides carefully crafted jurisdictional concepts, providing 'content' to familiar but heavily debated concepts such as 'effective control' and 'substantial business activities' and, in general, seeking to restrict expansive notions of 'investment' and 'investor' as some prior arbitral tribunals had adopted. Further, the 2017 model IIA has a denial-of-benefits clause that incorporates additional innovative categories where a State may deny benefits that go beyond the traditionally accepted limitations relating to treaty shopping/treaty planning. These are discussed below.

A. 'Investor' and 'Investment'

The definition of 'investment' in any IIA is significant because it defines the very scope of the agreement. The 2017 model IIA provides an interesting model when it defines 'investment'. An 'investment' is defined as an 'asset owned or effectively controlled by a Covered Investor' that has the following characteristics: (i) 'the commitment of capital or other resources', (ii) the expectation of gain or profit', (iii) 'the intention to maintain a long-term presence in the Host Party', and (iv) 'the assumption of risk for the investor', 'and takes one of the forms listed in sub-paragraph 2'.¹⁹

The 2017 model IIA seeks to avoid the discussions on whether a particular investment contributed towards the development of the host party, which has led to some inconsistencies in the jurisprudence.²⁰ Instead, a unique innovation of the

¹⁸ See *Glencore International AG and CI Prodeco SA v Republic of Colombia*, ICSID Case No ARB/16/6; *América Móvil SAB de CV v Republic of Colombia*, ICSID Case No ARB(AF)/16/5; *Eco Oro Minerals Corp v Republic of Colombia*, ICSID Case No ARB/16/41; *Gas Natural SDG and Gas Natural Fenosa Electricidad Colombia SL v Republic of Colombia*, ICSID Case No UNCT/18/1, UNCITRAL; *Telefónica SA v Republic of Colombia*, ICSID Case No ARB/18/3; *Astrida Benita Carrizosa v Republic of Colombia*, ICSID Case No ARB/18/5; *Alberto Carrizosa Gelzis, Felipe Carrizosa Gelzis and Enrique Carrizosa Gelzis v Republic of Colombia*, PCA Case No 2018-56, UNCITRAL; *Cosigo Resources Ltd, Cosigo Resources Sucursal Colombia and Tobie Mining and Energy Inc v the Republic of Colombia*, UNCITRAL; *Red Eagle Exploration Ltd v Republic of Colombia*, ICSID Case No ARB/18/12; *Galway Gold Inc v Republic of Colombia*, ICSID Case No ARB/18/13; *Gran Colombia Gold Corp v Republic of Colombia*, ICSID Case No ARB/18/23; *Angel Samuel Seda and others v Republic of Colombia*, ICSID Case No ARB/19/6; and *Glencore International AG, CI Prodeco SA, and Sociedad Portuaria Puerto Nuevo SA v Republic of Colombia*, ICSID Case No ARB/19/22.

¹⁹ See 2017 model IIA, Definitions, art [xxx] 'Investment'.

²⁰ Few issues are as divisive as this one. There is a significant body of awards relating to this issue that envisage two strong and opposing positions taken by tribunals. The first view is that the investment must contribute to the economic development of the host state. See eg *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction (16 July 2001) para 52; *Malaysian Historical Salvors, SDN, BHD v Malaysia*, ICSID Case No ARB/05/10, Award (17 May 2007) para 124; *Africa Holding, Ulysseas, Inc v Ecuador*, UNCITRAL, Final Award (12 June 2012) para 251. The opposing position is taken by another number of tribunals which reject this criterion of the economic development of the host state. See eg *Pantechmiki SA Contractors & Engineers v Republic of Albania*, ICSID Case No ARB/07/21, Award (30 July 2009) paras 36, 43; *Deutsche Bank AG v Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/09/2, Award (31 October 2012) para 295; *KT Asia Investment Group BV v Republic of Kazakhstan*, ICSID Case No ARB/09/8, Award (17 October 2013) paras 170-173.

Table 1. Comparing the closed list of assets of the 2017 model IIA with a prior example

2017 model IIA	2009 Colombia-India IIA
<p>‘Investment means:</p> <p>(1) An asset owned or effectively controlled by a Covered Investor that meets the following characteristics:</p> <p>(b) the commitment of capital or other resources;</p> <p>(c) the expectation of gain or profit;</p> <p>(d) an intention to maintain a long-term presence in the Host Party; and</p> <p>(e) the assumption of risk for the investor; <u>and takes one of the forms listed in sub-paragraph 2 [list of assets].</u>’ (emphasis added)</p>	<p>‘Investments shall mean every type of assets that have been established or acquired by investors of a Contracting Party in the territory of the other Contracting Party in accordance with the legislation of the latter <u>including particularly, but not exclusively, the following: [list of assets]</u>’²¹ (emphasis added)</p>

2017 model IIA is that one of the characteristics of ‘investment’ includes the ‘intention [of the investor] to maintain a long-term presence in the Host Party.’²¹ The peculiar wording of this temporal element points to a flexible approach where the business model of the investment is the focus of review, rather than meeting a generic and formalistic period of permanence in the host party. This may be a flexible alternative to adopting an enterprise-based approach.²²

A second difference with the previous IIAs is that the definition of ‘investment’ incorporates a closed list of assets, instead of an exemplary list as in the prevalent open-ended approach.²³ The 2017 model IIA requires that the investment ‘takes one of the forms’ listed. The table below contrasts the 2017 model IIA with a prior IIA taking the 2009 Colombia-India IIA, as an example.

Another innovation of the 2017 model IIA is that it empowers the Bilateral Investment Council, an entity that will administer the IIA, to review and recommend the inclusion of other forms of investment.²⁴ This will ensure that other forms of investment could be added or removed based on future developments as well as subsequent findings by tribunals.

²¹ See 2017 model IIA, Definitions, art [xxx] ‘Investment’(1)(c).

²² See eg the India Model BIT, art 1.1.4, which adopts an enterprise-based model (‘investment’ means an enterprise constituted, organised and operated in good faith by an investor in accordance with the law of the Party...’) (emphasis added). Under this formulation, assets such as debt instruments or licenses are not investments in and of themselves but must be held by a legal entity that is incorporated in the territory of the host State, and that entity must satisfy the requirement of entailing a substantial contribution to the development of the host State.

²³ See eg CETA (n 15), art 8.1: (‘investment means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: [list of assets]’); Trans-Pacific Partnership Agreement (n 15) art 9.1 (‘investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: [list of assets]’).

²⁴ See 2017 model IIA, Functions of the Bilateral Investment Council, art [xxx](5).

Table 2. Comparing the exclusions in the 2017 model IIA with the 2011 model IIA

2017 model IIA	2011 model IIA
<p>‘Investment does not include claims to money that arise solely from:</p> <ul style="list-style-type: none"> (a) commercial transactions for the sale of goods or services by natural persons or enterprises in the Territory of one Contracting Party to a natural person or enterprise in the Territory of the other Contracting Party; (b) loans or credits given in connection to a commercial transaction; (c) any order, judgment or arbitral award related to sub-paragraph 3.a and 3.b.’²⁶ 	<p>‘Investment does not include:</p> <ul style="list-style-type: none"> (i) public debt operations; (ii) claims to money arising solely from: (c) commercial contracts for the sale of goods and services by a national or legal entity in the territory of a Contracting Party to a national or a legal entity in the territory of the other Contracting Party; or (d) credits granted in relation with a commercial transaction;’²⁷

The 2017 model IIA does exclude certain claims from the definition of ‘investment’. Prior versions of the model IIA contained exclusions but the 2017 model IIA expands on those as listed below:

The definition of ‘investment’ must be read together with the definition of ‘Covered Investment,’ which further requires that, *inter alia*, the investment be ‘made in the Territory of a Contracting Party’ and is ‘made, managed and operated in accordance with the laws of the Host Party’.²⁶

The definition of ‘Covered Investors’ extends the protection of the IIA to both ‘Nationals and an Enterprise’ ‘who [own] or effectively [control] a Covered Investment in Territory of the other Contracting Party.’²⁷ The term ‘National’ is defined as ‘natural persons’ under domestic law and cannot be nationals of both contracting parties.²⁸ Further, they must have acquired the nationality of the host party before making the investment, and must continue to keep that nationality.²⁹ The definition of ‘Enterprise’ is defined as an entity that is (i) constituted or organised pursuant to domestic law, (ii) has its main seat of operations in the contracting country, and (iii) has ‘substantial business activities’ in that country. The definition also lists a series of elements that ‘must all be taken into account’ when judging the existence of ‘substantial business activities’. These elements cover objective features of economic activity such as the amount of sales and clients, whether the activities developed in the home and host parties are similar or directly related, the employee structure, and the continuous physical presence in the territory of the host party.

²⁵ Agreement for the Promotion and Protection of Investments between the Republic of Colombia and the Republic of India (signed 10 November 2009, entered into force 3 July 2012), art 1.1 (emphasis added).

²⁶ See 2017 model IIA, Definitions, art [xxx] ‘Covered Investment’(a)-(b).

²⁷ See 2017 model IIA, Definitions, art [xxx] ‘Covered Investor’.

²⁸ See 2017 model IIA, Definitions, art [xxx] ‘National’.

²⁹ See 2017 model IIA, Definitions, art [xxx] ‘National’(a)-(c).

Both the definition of 'Covered Investment' and the definition of 'Covered Investor' incorporate the notion of 'effective control' that an investor must exercise over an investment (as an alternative to ownership). The 2017 model IIA is unique because it provides content to this notion, which has been the subject of significant debate.³² 'Effective control' must be demonstrated through (i) the right or ability to select officers in managing bodies, (ii) the ability to take and implement key business decisions and (iii) participation in the ordinary management of the business.³³

B. Denial of Benefits

Traditionally, a denial-of-benefits clause permits a host State to deny treaty protections where the investor does not effectively control the investment or does not have substantial business activities in the home country.³⁴ In the 2017 model IIA, this clause provides two additional bases to deny benefits. First, upon very grave violations of domestic law, the constitution of a tribunal can be avoided at the consultations phase through the denial-of-benefits clause; a State-to-State process would be adopted instead.³⁵ Second, the 2017 model IIA expands on the notion of investments that do not merit the treaty's protection considering certain serious actions, even if they take place in the territory of a third State, to make an investor's claims inadmissible. For example, acts such as 'serious human rights violations', 'serious environmental damage', 'serious fraudulent actions against tax and fiscal laws', 'acts of corruption', 'serious fraudulent actions against the tax and fiscal laws and regulations' and 'money-laundering activities',³⁶ among others, enable a party to invoke the denial-of-benefits clause. Doing so means that even in the consultations stage, the denial of benefits can have the effect of terminating proceedings between the investor and the party, when the home party does not object to the denial of benefits within 90 days.³⁷

It is important to note that the 2017 model IIA requires that these actions be proven before an international court, a national court, or an authority of the

³⁰ See 2017 model IIA, Definitions, art [xxx] 'Investment'(3).

³¹ Article 2.2 of the 2011 model IIA. In the 2017 model IIA, public debt operations have already been carved out of the instrument's scope of application. See 2017 model IIA, Scope of Application, art [xxx](5).

³² See eg, *Vacuum Salt Products Ltd v. Republic of Ghana*, ICSID Case No ARB/92/1, Award (16 February 1994) para 43; *Camuzzi International SA v Argentine Republic*, ICSID Case No ARB/03/2, Decision on Objections to Jurisdiction (May 11, 2005) paras 32-41; *Caratube International Oil Company LLP v Republic of Kazakhstan*, ICSID Case No ARB/08/12, Award (5 June 2012) paras 401-407.

³³ See 2017 model IIA, Definitions, art [xxx] 'Covered Investor'(a)-(c).

³⁴ OECD, *Definition of Investor and Investment in International Investment Agreements* (OECD 2008) 28

('As investors try to build their legal structure in their favour, states may also seek in advance to avoid claims from certain entities to which they did not intend to offer treaty protection. Therefore, some treaties include a denial of benefits clause by which the state party to the Treaty is entitled to deny the treaty protection to investors incorporated in one of the states party to the treaty but under control of investors of a third country not party to the treaty or when they do not have any substantial activity in the country of incorporation.') See also CETA art 8.16; TPP art 9.15.

³⁵ See 2017 model IIA, Scope of Application of Investor-State Dispute Settlement, art [xxx](5), stating: 'If a Contracting Party issues a Notice of Denial of Benefits and the Home State of the affected Claimant Investor does not object to such Notice within the following ninety (90) days, any Consultations, judicial or arbitral proceedings carried out pursuant to this Section shall be terminated with immediate effect, irrespective of the stage of proceedings. Any ongoing judicial or arbitral proceedings must be suspended until the ninety (90) day period elapses' (emphasis added).

³⁶ See 2017 model IIA, Denial of Benefits, art [xxx](1.d).

³⁷ See 2017 model IIA, Scope of Application of Investor-State Dispute Settlement, art [xxx](5), establishing: '5. If a Contracting Party issues a Notice of Denial of Benefits and the Home State of the affected Claimant Investor does not object to such Notice within the following ninety (90) days, any Consultations, judicial or arbitral proceedings carried out pursuant to this Section shall be terminated with immediate effect, irrespective of the stage of proceedings. Any ongoing judicial or arbitral proceedings must be suspended until the ninety (90) day period elapses.'

contracting parties or a third State with which the contracting parties have diplomatic relations.³⁸ Further, the home party of the investor can object to the notice of the denial of benefits and the Bilateral Investment Council has a period of six months to determine if there are grounds for invoking such denial, before taking the case before a tribunal.³⁹

IV. STANDARDS OF PROTECTION

The 2017 model IIA includes some typical standards of protection accorded to foreign investors in earlier IIAs. However, the 2017 model IIA also applies lessons learned from findings by prior arbitral tribunals. By adopting precise definitions of the content of these standards, the 2017 model IIA attempts to circumscribe a tribunal's margin of interpretation.

A. *Expropriation: Distinction Between Direct and Indirect Expropriation*

Unlike virtually every earlier IIA, the expropriation clause of the 2017 model IIA makes a distinction between direct and indirect expropriation when it comes to the payment of compensation to determine whether the expropriation is lawful or not. This clause states: 'Covered Investments shall not be subject to nationalisations or expropriations, either directly or indirectly... except when such expropriation is: (a) adopted for reasons of public purpose or social interest, (b) made in accordance with due process of law and (c) made in a non-discriminatory manner. In the case of a direct expropriation, such expropriation shall be accompanied by prompt, adequate and effective compensation...'⁴⁰

Under the 2017 model IIA, compensation is a *sine qua non* requisite to consider a direct expropriation lawful. However, this requirement of the payment of compensation is not a requirement to determine the lawfulness of an indirect expropriation that results from a 'Measure or series of Measures adopted by a Contracting Party that have an equivalent effect to a direct expropriation, without the formal transfer of title or an outright seizure'.⁴¹ The reason for this distinction is that the conclusion that a measure or series of measures adopted by the host State amounts to an indirect expropriation is one that is made by the arbitral tribunal. Therefore, indirect expropriation is not accompanied by the payment of compensation.⁴²

This distinction does not necessarily imply that an investor that has suffered an indirect expropriation should not be compensated. The key question is whether a measure or series of measures are non-compensable bona fide regulations or constitute an indirect expropriation; the former is not a breach of the treaty, the latter amounts to a violation of international law and compensation is due.⁴³

³⁸ *ibid.*

³⁹ See 2017 model IIA, Scope of Application of Investor-State Dispute Settlement, art [xxx](6).

⁴⁰ See 2017 model IIA, Expropriation, art [xxx](1).

⁴¹ See 2017 model IIA, Expropriation, art [xxx](2).

⁴² Rudolf Dolzer and Christoph H Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 101 ('[A] typical feature of an indirect expropriation is that the state will deny the existence of an expropriation and will not contemplate the payment of compensation.').

⁴³ Rosalyn Higgins, (1982-III) 176 'The Taking of Property by the State: Recent Developments in International Law' 259, 331.

The criteria to determine whether a measure amounts to an indirect expropriation is similar to the one enshrined in the US–Colombia Trade Promotion Agreement ('US–Colombia TPA')⁴⁴ and the Canada–Colombia Free Trade Agreement ('Canada–Colombia FTA').⁴⁵ For instance, the US–Colombia TPA provides that the determination of indirect expropriation 'requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action, although the fact that an action or series of actions by a party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action'.⁴⁶

Further, 'non-discriminatory Measures adopted by a Contracting Party, designed, applied or maintained for the protection of public objectives such as the protection of public health and safety, the environment, consumer and competition protection, amongst others, do not constitute an indirect expropriation'.⁴⁷

B. *Compensation for Expropriation*

According to the 2017 model IIA, whether the expropriation is direct or indirect, the compensation payable:

shall be determined on the assessment of an equitable balance between the public interest and the interest of the affected Covered Investor, having regard for all relevant circumstances, and taking into account the current and past use of property, depreciation, the history of its acquisition, the fair market value of the Covered Investment, the purpose of the expropriation, the extent of previous profit made by the Covered Investor through the Covered Investment, and the duration of the Covered Investment. The Compensation for Expropriation shall neither include losses which are not actually incurred nor probable or unreal profits.⁴⁸

Unlike the prevailing view that compensation is intended to make an investor 'whole', the purpose of this clause is to provide arbitrators with a more robust set of tools to assess the quantum of the compensation and to avoid reparation for 'speculative' loss of profits.⁴⁹

C. *Fair and Equitable Treatment ('FET')*

Similar to the CETA text,⁵⁰ the 2017 model IIA adopts an exhaustive list of conducts that might breach the FET standard.⁵¹ Different from the prior 2007 model IIA⁵² and other IIAs ratified by Colombia,⁵³ this new model does not refer

⁴⁴ The United States—Colombia Trade Promotion Agreement (US–Colombia TPA) (signed 22 November 2006, entered into force 15 May 2012), annex 10-B, art 3.

⁴⁵ Canada–Colombia Free Trade Agreement (Canada–Colombia FTA), (signed 21 November 2008, entered into force 15 August 2011), annex 811.

⁴⁶ US–Colombia TPA (n 44).

⁴⁷ See 2017 model IIA, Expropriation, art [xxx](4); US–Colombia TPA, annex 10-B, art 3.

⁴⁸ See 2017 model IIA, Compensation for Expropriation, art [xxx].

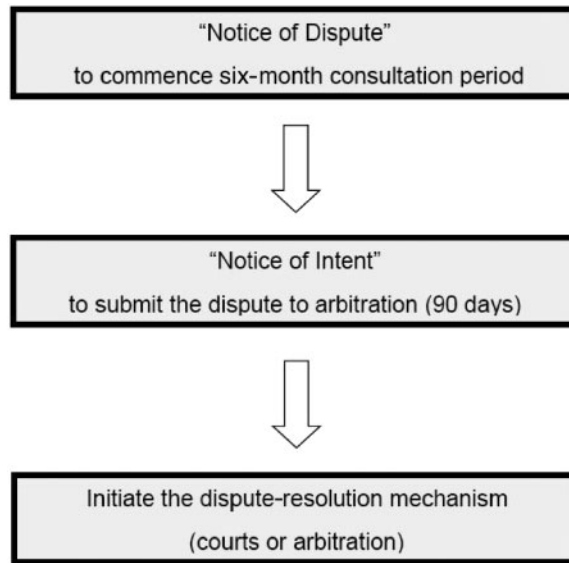
⁴⁹ *Siemens AG v Argentine Republic*, ICSID Case No ARB/02/8, Award (6 February 2007) paras 355–357.

⁵⁰ CETA, art 8.10.2.

⁵¹ See 2017 model IIA, Fair and Equitable Treatment, art [xxx](2).

⁵² See 2007 model IIA, art III(4).

⁵³ US–Colombia TPA (n 44), art 10.5(1); Canada–Colombia FTA, art 805(1).



to the ‘customary international law minimum standard of treatment of aliens’ (the ‘MST’).⁵⁴ When addressed in ISDS, the question of what amounts to customary international law minimum standard is not clear and some tribunals have provided a wide interpretation for the MST arguing that it has evolved.⁵⁵

To avoid this situation, the 2017 model IIA adopts a more precise formulation by including an exhaustive list of behaviours constituting a violation of FET. Towards this end, only the following conducts amount to a breach of this standard: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process in judicial or administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or (e) abusive treatment of investors, such as coercion, duress and harassment. This exhaustive list of conducts is similar to the categories included in CETA.⁵⁶ However, contrary to Article 8.10.4 of CETA,⁵⁷ the 2017 model IIA does not include a reference to ‘specific representations’ by the State or to the notion of ‘legitimate expectations’.

Further, the 2017 model IIA provides that the Bilateral Investment Council of the IIA would be able to revise the content of FET at the request of a contracting party.⁵⁸

⁵⁴ *Electronica Sicula SPA (ELSI) (Etats-Unis c Italie)* [1989] ICJ Rep 15, para 128; *American Manufacturing & Trading, Inc (AMT) v République Démocratique du Congo*, ICSID Case No ARB /93/1 (21 February 1997) para 6.06.

⁵⁵ FA Mann, ‘British Treaties for the Promotion and Protection of Investments’ [1981] 52 BYBIL 241, 244. *Cargill, Incorporated v Republic of Poland*, ICSID Case No ARB(AF)/04/2, Award (5 March 2008) para 453 (‘[S]everal ICSID tribunals have considered that the treaty standard of fair and equitable treatment is not materially different from the international law minimum as it has evolved under customary international law, and this Tribunal tends to concur.’).

⁵⁶ CETA, art 8.10.3.

⁵⁷ CETA, art 8.10.3: ‘[W]hen applying the above fair and equitable treatment obligation, a Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.’

⁵⁸ See 2017 model IIA, Fair and Equitable Treatment, art [xxx](2): ‘The Council may review the content of this Article, upon request of a Contracting Party.’

D. *Most-Favoured-Nation ('MFN')*

The MFN provision in the 2017 model IIA is designed to avoid the use of said standard to 'import' substantial and procedural provisions from other IIAs. Indeed, the 2017 model IIA states that: 'treatment referred to in paragraphs 1, 2 and 3 does not encompass: definitions, substantive standards of treatment, substantive or procedural obligations, or dispute settlement mechanisms'. Instead, the MFN standard can only be invoked in cases where measures, such as administrative acts, acts of congress or judicial decisions, violate the equal treatment between foreign investors who are competitors.

Finally, it is worth noting that the 2017 model IIA does not include an umbrella clause which elevates a breach of contract into a breach of the IIA.

V. DISPUTE RESOLUTION

The 2017 model IIA retains investor-State arbitration as the avenue for the resolution of disputes although there are several unique approaches.

A. *Steps for Dispute Resolution*

The 2017 model IIA requires that the dispute shall be settled 'as far as possible, by *bona fide* consultations and negotiations' which commence when the investor provides a 'written notice' to the State known as the 'Notice of Dispute'.⁵⁹ The consultations shall take place over six months but may be 'waived' or 'reduced by written certification by the Respondent State'.⁶⁰

If the dispute is not resolved, the next step is for the investor to provide a 'Notice of Intent' to notify the government of its intention to submit the dispute to arbitration.⁶¹ After 90 days have elapsed from the date of receipt of the notice of intent, the investor may submit its claim to (a) competent courts, (b) ICSID arbitration, (c) arbitration under ICSID Additional Facility, or (d) an arbitral institution agreed upon by the disputing parties or the contracting parties in writing.⁶² An investor cannot raise claims that were not identified in the notice of dispute or the notice of intent and cannot seek relief in excess of that identified in the notice of dispute or notice of intent (barring 'reasonable increases such as interests').⁶³ If the investor raises a matter before an arbitral tribunal, that matter will be raised before an arbitral tribunal comprising three members⁶⁴ that shall decide the case in accordance with the

⁵⁹ See 2017 model IIA, Consultations between the Covered Investor and a Contracting Party and Presentation of Notices, art [xxx](1)-(2). 'Notice of Dispute' is defined as 'the written notice sent by the Claimant Investor to the Respondent State prior to the commencement of Consultations'. See 2017 model IIA, Definitions.

⁶⁰ See 2017 model IIA, Consultations between the Covered Investor and a Contracting Party and Presentation of Notices, art [xxx](3).

⁶¹ *ibid* art [xxx](4). This Article further provides that both the Notice of Dispute and the Notice of Intent must indicate: 'a. name and contact information of the claimant and its legal counsel; b. evidence that claimant is a Covered Investor under this Agreement; c. the provisions of this Agreement alleged to have breached; d. the legal and factual basis of the claim; e. indication of the exhaustion of Non-Judicial Administrative Remedies, if applicable; and f. the relief sought and the estimated amount of damages claimed.'; *ibid* 'Notice of Intention' is defined as 'written notice sent by the Claimant Investor to the Respondent State when no agreement has been reached through Consultations, prior to the commencement of Judicial or Arbitration Proceedings'. See 2017 model IIA, Definitions.

⁶² See 2017 model IIA, Submission of a Claim Before a Court of Law or Arbitral Tribunal, art [xxx](1).

⁶³ *ibid* art [xxx](5).

⁶⁴ See 2017 model IIA, Composition of the Arbitral Tribunal, art [xxx].

IIA, international law, and domestic law but ‘may not decide on the legality [of a challenged measure] under the domestic law of the Respondent State’.⁶⁵

The 2017 model IIA expressly provides that a State ‘may submit claims against the Claimant Investor’ and the tribunal ‘will grant the Claimant Investor a reasonable period of time to respond to such claims’.⁶⁶ The 2017 model IIA therefore provides an express mandate for the State to raise counterclaims, which has been very difficult in investor-State arbitration.

In order to prevent multiple claims from both the shareholders of the enterprise and from the enterprise itself, the 2017 model IIA requires that any claims by the shareholders must be accompanied by written consent of the enterprise.⁶⁷ Further, any compensation in favour of the shareholders shall constitute the final compensation to the enterprise.⁶⁸

The chart below describes the dispute resolution mechanism:

The 2017 model IIA also provides for a ‘Tacit Withdrawal of the Dispute’ when the investor has not ‘presented any documents or information as requested’ by the respondent State, ‘presented a Notice of Intent within twelve (12) months of the conclusion of the period of Consultations’, ‘presented a Request for Arbitration or a formal Lawsuit within six (6) months from the delivery of its Notice of Intent’ or ‘taken any steps in the arbitral or judicial proceedings during a 6 month period’.⁶⁹

B. Institutional Mechanisms Relating to Dispute Settlement

The 2017 model IIA envisions the creation of a ‘Bilateral Investment Council’ for the ‘administration of this Agreement’⁷⁰ and ‘shall be composed by representatives of both Contracting Parties’.⁷¹ This Council has to meet once every two years at least and has a far-reaching mandate to cover a variety of issues. It may, for example, ‘supervise’ the implementation of the Agreement, provide ‘authoritative interpretations of this Agreement’ or decide oppositions to the denial-of-benefits clauses. Other far-reaching mandates could be to ‘recommend the inclusion of other forms of investment’ and ‘adjust the Investor-State Dispute Settlement Mechanism’.⁷²

The 2017 model IIA permits amicus submissions by the tribunal but such submissions ‘must identify the author, and any person who provides financial or any other assistance for the preparation of such submission’.⁷³ Further, the 2017 model IIA ‘shall accept or may invite oral or written submissions from the Non-Disputing Parties’ regarding the interpretation of this agreement.⁷⁴

⁶⁵ See 2017 model IIA, Applicable Law to the Arbitration, art [xxx](1)-(2).

⁶⁶ See 2017 model IIA, Disputes and Claims Raised by the Respondent State, art [xxx].

⁶⁷ See 2017 model IIA, Claims Presented by Shareholders of an Enterprise, art [xxx].

⁶⁸ *ibid.*

⁶⁹ See 2017 model IIA, Tacit Withdrawal of Dispute, art [xxx].

⁷⁰ See 2017 model IIA, Establishment of the Bilateral Investment Council, art [xxx](1).

⁷¹ *ibid.* art [xxx](2). The 2017 model IIA does not spell out how many members would actually participate in this Council.

⁷² See 2017 model IIA, Functions of the Bilateral Investment Council, art [xxx](1). Although the 2017 model IIA does not expressly reference the creation of an investment court, another Article expressly provides: ‘Five (5) years after the entry into force of the present Agreement, or at any time before, the Council shall convene to review the Investor State Dispute Settlement Mechanism and to determine whether to adopt improvements or adjustments to this Section.’ See 2017 model IIA, Review of the Investor-State Dispute Settlement Mechanism by the Council, art [xxx](1).

⁷³ See 2017 model IIA, Intervention by Amicus Curiae and Non-Disputing Party, art [xxx](1).

⁷⁴ See 2017 model IIA, Intervention by Amicus Curiae and Non-Disputing Party, art [xxx](2).

C. Conflict Rules for Arbitrators and Criteria for Arbitrators

In addition to establishing that arbitrators must be impartial and independent, the 2017 model IIA makes the International Bar Association Guidelines on Conflict of Interest in International Arbitration mandatory for the appointment of arbitrators.⁷⁵ Further, the 2017 model IIA prohibits multiple-hatting, establishing that arbitrators cannot continue to act as counsel or experts in other international arbitrations, even under other treaties, for the duration of the arbitration.⁷⁶

VI. OTHER SIGNIFICANT DEVELOPMENTS

The 2017 model IIA was developed with a view to covering as many issues that arise during ISDS as possible. While arbitration is still the chosen method for carrying out ISDS, the 2017 model IIA has adopted a series of provisions that channel the arbitrators' decision-making process, for example by setting a standard of review in fork-in-the-road cases, spelling out the minimum contents of an award and setting a standard of proof for the tribunal. Other policy goals that the 2017 model IIA seeks to achieve are to shield the Colombian Peace Process from ISDS, to prevent claim inflation and third-party funding with a view to avoiding a commercialisation of investment disputes.

A. Relationship to the Colombian Peace Process

In 2016 the Colombian Government signed an agreement with the FARC guerrilla movement to end the country's civil war.⁷⁷ The Peace Agreement⁷⁸ established the creation of a new transitional justice mechanism,⁷⁹ and also provides for land redistribution arrangements.⁸⁰ In order to shield the Peace Agreement and any measure related to its implementation, the 2017 model IIA expressly recognises the right 'to regulate within their territories, in order to achieve legitimate public policy objectives'.⁸¹ Further, Annex 6 provides that, '[t]he Contracting Parties hereby recognise and acknowledge that any Measure adopted, maintained or modified in order to implement the Peace Agreements between the Colombian Government and any Armed Group cannot be considered to be a violation to this Agreement, unless such Measures are proven to constitute

⁷⁵ See 2017 model IIA, Composition of the Tribunal, art [xxx](3)(c).

⁷⁶ See 2017 model IIA, Composition of the Tribunal, art [xxx](3)(d).

⁷⁷ Elwyn López and Susana Capelouto, 'Colombia signs peace deal with FARC' *CNN* (13 November 2016) <<https://www.cnn.com/2016/11/12/world/colombia-farc-peace/index.html>> accessed 12 June 2018.

⁷⁸ Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (Signed 24 November 2016, Ratified 30 November 2016), <especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf> accessed 12 June 2018.

⁷⁹ High Commissioner for Peace Office, 'ABC Jurisdicción Especial para la Paz' <<http://www.altocomisionadoparalopez.gov.co/Documents/informes-especiales/abc-del-proceso-de-paz/abc-jurisdiccion-especial-paz.html>> accessed 12 June 2018.

⁸⁰ High Commissioner for Peace Office, 'ABC Medidas de reparación integral para la construcción de paz' <www.altocomisionadoparalopez.gov.co/Documents/informes-especiales/abc-del-proceso-de-paz/abc-medidas-reparacion-integral-para-construccion-paz.html> accessed 12 June 2018.

⁸¹ See 2017 model IIA, Chapeau on Investment and Regulatory Measures, art [xxx] ('The Contracting Parties reaffirm their right to regulate within their territories, in order to achieve legitimate public policy objectives such as those enshrined in their Constitutions or in international agreements that promote and protect human rights, public health, safety and security, natural resources, the environment, sustainable development and other public policy objectives. The mere fact that the adoption, modification or enforcement of a Measure negatively affects a Covered Investment or interferes with a Covered Investor's expectations, including its expectation of profits, does not amount to a breach of any obligation under this Agreement.').

a discriminatory and arbitrary Measure'.⁸² The annex also provides a declaration on the duty for 'Covered Investors and Investments [to] collaborate within their possibilities to the successful implementation of the Peace Agreements and the achievement of full reparation to victims affected by the Colombian Armed Conflict'.⁸³ This model for investment protection can help other countries that are attempting to address matters of particular sensitivity.

B. Oath of Estimation to Prevent Overstating Damages

The 2017 model IIA borrows from the Colombian General Code of Procedure to include a unique idea which could go a long way in restoring balance and legitimacy to ISDS.⁸⁴ Overstating the quantum of damages as a litigation strategy has detrimental consequences for the system as a whole.⁸⁵ The oath of estimation seeks to remedy this issue. As a requirement, when submitting a claim to ISDS, the investors must provide an oath of estimation of their claim. If the amount claimed exceeds the damages that are eventually proven by 50 percent or more, the tribunal shall allocate 15 percent of the resulting difference as costs in favour of the State.⁸⁶ Currently, there is no downside to inflating claims which can serve to obtain a better negotiating position, to entice arbitrators to accept an appointment or to simply frame the dispute. With this provision, the 2017 model IIA seeks to impose a responsible rationale on claimants, which is not asking for more than an objective and genuine valuation of their damages.

C. Fork-in-the-Road Provision

One of the annexes to the 2017 model IIA⁸⁷ deals with how the fork-in-the-road would operate in the event that the dispute is brought before both domestic courts and ISDS.⁸⁸ It explicitly sets the standard of review for this mechanism, rejecting the otherwise commonly applied 'triple identity test', where the tribunals adopt a formalistic reading of the clause requiring the same parties, same dispute subject matter and identical cause of action. Under this test, a case will move forward in spite of parallel proceedings because either one of these elements is not met.⁸⁹

⁸² See 2017 model IIA, 'Scope of SECTION [CC]-RIGHT TO REGULATE AND INVESTMENT RELATED DUTIES AND OBLIGATIONS in relation to Colombia's Peace Process', annex 6.

⁸³ *ibid.*

⁸⁴ Artículo 2016 del Código General del Proceso de Colombia [Colombia's General Code of Procedure] art 2016. ('Whoever claims compensation or the payment of improvements or added value must reasonably estimate each of such items, under oath, in the lawsuit or relevant petition... If the estimated amount exceeds the proven amount by fifty per cent (50%), whoever made the oath of estimation shall be ordered to pay... a sum equal to ten per cent (10%) of the difference between the estimated amount and the proven amount.') (*Quien pretenda el reconocimiento de una indemnización, compensación o el pago de frutos o mejoras, deberá estimarlo razonadamente bajo juramento en la demanda o petición correspondiente... Si la cantidad estimada excediere en el cincuenta por ciento (50%) a la que resulte probada, se condenará a quien hizo el juramento estimatorio a pagar... una suma equivalente al diez por ciento (10%) de la diferencia entre la cantidad estimada y la probada.*) (Unofficial translation by the authors).

⁸⁵ See Kahale III, G 'Rethinking ISDS' (2018) 15(5) *Transnatl Disp Mgmt* 18 <<https://www.transnational-dispute-management.com/article.asp?key=2603>> accessed 9 November 2018 ('It should come as no surprise that claimants in any legal system tend to begin their cases with exaggerated claims of compensation, whether it be a personal injury claim of millions of dollars for a coffee spill or a multibillion-dollar expropriation claim. The technique is known as "anchoring."').

⁸⁶ See 2017 model IIA, Monetary Damages, art [xxx](5).

⁸⁷ See 2017 model IIA, Fork in the Road, annex 3.

⁸⁸ Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 152-157.

⁸⁹ See Christoph H Schreuer, 'Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5 *J WIT* 231. See eg *Ronald S Lauder v Czech Republic*, Arbitration UNCITRAL, Final Award (3 September 2001) para 162 ('The resolution of the investment dispute under the Treaty between Mr. Lauder and the

The 2017 model IIA follows the 'fundamental basis' of claim approach that was stated in the *Supervisión y Control*⁹⁰ and *Pantechniki*⁹¹ cases, in which focus lies not on the identity of parties, claim or legal regime but rather on the factual or fundamental basis of the claim and the relief sought. Thus, 'the choice of procedure shall be deemed as final regardless of the identity of disputing parties... or the identity between claims raised in the domestic proceedings and those raised in the arbitration... , as long as the remedy sought in both proceedings has the same effect in terms of reparation to the alleged injury suffered by the Claimant Investor in the arbitration...'.⁹² If the tribunal is satisfied that this is the case, then it should find that the fork-in-the-road provision bars jurisdiction over the claim.

D. *The Arbitral Award*

The 2017 model IIA gives a thorough requirement of what should be addressed in the arbitral award.⁹³ While Article 48 of the ICSID Convention provides that the award should cover 'every question submitted to the Tribunal, and shall state the reasons upon which it is based,' the model provides for additional requirements. It requires the tribunal to clearly 'express how the Tribunal has been satisfied, that the Disputing Parties have proved... : a. Their *Ius Standi* as claimants; b. The existence of any rule of international and/or domestic law invoked; c. The occurrence of the alleged facts or Measures; d. The existence of injuries for which monetary damages are sought; e. The causal link between [the facts or measures and the injuries]; and f. The amount of monetary damages sought.'⁹⁴ For all of the issues it explicitly spells out, the model establishes a clear and convincing evidence standard of proof,⁹⁵ which is said to be more stringent than the preponderance of evidence standard.⁹⁶ With this, the model seeks to raise the legitimacy of decisions and promote the finality of awards by limiting frivolous challenges to awards.

Czech Republic was not brought before any other arbitral tribunal or Czech court before - or after - the present proceedings was initiated. All other arbitration or court proceedings referred to by the Respondent involve different parties, and deal with different disputes.'). *CMS Gas Transmission Company v Republic of Argentina*, ICSID Case No ARB/01/8, Award (17 July 2003) para 80 ('Decisions of several ICSID tribunals have held that as contractual claims are different from treaty claims even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration. This Tribunal is persuaded that with even more reason this view applies to the instant dispute, since no submission has been made by CMS to local courts and since, even if TGN had done so—which is not the case —, this would not result in triggering the 'fork in the road' provision against CMS. Both the parties and the causes of action under separate instruments are different.').

⁹⁰ *Supervisión y Control SA v the Republic of Costa Rica*, ICSID Case No ARB/12/4, Award (18 January 2017) para 330 ('In this case, Claimant submitted the dispute involving the establishment of rates for the VTI service and the damages and lost profits derived from the conduct and omissions of Costa Rica to the local courts, and failed to withdraw from such proceeding once it initiated the arbitration. Therefore, the claims related to such dispute are inadmissible. In any event, the Tribunal is of the view that the strict application of the triple identity test (same parties; same object; and same normative source) applied by some investment tribunals removes all legal effects from fork in the road clauses, which contravenes the effet utile principle applicable to the interpretation of treaties. What, in the end, matters for the application of fork in the road clauses is that the two relevant proceedings under examination have the same normative source and pursue the same aim. This is, in the Tribunal's view, the case here.').

⁹¹ *Pantechniki SA Contractors & Engineers v the Republic of Albania*, ICSID Case No ARB/07/21, Award (30 July 2009) para 67 ('The Claimant chose to take this matter to Albanian courts. It cannot now adopt the same fundamental basis as the foundation of a Treaty claim. Having made the election to seize the national jurisdiction the Claimant is no longer permitted to raise the same contention before ICSID.').

⁹² See 2017 model IIA, Fork in the Road, annex 3.

⁹³ See 2017 model IIA, the Award, art [xxx].

⁹⁴ *ibid.* 2.

⁹⁵ *ibid.*

⁹⁶ *Wex Legal Dictionary*, 'Clear and Convincing Evidence' <https://www.law.cornell.edu/wex/clear_and_convincing_evidence> accessed 14 June 2018.

E. Third-Party Funding

Third-party funding⁹⁷ is a recent concern that has been addressed in the latest IIAs.⁹⁸ In line with CETA's approach,⁹⁹ under the 2017 model IIA, there is a duty to disclose the existence of any funding transaction, since '[c]laimants under [the IIA] may only submit a dispute to arbitration when... [t]hey have filled out and presented Form 4(a) or 4(b), contained in Annex 2, manifesting the disclosure of any Third-Party Funding. This Form must be filled out as soon as any sort of financing agreement is reached, even if it takes place after the submission of a claim to arbitration, without delay as soon as the agreement is concluded.'¹⁰⁰ However, the duty does not end with the disclosure of the funding or the source of such funding. The 2017 model IIA establishes that in cases of third-party funding the maximum compensation to be awarded should be equal to the amount of funding received.¹⁰¹ This provision was inspired by Article 1971 of the Colombian Civil Code,¹⁰² which mirrors Article 1699 of the French Civil Code and which allows a debtor to pay an assignee only the amount it paid for the assignment of the litigious rights.¹⁰³ The use of this limitation pursues the policy goal of claims rationalisation. The idea behind it is not to hinder access to ISDS to those without sufficient funds, but rather to avoid third-party funding becoming a tool to finance either frivolous or inflated claims in pursuance of business objectives.

VII. CONCLUSION

The reform of international investment law and dispute settlement is underway. Many different approaches have arisen during this decade; Brazil's proposal to do away with investment arbitration in favour of State-to-State dispute settlement,¹⁰⁴ or Canada and Europe's proposal to create an investment court, show that there is still no consensus on the way forward. Conversely, there is an enormous space for

⁹⁷ See 2017 model IIA, Definitions, art [xxx] 'Third Party Funding' ('[A]ny funding provided either by natural or legal persons who are not a Disputing Party, and have entered into an agreement with the Claimant Investor in order to finance the cost of the investor-State proceedings, either partially or in whole, by whichever means such as donations, grants, loans, or in return for remuneration contingent on the outcome of the dispute. Third Party Funding does not include cases where the Claimant Investor undergoes insolvency proceedings in the Host Party and the Home Party.')

⁹⁸ James Egerton Vernon, 'Taming the "Mercantile Adventurers": Third Party Funding and Investment Arbitration—A Report from the 14th Annual IITA-ASIL Conference', Kluwer Arbitration Blog (21 April 2017), <arbitrationblog.kluwerarbitration.com/2017/04/21/taming-the-mercantile-adventurers-third-party-funding-and-investment-arbitration-a-report-from-the-14th-annual-ita-asil-conference/> accessed 12 June 2018.

⁹⁹ CETA, art 8.26: '(1. Where there is third party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third party funder. 2. The disclosure shall be made at the time of the submission of a claim, or, if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.)'

¹⁰⁰ See 2017 model IIA, Submission of a claim before a Court of Law or Arbitral Tribunal, art [xxx](6.d).

¹⁰¹ See 2017 model IIA, the Award, art [xxx](5).

¹⁰² Código de Comercio de Colombia [Colombian Civil Code] art 1971 ['The debtor will not be obliged to pay to the assignee anything over the amount the latter had paid for the assigned right, among with any interest accrued since the date the assignment was notified to the debtor.'] ('*El deudor no será obligado a pagar al cesionario sino el valor de lo que éste haya dado por el derecho cedido, con los intereses desde la fecha en que se haya notificado la cesión al deudor.*') (Translation by the authors).

¹⁰³ French Civil Code, art 1699 ['One against whom a litigious right has been assigned may obtain a release from the assignee by reimbursing him the actual price paid for the assignment, plus costs and reasonable expenses, plus interest calculated from the date on which the assignee paid the price of the assignment made to him.'] ('*Celui contre lequel on a cédé un droit litigieux peut s'en faire tenir quitte par le cessionnaire, en lui remboursant le prix réel de la cession avec les frais et loyaux coûts, et avec les intérêts à compter du jour où le cessionnaire a payé le prix de la cession à lui faite.*').

¹⁰⁴ See Joaquim P Muniz, Kabir AN Duggal, Luis AS Peretti, 'The New Brazilian BIT on Cooperation and Facilitation of Investments: A New Approach in Times of Change' (2017) 32(2) ICSID Rev—FILJ 404.

middle-ground approaches that can help inform the investor-State debate. Colombia has come a long way in the last 30 years—it has overcome darker times and now it is positioning to be one of the heavyweight economies in Latin America. Indeed, it is the region's fourth biggest economy behind Brazil, Mexico and Argentina,¹⁰⁵ the third biggest receiver of foreign direct investment and it was the third largest capital exporter in 2017.¹⁰⁶ Additionally, while it is still a developing country, it was recently admitted to the OECD in May 2018.¹⁰⁷ This experience allows Colombia to offer a balanced point of view that works as a bridge between conflicting approaches to international investment law upon which consensus may be achieved. Many of the IIAs in force for Colombia will expire in the upcoming years and may be subject to renegotiation; the 2017 model IIA's persuasive power shall be examined in light of its acceptance by Colombia's partners.

¹⁰⁵ IMF DataMapper, 'GDP, current prices' (International Monetary Fund, 2018) <www.imf.org/external/datamapper/NGDPD@WEO/OEMDC/ADVEC/WEOWORLD/CBQ/WE> accessed 14 June 2018.

¹⁰⁶ See UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies* UNCTAD (2018) 50.

¹⁰⁷ Colombia, 'A mutually beneficial relationship' (OECD 2018) <<https://www.oecd.org/latin-america/countries/colombia/#d.en.345234>> accessed 14 June 2018.