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Myanmar's Investment Treaties: A review of legal issues in light of recent trends

June 2014

Written by Jonathan Bonnitcha

Executive Summary

This paper reviews Myanmar's existing investment treaties and examines the legal implications of key terms contained in them. The purpose of this paper is to provide an overview of Myanmar's current investment treaty context, which can inform a way forward for possible reform and contribute to a deeper understanding of the implications of potential future treaties. This paper focuses on key provisions that have proven important in other countries' experience with investment treaties over the past decade.1

The main findings of this paper are as follows:

1. Myanmar has seven investment treaties in force, plus an eighth treaty—the Myanmar–Japan bilateral investment treaty (BIT)—that may soon enter into force.
2. Myanmar's investment treaties cover the investment relationship between Myanmar and 15 other countries. These 15 countries are all located in East, South-East and South Asia and in Oceania (Australia and New Zealand).
3. Four of Myanmar's investment treaties, which cover Myanmar's investment relationship with 13 different countries, were negotiated either with or through ASEAN.
4. Myanmar's investment treaties that were negotiated with or through ASEAN show some degree of consistency, although important differences between these four treaties remain. In contrast, there is a very high degree of variation between Myanmar's ASEAN investment treaties and Myanmar's BITs, both in the types of provisions included in different treaties and in the drafting of provisions common to several treaties.
5. These variations have significant legal implications for the nature and extent of Myanmar's obligations under different treaties. They also make the government's task of complying with Myanmar's existing investment treaties more complex.
6. Many of Myanmar's investment treaties contain most-favoured nation (MFN) clauses. The effect of these provisions is that any benefit extended to foreign investors from one country under one investment treaty may need to be extended to foreign investors covered by Myanmar's other investment treaties. As a result, Myanmar may be required to grant a combination of benefits to foreign investors that is more generous than that provided by any one of Myanmar's investment treaties, considered individually.
7. Aside from the Myanmar–Philippines BIT, all of Myanmar's investment treaties allow foreign investors to bring claims under the treaty directly to investor–state arbitration. In such disputes, an arbitral tribunal will decide if the state in which the investment is located has breached the treaty. If the investor's claim is successful, the tribunal will make a binding, monetary award against the state.

Because Myanmar's investment treaties are enforceable through investor–state arbitration, questions relating to the extent of Myanmar's obligations under different treaties have important practical implications.

[1] A comprehensive discussion of different investment treaty provisions for sustainable development can be found in: Nathalie Bernasconi-Osterwalder, Aaron Cosbey, Lise Johnson, Damon Vis-Dunbar, *Investment Treaties & Why They Matter to Sustainable Development: Questions & Answers* (IISD, 2012). Retrieved from www.iisd.org/pdf/2011/investment_treaties_why_they_matter_sd.pdf

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1.0 Introduction

This paper comprises four sections. The first section provides a brief introduction to investment treaties. The second section reviews some general international trends in the drafting of investment treaties over the past decade. These two sections provide background context for the analysis of Myanmar's investment treaties, which is the subject of the third section. The fourth section draws some overall conclusions and highlights options for reform.

1.1 What Are Investment Treaties?

Investment treaties are agreements between states governing foreign investment between their respective countries. They are designed to protect foreign investment from one country (the home state) from interference by the government of the country in which the investment is located (the host state). More recent investment treaties often contain additional rules governing the admission of foreign investment. Investment treaties do not protect foreign investors from the risk that their commercial partners will prove unreliable nor do they assist investors in enforcing contracts with non-government entities. Their focus is the relationship between foreign investors and the government of the host state.

Historically, bilateral investment treaties (BITs) between a developed and a developing country were the most common type of investment treaty. Over the past two decades it has become more common for developing countries to negotiate BITs with each other. Multilateral investment treaties, such as the ASEAN Comprehensive Investment Agreement (ASEAN CIA), and the inclusion of investment chapters modelled on stand-alone investment treaties in free trade agreements (FTAs), such as Chapter 11 of the ASEAN–Australia–New Zealand Free Trade Agreement (AANZFTA), have also become more common. There are over 3,000 investment treaties in existence worldwide.

Most investment treaties allow foreign investors to bring claims that a host state has failed to live up to the protections guaranteed by an investment treaty directly to international arbitration. A three-person arbitral tribunal then decides the dispute. If the arbitral tribunal upholds an investor's claim, it will issue a final, binding award requiring the host state to compensate the investor. This is a "one-way" system, in that investment treaties allow foreign investors to bring claims against states but do not allow states to bring claims against foreign investors to international arbitration. Investment treaty arbitration is also an unusual process for settling disputes. In international law it is rare for a private actor to be allowed to bring claims against a state directly to an international forum.

1.2 What Is the Difference Between Investment Treaties and Investment Contracts?

Investment treaties are agreements between governments. Investment treaties apply to all foreign investment between the countries in question that falls within the scope of the treaty.[2] They impose general restrictions on the way in which any government entity—including parliament, ministries, regional governments, courts, the military, and individual government officials—is allowed to treat foreign investors and investments. In contrast, investment contracts are agreements between a government and an individual investor. They are normally specific to a particular investment project.

The protection that an investment treaty provides to foreign investment applies over and above the investor's entitlements under any relevant investment contract and the applicable law of the host state. As such, a government may breach an investment treaty even though it complies with all the terms of its investment contracts.

[2] See Section 3.1 of this report.

1.3 Why Do Countries Sign Investment Treaties?

In the past, the main reason that developed countries signed investment treaties was to protect their investors when they made investments abroad. During the period of decolonization and, subsequently, the Cold War, developed countries were particularly concerned about the risk that their companies' investments abroad would be nationalized.

The main reason that developing countries signed investment treaties was to attract new foreign investment. Evidence suggests that investment treaties have been largely ineffective as a tool for attracting additional foreign investment. This could be because investors regard other factors—such as the quality of infrastructure, access to raw materials, proximity to important markets, availability of suitably skilled labour and the existence of a legal system that allows for the enforcement of private contracts—as more important when making decisions on where to locate investments.

Recent scholarship also sheds light on other reasons why countries have signed investment treaties. Some treaties were signed primarily as tokens of goodwill or "photo opportunities" during ministerial visits. The governments involved did not always realize that the treaties they were signing were legally binding and enforceable, nor did they fully appreciate the significance of each of the various legal provisions contained in them.[3]

1.4 The Basic Architecture of Investment Treaties

Investment treaties contain several different types of provisions, the most important of which can be divided into four categories. The first category comprises provisions that define the scope of the treaty's application. This category includes provisions defining the types of "investors" and "investments" that fall within the coverage of the treaty. These provisions are important because they determine the range of foreign investors and foreign investments to which the other provisions of the treaty apply.

The second category comprises provisions that deal with the protection of foreign investment. This category includes provisions requiring host states to treat foreign investment "fairly and equitably," provisions preventing host states discriminating against foreign investment and provisions requiring the host state to pay compensation if it expropriates. Most of the investor–state disputes that arise under investment treaties involve allegations that the host state has failed to comply with the treaty's investment protection provisions.

A third category comprises provisions dealing with investment liberalization. This category comprises provisions governing the admission and establishment of new foreign investment in the state parties to the treaty. Examples include provisions that prohibit states from imposing restrictions on new foreign investments that are not applied to their own investors. Often, a single provision of an investment treaty will deal with both investment protection and investment liberalization. For example, the national treatment provision of the ASEAN CIA requires non-discriminatory treatment of foreign investment in relation to the admission and establishment of investments (investment liberalization) as well as non-discriminatory treatment in relation to the conduct and operation of investments (investment protection). However, for analytical purposes, it is useful to consider investment protection and investment liberalization components separately, as they have very different implications.

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[3] Poulsen, L.S., & Aisbett, E. (2013, April). When the claim hits. *World Politics, 65*(2); Poulsen, L.S. (2013, April). Bounded rationality and the diffusion of modern investment treaties. *International Studies Quarterly 58*(1). pp. 1–14.; Vis-Dunbar, D., & Poulsen, L.S. (2009, March). Reflections on Pakistan's investment-treaty program after 50 years. *Investment Treaty News*. Available at http://www.iisd.org/itn/2009/03/16/pakistans-standstill-in-investment-treaty-making-an-interview-with-the-former-attorney-general-of-pakistan-makhdoom-ali-khan/;

A final category of provisions consists of those governing the settlement of disputes arising under the treaty. As previously noted, most investment treaties allow investors to bring claims that the host state has failed comply with the terms of an investment treaty directly to investor–state arbitration. Provisions on dispute settlement contain the state parties' consent to this form of dispute settlement, as well as establishing the procedural rules that would govern the process. Most investment treaties also allow one state party to bring a claim that another state party has breached the terms of the treaty to state–state arbitration. In practice, the investor–state dispute settlement mechanism of investment treaties has proved much more important than the state–state dispute settlement mechanism. There have been over 500 known investor–state claims brought under investment treaties.[4] In contrast, there are only five known occasions where states have resorted to the state–state dispute settlement mechanism, of which one is currently pending.

1.5 How Does the Process of Investor–State Arbitration Work?

Each investment treaty specifies the procedural rules that govern the process of investor–state arbitration. The most common procedural rules are the rules for arbitration under the International Centre for Settlement of Investment Disputes (ICSID) Convention and the United Nations Commission on International Trade Law (UNCITRAL) Rules. Sometimes an investment treaty will specify several different sets of procedural rules and leave the choice between the different sets of rules to the investor. Because Myanmar is not yet a signatory to the ICSID Convention, any investor–state arbitrations involving Myanmar would have to involve some other set of procedural rules. (This would change if Myanmar does sign and ratify the ICSID Convention.) While there are minor variations in the process of investor–state arbitration depending on the governing rules, the basic elements of the process are the same.

The arbitral tribunal normally consists of three arbitrators. One arbitrator is appointed by the investor bringing the dispute, one arbitrator is appointed by the state defending the claim, and the third arbitrator is appointed by agreement between the investor and the state. If the two parties cannot agree on the third arbitrator, a default appointing authority will choose the third arbitrator. In theory, there are few limits on the people who can be appointed as arbitrators. In practice, arbitrators are almost always drawn from among a relatively small pool of senior lawyers, many of whom also work advising clients or as academics in the field.[5]

The tribunal sets the timetable for the proceedings, including the submissions of pleadings, tendering of evidence and the holding of hearings. The length of proceedings varies, but is normally between two and six years, depending on the complexity of the case. Whether the hearings and the documents relating to the case are made public depends on the procedural rules governing the case.

If the tribunal upholds the investor's claim, it will order the state to compensate the investor. Compensation is normally equivalent to the loss caused by the state's breach of the investment treaty, which would include loss of future profits if these losses are proven. The award of an arbitral tribunal is binding and final. Arbitral awards can be challenged only on the grounds that the procedure was not conducted correctly. Arbitral awards cannot be challenged on the grounds that the tribunal reached an incorrect decision. The process for challenging an award on the grounds that procedure was not conducted correctly varies depending on the procedural rules involved.

[4] UNCTAD. (2014). *Recent developments in investor-state dispute settlement*. Available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf

[5] Corporate Observatory Europe and the Transnational Institute. (2012). *Profiting from injustice.* Available at http://corporateeurope.org/trade/2012/11/profiting-injustice

Arbitral awards can be enforced through court proceedings in most countries. (The process for enforcing an award depends on the procedural rules involved.) In practice, this means that, if a state refuses to comply with an arbitral award ordering the state to compensate an investor, the investor will be able to obtain court orders that allow it to seize government-owned property located in almost any third country.[6]

1.6 Why Do Investment Treaties Matter?

As a matter of international law, all treaties between governments are binding. So it is always important for a government to consider the content and implications of a treaty before deciding to sign it. However, investment treaties have unusual features that make them particularly important in practice. Five of these features are as follows:

i) The range of government conduct implicated

Investment treaties are unusual in the breadth of government conduct controlled by the treaty. *Any* action by any arm of government that affects a foreign investment could raise an issue of compliance with the terms of an investment treaty. For example, the 50 new claims that came to light in 2013 dealt with matters such as:

> changes related to investment incentive schemes, cancellation or alleged breaches of contracts by States, alleged direct or *de facto* expropriation, revocation of licenses or permits, regulation of energy tariffs, allegedly wrongful criminal prosecution, land zoning decisions, creation of a State monopoly in a previously competitive sector, allegedly unfair tax assessments or penalties, invalidation of patents, and legislation relating to sovereign bonds.[7]

Other government actions that have been challenged under investment treaties include new tobacco-control measures, new environmental conditions attached to existing investments, delays in judicial proceedings in the courts of the host state and failure of the host state to prevent damage to foreign investment caused by armed groups.

ii) The unpredictability of investor–state arbitration

Investment treaties confer a high degree of discretion on arbitral tribunals. As a result, the process of investor–state arbitration is highly unpredictable. Different arbitral tribunals regularly arrive at different conclusions about the meaning of common investment treaty provisions. This makes it very difficult for governments to predict, in advance, whether policies that affect foreign investors could lead to successful investor–state claims under an investment treaty.

iii) The amount of money at stake

Investment treaties are not concerned with particular projects. Rather, they establish legal rules governing all foreign investments between the state parties to the treaty, subject to provisions limiting the treaty's scope of application. In this way, investment treaties govern investments worth many billions of U.S. dollars. This is reflected in the size of investment treaty claims brought against governments by foreign investors. Claims regularly run into the hundreds of millions of U.S. dollars and, increasingly, into the billions. The largest

[6] Not all state-owned property is subject to seizure in the event that a state refuses to comply with an arbitral award. The laws of the state in which enforcement is sought govern the question of whether particular types of state-owned property are covered by immunity from enforcement.

[7] UNCTAD. (2014). *Recent developments in investor-state dispute settlement*. p. 5. Available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf

amount awarded in an investment treaty claim is US$1.77 billion plus interest, in the case *Occidental v Ecuador (II)*. Even when governments successfully defend investment treaty claims, they may be left with millions of dollars in legal costs, which have been estimated as US$8 million per party per case on average.[8]

iv) The potential for complex and unanticipated interaction between treaties

Most investment treaties contain "most-favoured nation" (MFN) provisions. These provisions require a host state to extend benefits granted to investors from a third state to investors covered by the treaty with the MFN clause. However, MFN provisions have been interpreted as allowing investors covered by one investment treaty to "import" the most favourable provisions from each of several other treaties. In this way, the interaction between MFN clauses of different treaties can result in a host state being required to grant a combination of benefits to foreign investors that it would never have agreed to in any one treaty. It also means that an error in the drafting of one investment treaty—for example, the inclusion of words that inadvertently grant greater benefits and privileges to foreign investors than was intended—can have the effect of expanding the benefits and privileges granted by all the state's investment treaties.

v) Difficulties in termination

Investment treaties are difficult to terminate, which makes it especially important for countries to consider the implications of any new treaty before making a decision to sign it. The source of these difficulties varies depending on the nature of the investment treaty in question. Bilateral investment treaties (BITs) normally claim "survival clauses." The effect of these provisions is that, if one state terminates the BIT without the agreement of the other state party, the protections of the treaty remain in force for existing investments for up to 20 years. In practice, this means that it will be many years until the decision to terminate the treaty is fully effective. In the case of investment chapters in FTAs, the difficulties stem from a different problem. It will normally be impossible for a state to withdraw from the investment chapter of an FTA without withdrawing from the agreement in its entirety.

1.7 Myanmar's Investment Treaties

At the time of writing, to the best of our knowledge, Myanmar has only three BITs that have entered in force—those with China, India and the Philippines. In December 2013, Myanmar signed a BIT with Japan. It is not clear when the Myanmar–Japan BIT will enter into force. In June 2014, after the research for this note had been completed, Myanmar signed a BIT with South Korea. The text of this agreement is not yet available publicly and the agreement has not yet entered into force. Myanmar has signed four further BITs—with Kuwait, Laos, Thailand and Vietnam. These treaties were signed in 2008, 2003, 2008 and 2000, respectively but it appears that they never entered into force.[9] It is unclear why these treaties did not enter into force.[10]

[8] OECD. (2012). *Investor-state dispute settlement: Public consultation scoping paper*. p. 73. Available at http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf

[9] The UNCTAD BIT database lists the Myanmar–Laos, Myanmar–Thailand and Myanmar BITs as signed but unratified as of June 2013. We were unable to confirm whether this was still the case. The Myanmar–Kuwait BIT is not listed on the UNCTAD BIT database and is not publicly available. It is unclear why the Myanmar–Kuwait BIT is not listed on the UNCTAD database, despite the fact that several more recent Kuwaiti BITs—both ratified and unratified—are listed on the UNCTAD database.

[10] Notwithstanding the fact that these BITs did not enter into force, foreign investment between Myanmar, Laos, Thailand and Vietnam would be covered by the ASEAN Comprehensive Investment Agreement.

Myanmar is also party to four investment treaties that have been negotiated either with or through ASEAN. The first three of these are investment treaties that form part of wider frameworks for ASEAN regional economic cooperation. These are the ASEAN Comprehensive Investment Agreement, the ASEAN–China Agreement on Investment and the ASEAN–Korea Agreement on Investment. A fourth agreement, the ASEAN–Australia–New Zealand FTA contains an investment chapter that is modelled on stand-alone investment treaties.

Taken together, Myanmar's investment treaties cover the investment relationship between Myanmar and 15 other countries. These are: the nine other ASEAN Member States, Australia, New Zealand, China, South Korea, India and Japan. In the cases of the investment relationship between Myanmar and the Philippines and between Myanmar and China, two overlapping investment treaties apply—a BIT and one of the other ASEAN investment treaties. In practice, this means that the foreign investment between these two pairs of countries would be entitled to the most beneficial provisions found in each of these agreements. This is because, contrary to the normal position in international law,[11] the ASEAN CIA and the ASEAN–China Agreement on Investment specifically provide for the older BITs to continue in force.[12]

Myanmar's BITs tend to reflect the older generation of BITs. They are relatively short documents that provide a range of generous, vaguely worded protections to foreign investors. With the exception of the Myanmar–Philippines BIT, they provide for investor–state arbitration of disputes. In contrast, the four investment treaties that Myanmar has entered into with or through ASEAN are drafted with greater precision and reflect some of the trends in more recent investment treaty practice. Myanmar's bilateral investment treaty with Japan is different again and is the subject of detailed examination in a companion paper published by IISD.[13] Section 3 of this paper examines the content of these treaties in detail.

[11] Vienna Convention on the Law of Treaty (1969), art. 59.
[12] ASEAN CIA, art. 44; ASEAN–China Agreement on Investment, art. 23.
[13] Bonnitcha, J. (2014). *The Myanmar–Japan Investment Treaty*. Winnipeg: IISD.

2.0 Recent Trends in Investment Treaty-Making

The first investment treaty allowing for investor–state arbitration was signed in 1969, between Italy and Chad. Over the next three decades states signed hundreds more investment treaties. Most of these treaties were based on the template negotiating positions of developed countries. For this reason, they were remarkably similar in their terms. During this period, only a handful of investment treaty claims were submitted to investor–state arbitration. As such, investment treaties attracted relatively little policy attention. Around the year 2000 the number of investor–state disputes being brought to arbitration began to increase sharply. Some of the arbitral tribunals adjudicating these claims adopted very broad interpretations of the underlying treaties, expanding host states' obligations to foreign investors in ways that had not been anticipated when the agreements were originally signed.

Recent trends in investment treaty-making reflect these experiences. Countries have responded in different ways. Many have significantly revised their negotiating templates, seeking to provide greater clarity about the extent of particular obligations. Some countries have gone further, taking a decision to stop signing new investment treaties and to terminate their existing investment treaties. Overall, the trend is toward a more cautious and better-informed approach to investment treaty making with narrower and more precise drafting of particular provisions. The following sections review some of the ways in which these trends are playing out in practice.

2.1 The Decision Whether or not to Sign Investment Treaties

In recent years, several states have decided not to continue signing investment treaties. Following a high-profile claim against the government's affirmative action policies in the mining sector, the government of South Africa decided not to sign new investment treaties and has begun a process of terminating existing treaties. Indonesia reportedly initiated a similar process at the beginning of 2014. In Latin America, both Venezuela and Ecuador have terminated some of their investment treaties and flagged the possibility that they might terminate more.

In 2011, the Australian Government made a decision to cease signing investment treaties that contained investor–state dispute settlement clauses. Following a change in government in 2013, this decision was reversed. The European Union (EU) is pushing for the termination of all investment treaties between EU countries. Simultaneously, the EU is signing new investment treaties with countries outside of the EU on behalf of the 28 EU Member States. Norway ceased signing new investment treaties in the mid-1990s, due to concerns about the constitutionality of investor–state arbitration and disagreement among stakeholders about the objectives of the country's investment treaty program.[14]

2.2 Trends in Drafting: Scope of application

Most of the BITs negotiated in the 20th century contain provisions that provide for a very broad scope of application. Many of these treaties cover "any kind of asset" in the host state owned by a person from, or a company incorporated in, the home state. Among the states that have continued to sign investment treaties, the trend has been toward narrower and more precise drafting of the provisions that define a treaty's scope of application. In many cases, new treaty language responds to particular issues that have arisen in past disputes. For example, the ASEAN CIA clarifies that a commercial contract for the sale of goods does not qualify as an "investment" entitled to the treaty's protection.[15] This responds to concerns that investment treaties could be held to apply to any cross-border business transaction.[16] The ASEAN–China Agreement on Investment clarifies that a company must have "substantive business

[14] Comments on the Model for Future Investment Agreements. Available at http://italaw.com/documents/NorwayModel2007-commentary.doc; Vis-Dunbar, D. (2009). Norway shelves its proposed model bilateral investment treaty. Available at www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/

[15] ASEAN CIA, fn. 3.

[16] *Mytilinenos v. Serbia and Montenegro*, Partial Award on Jurisdiction, para. 106.

operations" in the country in which it is incorporated in order to qualify for the protection of the treaty.[17] This responds to concerns arising from past disputes in which investors have incorporated so-called "mailbox companies" for the purpose of bringing existing investment under the protection of investment treaties.[18]

2.3 Trends in Drafting: Investment protection

Investment treaties negotiated in the 20th century contained a handful of broad, vaguely drafted provisions dealing with investment protection. For example, article 2(2) of the U.K.–Tanzania BIT requires each party to provide "fair and equitable treatment" and "full protection and security" to the investments of investors of the other party. None of these terms are defined with greater precision. Arbitral tribunals have subsequently interpreted such provisions as requiring a state to ensure the stability of the legal framework and to act consistently with an investor's legitimate expectations.[19] States have responded to these decisions—which considerably expand the scope of states' liability to foreign investors—by drafting the investment protection provisions of new investment treaties more narrowly and more precisely and by including new exceptions clauses that protect governments' rights to enact legitimate policy measures.

Changes over time in the U.S. model investment treaty clearly illustrate this trend. Treaties negotiated on the basis of older versions of the U.S. model investment treaty prior to 2004 required each state to provide "fair and equitable treatment" to foreign investment, subject to the requirement that investment "shall in no case be accorded treatment less than that required international law."[20] This text left open the possibility that the standard of "fair and equitable treatment" required by the treaty could go beyond what was required by international law. The corresponding provision of the 2012 US model investment treaty now requires "treatment in accordance with customary international law, including fair and equitable treatment."[21] This formulation removes the possibility that the requirement of "fair and equitable treatment" could be interpreted as going beyond what is otherwise required by customary international law. However, questions remain about the standard required by customary international law. A subsequent paragraph provides further clarification that the concept of fair and equitable *includes* the "obligation not to deny justice."[22] However, this paragraph does not provide an exhaustive statement of the content of customary international law, so questions remain about precisely what customary international law requires. In contrast, the ASEAN–China Agreement on Investment omits any reference to customary international law, and clarifies that the term fair and equitable treatment "*refers* to the obligation not to deny justice."[23]

In addition to the clearer and more balanced drafting of substantive protections, the trend in recent investment treaties has been toward the greater use of exceptions clauses to safeguard governments' policy space. A good example of this trend is the ASEAN CIA. The treaty includes exceptions for government measures necessary to protect public health and for measures relating to environmental conservation, among others.[24] Well-drafted exceptions clauses can help ensure that governments are not held liable for legitimate public policy measures that affect foreign investors. However, the precise effect of these provisions remains to be seen. For example, the public health exception of the ASEAN CIA only covers measures that are "*necessary* to protect human, animal or plant life or health." Ultimately, it would be up to a tribunal to decide whether the public health measure introduced by a state were necessary and, therefore, exempt from liability under the treaty.

[17] ASEAN–China Agreement on Investment, art. 1(1)(f).
[18] *Mobil v. Venezuela*, Decision on Jurisdiction, paras. 186-190.
[19] e.g., *Frontier Petroleum v. Czech Republic*, Final Award, para. 285.
[20] e.g., U.S.-Argentina BIT (1991), art. 2(2)(a).
[21] 2012 U.S. Model BIT, art. 5(2).
[22] 2012 U.S. Model BIT, art. 5(2)(a).
[23] ASEAN–China Agreement on Investment, art. 7(2)(a).
[24] ASEAN CIA, arts. 16(1)(a), 16(1)(f).

2.4 Trends in Drafting: Investment liberalization

Among the states that have continued to sign investment treaties, there has also been a trend toward the inclusion of more provisions governing investment liberalization. While many recent investment treaties continue to exclude investment liberalization provisions—for example, the Japan–Korea–China Trilateral Investment Treaty—investment liberalization provisions are considerably more common than was the case previously. This trend began with the North American Free Trade Agreement (NAFTA) and is reflected in the U.S. and Canadian model bilateral investment treaties. This approach is now increasingly reflected in wider FTAs and regional agreements, which are becoming more common and which differ from the traditional approach of stand-alone BITs. The trend towards greater inclusion of provisions dealing with investment liberalization has entailed the need for further provisions qualifying, limiting or creating exceptions to these obligations.

One example of the trend is the April 2014 draft of the investment chapter of the Canada–EU Trade Agreement (CETA). The draft contains agreed provisions limiting the ability of state parties to restrict market access to investors of the other state and requiring national treatment to be extended to the pre-establishment phase.[25] These provisions are accompanied by further text clarifying reservations and exceptions to these provisions.[26]

2.5 Trends in Drafting: Dispute settlement

Among the states that have continued to sign investment treaties, the two key trends have been toward greater transparency in investor–state arbitration and the inclusion of mechanisms that allow states to retain greater control over the interpretation of investment treaties in order to respond to concerns that arbitral tribunals have interpreted investment treaties in ways that were not intended by the states that negotiated and signed the treaties in question.

New transparency rules for investor–state arbitrations held under the UNCITRAL Arbitration Rules and the current draft of the Canada–EU Trade Agreement are two examples of recent trends toward greater transparency in investor–state arbitration. Both would require a range of documents relating to the proceedings to be made public. These include all the submissions made by the parties, orders and awards made by the tribunal, and transcripts of the hearings. The arbitral hearings themselves must also be open to the public.[27] This is a significant change. Previously it was possible for investor–state arbitrations to be held entirely in secret under the UNCITRAL Rules. However, the new UNICTRAL transparency rules only apply automatically to investment treaties signed after April 1, 2014. As such, they do not apply to arbitrations under any of Myanmar's existing investment treaties, save to the extent they are explicitly adopted.

The Dominican Republic–Central America–U.S. FTA is an example of an investment treaty granting great interpretative control to states. The treaty establishes a "Free Trade Commission" that allows the state parties of the treaty to jointly issue an authoritative interpretation of the treaty. An interpretation issued by the Free Trade Commission is binding on an arbitral tribunal adjudicating an investor–state dispute under the treaty.[28] In addition, the treaty allows the state parties to the treaty that are not involved in the dispute to make submissions on the interpretation of the treaty.[29] While these submissions are not formally binding on an arbitral tribunal, they provide a mechanism to maintain some influence over the way in which the treaty is interpreted.

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[25] CETA, (April 4, 2014 draft), arts. X.5, X.7.
[26] e.g., CETA, (April 4, 2014 draft), art. X.4 (1)(a), X.4 (2).
[27] CETA (3 April 2014 draft), art. X.33; similarly U.S. 2012 Model BIT art. 29(1), art. 29(2).
[28] DR–CAFTA, art. 10.22(3).
[29] DR–CAFTA, art. 10.20(2).

3.0 Analysis of Myanmar's Investment Treaties

The following sections compare some of the key features of Myanmar's investment treaties. This comparison follows the basic structure of investment treaties, with sections addressing:

1. The scope of application of the treaty
2. Investment protection provisions
3. Investment liberalization provisions
4. Investor–state arbitration.

A final section reviews some of the other types of provisions that are occasionally found in Myanmar's investment treaties

3.1 Scope of Application

3.1.1 Provisions Defining the Range of "Investors" Covered by the Treaty

Provisions that define the range of foreign investors covered by the treaty are important, as only foreign investors covered by the treaty are directly entitled to the treaty's protections and benefits.[30] In practice, provisions defining the range of investors covered by an agreement are particularly relevant in situations where one investor has links to several different countries. To give one example: does a company incorporated in Singapore but owned entirely by Myanmar shareholders qualify as a "Singaporean" investor entitled to the benefits of an investment treaty between Singapore and Myanmar? The answer to this question depends on the provisions of the investment treaty in question. The relevant provisions include those defining the term foreign "investor," those defining subsidiary terms—for example "juridical person"—and those explaining the situations in which an otherwise eligible investor can be excluded from the coverage of the treaty. (The latter are often called "denial of benefits" clauses.)

Most of Myanmar's investment treaties cover any individual with the nationality of the home state and any company incorporated in the home state.[31] A minority of Myanmar's investment treaties require companies incorporated in the home state to have "substantive business operations" in the home state.[32] The effect of such provisions is to exclude "shell companies" with no real business presence in the home state from the coverage of the treaty. In addition, most of Myanmar's investment treaties contain "denial of benefits" provisions allowing a host state to exclude investors that have "no substantial business activities" in the homes state from the protection of the treaty in certain circumstances.[33] In the past, such provisions have not always had their intended effect. This is because arbitral tribunals have held that a state must invoke a denial of benefits provision before any dispute has arisen in order to exclude a company with no real business activities in the host state from the protection of the treaty.[34]

[30] Investors not covered by a treaty may, however, be *indirectly* entitled to its benefits through the operation of MFN clauses. This issue is discussed in more detail in Section 3.2.5.
[31] e.g. Myanmar–India BIT, arts. 1(a), 1(c), 1(d).
[32] ASEAN–China Agreement on Investment art. 1(1)(f).
[33] e.g. ASEAN–Korea AI, art. 17(1).
[34] e.g. *Stati v. Kazakhstan*, Award, December 19, 2013, para. 745.

3.1.2 Provisions Defining the Range of "Investments" Covered by the Treaty

To be entitled to the protection of an investment treaty, an investor of the home state must normally have, or be in the process of making, an investment in the host state. When policy-makers think of foreign investment they often imagine tangible assets such as factories or mines built by a foreign company. However, many investment treaty claims relate to intangible assets. Investors have argued that government permits, tax refunds, arbitral awards, government bonds and commercial contracts all amount to "investments" entitled to the protection of investment treaties. The provisions of each investment treaty will determine which of these assets are entitled to the protection of an investment treaty and, therefore, could provide the foundation for an investor–state dispute.

Myanmar's investment treaties take two different approaches. Myanmar's bilateral investment treaties, including the recent Myanmar–Japan BIT, cover a very wide range of foreign-owned assets. These treaties protect "every kind of asset" and include a broad range of examples that would fall within this definition. Many of these categories appear to cover legal entitlements that we would not normally think of as foreign investments. For example, the Myanmar–Japan BIT states that the term "investment" includes any type of claim to "performance under contract having financial value."[35] Under this definition, a normal sales contract to purchase goods in Myanmar would qualify as an "investment" when it is made by a foreigner.[36]

The ASEAN investment agreements to which Myanmar is a party generally adopt a different approach. They also define an "investment" as "every kind of asset" but then add further clarifications that certain types of legal entitlements are not "investments." For example, the ASEAN–Australia–New Zealand FTA (AANZFTA) excludes "judgments" and "commercial contracts for the sale of goods or services" from the definition of the term "investment."[37]

3.1.3 Provisions Limiting Coverage to Investments Made in Accordance With the Host State's Laws

With the exception of the Myanmar–Japan BIT, all of Myanmar's investment treaties contain provisions that limit the coverage of the treaty to investment acquired in accordance with the host state's laws. The purpose of such provisions is to ensure that investments that are acquired or established illegally—for example, without obtaining permits that are necessary for an investment to be made—do not benefit from an investment treaty's protection. Different treaties achieve this effect in different ways. In the case of the ASEAN CIA, the protection and benefits of the treaty are only extended to "covered investments," with the term "covered investment" defined as those investments that are "admitted according to its [the host state's] laws, regulations and national policies.[38] An investment must also be specifically approved in writing, if this is a requirement under the law of the host state.

3.1.4 Provisions Governing the Termination of the Investment Treaty

Aside from a few special situations that are not relevant here, it is always possible for the state parties of an investment treaty to terminate or amend the treaty with complete and immediate effect. This requires agreement of all the state parties to the treaty. Provisions dealing with termination govern the situation in which one state party wishes to terminate or withdraw from the treaty and is unable to reach agreement with all the other parties to the treaty. Myanmar's BITs generally include "survival clauses," which provide that the protections of a BIT will continue

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[35] e.g. Myanmar–Japan BIT, art. 1(a)(v).

[36] In spite of the expansive definitions of the term "investment" contained in investment treaties, some tribunals have questioned whether ordinary contracts for the sale of goods of the provisions of services qualify as "investments."

[37] AANZFTA, ch. 11, art. 2(c).

[38] ASEAN CIA, art. 4(a).

in force for many years in the event that one state party seeks to terminate the treaty without the agreement of the other parties. For example, the Myanmar–Japan BIT cannot be terminated during its first 10 years in force.[39] After this initial 10-year period, either state party could terminate the treaty by giving the other party one year's written notice of its intention to terminate. However, in respect of investments made or acquired prior to the date of termination, the provisions of the treaty would continue in force for a further 10 years.[40] In the case of the Myanmar–India BIT, the provision of the treaty would continue in force for an additional 15 years in respect of existing investments from the date of termination.[41]

The ASEAN investment treaties to which Myanmar is a party do not appear to contain survival clauses. In principle, therefore, it would be possible for any state to withdraw from the ASEAN CIA, the ASEAN–China Agreement on Investment or the ASEAN–Korea Agreement on Investment and for that withdrawal to have complete and immediate effect (there may, however, be very substantial political obstacles to this course of action). AANZFTA specifies that any state party may withdraw from the agreement by giving six months' notice in writing to the other parties.[42] However, this course of action would require the state in question to withdraw from the AANZFTA agreement in its entirety. It is not possible to unilaterally withdraw from one chapter of the agreement—such as the investment chapter—while remaining a party to the other chapters of the agreement.

3.2 Investment Protection Provisions

The vast majority of investor–state disputes under investment treaties concern allegations that the host state has failed to comply with the investment protection provisions of the relevant treaty. As previously noted, these disputes implicate a vast array of government action. Small differences in the drafting of investment protection provisions can be decisive when a tribunal is determining whether particular actions taken by a government breach the treaty.

3.2.1 "Fair and Equitable Treatment" Provisions

The fair and equitable treatment (FET) provision of investment treaties is the provision most often invoked by foreign investors in investor–state arbitration, and the claim with which investors have the best rate of success. FET provisions give arbitral tribunals broad discretion to determine whether the government conduct challenged by an investor was "fair and equitable." Tribunals have disagreed about the nature and extent of the obligation to treat foreign investment fairly and equitably. They have articulated a range of principles, some of which go beyond what the state parties to the treaty in question envisaged when the treaty was originally negotiated. For example, some tribunals have held that a government will breach the FET standard if it does not respect an investor's "legitimate expectations" or if changes to the laws governing a foreign investment breach an investor's entitlement to "legal stability."[43]

Another dimension of the uncertainty about the implications of FET provisions is the question of whether these provisions place demands on host states that go beyond the requirements of customary international law on the protection of foreign-owned property. This debate is important because, historically, customary international law has been understood as imposing a relatively lenient standard. However, even when a treaty specifically links the FET standard to customary international law there are further difficulties in determining precisely what standard is required by customary international law. In light of these debates, the drafting of FET provisions of investment

[39] Myanmar–Japan BIT, art. 28(1).
[40] Myanmar–Japan BIT, art. 28(4).
[41] Myanmar–India BIT, art. 16(2).
[42] AANZFTA, ch. 19, art. 8.
[43] *Frontier Petroleum v. Czech Republic*, Final Award, para. 285.

treaties is particularly important. By drafting provisions more precisely states can provide greater clarity about how much protection they intend to confer on foreign investment.

Myanmar's investment treaties all contain provisions requiring the host state to treat foreign investment fairly and equitably.[44] There is, however, a degree of variation in the way in which the FET provisions of Myanmar's investment treaties are defined. In Myanmar's early BITs, the obligation to provide fair and equitable treatment is a "free-standing" obligation. These provisions do not tie the FET standard to international law and do not provide any clarification of what is meant by the phrase "fair and equitable."[45] In contrast, the Myanmar–Japan BIT requires "treatment according to international law, including fair and equitable treatment." This formulation limits the FET standard to the requirements of international law, but does not provide a great deal of guidance to a tribunal about what is required by international law. The ASEAN CIA and the ASEAN +1 agreements go somewhat further in that they link the FET standard to international law and clarify what is required by international law in this context. For example, the ASEAN CIA clarifies that the FET standard "requires each Member State not to deny justice in any legal or administrative proceedings."[46] Drafting provisions in this way is the best option for states seeking to reduce the likelihood of arbitral tribunals arriving at expansive and unanticipated interpretations of treaty provisions.

3.2.2 Expropriation Provisions

All of Myanmar's investment treaties contain provisions dealing with the expropriation of foreign investment. These provisions allow the host state to expropriate foreign investments owned by investors of the home state only if compensation is paid to the investor. For example, the ASEAN CIA holds that a host state "shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation" except on payment of compensation.[47] As with the provisions of Myanmar's other investment treaties, this provision deals with two distinct situations. The first is "direct expropriation," which occurs when a government nationalizes or permanently takes over possession of an investment. The second is "measures equivalent to expropriation," more commonly referred to as "indirect expropriation." Indirect expropriation occurs when a government takes a measure akin to expropriation that does not involve nationalization or the ousting of the investor from possession of the investment.

The question of whether government measures that prevent a foreign investment from continuing to operate profitably amount to "indirect expropriation" for which compensation is required has proved controversial in practice. Investors have brought claims to investor–state arbitration arguing that government decisions not to renew an investor's operating permit,[48] or to ban the use of chemicals that are harmful to human health, amount to indirect expropriations.[49] None of Myanmar's BITs clarify what is meant by "indirect expropriation," nor do the ASEAN–China Agreement on Investment or the ASEAN–Korea Agreement on Investment contain such clarifications. In contrast, the ASEAN CIA and the AANZFTA contain annexes clarifying that determining whether an expropriation has occurred requires a case-by-case inquiry that considers:

[44] In the case of the Myanmar–Philippines BIT, the obligation is phrased as a requirement to provide "equitable and reasonable" treatment. In the past, arbitral tribunals have held that this textual formulation is not different from the more common "fair and equitable treatment" formulation. See *Parkerings v. Lithuania*, Award, para. 278.
[45] e.g., Myanmar–China BIT, art. 3(1).
[46] ASEAN CIA, art. 11(2)(a).
[47] ASEAN CIA, art. 14(1).
[48] e.g., *Tecmed v. Mexico*.
[49] e.g., *Methanex v. United States*; *Chemtura v. Canada*.

a) The economic impact of the measure

b) Whether the measure breaches a prior binding written commitment

c) The character of the government action, including its objective and whether it is disproportionate to the public purpose it pursues.[50]

These annexes also clarify that non-discriminatory regulatory measures designed to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriation.[51] This gives guidance to arbitral tribunals and helps make the interpretation of this provision more predictable.

All of Myanmar's investment treaties endorse the basic principle that compensation should be equivalent to the fair market value of the investment at the time when the expropriation was announced.[52] While this standard of compensation is common to investment treaties, its application can lead to anomalous results in practice. For example, if an investor acquires an investment for significantly less than its fair market value—perhaps because a competitive tender was not originally conducted—it would still be entitled to full compensation if the investment was renationalized, a situation that would grant the investor a substantial windfall. The ASEAN–China Agreement on Investment and the ASEAN CIA depart from the "fair market value" formulation in cases of expropriation of land. In cases involving the expropriation of land, these treaties allow a host state to calculate compensation according to national law.[53] For states considering alternatives to the fair market value standard for compensation, the Southern African Development Community (SADC) Model Investment Treaty provides an example of how a provision could be drafted so that compensation does take into account the circumstances in which an investment is acquired.[54]

3.2.3 Umbrella Clauses

Article 4(2) of the Myanmar–Japan BIT requires that "Each Contracting Party shall observe any obligation it may have entered into with regard to investments and investment activities of investors of the other Contracting Party."

Such clauses are commonly called "umbrella clauses." While tribunals have disagreed about the precise implications of these provisions, the prevailing view is that they "elevate" any breach of an obligation to the level of a breach of the treaty.[55] According to this view, any breach of a contract with an investor would amount to a breach of the investment treaty. In this way, umbrella clauses can radically expand the scope of host states' liability under investment treaties by allowing claims for breach of investor–state contract to be pursued through investor–state arbitration.

Aside from the Myanmar–Japan BIT, umbrella clauses are also found in the Myanmar–China BIT and the ASEAN–China Agreement on Investment, albeit with minor variations in wording[56] (though this provision of the ASEAN–China Agreement on Investment cannot be enforced through investor–state arbitration).[57] Umbrella clauses are not found in Myanmar's other investment treaties, notably the ASEAN CIA.

[50] e.g., ASEAN CIA, annex 2, art. 3; AANZFTA, chp. 11, annex, art. 3.
[51] e.g., ASEAN CIA, annex 2, art. 4; AANZFTA, chp. 11, annex, art. 4.
[52] e.g., Myanma–India BIT, art. 5(1).
[53] ASEAN CIA (2009) art. 14 fn 10; ASEAN-China Agreement on Investment (2009), art. 8(4).
[54] SADC Model Bilateral Investment Treaty Template with Commentary, art. 6(2), options 1 and 2.
[55] e.g., *Micula v. Romania*, Award, paras. 415-418.
[56] e.g., Myanmar–China BIT, art. 10(2); ASEAN–China Agreement on Investment, art. 18(2).
[57] ASEAN-China Agreement on Investment, art. 14(1).

3.2.4 National Treatment Provisions (at the Post-Establishment Phase)

National treatment provisions require a host state to treat foreign investors and investments at least as well as they treat their own investors. As such, national treatment provisions limit the use of preferential laws and policies to favour nationally owned investments. Depending on how these provisions are drafted, they may also limit a host government's ability to implement regulations that are more difficult for foreign investors to comply with, even if those regulations apply equally to domestic and foreign firms. Most of Myanmar's investment treaties contain national treatment provisions but there is significant variation in the way that they are drafted. This section examines the national treatment provisions of Myanmar's investment treaties insofar as they apply to the treatment of investment *after* the investment has been made—that is, the post-establishment phase. A subsequent section examines Myanmar's investment treaties insofar as they apply to host state laws and policies that govern the admission and establishment of foreign investment—i.e. the pre-establishment phase.[58]

Of Myanmar's investment treaties, only the Myanmar–Philippines BIT does not contain provisions relating to national treatment. National treatment provisions are contained in the AANZFTA and the ASEAN–Korea Agreement on Investment. However, in both cases the national treatment provision will not come into force until the parties to the treaty complete negotiations on their respective schedules of reservations.[59] It is not clear how much progress has been made in these negotiations.

The ASEAN–China Agreement on Investment and the Myanmar–China BIT both contain provisions dealing with post-establishment treatment. However, both treaties are qualified in important respects. The ASEAN–China Agreement on Investment allows a host state to maintain existing discriminatory measures that were in force at the time when the treaty came into effect.[60] This qualification is common in Chinese investment treaty practice. The national treatment obligation of the Myanmar–China BIT is "without prejudice to [each country's] law and regulations." This is an even more qualified formulation, which allows a host state to discriminate in favour of its own investors so long as such preferential treatment is lawfully authorized.

The ASEAN CIA and the Myanmar–Japan BIT both contain national treatment provisions. One important clarification included in both is that the obligation to treat foreign investments no less favourably than domestic investments only applies insofar as the comparison is between investments "in like circumstances." This phrase responds to concerns about the way in which arbitral tribunals have interpreted and applied national treatment provisions in investor–state disputes. For example, in one notorious case a tribunal held that a foreign investor in the oil and gas sector had not been granted national treatment because it was subjected to a less favourable taxation regime than that applied to domestic investors in the agricultural sector.[61] Nevertheless, difficult questions remain about when different investments in the same sector that use different productions techniques or project structures can be said to be "in like circumstances."

The national treatment provisions of both the ASEAN CIA and the Myanmar–Japan BIT are subject to reservations listed in the schedules to the treaties. However, Myanmar's schedules of reservations to these two treaties do not appear to correspond with one another. This could complicate efforts to comply with both treaties. Only the Myanmar–India BIT does not contain any reservations to post-establishment national treatment. However, this treaty does exclude "any matter pertaining wholly or mainly to taxation" from its scope.[62]

[58] See Section 3.3.3.
[59] AANZFTA, ch. 11, art. 16(5); ASEAN-Korea Agreement on Investment, art. 27(4).
[60] ASEAN-China Agreement on Investment, art, 6(1).
[61] *Occidental v. Ecuador (I)*, Final Award, paras. 167-179.
[62] Myanmar-India BIT, art. 4(2), art. 4(3)(b).

3.2.5 Most-Favoured Nation Treatment (at the Post-Establishment Phase)

Most-favoured nation treatment (MFN) provisions are one of the most important provisions of investment treaties. Most of Myanmar's investment treaties contain MFN provisions. As well as limiting a host state's ability to implement laws and policies that treat foreign investors from one country less favourably than foreign investors from another country, arbitral tribunals have interpreted MFN provisions as allowing foreign investors covered by one investment treaty to rely on more favourable provisions contained in the host state's other investment treaties.[63] This interaction between different MFN provisions has systemic implications. It means that any protection or benefit that a host state grants to investors of one country must be extended to investors of other countries covered by other investment treaties with MFN provisions. The result can be that foreign investors are entitled to a combination of protections that is more generous than any individual treaty that the state has negotiated.

Other than the AANZFTA, all of Myanmar's investment treaties contain MFN provisions. However, as with its national treatment provision, the ASEAN–Korea Agreement on Investment's MFN provision will not enter into force until the schedules of reservations under that treaty have been negotiated.[64] The MFN provisions of the other six investment treaties discussed in this paper are not conditional on the finalization of any further negotiations on their sectoral scope of application.

The MFN provisions of Myanmar's BITs with China, India and the Philippines are all drafted in broad language. For example, the Myanmar–China BIT provides that:

> Neither Contracting Party shall subject investment and activities associated with such investment by the investors of the other Contracting Party to treatment less favourable than that accorded to the investments and associated activities by the investors of any third State.[65]

In contrast, the MFN provision of the ASEAN CIA contains two important clarifications. First, as with the national treatment of the ASEAN CIA, the MFN provision only requires that an investor of the home state be treated no less favourably than investors of any third state "in like circumstances." Second, the ASEAN CIA clarifies that investors are not entitled to take advantage of any more favourable "investor–state dispute settlement procedures" found in treaties between the host state and a third country. This provision responds to controversial arbitral awards which have found that an investor may use the MFN provision of one investment treaty to import more favourable dispute settlement provisions from the host state's other investment treaties.[66]

Some of Myanmar's BITs—notably, the Myanmar–India, Myanmar–China and Myanmar–Philippines BITs—and the ASEAN–China Agreement on Investment[67] contain provisions exempting benefits provided by customs unions and FTAs from the reach of the MFN clause.[68] The effect of this exemption is to ensure that a host country is not required to extend the benefits that it grants through economic integration agreements like the ASEAN CIA to its bilateral treaty partners. No such provision is included in the Myanmar–Japan BIT. Thus, it appears that the Myanmar–Japan BIT requires Myanmar to extend any benefits it grants to ASEAN investors through its integration in the ASEAN Economic Community to Japanese investors.

[63] *MTD v. Chile*, Award, para. 104; *Bayindir v. Pakistan*, Award, para. 157; *White Industries v India*, Final Award, paras. 11.2.1-11.2.9
[64] ASEAN–Korea Agreement on Investment, art, 27(4).
[65] Myanmar–China BIT, art. 3(3).
[66] For discussion, see *Impregilo v. Argentina*, Decision of the *ad hoc* Committee on the Application for Annulment, paras. 134-141.
[67] The MFN ASEAN–China Agreement on Investment also contains additional exceptions for treatment provided to third-country investors under existing and future investment treaties: art. 5(2), art. 5(3).
[68] Myanmar–China BIT, art. 3(4)(a); Myanmar–India BIT, art. 4(3)(a); Myanmar–Philippines, art. 3(2)(a).

Another point of difference between Myanmar's investment treaties is whether various measures or economic sectors are exempt from the scope of the MFN provision. Probably the most sweeping exemption of this sort arises from the combined effect of Article 5(2) and Article 6(1) of the ASEAN–China Agreement on Investment. Article 6(1) exempts any existing measures in force at the time the treaty comes into effect from the scope of the MFN provision. This exempts both advantages granted to third-country investors under the national law of the host state and more beneficial treatment granted to third-country investors through any other investment treaties of the host state that are already in force. Article 5(2) provides that the state parties "shall not be obliged" to extend any benefits granted to investors of third parties through new "agreements or arrangements" to foreign investors covered by the ASEAN–China Agreement on Investment. Instead, it is up to the state parties to the ASEAN–China Agreement on Investment to negotiate the extension of these benefits. The combined effect of Article 6(1) and Article 5(2) is that foreign investors covered by the ASEAN–China Agreement on Investment are not automatically entitled to any more generous protection granted to third-country investors. The corresponding provision of the Myanmar–Japan BIT (Article 7) differs in that only measures or sectors listed in the reservations of the treaty are exempt from the MFN obligation. There is no exemption for existing non-conforming measures, or for treatment granted under existing or future investment treaties.

In conclusion, the precise effect of each of the MFN provisions of each of Myanmar's investment treaties depends on a complex interplay of several factors, including:

- The treatment of existing non-conforming measures.
- The reservation of particular measures or sectors.
- The status of benefits conferred under customs unions and FTAs.
- Whether the provision is expressly limited to only those investments "in like circumstances."
- Whether the dispute settlement provisions of investment treaties are specifically excluded.

3.2.6 General Exceptions

In addition to reservations and clarifications to particular provisions, several of Myanmar's investment treaties contain general exceptions. The purpose of such exceptions is to ensure that the implementation of measures pursuing specified public-interest objectives do not trigger a host state's liability under an investment treaty. If drafted carefully, these provisions can address some of the concerns about investment treaties' impact on legitimate laws and policies designed to protect the public interest. However, from the outset it is important to note that the existence of exceptions clauses does not reduce the need to draft the other provisions of an investment treaty carefully. This is because no exceptions clause can ever address the full variety of situations that might result in investment treaty disputes and because the exceptions clauses themselves may be subject to unexpected interpretations by arbitral tribunals.

General exceptions clauses are not found in the Myanmar–China, Myanmar–India or Myanmar–Philippines BITs. Nor are they found in the AANZFTA. The ASEAN CIA contains three general exceptions clauses. Article 17 creates general exceptions for a range of measures, including those:

- "necessary to protect public morals or to maintain public order"
- "necessary to protect human, animal or plant life or health"
- "relating to the conservation of exhaustible natural resources."[69]

For a host state to benefit from these exceptions, it would also need to show that the measure in question does not amount to "arbitrary or unjustifiable discrimination" or a "disguised restriction on investors of any other Member State."[70]

Article 18 of the ASEAN CIA contains a second general exception dealing with security measures. This exception clarifies that the treaty does not "prevent any Member State from taking any action which it considers necessary for the protection of its essential security interests."[71] The use of the phrase "which [the state] considers necessary" makes this provision self-judging – i.e. it would be up to the state in question, and not an arbitral tribunal, to determine whether a measure is necessary for the protection of its essential security interests. The third general exception of the ASEAN CIA is contained in Article 16. This article allows a host state to restrict payments and financial transfers "in the event of serious balance-of-payments and external financial difficulties or threat thereof," so long as such restrictions meet certain criteria, including consistency with the Articles of Agreement of the IMF.[72]

The ASEAN–Korea Agreement on Investment, the ASEAN–China Agreement on Investment and the Myanmar–Japan BIT contain exceptions provisions that are broadly similar to the ASEAN CIA. However, there are important textual nuances. For example, the general exceptions clause of the ASEAN CIA creates an exception to the agreement for measures "aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of investment or investors of any Member State."[73]

To benefit from this exception a host state would need to show that any challenged tax measure is "equitable or effective." In contrast, the Myanmar–Japan BIT does not refer to tax measures in its general exception clause. Instead, it addresses tax measures in a separate article, which exempts all "taxation measures" from the application the majority of that treaty's provisions.[74] The effect of this provision is that only a handful of the provisions of the Myanmar–Japan BIT (including those requiring access to the courts of justice, transparency and compensation for expropriation) apply to tax measures.[75] As such, the treaty's national treatment, FET and MFN provisions do not apply to tax measures. This precise wording of exemptions and exceptions referring to tax measures is important because many past investment treaty disputes relate to tax changes.

3.2.7 Compensation and Damages

As with most investment treaties worldwide, Myanmar's investment treaties do not generally specify how much compensation should be paid to a foreign investor if a host state breaches the treaty. Similarly to other investment treaties, there are two references to the calculation of compensation of Myanmar's investment treaties. The first reference occurs in the context of the treaties' expropriation provisions. All Myanmar's investment treaties require compensation for the expropriation of a foreign investment to equal the fair market value of that investment.[76] The

[69] ASEAN CIA, art. 17(1)(a),(b),(f).
[70] ASEAN CIA, art. 17(1).
[71] ASEAN CIA art. 18(a).
[72] ASEAN CIA art. 16(2).
[73] ASEAN CIA art. 17(1)(d).
[74] Myanmar–Japan BIT, art. 23.
[75] Myanmar–Japan BIT, art. 23(3).
[76] e.g., Myanmar-China BIT, art. 5(1); ASEAN CIA, art. 14(2)(b). See discussion in Section 3.2.2.

second reference occurs in the context of damage caused to an investment during wars or civil disturbances. In such cases compensation must be provided on a non-discriminatory basis but need not equal the full market value of the damage to the investment.[77]

In the absence of express provisions governing compensation for other breaches of the treaty, tribunals have applied the principles of customary international law governing reparation for a breach of international law. These principles require the award of damages equal to the loss caused by the breach of the treaty, including lost future profits if proven. In arbitral practice, this standard is usually understood as the equivalent to the fair market value standard for expropriation. Both standards involve a "forward-looking" valuation of the investor's loss. In other words, the circumstances in which the investor acquired the investment are not relevant to the calculation of compensation or damages. In practice, this means an investor that has acquired an investment from the host state for a small fraction of its fair market value—perhaps because a public tender process was not conducted—could be entitled to compensation from the host state that is many times larger than the amount it has actually invested in the investment.

3.3 Investment Liberalization Provisions

The range of investment liberalization obligations contained in Myanmar's investment treaties varies significantly. Myanmar's older BITs focus exclusively on investment protection. Any liberalization provisions are limited, and linked closely to the goal of protecting established investment. In contrast, Myanmar's more recent investment treaties contain more extensive liberalization provisions.

3.3.1 Free Transfer of Capital Provisions

All of Myanmar's investment treaties contain provisions dealing with the transfer of capital related to an investment. However, these provisions vary substantially in their implications. The broader versions of these provisions have significant economic policy implications, as they require Myanmar to allow free inward and outward movement of capital at market exchange rates.

The provisions that allow for greatest policy space are found in Myanmar's BITs with China and the Philippines. They require that the host state "subject to its law and regulations, guarantee to the investors of the other Contracting Party the transfer of their investment and return held in its territory."[78]

This provision appears to apply only to capital outflows, not capital inflows. The qualification "subject to its laws" has the effect of allowing restrictions or regulation of capital outflows so long as such restrictions are implemented lawfully.

The free transfer of capital provisions of Myanmar's other six investment treaties differ in three important respects. First, they apply both to the inward transfer of capital related to an investment as well as the outflow (repatriation).[79] Second, they require such transfers to be permitted in "freely usable currency at the market rate of exchange."[80] Third, they omit the qualification "subject to its laws." The combined effect of these three features is to prevent a state from restricting capital movements so far as they relate to investments falling within the coverage of the relevant investment treaty.

[77] e.g., Myanmar-China BIT, art. 6; ASEAN CIA, art. 12.
[78] Myanmar-China BIT, art. 6(1); similarly Myanmar-Philippines BIT, art. 6.
[79] e.g., Myanmar-Japan BIT, art. 16(1)(a).
[80] e.g., ASEAN CIA, art. 13(2).

In five out of the six treaties containing these provisions, they are subject to exceptions ensuring that specific types of restrictions on capital movements are allowed in particular circumstances. Exceptions commonly allow restrictions on capital transfers in cases of bankruptcy, the enforcement of criminal judgments and balance-of-payments crisis, among others.[81] Provisions allowing a state to restrict cross-border capital movements in times of economic crisis are especially important as, in such circumstances, a state may need to act swiftly and decisively to maintain its financial reserves. The Myanmar–Japan BIT and all four of the ASEAN treaties create an exception for restrictions on capital movements taken in a crisis of this sort.[82] However, the Myanmar–India BIT does not contain a comparable exception.

3.3.2 Restrictions on Performance Requirements

Performance requirements are requirements concerning the location or the origin of the inputs, outputs or activities associated with an investment. Examples of performance requirements include requirements that a foreign investor use a certain percentage of Myanmar-produced inputs, requirements that investors export a minimum percentage of their output and requirements that investors employ a certain percentage of Myanmar staff. Performance requirements are used by a range of countries in a range of industries. While the evidence of their success is mixed, bans on performance requirements contained in investment treaties can have a deep impact on the regulation of foreign investment within a country.

From the outset, it is important to note that some types of performance requirements are prohibited by the WTO's Trade-Related Investment Measures (TRIMs) treaty,[83] specifically local-content requirements, trade-balancing requirements, and export limits.[84]

Myanmar is a party to the TRIMs treaty by virtue of its membership of the WTO. Most other forms of performance requirements—notably, requirements related to employment, research and requirements to form partnerships or joint venture arrangements with local firms—are not prohibited by the TRIMs agreement.

Myanmar's investment treaties take differing approaches to performance requirements. The ASEAN–China Agreement on Investment and the Myanmar–China, Myanmar–India and Myanmar–Philippines BITs do not contain any restrictions on performance requirements. The ASEAN CIA, ASEAN–Korea Agreement on Investment and AANZFTA all prohibit performance requirements that would be inconsistent with the TRIMs treaty, but do not place any further restrictions on the use of performance requirements. Moreover, these treaties do not allow claims that the host state has imposed a performance requirement that is inconsistent with the TRIMs treaty to be brought to investor–state arbitration.[85]

The Myanmar–Japan BIT covers a much broader range of performance requirements than those covered by TRIMS. Article 6(1) prohibits, among others, minimum export requirements, technology transfer requirements, research and development requirements, and requirements related to the nationality of the investment's management.[86]

[81] e.g., ASEAN CIA, art. 13(3), art. 13(4)(c).
[82] ASAN CIA, art. 16; ASEAN-China Agreement on Investment, art. 11; AANZFTA, ch. 15, art. 4; ASEAN-Korea Agreement on Investment, art. 11; Japan-Myanmar BIT, art. 20.
[83] UNCTAD, p. 3
[84] Agreement on Trade Related Investment Measures, annex.
[85] ASEAN CIA, art. 32(a); ASEAN–Korea Agreement on Investment, art. 18(1); AANZFTA, chp. 11, art. 20(a).
[86] Myanmar–Japan BIT, art. 6(1)(a), (g), (h), (j).

Article 6(1) appears to prohibit the use of these mandatory requirements even if they have been agreed in contractual negotiations between the foreign investor and the host state (the situation is different if compliance with the performance requirement is not mandatory but would allow the investor to qualify for a legal or financial benefit from government. In this situation is appears that the Myanmar–Japan BIT prohibits only TRIMs-inconsistent performance requirements).[87]

The Myanmar–Japan BIT also allows a foreign investor covered by the agreement to bring disputes relating to the use of performance requirements to investor–state arbitration. This is a significant departure from Myanmar's other investment treaties. The effect of this provision is to significantly limit Myanmar's policy space to use negotiated performance requirements as a way to maximize the positive spillovers from foreign investment.

3.3.3 National Treatment (at the Pre-Establishment Phase)

National treatment provisions require a host state to treat foreign investors and investments at least as well as they treat their own investors and investments. This section concerns national treatment obligations insofar as they apply to the admission, establishment, acquisition and expansion of investments—i.e., at the pre-establishment phase. Pre-establishment national treatment provisions are not always included in investment treaties. When included, they govern a host state's ability to limit or regulate the entry of foreign investment. Pre-establishment national treatment does not require a host state to allow unconditional market access to foreign investors. Host states may still impose restrictions or conditions on foreign investment, provided that those same restrictions or conditions are applied to investments made by national investors from the host state.

Myanmar's BITs with China, India and the Philippines do not require pre-establishment national treatment; nor does the ASEAN–China Agreement on Investment. Pre-establishment national treatment provisions are contained in the AANZFTA and the ASEAN–Korea Agreement on Investment. However, in both cases the national treatment provision will not come into force until the parties to the treaty complete negotiations on their respective schedules of reservations.[88] It is not clear where these negotiations stand. In contrast, both the ASEAN CIA and the Myanmar–Japan BIT contain pre-establishment national treatment provisions that have entered into force (or, in the case of the Myanmar–Japan BIT, will enter into force if and when the treaty is ratified by both parties).

In Myanmar's four investment treaties that contain pre-establishment national treatment, the basic form of the provision is similar. All four require a host state to provide treatment to foreign investors that is no less favourable than the treatment provided to domestic investors "in like circumstances" in respect of the "establishment, acquisition and expansion" of investments. The ASEAN CIA, ASEAN–Korea Agreement on Investment and AANZFTA also refer to the "admission" of investments. It is unclear whether there are any restrictions on foreign investment that are caught by the term "admission" that would not otherwise be caught by the terms "establishment" and "acquisition."

The major difference between these treaties is in the range of sectors and industries to which the pre-establishment national treatment obligation is applied. As previously noted, the national treatment provisions of AANZFTA and the ASEAN–Korea Agreement on Investment do not appear to have come into force and will only enter force if/when schedules of reservations to the national treatment provision have been finalized. The ASEAN CIA adopts a different approach. The liberalization provisions of the ASEAN CIA—presumably including pre-establishment treatment—apply in only six (albeit broadly defined) sectors: manufacturing, agriculture, fishery, forestry, mining and quarrying, and services incidental to manufacturing, agriculture, fishery, forestry, mining and quarrying.[89]

[87] Myanmar–Japan BIT, art. 6(2).
[88] AANZFTA, ch. 11, art. 16(5); ASEAN-Korea Agreement on Investment, art. 27(4).
[89] ASEAN CIA, art. 3(3).

The application of the pre-establishment national treatment provision of the ASEAN CIA is then subject to further reservations, listed in Myanmar's schedule. Myanmar has 11 listed reservations dealing with a range of issues, including land ownership, gemstone mining and the oil and gas sector. In this way the ASEAN CIA combines what is often called a "positive list" approach, in which liberalization commitments only apply to certain pre-defined sectors, with a "negative list" approach, in which certain sectors are reserved from the application of liberalization provisions that would otherwise be applicable.

The pre-establishment national treatment obligation of the Myanmar–Japan BIT is much broader in application. It applies to all investments in all industries and sectors, save those excluded by the two Annexes of reservations. As such, Myanmar must allow Japanese investors to make investments on the same terms as Myanmar investors, unless the measure restricting Japanese investment is among the existing non-conforming measures listed in Annex I or the sector in question is subject to a specific reservation listed in the Annex II. The result is that the Myanmar–Japan BIT grants greater rights of establishment to Japanese investors than the ASEAN CIA grants to ASEAN investors in Myanmar (as discussed in Section 3.3.4, the effect of the MFN provisions of the ASEAN CIA may mean that Myanmar is required to extend these greater rights of establishment to ASEAN investors if and when the Myanmar–Japan BIT enters into force).

Another difference between the Myanmar–Japan BIT and the ASEAN CIA, ASEAN–Korea Agreement on Investment and AANZFTA treaties is that the Myanmar–Japan BIT allows foreign investors to bring claims that they were subject to discrimination in the making of an investment to investor–state arbitration.[90] The ASEAN CIA, ASEAN–Korea Agreement on Investment and AANZFTA do not allow investors to bring claims relating to the admission, acquisition, establishment, or expansion of investments to investor–state arbitration—only claims related to the "management, conduct, operation or sale or other disposition" of the investment are permitted.[91]

3.3.4 Most-Favoured Nation Treatment (at the Pre-Establishment Phase)

Most-favoured nation provisions entitle foreign investors covered by an investment treaty to treatment at least as favourable as the treatment that the host state gives to foreign investors from any third state. This section concerns MFN obligations insofar as they apply to the admission, establishment, acquisition and expansion of investments—i.e., at the pre-establishment phase. The extension of MFN obligations to the pre-establishment phase can have systemic effects. It may require a host state to extend market access or liberalization commitments granted under any trade or investment treaty to all investors covered by other investment treaties containing pre-establishment MFN provisions.

Myanmar's BITs with China, India and the Philippines do not require MFN treatment at the pre-establishment phase, nor does AANZFTA. The MFN provision of the ASEAN–Korea does extend to the pre-establishment phase.[92] However, as previously noted, the MFN provision of the ASEAN–Korea Agreement on Investment does not appear to have come into force, and will only enter force if/when schedules of reservations to that provision have been finalized.[93]

[90] Myanmar–Japan BIT, art. 1 b); art. 18(1).
[91] ASEAN CIA, art. 32(a); ASEAN-Korea Agreement on Investment, art. 18(1); AANZFTA, chp. 11, art. 20(a).
[92] ASEAN-Korea Agreement on Investment, art. 4.
[93] ASEAN-Korea Agreement on Investment, art. 27(4).

The ASEAN–China Agreement on Investment presents an interesting and complicated case. While the treaty does provide for pre-establishment MFN treatment, benefits extended to third-country investors under existing treaties,[94] future treaties[95] and intra-ASEAN agreements[96] are excluded, as are existing non-conforming measures.[97] As such, the pre-establishment MFN provision would only seem to cover new market access or liberalization concessions extended unilaterally—i.e. not as a result of a treaty— to third-country investors.

The pre-establishment MFN provisions of the ASEAN CIA and the Myanmar–Japan BIT are much broader in application. It would appear that the pre-establishment MFN provision of the ASEAN CIA applies only to the six sectors noted in Section 3.3.3. However, within these sectors the application of pre-establishment MFN is not subject to further reservations.[98] This breadth of application is not unusual, as the ASEAN CIA forms part of a broader program of regional economic integration.

Unlike the pre-establishment MFN under the ASEAN CIA, the pre-establishment MFN obligation contained in the Myanmar–Japan BIT is not limited to particular sectors. In principle, it is subject to reservations for existing non-conforming measures and in sectors listed in Annex I and Annex II to the treaty, respectively. However, Myanmar does not appear to have listed any reservations to the MFN provision of that treaty—its listed reservations in the Myanmar–Japan BIT relate primarily to the national treatment obligations and, occasionally also to the performance requirements prohibition in that treaty. Moreover, the Myanmar–Japan BIT does not contain an exception for treatment conferred to third-country investors under a customs union or regional economic integration agreement. As a result, it seems that any benefits that Myanmar extends to ASEAN investors through its membership of the ASEAN Economic Community would need to be extended to Japanese investors.

Another unique feature of the Myanmar–Japan BIT is that it allows investors covered by the agreement to bring claims that they have not been granted MFN treatment at the pre-establishment phase to investor–state arbitration. This differs from the ASEAN CIA, the ASEAN–China agreement on Investment and the ASEAN–Korea Agreement on Investment, which do not allow investor–state arbitration in respect of pre-establishment claims.[99]

Overall, the combination of four characteristics of the pre-establishment MFN provision of the Myanmar–Japan BIT means that this obligation is significantly more extensive than that contained in any of Myanmar's other investment treaties. These characteristics are that the provision: is not sectorally limited; is not subject to any listed reservations; is not subject to an exception for treatment conferred under regional economic integration agreements; and is enforceable through investor–state arbitration.

3.4 Investor–State Arbitration

Aside from the Myanmar–Philippines BIT, all of Myanmar's investment treaties provide for investor–state arbitration. The basic features of investor–state arbitration were described in Section 1.5. This section examines the provisions of Myanmar's investment treaties governing investors' access to investor–state arbitration, as well as procedural rules governing the conduct of the arbitration.

[94] ASEAN-China Agreement on Investment, art. 5(3)(a).
[95] ASEAN-China Agreement on Investment, art. 5(2).
[96] ASEAN-China Agreement on Investment, art. 5(3)(b).
[97] ASEAN-China Agreement on Investment, art. 6(1).
[98] See ASEAN CIA, art. 9(1).
[99] ASEAN CIA, art. 32(a); ASEAN–Korea Agreement on Investment, art. 18(1); AANZFTA, ch. 11, art. 20(a); ASEAN–China Agreement on Investment, art. 14(1).

3.4.1 Availability of Investor–State Arbitration

Seven out of Myanmar's eight investment treaties allow foreign investors to bring claims against the host state under the treaty to investor–state arbitration. However, Myanmar's investment treaties do not allow investor–state claims to be brought with respect of all types of disputes under the treaty. In general, Myanmar's investment treaties allow claims for the breach of the investment protection provisions of investment treaties to be brought to investor–state arbitration. They also allow claims for breach of requirements to allow the free transfer of capital to be brought to investor–state arbitration.

The ASEAN CIA is a representative example. Subject to the limitation that only claims relating to post-establishment treatment of the investment may be brought to investor–state arbitration,[100] it allows an investor to bring claims alleging breach of the following provisions of the agreement, among others: expropriation; fair and equitable treatment; national treatment; most-favoured nation treatment; and free transfer of capital.[101]

Provisions relating to the free transfer of capital aside, Myanmar's investment treaties generally do not allow claims for the breach of the investment liberalization provisions of investment treaties to be brought to investor–state arbitration. The only exception to this is the Myanmar–Japan BIT, which allows claims for the breach of the prohibition on performance requirements and claims for the breach of the obligations to provide national treatment and MFN treatment at the pre-establishment phase to be brought to investor–state arbitration.

3.4.2 Provisions Governing Access to Investor–State Arbitration

Most of Myanmar's investment treaties require a foreign investor to seek to resolve its dispute through consultations or negotiations with the host state prior to commencing arbitration. Under the Myanmar–Japan BIT, an investor may only submit after three months have elapsed from the point at which the investor initiated.[102] Under Myanmar's other investment treaties, the investor must wait six months (or, sometimes, 180 days) after initiating consultations before submitting a dispute to investor–state arbitration.[103]

In most other areas of international law a private individual (or company) is only entitled to bring a dispute against a government to an international court or tribunal after the individual has attempted to resolve the dispute in the courts of the country concerned and the relevant courts have reached a final decision. This principle is called the "exhaustion of local remedies" rule. With some notable exceptions, most investment treaties do not require a foreign investor to attempt to resolve their dispute through the national court system before commencing arbitration. None of Myanmar's investment treaties require foreign investors to attempt to resolve their dispute in local courts before proceeding to arbitration.[104]

A different type of provision, which is contained in some of Myanmar's investment treaties, prevents the foreign investor from pursuing the same dispute through the national court and the process of investor–state arbitration. These provisions are commonly called "fork in the road" clauses because they require an investor to choose between alternative routes for proceeding with a dispute. Versions of these provisions are found in the ASEAN CIA,

[100] ASEAN CIA, art. 32(a).
[101] ASEAN CIA, art. 32(a).
[102] Myanmar–Japan BIT, art. 18(4).
[103] e.g., Myanmar–India BIT, art. 9(2); ASEAN CIA, art.32.
[104] If an investor does commence proceedings in local courts, the Myanmar–China BIT requires exhaustion of that process before a claim can be brought to investor–state arbitration under an ad hoc procedure. However, this requirement of exhaustion does not apply if the investor decides not to commence proceedings in local courts and, instead, submits the claim directly to arbitration following the required period of negotiations. Nor does it apply if the investor initiates proceedings under the ICSID Convention. See, Myanmar–China BIT, art. 9(3).

ASEAN–Korea Agreement on Investment and AANZFTA, although there are important nuances in the wording of each provision.[105] The policy rationale behind such provisions is to prevent a host state being put to the expense and inconvenience of defending the same case simultaneously in multiple procedures. However, in practice such provisions have not always achieved their intended result. This is because arbitral tribunals have sometimes seen claims pursued in national courts, which by their nature normally allege a breach of national law, as involving a different "dispute" to claims arising out of the same facts but alleging a breach of an investment treaty.[106]

3.4.3 The Choice of Procedural Rules Governing Investor–State Arbitration

Regardless of the procedural rules that govern the arbitration, the basic structure of investor–state arbitration under Myanmar's investment treaties is the same. The investor bringing the dispute would appoint one arbitrator, the host state defending the dispute would appoint a second arbitrator and the investor and the host state must then agree on the appointment of a third arbitrator. If the host state refuses to appoint a second arbitrator or if the investor and the host state cannot agree on a third arbitrator, a default appointing authority would make the appointments. Once constituted, the tribunal has a broad authority to manage the proceedings as it sees fit. The tribunal ultimately issues an award, containing its decision on the dispute. A tribunal's award is final and binding.

The procedural rules are relevant in that they address a range of technical questions—for example, the division of the arbitral proceedings into different phases, the language of the proceedings, the taking of evidence and tribunals' powers to make interim orders. If the arbitration is governed by the ICSID Convention, there would also be implications for the procedures by which the arbitral award could be challenged and the way in which the arbitral award is enforced. This is because the ICSID Convention establishes a special "internationalized" system for the challenge and enforcement of investor–state arbitral awards. In contrast, awards rendered under the ICSID Additional Facility, the UNCITRAL rules or any other form of ad hoc arbitration rely on the same mechanisms as would govern the challenge and enforcement of commercial arbitration awards.

Myanmar's investment treaties generally grant the foreign investor initiating the investor–state arbitration a choice between different sets of procedural rules to govern the arbitration. The ASEAN CIA, the ASEAN–China Agreement on Investment, the ASEAN–Korea Agreement on Investment and AANZFTA all follow the same basic structure. They allow the investor to submit the dispute under:

- The ICSID Convention, so long as both the host state and the home state are parties to the ICSID Convention;
- The ICSID Additional Facility, so long as either the host state or the home state are parties to the ICSID Convention; or
- An ad hoc arbitration under the UNCITRAL Rules.[107]

The Myanmar–Japan BIT offers investors the same range of options.[108] Because Myanmar is not a party to the ICSID Convention, the choice in claims against Myanmar or by Myanmar investors against other states, in practice, will be between the ICSID Additional Facility and the UNCITRAL Rules.[109] This would change if Myanmar becomes a party to the ICSID Convention in the future. However, Myanmar's investment treaties do not require Myanmar to sign the ICSID Convention and some countries—such as, Brazil and India—have elected not to join the ICSID Convention.

[105] ASEAN CIA, art. 33(1); ASEAN–Korea Agreement on Investment, art. 18(6); AANZFTA, ch. 11, art. 21(1).
[106] e.g., *Toto Constuzioni v. Jordan*, Award on Jurisdiction, paras. 211-212.
[107] ASEAN CIA, art. 33(1); ASEAN-China Agreement on Investment, art. 14(4); ASEAN–Korea Agreement on Investment, art. 18(5); AANZFTA, ch. 11, art. 21(1).
[108] Myanmar–Japan BIT, art. 18(4).
[109] The ASEAN CIA also offers the additional option of submitting the dispute to a regional arbitration centre.

Under the Myanmar–India BIT the investor's choice is between investor–state arbitration under the ICSID Convention (but only if the home and host states are party to the ICISD Convention) or the UNCITRAL Rules.[110] Submission of the dispute to the ICSID Additional Facility is only possible if the home state agrees. Under the Myanmar–China BIT the investor's choice is between investor–state arbitration under the ICSID Convention and an ad hoc arbitration in which the tribunal has a broad authority to determine its own procedure.[111]

3.4.4 Additional Procedural Rules Governing Investor–State Arbitration

Investment treaties may include additional procedural rules for investor–state arbitration. Such rules override any inconsistent provisions in the set of procedural rules chosen to govern the arbitration. Several of Myanmar's investment treaties contain such additional procedural rules. For example, the ASEAN CIA, ASEAN–China Agreement on Investment, ASEAN–Korea Agreement on Investment, AANZFTA and the Myanmar–Japan BIT all require that a dispute must be submitted to arbitration within three years of the time at which the investor became aware of the events that are the subject of the claim.[112] The ASEAN CIA and AANZFTA add further requirements, including that any person appointed as an arbitrator must have expertise in international law,[113] and that the arbitral tribunal must hear any preliminary objections raised by the host state in a separate phase of proceedings prior to addressing the merits of the investor's claim.[114] These additional rules apply regardless of the set of procedural rules under which the investor has chosen to proceed.

3.4.5 Transparency of the Arbitral Proceedings

Four of Myanmar's investment treaties do not impose additional transparency requirements on the arbitration beyond those found in the procedural rules governing the arbitration. Accordingly, questions relating to the transparency of the proceedings would be governed by the set of procedural rules chosen to govern the arbitration. The ICSID Additional Facility Arbitration Rules do not expressly require hearings and documents relating to the proceedings to be made public. For this reason, hearings and documents relating to the proceedings are not normally made public unless both the foreign investor bringing the claim and the host state agree on disclosure. However, the Additional Facility Rules do require ICSID to publish excerpts of the legal reasoning of the award, in the event it is not made public in full.[115]

In 2013, a series of changes to the UNCITRAL Rules governing investor–state arbitration were adopted. The new rules contain mandatory provisions requiring the public disclosure of documents relating to investor–state arbitrations under investment treaties, as well as requirements that the hearings be held in public. However, these rules only apply to the use of the UNCITRAL Rules in arbitrations under investment treaties signed after April 1, 2014. Therefore, they do not apply to arbitration under Myanmar's existing investment treaties. Instead, arbitrations in which the investor elects to use the UNCITRAL Rules would be governed by the un-amended 2010 version of those Rules. They provide for an even lower degree of transparency than the ICSID Additional Facility. One way to avoid this outcome would be for Myanmar and its investment treaty partners to sign the UNCITRAL Transparency Convention, currently under negotiation. By signing this Convention states agree to apply the new UNCITRAL Rules on transparency in investor–state arbitration to arbitrations arising under their existing investment treaties.

[110] Myanmar–India BIT, art. 9(3).
[111] Myanmar–China BIT, art. 9(3).
[112] e.g. Myanmar–Japan BIT, art. 18(6).
[113] ASEAN CIA, art. 35(2); AANZFTA, ch. 11, art. 23(2).
[114] ASEAN CIA, art. 36(1); AANZFTA, ch. 11, art. 25(1).
[115] ICSID Additional Facility Arbitration Rules (2006), art. 53(3).

Three of Myanmar's investment treaties do contain limited provisions on the transparency of investor–state arbitration, which vary the procedural rules that would otherwise apply. The ASEAN CIA and AANZFTA grant the host state the power to release the "awards and decisions" of the tribunal publicly, subject to the redaction of confidential information.[116] The Myanmar–Japan BIT extends this power to include the publication of documents submitted to the arbitral tribunal, as well as the awards and decisions rendered by it.[117] Under all three treaties the host state is not required to exercise this discretion to make documents relating to the proceedings public.

3.4.6 Provisions Granting Interpretive Control to States

Some of Myanmar's investment treaties contain provisions that allow the state parties to the treaty to influence the way an arbitral tribunal interprets the treaty. Such provisions seek to address concerns that arbitral tribunals have interpreted investment treaties inconsistently with what was originally intended by the states that negotiated and signed the treaty. Article 40(2) of the ASEAN CIA and Article 27(2) of AANZFTA both require an arbitral tribunal, at the request of either party to the dispute, "to request a joint interpretation of any provision of [the treaty] that is in issue in a dispute" from the states that are party to the treaty. If the state parties issue an interpretation within 60 days, it would be binding on the tribunal.[118] It is unclear how useful this mechanism will prove in practice, given that there are 10 state parties to the ASEAN CIA and 12 state parties to AANZFTA. All of the state parties to the treaty in question would need to agree for a joint interpretation to be issued.

More circumscribed provisions grant a degree of interpretative control to states in disputes alleging the expropriation of a foreign investment by a government taxation measure. Provisions dealing with this very specific situation are found in the ASEAN CIA, the ASEAN–China Agreement on Investment, the ASEAN–Korea Agreement of Investment and the AANZFTA. They allow the home state and host state in a dispute to determine whether a taxation measure subject to challenge by a foreign investor under the treaty amounts to expropriation.[119] While such determinations are not formally binding on the tribunal it would, presumably, be highly unusual for a tribunal to ignore an agreed view expressed by the relevant states through a mechanism created by the treaty.

None of these provisions diminishes the general authority of the state parties to an investment treaty to interpret, amend or terminate the treaty by collective agreement among themselves at any point in time. Aside from a few special situations that are not relevant here, it is always possible for the states that are party to a treaty to vary its terms if they agree to do so.[120]

3.5 Other Types of Provisions in Myanmar's Investment Treaties

While most investment treaties focus on the obligations of the host state in relation to foreign investment within its territory, it is possible to include a range of other types of provisions in investment treaties. This section examines three other types of provision that are, or could be, included in Myanmar's investment treaties.

[116] ASEAN CIA, art. 39; AANZFTA, ch. 11, art. 26.
[117] Myanmar–Japan BIT, art. 18(12).
[118] e.g., ASEAN CIA, art. 40(3).
[119] e.g., ASEAN CIA, art, 36(7).
[120] See Bonnitcha, J. (2014). *Substantive protection under investment treaties: a legal and economic analysis*. Cambridge: Cambridge University Press.

3.5.1 Regulatory Obligations

The ASEAN CIA, ASEAN–China Agreement on Investment, AANZFTA and the Myanmar–Japan BIT all place limited regulatory obligations on the state parties to those treaties. In some respects, these obligations are similar in character to the investment protection obligations discussed in Section 3.2. However, unlike investment protection provisions, states' regulatory obligations are not limited to the treatment of foreign investments. Rather, these obligations require the state parties to meet certain regulatory standards, regardless of whether any foreign investors are affected by the regulatory conduct in question.

The most common regulatory obligation in Myanmar's investment treaties concerns the transparency of laws and regulations maintained by each state party. These provisions require each state to publish promptly all law regulations and guidelines that relate to investment in their territory.[121] Some of these provisions also require each state to establish a contact point, through which this information can be made available to foreign investors.[122] The Myanmar–Japan BIT contains a further provision requiring each state party to "provide a reasonable opportunity for comments by the public before the adoption, amendment or repeal of regulations of general application covered by [the BIT]."[123] It also contains a provision requiring each state, in accordance with its law, to ensure that measures are taken to prevent and combat corruption.[124]

The Myanmar–Japan BIT also places a regulatory obligation on both states to "grant and ensure the adequate and effective protection of intellectual property rights."[125] The relevant provision outlines a process of consultation between the two state parties if one party raises a concern about the adequacy of the other party's legal regime governing intellectual property. From the context, it appears that foreign investors covered by the agreement could not bring allegations that the host state failed to provide "adequate and effective protection" to their intellectual property rights to investor–state arbitration. However, this issue is not expressly addressed in the treaty and is not entirely clear.

3.5.2 Investment Promotion Provisions

Several of Myanmar's investment treaties contain provisions addressing investment promotion. These provisions often articulate shared objectives in aspirational, rather than mandatory, language. For example, Article 25 of the ASEAN CIA, which deals with investment facilitation, requires only that a state "endeavour to cooperate in the facilitation of investments."[126] This formulation does not require cooperation, still less cooperation leading to the achievement of specified objectives.

Other provisions do require the governments in question to take reasonably clearly defined actions toward achieving a specified objective, even if they do not place an obligation on the state to ensure that the objective is achieved. For example the ASEAN–China Agreement on Investment requires the state parties to cooperate in promoting ASEAN–China as an investment area, including by "promoting business matching events."[127]

[121] Myanmar–Japan BIT, art. 8(1); ASEAN CIA, art. 19(1): ASEAN–China Agreement on Investment, art. 19(1); AANZFTA, chp. 11, art. 13(1).
[122] e.g., ASEAN CIA, art. 21(1)(d).
[123] Myanmar–Japan BIT, art. 9.
[124] Myanmar–Japan BIT, art. 11.
[125] Myanmar–Japan BIT, art. 22(1).
[126] ASEAN CIA, art. 25.
[127] ASEAN–China Agreement on Investment, art. 20(a).

3.5.3 Obligations of Foreign Investors?

In principle, there is no obstacle to including obligations for foreign investors in investment treaties. Such provisions could address a range of questions, including investors' obligations to comply with domestic law, obligations not to be involved in corruption, obligations to meet certain standards of transparency in relation to revenues, payments and the setting of prices in transfers between related parties, and obligations to operate consistently with relevant international labour and environmental standards. If obligations for foreign investors are included in investment treaties, it is important to specify the consequences of the investors' non-compliance.

None of Myanmar's existing investment treaties place obligations on foreign investors. The Myanmar–Japan BIT does prohibit both countries from lowering labour or environment standards in order to attract new investment.[128] However, this obligation is addressed to the two state parties to the treaty, not to foreign investors. It concerns the regulatory standards imposed by the state parties within their territories. Part 3 of the Southern African Development Community Model BIT provides an example of how investor obligations could be incorporated into investment treaties.[129]

[128] Myanmar–Japan BIT, art. 25.
[129] SADC Model Bilateral Investment Treaty Template with Commentary, arts. 10-19.

4.0 Conclusions and Options for Reform

Section 3 of this paper reviewed some of the key features of Myanmar's existing investment treaties. This review showed that there is a very high degree of variation between the investment treaties that Myanmar has entered with or through ASEAN and Myanmar's BITs. This variation results from the inclusion of different types of provisions in different treaties and from differences in the drafting of provisions common to several treaties. It also showed that there are significant variations among the four ASEAN investment treaties to which Myanmar is a party. In the course of the analysis, the review highlighted some of the ways in which apparently minor differences in wording can significantly alter an investment treaty's implications in practice. These differences make compliance with existing investment treaties difficult and significantly increase the risk of unexpected and costly future investor–state claims.

In considering its policy on existing treaties, an important initial step is for Myanmar to clarify the objectives of its investment treaty program. What are Myanmar's objectives in signing an investment treaty? How effective are investment treaties at achieving these objectives? Are there other ways of achieving these objectives? Do the costs of signing investment treaties outweigh the benefits? The last of these questions is especially important given that many of the costs, notably the risk of future investor–state arbitral claims, will only crystallize several years after the treaty is signed. These are some of the policy questions that could be considered.

Having considered these questions, Myanmar has a limited range of options in relation to existing investment treaties. These range from the status quo—continuing with the existing treaties already in force, even if they are not considered to be ideal—to various options for renegotiation or even termination of existing treaties. However, renegotiation is only possible with the agreement of all the state parties to the treaty in question (the Myanmar–Japan BIT may be easier to renegotiate insofar as it has not yet entered into force). And, as discussed in Section 3.1.4, there are also difficulties in terminating investment treaties once they have entered into force. The choice between these options is as much a policy choice as legal one. It requires an assessment of the costs and benefits of the various options.

In relation to future investment treaty negotiations, Myanmar has the opportunity to adopt a more balanced and consistent treaty practice. In light of this review of existing investment treaties, Myanmar can adopt a new policy that better achieves the objectives while minimizing the costs associated with investment treaties. An initial question is whether negotiating new investment treaties is an important policy priority *now*. In light of disappointing evidence on the effectiveness of investment treaties in attracting new foreign investment, the risks of agreeing to a poorly drafted investment treaty (which would then be very difficult to change) may significantly outweigh any potential benefit from signing a new treaty. As such, the most sensible policy option for the government of Myanmar may be to defer any negotiation of new investment treaties for the time being, and focus instead on economic and legal reform priorities that are more likely to contribute to the country's development.

If a choice is made to proceed with negotiations for new investment treaties, another option would be to use one of Myanmar's existing investment treaties as an initial template for negotiations. The most obvious candidate for this role is the ASEAN Comprehensive Investment Agreement. The ASEAN CIA already governs Myanmar's investment relationship with nine of its 15 investment treaty partners, and its provisions are more balanced and precise than some of Myanmar's other investment treaties – notably the four BITs reviewed in this paper. There is also an evident policy rationale for Myanmar deciding not to confer more generous rights on foreign investors than are currently available to ASEAN investors under the ASEAN CIA. Again, the choice between different courses of action is as much a policy question as a legal one. It is hoped that the analysis of the implications of different provisions in this paper will contribute to a more informed choice.

The text of all the investor–state arbitral awards referred to in this note is available at www.italaw.com.

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