EXIT, QUASI-EXIT, AND SILENCE: How Developing Countries React when Discontent with the Investment Treaty Regime

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Abstract

As a result of growing discontent with Investor-State Dispute Settlement (ISDS) and the expansive nature of the substantive protection standards in Bilateral Investment Treaties (BITs), States around the world are revisiting their investment treaties. Developing countries are the most frequent respondents in ISDS cases. They have shared a growing concern that BITs restrict their right to regulate in the public interest. These realities trigger two research problems motivating this dissertation: how and why did developing countries sign these treaties; and how and why have their reactions to emerging policy constraints differed.

While there is a considerable literature addressing the first problem, there is a dearth of studies addressing the second. This political economy study conducts a qualitative comparative case study analysis of three developing countries – Egypt, South Africa, and Bolivia – that share similarities in the way they signed BITs, but reacted differently to their constraints. Mobilising Hirschman's Exit, Voice, and Loyalty framework, this thesis assesses what options are available to developing countries (in practice) and which factors determine why a particular route is pursued. This framework is supplemented by Poulsen's adaptation of the Bounded Rationality theory and Gwynn's use of the Structural Power Framework to enable a historical analysis of how and why BITs were signed and later contested.

This thesis argues that in order to reflect the options available to developing countries, Hirschman's framework must be reconceptualised to take into consideration the dynamics of the investment treaty regime and the challenges facing developing countries when deciding which route to take. It proposes revising Hirschman's framework so that 'exit' is reconceptualised, 'voice' is replaced with 'quasi-exit', and 'loyalty' with 'silence'. The main factors that influence the decision to take one route or another include structural power dynamics influenced by a country's international economic position, and its regime's ideological motives.

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Chapter 1. Introduction

The investment treaty regime is facing a legitimacy crisis. Realisation of the extent to which Bilateral Investment Treaties (BITs) and the Investor-State Dispute Settlement mechanism (ISDS) can threaten the sovereign right of host States to regulate, together with uncertainty regarding the economic benefits of joining the regime, have resulted in an attack on the regime by scholars, policymakers and civil society representatives alike. As part of the backlash against the investment treaty regime, both developed and developing countries have reacted, although in varying modes. Capital-exporting countries have reaffirmed their role as regime shapers by selectively amending their treaties. As rule takers and predominantly respondents to investor–State arbitration cases, developing countries (particularly capital-importing ones) are more exposed to the risks posed by the regime and significantly less powerful in terms of shaping or reforming the regime. Reactions of developing countries that have vocally contested the regime have varied, ranging from silence to attempts to exit the regime. This thesis investigates both how and why developing countries signed BITs and how and why they have reacted differently.

In contrast to the regulation of world trade, no comprehensive multilateral accord exists for global investments flows (Berger, 2013, p. 2). Instead, the investment treaty regime is composed of thousands of investment treaties (including more than 2,900 BITs[1]), complemented by the ISDS mechanism. The regime has been shaped by capital-exporting countries; these have sought to promote BITs since the 1950s, in an attempt to protect their nationals' foreign investments in developing countries. While the motives of capital-exporting countries for establishing this regime are clear, the rationale for developing countries' membership is less straightforward (Katselas, 2014). Indeed, developing countries have historically approached foreign investment with scepticism (Katselas, 2014); their opposition to the rules promoted by the capital-exporting countries, on the grounds of protecting their sovereignty, was one of the primary reasons why a multilateral agreement never materialised. Nevertheless, capital-exporting exporting countries, with the help of multilateral institutions like the

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[1] This thesis focuses on BITs. However it is important to note that global investment flows are also protected by investment provisions/chapters in more than 300 other trade and investment agreements.

World Bank and the United Nations Conference on Trade and Development (UNCTAD), were able to promote BITs and the investment treaty regime to developing countries on the premise that BITs would stimulate foreign direct investment (FDI) inflows. The proliferation of BITs amongst developing countries coincided with the rise of neoliberalism, which advocated for the liberalisation of inward FDI as an integral driver of economic development at a time when other sources of capital and credit were scarce (Katselas, 2014; Puig, 2013; Williamson, 2009).

A few decades later a significant rise in ISDS cases filed by investors against developing States triggered a backlash from developing countries, which began to revisit their membership of the neoliberal regime. Doubts arose over the benefits of BITs and concerns were expressed about their potential costs (Trubek, 2017). While BITs proved to be effective instruments in protecting foreign investors, they have failed to contribute to inclusive economic development in host States (El-Kady, 2016). Critics have argued that the current investment treaty regime is facing a legitimacy crisis, citing several structural challenges facing the regime (Morosini and Badin, 2017).

One of the main criticisms directed towards the regime is the absence of a clear link between signing BITs and the level of FDI inflows. Another major criticism relates to the controversial substantive clauses in BITs that unduly protect private property at the expense of the right of host countries to regulate in the public interest (Morosini and Badin, 2017). The structure of most BITs reveals a significant imbalance between clauses safeguarding the interests of investors and provisions preserving the interests of host States (e.g. policy space and increased FDI inflows). Broadly drafted investment protection provisions are not adequately complemented with provisions for host States' regulatory rights, investor obligations, and the protection of public-policy concerns (El-Kady, 2016). The expansive nature of the substantive protection standards in BITs has also led to inconsistent and unintended interpretations of BIT provisions by arbitral tribunals in ISDS cases, including challenges against policy measures taken in the public interest (El-Kady, 2016). In addition to the sovereignty costs that result from the raft of decisions by arbitration tribunals that use the vague wording of provisions in BITs to craft rulings that pose a threat to the regulatory autonomy of host States (Trubek, 2017), the substantial awards also represent a significant burden on the public budgets of developing countries. Even when claims are settled or dismissed in favour of the host State, the potential compensation payment (in case of settlement) and arbitration costs, in general, are costly for host States. Finally, the legitimacy crisis of the investment treaty regime is also linked to the deficiencies of the ISDS mechanism. These shortcomings include the potential disparity of treatment between foreign investors and domestic investors, costly and lengthy procedures, allegations of arbitrators' bias, lack of arbitrator accountability, lack of transparency, the inconsistency of awards, the absence of an appeals mechanism, and constraint on policy space (Morosini and Badin, 2017).

The magnitude of the legitimacy crisis facing the investment treaty regime increased significantly when some capital-exporting countries found themselves in the unusual position of being respondents to claims by investors challenging their regulatory measures. Despite the bilateral nature of these investment treaties, BITs were initially seen as constraining only the capital-importing partner. Accordingly, these developments led several major capital-exporting countries to revise their treaties in order to retain more policy space themselves (Trubek, 2017, p. 296). Since 2002, traditional investment treaty making through BITs has been losing momentum. In 2017, only 18 BITs were signed representing a considerable decline compared to the 200 BITs signed in 1996 (UNCTAD, 2018a). This trend reflected a turning point in the investment treaty making process as governments' increased awareness of the potential costs of BITs has led to reflection on their membership of the regime and the review of their commitments under BITs (Calvert, 2017; Jandhyala et al., 2011; Poulsen and Aisbett, 2013; UNCTAD, 2018a). The next development was the beginning of a backlash against the regime as developing and developed countries began to contest the investment treaty regime.

Capital-exporting countries have responded to the legitimacy crisis facing the regime in their capacity as regime shapers and rule makers. Their reactions consisted of amending the wording of certain substantive clauses to narrow their scope of protection and introducing procedural reforms to limit their exposure to investment arbitration. While attempting to reform the existing regime, the objective remained the safeguarding of the existing neoliberal investment protection model. Developing countries, however, have been the more frequent respondents to arbitration cases and the constraints on their policy space have been considerably higher, with significant implications for their capacity to implement their development strategies. Consequently, developing countries that have vocally contested the regime have criticised the unbalanced foundations of the regulations in the existing investment treaty regime with the charge that it overprotects investors at the expense of the host State's regulatory space. However, unlike their developed counterparts, their reactions have differed, ranging from introducing alternative frameworks to maintaining the status quo. The establishment of the investment treaty regime through thousands of bilateral treaties has meant that it lacks a central body where multilateral negotiations could take place and where all members would have a seat at the table and some voice in determining the nature of the regime (Katselas, 2014). Thus, whereas historically in the 1960s and 1970s developing countries were able to form blocs and collectively defy investment protection rules promoted by capital-exporting countries, under the current investment treaty regime, power dynamics, amongst other factors investigated in this thesis, have determined how they have reacted.

These realities trigger the three main research questions motivating this dissertation: 1) how and why did developing countries sign investment treaties; 2) how and why have their reactions to emerging policy constraints caused by the investment regime differed; and 3) to what extent does Hirschman's Exit, Voice and Loyalty framework reflect the options available to developing countries that are discontent with the regime?

In contrast to the ample legal literature on BITs, economists and political scientists have only relatively recently started to investigate the political economy of BITs. Existing literature has focused on investigating the impact of BITs on policy space, the relationship between BITs and FDI, and the diffusion of BITs amongst developing countries. In terms of studying the reactions of developing countries, most efforts in the existing literature have focused on categorising the different reactions and assessing the effectiveness of the different options in theory. Less attention has been paid to the actual experience of developing countries that have attempted different routes of contestation. There is a clear gap in the literature when it comes to accounting for the variation in reactions of developing countries that have vocally contested the regime (Calvert, 2017). Furthermore, the implications of these experiences in terms of the actual options available to developing countries to act on their dissatisfaction with the regime *in practice* have also been neglected.

This thesis seeks to fill this gap in the literature by analysing the different reactions of developing countries that have expressed their discontent with the investment regime, through a detailed and comprehensive comparative case study analysis using original empirical research. This political economy study conducts a qualitative comparative case study analysis of three developing countries – Egypt, South Africa, and Bolivia – that share similarities in the way they signed BITs, but which reacted differently to their constraints. Mobilising Hirschman's Exit, Voice and Loyalty framework, this thesis assesses what options are available to developing countries (in practice). Moreover, this thesis argues that in order to gain an in-depth understanding of the feasible options available to developing countries discontent with the regime, the factors that influenced both how and why they joined the regime and why they reacted differently must be taken into consideration. Hence, to provide greater theoretical depth to a "Hirschman-ian" categorisation of the different responses of dissatisfied developing countries, additional theoretical frames are deployed.

Three factors have been identified to supplement the Hirschman framework in this thesis: ideological motives of the ruling regime, bounded rational behaviour of government officials, and structural power dynamics. These three factors generally contribute to explaining both the entry to and contestation of the regime. However, based on the findings of the case studies, the extent to which they answer the questions of how and why developing countries joined the regime and why they reacted differently varies. While structural power dynamics play a pivotal role in explaining the research questions of how and why they joined the regime and why they reacted differently, bounded rational behaviour is deemed more relevant to explaining how developing countries joined the regime, and ideological motives are more useful in determining the routes adopted when reacting to discontent.

Accordingly, to explain how and why developing countries joined the regime this thesis adopts an eclectic approach combining the Structural Power framework as adapted by Maria Gwynn and the Bounded Rationality theory as adapted by Lauge Poulsen. However, to account for why developing countries discontent with the regime have reacted differently, this thesis builds on contributions from the existing literature and argues that the ideological motives of the regime and structural power dynamics determine the route adopted. The ideological position of the regime (mainly whether or not the country embraces the neoliberal model), determines whether the

State will seek to exit the system or whether it will attempt to practice voice. The structural power dynamics influenced by the economic position of the country and the results of a cost-benefit assessment by the country's officials determine whether it has the leverage to challenge its capital-exporting treaty partners and proceeds with either route or maintain the status quo.

Finally, while scholars and practitioners have argued that developing countries can choose between exit or voice, the findings of this dissertation reveal that the actual choices available to these countries are more restricted and complicated than understood in the existing literature. This thesis concludes that in order to reflect the options available to developing countries in practice, Hirschman's framework can be reconceptualised to take into consideration the power dynamics of the investment treaty regime and the challenges facing developing countries when deciding on which route to adopt. The revised framework includes a reconceptualised 'exit', the replacement of 'voice' with 'quasi-exit', and 'loyalty' with 'silence'.

The rest of the thesis proceeds as follows. Chapter 2 provides the necessary context for addressing the two main areas this thesis focuses on: (i) how and why did developing countries sign these BITS, in light of the significant costs and uncertain benefits associated with these treaties; and (ii) how and why have they reacted differently? It first outlines how the terms 'policy space' and 'investment treaty regime' are defined in this thesis. The rest of the chapter addresses the key arguments on how the investment treaty regime constrains the policy space of States to regulate and on the current legitimacy crisis facing the regime. Lastly, it documents how both developing and developed States that have expressed their discontent with the regime have reacted. Chapter 3 reviews how the existing literature on the investment treaty regime addresses the three research questions articulated above and identifies the literature gap that this thesis aims to fill. The chapter also outlines the main theories and frameworks that are used in the comparative case study analyses conducted in Chapters 5, 6 and 7. Chapter 4 outlines the research objectives and the methodology of the thesis. It documents the case selection process adopted and the primary and secondary sources that informed the qualitative analysis of the case studies. It also illustrates how the case studies are structured and the manner in which frameworks identified in Chapter 3 are employed in each case study. Chapters 5, 6 and 7 present detailed analyses of the experiences of Bolivia, South Africa, and Egypt. Each case study provides an analysis of the historical process of signing BITs and traces the events that led to the realisation of the extent to which the country's membership of the investment treaty regime had constrained its policy space (including its experience with ISDS cases). Finally, after analysing the factors that determine the route taken by the country, each case study concludes with an assessment of the extent to which a specific Hirschman category can explain the routes adopted by the country. In the final chapter, Chapter 8, the findings of the three case studies are used to revisit the research questions running through the thesis. The chapter analyses the main factors that influenced the route taken by each country and presents the revisions proposed to Hirschman's framework in this thesis, in order to illustrate the routes available to developing countries that are discontent with the regime in practice. To demonstrate, further, how the findings of this thesis apply to other developing countries, examples of other countries that fit under each of the new categories ('reconceptualised exit', 'quasi-exit', and 'silence') are provided. Finally, the chapter concludes with the contributions of this thesis to the literature on the political economy of the investment treaty regime and identifies avenues for further research.

Chapter 2. Investment Treaty Regime Facing a Legitimacy Crisis?

1. Introduction

In spite of the rapid proliferation of BITs in recent decades, the current investment treaty regime is at a crossroads. The regime has been subject to criticisms from developing and increasingly from developed countries, due to the growing number of investor claims against sovereign States triggered through substantive protection standards in BITs and challenging a wide range of regulatory measures undertaken by States (Perrone, 2014; Singh and Ilge, 2016).With over 855 known investment treaty arbitration cases filed to date,[2] in addition to an unknown number of cases in which the threat of arbitration has been used as a bargaining tool by investors, host States are increasingly finding themselves defending their domestic laws and policies in international arbitral tribunals (Langford et al., 2018). Furthermore, in several cases, these claims have resulted in substantial compensation awards for measures and policies that many States believe are ‘both legitimate and within their exclusive purview as sovereigns’ (Langford et al., 2018, p. 72).

In both policy and academic circles, fundamental concerns have been raised about the expansiveness of the substantive rights granted to foreign investors under BITs. Moreover, the ISDS mechanism has been criticised for lack of transparency, inconsistency and alleged bias in favour of investors amongst other shortcomings. These concerns have culminated in what is commonly referred to as a ‘legitimacy crisis’ triggering a backlash against the regime by a number of developing and more recently developed countries (Langford, 2011; see Waibel, 2010; Behn, 2015).

This chapter addresses key arguments on how BITs and the ISDS mechanism constrain the ability of States to regulate, leading to the crisis of legitimacy in the investment treaty regime. It also documents how both developing and developed States that have expressed their discontent with the regime have reacted. In doing so

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[2] See Figure 7.

this chapter provides the context for the two main areas this thesis focuses on: (i) how and why did developing countries sign these BITs, in light of the significant costs and uncertain benefits associated with these treaties; and (ii) how and why have they reacted differently?

The rest of the chapter proceeds as follows. Section 2 clarifies a set of conceptual issues related to the use of "investment treaty regime" in this thesis. Section 3 clarifies that the term policy space will be defined as the regulatory power of host States for the purpose of this thesis. Section 4 provides an overview of how BITs evolved and gave rise to particular concerns with regard to policy space, particularly for developing countries. Section 5 analyses how BITs and ISDS can have an impact on the policy space of host States at different stages of the policy making process. Finally, Section 6 explores how developed and developing States that have expressed their discontent have reacted differently, focusing on their role as principals in the investment treaty regime.

2. Investment Treaty Regime

An international regime is essentially a system of governance in a particular area of international relations (Salacuse, 2015). According to Puchala and Hopkins (1982, pp. 245–246), international regimes 'constrain and regularise the behaviour of participants, affect which issues among protagonists are on and off the agenda, determine which activities are legitimised or condemned, and influence where, when, and how conflicts are resolved'. Another leading international relations scholar, Krasner (2009, p. 113), has defined an international regime as 'principles, norms, rules, and decision making procedures around which actors' expectations converge in a given area of international relations'. On this basis, it has been argued 'that international investment treaties as a group represent a convergence of expectations by States as to how host governments will behave toward investments from other regime members. The norms and rules embodied in investment treaties are intended to constrain and regularise such behaviour in order to fulfil those expectations' (Salacuse, 2010, p. 431).

This broad definition ranges from formal arrangements (e.g. international organisations and treaties) to more informal arrangements (e.g. shared norms), and actors include States as well as non-State actors, including foreign investors (Bonnitcha et al., 2017).

In line with the above, Salacuse (2010, p. 431) has argued 'that international investment treaties as a group represent a convergence of expectations by States as to how host governments will behave toward investments from other regime members. The norms and rules embodied in investment treaties are intended to constrain and regularise such behaviour in order to fulfil those expectations'. On this basis, the investment treaty regime could be defined as a regime that is composed of investment treaties in addition to the arbitration institutions applying and interpreting these treaties. However, such a strictly legal definition of the regime neglects the context in which this regime was established and why certain regulatory norms were privileged over others. Hence this thesis follows a more socio-legal approach in defining the investment treaty regime by incorporating the legal architecture that has been developed through international investment treaties and arbitral institutions *as well as* the normative foundations upon which this regime has been established and continues to foster. In doing so, the regime refers to the principles and norms that have shaped the regime as a result of the environment/context in which it has evolved.

The legal framework of the investment regime consists of three main components (Bonnitcha et al., 2017, p. 3): (i) investment treaties; (ii) the set of treaties, rules, and institutions governing investment treaty arbitration; and (iii) the decisions of arbitral tribunals applying and interpreting investment treaties. Concerning the first component of the legal architecture, the majority of investment treaties are bilateral,[3] i.e. BITs between two States and they are primarily used for investment protection.[4] These are the type of investment treaties this thesis focuses upon as they have evolved into the dominant mechanism for the international regulation of FDI (Guzman, 1998). Although each BIT is legally separate and distinct, thus binding only States that have concluded it, BITs as a group are extremely similar with respect to structure, purpose and principles (Salacuse, 2015). Practically all BITs include protections against uncompensated expropriation and discrimination against foreign investment. One of

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[3] According to UNCTAD (2018a), of the 3,322 known international investment treaties, 2,946 are BITs.

[4] Several other international investment treaties involve more parties and issues, such as Chapter Eleven of the North American Free Trade Agreement (NAFTA). In recent years, the investment treaty regime has been moving towards multi-issue and plurilateral agreements (Bonnitcha et al., 2017).

the most significant features of BITs is the investment dispute settlement mechanism. Historically, investment treaties provided only for State-to-State dispute settlement. However, since the end of the Cold War, practically all BITs have included provisions that provide a broad and binding consent to investment treaty arbitration of disputes between foreign investors and host States (Bonnitcha et al., 2017), or what is commonly known as ISDS.

The second component of the legal architecture is the set of complementary treaties, rules, and institutions that govern the adjudication of investment disputes in investment treaty arbitration. The two most important set of rules are the International Centre for the Settlement of Investment Disputes (ICSID) and the New York Conventions, particularly due to their enforcement mechanisms (Bonnitcha et al., 2017). In these Conventions it is stipulated that if a State refuses to pay compensation after having lost an investment treaty arbitration, investors can bring court proceedings before the courts of any member States of the conventions to seek an order allowing the investor to seize commercial assets of the non-compliant State (Bonnitcha et al., 2017). While there are exceptions, like sovereign immunity, these Conventions ensure the investment treaty regime is enforceable in practice through courts in member States. The rules governing investment treaty arbitration in BITs do not provide an appeal mechanism and there is no requirement for foreign investors to exhaust local remedies before filing international arbitrations. Furthermore, investment treaty arbitration considers the State as a single actor responsible for the conduct of all its organs. As a result, arbitrations have targeted the acts of the executive, the judiciary, the legislature, specialised agencies and sub-national levels of governments (Bonnitcha et al., 2017).

Finally, the third component of the legal architecture is the decisions of the international arbitration tribunals. Due to the lack of a formal system of precedent, tribunals often refer to previous decisions of other tribunals even though they are not bound by these decisions. As Bonnitcha et al. (2017, p. 6) argue, this has resulted in the development of an informal jurisprudence that provides substantive meat to the bare bones of vague investment treaty protections.

In order to better understand the nature of the investment treaty regime, it is important to take into consideration the normative foundations of the regime and not merely the existing legal architecture. As argued by Tan (2013, p. 26), studying international law through the self-referential lens of formalist legal theory by focusing on purely textual and interpretative aspects of international rules and institutions fails to account for their contemporary context or what Berman (2005, p. 492) describes as 'the multifaceted ways in which legal norms are disseminated, received, resisted and imbibed' (cited in Tan, 2013). Accordingly, this thesis addresses the regime from a socio-legal perspective by taking into consideration the broader context in which these instruments are elaborated and implemented as well as the actors, actions and interactions that formed this context (Perry-Kessaris, 2013). It is important to note that the emergence of international rules regulating investment was not a process of creating a legal regime on a blank canvas (Miles, 2010). International investment law cannot be separated from its socio-political environment. Indeed the political and economic context from which it emerged determined its core character (Miles, 2010). The investment treaty regime has developed in response to a variety of geopolitical, economic, institutional, and ideological developments (Cutler and Lark, 2017). The consolidation of the regime coincided with broader transformations in the global political economy associated with the increasing power of multinational corporations, economic liberalisation and decreased State control under neoliberal economic ideology, as well as the growth and promotion of FDI as the primary driver of economic development (Cutler and Lark, 2017, p. 278). Cutler (2016, p. 99) argues that the regime forms a key element in the constitution of the normative foundations of transnational capitalism and that it has played a significant role in relocating authority between private and public actors in international economic governance. The regime managed to play such a transformative role in the global political economy by granting foreign investors and arbitration tribunals with the authorities typically afforded to States (Cutler and Lark, 2017). Indeed, to the extent to which the regime's role is considered to be foundational, it has been described as a form of "new constitutionalism" by critical political economy scholars (Cutler, 2016; Schneiderman, 2008). New constitutionalism here refers to:

'a political project aimed at the continuous expansion of capitalism through the entrenchment into national and international legal frameworks of neoliberal, market-oriented laws and policies that favor privatization, liberalization, and deregulation of trade, investment, and financial services, and a host of economic, social, and cultural activities' (Cutler, 2016, p. 99; see Cutler, 2014; and Gill and Cutler, 2014).

Chapter 3 of this thesis analyses how these political and ideological preferences of capital exporting countries became entrenched as the rules of this regime. However for the purposes of this chapter it is essential to note that these preferences have defined the norms and principles that have shaped this regime. Moreover, according to Cutler (2016, p. 99), the constitutional disciplines of investment activities are evident in three characteristics of this regime: (i) the significant insulation of foreign investment from interference by States; (ii) the agreement to standards of behavior that limit the policy and autonomy of States; and (iii) the commitment to dispute settlement in private arbitral proceedings subject to minimal legal review by national governments and courts.

Effectively, the regime has served to delocalise, denationalise and privatise decision making over foreign investment triggering significant concerns and questions regarding the growing influence of private actors have in the operation of global governance (Cutler and Lark, 2017). As will be demonstrated in this thesis, this re-allocation of power and loss of policy space for host States has been the primary source of contestation by the members of this regime. In response to domestic pressures in critical public policy areas, several countries from both the developed and developing parts of the world have sought to re-balance their relationship with private actors by re-evaluating their membership within the regime (Cutler and Lark, 2017).

Finally, this section aimed to clarify the scope of the investment treaty regime studied in this thesis. In this study, the regime refers to not only the legal framework provided through the investment treaties and arbitration institutions but also the norms and principles that have shaped the regime as a result of the social, political and economic environment in which the regime has evolved. In the same manner adopted by "social systems", this socio-legal approach enables us to include the norms and principles that may have not been 'incorporated in the formal law making process, yet they still create normative standards and expectations of appropriate behaviour' (Chinkin, 2003, pp. 24–25; cited in Tan, 2013).

Going forward in this thesis, the terms 'investment treaty regime' and 'international investment regime' will be used interchangeably.

3. Policy Space as Regulatory Power

The failure of neoliberal structural adjustment policies to induce inclusive economic development in developing countries has revived interest in the role of the State in development (Calvert, 2016). Calls for an increase in national ownership over development policies and more context-specific development programmes have led to a growing interest in the issue of policy space in the development literature over the past decade (Gallagher, 2005; Rodrik et al., 2004). For domestic institutions to play a role in formulating the policies required to achieve inclusive growth, a certain degree of policy space and autonomy is needed to ensure national development strategies address the country's social and economic objectives with the relevant and appropriate policy-mix (Calvert, 2016). Before addressing the different ways in which BITs and the ISDS mechanism have constrained the policy space available to host States to regulate their economy, it is important to clarify how policy space is defined in this thesis.

The term 'policy space' was first coined by the UNCTAD in its 2002 Trade and Development Report (UNCTAD, 2002). Although it has emerged recently, it captures an idea that has a long heritage. It can be traced to the work of Raul Prebisch, for instance, who recognised the importance of being integrated into the global economy but advocated for more active and interventionist developmental policies in order to secure economic development (Hannah and Scott, 2017). The phrase 'policy space' took off at the São Paulo Conference in 2004 as UNCTAD addressed the issue of restrictions on the available policy space for developing countries. In the São Paulo Consensus it was defined as 'the scope for domestic policies especially in the areas of trade, investment and industrial development, which might be framed by international disciplines, commitments and global market considerations' (UNCTAD, 2004, p. 2). In later UNCTAD reports the definition evolved to 'the freedom and ability of the government to identify and pursue the most appropriate mix of economic and social policies to achieve equitable and sustainable development in their own national contexts, but as constituent parts of an interdependent global economy' (UNCTAD, 2014a, p. vii). In this thesis, the term 'policy space' is used to describe the degree of autonomy that States have to regulate their economy as per their development objectives while observing their obligations under existing BITs.

The definitions of regulation have generally oscillated between the conceptualisations of centred regulation and de-centred regulation (Prabhash, 2012). Centred regulation refers to regulation that involves only the State. De-centred regulation also involves non-State actors such as Inter-Governmental Organisations (IGOs) and Non-Governmental Organisations (NGOs) (Prabhash, 2012). Furthermore, ‘regulation’ is a social phenomenon that extends beyond law in the sense that regulation does not need to come from the State, and thus law can be seen as one form of regulation (Baldwin et al., 1998; Black, 2002; Morgan and Yeung, 2007). Since the focus of this thesis is on the policy space available to the host States, this section will address the centred regulatory concept.

Centred regulation can be defined in two ways. One definition refers to the stipulation of rules by government supplemented by mechanisms for monitoring and enforcement, usually performed through a specialist public agency (Majone, 1996). This definition, however, provides a narrow understanding of regulation, because here regulation is only carried out by specialist public regulatory bodies mainly aimed at correcting market failures. It generally excludes redistributive policies of the State from the scope of regulation (Krajewski, 2003).

Another way to define centred regulation is that it includes any form of State intervention in the economy, whatever form that intervention might take (Black, 2002; Mitnick, 1980). This is a broader understanding of regulation under which the State may intervene not just through specialist regulatory bodies but also through direct State intervention (Prabhash, 2012). Thus, according to this understanding, regulation is the State’s intervention through various policies and measures to control or influence the behaviour of others (Black, 2002). Following this logic, one can define regulatory power as ‘the ability of the host State to adopt policies and laws to achieve a variety of policy objectives’ (Prabhash, 2012, p. 14). Considering that each of the three case studies in this thesis will focus on how BITs have restricted policy makers from achieving their policy objectives, I intend to use ‘policy space’ to reflect regulatory power in the broader sense as developed by Prabhash (2012).

Much of the debate regarding the role of national policies in development concerns the concept of policy space and focuses on the tension between international economic integration and the autonomy available to nation States to pursue policies that support their economic development (Mayer, 2009). Over the past few decades, the tension between international integration and policy space was exacerbated by two developments (Mayer, 2009). Firstly, the neoliberal policy agenda, which many developing countries pursued during the 1980s and 1990s which not only limited domestic policy space but also failed to achieve the desired acceleration of economic development even by the admission of institutions like the World Bank (World Bank, 2005). Secondly, the increased internationalisation of markets and the associated stronger influence of foreign factors on national development have further diminished the policy space available to achieve domestic policy objectives (Mayer, 2009).

This has been particularly the case for developing countries that as a group are being more tightly constrained in their national development strategies by proliferating regulations formulated and enforced by international organisations (Wade, 2003) and capital-exporting countries. The rules written into multilateral and bilateral agreements, as will be demonstrated below, actively prevent developing countries from pursuing the public policies historically adopted by now-developed countries when they were in a catching up position. In effect, the new regulations are designed to expand the options of multinational firms to enter and exit developing economies more easily, with fewer restrictions and obligations (Wade, 2003). Accordingly, these regulations and obligations result in the shrinkage of both development space and the space for 'self-determination' (Wade, 2003, p. 622). Hence, a major criticism of BITs has been that they can be perceived as attempts to 'kick away the ladder' for developing countries, in the words of Ha-Joon Chang (2002) and Friedrich List (1885) before him.

The next section provides an overview of how BITs evolved and the emergence of policy space concerns for members of the investment treaty regime.

4. BITs Evolution and the Emergence of Policy Space Concerns

Before and since the formation of the World Trade Organisation (WTO), several attempts to create a comprehensive multilateral agreement on investment were made but failed to materialise (Kurtz, 2002). Indeed, all binding international investment treaties have been created outside the WTO system and exist largely at a bilateral or regional level, except for services-related investments (Yazbek, 2010).[5] This absence

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[5] These treaties are covered under the WTO General Agreement on Trade in Services (GATS) and the limited application of the Multilateral Agreement on Investment Measures (Kurtz, 2002).

of investment rules from the international economic trading scene has by no means inhibited the conclusion of investment agreements (Yazbek, 2010). On the contrary, BITs have been increasingly used since 1959 to regulate foreign investment flows between developed and developing countries. From their early days, BITs were typically weighted in favour of protecting foreign investments from expropriation by newly independent host countries (Kurtz, 2002).

The period from 1990 to 2002 witnessed an explosive proliferation of BITs globally, as the number of new BITs signed averaged 154 BITs per year during that period (El-Kady, 2013). BIT negotiations were based on template models with a uniform set of core legally binding investment protection provisions placed on the host country to facilitate the operation of foreign investors in that State (El-Kady, 2013; Yazbek, 2010). A more detailed account of why some of these provisions are considered controversial is provided in Section 5.1.

The international investment regime has evolved over time, taking on a normative dimension, which limits the policy space of host State governments, specifically in their pursuit of economic development objectives (Yazbek, 2010). This presents major challenges for governments both in the present and in the future (UNCTAD, 2007). Over the past two decades, BITs have increasingly included a wider variety of disciplines affecting more areas of host country activity in a more complex and detailed manner (UNCTAD, 2007, p. xi). According to a UNCTAD report (2007, p. xi), these treaties put more emphasis on public policy concerns, in particular through, inter alia, the inclusion of safeguards and exceptions relating to public health, environmental protection and national security.

The wider implications of BITs provisions were initially ill-recognised, as BITs were seen basically as signals for a safe investment climate. Eventually, however, as arbitration cases accumulated, BITs emerged as a threat not only to the ability of host States to regulate, but also to public budgets,[6] through increasingly high costs for arbitration purposes (Van der Pas et al., 2015). Developing countries are now aware

[6] Foreign investors file arbitration claims for and receive compensations that can run into hundreds of millions of dollars.

of the substantively high costs associated with the investment regime promoted in bilateral and other international investment treaties (Van der Pas et al., 2015).

The next section of this chapter provides a more detailed account of the main arguments on how BITs and the ISDS mechanism constrain the ability of States to regulate, leading to what has been described as a crisis of legitimacy in the international investment regime.

5. The Conflict between BITs and Policy Space for Host States

Coinciding with the significant rise in investment treaty arbitration cases since the beginning of the new millennium, the debate over the impact of BITs on policy space has intensified. Supporters of the investment treaty regime argue that it promotes the rule of law in international economic relations, and protects foreign investors from arbitrary State policies and measures (see Schill, 2016). Critics, however, argue that the regime limits the ability of States to regulate in the public interest (Sornarajah, 2015). Scholars have argued that investment treaties like BITs restrict the policy autonomy of the host countries' governments while enabling foreign investors to unduly intervene in domestic democratic processes and policy-making (Blackwood and McBride, 2006; Chang, 2006, 2004; Gallagher, 2005, 2008; Wade, 2003). This argument has been supported by several studies that demonstrate how foreign investors have used investment protection standards in treaties like BITs to challenge public policies adopted by the government of a host country (Calvert, 2016). The studies highlighted how policies related to industrial development, public health, the environment, social justice and natural resource governance have been challenged through BITs (see Cho and Dubash, 2005; Manger, 2008; McBride, 2006; Spears, 2010; Yazbek, 2010). These studies also endorsed the conclusion that by signing BITs developing countries were sacrificing policy space in exchange for uncertain economic benefits (Calvert, 2016).

The criticisms above are said to amount to a legitimacy crisis of the investment treaty regime (see Bonnitcha et al., 2017; Brower et al., 2003; Franck, 2005), similar to the legitimacy crisis of the international trade regime around the time of the WTO Ministerial Conference in Seattle in 1999 (see Esty, 2002; Keohane and Nye, 2001).

The rest of this section will assess some of the main arguments on how BITs and the existing ISDS mechanisms constrain the policy space available for developing countries at multiple stages of the policy making process. Section 5.1 demonstrates how investment treaties provide the means by which actors discipline governments for adopting policies during and after the policy's implementation (Calvert, 2016). It focuses on how the expansive application of investment protection standards has been used to challenge a wide range of State regulatory activities. Section 5.2 addresses the issue of ‘regulatory chill’, which denotes the process whereby the threat of claims through BITs can be used to prevent governments from adopting certain policies, including regulatory regime changes, as they might breach some of the broadly interpreted provisions in BITs. Finally, Section 5.3 will address how issues of policy shrinkage have been compounded by deficiencies in the investment treaty arbitration system.

5.1 Challenging Regulations by the Host State

One way to conceptualise the relationship between investment treaties and regulatory power is in terms of investment disputes. According to this conceptualisation, the host country, unaware of the implications of the investment treaties, exercises its regulatory power, which the foreign investor challenges under investment treaty arbitration (Prabhash, 2012). The tribunal decides whether the regulatory measure of the host country is legal or not by interpreting the investment treaty in question. This approach focuses on how different provisions of the investment treaties are worded and whether these provisions balance investment protection with regulatory power (Prabhash, 2012). If a tribunal concludes that the regulatory measure of the host State is illegal, it will require the host State to compensate the foreign investor. Paying compensation to the foreign investor will increase the cost of regulation, which may deter the host country from adopting such regulations in the future (Prabhash, 2012).

5.1.1 Broad Definitions and Investment Protection Standards

The growing number of investor claims against sovereign States challenging a wide array of public policy decisions and regulatory measures has evoked deep concerns about the potential costs associated with such treaties (Singh and Ilge, 2016). The vaguely termed provisions in BITs can result in expansive interpretations by arbitral tribunals, leading to substantial monetary claims by foreign investors (Singh and Ilge, 2016). This section will provide a few examples of how broadly framed provisions have been (or can be) expansively interpreted by lawyers and tribunals. Section 5.1.2

will illustrate the range of State activities that have been the subject of investor-State disputes.

Firstly, concerning definitions, investment treaties tend to include extensive definitions of 'investors', as a result, consent by host States to arbitration in investment treaties opens these countries up for thousands of potential claimants (Bonnitcha et al., 2017). The list of potential claimants includes multinational firms, their shareholders, financial institutions, State-Owned Enterprises (SOEs), and individual investors. The definition of 'investments' equally expands the scope of protection offered by covering disputes not only over FDI, but also portfolio investments, contracts, intellectual property rights, and much more (Bonnitcha et al., 2017). As a result of these broad definitions, companies can make use of different treaties through corporate restructuring (see Dolzer and Schreuer, 2012).

Secondly, most investment treaties offer a core of six substantive protections to foreign investors: most-favoured-nation treatment (MFN); national treatment (NT); fair and equitable treatment (FET); a guarantee of compensation for expropriation; an umbrella clause; and a free transfer of funds clause. These provisions can be split into 'relative' standards of protection and 'absolute' standards of protection (Bonnitcha et al., 2017).

The two main relative standards of protection included in BITs are the MFN and NT provisions. [7] MFN prevents host States from treating foreign investors of one nationality better than foreign investors of another nationality and NT prevents host States from treating its own investors better than foreign investors. Both clauses are typically broadly formulated and generally apply to all State conduct affecting foreign investment. While most investment treaties contain relatively similar substantive protections, there is a degree of variation in the provisions provided and the scope of protection provided in some cases.

For nearly two decades, the discussion on MFN has been dominated by the controversy triggered by the *Maffezini v. Spain* (1997) case (Batifort and Heath, 2017; see Douglas, 2011). An original interpretation of MFN by the ICSID tribunal regarding the possibility for investors protected under a BIT to import more favourable

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[7] They are 'relative standards' in the sense that their application requires a comparison of the way a State treats one foreign investment with the way it treats its domestic investments or foreign investments from a different country.

provisions from a third-party BIT made by their host state in that case[8] led to what has been described as 'a seismic shift in international investment law' (Nikièma, 2017, p. 1). Under this interpretation of MFN, several decisions rendered by international arbitral tribunals suggest that an investor can use the MFN clause in the treaty that is applicable to their home State to search the universe of treaties to which the host State is party, identify more favourable clauses and protections in those other treaties, and use the MFN provision to replace or supplement the protections of the agreement.[9] This allows the foreign investors to isolate, extract and import more favourable provisions from other treaties which can broaden States' obligations, undoing what may have been the results of hard-fought negotiations between the host and home country, and nullifying what might have been purposeful limits in the agreement (IISD and UN Environment, 2017).

The basic framework adopted by tribunals to adjudicate claims on NT is based on a three-step analysis process (Dolzer and Schreuer, 2012, p. 200). First, a tribunal must determine whether the investors are in 'like circumstances' through a relative class of comparators. The tribunal must then determine whether the treatment accorded to a foreign investor is less favourable than the one enjoyed by domestic investors. Lastly, it must determine the host State's intent and whether there was a justification for this differentiation. The central question is whether particular domestic investments can reasonably be compared to the foreign investment in question (Bonnitcha et al., 2017). Accordingly, difficult questions arise for tribunals when determining whether differences in treatment constitute de facto discrimination[10] in practice. For example, in the case of *Occidental v. Ecuador I* (2004), the tribunal adopted a broad approach to the choice of the comparator in the NT claim made by the investor (Bonnitcha et al., 2017). It held that Ecuador's imposition of value-added tax on oil exports, but not on the export of other products, breached NT, even though the tax applied equally to oil exports by both foreign and Ecuadorian companies.[11] This is because the tribunal

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[8] see Emilio Agustín Maffezini v. The Kingdom of Spain. Decision of the Tribunal on Objections to Jurisdiction. ICSID, Case No. ARB/97/7, para 56,64.

[9] For example, see AWG Group Ltd. v. The Argentine Republic. UNCITRAL, 2003; and Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan. ICSID, Case No. ARB/03/29.

[10] I.e. discriminatory administrative practices that are not authorised by law.

[11] Occidental Exploration and Production Company v. The Republic of Ecuador I. London Court of International Arbitration. Award. Administered Case No. UN 3467, 1 July 2004, para 167-173.

found that Ecuadorian companies in the mining, seafood, and cut flowers sectors were relevant comparators (i.e. in ‘like circumstances’) in assessing the treatment of a foreign investor in the oil sector, simply because all were involved in producing goods for export.[12] This broad interpretation and decision was sharply criticised (see Bonnitcha et al., 2017; Kurtz, 2009).

Other tribunals have interpreted ‘like circumstances’ differently (Bonnitcha et al., 2017), for instance, the *SD Myers v. Canada* tribunal held that ‘the assessment of ‘like circumstances’ should take into consideration circumstances that would justify governmental regulations that treat firms differently in order to protect the public interest’.[13] It identified firms’ environmental impacts as an example of a factor that could justify a conclusion that two firms were not in ‘like circumstances’, notwithstanding their competitive relationship.[14]

Overall, NT has only played a minor role in the practice of the investment treaty regime to date (Bonnitcha et al., 2017). Most of the arbitration claims alleging the breach of the NT involve allegations of de facto discrimination (see Bjorklund, 2018; Henckels, 2015). As illustrated in Figure 1, only eight tribunals have decided NT claims in favour of investors.

The second type of protection standards are the so-called ‘absolute standards’ of protection. These standards include FET, expropriation (direct and indirect), umbrella clauses and free transfer of funds. They are absolute in the sense that they require host States to guarantee foreign investors specific standards of treatment, regardless of how they treat other investments. The fact that these investment treaty protections are often formulated in vague, imprecise terms, grants arbitral tribunals a significant degree of discretion in their interpretation and application.

The free transfer of funds provision found in most BITs typically stipulates that each contracting party shall grant to an investor of the other contracting party the unrestricted right to transfer abroad funds related to an investment. The clause generally covers a broad range of funds related to an investment, including incoming

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[12] Ibid.

[13] S.D. Myers, Inc. v. Government of Canada. Partial Award. UNCITRAL, 13 November 2000, para 250.

[14] Ibid.

transfers (e.g. the initial investment in the host State) and outward transfers (e.g. returns or proceeds from the sale of the investment) (UNCTAD, 2000). The implications of this clause on development and the right to regulate are that it generally doesn't include exceptions that may be necessary to allow temporary derogation to address severe macroeconomic problems (e.g. balance of payments crises) (UNCTAD, 2000). In the majority of cases, the clause does not allow for restrictions on transfers if required for the enforcement of a host State's existing domestic laws (e.g. for fraud prevention) (UNCTAD, 2000). Critics have pointed how through this clause investment treaties can chill the use of capital controls in times of crisis (see Siegel, 2013). Despite the extensive literature on the need for capital controls as part of a State's 'macro-prudential regulatory toolkit to maintain financial stability', only c.10 per cent of investment treaties create exceptions for restrictions on the transfer of funds during balance of payments crises or other macroeconomic emergencies (Bonnitcha et al., 2017, p. 116; see Broner and Ventura, 2016; Kant, 1998; Ostry et al., 2010).

Another example of an absolute standard of protection is the umbrella clause. Some investment treaties allow investors to circumvent or avoid what was agreed to in an investment contract or to initiate multiple claims, under treaty clauses commonly referred to as umbrella clauses. Their formulation varies, but a typical umbrella clause stipulates that each State party shall observe any obligation it may have entered into with regard to investments of nationals of the other State party (see UNCTAD, 2007). An umbrella clause could allow a foreign investor to assert State obligations from beyond the treaty itself (legislative, contractual and treaty-based) under the coverage of the treaty and its dispute settlement mechanisms (Šarkinović, 2011). It could also allow the investor to forum shop or initiate proceedings before both the domestic courts of the host State and the treaty-based dispute settlement mechanism (IISD and UN Environment, 2017).

The debate over whether the umbrella clause in a host State's BIT applies to obligations arising under otherwise independent investment contracts between the investor and the host State started over a decade ago when two tribunals (deciding shortly after one another) adopted conflicting interpretations of the umbrella clause in their decisions (Wong, 2006). One the one hand, the *SGS v. Philippines* (2002) tribunal adopted an expansive interpretation of the umbrella clause deciding that breach of the host state's contractual commitments would amount to a breach of the BIT, and the matter would be subject to ICSID jurisdiction.[15] On the other hand, the *SGS v. Pakistan* (2001) tribunal adopted a more restrictive interpretation of the umbrella clause deciding that the local forum would adjucate the investor's contractual claim.[16] Dissatisfaction with tribunals' interpretation of this provision has prompted some States to exclude this clause from new investment agreements (e.g. Chapter 9 of the TPP, Indian Model BIT, Chapter 8 of the Comprehensive Economic and Trade Agreement (CETA), and Canada-China BIT) (Šarkinović, 2011; IISD and UN Environment, 2017).

Finally, the last two absolute standards of protection covered in this section, FET and expropriation are the two most frequently invoked clauses by investors in arbitration claims. Figure 1 below illustrates how often investors have alleged breaches of substantive protections and how often investment tribunals have upheld each type of claim. As of July 2017, the FET provision was invoked by claimants in about 80 per cent of ISDS cases for which information on breaches alleged was available, followed by indirect expropriation with 75 per cent. ISDS tribunals most frequently found breaches of FET (65 per cent) and indirect expropriation (32 per cent) in cases decided in favour of the investor or decided in favour of neither party (liability found but no damages awarded) (UNCTAD, 2017a).

Almost all BITs contain an expropriation provision. A typical expropriation clause reads as follows:[17]

> Investments of investors of either Contracting Party shall not be expropriated or subjected to measures having an effect equivalent to nationalisation or expropriation…except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation.

The article as with almost all BITs distinguishes between direct expropriations (investments that shall not be nationalised or expropriated) and indirect expropriations (measures having an effect equivalent to nationalisation or expropriation). Direct

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[15] See SGS Société Générale de Surveillance S.A. v. Republic of the Philippines. Decision of the Tribunal on Objections to Jurisdiction. ICSID, Case No. ARB/02/6, para 169.

[16] See SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan. Decision on Objections to Jurisdiction. ICSID, Case No. ARB/01/13, para 166-173.

[17] Article 8 of the Egypt-Canada BIT (1996).

expropriation involves a transfer of title or physical seizure of an investment and is usually easy to identify. Instead, the more important question in arbitral practice is how to identify indirect expropriation. As demonstrated in Figure 1, indirect expropriation is the second most common breach alleged by investors of all known investment treaty arbitrations, and the subject has proven highly controversial (see Bonnitcha et al., 2017; Fortier and Drymer, 2004; Ratner, 2008; Schneiderman, 2008).

Indirect expropriation refers to the deprivation of the substantial benefits flowing from the investment without any formal 'taking' of the property (Dolzer and Schreuer, 2012; Salacuse, 2015). However, there is no commonly accepted definition of indirect expropriation; determining whether it has occurred will depend on how arbitration tribunals interpret the facts and the treaty language (IISD and UN Environment, 2017).

While there seems to be a consensus over the view that actions by the State can only amount to indirect expropriation if it results in a substantial deprivation of the investor's investment, there remains an on-going controversy about where and how to draw the line between indirect expropriation and a State's sovereign right to exercise its regulatory powers (Bonnitcha et al., 2017; see Sornarajah, 2010; Schneiderman, 2008). This uncertainty raises sustainable development concerns (IISD and UN Environment, 2017). In several cases, tribunals have ruled that measures taken for a public purpose, such as health, environmental protection and provision of basic services, amounted to indirect expropriation after investors claimed they had a substantial negative impact on their business. Examples include *Abengoa v. Mexico* (2009),[18] and *Biwater v. Tanzania* (2010).[19] Some tribunals have established implicit exceptions to the concept of indirect expropriation, stating that non-discriminatory regulatory measures in pursuit of legitimate policies do not amount to indirect expropriation regardless of the magnitude of loss, or interference with, an investment (e.g. *Methanex v. US* (2005).[20]

In recent years, the evolution of the economic and regulatory environment has brought to the forefront these questions regarding indirect expropriations (UNCTAD, 2012).

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[18] Abengoa, S.A. y COFIDES, S.A. v. United Mexican States. ICSID, Case No. ARB (AF)/09/2.

[19] Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania. ICSID, Case No. ARB/05/22.

[20] Methanex Corporation v. United States of America. Award. UNCITRAL, 3 August 2005, Part IV, Chapter D, para 7.

As States have recognised how arbitration tribunals have expansively interpreted this provision, there have been attempts to introduce clarifications to narrow the scope of protection provided under indirect expropriation clauses in new treaties. These clarifications include the appropriate criteria to (a) determine whether an indirect taking has occurred; and (b) to distinguish indirect expropriation from regulation in the public interest, which is non-compensable despite the economic impact on particular investments (UNCTAD, 2012).

Another major concern with the expropriation provision in BITs is how tribunals determine compensation. Compensation can be awarded for different treaty breaches and involve different categories of damages, subject to the treaty language and the tribunals' assessment of the specific circumstances of a case (Rosert, 2014). With regards to the scope of compensation, a significant number of BITs adopt the standard of 'prompt, adequate and effective' compensation (UNCTAD, 2007). This is the so-called Hull formula,[21] which was first claimed by the United States in 1938. 'Prompt, adequate and effective' compensation means that the investor should be granted, as soon as the investment is made (prompt), an amount equal to the total value of its expropriated investment (adequate) in a freely transferable and exchangeable currency (effective) (Nikièma, 2013). In some cases, the Hull formula refers to full compensation; which includes full compensation for losses suffered and lost profits. In general, tribunals have concluded that full compensation is always due in the event of expropriation, despite the diversity of terms used in BITs (Nikièma, 2013).

Almost no BITs provide any guidance on methods of assessment of the injury. The determination of the damages is thus left to the discretion of arbitration tribunals and accountancy firms, who use various and unpredictable formulas from case to case (Nikièma, 2013; see Salacuse, 2015, p. 356; Ball, 2001; Wälde and Sabahi, 2008). Furthermore, the lack of clarity regarding principles guiding the determination of the scope of compensation and the damages incurred by the claimants also extends to the methods for calculating 'full compensation' or the 'market value' of an investment (Nikièma, 2013; Salacuse, 2015). The common practice of the tribunals is to apply a combination of methods to varying degrees (Salacuse, 2015). In many cases, however,

[21] The famous formula was introduced by U.S. Secretary of State Cornell Hull in his note of July 21, 1938, in response to the Mexican nationalisations of 1917.

the tribunals' decisions fail to state why one calculation method was preferred over another, as the calculation of compensation and particularly of lost profits is generally left to accounting firms (Nikièma, 2013).

In addition to calls for more clarity and transparency regarding the determination of the scope of compensation and the calculation of damages, the current approach adopted for calculating compensation has been severely criticised for failing to consider factors that may balance investor and host State interests. In some cases tribunals have tended to disregard the regulatory purpose of the measures taken altogether (Kriebaum, 2015). For example, in the *Santa Elena v. Costa Rica* (1996) case, the tribunal stated that:

> Expropriatory environmental measures – no matter how laudable and beneficiary to the society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.[22]

Hence, a legitimate or even laudable cause does not necessarily affect the compensation requirement (Kriebaum, 2015). Furthermore, it is possible to envisage scenarios in which compensation should not cover the entire market value of the investment, especially in the case of indirect expropriation (Nikièma, 2013). These scenarios include historical circumstances under which the investment was acquired[23] or the host State's socio-economic situation when the treaty breach occurred.[24] Accordingly, the assessment of compensation should take into account other financial and non-financial factors in order to achieve a result that strikes a balance between the interests of investors and those of the host State (Nikièma, 2013).

The final provision addressed in this section is the FET clause, which exists in more than 95 per cent of BITs and is considered as the most important substantive protection standard (Bonnitcha et al., 2017). As demonstrated in Figure 1, it is the most common breach alleged by investors and found by tribunals. A typical FET clause will state that each contracting State shall in its territory in every case accord investments by

[22] Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica. Award. ICSID, Case No. ARB/96/1, para 72.

[23] Examples of such cases will be provided in Chapter 7.

[24] See Siemens A.G. v. Republic of Argentina. ICSID, Case No. ARB/02/8.

investors of the other contracting State fair and equitable treatment.[25] This short and open-ended formulation provides broad interpretive discretion to investment tribunals (Harten, 2007; Sornarajah, 2010). In some cases, arbitration tribunals have acknowledged that the lack of a precise definition of FET in BITs grants tribunals wide interpretive powers.[26] For instance, the arbitration tribunal in *Rumeli v. Kazakhstan* (2005) stated that the FET standard in treaties is 'intentionally vague in order to give tribunals the possibility to articulate the range of principles to achieve the treaty's purpose in particular disputes'.[27] Investors have invoked the FET standard to challenge a wide range of State activities, including changes to legislation of general application, decisions of executive agencies of the host State specifically addressed to the investor in question, and the actions of the host State's judiciary (Bonnitcha et al., 2017).

FET expands the scope of protection provided to investors even beyond what is offered by indirect expropriation, as host States may breach FET even if the impact of State conduct on the foreign investor falls short of a 'substantial deprivation' of an investment necessary for it to be considered as expropriation (Bonnitcha et al., 2017). The FET standard has been described as an all-purpose tool used to cover any gaps left by more specific standards of investment protection (e.g. MFN and NT) or to strengthen the claimant's argumentation related to any standard (Islam, 2016; Klager, 2010; see Sornarajah, 2015).

Arbitral tribunals, States, and academics have all failed to agree on the meaning of FET. Tribunals have considered a range of factors in determining whether host States have breached FET, including (Bonnitcha et al., 2017): (i) the extent to which State conduct interferes with or alters a foreign investor's legal rights under domestic law; (ii) the extent to which State conduct breaches promises made to foreign investors; (iii) the extent to which State conduct is consistent with standards of procedural fairness and due process; (iv) the extent to which State conduct pursues a legitimate policy objective; and (v) the likely effectiveness of the State conduct in achieving its

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[25] Article 2(2) of the German Model BIT (2009).

[26] Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania. Award. ICSID, Case No. ARB/05/22, para 593.

[27] Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. vs Kazakhstan. Award. ICSID, Case No. ARB/05/16, para 583.

intended policy objective. However, the most controversial factor that tribunals have considered when determining whether the standard has been breached is the 'legitimate expectations' of investors when entering into the investment (Miles, 2010; Sornarajah, 2015). This element has been interpreted as requiring the host State to notify the investor of all regulations that will govern the investment for its duration and requiring the host State to maintain a stable legal and business framework throughout the term of the investment (Miles, 2010, p. 42; see Schreuer and Kriebaum, 2009).[28] As will be demonstrated in Chapter 6, this interpretation of FET treatment, which has been described as being heavily weighted towards furthering the interests of foreign investors, can be particularly constraining for host States (Miles, 2010; Sornarajah, 2015).

The open-ended nature of the FET provision, coupled with its high success rate for investors, has made it the most controversial substantive guarantee in the modern investment treaty regime (Bonnitcha et al., 2017). For proponents of the investment treaty regime, FET embodies the rule of law in the regime (see Schill, 2013). For the critics, however, it has disempowered governments from modifying their laws, even if the regulations or measures are in the public interest (see Alvarez, 2011). Consequently, as will be demonstrated in Section 6 further below, amendments to the FET provision or its exclusion all together has been a common theme in the different reactions of both developing and developed countries that have expressed their discontent with the investment treaty regime and acted upon it.

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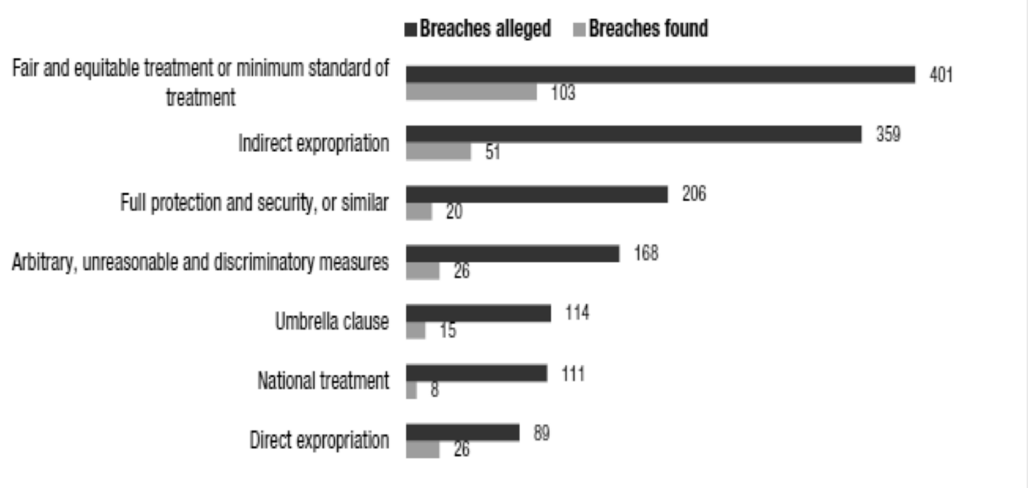
[28] See Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States. Award. ICSID, Case No ARB/AF (00)/2, para 154.

Figure 1: Breaches most frequently alleged and found, 1987–31 July 2017 (Number of known cases)



Source: UNCTAD (2017), UNCTAD ISDS Navigator.

5.1.2 Investor-State Disputes

Having given an overview of how broadly framed provisions may be expansively interpreted, the following section will illustrate the range of State activities that have been the subject of investor-State disputes. Many scholars argue that a wide range of sovereign decisions of host States are capable of being caught in the broad net of investor-State dispute settlement due to the vague and broad language of investment treaties (Schill, 2011). Investors have used investment treaties to address a much broader range of concerns about executive, legislative, and judicial acts—such as transparency, predictability, and fairness in government decision-making (Bonnitcha et al., 2017).

Investment disputes between foreign investors and host States have covered a wide range of regulatory measures, such as: environmental policy;[29] regulating privatisations;[30] regulatory measures related to supply of drinking water;[31] urban

[29] See Metalclad Corporation v. The United Mexican States. ICSID, Case No. ARB(AF)/97/1; Methanex Corporation v. United States of America. UNCITRAL, 2005.

[30] See Eureka BV v. Republic of Poland. ICSID, Case No ARB/01/11.

[31] See Biwater Gauff Ltd v. United Republic of Tanzania. ICSID, Case No. ARB/05/22.

policy;[32] monetary policy;[33] taxations policies;[34] energy;[35] public postal services;[36] electricity services;[37] tourism;[38] and many others (Dolzer and Schreuer, 2012; Footer, 2009; Kaushal, 2009). Moreover, there have been cases in which tribunals have arbitrated over the actions of the judiciary in the host States (Johnson et al., 2015).[39] Thus, it is safe to conclude, that arbitral tribunals have adjudicated many sovereign decisions of host countries (Dolzer and Schreuer, 2012; Kaushal, 2009) as violations of the investment treaties. Most arbitrations have been brought by investors from developed countries against developing and transition States. Countries such as Argentina, Venezuela and Egypt have been subject to dozens of arbitrations. Increasingly, however, investors also bring arbitrations against developed countries.

An empirical study of investor-State arbitration cases by Williams (2016),[40] reveals that the majority of investment treaty arbitrations arise from administrative or executive action, although legislative measures are the single most common source of publicly known investment treaty arbitrations (see Figure 2). Concerning the most common measures that have triggered investor-State arbitration cases, the study reveals that the top three measures are (Williams, 2016):[41] (i) the cancellation of a project, agreement or licence. Investor-State disputes triggered by this measure span different industries and levels of development, but are generally administrative (although a number also involve judicial decisions). (ii) Expropriation of a foreign investment makes up the next largest category of measures taken, although it is worth

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[32] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile. ICSID, Case No. ARB/01/7.

[33] See Enron Corporation v. Argentina. ICSID, Case No. ARB/01/3; Sempra Energy International v. Argentina. ICSID, Case No. ARB/02/16.

[34] See Occidental Exploration and Production Co v. Republic of Ecuador. LCIA, Case No. UN 3467; EnCana Corporation v. Ecuador, London Court of International Arbitration, 2006; Feldman v. Mexico. ICSID, Case No. ARB(AF)/99/1.

[35] Duke Energy Electroquil Partners v. Republic of Ecuador. ICSID, Case No. ARB/04/19.

[36] United Parcel Service of America v. Canada. Arbitration Under Chapter 11 of NAFTA, 2007.

[37] Nykomb Synergetics v. Republic of Latvia. Stockholm Chamber of Commerce, 2003.

[38] Waguih Elie George v. Egypt. ICSID, Case No. ARB/05/15.

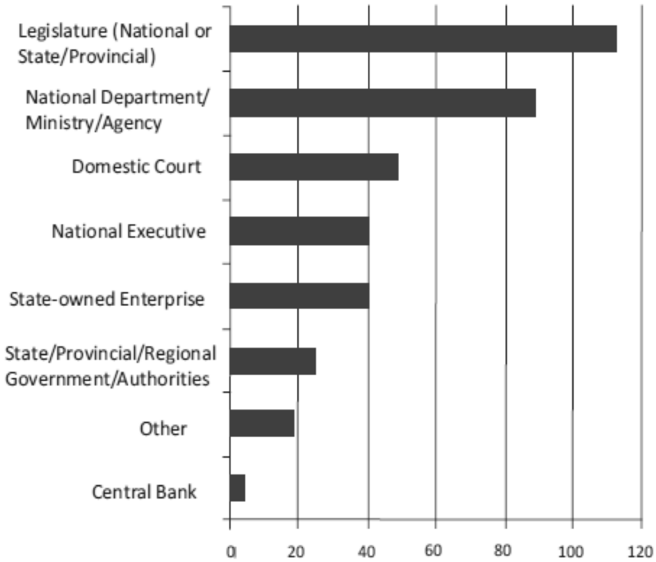
[39] See Chevron v. Ecuador. UNCITRAL, PCA Case No. 2009-23; Eli Lilly v. Canada. ICSID, Case No. UNCT/14/2; Awdi v. Romania. ICSID, Case No. ARB/10/13.

[40] The study is based on an original data set of known disputes and includes 583 ICSID and UNCITRAL cases, as well as those held at other arbitral forums where information was available (Williams, 2016).

[41] See Figure 3.

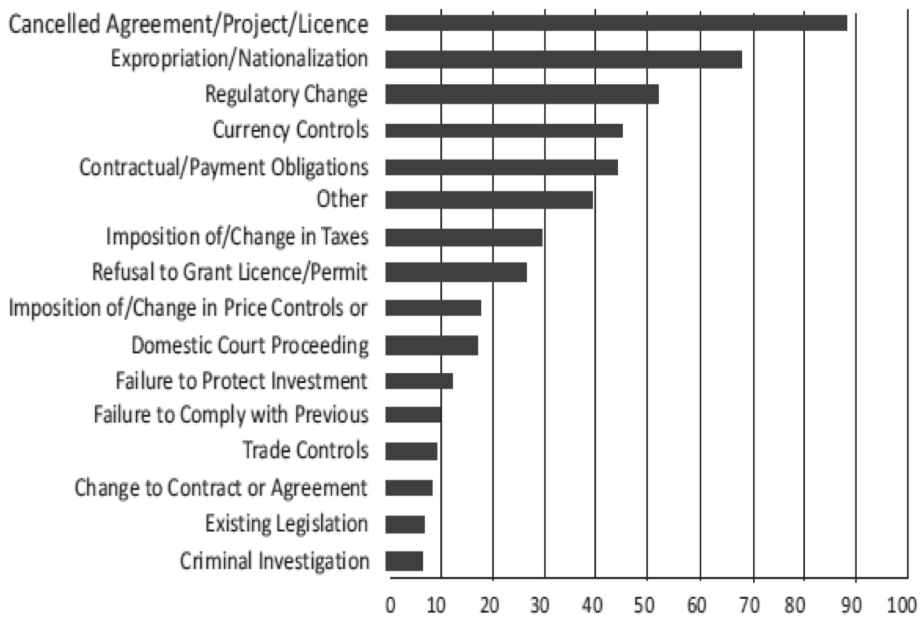
noting that the series of expropriations undertaken by the Venezuelan regime (under Hugo Chavez) make up over 25 per cent of these cases. (iii) The third most frequent measure is the rather broad category of regulatory change. Included within this category are measures that ban specific industrial activities; ban certain substances (for example, pesticides); or other changes to the regulatory framework of an entire industry.

Figure 2: Domestic institutions and investor-State arbitration



Source: Williams (2016)

Figure 3: Measures that triggered investor-State arbitration cases



Source: Williams (2016)

Finally, in this section the relationship between investment treaties and host country's regulatory power was conceptualised in terms of the potential disputes that can be brought against the host State for violating provisions of these treaties through exercising its regulatory power. According to Prabhash (2012), this conceptualisation is best suited to understanding the relationship between investment treaties and regulatory power in the case of countries where there is inadequate knowledge about the implications of the investment treaties, and hence these treaties are yet to be internalised in the exercise of regulatory power. Moreover, even if regulators in the host State adopt a regulatory measure under the belief that such measures are compatible with the investment treaty, they tend to abandon them once threatened to be sued by foreign investors under the investment treaty (Mann, 2007; Tienhaara, 2011). The fact that the provisions of investment treaties were broadly defined has empowered tribunals with a degree of discretion to interpret the terms occurring in these treaties and, hence, they operate as lawmakers in certain instances (Schill, 2011). Some scholars hold arbitral interpretation responsible for emerging problems in the arbitration system, arguing that arbitrators have failed to interpret investment treaties in a manner that balances interests of competing stakeholders by adopting pro-investor interpretation of these treaties to further enhance investment protection (Karl, 2008; Sornarajah, 2008). The issues with the investment arbitration system will be addressed in Section 5.3 further below. The next section, however, addresses another conceptualisation of the relationship between investment treaties and regulatory power.

5.2 Regulatory Chill

As stated by UNCTAD in the World Investment Report of 2003, the right to regulate is the sovereign prerogative of a country arising from the control over its own territory (UNCTAD, 2003). Nevertheless, as established in the previous sections, BITs require countries to exercise this sovereign right in accordance with their obligations for the protection of foreign investors. As a result of this confrontation, another hypothesis on the relationship between investment treaties and a host country’s regulatory power exists in the literature on BITs and policy space. The hypothesis states that once signed, investment treaties such as BITs result in ‘regulatory chill’ in the host State (High Commissioner for Human Rights, 2003; Schill, 2007; Tienhaara, 2009). According to Bonnitcha (2011), regulatory chill occurs when a host country does not exercise its regulatory power because it realises that its regulations may violate the investment treaty for which it can be sued by the investor. Tienhaara (2018) adds that the regulatory chill hypothesis suggests that governments will fail to regulate in the public interest in a timely and effective manner because of concerns about ISDS. According to this hypothesis, through ISDS BITs have significant potential for indirect impacts on the way in which host States exercise their regulatory powers (Bonnitcha, 2016). ISDS is expected to have this effect on host States because of the substantial financial risk involved (as will be demonstrated below governments have been found liable for hundreds of millions and, in some cases, even billions of dollars) as well as the difficulty in predicting outcomes (Tienhaara, 2011; UNCTAD, 2014a).

This particular hypothesis has been contested on the ground that regulators in host States are often unaware of the investment treaties they signed and of disputes that can be brought under them (Coe and Rubins, 2005). It has also been argued that it is difficult to find such cases 'because they require counter-factual evidence about the regulations that would have existed in the absence of the purported chilling' (Bonnitcha, 2011, p. 134; Tienhaara, 2017). Furthermore, according to Bonnitcha (2011, p. 134), regulatory chill due to protection provided by BITs is difficult to isolate because, in addition to identifying the chilling effect, one must be able to exclude the possibility that it was attributable to some other cause. Nevertheless, several scholars have put forward case studies that suggest that investor threats of arbitration had an impact on the development of specific policies (see Schneiderman, 2008; Tienhaara, 2011, 2009). For instance, Indonesia exempted a number of foreign investors from a ban on open-pit mining in protected forests after receiving threats of arbitration claims in the range of 20–30 billion USD (Tienhaara, 2011). The timing of the government's actions, statements to the media and other factors suggest that the government was strongly motivated to remove the threat of arbitration (see Gross, 2003).[42]

Finally, according to Prabhash (2012), a critical assumption made in the regulatory chill hypothesis is that regulators in host States have full knowledge about their investment treaties and of the disputes that can be brought against them under such international treaties. Considering that studies conducted on the experience of

[42] For other examples, see Tienhaara (2011).

developing countries in signing BITs reveal that officials tend to have inadequate knowledge about their investment treaties until they experience arbitration cases (Poulsen and Aisbett, 2013), it is more likely that the regulatory chill effect occurs in the case of countries that have had experience with arbitration. Once they face investment arbitration claims and realise the potency of BITs, policy-makers are likely to start internalising their investment treaties in their exercise of regulatory power (Prabhash, 2012).

5.3 Investment Treaty Arbitration

The investment treaty regime relies heavily on arbitration for the enforcement of its substantive rules, but in light of the increasing number of ISDS cases, the debate about the usefulness and legitimacy of the ISDS mechanism has gained momentum (Behn et al., 2018; Zhan, 2016). In parallel with the growth of investment treaty arbitration cases, there has been a significant backlash against its use by a vocal States, scholars, and civil society actors (Behn et al., 2018). Initially, the ISDS mechanism was designed to ensure a neutral forum for investors to settle their disputes with States before an independent and qualified tribunal, granting a swift, cheap and flexible process for settling investment disputes (Zhan, 2016). However, the actual functioning of ISDS has revealed systemic deficiencies in the system (Zhan, 2016). These deficiencies have been well documented in the literature and have been summarised in the UNCTAD's World Investment Report 2013 as listed below. After summarising the main criticisms directed towards the investment treaty arbitration system, the rest of this section will expand further on some of the issues listed above to demonstrate their impact on the regulatory power of respondent States.

- Legitimacy: it is questionable whether three individuals, appointed on an ad hoc basis, can be entrusted with assessing the validity of States' acts, particularly when they involve public policy issues. The pressures on public finances and potential disincentives for public interest regulation may pose obstacles to countries' sustainable development paths (UNCTAD, 2013 see Van Harten, 2007).
- Transparency: even though the transparency of the system has improved since the early 2000s, ISDS proceedings can still be kept fully confidential – if both disputing parties so wish – even in cases where the dispute involves matters of public interest (UNCTAD, 2013; see Behn, 2015) .

- Nationality planning/'Treaty shopping': investors may gain access to ISDS procedures using corporate structuring, i.e. by channelling an investment through a company established in an intermediary country with the sole purpose of benefitting from an investment treaty concluded by that country with the host State (UNCTAD, 2013; Baumgartner, 2016).
- Consistency of arbitral decisions: recurring episodes of inconsistent findings by arbitral tribunals have resulted in divergent legal interpretations of identical or similar treaty provisions as well as differences in the assessment of the merits of cases involving the same facts. Inconsistent interpretations have led to uncertainty about the meaning of key treaty obligations and lack of predictability as to how they will be read in future cases (UNCTAD 2013; see Franck, 2005) .
- Absence of an appeal mechanism: substantive mistakes of arbitral tribunals, if they arise, cannot be corrected effectively through existing review mechanisms. In particular, ICSID annulment committees, besides having limited review powers,[43] are individually created for specific disputes and can also disagree among themselves (UNCTAD 2013; see Kim, 2011) .
- Arbitrators' independence and impartiality: an increasing number of challenges to arbitrators may indicate that disputing parties perceive them as biased or predisposed. Particular concerns have arisen from a perceived tendency of each disputing party to appoint individuals sympathetic to their case. Arbitrators' interest in being re-appointed in future cases and their frequent 'changing of hats' (serving as arbitrators in some cases and counsel in others) amplify these concerns (UNCTAD, 2013; see Gaukrodger and Gordon, 2012).

[43] It is notable that even having identified 'manifest errors of law' in an arbitral award, an ICSID annulment committee may find itself unable to annul the award or correct the mistake (UNCTAD, 2013). See CMS Gas Transmission Company v. The Republic of Argentina. ICSID, Case No. ARB/01/8. See Article 52(1) of the ICSID Convention which specifies the grounds for approving an annulment request.

According to a study by Hodgson and Campbell (2017),[44] the average claim in investor-State arbitrations based on BITs and other international investment treaties is c. 1.2 billion USD (c. 719 million USD excluding the *Yukos v. Russia* arbitrations),[45] and the average award (when claimant succeeds) is c. 486 million USD (c. 110 million USD excluding the Yukos award). Billion dollar awards, such as the 50 billion USD award against Russia in relation to the dissolved Yukos oil company and the 1.77 billion USD award for Occidental in a dispute with Ecuador,[46] highlight just how large the stakes can get (Rosert, 2014). Thus, exposure to ISDS carries significant financial risks for governments. Under this system, the State is always the respondent, never the claimant, and it is the only party liable for treaty breaches under existing agreements.[47] Even when States 'win' an arbitration, they often have to pay their legal fees, as there is no established 'loser pays' principle in the regime (Bonnitcha et al., 2017). According to Hodgson and Campbell (2017), the successful party recovers some portion of its costs in 51 per cent of cases. The costs for respondents include legal expenses (c. 4.9 million USD on average) and tribunal costs (c. 0.9 million USD on average) (Hodgson and Campbell, 2017). The costs of these arbitrations depend on many factors that are largely outside of the respondent States' control (e.g., the compensation claimed by the investor, the length and complexity of the proceeding) (Rosert, 2014). Among known arbitrations, tribunals have often awarded far less than what investors claim, yet some States have had to pay hundreds of millions of dollars in compensation, and a few awards have exceeded 1 billion USD as illustrated in Figure 4 (Bonnitcha et al., 2017). This is of particular concern to developing countries, as these figures represent a significant burden on public budgets. A study by the Organisation for Economic Co-operation and Development (OECD) warned that large awards could 'seriously affect a respondent country's fiscal position' (Gaukrodger and

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[44] Hodgson and Campbell (2017) conduct an empirical analysis of 324 investment treaty arbitration awards and 52 decisions on annulment.

[45] Consisting of three cases heard by the same arbitral tribunal in parallel: Yukos Universal Limited (Isle of Man) v. Russian Federation. UNCITRAL, PCA Case No. AA 227; Veteran Petroleum Limited (Cyprus) v. Russian Federation. UNCITRAL, PCA Case No. AA 228; Hulley Enterprises Ltd. (Cyprus) v. Russian Federation. UNCITRAL, PCA Case No. AA 226.

[46] Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador. ICSID, Case No. ARB/06/11.

[47] In a rare number of investment treaty arbitrations, respondent States have made counterclaims against the investor that commenced the arbitration (Rosert, 2014; see Bjorklund, 2013)

Gordon, 2012, p. 7). Naturally, the impacts of large damages awards on low-income and lower-middle-income countries are even more significant (Rosert, 2014). Relative to government budgets and in per capita terms developing countries pay significantly more in damages than developed nations (Gallagher and Shrestha, 2011).

Figure 4: Amount of compensation in investment treaty arbitration[48]

	Claimed	Awarded by tribunal	Agreed in settlement
Less than US$1 million	5	11	0
US$1–9.9 million	38	34	2
US $10–99.9 million	150	47	15
US $100–499.9 million	158	19	9
US $500–999.9 million	53	3	5
US $1 billion or over	78	6	2
Not available	204	2	61

Source: (Bonnitcha et al., 2017) using data from UNCTAD IISD Navigator as of September 2016

States' expectation of high costs and the threat of sizeable claims can also influence negotiations between the investor and the State outside of the arbitration setting, providing claimants with leverage to demand compensation or other concessions in exchange for a settlement (Rosert, 2014). How often and successful investors are in doing so is unknown, but according to Gallagher and Shrestha (2011, p. 5), it can be assumed that they 'occur much more frequently than actual cases'. In some cases, investors were successful in watering down the government measures that led to the dispute (Gallagher and Shrestha, 2011) and in other cases, a settlement is reached. It is important to note that settlements can be worth hundreds of millions and even billions of dollars (Rosert, 2014).[49] Furthermore, according to an OECD study, high costs of ISDS or the threat of such costs can have a dissuasive effect on States and investors can use the spectre of high-cost ISDS litigation to bring a defiant government to the negotiating table for purposes of achieving a settlement of the dispute

[48] Data collected by Bonnitcha et al. (2017) only includes known investment treaty arbitrations where UNCTAD had information about the amount of compensation claimed, awarded, or agreed to in settlement.

[49] Examples include: a c.920 million USD settlement reached in a dispute between a subsidiary of the Danish Maersk Group and Algeria related to a windfall tax on oil profits. See Mærsk Olie, Algeriet A/S v. People's Democratic Republic of Algeria. ICSID, Case No. ARB/09/14. In another case, Venezuela paid 600 million USD to the Dutch building materials company CEMEX to settle a dispute. See CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela. ICSID, Case No. ARB/08/15.

(Gaukrodger and Gordon, 2012, p. 22). Hence, they can also use the threat of arbitration claims to induce a regulatory chill as discussed above.

In 2017, at least 65 new treaty-based ISDS cases were initiated, bringing the total number of known cases to 855 (UNCTAD, 2018b). About one-third of all concluded cases were decided in favour of the State (claims were dismissed either on jurisdictional grounds or on the merits), and about one-quarter were decided in favour of the investor, with monetary compensation awarded (UNCTAD, 2018b). A quarter of cases were settled and, in most cases, the specific terms of settlements remain confidential. In the remaining proceedings, cases were either discontinued, or the tribunal found a treaty breach but did not award monetary compensation (UNCTAD, 2018b). As in previous years, the majority of new cases were brought against developing countries and transition economies (UNCTAD, 2018b). Despite the recent increase in claims against developed countries, developing countries remain the most frequent respondents to investment treaty arbitration claims.

In addition to the deficiencies of the system which were listed above, critics have claimed that tribunals have systematically displayed certain biases when handling investment treaty arbitration cases. One of the claims is that tribunals disproportionately favour the private property interests of foreign investors over host States' space to regulate and legislate in the public interest (Behn et al., 2018). A public statement on the international investment regime supported by many leading academics criticised the current ISDS system arguing that it poses a serious threat to democratic choice and the capacity of governments to act in the public interest by way of innovative policy-making in response to changing social, economic, and environmental conditions.[50]

Other critiques hold that the investment treaty arbitration process is inadequately deferential to respondent States and that this results in either a pro-investor or anti-developing State bias (Behn et al., 2018). Issues of policy space shrinkage are compounded by the alleged commercial bias of arbitral proceedings as observed by many analysts (Calvert, 2016; see McArthur and Ormachea, 2009; Olivet and

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[50] Public Statement on the International Investment Regime, 2010. Toronto, ON, Osgoode Hall Law School. Available at: https://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/ (Accessed 12 September 2018).

Eberhardt, 2012; Van Harten, 2008). Critics have argued that ICSID and other international tribunals are composed on an ad hoc basis of judges that have a commercial law background (as opposed to human rights or public law) (Calvert, 2016). The investment treaty arbitration system uses a private law arbitration model based on arbitration followed in international commercial arbitration (ICA), to addresses public law questions (Harten, 2007; Salacuse, 2010; Schill, 2010; Van Harten and Loughlin, 2006). According to the critics, this ensures judges will interpret and apply investment rules according to commercial norms and will, therefore, be less sensitive to conflicts with human rights and domestic economic and social priorities (see Olivet and Eberhardt, 2012).

Arbitrators also lack the ability to interpret and apply provisions of investment treaties in light of countries' domestic circumstances and context (Calvert, 2016). An example of how the domestic circumstances are ignored at times by tribunals is the manner in which different interpretations of the 'necessity defence doctrine'[51] provided for in BITs have led to very different outcomes in investor-State disputes in the post-crisis Argentine context (Calvert, 2016; see Gomez, 2012; Kent and Harrington, 2012).[52] Considering that arbitrators are not accountable to an oversight mechanism, such arbitral processes are criticised as interfering in the democratic exercise of countries' policymaking processes (see Van Harten, 2008).

Apart from the scope and potential costs of investment treaty arbitration, the mechanism is notable for the identity of the arbitrators. Bonnitcha et al. (2017) provide a table that illustrates the exclusive list of 'elite' arbitrators that sit together in the majority of tribunals in investment treaty arbitrations (see Figure 5). Western men dominate the list of most frequent arbitrators, and fewer than half are experts in public international law. Consequently, 'the delegation of adjudicative powers to such a small group of relatively homogenous individuals, most of whom have been lawyers in

[51] The necessity defence refers to the provisions found in BITs and under international law, which explicitly exempt government action taken during times of crisis from full treaty coverage.

[52] According to Peterson (2012), arbitrators rejected Argentina's necessity defence with unanimous decisions in five cases (CMS, Sempra, Enron, BG and National Grid) and by a two to one majority in three cases (Suez, Impreglio and El Paso). Arbitrators accepted the defence (to some extent) in three cases (LG&E, Continental Casualty and Total).

private practice, has prompted considerable controversy in recent years' (Bonnitcha et al., 2017, p. 28; see Van Harten, 2012a).

Figure 5: Most frequently appointed investment arbitrators[53]

Arbitrator	Nationality	Gender	Specialist in public international law	Full-time practitioner	Number of appointments (% of known investment treaty arbitrations)
Brigitte Stern	France	Female	Yes	No	76 (11%)
Gabrielle Kaufmann-Kohler	Switzerland	Female	No	Yes	46 (7%)
Francisco Orrego Vicuña	Chile	Male	Yes	No	44 (6%)
Charles Brower	United States	Male	Yes	Yes	42 (6%)
Yves Fortier	Canada	Male	No	Yes	42 (6%)
Albert Jan Van den Berg	Netherlands	Male	No	Yes	35 (5%)
Marc Lalonde	Canada	Male	No	Yes	34 (5%)
Christopher Thomas	Canada	Male	No	Yes	33 (5%)
V.V. Veeder	United Kingdom	Male	No	Yes	30 (4%)
Karl-Heinz Böckstiegel	Germany	Male	No	No	30 (4%)
Bernard Hanotiau	Belgium	Male	No	Yes	28 (4%)
Bernardo Cremades	Spain	Male	No	Yes	26 (4%)
Rodrigo Oreamuno Blanco	Costa Rica	Male	No	Yes	25 (4%)
Piero Bernardini	Italy	Male	No	No	24 (3%)
Jan Paulsson	Sweden/ France	Male	Yes	Yes	24 (3%)
Vaughan Lowe	United Kingdom	Male	Yes	No	24 (3%)
Stanimir Alexandrov	Bulgaria	Male	Yes	Yes	24 (3%)
Philippe Sands	United Kingdom/ France	Male	Yes	Yes	23 (3%)
Juan Fernandez-Armesto	Spain	Male	No	Yes	22 (3%)
Pierre-Marie Dupuy	France	Male	Yes	No	20 (3%)
Toby Landau	United Kingdom	Male	No	Yes	20 (3%)

Source: Extracted from Bonnitcha et al. (2017)

So far, there have only been a few tentative efforts towards empirically assessing outcome asymmetries in investment treaty arbitration cases, and the results are mixed (Behn et al., 2018). A study by Van Harten (2012b) examined trends in legal interpretation instead of case outcomes in 140 investment arbitration cases and finds statistically significant evidence that arbitrators favour: (1) the position of claimants over respondent States, and (2) the position of claimants from major Western capital-exporting States over claimants from other States. According to the study, there is a range of possible explanations for the results, and further inferences are required to connect the observed trends to rationales for systemic bias (Van Harten, 2012b). Another study by Schultz and Dupont (2014) investigated the empirical manifestations of the uses and functions of investment arbitration, analysing over 500 arbitration claims from 1972 to 2010. The study found that less developed respondent States were

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[53] Total number of arbitration cases covered in this table is 696. Column 5 refers to the arbitrators' professional career as a whole (Bonnitcha et al., 2017).

twice as likely to lose an investment treaty arbitration case in comparison with cases defended by developed respondent States (Behn et al., 2018).

On the other hand, a series of empirical studies by Susan Franck and colleagues consistently find that there is no demonstrable relationship between a respondent States' development status and outcomes in investment treaty arbitration cases (see Franck and Wylie, 2015; Franck, 2014, 2009). These studies argue that the perceived relationship between respondent State development status and investment treaty arbitration outcomes may have conflated development concerns with concerns relating to democratic governance or respondent States' internal governance practices (Behn et al., 2018). Moreover, because economic development and domestic governance are such interdependent factors, any anti-developing State bias may actually result from poor domestic governance structures as opposed to its relative wealth or poverty (Behn et al., 2018).

Finally, a more recent study by Behn et al. (2018) analyses investment treaty arbitration outcomes for all known concluded cases as of January 2017. The study finds that instead of an anti-developing State bias disfavoring less developed respondent States in investment treaty arbitration, there appears to be a strong pro-developed State bias favouring more developed respondent States (Behn et al., 2018). Accordingly, higher economic development at the respondent State level is associated with lower claimant (investor) success rates in investment treaty arbitration (Behn et al., 2018). The study also finds partial support for the conflation theory. Behn et al. (2018) argue that while a State's overall democratic governance levels per se do not explain pro-developed respondent State favouritism in investment treaty arbitration, two particular governance aspects can possibly explain higher degrees of respondent State success in defending against investment treaty arbitration cases: the strength of a State's ability to protect property rights and the degree to which a State maintains impartial bureaucracies.

In defence of the system, proponents of investment treaty arbitration argue that host States are to blame for the recent explosion in arbitrations. They argue that arbitrations are filed as a result of arbitrary, discriminatory, and or predatory behaviour by the host States. Accordingly, the investment treaty regime increases the cost for States of failing to conform with norms of 'good governance' and the 'rule of law', which also provides an incentive for domestic reforms in the countries that are performing poorly in these areas (Bonnitcha et al., 2017). Furthermore, by joining the investment regime, these countries can provide strong investor protections and a neutral dispute resolution mechanism which are both necessary to attract much needed FDI (Bonnitcha et al., 2017). Other scholars argue that investment treaties are only going through 'growing pains', which will disappear as the system matures. They argue that the investment treaty system does not adversely affect the host State's right to regulate (Krishan, 2011; Paulsson, 2006; Schill and Brower, 2009). The argument often is that under general international law host countries have the regulatory power to adopt 'non-discriminatory', 'good faith' regulatory measure for public policy without attracting any international liability (Alvarez, 2009; Paulsson, 2006; Schill and Brower, 2009), which has been recognised by many tribunals.[54] However, again it is important to state here that the precise boundaries of justified 'public policy' are unclear (Salacuse, 2010). Even scholars like Stephan Schill who defend the investment treaty regime recognise that certain aspects of the system have to be critically evaluated (Schill, 2011).

Critics, however, remain unpersuaded by these arguments. They argue that foreign investors are already privileged in many developing countries and that tribunals have often awarded compensation 'over and above what is reasonable' (Bonnitcha et al., 2017, p. 31). Moreover, 'the unpredictable nature of a dispute settlement system premised on ad hoc arbitration, and the financial stakes involved for arbitrators themselves renders investment treaty arbitration unsuitable for settling disputes arising from the exercise of State authority' (Bonnitcha et al., 2017, p. 31). According to critics, these risks are particularly unreasonable, considering there is no convincing evidence that the treaties are economically or politically useful for host countries.

In conclusion, while proponents of the investment treaty regime may argue that the term 'legitimacy crisis' is an exaggerated description of the current state of affairs in the investment arbitration system, it seems that the investment treaty regime and particularly the investment treaty arbitration system is at a crossroads, with signs of

[54] Methanex Corporation v. Mexico. NAFTA Award, August 3, 2005; Tecmed v. Mexico. ICSID, Case No ARB/AF (00)/2; Feldman v. Mexico, Award, 16 December 2002, 18 ICSID Review-FILJ (2003) 488; Saluka v. Czech Republic, para 255; Parkerings-Campignet AS v. Lithuania. ICSID, Case No ARB/05/8, 11 September 2007, para 332.

growing unease appearing in both the developing and developed world. Investment treaty arbitration is affecting a large range of sovereign regulatory powers and thus certainly raises questions about the relationship between investment treaties and host country's policy space (Wells, 2011). Whereas developing countries began to reject the ISDS mechanism over a decade ago, it has been a subject of highly publicised public debates in the EU and the US more recently. In September 2015 the EU proposed to replace the existing system of party-appointed arbitrators with standing investment tribunals, which in turn are meant to provide the template for a multilateral investment court (Council of the European Union, 2016). The rejection of ISDS by the European Parliament and Commission has conferred unprecedented political legitimacy on the critics of the existing system, even if some of the critics have responded that the EU proposals do not really answer their objections (Howse, 2017). The implications of these changes for developing countries are still unknown, as EU member States have not indicated the intention to remove ISDS from the existing BITs with developing countries. Accordingly, it is important to examine the possible routes for developing countries that are discontent with the ISDS system and the investment treaty regime as a whole.

The next section addresses how countries began to realise the significant costs of joining the regime compared to the uncertain benefits. It also documents the different reactions of countries that have expressed their discontent with the investment treaty regime.

6. Backlash Against the Investment Treaty Regime: How States Have Responded Differently

6.1 The Wakeup Call: BITs Bite!

It was not until they were targeted in dispute settlement claims that most governments quickly began to take seriously the legal consequences of BIT obligations: 'The rise in investment treaty claims has therefore led to spatially and temporally dispersed arrival of important information about the potential costs of BITs' (Poulsen and Aisbett, 2013, p. 2). BIT-based Investor-State disputes had only 37 cases recorded between 1990 and 1999, compared to 408 between 2000 and 2011 (El-Kady, 2013). The year 2015 witnessed the highest number of new treaty-based cases ever filed with an estimated 80 cases initiated. The total number of known investment treaty arbitration cases reached 855 by January 2018 (UNCTAD, 2018b).[55]

As the number of investment treaty arbitrations has grown; the number of BITs has decelerated considerably, 'as even developed countries have been surprised about the potential breadth of key BIT-standards' (Poulsen and Aisbett, 2013, p. 5). Policymakers in host States had generally underestimated the potential costs of arbitration, both financial and political (UNCTAD, 2011). Today, many governments have gained a much better understanding of the costs and benefits associated with BITs and some are re-evaluating the previously unchallenged assumption that the economic benefits outweigh the loss of policy space (Kaushal, 2009; Sornarajah, 2010).

While the costs of joining the regime have become clear, the benefits remain uncertain. Hence, in addition to the realisation of the extent to which BITs and the ISDS mechanism can constrain policy space, another important reason cited for the decline in the number of BITs signed is the growing concerns about the effectiveness of BITs in attracting FDI. Empirical research to date is at best mixed on the issue of whether the treaties actually encourage investment and, in turn, that any signalling effect of the treaties influences investor decision-making about where to commit capital. (Van Harten, 2010).[56] In light of the increase in the number of ISDS cases globally and the inconclusive evidence of the impact of BITs on FDI flows, governments increasingly realising the importance of alternative, less risky, policy tools, including more targeted investment promotion policies to attract FDI strategically (El-Kady, 2013). While BITs remain a major policy tool used on the international investment scene, they are increasingly perceived as ineffective in the absence of other FDI determinants such as market size, income levels, natural resource availability, and labour cost and skills (El-Kady, 2013). This uncertainty about the merits of BITs as FDI attraction tools has led countries to question the trade-off between restricting policy space and increasing exposure to ISDS, and the promise of increased FDI flows as a result of treaty protection (El-Kady, 2013).

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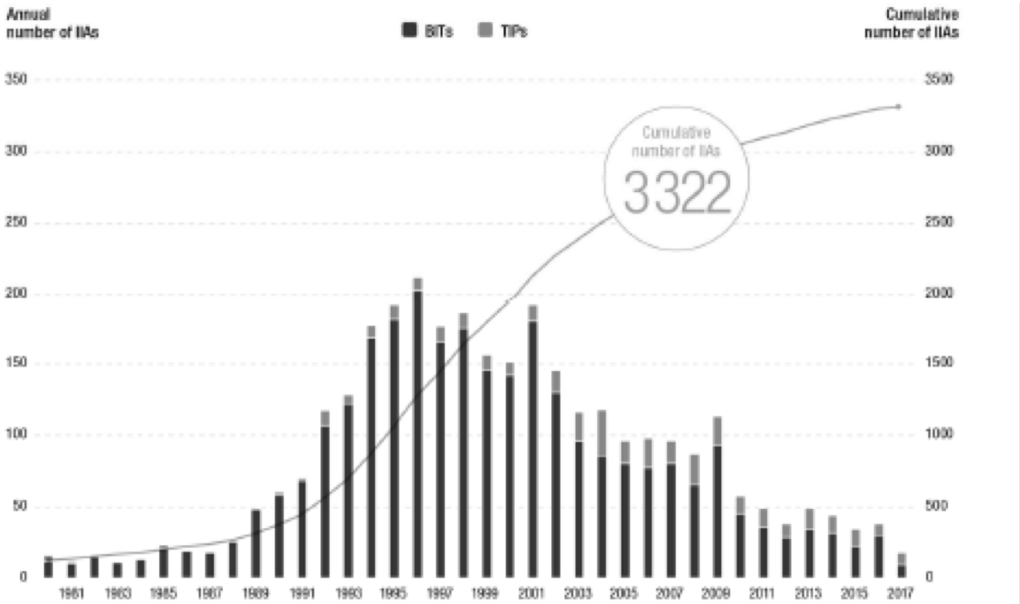
[55] See Figure 7.

[56] See Appendix I for a list of Quantitative Studies Examining the Relationship between BITs and FDI.

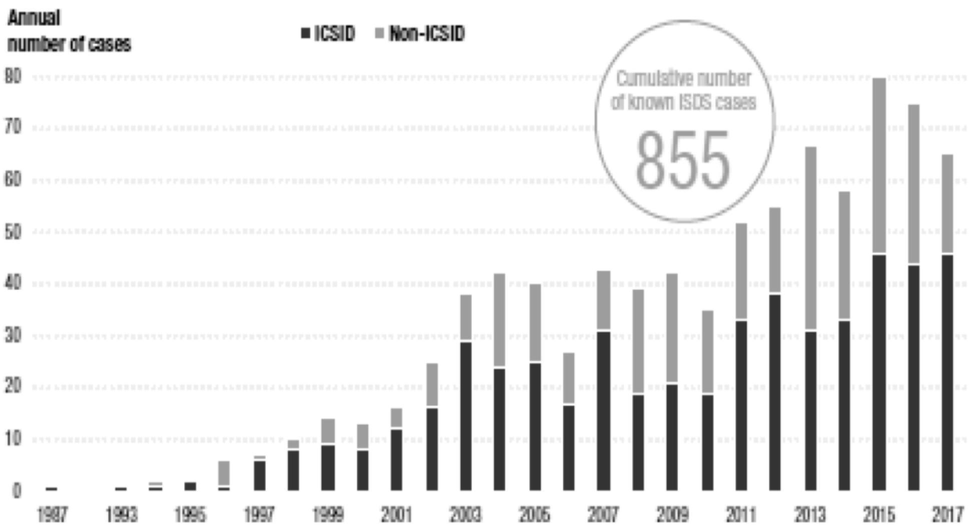
The realisation of the extent to which BITs and ISDS threaten the sovereign right of host States to regulate coupled with the uncertainty regarding the economic benefits of joining the regime has resulted in an attack on the regime by members and critics alike. As part of the backlash against the investment treaty regime, both developed and developing countries have reacted, although in varying degrees.

Figure 6: Annual and cumulative number of BITs, 1980-2017



Source: UNCTAD (2018a), UNCTAD IIA Navigator

Figure 7: Trends in known treaty based ISDS Cases 1987-2017



Source: UNCTAD (2018b), ISDS Navigator

The rest of this section proceeds as follows. Section 6.2 argues that despite the constraints, States still have an essential role to play in the regime from a critical IPE perspective. Section 6.3 demonstrates how developing and developed countries have recognised the conflict between policy space and BITs and have reacted differently as principals in the investment treaty regime.[57]

6.2 Despite of the Constraints States Still Have a Role to Play in the Investment Treaty Regime

Pursuant to a critical IPE account, even if the role of the State is altered, it still has a continuing role to play in the global political economy (Schneiderman, 2013). This changed role may not have been very well captured, however, in Robert Cox's initial formulation: 'The domestic-oriented agencies of the State are now more and more to be seen as transmission belts from world-economy trends and decision making into the domestic economy, as agencies to promote the carrying out of tasks they had no part in deciding' (Cox, 1996, p. 193). Cox has since abandoned this metaphor as he conceded such a unidirectional description of States was misleading, given States are active agents shaping, sometimes resisting, the rules and institutions of global law (Cox, 2002, p. 33). Nevertheless, Schneiderman argues that the metaphor remains useful as it underscores the continuing role of States in the structuration of economic globalisation even as States pre-commit to behave in certain ways via transnational legal commitments (Schneiderman, 2013).

Furthermore, Schneiderman claims that critical IPE scholars inspired by the account provided by Karl Polanyi in *The Great Transformation* (1944) have been better equipped than most to understand that, in the era of economic globalisation, the spread of markets is not spontaneous and unplanned but requires the deliberate planning by, and intervention of, States (Schneiderman, 2013). He compares that to the international investment regime, arguing that States are critical both to the construction and ongoing maintenance of the regime, even though their role may be less apparent considering the rising power and influence of investors and MNCs (Schneiderman, 2013). States are, nevertheless, both authors of the regime and parties to the disputes that inevitably arise (Roberts, 2010). Given that global law emerges out of the global take-up of local law, Schneiderman elaborates that we should naturally expect States to be championing global regimes that mimic rules drawn from their own national legal systems (Schneiderman, 2013). From this angle, we should

[57] An explanation of the role of States as principals vs. their role as litigants in the investment treaty regime is provided in Section 6.2.

understand that many of the disciplines enforced by investment arbitration tribunals are drawn from, or complement, the national legal orders of powerful capital-exporting States (Schneiderman, 2008). Considering that States still play an important role in the system (although to varying degrees), a study evaluating the options available to developing countries that have committed to BITs and hence this investment regime is timely and much needed.

6.2.1 The Reactions of States as Principals in the Investment Treaty Regime

States have significant stakes in how investment treaties are used and interpreted as they are respondents in all treaty-based claims and their investment treaty commitments can have far-reaching implications for public policy, fiscal positions and the policy-making process (Gordon and Pohl, 2015). The tension between the rights afforded to foreign investors under investment treaties and the legitimate rights of sovereign States to regulate in the public interest of their citizens precipitated a backlash from a growing number of States claiming that these treaties are undercutting their national sovereignty (Langford et al., 2018). According to Langford et al. (2018), the investment treaty regime is under attack, with even some prominent 'insiders' expressing concern (see Echandi et al., 2013; Joubin-Bret and Kalicki, 2015). The backlash has resulted in a single overarching strategy by States discontent with the regime, namely the reassertion of sovereign control by limiting legally or effectively the expansive rights granted to investors (Langford et al., 2018). This response from host States has been labelled as the 'return of the State' by Alvarez (2011). A full exit from the investment treaty regime is not feasible for neither developed or developing countries as BITs[58] have survival clauses that render them somewhat resilient to change or termination (Lavopa et al., 2013).[59] While several States have sought to make changes to their commitments in order to address perceived or real gaps and

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[58] The denunciation of the ICSID Convention does not immediately prevent investors filing claims against host States as well.

[59] The vast majority of investment treaties have clauses that extend some or all effects of the treaty beyond termination by a fixed period during which treaty protections still hold for investments that have been made – or approved or committed– prior to termination of the treaty. The shortest fixed survival period in the sample is five years, and the longest is 25 years. The average length of treaty effects beyond termination is 12.5 years and has been stable for many years (Gordon and Pohl, 2015).

imbalances, only a minority have launched a vocal and existential attack on the investment regime (Langford et al., 2018, p. 73).

Before proceeding with documenting the different reactions and the attempts to address these responses in the investment treaty regime literature, it is important to note that there two roles that the States perform in the regime. The first is the State as a principal, i.e. treaty maker and regime shaper; the second is the State as a litigant in investment treaty arbitration (Langford et al., 2018; see Roberts, 2010).

Tactics adopted by States as principals include (Langford et al., 2018): imposing moratoriums on the signing of new BITs; refraining from ratifying signed BITs; publicly criticising the regime; calling for the renegotiation of BITs already in force; adjusting negotiating strategies over new investment treaties including development of model BITs and amending or excluding controversial provisions like FET, expropriation and ISDS; terminating existing BITs; and withdrawing from arbitration institutions (mainly ICSID). On the other hand, in their role as litigants in the regime States have adopted the following tactics (Langford et al., 2018, p. 75):

> attempting to bind adjudicators to sovereignty protecting interpretations of certain treaty provisions; commencing domestic criminal proceedings against foreign investor claimants after a dispute arises; refusing to comply with awards; engaging in delay tactics; increasing the use of procedural motions for challenging arbitrators; requesting security for costs and other forms of injunctive relief; and making novel challenges to the jurisdiction of tribunals.

This thesis will focus on the State as a principal, analysing how different developing countries have reacted once they realised that their membership in the investment treaty regime constrained their sovereignty to regulate in the public interest and vocally expressed their discontent.

Both developed and developing countries are paying far greater attention today to the scope of their treaty obligations and are seeking a better balance between investor rights and the right to regulate in the public interest (Singh and Ilge, 2016). Whereas capital-exporting countries have reasserted themselves in their role as treaty-makers and overall regime shapers (Langford et al., 2018), developing and capital-importing countries that have expressed their discontent with the regime have reacted in different ways.

Notable developments in State practice amongst developed countries include recognition by developed capital-exporting countries like Australia, United States, Canada and Norway of conflicts between investment protection and their regulatory power as host countries. NAFTA States introduced a note of interpretation aimed at limiting and rejecting the expansive interpretation given by arbitral tribunals on the meaning of the FET provision (Salacuse, 2010).[60] In response to concerns expressed by civil society on the effect of investment treaties on Canada's regulatory power, the Canadian government adopted a new model investment treaty in 2004 (Newcombe, 2005) before revising it in 2012.

In the same vein, the US adopted a new model investment treaty in 2004, to address the concerns that the 1994 model investment treaty did not balance investment protection with regulatory power (Vandevelde, 2009). The US updated its Model BIT text again in 2012 to limit the expansive interpretations of arbitration tribunals (Singh and Ilge, 2016). In Europe, Norway developed a new BIT model in 2008, in response to concerns related to investment treaties and the host State's regulatory power. Due to strong opposition from civil society and political groups, Norway had to abandon its draft model BIT in 2009, which paved the way to a new draft model BIT published in 2015. The main changes introduced in the new model BIT relate to the State's ability to regulate for the protection of health, human rights, safety, and environmental issues, and, to a lesser extent, labour rights (Choudhury, 2016).

Finally, in 2011 the Gillard government in Australia vowed that it would no longer include provisions on ISDS in bilateral and regional agreements.[61] The new policy was justified by reference to the principles of 'no greater rights' for foreign investors and the government's 'right to regulate' to protect the public interest (Tienhaara and Ranald, 2011). Although the Abbott government reversed this policy in 2014, Australia has since decided on the inclusion of the ISDS provision on a case-by-case basis (Singh and Ilge, 2016).

As rule takers and predominantly respondents to investor-State arbitration cases, developing countries (particularly capital-importing ones) are more exposed to the

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[60] At the time of writing negotiations between the US, Canada and Mexico have resulted in an agreement to introduce changes to the current agreement including a scale-back of ISDS rules (see Gertz, 2018).

[61] See the 2011 Australian Department of Foreign Affairs and Trade report, Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity. Available at: http://pandora.nla.gov.au/pan/126547/20110502-1209/www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html (Accessed 2 October 2015).

risks posed by the regime and significantly less powerful in terms of shaping or reforming the regime. Developing countries that have expressed their discontent with the regime have reacted variously. In a few cases, States have decided to terminate some or all of their BITs and denounce the ICSID Convention. Bolivia and Ecuador for instance, gave up their membership of ICSID. Venezuela soon followed in 2012 and sent a notice to the World Bank denouncing the ICSID Convention. Both Bolivia and Ecuador proceeded to terminate all their BITs.

A second approach that has been adopted by some developing countries is the decision not to renew expiring BITs and to replace them with either a new revised BIT or domestic legislation. The new model BIT or domestic law in this approach generally maintains the main principles of the investment treaty regime but amends or excludes provisions that are deemed too expansive or controversial. This approach was first adopted by South Africa, as it decided not to renew most of its expiring BITs and to issue a new investment protection law to regulate FDI inflows. The new law has maintained some of the fundamental principles and provisions that existed in its BITs but has excluded two of the most important features that exist in the vast majority of the BITs, namely the FET provision and international investor-State arbitration.[62] India and Indonesia followed South Africa's lead in refusing to renew their expiring treaties, but aim to replace them with BITs that reflect their new model treaties that have amended some of the substantive protection standards and narrowed the scope of the ISDS clause.

The third and last type of reaction by developing countries that have expressed their discontent with the investment treaty regime is remaining committed to BITs signed and other related treaties like the ICSID Convention, due to fear of the possible consequences of denouncing and terminating these agreements, amongst other reasons. Egypt, for instance, has faced over 33 investment treaty arbitration cases and has vocally criticised the unbalanced nature of the investment treaty regime. Nevertheless, the State has settled for incremental reforms compared to the more substantive reforms conducted by countries that the two previous approaches explained above.[63] Other examples include Argentina, under the Kirchners and not the

[62] More detailed analysis of South Africa's experience is provided in Chapter 6.

[63] An in-depth analysis of Egypt's case will be provided in Chapter 7.

current administration. Between 1997 and 2016 Argentina was involved in a total of 59 investment treaty claims before arbitration tribunals (Pérez-Aznar, 2016). Under both the Cristina Kirchner and Néstor Kirchner administrations, the government of Argentina was very critical of BITs and investor-State dispute settlement mechanisms (Pérez-Aznar, 2016). Although there were voices calling for the termination of BITs and denunciation of the ICSID Convention, these proposals never materialised (Pérez-Aznar, 2016).

However, it is important to clarify again that this description is based on the assessment of the reaction of the State in its role as a principal and not a litigator (as explained above). States that have expressed their discontent with the regime and refrained from substantially revising their commitments or membership of the investment treaty regime may have reacted strongly in a different capacity or role. Argentina, in particular, is a good example of a State that has reacted strongly through its role as a litigator and not a principal. This is evident in its refusal to recognise and comply with some of the awards rendered by arbitration tribunals under Cristina Kirchner's rule (see Calvert, 2017).

7. Conclusion

While the debate over the pros and cons of the investment treaty regime continues, there has been wide recognition of the significant impact BITs can have over the policy space available for host States to regulate. This chapter has illustrated why the investment treaty regime is currently facing a crisis and how as part of the backlash against the regime its members have reacted differently. Whereas capital-exporting developed countries have generally reacted in similar fashion by tweaking their model BITs or new treaties to address their concerns, developed countries have had a wider range of reactions. Accordingly, this chapter has provided the necessary context for addressing the two main areas this thesis covers: (i) how and why did developing countries sign these BITs, in light of the significant costs and uncertain benefits demonstrated above; and (ii) how and why have they reacted differently?

Chapter 3 reviews how the literature on BITs has addressed these research questions articulated in Chapter 1 and identifies the literature gap that this thesis aims to contribute to filling. The chapter will also outline the main theories and frameworks that are used in the comparative case study analysis that is conducted in Chapters 5, 6 and 7.

Chapter 3. Literature Review and Analytical Framework

1. Introduction

One of the main objectives of this thesis is to identify the options available to developing countries that have decided to vocally express their discontent with the investment regime after realising the extent to which membership constrains policy space. The thesis deploys Hirschman's framework of Exit, Voice and Loyalty to categorise different options available to developing countries in practice. It does so on the basis of close scrutiny of 3 case studies. However, to give greater theoretical depth to a "Hirschman-ian" categorisation of different responses to discontent with the investment regime, additional theoretical frames are mobilised. These are necessary to account for, on the one hand, why and how countries join the investment regime in the first place and, on the other, why they adopt different routes after expressing discontent with the regime.

This chapter examines how the existing literature on the investment treaty regime addresses these questions and points to the literature gap that this thesis fills. This allows for the identification of the main factors and theories that are used for the comparative case study analysis that is conducted in Chapters 5, 6 and 7.

The first part of this chapter reviews efforts in the existing literature to categorise the different options available to States who are dissatisfied with their membership of the investment treaty regime. One framework that has been used in the literature to classify the different options available and which will be explored further in this chapter is Albert Hirschman's Exit, Voice and Loyalty framework. After demonstrating how Hirschman's framework has been applied in the literature on BITs and investment treaty arbitration, an analysis of the challenges and limitations facing developing countries when deciding on which route to take reveals the need to reconceptualise Hirschman's framework in order to reflect the dynamics of the regime and the feasible options available to these countries.

The second part of the chapter analyses the different theoretical frameworks that have been used to explain the diffusion of BITs amongst developing countries. Several leading scholars in the field argue that for developing countries, in particular, there has been a perceived need to sign BITs in order to remain competitive as a destination for

FDI and to conform to the norm that signing BITs was in line with the reform-minded model economy (Elkins et al., 2006; Jandhyala et al., 2011). However, the assumption made by these scholars that governments of developing countries signed these BITs as part of a careful and rational process to compete for capital are vigorously questioned by scholars like Poulsen and Gwynn. Based on their findings from studying the experience of developing countries in signing BITs they have proposed two theories which they argue more accurately reflect how and why BITs were signed by developing countries respectively. While Poulsen's hypothesis, based on his adaptation of the Bounded Rationality framework, allows us to understand how BITs were processed and why they were not taken seriously by governments of developing countries until they faced investment arbitration cases, Gwynn's use of the Structural Power lens provides an explanation of why developing countries agreed to sign these treaties in the first place, despite either historically resisting the investment protection rules included in BITs or adopting a more regulated approach to attracting FDI. For the rest of this thesis these two hypotheses will be combined to explain how and why developing countries signed BITs despite the significant costs and uncertain benefits associated with these treaties. Furthermore, as will be demonstrated in the case studies, the thesis argues that the Structural Power lens can also be used to explain the variation in the forms of contestation of the investment treaty regime by developing countries.

The third and final part of this chapter addresses a gap in the literature on BITs and policy space that this thesis aims to fill. It is argued in this chapter that despite the growing literature on BITs and policy space, one area that has been inadequately addressed is how and why developing countries that have expressed their discontent with the regime reacted differently. In order to fill this gap, a comparative case study analysis of three developing countries that have responded differently is conducted with the purpose of: (i) reconceptualising Hirschman's framework in order to reflect the actual options available to developing countries in practice, as opposed to the options that have proposed in theory; and (ii) providing insights in the factors that influence the decision of a developing when deciding on which route to adopt.

2. Using Hirschman’s Exit, Voice, and Loyalty Framework to Classify the Different Reactions of Different Routes Identified in the Literature

The first half of this chapter deals with the literature on how States have reacted differently after expressing their discontent with the investment treaty regime. It proceeds as follows. First, an overview of Hirschman's framework and its application to different fields is provided. The second section demonstrates how it can be applied to the investment treaty regime. The third section argues that, in light of the existing dynamics in the regime and the challenges facing developing countries, the framework needs to be reconceptualised to reflect the actual options that are feasible for developing countries.

2.1 Overview of Hirschman's Exit, Voice, and Loyalty Framework

In his seminal book Albert Hirschman makes a basic distinction between the alternative ways a member can react to deterioration in business firms and, in general, to dissatisfaction with organisations: one, exit is for a member to leave the organisation, and the other, voice is for members to agitate and attempt to reform from within. The book illustrates the relationship of consumer exit, an economic concept, to consumer voice, a political one, in the marketplace and beyond (Katselas, 2014). Exit, which is generally defined as the ability of one party to leave or sever the relationship with the other party (Hirschman, 1970), is associated with Adam Smith's invisible hand, in which buyers and sellers are free to move silently through the market, continually forming and destroying relationships. Voice comes from the world of politics and is a concept used in political science to assess participation (Hirschman, 1970). As Hirschman puts it, voice ‘is here defined as any attempt at all to change, rather than to escape from, an objectionable state of affairs’ (Hirschman, 1970, p. 30).

According to Hirschman (1970), most organisations are dominated by either exit or voice mechanisms. Katselas (2014) argues that Hirschman’s great insight was that the two forces have a dynamic relationship that can be imagined on a set of scales. If there are significant penalties associated with exit, then voice becomes the only option (Hirschman, 1970). Moreover, higher prospects for effective use of voice reduce the likelihood of exit. Conversely, the presence or availability of the exit option can sharply reduce the probability that the voice option will be taken up widely and effectively (Hirschman, 1970). Since voice requires effort, it will only be used in situations where influence is likely to work (Hirschman, 1970). Both may spur recuperation of an organisation that is in decline; however, that is not a given, and organisations are not uniformly sensitive to the two responses (Katselas, 2014; see Hirschman, 1970, p. 74).

Furthermore, depending on the type of organisation involved and the specific circumstances, exit and voice may complement or counteract each other (Hirschman, 1970, p. 74). Loyalty moderates between the voice and exit options (Hirschman, 1970). According to Hirschman, loyalty makes exit less likely and voice more effective: while loyalty may postpone exit, its 'very existence is predicated on the possibility of exit' (Hirschman, 1970, p. 82).

Finally, Hirschman's theorisation suggests that voice often provides better solutions to slack than exit (Gleeson, 2016), as exit often undercuts voice while being unable to counteract decline. Hence, loyalty is conceptualised as the primary motivator behind the decision to choose voice over exit.

2.2 Application of Hirschman's Framework in Different Fields and How it Can be Applied to the Investment Treaty Regime

When Hirschman first wrote about his theory of Exit, Voice and Loyalty in 1970, he focused primarily on markets and consumer goods, but, as Gehlbach (2006, p. 396) argues, the enduring popularity of Hirschman's framework can be attributed to the ability of this simple model to seemingly explain an array of political, economic, and social phenomena. Gehlbach (2006) further elaborates that in subsequent work Hirschman's framework has been used to address the role of exit and voice in applications as diverse as the theory of the State (see Hirschman, 1978; and Rogowski, 1998), revolution (see Hirschman, 1993; and Pfaff and Kim, 2003), trade protection (see Aggarwal et al., 1987), political parties (see Kato, 1998; and Schlesinger, 1975), globalisation (see Schoppa, 2006), labour organisation (see Freeman and Medoff, 1985), and education (see Chubb and Moe, 1988).

Recognising that all organisations are inherently unstable, the theory of Exit, Voice, and Loyalty serves as a method for understanding the pulls and pushes in and out of organisations (Welsh et al., 2014). Hirschman's theory so concisely outlines the balancing factors for any organisation that others soon applied it to States and international organisations (Welsh et al., 2014).[64]

However, applying Hirschman's theory to the investment treaty regime is not so straightforward, as it is not considered as a formal organisation. International or multilateral organisations are typically comprised of plenary assemblies involving all member States and executive organs (Katselas, 2014; see Alvarez, 2006). Member States delegate authority to the organisation that, in theory, can neutrally make decisions which maximise the welfare of all member States and possibly even address distributional issues among them (Katselas, 2014; see Guzman and Landsidle, 2008). The investment treaty regime as defined in Chapter 2 does not have a formal, centralised organisation governing the regime.

Nevertheless, Hirschman did not limit his reconnaissance to formal membership organisations or institutions. He illustrated, through examples, that the analysis can be applied to virtually any relationship (Katselas, 2014, p. 322). While there is no formal international investment organisation, there is undoubtedly a 'club' of sorts, or a 'voluntary association', according to Katselas (2014), which qualifies as an organisation that States have created and joined in Hirschman's terminology (Hirschman, 1970, p. 3). By signing BITs that contain a consent to investor-State arbitration, States become members of this organisation (Katselas, 2014). According to Katselas (2014, p. 323), the particular emphasis on the inclusion of the provision on ISDS is because States' consent to investor-State arbitration is the relevant delegation of authority that created and empowered the organisation. Considering that the vast majority of BITs contain this consent, this criterion does not exclude many States that have signed BITs from the organisation.[65]

The characterisation of the investment treaty regime as a voluntary association is useful as, according to Hirschman, voluntary associations are among the few types of organisations where both exit and voice may play essential roles, and where neither

[64] Weiler (1991) used the Exit, Voice, and Loyalty framework to analyse the historical development of the EU up to the early 1990's. Examples of how the framework was used to classify the different options available to States in the investment treaty regime are provided below.

[65] According to UNCTAD, 2441 of the 2572 BITs mapped (c. 95%) include ISDS provisions. United Nations Conference on Trade and Development. International Investment Agreements Navigator. Available at: http://investmentpolicyhub.unctad.org/IIA/ (Accessed 2 July 2018).

may be dominant (Katselas, 2014; see Hirschman, 1970, p. 76–77, 120). Moreover, as Katselas (2014) argues, the voluntary association lens is also useful because it serves as a reminder that States created the regime and are its principals and members (see Yackee, 2012, p. 398). Accordingly, investment arbitration tribunals exercise authority delegated by the State to settle investor-State disputes that would otherwise be subject to national judicial processes (Katselas, 2014). As Anthea Roberts recognised (Roberts, 2010, p. 196): 'whether investment tribunals are viewed as agents or trustees, they are accountable to two or more principals – the treaty parties.' Roberts (2010, p. 191) adds that one way of understanding this dynamic is through the concepts of 'exit' and 'voice'. Finally, despite the lack of a central governing body, the investment treaty regime exists for the same reason that formal multilateral international organisations exist, because States thought it would help them accomplish their economic objectives and judged the expected benefits would be worth the anticipated membership costs (Guzman and Landsidle, 2008; Katselas, 2014; Koremenos, 2008).

Exit and voice are both at work in the investment treaty regime, as the balancing of goals, and the concerns raised in the theory of Exit, Voice, and Loyalty are all present in the context of investment treaty regime (Welsh et al., 2014). Hence, it comes as no surprise that the Hirschman's exit and voice have been used by several scholars to categorise State tactics as principals in the investment treaty regime (Langford et al., 2018). Examples of scholars that have used the framework include: (i) Katselas (2014) examined States' options for spurring change in the investment arbitration club through exit and voice; (ii) Langford et al. (2018) used exit and voice to categorise the different tactics States adopted as principals and litigants in the investment treaty regime with the aim of reasserting sovereign control and increasing policy space to regulate; (iii) Roberts (2010) used exit and voice to demonstrate the different ways States can influence investment arbitration tribunals and their scope of interpretation, and finally; (iv) Gordon and Pohl (2015) provide an inventory of countries' options to alter their positioning vis-à-vis investment treaty law through exit and voice.

This thesis aims to reconceptualise Hirschman's framework so that it can reflect the different routes adopted by developing countries and hence the options available to them, taking into consideration the specific dynamics of the investment treaty regime and the limitations faced by developing countries. Developing countries (with a few exceptions) are generally described as the model rule-takers of the global economy

(Molina, 2013). They exercise little influence in shaping rules of international cooperation and frequently have low bargaining power (Molina, 2013). However, despite power asymmetries, some scholars argue that developing countries can engage with global governance rules, and in some instances find room to manoeuvre and leverage existing constraints (Jones et al., 2010; Keohane, 1971; Molina, 2013). At times, they exhibit loyalty to disadvantageous rules, due to the overwhelmingly costs of policy reversals, or due to regime priorities; occasionally, when they find alternatives, they seek to exit from international regimes altogether (Molina, 2013). While there are developing countries that fit the first category of being loyal to the disadvantageous rules (e.g. Egypt), there are others that have contested the international investment regime in one way or the other (e.g. Bolivia, Ecuador, South Africa, India, Indonesia).

When it comes to BITs, like all other aspects of political economy, each country faces its own particular political and economic considerations when making and implementing policy. Whereas some States were able to adjust, others have lacked the political and economic power or facilitating conditions to enable them to take measures to address these issues by either renegotiating or exiting the treaties that expose them to the constraints highlighted above. A number of countries are said to be considering action, but are choosing to wait and see the fate of the countries that have already embarked on attempts to exit or reform their treaties before deciding on what route would be most suitable for them.

The next section illustrates how the framework has been used to classify the different options available to States in the investment regime once they realise the constraints their membership poses on their policy space, as well as the different routes already taken by States in the regime. The section also demonstrates why there is a need to reconceptualise Hirschman's framework in order to reflect the actual options (in practice) available to developing countries that have expressed their discontent with the investment treaty regime.

2.3 How Hirschman's Framework has been Used in the Investment Treaty Regime Literature and the Case for Reconceptualisation

The challenges facing developing countries emerging from BITs, as outlined above, including concerns related to their development dimension and the balance between rights and obligations of investors and States, have led to a situation in which almost all countries are party to one or several BITs, but many are dissatisfied with the current treaty regime (UNCTAD, 2014a). According to UNCTAD, efforts by States to address these challenges reveal four broad paths of action (UNCTAD, 2014b, p. 1):

(i) maintain the status quo, e.g. largely refraining from changes in the way countries enter into new investment treaty commitments; (ii) implement selective adjustments, e.g. modifying models for future treaties but leaving the treaty core and the body of existing treaties largely untouched; (iii) disengage from the investment treaty regime, e.g. unilaterally terminating existing treaties or denouncing multilateral arbitration conventions; and, finally, (iv) undertake a systematic reform to address the investment treaty regime's challenges in a holistic manner.

Each of these routes involves a number of trade-offs that entail giving up some policy space in return for benefits from the treaty partners (UNCTAD, 2014a). There are several factors that UNCTAD identify as decisive in choosing a particular route. These include the level of economic development, relative trade and investment positions, geopolitical factors, and the general approach to bilateral and regional economic cooperation (UNCTAD, 2014a). There are also circumstances in which substantial change to a State's legal system might be considered unavoidable and desirable (Bonnitcha, 2014). One such circumstance is when a State changes its form of government (Teitel, 2000). This is particularly significant when incoming governments face pressure to enact social and economic reforms after replacing regimes that failed to achieve inclusive economic growth (Iqbal, 2012).

In the literature on the investment treaty regime, these options have been categorised as exit or voice. This study adds Hirschman's loyalty as a third category. The rest of this section is divided into three subsections: exit, voice and loyalty. In each subsection, the actions that can fall under each category are listed. Moreover, by highlighting the challenges or limitations facing States when adopting each route (particularly developing countries), the case for the need to reconceptualise Hirschman's framework in order to reflect the actual options available to developing countries in practice and the factors that lead to each action is made.

2.3.1 Exit

Exit involves a break with the regime. In the literature a range of actions have been classified as exit, including: systemic termination of treaties with no intent to renegotiate, termination of some treaties, treaty modifications, and refusing to ratify signed treaties. The most common definition of exit in the existing literature is the termination of existing investment treaties (see Gordon and Pohl, 2015; Langford et al., 2018; UNCTAD, 2017c). However, the definition of the investment treaty regime in this thesis extends beyond the legal architecture and includes the normative foundations of the regime (see Chapter 2). Hence, for the purpose of this thesis, exit refers to both exiting the legal framework[66] of the regime with no intent to renegotiate, as well as abandoning the neoliberal principles of foreign investment protection that shaped the regime in domestic law and other international investment agreements or provisions.

This path of action might be particularly attractive for countries in which concerns with the constraints posed by investment treaties feature prominently in the domestic policy debate (UNCTAD, 2014b). Disengaging from the investment treaty regime might be perceived as the strongest or most far-reaching path of action. Ultimately, it would result in the removal of international commitments on investment protection that are enshrined in BITs and would result in the effective shielding from ISDS related risks (UNCTAD, 2014b). In practice,[67] however, most of the desired implications will materialise only over a considerable amount of time and only for one treaty at a time. Exiting the regime does not immediately protect the State against future ISDS cases (UNCTAD, 2014b), as BIT commitments usually endure through survival clauses which oblige treaty partners to honour commitments for another 10-15 years on average.

Furthermore, there may be a need to review national legislation, State contracts, and other regional or international investment treaties, as they may also provide consent for ISDS (including arbitration under ICSID) (UNCTAD, 2014b). Finally, unless termination is undertaken on a consensual basis, a government's ability to terminate a BIT is limited. Its ability to do so depends on what is stipulated in each BIT

[66] It is worth noting that exit in this thesis also includes the denunciation of the ICSID Convention which has generally been categorised as voice in the literature (see Gordon and Pohl, 2015; Langford et al., 2018).

[67] From the experience of developing countries like Bolivia and Ecuador that have taken this route.

respectively and may be available only at a particular, limited point in time (UNCTAD, 2014b).

Hirschman describes the economist's approach to exit (as opposed to a political scientist's approach) as neat and impersonal, with the recuperation occurring as an automatic process (Hirschman, 1970). The recuperation comes by way of Adam Smith's Invisible Hand 'as an unintended by-product of the customer's decision to shift' (Hirschman, 1970, p. 15). However, the mechanics of exit are very different in the legal, political, and economic realms occupied by international investment treaties (Katselas, 2014). The challenges and sophistication of the exit process in the investment treaty regime is not captured in Hirschman's theory.

Exit from the BIT treaties is far from neat, as 'total' exit from the obligations under a BIT requires the resigning State to travel a long, challenging, and very open road (Katselas, 2014) due to the survival clauses discussed above. Hence, any policy space gained by the decision to exit is limited to new investments/investors at least for another 5-20 years reducing its immediate impact. Countries that have pursued the exit route were still subject to costly arbitration cases triggered through BITs post-termination. Moreover, other criteria specified by Hirschman for choosing exit include the certainty that comes with exit and the low costs associated with the decision to exit, both of which are not highly likely for developing countries. Accordingly, there is a need to reconceptualise Hirschman's framework to reflect the nature of exit in the investment treaty regime.

2.3.2 Voice

In the investment treaty regime, three main tactics have been identified for States that seek to adopt the voice option (as principals) to address their discontent with the regime (Gordon and Pohl, 2015):[68] (i) using instruments to influence the interpretation of the investment treaties; (ii) amending treaties; and (iii) renegotiation of new treaties to replace old ones. The first two methods can be classified under selective adjustments and the third under systematic reform (UNCTAD, 2014b).

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[68] This is not an exhaustive list of all the voice channels in the regime but rather the ones that have been most frequently mentioned and used.

One channel for voice is subsequent agreement and practice (Katselas, 2014). The Vienna Convention on the Law of Treaties (VCLT) provides that treaty interpretation shall take into account 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' and 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.'[69] Joint instruments can be used to clarify the meaning of certain clauses and/or treaty parties' intent, which may help to reduce the uncertainty caused by broadly worded provisions that often lead to contradictory interpretations in ISDS proceedings (UNCTAD, 2017b). Once an investment treaty has been adopted, treaty partners can use additional devices such as side agreements, protocols, understandings or exchanges of letters to clarify further the meaning of certain clauses and hence enhance predictability for investors, treaty partners and tribunals (Gordon and Pohl, 2015; UNCTAD, 2014b). Some treaties have built in explicit mechanisms that allow States to control the interpretation and application of their treaties more directly than through influencing interpretation. These mechanisms include the possibility to issue authoritative interpretations of the treaty that are binding on tribunals, and consultation procedures among treaty partners in relation to prudential and tax issues when these are raised in investor-State disputes (Gordon and Pohl, 2015).

The instruments mentioned above provide an option for States to influence the use and interpretation of existing treaty text. However, these mechanisms are limited in their scope, particularly when States need to amend their treaty obligations more substantially (Gordon and Pohl, 2015). For such more substantial expressions of voice, States may resort to amending treaty text or replacing the treaty entirely by a new document (Gordon and Pohl, 2015) or legislation that better meets their policy objectives.

According to UNCTAD (2017), the expansively formulated obligations common to old BITs may sometimes be challenging to fix through a joint interpretation. If treaty partners can successfully agree on amending treaty provisions, the parties can achieve

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[69] Vienna Convention on the Law of Treaties. Done at Vienna 23 May 1969. Entered into force 27 January 1980. United Nations, Treaty Series, vol. 1151, p. 331. Available at: http://www.refworld.org/docid/3ae6b3a10.html (Accessed 2 August 2018). Articles 31(3)(a)–(b).

a higher degree of change and thereby ensure that the amended treaty reflects their evolving policy preferences. Typically, amendments are limited in number and do not affect the overall design and philosophy of a treaty (UNCTAD, 2013). It is quite rare to find BITs that contain provisions that provide explicitly for the possibility of treaty amendments (Pohl, 2013). One of the main challenges associated with this option is that the negotiation over the amendments between the two treaty partners may lead to 'horse trading' in which desired amendments are achieved only through a quid pro quo with parties demanding other amendments (UNCTAD, 2017b, p. 82). This is particularly an issue for developing countries seeking amendments in BITs with capital-exporting countries due to the asymmetries of power between the two parties.

Comprehensive data on amendments are not available (UNCTAD, 2017b). Existing evidence suggests, however, that States have thus far used amendments somewhat sparingly (Gordon and Pohl, 2015). Exceptions include the EU member States,[70] which have made amendments by using protocols before and after accession to the EU (UNCTAD, 2017b). Other countries have used amendments more sporadically to include adjustments to the ISDS mechanism (e.g. the Exchange of Notes (1997) to the Paraguay–United Kingdom BIT (1981), the Protocol (2000) to the Panama–United States BIT (1982), the Protocol (2003) to the Germany–Moldova BIT (1994).

The third and final channel for voice covered in this section is the renegotiation of new treaties to replace old ones. This option is categorised under systematic reform as it offers the opportunity for treaty partners to undertake a comprehensive revision of the treaty instead of selectively amending individual clauses (UNCTAD, 2017b). About 130 BITs have been replaced in this way, mostly by other BITs (UNCTAD, 2017b). Countries that have been active in this respect over the past 20 years include Germany, followed by China, Egypt, Romania and Morocco (Langford et al., 2018). It is important to note, however, that the replacement of treaties is not necessarily the result of States practicing voice. Indeed, the majority of the countries mentioned above have essentially renegotiated BITs that are ripe for renegotiation due to their limited

[70] The countries referred to are the following Eastern European States: Bulgaria, Croatia, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Slovak Republic, Slovenia and Romania.

investment protections: Egypt,[71] Germany,[72] and Morocco[73] (Langford et al., 2018). There is also no clear evidence to indicate that Romania or China's renegotiations were related to their discontent with the expansive nature of the protection provided in their old BITs (Langford et al., 2018).

As is the case with the option of amending treaties, renegotiating new treaties rests on the ability of the two treaty partners to find common ground. Hence, the partners need to have aligned interests or share similar views if the new treaty is to include reform-oriented elements (UNCTAD, 2017b). Other challenges for developing countries are the cost and time intensive nature of negotiating treaties from scratch (UNCTAD, 2017b), not to mention the technical (legal) and administrative capacity required. Considering the challenges associated with this route, it should come as no surprise that developing countries that have expressed their desire to introduce substantial reforms to BIT obligations to increase their regulatory space have struggled to renegotiate new treaties with capital-exporting countries.

One of the main objectives of developing countries' decisions to review their BITs is to reduce their legal exposure to investment arbitration claims before arbitration tribunals. Whether the loyalty or exit option will succeed in achieving this goal is difficult to predict according to scholars in favour of the voice option (see Lavopa et al., 2012). This is because loyalty entails a minimal regulatory role for the State, which must wait for reform to happen from within the system through a consensus amongst members (who do not necessarily share the same interests or concerns: capital-exporting v. developing countries). Regarding exit, as demonstrated above BITs have a built-in self-defence mechanism that render them somewhat resilient to change

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[71] Egypt's 13 renegotiated BITs were first signed during the period 1966–88 and renegotiated versions were signed between 1994 and 2010. See: UNCTAD. 'Egypt'. International Investment Agreements Navigator. Available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/62#iiaInnerMenu/ (Accessed 20 August 2018).

[72] Germany's 18 renegotiated BITs were first signed during the period 1959–83 and renegotiated versions were signed between 1996 and 2010. See: UNCTAD. 'Germany'. International Investment Agreements Navigator. Available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/78#iiaInnerMenu (Accessed 20 August 2018).

[73] Morocco's 12 renegotiated BITs were first signed during the period of 1961–89 and renegotiated versions were signed in the period of 1996–2007. The status of the two remaining BITs is unclear as neither the original versions (signed in 1997 and 2001) nor the renegotiated versions (signed in 2001 and 2006) have entered into force. See: UNCTAD. 'Morocco'. International Investment Agreements Navigator. Available at: http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu (Accessed 20 August 2018).

through termination. Accordingly, those in favour of voice opine that developing countries seeking to reduce the constraints posed on their policy space to regulate through ISDS and expansive protection standards are better off renegotiating their BITs. Renegotiation does not require the termination of the treaty, it may be implemented at any time and does not trigger the application of survival clauses, hence making changes to the treaty immediately applicable.

Based on these arguments voice seems to be the ideal route to adopt until a critical caveat is recognised: for this strategy to be successful, the developing country must be able to tackle both the legal and political challenges in the process of brokering a deal. These challenges will entail getting their treaty counterparts (capital-exporting countries) to substantially amend or remove clauses (which can also be considered privileges) that they have publicly refused to compromise on.[74]

To date, no developing country that has expressed its discontent with the regime and sought to introduce substantial reforms to their BIT obligations has been able to do so through the channels of voice described above.[75] Changes in BITs as a result of interpretations, treaty amendments and replacements have been incremental and non-substantial. Moreover, as will be demonstrated later in this thesis, developing countries that have sought to reform their legal commitments under the existing regime have struggled to convince their capital exporting partners to renegotiate the BITs between them.

Based on the above, this thesis will analyse the experience of one of the developing countries that sought to voice its discontent with the regime and introduce systematic reforms by initially attempting to renegotiate new treaties to replace their existing BITs before realising it was not feasible.

2.3.3 Loyalty

In the investment treaty regime literature, Hirschman's loyalty has been considered as one of the factors that determine whether a State chooses to exit or to resort to voice

[74] While open to changing some of the controversial substantive clauses and the ISDS provision in new treaties amongst themselves, e.g. TTIP, capital-exporting countries have not displayed the same willingness to make similar changes in treaties with developing countries, as will be demonstrated in the South Africa case study.

[75] To the best of the author's knowledge.

when dissatisfied with membership of the regime. In addition to the relative difficulty of exit, it is possible that some States retain their memberships due in part to some degree of attachment, or loyalty, to the regime (Katselas, 2014). As per Hirschman's theorisation, loyalty functions to hold exit at bay for a finite period of time, because unlike faith it retains an enormous dose of reasoned calculation (Hirschman, 1970, p. 79). Loyalty is difficult to gauge in the investment treaty regime due to its fragmented nature and the difficulty of exit (Katselas, 2014). However, it can be argued that States that retain their membership in the regime by remaining committed to their existing treaties and/or conventions, even after they face investment treaty arbitrations, are the ones that show signs of loyalty.

For the purpose of this thesis, the path that will be initially classified as loyalty in the investment treaty regime is the one identified by UNCTAD (2014b) as maintaining the status quo. Under this option, States refrain from making any substantive changes to their commitments under their international investment treaties, thereby sending an image of continuity and investor friendliness to foreign investors (UNCTAD, 2014b). Any amendments or updated treaties under this category will include incremental changes, e.g. refining the wording of specific clauses to add more clarity or bringing them in line with the latest best practices in the regime identified by institutions like UNCTAD and the OECD.

The States most likely to find this path attractive are those that stand to gain the most and risk the least from membership of the investment regime. This is apparently the case for capital-exporting countries that are keen to protect their nationals' investments abroad via BITs and have a lower risk of being respondents compared to capital-importing developing countries. For developing countries that have faced a significant number of investment treaty arbitration cases and do not have a strong outward investment perspective, the assumption that their decision to refrain from making substantive reforms or existing the regime is down to loyalty is not as convincing. The inconclusive evidence on the economic benefits BITs provide to capital importers further complicates matters. As Hirschman argues, while a member can remain loyal to an organisation in the face of discontent without being influential themselves, it would not be possible without 'the expectation that someone will act or something will happen to improve matters' (Hirschman, 1970, p. 78). Nevertheless, an explanation for why developing countries in the situation mentioned above may remain loyal to the regime is that the State may have determined that it has more to gain and less to lose from seeking to reduce its risk from within the regime than from the outside (Katselas, 2014).

2.3.4 Concluding Remarks

Having established how Hirschman's framework has been applied to the investment treaty regime in the existing literature and why there is a need to reconceptualise the framework to reflect the actual routes adopted by developing countries, the rest of this chapter examines how the literature has addressed the two other research questions in this thesis.

As argued in Chapter 2, while there is uncertainty regarding the benefits of joining the regime for developing countries, there has been recognition of the costs incurred as a result of joining the regime. This realisation triggers an important question regarding how and why developing countries joined this regime in light of the above. Another critical issue which is insufficiently addressed in the existing literature is why reactions of developing countries that have expressed their discontent with the uncertain benefits and significant costs of being a member of the regime have varied. Addressing these two issues would contribute significantly to our understanding of the challenges facing developing countries in the investment treaty regime, but more importantly in the context of this thesis, they are integral to understanding the options available to these countries when they attempt to contest the regime and to explain why they chose one route or the other. Hence, the next two sections of this chapter address how the existing literature tackles these two issues and identifies some of the theories/frameworks that are used in the case studies.

3. Why and How Developing Countries Signed BITs

Although hardly known to anyone but specialised lawyers two decades ago, BITs have become one of the most potent legal tools underwriting economic globalisation (Poulsen, 2017). As demonstrated in Chapter 2, in recent years, foreign investors have realised the potency of this adjudicative tool, which brought developing countries, in particular, on the respondent end of significantly costly claims concerning a wide range of regulatory actions (Poulsen, 2017). The vague and broad constitution-like promises in investment treaties (Gwynn, 2016), have actually given ad hoc tribunals considerable flexibility to determine when and to what extent regulation of foreign investors by host States requires compensation to investors. This has accordingly triggered the need to explain why developing countries adopt treaties that restrict their discretion to regulate and expose them to expensive compensation damages (Gwynn, 2016).

There have been numerous theories and claims that have tried to explain why developing countries sign BITs. Some of these claims include that developing countries signed BITs because they were beneficial for them (Dolzer, 1981; Elkins et al., 2006; Guzman, 1998; Kaushal, 2009; Salacuse and Sullivan, 2005; Swenson, 2005; Vandevelde, 2000), as their FDI and prosperity would be increased. Another explanation provided was that BITs resulted from competition over FDI (Elkins et al., 2006; Salacuse and Sullivan, 2005, 2005).[76] Other explanations have stated that BITs were, in essence, an effort to clarify international investment rules (Kaushal, 2009; Kononov, 2011; Sornarajah, 2010), with some suggesting that the signing of BITs were merely photo opportunities when diplomatic representatives were visiting developing countries (Poulsen and Aisbett, 2013; Sornarajah, 2010).

The purpose of this section is to evaluate the different theories proposed to explain how and why developing countries signed BITs. A critique of 'rational choice' theories is followed by a demonstration of how Poulsen's adaptation of the Bounded Rationality Framework and Gwynn's adaptation of the Structural Power Framework can explain how and why developing countries signed BITs respectively.

3.1 Rational Choice Hypothesis

The first argument of the rational choice hypothesis is 'emulation', which states that the spread of BITs during the 1990s was a result of a norm-cascade, where developing countries adopted the treaties without any strategic objective, but rather as acts of political symbolism to signal adherence to the principles of the Washington Consensus (Jandhyala et al., 2011). This is backed up with statistical evidence indicating that the propensity of countries to adopt BITs during the 1990s was particularly driven by whether peer or similar countries did so (Poulsen, 2017).

[76] Guzman (1998) proposed that developed countries were in a prisoner's dilemma and so when acting on their own; to compete with one another developing countries signed BITs.

Poulsen (2017) questions this perspective, by arguing that BITs were poor public relations instruments until recently: unlike human rights treaties or trade agreements, they were typically signed entirely under the radar during the 1990s and received little attention by parliaments, the press, or the public at large (see Montt, 2009). Whereas some BITs were indeed adopted to display friendly diplomatic relations or show a commitment to economic globalisation (Jandhyala et al., 2011), the primary driver has been the expectation that they are essential strategic instruments to attract capital. This is indicated in the preambles of BITs and was the primary justification when UNCTAD and the arbitration industry promoted the treaties.[77]

After demonstrating that the expectation that these investment treaties would attract investment flows was a more important driver of the BIT-movement than emulation, Poulsen turns to the second traditional argument of the rational choice theory framework, which is that BITs were the result of a careful, and rational, competition for capital. At the time BITs proliferated rapidly, loans by International Financial Institutions (IFIs) to developing countries had diminished, and many governments saw FDI as an alternative source of capital (Poulsen, 2017). However, as Poulsen argues, the aim of the treaties does not tell us much about the process with which they were adopted, and standard rational choice accounts raise some puzzling questions.

There are a couple of variations of the rational competition argument that can be considered. One popular perspective is that BITs are decisive instruments to overcome problems of obsolescent bargaining (Guzman, 1998). Without a treaty with a binding consent to international arbitration, the argument is that many developing countries would be unable to make a ‘credible commitment’ that the assets of foreign investors remain safe post-establishment. However, a strong rebuttal of that argument is that, while investment treaties may be helpful for some investment decisions in certain circumstances, they have never been a functional necessity to attract inflows of foreign capital given the availability of alternative risk-mitigating instruments (Alvarez, 2011a; Yackee, 2010). Moreover, as highlighted in Chapter 2, the results of empirical studies on the relationship between FDI and BITs have been inconclusive. While some

[77] For example, as illustrated in UNCTAD (1998), these clauses are typically worded as follows: by ‘signing BITs … developing countries are sending a strong signal of their commitment to provide a predictable, stable and reliable legal environment for foreign direct investors, to stimulate investors´ confidence, and boost FDI flows.’

scholars have argued that investment treaties occasionally have an impact on the legal structure of foreign investments; very few seem to have a tangible impact on their destination and size (Allee and Peinhardt, 2014; Poulsen and Aisbett, 2013). Indeed, several studies find 'no correlation between FDI and BITs'.[78]

Another view of the rational choice theory is that developing countries used BITs as a costly signal to imperfectly informed investors about their commitment to foreign capital (Büthe and Milner, 2009). However, again scholars have refuted this argument by arguing that treaties were hardly relevant for investor-State relations until the late 1990s (Poulsen and Aisbett, 2013). Indeed, very few investors or developing country governments realised the potency of the treaties until recently (Poulsen and Aisbett, 2013).

3.2 Bounded Rationality Framework

Whilst acknowledging their contributions, Poulsen (2017) argued that the leading rational choice explanations for the diffusion of BITs leave us with too many unanswered questions (Poulsen, 2017). Many developing countries were at least 'intended rational' (Simon, 1957) when spreading their BIT-networks, as they typically followed the logic of expected consequences: 'BITs lead to FDI' (Poulsen, 2017). Nonetheless, Poulsen's theory argues that while most developing countries competed for capital when signing BITs, they were not as rational as often assumed. Poulsen attempted to address these oversights by advancing a new theory of BIT-diffusion based on experimental insights from behavioural economics (Poulsen, 2017). A core argument from Poulsen's work is that a Bounded Rationality framework has considerable potential to explain how officials from developing countries have approached and signed BITs.

Under the Bounded Rationality framework, policy-makers are seen as goal-oriented, and thereby rational in the broadest sense of the word.[79] Moreover, rather than using

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[78] See Appendix I.

[79] Herbert Simon proposed the bounded rationality theory as an alternative basis for the mathematical modelling of decision-making, as used in economics, political science and related disciplines. It complements 'rationality as optimisation', which views decision-making as a fully rational process of finding an optimal choice given the information available (Gigerenzer and Selten, 2002). Simon who coined the term 'bounded rationality' used the analogy of a pair of scissors, where one blade represents 'cognitive limitations' of actual humans and the other the 'structures of the environment', illustrating how minds compensate for limited resources (such as time and knowledge) by exploiting known

the laws of statistics, policy learning is biased by cognitive shortcuts consistently found in experimental studies on human judgments and decision-making (Poulsen and Aisbett, 2013). Applying this framework, Poulsen proposes a BIT diffusion process characterised by bounded rather than comprehensive rationality on the part of developing country decision-makers. According to his hypothesis, developing country governments began adopting BITs because they were presented by developed countries and other BIT-proponents as easy and readily 'available' policy blueprints to attract foreign investment (Poulsen, 2017). Decision makers in developing countries systematically overestimated the economic benefits of BITs. They wanted to believe the treaties were important to attract capital, which in turn had an impact on their information processing (Poulsen, 2017). Instead of relying on statistical and legal studies, the assumption that these BITs would attract FDI was based on anecdotal evidence and the claims of the IFIs and capital-exporting countries promoting these treaties. Finally, these governments ignored the costs of these BITs and only a few realised the power granted to third parties (international arbitration tribunals) to determine the meaning of the broad principles in these treaties in practice, or the fact that they conflicted with some of their national policies (Poulsen, 2017). It was not until a country was hit by a claim itself that the potency of the treaties became apparent to them, which explains why developing countries only started to contest the regime after they became respondents to arbitration claims.

3.3 How the Structural Power Framework Can Complement the Bounded Rationality Theory

Poulsen's hypothesis has addressed some of the shortcomings in rational choice theory explanations and has explained why BITs were signed without being reviewed and were not initially taken seriously. However, it does not explain the paradoxical behaviour of developing countries that signed BITs which contained the same investment protection standards they had initially rejected in multilateral forums. The theory also fails to explain why governments that advocated for a more regulatory approach to FDI ended up signing BITs which provided minimal space for regulation

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structural regularity in the environment. In his own words (Simon, 1956, p. 129): 'a great deal can be learned about rational decision making by taking account of the fact that the environments to which it must adapt possess properties that permit further simplification of its choice mechanisms.' Thus, models of bounded rationality describe how a judgment or decision is reached (that is, the heuristic processes) rather than merely the outcome of the decision (Gigerenzer and Selten, 2002, p. 4).

by the State. In order to explain why developing countries agreed to sign BITs despite their previous stance on FDI protection and regulation, it is imperative to understand the context in which these treaties were signed. This section will demonstrate how analysing the behaviour of governments of developing countries using the Structural Power framework can explain the paradox mentioned above.

Gwynn argues that the insufficiency of the above explanations of why developing countries signed BITs is due to the lens used to analyse the international investment regime. The international investment framework could be analysed using a different lens – a structuralist one, as Gwynn illustrates in her book *Power in the International Investment Framework* (2016). In international relations, the paradigm of structuralism is an alternative approach for understanding actors' behaviour. Instead of focusing on the actors per se, this paradigm explains actors' decisions by taking into account the surrounding structures in which the actors' relationships are built, e.g. world economic structures, and how these can influence and affect actors' decisions (Gwynn, 2016; see Steans et al., 2010).[80] There have been scholars who have stressed the relevance of structural factors for explaining an actor's behaviour and phenomena in international relations (Gwynn, 2016). Kenneth Waltz, for instance, stated that a 'structural approach can provide the foundations for a successful theory of international politics' (cited in Little, 2007, p. 168). Gwynn (2016) argues that in a similar vein, Susan Strange proposes a theory of structural power, according to which it 'confers the power to decide how things shall be done, the power to shape frameworks within which States relate to each other, relate to people, or relate to corporate enterprises' (Strange, 1998, p. 25). The ability to 'shape the frameworks' comes from controlling broad structures that, according to Strange (1988), can be categorised according to security, production, finance and knowledge. The actor that has control over these structures does not need to offer evidence for its exercise of power because the control of these structures allows the actor's interests to take precedence over the interests of other actors (Gwynn, 2016; see Tooze and May, 2002).

[80] In this particular context, the actors are the governments of developing and developed countries that signed BITs.

According to Gwynn (2016), the advantage of using this structuralist lens to analyse the international investment framework is that it gives a panorama of the whole framework rather than focusing on just the treaty. It does so by including the developments of foreign investment regulations in both the multilateral and bilateral settings. This leads to what Gwynn refers to as a paradoxical phenomenon (Gwynn, 2016, p. 127):

> while foreign investment was regulated at the multilateral level according to what developing countries wanted, when signing BITs, developing countries have agreed to provisions which surpassed or contradicted what developing countries had previously achieved at the multilateral level.

As described above, BITs became the core of the international investment regime. By applying Strange's concept of structural power, Gwynn provides a historical account that illustrates how the framework for international investment was not a result of a consensus, but that particular preferences of capital-exporting countries became the entrenched rules of the international investment regime (Gwynn, 2016).

Considering that trade and investment are intertwined, other political and economic factors that developed over time have to be considered to understand why developing countries signed BITs (Gwynn, 2016). In 1955, during the trade rounds of the General Agreement on Tariffs and Trade (GATT), a resolution was enacted that 'urged countries to conclude bilateral agreements to provide protection and security for foreign investment' (GATT Contracting Parties, 1955; see also Kononov, 2011). From the early 1960s through the mid-1970s, the General Assembly of the United Nations, dominated by developing countries, passed a series of resolutions intended to emphasise the sovereignty of nations concerning foreign investment (Guzman, 1998). First, in 1962, the Resolution on Permanent Sovereignty over Natural Resources was passed (United Nations General Assembly, 1962). This resolution provided that in cases of expropriation, 'appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty' must be paid (Guzman, 1998). Second, in 1973, UN Resolution No. 3171, *Permanent Sovereignty over Natural Resources* supported developing countries by stating that (United Nations General Assembly, 1973, Article 3):

> the application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any dispute which might

> arise should be settled in accordance with the national legislation of each State carrying out such measures.

Finally, in 1974, two other important resolutions were passed in favour of developing countries. One of them was the UN Resolution No. 3201, which established a New International Economic Order (NIEO) to address the inequalities between the developed and developing countries. The other was UN Resolution No. 3281, which introduced the Charter of Economic Rights and Duties of States. The Charter established that each State has the right to: 'regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations … No State shall be compelled to grant preferential treatment to foreign investment' (United Nations General Assembly, 1974, Article 2 (2) (a)). It further stated that 'where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals' (United Nations General Assembly, 1974, Article. 2 (2) (c)).

Nevertheless, the fact that UN General Assembly Resolutions are *de lege ferenda* (what the law ought to be) and, therefore, not binding, left an open door for those dissatisfied (major capital-exporting countries) to seek alternative ways to regulate foreign investment in a manner that would meet their interests (Gwynn, 2016).

The departure from the UN resolutions' provisions on foreign investment started with the wave of BITs in Europe and the BIT program in the United States.[81] In 1986, the GATT issued a Ministerial Declaration which stated that: 'Following an examination of the operation of GATT Articles related to the trade restrictive and distorting effects of investment measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade' (GATT Contracting Parties, 1986). In the same round in 1986, the Agreement on Trade Related to Investment Measures (TRIMs) was proposed.[82] However, the TRIMs Agreement, which was agreed only in 1994, did not contain the controversial core provisions in BITs such as compensation for expropriation and settlement of foreign investment disputes in international courts (Gwynn, 2016).

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[81] The United States started its BIT program in 1977. With this program came the idea of the detachment of disputes pertaining to foreign investment from domestic courts (Vandevelde, 2005).

[82] Other agreements that touch on investment issues, like the GATTs were also proposed and then later agreed and adopted in 1994 together with the creation of the WTO.

By 1989, with the Washington Consensus, a wave of neo-liberalism came about. In addition to promoting liberalisation of trade policies and openness to foreign investment, developing nations adopting protectionist measures restricting FDI were criticised. In the words of John Williamson (1990, p. 15): ‘a restrictive attitude limiting the entry of foreign direct investment (FDI) is regarded as foolish. ... The main motivation for restricting FDI is economic nationalism, which Washington disapproves of, at least when practised by countries other than the United States.’ Many developing countries did go on to embrace the economic proposals for reform and complied with what was established in the trade rounds of the GATT (Gwynn, 2016). This entailed a commitment to liberalising markets, which included liberalising their treatment of foreign investments. According to Sornarajah (2009, p. 1) the pillars of neoliberalism relevant to the area of foreign investment may be identified to include the following:

> (i) the need for safeguards of property rights in the host state, particularly property brought in or acquired by the foreign investor; (ii) the securing of judicial safeguards for such property through external arbitration in the absence of a court system in the host state which would provide secure protection in the face of executive or political displeasure; and (v) the redefinition of the rule of law to encapsulate these neo-liberal ideas.

The peak phase regarding the frequency of BIT conclusions occurred during the rise of the Washington Consensus model, which identified the liberalisation of inward foreign investment as an essential driver of economic development for developing States (Katselas, 2014). The number of BITs signed globally during the 1990s increased from 385 to 1,857 (Vandevelde, 2005). The rise of BITs was even considered as evidence of the success of neoliberal policies in the last decade of the twentieth century. A significant factor in the increased number of BITs during the aforementioned period relates to the role played by the International Monetary Fund (IMF) and the World Bank in developing countries (Prieto-Rios, 2015).

According to a structuralist perspective, the world economic structure would allegedly influence States’ behaviour and, thus, it is important to take into account (Gwynn, 2016). At the time of the BITs boom in the developing world, this economic structure cannot be omitted as some financial institutions played an integral role in the developing countries’ decision to agree to BITs (Gwynn, 2016). Indeed, developing countries which were facing economic difficulties during that period (e.g. debt crisis) turned to Bretton Woods institutions in order to bail them out and were consequently dictated to by the economic conditionalities imposed by these IFIs. The IMF and the World Bank advocated the need for developing countries to create a friendly and pro-investor climate in order to attract foreign investments as sources of capital, technology, and knowledge (Hinojosa and Bebbington, 2010; Prieto-Rios, 2015). A study by Elkins, Guzman and Simmons (2006) which conducted an econometric analysis of the different diffusion processes of BITs revealed a correlation between receiving IMF credits and entering into BIT agreements. The IMF demanded the liberalisation of foreign investments. In the IMF's stabilisation programs 'greater hospitality for foreign private investment' (Kaushal, 2009, p. 504) was required. This meant that developing countries had to agree to certain measures, inter alia, not to restrict investments, to give them national treatment and to be willing to privatise (Kaushal, 2009). The World Bank played a similar role through the policy prescriptions set as conditionalities in different credit facilities provided to developing countries. While Structural Adjustment Programs (SAPs) and conditionalities imposed by the IMF and World Bank never explicitly mentioned BITs, they included policy prescriptions that were modelled on the Washington Consensus prescriptions and pressured developing States into adopting the neoliberal economic model through changes in their legal frameworks (Sornarajah, 2009). As the case studies in this thesis reveal, the forceful and far-reaching nature of conditionalities imposed by the IMF and World Bank meant that the funding they provided was used as a powerful policy tool (Kaushal, 2009) and played a significant role, albeit indirectly, in the diffusion of BITs amongst developing countries.

Having provided the context for the evolving investment regime, we can revisit what was termed by Gwynn as a paradoxical phenomenon. In multilateral forums like the WTO, a large group of developing countries objected to investment standards which were part of the Singapore Issues[83] at the different WTO Ministerial Conferences (Khor, 1997). The main features of the investment rules proposed by the EU countries and supported by other developed countries included many similarities with the protection standards in BITs. A few examples of the proposed rules are non-

[83] Four issues that were introduced to the WTO agenda at the December 1996 Ministerial Conference in Singapore: trade and investment, trade and competition policy, transparency in government procurement, and trade facilitation. These issues were promoted by developed countries (led by the European Union). Developing countries rejected these issues as they argued it would restrict national governments in their domestic economic policy making.

discrimination standards like NT and MFN, a broad definition of expropriation that includes indirect expropriation and a dispute settlement provision potentially allowing investor-State dispute settlement (Khor, 2007).

Several of the developing countries that objected to this proposal, however, continued, at a bilateral level, to sign BITs (Gwynn, 2016). With the agreement and ratification of these treaties, BITs as a framework for international investment were 'legitimately' put into place, ending the historical debates on foreign investment rules but reflecting the minority's interests that were once hindered at a multilateral level (Gwynn, 2016). Gwynn argues that the Structural Power Framework can explain what seems as paradoxical behaviour by developing countries. According to Gwynn (2016), developing countries joined the investment treaty regime because they were dependent on structures beyond the treaty itself, like that of finance, which had an impact on their choice. It is due to this structural connection to specific political contexts – to the international financial institutions' involvement in creating a particular framework or other structures surrounding the relationship of the treaty partners – that the BIT framework was embraced by several developing countries (Gwynn, 2016).

It is important to note that Gwynn's study focused on Latin American countries who had signed their BITs on the back of a debt crisis. In this case, the main actors who held structural power were IFIs and capital-exporting countries who controlled the financial structure dimension by being the primary source of credit needed by the Latin American countries to recover from the debt and economic crises. Several other developing countries shared similar experiences during the 1980s and the 1990s, and there was a trend amongst developing countries of adopting neoliberal policies that were part of SAPs imposed by IFIs like the IMF in return for credit. However, this scenario does not apply to all developing countries, and more importantly, there are cases in which the structural power was held by other actors and the structures controlled were also different. For instance, as will be demonstrated in the South Africa case study in Chapter 6, structural power was held by the domestic corporate sector which controlled the production dimension as well as the knowledge dimension. Hence, the Structural Power framework can be adopted in other contexts and should not be restricted to the relationship between governments of developing countries and IFIs or capital-exporting countries.

Gwynn (2016) also provides an important clarification as she emphasises that the structural factors that affect the choices of agreeing to a framework must not be confused with coercion. According to Gwynn, those with the ability to define frameworks can dispense with the use of coercion because the control of different structures amounting to the framework can determine the outcome (Gwynn, 2016). While structural factors can limit a country's choice, there is always a choice (Gwynn, 2016). The degree of limitation of these choices, the actors involved, and the structures controlled, might all differ for each country.

As Gwynn (2016) argues, the value added by the structuralist perspective is that it provides alternative explanations to the question of why developing countries signed BITs. This perspective provides insights into why developing countries signed BITs by focusing on more than just the bargaining of the treaty per se and by considering other factors that had an impact on their adoption.

Finally, under this framework, the answer of why developing countries signed BITs lies in the structural elements surrounding the formation of the international investment framework. Moreover, as this thesis will argue these structural elements have not only influenced the decision of developing countries to join the regime, but also play a crucial role in determining which route developing countries adopt after they contest the regime.

4. Literature Gap: Analysing How and Why Developing Countries Have Reacted Differently

Several studies have attempted to classify and categorise the different reactions of States as part of the backlash against the investment treaty regime. Moreover, efforts to reform BITs have also received attention (Calvert, 2016; see Hindelang and Krajewski, 2016; Mysore and Vora, 2016). Studies that have attempted to assess the routes discussed above generally tend to argue strongly in favour of voice as a more constructive and effective path for States reach their objectives of increasing their policy space while minimising the costs entailed (see Gordon and Pohl, 2015; Gwynn, 2016; Johnson et al., 2018; Katselas, 2014; Lavopa et al., 2013). This recommendation is in line with Hirschman's preference for voice as the most effective option for recuperation.

One issue, however, that has not been adequately addressed in the literature on BITs and the investment treaty regime is why developing countries that have expressed their discontent with the regime react differently. Despite the expanding literature on BITs, the existing literature on investment treaties and policy space has yet to 'fully grasp the emergent forms of contestation' (Calvert, 2016, p. 4). As Calvert (2016) argues, we know little about the divergence in government approaches towards the investment regime, mainly why some countries terminate BITs while others seek to reform them. Two studies that have attempted to address this gap either directly or indirectly are briefly outlined below, before this section concludes with how this thesis will aim to contribute to filling this gap in the literature.

Calvert (2016) attempted to contribute to filling the gap mentioned above by examining how political ideology and State-society relations shape government responses to the constraints posed by the investment treaty regime. According to Calvert (2016), interest group pressure, domestic economic performance, global power politics and investor claims all influence government attitudes towards investor rights. However, the importance policy-makers assign to these factors relative to public and political interests will vary according to policymakers' normative beliefs and State-society relations (Calvert, 2016): decisions to either follow or terminate BITs are not products of purely rationalist calculations and are strongly influenced by policy-maker perceptions, which are in part subjective. She illustrates this argument with a comparative case study analysis of Argentina's and Ecuador's reaction to facing ISDS claims and expressing their discontent with the regime. According to Calvert's findings, the variation in government approaches, namely Ecuador's decision to terminate BITs and Argentina's decision to maintain them, stems from ideological differences and State-society relations (Calvert, 2016). Ideological differences, which reflect their social bases, caused policy-makers to weigh the costs and benefits of BITs relative to domestic interests differently. These factors will be considered in the three case studies analysed in this thesis.

The second study was conducted by Koivumaeki (2015a) who analyses the motivating factors behind the attempts of countries like Bolivia and Venezuela to evade the constraints of the international investment regime, with a particular focus on BITs. The findings of Koivumaeki's research indirectly contribute to the aforementioned gap in the literature, as they reveal that the prevailing economic conditions represent a determining factor in the decision of both countries to pursue the route they chose (Koivumaeki, 2015b). Koivumaeki's findings suggest that the decision of Latin American countries to exit or attempt to exit[84] the investment treaty regime, was part of a strategic plan and not solely explained by their leaders' ideology as commonly argued in the literature (Koivumaeki, 2015b, 2015a). The decision to challenge the regime was only taken after careful considerations of the economic costs and benefits of their actions. As a result of the expected future price increases in oil and gas, the Bolivian and Venezuelan governments' projections indicated that the future gains of nationalisation would exceed the costs of arbitration and potential compensation (Koivumaeki, 2015a). This thesis draws on Koivumaeki's hypothesis and research when analysing the factors behind Bolivia's decision to exit the regime in Chapter 7.

Finally, this thesis aims to contribute to filling the aforementioned gap by going a step further then what has been done so far: it undertakes a comparative study of the experience of three developing countries that have expressed their discontent with the investment treaty regime, yet reacted differently. By conducting such a comparative case study analysis, this study provides insights into the factors that determined why these three countries chose different routes to deal with similar problems.

5. Conclusion

This chapter demonstrated how Hirschman's framework has been applied to the investment treaty regime and why it is useful to categorise different routes adopted by developing countries after they express their discontent with the regime in this framework. A review of how Hirschman's framework has been used in the existing literature to categorise the different options available to developing countries, however, revealed the need to reconceptualise the framework in order to reflect the dynamics of the investment regime and the challenges facing developing countries. This is the objective of the thesis which proceeds on the basis of careful examination of three developing countries' response to discontent with the investment regime. The Hirschman categorisation will then be re-assessed in Chapter 8 as the author sums up the empirical findings of the case studies.

[84] In the case of Venezuela, the exit is considered incomplete as the State has denounced the ICSID Convention but has only terminated a few of its BITs.

In order to understand the different options available to developing countries, it is imperative to analyse how and why they joined the regime and why they reacted differently. Accordingly, the second half of the chapter focused on how these two questions have been addressed in the literature and identified existing theories that will serve as building blocks for the analysis of the case studies. These supplement the Hirschman framework to understand actual options available to developing countries discontent with the investment regime.

This chapter argues that an eclectic approach can be adopted to explain how and why developing countries signed BITs, combining the Bounded Rationality framework with the Structural Power framework. The Bounded Rationality framework as adapted by Poulsen, is drawn upon to account for how governments did not adopt a careful or strategic approach to assessing the benefits and costs of these treaties or to negotiating these treaties to ensure they did not conflict with their national policies. The Structural Power framework as adapted by Gwynn, on the other hand, can explain the role of structural power exercised by different actors (including IFIs, capital-exporting countries and the domestic corporate sector) in influencing the decision of each government to adopt neoliberal policies that effectively led to the signing of BITs. Moreover, as will be demonstrated in the case studies, both of these frameworks will also be used to analyse different aspects of the contestation of the regime by developing countries.

Finally, this thesis contributes to filling a gap in the existing literature by accounting for the variation in the forms of contestation of the regime by dissatisfied developing countries. In Chapter 8, the findings of the case studies will be used to build on some of the factors identified in the literature to explain why countries reacted differently after expressing their discontent with the investment treaty regime. These factors include the ideology of the ruling regime, State-society relations, and strategic decision making based on cost-benefit assessments by the State.

Chapter 4. Research Questions and Methodology

1. Introduction

This chapter outlines the research objectives of this thesis and illustrates the research methodology employed. Section 2 identifies the three research questions that this thesis aims to address using the findings of the comparative case study analysis. Section 3 sets out the methodology adopted in this study by explaining the case selection process and indicating the primary and secondary sources of research that were used to inform the qualitative comparative case study analysis. The strategies adopted to identify the interviewees approached for this study are also explained in this section. Furthermore, Section 3 outlines the structure of the case studies and explains how the theoretical frameworks identified in Chapter 3 are employed in the case studies. Finally, Section 4 provides an overview of the three case studies in addition to the steps adopted to filter and select the countries for each case study and the justifications for the relevance of each country selected.

2. Research Questions

The research questions addressed in this thesis are: (1) how and why do developing countries sign BITs that constrain their policy space with limited economic benefits? (2) What are the factors that drive developing countries to decide on whether to exit, use voice, or remain loyal to their BIT commitments? (3) How can Hirschman's framework be reconceptualised to reflect the different routes adopted by developing countries in dealing with their dissatisfaction with the international investment regime?

3. Research Design and Methodology

This thesis employs a qualitative comparative case study analysis drawing on the experiences of Egypt, South Africa and Bolivia. These three countries signed BITs as part of an economic liberalisation process, yet began to openly criticise the regime after realising the extent to which BITs and the ISDS mechanism constrained policy space. However, their reactions have differed and each of the case study countries adopted a different route in response to their discontent with the investment treaty regime. The comparative study draws on two theories from the existing investment treaty literature (the Structural Power and Bounded Rationality theories, as adapted by Gwynn and Poulsen respectively) to explain how and why each country joined the investment treaty regime and how they eventually contested it. The main contribution of this thesis is the analysis of how and why developing countries constrained by BITs reacted differently and determining the route available to dissatisfied developing countries in practice. The study builds on some of the scholarly contributions to the investment treaty literature on factors driving specific reactions of developing countries, and assesses the extent to which Hirschman's Exit, Voice, and Loyalty framework can reflect different routes taken by developing countries that have vocally expressed their discontent with the regime.

In selecting the case studies, a criterion sampling approach was adopted: the countries selected represented each of Hirschman's categories, as discussed in Chapter 3. Bolivia represents countries which attempted to exit the regime entirely and was categorised as an 'exit' case. South Africa attempted to reform its commitments under the investment regime, representing the 'voice' route; and Egypt remained loyal to its commitments under the regime despite openly contesting it, thus representing the 'loyalty' option. Another important criterion applied in the selection of the cases was the extent of the expression of discontent with the regime. While a significant number of developing countries have become respondents to ISDS cases and are wary of the threat posed by the investment treaty regime, a smaller group have openly contested the regime and expressed their intent to either reform or exit their treaties.

The three cases act as 'critical incident case studies', which, according to Patton (1990, p. 247), consider the factors that are 'critical to the success or failure of an activity or event and associated outcomes'. Chapter 8 examines the findings of the three case studies, identifying the main factors that influenced their respective decisions to take different routes and, in so doing, building on contributions by scholars like Calvert and Koivumaeki. The three cases also represent the range of reactions by developing countries that have publicly expressed their discontent with the regime thus far, and hence allows the author to examine how their experience in adopting each route in practice compares to the theoretical routes and options for developing countries proposed in the existing literature (as demonstrated in Chapter 3). The final outcome will be a revised version of Hirschman's framework, reflecting the possible routes available for developing countries that are discontent with the investment regime.

Each case study traces the process the country has undergone, from signing its BITS, to the moment it realised they constrained its policy space and the subsequent response. In each study an analysis of the historical process of signing BITs is conducted, an overview of the features of the BIT network is outlined, and the events that led to the realisation of the extent to which BITs can affect the country's policy autonomy (including experience with ISDS cases) is traced. Finally, after analysing the factors that determined the route taken by each country, the case studies conclude with an assessment of the extent to which the relevant Hirschman category can explain the routes adopted by the country. The qualitative analysis for each case study was informed by data collected from primary and secondary sources. Semi-structured interviews were held with public officials, lawyers, and policy and academic experts (see Appendix II). Initially, potential interview participants were identified through contacting institutions that were responsible for managing investment treaties and defending arbitration cases in each country, as well as officials, practitioners, academics and lawyers identified via official documents, legal transcripts, news archives and academic and policy publications.

Further participants were identified using the snowballing technique, which entailed requesting references from the initial respondents for other relevant subjects. This sampling strategy enabled the author to expand the scope of the participants and access participants who were not accessible through the initial strategies. The research collected during fieldwork was supplemented with secondary data from academic sources as well as reports by multilateral institutions (e.g. UNCTAD) and news articles, where relevant.

The next section briefly outlines the steps adopted to filter and select the countries for each case study and the justifications for the relevance of each country selected.

4. Justifications for Each Country Selected

Countries were purposively selected on the dependent variable to represent each of the categories exit, voice, and loyalty. The steps followed in the case selection procedure were:

1. List all developing countries that have vocally expressed their discontent with the investment treaty regime after becoming respondents to ISDS cases.

2. Classify countries identified through step 1 on the basis of how they reacted in their role as principals into one of Hirschman's three categories, as defined in Chapter 3.
3. When there were several cases in any category, preference was given to the country that was in a more advanced stage in the process. This was in order to ensure that there was sufficient scope for data collection through interviews and secondary data published on the countries' experience, in order to address the research questions of this thesis.
4. The language barrier was taken into consideration: only one of the case studies entailed the need for translation and accordingly a budget for translation was included in the funding received for the fieldwork.
5. Preliminary research on secondary data available and communication with potential interviewees was conducted to ensure that there was sufficient access to official documents and interviews to develop each case study.

The rest of this section explains how each of the case studies selected fit the analytical framework adopted in this thesis and also provides the justification for each case, along with the sources of information and potential alternative candidates for each case study.

4.1. Bolivia as a Case Study for Exit

Bolivia's decision to denounce the ICSID Convention, terminate its BITs and introduce a new domestic legal framework as part of an economic transformation that entailed a rejection of the neoliberal approach to FDI regulation makes it consistent with the definition of exit outlined in Chapter 3. During the neoliberal era which lasted for two decades from 1985-2005, the State signed 22 BITs of which 21 were ratified. Upon the election of Morales in 2006, Bolivia adopted a new policy agenda that entailed reversal of the neoliberal policies adopted by the previous regimes and ending the dependency on the Bretton Woods institutions that had a pivotal role in the policy-making process in Bolivia. This policy shift attracted considerable scholarly attention, because of the potential links to other small developing economies, but the implications of Bolivia's policy reversal have not yet been wholly unpacked (Molina, 2013). Between 2006 and 2010, the Morales regime implemented a series of measures with the aim of promoting a more inclusive economic development model through increasing the capacity of the State to provide welfare to its citizens. These policies included increasing the State's share of hydrocarbons revenues, a significant rise in public investments, and upgrading existing social transfer mechanisms for children and the elderly.

In May 2006, less than a year in office, President Morales renationalised the oil and gas production chain. Other nationalisations followed in the energy, mining and telecommunications sectors, leading to a surge in investment arbitration cases filed against Bolivia. Bolivia was familiar with the ISDS system through the infamous Bechtel case[85] that was triggered by the failed privatisation of water and sewage services in the city of Cochabamba and the subsequent 'Water War'. In 2007 Bolivia became the first State to withdraw from the ICSID Convention, arguing that the widely used forum for investor-State dispute settlement was biased towards investors. In line with this policy, the 2009 Bolivian Constitution established that domestic investment has priority over foreign investment and abandoned the neoliberal norms and principles of investment protection embodied in the investment treaty regime. The new investment regulation framework introduced by the Constitution subjects foreign investors to Bolivian jurisdiction, laws and authorities exclusively. Furthermore, the new Constitution prohibits the State from settling investment-related disputes with foreign investors in international tribunals. In 2006 Bolivia started to systematically refuse to renew each BIT that reached its expiration date before the State collectively denounced all of its remaining BITs in 2013.

Despite the termination of its BITs and its withdrawal from the ICSID Convention, Bolivia remains tied to the system for at least another decade or so due to survival clauses in the BITs. Since its decision to exit, Bolivia has faced 13 arbitration cases. Chapter 5 analyses how and why Bolivia signed its BITs before tracing its experience under the investment treaty regime and analysing the factors that motivated its decision to exit the regime. Bolivia's exit process is studied to determine the extent to which Hirschman's theory captures the exit route for developing countries in the investment treaty regime.

The Bolivia case study proceeded on the basis of interviews with government officials

[85] Aguas del Tunari S.A. v. Republic of Bolivia. ICSID, Case No. ARB/02/3.

and Ministers involved in the process of reviewing and terminating Bolivia's BITs, as well as State attorneys defending Bolivia in the investment arbitration cases filed against them. Former officials, academics and lawyers, as well as representatives of chambers (commerce and industry) and international financial institutions were also interviewed during two fieldwork trips in 2015 and 2016 to gather information from the various stakeholders involved (See Appendix II). During fieldwork, secondary data was also collected in the form of published and unpublished documents issued by governmental departments on the processes of terminating BITs and the outcomes of arbitration cases.

Finally, Ecuador and Venezuela were two possible alternates to Bolivia as an exit case study. However, Bolivia was in a more advanced position regarding the exit process compared to its two counterparts, which were either still in the process of exiting at the time of this study or had stopped short of a complete exit from the regime. In the case of Venezuela, it had denounced the ICSID Convention but had only terminated one of its BITs at the time of writing. Ecuador, on the other hand, had denounced the ICSID Convention but had only terminated a few of its BITs when this research project started. It eventually terminated all of its BITs in 2016 after an internal audit of its BITs was conducted. Hence, Bolivia was the most suitable candidate for this category.

4.2 South Africa as a Case Study for Voice

As established in Chapter 3, to the best of the author's knowledge, thus far, developing countries that have expressed their discontent with the regime and sought to introduce substantial reforms to their BITs have not been able to do so through the traditional channels of voice proposed by scholars and practitioners in the existing literature. Accordingly, the 'voice' case study in this thesis examines the experience of South Africa, which sought to introduce substantive reforms to its legal commitments under the regime through renegotiating its BITs, before realising it was not a feasible option.

In the immediate post-Apartheid era (1994-1999), South Africa signed 27 BITs, the majority of which were with capital-exporting European countries. Signing these BITs was an integral component of the new regime's policy of opening up the country to FDI and was seen as an essential diplomatic signal confirming South Africa's re-entry to the international community after years of isolation under Apartheid. In total, South Africa signed 49 BITs, only 21 of which entered into force. However, after realising how these treaties constrained their ability to introduce progressive social and economic policies, the South African regime sought to change its approach.

Despite having never signed the ICSID Convention, South Africa has been involved in two public ICSID cases. It was the second case however that rang the alarm bells for South African officials regarding the threat BITs posed to its transformative agenda. In 2007, an Italian investor registered an investment arbitration claim in ICSID against South Africa, alleging that the Black Economic Empowerment legislation (BEE) amounts to expropriation without adequate compensation. This case sparked a three-year comprehensive and public review of investment policy in South Africa which was concluded in 2010. The review highlighted the inconsistencies between some of the key protection standards in BITs and certain articles in the South African Constitution as well as the manner in which the investment rules in these BITs posed a constraint on the country's policy autonomy. After considering the results of the review, a series of landmark decisions were taken by the South African government. These decisions included amending the current investment regulatory framework to ensure that it is consistent with the South African Constitution and allows the State to regulate in the public interest. Accordingly, the South African government approached its partners to explore the possibility of renegotiating its BITs to introduce these reforms. However, when it became apparent that this option was not feasible, it notified its treaty partners (mainly capital-exporting countries) that it would not be renewing its expiring BITs. South Africa then proceeded with replacing its treaties with a domestic legal framework that encapsulated some of the main features in the traditional BIT template, yet introduced significant amendments to its investment protection model. The fundamental reforms included the exclusion or amendment of certain controversial protection standards (e.g. FET) as well as replacing the ISDS mechanism with domestic remedies and State-State arbitration.

South Africa was the first developing country to attempt to re-negotiate its BITs (to adopt the voice route, as per Hirschman's theory). Prior to its experience, developing countries either made incremental changes to their treaties or decided to attempt to exit the regime completely. Despite exiting its BITs, South Africa has maintained a neoliberal approach to FDI regulation and retained some of the key principles that underpinned the existing investment treaty regime. Furthermore, it has remained engaged in multilateral discussions in UNCTAD and UNCITRAL regarding reforms to the investment treaty regime. South African officials have also indicated the country's willingness to sign new BITs using the new South African model BIT as reference, as well as to reconsider international investment arbitration if current reform proposals are fruitful. Chapter 6 analyses South Africa's decision to sign BITs and traces its experience in the investment treaty regime including its arbitration experience and its pioneering review process. The case study assesses the factors that led to South Africa's decision to pursue the voice route through a 'hybrid'[86] tactic. It evaluates the extent to which Hirschman's framework can be used to reflect the route taken by South Africa and other developing countries that are attempting to introduce substantial reforms to their commitments under the existing investment treaty regime.

South African authorities and particularly the Department for Trade and Industry (DTI) have generally ensured that the review of its BITs and the subsequent policy measures (including non-renewal of existing BITs and new legislation) were conducted in a public and transparent manner. Consequently, out of the three case studies, South Africa was the case that had the greatest amount of accessible information, particularly regarding its experience with the investment treaty regime from the review process onwards. However, the same cannot be said concerning public documentation of the process of signing BITs; hence, for this phase, the study relies on secondary research from scholars who have studied South Africa's experience in signing BITs in addition to semi-structured interviews with policy officials.

The sources for the rest of the case study include data collected from semi-structured interviews with policy officials involved in the review process and in developing the new investment regulation framework conducted during three fieldwork visits in 2014, 2015 and 2016. Interviews were also conducted with academics, lawyers, civil society representatives and stakeholders representing some of the main capital-exporting treaty partners (including officials from chambers of commerce and diplomats). These interviews listed in Appendix II were supplemented with secondary data collected from reports by public institutions (e.g. DTI), civil society organisations, and stakeholder reports by bodies representing the capital-exporting treaty partners in consultations conducted by the South African government.

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[86] Combining both exit and voice tactics. See Langford et al. (2018)

It is important to note that important interviews and material collected for this case study took place in a fieldwork trip in July-August 2014 during the author's placement as a research associate at the Global Economic Governance programme (GEG) at Oxford University, as part of a Masters degree programme. The material collected was used in a working paper that was drafted by the author of this thesis and published by GEG in 2015 after the author had started his PhD programme. This paper is frequently cited in Chapter 6.

India and Indonesia would have been two possible alternatives to South Africa as case studies for the voice route. Both have expressed their discontent with the unbalanced nature of the investment treaty regime, which protects investors at the expense of the host State's ability to regulate. Although at different stages of the process, both countries have reviewed their existing BITs and decided to replace their existing BITs with treaties that would be negotiated based on new model BITs. As is the case with Bolivia, South Africa was considered a better choice for this case study because both India and Indonesia were at a much earlier stage of their respective processes when this project started.

4.3 Egypt as a Case Study for Loyalty

Egypt represents a rare case in the developing world for a country that has publicly condemned the investment treaty regime: despite conducting more than one internal BIT review and developing a few model BITs, it has maintained the status quo by not only retaining its existing BITs, but also codifying the controversial clauses in these existing BITs in its new investment legislation over the past few years.

Egypt has concluded more than 100 BITs in total, 72 of which entered into force. Despite being a capital importer, Egypt ranks seventh worldwide regarding the number of BITs signed according to UNCTAD,[87] behind major capital-exporting countries such as Germany, China, Switzerland, the United Kingdom and France. Egypt has also faced a total of 33 investment arbitration cases, placing it among the top five countries in the world concerning the number of arbitration cases faced as a

[87] See UNCTAD. International Investment Agreements Navigator. Available at: http://investmentpolicyhub.unctad.org/IIA/ (Accessed 2 July 2017).

respondent.[88]

In the aftermath of the January 25th revolution in 2011, a series of judicial verdicts rescinded privatisation deals as well as the sale of public assets (e.g. land) to investors, on corruption grounds. These verdicts, along with other measures aimed at redressing the corruption legacy of the Mubarak regime and addressing socio-economic inequality levels in Egypt, triggered a wave of investment arbitration cases. After conducting an internal BIT review in 2006, the Egyptian government concluded that the costs of its membership in the regime had outweighed the benefits it received thus far. Post-2011, Egyptian officials have vocally criticised the investment treaty regime and called for reforms to Egypt's BITs to balance investor rights with the rights of the host State to regulate. Nevertheless, despite regularly voicing its intentions to reform its BITs in UNCTAD forums and issuing more than one model BIT in the past decade (albeit with incremental changes only), the State has refrained from either exiting the regime or amending its existing BITs. Notwithstanding the growing awareness globally of the threats posed by BITs and corresponding efforts to reform these treaties by an increasing number of developing and developed countries, Egypt has remained reluctant to introduce substantial reforms to its existing investment protection model. Instead, successive governments post-2011 have not only remained loyal to these BITs but have also ensured new domestic legislation is consistent with the protection standards offered in these BITs.

Chapter 7 traces Egypt's experience with the investment treaty regime. It analyses the historical process that led to the signing of BITs and joining the regime, as well as the factors that led to the State's decision to maintain the status quo, despite being one of the top respondents to ISDS cases in the world and publicly expressing its discontent with the regime. Finally, the case study concludes with an assessment of whether Hirschman's conceptualisation of loyalty reflects the route taken by the Egyptian regime.

Out of the three case studies, Egypt was the most difficult in terms of accessing data on the policy adopted towards investment treaties and getting the consent of officials for interviews. A significant number of the interviews conducted with officials in the

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[88] See UNCTAD. International Dispute Settlement Navigator. Available at: http://investmentpolicyhub.unctad.org/ISDS (Accessed 2 July 2017).

departments responsible for managing Egypt's international economic agreements (General Authority for Investment and Free Zone and the Ministry of Investment (GAFI)) or defending the State in arbitration cases (Egypt State Law Authority (ESLA)) were done an on an informal basis. Nevertheless, sufficient data has been collected on Egypt's experience in the investment treaty regime to answer the research questions addressed in this thesis. Semi-structured interviews were conducted with State officials, international experts from multilateral institutions, and Egyptian arbitrators and lawyers (see Appendix II). These interviews were supplemented with secondary data from government documents, scholarly publications and reports by multilateral institutions like UNCTAD.

Finally, while the majority of developing countries that have faced several arbitration cases have maintained the status quo, once they have publicly criticised the regime and indicated their intention to contest the regime they have usually taken either of the two previously discussed routes. Egypt is one of the exceptional cases in which a country has vocally expressed its discontent with the regime and signalled its intent to reform its BITs yet eventually settled for incremental changes and retained its existing BITs. The closest example to the Egyptian case is the Argentinian experience under the Kirchners' administrations. Argentina is ranked as the country that has faced the highest number of arbitration cases as a respondent in the world. More than half of the cases that have been filed by investors against the State were triggered by emergency measures adopted during a severe financial crisis that hit the country at the beginning of the new millennium. The regime was vocal in its criticism of the constraints BITs and the ISDS mechanism imposed on its sovereignty to manage its economic crisis. However, despite calls by legislators and officials to exit the regime or amend existing treaties, both Néstor Kirchner and Cristina Kirchner maintained the status quo. Hence, in its role as a principal in the investment treaty regime, Argentina displayed the same kind of 'loyalty' demonstrated by the Egyptian regime, by refraining from replacing its existing BITs or withdrawing from the ICSID Convention. However, unlike their Egyptian counterpart, Argentina contested the regime in its role as a litigant, as Cristina Kirchner's government initially refused to comply with several awards rendered by arbitration tribunals against the State. Hence, while Argentina could have been used as a case study for 'loyalty', considering this thesis is only focusing on the reaction of developing countries as principals, Egypt represented a more convincing case given its compliance to the regime in its different roles, be it as a principal or litigant.

5. Conclusion

This chapter has illustrated the research methodology adopted in this thesis and the research objectives of the comparative case study analysis that will be conducted in the next three chapters. Chapters 5, 6, and 7 of this thesis will provide a detailed analysis of the experience of Bolivia, South Africa and Egypt with the investment treaty regime. The findings of these case studies will be used in Chapter 8 to address the research questions outlined above.

Chapter 5. Exit: A Bolivian Case Study

1. Introduction

In May 2007, Bolivia became the first country to denounce the ICSID Convention. Bolivia proceeded to terminate all of its BITs, initiating a backlash against the investment treaty regime amongst developing countries. Unlike its counterpart South Africa, Bolivia's decision to terminate its BITs was not an effort to introduce reform to the investment treaty regime. Instead, Bolivia replaced its BITs with a new domestic legal framework that rejected the main principles of the regime by prioritising domestic over foreign investment and empowering the State to play a more prominent role in regulating FDI. When Bolivia decided to terminate its BITs, investment treaty terminations were very infrequent, due to the uncertainty and potential economic costs associated with the exit route. Accordingly, Bolivia's experience becomes a critical case study as it represents a rare example of a developing country that has decided to exit the regime. This chapter offers an in-depth study of Bolivia's experience with the investment treaty regime, tracing the process the country has undergone from joining the regime, to realising the extent to which its membership of the regime constrained its policy space, and the subsequent response.

Considering that Bolivia’s experience is still a work in progress, this case study does not aim to assess the effectiveness of Bolivia’s decision to exit the regime. Instead, the objective of this case study is to analyse how Bolivia signed its BITs and the factors that determined why Bolivia proceeded with the exit route. To explain how and why Bolivia signed its BITs an eclectic approach is adopted, combining two theories from the existing literature on BITs. The Structural Power framework is deployed to justify why Bolivia joined the in investment treaty regime by signing BITs, despite historically rejecting some of the key investment rules in these BITs in multilateral forums, while the Bounded Rationality framework is used to explain why Bolivia only realised the potency of its BITs after facing its first arbitration claim. Concerning Bolivia’s reaction to its discontent with the regime, this chapter finds that ideological motives of the regime had a definite influence on the government’s preference for the reversal of existing neoliberal policies and exiting the investment treaty regime. However, the determining factors in Bolivia’s decision to proceed with its nationalisation programme and exit the regime were structural power dynamics influenced by the upturn in its economic fortunes and the outcome of a cost-benefit assessment conducted by the government. The favourable economic conditions resulted in a shift in structural power dynamics in favour of the State and enabled it confront its creditors and capital exporting partners with its decision to exit the regime. Furthermore, the State proceeded with its decision to nationalise the country's strategic sectors and exit the regime after it was satisfied by the assessments which concluded that the benefits outweighed the costs.

Based on the findings of this case study, Hirschman's conceptualisation of exit will be revised in Chapter 8 to reflect the complicated nature of exit in the investment treaty regime and also to capture the conditions in which exit might be considered feasible for developing countries.

The rest of this chapter proceeds as follows. Section 2 outlines the historical economic and political context in which Bolivia signed its BITs and provides an overview of the key provisions in Bolivia's BITs. Section 3 conducts an appraisal of Bolivia's BIT signing process. After analysing how Bolivia developed its BIT network, Section 4 addresses the factors that triggered Bolivia's decision to reverse the neoliberal policies in place and revise its membership of the investment treaty regime (including its first investment treaty arbitration case). Section 5 traces Bolivia's exit from the investment treaty regime and the context in which the exit occurred. Section 6 analyses the potential factors that motivated Bolivia's decision to exit the regime. Finally, Section 7 concludes the chapter by arguing that Hirschman's conceptualisation of exit needs to be revised to take into account the dynamics of the investment treaty regime.

2. Historical Context of the BIT Signing Process

This section documents how the global recession combined with the commodity bust and the resulting debt crisis, led Bolivia to resort to IFIs like the World Bank and the IMF as well as major capital-exporting countries for funding. Foreign investment liberalisation was a core component of the neoliberal economic reform programme that Bolivia had to implement as part of the conditionalities dictated by its creditors. It was in this context that Bolivia signed BITs and joined the investment treaty regime. The section concludes with an overview of the main features of Bolivia's BITs.

2.1 Build up to the Crisis and Bolivia's Turn to Neoliberalism

Towards the end of the 1970s, the Bolivian economy experienced a steep decline that almost led to a total collapse by the mid-1980s. This economic bust occurred unexpectedly on the back of the boom years of the previous decade (Jorgensen, 1992). The failure to undergo any structural transformation meant Bolivia's economic growth and development relied on volatile factors such as commodity prices and the state of the global economy. Under President Hugo Banzer (1971-1978), both the fiscal deficit and current account deficit widened, and Bolivia had to rely on external funding to finance these deficits and provide macroeconomic stability (Kehoe and Machiado,2014). As a result, external debt increased by c. 1.5 billion USD during the period between 1971-1978 (World Bank, 1992), compared to an increase of c. 340 million USD in the previous decade (1960-1970) (Kehoe and Machiado, 2014). The fragility of Bolivia's economic and political system was exposed in 1978, the year that marked the beginning of a four year period of intense political instability, during which seven military and two civil governments took office (Sachs and Morales, 1989; Spatz, 2006).

The economic difficulties resulting from the inability to raise enough external funding due to the global recessions in the 1980s were exacerbated by the steep decline in commodity prices and the significant rise in interest on loans (which had a significant impact on the size of the existing debt). As economic conditions were deteriorating both domestically and globally, commercial banks stopped lending to Bolivia and negotiated an emergency rescheduling agreement, which Bolivia defaulted on shortly after it was signed. Lending from the international community was also halted except for two loans that came from the Argentinian government (Sachs and Morales, 1989).

All of these factors placed Bolivia’s economy in peril. The significant decline in both sources of income, coupled with the governments’ inability to raise sufficient fiscal revenue, led the government to resort to seigniorage (printing more money) in order to finance its widening fiscal deficit (Sachs, 1986). By 1985, Bolivia was experiencing the most severe economic crisis of its history (Kehoe and Machiado, 2014), suffering from hyperinflation and a debt crisis. The Bolivian economy was in a precarious position, inflation had reached c. 24000 per cent, GDP per capita had fallen by more than a fifth since 1980, and fiscal deficits reached 25 per cent of GDP (Jorgensen, 1992). The political and social situation reached its nadir as shortages were widespread and popular discontent was threatening the peace of La Paz and other major cities (Jorgensen, 1992). One of the consequences of hyperinflation was Bolivia's inability to service its external debt. Payments to all international creditors, both public and private, were in arrears by 1985 and payments internally to various creditors were also in default (Sachs and Morales, 1989)

With the economy on the verge of collapse elections were called in 1985 by the Siles Zuazo government. Less than a month after being elected, President Paz Estenssoro initiated a comprehensive stabilisation and Structural Adjustment Programme under the name of the New Economic Policy (NEP). The NEP was introduced in an attempt to resolve the twin crises by implementing structural reforms to reduce inflation and generate foreign resources. Launched through Supreme Decree No. 21060 of 1985, which was promulgated by President Estenssoro, the structural reforms stipulated in the NEP represented a fundamental change in Bolivia's economic ideology, ushering in the neoliberal economic model that was sweeping Latin America at the time. The structural reforms were framed in line with the Washington Consensus model and aimed to transform the economy from a State-led economy to a free market economy by deregulating product and factor markets, liberalising trade and FDI regimes, privatising public companies and floating the local currency, amongst other reforms. The NEP was described as 'South America's second most radical neoliberal restructuring programme (after Chile)' (Kohl and Farthing, 2006, p. 60).

The Bolivian government claimed that by adopting an aggressive combination of austerity and liberalisation measures it aimed to control inflation and reduce the deficits (Aguirre, 2010; Kohl and Farthing, 2006). However, by incorporating these neoliberal policies in the NEP and adopting them, the Bolivian government also had the explicit intention of regaining the support of the IMF, World Bank, Inter-American Development Bank (IADB) and the United States (Kohl and Farthing, 2006).[89] While these actors played a significant role in bailing the Bolivian economy out of the debt crisis, their intervention marked the beginning of a phase in which they exercised substantial influence on Bolivia's economic policy-making process. This phase lasted for two decades and ended with the election of President Evo Morales in 2005.

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[89] These institutions had halted their activities in Bolivia during President Suazo's term (1982–85) (Kohl and Farthing, 2006).

The SAP adopted under the umbrella of the NEP was described as a 'shock and awe' strategy, which would help Bolivia restore 'business confidence' by regaining credibility among IFIs and bilateral donors (Conaghan et al., 1994; Dunkerley, 1990; Sachs and Morales, 1989). In March 1986, the Estenssoro government achieved its objective of 'international legitimacy' when the IMF approved the structural reforms planned, and soon after the World Bank and IADB followed suit (Kohl and Farthing, 2006). The next section focuses on one of the main conditionalities Bolivia had to satisfy in order to receive credit from the IFIs; this pertained to liberalisation of the FDI regime.

2.2 Liberalisation of the FDI Regime

The SAP adopted under the Estenssoro government in the form of the NEP helped stabilise the economy and reduce internal and external imbalances (World Bank, 1991). Inflation was brought down to 16 per cent on average during the period between 1987 and 1990, and the fiscal deficit was reduced to 3.3 per cent of GDP in 1990 (World Bank, 1991, p. i). As a reward for adopting these neoliberal reforms, Bolivia managed to negotiate two Paris Club deals in 1986 and 1988 which led to a rescheduling of about 710 million USD of debt service payments in arrears (World Bank, 1991, p. 7). Bolivia also managed to repurchase approximately two-thirds of its commercial bank debt at 11 cents to the dollar, using funds provided by official donors (World Bank, 1991, p. 7).

Nevertheless, while stabilisation was achieved, growth was sluggish (below three per cent on average between 1987-1990) and failed to keep up with the population growth rate (World Bank, 1991). The reforms also failed to induce private investments which were considered as the principal objective of the NEP. According to the World Bank, 'the structural adjustment programme enacted was based on the presumption that the private sector would act as the main engine of growth in the reactivation of the economy' (World Bank, 1991, p. iii). The Bank claimed that there were two main factors that could explain Bolivia's disappointing performance in attracting private investment to support higher economic growth. First, public enterprises dominated key sectors of the economy that presented strong growth potential (e.g. hydrocarbons, telecommunications, electricity, mining and transport). Second, Bolivia lacked an institutional framework to ensure private agents clarity, predictability, and enforceability of the legal and regulatory principles governing their activities (World Bank, 1995, p. 1).

Considering the scarcity of capital in Bolivia, IFIs (the World Bank in particular) exercised their leverage by applying pressure on President Jamie Zamora's government to implement further reforms (Tsolakis, 2009). This included deeper investment liberalisation. These reforms targeted removing obstacles for foreign investment and privatising public sector companies. In addition to investment incentives, measures to change the legal framework governing investment in Bolivia were demanded by the creditors to provide greater protection to foreign investors and limit regulation by the government. The Bolivian government complied with these demands as President Zamora issued Supreme Decree No. 22407 of 1990, which had been in the works for some time. Chapter IV of the Decree offered broad assurances to private investments by national and foreign investors. It also guaranteed that foreign and national investors would enjoy equal rights and treatment, be subject to the same fiscal duties, enjoy property rights and face no restrictions on capital transfer. The Zamora government followed up that Decree with three new pieces of legislation as part of its efforts to attract foreign investors. These legislations were the new Investment Law (Law No. 1182 of 1990), in addition to Hydrocarbons and Mining laws which opened SOEs to private capital (Tsolakis, 2009). This wave of legislation and measures adopted was described as a deep process of liberalisation of the economy (Aguirre, 2010).

The new Investment Law, in particular, was a significant turning point in Bolivia's economic transformation, as it represented the adoption of the investment protection rules that it had resisted for decades. A more detailed background on the history of Bolivia's resistance of these investment protection standards is provided in Section 3. The Investment Law was in line with the neoliberal transformation of the Bolivian economy as it followed some of the fundamental tenants of the Washington Consensus model. The Law guaranteed equal treatment of foreign and domestic investors, placed no restriction on repatriation of profits, provided for full payment in the case of expropriation and included settlement mechanisms for cross-border commercial and investment disputes including international arbitration (Spatz, 2006). The Investment Law also guaranteed the unimpeded repatriation of profits, the free convertibility of currency and free import and export of goods, services and capital (Spatz, 2006). The introduction of the Law was lauded by IFIs who praised the replacement of investment incentives with measures to improve the legal framework governing foreign investment in Bolivia. The World Bank praised the government for issuing the new Investment Law, stating that by providing legislative sanction for 'internationally accepted investment rules the Investment Law finally eliminated the important investment impediment of legal uncertainty' (World Bank, 1991, p. 11).

The Investment Law was complemented domestically by the Arbitration and Conciliation Law No. 1770 of 1997. The Arbitration Law was based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law (1985 version) and governed the recognition and enforcement of foreign arbitral awards generally (Aguirre, 2014). The Arbitration Law stipulated that foreign arbitral awards shall be recognised and enforced in Bolivia in accordance with the New York and Panama Conventions (Aguirre, 2014). On the international level, Bolivia committed to BITs and Multilateral Agreements that followed the same approach of further liberalising the investment regime. Bolivia signed multilateral investment agreements with agencies such as the Multilateral Investment Guarantee Agency (MIGA) and the Overseas Private Investment Corporation (OPIC) (Spatz, 2006). As a member of the Andean Community,[90] Bolivia approved a foreign investment regime known as the Common Regime on the Treatment of Foreign Capital (Aguirre, 2012). Decision No. 291 of 1991 issued by the Commission of the Andean Community provided a liberal general policy framework that was in line with the approach adopted in the Bolivian Investment Law (Aguirre, 2012).

The signing of BITs which is the primary focus of this chapter was an integral component of the regulatory system that was required to provide the foreign investment guarantees demanded by the IFIs. Supreme Decree No. 22626 of 1990, issued by President Zamora, stated that BITs which were signed during the President's official visits to Spain, Belgium and Luxembourg, as well as Italy were in adherence with Article 7 of the Investment Law. Article 7 of the Law stipulated that foreign investment shall be granted further protection through bilateral or multilateral instruments to be signed by the Bolivian government.[91] This Decree marked the

[90] The Andean Community is composed of Bolivia, Perú, Ecuador, and Colombia.

[91] Investment Law No. 1182, 17 September 1990, Official Gazette of Bolivia.

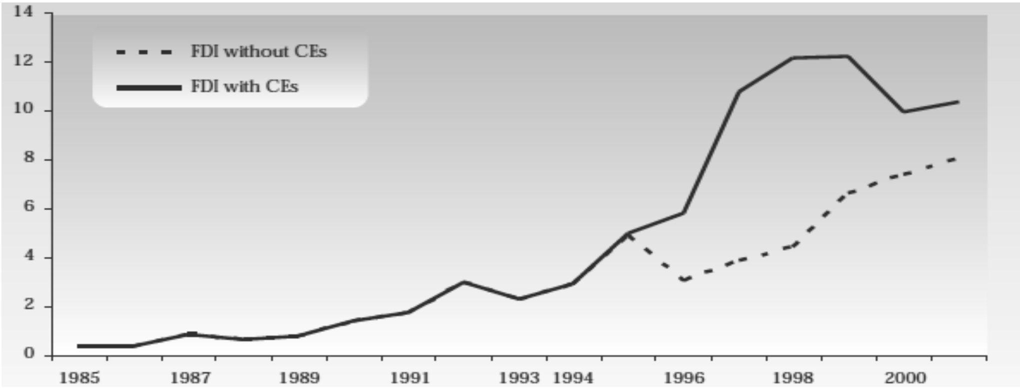
beginning of the expansion of Bolivia's BITs network as it revealed that it was an integral part of the new investment framework. The Decree also granted authorisation to the Minister of Foreign Affairs to sign the US BIT and to formalise Bolivia's accession to the ICSID Convention (both of which were finalised and ratified several years later).

In addition to the investment protection legislation and agreements, Bolivia was under immense pressure from the Bretton Woods institutions to privatise key public sector institutions. Accordingly, Bolivia embarked on a wide-ranging privatisation programme of State companies and ventures. This programme was facilitated through the enactment of a Privatisation Law in April 1992 and the Capitalisation Law of March 1994,[92] both of which were part of the conditionalities imposed by the creditors (Aguirre, 2010; Spatz, 2006). The Privatisation Law provided the regulations for the disposal of public companies and other State-owned assets, which resulted in the privatisation of 81 small and medium-sized companies for a total of 279 million USD (Antelo, 2000; Spatz, 2006). The Capitalisation Law was introduced to expand the scope of the privatisation process and accelerate it (Spatz, 2006). It did so by facilitating the privatisation of six major State monopolies over the following few years. These include ENDE (electricity), ENFE (railway), ENTEL (telecommunications), Fundidora de Vinto (mining), LAB (airlines), and YPFB (hydrocarbons) (Spatz, 2006).

These privatisations were vital because they proved to be the main destination for FDI as demonstrated in Figure 8 below. Indeed, the privatisations were deemed to be more effective than any of the efforts to attract FDI including the laws and agreements that liberalised the Bolivian economy (Nina and te Velde, 2003). More significantly, the privatisation process was a crucial landmark in recent Bolivian history as it is widely considered as one of the main triggers for the emergence of protest movements that surfaced in 2000 (Arsel et al., 2014). These protests and the social unrest that followed led to a regime change and the revision of the neoliberal model which included reversing the liberalisation of FDI regulations and effectively led to the termination of BITs as well as the denunciation of the ICSID Convention (see below).

[92] Law No. 1330, 24 April 1992, Official Gazette of Bolivia; Law No 1544, 21 March 1994, Official Gazette of Bolivia.

Figure 8: FDI inflows in Bolivia (as a percentage of GDP) with and without investments directed towards Capitalised Enterprises (CEs)



Source: Nina and te Velde (2003) using data from Central Bank and Ministry of Foreign Trade and Investment of Bolivia.

Having described the context in which Bolivia joined the investment treaty regime, the next section provides a brief overview of the main features of Bolivia's BITs.

2.3 Overview of Bolivia's BITs

Bolivia signed its first BIT with Germany, on March 23, 1987, and continued to sign BITs with other countries until 2002. In total the Bolivian State signed 22 BITs, of which 21 were ratified. In 1991, Bolivia signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) which came into force in 1995. Surveying the content of Bolivia's BITs, it comes as no surprise that they are generally consistent with the protection clauses that were stipulated in the Investment Law No. 1182 of 1990 (discussed above). This is mainly because most of Bolivia's BITs were based on templates provided by its capital-exporting partners. All of Bolivia's BITs were signed during the neoliberal era (See Appendix III for list of Bolivian BITs).

A summary of the key provisions in Bolivia's BITs is provided below:

- All of Bolivia's BITs provide protection for both direct and indirect expropriation. These measures can only take place if required for public need/purpose, on a non-discrimination basis and if prompt adequate and effective compensation is provided.
- The majority of Bolivia's BITs provide an expansive definition of investment with virtually no restrictions. 'Investment' is generally defined as any type of

asset including personal or real property, equity shares, credits in cash, royalties, contractual rights, and concessions.

- All of Bolivia's BITs recognise investors' right to both NT and MFN standards of protection.
- Most of Bolivia's BITs guarantee FET to foreign investors. In the majority of these BITs, the FET clause is unqualified and provides that the State will not in any way impair (through arbitrary, unreasonable or discriminatory measures) the management, maintenance, use enjoyment or disposal of investments of the other contracting party.
- The majority of Bolivia's BITs provide investors with full protection and security and guarantee the right of free transfer of capital investments and profits.
- All of Bolivia's BITs contain the ISDS provision. The vast majority of these BITs allow investors to submit arbitration claims to ICSID. In general, dispute settlement provisions in Bolivia's BITs provide that the investor and the host State should first attempt to resolve their dispute by consultation or other amicable means within a term of six months (cooling period). Notably, none of Bolivia's BITs require the exhaustion of domestic remedies before investors can turn to international arbitration.
- The majority of Bolivia's BITs have an initial ten-year duration, and in most cases, they can be extended thereafter for an indefinite period of time if neither party decides not to renew the treaty. All of Bolivia's BITs contain survival clauses which extend treaty protections for existing investors for another 10 years (in most treaties) beyond the date of termination.

Before addressing how Bolivia realised the extent to which BITs can constrain its policy space, Section 3 analyses how and why Bolivia signed its BITs.

3. An Appraisal of Bolivia's BIT Signing Process

As is the case with Egypt and South Africa, there is little if any documentation available on how Bolivia's BITs were signed. The similarities between Bolivia's BIT signing experience and that of its counterparts do not end there, as its approach to signing and processing its BITs reflects the same trends found in the two other case studies in this thesis. Like its counterparts, Bolivia signed its BITs without a prior assessment of the costs and benefits of these treaties and with minimal negotiation regarding the contents of these BITs. Moreover, Bolivia also only started to take BITs seriously and to restrict the signing of new BITs once it was hit with an investment treaty arbitration case. However, due to its history with investment protection rules, Bolivia's experience in signing BITs has more in common with the Egyptian experience than it does with the South African. Bolivia was part of the Latin American block that had fiercely resisted the investment protection standards promoted by the capital-exporting countries in the West during the 1960s and 1970s. The State eventually agreed to these protection standards when it began to sign BITs on the back of a severe economic crisis, and in the context of converting to the neoliberal economic model under pressure from IFIs (as demonstrated above).

In line with the methodology used in the two other case studies, this section adopts an eclectic approach to explain how and why Bolivia signed its BITs. Poulsen's hypothesis on the bounded rational behaviour of governments will be used to explain the trends in Bolivia's approach to signing BITs. Gwynn's adaptation of the Structural Power framework is deployed to explain why Bolivia signed BITs that included the very same investment rules that it rejected in multilateral forums both before and after it signed BITs.

3.1 Analysing Bolivia's Approach to Signing BITs through the Bounded Rationality Lens

According to Poulsen (2017), while developing countries signed BITs with the expectation that they would help to attract FDI inflows, the manner in which these BITs were adopted seems less rational than often portrayed in the existing literature. Poulsen's findings (discussed in Chapter 3) are consistent with some of the key themes deduced from Bolivia's approach to signing and processing its BITs. Firstly, it can be argued that the Bolivian regime wanted to believe that BITs would unlock FDI, as proposed by multilateral institutions like UNCTAD and the World Bank as well as the capital-exporting countries promoting these treaties. As discussed above, Bolivian officials were desperate to attract capital inflows on the back of the debt crisis. Accordingly, the context in which these BITs were signed could help explain why these officials signed BITs without a thorough assessment of the benefits and costs of these treaties and with minimal negotiation. A former Bolivian Diplomat, Julio

Aguilar, who took on different positions – including as an ambassador and the Vice Minister for International Trade – during his diplomatic career, which spanned from 1986 to 2006, is quoted stating that '1985 was the beginning of the (neoliberal) shock therapy in Bolivia. There was no investment, and the mines were closing, so we had to reactivate production. This was the context in which the treaties were signed. There was no debate whatsoever' (cited in Koivumaeki, 2015a, p. 109). Aguilar elaborated that 'since the productive sector was unable to re-start itself after the economic crisis and the structural reforms, politicians and technocrats wanted to attract new investment and, as a consequence, they did not question the treaties … the treaties faced little to no opposition' (cited in Koivumaeki, 2015b, p. 140). The former Minister of Foreign Affairs, Javier Murillo, also confirmed this view as he noted that, due to Bolivia's history with nationalisations in the mining and hydrocarbons sector, a degree of distrust existed among investors and further incentivised politicians to sign the treaties (cited in Koivumaeki, 2015b, p. 140).

These statements are in line with Poulsen's argument that 'bounded rational governments' would find the claim regarding the efficacy of BITs important for their adoption (Poulsen, 2014, p. 8). According to Poulsen, the trend was for governments in developing countries to take 'inferential shortcuts' (Poulsen, 2014, p. 8) based on the benefits of signing BITs that were being promoted by the IFIs. This is likely to have led to overestimating the benefits of BITs.

In Bolivia's case, there was clearly no specific body that was responsible for managing BITs, which were mainly signed by Ministers of Foreign Affairs. Furthermore, BITs were not being adequately analysed or evaluated by Congress. A report published by the Ministry of Foreign Affairs and the National Congress in 1995 revealed that during the period between 1978-1994, in which Bolivia experienced political and economic instability, laws and international agreements were approved in an expedited manner, due to the short duration of the Congressional sessions (Ministry of Foreign Affairs and National Congress, 1995). Consequently, a large number of international agreements were approved without detailed discussion or assessment of their contents (Luna, 2017). It is worth noting that around 13 of Bolivia's 21 ratified BITs were signed between 1987 and 1994. During that period the executive branch dominated the legislative bodies which implied that bodies like the Congress played more of a reactionary role. Although the National Congress's foreign policy prerogatives at the time primarily entailed its power to approve all treaties, accords, and international agreements, this authority or practice, however, was not always respected, particularly in the late 1980s (US Library of Congress, 1989).

The second observation on Bolivia's experience is consistent with Poulsen's argument that developing countries began adopting BITs because they were presented by their capital-exporting partners as readily ‘available’ policy blueprints to attract foreign investment. In addition to failing to thoroughly assess these treaties before signing them, it is also clear that the Bolivian government did not have a model of its own and that BITs were based on blueprints developed by the capital-exporting countries. As revealed in Decree No. 22626 of 1990,[93] the President at the time was signing BITs during diplomatic visits to European countries to promote the new Investment Law and framework. The consistency in the protection standards included across Bolivia’s BITs, as demonstrated in Section 2.3 above, further strengthens the case for assuming that there was minimal negotiation or input from the Bolivian side.

Thirdly, as argued by Poulsen, developing country officials only realised the potency of BITs when the country faced a claim itself. In interview, the Deputy Attorney General revealed that while Bolivia might have been aware of the concession it was making by allowing investors to resort to international arbitration, officials did not realise the extent of the power that these treaties afforded investors. It was only after the first investor-State dispute, which took place in the aftermath of the Water War in 2001, that the Bolivian government grasped the threats posed by these BITs (Interview with Pablo Menacho, 2015). Only one BIT was signed after that case was registered, the Costa Rica BIT, and it never entered into force. This experience, which is covered in more detail in Section 4 below, forced Bolivian officials to take these BITs more seriously when they developed their strategy for economic and social reform post-2005.

As demonstrated in this section, Bolivia’s approach to signing BITs is consistent with Poulsen’s theory on how developing countries processed their BITs displaying bounded rational behaviour. However, the question of why Bolivia accepted the same

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[93] As discussed in Section 2.2.

investment rules in its BITs that it had resisted in multilateral forums for decades remains unanswered. The next section first documents Bolivian and Latin American history in rejecting investment protection rules promoted by capital-exporting countries, before explaining how Gwynn's adaptation of the Structural Power theory is useful to explain the dichotomy in Bolivia's stance towards investment protection rules in bilateral and multilateral settings.

3.2 Explaining Bolivia's Paradoxical Behaviour using the Structural Power Framework

3.2.1 Bolivian and Latin American History with Investment Protection Rules

In 1868, Carlos Calvo, an Argentine diplomat and legal scholar, introduced the Calvo Doctrine when arguing for policies to ensure State sovereignty. The doctrine is primarily based on the following propositions (Calvo, 1896; Garcia-Mora, 1950, p. 206):

> 1) Equality, sovereignty and independence are paramount rights of the States;
>
> 2) States, being equal, sovereign and independent, have the right to expect non-interference from other States, and finally;
>
> 3) Aliens have to abide by the local law of the State wherein they reside without invoking diplomatic protection of their governments in the prosecution of claims arising out of contracts, insurrection, civil war or mob violence.

Under this doctrine, no foreign investor should expect greater protection and treatment than that given to nationals of the host State. Furthermore, investors should submit their disputes directly to the host State's domestic legal system and not be accorded protection by foreign powers. Many countries in Latin America have adopted these doctrines as a means of protecting their interests. Accordingly, it became State practice to include provisions obliging a foreign party to submit its dispute to local courts in relevant treaties or legislation (Gwynn, 2016). These clauses have been referred to as 'Calvo Clauses'. Since 1886, several Latin American States have incorporated Calvo Clauses into their constitutions. Bolivia, for instance, had a Calvo Clause in Article 18 of the 1948 Constitution (Fitzgibbon Russell H., 1948, p. 35) :

> Foreign subjects and enterprises are, in respect to property, in the same position as Bolivians, and can in no case plead an exceptional situation or appeal through diplomatic channels unless in case of a denial of justice.

The next significant development in the region occurred in 1938, when, due to a dispute between the governments of the United States and Mexico, the Hull principle rose to prominence. Cordell Hull, then US Secretary of State, issued a letter to the Mexican government demanding prompt, adequate and effective compensation for the expropriation of land, previously owned by US nationals, as part of the agrarian reform taking in place in Mexico at the time. Hull also proposed to submit the dispute to arbitration under international law. In response, the Mexican government referenced the Calvo Doctrine and asserted that States had no obligation to foreign investors under international law other than that of non-discrimination. Instead, foreign investors were expected to submit their claims to the host States' legal system to settle the dispute (Calvert, 2016).

This event triggered a debate between Latin American countries and the US over compensation on expropriation and the settlement of foreign investment disputes which eventually became a debate between developed and developing countries in multilateral forums. Other capital-exporting countries joined the United States in championing the Hull formula and were opposed by developing countries who were advocating for the Calvo Doctrine (Calvert, 2016).

During the 1960s and 1970s, Latin American countries were revelling in their newly found independence and were determined to protect their sovereignty. The Andean Common Market of which Bolivia, Chile, Colombia, Ecuador and Peru were members, adopted Decision No. 24 of the year 1970. This Decision stipulated that member countries would not grant investors more favourable treatment than that granted to national investors in addition to not enacting legislation that would enable foreign investors to seek dispute resolution outside the jurisdiction of the host State (Dolzer and Stevens, 1995, p. 9). Efforts by capital-exporting countries to push through a multilateral agreement on investment rules were also unsuccessful due to the continued disagreement between developing and developed countries over the rights of investors vis-a-vis the rights and obligations of the host State (Calvert, 2016; Subedi, 2012). Amongst these treaties was the 1967 Draft Convention on the Protection of Foreign Property advanced by the OECD. The failure to adopt the OECD Draft Convention stands out in particular, since most of the BITs eventually signed by Bolivia, and several other developing countries were generally based on the OECD model. Another rejected convention that is worth noting is the ICSID Convention. The first draft prepared on the future ICSID Convention in 1963 was approved by the Board of Governors of the World Bank in September 1964, at the annual meeting of the World Bank in Tokyo. However, at that time, the following Latin American countries voted against it, in what became known as the 'Tokyo No': Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Republic Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela (Boeglin, 2013). A few decades later Bolivia acceded to the Convention and later experienced its first investment treaty-based arbitration under the auspices of ICSID.

At this point in history, however, Latin American countries were joined by other developing countries in establishing a strong bloc in UN forums actively opposing the attempts of developed countries to impose their own rules of foreign investment protection. Indeed, as discussed in Chapter 3, a series of UN resolutions were in favour of the sovereignty of developing countries over their resources. Theses resolutions also contained provisions strengthening the position of host States stating that, in case of compensation for expropriation or disputes, the law of the host countries should be applied.

Future political and economic developments did not allow for these rules to be the framework for international investments (Gwynn, 2016). Instead, the interests of the developed countries prevailed, as they managed to enforce their investment protection standards through BITs. For Bolivia and its Latin American counterparts, in particular, the resistance against these investment rules which were embodied in BITs, broke down in the wake of the debt crises in the 1980s (Calvert, 2016). Major capital-exporting countries like the United States and other European countries began marketing the advantages of foreign capital to economic development (Calvert, 2016) and the need for investment protection treaties like BITs in order to facilitate FDI. Their efforts were complemented by IFIs like the World Bank and UNCTAD that promoted these treaties over the following few decades. Furthermore, as will be discussed below, IFIs like the IMF pressured developing countries like Bolivia to liberalise foreign investment regulation paving the way for BITs to be signed with capital-exporting countries. The next section demonstrates how the actors that held structural power through their control of the financial dimension played a crucial role in influencing Bolivia's decision to sign BITs, despite its previous resistance to the same investment rules. The Structural Power theory can also explain why, even after it signed BITs, Bolivia continued to resist similar investment protection rules in multilateral forums like the WTO. For, as the Bolivian government was signing BITS with the US (1998), Spain (2001) and Paraguay (2001), it was simultaneously objecting to the introduction of investment issues in WTO Ministerial Conferences in Seattle (1999), Doha (2001) and Cancun (2003). This contradictory stance towards investment rules in bilateral and multilateral settings is a clear indication that structural factors have an important role to play (Gwynn, 2016).

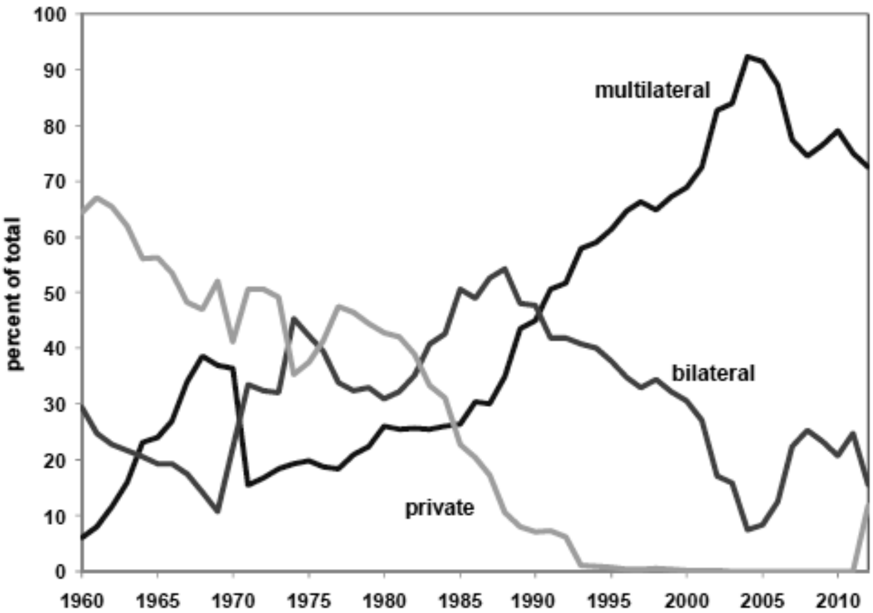
3.2.2 The Role of Structural Power

The dichotomy in Bolivia's multilateral stance and bilateral stance towards investment protection roles has been described as a paradox by scholars in the investment treaty literature. As argued in Chapter 3 this alleged paradox can be explained using Gwynn's adaptation of the Structural Power framework. When analysing the context in which Bolivia signed its BITs through a lens of Structural Power, the influence of Bolivia's dependence on the financial dimension in the form of financial credit clearly emerges. As Gwynn (2016) elaborates, under the financial dimension of structural power, the choice of the financially weaker party is constrained when dealing with the actors bearing this economic structural power. Bolivia's debt and economic crises meant it had to rely on 'high-conditionality lending' (Sachs and Collins, 1989, p. 255) from IFIs like IMF and the World Bank to bail it out. The rest of this section documents how actors that controlled the financial dimension, namely IFIs and capital-exporting countries like the US, strongly influenced Bolivia's decision to undergo intensive investment liberalisation which effectively led to its decision to sign BITs and join the investment regime.

Section 2 demonstrated how Bolivia resorted to IFIs like the World Bank and IMF to bail it out of its debt crisis. The emphasis placed on investment protection and liberalisation in the conditionalities imposed by the IFIs consequently meant that Bolivia had to significantly weaken its previously stringent resistance over investment protection standards promoted by capital-exporting countries, if it were to receive the financial support its economy desperately needed. As several other South American countries had signed BITs in similar circumstances, the proliferation of BITs in the region has been described as a legacy of the Third World debt crisis of the 1980s (Spronk and Crespo, 2008). While acknowledging that it is not directly connected to it, the Latin American debt crisis has undoubtedly contributed to the development of the international investment framework via the proliferation of BITs in that region (Gwynn, 2016; Pastor, 1989). Moreover, institutions like IMF, IADB and the World Bank played a significant role in the decision of South American countries to join the BITs framework (Gwynn, 2016). While there are no documents available to prove that signing BITs was specified as one of the conditionalities, the content of these BITs was consistent with the investment liberalisation reforms required by the funding institutions and donor countries. Having already documented the context in which Bolivia signed its BITs in Section 2, this section will expand on the influence and leverage IFIs and capital-exporting countries like the US (who were also creditors) had over Bolivia during the period in which it signed its BITs.

The IMF played a crucial role in Bolivia between 1986 and 2006 as the country operated continuously under IMF agreements during that period (Weisbrot and Sandoval, 2006). It served as a ‘gatekeeper’ for other sources of external financing and played an important role in coordinating policies with the World Bank and IADB in Bolivia. Together with the US Treasury Department, these institutions were able to exert substantial influence over domestic economic policy in Bolivia (Weisbrot and Sandoval, 2006). From 1985 onwards, the composition of Bolivia’s public debt drastically changed as private banks were no longer the major source of credit. By 2000, private bank lending had been replaced by multilateral and bilateral debt with the IADB, the United States and Japan as the most important lenders (Kohl, 2006). An illustration of the level of dependence Bolivia developed on multilateral creditors can be provided through a graph by Kehoe and Machiado (2014) in Figure 9, which traces the increase in debt from multilateral sources from just above 20 per cent of Bolivia’s total debt balance in 1985 to c. 90 per cent in 2005. Furthermore, to emphasise the level of influence the IMF exercised, it is worth noting that as a result of reaching an agreement with the IMF in the 1980s, the Bolivian government was able to negotiate the rescheduling of the debt it owed to the Paris Club (Kehoe and Machiado, 2014). These negotiations which started in 1985 lasted until 1999 and resulted in the reduction of Bolivia’s external debt by over 3 billion USD as demonstrated in the table compiled by Kehoe and Machiado (2014) using data from the Central Bank of Bolivia in Figure 10 below.

Figure 9: Composition of external creditors



Source: Kehoe and Machiado (2014)

Figure 10: External debt reduction (millions USD)

Creditor	Forgiven Amount	Percentage
1. International private banks	639.5	19.8
2. Argentina	845.2	26.1
3. Brazil	258.9	8.0
4. United States	393.0	12.1
5. Netherlands	7.0	0.2
6. France	8.8	0.3
7. Belgium	13.3	0.4
8. Soviet Union	9.2	0.3
9. Denmark	6.0	0.1
10. Austria	1.0	0.03
11. Club of Paris III	76.0	2.3
12. Club of Paris IV	121.0	3.7
13. Club of Paris V	273.0	8.4
14. Club of Paris VI	576.3	17.8
Total	3,278.0	100

Source: Kehoe and Machiado (2014)

As documented above, the adoption of a new investment regulatory framework was a cornerstone of the NEP and considered a priority by the Bretton Woods institutions. The promulgation of Investment Law No. 1182 of 1990 signalled Bolivia's official acceptance of the investment protection rules it had resisted for decades, as the Law contained the same protection standards that existed in the BITs that Bolivia began to ratify in 1990 as well. The Investment Law included an article which specifically mandated the Bolivian government to sign bilateral and multilateral treaties that would provide guarantees to foreign investors.[94] Hence, the signing of BITs can be considered part of the new investment framework demanded by the creditors.

Whereas the US signed its BIT with Bolivia only in the late 1990s, it had a strong influence on the adoption of the new investment framework in Bolivia earlier in that decade through the Enterprise Initiative for the Americas (EAI), a programme promoted by President Bush in the 1990s. Under this Initiative, the US signed 'Framework Agreements' with Latin American countries (Gwynn, 2016). EAI rested on three pillars through which the US could support economic reform and sustained growth in Latin America (Harrington, 1992). The first was to promote trade liberalisation in Latin America through entering into free trade agreements with individual countries or regional groupings (Harrington, 1992). The second was to promote investment liberalisation by helping 'countries compete for capital by reforming traditional policies that tended to discourage private investment' (Harrington, 1992, p. 5). The third pillar was to increase incentives for reform by offering additional debt relief measures (Harrington, 1992). Hence, the bait of this programme was that it offered financial support to developing countries as well as debt relief in return for trade and investment liberalisation (Gwynn, 2016). An investment loan programme and a 1.5 billion USD multilateral investment fund that was managed by the IADB provided the funds required to implement this Initiative (Gwynn, 2016). In 1991, under the framework of the EAI, the US and Bolivia agreed to an 80 per cent reduction in Bolivia's 38 million USD debt (Harrington, 1992). The structural power element is clear here through the use of the financial dimension (Gwynn, 2016), in this case, financial support and debt relief to influence the decision of the Bolivian government in undergoing further investment liberalisation.

The carrot and stick approach of the IFIs and the United States proved essential to ensure that Bolivia implemented the neoliberal reforms under five successive governments (Kohl, 2006). By conforming to IFI demands, Bolivia had little room to manoeuvre when negotiating conditions (Kohl, 2006). IFI funding remained essential over the next two decades as half of Bolivia's public investment was funded through

[94] See Section 2.

international aid during that period (Kohl, 2006). This dependency ensured strict compliance of Bolivian governments with the neoliberal prescriptions imposed by IFIs to guarantee a steady flow of funds that serviced the public debt (Kohl and Farthing, 2006).

Finally, as Gwynn (2016) argues, in order to explain why developing countries reversed their position on investment rules and signed BITs, it is imperative that the context in which these treaties were signed is taken into consideration. Bolivia's dependency on financial credit and the strong conditional factor attached to funding significantly influenced its decision to adopt a new investment framework and join the investment treaty regime. The next section traces the roots of the revolution against neoliberalism in Bolivia, and the eventual decision to exit the regime.

4. Growing Discontent with Neoliberal Policies and Bolivia's First Investment Arbitration Case

The neoliberal hegemony which started in 1985 and lasted until 2005, was consolidated in the second phase of reforms which were launched in 1993 under pressure from IFIs to deepen the market reforms and enable investors to play a more prominent role in the economy (Kohl, 2006). Under President de Lozada, Bolivia underwent one of the most aggressive privatisation programmes in the region. As discussed in Section 2, the Capitalisation Law facilitated the sale of 50 per cent of several major SOEs, which provided 60 per cent of the total government revenues, to multinational corporations (Bauer and Bowen, 1997; Brada et al., 1997). The Law also led to the partial privatisation of five strategic industries, which represented 12.5 per cent of Bolivia's GDP and employed a large percentage of the labour force. The privatised sectors included oil and gas, telecommunications, airlines and electricity (Kohl, 2002).

While the government had predicted that the capitalisation process would create hundreds of thousands of jobs and boost economic growth (Kohl, 2006; MNR-MRTK-L, 1993), the results failed to match these expectations. Although firm efficiency increased, the transfer of ownership resulted in a net cost to the government as revenues lost reached 255 million USD in 1997 alone, and continued to fall in 1998, as oil and gas companies, which had provided nearly half of government revenues, were privatised in mid-1997 (Kohl, 2002; La Razón, 1997a; Molina, 1998). Even though production of oil and natural gas continued to rise, government revenues were not increasing as much, due to the introduction of regulations that lowered taxes and royalties from 50 to 18 per cent in an attempt to attract investments in exploration and production (Kohl, 2002).

FDI increased primarily in the oil and gas sector following the privatisation of the State-owned petroleum company YPFB; however, these investments had limited linkages to the rest of the economy and generated much fewer jobs than predicted, hence failing to provide the necessary stimulus for the desired economic growth. Moreover, as employment in the public sector declined the private sector was unable to fill the gap resulting in further informalisation of the Bolivian economy (Assies and Salman, 2003; CEPAL, 2001). The informal sector continued to be the main source of employment as more workers lost their jobs as a result of the privatisation of the SOEs and weak economic growth (Kohl, 2006; Peirce, 1997; Whitehead, 1997).

In addition to lost revenue and growing unemployment, the economic restructuring also had a range of other impacts (Kohl, 2002; Villegas Quiroga, 1997). Most significantly, essential services were privatised, and subsidies were slashed, leading to an increase in energy, electricity and later water prices (Kohl, 2002).[95] In 1997, under pressure from the IMF and the World Bank and faced with a growing budget deficit, President Banzer imposed an economic austerity plan that increased gasoline and diesel prices by 25 per cent and further reduced public spending (Kohl, 2002; La Razón, 1997a, 1997b). These measures led to strikes and riots in December 1997 (Kohl, 2002), and triggered the beginning of a turbulent period in Bolivia's history, witnessing a continuous wave of protests until the election of Morales in 2005.

By the late 1990s, it was clear that the neoliberal economic reforms had failed to deliver the inclusive and sustainable economic growth. Slow growth characterised the period between 1986 and 2005, with GDP per capita growth averaging 1.1 per cent (Kehoe and Machiado, 2014). According to the IMF, Bolivia's situation was puzzling, as it was a country perceived to have one of the best structural reform records in Latin America, yet it experienced sluggish per capita growth, and made virtually no progress in reducing income-based poverty measures (IMF, 2005, p. 1). At the time, Bolivia

[95] Electricity and water prices increased by over 50 per cent between 1995 and 1997 (Kohl, 2002).

had one of the highest inequality rates in the world (Gigler, 2009). With a share of only four per cent of national income, the bottom 20 per cent of households lived in extreme poverty, while 62 per cent of the income was concentrated in the hands of the top 20 per cent of the population (Gigler, 2009; World Bank, 2002). Discontent with the Bolivian government's policies led to protests, which increased in frequency and severity leading to the shutdown of the country several times in 2000 and 2001 (Kohl and Farthing, 2001). While not all economic troubles can be linked to the economic restructuring, almost every protest included demands to end neoliberal economic policies (Kohl, 2002). In the following years, protests culminated in two major revolts namely the Water War and the Gas War.

The next section focuses on the Water War, which was a significant turning point in Bolivia's relationship with BITs and the investment treaty regime, as it triggered its first investment treaty arbitration.

4.1 Water War: The realisation that BITs bite and the spark for Bolivia's revolution against neoliberalism

The Cochabamba Water War is widely credited as the event that sparked the new cycle of protests, which created a state of crisis and public discord in Bolivia, leading to the downfall of two presidents and galvanising support for Morales to get elected by the end of 2005 (Gramont, 2006; Spronk, 2007).

In 1999, as part of the privatisation programme, the Bolivian government granted a consortium led by Bechtel (major American infrastructure company) a 40-year water and sewage services privatisation concession for the city of Cochabamba (El-Hosseny, 2018). Almost immediately after the concession was signed, there was an intensely hostile reaction by the residents and media in Cochabamba (Gramont, 2006). The deal to privatise water provision provided what was described as 'a lightning rod' for the Bolivian population's growing frustration with a stagnant economy and persistent poverty, both of which have been increasingly blamed on neoliberal policies adopted by the government (Gramont, 2006, p. 6). Only months after the company Aguas del Tunari (AdT) assumed control, it implemented a steep increase in prices. This triggered widespread protests by the Bolivian people (El-Hosseny, 2018). The Bolivian citizens resisted these decisions by forming the Committee to Defend Water and Life and, between January and April 2000, they organised protests that brought the city to a halt on several occasions (Kohl, 2006). After resorting to the military and declaring a state of siege on the 8th of April, the Bolivian government finally conceded to public pressure and revoked the concession (Kohl, 2006). As a result, AdT filed an ICSID claim against Bolivia using the Netherlands-Bolivia BIT.[96]

This event was a considered a significant milestone as it revealed the potency of the BITs signed by Bolivia, which later represented one of the main obstacles to implementing the economic and social reform agenda post-2005. In addition to raising Bolivia's awareness on how BITs can bite, this experience provided the State with a warning for the challenges it was going face when it aimed to reverse other privatisation deals under President Morales.

Few ICSID cases have garnered the global attention which extended beyond the realms of the field of international arbitration, as the AdT case did (Gramont, 2006). The failed privatisation of a basic public service and the revolution that followed captured the attention of the international media and social movements around the world. Civil society actors in Bolivia and around the world framed the Water War and the ICSID case as part of the anti-globalisation movement (Gramont, 2006). Indeed, the case was the first ICSID case in which a third party intervention took place (El-Hosseny, 2018). Civil society organisations sought to stand as parties to the dispute by filing a petition on August 28, 2002, before the tribunal, requesting permission to intervene in the arbitration case. The petitioners argued that as a result of Bechtel's decision to raise water prices by an average rate of 50 per cent, Cochabamba's residents' access to water had been restricted, particularly the poorer ones (La Coordinadora para la Defensa del Agua y Vida, et al., 2002; El-Hosseny, 2018).[97] The tribunal summarily rejected all of the petitioners' demands in a letter by the President of the tribunal dated January 23, 2003.[98]

The case was eventually dropped after domestic and international pressure forced AdT to withdraw its claim without receiving the compensation it had originally demanded.

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[96] Aguas del Tunari, S.A. v. Republic of Bolivia. ICSID, Case No. ARB/02/3.

[97] Aguas del Tunari, S.A. v. Republic of Bolivia, Petition of La Coordinadora para la Defensa del Agua y Vida, et al. to Participate as Amici Curiae. ICSID, Case No. ARB/02/3, 29 August 2003. Available at: https://www.italaw.com/sites/default/files/case-documents/ita0018.pdf (Accessed 2 June 2017)

[98] Aguas del Tunari SA v. Bolivia, Letter from President of Tribunal Responding to Petition. ICSID, Case No. ARB/02/3, 29 January 2003. Available at: http://www.ita.law.uvic.ca/documents/Aguas-BoliviaResponse.pdf (Accessed 4 April 2016).

A few months before AdT had succumbed to public pressure and withdrew its claim, however, the ICSID tribunal had ruled that it had jurisdiction to hear the merits of the case in a 2-1 decision dated October 21, 2005. The tribunal rendered this decision despite the strenuous objections by the Bolivian party who argued that the Concession Agreement did not allow for international arbitration and that AdT manipulated the system by creating shell companies in the Netherlands for the sole purpose of being able to draw on the Netherlands-Bolivia BIT to file an arbitration case against Bolivia.[99] Hence, despite seemingly escaping unscathed, the developments that occurred in the arbitration proceedings revealed the expansive nature of the protection BITs provide to investors as well as the arbitrators' broad interpretation of the protection offered by these BITs and the unpredictable nature of their decision making.

At the heart of the controversy and debate that surrounded this case in the investment arbitration field was the reality that at the time AdT signed the Concession Agreement in September 1999, its ownership structure did not afford it a basis on which to assert a claim to ICSID jurisdiction (Gramont, 2006). The parent company Bechtel was incorporated in the United States, and at the time the US-Bolivia BIT had not yet entered into force. AdT changed its upstream ownership by transferring a 55 per cent ownership stake to a Dutch company in December 1999. This shareholding change allowed AdT to use the Netherlands-Bolivia BIT. AdT’s allegedly weak ties with the Netherlands and the timing of the change (after the protests had started and a few months before the concession was revoked) led Bolivia to argue that the change in shareholding structure and the subsequent use of the Netherlands BIT was an abuse of process, while AdT claimed the change in ownership was for tax purposes.[100]

Long after the majority ruled in favour of AdT, this case remained a controversial topic debated in the field. As Peterson (2005, p. 3) argues, what is most notable about the majority ruling, is its ‘express confirmation that the definition of corporate “nationals” found in many BITs is a capacious one’.[101] Peterson further elaborated, that the majority stated that ‘national routing’ of investment or effectively structuring

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[99] See Aguas del Tunari, S.A. v. Republic of Bolivia. Decision on Respondent’s Objections to Jurisdiction. ICSID, Case No. ARB/02/3, para 72, 208-209.

[100] Ibid, para 68, 330.

[101] Ibid, para 332.

an investment through a third country so that it comes under the protective canopy of a BIT is considered a legitimate exercise (Peterson, 2005).[102] This decision leaves investors with considerable discretion in structuring their investments through a holding company to take advantage of BIT protections that might have not been otherwise available (Gramont, 2006). Hence, this case exposed Bolivia to one of the major controversial issues surrounding BITs and the investment treaty regime i.e. the widespread practice of 'treaty shopping' (Lee, 2015; Mitchell et al., 2015; Schill, 2008; van Os and Knottnerus, 2011).[103] Scholars have also noted that the ability to manipulate the system this way undermines the understanding of BITs as expressions of bilateral bargains because an investor can opt into almost any BIT regime it chooses (Schill, 2008). This feature of the BIT regime has been heavily criticised and cited as one of the reasons why the existing system needs urgent reform.

Finally, for Bolivia, this was an eye-opener and as it embarked on its economic transformation under the Morales regime, BITs and ISDS were given serious attention. The next section addresses Bolivia's economic transformation under Morales and its exit from the investment treaty regime.

5. Bolivia's Exit from the Investment Treaty Regime

Bolivia's decision to exit its BITs and the investment treaty regime was part of an economic transformation process with the objective of reversing the outcomes of the neoliberal era. In addition to introducing progressive economic policies, two other critical components of the economic reform agenda were the overhaul of the hydrocarbons sector and the renationalisation of enterprises that were privatised during the neoliberal era. Before tracing the exit process, this section first covers the context in which the exit process began including the new economic agenda and the measures adopted by the State to increase its share in hydrocarbon revenues and restore its control over strategic sectors.

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[102] Ibid, para 330d.

[103] Treaty shopping can be explained as an act in which multinational corporate investors alter their corporate structure so as to qualify for more favourable investment protection, both in terms of jurisdiction and substantive provisions, through treaties signed by other countries and not their original home State.

5.1 Context in which Exit Occurred

5.1.1 New Economic Agenda

In December 2005, Evo Morales was elected as Bolivia's first indigenous president. This marked the beginning of a new era in Bolivia. One of the critical features of this era has been the rejection and reversal of some of the key neoliberal policies adopted under the previous regimes. Morales took office on the back of a wave of massive social upheavals and popular mobilisations that started in 2000 (Burbach, 2006; Spronk, 2007). The Movement for Socialism (MAS), which was led by Morales, played a major role in mobilising the masses for the second major uprising that followed the Water War, which culminated in what became known as the Gas War in October 2003.[104] The demands that came out of the Gas War and became known as the 'October Agenda' included nationalisation of gas reserves, justice for the death of 70 citizens who died in the rebellion and a new Constitution.

The Gas War led to the resignation of President de Lozada, who fled the country. Before Morales was elected there were two interim presidents who struggled in the face of escalating protests calling for more radical economic and social reforms. Morales and his party were elected based on the goals in the October Agenda, and hence he inaugurated his term with a broad mandate for change (Molina, 2013). The new policy agenda was documented in the National Development Plan (NDP) which was announced in June 2006. The NDP was the first plan under the new regime to propose a roadmap for social, economic, and political change (Molina, 2013). The Plan had two main objectives: to end Bolivia's dependence on primary exports, and to reverse the outcomes of the structural adjustment policies implemented during the neoliberal era (Molero Simarro Ricardo and José Paz Antolín María, 2012).

In the first five years under Morales, Bolivia went from adhering to Washington Consensus policies, to repelling them, in addition to contesting the institutions that had played a leading role in installing these policies (Molina, 2013). In the first two years, the State made a clear statement of its position towards the role of the World Bank and IMF in the Bolivian economy and aid policy in general (Molina, 2013). This statement came through policy decisions that included refusing to renew a World Bank

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[104] An uprising waged against the effort to export unprocessed gas through Chile.

framework for multilateral ODA,[105] as well as repayment of the outstanding debt owed to IMF and refusal to adopt any new IMF programs thereafter (Molina, 2013). Although the World Bank continues to operate in Bolivia, it has dropped behind multilateral institutions like the IADB and the Andean Development Corporation in terms of lending volume. While these changes do not represent a complete exit from the aid regime, they significantly reduced the role played by the Bretton Woods institutions in dictating Bolivia's economic policies (Molina, 2013).

During its first term, the Morales administration achieved some of the key objectives outlined in the NDP. These included significantly increasing the government's share of revenues from the hydrocarbon sector (through the overhaul of the hydrocarbons sector and the nationalisation programme), boosting public investment to create jobs, and upgrading social welfare programs, e.g. Bono Juancito Pinto,[106] Bono Juana Azurduy,[107] and Renta Dignidad[108] (Molina, 2013).

The next section traces the overhaul of the hydrocarbons sector by the Bolivian government, which provided the State with the economic resources it needed to proceed with the nationalisation programme and its exit from the investment treaty regime.

5.1.2 Overhaul of the Hydrocarbons Sector and Setting the Platform for Nationalisation and Bolivia's Exit of the Investment Treaty Regime

The overhaul of the hydrocarbons sector was implemented in phases under three different presidents. A new Hydrocarbons Law (Law No. 3058 of 2005) was passed under President Carlos Mesa in July 2005. The Law introduced a new tax that increased the State's participation in the hydrocarbons sector from 18 to 50 per cent of production and ordered the Bolivian government to renegotiate contracts with the MNCs operating in the sector. The Congress passed the Law despite President Mesa's objections who deemed the reforms to be too radical. Mesa was succeeded by another

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[105] Namely the Poverty Reduction Strategy Paper (PRSP).

[106] A conditional cash transfer program designed for primary school students.

[107] Conditional cash transfer programme that provides a stipend to expectant and new mothers.

[108] The first universal pension programme (no conditions or means tests to receive the benefit) in Latin America.

interim President, Eduardo Rodríguez Veltzé who implemented the new tax policy but refrained from renegotiating the contracts under pressure from MNCs who threatened to resort to international arbitration. The last phase took place under the Morales administration which renegotiated the contracts and issued the Nationalisation Decree No. 28701 of 2006. The Decree mandated the Bolivian government to recapture the majority stake in the previously privatised enterprises and to introduce a further increase in the State's participation in the hydrocarbons sector, which reached 82 per cent of the production value.

When Vice President Carlos Mesa, took over the presidency after the resignation of Gonzalo Sanchez de Lozada in the aftermath of the Gas War in October 2003, he promised to hold a referendum over the legislative and regulatory reforms of the gas sector in response to the growing calls for nationalisation by the public and in an attempt to establish his public mandate (Koivumaeki, 2015a). The referendum was held in July 2004 and the main outcomes of the referendum included the following (Blackaby and Richard, 2015): (i) the 1996 Hydrocarbons law should be repealed; (ii) YPFB should be re-established and regain control over the privatised oil and gas companies; and (iii) the government should recover ownership over all hydrocarbons at the wellhead.

Over the next five years, and mostly under the leadership of Evo Morales (who officially took office in 2006) the measures voted for in the referendum were implemented. Before Morales took office, however, both interim presidents that preceded him were reluctant to adopt these measures due to fears of retaliation by MNCs who threatened to resort to international arbitration.

President Mesa was wary of the backlash the government would face from MNCs if it were to implement the measures the public voted for in the referendum. However, MAS capitalised on the results of the referendum and the growing public pressure to challenge Mesa's less radical reform attempts. In response to the pressure, Guillermo Torres, then Minister of Energy, proposed a change in the terms of the existing contracts between the MNCs and the State (Koivumaeki, 2015a). This move rang alarm bells for the MNCs and triggered retaliation in the form of threats to initiate arbitration cases. In an attempt to induce a regulatory chill by pressuring the government to halt any plans on amending the existing contracts, MNCs articulated their threats to resort to arbitration if the contracts were amended in both private and in public mediums (Koivumaeki, 2015a). Guillermo Torres recalls that multinationals wrote to the State to notify it of their discontent with the measures undertaken by the authorities and reminding it of their rights (cited in Koivumaeki, 2015a). Public statements were also made in the media by some multinationals operating in the sector. After a meeting between representatives of six major oil companies (which included Repsol, British Gas, Petrobras and Total) and the Senators drafting the new hydrocarbon law, the President of Repsol stated to the local press that if the wording of the bill was not changed (with particular reference to the part that requires the change of contracts without a negotiation) they will have no choice but to resort arbitration or leave the country (La Razón, 2004).

The threats were effective as Mesa fiercely resisted proposals made by MAS to raise royalties and renegotiate contracts with MNCs. In a State address, Mesa stressed the necessity of drafting a hydrocarbons law that would be acceptable to the 'international community' (cited in Webber, 2010). In his speech Mesa further elaborated on why he believes these proposals by MAS should be disregarded (cited in Webber, 2010):

> It's a law that the international community will not accept and that the petroleum companies will take to arbitration ... It's clear and everyone has told us: Brazil has told us, Spain has told us, the World Bank, the United States, the International Monetary Fund, Great Britain, and the entire European Union … Bolivian gentlemen, approve a law that is viable and acceptable for the international community.

In the event, as demonstrated below, these threats never materialised, and several years later, Mesa admitted that he regretted succumbing to the threats made by MNCs.[109] Mesa claimed that he was convinced at the time that Bolivia would face a flurry of arbitration cases if he proceeded with the plans to amend contracts and didn't think the State could afford the economic costs of these cases (cited in Koivumaeki, 2015a).

Nevertheless, Mesa was unable to stop the Congress from passing the new hydrocarbon legislation. MAS eventually gained more control in the Congress by taking over the presidency of the Economic Development Commission. Their dominating position allowed them to override the government's objections and to pass their version of the legislation which increased taxes and royalties from 18 per cent to 50 per cent and stipulated the renegotiation of existing contracts. Following the

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[109] Eventual arbitration claims were mainly triggered by the nationalisation process.

promulgation of the new Hydrocarbons Law, Morales and his party mobilised protesters against Mesa for his reluctance to proceed with the nationalisation plans and fulfil the demands expressed in the referendum. Eventually, Mesa was forced to step down after facing increased pressure from protests and political opponents.

The second interim President, Veltzé took over and in his eagerness to immediately ease the public pressure, he partially implemented the new Hydrocarbons Law by only introducing the new taxes and leaving the existing contractual terms unchanged (Koivumaeki, 2015a). Veltzé's decision to refrain from renegotiating the contracts was due to the pressure applied by MNCs operating in the sector. A few companies voiced their disapproval of the plan to amend the contracts and distribution of revenues and some initiated arbitration proceedings before eventually backing down. According to Veltzé, Repsol, British Gas, and Total commenced arbitration proceedings in July 2005, but later withdrew their claims at his request (cited in Koivumaeki, 2015b).

The next section addresses the last phase of the overhaul process which took place under the Morales administration. Morales went a step further than his predecessors by renegotiating all of the existing contracts with MNCs and embarked upon a nationalisation programme which coincided with Bolivia's exit from the investment treaty regime.

5.1.3 The Nationalisation Process

From the very beginning of the Morales era and as a result of the popular pressure, nationalisation (or what the regime clarified as the recapitalisation of the strategic SOEs that were privatised in the neoliberal era) was a clear priority. The NDP focused specifically on the hydrocarbons sector, anticipating the nationalisation policies that took place a few years later (Molina, 2013). After his election in December 2005, Morales spent the first few months of his presidency preparing his nationalisation plan. On May 1, 2006 he announced the Nationalisation Decree and the plan for the State to recover control over its oil and gas resources (Blackaby and Richard, 2015). The plan was not limited to the hydrocarbons sector as it included the renationalisation of enterprises in other strategic sectors including power, electricity, mining and telecom. The plan consisted of two main components (Koivumaeki, 2015a): the first was to renegotiate the oil and gas contracts which was also stipulated in the Hydrocarbons Law. The Nationalisation Decree also effectively raised the royalty rate on Bolivia's two most productive oil and gas fields to 82 per cent through the imposition of an additional 32 per cent in the participation rate of the YPFB (on top of the existing 50 per cent royalty rate) (Blackaby and Richard, 2015). Moreover, as per the Decree the oil and gas companies must agree to the new contractual terms proposed by the government in 180 days or risk expropriation (Blackaby and Richard, 2015). The second component of the nationalisation plan was for the State to recapture majority ownership of the privatised companies.

The rationale behind starting with the first component (renegotiating the contracts) before embarking on the nationalisation programme was that most of the State's revenue was generated through the extraction of the hydrocarbons (Blackaby and Richard, 2015). The privatised companies (be it in the hydrocarbons sector or in the other sectors) contributed significantly less in terms of State revenue (Koivumaeki, 2015a). Accordingly, it was imperative for the State to complete the renegotiation of contracts first before nationalising the companies as the windfall of revenue generated from the new terms allowed the State to offer compensation to the shareholders of the companies in question and/or settle the arbitration cases (that resulted from the nationalisation process) at an early stage of the proceedings. This strategy adopted by the State will be expanded on further in Section 6.

Despite publicly condemning the government's decision to force them to sign new contracts, all the MNCs operating in the field agreed to renegotiate contracts. Within the 180 days specified by the government in the nationalisation decree, YPFB successfully renegotiated all of its 'shared risk' oil and gas contracts, transforming them into service or operating contracts in compliance with the new regulatory framework (Blackaby and Richard, 2015). The first step of the process was considered a resounding success by the government as Bolivia managed to re-write all its oil and gas contracts with the MNCs based on the terms defined in the Nationalisation Decree without facing a single case of investment arbitration.

The second step involving nationalising the privatised companies, however, proved to be somewhat more complicated. While, the government was able to reach an agreement with a few of the companies, in several cases the disparity between the government's valuation of the shares and that of the investors meant that the nationalisation process led to a flurry of arbitration cases. In May 2006, President Morales renationalised the oil and gas production chain. Other nationalisations followed in the energy, mining and telecommunications sectors (Brauch, 2014). The nationalisation programme was comprised of 14 main decrees issued between 2006 and 2014 (see Appendix V for the list of decrees). The government adopted a negotiation strategy which will be analysed in more detail below in Section 6 and successfully managed to negotiate compensation packages with several companies avoiding arbitration.[110] However, the nationalisation process still triggered 11 of the 15 investment treaty arbitration cases faced by the Bolivian State to date (see Appendix IV for details on Bolivia's investment treaty arbitration cases). There is currently only two cases of the 11 related to the nationalisation measures that are pending (Glencore and Banco Bilbao Vizcaya Argentaria SA (BBVA)), as eight of them have been settled before the tribunals reached a verdict and Bolivia lost one, the Rurelec case.[111]

The next section traces Bolivia's exit from the investment treaty regime. The exit process started with the denunciation of the ICSID Convention, before the new Constitution in 2009 established the main principles of the new investment framework and mandated the government to conduct a review of Bolivia's BITs. The review recommended the termination of Bolivia's BITs and the last step of the exit process was the introduction of new investment and arbitration legislation.

5.2 Tracing Bolivia's Exit Process

Even before facing its first arbitration case as a result of the nationalisation process, Bolivia's plans to exit from the investment treaty regime were underway. In an interview, the Deputy Attorney General discloses that preparations for Bolivia's exit from BITs and ICSID began shortly after Morales took office. The initial step was to establish two bodies in 2007 to plan for the exit process and manage the disputes that were triggered by the nationalisation Decrees (Interview with Pablo Menacho, 2015). The first entity was the National Council for Legal Defence under the Ministry of Foreign Affairs which was in charge of the legal and technical work regarding arbitration cases. The second entity was under the Ministry of the Presidency which handled the political aspects of Bolivia's exit plans (Interview with Pablo Menacho, 2015). Bolivia took its first major step in the exit process in May 2007 (a few months before the first arbitration case triggered by the nationalisation decrees) as the Ministry

[110] These include: Repsol, Petrobas, GDF Seuz, Air BP and Shell.

[111] See Appendix IV.

of Foreign Affairs sent a formal notice to ICSID declaring its withdrawal from the ICSID Convention. In remarks about their decision to exit Bolivian officials also declared their plans to revisit the BITs signed by the State (Vis-Dunbar et al., 2007). As arbitration cases started to accumulate, the Bolivian government realised that having two entities in charge of handling arbitration cases led to coordination and efficiency problems. This led to the introduction of the Ministry of Legal Defence in 2008 which combined the tasks of the two bodies into one institution (Interview with Pablo Menacho, 2015). The next important milestone was in 2009, when the new Constitution was adopted. The Constitution introduced the principles for the new investment framework and mandated the renegotiation or termination of BITs. In 2010, the government created, also by Constitutional mandate, the State Attorney General's office (Procuraduría General del Estado) which became responsible for promoting, defending and protecting the interests of the State in various fields, including disputes with foreign investors. Shortly after, in 2011, an internal review of Bolivia's BITs was conducted, commencing the process to replace these treaties with a new framework as mandated by the Constitution. After terminating the BITs, the government repealed the Investment and Arbitration Laws that were promulgated in the 1990s and replaced them with new legislation in 2014 and 2015, respectively to complete the overhaul of the FDI regime and Bolivia's exit of the investment treaty regime. The rest of this section traces the exit process in more detail.

5.2.1 Denouncing the ICSID Convention

The first step in the process of exiting the investment treaty regime was the denunciation of the ICSID Convention. On May 2, 2007, the World Bank received a written notice of denunciation of the Convention from the Bolivian State (ICSID News Release, 2007). As per Article 71 of the ICSID Convention,[112] the denunciation took effect six months after receipt of notification, in November 3, 2007. The State declared the need to replace the current investment dispute settlement mechanism due the shortcomings of the existing system. The Bolivian government justified its decision to withdraw from the dispute settlement mechanism by citing the following problems:

[112] Article 71 of the ICSID Convention stipulates that: 'Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice'.

(i) perceived bias toward investors; (ii) lack of transparency and appeal mechanisms; (iii) high transaction costs of proceedings; and (iv) unpredictable and irrational decisions by tribunals (Arismendi, 2010; Lazo, 2014).

Despite denouncing the Convention, investors were still allowed to resort to ICSID through BITs that provided consent to ICSID jurisdiction. As per Article 72, the Bolivian government was still obliged to honour its obligations under the ICSID Convention arising out of consent given by it (or by one of its subdivisions, agencies or nationals) before its notice of denunciation was received by the World Bank (i.e. before May 2, 2007). This meant that investors could still file claims at ICSID until BITs expired (including survival clause duration) and the Investment Law or any other treaty/agreement that provided consent for ICSID jurisdiction was revoked.

5.2.2 New Constitution and BIT Review

The second step in the exit process was introducing the main principles for Bolivia's new investment framework through the new Constitution which was adopted in 2009. The new Constitution established that domestic investment has priority over foreign investment, and that foreign investors may not be treated more favourably than domestic investors. It also subjects foreign investment to Bolivian jurisdiction, laws and authorities exclusively and rejects international arbitration as a means to settle disputes with foreign investors (Brauch, 2014; Valle Velasco, 2012).

In the Chapter on International Relations, Article 255 of the Constitution provides the guiding principles for the negotiation, subscription and ratification of international treaties which include: independence and equality among States, no intervention in internal matters; defence and promotion of human, economic, social, cultural and environmental rights; and protection and preference for Bolivian production (Valle Velasco, 2012). After providing general guidance for Bolivia's approach to international treaties, Article 320 of the Constitution goes a step further with regards to treatment of foreign investment by establishing the main standards to be adopted in Bolivia's new investment framework for regulating foreign investment and its relationship with domestic investment. The Article provides that (Valle Velasco, 2012):

I. Bolivian investment will take priority over foreign investment.

II. Every foreign investment will be subjected to the Bolivian jurisdiction, laws and authorities, and no one may invoke an exceptional situation, nor appeal to diplomatic claims to obtain a more favourable treatment.

III. The economic relations with foreign States or enterprises shall be conducted under conditions of independence, mutual respect and equity. More favourable conditions may not be granted to foreign States or enterprises than those established for Bolivians.

IV. The State acts independently in all of its decisions on internal economic policy, and shall not accept demands or conditions imposed on this policy by States, banks or Bolivian or foreign financial institutions, multilateral entities or transnational enterprises.

V. Public policies will promote internal consumption of products made in Bolivia.

Through Article 320, the Constitution reverted back to Bolivia's historical position on foreign investment treatment by reflecting standards like the Calvo Doctrine which had been undermined by BITs (Menacho, 2015). The Article also provided the grounds for Bolivia's new investment framework as it was the basis for terminating the existing BITs, as well as replacing the old investment and arbitration laws with new ones that reflected the new vision (Menacho, 2015). After establishing the standards and principles for transforming Bolivia's investment framework, one of the transitionary provisions of the Constitution mandates that any existing treaties that contradict clauses in the Constitution shall be renegotiated or denounced within four years of the election of the 'Executive Organ'.[113] Given that the elections (convened by the new Constitution) took place in December 2009 and that the government of President Morales began its new term on January 22nd, 2010, the deadline established by the Constitution to denounce and bring international treaties in line with the new Constitution was in 2014.

Accordingly, the Bolivian government formed an inter-ministerial committee to review the existing BITs, following the Constitutional mandate to denounce and, if necessary, renegotiate all treaties that contradicted the Constitution (Brauch, 2014; Ministry of Foreign Affairs, Plurinational State of Bolivia, 2013). The Ministry of Foreign Affairs held an internal workshop ('Workshop') that gathered the General Directorates of Legal Affairs of the Ministries comprising the Executive Body of the

[113] See the Ninth Transitionary Provision in the Bolivian Constitution (2009) (Valle Velasco, 2012).

State, on May 17th 2011, to discuss the status of the international treaties that did not conform with the Constitutional Articles stated above (Ministry of Foreign Affairs, Plurinational State of Bolivia, 2013). According to an unpublished official memorandum drafted by the Ministry of Foreign Affairs ('Review Memorandum') to document this process, the title of the Workshop was the 'Denunciation of International Treaties for their adaptation to the Political Constitution of the State'. The objective of this Workshop was to clarify the procedure for denouncing and/or renegotiating treaties, agreements or other international instruments, signed by Bolivia, which might potentially have been unconstitutional, as well as assessing their scope and legal effects (Ministry of Foreign Affairs, Plurinational State of Bolivia, 2013).

According to the Review Memorandum, the BITs were reviewed to assess their compatibility with Article 320 of the Constitution (Ministry of Foreign Affairs, Plurinational State of Bolivia, 2013). Some of the key clauses included in BITs signed by Bolivia outlined in Section 3 clearly contradicted the standards set in Article 320. Examples of these clauses and why they would be considered unconstitutional based on the 2009 Constitution include: (i) NT and FET contradicted with Article 320 (1) which stipulates that Bolivian investments will be prioritised over foreign investments; (ii) expropriation (specifically what constitutes expropriation and how compensation would be determined) and ISDS clauses both violate Article 320 (2) which stipulates that foreign investment will be subjected to the Bolivian jurisdiction, laws and authorities exclusively.

As a result of the contradiction between various clauses of the BITs signed by Bolivia with the Constitutional precepts, the conclusion reached after the legal and technical evaluation conducted by the Ministry of Foreign Affairs in coordination with the competent and relevant public entities was that BITs amongst other treaties that violate the Constitution would be denounced to 'retrieve the economic, legal, and political sovereignty of the Plurinational State of Bolivia' (Ministry of Foreign Affairs, Plurinational State of Bolivia, 2013, p. 12). As part of the outputs of the Workshop a law was drafted to provide guidance on the termination process as well as the criteria and procedures that need to be adopted in signing any future international treaties. The draft legislation named 'Law for Treaties Celebration' was used as a reference for terminating and or renegotiating treaties even before it was ratified in September 2013 as Law no. 401. Article 71 of the Law for Treaties Celebration outlined the process by which BITs and other treaties that were deemed unconstitutional were to be terminated in the following clauses:[114]

> I. Pursuant to the Ninth Transitory Provision of the Political Constitution of the State, the International Treaties prior to its promulgation and that do not contradict it will be maintained in the internal legal order with the rank of Law.
>
> II. It is the responsibility of the Executive Branch to denounce and renegotiate the International Treaties signed, ratified or to which the Plurinational State of Bolivia has adhered prior to February 7, 2009 and which are contrary to the Political Constitution of the State, prior legal technical evaluation of the Ministry of Foreign Affairs, in coordination with the competent Public Entities, observing the interests and sovereignty of the State and only fulfilling the procedure foreseen in the respective international instruments subscribed.
>
> III. After the four years stipulated in the Ninth Transitory Provision of the Political Constitution of the State, International Treaties identified as contrary to their mandates and the interests of the State, may be renegotiated and/or denounced in accordance with the procedure established in the Treaty itself.

The Vice-Minister of Foreign Trade and Integration revealed in interview that in 2006 Bolivia started to notify its partners that they would not be renewing BITs that reached their expiration dates (Interview with Walter Clarems Endara, 2015). Since different BITs expired on different dates, in May 2013 the government decided to collectively denounce the remaining BITs in order to comply with the Constitutional mandate to renegotiate or terminate treaties that contradicted the Constitution within a four year period from the beginning of Morales's second term (see Table 1 below).

The Bolivian government proceeded with the termination of its 22 BITs within the timeframe set in the Constitution and following the guidelines set in Law No. 401 of 2013. The list of BITs terminated and the date of termination is provided in Table 1 below. It is worth noting that several BITs were denounced before the Workshop took place.

[114] Law No. 401, 18 September 2013, Official Gazette of Bolivia.

Table 1: List of Bolivia's terminated treaties

Treaty Denounced/Terminated	Date of Termination
Bolivia-Italy BIT (1990)	February 22, 2011
Bolivia-United States of America BIT (1998)	June 7, 2012
Austria-Bolivia (1997)	June 30, 2012
Bolivia -Sweden BIT (1990)	July 3, 2012
Bolivia-Paraguay BIT (2001)	September 3, 2012
Bolivia-Spain BIT (2001)	January 4, 2012
Bolivia-Argentina (1994)	May 13, 2013
Belgium-Luxembourg Economic Union-Bolivia (1990)	May 14, 2013
Bolivia-France BIT (1989)	May 13, 2013
Bolivia-China BIT (1992)	May 13, 2013
Bolivia-Germany BIT (1987)	May 13, 2013
Bolivia-Romania BIT (1995)	May 14, 21013
Bolivia-Denmark BIT (1995)	May 13, 2013
Bolivia-United Kingdom BIT (1988)	May 13, 2013
Bolivia-Ecuador BIT (1995)	May 7, 2013
Bolivia-Peru BIT (1993)	May 7, 2013
Bolivia-Chile BIT (1994)	May 7, 2013
Bolivia-Netherlands BIT (1992)	November 1, 2009
Bolivia-Switzerland BIT (1987)	December 27, 2006
Bolivia-Korea, Republic of BIT (1996)	January 11, 2007
Bolivia-Cuba BIT (1995)	July 9, 2008
Free Trade Agreement between the Republic of Bolivia and the United States of Mexico	June 7, 2010

Source: Ministry of Foreign Affairs,Plurinational State of Bolivia (2013)

5.2.3 New Investment and Arbitration Laws

The new foreign investment regulations which were first documented in the Constitution before being embodied in the respective laws for investment protection and arbitration demonstrated that this was not an attempt to reform the system by amending a few controversial clauses. Instead, it was an act by Bolivia to introduce an alternative framework with the aim of providing the State with the policy space and sovereignty required for achieving its social and economic objectives.

The promulgation of Law No. 516 of 2014, the Investment Promotion Law (*LPI*) was the next step in restructuring Bolivia's investment regime (Brauch, 2014). Along with exiting BITs and the ICSID Convention, the adoption of the LPI was a significant step in redesigning the national legal framework regulating investment to reflect the principles established in the Constitution (Brauch, 2014; Interview with Walter Clarems Endara, 2015).

The LPI starts by clarifying the principles guiding any investment activities in the Bolivian economy. Article 3 of the LPI highlights one of the main principles, which is the sovereignty of the State in conducting economic and social planning, directing the economy and exercising control over the strategic sectors established in the Constitution (Valle Velasco, 2014).[115] The LPI also reiterates the Constitutional principle of prioritising domestic over foreign investments, as a mechanism to strengthen the domestic market as per Article 3 (h) (Brauch, 2014; Valle Velasco, 2012). With regards to treatment of investments, Article 6 (II) stipulates that private investors can participate in strategic sectors but only subject to the rights granted by the State (Brauch, 2014; Valle Velasco, 2012). With the exception of protecting strategic sectors, the LPI does not restrict investment in any other economic sector, as long as the State's economic planning role is respected and Bolivian law is complied with (Brauch, 2014). In terms of investor obligations Article 11 of the LPI provides that all investments must comply with domestic laws and regulations on labour, tax, customs, environmental and other matters (Brauch, 2014).

Finally, the section of Additional Provisions in the LPI articulates that any new investment treaties must conform to this law in addition to the Constitution. The first Additional Provision stipulates that treaties concerning foreign investments which are renegotiated in accordance to what is set forth in the Ninth Transitory Provision of the Constitution, shall conform to the regulations established in the both the Constitution and the LPI. It also states that upon the publication of this Law, every investment framework agreement or international trade agreement regarding investments which is signed by the State will be based on the dispositions established in this Law (Valle Velasco, 2014). One aspect that remained vague in the LPI was the dispute settlement mechanism for foreign investments. The Third Transitionary Provision of Law, however, mandated the Ministry of Justice and Office of the Attorney-General to draft a new law on conciliation and arbitration within 90 days from the promulgation of the LPI (Brauch, 2014).

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[115] Strategic sectors include minerals, hydrocarbons, the electromagnetic spectrum, genetic resources, and water and energy sources (Constitution, Article 348 (I) and (II)).

In June 2015, Law No. 708, the Conciliation and Arbitration Law (LCyA) was promulgated. According to Deputy Attorney General, Pablo Menacho, the Law was enacted to provide legal security (predictability) to both the State and the investor (Menacho, 2015). The Law, however, incorporates significant modifications on the previous Arbitration Law (No.1770 of 1997), which was repealed and introduces specific rules concerning investment dispute resolution involving the Bolivian State that is consistent with the new Constitution and Investment Law. Pursuant to the LCyA, any disputes that involve the State and arise from or are related to an investment made under Law No. 516 for the Promotion of Investments shall be bound by the following rules (Gutierrez and Zelada, 2017): (i) Investment controversies shall be subject to Bolivian jurisdiction, laws and authorities; (ii) The parties must submit the controversy to conciliation prior to arbitration; (iii) Conciliation or arbitration will be held locally; and (iv) Conciliation or arbitration will have the territory of Bolivia as their seat. Hearings, evidence production and other procedures, could be conducted outside of Bolivian territory.

Bolivia's exit from the investment treaty regime and introduction of a new domestic legal framework to regulate FDI did not prevent it from facing international arbitration cases filed by foreign investors. Survival clauses in most of Bolivia's BITs meant that these treaties could still be used for investments that were made prior to the termination process for another ten years in most cases. As discussed earlier, Bolivia faced 15 investment treaty-based arbitration cases, most of which were triggered by the renationalisation process. This raises the question of why Bolivia proceeded with the exit option even though it was clear that these treaties would continue pose a threat from existing investors and they would ultimately have to pay hefty sums in terms of compensation for the claimants. Was it a matter of ideology, avoidance of arbitration or was there a strong element of pragmatism? This is what the next section addresses.

6. Motivations Behind Bolivia's Decision to Exit the Investment Treaty Regime: Arbitration Costs, Ideology, Strategic Approach?

Bolivia's decision to exit its BITs and denounce the ICSID Convention has attracted considerable attention in the field of international investment law, because of the potential implications for other developing economies. Most of the literature on Bolivia's exit, however, has focused on the reality that an immediate complete exit was never feasible because of the survival clauses in BITs and certain articles in the

ICSID Convention. Hence, despite its decision to exit the regime, Bolivia has faced 13 publicly known investment treaty arbitration cases since its decision to denounce the ICSID Convention. In total Bolivia has had to compensate investors in the region of 780 million USD based on available data so far (see Appendix IV) with three cases still pending (South American Silver, Glencore and BBVA).

There are several factors to consider when analysing Bolivia's decision to exit the regime which it had joined by signing BITs and joining the ICSID Convention. The previous sections demonstrated how the State was facing popular pressure to reverse the privatisations and economic policies adopted in the neoliberal era. The Morales administration also made it clear that it was critical of the neoliberal principles underlying the investment treaty regime as Bolivia's BITs shaped an obstacle to the implementation of the new economic agenda. Bolivia's decision to exit, however, revealed the ‘sticky’ quality of the regime (Salacuse, 2015) that ensures investors are still able to use BITs and resort to ICSID even after the State had terminated these instruments. Despite being aware of the arbitration threats and potential costs, the Bolivian government persisted with the decision to exit. This has led critics to describe Bolivia’s decision as an uncalculated move and one driven by ideological motivations rather than pragmatic ones.

This section analyses the different motives that have been used to explain or justify Bolivia’s decision to exit. It considers the arguments in favour of arbitration costs and ideological motives being factors that explain the decision to exit, before arguing that there is evidence that the State adopted a strategic and pragmatic approach in deciding to exit. The section concludes that while the Bolivian regime’s ideological position may have directed the State towards the exit route, it was the shift in structural power dynamics in favour of the State that enabled it to proceed with its decision to exit the regime. This shift in structural power dynamics was a result of a significant upturn in Bolivia’s economic status which empowered the State to confront its capital exporting partners and creditors with its decision to exit the regime. Furthermore, the favourable outcome of the cost-benefit assessments conducted by the Bolivian government convinced the State to proceed with its decision to exit the regime.

6.1 Arbitration Costs/History

It is difficult to establish a clear relationship between arbitration history, costs and Bolivia's decision to exit the investment treaty regime, both because the exit process began before Bolivia had lost a case, and also due to the reality that survival clauses would enable investors to continue to benefit from the terminated BITs for another decade or so (May, 2016). When Bolivia became the first State to denounce the ICSID Convention in May 2007, it had only faced two arbitration cases one of which was settled (the AdT case) and the other case, Quiborax,[116] was still pending at the time. Hence, Bolivia decided to leave ICSID without having lost a case or incurred any significant financial costs.

Accordingly, Bolivia's experience with arbitration and the costs incurred do not provide a compelling explanation for Bolivia's exit. A more credible argument in Bolivia's case is that costs of potential arbitration cases might have inspired its decision to exit this investment regime (May, 2016). Bolivia had already experienced investment arbitration and realised the scope of protection provided by BITs, and hence it was quite aware that the economic transformation project which entailed a nationalisation programme would inevitably lead to investment treaty arbitration cases. However, if the logic behind this decision to exit was to avoid the costs, then the explanation becomes less convincing. As discussed earlier, terminating BITs and denouncing the ICSID Convention does not allow States to release themselves from their obligations under the regime immediately.

The desire to prevent future investors from taking advantage of the expansive protection standards provided by BITs can be considered as a motivating factor to exit BITs. However, it still does not entirely explain why the Bolivian government proceeded with its plans to exit the system and pursue its nationalisation plans while being completely aware of the arbitration threat it was facing which eventually led to substantial amounts of funds paid in settlements or awards to investors.

6.2 Ideological Motivations

An alternative explanation that has been used to explain why countries like Bolivia and its Latin American counterparts proceeded with their plans regardless of the costs

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[116] See Appendix IV for background information on the Quiborax case.

is the ideological one. According to May (2016, p. 34), anti-neoliberalism provides an alternative explanation for Bolivia's decision to exit the system and also offers a 'connecting explanation between anticipated costs and exit'. As demonstrated in this case study, after Morales took office there was a significant change in politics and a major economic transformation reversing the neoliberal policies that had been in place for decades. On the domestic scene, the reversal of the neoliberal policies was evident in the nationalisation programme, the expansion in the role of the State in regulating the economy and providing social welfare, the redistribution of land, and the protection of domestic players and sectors. The government's stance on neoliberal policies soon shifted to the international scene as Morales became a vocal critic of capitalism including the international trade and investment frameworks (May, 2016). In 2007, at the 5th Annual Summit of the Bolivarian Alliance for the People of Our Americas (ALBA), Morales called on Venezuela and Nicaragua to join Bolivia in withdrawing from ICSID. The proposal submitted by Morales in the Summit stated (Reuters, 2007):

> (We) emphatically reject the legal, media and diplomatic pressure of some multinationals that ... resist the sovereign rulings of countries, making threats and initiating suits in international arbitration.

A few days later, the Bolivian government delivered a written notice to the ICSID Secretariat, announcing Bolivia's formal denunciation of the ICSID Convention (Fiezzoni, 2011; May, 2016).

The context in which Bolivia's exit took place and the statements made by Morales and his government signified that it was part of a broader struggle and revolt against the prevailing neoliberal economic order (May, 2016). Bolivia had grievances from its experience with ICSID and BITs, but more generally, there was a fundamental problem with the ideological grounds which these instruments and institutions were premised on (May, 2016). Upon taking office, it was clear to the Morales regime that BITs shaped a serious obstacle to its plans to introduce more progressive economic policies and to prioritise developing the domestic sectors and players over continuing his predecessors' policy of depending on FDI as the major engine of growth.

It would be misleading, however, to argue that the decision to exit was driven by purely ideological motives. The ideological argument seems to signify that as part of his commitment to his nationalistic goals, Morales was willing to accept the expected high costs of his policy decisions by overlooking the consequences of breaching the BITs. However, a study by Koivumaeki (2015a) reveals that Morales and his government assessed the legal implications of BITs carefully before choosing to undergo the nationalisation plans. Moreover, forecasts of rising gas prices and the expected revenues conducted by the government, played a significant role in the decision to implement the nationalisation plan which effectively led to the decision to proceed with exiting the investment treaty regime. (Koivumaeki, 2015a) describes this explanation as the 'strategic argument' whereby Morales took the decision to persist with the economic policies that could be challenged by investors through BITs after an assessment revealed that the expected gains from nationalisation, the new contracts, and taxation decrees would exceed the costs incurred by terminating BITs and the arbitration cases triggered through these treaties.

6.3 Strategic Approach

This section demonstrates how during the first few months in Morales's first term the government was carefully preparing for BITs and their legal implications. Bolivia had already experienced investment arbitration before Morales was elected. Moreover, as documented in Section 5, the MNCs began to warn the State about the legal and fiscal measures they were prepared to take in the hydrocarbons sector soon after the results of the referendum were announced. Hence, by the time Morales took power, BITs and the danger they posed were public knowledge. According to an interview with the Deputy Attorney General, MNCs aware of the intention of Morales to push through the reforms his predecessors were reluctant to enforce, warned the government that they intended to pursue international arbitration as soon as he took office (Interview with Pablo Menacho, 2015). Other key officials who were involved in the decision making process, including former hydrocarbons Minister Soliz Rada and diplomat Alvarado Aguilar, confirmed that the MNCs used the threat of arbitration to pressure the government to back down from its plans in the early days of Morales's first term (cited in Koivumaeki, 2015b).

These threats were far from ignored by the Bolivian government as the State began to prepare itself for the arbitration cases it was expecting to face. According to The Vice-Minister of Foreign Trade and Integration, the government became well aware of the reality that Bolivia was exposed to potential arbitration cases because of how these treaties were structured (Interview with Walter Clarems Endara, 2015). The approach from the very beginning was to analyse each nationalisation act as a potential arbitration case and assess the costs compared to the economic benefits gained by the State.

The leader of the government's technocratic negotiation team at the time, Manuel Morales Olivera [117] revealed that the contract renegotiation component of the Nationalisation Decree was designed in a particular way to attempt to avoid enabling companies to trigger or invoke their BITs (cited in Koivumaeki, 2015b). Olivera clarified that companies would find it difficult to invoke BITs because the decree did not call for the cancellation of any existing contracts; instead, it stated that State-owned company YPFB would not be able to execute any contracts that the legislature had not approved, as required by the Constitution (cited in Koivumaeki, 2015b). Accordingly, since the existing contracts which were signed in the 1990s and had not been individually approved in Congress, they would need to be amended to avoid violating the Constitution (Koivumaeki, 2015b). Furthermore, the team assigned to renegotiate the contracts consulted law firms that specialised in international arbitration such as Curtis, Mallet-Prevost, Colt & Mosle LLP (see Zelaya, 2007). Part of the preparations occurred before Morales took office, as a group of lawyers and technocrats from the Superintendency of Hydrocarbons travelled to Argentina during President Mesa's short tenure to study Argentina's experience with international arbitration according to the former head of the Superintendency Hugo De La Fuente (cited in Koivumaeki, 2015b).

Perhaps what demonstrates the extent to which BITs were an integral component of the Morales administration’s plans most is how the contract renegotiation process was handled. In the renegotiations of the exploration and extraction contracts, the government adopted a carrot and stick approach to convince companies to sign the new contracts without filing any investment claims through their BITs (Koivumaeki, 2015a). Concerning incentives, the government signed a new agreement with Argentina to export gas at a higher price (from 3.2 USD/MBTU to 5 USD/MBTU) ensuring that the companies would still find the new terms attractive. According to a lawyer in one of the MNCs, negotiating the price increase would ensure the MNCs

[117] Also former President of YFPB.

remain profitable (cited in Koivumaeki, 2015b). Another incentive provided by the government was that the MNCs' past investments would be taken into consideration and factored into the new contracts (Koivumaeki, 2015a). These incentives played an important role in enticing the companies to compromise and accept the new terms and taxes without resorting to arbitration. The stick used by the government in the negotiation process was the intimidation tactics and the short timelines (Koivumaeki, 2015a). The intimidation tactics included threats of taking over the operations of the companies, but these never reached a formal stage. The short timelines were particularly effective as some companies suspected that the choice of setting the deadline to agree on the new contracts in less than six months was a deliberate tactic adopted by the government to limit their ability to resort to arbitration (Koivumaeki, 2015a). The source of suspicion was the reality that most of the BITs signed by Bolivia provided in the case of an investment dispute the investors would need to wait for six months ('cooling off period') before initiating an arbitration case. This effectively meant that by resorting to arbitration cases the company could diminish their chances of staying in the country and benefiting from the rise in commodity prices if the government takes over the company. As the case would drag on (considering the lengthy timelines of arbitration proceedings), they would not be able to recover their sunk costs either (Koivumaeki, 2015a). The government's carrot and stick approach proved successful as all the companies agreed to the new terms and taxes imposed without resorting to arbitration. Moreover, the revenues generated as a result of these measures were crucial to the Bolivian government's decision to proceed with the nationalisation plan.

The second component of the nationalisation plan involved the reacquisition of the majority stake in the previously privatised companies and was a much more difficult process to implement. It is worth noting that from the onset the plan was not to expel the existing investors/shareholders and take full ownership of these companies, but instead to negotiate compensation for a majority stake in these institutions. While Bolivia did face several arbitration cases triggered by the nationalisations that took place, they were able to avoid several others. The reduction of the number of arbitration cases filed against the State and the ability of the government to reach quick settlements in most of the arbitration cases was due to a concerted effort to negotiate compensation with a clear strategy in place according to former President of YPFB

Olivera (cited in Koivumaeki, 2015b). Well aware of the threat posed by its BITs the Bolivian government avoided radical expropriation and instead sought to settle with the companies, using the revenue gained through the renegotiated contracts and taxes to try to limit the arbitration cases to the extent possible.

Despite the careful planning illustrated above, the accumulated costs of the arbitration cases and the compensations reached in settlements still represented a significant burden on a small developing country like Bolivia. This brings us to the second part of the strategic approach which is the cost-benefit analysis that was conducted by the Bolivian government. The positive results of this analysis convinced the Morales administration to proceed with the nationalisation plan and the termination of BITs, despite the costs of the first and the continued threat posed by BITs even post-termination. In interview, the Minister of Economy (who was appointed in 2006 and oversaw the nationalisation program) revealed that the government assessed the feasibility of the nationalisation plan prior to issuing the decrees and approaching the investors that owned a majority stake in the targeted companies (Interview with Luis Arce, 2015). According to the Minister of Economy, the government also hired an independent auditor to value the entities targeted for renationalisation before submitting offers to the MNCs that controlled the privatised entities (Interview with Luis Arce, 2015). Furthermore, a feasibility study was completed to analyse how much revenue the government would generate as a result of recapturing a majority stake in the privatised enterprises and whether these companies would remain profitable under its ownership (Interview with Luis Arce, 2015). A senior official at the State Attorney General's office also confirmed that an internal study was completed prior to undertaking the nationalisation programme (Interview with senior official at the State Attorney General’s Office, 2015). The study forecasted State revenues as a result of the nationalisations, the proposed increase in tax rates and renegotiated contracts against the expected compensation costs (Interview with senior official at the State Attorney General's Office, 2015). These studies were not accessible, and in general, public information on the government's projections of gas prices and revenues generated are scant. Nevertheless, a few examples of the revenue projections that convinced policy makers that the nationalisation plans and Bolivia's exit of the investment treaty regime were feasible are addressed below.

One example of the financial planning process that guided the government's decision-making process is demonstrated in the government's estimated annual hydrocarbon royalties, which the government calculated and presented to the legislature every year. The table below is compiled and used by Koivumaeki (2015a) to illustrate that the government was expecting a significant increase in royalties alone (i.e. not including the substantial increase in tax revenue as a result of the new Hydrocarbons Law). In 2006 and 2007, the government projected an 83 per cent and 62 per cent increase in royalties respectively. The forecasts slumped temporarily from 2008-2010 as a result of the financial crisis and recovered in 2011 (Koivumaeki, 2015a). The timing of Morales's rise to power coincided with the beginning of a commodity price boom which meant there were strong grounds for the new regime to predict that the positive trend would persist over the following few years, at least given the increase witnessed in the two years before taking office and the estimates provided by the Ministry of Hydrocarbons. As the estimated production volumes were constant and were based on observed values and are not as volatile as the oil prices, the growth in revenues was driven by the rise in gas prices (Koivumaeki, 2015a).

Figure 11: Estimated royalties in the government budget in Bolivia

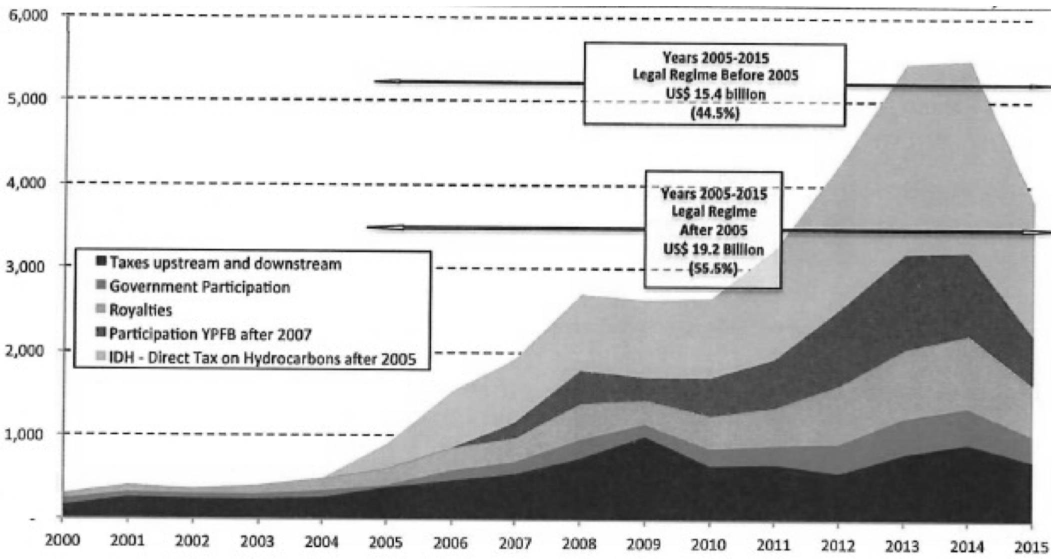
Year	Royalties (MM Bolivianos)	Increase in Royalties (%)	Increase in Production (%)
2003	589	2.9	15.1
2004	765	29.8	35.8
2005	1148	50.1	21.8
2006	2101	83.0	6.6
2007	3406	62.1	6.4
2008	3602	5.7	4.2
2009	4291	19.1	-14.1
2010	2945	-31.4	17.0
2011	4557	54.7	8.8

Source: (Koivumaeki, 2015b) based on data from the Bolivian Ministry of Economy and Public Finance (2003-2011)

Fiscal revenues grew steadily following the establishment of the new Hydrocarbons Law and the Nationalisation Decree of 2006. During the period over which the nationalisation process was implemented (2006-2013) these revenues reached 34.6 billion USD (Campodonico, 2016). In addition to the significant role played by the rising oil and gas prices, the most important source of fiscal revenue was the 50 per cent royalty introduced by the Hydrocarbons Law (composed of the 32 per cent Direct Tax on Hydrocarbons 'IDH' + 18 per cent royalty payment that already existed)

(Campodonico, 2016). In an attempt to measure the impact of the measures adopted by the Morales regime on the size of the fiscal revenue generated, Campodonico (2016) has constructed the graph below using official data published by Fundación Jubileo (2016). The graph compares the total revenue generated as a result of the new legislation with the revenue that would have been generated if Morales had stuck to the pre-2005 regulations. In order to measure the increase that corresponds to the measures taken after 2005, the graph provides five categories or sources of revenue. The first three from the bottom upwards represent revenue generated by the measures that were in place before 2005. The two categories on top are the revenues generated by the measures introduced post-2005 (Campodonico, 2016). According to the graph, if the pre-2005 framework were still in place, total fiscal revenues would have amounted to 15.4 billion USD. The impact of the new measures introduced post-2005 was a massive increase in revenue with an additional 19.2 billion USD was generated as a result of these policies.

Figure 12: Bolivia: hydrocarbon rent - before and after 2005 (in billions of USD)



Source: Campodonico (2016) using official data published by Fundación Jubileo (2016).

As the government began to reap the fruits of the measures taken to boost public revenues, the reality of a significant surplus that could cover compensation payments and possible arbitration costs placed it in a strong position when negotiating to reclaim a majority stake in the privatised companies. According to the former president of YPFB Santos Ramírez and other officials at the State-owned company, there were clear instructions from Morales to seek a 51 per cent majority stake in the companies and not a complete takeover. The objective set by Morales was to reach amicable settlements and avoid international arbitration when possible (cited in Koivumaeki, 2015b). The first agreement reached was with Petrobras which involved a compensation payment of 112 million USD for the refineries which were bought for 104 million USD in 1999 (Campodonico, 2016). The second agreement followed in May 2008, when the State promised to pay Repsol the stock market value for shares required for majority ownership of Andina (Koivumaeki, 2015a). From that period onward Bolivia started to face arbitration cases as expropriation claims due to nationalisation triggered 11 cases to date. The vast majority of these cases were settled with the total sum of payments made by the State reaching c. 780 million USD (excluding legal and arbitration fees).[118]

[118] See Appendix IV.

The magnitude of the costs incurred as a result of challenging the investment treaty regime reveals why many developing countries that realise the extent to which BITs constrain their policy space refrain from exiting the system. In studying Bolivia's experience, we can conclude that the State only proceeded with its plans when officials were confident they had the means to meet the costs of challenging the investment treaty regime. Since taking office, the Morales administration pursued its economic mandate strategically and pragmatically. During the planning phase, a cost-benefit assessment of its plans was conducted, and the implementation of the new economic policies and measures were only sanctioned after determining that the gains would exceed the costs. The estimated increase in royalties combined with the expected growth in tax revenues boosted the government's confidence about the economic viability of the decision to proceed with its nationalisation plans and its ability to deal with threats posed by BITs.

Finally, the significant upturn in Bolivia’s economic fortunes also meant a change in the structural power dynamics that strongly influenced its decision to join the regime. As demonstrated above, Bolivia no longer depended on IFIs and capital exporting countries for financial credit. Therefore it can be concluded that Bolivia’s decision to exit the investment treaty regime was not only guided by ideological motives. Indeed, it was the shift in structural power dynamics as a result of the favourable economic conditions and the positive outcomes of the cost-benefit analysis conducted by the government that empowered the State to proceed with its decision to exit the regime.

The final section of this case study argues that based on Bolivia’s experience, a reconceptualisation of Hirschman’s exit is required for it to reflect the nature of exit in the investment treaty regime.

7. Conclusion: Does Hirschman’s Framework explain Bolivia’s Exit?

According to Hirschman, members of an organisation or system would only consider the exit option in the following conditions: when there is an attractive alternative and the costs of exiting are low; the certainty of exit outweighs the uncertainty of possible reform within the system; and the ability of the member to influence the system is high. The exit option in the investment treaty regime literature is regarded as the most radical approach to change, in which countries seek to leave the treaty system entirely.

Until recently, exit from investment treaty obligations has been rare (Gordon and Pohl, 2015). This reality is not surprising considering that none of the three conditions above for choosing the exit option under the Hirschman framework entirely apply to developing countries that are discontent with their BITs and considering how to react. First, while internal reform may not be feasible due to asymmetries in power between the treaty parties or other misaligned interests (as will be demonstrated in Chapter 6), a unilateral termination from a BIT will not necessarily provide certainty either. In most BITs, unilateral termination is typically permitted after the treaty has been in force for a specified number of years, often ten or fifteen, and generally takes effect following a specified waiting period after notice is provided, commonly six months or a year. In addition to the timing constraints on termination, most BITs contain survival clauses, as discussed above, which extend the treaty's provisions, including the availability of investor-State arbitration for 10, sometimes 15 or even 20 years after the termination of the treaty. Hence, a complete exit is never feasible in the short run at least, leaving the State exposed to arbitration claims until the survival clauses elapse.

Secondly, developing countries as capital importers are not among the power brokers within the investment treaty regime and hence their ability to influence or change the system is limited. Thirdly, the costs of exit are not low, as illustrated in this case study. There are high political and economic costs associated with exit, that range from being out favour with IFIs (e.g. World Bank and IMF) and capital-exporting countries, which represent an essential source of credit and FDI, to the exorbitant financial costs of arbitration. Hence, the exit option may not be feasible or attractive to a developing country in a vulnerable economic or political position.

This case study provides an example of a developing country that decided to exit the investment treaty regime despite uncertainty regarding both the outcome and the costs of this decision as demonstrated above. Bolivia became the first to denounce the ICSID Convention in 2007 and went on to terminate its BITs, signalling the beginning of a backlash against BITs and ISDS amongst developing countries. Unlike other developing countries like South Africa (and more recently India and Indonesia), Bolivia’s decision to exit its BITs was not a prelude to exercising voice by introducing a new BIT or domestic framework that represented a reformed version of the international investment framework. Instead, it was a rejection of the norms and principles of foreign investment protection embodied in the existing investment treaty regime and the introduction of an alternative framework in which domestic investment was prioritised over foreign investment and in which the State played a more prominent role in regulating FDI. Furthermore, while Hirschman saw loyalty as a mitigating factor in taking the decision to exit, this chapter demonstrated that a member's decision to exit depends on structural dynamics and the ideological motives of the ruling regime.

The objective of this case study was to analyse how Bolivia signed its BITs and how it reacted to the constraint BITs posed on the State's ability to regulate and the factors that made the exit option a feasible one. Any attempt to assess the success of Bolivia's policy reversal and its exit from the investment treaty regime should be considered premature. However, it is important to understand the motives behind Bolivia's decision to exit and the conditions that made it possible. This analysis provides valuable insights for developing countries that are discontent with their membership of the investment treaty regime and are looking for particular options on how to react.

Finally, it can be concluded that while Hirschman's conceptualisation of exit might reflect some of the factors that influenced Bolivia's decision, it nonetheless needs to be revised to account for the complicated nature of exit in the investment treaty regime. In Chapter 8, Hirschman's conceptualisation of exit is revised to account for the findings of this case study.

Chapter 6. Voice: A South African Case Study

1. Introduction

In the very early days of the post-Apartheid era, the ANC faced immense pressure by the South African corporate sector and to a lesser extent IFIs to conform to the dominant neoliberal economic model by facilitating private investments at the expense of the ability of the State to regulate. As part of the economic liberalisation process South Africa was undergoing, it started signing BITs during the second half of the 1990s to demonstrate to the international investment community that it was open and a haven for foreign investments. South African officials did not thoroughly assess these treaties before they agreed to sign them and hence only became aware of the extent to which these treaties constrained their regulatory space once South Africa faced its first serious investment arbitration claim.

After experiencing an arbitration case that challenged legislation aimed at redressing the legacies of the Apartheid era, South Africa's response to the threats posed by BITs was to conduct a public and comprehensive review of its BITs. Whereas a few of its Latin American counterparts had already denounced the ICSID convention and started to unilaterally terminate their treaties before they had expired, South Africa decided not to renew its BITs and to introduce domestic legislation to provide a new regulatory framework for FDI. The review included feedback from different stakeholders, both foreign and domestic. The new investment protection and arbitration legislation that followed excluded or amended the clauses that were deemed too expansive and restricted access to international arbitration while keeping the rest of the standards that existed in the original BITs.

While South Africa did proceed to withdraw from BITs, its experience cannot be categorised under the same category as Latin American countries like Bolivia. Unlike its Latin American counterparts, South Africa's decision was not part of a radical change in economic policies and ideology. Indeed, South Africa remained committed to the neoliberal approach to FDI regulation and only sought to introduce reforms that ensured it retained the policy space necessary to achieve its development objectives. South Africa decided not to renew the expiring treaties as opposed to prematurely terminating them and sounded out its partners to check if there was any prospect of renegotiating treaties before proceeding to replace BITs with a national framework.

Furthermore, despite exiting the legal framework of the regime by refusing to renew its BITs, South Africa ensured the domestic legislation that replaced these BITs excluded some of the controversial clauses, yet retained most of the norms and principles that shaped the investment treaty regime. Hence, based on the definition of the investment treaty regime outlined in Chapter 2, South Africa has only partially exited the regime.

This chapter offers an in-depth study of South Africa's relationship with the investment treaty regime, examining how and why South Africa signed BITs, how it realised they constrained its policy space, and what route it decided to take in response. In line with the eclectic approach adopted in the other case studies, this chapter combines two theories from the literature on BITs to explain how and why South Africa signed its BITs. The Structural Power framework is used to explain the influence of the economic and political context, while Poulsen's adaptation of the Bounded Rationality framework is deployed to explain how BITs were signed without being reviewed and why the South African government only realised their potency once it faced its first serious investment arbitration case. As for South Africa's reaction to its discontent with the regime, this chapter finds that its ideological position towards FDI regulation had a strong influence on its preference for the voice route. While it lacked the bargaining power to convince its capital-exporting partners to renegotiate the existing BITs between them, it still had enough leverage to confront its partners with its decision to replace its existing BITs with a new domestic framework which introduced its desired reforms. Hence, unlike its Egyptian counterpart, structural power dynamics did not prevent it from introducing its desired reforms to its legal commitments under the investment treaty regime.

Based on Hirschman's framework, South Africa's chosen route would fall under the exit category, and indeed its experience has been described as an example of a country that has decided to exit the international investment regime.[119] In this case study, however, it is argued that South Africa's partially exited the regime in order to practice voice and that Hirschman's definition of voice needs to be reconceptualised to take into consideration the limitations imposed on the ability of developing countries to

[119] See Gordon and Pohl (2015) and Katselas (2014).

introduce amendments or reforms to their BITs with capital-exporting countries. South Africa's experience demonstrates that the options for voice are not feasible for developing countries that lack the bargaining power to renegotiate their treaties. Accordingly, this chapter concludes that the only way for developing countries to exercise voice is first to exit their treaties. This route which combines both exit and voice tactics is defined as 'quasi-exit' and will be discussed in further detail in Chapter 8.

The rest of this chapter proceeds as follows. Section 2 traces South Africa's history with foreign investment and the context in which it signed its BITs. Section 3 provides an overview of South Africa's BIT network. In Section 4, an appraisal of South Africa's BIT signing process is conducted. Sections 5 and 6 trace South Africa's reaction to its arbitration experience including a comprehensive review that was conducted to assess South Africa's experience with BITs. Section 6 also covers South Africa's decision to replace its BITs with a national framework and the reaction of foreign investors to these changes. In the final section, South Africa's categorisation as an example of a developing country that has chosen the exit route is contested, and it is argued that there are grounds to consider its chosen route as an example of the possible route to practice voice for dissatisfied developing countries in the investment treaty regime.

2. Historical Context of the BIT Signing Process

During the Apartheid era, South Africa was treated as a pariah State, and many States followed an approach of economic isolation and pressure in the form of sanctions. The isolation included disinvestment and divestment from South Africa (Schlemmer, 2016). As a result of the combination of international sanctions and tight capital controls, FDI inflows were minimal during Apartheid barely reaching 300 million USD from 1980 to 1993 (Poulsen, 2017). South Africa's position in the international arena was very precarious, and the negotiation and conclusion of international investment agreements were not on the agenda (Schlemmer, 2016). The primary source of investments in the Apartheid era was the government, as public investment was directed towards roads, dams, rail, electronics and armaments (Langalanga, 2016). With the economy being isolated through sanctions and disinvestment, the regime adopted an import substitution policy and focused on developing domestic 'strategic' industries in armaments, chemicals and energy (Langalanga, 2016).

Nevertheless, the South African legal system under Apartheid was generally favourable to foreign investments. Some of the legislation that was directly related to foreign investment regulation included the Expropriation Act No. 63 of 1975 and the Arbitration Act No. 42 of 1965. The Expropriation Act prohibited expropriation unless it was in the public interest following the general principle of international investment law, whereas the Arbitration Act codified the New York Convention on the Enforcement of Foreign Arbitral Awards (Langalanga, 2016).

The end of the Apartheid era and the rise of the African National Congress (ANC) to power after the 1994 elections witnessed a new era in which economic liberalisation was an integral pillar. The ANC government adopted conservative macroeconomic reforms, including liberalisation of commodity trade and the investment regime (Poulsen, 2017). In a statement made to Foreign Affairs in 1994, Nelson Mandela remarked (Mandela, 1993):

> It is obvious to me that the primary components of our international economic relations, which must feed our development strategy, are the strengthening of our trade performance and our capacity to attract foreign investment. We do not expect foreign investment to solve our economic problems, but we understand it can play a valuable role in our economic development.

The importance ascribed to foreign investment as a significant tool to drive economic growth was also illustrated in the 1994 White Paper on the Reconstruction and Development Programme (RDP). The RDP emphasised the regime's commitment to establishing the necessary climate to attract foreign investors and ensuring that foreign investors enjoyed the same treatment as domestic investors by applying the principle of national treatment (South African Parliament, 1994). The RDP was later replaced by a more neoliberal strategy that diminished the role of the State in regulating the economy, the Growth Employment and Redistribution Programme (GEAR). The GEAR programme which was adopted in 1996 emphasised economic growth as a potent stimulus of FDI (Vickers, 2003). In practice, South Africa implemented a series of measures to liberalise its investment regime in almost all sectors. These measures included: allowing foreign investors 100 per cent ownership, revoking discriminatory taxes imposed on non-residents, removing restrictions on capital repatriation and getting rid of performance requirements (Poulsen, 2017). South Africa's policies concerning FDI were tailored to win investor confidence in the South African regime and its economy because FDI was seen as a crucial tool to achieve its developmental goals (Yazbek, 2010).

This outward-looking neoliberal strategy of growth was complemented by South Africa's efforts to attract foreign investors which included developing an investment promotion agency, signing double taxation treaties and a substantial unilateral reduction in tariffs in the process of opening up of its markets. However, South Africa's main efforts to attract foreign investors came through signing a series of BITs. Between 1994 and 2009 49 BITs were signed by the State, only 21 of which entered into force. These treaties were a core component of the regime's strategy of opening up the country to FDI as well as assuring foreign investors that their investment would not be subject to expropriation or nationalisation (Peterson, 2006).

More importantly, all these policies and efforts to attract FDI were essentially meant to serve the overarching objective of socio-economic transformation in post-Apartheid South Africa. The post-Apartheid regime had inherited an economy in deep structural crisis, trapped in a low-growth equilibrium, economic exclusion and underdevelopment (DTI, 2003). The efforts to attract FDI were supposed to contribute to the greater objective which according to the State was to redress the legacy of disempowerment and fundamentally transform the country's political, social and economic landscape (DTI, 2003, p. 7). However, these reforms had disappointing outcomes as South Africa failed to attract much FDI throughout the 1990s and the economy struggled to achieve sustainable economic growth while suffering from one of the highest unemployment rates in the world (Poulsen, 2017). What South Africa did not realise at the time was that signing BITs would not only fail to attract FDI but would have a significant impact on its ability to regulate the economy. As Peter Draper, a former South African official remarked, 'we were essentially giving away the store without asking any critical questions or protecting crucial policy space' (cited in Provost and Kennard, 2015).

Eventually, South Africa realised that its membership of the investment treaty regime imposed constraints on its developmental agenda, subjecting the country to the threat of costly investment arbitration (Poulsen, 2017). This realisation occurred when the State was exposed to ISDS claims, see below. The next section provides an overview of South Africa's BITs including a summary of the main provisions in these BITs.

3. Overview of South Africa's BITs

The first South African BIT was signed with the UK in September 1994, signalling the start of South Africa's 'reintegration' into the world economy (Tralac, 2004). In the first five years (1994-1999), South Africa signed 27 BITs, the majority of which were with capital-exporting countries. Another 22 BITs were signed between 2000 and 2009, mainly with developing countries; however, only two of these treaties entered into force. Overall, most of South Africa's BITs were with European countries and European Union members, in particular, the rest of the BIT partners included States from Latin America, Africa and the Middle East.[120]

A comparison of the provisions of the South African BITs reveals that there was little change or progression in the government's approach to the negotiation and signing of the BITs (Schlemmer, 2016). Most of South Africa's BITs were loosely modelled on the British model, of the UK BIT. South African BITs generally contained definitions of 'investment', 'investors', 'returns' and 'territory', and clauses on the promotion and treatment of investments, compensation for losses, dispute settlement and transfers of investments and returns (Tralac, 2004). The only BIT that contained clauses that are relatively different from those contained in the other BITs is the one signed with Canada (Schlemmer, 2016). The different wording and the carve-outs contained in this BIT, however, were due to Canada's insistence on including clauses to ensure the BIT was consistent with its own model BIT and policy position (Schlemmer, 2016).[121]

A summary of the main clauses included in South Africa's BITs is included below:

- The definition of investment in South African BITs is broad in scope and is not a 'closed' list (Schlemmer, 2016). Definitions include 'every kind of assets' and the most common examples of assets include: movable and immovable property, other property rights (mortgages, liens and pledges), shares, stock and debentures of companies, claims to money and intellectual property rights.

[120] See Appendix III for a list of South Africa's BITs.

[121] The Canada-South Africa BIT never entered into force.

- FET is provided for in all South African BITs. In the majority of the BITs, the FET clause is unqualified and stipulates that neither contracting party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other contracting party. The FET clause is often complemented with the full protection and security protection standard.

- NT and MFN standards are provided in the majority of South Africa's BITs. In most BITs, both standards apply to the investment and activities of investors in general and also to returns of investments. A few BITs (only four of which have entered into force) contain an exception to the national treatment standard in favour of South Africa. The exception exempts the State from applying the national treatment standard to any law or measure applied for the purpose of equality in its territory or designed to protect or advance natural or legal persons, or categories thereof, disadvantaged by unfair discrimination in its territory.[122]

- All of South Africa's BITs contain an expropriation clause that covers both direct expropriation and indirect expropriation. Most of the BITs make provision for prompt, adequate and effective compensation.

- South Africa’s BITs generally contain a provision guaranteeing the free transfer of capital investments and profits.

- The vast majority of South Africa's BITs contain a broadly drafted ISDS clause. In most BITs the ISDS provision generally requires disputes to be notified in writing to the other party to the dispute and to be settled amicably through negotiations within a three to six months period (cooling off period). If no settlement can be reached within that period, the dispute may be submitted to international arbitration at the choice of the investor. The most

[122] This exception is only included in BITs with the following countries: Russia, China, Mauritius and Nigeria.

frequently used arbitration forum is ICSID with particular reference also to the Additional Facility of ICSID since South Africa is not a party to the ICSID convention. None of the South African BITs contained an obligation to exhaust local remedies.

- The majority of South Africa's BITs provide for an initial duration of 10 to 20 years, that can be renewed for an additional period, or that will become a treaty of indefinite duration unless any of the parties notifies the other party before the date of expiry that it wants to terminate the treaty. South Africa's BITs generally provide survival clauses that extend the protection granted by BITs for investments made prior to the expiry or termination of the treaty for an additional period of 10 to 20 years after it is no longer in force.

In the next section, an appraisal of South Africa's BIT signing process is conducted to gain a better understanding of how and why South Africa signed BITs that constrained its ability to implement the most comprehensive and far-reaching social policy since Apartheid, the black empowerment programme (BEE).

4. An Appraisal of South Africa's BIT Signing Process

In Chapter 3, it is argued that an eclectic approach can be adopted to explain how and why developing countries signed BITs by combining two theories from the literature on BITs. Poulsen's adaptation of the Bounded Rationality framework is used to explain how governments signed BITs without thorough review and only started to take them seriously once the State was hit by an investment arbitration claim. The Structural Power framework is deployed to explain how the context in which these BITs were signed can have a significant influence on the decision of governments in developing countries to accept the content of these BITs. In line with the Egypt and Bolivia case studies, South Africa's experience in signing BITs reflects trends that are consistent with Poulsen's theory. These trends include the assumption that BITs are harmless and will increase FDI inflows based on anecdotal evidence and in the absence of a legal and economic review. Moreover, South Africa only started to review its BITs once it faced an arbitration claim that revealed the potency of these BITs.

Where South Africa differs from its counterparts, Egypt and Bolivia, is its position on investment protection rules in multilateral forums. Unlike its counterparts, South Africa's decision to sign BITs did not represent a paradox as it did not have a history of resisting the investment protection rules. Furthermore, after it signed BITs, South Africa, unlike Egypt and Bolivia, consistently supported the US and EU proposals to include negotiation of the 'Singapore Issues' including the investment issue at the WTO (Lee, 2006). Hence, there was no contradiction in South Africa's position on investment protection rules in bilateral and multilateral settings.

Another key difference is that while South Africa was going through a transition, it was not suffering from an economic or debt crisis and hence IFIs did not have the same leverage they had over countries like Bolivia and Egypt. Nevertheless, IFIs like the IMF did not need to impose neoliberal policies on the South African post-Apartheid regime. In South Africa, the neoliberal shift was largely internally generated. The actor that held structural power in South Africa's case is the corporate sector. Through its indispensable role in South Africa's economic development and its enormous capacity to generate propaganda, the corporate sector was able to shape the economic model adopted by the incoming ANC government as demonstrated below. The impact of the IFIs came through the policy advice provided which paved the way for capital-exporting countries to approach the South African government with BITs to sign. Accordingly, in this case study, the Structural Power framework is adopted to explain how the economic context in which South Africa signed its BITs had a significant influence on its decision to sign these treaties.

The first part of this appraisal will analyse the role of the corporate sector and IFIs in shaping South Africa's new economic framework. The second part will demonstrate how South Africa's approach to signing and processing its BITs is consistent with Poulsen's hypothesis.

4.1 The Role of the Corporate Sector and IFIs in Shaping South Africa's Neoliberal Policy Landscape

Section 2 demonstrated how BITs were signed as part of the neoliberal economic reform taking place in the early days of the post-Apartheid era. It is important to note, however, that the ANC initially planned to adopt a different economic strategy which entailed a more prominent role for the State in regulating the economy (including FDI). This section analyses the role of the South African corporate sector and IFIs in influencing the ANC's decision to embrace neoliberalism and adopt a more liberalised approach towards FDI. Through the ability to shape the framework within which the State interacted with corporate enterprises and private investors (as illustrated below), South Africa's corporate sector demonstrated how it held structural power. This structural power enabled these actors to strongly influence the South African State's approach to FDI and hence, along with the pressure applied by IFIs, played a preponderant role in the State's eventual decision to sign BITs presented by capital-exporting countries during the early days of the post-Apartheid era.

For many years, the ANC advocated radical change in the management and ownership of the economy, including outright nationalisation, and radical redistribution of wealth, including land (ODI, 1994). During the build-up to the 1994 election campaign, two different strategies were being debated for South Africa's post-Apartheid economic future. On one side, the ANC promoted the establishment of a Welfare State through the RDP (Bakken, 2014). The RDP was borne out of the report, 'Making Democracy Work: a framework for macroeconomic policy in South Africa', which was published by the Macro-Economic Research Group (MERG)[123] (ODI, 1994). The report emphasised the need for an active State and was in favour of a Keynesian macroeconomic framework (Bakken, 2014). The opposing strategy was the scenario promoted by the National Party (NP), 'The Normative Model Approach' (NEM). The NEM, which was based on the IMF recommendations provided in the 1992 'Occasional Paper' (Marais, 2001), was a neoliberal blueprint that promoted the creation of a business-friendly environment. The key measures recommended in the NEM included minimal State intervention, privatisation, liberalisation and tight monetary policies (Bakken, 2014). Despite initially rejecting the NEM, the ANC eventually adopted the GEAR programme as the post-Apartheid government's economic development model in 1996 (as previously discussed above). The economic strategy articulated in the GEAR reflected the same neoliberal approach adopted in the NEM and focused on the liberalisation of the South African economy.

The implication of this policy reversal on FDI policy was a switch from a regulated approach to a more liberalised approach of attracting FDI. In 1994, the ANC did not

[123] MERG was set up set up jointly by the ANC and Congress of South African Trade Unions (COSATU).

have a substantial policy on FDI, but the government was reluctant to formulate a policy that would be supplied by the marketplace itself (Eisenberg, 1994). While there was no clear and coherent FDI policy, the ANC issued several statements to emphasise that the country was open to foreign investment. The policy guidelines published by the ANC and adopted at the National conference in May 1992 stated that (ANC, 1992):

> In a democratic South Africa, the ANC will welcome foreign investment, in accordance with our objectives for growth and development, and will adopt an open approach to the entry of foreign investment.

The statement set the tone for the building of a liberal investment climate in post-Apartheid South Africa. However, it also indicated that the ANC planned to adopt a more regulated approach to attracting FDI by introducing safeguards to ensure FDI inflows served the economic and social objectives of the future government. The ANC's commitment to affirmative action was expected to result in regulations imposing a new range of obligations on investors concerning employment practices, housing, training, trade union rights, women's rights, access to land and environmental standards (Brown et al., 1994). In a study commissioned by the ANC in 1994, the government was advised to ensure that any foreign investment regulations or codes would provide the State with the necessary policy space to regulate FDI (Brown et al., 1994). According to the study, the South African government should be able to provide preferential treatment (e.g. tax concessions or government subsidies) to particular types of investments that are considered especially desirable. These types include investments in under-developed regions, 'or in favour of South African citizens who have hitherto been disadvantaged and who will need special measures to assist them to become owners, either directly or indirectly, of a significantly larger proportion of the country's productive assets' (Brown et al., 1994, p. 48). This approach was indeed adopted in the 'Platform of Guiding Principles for Foreign Investors' which was drafted by the ANC and COSATU in 1992.[124] The guidelines listed obligations the investors would be expected to abide by, such as environmental standards, employment and labour practices, and development of black business.

[124] The Platform of Guiding Principles for Foreign Investors. ANC and COSATU position presented to the National Conference in Support of the African National Congress and Other Democratic Forces for a New South Africa, 12-15 November, 1992, New York City.

However, under the influence of the corporate sector in South Africa and to a lesser extent the IFIs, the ANC eventually became convinced that the appeasement of domestic and international capital had become unavoidable (Marais, 2011). The next section explores how and why this policy reversal occurred, highlighting the influence of the corporate sector and IFIs on the formulation of South Africa's FDI policy post-Apartheid.

4.1.1 South Africa's Corporate Sector

While it is quite common for developing countries in transition or suffering from an economic crisis to adopt neoliberal policies as part of a SAP imposed by the World Bank or IMF, in South Africa the neoliberal shift has mainly been internally generated (Carmody, 2002; Marais, 2011; see also Padayachee and Fine, 2018). South Africa's relatively low level of external debt meant the leverage of IFIs like the World Bank and IMF was not as high as it was over countries that were suffering from a debt crisis (e.g. Bolivia and Egypt). Furthermore, the strength of the corporate sector, its bargaining power and vested interest in the liberalisation of the South African economy as illustrated below, meant that IFI's did not need to persuade the South African government to adopt neoliberal policies. This is not to claim or argue that the IFIs did not play a role in the liberalisation of South Africa's FDI regime which led to the signing of BITs. The IMF was indeed involved with the South African authorities in the Apartheid era and provided policy recommendations which were adopted in the NEM. Moreover, the IMF and World Bank started to play an active role in South Africa during the transitional phase that preceded the 1994 elections providing policy recommendations (see further below). After analysing how the South African corporate sector exercised its influence on the ANC, the role of the IFIs will also be addressed later in this section.

The South African economy was dominated by a group of conglomerates, the four largest of which controlled 83 per cent of the companies listed on the Johannesburg Stock Exchange (JSE) before the end of Apartheid (Carmody, 2002).[125] The investment strategies of these conglomerates were important not only in their own

[125] Fine and Rustomjee (2018) argue that the economy has been dominated by six conglomerates or 'axes of capital': SA Mutual, Sanlam, Anglo-American Corporation, Liberty/Standard, Rembrandt/Volkskas and Anglovaal.

right, but also because the success of small businesses, and hence the potential for substantial job creation, was intimately linked to these conglomerates through their control of financing, linkage and demand effects, and technological spill overs (Carmody, 2002; Fine, 1997; Kaplinsky and Manning, 1998).

South African policy elites were hijacked by business influence early on in the policy making stages of the ANC's accession to power (Valsamkis, 2008). A 'plethora of corporate scenario-planning exercises was unleashed after 1990' (Marais, 2011, p. 101) and had a telling impact in convincing ANC decision makers to abandon their developmental State model (Bond, 1996; Marais, 2011). The corporate sector, often represented by the Mineral Energy Complex (MEC) and Anglo American Company (AAC) (Bakken, 2014), published a significant number of economic scenarios dedicated to correcting the ANC's perceived economic flaws and highlighting the pitfalls of a mixed economy model (Taylor, 2001). According to Marais (2011), these interventions by the corporate sector shared an overarching set of assumptions and tenets. These assumptions included the need for macroeconomic stringency, restraint in social restructuring, an outward-oriented economy and a facilitating (as opposed to interventionist) State (Marais, 2011). The ANC was subjected to an ideological barrage as the corporate sector promoted its preferred economic policies 'lavishly and ubiquitously in books, videos, multimedia presentations and newspaper supplements, and in a frenetic assortment of seminars, conferences, … and high-profile visits of carefully chosen foreign experts – all financed by business, donors and multilateral agencies' (Marais, 2011, p. 101). According to Terreblanche (2002, p. 55), the corporate sector's enormous bargaining power and its capacity to generate propaganda in both the economic and political arena cannot be overstated. Through this concerted campaign, the corporate sector was able to shape domestic economic policy. Consequently, by late 1993, 'the language and tone' of ANC and business policy documents were 'so similar that at times they appear interchangeable' (Kentridge, 1993, p. 26).

The South African corporate sector was without a doubt very influential during the transition period (Bakken, 2014). It controlled two structures specified by Susan Strange: production and knowledge. First, concerning the production dimension, the corporate sector enjoyed a significant degree of structural power as the economic backbone of a country engaged in political and economic transition (Valsamkis, 2008).

Second, through controlling the knowledge dimension, the corporate sector succeeded in convincing the ANC's top leadership that the ‘choices had become stark and binary: either yield to the injunctions of corporate capital or expose the economy to the wrath of the markets (and put the democratic transition at risk)’ (Marais, 2011, p. 106). Furthermore, the critical role of the corporate sector's discursive power in shaping and framing the newly elected ANC government's early economic policy (Valsamkis, 2008) ensured that the ANC committed itself to pursue a list of neoliberal reforms, which was eventually manifested in the GEAR programme.

As Bond (2005) argues, the corporate sector in South Africa was extremely active and successful in convincing the elite within the ANC of abandoning their heterodox policies in favour of a neoliberal and business-friendly policy. One of the main cornerstones of the GEAR strategy was the stimulation of private investment. The strategy advocated for minimal regulation by the State and the liberalisation of financial controls as well as the exchange rate (Bakken, 2014). By adopting this new strategy and signing BITs, the State also gave away its possibility to regulate investment in the economy (Bakken, 2014).

4.1.2 The Role of the IFIs

After the changes announced by the de Klerk government in the early 1990s signalling that the Apartheid era was coming to an end, the IMF, along with the World Bank, began to increase its visibility in South Africa (Kahn, 2000). IFIs, in general, became quite active in South Africa through holding more frequent discussions with the State, issuing policy documents with recommendations for economic measures to be adopted by the government, as well as engaging with academics, labour movement and NGOs. The IMF, in particular, was concerned with the economic policies that would be followed by the new government, as this was at a time of intense debate over future economic policy (Kahn, 2000). The debate was settled in favour of adopting the neoliberal path as demonstrated above through internal forces, namely the dominant corporate sector.

The influence of IFIs in post-Apartheid South Africa did not come through loans and conditionalities. Instead, the real impact was through the policy advice provided by these institutions. More importantly, the South African government was convinced that signing agreements with institutions like IMF signified its ‘stamp of approval’ for

South Africa's democratic transition and economic policies. This stamp of approval was expected to unlock potential FDI and international credit for the South African economy (Padayachee and Fine, 2018). By encouraging the South African government to undergo further economic liberalisation and persuading it that it was necessary for attracting foreign investors, IFIs paved the way for capital-exporting countries to sign BITs with South Africa.

After de Klerk‘s 1989 speech in Parliament, when he called for multiracial elections, the IMF, just like the World Bank, began to engage with the transitional government (Bakken, 2014). In 1992, the IMF launched the Occasional Paper called Economic Policies for a New South Africa (Lachman and Bercuson, 1992). The report on South Africa focused on issues like the scope for a more liberal trade and payment system of an outward-looking strategy (Bakken, 2014; Padayachee, 1997). It emphasised the importance of a limited State and the liberalisation of trade and financial policies (Bakken, 2014). The report was well received by the corporate sector as it supported the neoliberal economic approach it was advocating for (Padayachee, 1997).

In 1993, the Transitional Executive Council (TEC)[126] and the IMF signed a deal to borrow 850 million USD from the Fund. This agreement was an IMF Compensatory and Contingency Financing Facility. A quick review of the policy measures included in the Letter of Intent which accompanied the loan facility reveals ‘striking similarities’ with the National Party’s NEM (Marais, 2011) and the policies advocated for by the South African corporate sector. The Letter of Intent warned in general terms against the dangers of increases in real wages in the private and public sectors, stressed the importance of controlling inflation, supported trade and industrial liberalisation, and repeatedly espoused the virtues of market forces over regulatory interventions (Padayachee, 1997; Padayachee and Fine, 2018). These policies were also reflected later on in the GEAR programme, which further suggests that the IMF was consolidating the new economic framework shaped by the corporate sector and the National Party for post-Apartheid South Africa. Furthermore, in 1994, the same year South Africa signed its first BIT with the UK, the IMF published a report, ‘Key Issues in the South African Economy’ which pushed for abolition of exchange controls and

[126] An umbrella body composed of several parties that governed South Africa during the latter stages of the transition from Apartheid to democracy (Graham, 2011).

argued that the liberalisation of trade and financial relations was a prerequisite for increased export and foreign investment (IMF, 1994; Marais, 2011).

The World Bank was also active during that phase, as it reengaged with the South African government in 1990 after an absence of over twenty years (Bond, 2005). As is the case with the IMF, the World Bank's influence came through its policy advice and not its lending and conditionalities (Bakken, 2014; Bond, 2005). In its publications, the World Bank warned against an expansionary role for the State, especially with regard to fiscal instruments to stimulate demand, an outward-oriented strategy of development and controlling the real exchange rate (Padayachee, 1997). Like the IMF, the World Bank strongly advised the ANC to liberalise its economy in order to attract FDI inflows. In 1992, a World Bank Consultant stated that amongst the most critical factors keeping foreign investors away from South Africa were political instability and uncertainty about the possible economic policies of a future government (Schneidman, 1992). Accordingly, the South African regime scaled up its efforts to reassure foreign investors by signing the MIGA Convention in 1992.

The World Bank and IMF were not the only multilateral institutions pushing the South African government to provide further guarantees to foreign investors. The United Nations Centre for Transnational Corporations (UNCTC) also warned the South African government that the lack of a code or special regime for foreign investment would harm South Africa's chances of attracting FDI and hence negatively impact its economic development. A UNCTC (1992, p. 9) report stated that: 'failure to step forward with articulated policies would create doubts and uncertainties in the international community very damaging to economic prospects'. As a result of these warnings and the pressure exerted by the corporate sector, the ANC responded with a concerted effort to assure foreign investors that they would not be subjected to expropriation or nationalisation and that they would be free to repatriate profits and dividends in the lead-up to the 1994 elections (Peterson, 2006).

When South Africa first started to enter into BITs with capital-exporting European countries, one of the main aims was to gain the trust and approval of the international community. The capital-exporting countries sought clear signals that foreign investments would be protected. The ANC was desperate to reassure countries that had invested in South Africa during the Apartheid era that the new regime would not nationalise or expropriate their investments. It was against this background that the

British Prime Minister, John Major, fearing that the ANC might expropriate British assets in South Africa, was the first to approach the then Apartheid government in 1993 with an OECD BIT template (Langalanga, 2016). During a visit in 1994, Major emphasised the need for liberalising the South African economy and was equipped with pledges for 530 million Rand in development aid (Major, 1994). While there is no indication that signing the BIT was a conditionality for the aid package provided by the UK, South African officials at the time did find there was considerable political pressure to sign the treaty (Poulsen, 2017).

Finally, the raft of investment treaties that South Africa went on to sign over the following decade represented the broader policy of significantly liberalising the FDI regime, as part of the overall shift to a more neoliberal economic model under the GEAR programme (Peterson, 2006). As demonstrated in this section, South Africa‘s neoliberal trajectory after the end of Apartheid was a result of an elite compromise between the South African corporate sector, IFIs, and the first government of the post-Apartheid era which included ANC but also had representatives from the National Party, who shared the corporate sector's vision for a neoliberal economic model (Bakken, 2014; Terreblanche, 2002). The corporate sector, in particular, was instrumental in creating this compromise (Terreblanche, 2002).

While the context may explain why South Africa signed its BITs as part of liberalising its FDI regime, it does not adequately explain why South African officials did not analyse the treaties to ensure they did not conflict with their plans to introduce affirmative action measures to redress the legacies of the Apartheid era. This is where the Bounded Rationality framework can complement the explanation above to explain why officials only realised the potency of these BITs once South Africa was hit with an ISDS claim challenging its BEE programme.

4.2 Explaining South Africa’s BIT Signing Process using the Bounded Rationality Framework

This section deploys the Bounded Rationality framework as adapted by Poulsen to explain how South Africa signed treaties that were effectively nullifying its efforts to introduce affirmative action. When South African officials embarked on signing BITs in the 1990s, they failed to evaluate the implications of specific provisions of these treaties and were unaware of their potential impact on South Africa's future policies. Poulsen (2017) argues that the combination of bureaucratic conditions and lack of expertise and coordination led South African officials to ignore the risks of BITs and overestimate their benefits. Poulsen's research further reveals that BITs were signed merely because they were available and ready to adopt. The government did not undertake a careful consideration of the costs and benefits of these treaties compared to alternative investment promotion instruments (Poulsen, 2017). Consequently, the implications of entering into these investment treaties were brushed aside and did not receive scrutiny until the South African government found itself on the receiving end of its first serious claim in 2007 – the *Piero Foresti v. Republic of South Africa* (2007) case,[127] which will be elaborated on further in Section 5.

Although the new post-Apartheid South African government signed its first BIT with the UK in 1994, the BIT was presented to the outgoing National Party government a year earlier. As previously mentioned, the UK government at the time was said to be wary of the South African government, then, fearing it would not protect existing British investments and would nationalise or expropriate property (Williams, 2009). Accordingly, the British government acted swiftly by presenting its draft model BIT to the outgoing government, which simply accepted the draft model BIT with minimal if any negotiation when it was presented in 1992/93 (Williams, 2009). The proposed text was based on a standard OECD model[128] and contained the provisions outlined in Section 3.

At the time, these treaties were considered harmless by South African officials as was the case with many developing countries that signed them. However, a close analysis of the terms of the UK-South Africa BIT and South Africa's Constitution reveals substantial incompatibility and, in hindsight, it is quite striking that this was overlooked (Mossallam, 2015). One clear example is that the national treatment standard in the BIT contained no explicit provision allowing the State the right to give local firms preferential treatment. This clause directly contradicted the new Constitution, which was in the process of being developed when the BIT was signed, and, which included affirmative measures to redress the historical injustices faced by the black population (Poulsen, 2017). Many more contradictions started to appear once

[127] Piero Foresti, Laura de Carli and others v. Republic of South Africa. ICSID, Case No. ARB(AF)/07/1.

[128] See UNCTAD (1996).

the Constitution was finalised. These included the lack of a distinction between expropriation and deprivation in the BITs signed by South Africa, implying that deprivation was tantamount to expropriation and would result in compensation. In contrast, the Constitution clearly stipulated that deprivation would not require compensation if the measures were pursuant to law and not arbitrary (Mossallam, 2015). Another important aspect was how compensation for expropriation would be calculated, which in the Constitution included taking public interest into account and allowing for less than market compensation. This qualification is particularly significant in cases where, for instance, it was proven that the land was acquired during the Apartheid era. However, the relevant clause in the BITs would not allow any deviation from market value (Mossallam, 2015). Last but not least is the arbitration provision that allowed investors to sidestep domestic courts and file claims against South Africa in international courts like ICSID. Through these treaties, South Africa introduced investor-State arbitration over a wide range of regulatory issues, which was a first for South Africa and gave foreign investors access to a dispute settlement forum and enforcement mechanisms not available to local South African investors (Poulsen, 2017). As was the case initially for most developed and developing countries that signed these BITs, South Africa had no reason to be sceptical as in the early 1990s there were few if any, cases to reveal arbitration as the threat it constitutes today.

These contradictions between the BITs and South Africa’s Constitution were overlooked. Strikingly, after the President signed the BIT in 1994, officials did not voice any concerns to the Parliamentary committee (Poulsen, 2017). Instead, they asserted that the BIT with the UK did not contain any substantive obligations that would be placed on South Africa (Williams, 2009). Furthermore, the BIT between South Africa and the UK was adopted by South Africa as a draft model and used as the basis for concluding most of their subsequent BITs (Poulsen, 2017). This brings us to the question of how South African officials entered into agreements that significantly constrained their ability to regulate and implement their social and economic agenda.

Poulsen's research findings on this particular question point to weak levels of organisation, and uninformed and poorly coordinated government officials dealing with these issues. For instance, the public officials charged with negotiating the treaties were not lawyers and had little legal and technical expertise in international law (Poulsen, 2017). Accordingly, the mistaken impression that these treaties did not have any implications and their provisions entirely corresponded to South African law meant there was no reason for Parliamentarians to investigate these BITs and their importance for attracting FDI. Politicians also did not question the scale of the legal guarantees granted to these investors (Poulsen, 2017). As a consequence of the lack of oversight, BITs were signed in many cases for diplomatic reasons, ignoring the material commitments they entailed. Few records exist to explain why South Africa took the approach it did towards BITs in the 1990s. However, a draft Cabinet memorandum from 1994, which appears to contain no legal or economic analysis of the risks associated with BITs, provides a few observations (Mossallam, 2015). These observations include that 16 countries had requested the conclusion of BITs with South Africa; the Department of Trade and Industry (DTI) was convinced that such agreements would create an investor-friendly environment; and that the aspects covered by BITs can be viewed as 'basic investor rights' (DTI, 2009).

In interview, Xavier Carim, then the Director-General for International Trade and Economic Development at the DTI explained that the implications of South Africa's first BITs were not adequately analysed before they were signed (cited in Mossallam, 2015). In interview, Carim elaborates: 'we had signed on BITs without proper analysis, part of the global trend of signing BITs without understanding the implications' (cited in Mossallam, 2015). Moreover, as articulated in the DTI (2009) report, the impact of BITs on future policies was not critically assessed and the inexperience of negotiators coupled with the lack of knowledge about investment law at that time resulted in agreements that were not in South Africa's long-term interest (DTI, 2009).

Having conducted an appraisal of how and why South Africa signed its BITs, the next section traces how South Africa began to realise the potency of its BITs and documents its first investment treaty arbitration case.

5. BITs Bite: The Beginning of a Shift in South Africa's Position on BITs

South African officials claim that in the late 1990s they became aware of the challenges posed by these investment treaties (Mossallam, 2015). The signals first appeared when observing the fractious debate in the OECD over a multilateral investment agreement in the late 1990s (Carim, 2012). However, it was the surge in the number of international investment arbitrations that followed the financial crisis in 2001 that made developing countries like South Africa aware of the potential risks associated with BITs (Carim, 2012). Nevertheless, the South African government only reacted after it was on the receiving end of an investment arbitration claim itself.

In 2001, a legal officer from the multilateral trade negotiations unit within the DTI attended one of UNCTAD's BIT signing sessions[129] as part of the South African delegation (Poulsen, 2017). The officer was puzzled about the rapid adoption of treaties in Geneva, as South Africa signed around four BITs[130] in that session (Poulsen, 2017). While he could not object at the time, later that year the legal officer in question was appointed in charge of negotiating South Africa's investment treaties. Reflecting on his reaction after taking over as South Africa's BIT negotiator the Officer reveals that he was 'quite horrified' to read the content of the BITs, which 'places all the obligations on the host State and gives all the rights to the investors' (Williams, 2009). Once he began investigating the treaties signed by South Africa over the previous six years, he strongly advised the government to halt all negotiations over new BITs with developed countries (Williams, 2009). His recommendation was taken on board, and a decision was taken to refrain from signing any new BITs until a clear strategy was devised (Williams, 2009). Accordingly, this new approach marked a notable change in South Africa's external investment policy. The implications of this change included halting the ratification of several existing BITs as well as the negotiation of new ones (Poulsen, 2017). More crucially, the legal officer also stopped South Africa from joining the ICSID Convention by objecting to the chapter of domesticating the ICSID Convention in the Arbitration Bill that was submitted to Parliament in 2001 (Poulsen, 2017). The experience with arbitration claims, which will be addressed further below, led the DTI to conclude that it was not in South Africa's interest to join ICSID and concerns about the enforcement mechanisms under the ICSID Convention motivated the DTI decision to remove this chapter from the final Arbitration Bill (Poulsen, 2017). The DTI took this decision against

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[129] UNCTAD actively promoted BITs during the 1990s through publications, advisory services, and – notably – organising actual BIT-signing sessions.

[130] Benin, Burkina Faso, Chad, and Mauritania.

recommendations made by the South African Law Commission in 1998. The Commission after receiving inputs of prominent arbitrators and international experts had recommended that South Africa should follow the example of most other African countries and ratify the Convention, as this would create the necessary legal framework to encourage foreign investment and further economic development in the region (South Africa Law Commission, 1998, p. 22). The Commission also warned that the 'failure to ratify the Convention would leave South Africa as one of the very few African countries which have not done so and a continued failure to do so appears difficult to justify' (South Africa Law Commission, 1998, p. 167). Hence, the decision not to ratify the ICSID Convention marked the beginning of a new policy towards FDI in South Africa.

5.1 South Africa's Arbitration Cases

Although concerns did exist in the late 1990s and early 2000s, it was only when the first serious claim[131] landed in 2007 that the South African government began to address these concerns and change its FDI policy (Mossallam, 2015). Before the Piero Foresti claim in 2007, South Africa had only experienced investment treaty arbitration once, in 2001, when a Swiss-owned farm had been subjected to a series of incursions, thefts and vandalism perpetrated over the course of a decade (Peterson, 2008). The owner of the property filed a claim using the Swiss-South Africa BIT alleging that the South African police failed to protect his property and that his investment was subjected to an expropriation (Peterson, 2008). The confidential arbitration was processed under the UNCITRAL rules of arbitration, which allows parties to initiate and pursue arbitration proceedings without public disclosure (Peterson, 2008). While the Tribunal dismissed the expropriation claim, it held South Africa to have breached the obligation to provide for 'full protection and security' of foreign investments under the Switzerland-South Africa BIT (Peterson, 2008). In 2004, the Tribunal awarded the investor damages of 6.6 Million SAR, plus interest (c. 1 million USD).

While the Swiss claim was South Africa's first introduction to arbitration under BITs, it was the second claim that spurred the South African authorities to take action and review their BITs network. The ultimate trigger of the BIT review was the realisation

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[131] Piero Foresti, Laura de Carli and others v. Republic of South Africa. ICSID, Case No. ARB(AF)/07/1.

that South Africa's most comprehensive and far-reaching social policy since apartheid, its BEE programme, was conflicting with its obligations under BITs (Yazbek, 2010). The BEE policy was introduced as an attempt to redress inequalities in the political, social and economic spheres of South Africa. Throughout the 1990s and early 2000s, the implementation of the BEE programme had resulted in multinationals such as Deutsche Bank, Merrill Lynch, and de Beers selling equity stakes to black-owned enterprises or black employees, appointing black managers and entering into joint ventures with black operators (Poulsen, 2017; Schneiderman, 2008). Eventually and following a lengthy consultative process (Leon, 2009), the South African authorities decided to extend the programme to cover the mining industry (Poulsen, 2017). The Mineral and Petroleum Resources Development Act (MPRDA) enacted in 2002 aimed to 'substantially and meaningfully expand opportunities for historically disadvantaged persons … to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources'.[132] Under the new system established by the MPRDA, ownership of all mineral resources in South Africa was transferred to the State (Vis-Dunbar, 2009). The previous system of private ownership of mineral rights was replaced with a new licensing system under which mining enterprises that held old order mineral rights were obliged to convert these into new order rights (Vis-Dunbar, 2009). Another crucial element concerning the MPRDA was the introduction of requirements that enterprises have to fulfil to qualify for exploration or mining licenses, this included the requirement that a 26 per cent (or higher) ownership stake in the enterprise be held by historically disadvantaged South Africans (HDSA) (Friedman, 2010).

The conflict between BEE and BIT obligations became evident in the wake of the 2007 claim by several Italian citizens, and a Luxembourg corporation filed a claim under the Belgium- Luxembourg BIT, the Piero Foresti Case (Mossallam, 2015). The claimants charged that the implementation of the MPRDA amounted to the expropriation of their mineral rights.[133] The Act required mining companies to transfer 26 per cent of their shares to historically disadvantaged South Africans. The claimants

[132] Mineral and Petroleum Resources Development Act (2002), s. 2(d).

[133] Piero Foresti, Laura de Carli and others v. Republic of South Africa. Award. ICSID, .Case No. ARB(AF)/07/1, para 54.

argued that these measures were expropriatory in nature and contradicted certain obligations that existed in the BITs signed by South Africa.[134] The government responded by defending its obligation to promote equality under both international human rights law and the South African Constitution, arguing that the mining policy was aimed at realising its human rights obligations.[135]

The case was ultimately settled on the merits in 2010, with the Tribunal only required to make an award on costs (Peterson, 2010). The Piero Foresti Case, however, highlighted to the South African authorities that the ability of the State to regulate its domestic public policy objectives was under serious threat from BIT obligations in general and international investment arbitration in particular (Mossallam, 2015). In the wake of the settlement, South Africa initiated a review of its investment policy regime (Steenkamp, 2014). While the Foresti Case triggered the review, it is important to acknowledge a wider trend in international policy circles that bolstered the position of the South African government (Mossallam, 2015). As public statements by South Africa's Trade Minister reveal at the time, the government justified its decision to update the investment protection regime as consistent with global trends. A growing number of countries were seeking to address the faults in the treaties and investor-State arbitration processes (Davies, 2014).

6. South Africa’s BIT Review

In the aftermath of the Foresti Case, South Africa embarked on a comprehensive and public review of its BITs. This process was a first in the developing world where countries had thus far either decided to immediately terminate all their treaties, or settle for incremental changes once the threats posed by BITs became apparent. The government's decision to review its approach to BITs mirrored BIT revisions in both developing countries in South America and developed countries, including the United States, Canada and Australia. South Africa's review process coincided with the general disenchantment with the international investment agreements regime, and hence its experience was carefully observed by developing countries that were wary of the potential backlash of such an exercise. The South African government embarked on a

[134] Ibid.

[135] Ibid, para 76.

systematic review of its investment policies in 2007, and this entailed looking at both the macro and microenvironment surrounding BITs (Mossallam, 2015). The macro-policy research conducted under this review aimed to determine the policy and strategy considerations that motivate BITs and to assess the gains to South Africa from signing such treaties (DTI, 2009). The micro-environment study examined the legal obligations stipulated in the existing BITs and evaluated the changes that would be needed for the government to safeguard its policy objectives (Williams, 2009).

The review process involved more than a hundred stakeholders from business, labour, government, local and international institutions, intending to inform and update the Executive on the legal implications and impact of BITs on South Africa's developmental agenda (DTI, 2009). Furthermore, the review process entailed detailed interviews at management level with the different sector desks at the DTI, which had led BIT negotiations. The objective of the review was to trace the reasons why the government failed to pursue a coordinated policy which led to the conflict between BIT obligations and national policies and to draw out lessons for cross-governmental policy integration (DTI, 2009, pp. 6, 24) .

The policy framework review process produced three drafts, the first of which was an initial policy document based on research outcomes from interviewing the bilateral units in the international trade division which directly worked with BITs (Williams, 2009). After receiving feedback from relevant policymakers in a government-organised workshop, a second draft of the policy paper was published online as well as in the newspapers for public comment. This step failed to generate sufficient public participation and feedback, so a public workshop was held, attended by a wide range of stakeholders including academics, NGOs, business representatives, lawyers, labour unions and civil society (Williams, 2009). The feedback received from this event was integrated into the third draft that was sent to the Cabinet. The review was concluded in 2010. The key finding of the macro-review was that there is no correlation between a bilateral investment treaty with a particular country and the flow of FDI from that country. Instead, some of South Africa's principal investors came from countries they did not sign BITs with, such as, the United States (Mossallam, 2015). In interview, a former DTI Director explained that substantial investments came in from non-treaty partners, including the United States, India, Malaysia, and Brazil (cited in Mossallam, 2015). The Director further elaborated, '… we could not see any clear, unambiguous evidence that the treaties themselves encourage investment, which was also part of the calculation in weighing the possible benefits of the treaties compared to the risk' (cited in Mossallam, 2015).

Perhaps more importantly, the review confirmed that BITs, as they are currently drafted, extend too far into developing countries' policy space, imposing damaging binding investment rules with far-reaching consequences for sustainable development (DTI, 2009, p. 11). In South Africa's case, the policy space constraint was in the form of legal challenges to public interest regulation. Accordingly, the DTI recommended that South Africa restructure its policy framework to ensure that broader social and economic priorities are not undermined (DTI, 2009, p. 24) . The review concluded that a new overarching investment policy strategy was needed to cover all of South Africa's investment-related policy efforts (DTI, 2009, p. 6) .

The South African Cabinet made a series of landmark decisions from the review, and the DTI presented these resolutions to Parliament. The core decisions were to (Mossallam, 2015):[136]

(i) end first generation BITs after offering the partners the possibility to renegotiate;

(ii) develop investment legislation to codify BIT provisions into domestic law;

(iii) develop a South African Model BIT as the basis for any new agreement;

(iv) establish an inter-ministerial committee to oversee the process.

6.1 Replacing BITs with a Domestic Framework

In the aftermath of the review and subsequent Cabinet decisions, the South African government began notifying several of its partners that it would not be renewing its existing BITs. The South African government is said to have consulted extensively with governments with whom it had signed BITs on the issue of not renewing its BITs, following the Cabinet decision in July 2010 to terminate all BITs (Schlemmer, 2016).[137] The process of engaging with BIT partners was led by the Department of International Relations and Cooperation. Between 2011 and 2014, South Africa

[136] See Department of Trade and Industry, Update on the Review of Bilateral Investment Treaties in South Africa, (Pretoria: Report to Cabinet, 15 February 2013), Available at: http://www.safpi.org/sites/default/files/ publications/dti_review_of_bits_ppc_20130215.pdf.

[137] This was confirmed in interviews with DTI officials, as discussed in Section 7.

provided the necessary notice to terminate three of its most important BITs: with Germany, Switzerland and the Netherlands. These three treaties were given priority as they were subject to automatic renewal clauses and, therefore, would have been extended had the notice not been sent in time (Mossallam, 2015). Both the German and Swiss treaties include a 12-month notice period with run-off protection for existing protected investments of 20 years, whereas the Netherlands treaty has a six-month notice period with a 15-year run-off period (Kolver, 2013). The South African government went on to terminate 15 BITs according to the DTI (2017), 13 of which were with European capital-exporting countries.[138] Discussions have since continued with European and non-European BIT partners over termination in various forums (DTI, 2017).

In tandem, the government drafted a Promotion and Protection of Investment Bill (PPIB) which was intended to provide investors with a domestic law that would protect their investments, and in effect, replace the BITs it was terminating (Mossallam, 2015). Interviews with senior officials revealed that the government had a firm conviction that South Africa's domestic law would be able to provide adequate guarantees to all investors, their investment and returns on investment (Interview with Carim, 2014; Interview with De Gama, 2014). The PPIB was a draft law issued by an inter-ministerial workgroup commissioned to devise an Investment Protection Act. The Bill aligned the national treatment, expropriation, compensation and transfer of funds provisions with South Africa's Constitutional principles. Concerning the right to regulate, the Bill stipulated that the government may take measures to, among other things: redress inequalities; preserve cultural heritage; foster economic development and industrialisation; achieve socio-economic rights, and protect health and environment (Carim, 2016).

One of the major changes was the exclusion of what can be considered as a cornerstone standard in any BIT. The FET provision was left out entirely as it was deemed to be too widely framed and subject to controversial interpretation (Mossallam, 2015). The Bill also excluded the MFN clause. The DTI argued that this clause was no longer relevant as the Bill applies only in South Africa and that the Bill moves away from the

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[138] The BITs terminated included BITs signed with Belgium-Luxembourg, Germany, Switzerland, The Netherlands, Spain, United Kingdom, France, Denmark, Austria, Greece, Italy, Finland and Sweden.

concept of nationality and treats all investors in a similar manner irrespective of their nationality (Mlumbi-Peter, 2015).

In interview, Mustaqeem De Gama, the former Director of Legal, Trade and Investment at DTI, clarified that the national treatment standard in the Bill is subject to exceptions in respect of measures to redress inequalities as stated in the South African Constitution and to uphold rights guaranteed in the Constitution (cited in Mossallam, 2015). These exceptions, according to the Legal Director, should allow the government to address social and economic inequalities through measures like the BEE, without violating the national treatment standard (cited in Mossallam, 2015). There were also substantive changes made to the expropriation and compensation clauses in the Bill in comparison to those found in most BITs. Whereas most expropriation clauses in BITs do not differentiate between direct and indirect expropriation, the issue of indirect and creeping expropriation was addressed in the Bill (Mossallam, 2015). The PPIB differentiates between deprivation and expropriation as defined in Article 25 of the South African Constitution, and clarifies that incidental adverse impact on the economic value of the investment does not constitute expropriation (De Gama, 2014). Also, while BITs usually call for prompt adequate and effective compensation and stipulate that market value is the only reference for determining compensation for expropriation, the PPIB in line with Article 25 of the Constitution provides for just and equitable compensation. Tellingly, the significant modification in the compensation formula is that market value is not an endpoint. In the cases where the expropriation was proven to the court to be exercised in light of legitimate objectives of public interest, a lower than market value compensation can be determined at the discretion of the court (Mossallam, 2015).

Influenced by South Africa's experience in the Swiss arbitration claim, the Bill also modified the security and protection clause. The Bill emphasised that the government must accord foreign investors and their investments a level of security as may generally be provided to domestic investors, subject to available resources and capacity (Mlumbi-Peter, 2015). Finally, concerning investor-State dispute settlement, the Bill contained no provisions that provide for investor-State arbitration in international courts and limits dispute resolution to domestic remedies. Only subject to exhaustion of such remedies, may State-to-State arbitration be sought.

Since it was released in 2013, the PPIB was subjected to transparent and extensive consultations from a broad range of stakeholders including government, NGOs, domestic and international policy think tanks and academics. The government received written submissions which it eventually published along with the DTI's responses[139] before holding a public hearing in September 2015. As a result of public comment, in 2015 a revised Bill was released and later promulgated as the Protection of Investment Act (PIA).

6.2 The Reaction of Foreign Investors

As mentioned above the PPIB was subject to a rigorous consultation process between the government and stakeholders (Mlumbi-Peter, 2015). These stakeholders also included representatives of foreign investors, such as the EU, Swiss, German and American chambers of commerce. For foreign investors, the new legislation represented a downgrade to the scope of protection and expansive rights that were provided in the BITs. The EU is South Africa's largest trading partner and source of FDI, and it was particularly vocal (Steyn, 2013).

Interestingly, the EU and European investors did not question the decision of the government to embark on a review of its investment policies. However, concerns were expressed at the decision not to renew the BITs and the narrowing of the scope of protection standards provided in the PPIB. According to Axel de La Maisonneuve, the former Head of Economic and Trade section of the EU Delegation in South Africa: 'this was the sovereign right of the government to take policy steps of this nature. ... South Africa is entitled to believe at a certain stage that BITs have done their time and that they need to modernise the framework' (cited in Mossallam, 2015).

While most representatives of foreign investors raised objections which will be addressed below, some were sympathetic to the South African government's situation (Mossallam, 2015). As the well-known lawyer Peter Leon, who also served as co-counsel to the claimants in the Piero Foresti case acknowledged (cited in Mossallam, 2015):

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[139] Summary of Submissions for the Promotion and Protection of Investment Bill (PPIB) [B18-2015]. Available at: http://pmg-assets.s3-website-eu-west1.amazonaws.com/150922Summary_of_Matrix.pdf (Accessed 2 May 2016).

> I have to say I do have sympathy with the government here, I do think they signed these BITs under ignorance and pressure from the UK. The South African government should have obtained advice about what they were signing from international investment lawyers. They did so under pressure on the basis that this would open a veritable Pandora's Box for a whole flood of investments

Nevertheless, interviews with European stakeholders (including officials from chambers of commerce and diplomats)[140] revealed three main concerns with South Africa's decision not to renew BITs: (i) that South Africa could not afford to take such a move considering the negative implications it would have on the investment climate; (ii) the insufficient communication/consultation over the decision not to renew BITs; and (iii) the lack of an alternative framework in place immediately after BITs were terminated and the uncertainty it caused to investors.

According to the EU Delegation official, it was the handling of the termination and not whether it was expected that was most disappointing. It was unforeseen that South Africa would proceed to end its BITs with EU partners unilaterally (cited in Mossallam, 2015). The official added that this decision contradicted the nature of bilateral treaties, and the result was not only a diplomatic concern but could also damage investor confidence. In an interview with the then Head of Economic Cooperation and Development at the Embassy of Switzerland, the diplomat argued that South Africa was not in a position to take such measures, considering its low ranking in reports like Doing Business at the time. He added that although some countries have high FDI rates without having signed BITs, this does not apply to South Africa as it is one thing to sign a BIT in the first place and another to cancel existing treaties without providing clear alternatives (cited in Mossallam, 2015). With regard to the concern that the alternative framework in the form of the PPIB was not immediately available after BITs expired, the Executive Director of the South African-German Chamber of Commerce stated that: 'the BIT terminations came three months before the PPIB was released. The lack of coordination and consultation conveyed a message to investors that South Africa only wanted FDI on its own terms' (cited in Mossallam, 2015).

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[140] Officials interviewed include: Head of Economic Cooperation and Development at the Embassy of Switzerland, Executive Director of the South African-German Chamber of Commerce and Industry, and the Head of the Economic and Trade Section of the EU Delegation in South Africa. See Mossallam (2015) for a more detailed account of these interviews.

Interviews with representatives of foreign investors also revealed the concerns they had with the legislation that was replacing the BITs as the new regulatory framework. These concerns included:[141] first, the absence of the FET provision, with the implication that domestic law can change in ways that disadvantage investors. Second, the legal protection of investments under the PPIB only covers direct expropriation. No claim for compensation exists for measures having an equivalent effect to expropriation – contrary to what the expropriation standard in BITs covered. Third, in contrast to the BIT framework, compensation payments in cases of expropriations can be below market value, as the basis for any decision is the general provision of fair and equitable treatment. Fourth, also in contrast to the BIT framework, the legislation does not provide recourse to international arbitral tribunals.

6.3 The South African Government's Response to these Concerns

Interviews with leading policy-makers in the South African government shed light on the government's rationale for terminating BITs and how it responded to criticism from investors. Government officials firmly rejected the assertion that the new domestic legal framework does not offer investors adequate protection. The former lead official for BITs at the DTI described the new legal framework as one that is underpinned by the Constitution, which firmly entrenches private property rights and protects against expropriation (cited in Mossallam, 2015). As for the delay in introducing the new framework and the uncertainty it caused, the former Legal Director at DTI responded that investors and BIT partners were well aware of the existence of survival clauses in BITs. The reality that existing investments would continue to be protected by BITs after it was terminated meant that investors were under no threat from the legal vacuum resulting from the absence of a regulatory framework prior to the introduction of the PPIB (cited in Mossallam, 2015). De Gama acknowledged, however, that the legal vacuum applied to new investments and conceded that the drafting of the PPIB took the government longer than initially expected.

The reaction of foreign investors and European officials to the government's decision to review and exit the treaties was, from Carim's perspective, disproportionate.

[141] See Mossallam (2015).

According to Carim, in his 20-year career at the DTI, no investor had made an explicit link between an investment and the existence of an investment treaty (cited in Mossallam, 2015). Crucially, he was also not aware of any instance where an investor had refused to invest in South Africa because there was no treaty signed between its country and South Africa. He further argued that foreign governments appeared to care more about the existence of a treaty than foreign investors because they consider these treaties to be part of their policy framework (cited in Mossallam, 2015). For this reason, many of the objections to South Africa's decision not to renew its BITs came from foreign governments rather than the investors themselves. The DTI's assessment of South Africa's experience with BITs revealed that it had not been an investor concern, but once governments started to raise it, the investors started to pick up on it (Mossallam, 2015). To defend its point of view, the South African government has used examples of investments that have occurred around the time of termination or shortly after it. These include investments by Mercedes Benz at around the same time the government of South Africa was terminating its BIT with Germany. Similarly, in July 2014 the Dutch Foreign Trade & Development Cooperation minister visited South Africa with a delegation of potential investors, even though South Africa had terminated its BIT with the Netherlands in the previous year (Netherlands Embassy in Pretoria, South Africa, 2014).

That said, the government does acknowledge the impact of wider policy trends on foreign investment. As Carim explains, investors have raised concerns about a general trend of policy developments that they feel negatively affect foreign investment. This includes the labour strikes, rising electricity costs, and currency volatility. From the investors' perspective, the decision not to renew BITs is, therefore, part of a wider and more general concern, and it is difficult for the government to decipher the relative weight of each of these factors in investors' decisions (cited in Mossallam, 2015). From the government's perspective, this underscores the reality that the presence or absence of a BIT does not affect foreign investment. Investors invest in South Africa because they can see economic opportunities and they are comfortable with the legal framework according to the DTI (Interview with Carim, 2014).

The South African government's response to the criticism of the new domestic framework, is that the new Law does not do away with foreign investor protections but is instead making changes to the way in which protection standards are safeguarded (Lang, 2013). According to De Gama, the new framework seeks to achieve several balances, including the rights and obligations of investors, the provision of provide adequate protection to foreign investors, ensuring that South Africa's Constitutional principles are upheld, and that the government retains the policy space needed to regulate in the public interest (cited in Mossallam, 2015). During interviews, senior officials discussed the government's position on the specific concerns raised by investors with regard to the contents of the PPIB and its shortcomings when compared to the BITs. Concerning the FET standard, the former Legal Director at the DTI explained that there is no mention of the international investment law principle of FET in the PPIB because this concept is too broadly framed, and subject to various controversies. He further elaborated that the South African law already provides sufficient guarantees for substantive and procedural due process (cited in Mossallam, 2015). In the stakeholder consultations held over the final draft of the PPIB in 2015, the DTI also reiterated its stance on the exclusion of the FET clause arguing that the protection standards contained in the Constitution and existing legislation provide sufficient protection for legitimate interests that investors may have (Mlumbi-Peter, 2015).

On the definition of expropriation, De Gama stated that this issue had been a longstanding government concern. For many years the government has had a draft Expropriation Bill which sought to ensure that Article 25 of the South African Constitution (which allows for less than market value compensation in certain cases) was reflected in South Africa's 'international obligations'. The expropriation clause in these international treaties stipulated market value for any taking that the government makes regardless of the circumstances and history of acquisition and property use (Mossallam, 2015). According to Carim, the definition of expropriation in the new Law is an improvement on the draft Expropriation Bill, as the term is defined more clearly with specific reference to the Constitution and it sets out public interest measures that would not be considered as expropriation and therefore not require compensation (cited in Mossallam, 2015). South African officials did acknowledge, however, that the way the clause was drafted in the Bill might have sent the wrong signal to investors by keeping the list of exceptions for what constitutes expropriation open-ended. They stressed that the final draft would remove the open-ended list of exceptions and merely ensure the clause was consistent with Article 25 of the Constitution (Mossallam, 2015).

Finally, concerning the question of arbitration, South African officials argue that it is difficult to draw a direct comparison between international arbitration and domestic legal systems. De Gama argues that the calls for ISDS to be watered down or excluded from the TTIP are not that different from the South African demands, because in both instances it is about preserving legitimate public spaces for public policy (cited in Mossallam, 2015). Furthermore, the government is confident that the domestic legal process is sufficiently robust to protect investors. South African officials refused the notion that the South African government is incapable of handling the legal obligations, as they claim it has a strong Constitution and a robust legal framework. While conceding that deficiencies exist, officials maintain that most issues are settled relatively promptly (Mossallam, 2015). South Africa is also working on empowering its domestic courts and enabling them as per the recommendations by the Cabinet. In describing South Africa's efforts to reform its investment framework, De Gama concludes: 'at the end of the day we have this process to really indicate that we are serious about investor rights but also about the right to regulate…. Making these requirements means we are more serious about sustainable growth and not that we are against more investment' (cited in Mossallam, 2015).

As previously mentioned, the DTI published a summary of the submissions it received and its responses to them, before submitting a final draft to the Cabinet. The Cabinet endorsed the Bill on 24 October 2014. The Parliament then held public hearings over the Bill inviting a wide range of stakeholders to discuss the latest draft in September 2015. The PIA was finally enacted by the Parliament in December 2015 and upheld most of the substantive changes in the PPIB. The Act responded to concerns by foreign investors on some of the definitions including those of 'investments' and 'expropriation'. In the case of expropriation, the new Act excluded the clause, and the government clarified that it would be addressed in a separate Expropriation Bill (which was released in 2015). Essentially according to South African officials, the new Expropriation Bill ensures that the expropriation standard will be consistent with Article 25 of the Constitution as originally intended, but it will remove the open-ended list of exceptions to the measures that would not be interpreted as expropriation which existed in the PPIB (cited in Mossallam, 2015). To ensure that its investor protection standards are consistent across all its binding international treaties and agreements, South Africa led the process of amending Annex 1 of The South African Development Community (SADC) Finance and Investment Protocol in August 2016. Some of the main changes in the amended version include the following (UNCTAD, 2017c, p. 113):[142] (i) the exclusion of the FET provision and the ISDS mechanism; (ii) redefinition of investment and investors; (iii) introduction of exceptions to the expropriation provision for public policy measures; (iv) clarification of the national treatment provision (with reference to 'like circumstances'); and (iv) the inclusion of detailed provisions on investor responsibility and the right of host countries to regulate investment for the public interest.

The long-term effects of this new policy cannot yet be judged. It is too early to tell whether the South African government met its objectives, or equally if the new policy will impact foreign investment flows. Furthermore, the impact of these changes will need to be assessed over a more extended period and in the context of the policies that the government intends to adopt as part of its transformative agenda. These policies include BEE policies, Mining Charter and land reform (Expropriation Bill), all subject to heated debate at the time of writing. The purpose of this case study is not to assess the success of South Africa's policy decisions, but instead to analyse how it signed these BITs and how it has reacted once it realised the constraint these BITs pose on its ability to regulate in the public interest. In the existing investment treaty literature, South Africa's chosen route is classified as a case of 'exit', and under Hirschman's framework, it would also fit with his definition of exit. The next section, however, argues that it should be considered a case of 'voice'.

7. Exit or Voice? An Appraisal

7.1 South Africa's Failed Attempts to adopt the 'Voice' Route

From the onset, South Africa's approach to managing its BITs was quite different compared to its Latin American counterparts. For instance, while Bolivian officials

[142] See Agreement Amending Annex 1 (Cooperation on Investment) of the SADC Protocol on Finance and Investment. Available at: https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf.

had explicitly announced that domestic investment was prioritised over foreign investment and reversed its neoliberal economic policies, South Africa remained loyal to its neoliberal economic model. In consultations with stakeholders including former BIT partners, South African officials have consistently reiterated the message that the purpose of the new framework is to ensure South Africa remains open to foreign investment. According to the DTI, the new framework aims to provide investors with adequate security and protection (including several of the clauses that existed in the BITs), while preserving the sovereign right of the State to regulate in the public interest and pursue development objectives (Mlumbi-Peter, 2015). Moreover, while South Africa has replaced its BITs with a domestic legal framework, it has ensured that this new framework maintained the neoliberal approach to FDI regulation by retaining most of the principles and norms that shaped the investment treaty regime.

South Africa also consciously ensured that its treaties were terminated when they expired to avoid violating any terms of the agreement. South African officials refuted the claim by their European counterparts that the process of terminating the BITs was abrupt and unilateral. During interviews, senior officials explained that the review started in 2007 and the government began to informally approach European counterparts in 2008-9 when it became clear that the current treaties had severe shortcomings (cited in Mossallam, 2015). At the time, South Africa participated with the EU in the G8+G5 process and informally raised the possibility of renegotiation of treaties with individual representatives of the countries present. According to the South African officials, representatives from these partner countries made it very clear that the agreements were ‘basic’ in content and that any renegotiation would entail measures to liberalise foreign investment regulation further (cited in Mossallam, 2015). According to Carim, EU countries were also made aware of South Africa’s intention to renegotiate or terminate BITs during UNCTAD conferences in Doha and Geneva in 2012 and 2013, through public statements by senior officials and the lead Minister (cited in Mossallam, 2015). These claims have been acknowledged by some of the foreign investors’ representatives. For instance, in interview, the Executive Director of the South African-German Chamber of Commerce and Industry, stated that they had known since 2011 that the South African government intended to review its BITs (not only German BITs) that were concluded in the 1990s. What surprised them was that the termination of the BITs was conveyed before an alternative for protection of investments was finalised (cited in Mossallam, 2015).

Furthermore, the effort exerted by the South African government to involve its foreign counterparts in consultations and to consider their feedback (see above), indicates that South Africa was open to reaching a mutual decision on how to reform the BITs if its counterparts had been willing to make concessions. In interviews, senior officials at the DTI explained that the government had made extensive efforts to solicit input from a broad range of stakeholders. At the very early phases of the review, the South African government invited public comment and organised public forums where the government's approach to BITs and the initial findings of the review were discussed (Interview with Kruger, 2015; Interview with De Gama, 2014). The State also engaged in meetings outside of South Africa, at UNCTAD and the South Centre. The government received written submissions from a range of stakeholders including governments, think tanks and NGOs. Accordingly, and on these grounds, senior government officials argue that it is implausible that any of South Africa's treaty partners were not aware of the review process (Mossallam, 2015). Not to mention that the government only started taking concrete steps to terminate specific BITs towards the end of 2012, almost three years after the government published the key findings of the review and the Cabinet decisions, which set out the measures South Africa was planning to take. According to the former Legal Director at DTI, ‘during that period, we had several consultations and specifically with the EU delegation; we had a full-on discussion regarding the rationale… We took criticisms on board and addressed them while striving to make our clauses consistent with the Constitution and existing legal frameworks’ (cited in Mossallam, 2015). Accordingly, De Gama describes claims by former BIT partners that the State did not consult its treaty partners over the renegotiation of BITs before deciding not to renew them as unfair criticism. A former DTI Director adds that the South African government met with EU representatives a year before officials started to provide notices of their decision not to renew BITs to explain the options that the South African government was considering (cited in Mossallam, 2015).

Even if South Africa's European counterparts had shown willingness to renegotiate the BITs with South Africa, there was still the crucial element of timing. The former Legal Director of the DTI elaborated that the Lisbon Treaty was due to come into force at the point when the South African government sought to renegotiate BITs with individual European member States (cited in Mossallam, 2015). Under the Lisbon Treaty, competencies for investment moved from the member States to the European Commission. It was therefore unclear whom the South African government could approach, to discuss the possibility of new agreements as the EU was in flux. This led to a tricky situation for South Africa. After waiting for two years, the South African government decided not to renew several BITs that were reaching the automatic renewal date that would extend the treaty for another 10-15 years. The option of not renewing or terminating BITs when they reached the initial expiry date was allowed in the provisions of the BITs. According to the former Legal Director at DTI: 'we waited two years, and it only became clear that EU member States had limited capacity to negotiate their agreements and hence it was too late for us' (cited in Mossallam, 2015).

Finally, the South African government has also made it clear that it is not opposed to the negotiation of new BITs and does not want to exit the system entirely. The South African government has been actively participating in discussions on ISDS reform on the international stage by constructively engaging at the OECD and the UNICTRAL. According to De Gama, South Africa does not intend to remove itself from the international arbitration system as a whole: 'if there is serious reform and a more credible and transparent system is in place, the South African government will reconsider international arbitration' (cited in Mossallam, 2015). Moreover, the DTI has been working on developing a draft model BIT that would be in line with the PIA and the model BIT adopted by SADC (Interview with De Gama, 2014; Interview with Kruger, 2015).[143] South Africa was actively engaged with the International Institute for Sustainable Development (IISD) in developing the SADC model BIT that was completed by 2012 and adopted in 2013.

8. Conclusion: Revising 'Voice' in Hirschman's Framework

The review conducted by the South African government had established that there was no evidence that BITs led to an increase in FDI in South Africa, but that their financial

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[143] As mentioned earlier, the draft BIT has been finalised and is currently being reviewed by the Cabinet as per the DTI 2017 Annual Report.

and sovereignty costs were significant. While there were discussions about possible reform in multilateral fora, future improvement via this route was/is very much an open question, not only concerning its possibility but also more fundamentally regarding its nature and character (Katselas, 2014). South Africa was in a difficult situation, as although the costs of keeping these treaties seemed to exceed the direct benefits, unlike its Latin American counterparts, it was wary of sending out the signal that it was adopting protectionist policies or turning its back on the free market model. While South Africa's decision to exit its BITs was well publicised, its efforts to engage and sound any potential for reform in the form of renegotiation as illustrated above are not well known.

According to Hirschman's framework, South Africa’s route would be considered as an ‘exit’ decision. First, because it left the system and replaced its treaties with alternative domestic legislation and, secondly, because voice entails ‘any attempt at all to change, rather than to escape from, an objectionable state of affairs’ (Hirschman, 1970, p. 3), and ‘always involves sticking to the deteriorating organization’ (Hirschman, 1970, p. 38). Furthermore, according to Hirschman, once the decision to exit is made, there is no longer scope for voice. This categorisation of South Africa's chosen route is also shared by scholars and practitioners that have addressed the possible routes that can be adopted by countries looking to reform their BITs, where South Africa has been deployed as an example of a country that adopted the ‘exit’ option (see Gordon and Pohl, 2015; Katselas, 2014).

The findings of this case study reveal that South Africa did attempt to adopt a voice route as per Hirschman's conceptualisation. However, South African officials realised that South Africa's chances of reforming its existing BITs were slim due to the need for a mutual agreement between both parties, which judging from the response they received in informal discussions with some of their capital-exporting partners, was not feasible. Due to its lack of bargaining power and mutual interest with its capital-exporting partners (excluding those with which they had strategic relations, e.g. BRICS countries), South Africa could not convince its treaty partners to make the compromises needed to ensure a balance between the rights of investors and its right to regulate in the public interest. Consequently, it had to exit its BITs first by choosing not to renew them, before introducing a new framework that included several components of its expired BITs yet excluded the clauses that constrained the State's ability to pursue its development objectives. Based on the definition of the investment treaty regime in Chapter 2, South Africa's decision to terminate its BITs means it has exited the legal framework of the regime. However, by retaining most of the neoliberal norms and principles of the regime in the domestic legal framework that replace its BITs, South Africa ensured it was only a partial exit.

Hence, in this case study, it is argued that South Africa's experience demonstrates that for developing countries the only way to effectively practice voice in the regime is through a quasi-exit strategy that combines both exit and voice tactics. This argument suggests that Hirschman's definition of voice and the dynamics of the interplay between exit and voice would need to be revisited to explain the options available to developing countries dealing with their BITs.

Accordingly, the findings of this case study demonstrate the need for revising Hirschman's conceptualisation of the voice route in order to account for the dynamics of the international investment regime. Chapter 8 expands more on the suggested contribution to the framework and the change in dynamics between exit and voice proposes the replacement of 'voice' with 'quasi-exit'.

Chapter 7. Loyalty: An Egyptian Case Study

1. Introduction

The mid-1970s marked the beginning of the neoliberal era in Egypt as President Sadat announced the 'Infitah' (opening) of the Egyptian economy by implementing a neoliberal economic agenda that aimed to enforce a retreat by the State as an economic actor in favour of private and foreign capital. It was in this context that Egypt decided to join the international investment regime by launching its BIT network and signing the ICSID Convention. Since then Egypt has signed 111 BITs placing it among the top ten signatories of BITs worldwide, despite being a net capital importer.

Egypt became aware of the constraints that these treaties can pose to its policy space when it started facing arbitration cases triggered by BITs in the late nineties. An internal review of BITs by the Egyptian authorities in 2006 exposed the unbalanced nature of the treaties and the absence of a link between these treaties and FDI inflows. Furthermore, in the aftermath of the January 25th revolution in 2011, efforts to redress the corruption and inequality legacies of the Mubarak regime triggered a wave of investment arbitration claims.

Despite vocally criticising the investment treaty regime and calling on reforms to balance investor rights with the right of host State to regulate, Egypt has remained committed to the regime by refraining from amending or replacing its BITs. Instead, successive governments that took office post-2011 have maintained a neoliberal approach to FDI by retaining the expansive protection standards provided in Egypt's existing BITs and ensuring that domestic legislation contained similar provisions. Furthermore, since 2012, Egyptian authorities have gone a step further by introducing new legislation to provide foreign investors with further protection that goes above and beyond what is already provided in the BITs it has signed.

Nevertheless, the decision to remain committed to the international investment regime has not stopped the arbitration cases filed against Egypt from accumulating. As of September 2018, Egypt has faced 33 investment treaty arbitration cases triggered through BITs ranking it amongst the top five most frequent respondents (as host States) to investment treaty arbitration cases in the world.

Egypt's decision to maintain the status quo is in line with the general trend in the developing world: a significant number of developing countries have refrained from exiting the investment treaty regime or introducing substantial reforms to their BITs despite realising the extent to which the regime can constrain their ability to regulate. What makes Egypt's case unique, however, is its decision to maintain the status quo despite openly contesting the investment treaty regime in public forums. Accordingly, an in-depth study of Egypt's experience with the investment treaty regime is necessary to understand why, unlike its counterparts (South Africa and Bolivia), it has yet to act to on its discontent with the regime. This case study traces the process the country has undergone from joining the regime, to its reaction, to realising the constraints its membership of the regime imposed on its policy space to regulate. The objective of this chapter is to analyse how and why Egypt signed its BITs and why it has decided to maintain the status quo despite vocally expressing its discontent with the regime.

The chapter argues that, in line with the two other case studies, the Structural Power and Bounded Rationality theories can be combined to explain different aspects of Egypt's BIT signing process. Whereas Poulsen's adaptation of the Bounded Rationality framework is used to explain how BITs were signed without being reviewed or taken seriously, Gwynn's use of the Structural Power framework is deployed to justify why Egypt joined the international investment regime by signing BITs despite rejecting some of the key investment rules in these BITs in multilateral forums.

Concerning Egypt's reaction to its discontent with the regime, the chapter proposes that the economic conditions Egypt faced post-2011 established a similar context to the one which had allowed IFIs and capital-exporting countries to hold structural power when it signed its BITs several decades earlier. The IMF and the GCC countries, both of which influenced the government's decision to refrain from amending its BITs or its domestic legal framework, exercised structural power through conditionalities imposed in return for credit and aid. Thus, Egypt's decision to maintain the status quo and remain in the international investment regime is not due to an attachment to a system it believes will eventually result in benefits for its economy, as Hirschman's loyalty would imply. Instead, the route taken by Egypt is more likely to have been motivated by fear of the possible economic and political repercussions deriving from its vulnerable economic position.

Finally, this chapter concludes that Hirschman's conceptualisation of loyalty cannot adequately explain why developing countries like Egypt remain members of the regime. This creates a need to revise Hirschman's framework and to introduce a new category that reflects better the route taken by countries like Egypt. In Chapter 8 the concept of 'silence' is suggested as a possible addition to the framework to explain such a trajectory.

The rest of the chapter proceeds as follows. Section 2 provides the historical political and economic context in which BITs were signed. Sections 3 documents Egypt's introduction to the international investment regime and describes the main features of Egypt's BIT program. Section 4 conducts an appraisal of Egypt's BIT signing process. After analysing how Egypt developed its BIT network the chapter traces how Egypt realised the extent to which BITs can constrain its policy space both pre- and post-2011 as well as its reaction to this realisation in Sections 5 and 6. Section 7 first documents how Egypt refrained from revising its position towards BITs and instead furthered protection provided to foreign investors by introducing legislation to grant investors immunity from accountability to the domestic judicial system. The rest of Section 7 analyses the context in which Egyptian governments decided to maintain the status quo and make further concessions to appease foreign investors. Finally, the last section concludes that despite remaining committed to BITs and the international investment regime, the route Egypt has chosen is not consistent with Hirschman's Loyalty option.

2. Historical Context of the BIT Signing Process

Before addressing the evolution of Egypt's BIT program, this section documents the economic and political context in which these BITs were signed. Starting in the late 1960s, Egypt changed its economic orientation, abandoning planned development in favour of market forces and private initiative (Abdel-Khalek, 1981). The impetus behind Egypt's shift to the West and the adoption of the neoliberal economic model is better understood against the backdrop of the economic situation of the country following the 1973 October War with Israel (Ikram, 2007). GDP growth was sluggish, the budget deficit was widening, and the deficit on the current account of the balance of payments was rising. In parallel, the external debt was increasing, and Egypt required substantial and immediate funds to service it (Ikram, 2007).

President Sadat conveyed the gravity of Egypt's economic predicament in the following statement,(cited in Scobie, 1981, p. 31):

> I wanted to tell them [the National Security Council] that we had reached the 'zero stage' economically … in every sense of the term … I could not have paid a penny toward our debt instalments falling due on January 1, 1974, nor could I have bought a grain of wheat in 1974. There would not have been bread for the people.

Ahmed Abou Ismail, then Minister of Finance, while reflecting on the situation after 1973, reveals that Egypt had made a political choice in deliberately orienting its foreign policy towards countries that were economically stronger than the Soviet Union (cited in Ikram, 2007, p. 28). Accordingly, this decision entailed abandoning the philosophy of a centralised economy and substituting political dependence on the communist bloc with dependence on the United States and other powerful Western countries and financial institutions. In 1974, President Sadat initiated the 'Open Door' policy which aimed at liberalising the Egyptian economy and attracting foreign investment. The shift of economic and political relations towards Europe and United States coincided with changes in the international arena that created a general ideological atmosphere favouring economic liberalisation (Ateş et al., 2006).

Despite the symbolism of the Open Door policy which is associated with Egypt's abandonment of the 'socialist' model and alliance and embrace of Western capitalism, the policy itself was not considered to be a well-developed economic strategy. Following Sadat's Prime Minister at the time Abdel-Aziz Hegazy, the Open Door policy was to serve more as an 'investment promotion program' than a blueprint for a free economy (cited in Ikram, 2007, p. 20). The main objective of the policy was to set up a framework that would encourage an inflow of capital from the Gulf countries and the West. The promulgation of Investment Law No. 43 of 1974 (which will be discussed further in Section 3) was a crucial part of this framework as it was issued with the aim of easing the path for Arab and other foreign investment (Ikram, 2007). Thus, it becomes clear that the main objective of Egypt's Open Door policy was to raise external funds that Egypt desperately needed through foreign aid and FDI by restructuring its international economic relations (Abdel-Khalek, 1981).

The period immediately after the announcement of the Open Door policy witnessed a significant role for the World Bank, the IMF and the USAID, who were advising Egyptian policymakers on how to transition to a free market economy (Ikram, 2007).

Egypt required a substantial inflow of external funds and both the IMF and the World Bank were the prime candidates for providing much of these resources. Moreover, the scale of external financing required by the country meant it needed to enlarge the number of donors. Accordingly, the World Bank set up a ‘Consultative Group’ (an association of Egypt’s main donors), who held its first meeting in Paris in May 1977 (Ikram, 2007). The resource transfer from these institutions was accompanied by conditionalities which will be touched upon later in this case study.

Egypt’s dependence on these organisations and foreign governments for financial credit consequently meant that they strongly influenced the process of reintegrating the Egyptian economy into the world capitalist market (Abdel-Khalek, 1981). The influence was exercised by a variety of means including providing consultants, signing loan agreements and facilitating external aid through Consultative Group meetings (Abdel-Khalek, 1981).

In 1974, the World Bank sent a consultant to Egypt to provide policy advice to the Egyptian government on a new development strategy. In his essay ‘Towards a Development Strategy in Egypt’ the World Bank consultant, Balassa (1977, p. 88) made the following recommendation:

> There is a need to define the role of public decision-making in the national economy ... reorienting government activities from the regulation of prices, production and foreign exchange allocation towards determining the main directions of the economy and the ‘rules of the game’ applicable to public, private, and foreign firms. In particular, one would need to indicate the areas in which private and foreign firms may operate; the constraints imposed on them; and the incentives to be provided … in order to encourage the establishment of private firms, their status would need to be clarified. This would entail publicly stating the permitted scope of private investment and disclaiming any intention of future nationalization.

Balassa (1977, p. 96) concluded the essay with other recommendations to achieve the objective of ‘establishing a market system where public, private and foreign firms coexist in the framework of an open economy’. The World Bank’s policy recommendations that appeared in this essay coincided with the publication of the October Paper, the official document in which the Open Door policy was first articulated (Abdel-Khalek, 1981). Since the essay was published with the concurrence of the Egyptian government (Balassa, 1977), it came as no surprise when the Open Door policy articulated in the October Paper published by President Sadat adopted the recommendations made by the World Bank consultant. The Open Door policy according to the Paper signalled a decisive break with the Egyptian economy's public-sector-dominated past, with the private sector and foreign investment replacing the public sector's role in the economy (Sadat, 1974).

In addition to the World Bank, both the IMF and the Consultative Group exerted significant pressure on the Egyptian government to liberalise the economy (Abdel-Khalek, 1981). The guiding and even forcing role of the IMF became evident as the size of both external and internal debt grew (Momani, 2003). After the deterioration of its external economic situation, Egypt began its negotiations for an upper credit tranche arrangement with the IMF in the mid-1970s (Laobooncharoen, 2004). Following prolonged negotiations of nearly three years, an agreement was reached in 1977 when the IMF Executive Board approved of SDR 125 million Stand-By Arrangement (SBA) for Egypt (Laobooncharoen, 2004). The main objective of the economic reform programme under the SBA was 'to restructure relative prices so as to develop the external sector'.[144] To achieve this aim, several conditionalities were set by the IMF including exchange reform, external trade policy, domestic price liberalisation, fiscal policy, monetary and credit policy, and external debt policy and arrears (Laobooncharoen, 2004).

In January 1977, riots broke out throughout Egypt after the government announced price increases in the 1977 budget (Laobooncharoen, 2004). Nevertheless, IMF talks were resumed in 1978 over a new stabilisation programme for an Extended Fund Facility (EFF). The policy measures Egypt was required to implement in return for the 720 million USD loan included: reducing the budget deficit, adopting a deflationary money and credit policy, eliminating multiple-exchange rates (a de facto devaluation of the Egyptian pound), removing exchange controls (except on capital transactions), and phasing out bilateral trade agreements (Abdel-Khalek, 1981).

According to Abdel-Khalek (1981), these measures forced the doors of the Egyptian economy wide open for foreign investments at the expense of the domestic industries, under the pretext of creating a more attractive climate for foreign investment. In this context, an open economy specifically meant open to the capitalist industrialised

[144] IMF Central Files, C/Egypt/1760, Stand-by Arrangements, 1977-1985, Arab Republic of Egypt, Annex to Stand-By Arrangement [the Letter of Intent], 4 March 1977.

countries (Abdel-Khalek, 1981). Egypt's promotion of these policies meant a commitment to liberalising the Egyptian market, and this included liberalising treatment of foreign investments. This commitment became more evident when, under pressure by the leading donors in the first Consultative Group meeting in 1977, the Egyptian delegation announced several measures the government was planning to adopt within the framework of the Open Door policy to encourage investments (Abdel-Khalek, 1981, p. 404):

> (i) Amending Law 43 for 1974 to give more incentive to the private sector;
> (ii) Approving a large number of private sector projects in free zones;
> (iii) Ending monopoly of foreign trade by the public sector;
> (iv) Minimising administrative obstacles confronting foreign investors; and
> (v) Activating the stock exchange.

The liberalisation measures adopted had a significant impact on the Egyptian economy. Although the economy did not grow or structurally change as anticipated, it became much more dependent on trade and external capital flows (Ateş et al., 2006). During the period between 1972-1979, Egypt's exports and imports as a percentage of GDP rose from 14.6 per cent and 21 per cent to 43.8 per cent and 53 per cent respectively (Ateş et al., 2006). Moreover, over the same period, external debt as a percentage of GDP rose from 38 per cent to 58 per cent (Ateş et al., 2006).

More importantly, Egypt continued to depend on external credit from donors and IFIs to keep the economy afloat. Initially, Egypt was mostly reliant on Arab countries for support. The Gulf countries decided to scale up their aid programmes in the immediate aftermath of Egypt's 1973 war with Israel (Ikram, 2007). The total amount of main types of Arab assistance to Egypt (grants, cash loans and deposits, and project and programme loans) rose from 905 million USD in 1973 to a peak of c.2.7 billion USD in 1975 (Ikram, 1980). However, in the following year, Egypt developed new sources of financial assistance owing to its rapprochement with the West and the alteration in its foreign policy regarding the Arab-Israeli conflict marked by Sadat's visit to Jerusalem in November 1977. In the period between the Camp David Summit (September 1978) and the signing of the Egyptian-Israeli Treaty (March 1979), the US under the Carter Administration increased its aid, pledging 300 million USD in post-treaty economic assistance to supplement the on-going billion-a-year programme (Laobooncharoen, 2004). The US government also promised a supplemental package of 1.5 billion USD in military aid, to be spread over three years (Burns, 1985).

During the same period, the major Western capital exporters commenced a substantial programme of economic assistance to Egypt. Egypt eventually became utterly dependent on the West for financial assistance, trade and capital inflows after nineteen Arab countries decided to impose economic sanctions against Egypt at the Baghdad Arab League summit following the signing of Egypt's peace treaty with Israel (Ikram, 2007). The main sources of financial aid were the US, Western European countries and Japan as a sizeable pipeline of commitments was soon built up (Ikram, 2007). By 1981, the total disbursement of official loans and grants into Egypt was put at c.1.6 billion USD, or 7 per cent of GDP (Ikram, 2007).

Egypt’s dependence on the West was not limited to aid. The capitalist countries also became the largest trade partners of Egypt (Abdel-Khalek, 1981). Between 1974 and 1977, the United States and the Western European countries accounted for 44.5 per cent of Egypt's foreign trade (both exports and imports) (National Bank of Egypt, 1979). Furthermore, by 1978, the number of commercial agencies exceeded 1,000, and they were representing 2,600 commercial firms that belonged to 56 countries (Abdel-Khalek, 1981). Multinationals from West Germany, Britain, France, Italy, Switzerland and the United States topped that list (Abdel-Khalek, 1981).

It was in the context described above that Egypt joined the international investment regime by signing the ICSID Convention in 1972 and initiating its BITs programme in 1973.[145] The next section will focus on Egypt’s new FDI regime and its introduction to the international investment regime concluding with a brief overview of the main features of its BIT programme.

3. Egypt’s New FDI Policy and Introduction to the Investment Treaty Regime

The foundations for Egypt’s first FDI policy, as well as its engagement with the BITs system, were laid when Egypt adopted the Open Door policy as illustrated in the previous section.

A centrepiece of the Open Door programme was a new investment law, Law No. 43 of 1974 (Parra, 2015), which replaced Law No. 65 of 1971 and was considered the

[145] See Appendix III for a list of Egypt’s BITs.

first real comprehensive investment law. The new law's primary objectives were to expand the types of desired investments and to provide incentives and guarantees beyond those previously afforded foreign investors (Bushnell, 1980). The Law provided for the opening of the Egyptian economy to FDI in almost every field.[146] It also extended incentives and guarantees to foreign investment, including a guarantee against uncompensated expropriation and granting foreign investors equal treatment to that provided to domestic investors among other benefits.

During the same period, Egypt joined the international investment regime by signing the ICSID Convention on 11 February 1972 (entered into force on 2 June 1972) and concluding the first of its 111 BITs. Between 1973 and 1977 Egypt signed twelve BITs, primarily with major European capital exporters such as Germany, France, and the UK. However, before describing the main features of Egypt's BIT programme, it is important to note that Egypt's first brush with ISDS came through its very own Investment Law as explained further below.

More than 50 years ago the ICSID Convention was finalised and submitted to the member governments of the World Bank. In a report by the Executive Directors of the Bank which accompanied the Convention they explained that while the written consent of the parties would be a prerequisite for resorting to arbitration under the Convention, there was no requirement that the consent of both parties be documented in a single instrument such as an investment contract between them (Parra, 2015). To demonstrate what that entailed, the Executive Directors suggested that 'a host State might in its investment provision legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing' (IBRD, 1965, p. V).

Once the ICSID Convention came into force in 1966, investment promotion laws began to appear with general consents of the type envisaged by the Executive Directors (Parra, 2015). Amongst the earliest was Egypt's Law No. 43 of 1974 (Parra, 2015) which contained an ICSID arbitration provision that is elaborated on further below when discussing the arbitration case that took advantage of that provision. A year later in 1967, Aron Broches, the founding Secretary-General of ICSID (also dubbed the

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[146] See Article 3 of Law 43 of 1974. Egyptian Official Gazette.

'father of ICSID'), proposed that BITs should also provide for investor-State arbitration under the Convention (Parra, 2015). This suggestion was taken up by governments, and it eventually became a cornerstone of most BITs signed thereafter, including the majority of Egypt's BITs (Parra, 2015).

Arbitration cases initiated under such general consents in investment laws or treaties would be called 'arbitration without privity'[147] because they are not based on pre-existing arbitration agreement between the parties (Parra, 2015). In his paper, 'ICSID Arbitration and Developing Countries', former arbitrator Professor Ahmed El-Kosheri predicted that this type of arbitration would eventually dominate the caseload of ICSID (El-Kosheri, 1993). His prediction was fulfilled as, by the end of the 1990s, the number of investor-State arbitrations without privity had exceeded the number of cases being brought to ICSID through arbitration clauses in investment contracts (Parra, 2015).

This shift in the type of cases began with the first ICSID case involving Egypt in 1984. The case generally known as the 'Pyramids case',[148] as it involved the cancellation by the Egyptian government of a tourism complex near the Pyramids, was the first ever arbitration without privity (Parra, 2015). In the case, the claimant successfully relied on the general consent in the translated version of Egypt's Investment to establish ICSID jurisdiction.

In 1974, SPP, a Hong Kong company, entered into agreements with Egypt to establish a joint venture (ETDC) intending to develop an international tourist complex at the Pyramids Oasis in Egypt (Ripinsky and Williams, 2008). In interview, El-Kosheri[149] reveals that this was the first project under the new Investment Law (Interview with El-Kosheri, 2017). The project went ahead until 1978 when, as a result of domestic and international pressure due to the perceived threat the project posed to undiscovered antiquities, the government cancelled the project. In 1978, under the contractual arbitration clause, SPP filed an arbitration claim at the ICC, under the pretext that the cancellation of the project amounted to expropriation and obtained an award of 12.5

[147] The phrase was coined by Jan Paulsson. See Paulsson (1995)

[148] Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt. ICSID, Case No. ARB/84/3.

[149] In addition to being an arbitrator and former Vice President of the ICC International Court of Arbitration, El-Kosheri has also defended Egypt in arbitration cases and acted as an advisor to the State on arbitration issues.

million USD in damages (Ripinsky and Williams, 2008).[150] However, this award was later annulled by French courts on jurisdictional grounds (Ripinsky and Williams, 2008). The annulment did not spell the end of SPP's efforts to seek compensation for the cancellation of the project. The claimant's counsellor Jan Paulsson was inspired by the text in one of Broches' articles in which he explained that States may express agreements on ICSID jurisdiction in contracts – or alternatively in treaties or laws (Broches, 1966; Paulsson, 2012). Accordingly, in 1984, the Claimants decided to take the same matter before an ICSID tribunal, pursuant to Egypt's Investment Law No. 43 of 1974 which contained an ICSID arbitration provision. The Law contained a dispute settlement clause that stipulated the following (according to the translated version of the Law):[151]

> Investment disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered by virtue of Law no. 90 of 1971, where such Convention applies … Disputes may be settled through arbitration.

An important decree, Decree No. 375 of 1977 was issued in furtherance of the implementation of the 1974 law. This Decree was critical to the *SPP v. Egypt* (1984) case as it established a hierarchical relationship among the dispute settlement methods stipulated in the Law.[152] The Decree stipulated that in the absence of a BIT or an agreement between the State and the investor, 'disputes between the State and the nationals of other countries are to be settled in accordance with the provisions of the Convention for the Settlement of Investment Disputes, to which the Arab Republic of Egypt has adhered pursuant to Law No. 90 of 1971'. [153]

The case was registered in 1984, and by 1992 the tribunal held that Egypt's actions constituted a lawful expropriation of the claimants' investment and that Egypt was,

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[150] SPP (Middle East) Ltd. & Southern Pac. Properties Ltd. v. Arab Republic of Egypt & Egyptian Gen. Co. for Tourism & Hotels (EGOTH). ICC, Case No. 3494, 11 March 1983.

[151] Translation of Article 8 of Law No. 43, used by the ICSID tribunal in SPP v. Egypt, Decision on Jurisdiction, 27 November 1985.

[152] Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt. ICSID, Case No. ARB/84/3

[153] Ibid, para 75.

therefore, liable to pay equitable compensation for the value of the expropriated investment (Ripinsky and Williams, 2008). In total, the tribunal awarded 27.6 million USD.[154] El-Kosheri revealed in interview that despite initially attempting to annul the award, Egyptian authorities eventually settled with the claimant for a sum in the region of c.15 million USD (Interview with El-Kosheri, 2017).

This experience revealed that the Egyptian authorities had included this ICSID provision which was promoted by the World Bank (ICSID is funded by and part of the World Bank Group) in their Investment Law without understanding the implications of that provision. Even after realising how this provision exposed Egypt to international arbitration claims, the authorities did not act to amend the Law until another claimant successfully used the dispute settlement provision of Law No. 43 of 1974 to file a second arbitration case against Egypt in ICSID five years later.[155]

A month after the second case was registered, Law No. 43 was replaced by Law No. 230 of 1989 amending the clause that provided consent to ICSID jurisdiction in Law No. 43 (Parra, 2015). The new Investment Law contained a provision which clearly stated that the choice of any of the several alternatives of dispute settlement contained in the Law would require the agreement of the parties involved.[156] The modified legislation also stipulated that Egyptian courts would generally have jurisdiction over such disputes.[157]

Through its early experience with investor-State arbitration, Egypt had the advantage of having an early warning of what consent to international arbitration entails while it was still in the very early phase of its BIT network. Most developing countries only realised the implications of this provision after they had already signed most of their BITs. Accordingly, with the knowledge acquired from these two arbitration cases, it would be naturally expected that Egypt could approach its BITs more carefully. This

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[154] Ibid, para 257.

[155] The case discussed is the Manufacturers Hanover Trust Company v. Arab Republic of Egypt and General Authority for Investment and Free Zones. ICSID, Case No. ARB/89/9. The dispute that triggered the case concerned a branch operation of the claimant in Egypt. The proceedings and award of this case were never published, but a settlement was agreed between the claimant and one of the respondents and proceedings discontinued at their request, 24 June 1993.

[156] See Article 55 of Law No. 230 of 1989. Egyptian Official Gazette.

[157] Ibid.

impression was misleading, as will be demonstrated in this case study. Before conducting an appraisal of Egypt's BIT signing process, the next section provides an overview of the main features of Egypt's BIT programme.

3.1 Overview of the Key Provisions in Egypt's BITs and Trends in BIT Signings

According to the General Authority for Foreign Investment and Free Zones (GAFI), Egypt has signed a total of 111 BITs, only 57% of which came into force (GAFI, 2012). The 103 of these treaties that are publicly available are listed in Appendix III. Egypt is both the top-ranked Arab and African country in terms of BITs signed and is ranked seventh globally.[158] Strikingly amongst the top 10 countries that have signed most BITs in the world, Egypt stands out as the only net capital importer.

Some of the most common features of Egypt's BITs include (Mossallem, 2016):

- The definition of investment in BITs signed by Egypt is generally broad and includes language like 'every kind of assets'. Definitions include tangible and intangible assets and generally apply to existing as well as new investments.
- The majority of BITs provide MFN and NT standards. In most cases, these standards cover 'the management, maintenance, use, enjoyment or disposal' of investments.
- The majority BITs provide for FET in general terms (unqualified) often complemented with standards, such as those prohibiting arbitrary or discriminatory measures or requiring the duty to observe investment related commitments.
- All BITs entered into by Egypt contain protection against expropriation, and most of them provide for the payment on adequate compensation in case of expropriation of the investment. The majority of BITs extend guarantees against expropriation to indirect expropriation measures.
- The full protection and security standard is present in most of Egypt's BITs.
- The majority of BITs signed by Egypt provide general consent for ISDS with ICSID featuring as the most common forum. Most BITs also provide for State-State dispute resolution.

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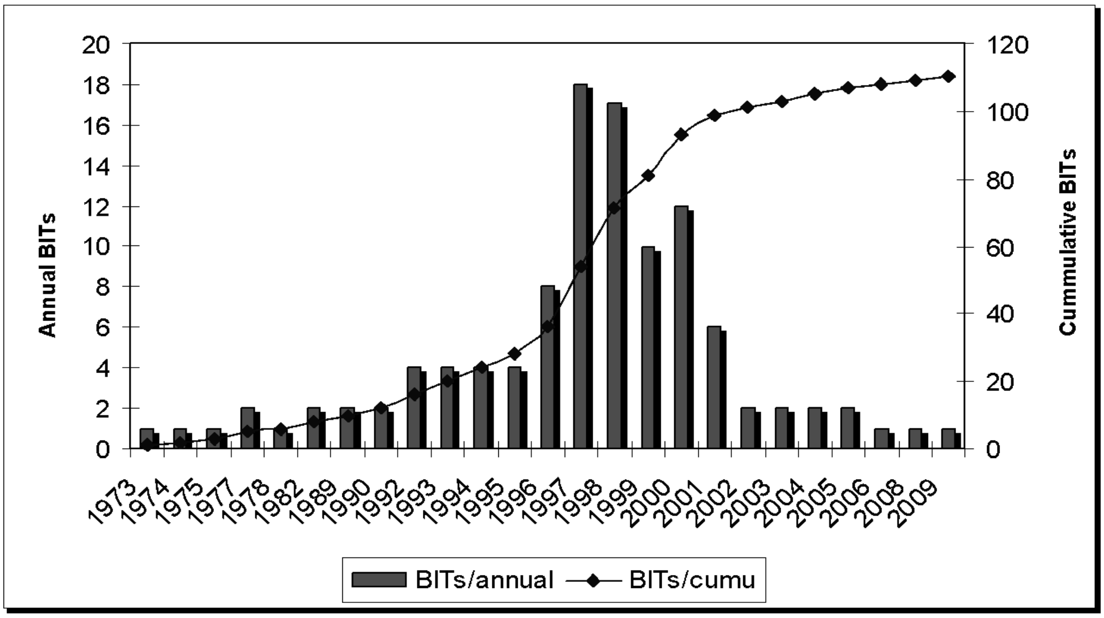
[158] See UNCTAD, 'IIAs by Economy'. International Investment Agreements Navigator. Available at: http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu (Accessed 16 June 2017).

- The majority of Egypt's BITs have an initial ten-year duration, and in several cases, automatic renewal is allowed for an indefinite term. Most treaties also have a survival clause that extends protection for ten years post-termination.

Egypt’s BIT signing efforts went through three phases as demonstrated in the graph below (Figure 13). In the first phase, between 1973-1990, the number of BITs signed grew at a relatively stable pace (Hussein, 2013). During the phase in which Egypt made the shift both politically towards the West and economically towards neoliberalism, Egypt signed BITs with some of the leading capital exporters including the US, UK, Germany, France and Japan. The second phase, from 1990-2000, witnessed an exponential growth rate in Egypt's BITs which coincided with the boom in the rate of BITs signed on the international scene. During this decade the number of BITs signed with developing countries, in particular, grew significantly (although at least 30 per cent of these BITs did not enter into force). The third and final phase (2000-2010) saw a steep decline in the number of BITs signed by Egypt. This decline coincided with Egypt's introduction to investment treaty arbitrations, which started in 1998, and the subsequent internal review conducted by GAFI to address the implications of these treaties.

Figure 13: Number of BITs concluded by Egypt, annual and cumulative (1973-2010)



Source: GAFI (2010); Hussein (2013)

4. An Appraisal of Egypt’s BIT Signing Process

There is hardly any available documentation on how and why Egypt signed so many BITs. Discussions with Egyptian officials reveal that there was no clear policy followed. In the majority of cases, Egypt was presented with a draft BIT from the capital exporting partners, which it usually signed without an assessment of the costs and benefits and with little input or negotiation from the Egyptian side. In cases where Egypt signed BITs with other developing countries, the BITs generally followed a template based on the OECD model. Until 2006 (more than three decades after Egypt signed its first BIT), there was no institution responsible for managing BITs, setting a strategy for what kind of BITs would be signed and which countries Egypt would seek to sign BITs with. Another fundamental issue concerning Egypt's BIT signing process that needs to be explained is the reality that, in signing BITs, Egypt accepted investment protection rules that it consistently rejected in multilateral forums both before it began signing BITs and after. Before conducting an appraisal of how Egypt's BIT network was developed below, the first part of this section reflects on one specific BIT signing experience. The US BIT is selected, as it represents a rare occasion in which Egyptian officials attempted to re-negotiate a BIT after initially signing the template that was presented by the capital exporting partner. The US-Egypt BIT signing experience reveals two key issues or themes that will be elaborated further below. The first concerns the initial decision by the Egyptian government to sign a BIT that was based on a template provided by the capital exporting partner without any prior assessment or negotiation. The second relates to Egypt's acceptance of investment rules it had contested in multilateral forums after the renegotiation process resulted in minimal concessions by the US.

4.1 The US BIT Signing Experience

An interview with El-Kosheri regarding the US BIT experience provided critical insights into the approach adopted by the Egyptian officials when signing BITs. This BIT is the most widely discussed of Egypt's BITs as it was the first BIT signed by the US under their BIT programme which was launched in 1981. The Treaty was first signed in Washington in 1982. However, shortly after signing the BIT, the Egyptian government indicated a need to renegotiate a number of the treaty's provisions before it was ratified.[159] After joint discussions, both parties agreed to a few changes which were reflected in a supplementary protocol signed in 1986.[160]

The treaty with Egypt was the result of the first BIT negotiation undertaken by the US, and despite the revisions made upon the Egyptians' request; the treaty remained close to the objectives of the then-US Model BIT.[161] The provisions included in the final version of the BIT were fairly consistent with the clauses outlined in Section 3.1 except for the absence of the FET standard. Egypt's agreement to these standards of protection, the ISDS option, and in particular its acceptance of international law as the governing law, was considered an important achievement by the then US administration, for the BIT programme and US FDI and international arbitration policies more generally.[162]

Based on knowledge acquired from public officials, in interview, El-Kosheri claims that the US government submitted the first draft of the BIT to the Egyptian government in the 1970s. At the time the Egyptian Minister of Economy was in charge of investment policies in Egypt, and he was not convinced that this BIT was worth pursuing and hence the draft BIT was 'kept in the drawer, and no action was taken' (Interview with El-Kosheri, 2017). It was not until Waguih Shindy was appointed as Minister of Investment in 1982 that discussions over the BIT were revived. According to El-Kosheri, shortly after Shindy acceded to that role an American diplomat responsible for economic affairs at the US embassy in Cairo visited the Minister of Investment to follow up on the BIT arguing that it would 'open the door for American investments'. The diplomat also extended an invitation for the Minister to visit Washington and sign the BIT in a ceremony (Interview with El-Kosheri, 2017). According to El-Kosheri's government sources, the Minister approved the BIT without a proper review and made the trip Washington to sign the BIT in a grand ceremony (Interview with El-Kosheri, 2017).

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159 Treaty Between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments. Done at Washington, 29 September 1982. Senate Treaty Doc. No. 24, 99th Cong., 2nd Sess. (1986). Hereinafter US–Egypt BIT.

160 Ibid.

161 Ibid.

162 Ibid.

Before the BIT was ratified, there was a reshuffle in the Egyptian Cabinet, and Sultan Abu Aly became Minister of Economy in 1985. El-Kosheri claims that once Abu Aly reviewed the BIT signed with the US, he informed his American counterparts that the BIT could not be submitted to the parliament for ratification in its existing form (Interview with El-Kosheri, 2017). The discussions and negotiations were not public, but the outcomes were revealed in the revised BIT. The main amendments included amending the definition of investments in the BIT by clarifying that control entails having 'a substantial share of ownership rights and the ability to exercise decisive influence'.[163] The second main amendment was the introduction of a list of sectors to be excluded from the national treatment standard.[164]

Overall, the changes were quite limited, as the Egyptian officials were not able to negotiate any fundamental changes to the BIT. As Vandevelde (1988, p. 223) argues, the deviations from the US model BIT in the final draft of the BIT with Egypt were not concessions to Egypt but were instead based on the language of earlier 1982 model texts which had been used to negotiate the Egypt BIT.

Despite Egypt's attempt to renegotiate, the final BIT contained a general consent to investor-State arbitration in ICSID amongst other forums contradicting Egypt's previous decision to remove the consent from its Investment Law as discussed in Section 3. The treaty also includes expansive protection standards like the scope of protection for expropriation and indirect expropriation, not to mention the national treatment standard (even with the exceptions). These protection standards contradict Egypt's previous stance on foreign investment protection measures during the 1960's and early 1970's as illustrated in more detail below.

Egypt's experience with the US BIT revealed that there was no preparation for signing BITs and no task force to review BITs. The decision to review and renegotiate the US BIT seemed more like a one-off intervention by the Minister at the time to try and limit some of the expansive protection privileges provided by the BIT, but it was not part of an effort to bring Egypt's BITs it in line with Egypt's economic priorities or policies.

[163] Ibid, p. 19.

[164] Ibid, p. 7.

In the rest of this section, an eclectic approach is adopted to explain how and why Egypt signed its BITs. As argued in Chapter 3, this thesis proposes to combine the Bounded Rationality framework and the Structural Power theory as adapted by Poulsen and Gwynn respectively to explain how and why developing countries signed BITs. In Egypt's case, Poulsen's hypothesis is useful to explain how Egypt signed BITs assuming they would increase FDI inflows without proper review. The Structural Power framework, however, can explain why Egypt accepted the same investment rules that it had initially rejected in multilateral forums like the UN, before signing BITs, and which it continued to resist in bodies like the WTO, after it had signed a significant number of BITs.

The first part of this appraisal discusses the author's research findings on Egypt's approach to signing BITs and demonstrates how this can be explained using the Bounded Rationality framework. The second part traces Egypt's history in resisting investment protection rules promoted by capital-exporting countries in multilateral forums, before deploying the Structural Power framework to explain the dichotomy in Egypt's stance towards investment protection rules in bilateral and multilateral settings.

4.2 Explaining Egypt's Approach to Signing BITs using the Bounded Rationality Framework

According to an Egyptian official involved in Egypt's BIT programme, in 1973 when Egypt was in dire need of external capital, developed countries from the West were exerting pressure on their developing counterparts to sign BITs, convincing them that they were necessary to attract FDI (Interview with Egyptian official 1, 2017). The official claimed in interview that Egyptian governments which signed these BITs were convinced of 'the arguments made by major capital exporting countries and started signing BITs with the expectation that they would attract FDI' (Interview with Egyptian official 1, 2017). However, there was no study or assessment of the costs and benefits of the treaties signed and later ratified by the Egyptian government, nor was there a model of the type of BIT Egypt would be willing to sign. Instead during the period 1973-1990, Egypt signed BITs mostly with major capital-exporting countries each of which presented template BITs that were based on their preferences and served their interests (Interview with Egyptian official 1, 2017). Egypt signed these BITs with minimal negotiations, and there are no accessible records of any discussions regarding BITs within government or in parliament.

Experts in the legal field in Egypt were puzzled that the State did not build on its experience with the US BIT negotiations to set out a clear policy on what it was looking for in BITs (Interview with El-Kosheri, 2017; Interview with partner in Egyptian law firm, 2017). The expectation was that after that experience Egyptian officials would start taking BITs seriously after acknowledging the expansive nature of the protection standards in them. It was also an opportunity to create a task force to carefully assess these treaties and develop a model to be used in negotiations for future treaties. On the contrary, officials and experts interviewed about Egypt's approach to signing BITs reveal that the US BIT experience was ignored, and that during the 1990s, the period in which Egypt signed most of its treaties, Egypt started using BITs for political and diplomatic reasons. According to an Egyptian official there were no clear criteria as to with whom Egypt would seek to sign BITs (Interview Egyptian official 1, 2017).

During that decade (1990-2000), BITs were signed at very high frequency and in a haphazard manner with no apparent pattern as to which countries were being targeted. Egypt signed around 70 BITs in that phase. The Egyptian official's claim that BITs were signed for political reasons was endorsed by an international expert who is well acquainted with Egypt’s BIT programme. The international expert reiterated that BITs were being signed during missions by then President, Hosni Mubarak, as a tool to signal intent of developing cordial relations with these countries (Interview with international expert, 2017). The international expert also claims that there were no real negotiations held before signing. Instead an OECD BIT template was being casually signed during Mubarak's diplomatic visits (Interview with international expert, 2017). According to the expert, a mapping of Mubarak's major diplomatic missions during that period could be used to trace when BITs were signed and with whom they were signed (Interview with international expert, 2017). Hence, BITs were treated as if they were Memorandums of Understanding (MoU) rather than binding legal treaties.

Towards the end of the 1990s, Egypt started experiencing its first set of investment treaty arbitration cases. It was not until the 'SIAG case',[165] discussed in further detail in Section 5 below, that Egypt started to take its BITs more seriously. Despite it being the eighth case Egypt had faced, the size of compensation claimed, and the controversial nature of the claim rang alarm bells for the Egyptian government. In the aftermath of the case, Egypt restricted the signing of new BITs, and in 2006, GAFI was designated as the authority responsible for managing, negotiating and signing Egypt's BITs. For more than thirty years since Egypt signed its first BIT, it was never clear which body was in charge of BITs. This explains why BITs were signed by different Ministries including Trade, Economy, Foreign Affairs and International Cooperation.

The findings above regarding Egypt's approach to signing BITs are consistent with Poulsen's hypothesis. The Bounded Rationality framework can be used to explain three central themes that are deduced from the findings on Egypt's approach to signing BITs. The first theme is the assumption that BITs would attract FDI and the lack of an assessment of the benefits and costs of these BITs. Poulsen argues that during the 1990s, when BITs signed globally witnessed the highest rate of growth (which was the case for Egypt as well); there were no systematic or rigorous analyses of BITs available, but instead mostly anecdotes. Instead of conducting investor surveys or studies on the relationship between the earlier BITs signed and FDI levels during the same period, governments seemed to adopt 'inferential shortcuts' which may have led to exaggeratedly optimistic views on the necessity of BITs to attract FDI (Poulsen, 2014, p. 8). This explanation is based on applying a combination of the heuristics of representativeness and availability according to Poulsen.

The second theme is Egypt's signing of BIT templates drafted by the foreign partner instead of negotiating the treaties based on their own model, in addition to using an OECD model BIT when negotiating with other developing countries. According to Poulsen's framework this would be explained by the availability heuristic that policies based on a 'concrete and clear model' are highly likely to spread widely as they enable

[165] Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt. ICSID, Case No. ARB/05/15.

policymakers to adopt ‘an already defined prototype rather than going through the hassle of tailoring to local circumstances – however rational that may be’ (Poulsen, 2014, p. 9; Weyland, 2006, pp. 52–54).

Finally, the third theme is that Egypt only began to take BITs more seriously when it faced a controversial investment treaty claim despite readily available information from the experience of other developing countries with investment treaty arbitration. Not to mention that Egypt had experienced investment arbitration in the past (as covered in Section 3) even though it was triggered through the Investment Law and not BITs. Poulsen’s theory explains this behaviour, again relying on insights from behavioural economics which reveal that individuals often ignore low probability high impact risks, such as an investment treaty claim in this case, until they experience it themselves (Poulsen, 2014, p. 3). Moreover, the bounded rational learning hypothesis posits that risks were not just underestimated due to imperfect information as would be explained by a Bayesian framework but instead ignored completely (Poulsen and Aisbett, 2013, p. 10).

While the Bounded Rationality framework can explain how Egypt processed its BITs without a proper assessment of their costs and benefits, it does not explain Egypt's paradoxical behaviour in signing BITs that contained the same investment rules it rejected in multilateral forums both in the past and the present. The next part of this section first illustrates the dichotomy in Egypt's position towards investment protection rules in bilateral and multilateral settings. The rest of the section explains how Gwynn's adaptation of the Structural Power theory can explain this paradox.

4.3 Explaining Egypt’s Paradoxical Behaviour using Structural Power Theory

Egypt’s decision to sign BITs represents a paradox for two main reasons. First, Egypt adopted an unequivocal stance against some of the protection standards in its existing BITs in multilateral forums both before and after they signed these BITs. This is evident in Egypt's position on foreign investment protection rules in UN forums during the period that preceded the birth of the BITs regime, as well as its position on the Investment Issue in the WTO since it was introduced as part of the ‘Singapore Issues’ in 1996. The second reason is that unlike other developing countries, Egypt had the advantage of an early experience with international investment arbitration cases as demonstrated above. Whereas this experience led Egypt to amend its investment legislation, the BITs it signed after these experiences included the very same general consent to ISDS that allowed investors to take the State to international arbitration without requiring prior agreement of the State or exhausting local remedies (via domestic courts) first.

These two reasons make it difficult to argue that Egypt was utterly unaware of the potential threat that these treaties pose. Having discussed Egypt's experience with arbitration triggered through the investment dispute settlement clause in the Investment Law in Section 3, this Section traces Egypt's rejection of some of the principal investment protection rules (included in its existing BITs) in multilateral forums both before it signed its BITs and after. As argued in Chapter 3, the Structural Power theory can be used to explain why developing countries have accepted investment rules in their BITs which they had explicitly rejected in multilateral forums. In Egypt's case, structural power is exercised by the creditors who used their influence to pressure Egyptian governments to undergo intensive investment liberalisation. While BITs were never specifically included in any of the conditionalities set by the funders, signing them was clearly part of the investment framework promoted by the capital-exporting countries and the IFIs. The first segment of this section documents Egypt's historical resistance of investment protection standards promoted by capital-exporting countries, before illustrating how the Structural Power theory can explain why Egypt accepted these rules in its BITs in the next segment.

4.3.1 The Dichotomy in Egypt’s Multilateral Stance and Bilateral Stance on Investment Protection Rules

The debate between developing and developed countries over investment protection rules in the 1960s and 1970s was covered in Chapter 3. Hence, this section will mainly focus on Egypt's position on investment rules in multilateral forums and how this contradicts the decision to sign BITs.

As documented in Chapter 3, from the early 1960s through the mid-1970s, the General Assembly of the United Nations was dominated by developing countries and passed a series of resolutions that endorsed the sovereignty of nations in regulating foreign investment. These resolutions reflected the developing countries' interests by stating that foreign investments would be regulated according to the domestic laws of the host State and that foreign investment disputes should be settled in the courts of the host

State. Developing countries' efforts were led through the Non-Aligned Movement (NAM)[166] and the G77[167] both of which were a culmination of the Third World Project of the 1955 Bandung Conference (Abou-El-Fadl, 2015). Egypt was a founding member of both the NAM and the G77. Hence, it was unequivocally against the investment protection rules promoted by the developed countries.

One of the biggest achievements of the NAM was the UN General Assembly Resolution No. 1803 (Anghie, 2007).[168] Under the pressure of the G77, another resolution was passed in 1973 that strengthened the position of the developing countries (United Nations General Assembly, 1973).[169] Furthermore, in 1974, the UN Resolution No. 3201, established the NIEO which was originally drafted in the NAM summit in Algiers in 1973 (Tarrosy, 2005).[170]

Although these General Assembly resolutions were not binding and did not represent authoritative statements of international law, they were reflective of the state of international law (Guzman, 1998). Remarkably, however, Egypt (amongst several other developing countries) ended up signing BITs which not only included the rules it had resisted vociferously for years in the UN but also extended the scope of protection provided to foreign investors as listed in Section 3.1 above. Egypt presided over the G77 in 1972/1973 and signed its first BIT with Switzerland in 1973. The paradox does not end there, for after Egypt had signed these BITs and accepted these standards they rejected similar standards in another multilateral forum: the WTO in the mid-1990s.

As discussed in Chapter 3, most developing countries opposed the introduction of negotiations on investment at the WTO. Since the issue was first raised at the WTO Ministerial in Singapore in 1996, Egypt, amongst other developing countries, questioned whether the WTO was an appropriate forum for an investment agreement

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[166] The Non-Aligned Movement (NAM) created in the Bandung Conference in 1955 emerged in the context of the wave of decolonisation and the independence struggles in the developing world.

[167] The G77 was founded in 1964 by seventy-seven developing countries, signatories of the Joint Declaration of the Seventy-Seven Developing Countries issued at the end of the first session of UNCTAD in Geneva.

[168] See Chapter 3.

[169] The resolution on Permanent Sovereignty over Natural Resources (United Nations General Assembly, 1973). See Chapter 3.

[170] See Chapter 3.

and argued that it would threaten their economic development (ActionAid, 2003). The widespread opposition culminated in a joint statement issued at the start of the Cancun Ministerial Conference in 2003 by Ministers which represented 70 developing countries. Egypt was amongst these developing countries and was, in fact, a co-sponsor of the statement. The following extract from the statement indicates the clear position these developing countries held regarding the liberalisation of investment regulation (WTO, 2003):

> The co-sponsors of this paper believe that binding disciplines on Singapore issues would certainly not only curtail the policy space for developing countries but would also entail high costs, which many developing countries cannot afford at their present level of development.

While Egypt, along with other developing countries, rejected the investment regulations proposed in the WTO, arguing that it would curtail their policy space and have negative repercussions on their development, it continued to accept the same provisions in the BITs it was signing at the time.

4.3.2 The Role of Structural Power

The paradoxical behaviour of Egypt and other developing countries can be explained using Gwynn's Structural Power framework, as set out in Chapter 3. When analysing the context in which Egypt signed its BITs through the lens of structural power, a clear reliance on the financial dimension in the form of financial credit emerges. As Gwynn (2016) explains, the power is exercised in this dimension by limiting the range of choices of the financially weaker party to the extent that what is proposed by the creditor will generally be accepted. As was the case for other developing countries like Bolivia, Egypt's economic and debt crises meant it had to resort to IFIs and capital exporting countries to bail it out. The last part of this section builds on the historical context in Section 2 to demonstrate how Egypt's dependence on IFIs and adoption of the liberalisation policies (that were an integral component of the conditionalities imposed by these institutions) effectively led to its decision to sign BITs.

As demonstrated in Section 2, Egypt's dire economic conditions and desperate need for external funds led the regime to shift its allegiance from the Eastern bloc to the Western bloc of the Cold War. In order to seek capital in the form of aid and investment from the West, Egypt had to accept the conditionalities imposed by the Bretton Woods institutions. These policy conditions entailed the liberalisation of the

Egyptian economy. The economic support of major capital-exporting countries in the West was also contingent on adopting these policy prescriptions. While no documents specified signing BITs as one of the conditionalities of IFI policy-based loans, the signing of BITs was consistent with the investment liberalisation reforms required by the funding institutions and donor countries. This was first reflected through the promulgation of an Investment Law (No. 43 of 1974) which embodied the main investment protection standards in the BIT templates promoted by the capital-exporting countries and signed by Egypt during the same period that the Law was issued. BITs were presented to the Egyptian authorities by capital exporting countries as soon as Egypt started showing commitment towards adopting investment and trade liberalisation measures. The first four BITs Egypt signed during the first few years of the neoliberal era (Switzerland (1972), Germany (1974), France (1974) and United Kingdom (1975) were with the very same capital exporting countries that Egypt was seeking aid and investment from (see Section 2).[171]

In a few years, Egypt went from resisting a set of investment rules in the UN to accepting them by signing BITs. This clearly demonstrates the structural power enjoyed by both the IFIs and the capital-exporting countries. These actors continued to exercise this structural power over the Country in the 1990s, the decade in which Egypt signed the majority of its BITs.

By 1990, Egypt was facing bankruptcy only to be saved by massive debt write off by the Paris Club creditors in return for Egypt's military intervention in the Gulf War. The cancellation of approximately 24 billion USD or half of Egypt's external debt (Harrigan and El-Said, 2009) came with strings attached. As a pre-requisite for the cancellation of the debt and for new credit inflows, Egypt had to agree to an Economic Reform and Structural Adjustment Programme (ERSAP) with the IMF and World Bank. One of the key policy recommendations of this reform programme was the liberalisation of inward FDI and accordingly Egypt continued to sign BITs on the external level and introduced a series of new laws at the domestic level aimed at

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[171] The British BIT, for instance, was introduced in connection with other agreements, one of which was a credit arrangement to finance British participation in Egyptian development projects worth 40 million GBP (Poulsen, 2017, p. 64). This agreement was considered important to the Egyptian party and facilitated the negotiation of the treaty by providing a 'helpful background' (Poulsen, 2017, pp. 64–65).

attracting foreign investments which were consistent with the protection standards in the BITs being signed. One of the main pieces of legislation introduced was Investment Law No. 8 of 1997. The Law provided investment incentives and guaranteed foreign investors protection against confiscation, sequestration, and nationalisation of their property. This Law also granted foreign investors equal legal treatment regardless of nationality and granted exemptions from certain labour requirements.[172] The reality that new domestic investment laws and regulations reflected a lot of the clauses in Egypt's BITs was no coincidence considering that more than 70 per cent of its BITs were signed during the 1990s.

In conclusion, this section argued that Egypt's economic weakness and need for financial credit clearly limited its options when engaging with the actors that held the structural power. In the case of receiving credit from the IMF, the conditionalities were explicitly aimed at liberalising Egypt's economy, and this included liberalising the treatment of foreign investments. The support of the major capital exporters from the West was also contingent on adopting these structural adjustment policies. By controlling the financial dimension, the major capital-exporting countries were able to impose through BITs the rules that reflected their interest in the framework for international investments (Gwynn, 2016).

The next section documents how Egypt began to realise the potency of BITs and the results of the first internal BIT review conducted by GAFI.

5. BITs Bite: Egypt's First BIT Review

5.1 Siag Case Triggers the BIT Review

Egypt only started to realise the extent to which BITs can 'bite', and hence grasped their legal and political implications, when it started facing treaty-based arbitration cases from the late 1990s. Between 1998 and 2011, Egypt faced 11 investment arbitration cases.[173] The State prevailed in seven cases, lost three and settled one case before the tribunal reached a verdict. The total amount awarded in compensation in all the cases lost by Egypt until 2011 reached approximately 100 million USD (El-Kady,

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[172] See Articles 8,9, and 12 of Law No. 8 of 1997. Egyptian Official Gazette.

[173] See Appendix IV.

2012).[174] According to an Egyptian official, one case, in particular, rang alarm bells, namely the controversial *Siag v. Egypt* (2005) case filed in ICSID.[175] The case alerted the Egyptian authorities to the threat posed by BITs due to the size of compensation awarded and the manner in which one of the claimants was able to circumvent a rule under the ICSID convention that prohibits individuals from pursuing arbitration against their own State (Interview with Egyptian official 1, 2017). A divided ICSID tribunal ordered the government of Egypt to pay 74.5 Million USD to an Italian national, Mr Waguih Siag, as a result of the expropriation of a commercial real-estate venture.[176]

The controversy relates to whether Mr Siag had, in effect, lost his Egyptian nationality during the period in which his investment was expropriated as well as whether he had committed fraud in the process of acquiring another nationality. It should be noted that, as per Article 25 clause (2)(a), a natural person who was a national of the State party to the dispute would not be eligible to be a party in proceedings under the auspices of the Centre, even if at the same time he had the nationality of another State (ICSID, 1966). This exclusion is absolute. There is no way to override it, not even by the States that signed a BIT, and not even by an explicit agreement between the investor and the State involved (Anzola, 2016). Thus, for Mr Siag to be able to sue Egypt at ICSID, he needed to establish that he no longer had Egyptian nationality by the time that he filed for arbitration with ICSID.

Despite receiving evidence that Mr Siag had an Egyptian passport at the time of the investment, the majority of the tribunal concluded in its May 2007 jurisdiction award that Mr Siag's Egyptian nationality automatically lapsed one year after his acquisition of Lebanese nationality in 1989.[177] According to the tribunal this automatic lapse occurred as a result of the claimant's failure to expressly request that his Egyptian nationality be preserved, as is required under Egyptian law (Peterson, 2009b).[178]

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[174] Excluding legal expenses and compounded interest fees.

[175] Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt. Award. ICSID, Case No. ARB/05/15.

[176] Ibid, para 631.

[177] Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt. Decision on Jurisdiction, and Partial Dissenting Opinion of Francisco Orrego Vicuña ICSID, Case No. ARB/05/15, para 172.

[178] Ibid.

Following the jurisdiction award, Egypt presented new evidence which it alleged proved Mr Siag had fraudulently procured his Lebanese nationality, hence casting doubt on the validity of Mr Siag's acquisition of the Lebanese nationality (Peterson, 2009b) .

In its final verdict, the ICSID tribunal was split on the question of whether fraud or some other impropriety had occurred (Peterson, 2009b). Two of the three arbitrators on the panel, ruled that there was no convincing evidence of fraud or impropriety.[179] However, in the view of the dissenting arbitrator, Professor Francisco Orrego Vicuna, there was enough circumstantial evidence to support an inference of fraud or impropriety on the part of one of the claimants (Peterson, 2009b).[180] Strikingly, the majority proceeded to add that even if a fraudulent act had occurred during the acquisition of Mr Siag's Lebanese nationality, this might not have been detrimental to his claim (Peterson, 2009b).[181]

As mentioned above Egypt's experience in the Siag case led officials to start taking BITs seriously. While Egypt had been experiencing treaty-based arbitration cases since 1998, it was the Siag case that triggered the decision to conduct a review of its BITs. An internal review of Egypt's BIT network conducted by GAFI in 2006 concluded that there was a state of imbalance that characterised Egypt's BITs in favour of foreign investors at the expense of the host country's policy space, deviating from one of the essential objectives stipulated in treaty preambles concerning the contribution to the economic development of its contracting parties (GAFI, 2010). Despite the results of the review, and unlike its counterparts (Bolivia and South Africa), the Egyptian authorities maintained the status quo and refrained from making any substantive changes to Egypt's BITs. The next section documents the results of the review process in more detail, and Section 6 addresses how the decision to maintain the status quo allowed investors to challenge efforts by the State to redress corruption and introduce progressive economic policies post-2011.

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179 Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt. Award. ICSID, Case No. ARB/05/15, para 631.

180 See Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt. Dissenting Opinion of Professor Franciso Orrego Vicuña. ICSID, Case No. ARB/05/15, p. 1.

181 See Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt. ICSID, Case No. ARB/05/15, para 357.

5.2 The Outcome of the BIT Review: A New Model BIT with Incremental Reforms

As a result of its experience with arbitration cases, and in line with the growing trend at the time, Egypt conducted an internal review of its BITs. In 2006, GAFI engaged with UNCTAD to conduct a review of its BITs network. The review was far from comprehensive compared to similar exercises completed by other developing countries such as South Africa and was not published. Nevertheless, an internal assessment of Egypt's BIT network revealed a lack of consistency in the content of the BITs signed and the absence of a link between the content of the treaties and Egypt's economic objectives or priorities. This lack of consistency was the result of the 'dominance of the political objectives over the economic ones during the processes of negotiation and signature' (GAFI, 2012, p. 5) According to an Egyptian official, the review also revealed that there was no evidence of a causal relationship or even correlation between BITs and FDI despite being cited as one of the primary motivations behind signing BITs (Interview with Egyptian official 1, 2017).

Egypt's response after its first review was to launch a reform programme to ensure there was a clear system in place for signing new treaties. The objectives of this programme were to ensure that any new BITs signed would be driven by real economic interests and ensuring the content of these BITs achieved a more balanced relationship between the interests of the investor and that of the State. Furthermore, as a result of this process, the Egyptian Model of Investment Promotion and Protection Agreement was adopted in 2007 ('Model BIT'). The main objectives of the new Model BIT according to GAFI (2012, p. 9) were:

> (i) Achieving consistency and conformity between Egyptian BITs; and (ii) Restoring the sustainable balance between the objectives of promotion, protection and liberalisation of foreign investments, on the one hand, and its regulation by the State, on the other hand. These objectives were driven by the desire to enforce the sovereign right of the host State to regulate FDI in order to ensure it contributes to achieving sustainable development, as well as the need to maintain the policy space necessary to achieve national social and economic objectives.

Some of the main features of the Model BIT included (GAFI, 2012; Mossallem, 2016):

1. The Model BIT provided more precise definitions of the main terms in BITs, especially those of 'investment' and 'investor'. These changes included moving from the traditional broad asset-based definition of 'investment',

through specific limitations and linking covered investments with satisfying certain economic characteristics and respecting the laws and regulations of the host State, besides excluding 'non-investment' activities. Also, the new definition of 'investor' concentrated on proving a real relationship between the investor and his home country, either a natural person or a legal entity, to exclude unwelcome investors, e.g. shell companies.

2. Regarding substantive standards of protection, the Model BIT retained the FET provision but equated it to the minimum standard of treatment of aliens under customary international law. In an attempt to eliminate 'treaty shopping' practices, the Model BIT excluded the application of MFN standards on ISDS clauses. The Model BIT also amended the free transfer of funds clause by acknowledging the host State's right to take safeguard measures to deal with any severe short-term balance of payments or monetary policy difficulties. Other key substantive provisions including expropriation, NT and protection and security standards remained relatively unchanged.
3. Concerning the ISDS provision, the Model BIT introduced limitations on the time period to submit investment claims.

This exercise represented the first concerted effort by Egyptian authorities to engage in treaty drafting. In practice, however, unlike the examples of responses by other developing countries including the two other case studies in this thesis (South Africa and Bolivia) the changes in the new Model BIT were mild, leaving the most controversial clauses including FET, expropriation and ISDS provisions relatively unchanged in existing treaties. More importantly, this Model BIT was not used to attempt to renegotiate any of the existing treaties, leaving Egypt dangerously exposed to what are now publicly known and widely acknowledged threats to its sovereignty to legislate and regulate its economy.

6. The Implications of Egypt's Decision to Maintain the Status Quo

Despite the growing awareness globally of the threats posed by BITs and corresponding efforts to amend or withdraw from these treaties by an increasing number of developing and developed countries (as documented in Chapter 2), Egypt has remained reluctant to amend or replace its existing treaties. Failing to revise the existing treaties returned to haunt Egypt in the aftermath of the January 25th revolution, when it realised that BITs might not only lead to the loss of policy space but also impede efforts to devise new investment policies and regulations to address specific development objectives (El-Kady, 2012). The rest of this section demonstrates how Egypt's membership in the investment treaty regime has restricted its ability to regulate in the public interest.

6.1 BITs Restricting Egypt's Regulatory Space Post-2011: Theory and Practice

One of the triggers that led to the January 25th, 2011 revolution was the neoliberal economic policies implemented over the past several decades, which provided the conditions for both the emergence of a capitalist oligarchy within the regime and an unprecedented rise in socio-economic inequality in society at large (Roccu, 2013). Rapid deregulation, liberalisation and privatisation efforts aimed at increasing FDI inflows also paved the way for rampant corruption (El-Kady, 2012). In the 1990s, a privatisation programme which was part of an IMF sponsored ERSAP was implemented. Several public institutions were privatised either through outright sale or government partnerships with private investors (Hazzaa and Kumpf, 2015). This process lacked both transparency and anti-corruption control measures (Hazzaa and Kumpf, 2015). Moreover, government officials regularly undervalued State-owned assets and sold these to foreign and domestic investors for a fraction of their market values (El-Kady, 2012), as revealed by the court rulings post-2011. Economic liberalisation certainly benefited foreign investors as investor-friendly laws were issued. However, FDI benefits to the national economy were limited as FDI failed to promote sufficient economic growth to improve income distribution and lower poverty levels (Kheir-El-Din and El-Laithy, 2006, p. 28). Instead, the beneficiaries of FDI and economic policies during that era were the higher income segments of the population and the class of crony capitalists close to the regime (Fadel, 2011).

According to Bonnitcha (2014), a common feature of authoritarian regimes is that economic benefits, including investment opportunities, are distributed through networks of patronage and cronyism. Consequently, in the event of a revolution or a transition to a new regime, there may be demands for the reclamation of public funds and assets as well as the introduction of more progressive economic and social policies with the aim of achieving a more equitable sharing of these economic benefits. This was precisely the situation in Egypt post-January 2011, before the State realised that in many respects investment treaties do not provide sufficient flexibility to incoming regimes as they preclude various options for redistribution and reform. Egypt's experience post-2011 was consistent with the results of a study conducted on 114 developing countries which concluded that BITs can directly reduce host government incentive and ability to implement redistributive policies (Bodea and Ye, 2017). By enabling investors to challenge efforts to introduce progressive economic and social policies, BITs tend to indirectly lock-in initial favourable policies to foreign investors in the fields of taxes, welfare spending, and labour practices and constrain the future policy improvements in these fields (Bodea and Ye, 2017).

The rest of this section demonstrates how BITs restricted Egypt's regulatory space post-2011, both in terms of theory and practice.

6.2 In Theory

Post-2011, the primary regulatory concern for Egypt stemmed from the impact of BITs on the ability of the government to regulate the economy in line with its efforts to reform the failed economic liberalisation policies of the ousted regime. Another major concern was the extent to which these treaties allow Egypt to take measures to combat corruption when it involves deals between foreign investors and the previous regime. As demonstrated in Chapter 2, the substantive protection clauses in BITs come with limited safeguards to allow host country governments to regulate with the aim of protecting the public interest. This section focuses on the expansive nature of two of the most problematic substantive provisions in Egypt's BITs, FET and expropriation, highlighting how they empowered foreign investors to restrict the ability of the State to regulate post-2011.

6.2.1 Fair and Equitable Treatment

A significant challenge faced by Egyptian governments post-2011 is the issue of 'legitimate expectations' of foreign investors arising from previous government policies and measures to attract investment before the revolution (El-Kady, 2012). As discussed in Chapter 2, arbitration tribunals have consistently identified these expectations as a critical aspect of the FET standard in BITs. Again as demonstrated in Chapter 2, in practice, it is difficult to predict when actions of a government will breach the FET standard. The wording of the clause itself typically gives no detailed guidance, and tribunals considering this obligation have delivered widely differing interpretations. Indeed, some tribunals have interpreted the FET standard as a guarantee against all significant changes to the laws and policies governing a foreign investment (Bonnitcha, 2014).

According to El-Kady (2012), this concept is particularly important in times of political and social change and uncertainty. This was evident in Egypt's case. El-Kady (2012, p. 6) argues that the 'legitimate expectations' of foreign investors under FET reduced the ability of Egyptian governments to implement new regulations that could potentially impact foreign investors without increasing the risks of breaching the clause, even if those measures are implemented to serve 'legitimate public purposes'.[182] Accordingly, this posed a serious challenge to Egyptian policymakers who are expected to intervene in the economy and introduce regulatory changes with the aim of pursuing economic and social justice (El-Kady, 2012).

The FET standard has triggered several investment claims against Egypt, and in this particular context, i.e. post-2011, one case to be discussed in the next section is the *Veolia v. Egypt* (2012) case. Furthermore, this standard can also be considered as one of the main drivers of the regulatory chill effect as it threatens any new regulatory measures that may affect the profitability or interests of foreign investors.

6.2.2 Expropriation

As currently drafted, Egypt's BITs do not allow scope for an incoming regime to renationalise foreign investments or cancel concessions, except on payment of full market value compensation (see Section 3.1). The protection extends to investments acquired from the host State in a transaction that was not at arm's length or acquired at a price that is significantly below their market value (Bonnitcha, 2014). Furthermore, these investments would be entitled to full market value compensation, as the principle of full market value compensation does not allow a tribunal to adjust compensation to reflect the circumstances in which investment was originally acquired (Bonnitcha, 2014). As Bonnitcha (2014) notes, this raises concerns over the fairness of the application of these investment treaties for countries in transition. He further elaborates that by granting foreign investors a right to full market value compensation (even if the investments were originally acquired for a small fraction of

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[182] These measures could include: minimum wage, withdrawal of tax exemptions, requirements to source raw materials from local sources and environmental regulations.

their market value from the previous regime), these treaties 'restrict the ability of an incoming regime to recover assets transferred to associates of the authoritarian regime, and to engage in more radical forms of redistribution' (Bonnitcha, 2014, p. 108) .

Egypt's experience post- 2011 is a case in point, as the Mubarak legacy of corruption led to efforts to recover public assets that were privatised or acquired by investors at rates that were significantly below their market value. Egyptian courts issued at least 11 rulings in the few years following the revolution and more than a dozen lawsuits followed. These court decisions ordered the State to reverse deals signed by the former President's administration (Fick, 2013). Such deals included privatisations as well as concessions and acquisitions of public assets (including land, public companies and factories) by foreign investors. The decision by the State to implement the court rulings triggered several treaty-based and commercial arbitration cases. Eventually, the threat of these cases led the State to back down from its efforts to recover these assets and instead resort to settlements to appease foreign investors and avoid arbitration.

The next section on how BITs have constrained Egypt's regulatory space in practice provides examples of the arbitration cases filed.

6.3 In Practice: Arbitration Cases

Egypt has faced 22 new investment treaty-based arbitration cases since 2011, increasing the total number of cases to 33 and making Egypt one of the top five countries in the world when it comes to the number of investment arbitration cases faced as a host State.[183] Of these 22 cases, the State has lost three cases, won two cases, and settled 10 cases. The remaining seven cases are pending. To provide a glimpse of the size of the financial burden these cases have on the public budget of the State, it is worth noting that Egypt paid c. 164 million USD for only three of the 10 settled cases.[184] In one of the three cases Egypt has lost, the tribunal has ordered the State to pay the investor c. 2 billion USD in compensation.[185] In the remaining two, the

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[183] See Appendix IV.

[184] The three cases for which the settlement amounts were publicly disclosed are: Indorama International Finance Limited v. Arab Republic of Egypt. ICSID, Case No. ARB/11/32; ASA International S.p.A. v. Arab Republic of Egypt. ICSID, Case No. ARB/13/23; and ArcelorMittal S.A. v. Arab Republic of Egypt. ICSID, Case No. ARB/15/47.

[185] Unión Fenosa Gas, S.A. v. Arab Republic of Egypt. ICSID, Case No. ARB/14/4.

tribunals have yet to determine the compensation to be paid by the State to the investors, but the damages claimed by the investors exceed 1.7 billion USD.[186] Of the seven pending cases, information on the compensation claimed by investors is only available for one case and amounts to c. 150 million USD.[187]

The rest of this section will address four cases that have been triggered by the introduction of new labour legislation, land sales and other commercial transactions involving corruption. The disputes below concern situations in which the incoming Egyptian governments sought to revoke or amend measures adopted by the previous regime. These claims illustrate how BITs have constrained Egypt's regulatory space in practice. It is important to note that 18 other cases were filed post-2011, some of which entail much more significant financial implications and also have an impact on policy space. However, this chapter focuses on the four below as these indicate how attempts to redress corruption and introduce more progressive economic policies were stifled early on. Going forward, successive governments have taken measures reminiscent of the pre-2011 era by catering to investors at the expense of public interest.

The *Veolia v. Egypt* (2012) case[188] is an example of a claim triggered by the incoming Egyptian government's efforts to redress the economic policies of the previous regime (Bonnitcha, 2014) and introduce progressive economic policies. French multinational Veolia had an ICSID arbitration claim for 82 million EUR registered against Egypt in 2012. Veolia signed a contract in 2001 for waste management in Alexandria. However, the 15-year contract was terminated early in 2011, as a result of a series of disputes between the local authority and Veolia (Peterson, 2012b). One of the main issues in this dispute was the company's demand to be compensated for changes to local labour laws which include an increase in minimum wages (Peterson, 2012). The company claimed that provisions in the contract between the authority and company stipulated that the authority should compensate the company for financial implications

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[186] The two other cases that Egypt has lost post-2011 are: Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v. Arab Republic of Egypt. ICSID, Case No. ARB/12/11; Yosef Maiman, Merhav (MNF), Merhav-Ampal Group, Merhav-Ampal Energy Holdings v. Arab Republic of Egypt. PCA, Case No. 2012/26.

[187] Al Jazeera Media Network v. Arab Republic of Egypt. ICSID, Case No. ARB/16/1.

[188] Veolia Propreté v. Arab Republic of Egypt. ICSID, Case No. ARB/12/15.

of such changes in legislation (Peterson, 2012b). After six years of defending the case, which may potentially cost millions of dollars in legal and arbitration costs, the ICSID tribunal ruled in favour of the State in May 2018.[189]

The *Indorama v. Egypt* (2011) case[190] is an example of an arbitration case in which an investor challenged efforts to combat corruption by the domestic judiciary system through a BIT.[191] In 2007, Indorama, a multinational textile company, acquired the privatised Shebin El Kom textile factory for c. 15 million USD (Al Borsa News, 2015). In September 2011, the Egyptian Administrative court ruled that the privatisation process had been unlawful because the investor had not paid full market value for the factory (Fick, 2013). This renationalisation was one of several ordered by the Egyptian courts on the grounds that privatisations carried out by the Mubarak regime had not been conducted on a fair market value basis. Indorama initially claimed 156 million USD in compensation before eventually settling for 54 million USD in 2015 (Al Borsa News, 2015). The financial cost incurred by this claim was not the only consequence of the challenge faced by Egypt. The threat of arbitration eventually led Egyptian authorities to back down from efforts to renationalise or cancel concessions that had proven to be acquired in corrupt circumstances and instead seek settlements with the investors implicated in these transactions.

The *Damac v. Egypt* (2011) [192] and *Utsch v. Egypt* (2013)[193] cases are both examples of cases where the investments involve allegations that they were not acquired through an arm's length transaction and that the price paid was significantly below the fair market value (Bonnitcha, 2014). Both also included criminal convictions against the investors but ended up eventually being settled out of court.[194]

In the case of 'Damac', the investor, Hussain Sajwani, had acquired a plot of land on Gamsha Bay on the Red Sea Coast in 2006 for the development of a residential

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[189] Tribunal documents are not publicly available.

[190] Indorama International Finance Limited v. Arab Republic of Egypt. ICSID, Case No. ARB/11/32.

[191] Tribunal documents not publicly available.

[192] Hussain Sajwani, Damac Park Avenue for Real Estate Development S.A.E., and Damac Gamsha Bay for Development S.A.E. v. Arab Republic of Egypt. ICSID, Case No. ARB/11/16.

[193] Utsch M.O.V.E.R.S. International GmbH, Erich Utsch Aktiengesellschaft, and Mr Helmut Jungbluth v. Arab Republic of Egypt. ICSID, Case No. ARB/13/37.

[194] Tribunal documents for both cases are not publicly available.

complex. Shortly after the revolution Sajwani and former tourism minister Zuhair Garranah were charged for corruption in the process of purchasing the land and the squandering of public assets respectively. Sajwani was sentenced ‘in absentia' to five years, fined 40 million USD and ordered to return the land to the State. Sajwani reacted by filing an ICSID claim in May 2011. In 2013, the government negotiated a settlement ‘aiming to spare Egypt the risks of international arbitration, safeguard its image abroad and reassure investors amidst continuing political uncertainty’ (Fick, 2013). The official terms of the settlement were confidential.

In the Utsch case, or the ‘License Plates' case, as it was publicly known, three members of the Cabinet (former Prime Minister Ahmed Nazif, former Interior Minister Habib El Adly, and former Finance Minister Youssef Boutros Ghali) were indicted on corruption charges related to the 2008 purchase of car license plates from Utsch (Enterprise, 2017). The court in 2011 had also convicted both Erich Utsch, AG's Chairman and CEO Helmut Jungbluth in absentia (Enterprise, 2017). The Company responded by filing an international arbitration case against Egypt in ICSID seeking compensation for damages. Jungbluth was later acquitted, and after negotiations with The Ministerial Committee for Settlement of Investment Disputes, both parties agreed to suspend case proceedings in July 2016 before reaching a resolution to drop the case that did not involve any settlements (Enterprise, 2017). The controversial decision to settle criminal charges through an extrajudicial committee bypassing the Egyptian courts was part of the regulatory chill caused by the influx of arbitration cases which is addressed further in the next section.

7. Remaining Loyal to the Regime? Egypt Backtracks in the Face of Arbitration

7.1 Regulatory Chill

Post-revolution promises to unwind the Mubarak era FDI policies and hold investors implicated in deals that involved embezzlement of public funds or assets accountable were short-lived. After realising the extensive nature of the substantive provisions of BITs and how they can constrain the State’s sovereignty to regulate for the public interest, the successive governments that took office refrained from introducing any new FDI regulatory measures that could trouble foreign investors (e.g. progressive taxation, minimum wage). The State realised that prospects of successfully implementing the judicial rulings on the corruption cases were low, as the likelihood that a tribunal will find that these decisions constitute expropriation or other breaches under the BITs was high (Hazzaa and Kumpf, 2015). Upon this realisation, the Egyptian government started backtracking on its efforts to hold investors accountable for corruption by first introducing dispute settlement committees to negotiate settlements with investors before eventually going a step further to prevent domestic courts from annulling contracts (Hazzaa and Kumpf, 2015).

7.1.1 Dispute Settlement Committees

In 2012, faced with an increasing number of investment disputes, the Prime Minister issued Decree No. 1115 of 2012 establishing an Investment Dispute Settlement Ministerial Committee, presided by the Minister of Justice (Abbas and Matouk, 2016). This committee was established to address investors' complaints, requests and disputes with any governmental entity.[195] In 2015, in applying the new amendments of the Investment Law, the Prime Minister established another ministerial committee headed by the Prime Minister through Decree No. 3412 of 2015. This committee was granted the competency to negotiate amicable settlements for disputes arising out of investment contracts to which the government or an affiliated public or private government entity are parties (Abbas and Matouk, 2016).[196] It also allowed the government to bypass the Administrative Courts and settle with investors who had been indicted with corruption charges as illustrated in the Utsch case above.

After backtracking on introducing new progressive policies and reconciling with investors who were charged for corruption in privatisation and other commercial deals under the threat of arbitration cases, Egypt represented a classic example of the regulatory chill effect (see Chapter 2). Moreover, Egyptian authorities have gone a step further by introducing new legislation to provide protection that goes above and beyond what is already provided in BITs.

7.1.2 Introducing Legislation to Make Investors Immune from Judicial Accountability

The success of court cases in undoing Mubarak era deals sent shockwaves through the investment community in Egypt (Hazzaa and Kumpf, 2015, p. 5). The interim

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[195]See Article 4 of Decree No. 1115 of 2012. Egyptian Official Gazette.

[196] See Article 2 of Decree No. 3412 of 2015. Egyptian Official Gazette.

government in March 2014 announced in a public memorandum that the high probability of losing investment arbitration cases and incurring large amounts of damages as a result would have a devastating effect on the much-needed economic recovery process (Youm 7, 2014). Consequently, the Egyptian government sought to stop the Administrative Courts from annulling the investment contracts by banning Public Interest Law in all pending and future cases (Hazzaa and Kumpf, 2015).

Earlier in 2012, the transitional government issued Law No. 4 of 2012, creating an extra-judicial committee to resolve cases of embezzlement and undermining the ability of Egypt's courts to hold investors accountable (Joya, 2017). This Law shifts the responsibility to seek reconciliation with investors from the judiciary to the General Authority for Investment and Free Zones, de facto denying courts' jurisdiction over cases of corruption, theft and embezzlement of public funds involving any investor (Khalil et al., 2015).[197] In 2014, the Egyptian government proposed a sweeping ban on third-party litigation through Law No. 32 of 2014 limiting the right to challenge the validity of government contracts to the parties and creditors only.[198] As Hazzaa and Kumpf (2015) explain, by issuing this Law the government has blocked an avenue for the public to respond to institutionalised and widespread corruption and has also foreclosed the courts' review power in the name of foreign investment.

Finally, these measures adopted to protect investors from any domestic judiciary oversight were complemented with additional dispute settlement committees in a desperate attempt to avoid international arbitration. As of the latest Investment Law (Investment Law No. 72 of 2017), there are three committees.[199] Ten cases have been settled thus far, but with the lack of transparency over the terms of the settlements and the lack of accountability on the financial settlements agreed, it becomes almost impossible to assess if they served the public interest.

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[197] See Articles 7 (bis) and 66 (bis) of Law No. 4 of 2012. Egyptian Official Gazette.

[198] See Articles 1 and 2 of Law No. 32 of 2014. Egyptian Official Gazette.

[199] The Complaint Committee, the Committee for Settlement of Investment Contract Disputes, and the Committee for Resolution of Investment Disputes. See Articles 83-89 of Law No. 72 of 2017. Egyptian Official Gazette.

Ironically, however, what has been confirmed to a large extent is that all these measures to appease foreign investors and remain committed to BITs have not stemmed the accumulation of new investment arbitration cases as there have been at least eight new cases since 2015 (see Appendix IV).

7.2 A Second BIT Review and Model BIT: Status Quo Maintained

Although Egypt has made no attempt to revise its current BITs and the government has sought to ensure that its domestic legislation reflects the same standards in its existing BITs, the State has continued to engage with UNCTAD and has publicly stated that it needed to revise its unbalanced BIT network.

In the UNCTAD Expert Meeting on Taking Stock of IIA Reform in March 2016, a GAFI official stated that BITs tend to ‘favour the protection of foreign investors at the expense of the legitimate rights of the host countries in the regulation and treatment of foreign investments in accordance with the right to achieve sustainable economic development’ (GAFI, 2016, pp. 1–2). The statement also revealed that in order to address these imbalances, Egypt is embarking on reforming its network of investment treaties in line with recent developments and best practices using UNCTAD's investment policy framework and its roadmap for reform (GAFI, 2016). The Egyptian official’s statement also revealed that in 2013 Egypt re-engaged with UNCTAD to conduct a more comprehensive review of its BITs and introduce a new Model BIT (‘2013 Model BIT’). The model passed through several phases starting with an internal technical review, consultation with stakeholders from the public and private sector and a peer review presented by relevant international organisations advanced by UNCTAD (GAFI, 2016). Although the 2013 Model BIT is not publicly available, the Vice President of the ICC, Dr Mohamed Abdel Wahab provides an overview of this model BIT in his chapter on Egypt in the publication ‘Enforcement of Investment Treaty Arbitration Awards’ (Abdel Wahab, 2015). Like the 2007 model, the 2013 Model BIT refrains from making any significant reform or revision of the investment protection standards. The Model BIT includes the same investor protection standards, e.g. expropriation, FET, protection and security and the free transfer funds with the inclusion of ‘broadly drafted exclusions or exceptions’ (Abdel Wahab, 2015, p. 206). The 2013 Model BIT also includes an investor-State arbitration provision; the only notable change is the introduction of an article excluding non-discriminatory regulatory actions or measures intended to protect legitimate public welfare objectives in an attempt to limit recourse to investment arbitration (Abdel Wahab, 2015).[200]

Overall, the 2013 Model BIT has introduced modest changes leaving the two most expansively interpreted protection clauses – FET and expropriation – relatively unchanged, and sticking with ISDS. Most importantly, this model, which has not been officially released as of September 2018, will remain of little significance until Egypt decides and succeeds to replace or renegotiate its existing BITs.

A statement by an Egyptian official at a UNCTAD forum in 2016, revealed that the State in collaboration with UNCTAD prepared a comprehensive analytical report on Egypt's BITs (GAFI, 2016). The report, which is not publicly available, provides policy options for the reform of the critical provisions of Egypt's BITs and provides recommendations for Egypt's International Investment Agreements reform efforts (GAFI, 2016). GAFI was expected to hold a conference during 2016 along with the relevant stakeholders and UNCTAD to present the findings of the report. However, as of September 2018, there has been no announcement regarding neither the results of this review nor plans to reform Egypt's BIT regime.

These statements by the Egyptian officials contradict the actual policies adopted by successive governments that have taken office since 2011. Instead of considering the need to amend or replace existing BITs, successive governments have ensured that any new investment policies or legislations mirror the expansive protection standards provided in Egypt's BITs. The latest episode of this cycle has been the Investment Law No. 72 of 2017 which provides investment protection standards that are consistent with those in Egypt's existing BITs.

7.3 Factors Behind Egypt's Decision to Maintain the Status Quo

Despite acknowledging the unbalanced nature of these treaties and the lack of clear benefits compared to the substantial costs incurred since the internal review conducted in 2006, Egypt has refrained from an exit or renegotiation. On the one hand, this case study has demonstrated how arbitration cases have led to the backtracking of the State on changing its domestic FDI regulatory framework (both legislation and economic policies). On the other hand, the same structural power dynamics that explained why

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[200] Article 16(14) of the 2013 Model BIT.

Egypt signed BITs and agreed on the content of these BITs can also explain why Egypt has refrained from revising these BITs. Post-2011, Egypt has faced fiscal and debt problems that are quite similar to the difficulties faced in the 1970s and 1980s and hence have turned to donor countries (this time Gulf States) and the IMF for help.

The economic and political turmoil since 2011 has further exposed and exacerbated Egypt's longstanding and deeply-rooted structural economic problems (Mossallem, 2017). These problems have been compounded by widening fiscal deficits, rising public debt, fragility in the balance of payments and, hence, losses of foreign exchange reserves (Mossallem, 2017). For several years, Egypt's primary sources of income and foreign currency have stalled (Mossallem, 2017). Suez Canal revenues stagnated due to the recession in international trade (Adly, 2016). Tourism revenues have also contracted because of a series of internal and external shocks over the past few years. The Central Bank has used the reserves to finance the import of fuel and foods and to defend the value of the Egyptian pound (Mossallem, 2017). During the period between 2011 to 2015, the trade deficit increased from -11.5 per cent of GDP to -11.7 per cent of GDP and the current account deficit reached -3.6 per cent of GDP. These conditions have led to a sizeable public debt which reached 91.1 per cent of GDP in June 2017 (Central Bank of Egypt, 2017a), with external debt at around 41 per cent of GDP by June 2017 (Ministry of Finance, 2017).

Since mid-2012, Egypt relied on financial assistance from Gulf countries to finance their fiscal and external deficits. Funding from the Gulf over FY13/14, for instance, amounted to 20 billion USD (Ministry of Finance, 2015), in the form of cheap credit, deposits in the Central Bank of Egypt (which were used to replenish foreign currency reserves and grants and in-kind aid, which helped absorb the political backlash of worsening economic conditions) (Adly, 2016). As of March 2017 around 30 per cent of Egypt's external debt was owed to Arab countries (mainly United Arab Emirates, Saudi Arabia and Kuwait) making them the creditors with the most significant share of Egypt's foreign debt (Central Bank of Egypt, 2017b). Furthermore, the Gulf States have been the primary source of FDI post-2011. Between 2012 and 2016 around 40 per cent of greenfield FDI projects in Egypt came from the Middle East (Dhaman, 2017). Together the UAE and Saudi Arabian contributions account for 20 per cent of the green FDI projects during that period (Dhaman, 2017).

The Gulf Cooperation Council countries (GCC) have used this leverage to pressure the Egyptian government to maintain the same protection standards as well introduce new investment-friendly reforms (Hazzaa and Kumpf, 2015; Joya, 2017). In the aftermath of the annulment of investment contracts by Egyptian courts, investors began to lobby for increased protection through amendments to the Investment Law (Hazzaa and Kumpf, 2015). For example, the active lobbying by Saudi Arabian investors to introduce amendments to the Investment Law that would ensure that rights and privileges enjoyed by investors under previous contracts would remain intact was widely covered by the Egyptian press (Hazzaa and Kumpf, 2015). The proposed amendments by the Saudi investors aimed to place restrictions on the right to sue investors in criminal courts and barred Public Interest Law challenges against investment contracts (Daily News Egypt, 2014). These proposals were initially met with outrage by Egyptian labour and human rights organisations and subsequently dropped (Al-Essawi, 2014). Nevertheless, the pressure exerted by investors eventually led to the introduction of Law 32 of 2014 'Regulating Some Procedural Aspects of Challenging Government Contracts' which denies third parties the right to file claims relating to contracts between investors and the government, as previously discussed above.

Another example of the pressure exerted was the warning by the Saudi government in 2011 that it would cancel the work visas of over 1 million Egyptians in Saudi Arabia if privatisation deals were reversed or revised (Abdelhadi, 2012; Joya, 2017). The fear of investor and donor backlash also led the Egyptian government to resort to settling with investors by establishing investment dispute settlement committees as early as 2012 (Joya, 2017), again, as illustrated above. Investment treaty-based cases settlements with GCC investors included the Damac case and a case that involved a Kuwaiti company, Bawabet Al Kuwait Holding [201] (Enterprise, 2016). Other commercial arbitration cases include Saudi's Prince Alwaleed bin Talal's Kingdom Agricultural Development Co. and Saudi's Anwal group over the privatisation of Omar Effendi (departmental store) (Fick, 2013; Joya, 2017).

[201] Bawabet Al Kuwait Holding Company v. Arab Republic of Egypt. ICSID, Case No. ARB/11/6. See Appendix IV for background on dispute.

Egypt's dependence on the Gulf States for both aid and FDI demonstrates the structural power these actors hold and its impact on the ability of the State to revisit FDI regulations including BITs. The Gulf States, however, were not the only actors that had that kind of influence on Egypt's policymaking. Post-2011, the IMF has played a central role in guiding and shaping Egypt's economic policies. Despite only reaching a loan agreement towards the end of 2016, capital inflows from donors and creditors were generally contingent on the structural adjustment policies prescribed by the IMF even before 2016. The IMF's SAPs consisted of the same combination of austerity and liberalisation measures that were discussed in detail in Sections 2 and 4 and hence any attempts to introduce new regulatory measures or reduce the scope of protection provided to investors was certainly not part of the plan.

Consequently, despite facing a substantially higher number of arbitration cases compared to other developing countries like South Africa and Bolivia, Egypt has refrained from revising its BITs and FDI regulatory framework. Instead Egyptian governments since 2012 have introduced new legislation that has not only maintained the protection standards present in BITs (which they have publicly stated required reform) but also added new layers of protection as demonstrated above.

8. Conclusion: Egypt, a Case for Hirschman's Loyalty?

Over the past decade, a broad consensus has been emerging regarding the threat posed by BITs on the national regulatory space of developing countries. During this period, multilateral organisations like UNCTAD have been vocal about the need to reform these treaties after acknowledging that investment treaties have placed limits on host countries' sovereignty in domestic policymaking (UNCTAD, 2015). Furthermore, given rising concerns about the limitations set by BITs, reform of these treaties needs to ensure that countries retain their right to regulate for pursuing public policy interests, including sustainable development objectives. This also includes safeguarding the right to regulate needed for implementing economic or financial policies (UNCTAD, 2015) .

This case study has demonstrated how Egypt's decision not to amend or replace its existing treaties after the findings of the BITs review conducted in 2006 has cost the State its ability to legislate and regulate in the public interest after the January 25th revolution in 2011. Furthermore, Egypt has become one of the most frequent defendants in ISDS cases, as it ranks fifth in terms of international investment arbitration cases faced by a host country. Defending these cases has serious financial implications both in terms of costs of arbitration proceedings and the awards rendered or settlements reached. Could Egypt's decision to refrain from exercising neither voice nor exit be explained as an act of loyalty towards the international investment regime?

According to Hirschman, the loyalty of a member of an organization/regime is higher when the entrance costs (moral, physical, material or cognitive) are higher (Hirschman, 1970). He contends that the possibility of exit may be further reduced where options to exit are less appealing, i.e. small job market, political or financial hurdles (Hirschman, 1970). Hirschman's conceptualisation of loyalty to an organisation (in this study the organisation is the investment treaty regime as explained in Chapter 3) includes both an expectation by the member that there is scope for future improvement and that it serves as a predicate for the practice of voice. Loyal members become especially devoted to the organization's success when their voice will be heard and they can reform it (Hirschman, 1970).

In the investment treaty regime literature it is argued that the States most likely to feel some semblance of loyalty to their investment treaties and the international investment regime are those that stand the most to gain and the least to lose from membership (Katselas, 2014). That group appears to be the large capital exporters that feel the greatest need to protect their nationals' foreign investments through investment treaties and have the least risk of liability under them (Katselas, 2014). For developing countries, however, it is a different situation. As capital importers, they are keen to avoid losing out on FDI inflows and avoid arbitration cases. Consequently, their motivation to retain their treaties instead of exercising voice or exit has more to do with avoiding possible repercussions and less with loyalty, as defined by Hirschman. Moreover, the State may have determined that it has more to gain and less to lose by seeking to reduce its risk from within the international investment regime rather than from the outside (Hirschman, 1970). Hirschman's conceptualisation of loyalty may apply to developing countries that are exposed to arbitration cases through BITs, but nonetheless benefit from the system due to the protection their investors receive when investing in other developing countries (e.g. China). However, it does not account for members who have incurred significant costs in the form of investment disputes and little benefits from their membership of the international investment regime and yet have refrained from reacting through exit or voice.

Despite being cited as one of the main causes of the high levels of inequality that triggered the revolution in 2011, successive Egyptian governments post-2011 have continued to embrace the neoliberal economic model. Accordingly, when expressing its dissent with the investment treaty regime, the objective of the State was to practice voice rather than exit the regime. As documented in this case study, government officials have been vocal about their discontent with the unbalanced nature of the existing international investment regime, with particular emphasis on BITs and the need to revise these treaties. However, Egypt's lack of bargaining power and leverage due to its economic position means that it is not in a position to consider the voice option in the same manner that South Africa did. Furthermore, this case study revealed how accumulating arbitration cases led to a regulatory chill and how the economic conditions Egypt faced post-2011 gave rise to the same type of structural power exercised by capital exporters and multilateral institutions that led Egypt to signing BITs in the first place. In this case the structural power was used by the aforementioned actors to ensure Egypt maintained the existing FDI regulatory framework (including BITs). Thus, Egypt's decision to maintain the status quo and remain in the international investment regime is not due to an attachment to a system it believes will eventually result in benefits for its economy, as Hirschman's loyalty would imply. Instead, the route taken by Egypt (maintaining the status quo) is more likely to be due to the lack of voice mechanism combined with an inability to exit both due to the survival mechanisms in the treaties and fear of the possible economic and political repercussions deriving from its vulnerable economic position.

In conclusion, Hirschman's conceptualisation of loyalty cannot adequately explain why developing countries like Egypt remain as members of the regime. This creates the need to revise Hirschman's framework and introduce a new category that reflects the route taken or choice made by countries like Egypt more accurately. In Chapter 8 the concept of 'silence' is suggested as a possible addition to the framework to explain the trajectory of countries like Egypt.

Chapter 8. Conclusion: Exit, Quasi-Exit, and Silence

1. Introduction

This thesis contributes to our understanding of the nature of the contestation of the investment treaty regime by developing countries. It does so by addressing a gap in the existing literature to account for the variation in reactions of developing countries that have vocally contested the regime. Furthermore, it tackles another issue that has been neglected in the literature by identifying the actual options available to dissatisfied developing countries.

To achieve the above this political economy study conducted a qualitative comparative case study analysis critically examining the experience of three developing countries – Egypt, South Africa, and Bolivia – that share similarities in the way they signed BITs, but which reacted differently to their realisation of the extent to which their membership of the regime constrains their policy space. Mobilising Hirschman's Exit, Voice and Loyalty framework, this study assessed and formulated the options available to developing countries (in practice). Moreover, as established in Chapter 3, an in-depth understanding of the options available to dissatisfied developing countries is not possible without taking into consideration the factors that influenced both how and why they joined the regime and why they reacted differently after expressing their discontent. Hence, to give greater theoretical depth to a "Hirschman-ian" categorisation of different responses to discontent with the international investment regime, additional theoretical frames were deployed.

This thesis identified three main factors that can supplement the Hirschman framework: ideological motives of the ruling regime, bounded rational behaviour of government officials, and structural power dynamics. These three factors generally contribute to explaining both the entry to and contestation of the regime. However, this thesis argues that the extent to which they answer the questions of how and why the countries joined the regime and how they reacted differently varies. While structural power dynamics play a significant role in answering the research questions of how and why developing countries joined the regime and why they reacted differently, bounded rational behaviour is deemed more relevant to explaining how developing countries entered the regime, and ideological motives are more useful in determining the different routes adopted when reacting to discontent.

The rest of this chapter uses the findings of the three case studies to answer the three research questions outlined in Chapter 4.

Concerning the first research question regarding how and why developing countries signed BITs that constrain their policy space with limited economic benefits, it is argued that an eclectic approach can be adopted to explain how and why developing countries joined the regime by combining the Structural Power framework as adapted by Gwynn with the Bounded rationality theory as adapted by Poulsen.

With regard to the second research question concerning the factors that drive developing countries to decide on whether to exit, use voice, or remain 'loyal' to their BIT commitments, the findings of the case studies point to two main factors affecting which route is taken by the case study country. First, the ideological position of the regime (mainly whether or not the country embraces the neoliberal model), determines whether the State will seek to exit the system or whether it will attempt to practice voice through a quasi-exit route. Second, structural power dynamics influenced by the economic position of the country and the results of a cost-benefit assessment[202] by the country's officials determine whether it has the leverage to challenge its capital-exporting treaty partners and proceed with either exit/quasi-exit or remain silent.

The third and final research question addressed in this thesis is: how Hirschman's framework can be reconceptualised to reflect the different routes adopted by dissatisfied developing countries? This thesis concludes that in order to reflect the power dynamics of the investment treaty regime and the challenges faced by developing countries a revised framework is introduced where: 'exit' is reconceptualised, 'voice' is replaced with 'quasi-exit', and 'loyalty' with 'silence'.

The remainder of the chapter proceeds as follows. Section 2 illustrates how the findings of the case studies reveal that structural power dynamics and bounded rational behaviour explain to varying degrees how and why each country joined the regime. Section 3 presents the new framework proposed in this thesis to illustrate the routes

[202] The cost-benefit assessment can be a full-fledged financial feasibility study as was the case of Bolivia, or a judgment by the State officials as in the case of South Africa and Egypt.

available in practice to developing countries that are discontent with the regime. Under the headings of 'reconceptualised exit', 'quasi-exit', and 'silence', each sub-section explains the need to reconceptualise Hirschman's categories of exit, voice and loyalty in order to reflect the dynamics of the investment treaty regime and the challenges facing developing countries in this regime. In addition to drawing on insights from existing contributions in the investment treaty literature, as well as scholars from the political science and management fields, these sections demonstrate the role of ideological motives and structural power dynamics in determining the route taken by each country. To illustrate how the findings of this thesis can apply to other developing countries, examples of other countries that fit under each category are provided. Finally, the chapter concludes by highlighting the dissertation's contribution to the political economy of investment treaty literature and identifying areas for further research.

2. How and Why Developing Countries Joined the Regime

The experiences of Bolivia, South Africa and Egypt, as documented in this thesis, reveal common trends regarding how and why they joined the regime. In the three cases, BITs were signed despite initial rejection of the investment protection model promoted in these treaties, or preference for a more regulated approach to attracting FDI. Both Egypt and Bolivia had a history of resisting investment rules promoted by capital-exporting countries on the grounds of sovereignty, before eventually conceding and accepting these rules when signing BITs. While South Africa was not engaged in the debate on investment protection rules that took place before the proliferation of BITs (in the 1960s and early 1970s), the ANC initially advocated for an active State role in regulating FDI to redress the legacies of the Apartheid era. However, like its two counterparts, South Africa eventually abandoned the regulated FDI approach by signing BITs presented by their capital-exporting partners. Furthermore, even though the three countries were initially reluctant to embrace the investment protection model promoted through BITs, none of them seemed aware of the extent to which these BITs could constrain their ability to regulate until facing their first serious investment arbitration claim.

This thesis has argued that two theories from the existing literature can be combined to explain why and how countries sign investment treaties that eventually constrain policy space to regulate in the public interest despite the lack of evidence regarding the economic benefit of these BITs. First, Gwynn's adaptation of the Structural Power theory argues that the context in which these BITs are signed and the influence of the actors that hold structural power has a crucial impact on the decision of States to sign BITs proposed by their capital-exporting counterparts. For Egypt and Bolivia, the actors that held structural power were the IFIs and the capital-exporting countries. These actors controlled the financial dimension (of Strange's four structures) by holding access to the financial credit that both States needed at the time to survive their economic crises. South Africa, on the other hand, was not suffering from an economic or debt crisis, and hence, IFIs did not have the same leverage they had over countries like Bolivia and Egypt. In South Africa's experience, the actor that held structural power was the corporate sector. The corporate sector in South Africa controlled two further structures specified by Strange: knowledge and production. Accordingly, we can conclude that structural power dynamics had a stronger impact on the decision of the Bolivian and Egyptian regimes to join the regime compared to the influence it had on their South African counterpart.

While Gwynn's hypothesis explains why BITs were signed, it fails to answer the question of why these countries only realised the potency of these treaties after they started facing arbitration cases. This was explained by analysing the process by which the governments signed their BITs. The findings of three case studies revealed a similar pattern in the way BITs were processed by Bolivian, South African and Egyptian officials. The main similarities were lack of a thorough review of the treaties before signing, the signing of templates provided by capital-exporting countries with minimal negotiation from the developing countries' officials, and reliance on anecdotal evidence regarding the efficacy of BITs in attracting FDI. These findings are consistent with Poulsen's framework, which uses insights from the Bounded Rationality theory to explain how developing countries signed BITs. In line with Poulsen's hypothesis, this thesis argues that due to the manner in which States processed these BITs, they did not appreciate or recognise the extent to which they were sacrificing their policy space to regulate by joining the investment treaty regime until they faced investment arbitration cases. It could be argued that the Bounded Rationality argument is more convincing in the case of South Africa, considering that unlike its two other counterparts, it did not have a history of resisting the investment protection. Egypt and Bolivia, on the other hand, both had a history of challenging the type of protection standards they ended up committing to in their BITs and hence were aware of their implications. Nevertheless, their experience, as documented in the case studies reveals that they only realised the extent to which their membership of the regime would constrain their policy space after facing their first substantial investment treaty arbitration claim.

Finally, it is worth noting that another common trend across the three case studies is that they joined the regime as part of a shift to a neoliberal economic model. However, as established above the neoliberal model of FDI regulation was adopted under the influence and pressure of actors that held structural power. Accordingly, the extent to which ideological motives can be considered as a driving factor in the decision to join the regime is questionable.

3. Reconceptualising Hirschman's Framework

A better understanding of the variation in these reactions was one of the primary motivations behind this thesis. In the existing literature, there have been efforts to categorise the various options available to developing countries and to analyse the effectiveness of these different routes in achieving the objective of alleviating policy space concerns of these countries (in theory). However, there has been less attention paid to the experience of developing countries that have adopted different routes and less focus on explaining their variegated reactions. This thesis contributes to filling this gap through an in-depth study of the experience of three countries that have taken different routes. In addition to identifying the main factors that influenced the decision of each country to take a particular route, this chapter also uses the findings of the case studies to revise Hirschman's framework in order to reflect the actual options available to developing countries in practice.

When members of the investment treaty regime (in this case developing countries) started to express their discontent with the limited benefits they gained from their membership compared to the constraints on their ability to regulate, they began to assess their options. Based on the findings of the case studies, this thesis argues that Hirschman's exit is still generally relevant when analysing the reactions of dissenting members that attempt to leave the regime. However, certain assumptions need to be revised and additional factors need to be integrated to expand his conceptualisation of exit and reflect the complexity of the exit option in this system, as well as the power dynamics involved. The findings also reveal the need to revise Hirschman's theorisation of voice and loyalty in order to account for the power dynamics in the regime and the challenges facing developing countries when deciding which route to take.

The South Africa case study suggested that voice can only be practised after an initial exit, contradicting Hirschman's assumption that the exit option limits any chance of adopting the voice option. Hence, a new category which combines both exit and voice tactics, 'quasi-exit' is proposed as the only feasible route to practice voice in the regime. This route entails a partial exit of the regime as States disengage from the existing legal framework by deciding to terminate their BITs. They remain part of the regime by ensuring that the new framework introduced to reform their legal commitments retains most of the neoliberal norms and principles that shape the regime.[203] The revised legal framework can be introduced through domestic legislation, as was the case for South Africa, or through new BITs, as demonstrated in the cases of India and Indonesia, which will be discussed in further detail below.

Finally, Egypt's case study questioned whether maintaining the status quo for developing countries was a result of loyalty as Hirschman defined it. Instead, considering that the Egyptian officials have regularly expressed their dissatisfaction with the system and the need for more policy space, the decision to remain seemed to be more related to the concept of 'silence'.

After analysing these changes in further detail below, this section concludes with a flowchart in Figure 14 illustrates the potential routes for developing countries dissatisfied with the regime and how ideological motives and structural power dynamics determine these routes. Furthermore, a table that summarises the main revisions made to each category both in terms of Hirschman's conceptualisation and how they have been applied in the literature is provided in Appendix VI.

3.1 Exit

Bolivia's experience reveals that State-society relations and the ideology of the new administration both influenced the regime's decision to consider the exit route. This

[203] Based on the definition of the investment treaty regime outlined in Chapter 2.

conclusion would be consistent with Calvert's hypothesis that these two factors play a pivotal role in shaping a government's response to constraints posed by the investment treaty regime and hence the decision to exit or not. However, based on the findings of the case study, one of these factors was more decisive in determining the route taken by Bolivia than the other. While popular revolutions led the State to express its discontent with the regime, it was the ideological motives of the new administration that motivated the decision to seek an exit from the regime rather than attempt to practice voice. Furthermore, the case study reveals another crucial factor which determined the route adopted by Bolivia and was not explicitly addressed by Calvert, which is the change in the structural power dynamics that strongly influenced the State's decision to join the regime in the first place. The upturn in Bolivia's economic fortunes as a result of the commodity price boom and the result of the cost-benefit assessment conducted by the State officials ended Bolivia's financial dependency on the IFIs and capital-exporting countries. Consequently, this shift in structural power dynamics in favour of the Bolivian State ensured that it had the leverage to confront its capital-exporting partners and creditors with its decision to exit the regime and to actually proceed with its exit plans. This particular finding is also relatively consistent with Koivumaeki's hypothesis that the decision to sanction the exit plan was predicated upon a strategic cost-benefit analysis conducted by Bolivian officials.

Elected on the back of two major uprisings, the Morales administration was under immediate pressure to implement radical economic and social reforms. As demonstrated in Chapter 6, domestically, the reversal of the neoliberal policies was evident through the nationalisation programme and the expansion in the role of the State in regulating the economy and providing social welfare. On the global scene, Morales was a vocal critic of the neoliberal investment and trade frameworks. Bolivia had grievances from its experience with ICSID and BITs, but more generally, there was a fundamental problem with the ideological grounds on which these instruments and institutions (BITs and ICSID) were premised. Unlike South Africa, Bolivia's exit was not a prelude to exercising voice. Instead, the decision to exit was an explicit rejection of the current international investment regime and the fundamental principles that shape it. This was confirmed through the new framework to regulate FDI which was introduced through the 2009 Bolivian Constitution.

Popular pressure and the ideological motives of the regime had a definite influence on the government's preference for the reversal of existing neoliberal policies and exiting the investment treaty regime. However, Bolivia was still considered to be a small developing country that strongly relied on credit from IFIs and foreign investment to promote development. Accordingly, the prevailing economic conditions were the critical factor that empowered the State to proceed with these decisions. Commodity price booms enabled the Bolivian regime to re-nationalise SOEs and to overhaul the hydrocarbons sector reversing the neoliberal reforms adopted over the previous two decades. Through these measures, the State was able to compensate for the loss of aid funds that followed its decision to end its dependency on the IFIs (who had played a dominant role in the policymaking process in Bolivia until Morales rose to power). Hence, Bolivia's strong economic position resulted in a shift in structural power dynamics in favour of the State which enabled it to proceed with its nationalisation plans and the exit option despite the opposition of IFIs and its capital exporting partners. Furthermore, it enabled the Bolivian government to cover the costs of international arbitration and the resulting compensation.

The magnitude of the costs incurred as a result of challenging the international investment regime highlights why developing countries may refrain from attempting to exit the regime despite awareness of the costs of membership. The Bolivian experience allows us to conclude that the State only sanctioned the plans to implement the nationalisation programme and exit the regime when officials were confident that the strategy would ensure that benefits of the new economic policies would exceed the costs of contesting the regime. Once in office, the Morales administration pursued its economic mandate strategically and pragmatically.

As demonstrated in the Bolivian case study, exiting the investment treaty regime is far from neat: it requires the resigning State to travel a long, challenging, and open road before it can forfeit its obligations. Due to survival clauses, any policy space gained by the decision to exit is limited to new investments/investors for at least another decade or two. Countries that have pursued the exit route are still subject to costly arbitration cases triggered through BITs post-termination. Accordingly, the nature of the exit process in the investment treaty regime is not entirely consistent with Hirschman's conceptualisation of exit and its expected outcomes. Moreover, Hirschman's framework implies that determining factors for choosing the exit option include the certainty that comes with exit and the low costs associated with the decision to exit, both of which are unlikely in the developing country context. Accordingly, there is a need to reconceptualise Hirschman's framework to reflect the nature of exit from the investment treaty regime. The next section addresses the aspects that are missing from Hirschman’s framework and identifies what needs to be included to better reflect the exit process.

3.1.1 Reconceptualising Hirschman’s Exit

As per Hirschman's analysis, there is a tipping point for a member when electing to opt for the exit route. In Bolivia's case once the newly elected regime realised that its membership in this system would restrict its ability to introduce economic and social reforms and deliver on its electoral mandate, it began to consider the exit option. This is similar to Hirschman's description of the situation in which a member cannot tolerate the disadvantages they are facing as a result of remaining in an organisation and decide to disengage and eventually exit (Hirschman, 1993, 1970). Hirschman also implied the existence of power dynamics between the management of an organisation and its members, as he argued that there is a tendency for management to attempt to limit the bargaining power of members by manipulating costs of exit and voice (Hirschman, 1970). However, he did not expand on this idea and underestimated the impact it has on the ability of members of an organisation to exercise voice and exit. In the investment treaty regime, these dynamics have a significant impact on the type of routes available for developing countries.

Exit from the regime is more complicated than how Hirschman envisioned it, both regarding cost and procedure. While Hirschman’s model reflects the economists’ view that exit is costless, Bolivia’s experience confirms that exit in the investment treaty regime is costly and the outcomes are uncertain. Hirschman also argued that loyalty is a determining factor in deciding whether to exit or use voice. However, as Bolivia's experience again reveals, the decision to proceed with the exit route was determined by ideological motives and structural power dynamics.

To address the limitations of Hirschman's model in explaining the exit process from the investment treaty regime, it is useful to draw on some of the relevant contributions made by political scientists and applied in the management field. One of these contributions is Gehlbach’s reconceptualisation of Hirschman's model which explores the power relationship between management and employees in the workplace and the overall implications for exit, voice and loyalty (Gehlbach, 2006; Gleeson, 2016). Gehlbach addressed one of the limitations of Hirschman’s model which is the insufficient weight given to the role of power dynamics and how it impacts the decision to exit. Hirschman acknowledged that organisations would typically want to avoid allowing members to gain bargaining power by attempting to influence the feasibility of exit or voice, with the aim of preventing both from occurring (Hirschman, 1993, 1970). He, however, underestimates how effective these tactics can be (Barry, 1974; Birch, 1975; Gehlbach, 2006; Gleeson, 2016). This argument is highly applicable in the international investment regime in which capital-exporting countries supported by multilateral institutions structured the treaties that formed the fragmented international investment regime in a manner that made any decision to attempt to exit or resort to voice a highly costly and complicated one. Gehlbach’s (2006) game theory model was used to understand how cost-benefit analysis informs when employees in a workplace decide to exit the organisation and how management can impact the feasibility of these options by manipulating the costs associated with exit and voice (Gleeson, 2016). The view adopted by Gehlbach as well as other scholars in the organisational literature was that the choice of exit needs to be considered as the member's response to the organisation's decline, based on the dissenter's perceptions of organisational conditions (Gleeson, 2016). The conditions that are assessed when deciding to exit according to scholars like Kassing (2002) include whether the organisational climate recognises and responds to dissenters as well as assessing the cost of retaliation.

These dynamics are missing from Hirschman's framework. Just as an analysis of these dynamics is needed to explain when and how employees decide to exit their company, so one is needed to provide a better account of the process whereby developing countries may exit from the investment treaty regime. In establishing the international investment regime, there was an apparent manipulation of the availability of voice and exit options by the capital-exporting countries, which shaped the regime. Due to the absence of a centralised body to govern the fragmented system, composed of bilateral treaties, the management role in the investment treaty regime is played by the capital-exporting countries that crafted the investment rules and promoted the treaties. The system was established and consolidated when capital-exporting countries succeeded in diffusing these binding treaties, which were based on investment protection standards catering to their interests. By equipping these treaties with survival clauses, capital-exporting countries ensured they were resilient to any attempts by treaty partners to terminate them. They also ensured voice would be costly, since any amendments would need to be mutually agreed upon – as will be demonstrated in further detail when addressing the findings of the South African case study. Despite the bilateral nature of these treaties, the protection offered is generally enjoyed by the capital-exporting partners who seek to protect their nationals' investments abroad through BITs and face a relatively lower threat of being respondents to ISDS cases compared to capital-importing developing countries. Consequently, the interests are not aligned and the power dynamics have a significant impact on the decision-making process of the dissenting developing countries.

Bolivia's case study demonstrates that there was a high cost for exiting the system by terminating its BITs, denouncing the ICSID convention, and reversing the neoliberal policies adopted by the previous regimes. The decision to exit coincided with disengaging from multilateral institutions that had been the primary source of credit for Bolivia and threats from capital-exporting countries that the level of FDI inflows would be negatively impacted as a result of this decision. More importantly, the State remained obliged to honour its commitments after its exit. Accordingly, Bolivia faced the same threat of arbitration by investors that existed before its decision to terminate its treaties and withdraw from the international investment regime. In determining whether to opt for exit or voice, Bolivia's experience reveals that loyalty played no role in the decision-making process. The State's decision to proceed with exit and to adopt the policy reforms that would trigger arbitration claims was contingent on the shift in structural power dynamics in its favour as a result of the favourable economic conditions and the assessment of the benefits it would gain from the proposed economic policies and its ability to cover the potential costs. If Bolivia had decided to maintain the status quo like Egypt or adopt the voice route like South Africa, it would have been because it did not have the leverage to confront its capital-exporting partners or due to negative projections emerging from a cost-benefit analysis rather than its loyalty to the system as per Hirschman's analysis.

Accordingly, in the revised framework proposed here the exit route factors in the resilience of the investment treaty regime and the power dynamics between the regime shapers and their developing treaty partners to understand why a complete and immediate exit is generally not feasible for developing countries. Furthermore, exit in this regime is understood to be costly and with uncertain outcomes. Hence, while discontent with the constraints imposed by the regime and ideological motivations may drive developing countries to consider the exit route, they are unlikely to proceed with that option if the State does not have enough leverage to confront its capital exporting partners and if policymakers are not convinced that they will be able to mitigate the potential costs. This hypothesis is supported by the experience of the two other developing countries that have attempted to exit the system thus far: Ecuador and Venezuela.

Ecuador and Venezuela together with Bolivia were part of the ‘pink tide’ of leftist governments that swept to power in Latin America in the early 2000s (Calvert, 2017). As was the case with Morales, both Chavez and Correa were elected after running on platforms that opposed neoliberalism, and both candidates promised to reclaim State sovereignty over natural resources and strategic sectors. Both regimes were under pressure from their civil societies to reverse the neoliberal reforms of the 1990s and recover the State’s capacity to deliver welfare to its citizens.

Despite their awareness of the protection that BITs afforded foreign investors, after being respondents to ISDS cases, both countries proceeded with the overhaul of their hydrocarbons sector and a wave of nationalisations (in the case of Venezuela). The decision to implement these policies and overstep BITs occurred after the boom in commodity prices. The significant rise in oil prices prompted officials to forecast high gains from the new windfall taxes, amended service contracts with MNCs, and nationalisations (Koivumaeki, 2015a). In both cases, governments’ bargaining position vis-a-vis foreign investors was strengthened by the favourable economic conditions as it reduced their economies’ dependence on foreign investment (Calvert, 2017).

Furthermore, both countries only began to take steps towards exiting the regime after the boom in commodity prices in the early 2000s. In both cases, governments concluded that the profits and revenues generated would exceed the potential costs of the measures adopted and their decision to contest the investment treaty regime. In Ecuador's case, the government decided to withdraw from ICSID in December 2007 and denounced a few BITs in 2008. In 2012, a few months after the 1.77 billion USD award in favour of Occidental, Correa established a Citizen's Audit Commission to assess the constitutionality of the remaining BITs and their impacts (Calvert, 2017). The Commission concluded that the remaining BITs should be terminated and that any new treaties should narrow the scope of protection standards, provide for State-State dispute resolution instead of investor-State, and include investor obligations (CAITISA, 2017; Calvert, 2017). Correa announced the termination of the rest of Ecuador's BITs shortly before the 2016 elections (Calvert, 2017). Venezuela, on the other hand, withdrew from ICSID in 2012 but only terminated its BIT with the Netherlands. Thus, unlike Ecuador and Bolivia, Venezuela did not attempt to exit the investment treaty regime completely.

Ecuador has faced 23 known investment arbitration cases so far, the most costly of which involved MNCs in the hydrocarbons sector. By 2017, awards rendered to oil companies exceeded 1.6 billion USD (excluding interest and arbitration costs) (Calvert, 2017). Nevertheless, like its Bolivian counterpart, Correa's government successfully convinced most MNCs in the hydrocarbons sector to adopt service contracts. Indeed, Correa managed to go a step further and persuaded these companies to also forfeit their right to ICSID arbitration over contractual issues (Calvert, 2017). The new contracts combined with the revenues generated from the windfall tax (aided by the commodity price boom) ensured the State captured a significantly larger share of profits in the sector compared to its share under the pre-2005 regulations. State revenue generated from the hydrocarbons sector increased from c. 2.2 billion in 2005 to c. 12.9 billion USD in 2012 and has so far outweighed the costs of arbitration claims (Calvert, 2017).

Out of the three Latin American countries discussed in this section, Venezuela has had the most challenging path, which may or may not explain why they have not terminated the rest of their BITs. Venezuela has faced 41 known investment arbitration cases to date, one in 1996 and the rest between 2000 and 2016 (Roffinelli et al., 2018). Most of the claims (19) were related to non-negotiated expropriation, and the sum of compensation claims in 16 cases alone reached c.7.7 billion USD (Roffinelli et al., 2018). So far the State has won 8 cases, lost 15 and has 14 cases that are pending a decision by the arbitration tribunals.[204] Initially, Venezuela seemed in a comfortable position as it complied with the decisions rendered by the arbitration tribunals and quickly settled awards which included a 908 million USD award issued by the ICC in 2011 (Koivumaeki, 2015a). Venezuela's compliance with the awards and prompt payment indicated that its officials were anticipating these costs and were prepared for them using the gains from their nationalisation programme (Koivumaeki, 2015a). However, Venezuela's tally of arbitration cases has continued to grow and in a single case that Venezuela settled with ConocoPhillips (US oil company) in August 2018 it agreed to pay the claimants a 2 billion USD settlement (Bohmer, 2018). While it initially seemed like the Venezuelan regime had matters under control, the Venezuelan economy has spiralled into a deep recession over the last few years, shedding severe doubt over its ability to comply with the accumulating awards rendered in favour of investors by arbitration tribunals. Plagued with hyperinflation, Venezuela's cash-constrained economy, which is almost entirely dependent on oil exports, has also been significantly impacted by the US-imposed sanctions (Parraga, 2018). At the moment, the country is facing severe shortages in medicine and food, painting a bleak picture for a country that is expected to pay billions of dollars in awards over the next few years.

Finally, it can be argued that the three countries have enjoyed varying levels of success in their attempts to exit the investment treaty regime. Moreover, in addition to Venezuela's economic struggles which may halt the exit process, Ecuador's newly elected government has announced a reversal in the country's approach towards FDI. The return of the neoliberal approach includes retreating from the exit strategy adopted by the Correa administration as the new regime has revealed plans to replace the terminated BITs and restore ISDS mechanisms. For the purpose of this thesis, however, the focus is on what prompted these countries to consider the exit route and the implications of their decision to contest the investment rules of the regime. The experiences of both Venezuela and Ecuador seem in line with the conclusions reached

[204] UNCTAD, 'Venezuela, Bolivarian Republic of – as respondent State'. International Investment Agreements Navigator. Available at: http://investmentpolicyhub.unctad.org/ISDS/CountryCases/228?partyRole=2 (Accessed 2 September 2018).

in the Bolivia case study. In both cases, regimes were elected to reverse the neoliberal policies and restore the capacity of the State to regulate in the public interest. Both governments expressed their discontent with the investment treaty regime which they believed imposed illegitimate constraints on their sovereignty. However, as demonstrated above, officials began to adopt policies that challenged the investment rules in the investment treaty regime and started the process of exiting the regime after favourable economic conditions empowered them. Governments in both countries were aware of the potential costs of their actions and proceeded with their plans after assessing that the economic gains of the measures taken combined with the boom in oil prices would outweigh these costs.

3.2 Quasi-Exit

Despite not facing major social uprisings like its two counterparts in this thesis, the South African government was under pressure by civil society to introduce affirmative action legislation aimed at redressing the legacy of Apartheid, by bringing about social redress and addressing economic inequality. While South Africa sought to revise the scope of protection it offered to foreign investors; it remained committed to the neoliberal principles underpinning the investment treaty regime. Hence, although it exited the legal framework of the regime by refusing to renew its BITs, South Africa ensured the domestic legislation that replaced these BITs retained most of the norms and principles that shaped the investment treaty regime as defined in Chapter 2. Accordingly, this thesis argues that South Africa’s adopted route represents a ‘quasi-exit’ of the investment treaty regime as this route represented a combination of exit and voice tactics that are not consistent with Hirschman’s conceptualisation of voice.

South Africa's economic position meant it was able to challenge the regime and withstand the criticism and warnings directed towards its decision to revise its investment protection framework by representatives of capital-exporting countries. While South Africa continues to rely on FDI, its officials are convinced that the South African economy will remain an attractive destination for FDI even without BITs. This conclusion was reached based on the internal review of South Africa's BITs framework, which found that there was no causal relationship between the BITs signed and FDI inflows. Furthermore, South Africa’s position as a leading destination for FDI in Africa due to its extractible sources, growing manufacturing sector and market size, compared to its peers in the continent, further empowered the South African government. Hence, unlike its Egyptian counterpart, structural power dynamics did not prevent it from proceeding with its decision to reform its legal obligations under the regime.

South Africa belongs to a group of emerging countries that while traditionally recipients of FDI have also become capital exporters over the past two decades (e.g. India). While they are considered countries with sufficient leverage to challenge existing investment rules, they do not have enough bargaining power to act like regime shapers (the major capital-exporting countries) and to develop an alternative system (Morosini and Badin, 2017, p. 6). In South Africa's experience, this conclusion was evident in its failed attempts to lure its capital-exporting partners to renegotiate their existing treaties. Eventually, however, South African officials determined that the costs of maintaining the status quo far exceeded the benefits, and that voice in its conventional form (i.e. treaty amendments or replacements) did not seem feasible in the foreseeable future. Consequently, the South African government concluded that the only way to practice voice in this regime and introduce substantial reforms to its investment protection model was through a quasi-exit route.[205]

Following the completion of a full and comprehensive review (the first of its kind), the South African government began to implement its recommendations. These included legally terminating existing BITs after offering the partners the possibility to renegotiate, developing investment legislation to codify BIT provisions into domestic law and developing a new model BIT to serve as a basis for new investment treaties. After deducing that renegotiations were unlikely, the government began to send notices to its treaty partners (mainly capital-exporting) with whom existing BITs were due to expire soon. In parallel to exiting the existing investment treaties, the DTI developed a new investment law (PIA) which was enacted in 2015 and a new model BIT which is being reviewed by the Cabinet at the time of writing. The PIA introduced amendments to the substantive protection standards and procedural rules for arbitration that existed in the BITs with the aim of rebalancing investor rights and regulatory space. The reformed investment framework aligned protection standards like national treatment, expropriation, compensation and transfer of funds provisions

[205] It is important to note that the amendments to these legal obligations will only apply to new investments/investors until the survival clauses of the terminated BITs expire.

with South Africa's constitutional principles. The most controversial changes were the exclusion of the FET standards and the replacement of the ISDS mechanism with domestic remedies or State-State arbitration.

Finally, as the new model BIT is being finalised, South African officials have reiterated that it is not opposed to the negotiation of new BITs and does not want to exit the system entirely. They have also indicated that it would be willing to reconsider providing investors with access to international arbitration if ongoing multilateral efforts result in a more credible and transparent system. The South African government has been actively participating in discussions in multilateral talks on ISDS and investment treaty regime reform by constructively engaging at the OECD and the UNICTRAL forums. Hence, this section concludes that despite exiting from its existing BITs, South Africa has continued to practice voice in the regime. The next section expands on why this thesis argues that Hirschman’s voice does not accurately reflect the route taken by developing countries that sought to substantially reform their investment protection commitments under the investment treaty regime. Instead, this thesis proposes ‘quasi-exit’ to more accurately reflect the route adopted by countries that have introduced these reforms to date.

3.2.1 Replacing ‘Voice’ with ‘Quasi-Exit’

As established in Chapter 6, South Africa’s route has been categorised as an ‘exit’ decision by some in the literature. This reflects its termination of existing treaties instead of sticking to the regime and attempting to change it from within. Furthermore, according to Hirschman, once the decision to exit is made, there is no longer scope for voice. However, based on the findings of the South African case study it is argued that South Africa did attempt to adopt a voice route through one of the traditional channels of voice as outlined in Chapter 3 before realising it was not possible. From the outset, South Africa's reaction to its realisation that BITs were constraining its policy space to regulate in the public interest differed from Bolivia’s. A neoliberal approach to FDI regulation was maintained, and the government’s statements before and after the BIT review indicated its aim to reform the existing investment framework rather than reject it entirely. Furthermore, as established above, based on the definition of the investment treaty regime outlined in Chapter 2, South Africa’s decision to terminate its BITs and exit its legal framework represents a partial exit of the regime. After failing to convince its capital-exporting partners to renegotiate the BITs between them, South

Africa's only feasible route to introduce its reforms was through replacing its BITs with a new legal framework. Hence, this combination of voice and exit tactics is best described through the quasi-exit category proposed in this thesis.

According to Hirschman, the two principal determinants of readiness to resort to voice when exit is possible are: (i) the extent to which members or different parties are willing to trade off the certainty of exit against the uncertainties of their organisation's future improvement, and (ii) the estimate members have of their ability to influence the organisation. Concerning the first determinant, South Africa was facing a conundrum. On the one hand, its treaties were expiring and if it did not act many treaties would be automatically renewed for at least another decade. On the other hand, these treaties had survival clauses that ensured that the current terms of protection would be provided to existing investors for another 10-15 years. Hence, an 'exit' would never be a full exit, and the new investment protection law/treaty would only apply to new investors until the duration stipulated in the terminated BITs has elapsed. This situation seemed ideal for effective use of the voice option since Hirschman argues that for voice to be effective and functional, exit has to be an option but not too easy or too attractive (Hirschman, 1970, p. 83). However, it was the second of the two principal determinants identified by Hirschman that proved the sticking point for South Africa.

Due to the way BITs were designed to lock-in treaty partners to their commitments in ways that give the treaty continuing effect for many years (Gordon and Pohl, 2015), South Africa needed to convince its capital-exporting partners to agree on the reforms it sought in order to recalibrate the scope of investment protection offered in its existing BITs. However, it eventually realised that it lacked the bargaining power necessary to persuade most of its capital-exporting treaty partners to make the compromises needed to ensure a balance between the rights of investors and its right to regulate in the public interest. Consequently, South Africa adopted a quasi-exit strategy which enabled the government to introduce the desired reforms to its legal obligations under the regime. It has also developed a new model BIT (which is consistent with its new investment legislation to be used as a reference for future BITs).

South Africa's experience is in line with findings in the current literature on the reform of the international investment regime that reveal that the regime is particularly resistant to reform (Johnson et al., 2018). If a State wants to amend its BITs to resolve an issue of scope, or reach an interpretive agreement with its treaty partners to clarify the substantive meaning of standards, it may have to do so on an individual treaty-by-treaty basis (Johnson et al., 2018). This exercise is not only time consuming, but also requires technical and legal capacity that may not be available in many developing countries. Furthermore, Johnson et al. (2018) reveal that based on anecdotal evidence (feedback of developing countries in UNCTAD forums[206] and interviews with officials from several countries[207]), these efforts are often unsuccessful, due to asymmetries in power between the treaty parties or other misaligned interests (Johnson et al., 2018).

Accordingly, there has been a growing trend of developing countries that refuse to renew their existing BITs as a method of voicing their dissatisfaction. These countries have replaced their expiring BITs with either domestic legislation (that includes similar protection standards but omits or amends the controversial ones) or with new BITs that would be based on their own model treaties as a reference. This approach has been described as a hybrid approach that combines both exit and voice tactics, which may be useful in balancing enhanced sovereignty with the need to maintain a reputation for a favourable investment climate (Langford et al., 2018, p. 81). This trend was started by South Africa and has been more recently adopted by India and Indonesia as will be demonstrated below.

These findings indicate that the voice option available to developing countries in practice is not consistent with Hirschman's theorisation of voice, nor can it be implemented through any of the traditional routes categorised as 'voice' in the literature (as illustrated in Chapter 3). It also explains why efforts to introduce substantial reform to BITs for developing countries have mainly come through the hybrid approach adopted by South Africa. The alternative routes have been either undertaking incremental reforms and maintaining the status quo (which will be described as silence later in this chapter), or attempting to completely exit the system

[206] UNCTAD's session on 'Clarifying and modifying treaty content' at its high-level Annual IIA Conference, October 2017.

[207] See Johnson et al. (2018).

and abandon the protections standards that were stipulated by BITs, as illustrated above.

Accordingly, this thesis has concluded that the only way to effectively adopt the 'voice' option is through the quasi-exit route adopted by South Africa. This argument suggests that Hirschman's theorisation of voice and the dynamics of the interplay between exit and voice inadequately explain the options available to developing countries dealing with their BITs. Instead of undermining voice as implied by Hirschman, exit facilitates it. Hence, this thesis proposes the replacement of 'voice' with 'quasi-exit' to more accurately reflect the route taken by developing countries to practice voice in the investment treaty regime. This hypothesis is supported by the recent experience of countries like India and Indonesia that have had to exit their treaties to negotiate new BITs.

Like South Africa, both India and Indonesia have not condemned the investment treaty regime from an ideological standpoint. Indeed, they have expressed their willingness to remain part of the regime if certain reforms are made to the substantive protection standards and arbitration procedures to increase the policy space available for the host State to regulate. As in the case of South Africa, despite deciding to terminate their BITs, they remained loyal to the normative foundations of the investment treaty regime by retaining the core principles and standards of the regime in their new model BITs. Furthermore, both countries were in an economic position that provided them with sufficient leverage to challenge existing investment rules, but they did not possess enough bargaining power to persuade their capital-exporting treaty partners to modify their existing BITs.

The BIT reviews conducted by the Indian and Indonesian authorities reached relatively similar conclusions with recommendations to amend or exclude certain substantive protection standards (such as FET, indirect expropriation, MFN and NT) and introduce procedural limits to the ISDS mechanism. Consequently, both countries sought to develop new model BITs,[208] which, while maintaining a traditional investment treaty template which embodies most of the neoliberal standards of investment protection present in their existing BITs, introduces reforms to narrow the

[208] India has already adopted a new model BIT in 2016, whereas Indonesia is still in the process of finalising theirs.

scope of protection offered to investors and limit the discretion of arbitration tribunals to interpret the investment treaties. The purpose of developing these models was to provide a template and guidelines for negotiating and concluding new investment treaties that would replace the existing treaties. As with South Africa, Indonesia and India have signalled their commitment to update their investment regulatory framework based on the recommendations reached in their BIT reviews.

The fact that both countries concluded that in order to introduce these reforms they needed to exit their existing investment treaties further supports the hypothesis that voice in the investment treaty regime is exercised through a quasi-exit route. Indonesia decided to exit its BITs through a gradual discontinuation approach which entails terminating BITs that are due to expire according to the required period set in the termination clause of the BIT. However, if the BIT authorises either party to end the treaty at any time, then the State would immediately discontinue it (Jailani, 2016). Indonesia has so far terminated 29 of the 55 BITs (in force).[209] India, on the other hand, adopted a ‘two-pronged approach’ with respect to managing its existing BITs (Prabhash et al., 2018, p. 10). Firstly, the government has served termination notices to 58 countries (mainly including capital-exporting countries like the United Kingdom, France and Germany) with whom existing BITs have either expired or will expire soon (Prabhash et al., 2018). India has indicated that it is open to renegotiating new BITs with these countries based on its model BIT. For the remaining 25 countries, India has asked for joint interpretive statements to clarify ambiguities in treaty texts to avoid expansive interpretations by arbitration tribunals. However, only Bangladesh has accepted India’s proposed joint interpretive statement note so far (Prabhash et al., 2018).

It is important to highlight an essential difference between the reforms undertaken by South Africa and those adopted by India and Indonesia, which is their decision to refrain from excluding the ISDS mechanism. This could lead to questions over whether the three countries should be placed in the same category. However, while it can be argued that India and Indonesia have adopted more conservative reforms

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[209] UNCTAD, ‘Indonesia’. International Investment Agreements Navigator. Available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/97#iiaInnerMenu (Accessed 2 September 2018).

compared to South Africa, the overall objectives of the three countries are similar. Their shared objective was to reach a balance between reassuring foreign investors that the host State will continue to provide them with protection standards similar to those that exist in the investment treaty regime, while introducing amendments to ensure that the State has more policy space to regulate in the public interest. More importantly, despite of their desire to remain part of the regime, the three countries realised that to introduce the required substantial reforms to their legal obligations, the quasi-exit route was more feasible than the traditional channels of voice documented in the literature (addressed in more detail in Chapter 3) which would require convincing capital-exporting countries to agree on these reforms. While South Africa introduced a revised legal framework through replacing its BITs with domestic legislation, India and Indonesia introduced their amendments through their new model BITs. Indeed, some scholars have predicted that in the future this quasi-exit route or hybrid approach is likely to become more frequently adopted by States who believe that BITs are one-sided agreements that protect investors at the expense of a State's legitimate policy goals and its ability to regulate in the public interest (Langford et al., 2018, p. 83).

3.3 Silence

In the aftermath of the January 25th revolution in 2011, the Egyptian State was under immense pressure to redress the corruption and inequality legacies of the Mubarak regime. However, as demonstrated in Chapter 7 both the judicial verdicts ordering the reversal of privatisations that took place under the ousted regime on corruption grounds and the limited efforts to introduce progressive policies (e.g. minimum wage) triggered a wave of investment arbitration claims which led to a regulatory chill. Successive governments that took office post-2011 have maintained the same neoliberal economic framework adopted by the former regime. They have done so despite the significant criticism it attracted from civil society which attributed the high levels of poverty and inequality in Egyptian society to the neoliberal reforms that were adopted by the previous regimes under the auspices of the IMF and the World Bank. Accordingly, Egypt's approach to FDI remained the same, and there was no real prospect of seeking a complete exit from the investment treaty regime.

After conducting a preliminary review of Egypt's BITs programme, the Egyptian government concluded that the costs of its membership in the regime had outweighed the benefits it had received thus far. Eventually, Egyptian officials vocally criticised the investment treaty regime and called for reforms to Egypt's BITs to balance investor rights with the rights of the host State to regulate. However, unlike its counterparts, Egypt's ailing economy did not provide the government with sufficient leverage to build on its verbal criticism through actions to contest the investment treaty regime. Post-2011 Egypt faced an economic and debt crisis which established a similar context to the one which had allowed IFIs and capital-exporting countries to hold structural power when it signed its BITs several decades earlier. The structural power was held by the IMF and the GCC countries, both of whom influenced the government's decision to refrain from amending its BITs or its domestic legal framework through the conditionalities imposed in return for the credit and aid provided. Hence, despite the dissent expressed in public forums and the continuous reviews undertaken by the relevant authorities, who also issued several model BITs, the Egyptian regime conceded that the costs of attempting a quasi-exit route would exceed the benefits. Accordingly, it has thus far maintained the status quo and ensured that any new investment legislation codified the same controversial provisions that existed in its BITs. Indeed, the Egyptian government has gone a step further by introducing further layers of protection through legislation that made investors immune to judicial accountability.

Egypt has effectively refrained from exit and voice by deciding to remain committed to its existing BITs. However, as concluded in Chapter 7, Hirschman's conceptualisation of loyalty cannot adequately explain why developing countries like Egypt have maintained the status quo. The next section starts by demonstrating how Egypt's reaction is inconsistent with Hirschman's conceptualisations of conscious and unconscious loyalty. Instead, it is argued that the concept of 'silence', and particularly 'enforced silence', is a more accurate reflection of the way the Egyptian government reacted after announcing its dissatisfaction with the investment treaty regime.

3.3.1 Replacing Hirschman's Loyalty with Silence

Hirschman describes loyalty as a 'special attachment' to an organisation whereby the member who possesses it is willing to trade off the certainty of exit for the uncertainties of voice (Gleeson, 2016; Hirschman, 1970, p. 77). 'As a rule, loyalty holds exit at bay and activates voice' according to Hirschman (1970, p. 78). Based on his theory, the driving factors behind a member's loyalty might be their desire to assist in changing their organisational circumstances, or their being content to remain passively loyal to their organisation in the hope that things will improve (Gleeson, 2016; Hirschman, 1970, p. 78). He elaborates that while a member can remain loyal to an organisation in the face of discontent without being influential themselves, it would not be possible without 'the expectation that someone will act or something will happen to improve matters' (Hirschman, 1970, p. 78).

These criteria do not apply to the investment treaty regime. Firstly, the future improvement upon which the decision to be loyal rests, according to Hirschman's framework, is questionable for developing countries in the investment treaty regime, both concerning its possibility, but also more 'fundamentally in terms of its nature and character' (Katselas, 2014, p. 361). As Katselas (2014) points out, the main issues with applying Hirschman's concept of loyalty to the regime are that, while it is not clear that BITs lead to an increase in inward FDI, their financial and sovereignty costs are substantially high. Egypt's experience endorses both these observations as; on the one hand, an internal review of Egypt's BIT network in 2006 concluded that there are no apparent links between FDI levels and the signing of BITs. On the other, Chapter 7 demonstrated the magnitude of both the financial and sovereignty costs Egypt has experienced due to arbitration cases triggered by the BITs it signed. Secondly, as demonstrated above, the existing power asymmetries between treaty partners in the investment treaty regime limit the capacity of developing countries to reform the regime from within. Accordingly, as this thesis has argued, the only way to practice voice in this system is through a quasi-exit route. Again as established in Chapter 7, Egypt's economic predicaments imply that it lacks the leverage to consider the quasi-exit route.

There are some aspects of Hirschman's theorisation of loyalty that may initially seem applicable to the investment treaty regime. For instance, Hirschman acknowledges that while he considers loyalty as a force which saves organisations from the perils of a premature exit of its members by strengthening the voice option and postponing exit, there are situations when loyalty does not play such a 'providential role' (Hirschman, 1970, p. 81, 92). He explains that 'the various institutions designed to foster loyalty have obviously not been established with the purpose of elaborating an improved mixture of voice and exit' (Hirschman, 1970, p. 92). There is a possible scenario when loyalty can lead to an exit-voice mix that unduly neglects the exit option. Moreover, he stresses that ‘loyalty-promoting institutions are not only uninterested in stimulating voice at the expense of exit: indeed they are often meant to repress voice alongside exit (Hirschman, 1970, p. 92). While an organisation is meant to benefit from the active participation of its members through their feedback, Hirschman argues its usually in the interest of those managing or controlling the organisation to enforce their own agenda or ‘act as they wish’ with little complaints or desertions from its members (Hirschman, 1970, p. 93). Hirschman identifies high costs for entering an organisation and stiff penalties for an exit as two of the main ‘devices generating or reinforcing loyalty in such a way as to repress either exit or voice or both’ (Hirschman, 1970, p. 93). He explains that, using these two devices, organisations or systems can convert conscious loyalty to unconscious loyalist behaviour. Based on Hirschman's theorisation there is no clear line between conscious and unconscious loyalist behaviour because a ‘member of the organisation may have a considerable stake in self-deception’ (Hirschman, 1970, p. 93).

As argued in Section 8.2, Hirschman’s argument that those controlling the system can ensure voice and exit options are costly enough to deter members from adopting them is consistent with how capital-exporting countries have structured the investment treaty regime in a manner that makes both exit and voice options challenging for developing countries. However, as established above, these tactics have not been sufficiently expanded on by Hirschman as he limits the type of organisations in which members would face high penalties for exiting to a very narrow category: either the most traditional human groups, such as the family, the tribe, the religious community, and the nation; or more ‘modern inventions’ such as gangs and totalitarian parties (Hirschman, 1970, p. 96). The kind of penalties Hirschman was alluding to range from the ‘loss of life-long associations to loss of life, with such intermediate penalties as excommunication, defamation, and deprivation of livelihood’ (Hirschman, 1970, p. 96). Hence, he fails to account for other types of organisations like the investment regime where power dynamics between the members can lead to similar outcomes. More importantly, Hirschman implies that organisations in which high penalties are enforced in the case of exit cultivate unconscious loyalty from their members. According to Hirschman unconscious loyalist behaviour is free from felt discontent (Hirschman, 1970, p. 91) and entails being in denial about the defects of the organisation. This conception of loyalty cannot be applied to developing countries like

Egypt which not only realised but also publicly criticised the faults of the investment treaty regime.

Hence, based on the above we can conclude that Egypt's reaction cannot be adequately explained by either of Hirschman's conceptualisations of loyalty (conscious and unconscious). His model does not account for the frequent scenario in organisations in which conditions worsen, voice and exit options are not feasible, and members silently remain, not out of loyalty, but waiting for the right opportunity to react (Gleeson, 2016, p. 78).

In the search for a broader definition of Hirschman's concept of loyalty that can account for the behaviour of countries like Egypt, this thesis explores the concept of silence that has been introduced in other fields of study (e.g. political science and management or organisational literature) to expand Hirschman's definition of loyalty and cover a broader range of choices for members of an organisation that choose not to exit but cannot practice voice. Political scientists Brian Barry (1974) and Anthony Birch (1975) have suggested that Hirschman's conceptualisation of loyalty fails to account for the different choices a member has when they decide not to exit an organisation in the face of discontent. As Gleeson (2016) summarises: Hirschman's loyalty effectively collapses two separate choices into one: first there is a choice between exit and non-exit; if the decision not to exit is made, there is a further choice between voice and silence (Barry, 1974; Birch, 1975; Gleeson, 2016, p. 25). For Barry (1974, p. 91), 'one choice is between exit (leaving) and non-exit (staying), the other is between voice (activity, participation) and silence (inactivity, non-participation)'. Another way to look at it is that there is a choice between engaged loyalty, which is a decision to stay out of a desire to rectify decline and a silent non-exit form (Barry, 1974; Gleeson, 2016, p. 14).

In his attempt to re-examine Hirschman's model through a game-theoretic interpretation of the relationship between exit and voice, Gehlbach (2006) recognises that the model implies the existence of the dynamic of silence. This dynamic, according to Gehlbach, depends on the relative bargaining power between the organisational hierarchy and the member (Gleeson, 2016). Gleeson (2016, p.11) explains that silence manifests in two ways: apathy and enforced silence. An apathetic member 'accepts the status quo, abides by the rules, is productive and sees no reason to engage in voice' (Gleeson, 2016, p. 11). Such members demonstrate loyalty in the form of silence, which is not accounted for in Hirschman's original conceptualisation of loyalty in which he perceived loyalty as being the necessary predicate of voice (Gleeson, 2016). The dynamic of enforced silence, on the other hand, emerges when there is no adequate outlet for an effective voice route in an organisation and the option of exit is also not feasible (Donaghey et al., 2011; Gleeson, 2016).

This thesis argues that the concept of 'enforced silence' more accurately reflects Egypt's experience. The State's decision to remain in the investment treaty regime is not due to an attachment to a system it believes will eventually result in benefits. Instead, its decision is more likely to reflect the lack of a possible voice mechanism combined with an inability to exit, both due to the survival mechanisms in the treaties and the fear of the possible economic and political repercussions, especially considering Egypt's vulnerable economic position.

While there are examples of countries that can fit in the 'exit' and 'quasi-exit categories', it is difficult to find other developing countries that fit into the 'enforced silence' category in the manner that Egypt does. A significant number of developing countries have faced several arbitration cases and have refrained from attempting to exit or take the quasi-exit route. Moreover, several of them have voiced their discontent in consultations conducted in multilateral forums like UNCTAD and UNCITRAL (Johnson et al., 2018). However, whenever developing countries have decided to vocally and publicly express their discontent with the investment treaty regime while indicating that they will take steps to reform their BITs, they have generally proceeded with one of the first two options mentioned above (exit or quasi-exit). While this might change in the near future as an increasing number of developing countries have indicated that they would initiate reviews of their BITs, the closest example to Egypt's case thus far is Argentina.

Argentina has been a respondent to 60 known investment arbitration cases to date. Accordingly, it is currently ranked as the country that has faced the highest number of investment arbitration claims in the world.[210] Between 1990 and 2001, Argentina

[210] UNCTAD, 'Argentina – as respondent State'. International Investment Agreements Navigator. Available at: http://investmentpolicyhub.unctad.org/ISDS/CountryCases/8?partyRole=2 (Accessed 2 September 2018).

signed 58 BITs, 55 of which entered into force.[211] The year 2001 also marked the beginning of a surge in investor claims against the State which coincided with the worst economic crisis the country has suffered in its history (Pérez-Aznar, 2016). More than 45 cases were triggered by emergency measures that the government adopted in response to the economic crisis and led to altering the neoliberal regulatory framework that was established in the 1990s (Calvert, 2017, p. 6; Pérez-Aznar, 2016). As discussed in Chapter 2, under the rule of the Kirchners, the Argentinian government was vocally critical of the investment treaty regime. However, despite calls from legislators and civil society the Kirchners refrained from terminating Argentina's BITs (Calvert, 2017; Pérez-Aznar, 2016).

The Kirchners were critical of the constraints imposed by Argentina's existing BITs but remained loyal to the neoliberal approach to FDI that was adopted by their predecessors. The Argentinian regime was wary of the potential costs of terminating BITs and sought the path of reform as opposed to the exit route adopted by its Latin American counterparts. Its economic position meant that, like Egypt, it lacked the leverage to consider the quasi-exit route and hence remained silent in its role as a principal in the investment treaty regime. During the 2000s, initiatives from the Argentinian government to reform its existing BITs were minimal. A comprehensive review of Argentina's BIT programme never took place, and the development of an alternative BIT model was never finalised (Pérez-Aznar, 2016). The government placed a moratorium on signing BITs which lasted until 2016; the termination of BITs with India, Bolivia and Indonesia were a result of initiatives by the three countries and not based on a decision by the Argentinian party (Pérez-Aznar, 2016).

However, as argued in Chapter 2, Argentina's response cannot be placed in the same category as countries like Egypt due to its active role as a litigant in the regime. While Argentina represented another case of 'enforced silence' with regard to its commitment to BITs and the ISDS mechanism, it was not passive when it came to contesting the awards issued by arbitration tribunals. The Argentinian government under Néstor Kirchner sought an annulment on all awards rendered against it and

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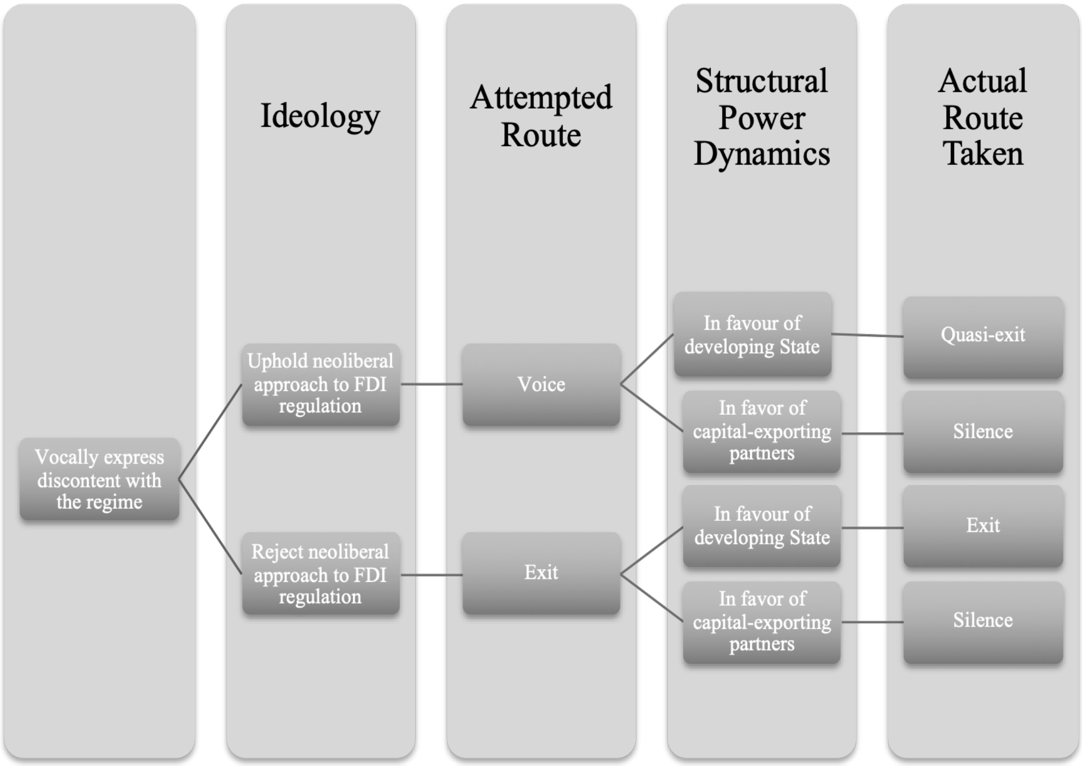
[211] UNCTAD, 'Argentina'. International Investment Agreements Navigator. Available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/8#iiaInnerMenu (Accessed 2 September 2018).

where annulment failed it refused to fulfil the awards unless they were reviewed by domestic courts (Calvert, 2017). Argentina' s Minister of Justice at the time, Horacio Rosatti, explicitly rejected the notion that decisions by ICSID tribunals should supersede Argentina's constitution and asserted that they needed to be reviewed by Argentine courts for compatibility (Calvert, 2017; see Goodman, 2007). Consequently, Argentina withheld payment on five awards after claimants refused to submit them to Argentine courts for review (Calvert, 2017). Eventually, however, further deterioration in Argentina's economic situation led to a more conciliatory approach towards foreign investors, and in 2013 Cristina Kirchner agreed to pay five outstanding arbitral awards (Calvert, 2017). The decision reflected the government's assessment that the costs of contesting the regime overweighed the benefits for a country that needed access to international capital (Peinhardt and Wellhausen, 2016).

Finally, the election of President Mauricio Macri in December 2015 resulted in a shift in Argentina's stance towards BITs as the new administration placed attracting FDI as one of its top priorities (Pérez-Aznar, 2016). Argentina has since signed two BITs with Qatar and the United Arab Emirates.

To conclude this section on the reconceptualisation of Hirschman's framework, a flowchart in Figure 14 illustrates the potential routes for developing countries dissatisfied with the regime and how ideological motives and structural power dynamics determine these routes. Furthermore, a summary of the main revisions made to each category both in terms of Hirschman's conceptualisation and how they have been applied in the literature is provided in Appendix VI.

Figure 14: Potential routes for dissatisfied developing countries



4. Final Conclusions

It is well established in the existing literature that the investment treaty regime is currently facing a backlash from both developed and developing countries. The magnitude of the legitimacy crisis facing the investment treaty regime cannot be underestimated as FDI policies represent an integral component of development strategies for both capital-exporting and capital-importing countries (Morosini and Badin, 2017). Investment treaty making reached a turning point in the year 2017, which witnessed the lowest number of new international investment treaties since 1983, signalling a period of reflection on, and review of, international investment policies (UNCTAD, 2018a, p. 1). Capital-exporting countries that have more recently become frequent respondents to investment arbitration cases have responded to the legitimacy crisis facing the regime in their capacity as regime shapers. Their efforts to reform the regime have been restricted to clarifying substantive clauses and introducing procedural reforms to limit their exposure to investment arbitration while ensuring the neoliberal investment protection model they established remains intact. Developing countries, on the other hand, have been predominantly the more frequent respondents to arbitration cases and, as demonstrated in this thesis, their membership of the regime has had a significant impact on their capacity to implement their development strategies. Consequently, a small group of developing countries have contested the existing order and what they perceived as the unbalanced foundations of the regulations in the existing investment treaty regime that overprotects investors at the expense of the host State's regulatory space. The growing discontent has led to experimentations with alternative frameworks and attempts to reconceptualise investment regulation in the developing world (Morosini and Badin, 2017).

Nevertheless, unlike their earlier efforts to create a new international economic order in the 1960s and 1970s, developing countries have not joined forces to develop an alternative model to the existing investment treaty regime this time around (Trubek, 2017). Moreover, the resistance to the regime involves several at times conflicting tactics by different developing countries (Trubek, 2017). While the general overarching objective of developing countries that have expressed their discontent with the regime has been to preserve State autonomy to regulate in the public interest (Morosini and Badin, 2017), responses have varied. Reactions have included attempts to exit the regime altogether, and efforts to amend the rules while adhering to the general principles of the regime, while in most cases countries have settled with maintaining the status quo. These developments have not received sufficient attention in the existing literature. Despite the emergence of innovative methods to contest the existing rules of the investment treaty regime in the developing world through new model treaties and national laws, most of the existing debate in the policy and academic spheres has focused on multilateral efforts to reform the regime. These efforts include negotiations over mega-regional investment regulation through the TPP and the TTIP, reform initiatives led by UNCTAD and UNCITRAL, and the multilateral investment court initiative by the EU.

Moreover, most of the existing literature on the experience of developing countries with the investment treaty regime has focused on categorising the different reactions and analysing which route is most effective in alleviating constraints posed by BITs in theory. Less attention has been paid to the actual experience of developing countries that have attempted different routes. Consequently, as argued by Calvert (2016), the existing literature has yet to fully grasp the new forms of contestation in the developing world. Indeed, a limited amount of studies have explored why developing countries with the same concerns have adopted divergent approaches to the investment treaty regime. Furthermore, the implications of these experiences in terms of revealing the actual options available to these developing countries in practice have also been neglected.

While taking into consideration the limitations of this study addressed below, this thesis has contributed to filling this gap in the literature by analysing the different reactions of developing countries that have expressed their discontent with the investment regime, through a detailed and comprehensive comparative case study analysis using original empirical research. In the three case studies analysed in this thesis, States expressed their discontent with the investment treaty regime after realising how their membership in the regime significantly constrained their policy space to regulate. This thesis argues that two main factors influenced how each country reacted after expressing its discontent. First, the ideological position of the regime in power determined whether or not the exit option was being considered. The second factor was the structural power dynamics influenced by the economic position of the country and the results of a cost-benefit assessment by its officials which determines whether the State has the leverage it had to confront its capital-exporting partners with its desire to exit or amend its existing treaties and to proceed with either route.

Whereas scholars and practitioners have argued that countries can choose between exit or voice, the findings of this study reveal that the actual choices available to developing countries are more complicated than those proposed in the existing literature. This thesis argues that in order to reflect the options available to developing countries, Hirschman's framework can be reconceptualised to take into consideration the power dynamics in the investment treaty regime and the challenges facing developing countries when deciding which route to take. The proposed revisions include a reconceptualised 'exit', the replacement of 'voice' with 'quasi-exit', and 'loyalty' with 'silence'.

In light of the current legitimacy crisis facing the investment treaty regime, it is expected that more developing countries will revise their membership of the regime and will certainly draw on the earlier experiences of their counterparts. While current efforts to reform the investment treaty regime on the multilateral level might result in changes in the regime to address the concerns shared by both developed and developing countries, any initiatives for radical or significant reconceptualisations of the regime are likely to emerge from the developing world. For the reasons above this study on the experiences of developing countries in the investment treaty regime is both timely and necessary.

This study focused on developing a better understanding of how developing countries became members of the investment treaty regime and why developing countries that have publicly expressed their discontent with the regime have reacted differently. The findings, however, cannot be generalised across the developing world as several dimensions are not covered in this thesis. First, a complete consensus on BITs and the investment treaty regime does not exist in the developing world. Indeed, there are examples of developing countries for which the benefits of BITs and the ISDS mechanism seem to outweigh their costs. These countries include capital-exporting countries like China as well as capital-importing countries like Chile. In the case of China, ISDS is perceived as potentially a useful tool to protect the interests of its investors abroad (Morosini and Badin, 2017). While it shares the concerns of other developed and developing countries regarding the impact of ISDS on its regulatory space, it has had limited exposure so far as a respondent to investor-State arbitration cases (Morosini and Badin, 2017). Chile, on the other hand, has continued to include ISDS in its treaties and to negotiate other agreements with similar provisions to those in BITs because it believes that it has gained more from adopting the liberal investment and economic rules than it has lost (Morosini and Badin, 2017). It is worth noting that the number of investment claims filed by Chilean investors (i.e. Chile as a home State) (7) exceeds the number of cases it has faced as a respondent (5) at the time of writing.[212]

Moreover, the categories addressed in this thesis do not include developing countries like Brazil who have not ratified any BITs. In 2015, Brazil has introduced a new model investment agreement to regulate the relationship between foreign investors and host countries: Cooperation and Facilitation Investment Agreements (CFIAs).[213] Finally, there are several developing countries that have been frequent respondents to ISDS cases but have expressed their discontent more discreetly. Hence, it is important to reiterate that this thesis has focused primarily on developing countries that have publicly contested the investment treaty regime before proceeding to react in different ways.

Another avenue for further research that has been already touched upon in this thesis is the assessment of the reaction of developing countries as litigants and not just as principals (which was the focus of this thesis). As established, once a State has joined the investment treaty regime by consenting to a BIT that includes ISDS, it forgoes its ability to immediately withdraw from the regime, or amend its obligations as a member, unless it reaches a mutual understanding with all its treaty partners, or the survival clauses in its BITs elapse. Accordingly, once an arbitration claim has been initiated, the State's ability to contest the claim is limited to litigation tactics as demonstrated in chapter 2. This is an important dimension to how countries have acted on their discontent with the regime which has not been addressed in this thesis. While

[212] UNCTAD, 'Chile – as home State'. International Investment Agreements Navigator. Available at: http://investmentpolicyhub.unctad.org/ISDS/CountryCases/41?partyRole=1 (Accessed 2 September 2018).

[213] Brazil has signed 8 CFIAs so far with other developing countries. These treaties update some of the traditional clauses included in BITs and introduce new safeguard clauses to regulate investments and investors' behaviour (corporate social responsibility clauses and provisions to protect the environment, labour affairs and public health). These agreements also include an alternative dispute resolution mechanism to the investor-State arbitration option in BITs (Moreira, 2018).

scholars like Langford et al. (2018) have documented some of the different tactics adopted by developing countries, it remains an area that could benefit from a more in-depth analysis in the form of case studies, in the way this thesis has assessed the tactics developing countries adopted as principals.

Finally, a third topic for future research is the effectiveness of the different routes adopted by developing countries. While there have been efforts in the existing literature to assess the different options available in theory, conclusions on the effectiveness of the routes adopted in practice and whether they can be considered as a success or failure may be premature at this point. Considering that developing countries generally started to react to the realisation that BITs are a threat to their sovereignty less than a decade ago, it will take a considerable amount of time before the full impact on their economy of the routes each has chosen is revealed or unpacked.

Appendix I. Quantitative Studies Examining the Relationship between BITs and FDI

Author of study	**Causal mechanism**	**Main findings**
Danzman (2016)	Signalling effects	Developing countries that sign BITs with developed countries experience an increase in FDI inflows in the infrastructure sector, however they do not experience an increase in total FDI inflows.
Egger and Merlo (2007)	Commitment effects	BITs increase OECD countries' outward FDI stock in partner countries (i.e. commitment effect).
Dixon and Haslam (2016)	Commitment and signalling effects	BITs do not increase FDI through signalling effects; 'strong' investor provisions in ratified BITs among Latin American States increase FDI through commitment effects in the context of, or combined with, trade agreements.
Aisbett (2009)	Commitment and signalling effects	BITs with OECD countries do not increase FDI to developing countries either through commitment or signalling effects.
Banga (2008)	Signalling effects	BITs with developed countries increase FDI to Asian developing countries through signalling effects.
Berger et al. (2011)	Commitment effects	BITs with full advance consent to investment treaty arbitration have no greater impact on FDI than other BITs, suggesting that BITs do not increase FDI through commitment effects.
Berger et al. (2013)	Commitment effects	BITs and regional trade agreements with full advance consent to investment treaty arbitration have no greater impact on FDI than other investment treaties, suggesting that investment

		treaties do not increase FDI through commitment effects.
Busse et al. (2010)	Commitment effects	BITs increase FDI flows to developing countries through commitment effects.
Büthe and Milner (2009)	Signalling effects	BITs increase FDI to developing countries through signalling effects.
Gallagher and Birch (2006)	Commitment and signalling effects	BITs with the United States do not increase FDI in Latin American countries from the United States. But the number of BITs signed increases total FDI through signalling effects.
Hallward-Driemeier (2003)	Commitment effects	BITs with OECD countries do not increase FDI to developing countries.
Kerner (2009)	Commitment and signalling effects	BITs with OECD countries increase FDI to developing countries through both commitment and signalling effects.
Neumayer and Spess (2005)	Signalling effects	BITs increase FDI to developing countries through signalling effects
Peinhardt and Allee (2012a) and Peinhardt and Allee (2012b)	Commitment effects	BITs with the United States do not generally increase FDI. BITs with OECD countries increase FDI from partner countries, but there is no difference between the effect of BITs with and without investment treaty arbitration.
UNCTAD (2009b)	Commitment effects	BITs have only a 'minor and secondary' impact on FDI.
Yackee (2009)	Signalling effects	BITs do not increase FDI to developing countries through signalling effects.
Rose-Ackerman and Tobin (2005)	Commitment and signalling effects	BITs with the United States do not increase FDI to developing countries from the United States; in general, BITs do not

		increase FDI through signalling effects.
Tobin and Rose-Ackerman (2011)	Signalling effects	BITs with OECD countries increase FDI to developing countries through signalling effects; these effects are greater for host countries with stronger domestic political institutions.
Salacuse and Sullivan (2005)	Signalling effects	US BITs increase FDI to developing countries from all sources (i.e. signalling effect); other OECD BITs have no significant signalling effect.

Source: Bonnitcha et al. (2017)

Appendix II. List of Interviewees

1. Bolivia

- Anonymous, Bolivian Diplomat, Skype interview, 12 April 2015.*
- Pablo Menacho, Deputy Attorney General at the State Attorney General's office, La Paz, 28 July 2015 and 29 August 2016.
- Luis Carlos Jemio, former Minister of Finance, La Paz, 29 July 2015.
- Beatriz Muriel, Senior Researcher at Institute for Advanced Development Studies, La Paz, 3 August 2015.
- Luis Arce, Minister of Economy and Public Finance, La Paz, 5 August 2015 and 7 September 2016.
- Juan Antonio Morales, former President of the Central Bank, La Paz, 5 August 2015 and 5 September 2016.
- Anonymous, senior official at the State Attorney General's office, La Paz, 11 August 2015 and 23 August 2016.
- Walter Clarems Endara, Vice Minister of Foreign Trade and Integration, Ministry of Foreign Affairs, La Paz, 11 August 2015 and 19 August 2016.
- Anonymous, representative of an international financial institution, La Paz, 22 August 2016.*
- Anonymous, Partner at private law firm, La Paz, 24 August 2016.
- Anonymous, representative of National Chamber of Commerce, La Paz, 26 August 2016.
- Anonymous, senior official at the Department of Investment Promotion, Ministry of Development Planning, La Paz, 29 August 2016.*
- Carlos Arze, Economic Researcher at the Centre of Studies for Labour and Agrarian Development, La Paz, 30 August 2016.
- Anonymous, representative of a European commercial delegation, La Paz, 31 August 2016.*
- Anonymous, representative of National Chamber of Industry, La Paz, 1 September 2016.
- Anonymous, former Minister of Hydrocarbons, La Paz, 2 September 2016.
- Anonymous, former Vice Minister of Finance, La Paz, 2 September 2016.
- Karen Longaric, Professor of International Law at the Higher University of San Andrés and former Director of Legal Affairs of the Ministry of Foreign Affairs, La Paz, 3 September 2016.

2. South Africa

- Anonymous, expert on South Africa’s investment policy, Skype interview, 21 March 2014.*
- Anonymous, official at an international financial institution, Skype interview, 30 June 2014.*
- Matthias Boddenberg, Executive Director of the South African-German Chamber of Commerce and Industry, Johannesburg, 21 July 2014.
- Xavier Carim, Director-General for International Trade and Economic Development, Department of Trade and Industry, Department of Trade and Industry, Pretoria, 22 July 2014.
- Mustaqeem De Gama, Director of Legal, Trade and Investment Division, Department of Trade and Industry, Department of Trade and Industry, Pretoria, 24 July 2014.
- Anonymous, Director at an international private law firm, Johannesburg, 28 July 2014.*
- Peter Leon, Partner at an international private law firm, Johannesburg, 30 July 2014 and 14 December 2016.
- Axel Pougin de La Maisonneuve, Head of Economic, Trade section of the EU Delegation in South Africa, Pretoria, 5 August 2014.
- Markus Schrader, Head of Economic Cooperation and Development at the Embassy of Switzerland in South Africa, Pretoria, 6 August 2014.
- Peter Draper, Managing Director at Tutwa Consulting and former Senior Research Fellow in the Economic Diplomacy Programme at the South African Institute of International Affairs, Johannesburg, 6 August 2014 and 15 December 2016.
- Azwimpheleli Langalanga, trade and investment law policy advisor, Johannesburg, 25 August 2015 and 8 December 2016.
- Andrew Layman, Executive Consultant, South African Chamber of Commerce and Industry, Johannesburg, 26 August 2015.
- Anonymous, former senior official at Department of Trade and Industry, Johannesburg, 27 August 2015 and 16 December 2016.
- Nikki Kruger, Chief Director, International Trade and Economic Development Division, Department of Trade and Industry, Department of Trade and Industry, Pretoria, 31 August 2015.
- Anonymous, Senior Associate at a local think tank, Johannesburg, 2 September 2015.
- Anonymous, Professor at Institute for Social and Economic Research, University of the Witwatersrand, Johannesburg, 2 September 2015 and 14 December 2016.

- Anonymous, representative of World Trade Organisation, Skype interview, 10 November 2015.*
- Patrick Bond, Professor of Political Economy, University of the Witwatersrand, 6 December 2016.
- Anonymous, official at Department of Trade and Industry, Pretoria, 7 December 2016.
- Anonymous, Professor at School of Law, University of the Witwatersrand, 12 December 2016.

3. Egypt

- Anonymous, official at General Authority for Investment and Free Zones, Cairo, 30 December 2014.*
- Anonymous, advisor to the Minister of Investment, Cairo, 4 January 2015.
- Anonymous, former official in a regional arbitration centre, phone interview, 17 December 2015.
- Anonymous, official II at Egyptian State Law Authority, Cairo, 20 December 2015 and 26 December 2017.*
- Anonymous, official I at Egyptian State Law Authority, Cairo, 22 December 2015 and 1 June 2017.*
- Anonymous, international expert on Egypt's investment treaties, Skype interview, 24 April 2017.
- Anonymous, former Minister of International Cooperation, Cairo, 8 May 2017.*
- Anonymous, senior official at General Authority for Investment and Free Zones, Cairo, 23 May 2017.
- Ahmed El-Kosheri, arbitrator, former Vice President of ICC Court and Senior Partner of Kosheri, Rashed and Riad Law Firm, Cairo, 14 June 2017.
- Anonymous, head of international arbitration and partner at a private law firm in Egypt, 31 July 2017.

* Interviewees who would not or could not formally be interviewed. The information collected from these informal interviews was used by the author to gain a better understanding of the issues relating to investment treaties in the respective countries and not published in this thesis.

Appendix III. List of Bilateral Investment Treaties

1. Bolivia

BIT	**Date of signature**	**Date of entry into force**
Bolivia - Germany BIT (1987)	23/03/1987	09/11/1990
Bolivia - Switzerland BIT (1987)	06/11/1987	17/05/1991
Bolivia - United Kingdom BIT (1988)	24/05/1988	16/02/1990
Bolivia - France BIT (1989)	25/10/1989	12/10/1996
Bolivia - Spain BIT (1990)	24/04/1990	12/05/1992
Belgium - Luxembourg Economic Union-Bolivia (1990)	25/04/1990	10/01/2004
Bolivia - Italy BIT (1990)	30/04/1990	22/02/1992
Bolivia - Sweden BIT (1990)	20/09/1990	03/07/1992
Bolivia - Netherlands BIT (1992)	10/03/1992	01/11/1994
Bolivia - China BIT (1992)	08/05/1992	01/09/1996
Bolivia - Peru BIT (1993)	30/07/1993	19/03/1995
Bolivia - Argentina (1994)	17/03/1994	01/05/1995
Bolivia - Chile BIT (1994)	22/09/1994	21/07/1999
Bolivia - Denmark BIT (1995)	12/03/1995	22/03/1997
Bolivia - Cuba BIT (1995)	06/05/1995	23/08/1998
Bolivia - Ecuador BIT (1995)	25/05/1995	15/08/1997
Bolivia - Romania BIT (1995)	09/10/1995	16/03/1997
Bolivia - Korea, Republic of BIT (1996)	01/04/1996	04/06/1997
Austria - Bolivia (1997)	04/04/1997	01/07/2002
Bolivia - United States of America BIT (1998)	17/04/1998	06/06/2001

Bolivia - Paraguay BIT (2001)	03/05/2001	04/09/2003
Bolivia - Spain BIT (2001)	29/10/2001	09/07/2002
Bolivia - Costa Rica BIT (2002)	07/10/2002	

Source: UNCTAD IIA Navigator

2. South Africa

BIT	**Date of signature**	**Date of entry into force**
South Africa - United Kingdom BIT (1994)	20/09/1994	27/05/1998
Netherlands - South Africa BIT (1995)	09/05/1995	01/05/1999
South Africa - Switzerland BIT (1995)	27/06/1995	30/11/1997
Korea, Republic of - South Africa BIT (1995)	07/07/1995	28/06/1997
Germany - South Africa BIT (1995)	11/09/1995	10/04/1998
France - South Africa BIT (1995)	11/10/1995	22/06/1997
Canada - South Africa BIT (1995)	27/11/1995	
Cuba - South Africa BIT (1995)	08/12/1995	07/04/1997
Denmark - South Africa BIT (1996)	22/02/1996	23/04/1997
Austria - South Africa BIT (1996)	28/11/1996	01/01/1998
Mozambique - South Africa BIT (1997)	06/05/1997	
Italy - South Africa BIT (1997)	09/06/1997	16/03/1999
Iran, Islamic Republic of - South Africa BIT (1997)	03/11/1997	
China - South Africa BIT (1997)	30/12/1997	01/04/1998
Mauritius - South Africa BIT (1998)	17/02/1998	23/10/1998
South Africa - Sweden BIT (1998)	25/05/1998	01/01/1999

Senegal - South Africa BIT (1998)	19/06/1998	29/12/2010
Ghana - South Africa BIT (1998)	09/07/1998	
Argentina - South Africa BIT (1998)	23/07/1998	01/01/2001
BLEU (Belgium-Luxembourg Economic Union) - South Africa BIT (1998)	14/08/1998	14/03/2003
Finland - South Africa BIT (1998)	14/09/1998	03/10/1999
South Africa - Spain BIT (1998)	30/09/1998	23/12/1999
Egypt - South Africa BIT (1998)	28/10/1998	
Chile - South Africa BIT (1998)	12/11/1998	
Greece - South Africa BIT (1998)	19/11/1998	06/09/2001
Russian Federation - South Africa BIT (1998)	23/11/1998	12/04/2000
Czech Republic - South Africa BIT (1998)	14/12/1998	
Nigeria - South Africa BIT (2000)	29/04/2000	27/07/2005
South Africa - Uganda BIT (2000)	08/05/2000	
South Africa - Turkey BIT (2000)	23/06/2000	
Algeria - South Africa BIT (2000)	24/09/2000	
Rwanda - South Africa BIT (2000)	19/10/2000	
South Africa - Tunisia BIT (2002)	28/02/2002	
Libya - South Africa BIT (2002)	14/06/2002	
South Africa - Yemen BIT (2002)	28/01/2003	
Qatar - South Africa BIT (2003)	21/10/2003	
Equatorial Guinea - South Africa BIT (2004)	17/02/2004	
Democratic Republic of the Congo - South Africa BIT (2004)	31/08/2004	
Israel - South Africa BIT (2004)	20/10/2004	

Angola - South Africa BIT (2005)	17/02/2005	
Gabon - South Africa BIT (2005)	02/08/2005	
South Africa - United Republic of Tanzania BIT (2005)	22/09/2005	
Kuwait - South Africa BIT (2005)	26/09/2005	
Congo - South Africa BIT (2005)	01/12/2005	
Madagascar - South Africa BIT (2006)	13/12/2006	
Guinea - South Africa BIT (2007)	25/09/2007	
South Africa - Sudan BIT (2007)	07/11/2007	
Ethiopia - South Africa BIT (2008)	18/03/2008	
South Africa - Zimbabwe BIT (2009)	27/11/2009	15/09/2010

Source: UNCTAD IIA Navigator

3. Egypt

BIT	**Date of signature**	**Date of entry into force**
Albania - Egypt BIT (1993)	22/05/1993	06/04/1994
Algeria - Egypt BIT (1997)	29/03/1997	03/05/2000
Argentina - Egypt BIT (1992)	11/05/1992	03/12/1993
Armenia - Egypt BIT (1996)	09/01/1996	01/03/2006
Australia - Egypt BIT (2001)	03/05/2001	05/09/2002
Austria - Egypt BIT (2001)	12/04/2001	29/04/2002
Azerbaijan - Egypt BIT (2002)	24/10/2002	
Bahrain - Egypt BIT (1997)	04/10/1997	11/01/1999
Belarus - Egypt BIT (1997)	20/03/1997	18/01/1999

Belgium-Luxembourg Economic Union (BLEU)- Egypt BIT (1977)	28/02/1977	20/09/1978
BLEU- Egypt BIT 1999)	28/02/1999	24/05/2002
Bosnia and Herzegovina - Egypt BIT (1998)	11/03/1998	29/10/2001
Botswana - Egypt BIT (2003)	02/07/2003	
Bulgaria - Egypt BIT (1998)	15/03/1998	08/06/2000
Burundi - Egypt BIT (2012)	13/05/2012	
Cameroon - Egypt BIT (2000)	24/10/2000	
Canada - Egypt BIT (1996)	13/11/1996	03/11/1997
Central African Republic - Egypt BIT (2000)	07/02/2000	
Chad - Egypt BIT (1998)	14/03/1998	
Chile - Egypt BIT (1999)	05/08/1999	
China - Egypt BIT (1994)	21/04/1994	01/04/1996
Comoros - Egypt BIT (1994)	13/11/1994	27/02/2000
Congo, Democratic Republic of the - Egypt BIT (1998)	18/12/1998	
Croatia - Egypt BIT (1997)	27/10/1997	02/05/1999
Cyprus - Egypt BIT (1998)	21/10/1998	11/05/1999
Czech Republic - Egypt BIT (1993)	29/05/1993	04/06/1994
Denmark - Egypt BIT (1999)	24/06/1999	29/10/2000
Djibouti - Egypt BIT (1998)	21/07/1998	
Egypt - Ethiopia BIT (2006)	27/07/2006	27/05/2010
Egypt - Finland BIT (1980)	05/05/1980	22/01/1982
Egypt - Finland BIT (2004)	03/03/2004	05/02/2005
Egypt - France BIT (1974)	22/12/1974	01/10/1975

Egypt - Gabon BIT (1997)	22/12/1997	
Egypt - Georgia BIT (1999)	10/08/1999	
Egypt - Germany BIT (1974)	05/07/1974	22/07/1978
Egypt - Germany BIT (2005)	16/06/2005	22/11/2009
Egypt - Ghana BIT (1998)	11/03/1998	
Egypt - Greece BIT (1993)	16/07/1993	06/04/1995
Egypt - Guinea BIT (1998)	06/03/1998	
Egypt - Hungary BIT (1995)	23/05/1995	21/08/1997
Egypt - Iceland BIT (2008)	08/01/2008	15/06/2009
Egypt - India BIT (1997)	09/04/1997	22/11/2000
Egypt - Indonesia BIT (1994)	19/01/1994	29/11/1994
Egypt - Iran, Islamic Republic of BIT (1977)	25/05/1977	
Egypt - Italy BIT (1989)	02/03/1989	01/05/1994
Egypt - Jamaica BIT (1999)	10/02/1999	
Egypt - Japan BIT (1977)	28/01/1977	14/01/1978
Egypt - Jordan BIT (1996)	08/05/1996	11/04/1998
Egypt - Kazakhstan BIT (1993)	14/02/1993	08/08/1996
Egypt - Korea, Dem. People's Rep. of BIT (1997)	19/08/1997	12/01/2000
Egypt - Korea, Republic of BIT (1996)	18/03/1996	25/05/1997
Egypt - Kuwait BIT (1966)	02/05/1966	09/08/1966
Egypt - Kuwait BIT (2001)	17/04/2001	26/04/2002
Egypt - Latvia BIT (1997)	24/04/1997	03/06/1998
Egypt - Lebanon BIT (1996)	16/03/1996	02/06/1997
Egypt - Libya BIT (1990)	03/12/1990	04/07/1991

Egypt - Macedonia BIT (1999)	22/11/1999	
Egypt - Malawi BIT (1997)	21/10/1997	07/09/1999
Egypt - Malaysia BIT (1997)	14/04/1997	03/02/2000
Egypt - Mali BIT (1998)	09/03/1998	07/07/2000
Egypt - Malta BIT (1999)	20/02/1999	17/07/2000
Egypt - Mauritius BIT (2014)	25/06/2014	17/10/2014
Egypt - Mongolia BIT (2004)	27/04/2004	25/01/2005
Egypt - Morocco BIT (1976)	03/06/1976	07/09/1978
Egypt - Morocco BIT (1997)	14/05/1997	01/07/1998
Egypt - Mozambique BIT (1998)	08/12/1998	
Egypt - Netherlands BIT (1976)	30/10/1976	01/01/1978
Egypt - Netherlands BIT (1996)	17/01/1996	01/03/1998
Egypt - Niger BIT (1998)	04/03/1998	
Egypt - Nigeria BIT (2000)	20/06/2000	
Egypt -Palestine BIT (1998)	28/04/1998	19/06/1999
Egypt - Oman BIT (1985)	28/04/1985	
Egypt - Oman BIT (1998)	25/03/1998	03/03/2000
Egypt - Pakistan BIT (2000)	16/04/2000	
Egypt - Poland BIT (1995)	01/07/1995	17/01/1998
Egypt - Portugal BIT (1999)	29/04/1999	23/12/2000
Egypt - Qatar BIT (1999)	12/02/1999	14/07/2006
Egypt - Romania BIT (1976)	10/05/1976	02/01/1977
Egypt - Romania BIT (1994)	24/11/1994	03/04/1997
Egypt - Russian Federation BIT (1997)	23/09/1997	12/06/2000

Egypt - Senegal BIT (1998)	05/03/1998	
Egypt - Serbia BIT (1977)	03/06/1977	20/03/1979
Egypt - Serbia BIT (2005)	24/05/2005	20/03/2006
Egypt - Seychelles BIT (2002)	22/01/2002	
Egypt - Singapore BIT (1997)	15/04/1997	20/03/2002
Egypt - Slovakia BIT (1997)	30/04/1997	01/01/2000
Egypt - Slovenia BIT (1998)	28/10/1998	07/02/2000
Egypt - Somalia BIT (1982)	29/05/1982	16/04/1983
Egypt - South Africa BIT (1998)	28/10/1998	
Egypt - Spain BIT (1992)	03/11/1992	26/04/1994
Egypt - Sri Lanka BIT (1996)	11/03/1996	10/03/1998
Egypt - Sudan BIT (1977)	28/05/1977	14/03/1978
Egypt - Sudan BIT (2001)	08/07/2001	01/04/2003
Egypt - Swaziland BIT (2000)	18/07/2000	
Egypt - Sweden BIT (1978)	15/07/1978	29/01/1979
Egypt - Switzerland BIT (1973)	25/07/1973	04/06/1974
Egypt - Switzerland BIT (2010)	07/06/2010	15/05/2012
Egypt - Syrian Arab Republic BIT (1997)	28/04/1997	05/10/1998
Egypt - United Republic of Tanzania BIT (1997)	30/04/1997	
Egypt - Thailand BIT (2000)	18/02/2000	27/02/2002
Egypt - Tunisia BIT (1989)	08/12/1989	02/01/1991
Egypt - Turkey BIT (1996)	04/10/1996	31/07/2002
Egypt - Turkmenistan BIT (1995)	23/05/1995	28/02/1996
Egypt - Uganda BIT (1995)	04/11/1995	

Egypt - Ukraine BIT (1992)	21/12/1992	10/10/1993
Egypt - United Arab Emirates BIT (1988)	19/06/1988	02/03/1998
Egypt - United Arab Emirates BIT (1997)	11/05/1997	11/01/1999
Egypt - United Kingdom BIT (1975)	11/06/1975	24/02/1976
Egypt - United States of America BIT (1986)	11/03/1986	27/06/1992
Egypt - Uzbekistan BIT (1992)	16/12/1992	08/02/1994
Egypt - Viet Nam BIT (1997)	06/09/1997	04/03/2002
Egypt - Yemen BIT (1988)	19/10/1988	03/03/1990
Egypt - Yemen BIT (1996)	06/06/1996	10/04/1998
Egypt - Zambia BIT (2000)	28/04/2000	
Egypt - Zimbabwe BIT (1999)	02/06/1999	

Source: UNCTAD IIA Navigator

Appendix IV. List of Investment Treaty Arbitration Cases

1. Bolivia

Year	Case	BIT	Dispute and Court	Status/Outcome
2002	Aguas del Tunari S.A. v. Republic of Bolivia (ICSID Case No. ARB/02/3)	Bolivia-Netherlands BIT (1992)	ICSID Claims arising out of alleged actions and omissions of the government leading up to the rescission of a concession agreement for the provision of water and sewage services to the City of Cochabamba, Bolivia entered into with the claimant. Alleged BIT breaches: expropriation	The case was settled for a nominal fee after internal and external pressure against the company. The ICSID tribunal issued an order taking note of the discontinuance of the proceeding in March 2006.
2006	Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia (ICSID Case No. ARB/06/2)	Bolivia – Chile BIT (1994)	ICSID Claims arising out of the revocation by Presidential Decree of eleven mining concessions allegedly held by claimants through an investment vehicle in Bolivia. BIT breaches found by tribunal: direct and indirect expropriation, fair and equitable treatment and arbitrary, unreasonable and/or discriminatory measures	In September 2015 the tribunal ruled in favour of the claimant awarding them compensation worth c. 57 million USD. The claimant had initially claimed damages of c.150 million USD. In June 2018 the Office of the Attorney General announced that they reached an agreement with the claimant to reduce the compensation award to c.42 million USD.
2007	E.T.I. Euro Telecom International N.V. v. Plurinational State of Bolivia	Bolivia – Netherlands BIT (1992)	ICSID Claims arising out of the government's transfer of claimant's 50 per cent stake in the Bolivian telecoms company	The case was settled and the ICSID tribunal issued an order taking note of the discontinuance of the proceeding in October 2009.

	(ICSID Case No. ARB/07/28)		ENTEL to the State after the company was nationalised in 2007. Alleged BIT breaches: expropriation	The claimant initially sought a compensation of c. 700 million USD, but the Bolivian authorities managed to negotiate a settlement of 100 million USD.
2008	Ashmore Energy International (A.E.I) Luxembourg Holdings S.a.r.l. v. the Plurinational State of Bolivia	BLEU (Belgium-Luxembourg Economic Union) – Bolivia BIT (1990)	Stockholm Chamber of Commerce (SCC). Claims arising out of the alleged government's expropriation of shares in the natural gas pipeline Transporte de Hidrucarburos S.A. (Transredes) in which AEI held a 25 per cent stake (as part of the nationalisation scheme). Alleged BIT breaches: expropriation	The case was settled before the tribunal reached a final verdict. The claimant initially sought a compensation award of 500 million USD, before settling for 121 million USD after negotiations with the Bolivian government.
2010	Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia (PCA Case No. 2011-17)	Bolivia-United Kingdom BIT (1988) Bolivia-United States of America BIT (1998)	PCA Claims arising out of the failure to agree on compensation for the government's nationalisation of Guaracachi America, Inc. and of Rurelec's controlling 50.001 per cent shareholding in the Bolivian electricity company Empresa Eléctrica Guaracachi. BIT breaches found by tribunal: expropriation	The tribunal decided in favour of the investor after finding that the State has breached the expropriation clause. In January 31, 2014, an arbitral tribunal of the Permanent Court of Arbitration issued its final award, establishing a compensation amount of 28.9 million USD in addition to compound interest at 5.6% per annum from the nationalization date (May 1, 2010 up to the time of payment). The claimant had

				initially claimed damages of c. 140 million USD. The Bolivian government reached an agreement with the claimant for a compensation of 31.5 million USD in total.
2010	Pan American Energy LLC v. Plurinational State of Bolivia (ICSID Case No. ARB/10/8)	Bolivia-United States of America BIT (1998)	ICSID Claims arising out of the government's nationalisation of the Chaco Petroleum Company (a subsidiary in which Pan American held a 50 per cent interest) after failing to reach an agreements over the compensation value. Alleged BIT breaches: expropriation	The case was settled and the ICSID tribunal issued an order taking note of the discontinuance of the proceeding in February 2015. The claimant was initially seeking a compensation of 1.5 billion USD but settled for 357 million USD after negotiations with the Bolivian government.
2010	Oiltanking GmbH, Graña Montero S.A. and Graña Montero S.A.A. v. Bolivia	Bolivia-Germany BIT (1987) Bolivia - Peru BIT (1993)	PCA Claims arising out of the government's 2008 nationalisation of the claimants' shares in Compañía Logística de Hidrocarburos S.A. (CLHB), a company that engages in the transportation and storage of hydrocarbons, following failed negotiations between the State and the company concerning the amount invested and the compensation owed.	The case was settled before the tribunal reached a final verdict. In February 2011, it was reported that Oiltanking and Graña y Montero had dropped their arbitration claim against Bolivia after agreeing to a reported settlement of 16.4 million USD (against an original claim of 30 million USD).
2011	Abertis Infraestructuras	Bolivia - Spain BIT (2001)	PCA	In May 2017 Bolivia announced it had

	S.A. v. Government of Bolivia (PCA Case No. 2011-14)		Claims arising out of allegations that Bolivia breached the concession agreement with Servicios de Aeropuertos Bolivianos S.A. (SABSA), an Abertis-controlled company that had operated three airports in Bolivia. The government later nationalized SABSA. Alleged BIT breaches: FET	reached a settlement of 23 million USD with the claimant. The claimant had initially claimed damages of 85.5 million USD.
2013	South American Silver Limited v. The Plurinational State of Bolivia (PCA Case No. 2013-15)	Bolivia-United Kingdom BIT (1988)	PCA Claims arising out of the government's issuance of a decree that revoked mining concessions that had been previously granted to claimant's subsidiary concerning the Malku Khota project. Alleged BIT breaches: -expropriation (direct and indirect) -FET -NT	Pending The claimant is seeking a compensation of 385.7 million USD, or alternatively restitution of the Malku Khota project along with monetary damages in the amount of 176.4 million USD.
2014	Iberdrola, S.A. and Iberdrola Energía, S.A.U. v. The Plurinational State of Bolivia (PCA Case No. 2015-05)	Bolivia- Spain BIT (2001)	PCA Claims arising out of Bolivia's Supreme Decree No. 1448 of 2012, which ordered the nationalisation of claimants' (indirectly-held) shares in four electricity companies. Alleged BIT breaches:	The case was settled before the tribunal reached a final verdict. According to the Supreme Decrees No. 2592 in November 2015 and published in Bolivia's Official Gazette, Bolivia paid 34.17 million USD to Iberdrola.

			-direct expropriation -FET -full protection and security -NT -MFN	
2014	Red Eléctrica Internacional S.A.U. v. Plurinational State of Bolivia	Bolivia - Spain BIT (2001)	UNCITRAL Arbitration Rules Claims arising out of the government's issuance of Supreme Decree No. 1214 that seized and nationalised an electricity transmission company controlled by the claimant. Alleged BIT breaches: direct expropriation	The case was settled before the tribunal reached a final verdict. In November 2014 Bolivia announced it had reached a settlement of 36.5 million USD with the claimant. The claimant was initially seeking 200 million USD in compensation.
2015	Paz Holdings Ltd. v. Plurinational State of Bolivia	Bolivia-United Kingdom BIT (1988)	UNCITRAL Arbitration Rules Claims arising out of Bolivia’s Supreme Decree No. 1448 of 2012, which ordered the nationalisation of claimant’s (indirectly-held) shares in four Bolivian electricity companies.	The case was settled before the tribunal reached a final verdict. According to the Supreme Decrees No. 2594 in November 2015 and published in Bolivia’s Official Gazette, Bolivia paid 19.5 million USD to Paz Holdings.

2016	Glencore Finance (Bermuda) Ltd. v. Plurinational State of Bolivia (PCA Case No. 2016-39)	Bolivia-United Kingdom BIT (1988)	PCA. Claims arising out of Bolivia's direct expropriations of two smelting plants, the Vinto Metallurgical Complex and the Vinto Antimony Plant, as well as the tin and zinc mine Colquiri mining centre, all of which are owned by the claimant's local subsidiaries. They were nationalised by presidential decrees between 2007 and 2012.	The case is still pending.
2018	Banco Bilbao Vizcaya Argentaria S.A. v. Plurinational State of Bolivia (ICSID Case No. ARB(AF)/18/5)	Bolivia-Spain BIT (2001)	ICSID Claims arising out of Bolivia's Pension Law No. 65 of 2010 which stipulated the nationalisation of the pension fund. Alleged BIT breaches: expropriation	The case is still pending.

Sources: UNTCAD ISDS Navigator, Investment Arbitration Reporter, Official Gazette of Bolivia

2. South Africa

Year	Case	BIT	Dispute and Court	Status/Outcome
2001	Swiss Investor v. Republic of South Africa (confidential arbitration case)	South Africa - Switzerland BIT (1995)	UNCITRAL Arbitration Rules. Claims arising out of allegations by the claimant that the South African police failed to protect his property and that his investment was subjected to an expropriation.	In 2003, the tribunal rendered an award in favour of the investor. The tribunal ruled that South Africa failed to offer sufficient police protection and security to the property of the Swiss investor. The claimant was subsequently awarded 6.6 million SAR in damages later in 2004. a subsequent arbitral award was rendered on October 19, 2004, awarding damages of 6.6 Million South African Rand, plus interest.
2007	Piero Foresti, Laura de Carli and others v. Republic of South Africa (ICSID Case No. ARB(AF)/07/1)	Italy - South Africa BIT (1997)	ICSID Claims arising out of the introduction of compulsory equity divestiture requirements with respect to the investors' shares in certain operating companies through the Mineral and Petroleum Resources Development Act, and Alleged BIT breaches: -expropriation (direct and indirect) - FET - NT	The case was ultimately settled on the merits in July 2010. The claimant was initially seeking 375 million USD in compensation. In August 2010 the tribunal ordered the claimants to contribute to the sum of 400,000 Euros to the respondent's costs and bear its own costs.

Sources: UNCTAD ISDS Navigator and Investment Arbitration Reporter.

3. Egypt

Year	Case	BIT	Dispute and Court	Status/Outcome
1998	Wena Hotels Ltd. v. Arab Republic of Egypt (ICSID Case No. ARB/98/4)	Egypt - United Kingdom BIT (1975)	ICSID Claims arising out of the alleged breach of agreements to develop and manage two hotels in Luxor and Cairo, Egypt, as well as an alleged campaign of continual harassment to the investor by the government of Egypt. BIT breaches found by the tribunal: -indirect expropriation - FET -full protection and security	The ICSID tribunal ruled in favour of the investor in December 2000. The investor claimed damages of 62.8 million USD, but the tribunal awarded an 8 million USD compensation for the investor which rose to 20.6 million USD after adding interest and legal costs.
1999	Middle East Cement Shipping and Handling Co. v. Arab Republic of Egypt (ICSID Case No. ARB/99/6)	Egypt - Greece BIT (1993)	ICSID Claims arising out of Egypt's alleged expropriation of Middle East Cement's interests in a business concession located in Egypt. BIT breaches found by tribunal: indirect expropriation.	The ICSID tribunal ruled in favour of the investor in April 2002. The investor claimed damages of 42.2 million USD, but the tribunal awarded c. 2.2 million USD plus interest.
2002	Ahmonseto, Inc. and others v. Arab Republic of Egypt (ICSID Case No. ARB/02/15)	Egypt - United States of America BIT (1986)	ICSID Claims arising out of the State’s credit policy towards the claimants including customs duties and taxes. In addition to criminal proceedings initiated by the State against the claimants.	In June 2007 the ICSID tribunal rendered an award in favour of the State dismissing all the claims made by the investor. The investor had claimed damages of 100 million USD.

			Alleged BIT breaches: -indirect expropriation - FET -MFN	
2002	Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt (ICSID Case No. ARB/02/9)	Egypt - United States of America BIT (1986)	ICSID Claims arising out of allegations by claimants that the cotton company in which they held shares in had been denied financial benefits conferred upon other players in the cotton industry. Alleged BIT breaches: -FET -full protection and security - arbitrary unreasonable and/or discriminatory measures	In October 2006 the ICSID tribunal rendered an award in favour of the State dismissing all the claims made by the investor. The investor had claimed damages of 365 million USD.
2003	Joy Mining Machinery Limited v. Arab Republic of Egypt (ICSID Case No. ARB/03/11)	Egypt - United Kingdom BIT (1975)	ICSID Claims arising out of the investor's supply of two sets of phosphate mining equipment to an Egyptian State enterprise, IMC. The claimant alleged that the equipment was paid for but the relevant guarantees were never released. Alleged BIT breaches: - indirect expropriation -FET - full protection and security - transfer of funds -arbitrary, unreasonable and/or	In August 2004 the case was decided in favour of the State as jurisdiction was declined by the ICSID tribunal. The investor had claimed damages of 4.5 million USD.

			discriminatory measures	
2004	Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt (ICSID Case No. ARB/04/13)	BLEU (Belgium-Luxembourg Economic Union) - Egypt BIT (1999)	ICSID Claims arising out of disagreements over additional compensation allegedly due to the investor under a contract it had entered into with the Egyptian agency in charge of the operation of the Suez Canal for the deepening and widening of certain southern stretches of the Canal. Alleged BIT breaches: -FET -full protection and security	In November 2008 the ICSID tribunal rendered an award in favour of the State dismissing all the claims made by the investor. The investor had claimed damages of 80 million USD.
2005	Helnan International Hotels A/S v. Arab Republic of Egypt (ICSID Case No. ARB/05/19)	Denmark – Egypt BIT (1999)	ICSID Claims arising out of the eviction from the management of the Shepheard Hotel in Cairo, following a decision of the Egyptian Ministry of Tourism to downgrade the hotel's classification from the five star status required under the management contract. Alleged BIT breaches: -indirect expropriation -FET	In July 2008 the ICSID tribunal rendered an award in favour of the State dismissing all the claims made by the investor. The investor had claimed damages of 65.7 million USD.

			-full protection and security	
2005	Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt (ICSID Case No. ARB/05/15)	Egypt - Italy BIT (1989)	ICSID Claims arising out of a series of acts and omissions by the respondent that allegedly expropriated claimants' property of oceanfront land, including the issuance of a ministerial resolution cancelling the project's contract and the physical seizure of the property on two occasions. BIT breaches found by tribunal: -expropriation -full protection and security -FET -arbitrary, unreasonable and/or discriminatory measures	The ICSID tribunal rendered an award in favour of the investor in June 2009. The investor claimed damages of 230 million USD, but the tribunal awarded c. 127 million USD including compound interest.
2008	Malicorp Limited v. Arab Republic of Egypt (ICSID Case No. ARB/08/18)	Egypt - United Kingdom BIT (1975)	ICSID Claims arising out of the claimant's allegation that the Egyptian government has expropriated its contractual rights to build and operate the Ras Sudr airport in Sinai. Alleged BIT breaches: -indirect expropriation -FET	In February 2011 the ICSID tribunal rendered an award in favour of the State dismissing all the claims made by the investor. The investor had claimed damages of 500 million USD.

2009	H&H Enterprises Investments, Inc. v. Arab Republic of Egypt (ICSID Case No. ARB/09/15)	Egypt - United States of America BIT (1986)	ICSID Claims arising out of disagreements between the parties concerning a contract to manage and operate a resort in El Ain El Sokhna including the denial of claimant's alleged right to purchase the resort under an option to buy agreement leading to litigation before domestic courts and the government's subsequent eviction of H&H from the resort. Alleged BIT breaches: -indirect expropriation -FET -full protection and security	In May 2014 the ICSID tribunal rendered an award in favour of the State dismissing all the claims made by the investor. The investor had claimed damages of 833 million USD.
2011	Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (PCA Case No. 2012-07)	Egypt - Finland BIT (2004)	Permanent Court of Arbitration Claims arising out of criminal charges allegedly brought against the claimant by the government and a related seizure of the claimant's assets.	This case is still pending. The claimant is seeking damages of 200 million USD.
2011	Bawabet Al Kuwait Holding Company v. Arab Republic of Egypt (ICSID Case No. ARB/11/6)	Egypt - Kuwait BIT (2001)	ICSID Claims arising out of the government's cancellation of the free zone status in which the claimant's fertilizer company operated, along with the increase in the price of gas supplied.	The case was settled and the ICSID tribunal issued an order taking note of the discontinuance of the proceeding in November 2016. The Egyptian Ministry of Petroleum announced a settlement was reached with

				Bawabet Al Kuwait Holding Company in October 2016. The settlement took place under the auspices of the Committee for the Settlement of Investment Contract Disputes led by the Council of Ministers. Details and terms of the settlement have not been disclosed. The claimant was seeking damages of 2.2 billion USD.
2011	Indorama v. Egypt Indorama International Finance Limited v. Arab Republic of Egypt (ICSID Case No. ARB/11/32)	Egypt - United Kingdom BIT (1975)	ICSID Claims arising out of the government's renationalisation of Indorama's Shebin al-Kom textile factory, in the Menoufia province. Alleged BIT breaches: expropriation	The case was settled and the ICSID tribunal issued an order taking note of the discontinuance of the proceeding in July 2015. In July 2015 the Minister of Investment announced that a settlement was reached between the Egyptian government and Indorama. The investor was seeking damages of 156 million USD, but settled for 54 million USD.
2011	National Gas S.A.E. v. Arab Republic of Egypt (ICSID Case No. ARB/11/7)	Egypt - United Arab Emirates BIT (1997)	ICSID Claims arising out of the decision by Cairo Court of Appeal to set aside a commercial arbitration award rendered in favour of National Gas against the state-owned Egyptian General Petroleum Company under a gas pipelines	In April 2014 the case was decided in favour of the State as jurisdiction was declined by the ICSID tribunal. The investor had claimed damages of 36 million USD.

			construction and operation agreement, on the alleged basis that the arbitration clause in the concession agreement had not been approved by the competent authorities as required by Egyptian law. Alleged BIT breaches: -indirect expropriation - FET	
2011	Hussain Sajwani, Damac Park Avenue for Real Estate Development S.A.E., and Damac Gamsha Bay for Development S.A.E. v. Arab Republic of Egypt (ICSID Case No. ARB/11/16)	Egypt - United Arab Emirates BIT (1997)	ICSID Claims arising out of the government's conviction of Mr. Sajwani and of Egypt's tourism minister on grounds of corruption concerning the investor's acquisition of land in Gamsha Bay for the development of a residential complex.	The case was settled and the ICSID tribunal issued an order taking note of the discontinuance of the proceeding in September 2014. In May 2013 a settlement was reached between the Egyptian government and the investor. The official terms of the settlement were confidential, but according to some press reports it involved payment in the region of 40 million USD by Sajwani and the forfeit of the land on the Red Sea Coast, while retaining the land where the Park Avenue Mall will be constructed.
2012	Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-	Egypt - United States of America BIT (1986) Egypt - Germany BIT (2005)	Claims arising out of alleged breaches of a long-term contract for the supply of natural gas between the parties, including the prolonged interruption of gas supply and failure to	The ICSID tribunal reached a decision in favour of the investor in February 2017, however compensation for the BIT breaches remains to be

	EMG Investors LLC and David Fischer v. Arab Republic of Egypt (ICSID Case No. ARB/12/11)		deliver the agreed volume of gas. BIT breaches found by tribunal: -expropriation -full protection and security	determined in a subsequent ruling. The claimant is seeking damages of c. 535.1 million USD
2012	Yosef Maiman, Merhav (MNF), Merhav-Ampal Group, Merhav-Ampal Energy Holdings v. Arab Republic of Egypt (PCA Case No. 2012/26)	Egypt - Poland BIT (1995)	Permanent Court of Arbitration Claims arising out of the alleged government's failure to protect a gas pipeline in which the claimants had invested from attacks that took place during the Arab Spring. BIT breaches found by tribunal: -FET -expropriation	The UNCITRAL tribunal reached a decision in favour of the investor in December 2017, however compensation for the BIT breaches remains to be determined. The claimant is seeking damages of 1.1 billion USD
2012	Veolia Propreté v. Arab Republic of Egypt (ICSID Case No. ARB/12/15)	Egypt - France BIT (1974)	ICSID Claims arising out of disagreements over the performance of a contract entered into between Veolia's subsidiary, Onyx Alexandria, and the governorate of Alexandria to provide waste management services, including Egypt's alleged refusal to modify the contract in response to inflation and the enactment of new labour legislation.	The ICSID tribunal rendered an award in favour of the State in May 2018. The award has not been released or published yet. The claimant was seeking damages of c. 175 million Euros.
2013	Ossama Al Sharif v. Arab Republic of Egypt (I) (ICSID Case No. ARB/13/3)	Egypt - Jordan BIT (1996)	ICSID Claims arising out of the alleged interference by the government with	The case was settled and the ICSID tribunal issued an order taking note of the discontinuance of

			claimant's investments in a port development project.	the proceeding in June 2015. Details of the settlement remained confidential. Reports in the press claim that the investor sought damages of 490 million USD in total for the three arbitration claims filed in ICSID.
2013	Ossama Al Sharif v. Arab Republic of Egypt (II) (ICSID Case No. ARB/13/4)	Egypt - Jordan BIT (1996)	ICSID Claims arising out of alleged interference by the government with claimant's investments in a customs system project.	The case was settled and the ICSID tribunal issued an order taking note of the discontinuance of the proceeding in May 2015. Details of the settlement remained confidential. Reports in the press claim that the investor sought damages of 490 million USD in total for the three arbitration claims filed in ICSID.
2013	Ossama Al Sharif v. Arab Republic of Egypt (III) (ICSID Case No. ARB/13/5)	Egypt - Jordan BIT (1996)	ICSID Claims arising out of alleged interference by the government with claimant's investments in a bulk liquids terminal project.	The case was settled and the ICSID tribunal issued an order taking note of the discontinuance of the proceeding in June 2015. Details of the settlement remained confidential. Reports in the press claim that the investor sought damages of 490 million USD in total for the three arbitration claims filed in ICSID.

2013	ASA International S.p.A. v. Arab Republic of Egypt (ICSID Case No. ARB/13/23)	Egypt - Italy BIT (1989)	ICSID Claims arising out of alleged government measures that affected the claimant's investment in a company that had concluded contracts for waste management services in Cairo.	The case was settled and the ICSID tribunal issued an order taking note of the discontinuance of the proceeding in August 2016. According to a statement by the Ministry of Investment a settlement was reached with the investor in 2016. Local press report that the claimant was seeking a compensation of 750 million EGP (c. 85 million USD) but settled for 180 million EGP (c. 20 million USD).
2013	Cementos La Union S.A. and Aridos Jativa S.L.U v. Arab Republic of Egypt (ICSID Case No. ARB/13/29)	Egypt - Spain BIT (1992)	ICSID Claims arising out of the alleged overpricing by the government of an operating license for a cement manufacturing plant, and the application of an allegedly uncommon system of granting the licenses through tenders.	The case is pending.
2013	Erich Utsch Aktiengesellschaft, Helmut Jungbluth and Utsch M.O.V.E.R.S. International GmbH v. Arab Republic of Egypt (ICSID Case No. ARB/13/37)	Egypt - Germany BIT (2005)	ICSID Claims arising out of the government's termination of a license plate supply and manufacturing contract concluded with the claimants, on the alleged basis that the transaction was closed for an uncompetitive price, leading to the conviction of Utsch's	The case was settled and the ICSID tribunal issued an order taking note of the discontinuance of the proceeding in April 2017. The Egyptian government and the investor reached an agreement to suspend case proceedings in July 2016 before the claimant decided to

			chief executive officer.	withdraw the case in 2017.
2014	Unión Fenosa Gas, S.A. v. Arab Republic of Egypt (ICSID Case No. ARB/14/4)	Egypt - Spain BIT (1992)	ICSID Claims arising out of the alleged suspension of gas supplies by the government to a liquefied natural gas plant operated by the claimant, which caused the plant to be inoperative for over a year.	In September 2018, Naturgy Energy Group S.A., who owns 50% of Unión Fenosa Gas, disclosed that an ICSID tribunal found that Egypt failed to afford FET to the investor, and has been ordered to pay c. 2 billion USD billion in compensation.
2015	ArcelorMittal v. Egypt ArcelorMittal S.A. v. Arab Republic of Egypt (ICSID Case No. ARB/15/47)	BLEU (Belgium-Luxembourg Economic Union) - Egypt BIT (1999)	ICSID Claims arising out of the government's alleged refusal to extend the development period for the claimant's steel plant construction project, followed by a process to revoke the claimant's licenses. According to the claimant, the construction was delayed due to the occupation of the property and problems with gas and electricity supply.	The case was settled and the ICSID tribunal issued an order taking note of the discontinuance of the proceeding in April 2017. In November 2016 the Minister of Investment announced that the government had reached a settlement with ArcelorMittal. The claimant was seeking damages of 600 million USD but according to local press reports the settlement reached was 90 million USD.

2016	Al Jazeera Media Network v. Arab Republic of Egypt (ICSID Case No. ARB/16/1)	Egypt - Qatar BIT (1999)	ICSID Claims arising out of alleged destruction of the claimant's media business in Egypt, by means of arrest and detention of employees, attacks on facilities, interference with transmissions and broadcasts, closure of offices, cancellation of claimant's broadcasting licence and compulsory liquidation of its local branch.	The case is pending. The claimant is seeking damages of 150 million USD.
2016	Champion Holding Company, James Tarrick Wahba, John Byron Wahba and others v. Arab Republic of Egypt (ICSID Case No. ARB/16/2)	Egypt - United States of America BIT (1986)	ICSID	The case is pending.
2016	Fund III Egypt, LLC, LP Egypt Holdings I, LLC and OMLP Egypt Holdings I, LLC v. Arab Republic of Egypt (ICSID Case No. ARB/16/37)	Egypt - United States of America BIT (1986)	ICSID Claims arising from the decision of the New Urban Communities Authority (NUCA) to terminate a contract with Orascom Housing Communities and halt the construction work at the 'Haram City' affordable housing project.	The case was settled and the ICSID tribunal issued an order taking note of the discontinuance of the proceeding in July 2018.

2016	Nile Douma Holding v. Arab Republic of Egypt	Bahrain - Egypt BIT (1997)	UNCITRAL Arbitration Rules Claims arising from dispute over a piece of land which the claimant alleges it has the right to use to build a hotel in the Rod El Farag area in Cairo.	The case is pending.
2017	Future Pipe International B.V. v. Arab Republic of Egypt (ICSID Case No. ARB/17/31)	Egypt - Netherlands BIT (1996)	ICSID Claims arising from a dispute over water and sewage distribution in Egypt's new administrative capital.	The case is pending.
2018	Tantalum International Ltd. and Emerge Gaming Ltd. v. Arab Republic of Egypt (ICSID Case No. ARB/18/22)	Egypt-Australia BIT (2001)	ICSID Claims arising from Tantalum's (a subsidiary of Arrowhead Resources Inc.) allegations that the State has implemented illegal measures to gain control of their exploitation Licences in the Abu Dabbab mine.	The case is pending.

2018	International Holding Project Group and others v. Arab Republic of Egypt (ICSID Case No. ARB/18/31)	Egypt - Kuwait BIT (2001)	ICSID Claims arising out of a dispute between the government and the claimant over a real estate project.	This case is pending.

Sources: UNCTAD, Investment Arbitration Reporter and local press reports

Appendix V. List of Nationalisation Decrees (Bolivia)

- On the 1st May 2006, Supreme Decree No. 28701 mandated the government to revert 50 per cent plus one of the shares of the major hydrocarbon companies in the sector to the State. These companies included: Empresa Petrolera Chaco SA, controlled by Pan American Energy through subsidiary Amoco Bolivia Oil & Gas AB; Andina SA, controlled by Repsol YPF; Transredes SA, controlled by Shell Gas Latin America BV and Ashmore Energy LLC; Petrobrás Bolivia Refinación SA, controlled by Petrobras; and Compañía Logística de Hidrocarburos Boliviana SA (CLHB), controlled by Oiltanking GmbH, Graña y Montero Petrolera SA.
- On the 31st of October 2006, Supreme Decree No. 28901 stipulated the nationalisation of the Huanuni Mining Center operated by England's Allied Deals PLC.
- On the 7th February 2007, Supreme Decree No. 29026 ordered the 'reversion' of the Metallurgical Complex of Vinto, which was under the control of Swiss company Glencore International AG, to the State.
- On the 1st of May 2008, 3 Supreme Decrees were issued: Supreme Decree No. 29541 mandated the acquisition of majority shareholding interest (50 per cent plus 1) in Empresa Petrolera Chaco SA (from Amoco Bolivia AB) and Transredes – Transporte de Hidrocarburos SA (from Shell and Ashmore Energy) by the State. Supreme Decree No. 29542 mandated the acquisition of the total share package of CLHB from Oiltanking GmbH by the State. Supreme Decree No. 29544 mandated the nationalisation of Entel SA which was owned by ETI Euro Telecom International NV's by the State.
- On the 2nd June 2008, Supreme Decree No. 29586 mandated the acquisition by the State of 100 per cent of the shareholding package of Shell Gas Latin America BV and Ashmore Energy LLC in oil and gas transportation corporation, Transredes SA.
- On 23rd of January 2009, Supreme Decree No. 29888 mandated the acquisition by the State of 100 per cent of the shareholding interests of Amoco Bolivia Oil & Gas AB in Empresa Petrolera Chaco SA.
- On the 1st of May 2009, Supreme Decree No.111 mandated the nationalisation of Air BP Bolivia SA, jet fuel investments in Bolivian airports.
- On the 1st of May 2010, Supreme Decree No. 493 mandated the nationalisation of four power companies including Corani SA, Vallehermoso SA and Guaracachi SA. owned by GDF Suez, Carlson Dividend Facility SA, The Bolivian Generating Group LLC (BGG) and Rurelec PLC.

- On the 1st of May 2010, Supreme Decree No. 499 mandated the nationalisation of the Vinto-Antimony Plant, operated by Swedish Glencore International AG.
- On the 1st of May 2012, Supreme Decree No. 1214 mandated the nationalisation of electrical carrier Transportadora de Electricidad SA, which was owned by Red Eléctrica Internacional SA.
- On the 29th of December 2012, Supreme Decree No. 1448 mandated the nationalisation of four electricity companies: Electricidad de La Paz (Electropaz); Empresa de Luz y Fuerza Eléctrica de Oruro, Sociedad Anónima (ELFEO); Compañía Administradora de Empresas Bolivia, Sociedad Anónima (CADEB); and, Empresa de Servicios, Sociedad Anónima (EDESER). Majority stakes thereof belonged at the time of the nationalisation to a subsidiary of Iberdola SA.
- On February 18th 2013, Supreme Decree No. 1494 mandated the nationalisation of airport operator Servicios de Aeropuertos Bolivianos Sociedad Anónima (SABSA) owned by Abertis SA.

Appendix VI. Revising Hirschman's Framework to Reflect Routes Available to Developing Countries in Practice

Routes available to developing countries (in practice)	**Description**	**Revisions to the routes documented in the literature**	**Reconceptualisations of Hirschman's categories**
Exit	Exit refers to disengaging from the legal architecture of the regime[1] with no intent to renegotiate, as well as abandoning the neoliberal principles of foreign investment protection that shaped the regime in domestic legislation and other international investment agreements or provisions.	The exit route in the existing literature focused only on an exit from the legal architecture of the regime. The most common definition is a disengagement from the regime by terminating existing treaties (see Gordon and Pohl, 2015; Langford et al., 2018; UNCTAD, 2017c).	Exit from the investment treaty regime is more complicated than how Hirschman envisioned it, both regarding cost and procedure. Moreover, while Hirschman identified loyalty as a mitigating factor for exit, this thesis finds that ideological motives and structural power dynamics determine whether the member seeks to exit and proceeds with the decision, respectively.

[1] I.e. BITs and/or ICSID Convention.

			Accordingly, this thesis builds on relevant contributions from the political science and management fields[2] to conclude that there is a need for factoring in the resilience of the investment treaty regime and the power dynamics between the capital-exporting countries (regime shapers) and their developing treaty partners to understand why exit is actually costly and with uncertain outcomes.
Quasi-Exit	Quasi-exit refers to a route that combines exit and voice tactics. A partial exit of the regime is implemented through disengaging from the legal framework of	None of the traditional channels for voice[4] in the existing literature were feasible options for developing countries that wanted to introduce	One of the main conditions set by Hirschman for practising voice is the estimate members have of their ability to influence the

[2] See Gehlbach (2006) and Gleeson (2016).

[4] These tactics include (Gordon and Pohl, 2015; UNCTAD 2014b): (i) using instruments to influence the interpretation of the investment treaties; (ii) amending treaties; and (iii) renegotiation of new treaties to replace old ones.

	the regime. Voice, on the other hand, is practised through introducing the desired reforms in the new legal framework that regulates FDI.[3]	substantial reforms to their obligations under the regime. Instead, developing countries have practised voice through what has been described by scholars in the literature as a 'hybrid' approach[5] and categorised in this thesis as a quasi-exit route.	organisation. A criteria that is not satisfied by most developing countries considering their status as rule takers in the regime. Asymmetrical power relations in the regime ensured voice as conceptualised by Hirschman was a highly unlikely option for most developing countries. Indeed developing countries that have introduced substantial reforms to their legal obligations under the regime have only been able to do so through the quasi-exit route.[6] Hence, Hirschman's theorisation of voice and the dynamics of the interplay between exit and voice inadequately reflects the route

[3] The new framework can be introduced through new BITs or domestic legislation.

[5] See Langford et al. (2018).

[6] It is important to note that the amendments to these legal obligations will only apply to new investments/investors until the survival clauses of the terminated BITs expire.

			available to developing countries to reform their obligations under the regime. Instead of undermining voice as implied by Hirschman, exit facilitates it. Accordingly, this thesis proposes the replacement of ‘voice’ with ‘quasi-exit’ to more accurately reflect the route taken by developing countries to practice voice in the investment treaty regime.
Silence	Silence refers to maintaining the status quo by refraining from exiting the regime or attempting to practice voice through a quasi-exit route.	In the existing literature the route ‘maintaining the status quo’ refers to refraining from making any substantive changes to commitments under their international investment treaties (UNCTAD, 2014b). While, this route is consistent with the third option proposed in this thesis, the point of contestation is whether it should be conceptualised as silence or loyalty.	Hirschman’s conceptualisation of loyalty to an organisation includes both an expectation by the member that there is scope for future improvement and that it serves as a predicate for the practice of voice. These conditions do not apply for developing countries that have

			vocally expressed their discontent with the regime. Another form of loyalty under Hirschman's framework is the unconscious loyalist behaviour which entails being in denial about the defects of the organisation. Again, however, this conception of loyalty cannot be applied to developing countries addressed in this thesis which not only realised but also publicly criticised the faults of the investment treaty regime. The decision to maintain the status quo has as more to do with avoiding possible political and economic repercussions and less with loyalty, as defined by Hirschman. Drawing on contributions from the political science and management

			fields[7] this thesis argues that the concept of silence and particularly enforced silence[8] more accurately reflects the stance taken by countries that maintain the status quo.

[7] See Gehlbach (2006), Barry (1974), Birch (1975) and Gleeson (2016).

[8] See Donaghey et al. (2011) and Gleeson (2016).

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