BILATERAL INVESTMENT TREATIES AND THE ENVIRONMENT: A NEW APPROACH TO A GLOBAL CRISIS

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I. INTRODUCTION

America is at an inflection point with the climate crisis. Despite broad popular support for bills on climate change,[1] Congress has failed to pass significant legislation addressing the issue, with several bills dying in the Senate.[2] Gridlock and division within both chambers of Congress suggest legislative solutions are almost impossible, and even the nonbinding goals the United States has targeted after reentering the Paris Agreement seem unlikely to engender real change.[3]

Given these obstacles, making progress on the issue of climate change will require the Biden administration to explore untraditional policy solutions. One possible route is to enact regulations through bilateral investment treaties (BITs) in order to create enforceable obligations on investors and states to operate in an environmentally responsible manner. Part I will address the history of such provisions in BITs, including an exploration of the 2012 U.S. Model BIT. Part II

1. Alec Tyson & Brian Kennedy, *Two-Thirds of Americans Think Government Should Do More on Climate*, PEW RES. (June 23, 2020), https://www.pewresearch.org/science/2020/06/23/two-thirds-of-americans-think-government-should-do-more-on-climate/.

2. *See, e.g.*, American Clean Energy and Security Act, H.R. 2454, 111th Cong. (2009-2010); Climate Action Now Act, H.R. 9, 116th Cong. (2019).

3. Renee Cho, *The U.S. Is Back in the Paris Agreement. Now What?*, STATE OF THE PLANET (Feb. 4, 2021), https://news.climate.columbia.edu/2021/02/04/u-s-rejoins-paris-agreement/.

will address the types of provisions that the United States could include in its BITs to effectively regulate climate change. Finally, Part III will address the feasibility of negotiating new BITs or renegotiating existing BITs, focusing on the possibility of unilateral executive action in light of congressional gridlock.

II. A HISTORICAL REVIEW OF BITS AND ENVIRONMENTAL RESPONSIBILITY

BITs are a relatively new phenomenon in international law. Beginning in the 1990s, countries increasingly began signing treaties establishing standards of trade between just two nations and allowing for dispute resolution directly by a foreign investor against a host State.[4] Their implementation has been both praised and criticized; while BIT-based facilitation of international trade has helped transition foreign investment away from a system based primarily on threats from a powerful exporter State to a weaker host State,[5] it has also tended to create huge liability for host nations and oftentimes inhibits progressive legislative measures.[6]

Historically, BITs have not addressed environmental concerns.[7] Even now, "BITs contain few incentives, let alone obligations, to promote and support [corporate social responsibility] policies by governments and the implementation of [such] initiatives by

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4. O. Thomas Johnson Jr. & Jonathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Investment Law*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2010-2011, at 649, 686-687 (Karl P. Sauvant ed., 2011).

5. *See id.* at 692 ("[T]he current BIT regime helps weak States by insulating them from unwelcome diplomatic, economic, and perhaps military pressure from strong States whose nationals believe they have been injured . . . .").

6. Jonathan Bonnitcha et al., *Legitimacy and Governance Challenges*, *in* THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME 233, 235 (Oxford Univ. Press 2017) (noting one "criticism is that the regime interferes with the ability of states to regulate in the public interest by excessively constraining national policy autonomy – for example, with respect to measures intended to protect the environment or public health.").

7. Kathryn Gordon & Joachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey* 5 (Org. for Econ. & Coop. Dev., Working Paper on Int'l Inv. 2011/01), http://dx.doi.org/10.1787/5kg9mq7scrjh-en.

companies."[8] In fact, a review of nearly half of existing international investment agreements (IIAs) found that just 6.5% of BITs in 2011 had any reference to environmental concerns.[9]

In other types of international trade agreements, however, provisions on the environment are more common. Beginning in the 1990s, a number of countries began including environmental provisions in multilateral free trade agreements (FTAs), including the United States, Canada, and Mexico.[10] The North American Free Trade Agreement (NAFTA), which these three nations signed in 1994, was one of the first major FTAs to reference the protection of the environment.[11] By the late 2000s, nearly all new FTAs had some reference to environmental concerns[12]—so why are BITs so far behind?

Part of the issue lies in the traditional formulation of international investment, i.e., that "all investments are beneficial for development,"[13] and that investors will refuse to bring their capital to a host nation if there are stringent protections limiting how they might use that capital.[14] With this view of foreign investment, it makes sense that

8. MYRIAM VANDER STICHELE & SANDER VAN BENNEKOM, CTR. FOR RESEARCH ON MULTINAT'L CORPS., INVESTMENT AGREEMENTS AND CORPORATE SOCIAL RESPONSIBILITY (CSR): CONTRADICTIONS, INCENTIVES AND POLICY 5 (2005), https://www.somo.nl/wp-content/uploads/2005/12/Investment-agreements-and-Corporate-Social-Responsibility.pdf.

9. *See* Gordon & Pohl, *supra* note 7, at 5 (noting that from the analyzed sample of 1,623 IIAs, 1,593 were BITs and the remainder were Free Trade Agreements). Although this figure is somewhat old, it is still a fair representation of the current situation, given that the vast majority of IIAs were created before 2010. *See* Ctr. for Int'l Law, *United States-Asia Law Institute Conference on Investment Law Reform: The View from Asia (Session 1 of 4)*, YOUTUBE (June 14, 2021), https://www.youtube.com/watch?v=0PW2UXMxNvc (statement by Hamed El-Kady noting that over 90% of existing IIAs were concluded before 2010, so this number is a fair representation of the current situation).

10. Gordon & Pohl, *supra* note 7, at 8.

11. *See* RICHARD K. LATTANZIO & IAN F. FERGUSON, CONG. RSCH. SERV., IF10166, ENVIRONMENTAL PROVISIONS IN FREE TRADE AGREEMENTS (FTAS) 1 (2021) (describing some of these environmental provisions, including prohibitions on failing to enforce environmental laws, a requirement to develop environmental protection mechanisms, and the creation of an Environmental Affairs Council); North American Free Trade Agreement art. 1114 (Washington, D.C., 12 Dec. 1992), U.S.-Can.-Mex., U.S. Gov't Printing Office (1992), entered into force 1 Jan. 1994.

12. Gordon & Pohl, *supra* note 7, at 8.

13. STICHELE & VAN BENNEKOM, *supra* note 8, at 1.

14. LUKE ERIC PETERSON & KEVIN R. GRAY, INST. FOR INT'L SUSTAINABLE DEV., INTERNATIONAL HUMAN RIGHTS IN BILATERAL INVESTMENT TREATIES AND IN

environmental obligations would be absent from BITs, while present in non-BIT IIAs. Non-BIT IIAs are typically free trade agreements, which are more comprehensive and geared toward relations between the signatory States. This is in contrast with the BIT regime, which is primarily constructed to protect investors, and therefore has not fully evolved to address social responsibility issues yet.

The winds of reform are beginning to blow surrounding BITs and environmental change, however, and some countries have begun to include environmental obligations into their BITs.[15] The Brazil-Mozambique BIT, for instance, provides that "the investor and investments shall strive to carry out the highest level possible of contributions to the sustainable development of the host State and the local community, by means of the adoption of a high degree of socially responsible practices."[16] However, while some BITs purport to encourage corporate responsibility and environmental standards, many of the obligations imposed are of a "soft" character.[17] The next step, therefore, is establishing environmental regulations as a hard, objective standard, and making them enforceable through a binding dispute mechanism which allows host States to use arbitration to bring environmental violators into compliance.

The United States has slowly begun to make changes to its BITs in response to environmental concerns. In its 2012 Model BIT[18] (the 2012 Model), the United States calls on parties to "ensure" that they enforce environmental laws, rather than the milder "strive to ensure"

INVESTMENT TREATY ARBITRATION 16 (2003), https://docs.escr-net.org/usr_doc/Luke_Peterson___IHR_in_bilateral.pdf.

15. Laurence Boisson de Chazournes, *Environmental Protection and Investment Arbitration: Yin and Yang?*, 10 ANUARIO COLOMBIANO DE DER. INTERNACIONAL 371, 380-81 (2017).

16. Cooperation and Investment Facilitation Agreement, Bra.-Mozam., art. 10, Mar. 30, 2015 (not yet in force), English translation available at https://www.iisd.org/system/files/publications/comparison-cooperation-investment-facilitation-agreements.pdf.

17. Madhav Mallya, *India's Race to the Bottom: Bilateral Investment Treaties and the New Draft Environmental Impact Assessment Notification*, OPINIOJURIS (Oct. 10, 2020), https://opiniojuris.org/2020/10/09/indias-race-to-the-bottom-bilateral-investment-treaties-and-the-new-draft-environmental-impact-assessment-notification/ (noting "at present those obligations only exist in the form of soft law"). One commonly cited example of soft obligations is the U.N. Global Compact, a voluntary agreement in which businesses may participate and which provides helpful guidelines for sustainable practices but does not mandate any specific behavior by investors.

18. Model treaties, including the U.S. models, are used as a skeleton framework for newly concluded treaties with other States.

from the 2004 Model BIT.[19] The 2012 Model also allows State parties to exercise additional environmental regulatory action post-signing, a carve-out absent from the 2004 Model BIT.[20] Nevertheless, the traditional framework of providing heavy protections, yet few obligations for investors still applies.[21] Most glaringly, the 2012 Model, like most modern BITs, continues to only allow for an initiation of arbitration by the investor, rather than the host State.[22] This precludes States from seeking arbitral remedy against States which operate irresponsibly in their territory, and limits the potential action that can be taken against environmental violators.

III. WHAT WOULD ENVIRONMENTAL RESPONSIBILITY PROVISIONS IN A BIT LOOK LIKE?

There are two glaring areas in which current U.S. BITs, including the 2012 Model, fall short. The first is a lack of specifically prescribed environmental standards in the 2012 Model or any of the United States' BITs. The 2012 Model has a carve-out which specifies that states may not *relax* environmental regulations to induce foreign investment,[23] but it does not specify a minimum benchmark for what regulations must require.[24] Modern BITs typically incorporate a "minimum standard of

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19. Paolo Di Rosa, *The New 2012 U.S. Model BIT: Staying the Course*, KLUWER ARB. BLOG (June 1, 2012), http://arbitrationblog.kluwerarbitration.com/2012/06/01/the-new-2012-u-s-model-bit-staying-the-course/.

20. *Compare 2004 U.S. Model Bilateral Investment Treaty*, art. 12.1, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf, *with 2012 U.S. Model Bilateral Investment Treaty*, art. 12.1, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf [hereinafter *2012 Model*] (specifically the 2012 Model's recognition of the importance of domestic environmental laws, and its stronger language concerning positive environmental obligations). Aside from requiring compliance with the host State's domestic law, the bulk of the hard obligations involved in BITs, like fair and equitable treatment, most favored nation status, and full protection and security, all rest upon the States parties' shoulders.

21. Yaraslau Kryvoi, *Counterclaims in Investor-State Arbitration*, 21 MINN. J. INT'L L. 216, 225 (2012) (noting "[t]oday most treaties explicitly provide that their main goal is to protect investors . . . .").

22. *See 2012 Model*, *supra* note 20, art. 24 (providing avenues to arbitration for investors only, rather than for host States).

23. *Id.*, art. 12.2.

24. This is particularly problematic, as corporations export their most pollution-heavy operations to "pollution havens," which have little environmental regulation. Itzhak Ben-David et al., *Research: When Environmental Regulations are Tighter at Home,*

treatment" that States must afford foreign investors, a concept established in customary international law.[25] Relying on frameworks like the Kyoto Protocol and Paris Agreement, renegotiated BITs could similarly include a "minimum environmental standard" to regulate the operations of foreign investors. Such standards already exist in international law and are linkable to tangible existing agreements and customs.[26] Given the attractiveness of the United States as both an investment location and exporter,[27] the United States has an opportunity to positively influence countries and investors by both prescribing such obligations in its model and new BITs[28] and making those provisions enforceable and effective.[29]

The second shortcoming lies in the enforceability of environmental provisions. While the 2012 Model has mildly strengthened its language on environmental responsibility, it does not

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Companies Emit More Abroad, HARV. BUS. REV. (Feb. 4, 2019), https://hbr.org/2019/02/research-when-environmental-regulations-are-tighter-at-home-companies-emit-more-abroad; *see also* Nick Mabey & Richard McNally, *Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development*, WWF-UK REPORT 41 (Aug. 1999), https://www.oecd.org/investment/mne/2089912.pdf ("[L]ower environmental regulations do influence locational preference for the most resource and pollution intensive industries.").

25. *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, *Standards of Protection*, *in* PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 130, 136 (2d ed. 2012) (noting that many treaties, including NAFTA, incorporate the customary international law principle of a "minimum standard of treatment" into their provisions on fair and equitable treatment).

26. *See* David Gaukrodger, ORG. ECON. & COOP. DEV., *The Future of Investment Treaties: Background Note on Potential Avenues for Future Policies* (Mar. 29, 2021), https://www.oecd.org/daf/inv/investment-policy/Note-on-possible-directions-for-the-future-of-investment-treaties.pdf (noting that with regard to environmental law in BITs, "intensively negotiated basic standards have been developed in specialised fora and can be incorporated by reference."). This standard could include emissions caps, responsible operating procedures, and set measurable baselines for investors to be held to, especially in extractive industries.

27. *See* U.N. Conf. on Trade & Dev. [UNCTAD], *World Investment Report 2019*, at 4, 22 U.N. Doc. UNCTAD/WIR/2019 (Jun. 12, 2019) (noting the United States' status as the largest receiver of foreign investment and the home country of many large capital exporters).

28. Another potential "hard" benchmark for use in future BITs would be the requirement of meeting the prescribed emissions goals for each country under the Paris Agreement.

29. *See, e.g.*, UNCTAD, *Investment Policy Framework for Sustainable Development*, at 110, U.N. DOC. UNCTAD/DIAE/PCB/2015/5 (2015) (discussing potential methods of enforceability of sustainable development provisions in IIAs, including denying treaty benefits to breaching investors).

contain any mechanism for States to enforce environmental standards.[30] The current structure provides no recourse for states against investors, "even where an investor causes significant harm to the host-State, including environmental damage."[31] Large corporations export their most pollution-heavy operations to developing countries with relatively limited domestic enforcement capacity,[32] and not providing for an enforcement mechanism in response to these practices renders environmental provisions toothless.[33] Additionally, the failure to allow States to bring claims against investors, especially environmental claims, tilts the BIT system in favor of investors.[34] Allowing States to enter into dispute resolution in response to environmental violations by foreign investors would help restore balance to the foreign investment process. Just a few awards for host States, or even the specter of potential claims, might compel capital exporters to operate in an environmentally responsible manner.[35] Incorporating a minimum environmental standard, coupled with effective dispute resolution for States against violators, would make a significant contribution toward ensuring environmentally responsible foreign investment in the future.

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30. *See generally 2012 Model*, *supra* note 20 (lacking any counterclaim provision for States); *see also* Lise Johnson, *The 2012 US Model BIT and What the Changes (or Lack Thereof) Suggest About Future Investment Treaties*, 8 POL. RISK INS. NEWSL. 2, 5 (2012), https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/160.

31. Ted Gleason, *Examining Host-State Counterclaims for Environmental Damage in Investor-State Dispute Settlement from Human Rights and Transnational Public Policy Perspectives*, INT'L ENV'T AGREEMENTS: POL., L. AND ECON. 427, 428 (2020).

32. Ben-David et al., *supra* note 24.

33. Using existing models, including expanded counterclaims options for States and a State-State dispute resolution and consultation system similar to the United States-Mexico-Canada Agreement (USMCA), can help solve this problem. *See, e.g.*, United States-Mexico-Canada Agreement, ch. 31, Can.-Mex.-U.S., Nov. 30, 2018, 134 Stat. 11, (entered into force July 1, 2020).

34. *See* Bonnitcha et al., *supra* note 6, at 256 ("[I]nvestor treaties do not create investor obligations that can be enforced by host states acting on their own initiative.").

35. For an example of how this might look in practice, see South African Dev. Cmty., *Model Bilateral Investment Treaty Template with Commentary*, art. 17, IISD (July 2012), https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf (specifying that for environmental or labor violations, "Investors and Investments shall be subject to civil actions for liability in the judicial process of their Home State . . . .")

IV. PASSING BITS THROUGH THE SENATE—A FOOL'S ERRAND?

BITs require ratification by two-thirds of the Senate,[36] and at present, passing anything with a Senate supermajority is a Sisyphean task. However, certain elements of the treatymaking process give life to the idea of using BITs to promote environmental responsibility. First, as to the negotiation of a treaty, the President "alone negotiates. Into the field of negotiation, the Senate cannot intrude; and Congress itself is powerless to invade."[37] This gives the Executive significant leeway to include environmental protections in treaty negotiations. Second, other countries have begun pushing for increased environmental protections in BITs, and "the interests of the United States and emerging economies as regards to investment protection appear to be converging more than in the past."[38] If states that are home to desirable markets for American investors successfully negotiate BITs that include environmental provisions, there will be significant domestic pressure on the Senate not to roadblock their ratification.

Even if ratifying new BITs at this time is a wishful thinking, the flexibility of BITs as international agreements nonetheless makes them an appealing route for environmental regulation. Without congressional involvement, the Executive Branch may rewrite the 2012 Model to reflect more stringent environmental obligations.[39] Additionally, it might also bypass traditional treaty methods and use congressional-executive agreements or sole executive agreements to force through pending BITs.[40] These methods would require either a simple majority in both chambers of Congress (for congressional-executive agreements) or just the signature of the President (for sole

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36. *Trade Guide: Bilateral Investment Treaties*, DEP'T COM. INT'T TRADE ASS'N, https://www.trade.gov/trade-guide-bilateral-investment-treaties.

37. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

38. SHAYERAH ILIAS AKHTAR & MARTIN A. WEISS, CONG. RES. SERV., R43052, U.S. INTERNATIONAL INVESTMENT AGREEMENTS: ISSUES FOR CONGRESS 11 (Apr. 29, 2013) (noting that countries like China have increasingly begun to export capital in a large scale, aligning their interests with historical capital exporters like the United States).

39. *Fact Sheet: Model Bilateral Investment Treaty*, OFF. U.S. TRADE REPRESENTATIVE (Apr. 2012), https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2012/april/model-bilateral-investment-treaty (noting "revisions to a U.S. model BIT do not require Congressional action").

40. Frederic L. Kirgis, *International Agreements and U.S. Law*, 2 AM. SOC. INT'L L. INSIGHTS, no. 5 (May 27, 1997), https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law.

executive agreements), and are thus more feasible than the two-thirds majority in the Senate needed in the traditional treaty process. As another alternative, the Executive may make "joint interpretive statements" with other states, reshaping the provisions of existing BITs without having to ratify amendments.[41] Finally, the Executive may take drastic steps, such as unilaterally withdrawing from existing BITs to pressure the Senate into ratifying, new, modernized agreements.[42]

If the U.S. government does elect to pursue environmental regulations through BIT negotiation and renegotiation, the above proposals should be pursued in conjunction with one another. First, new BITs should contain stronger positive obligations regarding environmental protection, including the establishment of a minimum standard of environmental treatment, to ensure that U.S. investors in foreign countries are operating responsibly. Second, binding dispute resolution should be an available remedy to host States, specifically with respect to environmental violations. These changes will help usher in a new, more environmentally responsible era of foreign direct investment and will help even the playing field between host States and investors.

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41. LAUGE N. SKOVGAARD POULSEN & GEOFFREY GERTZ, REFORMING THE INVESTMENT TREATY REGIME: A 'BACKWARD-LOOKING' APPROACH, CHATHAM HOUSE BRIEFING PAPER, GLOB. ECON. AND FINANCE PROGRAMME (Mar. 17, 2021), https://www.chathamhouse.org/sites/default/files/2021-03/2021-03-10-reforming-investment-treaty-regime-poulsen-gertz.pdf/.

42. *See* Goldwater v. Carter, 444 U.S. 996, 996 (1979) (declining to hold that the President was unable to unilaterally withdraw from a treaty concluded on advice and consent of the Senate).