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International Investment and Development

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I. Introduction

This article reviews 2015 developments in the field of international investment law and development.¹ In addition to reviewing significant developments in international investment rulemaking, the article highlights developments in seven countries: Bolivia, China, Kazakhstan, Kenya, Russia, Rwanda, and Senegal.

II. International Investment Law Making in a State of Flux

A. INTRODUCTION

In 2015, significant developments occurred with regard to international investment rule-making. Key developments included: the conclusion of the Trans-Pacific Agreement (TPP), the release of a draft Model Text for the Indian Bilateral Investment Treaty, and the unveiling of Brazil's new model-investment treaty. Together, these developments suggest the end of "a business as usual" approach to international investment rule-making. Whether an investment treaty comprises elements directed at preserving regulatory space for public policies, whether such a treaty minimizes a State's exposure to investment arbitration, and whether it strikes a balance as between the rights and duties of a host country and those of foreign investors are critical questions with which negotiators increasingly grapple. The result is more detailed international investment agreements (IIAs) with more refined investor-State dispute settlement (ISDS) mechanisms, and the emergence of new and creative tools for managing the cost and benefits of investment

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1. For developments during 2014, see Uche Ewelukwa, Qingqing Miao, Irina Feofanova, Amala Nath, Melissa Boudreau, & Anne Marie Carson, *International Investment and Development*, 49 ABA/SIL YIR 235 (2015).

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treaties. There is a noticeable trend towards increased transparency in ISDS, the inclusion of sustainable-oriented clauses in IIAs, and the inclusion of clauses directed at preserving the domestic policy space of host countries. In addition, more and more countries are reviewing, and even revamping, their model IIAs to reflect these developments in international investment law.

B. THE TRANS-PACIFIC PARTNERSHIP

On October 5, 2015, following the Atlanta ministerial meeting, trade ministers from twelve Asia-Pacific countries announced the successful conclusion of the Trans-Pacific Partnership (TPP) negotiations.² The TPP is divided into thirty chapters and covers a broad range of topics.³ In addition to a chapter on Trade in Goods (Chapter 2) and an investment chapter (Chapter 9), the TPP also addresses Textile & Apparel (Chapter 3); Rules of Origin (Chapter 4); Customs Administration and Trade Facilitation (Chapter 5); Sanitary and Phytosanitary (SPS) Measures (Chapter 6); Technical Barriers to Trade (TBT) (Chapter 7); Trade Remedies (Chapter 8); Cross-Border Trade in Services (Chapter 10); Financial Services (Chapter 11); Temporary Entry for Business Persons (Chapter 12); Telecommunications (Chapter 13); Electronic Commerce (Chapter 14); Government Procurement (Chapter 15); Competition Policy (Chapter 16); State-Owned Enterprises (SOEs) and Designated Monopolies (Chapter 17); Intellectual Property (Chapter 18); Labour (Chapter 19); Environment (Chapter 20); Cooperation and Capacity Building (Chapter 21); Competitiveness and Business Facilitation (Chapter 22); Development (Chapter 23); Small-and Medium-Sized Enterprises (Chapter 24); Regulatory Coherence (Chapter 25); Transparency and Anti-Corruption (Chapter 26); Administrative and Institutional Provisions (Chapter 27); Dispute Resolution (Chapter 28); Exceptions (Chapter 29) and Final Provisions (Chapter 30).

Regarding respect for domestic policy space, the TPP devotes a whole chapter to Exceptions. The agreement provides for General Exceptions (Article 29.1); Security Exceptions (Article 29.2); Temporary Safeguard Measures (Article 29.3); and Taxation Measures (Article 29.4). The TPP also contains a unique exception aimed at protecting traditional knowledge, traditional cultural expressions, and genetic resources. Article 29.8 stipulates that “[s]ubject to each Party’s international obligations, each Party may establish appropriate measures to respect, preserve and promote traditional knowledge and traditional cultural expressions.”⁴

The TPP also provides a very unique ISDS Carve Out. State Parties have a right to deny the benefits of the investor-state dispute settlement mechanism with respect to claims against tobacco-control measures (Article 29.5). “For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed,” the last sentence of Article 29.5 reads.⁵

2. *Trans-Pacific Partnership Ministers’ Statement*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/trans-pacific-partnership-ministers>.

3. *TPP Final Table of Contents*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

4. Trans-Pacific Partnership art. 29.8, Feb. 4, 2016, <https://ustr.gov/sites/default/files/TPP-Final-Text-Exceptions-and-General-Provisions.pdf>.

5. *Id.* at art. 29.5.

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The TPP is by no means a done deal. The agreement faces intense opposition in the United States and in other countries. Civil society organizations are strongly opposed to the agreement and may yet mount a serious campaign to prevent its ratification in the twelve participating countries.⁶

C. MODEL TEXT FOR THE INDIAN BILATERAL INVESTMENT TREATY

In March 2015, the Indian Government published and invited public comments on the Model Text for the Indian Bilateral Investment Treaty (Model BIT).⁷ The objective of the Indian Model BIT is “to provide appropriate protection to foreign investors in India and Indian investors in the foreign country, in the light of the relevant international precedents and practices, while maintaining a balance between the investor’s rights and the Government obligations.”⁸ The Model BIT contains typical substantive investment protection provisions, but also incorporates many innovative elements. Significant in the Model BIT are: (i) an enterprise-based definition of investment instead of an asset-based definition;⁹ (ii) a carefully tailored “National Treatment” obligation that explicitly excludes acts of regional and local governments;¹⁰ (iii) a narrowly tailored expropriation clause;¹¹ and (iv) the absence of a “fair and equitable treatment” obligation or a “full protection and security” obligation. Instead of a fair and equitable treatment guarantee, the Model BIT protects investors and their investments from measures which constitute “[d]enial of justice under international law,” “[u]n-remedied and egregious violations of due process,” and “[m]anifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment.”¹²

Does the Model BIT strike an appropriate balance between the rights and obligations of foreign investors, *vis-à-vis* those of the state? Does it preserve domestic policy space? Is an effort made to minimize exposure to investment arbitration? While some believe that the Model BIT could scare potential investors, others believe that it strikes the right balance. With respect to preserving regulatory space for public policies, the Model BIT explicitly excludes from its scope “government procurement,” subsidies or grants, any taxation measures, the issuance of compulsory license granted in relation to intellectual property rights, “services supplied in the exercise of governmental authority,” as well as “any commercial contract or agreement between a Party and an Investment or an Investor with respect to its Investment.”¹³ Furthermore, Chapter V of the document boasts a broad “General Exception” provision (Article 16) as well as a fairly broad “Security

6. *Initial Analysis of Key TPP Chapters*, PUBLIC CITIZEN, <http://www.citizen.org/documents/analysis-tpp-text-november-2015.pdf>.

7. *Inviting comments on the Draft Indian Model Bilateral Investment Treaty text*, MINISTRY OF FINANCE GOVERNMENT OF INDIA, http://finmin.nic.in/suggestion_comments/Draft_Indian_Model_Bilateral_Investment_Treaty.asp.

8. *Id.*

9. *Id.*, at art. 1.6.

10. *Id.*, at art. 4.

11. *Id.*, at art. 5.

12. *Inviting comments on the Draft Indian Model Bilateral Investment Treaty text*, MINISTRY OF FINANCE GOVERNMENT OF INDIA, http://finmin.nic.in/suggestion_comments/Draft_Indian_Model_Bilateral_Investment_Treaty.asp.

13. *Id.*, at art. 2.6.

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Exception” (Article 17) provision. Article 22 deals with “Amendment” and explicitly declares that “[t]his Treaty may be amended at any time at the request of either Party.”¹⁴

With regards to striking a balance between the rights and duties of host countries and those of foreign investors, Chapter III is titled “Investor, Investment and Home State Obligations” and “prescribes the minimum obligations for investors and their investments for responsible business conduct.”¹⁵ Compliance with Articles 9 (Corruption), Article 10 (Disclosures), Article 11 (Taxation), and Article 12 (Compliance with Laws of Host State) of the Chapter is compulsory.¹⁶

Finally, there is a noticeable effort in the Model BIT to strike a balance between the costs and benefits of ISDS. While the Model BIT retains ISDS, access is restricted and safeguards are implemented using a broad range of tools, including: the exhaustion of domestic remedies provision, stipulation of a limitation period of three years, mechanisms for counterclaims, transparency requirements, and the requirement of waivers for parallel claims.

**D. BRAZIL’S NEW MODEL INVESTMENT TREATY: A NEW APPROACH TO
INVESTMENT PROMOTION AND PROTECTION?**

In 2015, Brazil, a country that has historically shied away from BITs, concluded investment treaties with six countries—Mozambique (March 30, 2015), Angola (April 1, 2015), Mexico (May 26, 2015), Malawi (June 25, 2015), Colombia (October 9, 2015), and Chile (November 24, 2015)—based on what now appears to be Brazil’s new model investment treaty. Dubbed “Cooperation and Investment Facilitation Agreement” (CIFA), scholars and practitioners are still pondering whether Brazil’s CFIA represents a marked departure from traditional BITs.

An examination of the Brazil-Mozambique CIFA suggests a clear intention on the part of Brazil to depart from traditional BITs and craft an alternative FDI policy in important respects.¹⁷ The goal of the Agreement is “to facilitate and promote mutual investment.”¹⁸ But departing from traditional BITs, the preamble to the agreement does not explicitly reference investment protection as an objective. On the contrary, the preamble contains references to sustainable development, and each Contracting Party explicitly reaffirmed its legislative autonomy and the space for public policies. The Agreement, however, contains some traditional guarantees found in BITs, including protection against expropriation (Article 8), compensation for losses due to war or other armed conflict (Article 12), transparency (Article 13), and transfers (Article 14).

The Agreement does not provide for ISDS and focuses more on dispute prevention than on dispute resolution. Section IV is titled “Risk Mitigation and Dispute Prevention.” Central to the Agreement is the role of a Joint Committee (Article 4) and Focal Points or

14. *Id.*, at art. 22.

15. *Id.*, at art. 8.2.

16. *Id.*, at art. 8.3.

17. See generally Brazil-Mozambique Cooperation Agreement and Investment Facilitation (ACFI), Braz.-Mozam., March 30, 2015, http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=8511&catid=42&Itemid=280&lang=pt-BR.

18. *Id.*, at art. 1.

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“Ombudsmen” (Article 5). Article 10 and Annex II address “Corporate Social Responsibility.”

E. TRANSPARENCY IN INVESTMENT ARBITRATION

Adopted on December 10, 2014, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the “Mauritius Convention on Transparency”) opened for signature on March 17, 2015.¹⁹ The Convention received one ratification²⁰ and fourteen signatures in 2015.²¹ The Convention is a mechanism through which State Parties to investment treaties express their consent to apply the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration to their existing investment promotion and protection agreements.

F. POSSIBLE REFORM OF THE INTERNATIONAL INVESTMENT REGIME

Chapter IV of the World Investment Report 2015 is titled “*Reforming the International Investment Regime: An Action Menu*.”²² In Chapter IV, the United Nations Conference on Trade and Development (UNCTAD) reviews six decades of IIA rule-making, discusses the “[g]rowing unease with the current functioning of the global international investment agreement . . . regime” noting that the IIA regime is “going through a period of reflection, review and revision,” and, most importantly, “offers an action menu . . . for IIA reform.”²³ With an emphasis on a holistic approach and on policy coherence, the report highlights and addresses five main policy challenges: (i) “safeguarding the right to regulate for pursuing sustainable development objectives;” (ii) “reforming investment dispute settlement;” (iii) “promoting and facilitating investment;” (iv) “ensuring responsible investment;” and (v) “enhancing systemic consistency.”²⁴

G. CONCLUSION

While 2015 did not bring about a sea of changes in international investment rulemaking, the year witnessed significant developments that together suggest a changing attitude and approach to international investment law and international investment law rulemaking. The global international investment agreement regime appears to be changing, but it is too early to tell how deep-rooted emerging changes will go. The backlash against investor-state arbitration in particular and BITs in general appear to be forcing major stakeholders to review legal developments of the past fifty years and to permit more voices at the discussion table.

19. G.A. Res. 69/116, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Dec. 10, 2014).

20. Mauritius ratified the Convention on 5 June 2015. See *Status United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html.

21. Countries that signed the Convention in 2015 are: Belgium, Canada, Congo, Finland, France, Gabon, Germany, Italy, Luxembourg, Madagascar, Mauritius, Sweden, Switzerland, Syrian Arab Republic, United Kingdom of Great Britain and Northern Ireland, and United States. *Id.*

22. UNCTAD, World Investment Report 2015 (2015).

23. *Id.* at 120, 171.

24. *Id.* at 120.

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III. Bolivia – Investment Arbitration

On June 25, 2015, the new Bolivian Conciliation and Arbitration law was enacted²⁵ to regulate ADR, including commercial and investment arbitration. The Bolivian government made a bold gamble by incorporating its own investment dispute settlement system after having separated from the international investment arbitration system by denouncing the twenty-two BITs that it had in force,²⁶ denouncing the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, and being the first country to separate from the International Centre for Settlement of Investment Disputes.

The investment arbitration provisions of Law No. 708 fall within the provisions of Article 320 II of the Bolivian Constitution: “Every foreign investment shall *submit* to Bolivian jurisdiction, laws and authorities, and no one may *cite an* exceptional situation, nor appeal to diplomatic claims *to obtain* a more favorable treatment.”²⁷ The following common provisions applicable to all cases of investment disputes are established²⁸: (a) Bolivian law shall be the applicable law; (b) compulsory conciliation prior to the arbitration is incorporated; (c) either the conciliation or the arbitration will be held in the territory of Bolivia, but hearings to produce evidence and other proceedings may be held outside the Bolivian territory; and (d) the arbitration shall be decided in accordance with the law and shall apply the Bolivian constitution and laws to decide the merits of the dispute.

The settlement of investment disputes is classified by Law No. 708 as follows:

1. *Disputes concerning foreign and mixed investment.*²⁹ The law refers to controversies affecting, on one hand, foreign investments and joint investments made by the State and, on the other, foreign or domestic investment in which the private partner of the company becomes a stakeholder under the terms defined in Law No. 516. In this case, the place of arbitration, the arbitration rules, and the appointing authority can be chosen by mutual agreement of the parties. Parties may also adopt national rules, the rules of international arbitration centers such as the International Chamber of Commerce, or *ad hoc* courts applying the rules of UNCITRAL, among others. For this category, the duration of arbitration may be extended for up to an additional 600 calendar days.

2. *Bolivian investment disputes.*³⁰ Law No. 708 provides for domestic investment arbitration by natural or legal persons and public or private entities, opening a window for Bolivian investors to collect State debts in this way. The unique feature in this law is that administration by international arbitration centers is not allowed. Rather, the arbitration center is chosen by the parties and the rules regarding conciliation and arbitration are administered by the national arbitration center.

25. Law No. 708, G. O. 770 NEC (June 25, 2015) (Bol.) (replaces Law No. 1770 enacted on 1997 of arbitration and conciliation).

26. See Carlos Corz, *Bolivia denounced at least 20 international treaties that were contrary to the Constitution*, LA RAZÓN (May 20, 2015, 10:38 AM), http://www.la-razon.com/seguridad_nacional/Bolivia-tratados-internacionales-contrarios-Constitucion_0_2274372629.html.

27. Bolivia's Constitution of 2009 (2009), art. 320 (Bol.).

28. See Law No. 708, art. 129.

29. *Id.* at art. 132, 133.

30. *Id.* at art. 130, 131.

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3. *Disputes between State and intergovernmental companies.*³¹ The provisions of Bolivian investment disputes are applied in the case of wholly state-owned enterprises while the provisions of foreign investment disputes are applied in the case of joint state-private companies receiving contributions from private partners.

The biggest criticism of Law No. 708 is in the case of foreign investment disputes in which arbitration is compulsory and based in Bolivia.³² The courts, from a place of competence, decide on actions for annulment of awards. There are concerns that foreign investors will not have access to a neutral venue and, therefore, will assess more favorable investment terms offered in neighboring countries. Also, Law No. 708 does not establish the mechanism of implementation or the standards of protection granted by the State, something that will surely be regulated or established in the BITs to be signed in the future.

IV. China

A. OVERHAUL OF FOREIGN INVESTMENT RULES THROUGH A PROPOSED FOREIGN INVESTMENT LAW

On January 19, 2015, the Ministry of Commerce of the People's Republic of China (MOFCOM), released the proposed Foreign Investment Law (the Draft Law) for public comment together with the Official Explanation of the Draft Law.³³ If passed, the Draft Law will entirely replace three main laws that form the regulatory framework for foreign investment activities in China, including the Sino-Foreign Equity Joint Venture Law, the Sino-Foreign Cooperative Joint Venture Law, and the Wholly Foreign-Owned Enterprise law.³⁴ Upon adoption, foreign investment activities in China will be subject to one uniform law.³⁵

The Draft Law aims at streamlining the regulation of foreign investment activities and encouraging further foreign investment through more cohesive laws and regulations.³⁶ Under the Draft Law, unless otherwise provided, foreign investment will receive "national

31. *Id.* at art. 127.

32. This is only true for investment arbitration. In international commercial arbitration the seat of arbitration and applicable law may be freely agreed by the parties. See *id.* at art. 54.

33. Shangwubu jiu "Zhonghua Renmin Gongheguo Waiguo Touzifa (商务部就《中华人民共和国外国投资法(草案征求意见稿)》公开征求意见) [Ministry of Commerce of the People's Republic of China's Call for Public Comments on the "People's Republic of China Foreign Investment Law (draft for public comments)], <http://tfs.mofcom.gov.cn/article/as/201501/20150100871010.shtml>.

34. *China Releases Draft Foreign Investment Law, Signaling Major Overhaul for Foreign Investment*, CHINA BRIEFING (January 21, 2015), <http://www.china-briefing.com/news/2015/01/21/breaking-news-china-releases-draft-foreign-investment-law-signaling-major-overhaul-foreign-investment.html>.

35. *Id.*

36. Zhonghuarenmin Gongheguo Waiguo Touzifa (《中华人民共和国外国投资法(草案征求意见稿)说明》[Official Explanation to the People's Republic of China Foreign Investment Law (draft for public comments)] [hereinafter The Official Explanation Draft], <http://tfs.mofcom.gov.cn/article/as/201501/20150100871010.shtml>; Zhonghuarenmin Gongheguo Waiguo Touzifa (《中华人民共和国外国投资法(草案征求意见稿)》[People's Republic of China Foreign Investment Law (draft for public comments)] [hereinafter The Draft Law], art. 5, <http://tfs.mofcom.gov.cn/article/as/201501/20150100871010.shtml>.

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treatment.”³⁷ The Draft Law is generally viewed as a positive change and will likely bring China’s business practice into closer alignment with global standards.³⁸ Major highlights of the Draft Law are as follows:

B. “FOREIGN INVESTMENT” DEFINED

Currently, foreign investment is regulated differently based on how the foreign investment is structured within the invested entity in China (i.e. equity joint venture, cooperative joint venture, or wholly foreign owned enterprise). Under the Draft Law, there will be one uniform definition of “foreign investment,” which includes: (1) setting up a company in China; (2) acquiring shares, equity, property share, voting rights, and similar rights; (3) providing financing to businesses with rights as mentioned in the aforementioned subsection for over one year; (4) obtaining licensing rights to develop and exploit natural resources or to develop and operate infrastructure; (5) obtaining real estate rights such as land use and real property ownership; and (6) acquiring equity or controlling rights of Chinese-owned businesses via contract or trust.³⁹ Further, if a transaction outside China results in a foreign investor obtaining actual control of a Chinese-owned business, these transactions are considered “foreign investment in China.”⁴⁰

C. “ACTUAL CONTROL” AND POTENTIAL IMPACT ON VARIABLE INTEREST ENTITIES

When determining whether a company is a foreign invested entity, the Draft Law adopts an “actual control” test.⁴¹ Specifically, a company established in China but “controlled” by foreign investors will be treated as a foreign invested entity. “Control” means any of the following: (1) holding 50 percent or more of voting rights or similar equity rights; (2) holding less than 50 percent of the voting rights or similar equity rights, but having the power to secure at least 50 percent of the seats on the board or similar decision-making bodies, or having the voting power to exert “significant impact” on the shareholders, the shareholders’ meeting or other similar decision-making bodies; or (3) having the power to exert “decisive impact” on the business operation, finances, personnel or technologies via contract, trust or other arrangements.⁴² Note that the Draft Law does not define “significant impact” and “decisive impact.”⁴³

The “actual control” test is likely to affect the “variable interest entity” (VIE) structure that has been adopted by many PRC-based companies to bypass the Chinese restrictions on sensitive industries such as the Internet, telecommunications, etc.⁴⁴ Under the VIE

37. The Draft Law, *supra* note 36, at art. 6.

38. *China Seen Planning Overhaul of Foreign Investment Rules*, BLOOMBERG NEWS (January 22, 2015, 5:35 AM CST), <http://www.bloomberg.com/news/articles/2015-01-22/china-seen-planning-overhaul-of-foreign-investment-rules>.

39. The Draft Law, *supra* note 36, at art. 15.

40. *Id.*

41. *Id.* at art. 18–19.

42. *Id.* at art. 18.

43. *Id.*

44. See Gillian Wong & Juro Osawa, *How China’s Draft Rules May Affect Foreign Investors*, WALL STREET JOURNAL, (Jan. 27, 2015), <http://www.wsj.com/articles/how-chinas-draft-rules-may-affect-foreign-investors-1422412416>.

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structure, foreign “investors take stakes in offshore holding companies” that control the Chinese operating entities.⁴⁵ Companies such as Alibaba, Baidu Inc., and Tencent Holdings are all using the VIE structure to seek U.S. venture capitals.⁴⁶ The legality of the VIE structure has remained unclear for over a decade.⁴⁷ The Draft Law officially recognizes the VIE structure but at the same time, because of the “actual control test,” these VIEs may no longer be able to sidestep the existing industry restrictions to which foreign investments are subject.⁴⁸ Noticeably, the Draft Law does not provide a grandfather clause for existing VIEs.⁴⁹ The Official Explanation provides for potential solutions that involve applying for approval or clearance from the State Council.⁵⁰

D. THE “NEGATIVE LIST” APPROACH

Under the Draft Law, most foreign investments will no longer need pre-approval from the State Council.⁵¹ Nevertheless, if the business of a foreign-invested enterprise falls under the “negative list,” pre-clearance is still required.⁵² The “negative list” further includes a “restricted list” and a “prohibited list.”⁵³ The State Council is expected to establish the “negative list.”⁵⁴

E. NATIONAL SECURITY REVIEW SYSTEM

The Draft Law establishes a unified National Security Review system to pre-clear foreign investment that may harm national security.⁵⁵ The State Council is to establish a reviewing body that is responsible for conducting national security review.⁵⁶ Under the provisions of the Draft Law, the national security review is not mandatory, and the foreign investor “may” submit an application for review, although the government can initiate a national security review at its discretion.⁵⁷ The foreign investor cannot file an administrative appeal or lawsuit based on the decision.⁵⁸

Currently, the Draft Law has not been adopted. On March 7, Mr. Hucheng Gao, the Minister of Commerce, stated at a press conference that the MOFCOM was working on improving the Draft Law based on the comments it received and was hoping to submit the Draft Law to the legislature in a timely fashion.⁵⁹ Although the Draft Law has received

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*; see The Official Explanation Draft, *supra* note 36, § 2, art. 1.

49. See The Official Explanation Draft, *supra* note 36, § 2, art. 3.

50. *Id.*

51. The Draft Law, *supra* note 36, at art. 6, ch. 3.

52. *Id.* at art. 20.

53. *Id.*

54. *Id.*

55. *Id.* at ch. 4.

56. *Id.* at arts. 49-50.

57. *Id.* at art. 50, 55.

58. *Id.* at art. 73.

59. GaoHu cheng: Waiguo Touzi fa Cao'an yi Gongkai Zhengqiu Yijian Jiang jinzhao Chutai (高虎城：外国投资法草案已公开征求意见 将尽早出台) [GaoHucheng: The Foreign Investment Law Has been Published for Public Comments and is Expected to be Implemented], PEOPLE.CN. (Mar. 7, 2015), <http://lianghui.people.com.cn/2015npc/n/2015/0307/c394291-26653534.html> (last visited Nov. 1, 2015).

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generally positive feedback, concerns over the transition of the regulatory regime, the implementation timetable, and the interpretation of the new law remain.

V. Kazakhstan

In 2015, Kazakhstan made many changes in different areas related to investment laws. February 5 was marked by the appointment of the first investment Ombudsman, whose position was created by the amendments of the Law “On investments”⁶⁰ and Government Regulations on the activities of the investment Ombudsman.⁶¹ The goal of this novelty is “to promote protection of the rights and legitimate interests of investors operating in the Republic of Kazakhstan” by creating a system to “[consider] the proposals of investors to improve conditions for investment activities.”⁶²

A. DOING BUSINESS REFORMS

According to the World Bank Group *Doing Business 2016* data,⁶³ Kazakhstan climbed up to 41st place (from 53rd on the previous year), and made positive reforms, among other things, in the following areas:

- 1) Starting a business: registration fees for small⁶⁴ and medium-size firms and the legal requirement to use a company seal were eliminated, while registration timing was shortened.⁶⁵
- 2) Registering Property: the requirement to obtain a technical passport for the transfer and to have the seller’s and buyer’s incorporation documents notarized were discontinued.⁶⁶

60. Закон Республики Казахстан от 8 января 2003 г. № 373-III Об инвестициях [The Law of the Republic of Kazakhstan from Jan. 8, 2003 No. 373-III On Investments (with amendments and additions as of the Dec. 29, 2014)] art. 1(8-1), 12-1, <http://www.invest.gov.kz/upload/docs/2015normbaza/eng/31603f00e3594e1b58645107cf72fa79.pdf>.

61. Об утверждении Положения о деятельности инвестиционного омбудсмана Постановление Правительства Республики Казахстан от 30 октября 2014 года No 1153 [On approval of the Investment Ombudsman Resolution of the Republic of Kazakhstan dated October 30, 2014 No 1153], <http://invest.gov.kz/uploads/files/2015/12/03/regulations-on-the-activities-of-investment-ombudsman.pdf>.

62. *In 2015 the Investment Ombudsman Helped 20 Companies Working in Kazakhstan*, MINISTRY FOR INVESTMENT AND DEVELOPMENT OF THE REPUBLIC OF KAZAKHSTAN, <http://invest.mid.gov.kz/en/news/2015-investment-ombudsman-helped-20-companies-working-kazakhstan>

63. *World Bank Group: Ease of Doing Business in Kazakhstan*, DOING BUSINESS, <http://www.doingbusiness.org/data/exploreeconomies/kazakhstan> (last visited Apr. 3, 2016).

64. See also Law No. 124 of 31st January 2006 of the Republic of Kazakhstan Concerning Private Entrepreneurship (as amended and added as of June 08, 2015), Article 6-1, available at <http://www.invest.gov.kz/upload/docs/2015/10b5e90bb8cb8e2e315603e5e187a201.pdf>.

65. See Law No. 124 of Jan. 31, 2006 of the Republic of Kazakhstan Concerning Private Entrepreneurship (as amended and added as of June 8, 2015), art. 6-1, 18(3) <http://invest.gov.kz/uploads/files/2015/12/03/law-of-the-republic-of-kazakhstan-on-private-entrepreneurship.pdf>

66. *World Bank Group: Business Reforms in Kazakhstan*, DOING BUSINESS, <http://www.doingbusiness.org/reforms/overview/economy/kazakhstan> (last visited Apr. 3, 2016); see Law No. 2198 of the Republic of Kazakhstan of April 17, 1995 on State Registration of Legal Entities, Branches and Representations (with alterations and amendments as of April, 22, 2015, art. 6, 9, <http://invest.gov.kz/uploads/files/2015/12/03/law-of-the-republic-of-kazakhstan-on-state-registration-of-legal-entities-and-registration-of-branches-and-representative-offices.pdf>).

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- 3) Getting Credit: a new law on secured transactions allows a general description of a combined category of assets granted as collateral.⁶⁷
- 4) Resolving Insolvency: the Insolvency Act Royal Decree-Act 1/2015 was amended to establish second-chance mechanism urgent measures to reduce financial burden (in force as of March 1, 2015).⁶⁸

B. INTELLECTUAL PROPERTY REFORM

The long-anticipated intellectual property reform came into effect on April 20, 2015,⁶⁹ and includes,⁷⁰ *inter alia*: (1) “establish[ing] a principle of regional exhaustion of trademark rights”; (2) a “simplified registration of assignment and licensing agreements” and “the procedure for transfer of the right for obtaining a trademark”; (3) “reduction of the timing for trademark registration”; (4) “amendment of the list of absolute grounds for refusal of trademark registration”; and (5) “mandatory State registration of a franchising agreement.”⁷¹

VI. Kenya: The Special Economic Zones Bill 2015

The Special Economic Zones Act, 2015 (No. 6 of 2015) of Kenya received assent on September 11, 2015, and will become effective on December 15, 2015.⁷² The overall goals of the new law are to provide for the establishment of special economic zones, the promotion and facilitation of global and local investors, and the development and management of enabling environment for such investments. Act No. 6 of 2015 is divided into six parts: Part I (Preliminary), Part II (The Special Economic Zones), Part III (The Special Economic Zones Authority), Part IV (Financial Provisions), Part V (Regulatory Provisions), Part VI (Rights and Obligations of the Special Economic Zone Entities) and Part VI (Miscellaneous Provisions).⁷³

67. *Business Reforms in Kazakhstan*, *supra* note 66; see Гражданский кодекс Республики Казахстан [Civil Code of the Republic of Kazakhstan] art. 307, http://online.zakon.kz/Document/?doc_id=1006061, amended by 29 December 2014 ? 269-V and by the Law of 22 April 2015 ? 308-V; see Kanat Skakov & Rahim Shimarov, *Kazakhstan Improves Conditions for Entrepreneurs*, DENTONS (Feb. 16, 2015), <http://www.dentons.com/en/insights/alerts/2015/february/16/kazakhstan-improves-conditions-for-entrepreneurs>; *Tax and Legal Alert*, DELOITTE (May 2015), https://www2.deloitte.com/content/dam/Deloitte/kz/Documents/legal/LegalAlert/KZ_Legal%20Alert_for_May_2015.pdf.

68. *Business Reforms in Kazakhstan*, *supra* note 66; see *Amendment of the Insolvency Act Royal Decree-Act 1/2015 Second-Chance Mechanism Urgent Measures to Reduce Financial Burden*, BAKER & MCKENZIE (Mar. 1, 2015), <http://www.bakermckenzie.com/ALSpainAmendmentInsolvencyActMar15/>.

69. Закон Республики Казахстан от 7 апреля 2015 года No 300-V О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам правового регулирования сферы интеллектуальной собственности [Law of the Republic of Kazakhstan as of April 7, 2015 No 300 -V On Amendments and Additions to Some Legislative Acts of Kazakhstan on the Issues of Legal Regulation of Intellectual Property Sphere], http://online.zakon.kz/Document/?doc_id=36871758#pos=1;-8.

70. See, Aigoul Kenjebayeva, *Significant Amendments to the Legislation on Intellectual Property in Kazakhstan*, DENTONS (April 24, 2015), <http://www.dentons.com/en/insights/alerts/2015/april/24/significant-amendments-to-the-legislation-on-intellectual-property>.

71. *Id.*

72. The Special Economic Zones Bill, No. 6 (2015), KENYA GAZETTE SUPPLEMENT No. 18.

73. *Id.*

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VII. Russia

Despite Western sanctions and a significant currency rate drop, Russia was ranked the fifth biggest economy in the world bypassing Germany, according to the World Bank report⁷⁴ released July 1, 2015. The World Bank Group placed Russia at 51st place in the *Doing Business 2016* rank report, which is three steps higher than last year.⁷⁵ According to the former publication, getting credit and paying taxes became easier in Russia, while starting a business changed in ranking negatively.⁷⁶ Specifically, the report mentions that Russia 1) “made starting a business in Moscow easier by reducing the number of days required to open a corporate bank account”; 2) “made transferring property easier by reducing the time required for property registration” (from eighteen calendar days to ten working days, according to Federal Law No 447-FZ, effective January 1, 2015);⁷⁷ 3) “made paying taxes less costly for companies by excluding movable property from the corporate property tax base – though it also raised the wage ceiling used in calculating social contributions.”⁷⁸

Effective January 1, 2015, Amendments to several legislative acts⁷⁹ established a new accreditation process for non-Russian branches and representative offices, with separate procedure for banking and aviation entities.⁸⁰ The novelties of these amendments include: 1) the affected companies are required to register with the Russian tax authorities in a unified state registry, instead of the Russian Registration Chamber; 2) separate registrations for taxpayer, pension, and social security funds are no longer necessary; 3) the term of such registration is indefinite (as opposed to the prior three-year registration term); 4) the information of the created Unified State Register of Accredited Foreign Company Branches and Representative Offices is open to the public; and 5) the number of foreign employees must now be certified and the employees become accredited by the Chamber of Commerce and Industry of the Russian Federation.⁸¹ The new system is similar to the Unified State Register of Legal Entities (EGRUL), and its goal is to simplify

74. World Dev. Indicators Database, *Gross Domestic Product 2014, PPP*, WORLD BANK (Feb. 17, 2016), http://databank.worldbank.org/data/download/GDP_PPP.pdf.

75. *World Bank Group: Ease of Doing Business in Russian Federation*, DOING BUSINESS, <http://www.doingbusiness.org/data/exploreeconomies/russia> (last visited Apr. 3, 2016).

76. *Id.*

77. See Федеральный закон РФ №447-ФЗ [Federal Law No. 447-FZ] 2014 (Russian Federation), <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102364276&intelsearch=%E7%E0%EA%EE%ED+%EE%F2+22.12.2014+%B9+447-%F4%E7> and http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=140607&database=faolex&search_type=link&table=result&lang=eng&format_name@ERALL (English).

78. *World Bank Group: Business Reforms in Russian Federation*, DOING BUSINESS, <http://www.doingbusiness.org/reforms/overview/economy/russia> (last visited Apr. 3, 2016).

79. Федеральный закон РФ №106-ФЗ от 5 мая 2014 года «О внесении изменений в отдельные законодательные акты Российской Федерации» [Federal Law no. 106-FZ On Amendments to Certain Legislative Acts of the Russian Federation] 2014, <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102349604&intelsearch=05.05.2014+%B9+106-%D4%C7>.

80. See, Valentin Petrov, *Opening and Closing Branches and Representative Offices of Non-Russian Companies in Russia*, HG LEGAL RESOURCES, <http://www.hg.org/article.asp?id=33872> (last visited Apr. 3, 2016).

81. See, Svetlana Barinova, *Accreditation of Branches and Representative Foreign Companies in Russia New Rules*, DENTONS (Jan. 28, 2015), <http://www.dentons.com/en/insights/alerts/2015/january/28/accreditation-of-branches-and-representative-offices-of-foreign-companies-in-russia-new-rules>.

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the registration process of foreign companies in Russia and add the element of transparency.⁸²

Another law that came into effect on January 1, 2015,⁸³ amends the Tax Code of Russia, setting new rules to prevent the abuse of offshore structures in the areas of: (1) “taxation of controlled foreign companies’ profits”; (2) “tax residency of foreign companies”; (3) “taxation of income from disposal property shares or LLC interest”; and (4) free of charge transfer of property as a profit tax exemption with additional condition related to “black-list” countries.⁸⁴

VIII. Rwanda: A New Law on Investment Promotion and Facilitation

With the goal of attracting more foreign investment and spurring growth, in May 2015 Rwanda published a new investment code. *Law No. 6/2015 of March 28, 2015, Relating to Investment Promotion and Facilitation* replaces The Law no. 26/2005 of December 17, 2005.⁸⁵ The new law, *inter alia*, spells out investor guarantees (Chapter II), addresses investment registration (Chapter III), defines the obligations of a registered investor (Chapter IV), and addresses change, suspension, or termination of investment operations (Chapter VI).⁸⁶ Chapter II which spells out the guarantees to investors addresses a number of issues very important to foreign investors including Investor Rights (Article 4), Protection of the Investor’s Capital and Assets (Article 6), Protection of Intellectual Property Rights (Article 7), Repatriation of Capital and Assets (Article 8), and Dispute Settlement (Article 9).⁸⁷ Annexed to Law No. 6/2015 of March 28, 2015 is a document titled “Special Incentives for Registered Investors.”⁸⁸ Special incentives offered under the new law to qualifying investments include “preferential corporate income tax rate of zero per cent (0%),” “corporate income tax holiday of up to seven (7) years,” “exemption of custom duties for products used in Export Processing Zones,” “exemption of capital gains tax,” “value added tax refund,” and “accelerated depreciation.”⁸⁹

IX. Senegal: Draft Mining Code

A. INTRODUCTION

The process of revising the 2003 mining law began in November 2012 with the decision of the Senegal President to review all the mining contracts in order (i) to assess their fairness and, if found unbalanced and detrimental to the State’s interests, (ii) to

82. *Id.*

83. Федеральный закон Российской Федерации от 24 ноября 2014 г. № 376-ФЗ [Federal Law of the Russian Federation dated November 24, 2014 No. 376 –FZ] 2014, <http://www.rg.ru/2014/11/28/nalog-inostr-dok.html>.

84. See, Irina Dmitrieva, “*Deoffshorization*” Measures, WHITE & CASE (Dec. 2014), <http://www.whitecase.com/publications/alert/deoffshorization-measures-russian-federation>.

85. Law No. 06/2016 of 28/03/2015 Relating to Investment Promotion and Facilitation, Official Gazette No. Special of 27/05/2015, <http://primature.gov.rw/index.php?id=54&tx-filelist-pi1-39%5Bpath%5D=2015%20Official%20Gazettes&cHash=88657e9fbf9142cc7c803e3c0dbe6617>.

86. *Id.*

87. *Id.* at ch. II, art. 4, 6-7, 8-9.

88. *Id.* at annex.

89. *Id.*

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renegotiate them properly.⁹⁰ In 2013 a presidential decree established the “*Commission de revision des contrats minier et du code minier*” (Commission for the revision of mining contracts and the mining code) which is composed of representatives of public institutions (government, Parliament, etc.).⁹¹ The main objective of the Commission’s mandate was to take into account the *strategic interests of the State and the local populations*.⁹² In the meantime, Senegal launched a World Bank funded study on the “*Diagnostic of the Legal & Fiscal Framework of the Mining Sector*” which was conducted by an international team of legal and fiscal mining experts.⁹³ After a series of internal meetings in 2014 and external consultations, the Commission organized a public workshop to share the draft legislation which is to replace the current 2003 mining code.⁹⁴ In February 2015 a final workshop took place in Dakar and was attended by all stakeholders operating in the mining sector.⁹⁵

B. HIGHLIGHT OF THE MAIN INNOVATIONS CONTAINED IN THE DRAFT LEGISLATION

- (i) All fiscal provisions contained in the 2003 Mining Code (which is still in force) have been totally removed and transferred into the General Tax Code.
- (ii) The notion of *concession minière (mining concession)*, has been replaced by that of *permit d’exploitation (exploitation permit)*, which the drafters consider to be legally more accurate. It is important to underline that current mining concessions will continue to be governed by the 2003 Mining law until their expiration dates. The term “*exploitation permit*” will be used for mining agreements issued after entry into force of the next Mining Law. The change of name does not therefore result in legal consequences.
- (iii) The legal regime of quarries has been simplified (see articles 66 and 67 of the draft law).
- (iv) The government has decided to introduce the concept of *production sharing agreements (PSA)*, which are widely used in the petroleum sector.
- (v) The introduction of the concept of *revenue sharing* is designed to express the Government’s will to better share the proceeds of the payments made by mining companies with the social actors on the ground, including local populations living on the exploitation sites.
- (vi) The legal regime of controls has been reinforced by a series of new sanctions. The cancellation of a permit is now only envisaged in the event of major misconduct. The control of the State over mining operations has been reinforced, as well.
- (vii) All the royalties to be paid by mining companies have been upgraded (for example: gold and precious metal royalties have been upgraded from 3% to 5%).

⁹⁰ Aboubacar Fall, *Towards a New Mining Code for Senegal*, AMERICAN BAR, http://www.americanbar.org/content/dam/aba/events/international_law/2015/06/Africa%20Forum/Mining2.authcheckdam.pdf.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

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All entry fees have been upgraded, as well. However, the controversial Special Contribution on Mines and Quarries has been removed entirely.

- (viii) Among other innovations is the creation of a surface tax. The calculation of the royalty is now based on the commercial value of the mining product, i.e. the daily rate or the market rate at the date of the transaction.
- (ix) In promotional mining zones an entry bonus has been created to be paid by the investor.
- (x) As transparency constitutes a major pillar of its governance policy, Senegal has decided to (i) suppress the notion of confidentiality which is in the current legislation and (ii) impose on the Government an obligation to publish on its website all the contracts it has signed. This significant move is consistent with the requirements of the Extractive Industries Transparency Initiative to which Senegal has recently adhered (see articles 94, 95 & 102 of the draft legislation).⁹⁶

C. CONCLUSION

In revising its mining legislation, Senegal is following the trend currently observed in West Africa aimed at increasing the State revenues to boost its GDP, introducing more stringent social and environmental safeguards, and improving the social and economic conditions of local communities residing in the areas of the mining site. The draft legislation is before the Parliament and should be finally adopted as a law before the end of the year.

^{96.} *Id.*

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