

International Investment and Development

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I. Introduction

The field of international investment and development law saw many significant legal and policy developments in 2017. Keen on attracting and facilitating foreign direct investment (FDI), countries adopted many investment-related laws and regulations. States also negotiated a broad range of international investment agreements (IIA), including mega-regional trade agreements with investment chapters and bilateral investment treaties (BITs). Efforts towards IIA reform continued in 2017, prompting the United Nations Conference on Trade and Development (UNCTAD) to conclude that “sustainable development-oriented IIA reform has entered the mainstream of international investment policymaking”¹ While several countries took steps to terminate some old-generation BITs, others worked toward inserting sustainable development-oriented features in the treaties currently under negotiation.

II. International Investment Agreements: Rulemaking and Reform

A. MEGA-REGIONAL TREATIES

1. The Trans-Pacific Partnership Agreement (TPP)

The Trans-Pacific Partnership (TPP) was signed in Auckland, New Zealand, on February 4, 2016,² and was set to create a twelve member

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1. U.N. Conference on Trade and Development [UNCTAD], *World Investment Report*, 119 (2017).

2. Press Release, Executive Office of the President, Office of the U.S. Trade Representative, Trans-Pacific Partnership Ministers’ Statement 2 (Feb. 4, 2016), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/February/TPP-Ministers-Statement>.

trading bloc from the United States to Vietnam.³ On January 30, 2017, the United States formally withdrew from the TPP.⁴ Numerous countries expressed their commitment to resurrecting the deal without United States involvement.⁵ In November 2017, countries in the TPP trade deal agreed on the core elements of a plan to move forward and unveiled a revised agreement called the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP or TPP-11).⁶ In a Ministerial Statement released on November 11, 2017,⁷ TPP Ministers announced that the CPTPP incorporates provisions of the TPP, with the exception of a limited set of provisions that will be suspended.⁸ According to the Ministerial Statement, the CPTPP “maintains the high standards, overall balance, and integrity of the TPP while ensuring the commercial and other interests of all participants and preserving our inherent right to regulate, including the flexibility of the Parties to set legislative and regulatory priorities.”⁹

On March 8, 2018, CPTPP Member States signed the trade deal at a ceremony in Chile’s capital, Santiago.¹⁰ Although President Trump withdrew the United States from the TPP in 2017, in April 2018, he indicated, via twitter, that he was looking into rejoining the trade deal.¹¹

2. *The Transatlantic Trade and Investment Partnership (T-TIP) Agreement*

Negotiation on the terms of a Transatlantic Trade and Investment Partnership (T-TIP) stalled in 2017. Between July 2013 and October 2016, fifteen negotiating rounds were held.¹² In January 2017, the two sides

3. *Id.*

4. Press Release, Executive Office of the President, Office of the U.S. Trade Representative, The United States Officially Withdraws from the Trans-Pacific Partnership 2 (Jan. 30, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TTP>.

5. Alexandra Stevenson & Motoko Rich, *Trans-Pacific Trade Partners Are Moving On, Without the U.S.*, N.Y. TIMES (Nov. 11, 2017), <https://www.nytimes.com/2017/11/11/business/trump-tpp-trade.html>.

6. *Id.*

7. Press Release, Austl. Government, Department of Foreign Affairs and Trade, Trans-Pacific Partnership Ministerial Statement (Nov. 11, 2017), <http://dfat.gov.au/trade/agreements/tpp/news/Pages/trans-pacific-partnership-ministerial-statement.aspx>.

8. *Id.*

9. *Id.*

10. See Ernesto Londoño & Motoko Rich, *U.S. Allies Sign Sweeping Trade Deal in Challenge to Trump*, NEW YORK TIMES (March 8, 2018), <https://www.nytimes.com/2018/03/08/world/asia/us-trump-tpp-signed.html> (last visited April 23, 2018).

11. See Zeeshan Aleem, *Trump changed his mind on joining the TPP . . . again*, VOX (April 18, 2018), <https://www.vox.com/world/2018/4/18/17251242/trump-tpp-twitter-news-rejoin> (last visited April 23, 2018).

12. Press Release, Executive Office of the President, Office of the U.S. Trade Representative, U.S.-EU Joint Report on T-TIP Progress to Date 4 (Jan. 17, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/us-eu-joint-report-t-tip-progress-0>.

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released a report on the T-TIP progress to date.¹³ According to an April 2017 meeting report from the Transatlantic Trade and Investment Partnership Advisory Group, no Negotiating Round occurred in 2017, and no formal engagement on T-TIP has taken place under the Trump Administration.¹⁴

3. *Pacific Agreement on Closer Economic Relations Plus*

In June 2017, the Pacific Agreement on Closer Economic Relations Plus (PACER Plus), an economic partnership agreement between fourteen countries, was signed.¹⁵ The majority of the signatories are small island nations in the Pacific. The agreement contains a chapter on investment and investor protection (Chapter 9).¹⁶

4. *The Regional Comprehensive Economic Partnership (RCEP)*

Negotiations on the Regional Comprehensive Economic Partnership (RCEP), a mega Asia trade pact involving sixteen nations, continued in 2017.¹⁷ The RCEP comprises ten ASEAN members¹⁸ and their six FTA partners—India, China, Japan, South Korea, Australia and New Zealand.¹⁹ Eighteen rounds of negotiations have occurred thus far.²⁰ The RCEP negotiation includes *inter alia*: trade in goods, trade in services, investment, intellectual property, competition, dispute settlement, and e-commerce.²¹ In a joint statement issued on November 14, 2017,²² the Heads of State/Government of the RCEP Participating Countries “reaffirmed [their] resolve to ensure that RCEP delivers its potential to be a key driver of growth and equitable economic development, and serve as a pathway to

13. *Id.* at 2.

14. Transatlantic Trade & Investment Partnership Advisory Group, Meeting Report 2 (Mar. 9, 2017), http://trade.ec.europa.eu/doclib/docs/2017/april/tradoc_155484.pdf.

15. Member states are: Australia, Cook Islands, Micronesia, Kiribati, Nauru, New Zealand, Niue, Palau, Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu. See Pacific Agreement on Closer Economic Relations Plus Preamble, June 4, 2017, UNCTAD.

16. See *id.* ch. 9.

17. PTI, *RCEP Deal: Trade Ministers from 16 Countries Including India and China to Meet in Vietnam*, FIRSTPOST (May 19, 2017, 16:28:05 IST), <http://www.firstpost.com/world/rcep-deal-trade-ministers-from-16-countries-including-india-and-china-to-meet-in-vietnam-3458566.html>.

18. *Id.* Brunei, Cambodia, Indonesia, Malaysia, Myanmar, Singapore, Thailand, the Philippines, Laos and Vietnam.

19. *Id.*

20. *Id.*

21. Association of Southeast Asian Nations [ASEAN], Regional Comprehensive Economic Partnership: Coverage Areas, http://asean.org/?static_post=rcep-regional-comprehensive-economic-partnership.

22. See ASEAN, Joint Leaders’ Statement on the Negotiations for the Regional Comprehensive Economic Partnership (RCEP) 1 (Nov. 14, 2017), http://asean.org/storage/2017/11/RCEP-Summit_Leaders-Joint-Statement-FINAL1.pdf.

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further integrate [their] economies.”²³ The Investment Chapter of the RCEP would reportedly “create an enabling investment environment in the region covering the four pillars of investments: protection, liberalization, promotion, and facilitation.”²⁴

5. *Intra-MERCOSUR Cooperation and Facilitation Investment Protocol*²⁵

In April 2017, States Parties of the MERCOSUR (Argentina, Brazil, Paraguay and Uruguay) signed the Protocol on Investment Cooperation and Facilitation (MERCOSUR Protocol).²⁶ As of January 2018 negotiations were still ongoing.²⁷ This agreement displaces two earlier regional agreements that never entered into force: the Protocol of Colonia for the Promotion and Reciprocal Protection of Investments within MERCOSUR (Colonia Protocol)²⁸ and the Protocol on Promotion and Protection of Investments Coming From Non-Mercosur State Parties (Buenos Aires Protocol).²⁹

6. *COMESA-EAC-SADC Tripartite*

Negotiation on the key provisions of the COMESA-EAC-SADC Tripartite Free Trade Area (TFTA) continued in 2017. Launched on June 10, 2015, the TFTA aims to create an integrated market involving twenty-six African countries.³⁰ The TFTA comprises the three largest regional economic communities (RECs) in Africa: the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), and the Southern African Development Community (SADC).³¹ The TFTA has

23. *Id.*

24. *Id.* at 3.

25. UNCTAD, *Intra-MERCOSUR Cooperation and Facilitation Investment Protocol* (Apr. 4, 2017), <http://investmentpolicyhub.unctad.org/IIA/treaty/3772>.

26. *Id.*

27. *Latest round reports and EU proposals for the trade agreement with Mercosur*, EUROPEAN COMMISSION, http://trade.ec.europa.eu/civilsoc/csd_proc.cfm (last visited April 12, 2018).

28. The Colonia Protocol was signed on Jan. 17, 1994. See UNCTAD, *Protocol of Colonia for the Promotion and Reciprocal Protection of Investments within MERCOSUR* (Jan. 17, 1994), <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3120>.

29. See Organization of American States, *Mercosur/CMC/DEC. N° 11/94: Protocol on Promotion and Protection of Investments Coming from Non-Mercosur State Parties* (Aug. 5, 1994), <http://www.sice.oas.org/Trade/MRCSRS/Decisions/dec1194e.asp>.

30. See Agreement Establishing a Tripartite Free Trade Area Among the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC), June 10, 2015, <https://www.tralac.org/documents/resources/tfta/1084-signed-tfta-agreement-and-declaration-10-june-2015/file.html>; East African Cmty., COMESA-EAC-SADC Tripartite, Sharm El Sheikh Declaration Launching the COMESA-EAC-SADC Tripartite Free Trade Area (June 10, 2015), <https://www.eac.int/documents/category/comesa-eac-sadc-tripartite>; Communiqué of the Third COMESA-EAC-SADC Tripartite Summit 2 (June 10, 2015), https://www.sadc.int/files/5914/3401/0196/Communiqu_of_the_3rd_COMESA_EAC_SADC_Tripartite_Summit.pdf.

31. See Agreement Establishing a Tripartite Free Trade Area Among the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the

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forty-five articles and ten accompanying annexes. At the ministerial meeting in July 2017, participating countries ironed out and adopted the three remaining annexes (on rules of origin, trade remedies, and dispute settlement) of the TFTA.³² South Africa signed the TFTA in July 2017³³ and Mauritius signed the agreement in October 2017, bringing the number of states that have signed the agreement to twenty-one.³⁴

7. *The North American Free Trade Agreement (NAFTA)*

On May 18, 2017, the Trump Administration announced plans to renegotiate the terms of the North American Free Trade Agreement (NAFTA).³⁵ On July 17, 2017, the United States Trade Representative (USTR) released a detailed and comprehensive summary of the U.S. negotiating objectives for the renegotiation of NAFTA.³⁶ The first round of the negotiations took place from August 16-20, 2017,³⁷ and the fifth round of negotiations ended in November, 2017.³⁸ Progress appears to be slow. In a statement made at the conclusion of the fifth round of negotiations, the USTR stated:

[w]hile we have made progress on some of our efforts to modernize NAFTA, I remain concerned about the lack of headway. Thus far, we have seen no evidence that Canada or Mexico are willing to seriously engage on provisions that will lead to a rebalanced agreement. Absent rebalancing, we will not reach a satisfactory result.³⁹

Southern African Development Community (SADC) Preamble, June 10, 2015, <https://www.tralac.org/documents/resources/tfta/1084-signed-tfta-agreement-and-declaration-10-june-2015/file.html>.

32. See *Tripartite Signatures Rise to 20*, COMESA SECRETARIAT CORP. COMM. UNIT (Jul. 14, 2017) at 1, http://www.comesa.int/wp-content/uploads/2017/07/e-comesa-newsletter_525.pdf.

33. *Id.*

34. See *Tripartite FTA Signatures Rise to 21, as Mauritius Signs*, COMESA SECRETARIAT CORP., COMM. UNIT (Oct. 2017) at 1, http://www.comesa.int/wp-content/uploads/2017/10/e-comesa-newsletter_534.pdf.

35. Press Release, Executive Office of the President, Office of the U.S. Trade Representative, Trump Administration Announces Intent to Renegotiate the North American Free Trade Agreement 2 (May 18, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/ustr-trump-administration-announces>.

36. Press Release, Executive Office of the President, Office of the U.S. Trade Representative, USTR Releases NAFTA Negotiating Objectives 2 (Jul. 17, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/july/ustr-releases-nafta-negotiating>.

37. Press Release, Executive Office of the President, Office of the U.S. Trade Representative, Trilateral Statement on the Conclusion of NAFTA Round One 2 (Aug. 20, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/august/trilateral-statement-conclusion>.

38. Press Release, Executive Office of the President, Office of the U.S. Trade Representative, USTR Lighthizer Statement on the Conclusion of the 5th Round of NAFTA Renegotiations 1—2 (Nov. 21, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/november/ustr-lighthizer-statement-0>.

39. *Id.* at 2.

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B. BILATERAL INVESTMENT AGREEMENTS

A number of bilateral investment treaties (BITs) were signed in 2017. BITs concluded in 2017 include: Turkey - Ukraine BIT (2017),⁴⁰ China - Hong Kong CEPA Investment Agreement (2017),⁴¹ Burundi - Turkey BIT (2017),⁴² Mozambique - Turkey BIT (2017),⁴³ Israel-Japan BIT (2017),⁴⁴ Iran, Islamic Republic of - Luxembourg BIT (2017),⁴⁵ Jordan - Saudi Arabia BIT (2017),⁴⁶ and Paraguay - United States Trade and Investment Agreement.⁴⁷ A few BITs were concluded in December 2016 including *inter alia*: Republic of Moldova-Turkey BIT (2016),⁴⁸ Ethiopia-United Arab Emirates BIT (2016),⁴⁹ and Morocco-Nigeria BIT (2016).⁵⁰ Although signed before 2017, a number of BITs entered into force in 2017. These include: Canada-Mongolia BIT (2016),⁵¹ the Japan-Kenya BIT (2016),⁵² Islamic Republic of Iran-Russian Federation BIT (2015),⁵³ the Singapore-Turkey FTA (2015),⁵⁴ Honduras-Peru FTA (2015),⁵⁵ and Kenya-Republic of Korea BIT (2014).⁵⁶

**C. REFORMING THE INTERNATIONAL INVESTMENT AGREEMENTS:
PHASE II**

Efforts to reform the international investment law regime strengthened in June 2017 with the publication of the World Investment Report 2017 (WIR 2017). In the WIR 2017, UNCTAD called for a move to phase two of IIA

40. Bilateral Investment Treaty, Turk.-Ukr., Oct. 9, 2017, UNCTAD.

41. Investment Agreement of the Mainland and Hong Kong Closer Economic Partnership Arrangement. Closer Economic Partnership Arrangement Investment Agreement, China, H.K.-China, June 28, 2017, UNCTAD.

42. Bilateral Investment Treaty, Burundi-Turk., June 14, 2017, UNCTAD.

43. Bilateral Investment Treaty, Mozam.-Turk., Jan. 24, 2017, UNCTAD.

44. Bilateral Investment Treaty: For the Promotion and Protection of Investment, Japan-Isr., Feb. 1, 2017, UNCTAD.

45. Bilateral Investment Treaty, Iran-Lux., Feb. 14, 2017, UNCTAD.

46. Bilateral Investment Treaty, Jordan-Saudi Arabia, Mar. 27, 2017, UNCTAD.

47. Trade and Investment Agreement, Para.-U.S., Jan. 13, 2017, UNCTAD.

48. Bilateral Investment Treaty, Mold.-Turk., Dec. 16, 2016, UNCTAD.

49. Bilateral Investment Treaty, Eth.-U.A.E., Dec. 3, 2016, UNCTAD.

50. Bilateral Investment Treaty: Reciprocal Investment Promotion and Protection Agreement, Morocco-Nigeria, Dec. 3, 2016, UNCTAD.

51. The Agreement was signed on September 8, 2016, and was entered into force on February 24, 2016. Bilateral Investment Treaty: Agreement Between Canada and Mongolia for the Promotion and Protection of Investors, Can.-Mong., Sept. 8, 2016, UNCTAD.

52. Bilateral Investment Treaty, Japan-Kenya, Aug. 28, 2016, UNCTAD.

53. The Agreement was signed on December 23, 2015, and entered into force on April 6, 2017. Bilateral Investment Treaty, Iran-Russ., Dec. 23, 2015, UNCTAD.

54. The Agreement was signed on November 14, 2015, and was entered into force on October 1, 2017. Free Trade Agreement, Sing.-Turk., Nov. 14, 2015, UNCTAD.

55. Free Trade Agreement, Hond.-Peru, May. 29, 2015, UNCTAD.

56. The Agreement was signed on July 8, 2014, and was entered into force on May 3, 2017. Bilateral Investment Treaty, Kenya-S. Kor., Jul. 8, 2014, UNCTAD.

reform which would entail “modernizing the existing stock of old-generation treaties.”⁵⁷ UNCTAD identified ten options available for countries that wish to engage in phase two reform: (i) jointly interpreting treaty provisions; (ii) amending treaty provisions; (iii) replacing “outdated” treaties; (iv) consolidating the IIA network; (v) managing relationships between coexisting treaties; (vi) referencing global standards; (vii) engaging multilaterally; (viii) abandoning unratified old treaties; (ix) terminating existing old treaties; and (x) withdrawing from multilateral treaties.⁵⁸ UNCTAD takes the position that “[d]etermining which reform option is ‘right’ for a country in a particular situation requires a careful and facts-based cost-benefit analysis, while addressing a number of broader challenges,” and that a “[c]omprehensive regime reform would benefit from intensified multilateral backstopping.”⁵⁹

III. The Investor-State Dispute Settlement System

A. THE MAURITIUS CONVENTION ON TRANSPARENCY ENTERS INTO FORCE

The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the Mauritius Convention) entered into force on October 18, 2017.⁶⁰ Adopted on December 10, 2014, the goal of the Mauritius Convention is to promote the application of the Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Rules on Transparency) to arbitration under already concluded investment treaties.⁶¹ The Mauritius Convention applies to arbitration between an investor and a state or a regional economic integration organization conducted on the basis of an investment treaty concluded before April 1, 2014.⁶² Three countries have ratified this treaty: Canada, Mauritius, and Switzerland.⁶³

B. ICSID RULES AMENDMENT PROCESS

In October 2016, the International Center for Settlement of Investment Dispute (ICSID) launched a process to amend the ICSID Convention Rules and Regulations (adopted in 1967) and the Additional Facility Rules

57. UNCTAD, *World Investment Report*, 126 (2017).

58. *Id.* at 131.

59. *Id.* at 131-145.

60. U.N. Commission on International Trade Law [UNCITRAL], U.N. Convention on Transparency in Treaty-Based Investor-State Arbitration (Dec. 10, 2014), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html.

61. *Id.*

62. *Id.*

63. UNCITRAL, Status U.N. Convention on Transparency in Treaty-Based Investor-State Arbitration (2014), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html.

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(adopted in 1978).⁶⁴ This will be the fourth rules amendment process in the history of the ICSID. Between October 2016 and January 2017, Member States as well as the general public were invited to suggest topics that warranted consideration.⁶⁵ In February 2017, the ICSID published a List of Topics for Suggested Rules Amendment and in April published The ICSID Rules Amendment Process.⁶⁶ The ICSID is now in the process of preparing background papers that will help stakeholders evaluate potential amendments.⁶⁷

IV. Investment and Sustainable Development

In 2017, the concepts of sustainable development and sustainable investment played an increased role in the policies of various financial institutions and development institutions at the domestic, regional and global level.

A. DUTCH DEVELOPMENT BANK: POSITION STATEMENTS ON HUMAN RIGHTS, LAND GOVERNANCE AND GENDER

On August 29, 2017, the Dutch Development Bank (FMO) published its Position Statements on human rights, land governance, and gender.⁶⁸ The Position Statements are integral parts of the FMO Sustainability Policy framework that steers FMO's activities.⁶⁹ According to the Position Statement on Gender, FMO considers gender equality "both a human right and a means to reach sustainable people-centered growth,"⁷⁰ and aims "to contribute to the achievement of Sustainable Development Goal (SDG) 5 seeking Gender Equality and empowering all women and girls,"⁷¹ and will

64. International Centre for Settlement of Investment Disputes [ICSID], *About: Amendment of ICSID's Rules and Regulations*, <https://icsid.worldbank.org/en/Pages/about/Amendment-of-ICSID-Rules-and-Regulations.aspx>.

65. *Id.*

66. *Id.*

67. *See id.*

68. The Netherlands Development Finance Company [FMO], Position Statement on Human Rights 1 (Aug. 29, 2017), https://www.fmo.nl/1/library/download/urn:uuid:c0240734-e58f-49d3-b5b3-8f88d8c20ab0/position+statement+human+rights.pdf?format=save_to_disk&ext=.pdf; The Netherlands Development Finance Company [FMO], Position Statement on Land Governance (Aug. 29, 2017), https://www.fmo.nl/1/library/download/urn:uuid:c973b928-d772-42d9-b1c6-57eb9de5f50f/position+statement+land+governance.pdf?format=save_to_disk&ext=.pdf; The Netherlands Development Finance Company [FMO], Position Statement on Gender 1 (Aug. 29, 2017), https://www.fmo.nl/1/library/download/urn:uuid:5a6a48c6-22c9-4585-a9ae-1d056bd74f75/position+statement+gender.pdf?format=save_to_disk&ext=.pdf.

69. The Netherlands Development Finance Company [FMO], *Policies and Position Statements*, <https://www.fmo.nl/policies-and-position-statements>.

70. Position Statement on Gender, *supra* note 68, at 1.

71. *Id.*

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“actively seek investment opportunities that positively contribute to the full inclusion of women in economic, social and public life.”⁷²

**B. UNITED STATES AND THE EXTRACTIVE INDUSTRY
TRANSPARENCY INITIATIVE (EITI)**

On November 2, 2017, the United States formally withdrew as an implementing country from the Extractive Industries Transparency Initiative (EITI).⁷³ The EITI “is a global standard to promote the open and accountable management of oil, gas and mineral resources.”⁷⁴ The EITI Standard requires countries and companies to disclose details about important steps in the administration of oil, gas, and mining revenues.⁷⁵ They must provide information concerning contracts and licenses, revenue collection and allocation, and social and economic spending.⁷⁶ The EITI Chair, Fredrik Reinfeldt, has called the United States withdrawal “a disappointing, backwards step.”⁷⁷

C. EUROPEAN UNION

1. The High-Level Expert Group on Sustainable Finance (HLEG)

As part of the EU’s commitment to the Paris Climate Agreement, on December 22, 2016, the EU Commission established the High-Level Expert Group on Sustainable Finance (HLEG).⁷⁸ The task of the HLEG is to provide recommendations to the Commission on how to “better integrate sustainability considerations in the EU’s financial policy framework,”⁷⁹ “protect the stability of the financial system from risks related to the environment and its stability,”⁸⁰ and “mobilize capital, notably from private resources, to finance sustainable investments and growth.”⁸¹ On July 13, 2017, the HLEG released its first report, delineating concrete steps to be

72. *Id.* at 2.

73. Extractive Industries Transparency Initiative [EITI], *EITI Chair Statement on United States Withdrawal from the EITI* (Nov. 2, 2017), <https://eiti.org/news/eiti-chair-statement-on-united-states-withdrawal-from-eiti>.

74. EITI, *Who We Are*, <https://eiti.org/who-we-are>.

75. *Id.*

76. *Id.*

77. *EITI Chair Statement on United States Withdrawal from the EITI*, *supra* note 73.

78. European Commission Press Release IP/16/4502, European Commission Appoints Member of the High-Level Expert Group on Sustainable Finance (Dec. 22, 2016).

79. European Commission, Finanzas Sostenibles (Spanish) or Sustainable Finance (English): Overview, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance_es.

80. *Id.*

81. *Id.*

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taken in creating a financial system that supports sustainable investments.⁸² The HLEG is expected to deliver its final report by January 2018.⁸³

2. *Guidelines on Non-Financial Reporting*

In May 2017, the European Commission issued the Guidelines on non-financial Reporting (Guidelines).⁸⁴ The Guidelines were issued pursuant to Directive 2014/95/EU of the European Parliament and of the Council on disclosure of non-financial and diversity information by certain large undertakings and groups (the Directive), which entered into force on December 6, 2014.⁸⁵ Article 1 of the Directive provides inter alia:

Large undertakings which are public-interest entities exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year shall include in the management report a non-financial statement containing information to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters⁸⁶

The intent of the Guidelines “is to provide balanced and flexible guidance on reporting non-financial information in a way that helps companies disclose material information consistently and coherently.”⁸⁷

3. *Supply Chain Due Diligence – Minerals and Metals*

In May 17, 2017, the European Union issued Regulation (EU) 2017/821 that establishes an EU system for supply chain due diligence for importers of minerals or metals containing or consisting of tin, tantalum, tungsten, or gold.⁸⁸ The goal is “to curtail opportunities for armed groups and security forces to trade in tin, tantalum and tungsten, their ores, and gold.”⁸⁹ Regulation 2017/821 sets out volume threshold, defines key terms such as

82. European Commission Press Release IP/17/2022, High-Level Expert Group on Sustainable Finance Delivers Early Recommendations (Jul. 13, 2017).

83. Finance Watch Press Release, Sustainable finance: The tool box is taking shape, but where is the project? (Jan. 31, 2018) <http://www.finance-watch.org/press/press-releases/1503>.

84. European Commission, Guidelines on Non-Financial Reporting 2017/C 215/01 (May 7, 2017).

85. *Id.* at 1.

86. Council Directive 2014/95/EU, of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups 2014 O.J. (L 330) 1, 1.

87. European Commission, Guidelines on Non-Financial Reporting, *supra* note 84, at 5.

88. Commission Regulation 2017/821 of the European Parliament and of the Council of 17 May 2017 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas, 2017 O.J. (L 130) 1, 1.

89. *Id.* art. 1.

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“conflict-affected and high-risk areas”, and clarifies the metals and mineral implicated by the regulation.⁹⁰ Furthermore, Regulation 2017/821 sets out management system obligations, risk management obligations, third-party audit obligations, and disclosure obligations with which affected suppliers must comply.⁹¹

D. THE INTERNATIONAL FINANCE CORPORATION – GOOD PRACTICE NOTE

In October 2017, the International Finance Corporation (IFC) published Good Practice Note: Managing Contractors’ Environmental and Social Performance (Good Practice Note).⁹² The Good Practice Note aims at helping clients implement thorough, uniform approaches in compliance with IFC’s Performance Standards on Environmental and Social Sustainability (PSs).⁹³ It is also designed to help clients manage the environmental and social (E&S) performance of their contractors, subcontractors, and other third parties working on a project.⁹⁴ The Good Practice Note addresses “contractor selection” and “project performance.”⁹⁵

E. THE ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD) – GUIDELINES FOR INSTITUTIONAL INVESTORS

In 2017, the Organization for Economic Cooperation and Development (OCED) published the Responsible Business Conduct for Institutional Investors, Key Considerations for Due Diligence under the OECD Guidelines for Multinational Enterprises (Guidelines on Responsible Business Conduct or Guidelines).⁹⁶ The Guidelines seek “to assist institutional investors by explaining what due diligence under the OECD Guidelines entails and [discuss] key considerations for investors at each step of the process.”⁹⁷ The Guidelines describe “due diligence approaches

90. *Id.* at annex 1, art. 2.

91. Commission Regulation 2017/821 of the European Parliament and of the Council of 17 May 2017 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas, art. 5-7, 2017 O.J. (L 130).

92. International Finance Corporation [IFC], Good Practice Note: Managing Contractor’s Environmental and Social Performance (Oct. 2017), http://www.ifc.org/wps/wcm/connect/03ff53f4-24e2-4526-8bc1-60bec0638b93/p_GPN_ESContractorManagement.pdf?MOD=AJPERES.

93. *Id.* at vii.

94. *Id.*

95. *Id.* at 6, 21.

96. Organization for Economic Co-operation and Development [OECD], Responsible Business Conduct for Institutional Investors: Key Considerations for Due Diligence under the OECD Guidelines for Multinational Enterprises (2017), <http://www.oecd.org/finance/RBC-for-Institutional-Investors.pdf>.

97. *Id.* at 8.

relevant for institutional investment managers and asset owners,”⁹⁸ and outlines “[e]xpected benefits of carrying out due diligence under the OECD Guidelines.”⁹⁹

F. THE GROUP OF SEVEN (G7)

The Group of Seven (G7) countries adopted a number of policy statements that together aim at furthering the goals of sustainable development. Key policy statements adopted in 2017 include: the Bari Policy Agenda on Growth and Inequalities,¹⁰⁰ the G7 Roadmap for a Gender-Responsive Economic Environment,¹⁰¹ the G7 People Centered Action Plan on Innovation, Skills and Labour,¹⁰² and the G7 For a Better Future of Work: Pathways for Action.¹⁰³

V. Domestic Investment Laws and Policies

A. BOLIVIA

1. *Bolivia Ratifies the Hague Apostille Convention*

On August 2, 2017, Bolivia enacted Law No. 967, making official the country’s adhesion to the Convention Abolishing the Requirement of Legalization for Foreign Public Documents (Apostille Convention).¹⁰⁴ The Apostille Convention establishes the necessary procedures to certify for legal purposes public documents originating from one signatory state in all other signatory states, eliminating the need for additional certification.¹⁰⁵

Under the Apostille Convention, public documents are: (i) the documents originated from an authority or originated from a Public Agent; (ii) the administrative documents; (iii) the notarial acts; and (iv) the official certificates placed on documents signed by persons in their private capacity.¹⁰⁶ The Apostille Convention is not applicable to administrative

98. *Id.*

99. *Id.* at 9.

100. Group of Seven [G7], Bari Policy Agenda on Growth and Inequalities (2017), <http://www.g7italy.it/sites/default/files/documents/Bari%20Policy%20Agenda%20final%20.pdf>.

101. G7, G7 Roadmap for a Gender-Responsive Economic Environment (2017), <http://www.consilium.europa.eu/media/23560/g7-gender-roadmap.pdf>.

102. G7, G7 People-Centered Action Plan on Innovation, Skills and Labor (2017), <http://www.g7italy.it/sites/default/files/documents/Action%20Plan.pdf>.

103. G7, For a Better Future of Work: Pathways for Action, G7 Labour and Employment Ministers’ Declaration (Sept. 30, 2017), <http://www.g8.utoronto.ca/employment/2017-labour-declaration.html>.

104. *See* Law No. 967, Aug. 2, 2017, G.O. 984 NEC (Bol.).

105. *See* Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, art. 5, Oct. 5, 1961 (The Hague), attached to the Law No. 967, Aug. 2, 2017, G.O. 984, NEC (Bol.).

106. *See* Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, art. 1, Oct. 5, 1961 (The Hague), attached to the Law No. 967, Aug. 2, 2017, G.O. 984, NEC (Bol.).

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documents issued by diplomatic or consular agents, nor to administrative documents directly related to commercial or custom operations.¹⁰⁷

The Bolivian Government explained that Law No. 967 promotes the goal of reducing state bureaucracy, contributes to the transparency of public administration, and benefits all Bolivians, residents abroad, and foreigners themselves who have the need to enforce public documents in Bolivia.¹⁰⁸

The Apostille Convention is expected to become effective in Bolivia in the first semester of 2018.¹⁰⁹ After that point in time, documents originating from signatory States will be exempt from diplomatic or consular legalization requirements for becoming valid and effective.¹¹⁰

2. *E-Government*

In July of 2017, the Bolivian government issued a regulation to approve plans for implementation of e-government and free software.¹¹¹ Both the e-government plan and the free software plan will be applied at all levels of Bolivian government,¹¹² and each public entity will be in charge of their implementation.¹¹³

The e-government plan aims to modernize and make transparent public management. It has three strategic points: sovereign government, efficient government, and open and participatory government.¹¹⁴ The main objectives of the software plan are to develop free software and open standards in public entities based on technological sovereignty, technological knowledge, and management of change.¹¹⁵ The government has said that this regulation represents a technological advance for Bolivia, enabling the Bolivian State to develop and implement its own technologies.¹¹⁶

107. *Id.*

108. See Ministerio Relaciones Exteriores [Ministry of Foreign Affairs], *Presidente Evo Morales promulga ley 967 de ratificación para la adhesión de la apostilla* [President Morales Promulgates Law 1967 Ratifying the Apostille Adhesion] (Aug. 3, 2017) (Bol.), <http://www.cancilleria.gob.bo/webmre/noticia/2149>.

109. See Convention Abolishing the Requirement of Legalization for Foreign Public Documents, art. 12, Oct. 5, 1961 (The Hague), attached to the Law No. 967, Aug. 2, 2017, G.O. 984, NEC (Bol.).

110. See Convention Abolishing the Requirement of Legalization for Foreign Public Documents, art. 5, Oct. 5, 1961 (The Hague), attached to the Law No. 967, Aug. 2, 2017, G.O. 984, NEC (Bol.).

111. See Decreto Supremo No. 3251 [Supreme Decree No. 3251], July 12, 2017, G.O. 978 NEC (Bol.).

112. See *id.* art. 2.

113. See *id.* art. 6.

114. See Decreto Supremo No. 3251 [Supreme Decree No. 3251], July 12, 2017, G.O. 978 NEC (Bol.).

115. See *Id.*

116. See Nélica Sifuentes Cueto, *Entra en vigencia la implementación de gobierno electrónico y software libre en Bolivia* [The implementation of e-government and free software in Bolivia comes into force] NELIDASIFUENTES.COM (July 19, 2017), <https://nelidasifuentes.com/2017/07/19/entra-en-vigencia-la-implementacion-de-gobierno-electronico-y-software-libre-en-bolivia/>.

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**B. CHINA: THE 2017 FOREIGN INVESTMENT CATALOGUE PROVIDES
NEW OPPORTUNITIES FOR FOREIGN INVESTMENT**

On June 28, 2017, the National Development and Reform Commission of the People's Republic of China (NDRC) and the Ministry of Commerce (MOFCOM) jointly released the 2017 Catalogue for the Guidance of Foreign Investment (the 2017 Catalogue).¹¹⁷ The 2017 Catalogue came into effect on July 28, 2017, replacing the 2015 edition (the 2015 Catalogue) issued on March 10, 2015.¹¹⁸ The Catalogue was first released in 1995.¹¹⁹ The 2017 edition is the seventh version.¹²⁰

The 2017 Catalogue introduces a national "Negative List" for market access to guide foreign investment.¹²¹ The Negative List also contains restrictions such as equity ratio and senior executive requirements for certain types of industries.¹²² According to the NDRC, after the implementation of this system, only foreign investment in areas included on the Negative List will be subject to restriction measures.¹²³ In addition, setting up projects and enterprises with foreign investment in those areas not on the list will be subject to record-filing requirements rather than pre-approvals from authorities.¹²⁴

117. National Development and Reform Commission of the People's Republic of China [NDRC] and Ministry of Commerce of People's Republic of China [MOFCOM], 外商投资产业指导目录 (2017 年修订) [Catalogue for the Guidance of Foreign Investment Industries (Revised in 2017)] (June 28, 2017), <http://www.ndrc.gov.cn/zcfb/zcfbl/201706/W020170628553266458339.pdf>; NDRC and MOFCOM, Zhonghua Renmin Gongheguo Guojia Fazhan Gaige Weiyuanhui Zhonghua Renmin Gongheguo Shangwubu Ling Di Si Hao, 中华人民共和国国家发展和改革委员会 中华人民共和国商务部令 第 4 号 [National Development and Reform Commission of the People's Republic of China and Ministry of Commerce of People's Republic of China Order No. 4] (June 28, 2017), http://www.ndrc.gov.cn/zcfb/zcfbl/201706/t20170628_852857.html.

118. See Zhonghua Renmin Gongheguo Guojia Fazhan Gaige Weiyuanhui Zhonghua Renmin Gongheguo Shangwubu Ling Di Si Hao, 中华人民共和国国家发展和改革委员会 中华人民共和国商务部令 第 4 号 [National Development and Reform Commission of the People's Republic of China and Ministry of Commerce of People's Republic of China Order No. 4], *supra* note 117.

119. MOFCOM, Ministry of Commerce of People's Republic of China, State Development and Reform Commission and the Ministry of Commerce Issued the Catalogue for the Guidance of Foreign Investment Industries (Amended in 2017) (June 30, 2017), <http://english.mofcom.gov.cn/article/newsrelease/significantnews/201707/20170702607364.shtml>.

120. *Id.*

121. Alexander Chipman Koty & Zhou Qian, *China's 2017 Foreign Investment Catalogue Opens Access to New Industries* CHINA BRIEFING (July 11, 2017), <http://www.china-briefing.com/news/2017/07/11/china-releases-2017-foreign-investment-catalogue-opening-access-new-industries.html>.

122. Laney Zhang, *China: Catalog of Foreign Investment Industries Updated*, LIBR. CONGRESS (Aug. 7, 2017), <http://www.loc.gov/law/foreign-news/article/china-catalog-of-foreign-investment-industries-updated/>.

123. *Id.*

124. See *id.*; see also NDRC, 7 Yue 28 Ri Qi Zai Quanguo Fanwei Nei Shishi Waishang Touzi Zhunru Fumian Qingdan — Waishang Touzi Chanye Zhidao Mulu (2017 Nian Xiuding) Shuoming, 7月28日起在全国范围内实施外商投资准入负面清单——《外商投资产业指导目录

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Under the 2017 Catalogue, all industries subject to foreign investment rules and restrictions are included either in the “Encouraged” category or the “Negative List,” which includes a “Restricted List” and a “Prohibited List.”¹²⁵ Compared to the 2015 Catalogue, the 2017 Catalogue removes a total of thirty industries from the either Restricted or Prohibited List (a reduction of ninety-three to sixty-three), providing more market opportunities for foreign investment.¹²⁶ Eleven industries were removed from the Prohibited Lists because common restrictive measures apply to both domestic and foreign investment.¹²⁷ These industries include processing of traditional Chinese medicinal materials, ivory carving, tiger bone processing, construction of golf courses and villas, gambling and lottery industry (including horse race betting), pornography, etc.¹²⁸

The 2017 Catalogue, like its predecessor, continues to place heavy restrictions on media and cultural service industries. Foreign investors are prohibited from engaging in the businesses of the editing and publication of books, newspapers, periodicals, audio-visual products, and electronic content, radio and television video-on-demand services, radio and television program production, operating social sciences research institutes, online news services, etc.¹²⁹ The industries in the encouraged category remain largely unchanged with a continued focus on advanced manufacturing, new

(2017年修订) 说明 [Starting from July 28th, the Implementation of the Negative List of Foreign Investment Access in the Entire Country—“Foreign Investment Industry Guidance Catalogue (Revised in 2017)"] (June 28, 2017), http://zwdt.ndrc.gov.cn/fwdt/fwdttzgg/201706/t20170628_852895.html.

125. See Zhang, *supra* note 122; see also 7 Yue 28 Ri Qi Zai Quanguo Fanwei Nei Shishi Waishang Touzi Zhunru Fumian Qingdan — Waishang Touzi Chanye Zhidao Mulu (2017 Nian Xiuding) Shuoming, 7月28日起在全国范围内实施外商投资准入负面清单——《外商投资产业指导目录(2017年修订)》说明 [Starting from July 28th, the Implementation of the Negative List of Foreign Investment Access in the Entire Country – “Foreign Investment Industry Guidance Catalogue (Revised in 2017)”, *supra* note 124.

126. See Zhang, *supra* note 122; see also NDRC, Guojia Fazhan Gaige Weiyuanhui Youguan Fuzeren jiu <Waishang Touzi CHanye Zhidao Mulu (2017 Nian Xiuding)>, 国家发展改革委有关负责人就《外商投资产业指导目录(2017年修订)》答记者问 [Relevant Person in Charge of the National Development and Reform Commission Replied to the Reporter on the “Foreign Investment Industry Guidance Catalogue (Revised in 2017)"] (June 28, 2017), <https://www.yidaiyilu.gov.cn/zchj/xzcjd/17375.htm>.

127. See Guojia Fazhan Gaige Weiyuanhui Youguan Fuzeren jiu <Waishang Touzi CHanye Zhidao Mulu (2017 Nian Xiuding)>, 国家发展改革委有关负责人就《外商投资产业指导目录(2017年修订)》答记者问 [Relevant Person in Charge of the National Development and Reform Commission Replied to the Reporter on the “Foreign Investment Industry Guidance Catalogue (Revised in 2017)”, *supra* note 126.

128. See *id.*; MOFCOM, State Development and Reform Commission and the Ministry of Commerce Issued the Catalogue for the Guidance of Foreign Investment Industries (Amended in 2017) (June 30, 2017), <http://english.mofcom.gov.cn/article/newsrelease/significantnews/201707/20170702607364.shtml>

129. See Alexander Chipman Koty & Zhou Qian, *China’s 2017 Foreign Investment Catalogue Opens Access to New Industries*, CHINA BRIEFING (July 11, 2017), <http://www.china-briefing.com/news/2017/07/11/china-releases-2017-foreign-investment-catalogue-opening-access-new-industries.html>.

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and high technology, environmental technologies, and modern service industries, etc.¹³⁰ A handful of industries, such as virtual reality (VR) and augmented reality (AR) devices, and urban parking facility construction have been added to the encouraged category.¹³¹

A few industries have been removed from the encouraged category, including comprehensive water control project construction and operation, manufacturing of rail transportation, accounting and auditing, commercial road transportation services, credit rating services, manufacturing of automobile electronic networks and electronic controls for electric power steering systems, and exploration and development of unconventional oil and gas resources (such as oil shale, oil sands, and shale gas).¹³² This means that these industries are no longer subject to restrictive measures applicable only to foreign investments.¹³³ It is worth noting that a few days before the promulgation of the 2017 Catalogue, the State Council released an updated Negative List for China's Free Trade Zones.¹³⁴ This Negative List also reduced restrictions on foreign investment made in Free Trade Zones.¹³⁵

Although the 2017 Catalogue creates more opportunities for foreign investment and further relaxes the restrictions, some believe that it falls short of opening up the market and effectively leveling the playing field for foreign investment in China.¹³⁶

130. *Id.*

131. See NDRC, 7 Yue 28 Ri Qi Zai Quanguo Fanwei Nei Shishi Waishang Touzi Zhunru Fumian Qingdan — Waishang Touzi Chanye Zhidao Mulu (2017 Nian Xiuding) Shuoming, 7月28日起在全国范围内实施外商投资准入负面清单——《外商投资产业指导目录(2017年修订)》说明 [Starting from July 28th, the Implementation of the Negative List of Foreign Investment Access in the Entire Country – “Foreign Investment Industry Guidance Catalogue (Revised in 2017)"] (June 28, 2017), http://zwdt.ndrc.gov.cn/fwdt/fwdttzgg/201706/t20170628_852895.html.

132. See Alexander Chipman Koty & Zhou Qian, *China's 2017 Foreign Investment Catalogue Opens Access to New Industries*, CHINA BRIEFING (July 11, 2017), <http://www.china-briefing.com/news/2017/07/11/china-releases-2017-foreign-investment-catalogue-opening-access-new-industries.html>.

133. *See id.*

134. Office of the State Council, Guowuyuan Bangongting Guanyu Yinfa Ziyoumaoyi Shiyangu Waishang Touzi Zhunru Tebie Guanli Cuoshi (Fumian Qingdan) (2017nian ban) de Tongzhi, Guobanfa [2017] 51Hao, 国务院办公厅关于印发自由贸易试验区外商投资准入特别管理措施(负面清单)(2017年版)的通知, 国办发, (2017) 51号 [The General Office of the State Council Issued the Free Trade Pilot Zone Special Measures for Foreign Investment Access Control (negative list) (2017 version) Notice] (June 16, 2017), http://www.gov.cn/zhengce/content/2017-06/16/content_5202973.htm.

135. *Id.*

136. European Union Chamber of Commerce in China Press Release, Revised Foreign Investment Catalogue Falls Short of Expectations (July 5, 2017), http://www.europeanchamber.com.cn/en/press-releases/2568/revised_foreign_investment_catalogue_falls_short_of_expectations.

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C. EGYPT

In May 2017, the Egyptian Parliament enacted a new law on investment, Law No.72 of 2017 (Investment Law 2017 or new law).¹³⁷ Investment Law 2017 entered into force on June 1, 2017, repealing the Investment Guarantees and Incentives Law No. 8 of 1997.¹³⁸ In August 2017, Egypt's cabinet passed regulations implementing the new law.¹³⁹ The new law provides a number of investment guarantees and incentives (Section II), creates several investment regimes (Section III), forms a new entity—the Supreme Council for Investment—responsible for managing foreign investment in Egypt (Section IV), and addresses the settlement of investment dispute (Section V).¹⁴⁰ The new law also deals with investor responsibility. According to Chapter III (The Social Responsibility of the Investor), which is aimed at achieving the goals of comprehensive and sustainable development, an investor may dedicate a percentage of his annual profit to create a social development system by participating in a number of activities.¹⁴¹ These actions include training and scientific research, protecting and enhancing the environment, and providing services or programs in the areas of healthcare, social care, or cultural care or other development areas.¹⁴² The new law establishes four types of investment regimes: Inland Investment Regime; Investment Zones Investment Regime; Technological Zones Investment Regime, and Free Zones Investment Regime.¹⁴³

D. MYANMAR

Myanmar Investment Law No. 40/2016 entered into force on October 18, 2016,¹⁴⁴ and implementing regulations were published in March 2017.¹⁴⁵ The law is clearly aimed at attracting FDI while maintaining appropriate policy space for the government. It creates a new Myanmar Investment Commission (MIC) tasked with carrying out investment promotion activities in Myanmar and generally supervising investment activities in the country.¹⁴⁶ The legislation addresses a number of key topics including: Treatment of Investors (Chapter XI), Right to Use Land (Chapter XII), Employment of

137. Law No. 72 of 2017 (Promulgating the Investment Law), 31 May 2017 (Egypt).

138. *Id.* art. VIII.

139. *Executive Regulations of New Investment Law Ratified*, EGYPT TODAY (Aug. 17, 2017), <https://www.egypttoday.com/Article/3/17818/Executive-regulations-of-New-Investment-Law-ratified>.

140. Law No. 72 of 2017 (Promulgating the Investment Law), 31 May 2017, art. 68 (Egypt).

141. *Id.* art. 15.

142. *Id.*

143. Law No. 72 of 2017 (Promulgating the Investment Law), 31 May 2017, arts. 16-47 (Egypt).

144. The Myanmar Investment Law (No. 40/2016), 18 Oct. 2016, 1378 M.E. (Myan.).

145. The Myanmar Investment Rules (No. 35/2017), 30 Mar. 2017, 1378 M.E. (Myan.).

146. *See* The Myanmar Investment Law (No. 40/2016), 18 Oct. 2016, 1378 M.E., chs. IV-VII (Myan.).

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Staff and Workers (Chapter XIII), Investment Guarantee (Chapter XIV), Transfer of Funds (Chapter XV), Responsibilities of Investors (Chapter XVI), Exemptions and Reliefs (Chapter XVIII), Dispute Settlement (Chapter XIX), and Administrative Penalties (Chapter XX).¹⁴⁷ Pursuant to Section 36, investors wishing to engage in certain types of defined investment activities must submit a proposal to the MIC for a Permit.¹⁴⁸ The law offers beneficial tax incentives to investors, varying by the industry and the level of development of a particular region.¹⁴⁹ The law obliges investors to respect the social environment and to follow international best practices in developing their project.¹⁵⁰

E. TUNISIA

On September 30, 2016, the Tunisian legislature adopted law n°71-2016 (Loi sur l'Investissement 2016, the Investment Law).¹⁵¹ The law entered into force on January 1, 2017, and effectively repealed and replaced a 1993 incentive code (Code d'Incitations aux Investissements).¹⁵² With the goal of attracting foreign investment, the law provides a number of investment guarantees and protections including enhanced flexibility to transfer funds out of the country and relaxation of restrictions on the compositions of an entity's management.¹⁵³ It creates an overarching institutional framework in the form of a high Investment Authority.¹⁵⁴

F. LAOS

The Law on Investment Promotion (2016) of the Lao People's Democratic Republic became effective on April 19, 2017.¹⁵⁵ This legislation replaces the Law on Investment Promotion No. 02/NA of July 8, 2009, and its Decree on the Implementation of the Investment Law (2009) No. 119/PM, of April 20, 2011.¹⁵⁶ It offers incentives, supports, and protection for investment. Some incentives are offered by business sector and by zones, and others are tied to defined activities (e.g. land use and investment expansion).¹⁵⁷ Article

147. The Myanmar Investment Law (No. 40/2016), 18 Oct. 2016, 1378 M.E., ch. XI-XX (Myan.).

148. *Id.* § 36.

149. *See* The Myanmar Investment Law (No. 40/2016), 18 Oct. 2016, 1378 M.E., § 74-78 (Myan.).

150. *See id.* § 65(g).

151. Loi n° 2016-71 du 30 septembre 2016, portant loi de l'investissement [Civil Code] (Tunis.).

152. *Id.* art. 27.

153. *Id.* art. 9, 6.

154. Tarek Amara, *Tunisian Parliament Approves Investment Law*, REUTERS (Sept. 17, 2016, 10:26 AM), <https://www.reuters.com/article/us-tunisia-investment/tunisian-parliament-approves-investment-law-idUSKCN11N0IN>.

155. Law on Investment Promotion (Amendment) (No. 14/NA) [Civil Code] (Laos).

156. *Id.* art. 109.

157. *See id.* art. 8-16.

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22, regarding protection of investment, provides: “The State protects legitimate rights, interests and equality of all domestic and foreign parties of economy who invest under Lao PDR laws, treaties, agreements to which Lao PDR is a party.”¹⁵⁸ Article 23 protects lawful investment “against Government seizure, confiscation or nationalization by administrative means.”¹⁵⁹ Rights and obligations of investors are set forth in Part VI.¹⁶⁰ Investors have social obligations, environmental obligations, and more general obligations towards the State.¹⁶¹ The law also establishes the Investment Promotion and Supervision Committee (IPSC) and a new one-stop service for investment.¹⁶²

G. SERBIA

Serbia’s Regulations on Terms and Conditions for Attracting Direct Investment entered into force on January 1, 2017.¹⁶³ The regulation is directly based on the Serbian Investment Act of 2015.¹⁶⁴ The Regulation creates certain incentives for investments in the manufacturing and services sectors, and defines both the investment thresholds for incentives and the entities eligible for the stated incentives.¹⁶⁵

H. MAURITIUS

Published on July 24, 2017, the Finance (Miscellaneous Provisions) Act 2017 (the 2017 Finance Act) entered into force in July.¹⁶⁶ The law implements a number of measures announced in the Budget Speech 2017-2018.¹⁶⁷ The 2017 Finance Act introduces a number of significant changes to Mauritius’ corporate tax regime, personal tax, and value added tax.¹⁶⁸

I. NAMIBIA

The Namibia Investment Promotion Act, 2016 (NIPA), published on August 31, 2016, is under review.¹⁶⁹ If adopted, NIPA will replace Namibia’s

158. *Id.* art. 22.

159. *Id.* art. 23.

160. Law on Investment Promotion (Amendment) (No. 14/NA) [Civil Code] pt. VI (Laos).

161. *Id.* art. 72-74.

162. *Id.* pt. VII.

163. Regulation on Terms and Conditions for Attracting Direct Investment (No. 110/2016) [Civil Code] (Serb.). Direct Investment, Official Gazette of the Republic of Serbia”, no. 110/2016, available et: <http://privreda.gov.rs/wp-content/uploads/2017/05/2017-Uredba-EN.pdf>.

164. See Marija Oreski Tomasevic, *Serbia Adopts New Regulation for Attracting Direct Investment*, LEXOLOGY (May 4, 2017), <https://www.lexology.com/library/detail.aspx?g=a7aee01b-5226-4bdb-a72c-7d0af4eb5616>.

165. Regulation on Terms and Conditions for Attracting Direct Investment (No. 110/2016) [Civil Code] pt. II-III (Serb.).

166. The Finance (Miscellaneous Provisions) Act 2017 (No. 10/2017) (Mauritius).

167. *Id.*

168. *Id.*

169. Namibia Investment Promotion Act, 2016 (No. 9/2016) (not yet adopted).

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Foreign Investments Act, 1990. NIPA introduces some far-reaching changes in the Namibian foreign investment regime. The law has seven parts: Introductory Provision (Part I), Administration of the Act (Part II); Investors, economic sectors and business activities (Part III); Changes of ownership and control of investment (Part IV); Rights and obligations of investors (Part V); Dispute settlement (Part VI) and General provisions (Part VII).¹⁷⁰ NIPA empowers the Minister, by regulation, to reserve certain categories of economic sectors or business activities exclusively for particular types of investors, including State, Namibians, joint venture partnerships between Namibian and foreign investors, and other qualifying investors.¹⁷¹ Certain changes of ownership and control of investment require the prior approval of the Minister.¹⁷² Investors that meet investment thresholds (to be determined by the Minister) must register with the Namibia Investment Centre.¹⁷³ The new law also addresses expropriation, transfer of funds, the employment of foreign personnel, and dispute settlement.¹⁷⁴ NIPA is not yet in force. Some are concerned that the law will hinder rather than promote investment in Namibia.

J. UNITED STATES – MANDATED REVIEW OF INVESTMENT AGREEMENTS

On April 29, 2017, President Donald Trump issued the Presidential Executive Order Addressing Trade Agreement Violations and Abuses, requiring the Secretary of Commerce and the United States Trade Representative (USTR) to conduct comprehensive performance reviews of key trade and investment agreements.¹⁷⁵ Section 2 of the Executive Order mandates comprehensive performance reviews of *inter alia* “all bilateral, plurilateral, and multilateral trade agreements and investment agreements to which the United States is a party.”¹⁷⁶ According to the Executive Order, each performance review shall, among other things, identify: (i) those violations or abuses of any U.S. investment agreement that are harmful to American interest; (ii) instances where investment agreement has failed; and (ii) lawful and appropriate actions to remedy or correct deficiencies identified.¹⁷⁷

VI. Cryptocurrencies and ICOs: Legal Developments

Over the past few years, as the appeal of decentralized transactions and the elimination of barriers to trade and associated fees has grown,

170. *Id.* at pt. 1-7.

171. *Id.* § 8(2).

172. *Id.* pt. 4.

173. *Id.* § 19.

174. *Id.* § 21-24, 28.

175. Exec. Order No. 13,796, 82 Fed. Reg. 20819 (May 4, 2017).

176. *Id.* § 2.

177. *Id.* § 3.

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cryptocurrencies have increased exponentially worldwide. As a result, companies are funding their cryptocurrencies through the crowdfunding method termed an initial coin offering (ICO).¹⁷⁸ ICOs allows companies to raise capital from almost any individual through either the purchase of shares, coins, or tokens at a specific valuation, outside of traditional regulatory systems.¹⁷⁹ The explosive growth of cryptocurrencies has prompted various approaches to dealing with the purchase of such coins or tokens, and the methods by which these companies are raising capital through ICOs. This article offers a snapshot of major jurisdictions who have undertaken more concrete positions in 2017.

A. CHINA/ SOUTH KOREA

China, the current largest Bitcoin trading market globally, has made an effort to restrict and eliminate the use of cryptocurrencies. The country has banned banks and their employees from engaging in Bitcoin transactions, or engaging in or servicing the industry.¹⁸⁰ Trading and mining bitcoin is not illegal for regular citizens unconnected with the banking industry, but the government has taken aggressive action to curb use by institutions. On September 4, 2017, China announced a ban on ICOs and an immediate halt on ICO activity.¹⁸¹ The government required that all funds raised by ICOs be refunded to investors.¹⁸² The announcement recommended that “all bank and financial institutions should not do any business related to ICO trading.”¹⁸³ Due to concerns about financial fraud, South Korea also followed suit, banning ICOs on September 28, 2017.¹⁸⁴

B. UNITED STATES/ CANADA

The United States has thus far allowed the courts to develop the law through legal cases involving the use of cryptocurrencies. Some legislators, recognizing the importance of blockchain technology within the economy, have attempted to take a proactive approach. But thus far, such proposals

178. See *Initial Coin Offering*, INVESTOPEDIA, <https://www.investopedia.com/terms/i/initial-coin-offering-ico.asp>.

179. See *Making Sense of Bitcoin, Cryptocurrency, and Blockchain*, PWC, <https://www.pwc.com/us/en/industries/financial-services/fintech/bitcoin-blockchain-cryptocurrency.html> (last visited Nov. 19, 2017).

180. See Saheli Roy Choudhury, *China Bans Companies from Raising Money Through ICOs, Asks Local Regulators to Inspect 60 Major Platforms*, CNBC (Sept. 2017, 2:51 am), <https://www.cnbc.com/2017/09/04/chinese-icos-china-bans-fundraising-through-initial-coin-offerings-report-says.html>.

181. *Id.*

182. *Id.*

183. *Id.*

184. Yuji Nakamura & Sam Kim, *Cryptocurrencies Drop as South Korea Bans ICOs, Margin Trading*, BLOOMBERG (Sept. 29, 2017, 4:00 am), <https://www.bloomberg.com/news/articles/2017-09-29/cryptocurrencies-drop-as-south-korea-bans-icos-margin-trading>.

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have not been enacted into legislation.¹⁸⁵ Several state governments are considering regulatory action. As of 2017, eight state legislatures are working on bills accepting or promoting the use of bitcoin and blockchain technology.¹⁸⁶ Most of these bills relate to the use of blockchain technology in its recordkeeping capacity rather than use as a currency or commodity.¹⁸⁷

In financial markets, the U.S. Commodity Futures Trading Commission granted LedgerX, a cryptocurrency trading platform, approval as the first federally regulated options exchange and clearinghouse within the United States.¹⁸⁸ On July 25, 2017 the Securities and Exchange Commission (SEC), while investigating the theft surrounding the DAO ICO, found that the DAO tokens were securities.¹⁸⁹ This raised a red flag to the industry that some ICOs may fall under U.S. securities laws and require additional due diligence and compliance.¹⁹⁰ Responding to the United States recognition of the DAO ICO as a security, the Canadian Securities Administrators issued a notice in line with the SEC advising caution to businesses handling ICOs to evaluate whether they are dealing with a security.¹⁹¹

C. EUROPEAN UNION

While the European Union (E.U.) has taken steps toward accepting cryptocurrency and blockchain technology, Switzerland has become a leader among European countries in both recognition and regulatory action. The Crypto Valley Association, a Swiss non-profit blockchain and cryptographic technology ecosystem, issued an ICO Code of Conduct, one of the first instances of a proactive approach to the technology.¹⁹² The Swiss Financial Market Supervisory Authority (FINMA), the Swiss government body overseeing financial regulation, began investigating ICO procedures to

185. H.R. Res. 835, 114th Cong. (2016) (“Whereas blockchain technology with the appropriate protections has the potential to fundamentally change the manner in which trust and security are established in online transactions through various potential applications in sectors including financial services, payments, health care, energy, property management, and intellectual property management”).

186. See Divya Joshi, *How the Laws & Regulation Affecting Blockchain Technology Can Impact its Adoption*, BUSINESS INSIDER (Oct. 20, 2017, 5:25 pm), <http://www.businessinsider.com/blockchain-cryptocurrency-regulations-us-global-2017-10>.

187. *Id.*

188. *Id.*

189. See Press Release, Securities Exchange Commission [SEC], SEC Issues Investigative Report Concluding DAO Tokens, a Digital Asset, Were Securities (July 25, 2017); see also SEC, Rules and Regulations for the Securities and Exchange Commission and Major Securities Laws, <https://www.sec.gov/about/laws/secrulesregs.htm> (last modified March 29, 2017).

190. See SEC Issues Investigative Report Concluding DAO Tokens, a Digital Asset, Were Securities, *supra* note 189; See also Rules and Regulations for the Securities and Exchange Commission and Major Securities Laws, *supra* note 189.

191. See Press Release, Canadian Securities Administrators, Canadian Securities Regulators Outline Securities Law Requirements that May Apply to Cryptocurrency Offerings (Aug. 24, 2017).

192. See Crypto Valley Association [CVA], Mission and Policy Framework: ICO Code of Conduct (Jan. 2018), <https://cryptovalley.swiss/codeofconduct/>.

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determine if any regulatory procedures have been violated.¹⁹³ FINMA recently took action against a cryptocurrency it deemed fraudulent because the currency was stored on local servers, “unlike real cryptocurrencies, which are stored on distributed networks using blockchain technology.”¹⁹⁴

D. JAPAN

Japan is the state most quickly recognizing and accepting the use of digital currencies globally. Japan first officially recognized Bitcoin as a currency in April 2017.¹⁹⁵ Japan has initiated additional regulatory scrutiny of the currency, necessitating AML and KYC requirements.¹⁹⁶ At the end of September, Japan officially recognized eleven companies as registered cryptocurrency exchange operators.¹⁹⁷

193. See Press Release, Financial Market Supervisory Authority [FINMA], FINMA is Investigating ICO Procedures (Sept. 29, 2017).

194. See Press Release, FINMA, FINMA Closes Down Coin Providers and Issues Warning About Fake Cryptocurrencies (Sept. 19, 2017).

195. See Gautham, Japan Officially Recognises Bitcoin as Currency Starting April 2017, NEWSBTC (Apr. 2, 2017), <https://www.newsbtc.com/2017/04/02/japan-officially-recognises-bitcoin-currency-starting-april-2017/>.

196. *Id.*

197. See Luke Graham, *As China Cracks Down, Japan is Fast Becoming the Powerhouse of the Bitcoin Market*, CNBC (Sept. 29, 2017, 8:43 am), <https://www.cnbc.com/2017/09/29/bitcoin-exchanges-officially-recognized-by-japan.html>.

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