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International Investment and Development

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This article reviews important developments in 2014 in the field of international investment and development.

I. International Investment Policy Making*

2014 saw considerable activity in the area of investment policy making. At least eight bilateral investment treaties (BITs) were concluded in 2014.[1] In addition, about thirteen other international investment agreements (IIAs) were also concluded.[2] The BITs concluded in 2014 include: Israel-Myanmar BIT,[3] Azerbaijan–Russia Federation BIT,[4] Canada-Serbia BIT,[5] Burkina Faso-Singapore BIT,[6] Cote d'Ivoire-Singapore BIT,[7] Columbia-Turkey BIT,[8] Colombia-France BIT,[9] and Georgia-Switzerland BIT.[10] Two BITs were also concluded late in 2013: Japan-Myanmar BIT[11] and India-United Arab Emirate BIT.[12] Regarding other IIAs, the following were concluded in 2014: Canada-

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1. *See generally*, United Nations Conference on Trade and Development (UNCTAD), International Investment Agreement Monitor, http://investmentpolicyhub.unctad.org/IIA.
2. *Id.*
3. Concluded 5 October 2014.
4. Concluded 29 September 2014.
5. Concluded 5 September 2014.
6. Concluded 27 August 2014.
7. Concluded 27 August 2014.
8. Concluded 28 July 2014.
9. Concluded 10 July 2014.
10. Concluded 3 June 2013.
11. Concluded 15 December 2013.
12. Concluded 12 December 2013.

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Korea Free Trade Agreement (FTA),[13] ASEAN–India Services and Investment Agreement,[14] ECOWAS–USA TIFA,[15] Japan-Mongolia Economic Partnership Agreement (EPA),[16] Australia-Japan EPA,[17] European Union-Georgia Association Agreement,[18] EU-Moldovia Association Agreement,[19] EU-Ukraine Association Agreement,[20] Canada-Republic of Korea FTA,[21] the Treaty on Eurasian Economic Association,[22] Malaysia-Turkey FTA,[23] Australia-Republic of Korea FTA,[24] Mexico-Panama FTA,[25] and Protocol Pacific Alliance.[26]

A. Reform of International Investment Law: The BRICS Perspective on International Investment Agreements

On 13 July 2014, the Trade Ministers of Brazil, Russia, India, China and South Africa (hereinafter "the BRICS") meeting on the eve of the 6th BRICS Summit, adopted a Communiqué in which they "reaffirmed the importance of a continued dialogue on international investment agreements."[27] The following day, on 14 July 2014, the BRICS nations released a document titled "*BRICS Perspective on International Investment Agreements* ("BRICS Perspective on IIA").[28] The *BRICS Perspective on International Investment Agreements* is to date the boldest statement yet from the BRICS regarding their views about the international investment law regime and their position regarding needed reform. The document serves as a voluntary reference for countries to advance a more balanced approach to investment treaties.[29] While acknowledging that FDI "can make a positive contribution to sustainable development when integrated into national development strategies," BRICS Member States take the position that IIAs "should strike a balance between the protection of investors and the Government's sovereign right to regulate in the public interest"[30] and specifically call for further improvements of IIAs, including in their dispute settlement mechanisms.[31] Individually, and collectively, the BRICS nations appear to be opening up considerable space for serious discussion about the future of international investment law and the investor-State dispute settlement (ISDS) system. Although more spaces for dialogue and debate are emerging, whether there is enough political will to push needed reform through is quite another matter. Whether other

13. Concluded 22 September 2014.
14. Concluded 8 September 2014. ASEAN stands for the Association of South-East Asian Nation.
15. Concluded 5 August 2014. ECOWAS stands for Economic Community of West Africa States.
16. Concluded 22 July 2014.
17. Concluded 8 July 2014.
18. Concluded 27 June 2014.
19. Concluded 27 June 2014.
20. Concluded 27 June 2014.
21. Concluded 13 June 2014.
22. Concluded 29 May 2014.
23. Concluded 17 April 2014.
24. Concluded 8 April 2014.
25. Concluded 3 April 2014.
26. Concluded 10 February 2014.
27. *See* Communiqué of the Meeting of Trade Ministers on the eve of the VI Summit. 14 July 2014.
28. *See* BRICS Perspective on International Investment Agreements, 14 July 2014.
29. *See* BRICS Perspective on International Investment Agreements, 14 July 2014.
30. *Id.*, ¶ 2.
31. *Id.*, ¶ 3.

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developing countries, particularly countries in Africa, will seize this new opportunity to push the BRICS nations to introduce meaningful changes to the system also remains to be seen. The role of the BRICS nations as both capital-importers and capital exporters means that the road to reform will undoubtedly be complicated, difficult, and potentially treacherous.

The expressed position of BRICS that "[i]t is . . . important International Investment Agreements serve the purpose of sustainable development," will be tested in the coming years. It remains to be seen whether BRICS Member States will build common approaches on international investment policy and whether they will, individually and collectively, push for improvement in the international investment law architecture. Undoubtedly, more is needed from the BRICS nations than statements and declarations at high-profile meetings. Many old generation BITs between some BRICS members and other developing countries remain in force and will need to be addressed now or in the future.

II. Africa*

A. China-Africa Investment and Development Relations

In July 2014, the Information Office of the State Council of the People's Republic of China issued China's second white paper on foreign aid.[32] The first Chinese Aid White Paper was released in 2011. The second white paper offers an overview of China's foreign assistance from 2010 to 2012. Information in the white paper points to the emergence of China as a significant aid donor and to China's influence in the South-South cooperation framework. Overall, China's aid program is growing and the number of countries receiving Chinese aid is also growing. Countries in Africa appear to be the main beneficiaries. According to the white paper, from 2010 to 2012, China appropriated approximately 89.34 billion yuan (14.41 billion U.S. dollars) for foreign assistance in three types: grant (aid gratis), interest-free loan, and concessional loan.[33]

The stated goal of China's development aid is "to reduce poverty and improve livelihoods."[34] According to the white paper, "China prioritizes supporting other developing countries to develop agriculture, enhance education level, improve medical and health services and build public welfare facilities, and provide emergency humanitarian aid when they suffer severe disasters." Economic infrastructure features strongly in China's foreign assistance program in general and China's assistance to Africa in particular. In terms of the distribution of China's foreign assistance fund, according to projected fields, 44.8% went to economic infrastructure, 27.6% to social and public infrastructure, 15.0% to goods and materials, 5.8% to human resource development cooperation, 3.6% to industry, and 2% to agriculture.[35]

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32. Information Office of the State Council, The People's Republic of China, China's Foreign Aid (2014).

33. *Id.*

34. *Id.*

35. *Id.*

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In terms of the distribution of China's Foreign Assistance Funds according to the income level of recipient countries, from 2010 to 2012, least-developed countries (LDC) received 52.1% of China's foreign assistance.[36] Countries in Africa feature strongly in China's foreign assistance–a fact that is generating considerable debate and controversy in and outside Africa. Of the 121 countries that were the beneficiaries of China's assistance, 51 are in Africa, 30 in Asia, 19 in Latin America and the Caribbean and 12 in Europe.[37] 51.8% of the distribution from China's foreign assistance fund between 2010 and 2012 went to Africa, 30.5% to Asia, 8.4% to Latin America and the Caribbean, 4.2% to Oceania, 1.7% to Europe, and 3.4% to Others.

Growth in China's foreign assistance to countries in Africa is matched by phenomenal growth in China-Africa investment relations. According to the China-Africa Economic and Trade Cooperation White Paper (2013), "[f]rom 2009 to 2012, China's direct investment in Africa increased from US$1.44 billion to US$2.52 billion, with an annual growth rate of 20.5%." Also from 2009 to 2012, "China's accumulative direct investment in Africa increased from US$9.33 billion to US$21.23 billion, 2.3 times the 2009 figure."[38]

China's rising prominence in development aid poses significant challenges for traditional aid donors and for the international development assistance infrastructure. To what extent is China changing the very notion of development and development aid? What does Chinese foreign assistance mean for the poorest of the poor in recipient countries? Is China reaching development "aid orphans" ignored by traditional donors? Is China guided by established standards and norms pertaining to development aid and aids effectiveness or is China charting its own course and creating its own rules? How does China respond to accusations that its aid supports rogue states and undermines rule of law in recipient countries? According to the white paper,

China will continue to increase the input in foreign assistance, further optimize assistance structure, highlight key aspects, innovate assistance means, raise the efficiency of capital utilization, effectively help recipient countries improve their people's well-being and enhance their capability of independent development. China is willing to work with the international community to share opportunities, meet challenges, strive to realize the world's dream of lasting peace and common prosperity, and make greater contribution to the development of mankind.[39]

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36. *Id.* Lower-middle-income countries received 21.2%; upper-middle-income countries, 12.3%, other low-income countries 9.0%, and others, 5.4%.).

37. *Id.*

38. The Information Office of the State Council, The People's Republic of China, China-Africa Economic and Trade Cooperation (2013) (August 2013). http://www.scio.gov.cn/zxbd/wz/Document/1344818/1344818.htm

39. *Id.*

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B. South Africa

1. *The Promotion and Protection of Investment Bill*

Action is still awaited on South Africa's *Promotion and Protection of Investment Bill* ("Act") which was published for broader comments on October 29, 2013.[40] The Act was open for public comment until January 31, 2014. The Bill has generated considerable controversy in South Africa. The Act is under discussion at the National Economic Development & Labour Council and will be referred to Parliament soon.[41]

The broad aims of the Act are to "promote and protect investment in a manner that is consistent with public interest and a balance between the rights and obligations of investors," and to ensure equal treatment between foreign investors and South African citizens. Very similar to traditional BITs, investment is defined in the Bill to include intellectual property rights such as copyrights, patents, utility model patents, registered designs, trade-marks, trade-names, trade and business secrets and technical processes."[42] However to qualify for protection, the investment must "relate[ ] to a material economic investment or significant underlying physical presence in the Republic, such as operational facilities."[43] Another qualifier is found in Article 5 which states that the investment protection under this Act applies to investors and their investments "where those investments have been-(a) made in accordance with applicable legislation; and (b) acquired and used in the expectation, and for the purpose, of economic activity or other business purposes."[44] Furthermore, the Act states explicitly that "the protection of foreign investment is subject to compliance with applicable domestic legislation and international agreements."[45]

With a view to achieving necessary policy coherence, the Act offers interpretive guidance that is clearly intended to constrain the discretion of future arbitral tribunals. Article 2 provides that the "Act must be interpreted and applied with due regards to . . . (a) the Constitution; (b) international law consistent with the Constitution; (c) customary international law consistent with the Constitution; and (d) any other relevant convention or international agreement to which [South Africa] is or becomes a party."

Unlike traditional BITs, the South African government retains considerable policy space under the new Act. For example, the preamble explicitly reaffirms "the Government's right to regulate in the public interest in accordance with the law." Furthermore, Article 4(3) states:

> This Act does not preclude or affect the duty of the Government of the Republic or any organ of State, to take the measures contemplated in section 10, including but not limited to, the operation of-
> (a) any existing taxation legislative measures or provisions;

40. Promotion and Protection Investment Bill, 2013, General Notice 1087 in GG36995 of 1 Nov. 2013 (S. Afr.) *available at* http://www.greengazette.co.za/documents/national-gazette-36995-of-01-november-2013-vol-581_20131101-GGN-36995.pdf.
41. Jena Marias, New-look protection bill will not chase away foreign investment–DTI, Business Day Live. 28 September 2014. http://www.bdlive.co.za/businesstimes/2014/09/28/new-look-protection-bill-will-not-chase-away-foreign-investment—-dti
42. Article 1(e).
43. *Id.*
44. *Id.*, Article 5(1)(a) and (b).
45. *Id.*, Article 5(1)(e).

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(b) subsidies or grants provided by the Government of the Republic or any organ of State as defined in section 239 of the Constitution;

. . .

(e) any special advantages accorded by the Republic to development finance institutions established for the purpose of development assistance or the development of small and medium businesses or new industries.

Article 10 of the Bill is titled, "Sovereign right to regulate in the public interest." Article 10 permits the Government of South Africa and any organ of State to take measures to, inter alia, "redress historical, social and economic inequalities;" "uphold the values and principles espoused in section 195 of the Constitution;" "uphold the rights guaranteed in the Constitution;" and "promote and preserve cultural heritage and practices, indigenous knowledge and biological resources related thereto."

Other notable differences between the Act and traditional BITs that South Africa concluded in the past can be found in the provisions relating to national treatment, expropriation and dispute settlement. The Act details government measures that are excluded from the provision on expropriation. Compulsory license enjoys immunity under the Act. Actions that do not amount to expropriation include: (i) "A measure or series of measures taken by the government of the Republic that have an incidental or indirect adverse impact on the economic value of an investment;" and (ii) "a measure aimed at protecting or enhancing legitimate public welfare objectives, such as public health or safety, environmental protection or state security." Also excluded is: "the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property."

2. *Advertising Regulation and Food Companies*

On 29 May 2014, South Africa's Department of Health published *The draft Regulations Relating to the Labelling and Advertising of Foods (R. 429)*, and supporting guidelines.[46] R. 429 is based on the Foodstuffs, Cosmetics and Disinfectants Act, 1972 (Act No. 54 of 1972) and addresses the commercial marketing of foods and non-alcoholic beverages to children of school-going age (up to Grade 12). R. 429 affects persons who manufacture, import, sell, donate or offer for sale any pre-packed food. R. 429 joins existing laws in the area including: R.246 of 11 February 1994: Regulations governing the maximum limits for pesticide residues that may be present in foods; R.1809 of 3 July 1992: Regulations governing the maximum limits for veterinary medicine and stock remedy residues that may be present in foods; R.500 of 30 April 2004: Regulations relating to Maximum Levels for Metals in Foods; R.491 of 27 May 2005: Regulations relating to Marine Biotoxins; R.1145 of 8 October 2004: Regulations governing tolerances for fungus produced toxins in foods (mycotoxins); and R.911 of 28 September 2001: Regulations governing certain solvents in foods (benzene and methanol).

46. Republic of South Africa, Regulation Gazette No. 37695 (29 May 2014).

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C. The Mining Sector in Africa

The mining industry in East African countries–Kenya, Tanzania and Uganda–is in its nascent stage. Large-scale mining projects are only just beginning, or about to begin, in the three countries. Not surprisingly, the last two years have seen a spate of changes to the regulatory framework.

On 28 January 2014, the Kenyan Cabinet approved *The Mining Bill, 2014* ("The Bill"), and authorized its submission to parliament for debate.[47] The Bill was introduced to the National Assembly on 17 March 2014. In October, the National Assembly passed The Mining Bill, 2014.[48] The fate of The Mining Bill is uncertain, however. The Kenyan Senate is threatening legal action because it was not consulted. The Mining Bill, which is intended to replace the Mining Act (Cap. 306) of 1 October 1940, gives effect to to Articles 60, 62 (1)(f), 66 (2), 69 and 71 of the Constitution in so far as they apply to minerals.

Article 6 of the Mining Bill declares that all minerals: "(a) in its natural state in, under or upon land in Kenya; (b) in or under a lake, river, stream, or water courses in Kenya; (c) in the exclusive economic zone and an area covered by the territorial sea or continental shelf, is the property of the Republic and is vested in the National Government in trust for the people of Kenya."[49] The Bill creates several bodies and institutions including, a state-owned National Mining Corporation (NMC)[50] and the Mining Tribunal.[51]

The Bill has drawn sharp criticisms in some quarters. Critics point to the wide discretionary powers held by the Cabinet Secretary, the fact that the Bill does not explicitly provide for the principle of Prior Full Informed Consent, and does not include provisions adequately dealing with consultation with communities in relation to mining activities

The Bill is arranged into XVI parts: Part 1- Preliminary; Part II–Ownership of Minerals; Part III–General Principles; Part IV–Administration; Part V–Mining Institutions and Bodies; Part VI–General Provisions on Mineral Rights; Part VII–Mineral Agreements; Part VIII–Surrender, Suspension and Revocation of Mineral Rights; Part IX–Surface Rights, Compensation and Disputes; Part X–Dealings in Minerals; Part XI–Health, Safety and Environment; Part XII–Financial Provisions; Part XIII–Records and Registration of Mineral Rights; and Part XIV–Monitoring, Compliance and Enforcement.[52]

47. The Presidency, *Cabinet Brief at State House, Nairobi*, 28 January 2014. http://www.president.go.ke/cabinet-brief-at-state-house-nairobi/
48. The Mining Bill, 2014, Kenya Law, National Assembly Bills 2014. http://kenyalaw.org/kl/index.php?id=4250
49. *Id.*, Article 6.
50. *Id.*, Article 22.
51. *Id.*, Article 30.
52. *Id.*

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III. *Asia–China*: New Rules Streamline Administrative Approval Procedures for Outbound Investment*

2014 saw major changes to the principal administrative measures that shape the regulation of overseas direct investment activities by Chinese entities.[53]

A. New Administrative Measures for Verification and Record-Filing of Outbound Investment Projects

On April 8, 2014, the National Development and Reform Commission ("NDRC") promulgated new Administrative Measures for the Verification and Record-Filing of Outbound Investment Projects ("NDRC Measures"). The new NDRC Measures replaced the Interim Measures on Approving Outbound Investment Projects ("NDRC Interim Measures"), previously promulgated in October 2004.[54] The new NRDC Measures took effect on May 8, 2014.[55]

Under the new NDRC Measures three types of projects are subject to NDRC approval, including: 1) projects with Chinese investment of more than US $ 1 billion ; 2) projects in a sensitive country/region; and 3) projects in a sensitive industry.[56]

For projects with over US $2 billion in Chinese investments which are either in a sensitive country/region or a sensitive industry, initial review by the NDRC together with a final approval by the State Council of the People's Republic of China is required.[57] Other overseas investment projects need only file with the NDRC at the central or provincial level–an application for project approval is no longer needed.[58] The NDRC Measures define a "sensitive country/region" as a state having no diplomatic relations with China, a state/region currently subject to international sanctions, or a state/region currently in war or unrest.[59] "Sensitive industries" include telecommunications (operations and infrastructure), cross-border water resource development, large-scale land development, main power transmission lines, power grids and news media, etc.[60]

The NDRC Measures significantly relaxed the pre-approval requirements as compared with the 2004 NDRC Interim Measures.[61] Previously, overseas investments projects with a Chinese investment amount of over US $ 10 million (or US $ 30 million for natural

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53. *See*, Karl P. Sauvant & Zitian Chen, *China's Regulatory Framework for Outward Foreign Direct Investment* (2.1 The Current Framework is Enabling- but Still Cumbersome), China Economic Journal, 7(1), 141-163 (2014).

54. Zhonghua Renmin Gongheguo Guojia Fazhan he Gaige Weiyuanhui Ling Di Jiu Hao (中华人民共和国国家发展和改革委员会令第九号) [The National Development and Reform Commission of the People's Republic of China Order No. 9] (promulgated by the National Development and Reform Commission of the People's Republic of China, April 8, 2014),*available at* http://www.sdpc.gov.cn/zcfb/zcfbl/201404/t20140410_606600.html [hereinafter NDRC Measures].

55. *Id.*

56. NDRC Measures art. 7.

57. *Id.*

58. *Id.* art. 8.

59. *Id.* art. 7.

60. *Id.*

61. Laney Zhang, *China: New Rules Relax Government Approvals for Overseas Investment*, Global Legal Monitor (July 3, 2014), *http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205404056_text.*

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resources-based projects) needed to be approved by the NDRC.[62] The old rule further required approval from the State Council of the People's Republic of China for projects exceeding US $ 50 million (or US $ 200 million for natural resource-based projects).[63] Most other projects were subject to the approval of the NDRC at the provincial level.[64]

B. Administrative Measures on Outbound Investment

On September 6, 2014, the Ministry of Commerce of the People's Republic of China ("MOFCOM") announced revised Administrative Measures for Outbound Investment ("the Revised MOFCOM Measures"), effective on October 6, 2014.[65] The Revised MOFCOM Measures replaced the previous measures that were promulgated in 2009. The Revised MOFCOM Measures are the governing measures for overseas investment activities by non-financial Chinese enterprises.[66]

This marks further efforts by the Chinese government to simplify application procedures following the December 2013 promulgation of the Revised Catalogue of Investment Projects Subject to Government Verification and Approval.

Similar to the NDRC Measures, the Revised MOFCOM Measures are intended to encourage and facilitate overseas investment activities.[67] The MOFCOM Measures also make record-filing, as opposed to approval, the default rule for overseas investment projects.[68] Additionally, the Revised MOFCOM Measures shortened processing time for filing and approval.[69] Under the Revised MOFCOM Measures, only projects involving sensitive region/country or sensitive industries must obtain approval from the MOFCOM or its provincial level equivalent.[70] The definition of sensitive country/region remains the same as in the old Measures.[71] It is also worth noting that these definitions are quite different from the definitions in the NDRC Measures.

For the first time, the MOFCOM Measures introduced criminal liabilities for certain conduct, such as bribery, fraud in obtaining approval, and falsifying the Certificate of Overseas Investment issued under these Measures, etc.[72]

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62. *See*, Jingwai Touzi Xiangmu Hezhun Zanxing Guanli Banfa (境外投资项目核准暂行管理办法) [Interim Measures on Approving Outbound Investment Projects] (promulgated by the National Development and Reform Commission of the People's Republic of China, October 9, 2014), *available at* http://www.gov.cn/gongbao/content/2005/content_64245.htm, arts. 4-5. [hereinafter Interim Measures]
63. *Id.*
64. Interim Measures arts. 5-6.
65. Jingwai Touzi Guanli Banfa (《境外投资管理办法》) [Administrative Measures for Outbound Investment] (promulgated by the Ministry of Commerce, September 6, 2014), *available at* http://www.mofcom.gov.cn/article/b/c/201409/20140900723361.shtml [hereinafter MOFCOM Measures].
66. *Id.* art. 2.
67. *Id.* art. 1.
68. *Id.* art. 6.
69. *Id.* art. 9 & 12.
70. *Id.* arts. 6-7.
71. *Id.* art. 7.
72. MOFCOM Measures arts. 29, 31 & 33; *See also*, Laney Zhang, China: Rules Revised to Facilitate Overseas Investment, Global Legal Monitor (October 31, 2014), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205404181_text.

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IV. *Europe**

A. Kazakhstan investment development in 2014

In early 2014 President Nazarbayev pledged to improve investment climate in the country, and in April he appointed a new Prime Minister with that clear mandate[73] Legislative reforms followed shortly. During the 27th session of the Foreign Investors' Council held on 12 June 2014 the President announced the unilateral visa-free regime for investors and laborers of 10 countries that invest in Kazakhstan the most: the UK, Germany, Italy, Malaysia, the Netherlands, the UAE, the Republic of Korea, the USA, France, and Japan.[74]

The same day, President Nazarbayev signed the "Law for Introducing Amendments to Various Legislative Acts on Issues Relating to the Improvement of the Investment Climate"[75], which made changes in the Tax Code, the Land Code, the Law on Investments, and the Law on Employment of Population. Among other things, investment reform improved legal and regulatory aspects for investors and created a new Investment Ombudsman institution. It created direct preferences for investors implementing the "priority investment project", introduced "investment subsidy" (state reimbursement of investor's construction expenses), introduced new procedures aimed at expediting property transfer and registration, and exempted investors in certain cases from corporate income and land tax up to 10 years, and from the property tax–up to 8 years[76]

Another reform was introduced by the Law of 7 March 2014 ? 177-V[77], in order to improve the insolvency processes by "permitting accelerated business reorganization proceedings, extending the period for rehabilitation or reorganization, and expanding the powers of–and making more stringent the qualification requirements to become–insolvency administrators."[78] Bankruptcy filing became less bureaucratic. This fact brought Kazakhstan to the 63rd spot[79] for ease of resolving insolvency in the World Bank's latest "Doing Business" report[80], with an overall rank of 77th place for ease of doing business in Kazakhstan. However, Kazakhstan did not improve its overall ranking this year due to tax reform (in force from 1 January 2015), which, on one hand, provides

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73. *See* Prime Minister Karim Massimov, http://www.primeminister.kz/page/biography

74. Rustem M., 16 June 2014, *Kazakhstan Establishes Visa-Free Regime for 10 Countries*, http://www.astana-times.com/2014/06/kazakhstan-establishes-visa-free-regime-10-countries/.

75. Закон Республики Казахстан от 12 июня 2014 года № 209-V «О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам совершенствования инвестиционного климата», http://online.zakon.kz/Document/?doc_id=31565328

76. *See* Investments to Kazakhstan: they were, are and will be, 31.10.2014, http://www.invest.gov.kz/?option=news&itemid=137

77. Закон Республики Казахстан от 7 марта 2014 года «О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам реабилитации и банкротства, налогообложения», http://online.zakon.kz/Document/?doc_id=31518781.

78. Bureau Of Economic and Business Affairs: *2014 Investment Climate Statement–Kazakhstan*, http://www.state.gov/e/eb/rls/othr/ics/2014/228884.htm

79. http://www.doingbusiness.org/data/exploreeconomies/kazakhstan#resolving-insolvency.

80. Doing Business 2015. Economy Profile 2015: Kazakhstan, http://www.doingbusiness.org/reports/global-reports/~/media/giawb/doing%20business/documents/profiles/country/KAZ.pdf

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optional exemptions, but, on another hand, introduces a mandatory contribution to the National Chamber of Entrepreneurs and increases the vehicle and environmental taxes[81]

B. Russia

Russia climbed 30 positions, from 92nd place in 2013 to 62nd in 2015, according to the World's Bank ease of "Doing Business" ranking.[82] The two major reforms Russia enacted in the last year were: 1) "eliminate the requirement for a company's founder to deposit the charter capital before incorporation" (in force from September 1, 2014[83]), and 2) "Russia has made transferring property smoother by speeding up property registration as well as axing the need for notarization.[84] It also axed the requirement for companies to notify authorities before opening a bank account."[85] However, the same report shows that, even though starting business in Russia has improved, such areas as getting credit, protecting minority investors, paying taxes, trading across borders, and resolving insolvency have dropped in ranking.[86]

Regardless of legal improvements, another World Bank report shows only 0.8% percent economy growth due to "structural problems", "wait-and-see attitude on the part of both businesses and consumers", and "increased geopolitical tensions and an uncertain policy environment."[87]

Crisis in Ukraine led to several limitations in foreign trade and investment law in Russia. President Putin passed a presidential order of 6 August 2014 "banning or limiting" imports of agricultural products from "all countries that have imposed sanctions on Russia."[88] On October 14, 2014 he signed a new law that forbids foreign persons from owning or holding more than 20% of shares in Russian media business.[89] This new media law

81. Business Reforms in Kazakhstan, http://www.doingbusiness.org/reforms/overview/economy/kazakhstan.

82. #62: Russia jumps record 30 places in 'Doing Business' ranking, http://www.ved.gov.ru/eng/general/news/19/18324.html

83. Federal Law of 5 May 2014 No. 99-FZ, "On Introduction of Changes to Chapter 4 of the First Part of the Civil Code of the Russian Federation and Invalidation of Certain Provisions of Legislation"; *See also* Russian Civil Code reform in the field of corporate law, http://www.cms-russia.info/legalnews/2014/09/cms_client_alert_2014_09_12.html#3

84. Amendments to Federal Law of 21 July 1997 ? 122-FZ "On government registration of rights to real estate and transactions involving real estate" (in force since 21 December 2013); *See also* Federal Law N 379-FZ "On amending part one of the Civil code of the Russian Federation and the annulment of certain legislative acts (provisions of legislative acts) of the Russian Federation" (in force since 1 July 2014).

85. *See also* Business Reforms in Russian Federation, http://www.doingbusiness.org/reforms/overview/economy/russia, *and* Doing Business 2015. Economy Profile 2015: Russian Federation, http://www.doingbusiness.org/reports/global-reports/~/media/giawb/doing%20business/documents/profiles/country/RUS.pdf.

86. *See* Ease of Doing Business in Russian Federation, http://www.doingbusiness.org/data/exploreeconomies/russia.

87. Russia Economic Report 32: Policy Uncertainty Clouds Medium-Term Prospects, September 24, 2014, http://www.worldbank.org/en/news/press-release/2014/09/24/russia-economic-report-32.

88. Delphine d'Amora, Putin Strikes Back Against Sanctions With Food Import Bans, http://www.themoscowtimes.com/business/article/putin-orders-agricultural-import-bans-on-countries-that-sanctioned-russia/504675.html.

89. Federal Law of October 14 2014
№ 305-ФЗ "О внесении изменений в Закон Российской Федерации "О средствах массовой информации",

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will come in force 1 January 2016, though media owners will have until 1 February 2017 to bring their businesses in compliance.

In the Permanent Court of Arbitration 18 July 2014, Russia lost three cases and was ordered to pay the largest damages award yet known, over US $50 billion, in compensation for the indirect expropriation of OAO Yukos Oil Company[90] According to the Court, even though the owners of Yukos were Russian nationals, they were still protected as investors, since their companies were created under the laws of a contracting party to the Energy Charter Treaty (Cyprus).

Among positive legislative changes, the Federal law "On investment activities in Russian Federation" was amended as part of a procurement contract system reform[91] According to amendments (in force from 1 January 2014), a new order for competitions and auctions is established with a requirement of no conflict of interests between participants; antitrust regulations regarding auctions, prices, and offers are corrected; and a new united information system for government purchases is in the process of formation.

Investment partnership regulation was amended on 2 August 2014[92] to eliminate omissions and provide more options and flexibility,[93] which involve: 1) deposit of common property by managing partner and providing loans out of such funds; 2) individuals ceasing their ability to be parties to agreements; 3) broadening of contract provisions that are not mandatory by law; 4) requirements for dealing with third parties; 5) creation and transfer of common property of a partnership by its members; 6) liability of partners in case of fault and relevant obligation; 7) allocation of property after termination; and 8) partnership transparency.

The newest amendments to the Federal Law 57-FZ on foreign investments in strategic sector (in force since 4 December 2014[94]) specify additional requirements and procedures of foreign investments in areas of strategic importance, filling legislative gaps and formalizing custom practices. For instance, the scope of business activities, which do not require preliminary consent of the Government Commission on Monitoring Foreign Investment, is broadened, significantly decreasing the administrative burden for investors.[95]

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http://publication.pravo.gov.ru/Document/View/0001201410150012; *see also* HRW: Russia: Drop New Media Law, http://www.hrw.org/news/2014/10/01/russia-drop-new-media-law.

90. Brauch M. D., Yukos v. Russia: Issues and legal reasoning behind US$50 billion awards, September 4, 2014, http://www.iisd.org/itn/2014/09/04/yukos-v-russia-issues-and-legal-reasoning-behind-us50-billion-awards/.

91. *See* Federal Law of 28 December 2013 No. 396-FZ "On Amendments of Certain Legislative Acts of Russian Federation" (text and annotation), http://base.garant.ru/70552632/#block_8

92. The Federal Law of 21 July 2014 No. 220-FZ "On Amendments to the Federal Law 'On Investment Partnerships'".

93. Liniya Prava: Review on Key Novelties in Investment Partnership Regulation, http://lp.ru/en/analytics/specialalerts/novelli-v-regulirovanii-investicionnogo-tovarishhestva/; *See also* Федеральный закон Российской Федерации от 21 июля 2014 г. N 220-ФЗ "О внесении изменений в Федеральный закон "Об инвестиционном товариществе", http://www.rg.ru/2014/07/30/investicii-dok.html.

94. Federal Law of 4 November 2014 No 343-FZ, http://www.pravo.gov.ru/laws/acts/87/5152514510601047.html

95. Глазунов Д., Коростелева Н., Казак Е., Барышев М., Иностранные инвестиции в стратегические отрасли российской экономики: новые правила, http://epam.ru/files/documents/legal-updates/54636d6c42ff5.pdf.

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V. *Mexico: Comprehensive Energy Reform in Mexico: Innovation and Uncertainty**

Since 1938, Mexico's energy market has been closed to private investment. In March of that year, the Mexican government expropriated all resources and facilities of foreign-owned oil companies; ever since then, the state-owned petroleum company, Petróleos Mexicanos ("PEMEX"), has been the only oil producer and oil field explorer in Mexico.[96]

All of this changed in August 2014. For the first time in seventy-six years, the Mexican energy sector is open to foreign and private investment. This article explores the constitutional amendments and implementing legislation that has enabled this comprehensive energy reform, and provides an overview of the reform's expected challenges and opportunities.

Prior to the comprehensive energy reform, Mexican energy prices for industrial users were the highest in North America by a significant margin. Users in the United States paid US$6.60/Mwh and Canadian users paid US$7.50/Mwh, while the price in Mexico was US$11.40/Mwh.[97] This disparity was largely due to PEMEX's monopoly over state energy resources. As one commentator notes, "PEMEX lacked the technology and financial capacity to profitably extract more complicated shale and deepwater deposits [, which] led to depressed production and economic stagnation."[98]

Recognizing an area ripe for reform, Mexican President Enrique Peña Nieto championed the modernization of his nation's energy sector. Constitutional amendments in December 2013 paved the way for implementing legislation that was signed into law in August 2014.

This legislation does not privatize Mexico's energy resources; rather, it opens the nation's energy sector to outside investment. Divided into 21 parts, the legislation includes details on the fiscal regime, anti-corruption provisions, contract terms, and government regulation involved in the reform.[99] Its aim is to attract foreign capital, which would increase energy output, lower energy prices and create "an estimated 2.5 million jobs by 2025."[100] One international energy affairs expert asserts that this reform will transform Mexico into "a major energy and industrial power."[101]

Perhaps most notably, the legislation simplifies PEMEX's formerly complex fiscal regime, decreasing its tax burden by as much as 36 percent. The tax savings aim to en-

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96. David Goldwyn, Neil Brown, & Megan Cayten, *Mexico's Energy Reform: Ready to Launch*, ATLANTIC COUNCIL 6 (Aug. 25, 2014), http://www.atlanticcouncil.org/images/files/MexEnRefReadytoLaunch_FINAL_8.25._1230pm_launch.pdf.

97. Everett Rosenfeld, *Mexico to receive major economic jolt, experts say*, CNBC (Aug. 26, 2014), http://www.cnbc.com/id/101948520.

98. Peter Schechter and Jason Marczak, *Comprehensive energy reform is a new dawn for Mexico*, THE HILL (Sept. 17, 2014), http://thehill.com/blogs/congress-blog/energy-environment/217898-comprehensive-energy-reform-is-a-new-dawn-for-mexico.

99. Diana Negroponte, *Mexico's Energy Reforms Become Law*, BROOKINGS (Aug. 14, 2014), http://www.brookings.edu/research/articles/2014/08/14-mexico-energy-law-negroponte.

100. Rosenfeld, *supra* note 97.

101. *Mexico's Energy Reform: Fact Sheet*, ATLANTIC COUNCIL 1 (Aug. 25, 2014), http://www.atlanticcouncil.org/images/files/Energy_Reform_Fact_Sheet.pdf.

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courage PEMEX to increase its oil production by investing in resources that would otherwise be too costly; these savings will offset the expenses incurred for investments challenged by insufficient technology, training and equipment.[102] This opportunity for innovation responds to the limitations PEMEX has faced in developing challenging regions of Mexico's energy sector. The reform further facilitates PEMEX's efforts by "allowing private companies to complement PEMEX's investment through contracts or licenses for the exploration and extraction of oil and gas" and has the potential to "[m]odernize the country's refining, transportation and storage infrastructure."[103]

Additionally, the timing of Mexico's reform may allow it to integrate the lessons learned and best practices developed by other countries' major energy reforms that have already transitioned through implementation. For example, the reform establishes the Mexican Petroleum Fund to handle contract payments and oil revenue and further specifies a 25 percent domestic content minimum for incoming companies by 2015, growing to 35 percent by 2025.[104] These requirements are in line with those specified by other countries under comparable energy reforms. Commentators reflect that this will be progress toward ensuring "international standards of efficiency, transparency and accountability."[105]

Proponents of the reform expect the prospective influx of private investment to diversify Mexico's energy landscape and promote competition and innovation, and many experts believe that this reform will lead to a significant lowering of the cost of energy throughout Mexico.[106] This potential decrease in energy prices could result in greater domestic economic prosperity throughout the country and facilitate an increase in global competitiveness, ultimately decreasing unemployment and increasing development across Mexico. For example, one Washington, D.C.-based policy organization projects that the reform will add "1 percent to economic growth by 2018 and 2 percent by 2025."[107] A senior economist for Mexico confirms this projection and asserts that "Mexican firms have gained in past years because of an improvement in human capital. . .but energy costs have kept them from being more competitive".[108] The GDP boost will be due to the changes in electricity costs as well as foreign investment in the energy sector.[109]

However, not all aspects of this reform are certain. Notably, PEMEX faces an unprecedented degree of insecurity regarding its future role. While the reform appears favorable for PEMEX's tax status, the Mexican government retains the right to draw on the state oil company's profits for national purpose, as the Ministry of Finance has not relinquished the right to adjust tax rates to ensure sufficient revenue for public expenditure.[110]

Additionally, security remains a concern for private investors; this is particularly the case in the northern region of Mexico, known to be natural gas-rich.[111] Experts assert that the Mexican Government "needs to publicly describe how it will secure pipelines,

102. Negroponte, *supra* note 99.
103. ATLANTIC COUNCIL, *supra* note 96.
104. Negroponte, *supra* note 99.
105. ATLANTIC COUNCIL, *supra* note 96.
106. Schechter, *supra* note 98.
107. ATLANTIC COUNCIL, *supra* note 96.
108. Rosenfeld, *supra* note 97.
109. *Id.*
110. Negroponte, *supra* note 99.
111. Rosenfeld, *supra* note 97.

areas of onshore exploration and land bases for deep water development."[112] Furthermore, although certain contracts can include arbitration clauses, any termination as a result of administrative rescission (*rescisión administrativa*) cannot be submitted to arbitration.[113] And perhaps most importantly, the timetable for decisions and developments is unknown, which increases uncertainty about the impact of this reform.

Mexico's 2014 comprehensive energy reform has the potential to impact the cost of energy throughout Mexico and ultimately influence Mexico's global competitiveness. While a decrease in the cost of energy likely will provide significant benefits, these benefits are coupled with uncertainties that may influence investor decisions. As the implementation legislation goes into full effect and uncertainties are resolved, the international focus on the Mexican energy landscape is expected to sharpen. Foreign and private investors alike are poised to take advantage of the expected opportunities attendant to this unprecedented reform.

112. ATLANTIC COUNCIL, *supra* note 96.
113. *Mexico Approves Energy Reform*, NORTON ROSE FULBRIGHT 4 (Sept. 2014), http://www.nortonrosefulbright.com/files/mexico-approves-energy-reforms-pdf-54kb-119538.pdf.

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