The Return of State Remedies in Investor-State Dispute Settlement: Trends in Developing Countries

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This Article explores the variety of strategies deployed by developing countries to bypass traditional investor-state arbitration and assesses the limitations and drawbacks of these efforts. From giving preeminence to domestic courts of the host state to the resurgence of diplomatic protection and other state-based processes for solving investment disputes, these tactics are reminiscent of the pre-bilateral investment treaty era, where states played a more prominent role in foreign investment dispute resolution. The main proponents of such moves are Brazil, India, UNASUR, South Africa, and Indonesia. After an overview of initiatives from these countries, this Article analyzes the hurdles and limitations of state-centric dispute resolution. It concludes that relying purely on state remedies is unlikely to fully address investor-state dispute resolution, although it may increase the pressure to critically reassess the current investor-state arbitration system. Ultimately, this Article frames the return to state-controlled dispute settlement mechanisms as part of a broader trend to reassert host states' control of foreign investment policy.

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INTRODUCTION

Amidst heated critiques of investor-state arbitrations and proposals for alternative venues, such as a court of arbitration, developing countries are advocating for a redraft and reinterpretation of a number of traditional bilateral investment treaties' ("BIT") features. These include the definition of investors and investment, the types of protections afforded to investors, the obligations of investors toward home and host states, exceptions to treaty obligations to preserve host states' domestic regulatory autonomy, more stringent procedures regarding investment arbitration, and disclosure of conflicts of interest by arbitrators. Additionally, some emerging countries have taken even more radical positions and rejected or heavily restricted investor-state arbitration altogether. Some of these states are opting for a return to diplomatic protection and other state-based processes for solving investment disputes. The move may seem anachronistic. Does it merely reflect a reactionary position caused by some emerging countries' deep disenchantment with international investment law? This Article argues that the return to state-controlled dispute settlement mechanisms may be framed as part of a broader trend to reassert host states' control of foreign investment policy.

This Article first explores the variety of tactics deployed by developing countries to bypass traditional investor-state arbitration and then assesses the limitations and drawbacks of these efforts.

I. BYPASSING INVESTOR-STATE ARBITRATION

Investor-state arbitrations under the auspices of the International Centre for the Settlement of Investment Disputes ("ICSID") Convention or the United Nations Commission on International Trade Law ("UNCITRAL") and other similar frameworks have come under fire from states, whether developed or developing, civil society, and local communities. Critiques leveled at such arbitrations are both procedural and substantive. On the procedural front, the lack of clear and universally accepted codes of conduct and ethics rules for arbitrators has left the practicing world vulnerable to accusations of conflicts of interest, clientelism, and other biases.[1] The cost of the process is another concern for low-income developing countries and even middle-income emerging powers.[2] Civil society advocates lament the opacity of the process and their lack of standing to participate when a foreign investor's activities have a deleterious impact on the public interest, a local community, or a vulnerable ecosystem that the state is either unable or unwilling to protect.[3]

With respect to substantive law, issues of consistency across arbitrations addressing similar issues, differing interpretations regarding the scope and meaning of treaty terms that are identical across large numbers of BITs,[4] a growing imbalance between shrinking state options to exert their sovereign regulatory prerogatives and expansive interpretations of investor rights, protections and privileges,[5] opportunities for treaty-shopping by investors using fluid corporate structures, inadequate account of spill-over effects from investment

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1. *See, e.g.*, Susan D. Franck et al., *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration*, 53 COLUM. J. TRANSNAT'L L. 429, 496–97 (2015) (identifying the characteristics of the practicing bar involved in international arbitration).

2. *See, e.g.*, Silvia Karina Fiezzoni, *The Challenge of UNASUR Member Countries to Replace ICSID Arbitration*, 2 BEIJING L. REV. 134, 134 (2011) (discussing myriad complaints and concerns of Latin American countries with ICSID).

3. *See, e.g.*, TRANSFORMING THE IIA REGIME: EXITING THE UNNECESSARY, DAMAGING INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM (UNCTAD World Investment Forum, Feb. 20, 2014), http://unctad-worldinvestmentforum.org/wp-content/uploads/2015/05/Public-Citizen-Draft.pdf; *Civil Society Groups Say "No" to Investors Suing States in RCEP*, PUBLIC SERVICES INTERNATIONAL (Aug. 4, 2016), http://www.world-psi.org/en/civil-society-groups-say-no-investors-suing-states-rcep.

4. *See generally* Julie A. Maupin, *MFN-based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach?*, 14 J. INT'L ECON. L. 157 (2011). The novel approach to most-favored nation clauses in relation to consent to arbitration was developed in Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award of the Tribunal (Nov. 13, 2000), 5 ICSID Rep. 419 (2002), which was followed by arbitrators in Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug. 3, 2004). *See also* Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on Jurisdiction (May 16, 2006); Gas Natural SDG, S.A. v. Argentine Republic, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction (June 17, 2005). But other awards declined to follow the *Maffezini* approach: Telenor Mobile Communications A.S. v. Republic of Hungary, ICSID Case No. ARB 04/15, Award (Sept. 13, 2006); Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8 2005); Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction (Nov. 29, 2004).

5. MUTHUCUMARASWAMY SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, 44–45, 201 (Cambridge Univ. Press 2015); Frank J. Garcia et al., *Reforming the International Investment Regime: Lessons from International Trade Law*, 18 J. INT'L ECON. L. 861, 869–70 (2015); *see also* Org. for Econ. Co-operation and Dev., *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law* 2 (OECD Working Papers on Int'l Inv., Paper No. 4, 2004) (discussing indirect expropriation as one of the options available to states).

arbitrations into the realm of trade law, financial and monetary policy, and international taxation regulation, very large awards or the potential thereof are but a few of the most often-mentioned debates.[6]

In response, developing countries are pursuing a variety of tactics to bypass investor-state arbitration in hopes of gaining better control over the process and substantive law. These fall mainly in two categories: giving preeminence to domestic courts of the host state (Part A) and relying on state-to-state processes for resolving investor claims (Part B).

A. Relying on Domestic Remedies

Historically, most BITs have included a "fork in the road" provision allowing investors to pursue either domestic judicial remedies in the host country or international arbitration.[7] In practice, foreign investors demonstrate an overwhelming preference for international arbitration. In contrast, BITs do not grant host states the right to request international arbitration proceedings against a foreign investor. The host state is therefore limited to seeking whatever domestic administrative and judicial remedies may be contractually available between the investor and state agencies or as a matter of general law in that country. Most BITs also provide a state-to-state international arbitration opportunity should the state parties have a disagreement on the interpretation and application of the treaty that cannot be resolved through negotiations.

Lastly, domestic constituencies have no legal recourse under BITs and may vindicate their grievances through domestic judicial and administrative avenues if the legal system provides them with standing and claims. In some limited cases, individuals and communities have sought remedies in the foreign investor's home country if that state offered a suitable avenue for doing so. The Alien Torts Claim Act, in the United States, has been used for that purpose over the past two decades, but the Supreme Court has now severely limited the statute's

6. *See generally* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION, AND INVESTMENT FLOWS (Karl P. Sauvant & Lisa E. Sachs eds., 2009); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005); Gary Clyde Hufbauer, *Rules of the International Trade, Investment and Financial Systems: What They Deliver, how they Differ, the way Forward* 17 J. INT'L ECON. L 833 (2014); Jennifer L. Tobin & Marc L. Busch, *A BIT Is Better Than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements,* 62 WORLD POL. 1 (2010); Roeline Knottnerus & Roos van Os, *The Netherlands: A Gateway to 'Treaty Shopping' for Investment Protection*, INV. TREATY NEWS (Jan. 12, 2012), http://www.iisd.org/itn/2012/01/12/the-netherlands-treaty-shopping/.

7. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 216–17 (2008); Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INV. & TRADE 231, 239–49 (2004).

jurisdictional scope (*ratione personae* and *ratione materiae*).[8]

A number of countries are now seeking to reinforce the role of domestic courts in resolving investment claims. They also seek to protect the finality of domestic court judgments and administrative decisions against subsequent arbitral claims that an investor might make to effectively overrule domestic decisions. This Part presents the examples of India, UNASUR countries, Indonesia, and South Africa to illustrate this trend.

i. India

While not radically opposed to the traditional investor-state arbitration system, India's new model BIT reflects concerns born out of recent arbitral setbacks that were perceived to undermine the authority of Indian courts.[9]

The restrictive nature of ISDS under the 2016 Indian Model BIT comes from the interaction of three requirements: exhaustion of domestic remedies, immunity of domestic court decisions, and India not being a party to the ICSID Convention.

First, the Model requires investors to exhaust remedies available under domestic law that cover "the same measure or similar factual matters for which a breach of [the] Treaty is claimed"[10] for at least five years from the date when the investor first knew of the measure[11] before proceeding with investor-state arbitration under the BIT. If no domestic recourse exists or no resolution is reached within the five-year period, investors may proceed to arbitration but effectively only have a six-month window to trigger the process.[12]

Second, the Model BIT states that arbitration tribunals lack the

8. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013); Sosa v. Alvarez-Machain, 542 U.S. 692, 727–28 (2004).

9. In 2012, India received an unfavorable decision in *White Industries Australia Ltd. v. The Republic of India*. *See* White Indus. Australia Ltd. v. The Republic of India, Final Award, UNCITRAL (Nov. 30, 2011). This decision, which was based on delays in the Indian judiciary, caused a major stir in India. It is also thought to be the first arbitral award against India. Prabhash Ranjan, *The* White Industries *Arbitration: Implications for India's Investment Treaty Program*, INT'L INST. FOR SUSTAINABLE DEV. (Apr. 13, 2012), https://www.iisd.org/itn/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/. Shortly after it was decided, India received another seventeen notices of dispute over claims ranging from the cancellation of licenses to the review of Supreme Court decisions. Grant Hanessian & Kabir Duggal, *The 2015 India Model BIT: Is This the Change the World Wishes to See?*, 32 ICSID REV. – FOREIGN INV. L.J. 216 (2017).

10. Model Text for the Indian Bilateral Investment Treaty, pmbl., art. 15.1 (adopted Jan. 14, 2016) [hereinafter 2016 India Model BIT].

11. *Id*. at art. 15.2.

12. *Id*. at arts. 15.2, 15.4, 15.5 (i).

jurisdiction to "review the merits of a decision made by a judicial authority of the Parties."[13]

Third, the 2016 Model BIT allows arbitrations under the ICSID Convention "provided that both the Parties are full members of the Convention."[14] However, India is not a party to the ICSID Convention. This provision, then, means that in practice, investors are barred from bringing arbitration proceedings under ICSID until India accedes to the ICSID Convention (and assuming that their state of origin is also a party to the Convention). When the Indian government launched a working group to renegotiate India's BITs in 2013, some argued in favor of joining the Convention.[15] While the provision suggests that India may consider doing so in the future, there is no indication of such a move at present. Perhaps as a stop-gap measure, or to mollify those who would be wary of the inapplicability of ICSID, the 2016 Model BIT allows arbitrations under the Additional Facility Rules of ICSID, intended to cover situations where one of the states, but not both, is a party to the ICSID Convention. The application of the ICSID Convention is still excluded and the proceedings are instead governed by the Additional Facility Rules.[16] Other processes (such as the Permanent Court of Arbitration) and rules (such as UNCITRAL) may also be used for investor-state arbitration.

In practice, then, it appears that investors must first vindicate their grievances in Indian courts. If they win, they will not need ISDS. If they lose, they will be precluded from resorting to ISDS on those same facts because the tribunal cannot take up an issue once it is decided by a court. With India terminating BITs with a slew of countries since 2016,[17] the Model BIT gives important indications of the direction that India might seek in the negotiations of its future BITs and free trade agreements chapters. Some countries have gone further and are implementing rules to exclude investor-state arbitration altogether.

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13. *Id.* at art. 13.5.

14. *Id.* at art. 16.1.

15. Abhinav Goel, *Protecting foreign investment*, INDIAN EXPRESS (Aug. 27, 2013, 3:11 AM), http://archive.indianexpress.com/news/protecting-foreign-investment/1160596/0.

16. International Centre for Settlement of Investment Disputes ("ICSID") Additional Facility Rules, art. 3 (Apr. 2006); International Centre for Settlement of Investment Disputes ("ICSID") Convention, Regulations and Rules, art. 25(1) (Apr. 2006).

17. Nicholas Peacock & Nihal Joseph, *Mixed Messages to Investors as India Quietly Terminates Bilateral Investment Treaties with 58 Countries*, HERBERT SMITH FREEHILLS: ARBITRATION NOTES (Mar. 16, 2017, 2:42 PM), http://hsfnotes.com/arbitration/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries/.

ii. The Union of South American Nations ("UNASUR")

UNASUR countries have declared their opposition to ICSID as a forum and some members have sought to develop an alternative arbitral forum in Latin America. A subset of Latin American countries has been more radical in its opposition to traditional ISDS as illustrated by the "Bolivarian Alternative for the Peoples of Our America" ("ALBA")'s Fundamental Principles of the Peoples' Trade Treaty ("TCP") affirming "[t]he exigency that foreign investment respects national laws. Unlike FTAs which impose a series of advantages and guarantees in favour of transnational companies, the TCP looks for a foreign investment that it respects the laws, reinvest the utilities and solves any controversy with the State like any national investor."[18] Bolivia and Ecuador, two member countries of ALBA and TCP, now have constitutional provisions prohibiting the respective governments from entering into treaties where the domestic judiciary would be displaced by international arbitration.[19]

iii. South Africa

In the period following the end of apartheid, South Africa entered into a flurry of BITs without really considering the long-term effects thereof.[20] It was only after the first claim by a foreign investor, in the 2007 *Piero Foresti v. Republic of South Africa* case, that the implications of BITs received necessary scrutiny.[21] As a result of the *Foresti* claim, South Africa embarked on a process of reviewing its BITs. South Africa found that most of the BITs it had entered into did not accord with its Foreign Direct Investment ("FDI") policy or even with its constitutional mandate, particularly relating to post-apartheid Black empowerment policies.[22] It also found no direct link between a

18. *Fundamental Principles of the Peoples' Trade Treaty*, BOLIVARIAN ALLIANCE FOR THE PEOPLES OF OUR AMERICA 16, http://alba-tcp.org/en/contenido/governing-principles-tcp.

19. CONSTITUCION DE LA REPÚBLICA DEL ECUADOR 2008, Sept. 2008, art. 422; CONSTITUCIÓN POLÍTICA DEL ESTADO, Feb. 7, 2009, art. 366 (Bol.); *see also* INTERNATIONAL INVESTMENT LAW IN LATIN AMERICA: PROBLEMS AND PROSPECTS 180–81 (Attila Tanzi et al. eds., 2016) (discussing the reemergence of the exhaustion of local remedies rule).

20. Mohammed Mossallem, *Process Matters: South Africa's Experience Exiting its BITs* 7 (The Global Economic Governance Programme, University of Oxford, Working Paper No. 97, 2015), http://ssrn.com/abstract=2562417.

21. *Id.* at 7, 10.

22. South African Department of Trade and Industry, *Bilateral Investment Treaty Policy Framework Review* 11 (Position Paper, June 2009), http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/090626trade-bi-lateralpolicy.pdf; *see also* Jonathan Lang, *Bilateral Investment Treaties – a shield or a sword?*, BOWMAN GILLIFAN (Nov. 8, 2013), http://www.bowman.co.za/FileBrowser/ArticleDocuments/South-African-Government-Canceling-Bilateral-Investment-Treaties.pdf (detailing the findings of South Africa's Department of Trade and Industry's ("DTI") official review of BITs in 2010 and the recommendations made

BIT with a particular country and the flow of FDI from that country.[23] Between 2011 and 2014 South Africa gave notice of its intention to cancel existing BITs, and in 2013 it formally began the process of terminating its BITs.[24] To date, South Africa has terminated BITs with the Netherlands, Spain, Luxembourg and Belgium, Germany, Switzerland, and Austria.[25]

The Protection of Investment Act enacted in 2015 by South Africa[26] now specifically excludes investor-state arbitration, and South Africa is considering new BITs without an investor-state arbitration clause, particularly with countries where it is exporting. The legislation also calls for letting lapse current BITs that include investor-state arbitration. While the official rationale for such moves is constitutional requirements, it was only after some related legislation came under threat from investor-state arbitrations that South Africa resolutely moved away from BITs.

Moreover, the South African Development Community ("SADC") took the position in its Model BIT template with commentary that the preferred option is not to include investor-state dispute settlement.[27] Negotiations are currently under way at the African Union and United Nations Economic Commission for Africa to design a Pan African Investment Code that would likely result in a text that is close to the features of the SADC model.[28] The hope is that such a text would also serve as a model for regional groupings and BITs involving African countries.

iv. Indonesia

Indonesia has also denounced a slew of BITs and is drafting a new model BIT, though it is unclear whether it plans to exclude investor-state arbitration from its new approach. Where it is able to terminate its BIT obligations, Indonesia would be mostly reverting to domestic remedies, with the applicable law including domestic rules and

in response).

23. Mossallem, *supra* note 20, at 10.

24. *Id.* at 12.

25. List of Treaties Terminated by South Africa, U.N. CONF. ON TRADE AND DEV., http://investmentpolicyhub.unctad.org/IIA/CountryBits/195 (sort by status) (last visited Oct. 9, 2017).

26. Protection of Investment Act (Act No. 22/2015) (S. Afr.).

27. SADC Model Bilateral Investment Treaty Template, S. Afr. Dev. Community, Art. 29 (July 2012), http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf.

28. U.N. Economic Commission for Africa, *Draft Pan-African Investment Code* (Dec. 2016) https://www.tralac.org/images/docs/11444/draft-pan-african-investment-code-february-2017.pdf.

customary international law.

Overall, then, there is a broad spectrum of positions amongst the Global South regarding the pull back from traditional investor-state dispute settlement. Few have radically foregone the traditional ISDS format, and most seem to envision domestic recourses as a complement to yet-to-be defined international processes.

B. Return to Diplomatic Protection? The Case of Brazil

In those countries denouncing BITs (South Africa, Indonesia, and Ecuador, for instance) or declining to participate in them (as is the case for Brazil), foreign investors may only rely on domestic law and institutions, as explored above, and international customary law, which might be vindicated through diplomatic protection. Traditionally, diplomatic protection requires a private entity aggrieved by a foreign state to call upon the state of its nationality to seek redress on its behalf from the foreign state. The state is not obligated to provide protection.[29] With respect to legal entities such as corporations, the International Court of Justice held in the landmark *Barcelona Traction* case[30] that the state of incorporation, rather than the state of nationality of the shareholders, would be the state in a position to offer diplomatic protection. As Noel Maurer has extensively researched in the case of Latin America,[31] pressure from U.S. investors to persuade the state to seek remedies on their behalf became severely burdensome on foreign policy, and still failed to protect U.S. investments from expropriation abroad. Ultimately, the United States and other major capital-exporting countries found that the constant demands of diplomatic protection impeded broader diplomatic strategies, and they created an avenue for investors to seek direct recourse against the host state via international arbitration.[32]

In the 1990s, Brazil signed fourteen traditional BITs and two MERCOSUR Protocols on investment,[33] but the BITs were never

29. John Dugard, *Diplomatic Protection*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 1051–72, (James Crawford et al. eds., 2010); VAUGHAN LOWE, INTERNATIONAL LAW 197–99 (Oxford Univ. Press 2007).

30. Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain) Judgment, 1970 I.C.J. Rep. 3 (Feb. 5, 1970).

31. *See generally* NOEL MAURER, THE EMPIRE TRAP: THE RISE AND FALL OF U.S. INTERVENTION TO PROTECT AMERICAN PROPERTY OVERSEAS 1893–2013 (2013).

32. *See generally id.*

33. Marcelo Gustavo Silva Siqueira, *Brazil and Bilateral Investment Treaties (BITs)*, SIQUEIRA CASTRO (Aug. 2014), http://www.siqueiracastro.com.br/informativos/Brazilian-Legal-Report/2014/BLR-4-03.html (listing Brazil-Portugal BIT, Brazil-Chile BIT, Brazil-United Kingdom BIT, Brazil-Switzerland BIT, Mercosur (Protocol of Colombia for protection of investors from member states), and Mercosur (Protocol of Buenos Aires for protection of

ratified. Brazil's BITs included fair and equitable treatment, national treatment, freedom of incorporation and management for international investors, compensation standards for expropriations, free transfer of capitals as profits and associated amounts cross-border, and investor-state dispute settlement mechanisms whereby the investor usually could choose between arbitration or judicial remedies.[34] Some treaties even allowed investors to switch dispute-settlement mechanisms along the way in some cases.[35] Brazil also joined the Multilateral Investment Guarantee Agency ("MIGA"). Subsequently, however, Brazil retrenched from bilateral and multilateral investment negotiations and, in response to concerns raised by the National Congress, would only consider agreements guaranteeing the state's right to regulate, excluding indirect expropriation protection, excluding certain classes of assets from covered investments (particularly portfolio investments), and restricting avenues for dispute settlement for investors.[36]

Brazil's new Cooperation and Investment Facilitation Agreements ("CIFA") envision a state-to-state dispute settlement process that is reminiscent of traditional diplomatic protection. Such a move bucks the trend of judicialization of foreign investment law over the past century. It is therefore quite a radical response to emerging countries' demand for the protection of their policy space against norms of international economic law perceived to be at times incompatible with their development needs.[37]

Since 2015, Brazil has signed CIFAs with Angola, Chile, Colombia,

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investors from non-member states) in 1994; Brazil-France BIT, Brazil-Finland BIT, Brazil-Italy BIT, Brazil-Denmark BIT, Brazil-Venezuela BIT, Brazil-South Korea BIT, and Brazil-Germany BIT in 1995; Brazil-Cuba BIT in 1997; Brazil-Netherlands BIT in 1998; and Brazil-Belgium-Luxembourg BIT in 1999).

34. *See, e.g.*, Agreement between the Belgo-Luxemburg Economic Union and the Government of the Federative Republic of Brazil on the Reciprocal Promotion and Protection of Investments (Jan. 6, 1999), http://investmentpolicyhub.unctad.org/Download/TreatyFile/332; Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Federative Republic of Brazil (Nov. 25, 1998), http://investmentpolicyhub.unctad.org/Download/TreatyFile/510.

35. Débora Bithiah de Azevedo, *Os acordos para a promoção e a proteção recíproca de investimentos assinados pelo Brasil*, Estudo, Câmara dos Deputados, May 2001.

36. INT'L INST. FOR SUSTAINABLE DEV., REPORT ON THE FOURTH ANNUAL FORUM OF DEVELOPING COUNTRY INVESTMENT NEGOTIATORS 13–14 (2010), https://www.iisd.org/pdf/2011/dci_2010_report.pdf.

37. In the Brazil-Mozambique and Angola contexts, this issue may be less salient because of the history of trade and investment relations between the two countries. Additionally, Brazilian investors may not be concerned about overreach by these African states, as they appear to be comfortable with this new approach to investment protection. Whether such a model would operate equally well in other circumstances remains an open question.

Malawi, Mexico, Mozambique, and Peru,[38] and has conducted negotiations with South Africa, Algeria, India, Morocco, Nigeria, Thailand, and Tunisia. This Section takes the Brazil-Mozambique CIFA as an illustrative benchmark because it was the first such agreement and subsequent ones include essentially similar mechanisms.

The Agreement establishes a Joint Committee composed of government representatives appointed by each State. The Committee is expected to meet at least once annually under an alternating presidency to discuss implementation, work toward deeper coordination and cooperation, and help to resolve disputes.[39] Alongside the Committee, the States are each to designate a domestic "Focal Point," which is a specific government agency tasked with offering support to investors of the other State. The Focal Point liaises with other governmental authorities domestically and with its counterpart in the other State.[40] The Focal Point (at times also called "Ombudsman" in the CIFAs), backed by the Joint Committee, also assists in the conciliatory settlement of disputes.[41] Despite the use of the term "Ombudsman," this process does not designate a neutral independent person to help resolve disputes.

Anecdotal evidence suggests that the "Ombudsman" model was initially inspired by the Korean institution of a Foreign Investment Ombudsman, established in 1999, which has enjoyed vast success in resolving disputes outside of formal judicial or arbitral proceedings. The office of the Ombudsman was created as a one-stop service to handle grievances by foreign investors in Korea. The office of the Ombudsman focuses on post-investment services for foreign investors in areas covering finance, taxation, accounting, intellectual property rights, construction, and labor. The Ombudsman is the head of the grievance settlement body. Grievances are resolved through the direct deployment of licensed and experienced experts to business sites and indirectly by

38. Bilateral Investment Treaties of Brazil, U.N. CONF. ON TRADE AND DEV., http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu (last visited Jan. 22, 2018).

39. Brazil-Mozambique Cooperation and Facilitation Agreement, art. 4 (Mar. 30, 2015), http://investmentpolicyhub.unctad.org/Download/TreatyFile/4717 [hereinafter Brazil-Mozambique CIFA].

40. Other features of the CIFAs include provisions for engagement of the private sector and civil society and corporate social responsibility. For example, the Brazil-Mozambique CIFA creates opportunities for including the private sector at large (beyond the protected investors) and civil society at the policy coordination level, at the implementation stage, and in dispute resolution efforts. The main text of the treaty and a detailed annex spell out principles for corporate social responsibility of investors. Although not worded as a strict obligation, its inclusion in the treaty is remarkable because it is atypical.

41. Brazil-Mozambique CIFA, *supra* note 39, at art. 15.

taking preemptive measures to prevent future grievances through systemic improvements and legal amendments. The Ombudsman is commissioned by the President on a recommendation of the Minister of Trade, Industry and Energy, through the deliberation of the Foreign Investment Committee.

Since 2010, the Ombudsman has been the Chair of Korea's Regulatory Reform Committee and also sits on the Presidential Council on National Competitiveness ("PCNC"), thus ensuring that the opinions of foreign investors are heard at the highest levels of policy-making within Korea. The Ombudsman is empowered to directly contact heads of ministries and government agencies for requests and recommendations. The Ombudsman therefore plays a mix of alternative dispute resolution intermediary, diplomatic, and political roles.

The Brazilian Ombudsman/Focal Point system, however, differs substantially from the Korean model. The role is not embodied by a person, but rather is envisioned as a committee with interministerial representation.

While the agreements establish a process to encourage settlement of disputes, only the governments of the states party to a particular CIFA may trigger these procedures. In the Mozambique agreement, a dispute must be officially initiated by the state party of the investor by filing a request to the Joint Committee.[42] The latter then has sixty days, renewable by mutual agreement, to present relevant information and to invite representatives of the investor, as well as representatives of governmental and non-governmental entities involved in the dispute. Following meetings as necessary to resolve the situation, the procedure may be closed by request of either state party. If the dispute has not been resolved, the state parties may then proceed to arbitration. Joint Committee actions and documents remain mostly confidential.

The early CIFAs did not provide any details concerning the nature of arbitration, other than to make clear that it was limited to state-to-state disputes. Subsequent agreements signed with Latin American countries have added substantial detail, although the agreements are rather varied. Thus, the Mexico and Colombia agreements specify that the arbitral tribunal for state-to-state disputes may determine damages and award compensation,[43] while other agreements are silent on this issue. All

42. Brazil-Mozambique CIFA, *supra* note 39, at art. 15.

43. Acordo de Cooperação e Facilitação de Investimentos Entre a República Federativa Do Brasil e a República da Colômbia, Braz.-Colom., art. 23, Oct. 10, 2015, http://investmentpolicyhub.unctad.org/Download/TreatyFile/4714 [hereinafter Colombia CIFA]; Acordo de cooperação e facilitação de investimentos entre a República Federativa do Brasil e os Estados Unidos Mexicanos [Agreement of Cooperation and Facilitation of Investments between

provide a general framework for arbitration covering the number of arbitrators, the use of World Trade Organization ("WTO") rules on the conduct of arbitrators, and time limits for the arbitral proceedings. However, they vary in the procedures for the arbitration and other aspects.

Thus, although the legal conduit created by Brazil is different from diplomatic protection, the Brazilian and Korean models share a core political element due to the governmental nature of Joint Committees and Focal Points.

II. HURDLES AND LIMITATIONS OF STATE-CENTRIC DISPUTE RESOLUTION

Moves away from investor-state arbitration, however, are fraught with legal risks and political hurdles. This Section focuses on some substantive and procedural legal issues. On the political front, obstacles to ISDS reform may spring from private parties as well as states. For instance, the vested interest from beneficiaries of the current system, including established arbitrators and practitioners, will likely generate resistance. Joost Pauwelyn has argued that the international investment regime's legitimacy crisis, and in particular critiques leveled at ISDS, largely proceeds from a shift in the respective roles of the rule of law, the rule of lawyers, and politics in procedural and substantive frameworks.[44] But inasmuch as a retreat from ISDS is meant to rebalance public and private interests in favor of the state, we must question whether a process giving the state increased power would actually lead to more prominence of public interests. If states fail to provide a consistent and legitimate legal framework for asserting the preeminence of the public interests and dealing with clashes between public interests and private property interests, then adjudicators, regardless of who they are and how they are empowered or constrained, have little reason to depart from current approaches.

A. Holdovers from the Past

With respect to South Africa and Indonesia, it must be noted that a number of claims may survive the termination of BITs and still be capable of being submitted to investor-state arbitration. Both Indonesia's and South Africa's policy is to notify partners of its intent not to renew BITs that reach the ten- or fifteen-year period for initial

Brazil and Mexico], Braz.-Mex., art. 19.2, signed on May 26, 2015, http://investmentpolicyhub.unctad.org/Download/TreatyFile/4719.

44. Joost Pauwelyn, *The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators are From Mars, Trade Adjudicators From Venus*, 109 AM. J. INT'L L. 761, 763–65 (2015).

validity. The first South African treaties to lapse under this type of sunset clause were the BITs with the Belgium-Luxembourg Economic Union (2012), with Switzerland (2013), with the Netherlands (2013), with Spain (2013), with Germany (2014), with Austria (2014), with France (2014), and with Denmark (2014). South Africa also plans to reconsider its BIT with China when the initial ten-year validity period comes to term in 2018. Indonesia has terminated BITs with Norway (2001), with Egypt (2014), with Bulgaria (2015), with China (2015), with France (2015), with Italy (2015), with Lao People's Democratic Republic (2015), with Malaysia (2015), with the Netherlands (2015), with Slovakia (2015), with Cambodia (2016), with Romania (2016), with Turkey (2016), and with Vietnam (2016).[45] Additionally, the Indonesia-Argentina BIT was terminated by mutual agreement.[46]

Despite these numerous BIT terminations, survival clauses in some of these treaties may continue to protect existing investments for a number of years after the treaty has been terminated. This period varies from treaty to treaty. For instance, the South African BIT with Belgium and Luxembourg extends the coverage of the treaty for existing investments for a period of ten years following termination of the treaty,[47] as does the BIT with Denmark[48] and Spain.[49] The latter explicitly includes dispute settlement provisions within the ambit of the survival clause.[50] The South Africa-China BIT has a ten-year survival clause. The term of the survival clause for the BIT with the Netherlands is fifteen years.[51] The BIT with Austria provides a survival clause of twenty years,[52] as

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45. List of Treaties Terminated by Indonesia, U.N. CONF. ON TRADE AND DEV., http://investmentpolicyhub.unctad.org/IIA/CountryBits/97; (sort by status) (last visited Nov. 11, 2017).

46. Luke Eric Peterson, *Indonesia ramps up termination of BITs – and kills survival clause in one such treaty – but faces new $600 mil. claim from Indian mining investor*, BILATERALS.ORG (Dec. 7, 2015), http://www.bilaterals.org/?indonesia-ramps-up-termination-of.

47. Accord entre l'Union économique belgo-luxembourgeoise et la République d'Afrique du Sud concernant l'encouragement et la protection réciproques des investissements, Belg.-Lux.-S. Afr., art. 12(2) (Aug. 14, 1998), 2218 U.N.T.S 3.

48. Agreement Between The Kingdom of Denmark and The Republic of South Africa Concerning the Promotion and Reciprocal Protection of Investments, Den.-S. Afr., art. 16.2 (Feb. 22, 1996; terminated Aug. 30, 2014), 2547 U.N.T.S 3.

49. Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Rieno de España y la Repùblica de Sudáfrica, Spain-S. Afr., art. XII.3 (Sept. 30, 1998; terminated Dec. 22, 2013), 2098 U.N.T.S. 203.

50. *Id.* at art. XII.3, B.O.E. n.26.

51. Agreement on encouragement and reciprocal protection of investments between the Republic of South Africa and the Kingdom of the Netherlands, Neth.-S. Afr., art. 14.3 (Sept. 5, 1995; terminated Apr. 30, 2014), 2066 U.N.T.S. 413.

52. Abkommen Zwischen der Regierung der Republik Österreich und der Regierung der Republik Südafrika über die Förderung und den Gegenseitigen Schutz von Investitionen samt Protokoll, Austria-S. Afr., art.12.3 (Nov. 28, 1996; terminated Oct. 11, 2014).

does the BIT with France[53] and with Switzerland.[54] With respect to these treaties, South Africa may be subject to investor-state arbitration until as late as 2024, should a dispute arise regarding an investment made before 2014 and protected by a treaty denounced in 2014 with a twenty-year survival clause. Terminated Indonesian BITs also include survival clauses: ten years for Cambodia, China, Italy, Laos, Malaysia, Norway, Romania, Slovakia, Turkey, and Vietnam. The Indonesia-Netherlands BIT includes a fifteen-year survival clause. The Indonesia-France BIT is remarkable for its indefinite survival clause: Article 10 provides that in the case of termination, the provisions of the treaty shall continue to apply to investments covered by the treaty and approved by the parties prior to the denunciation.[55] The possibility of disputes being brought under expired treaties using survival clauses is not merely a theoretical one. Indonesia notified India of its intent not to renew the BIT between those two countries and the termination took effect in April 2016; in the intervening period, Indian Metals & Ferro Alloys Limited ("IMFA") initiated arbitration proceedings against Indonesia under the lame duck BIT in November 2015 for $560 million.[56]

With the issue of survival clauses now squarely in the limelight, other countries seeking to denounce BITs, such as Indonesia, should be carefully considering the limited effect of such moves with respect to existing investments. It may be argued that in practice, an investment that has gone trouble-free for several years is less likely to result in a major investor-state dispute decades later. At the same time, it may be that legislators in host states, thinking themselves free of the constraints of denounced BITs and the related exposure to arbitral claims, may take regulatory actions that are in fact still likely to trigger major arbitral proceedings under the various survival clauses. Additionally, developing countries' poor tracking of the type of FDI, its origin and its

53. Accord entre le Gouvernement de la République Française et le Gouvernement de la République d'Afrique du Sud sue l'encouragement et la protection réciproques des investissements, Fr.-S. Afr., art. 11 (Oct. 11, 1995; terminated Aug. 30, 2014), 2055 U.N.T.S. 455.

54. Accord entre le Conseil fédéral suisse et le Gouvernement de la République d'Afrique du Sud concernant la promotion et la protection réciproque des investissements, Switz.-S. Afr, art. 13.2 (June 27, 1995; terminated Aug. 30, 2014), 2008 U.N.T.S. 103.

55. Accord entre l'Union économique belgo-luxembourgeoise et la République d'Afrique du Sud concernant l'encouragement et la protection réciproques des investissements, Belg.-Lux.-S. Afr., art. 10 (Aug. 14, 1998), 2218 U.N.T.S 3: "Au cas où le présent Accord viendrait à prendre fin, ses dispositions continueront à s'appliquer aux investissements couverts par ledit Accord et agréés par la Partie contractante préalablement à la dénonciation de cet Accord."

56. Randy Fabi, *Indian Metals and Ferro Alloys miner files $560 mln claim against Indonesia*, REUTERS (Nov. 18, 2015), http://in.reuters.com/article/indonesia-imfa-idINKCN0T70O320151118.

nature may make it very difficult for governments to ascertain the possible consequences of regulatory measures that could be seen as indirect expropriation under traditional BITs. That landscape may be even further complicated by investors who reincorporate and nominally recast their investment to fall within the ambit of another treaty, which might not yet have been denounced, or might offer a longer survival clause.

South Africa's and Indonesia's moves also offer important lessons in treaty drafting for those countries that are crafting new model BITs or are currently negotiating investment agreements (bilaterally or as part of regional trade agreements). A number of options could be considered. First, survival clauses may be excluded altogether or dramatically shortened. Second, survival clauses could be neutralized by mutual agreement at the time of denunciation or termination of the treaty. This technique was deployed by the Czech Republic[57] and was also utilized by Indonesia and Argentina.[58] Third, survival clauses could extend to the substantive rights and obligations under the BIT, but not to the arbitration clause. It may also be prudent to exclude the MFN clause from the ambit of any survival clause in order to avoid *Maffezini*-type imports of dispute settlement provisions from other BITs.[59]

B. Beyond Process: Substantive Law Considerations

Developing countries' concerns with investor-state arbitration relate in large part to the process as it currently exists, but their critique is also leveled at substantive outcomes or the risk of certain outcomes in the arbitration awards. Inasmuch as the rationale for rejecting or limiting ISDS is to preserve host state autonomy, it might stand to reason that reverting to domestic processes and the filter of the state through

57. Luke Eric Peterson, *Czech Republic terminates investment treaties in such a way as to cast doubt on residual legal protection for existing investments*, INVESTMENT ARBITRATION REPORTER (Feb. 1, 2011), http://www.iareporter.com/articles/czech-republic-terminates-investment-treaties-in-such-a-way-as-to-cast-doubt-on-residual-legal-protection-for-existing-investments/.

58. Peterson, *supra* note 46.

59. In 2000, the tribunal in *Maffezini v. Spain* applied a BIT's most-favored nation obligation ("MFN") to procedural issues relating to jurisdiction. The award shaped subsequent treaty negotiations as well as other ICSID arbitrations. Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7 (Jan. 25, 2000), 5 ICSID Rep. 396 (2002). More recently, *RosInvestCo v. Russia*, a Stockholm Chamber of Commerce arbitration, went even further by using an MFN clause to broaden the types of claims that could be brought under a BIT when another BIT signed by the host state included coverage for a wider range of claims. RosInvestCo UK Ltd. v. Russia, Arb. V07/2005, Award on Jurisdiction (Arbitration Institute of the Stockholm Chamber of Commerce 2007) http://www.italaw.com/sites/default/files/case-documents/ita0719.pdf.

diplomatic protection and quasi-diplomatic processes such as those delineated in the Brazil CIFAs would deliver such policy space. However, reverting to diplomatic processes and domestic remedies may not assuage all of the substantive concerns.

Indeed, considerations of policy autonomy and host states' ability to condition foreign investments depending on their domestic development and regulatory priorities is framed by international investment law, whether embodied in BITs, trade agreements, or customary international law. Doing away with investor-state arbitration will not change this framework. Letting BITs lapse—or actively denouncing them—may help sidestep some objectionable language or interpretations of BITs, but customary law will still apply.

Concerns about transparency, accountability, and recourses for affected communities will only be improved if the domestic law of host countries provides an adequate framework to protect such interests and the means for implementing them. In many cases, foreign investments involve a slew of contracts, agreements, letters, and other documents exchanged between various host government agencies and the investor, typically out of the public eye and not available for review. Chinese investments in Africa and Latin America, for instance, are notorious for the shroud of secrecy surrounding the specifics of the deals. Local communities are typically not parties to these agreements, and their legal standing to engage in the process *ex ante* or to seek remedies *ex post* are often limited or nonexistent. Obligations on foreign investors to generate social, economic, and environmental impact assessments, subject to community scrutiny and public comment, may help but ultimately fall far short of leveling the playing field between affected communities and foreign investors in places where the state is unable or unwilling to protect local interests. Domestic governance shortcomings in host states create additional hurdles to the full expression of the public interest.

If reinforcing the role and autonomy of the state is to truly police foreign investment law, then home states must play a role in holding their investors accountable for breaches of human rights, environmental obligations, and other international law to which the home state has subscribed. Indeed, the very notion of foreign investor suggests that the investor falls within the jurisdiction of its home state; but almost universally, little-to-no legal avenues exist to hold investors accountable for their actions when those contravene the state's international commitments. Recourses could be envisioned under penal/criminal law and tort law, particularly in monist countries, where international law takes direct effect domestically, and in dualist countries where the necessary domestic adoption measures have been enacted.

Beyond such public law considerations—whether domestic or international—José Alvarez argues that ISDS reform also needs to take into account private aspects of the system, including the governance power of private actors.[60]

CONCLUSION

To conclude, then, it will be interesting to monitor the continuing efforts by the global South to develop alternative models for investor-state dispute resolution. While relying purely on state remedies, whether diplomatic protection or domestic adjudication, is not a sufficient response, it may help increase the pressure to critically reassess investor-state arbitration processes. Ultimately, such arbitrations may no longer be acceptable as the default option, but the plurality of alternatives also reflects the lack of consensus on the way forward.

60. José E. Alvarez, *Is Investor-State Arbitration 'Public'?*, 7 J. INT'L DISP. SETTLEMENT 534, 573–74 (2016).