NEW DIRECTIONS IN INTERNATIONAL INVESTMENT LAW:

ALTERNATIVES FOR IMPROVEMENT

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CAROLA POLICY BRIEF

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On September 16, 2019, Georgetown Law's Center for the Advancement of the Rule of Law in the Americas (CAROLA) hosted a one-day conference on "ISDS Reform in Latin America." The program brought together delegates from Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, Mexico, Peru, and Uruguay to share their experiences in the negotiation, administration, and litigation of investment treaties and to identify areas of concern and potential reform.

INTRODUCTION

This note seeks to provide policy-makers with a set of international investment reform options and to highlight mechanisms through which they may implement them. The note identifies three overall approaches.

The first approach, re-domestication, focuses on eliminating special rules and procedures for protecting foreign investment, such as the investor-state dispute settlement (ISDS) mechanism. Under this approach, foreign investments and investors would be subject to the same rights as nationals of the host State.

The second approach, reconceptualization covers reforms which seek to transform the international investment regime, rethinking its assumptions and beneficiaries to realign it with sustainable development objectives. It aims to replace the special ISDS protections to foreign investors with different guarantees and fora in which to discuss their grievances.
The third approach, reform, keeps current assumptions in place, but seeks to reduce the reach of the ISDS system and to fix latent problems and abuses. Most efforts to change the system until now seem to fall under this last approach, yet recently many countries have undertaken bold actions that fall within the first and second approach.

These reform approaches are presented from the most to least sweeping. While each one is described as if autonomous, they need not be, and indeed have not been, pursued exclusively; a country's reform efforts could encompass initiatives that fall within more than one approach. They are presented in this framework simply to provide a useful taxonomy for thinking anew about the international investment regime and its potential alternatives. The note describes a wide array of procedural and substantive issues, as well as mechanisms to address them, in order to help guide policy analysis and potential reform.

*The authors wish to thank Brooke S. Guven, Frank Garcia, Lise Johnson and Matthew Porterfield, for their invaluable comments and suggestions.

I.

RE-DOMESTICATION

Under the current international investment regime, investors can bring claims against host States before ad hoc international tribunals, a practice based on obligations enshrined in international investment agreements (IIAs). [1] In recent years, however, some countries have adopted measures to eliminate ISDS protections and level the playing field between foreign and domestic investors. The many factors driving this trend include the escalation of disputes (including those not envisioned by the treaty parties), the unpredictability of ISDS outcomes, the high dollar amount of awards and damages calculation, and the shift in claims from those that target direct expropriation to those challenging government regulation pursuing public policy objectives, all on top of growing evidence of the disconnect between IIAs and FDI inflows. [2] In this vein, re-domestication as a reform approach is informed by the principle of equal treatment, whereby procedural rules and substantive standards of treatment are realigned.

A. PROCEDURAL ASPECTS

The most common solution states have adopted to eliminate ISDS protections has been to preclude access to international arbitration to foreign investors. In order to do so, countries have undertaken both international and domestic courses of action.

On the international front and with the specific objective of eliminating foreign investors' access to arbitration, countries like Ecuador, Bolivia, Indonesia, and South Africa terminated most of their IIAs.
In addition, Bolivia and Venezuela withdrew their consent from the ICSID Convention.[3] These countries saw those measures as effective ways to pull out of the system. Yet, a number of caveats are relevant when considering this option.

Firstly, most IIAs contain survival clauses which establish that the guarantees contained in the treaty, including ISDS, will remain in force after its termination for a period of time that could range from 5 to 20 years.[4] A survival clause may be stripped away if treaty parties jointly decide to terminate a treaty and amend the clause prior to termination. Some survival clauses may even provide room for states to withdraw the offer to arbitrate. However, these clauses are an element to be reckoned with in the proper design of re-domestication efforts.

Secondly, most IIAs allow ad hoc arbitration under UNCITRAL Arbitration Rules or International Chamber of Commerce (ICC) arbitration. Thus, exiting the ICSID system usually leaves the door open for litigation at the international level, and while the consequences of terminating IIAs are significant, they will only be apparent in the long term.

The Bolivian case is illustrative. In spite of its decision to withdraw from ICSID and terminate its IIAs, Bolivia kept receiving notices of arbitration from foreign investors. Under ICSID, investors took advantage of the deferred effect of the denunciation or put forward innovative arguments to artificially extend jurisdiction.[5] Under UNCITRAL rules, claimants used other fora such as the Permanent Court of Arbitration in which to raise their grievances.

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Thirdly, states assessing the possibility of denouncing the ICSID Convention need to consider a contingency involving claims by dual nationals. Whilst Article 25(2)(a) of the ICSID Convention precludes an investor who holds dual nationalities from suing one of the states that has conferred citizenship while acting under the cover of the second nationality, other arbitration rules are silent on this issue. For instance, investors have sued Venezuela using UNCITRAL Arbitration Rules which make no mention of the dual nationality of investors.[6]

Mindful of the aforementioned risks, the Columbia Center on Sustainable Investment (CCSI), the International Institute for Environment and Development (IIED), and the International Institute for Sustainable Development (IISD) have put forward a proposal that would allow countries to terminate IIAs through a multilateral instrument and, at the same time, eliminate their survival clauses; this proposal also provides a mechanism for the withdrawal of consent to arbitrate.[7] In a similar vein, and following the Achmea decision in which the European Court of Justice found that investor-State arbitration clauses in intra-EU bilateral investment treaties are incompatible with the EU treaties,[8] the majority of EU Member States, in May 2020, signed an agreement to terminate all bilateral investment treaties that they have concluded between them.[9]

Likewise, the United States-Mexico-Canada Agreement (USMCA) terminates ISDS between the United States and Canada, and Mexico and Canada. Starting in July 2023, foreign investors will not have recourse to the North American Free Trade Agreement (NAFTA) Investment

> " An alternative to equating the treatment granted to foreign investors to that of domestic investors is to tie the standards in IIAs to existing domestic law "

Chapter and there would only be certain ISDS protections for cross-border investments between the United States and Mexico.

On the domestic level, some countries have eliminated access to international arbitration by amending their constitution or by enacting national laws. Bolivia, for instance, in its 2009 constitution established that the oil and gas (O&G) sector was beyond the scope of ISDS.[10] Similarly, Ecuador adopted a new constitution that prevents it from entering into treaties or international instruments that provide jurisdiction to international arbitration in contractual or commercial disputes.[11] However, the measure does not foreclose the possibility of investment claims given that the government has included investment arbitration clauses in some of its recent administrative contracts.[12] Venezuela, besides denouncing the ICSID Convention, enacted national laws subjecting foreign investors to national courts.[13] However, it did not terminate its IIAs and, therefore, remains subject to international claims. In fact, as of today Venezuela has 15 active investment arbitration cases.[14]

Representative of the Bolivian government speaking during CAROLA's conference on "ISDS Reform in Latin America" in 2019.

In a way, the experiences of Latin American countries wishing to exit the system have been unsatisfactory. They have gained the stigma of being hostile to international arbitration yet are still subject and vulnerable to ISDS claims. To that extent, an integral strategy like the one adopted by South Africa, which is explored below, might be more effective in eliminating the risks associated with investment claims.

B. SUBSTANTIVE ASPECTS

On the substantive front, some countries have eliminated not only the access to international fora, but also the special substantive obligations vis-à-vis foreign investors. The aforementioned decision by Ecuador, Bolivia, Indonesia, and South Africa to terminate IIAs has this practical consequence.

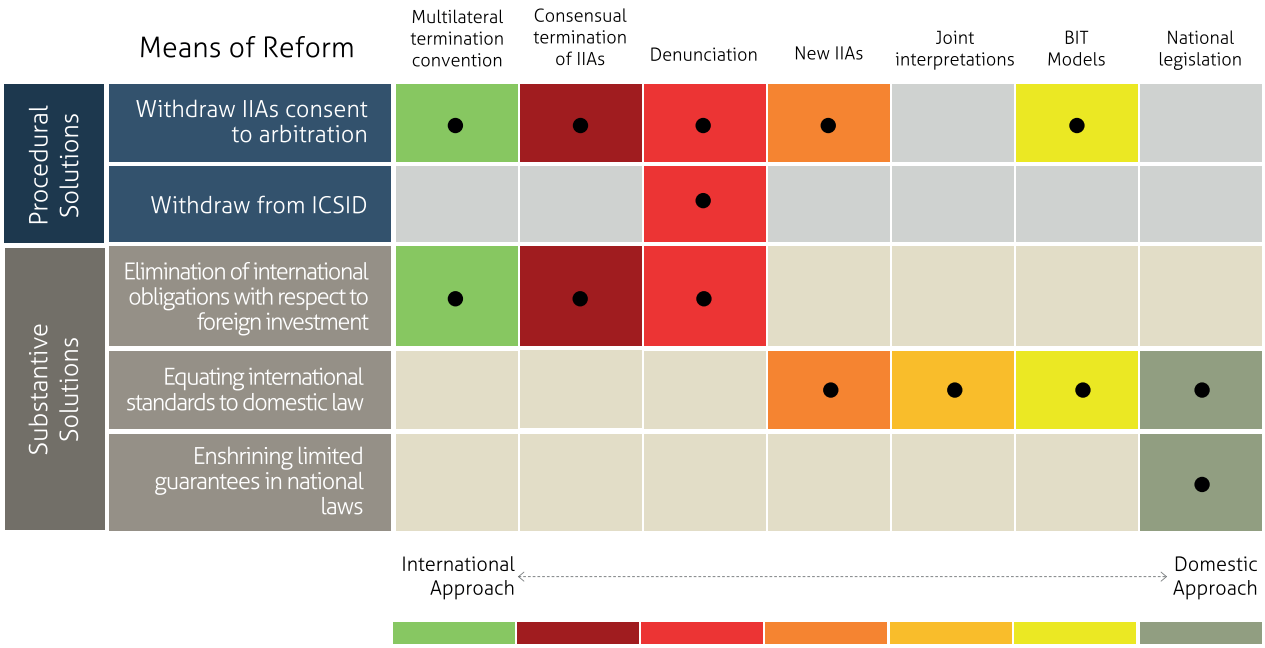
In addition to terminating most of its IIAs, South Africa enacted the Protection of Investment Act of 2015. This legislation grants foreign investors specific rights, namely, national treatment, physical security of investment, and repatriation of funds.[15]

An alternative to equating the treatment granted to foreign investors to that of domestic investors is to tie the standards in IIAs to existing domestic law. To that end, countries have used joint interpretative declarations, such as the one adopted by Canada and the European Union and its Member States concerning the Comprehensive Economic and Trade Agreement (CETA).[16] Notwithstanding the above example, tribunals could still interpret the guarantees conceded in IIAs in an expansive fashion, surpassing the rights that domestic law gives to domestic investors. There have been cases in which claimants have undoubtedly attempted this strategy. For instance, in Methanex v. United States, the investor argued that the Free Trade Commission interpretation of Article 1105 of the North American Free Trade Agreement (NAFTA) (explained in greater detail below) was, in effect, an ultra vires amendment and, to that extent, non-binding for the tribunal.[17]

In response, in 2007 the Bush Administration and the Democratic leadership of the House of Representatives agreed to include a "no greater rights" principle in the preamble of IIAs entered into by the United States;[18] this principle was included in the U.S.-Korea Free Trade Agreement.

Overall then, a multilateral convention terminating IIAs would seem to be the most effective solution for countries that wish to exit the system. As a second-best option, countries opting for this approach might want to engage in negotiations to bilaterally terminate their IIAs; this would be the only other way to secure the elimination of survival clauses. Finally, South Africa's integral strategy can also serve as an example: it complemented international with domestic actions to reduce its ISDS exposure and has not received ISDS claims since then.

Taking all these considerations into account, the following diagram depicts the procedural and substantive issues related to the elimination of the special regime for foreign investment and the possible means of reform available to governments.



II.

RE-CONCEPTUALIZATION

The adoption, in 2015, of the United Nations Sustainable Development Goals (UN SDGs) and the Addis Ababa Action Agenda on Financing for Development[19] reframed the debate about international investment. Countries agreed that mobilizing foreign capital plays an essential role in complementing national development efforts, but they also emphasized the need to develop policies that better align private sector incentives with public goals. In that spirit, some countries have sought to develop a special regime for international investment that revolves not around investment protection, but rather has as its principal objective maximizing investments' contribution to sustainable development.

A. PROCEDURAL ASPECTS

By replacing ISDS provisions with alternative means of dispute resolution, countries can enhance the contribution of international investment to sustainable development. For example, State-State arbitration, an ombudsman mechanism, or joint committees can be better tailored to national developmental needs than traditional ISDS provisions. In the

Representative of the Colombian government speaking during CAROLA's conference on "ISDS Reform in Latin America" in 2019.

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same vein, scholars have advocated for enhanced third-party rights in ISDS disputes to demand that investors comply with both international standards and domestic regulation.

Brazil, after refusing for decades to ratify an IIA, has adopted a sui generis investment treaty model that includes no investor-state arbitration provisions. Rather, Brazil's Cooperation and Facilitation Investment Agreement Model (CFIA) relies on institutional governance mechanisms designed to promote cooperation between the parties—namely a Joint Committee, the Agendas for Further Cooperation and Facilitation, and the Ombudsperson/National Focal Point.[20] Only after failure to reach a solution via these mechanisms can an aggrieved treaty party initiate a State-State arbitration.[21] Recognizing that investors are primarily interested in overcoming difficulties while avoiding costly litigation, under the Brazilian model, they must follow a dispute avoidance procedure conducted by the Joint Committee before arbitration takes place.[22]

Along similar lines, several countries are also developing BIT models that provide State-State arbitration as an alternative provision. Countries such as India, Indonesia, and Tanzania are thus instituting State-State arbitration alongside ISDS. Other agreements such as the Intra-Mercosur Cooperation and Facilitation Agreement, explicitly exclude ISDS[23] and incorporate an ombudsman mechanism to solve the disputes between the parties of the agreement, in addition to the State-State Mercosur dispute settlement mechanism.[24]

South Africa's Protection of Investment Act includes special provisions on recourse to mediation for foreign investors. This Act also allows State-State arbitration with the requirement that parties first exhaust domestic remedies.[25] Another alternative African countries have adopted on a domestic level is to enact national investment laws that offer the possibility of ISDS without providing consent upfront,[26] and requiring an additional act of consent by the host State before arbitration can go forward.[27]

Within the reconceptualization approach and in addition to alternative means of dispute settlement, some scholars have proposed creating a legal rights for directly affected third parties—such as local communities or indigenous

populations—to intervene in arbitration proceedings to protect their rights and enforce relevant investors' obligations.[28] Furthermore, the IISD Model International Agreement on Investment for Sustainable Development[29] proposes that third parties should be able to initiate actions for damages under the domestic laws of the host or home States if an investor breaches treaty obligations.[30] Some have gone further and advocated for the possibility of granting communities affected by investment projects the right to initiate disputes before international arbitral tribunals.[31]

balance the rights and obligations of foreign investors while safeguarding the right of states to regulate and protect legitimate public welfare objectives.[32]

Recently, both developing and developed countries have started to include both binding and aspirational investor obligations in their IIAs and BIT Models. For instance, the 2016 Morocco-Nigeria BIT contains a series of specific obligations for investors. Among others, investors must apply the precautionary principle, maintain an environmental management system, uphold human rights, never engage or be complicit in corruption practices, meet or exceed

> " When countries discuss the necessity of including a sustainable development angle in ISDS, they frequently mention the need to balance the rights and obligations of foreign investors. "

B. SUSTANTIVE ASPECTS

Reconceptualizing the international investment regime also calls for putting sustainable development at the core of substantial provisions. When countries discuss the necessity of including a sustainable development angle in ISDS, they frequently mention the need to

national and internationally accepted standards of corporate governance, and apply the ILO Tripartite Declaration on Multinational Investments and Social Policy.[33] Furthermore, Colombia's 2017 Model BIT sets forth grounds for denying the benefits of IIAs, including human rights violations, serious environmental damage, fiscal fraud, corruption, labor

law violations, and money laundering.[34] With regards to the developed world, the Netherlands model BIT, issued in 2019, establishes that investors should identify, prevent, and mitigate environmental and social risks.[35]

Likewise, efforts to protect governments' regulatory space have been written into the texts of newer agreements. Article 23 of the 2016 Morocco-Nigeria BIT establishes that the host State has the right to take regulatory measures to ensure sustainable development in its territory and that non-discriminatory measures taken to comply with international obligations under other treaties shall not constitute a breach of the BIT.

A salient element of the Investment Chapter of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) related to the right to regulate is the tobacco carve-out. Article 29.5 of this agreement allows parties to deny the benefits of the Investment Chapter to investors making claims related to tobacco control measures.

These developments could also be achieved in a more holistic manner that goes beyond the modification or establishment of specific bilateral relations amongst countries. In fact, Georgetown's Harrison Institute for Public Law has proposed a framework convention model to shift focus from investor protection to sustainable development.[36] Within this platform, parties could gradually hammer out agreements that include the procedural and substantive solutions described above. The MLI-type model, explained in detail in the next section, could also be used as a multilateral tool to implement some of the most practical reconceptualization solutions, such as State-State arbitration, third party rights, protection of policy space, and establishing obligations for foreign investors. This model could serve as an alternative to the framework convention if the latter proves difficult to obtain, for instance, due to the amount of political capital required to create platforms for continuing negotiation and consensus building.

Finally, UNCTAD has argued that states must have the sovereign right to establish entry and operational conditions for foreign investment in the interest of the public good and to minimize potential negative effects.[37] In that sense, governments could devise investment screening mechanisms to assess the conformity of the incoming investment with the fulfillment of its sustainable development strategy. Existing investment review proceedings could be helpful in devising such a mechanism. Whereas most of them focus on national security considerations, some allow the government to review investment proposals using a "national interest" test. For instance, when assessing if an investment project is consistent with its national interest, Australia takes into account, inter alia, the environmental impact and the effects on the economy and the community.[38]

The following diagram depicts the procedural and substantive avenues for reconceptualizing the international investment regime. It is worth noting how many of the solutions could be implemented through a multilateral convention, either in a framework version or an MLI-type instrument. Additionally, Brazil's approach to reconceptualizing the international investment regime is notable. CFIAs include many of the alternative dispute resolution mechanisms discussed here as well as substantive provisions that further sustainable development.

	Means of Reform	Framework convention	MLI-type convention	CFIAs	New IIAs	Joint interpretations	BIT Models	National legislation
Procedural Solutions	State-State arbitration	●	●	●			●	
	Mediation	●	●	●				●
	Ombudsman	●	●	●			●	
	Third-party rights	●	●		●		●	
Substantive Solutions	Obligations for foreign investors	●	●	●	●		●	
	Protection of policy space	●	●	●	●	●	●	
	Investment screening for sustainable development	●						●

International Approach ⟷ Domestic Approach

III. REFORM

A more modest solution for reforming certain procedural and substantive issues arising from IIAs litigation is to limit the availability of ISDS as a forum in which to challenge states' decisions and to reduce the reach of the obligations states undertake through this type of agreement. This approach keeps current assumptions in place but seeks to narrow the scope of the ISDS system and resolve some of its existing problems.

A. PROCEDURAL ASPECTS

Countries interested in streamlining the ISDS system have undertaken and/or considered myriad procedural reforms for improving ISDS arbitration. This note focuses on the following: (i) exhaustion of local remedies; (ii) fork in the road provisions; (iii) counterclaims; (iv) restriction of third-party funding; (v) early dismissal of frivolous claims provisions; (vi) keyholes—such as the existence of a government contract—to obtain access to special protections; and (vi) shareholder claims and reflective loss. Points (iii), (iv), (v), and (vi) have been included in the UNCITRAL's Working Group III reform agenda.

Firstly, the exhaustion of local remedies refers to the use of domestic remedies for a certain period of time before international arbitration may be initiated. A good way to limit the access to arbitration is to require the exhaustion of both judicial and administrative means.[39]

Secondly, states may include a "fork in the road" provision in their treaties. Note that some tribunals have declined jurisdiction under fork in the road provisions. For instance, in Pantechniki v. Albania,[41] the tribunal found that the investor's claims were precluded from being heard by an ICSID tribunal because they arose out of the same alleged entitlement to payment for contractual losses that the investor had already brought before the courts in Albania. Thus, one of the advantages of the fork in the road provision is that it prevents the duplication of procedures and claims.[42] However, note also that certain tribunals have held that the requirements of triggering fork in the road clauses are difficult to satisfy,[43] limiting the effectiveness of these provisions.

> " investors have taken advantage of the indirect expropriation concept to challenge general non-discriminatory regulations. "

Thirdly, in order to eliminate parallel proceedings and, thus, reduce their duration and costs, states may include the possibility of bringing counterclaims in their IIAs. This option might also be included in arbitral rules.[44] States may bring claims against investors involving violations of their obligations, which need not be limited to the environmental realm as commonly believed. Rather, they can involve compliance with other laws and regulations of the host State in order to elevate local law violations to treaty breaches.[45] Arbitral rules—rule 46 of the ICSID Convention, for instance—can also give grounds to counterclaims. Recently, in Perenco v. Ecuador, under the host State's environmental counterclaim, the tribunal ordered the investor to compensate Ecuador for USD 54 million.[46]

Fourthly, states may regulate third-party funding through treaty law or national regulation.[47] On the international level, third-party funding can be disciplined through IIAs or a potential multilateral convention regulating, for instance, the extent of the disclosure, identity of the funders, and terms of the agreement. States may also opt to regulate third-party funding for international arbitration seated within their jurisdictions by enacting national laws as was done by Hong Kong and Singapore.[48] Lastly, third-party funding can also be regulated through arbitral rules. ICSID, for example, proposed a rule to regulate third-party funding, requesting only the disclosure of the name and address of the third-party funder.[49]

States can also include treaty provisions calling for early dismissal of frivolous claims. A frivolous claim is one "lacking a legal basis or legal merit," "not serious" or "not reasonably purposeful."[50] A mechanism for dismissal of frivolous claims can be inserted not only in IIAs,[51] but also in arbitration rules or a multilateral convention.

USMCA's investment provisions applicable to the United States and Mexico include a novel element in the legal engineering of IIAs. Whereas most investors are allowed to bring claims

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based only on direct expropriation, national treatment, and most-favored nation substantive obligations, those who are parties to a covered government contract and operate in a covered sector[52] can use the whole array of disciplines contained in the Investment Chapter (including the minimum standard of treatment).[53] In practice, the agreement only confers expansive ISDS protection

to a handful of U.S. investors in Mexico in the oil and gas sector. To that extent, the existence of a covered government contract can be seen as a keyhole necessary to gain access to the more favorable protections contained in the agreement. In this way, governments can reduce their exposure to investor claims and agree to higher protections only for certain sensitive sectors.

Finally, states may wish to limit or put an end to claims brought for loss of value of investor shares as a result of injury caused to a company—so-called reflective loss. In states with advanced national corporate law systems, shareholders are allowed to bring claims for direct injury but not for indirect injury/reflective loss. Under NAFTA, shareholders were able to bring claims on their own behalf and claims on behalf of a company only when the investor is a controlling shareholder and recovery accrues to the company.[54] The Southern African Development Community (SADC) model BIT takes a different approach. This model excludes portfolio investments, defined as shareholdings under 10 percent.[55]

Within UNCITRAL's Working Group III discussions, several governments have presented submissions supporting the idea of a multilateral instrument as the appropriate means to implement several of these procedural reforms. As a

Representative of the Mexican government speaking during CAROLA's conference on "ISDS Reform in Latin America" in 2019.

> " The preferred solution has been to either reduce the reach and clarify the extent of the disciplines or eliminate them entirely. "

consequence, UNCITRAL's Secretariat has issued a paper discussing the possible characteristics that such an instrument might have.[56] This proposal specifically refers to Colombia's submission, suggesting that a unique multilateral convention, inspired by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI), would provide a means for modifying existing IIAs in an efficient and consistent manner, while allowing an important degree of flexibility to its signatories.[57]

B. SUSTANTIVE ASPECTS

As for the substantive reform agenda, in recent years countries have engaged in a process known as modernization of IIA obligations, i.e., reducing the scope and reach of such undertakings. This reform effort has targeted key IIA obligations including fair and equitable treatment (FET), most favored nation (MFN), and the protection against indirect expropriation.

FET is by far the most litigated and controversial standard granted to investors in IIAs. The arbitral interpretation of FETs encompasses notions of fairness, non-arbitrariness, consistency, stability, transparency, coercion, and protection of legitimate expectations.[58] In particular, the latter element, i.e., legitimate expectations, has been highly controversial as it tends to require that governments impose a regulatory freeze.[59]

Traditionally, MFN clauses seek to prevent less favorable treatment to investors from the signatory State vis-à-vis comparable investors from any third country. In spite of this straightforward objective, foreign investors have used these clauses extensively to claim the application of more "investor-friendly" provisions in other IIAs concluded by the host State with third countries.[60]

Virtually every IIA contains provisions that regulate the way in which states can expropriate property and businesses of foreign investors. Most agreements cover both direct and indirect expropriation so that states cannot circumvent restrictions of traditional takings. Indirect expropriation refers to situations where there is an effective transfer of property rights, without physically seizing or formally taking over the property.[61] However, investors have taken advantage of the indirect expropriation concept to challenge general non-discriminatory

regulations that turn out to have a detrimental impact on their investments.[62]

States have tried to address the unforeseen consequences of how tribunals interpret these obligations. The preferred solution has been to either reduce the reach and clarify the extent of the disciplines or eliminate them entirely. These alternatives are now part of a number of joint interpretations, new BIT models or new agreements.

This move to reduce the reach of obligations is evident in a number of major agreements. In order to counter expansive FET interpretations, for instance, NAFTA's contracting parties issued notes of interpretation asserting that this obligation does not require treatment beyond the minimum standard. In a similar way, concerning MFN, CETA clarifies that substantive obligations in other IIAs do not in themselves constitute "treatment," absent measures adopted by a State pursuant to such obligations. Likewise, CPTPP clarifies that MFN does not encompass international dispute resolution procedures or mechanisms.[63] Finally, with regards to indirect expropriation, Canada and U.S. BIT models exclude certain types of State regulation from the definition of indirect expropriation. For example, these exclusions include non-discriminatory measures that are designed and applied to protect legitimate public welfare objectives.[64]

Concerning the elimination of substantive obligations, consider the example of India. It stripped out FET from its Model BIT in 2015, retaining only a few FET-related elements such as denial of justice and fundamental breach of due process.[65] Furthermore, USMCA's general ISDS regime between Mexico and the United States removes the majority of substantive protections, including indirect expropriation, FET and full protection and security. Likewise, several new agreements do not include MFN clauses.[66]

The following diagram depicts these solutions with potential avenues of reform. It is important to recall that, although the current mandate of UNCITRAL's Working Group III is limited to procedural reforms, a multilateral instrument like the one Colombia has proposed in that forum could also be used to carry out substantive reforms where enough consensus exists in the international community. Concerning bilateral and regional avenues, recent agreements—such as CETA and CPTPP—can be seen as the most developed attempts to reform ISDS, while keeping its core assumptions in place.

	Means of Reform	MLI-Type Convention	Arbitral Rules	New IIAs	Joint Interpretations	BIT Models	National Legislation
Procedural Solutions	Exhaustion of local remedies	●		●		●	
	Fork in the road	●		●		●	
	Counterclaims	●	●	●			
	Keyholes	●		●		●	
	Regulation of third-party funding	●	●				
	Dismissal of frivolous claims	●	●				
Substantive Solutions	Reduction of the reach of obligations	●		●	●	●	
	Elimination of obligations	●		●		●	

International Approach ⟷ Domestic Approach

IV. CONCLUSION

The international investment regime is in flux. Mounting criticism of ISDS has led countries to engage in multiple and diverse reform agendas to align their investment policies with their general policy goals. Among those agendas, three approaches stand out: ISDS re-domestication, reconceptualization of the international investment regime, and ISDS reform.

States' re-domestication attempts aim to eliminate special rules and procedures to protect foreign investment and instead grant foreign investors the same guarantees available to domestic investors. To eradicate both the procedural and substantive guarantees that support ISDS, a significant number of developing countries have terminated several IIAs. However, the survival clauses enshrined in those agreements limit the effectiveness of this strategy. What's more, denouncing the ICSID Convention does not prevent these liabilities, due to the existence of alternate ISDS fora. States attempting to withdraw from the system have also carried out reforms to their domestic legal systems. Yet without a parallel international strategy, these initiatives have limited success, as shown in the case of Venezuela. Conversely, South Africa's experience shows how it is possible to complement international and domestic actions for reducing ISDS exposure by opting for an integral strategy that calls for terminating its IIAs while simultaneously replacing the ISDS system with limited domestic protections for investors.

In this context, proposals with a multilateral focus, such as the "Withdrawal of Consent to Arbitrate and Termination of International Investment Agreements Convention" suggested by CCSI, IIED, and IISD, and the IISD "Draft Agreement for the Coordinated Suspension of Investor-State Dispute Settlement with respect to COVID-19 Related Measures and Disputes" seem like promising solutions, if a critical mass of states with enough political clout could get behind them.

The reconceptualization of the international investment regime is underpinned by the UN SDGs, the Addis Ababa Action Agenda on Financing for Development, and the acknowledgement that foreign investment is necessary to complement national development strategies. To achieve this end, alternative means of dispute resolution—more mindful of the developmental needs of host countries—are required. Furthermore, countries and stakeholders that advocate for reconceptualization emphasize the need to rebalance the system, impose obligations on investors, allow regulatory space for states, and enhance third party rights in investment disputes. In that regard, Brazil's CFIA model provides an interesting example of international

> "Countries may engage, and effectively have done so, in initiatives that encompass more than one approach."

agreements that deal with investment, but with a totally different focus than ISDS-centered BITs. This model prefers dispute prevention and alternative means to solve conflicts, such as joint committees and ombudsman mechanisms, and includes provisions that respect the states' right to regulate.

This approach could also have a multilateral dimension, either in the form of a framework convention on sustainable investment or by the negotiation of an MLI-type instrument. Whereas the former would provide an ongoing platform to, incrementally, achieve substantive and potentially transformative consensus, the latter would allow for quick fixes to introduce the most needed reforms.

Yet, the majority of countries at this time are devoting their efforts to the ISDS reform approach. These initiatives keep the current assumptions in place but seek to reduce the reach of the system and to fix certain problems and abuses. On the procedural level, the developments of UNCITRAL's Working Group III are promising, and the idea of negotiating an MLI-type instrument to fully realize them is positive. However, several countries have expressed the need for a deeper and wider reform than UNCITRAL's current mandate permits. In the meantime, reform solutions have found their way into recent IIAs, such as USMCA, CETA, and CPTPP.

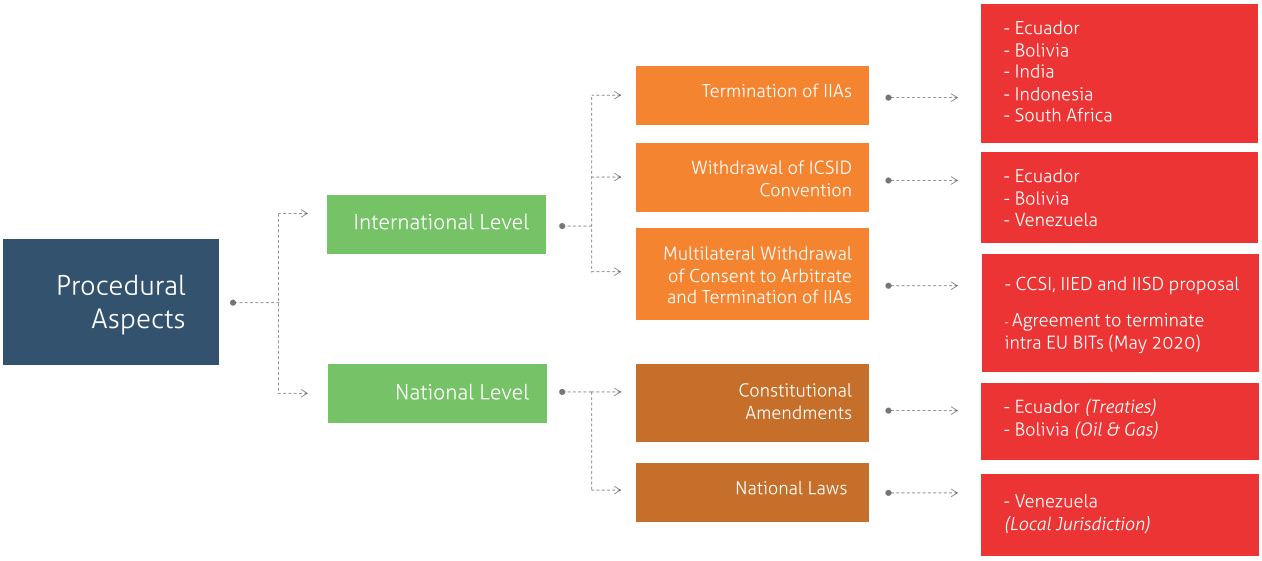
Finally, it is important to bear in mind that the approaches set forth in this brief are not mutually exclusive. Countries may engage, and effectively have done so, in initiatives that encompass more than one approach. India, for instance, has used a re-domestication solution—terminating IIAs—to negotiate new agreements based on its revamped BIT Model, which is clearly an attempt to reform its participation in the existing ISDS system. In addition, countries should understand that, to a certain degree, the means of reform limit the extent to which transformation can be achieved. Domestic solutions have clear limitations and bilateral agreements require a substantial alignment of interests of the negotiating parties. In that sense, the multilateral initiatives set forth in each of the identified approaches can lay the foundation for the overarching and deep transformation that the system currently needs.

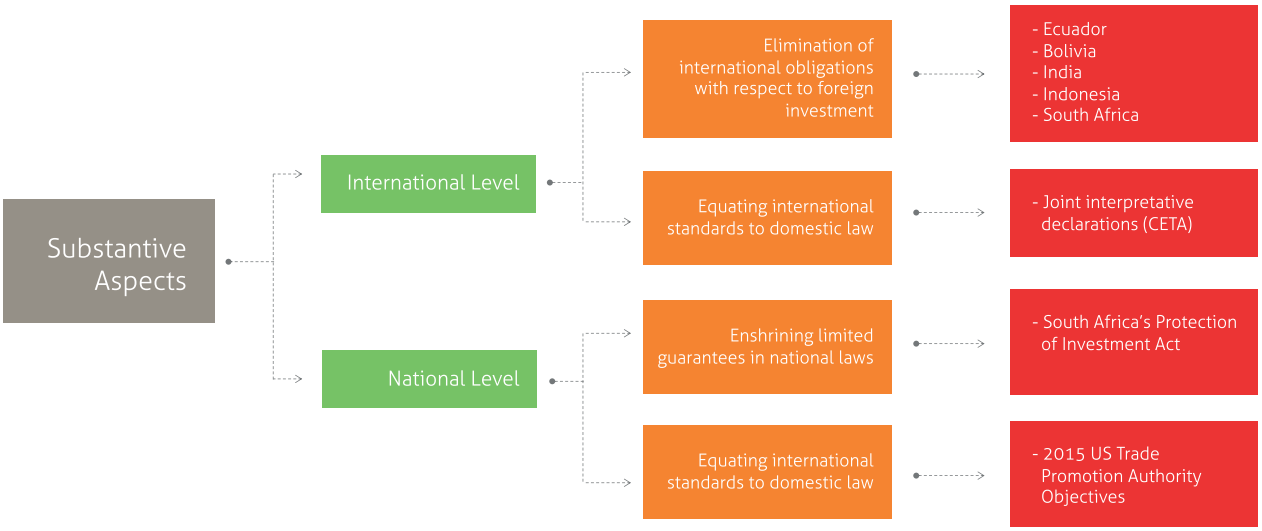
ANNEX


I. ISDS
Re-domestication
II. International Investment Regime
Reconceptualization
III. ISDS Reform

I.

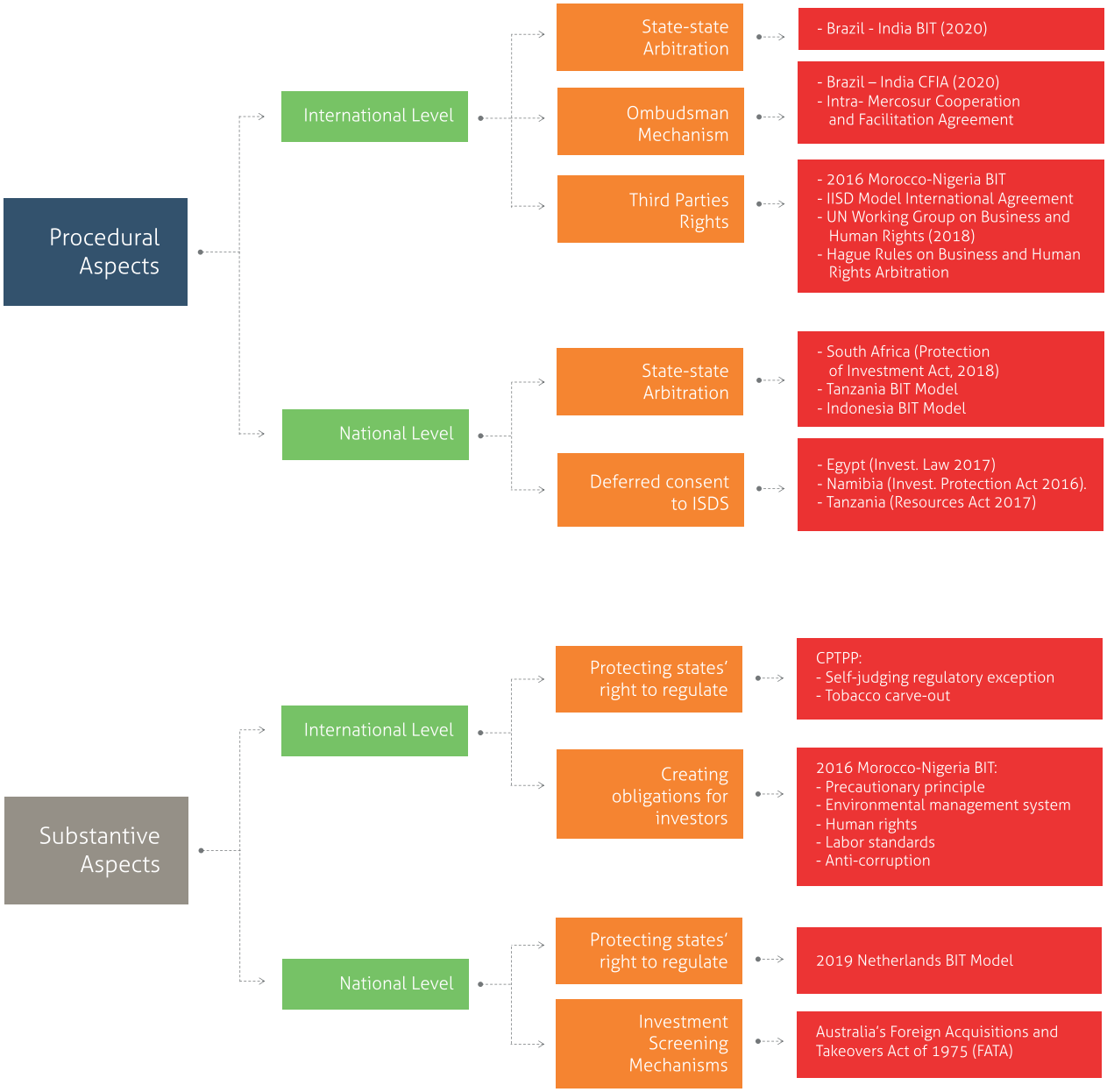
RE-DOMESTICATION





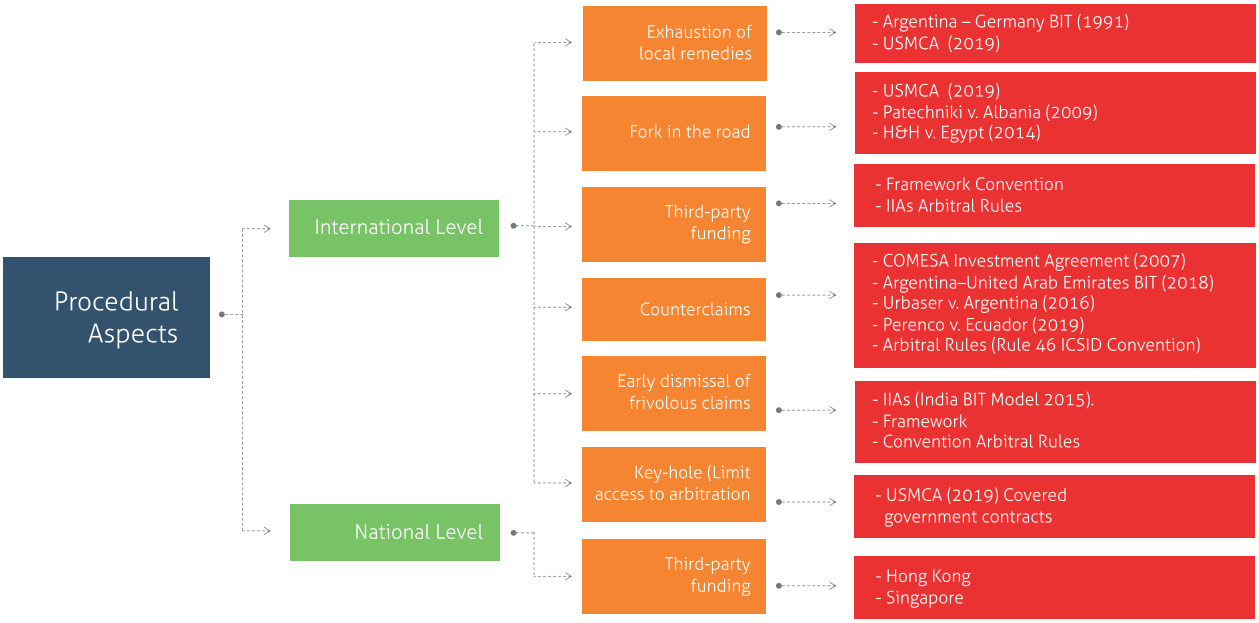
II.

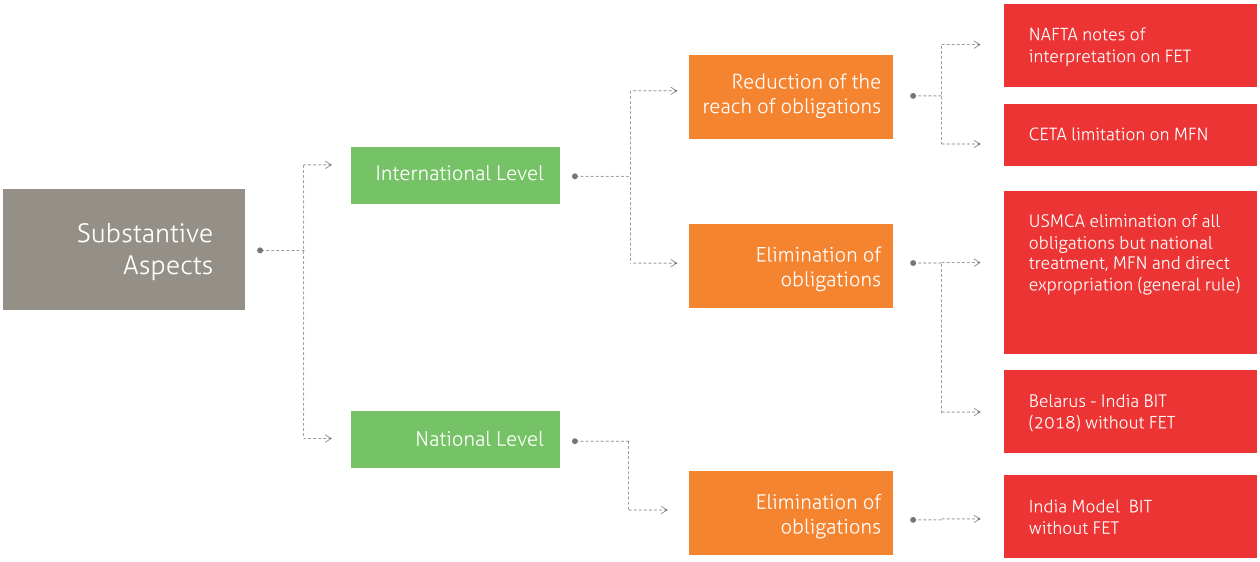
RE-CONCEPTUALIZATION



III.

REFORM


Procedural Aspects
International Level
National Level
Exhaustion of local remedies
Fork in the road
Third-party funding
Counterclaims
Early dismissal of frivolous claims
Key-hole (Limit access to arbitration
Third-party funding
- Argentina – Germany BIT (1991)
- USMCA (2019)
- USMCA (2019)
- Patechniki v. Albania (2009)
- H&H v. Egypt (2014)
- Framework Convention
- IIAs Arbitral Rules
- COMESA Investment Agreement (2007)
- Argentina–United Arab Emirates BIT (2018)
- Urbaser v. Argentina (2016)
- Perenco v. Ecuador (2019)
- Arbitral Rules (Rule 46 ICSID Convention)
- IIAs (India BIT Model 2015).
- Framework
- Convention Arbitral Rules
- USMCA (2019) Covered government contracts
- Hong Kong
- Singapore


Substantive Aspects
International Level
National Level
Reduction of the reach of obligations
Elimination of obligations
Elimination of obligations
NAFTA notes of interpretation on FET
CETA limitation on MFN
USMCA elimination of all obligations but national treatment, MFN and direct expropriation (general rule)
Belarus - India BIT (2018) without FET
India Model BIT without FET

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6 Particularly, under the Venezuela-Spain BIT. This BIT allows arbitration under UNCITRAL rules if ICSID arbitration is not available. In the García Armas and García Gruber v. Venezuela case the tribunal accepted claims from investors holding both Spanish and Venezuelan citizenship. Moreover, two other disputes with similar fact patterns have been filed against Venezuela in recent years (Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela [PCA Case No. 2016-08] and Luis García Armas v. Bolivarian Republic of Venezuela [ICSID Case No. ARB(AF)/16/1]). See also, Javier García Olmedo, Claims by Dual Nationals under Investment Treaties: A New Form of Treaty Abuse?, EJIL:Talk! Blog of the European Journal of International Law (2015), https://www.ejiltalk.org/claims-by-dual-nationals-under-investment-treaties-a-new-form-of-treaty-abuse/ and Clovis Trevino, Treaty Claims by Dual Nationals: A New Frontier?, Kluwer Arbitration Blog (2015), http://arbitrationblog.kluwerarbitration.com/2015/10/08/treaty-claims-by-dual-nationals-a-new-frontier/.

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20 For the dispute prevention phase, Brazil relies on Focal Points or the Ombudsman Mechanism, the principal function of which is to provide governmental support to the investments of the other Party in their country. See Brazil: Brazil-Angola Agreement on Cooperation and Facilitation of Investment, Article 5.

21 Article 23 of the Ethiopian CFIA; Article 24 of the Surinamese CFIA. See also Natali Cinelli Moreira, Cooperation and Facilitation Investment Agreements in Brazil: The Path for Host State Development, Kluwer Arbitration Blog (2018), http://arbitrationblog.kluwerarbitration.com/2018/09/13/cooperation-and-facilitation-investment-agreements-in-brazil-the-path-for-host-state-development/.

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Investment Promotion Act (2016), South Africa's Protection of Investment Act (2015), Tanzania's Natural Wealth and Resources Act (2017). See id. at 11. See also WIR17 and WIR18, Chapter III.

27 For instance, Egypt's Investment Law (2017) does not provide consent in advance of investor-state arbitration, Namibia's Investment Promotion Act (2016) does not provide consent in advance of investor-state arbitration, and arbitration in Namibia is only possible upon explicit consent. Tanzania's Natural Wealth and Resources Act (2017) does not provide consent in advance of investor-state arbitration and precludes proceedings in foreign courts or tribunals. See id. at 11. See also WIR17 and WIR18, Chapter III.

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30 This proposal was developed by Nigeria and Morocco in their 2016 BIT, in which parties agreed that investors shall be subject to civil actions in the home state if their actions lead to significant damage, personal injuries or loss of life in the host state. See Morocco-Nigeria BIT (2016) Article 20. Text available here https://investmentpolicy.unctad.org/international-investment-agreements/treaties/otheriia/3711/morocco---nigeria-bit-2016-.

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35 Kabir A.N. Duggal & Laurens H. van den Ven, With Rights Come Responsibilities: Sustainable Development and Gender Empowerment under the 2019 Netherlands Model BIT, Kluwer Arbitration Blog (2019), http://arbitrationblog.kluwerarbitration.com/2019/06/15/with-rights-come-responsibilities-sustainable-development-and-gender-empowerment-under-the-2019-netherlands-model-bit/

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38 Australia's Foreign Investment Policy, https://firb.gov.au/guidance-resources/policy-documents (last visited May 18, 2020).

39 See Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan (ICSID Case No. ARB/10/1) (Award of 2 July, 2013) ¶ 6.6.1., p.76. The Tribunal held in this case that "neither it, nor the Centre, has jurisdiction over this arbitration, due to the Claimant's failure to comply with the mandatory requirement of prior submission of the dispute to Turkmenistan's courts under Article VII.2 of the BIT." See also, Ömer Dede and Serdar Elhüseyni v. Romania (ICSID Case No. ARB/10/22).

40 Under this provision, the investor elects to submit a claim at one particular forum that may include the national courts of the host state or an investment arbitration tribunal. That election is definitive and final, and the investor may not submit another claim, related to the same matter or underlying measure to other fora.

41 Pantechniki S.A. Contractors & Engineers v. Republic of Albania (ICSID Case No ARB/07/21) (Award of 30 July 2009) ¶64 p. 16 and ¶107 p.27, https://www.italaw.com/sites/default/files/case-documents/ita0618.pdf.

42 Supervision y Control v. Costa Rica (ICSID Case No. ARB/12/4) (Award of 18 January 2017) ¶293 p.134. In this case the Tribunal held that "the existence of national courts and international arbitration as mechanisms for resolving disputes can generate a significant risk of duplication and a problem in determining what is the proper dispute resolution mechanisms for disputes that may arise during the investment period."

43 In Khan Resources v. Mongolia (PCA Case No. 2011-09) (Decision on Jurisdiction of 25 July 2012) ¶391 p. 84. The Tribunal stated that the requirements of triggering the fork in the road provision need to remain difficult to satisfy since "this could have a chilling effect on the submission of disputes by investors to domestic fora, even when the issues at stake are clearly within the domain of local law. This may cause claims being brought to international arbitration before they are ripe on the merits, simply because the investor is afraid that by submitting the existing dispute to local courts or tribunals, it will forgo its right to later make any claims related to the same investment before an international arbitral tribunal."

44 Article 46 of the ICSID Convention states that "Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre."

45 Article 28(9) of the COMESA Investment Agreement (2007) states that the State may bring claims concerning failure of the investor "to comply with all applicable domestic measures" [Investment Agreement for the COMESA Common Investment Area (signed 23 May 2007), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3092/download]. See also, Trans-Pacific Partnership (TPP) Article 9.18(2): "When the claimant submits a claim pursuant to [Investment chapter provisions], the respondent may make a counterclaim in connection with the factual and legal basis of the claim or rely on a claim for the purpose of a set off against the claimant." See also, Southern African Development Community- SADC Model BIT, Article 10.2. "A Host State may initiate a counterclaim against the Investor before any tribunal established pursuant to this Agreement for damages or other relief resulting from an alleged breach of the Agreement."

46 Perenco Ecuador Limited v. Republic of Ecuador (ICSID Case No. ARB/08/6) (Award of 27 September 2019) ¶1023 (b) p.374. "Perenco Ecuador Limited shall pay to the Republic of Ecuador the costs of restoring the environment in areas within Blocks 7 and 21 and

remedying the infrastructure in these two Blocks in the amount of US$54,439,517.00. To that amount, post-award interest will accrue at a rate of LIBOR for three-month borrowing plus two percent, compounded annually. Post-award interest will accrue from 1 December 2019, until the date of full and final payment."

47 Some of the concerns about third-party funding were set out in some of the UNCITRAL discussions. In particular, third party funding (i) has the potential to increase the number of frivolous claims, (ii) it would likely have a negative impact on amicable resolution of disputes, (iii) it could have an impact on foreign direct investment flows, and (iv) it could potentially create a structural imbalance in the ISDS regime due to the fact that generally speaking investors have access to it and host states do not. On the other hand, third-party funding can create potential conflicts of interests, or certain influence over arbitration proceedings, impact on confidentiality, costs, and security for costs. There is also a perception of lack of transparency in the use of the third-party funding given the existent lack of regulation that might jeopardize the integrity and legitimacy of international arbitration proceedings.

48 The Ordinance of 2017 in Hong Kong Special Administrative Region, Section 98T (1)(a)(b); Civil Law (Amendment) and in Singapore the Act 2017, Singapore, Section 5(b)(2).

49 World Bank Group, International Centre for Settlement of Investment Disputes (ICSID), Proposals for Amendment of the ICSID Rules, Working Paper #4, Rule 14 at 37 (February 2020). Rule 14 Notice of Third-Party Funding (1) A party shall file a written notice disclosing the name and address of any non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding ("third-party funding"). (2) A non-party referred to in paragraph (1) does not include a representative of a party. (3) A party shall file the notice referred to in paragraph (1) with the Secretary-General upon registration of the Request for arbitration, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice. (4) The Secretary-General shall transmit the notice of third-party funding and any notification of changes to the information in such notice to the parties and to any arbitrator proposed for appointment or appointed in a proceeding for purposes of completing the arbitrator declaration required by Rule 19(3)(b). (5) The Tribunal may order disclosure of further information regarding the funding agreement and the non-party providing funding pursuant to Rule 36(3) if it deems it necessary at any stage of the proceeding." Document available at https://icsid.worldbank.org/en/Documents/WP_4_Vol_1_En.pdf.

50 Michele Potestà and Marija Sobat, Frivolous claims in international adjudication: a study of ICSID Rule 41(5) and of procedures of other courts and tribunals to dismiss claims summarily, Journal of International Dispute Settlement, Volume 3, Issue 1 p.137-168 (March 2012).

51 See Article 21(1) of the India Model BIT (2015) states that: "Without prejudice to a Tribunal's authority to address other objections, a Tribunal shall address and decide as a preliminary question any objection by the Defending Party that a claim submitted by the investor is: (a) not within the scope of the Tribunal's jurisdiction, or (b) manifestly without legal merit or unfounded as a matter of law."

52 The covered sectors are: (i) oil & gas exploration, extraction, refining, transportation, distribution, or sale, (ii) supply of power generation (iii) telecommunications services (iv) transportation services, and (v) the ownership or management of roads, railways, bridges, or canals.

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59 Id., and Tecnicas Medioambientales Tecmed SA v. United Mexican States (ICSID Case No. ARB(AF)/00/2) (Award of 29 May 2003).

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