

ALTERNATIVES TO INVESTOR-STATE DISPUTE SETTLEMENT

AN AFRICAN PERSPECTIVE

Won Kidane



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ABSTRACT

The investor–state dispute settlement system (ISDS) has served as an alternative to domestic legal processes in the post-colonial era, particularly in less developed countries. Although the countries whose legal processes ISDS has supplanted have over the decades begrudgingly acquiesced, they have never appreciated the increasing interference in their policy spaces by arbitral tribunals constituted largely of a limited pool of specialised jurists from the Global North. As the excesses of these tribunals have begun to encroach on the policy spaces of the more advanced economies of the Global North, the foundations of their mandate and the nature of the legal constraints of their processes have increasingly come under closer and public scrutiny. That, in turn, has resulted in sovereign actions of renunciation and new proposals to modify or even replace the existing system. Many developing countries – ranging from India to South Africa – have taken dramatic measures in this regard. This paper evaluates current trends regarding the ISDS system and provides a summary of proposals that developing countries, particularly African countries, may consider in their reform efforts.

AUTHOR

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INTRODUCTION

Considered a profound aberration under classical public international law, the investor–state dispute settlement (ISDS) system was essentially invented to avoid parochialism and bridge a perceived maturity gap in judiciaries around the world. Preeminent among the assumptions that underpinned ISDS from its inception was the belief that domestic justice for foreign investors from the Global North in the Global South would be inadequate, and as such it required moderation and even monitoring by the home state of the investor. Because the architectural design of such moderation emerged under the stewardship of the dominant economic powers of the time (most of which had enjoyed the privilege of colonial means of protection of capital), the imbalance embedded in ISDS seemed natural to the designers.

ISDS thus forms part of what is called the ‘gradual legalisation’ of North–South relations.¹ Developing countries’ chronic dissatisfaction with ISDS has its roots in the underlying assumption that their legal systems and processes are deficient,² and

1 The term ‘gradual legalisation’ was first used in this context in Dezalay Y & BG Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, *Chicago Series in Law and Society*. Chicago: Chicago University Press, 1996, p. 64.

2 See, for example, Sornarajah M, *The International Law on Foreign Investment*, 3rd ed. Cambridge: Cambridge University Press, 2010, 19.

that these must be supplanted by a legal system run by largely Northern jurists from Northern capitals.³ In that sense, ISDS could be perceived as an interim or stopgap measure curiously analogous to the principle of extraterritoriality codified in the unequal treaties of the 19th century.⁴

Just as historical circumstances and the variability of the accompanying power hierarchy discouraged the widespread use of the principle of extraterritoriality, emerging economic realities⁵ and the resulting contemporary transnational

Developing countries' chronic dissatisfaction with ISDS has its roots in the underlying assumption that their legal systems and processes are deficient, and that these must be supplanted by a legal system run by largely Northern jurists from Northern capitals

economic dynamism in both the North and the South, coupled with ISDS's own structural flaws, are now calling into question the wisdom of its essential design. Once praised as a brilliant legal innovation, ISDS faces an acrimonious reality check.

Although ideological opposition to the ISDS system is as old as the system itself, the current dissatisfaction is nothing less than extraordinary, as it is coming from all

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- 3 The words of Bolivia's representative during the World Bank's consultative meeting on the draft International Convention for the Settlement of Investment Disputes (ICSID) on 3 February 1964 offer an excellent example of the ideological opposition that the system faced from its inception: 'The sovereignty of a state could not be subordinated to the authority of an international institution without being seriously impaired ... those responsible for preparing the draft had failed to appreciate its adverse effects. Thus the bank itself seemed to be displaying a lack of confidence in the institutions of the countries wishing to attract foreign capital.' See ICISD (International Center for the Settlement of Investment Disputes), 'History of the Convention: Documents Concerning the Origin and Formulation of the Convention', 1968, p. 305.
 - 4 The notion of extraterritoriality is described in Lipson C, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries*. Berkeley: University of California Press, 1985, pp. 13–14 ('foreign firms "conserved their nationality" ... and were governed according to the laws of their own country'). See also Sornarajah M & J Wang, *China, India and the International Economic Order*. Cambridge: Cambridge University Press, 2010, p. 136: 'With the end of the Opium Wars and treaties such as the Treaty of Nanjing, a system of extraterritoriality was introduced into China making the Chinese writ not applicable to European traders in the port cities. The indignity that was involved in the system could not easily be erased.'
 - 5 See, for example, Sornarajah M & J Wang, *op. cit.*, p. 3. 'The WTO deadlock demonstrates that the conventional wisdom is changing, namely that the powerful developed countries, leaving aside the differences among themselves, can no longer easily impose their common will upon developing countries.'

directions – including from those who had invented the rules.⁶ The opposition of African states has in essence been validated by more than half a century of arbitral jurisprudence that has questioned the validity of their domestic laws and regulations and imposed unwelcome external standards in the name of the interpretation and application of investment treaties, customs and even ‘precedent’.⁷

Frustration with the imposition of external substantive standards has been exacerbated by the lack of African representation in the decision-making process. The most recent publicly available statistics of the World Bank’s International Center for the Settlement of Investment Disputes (ICSID) demonstrate this. While cases against African states constituted more than 20% of the total caseload, the number of African arbitrators was less than 4%. If limited to sub-Saharan Africa, the percentage of arbitrators is 2%;⁸ and that number counts a handful of arbitrators repeatedly. Moreover, Africa almost never hosts ICSID proceedings. Although no data is available for ISDS outside of the ICSID system, such as under the UN Commission on International Trade Law (UNCITRAL) *Arbitration Rules*, there is no reason to assume that the representational deficit is any better elsewhere.

Questions around the validity of the assumption that investment treaties help attract investment also deepened scrutiny of the system.

As a result of these issues, at least three serious concerns have been identified:

- lack of African representation in the pool of arbitrators;
- lack of meaningful checks and balances in decision-making; and
- lack of jurisprudential coherence and discipline.

Specific triggers caused some countries to renounce their investment treaties and leave the ICSID altogether.⁹ Others began deliberating alternatives. This paper focuses on Africa’s consideration of alternative mechanisms in light of recent developments. To contribute to this deliberation in a structured manner, this paper is divided into five sections (with the introduction constituting the first section). The second section outlines relevant recent developments, while the third assesses the various options under consideration. Section four evaluates the alternatives in light of the concerns and priorities of developing countries, and the paper concludes with some thoughts on reform.

6 See European Commission, ‘Investment in TTIP and Beyond: The Path for Reform’, 2015, p. 1, http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF, accessed 15 July 2017 ([‘international investment rules were invented in Europe’]).

7 For a discussion and statistical analysis of ICSID cases involving African states, see generally Kidane W, ‘The China–Africa factor in the ICSID legitimacy debate’, *U. Pa. J. Int’l L.*, 559, 561–62, 2014, p. 35.

8 See ICSID, ‘The ICSID Caseload: Statistics’, 2017-1, charts 6, 12, [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20\(English\)%20Final.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf), accessed 16 July 2017.

9 Bolivia, Ecuador, Venezuela.

RECENT DEVELOPMENTS IN THE INVESTOR–STATE DISPUTE SETTLEMENT SYSTEM

Beginning with Vattel's advocacy of external standards in *The Law of Nations* of 1758¹⁰ and ranging to the 2015 European Commission Concept Paper on investment rules and ISDS,¹¹ European legal thought has influenced doctrine in this area of law in many remarkable ways. A discussion of recent developments in this area must, therefore, necessarily first focus on efforts such as the Transatlantic Trade and Investment Partnership (TTIP),¹² the EU–Canada Comprehensive Economic Trade Agreement (CETA)¹³ and the Trans-Pacific Partnership (TPP),¹⁴ as well as other notable recent developments, namely India's new model bilateral investment treaty (BIT)¹⁵ and South Africa's domestic alternative.¹⁶

TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP

The TTIP is envisioned as a comprehensive economic agreement. It contains perhaps the most developed and most meaningful proposal for reforming the existing ISDS system. The European Commission's concept paper highlights that¹⁷

[i]t has also been argued in the public debate that arbitral tribunals, in interpreting the investment agreements, have only considered the objective of protecting the economic interests of the investors and have not balanced it against the sovereign right of States to legislate in the public interest.

TTIP contains perhaps the most developed and most meaningful proposal for reforming the existing ISDS system

10 Vattel E, *The Law of Nations*, Vol. II, 1758, pp. 8, 104.

11 European Commission, 2015, *op. cit.*, p. 1.

12 Office of the US Trade Representative, 'Transatlantic Trade and Investment Partnership (TTIP)', <https://ustr.gov/ttip>, accessed 24 December 2017.

13 European Commission, 'EU–Canada Comprehensive Economic and Trade Agreement', <http://ec.europa.eu/trade/policy/in-focus/ceta/>, accessed 15 July 2017.

14 Office of the US Trade Representative, 'Trans-Pacific Partnership', <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>, accessed 23 December 2017.

15 India, Ministry of Finance, 'India's Model BIT', http://finmin.nic.in/reports/ModelTextIndia_BIT.pdf, accessed 30 June 2017.

16 South Africa, dti (Department of Trade and Industry), 'The Protection of Investment Act 2015', 23 January 2016, <http://www.thedti.gov.za/editmedia.jsp?id=3630>, accessed 16 July 2017.

17 European Commission, 2015, *op. cit.*, p. 1.

The solution that it proposes is nothing less than revolutionary. The TTIP does not only seek to redefine doctrine and change the structure of decision-making but, more importantly, also seeks to change the decision makers.¹⁸

The European Commission thus proposes to set up a new permanent Investment Court System (ICS).¹⁹

The main elements of the new ICS are:

- a public ICS, composed of a first instance tribunal and an appeal tribunal, to be set up;
- judgements to be made by publicly appointed judges with qualifications comparable to those required for members of permanent international courts such as the International Court of Justice and the WTO Appellate Body;
- the new appeal tribunal to operate on similar principles as the WTO Appellate Body;
- the ability of investors to take a case before the tribunal to be precisely defined and limited to cases such as targeted discrimination on the base of gender, race, religion or nationality, expropriation without compensation, or denial of justice; and
- a government's right to regulate to be enshrined and guaranteed in the provisions of trade and investment agreements.

This builds on the EU's existing approach, which ensures:

- transparent proceedings, open hearings and comments available on-line, as well as a right to intervene for parties with an interest in the dispute;
- an inability to forum-shop;
- quick dismissal of frivolous claims;
- a clear distinction between international law and domestic law; and
- the avoidance of multiple and parallel proceedings.²⁰

18 See *ibid.*, pp. 6–7. 'Currently, arbitrators on ISDS tribunals are chosen by the disputing parties (i.e. the investor and the defending state) on a case-by-case basis. The current system does not preclude the same individuals from acting as lawyers (e.g. preparing the investor's claims) in other ISDS cases. This situation can give rise to conflicts of interest – real or perceived – and thus concerns that these individuals are not acting with full impartiality when acting as arbitrators. The ad hoc nature of their appointment is perceived by the public as interfering in their ability to act independently and to properly balance investment protection against the right to regulate. It has also led to perceptions that this provides financial incentives to arbitrators to multiply ISDS cases.'

19 *Ibid.*, pp. 11–12. 'Therefore, the EU should pursue the creation of one permanent court. This court would apply to multiple agreements and between different trading partners, also on the basis of an opt-in system. The objective would be to multilateralise the court either as a self-standing international body or by embedding it into an existing multilateral organization. Work has already begun on how to start this process, in particular on aspects such as architecture, organisation, costs and participation of other partners.'

20 European Commission, 'Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations', Press Release, 16 September 2015, http://europa.eu/rapid/press-release_IP-15-5651_en.htm, accessed 20 July 2017.

The draft TTIP proposes the establishment of a first instance tribunal in Section 3, Article 9 and an appellate tribunal in Article 10. The first instance tribunal will initially be composed of 15 judges (five from the EU, five from the US and five from third countries²¹) to be selected by a joint committee.²² The members, who need to have expertise in international law, international investment law and international trade law, will be selected for a period of six years with special rules at the beginning to ensure a staggered membership.²³ More importantly, the draft provides the following:²⁴

The Tribunal shall hear cases in divisions consisting of three Judges, of whom one shall be a national of a Member State of the European Union, one a national of the United States and one a national of a third country. The division shall be chaired by the Judge who is a national of a third country.

It also sets up a mechanism to ensure that the selections are ‘random and unpredictable’.²⁵ While the TTIP suggests retaining judges temporarily for a nominal monthly fee to ensure their availability, it envisions that the court will be transformed into a permanent court with permanent members.²⁶

A permanent appeals tribunal with six members is another feature of the TTIP’s design. Members are assigned in the following proportions: two each from the EU and the US, and two from third countries.²⁷ The same rules of qualifications, appointment, retention, remuneration and assignments as the first instance tribunal apply.²⁸ In both cases, either the ICSID or the Permanent Court of Arbitration (PCA) is anticipated to provide secretariat services.²⁹ The most important aspect of the appeals process is the jurisdiction granted to the appeals tribunal. Its jurisdiction is stated as follows:³⁰

Either disputing party may appeal before the Appeal Tribunal a provisional award, within 90 days of its issuance. The grounds for appeal are: (a) that the Tribunal has erred in the interpretation or application of the applicable law; (b) that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation

21 *Ibid.*, countries that are not in the EU.

22 See Office of the US Trade Representative, ‘Transatlantic Trade and Investment Partnership (TTIP)’, *op. cit.*, Section 3, Article 9.

23 *Ibid.*, Section 3, Article 9(2-5).

24 *Ibid.*, Section 3, Article 9(6).

25 *Ibid.*, Section 3, Article 9(7).

26 *Ibid.*, Section 3, Article 9(11-15).

27 *Ibid.*, Section 3, Article 10.

28 *Ibid.*, Section 3, Article 10(2-15).

29 *Ibid.*, Section 3, Article 9(16) and 10(16).

30 *Ibid.*, Section 3, Article 29(1).

of relevant domestic law; or, (c) those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b).

The court can correct not only errors of law but also errors of fact, as long as they are ‘manifest’, in addition to all the other annulment grounds under the ICSID Convention.³¹ This is unprecedented, and a manifestation of the frustration with the existing system. Additional checks and balances include strict rules on ethics that prohibit the revolving door phenomenon of arbitrator–counsel–arbitrator,³² the dismissal of unfounded claims,³³ transparency³⁴ and even third-party intervention.³⁵ All of these measures are designed to fundamentally change the way investment arbitration has developed over the last half-century.

EU-CANADA COMPREHENSIVE ECONOMIC TRADE AGREEMENT

CETA is also a comprehensive economic partnership agreement. Section F, articles 8.18 to 8.45, contains detailed rules on ISDS. Its most notable features include the creation of first instance and appellate tribunals. CETA defers the possibility of the establishment of an investment court system for a multilateral arrangement³⁶ but sets up a tribunal of 15 jurists (five from the EU, five from Canada, and five from third countries).³⁷ A panel of three, with a neutral chair selected by a CETA joint committee, ordinarily hears each case, unless the parties agree on a sole arbitrator.³⁸ If appointments are not made timely, the secretary general of the ICSID is given the authority to do so. The ICSID also serves as the secretariat. In addition, the ICSID Rules or the Additional Facility Rules govern unless the parties choose the UNCITRAL Rules or other procedural rules.³⁹

31 See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 17 UST 1270, TIAS 6090, 575 UNTS 159 (entry into force 10/14/1966), art. 52: ‘(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.’

32 Office of the US Trade Representative, ‘Transatlantic Trade and Investment Partnership (TTIP)’, *op. cit.*, Section 3, Article 11(2).

33 *Ibid.*, Section 3, Article 17.

34 *Ibid.*, Section 3, Article 18.

35 *Ibid.*, Section 3, Article 23.

36 European Commission, ‘EU–Canada Comprehensive Economic and Trade Agreement’, *op. cit.*, Article 8.29.

37 *Ibid.*, Article 8.27.

38 *Ibid.*

39 *Ibid.*

CETA also sets up a permanent appellate tribunal with the jurisdiction to ‘uphold, modify or reverse the Tribunal’s award based on: (a) errors in the application or interpretation of applicable law; [and] (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law’.⁴⁰ Enforcement is through either the ICSID or the New York Convention.⁴¹ CETA also adds several safeguards, such as rules on ethics,⁴² transparency⁴³ and dismissal of manifestly unfounded claims.⁴⁴

TRANS-PACIFIC PARTNERSHIP

Although the TPP failed to see the light of day with the election of Donald Trump, it had made ISDS provisions with some proposed improvements. These proposed improvements were by no means revolutionary. The TPP maintained the traditional infrastructure ie, the ICSID, ICSID Additional Facility Rules (with default appointing authority given to the secretary general under 9.21(2)) or UNCITRAL Rules, based on parties’ choice.⁴⁵ Most notably, suggesting a new trend, it spelled out the respondent state’s right to submit counterclaims or even rely on its own claims as a set-off in a proceeding initiated by the investor.⁴⁶ Even more indicative of a new trend was the provision for proceedings to be open to the public.⁴⁷ This was, of course, meant to address the widely held belief that secretly constituted tribunals operating in secret should not be ruling on the wisdom of state regulatory measures.⁴⁸

40 *Ibid.*, Article 8.28.

41 *Ibid.*, Article 8.41.

42 *Ibid.*, Article 8.30.

43 *Ibid.*, Article 8.36.

44 *Ibid.*, Article 8. 32–33.

45 Office of the US Trade Representative, ‘Trans-Pacific Partnership’, *op. cit.*, Article 9.18.

46 *Ibid.*, Article 9.18: ‘2. When the claimant submits a claim pursuant to paragraph 1(a)(i)(B), 1(a)(i)(C), 1(b)(i)(B) or 1(b)(i)(C), 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.’

47 *Ibid.*, Article 9.23: ‘(a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memorials and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 9.22.2 (Conduct of the Arbitration) and Article 9.22.3 and Article 9.27 (Consolidation); (d) minutes or transcripts of hearings of the tribunal, if available; and (e) orders, awards and decisions of the tribunal.’

48 See, for example, Deplama A, ‘Nafta’s powerful little secret: Obscure tribunals settle disputes, but go too far, critics say’, *New York Times*, 11 March 2001, <http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html>, accessed 12 May 2017: ‘Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged. And it is all in the name of protecting the rights of foreign investors under the North American Free Trade Agreement.’

INDIAN’S NEW MODEL BIT

India entered the foray on 14 May 1994 by signing its first BIT with the UK.⁴⁹ Official Indian government sources indicate that since then, India has signed 83 bilateral investment promotion and protection agreements, of which 72 have come into force.⁵⁰ It is also party to 13 additional treaties with investment provisions.⁵¹

India is not a member of the ICSID⁵² but has ratified the UN Convention on Recognition and Enforcement of Foreign Arbitral Award.⁵³ It has also adopted an arbitration law modelled after the UNCITRAL Model Law.⁵⁴ Despite its lack of ICSID membership, India has been named as a respondent state in at least 20 ad hoc investor–state arbitration cases.⁵⁵

As a result of the high number of treaty-based investment claims against it, India announced that it would overhaul its existing BIT regime,⁵⁶ serving notice of

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- 49 See Investment Policy Hub, 'India: Bilateral investment treaties', <http://investmentpolicyhub.unctad.org/IIA/CountryBits/96#iialInnerMenu>, accessed 23 December 2017.
- 50 See India, Ministry of Finance, 'BIPA', <http://dea.gov.in/bipa>, accessed 12 December 2017.
- 51 See Investment Policy Hub, 'International investment agreements', <http://investmentpolicyhub.unctad.org/IIA>, accessed 23 December 2017.
- 52 See ratification status at ICSID (International Centre for Settlement of Investment Disputes), 'Database of member states', <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx>, accessed 12 May 2017. China ratified the ICSID Convention on 7 January 1993. India has never even signed the convention. See *ibid.*
- 53 See ratification status at New York Arbitration Convention, 'Contracting states: List of contracting states', <http://www.newyorkconvention.org/list+of+contracting+states>, accessed 18 July 2017.
- 54 See a list of countries that modelled their arbitration laws after the UNCITRAL Model Law at UNCITRAL, 'Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006', http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html, accessed 18 July 2017.
- 55 See a list of cases and links to the available information at Investment Policy Hub, 'Investment dispute settlement navigator', <http://investmentpolicyhub.unctad.org/ISDS/CountryCases/96?partyRole=2>, accessed 18 July 2017. The earliest case was filed in 2003. India had 10 pending investment claims against it as of October 2016. As to the concluded cases, while one case was concluded through an award in favour of the claimant, the remaining nine were settled. The case that was disposed by a final award is the White Industries case. It is believed to have expressed India's dissatisfaction with the existing arbitral order that the BITs enabled. See *White Industries Australia Limited (Claimant) v. The Republic of India (Respondent)*, Final Award (30 November 2011), <http://investmentpolicyhub.unctad.org/ISDS/Details/378>, accessed 20 July 2017.
- 56 See Singh K & B Ilge, 'India overhauls its investment treaty regime', *Financial Times*, blog post, 15 July 2016, <http://blogs.ft.com/beyond-brics/2016/07/15/india-overhauls-its-investment-treaty-regime/>, accessed 20 July 2017.

termination to 57 countries⁵⁷ and unveiling its own new BIT model text.⁵⁸

In addition to modifying many of the substantive provisions⁵⁹ and adding investor and home state responsibilities,⁶⁰ India's new model BIT also makes significant changes to the dispute settlement provision. The most notable of these are the requirement that domestic judicial remedies must be exhausted or show futility after 'diligent' pursuit,⁶¹ and strict time limits.⁶² It also provides for the dismissal of frivolous claims, ie, those that are 'manifestly without legal merit or unfounded as a matter of law'.⁶³

Once the exhaustion hurdle has been passed, the draft BIT text sets forth detailed provisions on the submission of the claim for arbitration and the constitution of the tribunal. The process is not remarkable. Each side appoints an arbitrator, and the

57 *Ibid.*

58 India first unveiled a draft in March 2015 for comment and consultations. A copy of the draft BIT text is available at MyGov, 'Model text for the Indian bilateral investment treaty', https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf, accessed 21 July 2017. Comments were received from various sources, including the Law Commission of India (LCI). See Hanessian G & K Duggal, 'The final 2015 Indian model BIT: Is this the change the world wishes to see?', *ICISD Review*, 2017, pp. 1–11, n. 6, citing India, Ministry of Law and Justice, LCI, 'Analysis of the 2014 Draft Model Indian Bilateral Investment Treaty', August 2015, Rep No. 260. A significantly modified model was adopted in December 2015. The text is available at India, Ministry of Finance, 'Model text of the Indian BIT', http://finmin.nic.in/reports/ModelTextIndia_BIT.pdf, accessed 4 January 2017. On 16 December 2015 the Press Information Bureau of the Government of India announced that '[t]he Union Cabinet chaired by the Prime Minister Shri Narendra Modi has given its approval for the revised Model Text for the Indian Bilateral Investment Treaty. The revised Indian model text for Bilateral Investment Treaty (BIT) will replace the existing Indian Model BIT. The revised model BIT will be used for re-negotiation of existing BITs and negotiation of future BITs and investment chapters in Comprehensive Economic Cooperation Agreements (CECAs)/ Comprehensive Economic Partnership Agreements (CEPAs) / Free Trade Agreements (FTAs).' See India, Press Information Bureau, 'Model text of the Indian bilateral investment treaty', Press Release, 16 December 2015, <http://pib.nic.in/newsite/PrintRelease.aspx?relid=133411>, accessed 21 July 2017. The officially approved and signed the final Model BIT text is referenced F. No. 26/5/2013-IC, Government of India Ministry of Finance Department of Economic Affairs (Investment Division), Northern Block, New Delhi, Dated 28th, December, 2015. See India, Ministry of Finance, 'Model text of the Indian BIT', *op. cit.*

59 For example, it maintains national treatment but eliminates most favoured nation status. See India, Ministry of Finance, 'India's Model BIT', *op. cit.*, Article 4. It also formulates certain provisions differently. See *ibid.*, Article 3.1: 'No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law through: (i) Denial of justice in any judicial or administrative proceedings; or (ii) fundamental breach of due process; or (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or (iv) manifestly abusive treatment, such as coercion, duress and harassment.'

60 *Ibid.*, articles 11 (anti-corruption and tax liability rules), 12 (corporate social responsibility rules).

61 *Ibid.*, Article 14.3.

62 *Ibid.*, Article 14.4.

63 *Ibid.*, Article. 21.1.

two select the chair. It accords the default appointment authority to the secretary general of the PCA. If he/she happens to be a national of one of the parties, this authority is passed to the president of the International Court of Justice, the vice-president or the next most senior judge, in that order.⁶⁴ The qualifications are limited to expertise, impartiality and independence, regarding which the draft text has added various provisions.⁶⁵

Interestingly, the draft BIT text calls for ICSID arbitration if both parties are members, and for the ICSID Additional Facility if only one party is a member. More realistically, given that India is not a member of the ICSID, it adopts the UNCITRAL Rules and permits the parties to agree on a seat, failing which it gives the tribunal the authority to decide on the seat with preference to a seat in the host country.⁶⁶ The lack of a definitive seat selection in the host country is surprising given all the precautionary measures that the draft text seems to adopt.

Consistent with current trends, the Indian BIT model proposes the establishment of an appellate mechanism.⁶⁷ Its practicability in a bilateral setting is doubtful, to say the least.

SOUTH AFRICA'S DOMESTIC ALTERNATIVE

As far as binding dispute resolution is concerned, the South African Protection of Investment Act⁶⁸ offers access to domestic justice,⁶⁹ but adds the following critical provision, which rethinks the whole investor–state regime:⁷⁰

The government may consent to international arbitration in respect of investments covered by this Act, subject to the exhaustion of domestic remedies. The consideration of a request for international arbitration will be subject to the administrative processes set out in section 6. *Such arbitration will be conducted between the Republic and the home state of the applicable investor.* [emphasis added]

64 *Ibid.*, Article 14.5.

65 *Ibid.*, Article 14.6.

66 *Ibid.*, Article 14.7.

67 *Ibid.*, Article 29. ('The Parties may by agreement or after the completion of their respective procedures regarding the enforcement of this Treaty may establish an institutional mechanism to develop an appellate body or similar mechanism to review awards rendered by tribunals under this chapter. Such appellate body or similar mechanism may be designed to provide coherence to the interpretation of provisions in this Treaty.')

68 South Africa, Protection of Investment Act 2015 (Act 22 of 2015), *Government Gazette*, 606, 39514, 15 December 2015, http://www.gov.za/sites/www.gov.za/files/39514_Act22of2015ProtectionOfInvestmentAct.pdf, accessed 30 July 2017.

69 *Ibid.*, Section 13(4): 'Subject to applicable legislation, an investor, upon becoming aware of a dispute as referred to in subsection (1), is not precluded from approaching any competent court, independent tribunal or statutory body within the Republic for the resolution of a dispute relating to an investment.'

70 *Ibid.*, Section 13(5).

This innocuous-sounding provision effectively gets rid of investor–state arbitration and ostensibly attempts to permit state–to–state arbitration without privity. It is in a way analogous to the investor–state third-party beneficiary formula, which was considered revolutionary at the time because it suddenly made private parties subject to international law. South Africa’s new legislation permits a private investor to grant *locus standi* to the home state, presumably through a simple private contractual instrument. Even assuming that South Africa’s permission in this regard is relevant, it is unclear how and under what circumstances, and on the basis of what substantive rules, the home state might assert a claim on behalf of its investor-citizens against the South African state. It would appear that it is anticipated that the assertion of the investor’s contractual and domestic law rights by the home state will take place without the benefit of an international treaty.

Procedurally, this would appear analogous to a trade dispute settlement, but in trade there is always a substantive treatment rule that the moving state will invoke, alleging that violations thereof have harmed its citizens or its interests. South Africa’s invitation for the home state’s espousal of contractual claims traditionally would fall under the domain of diplomatic protection. It is also reminiscent of the pre-BIT days of self-help and gunboat diplomacy. Through this act South Africa might have taken the most radical action so far. How it will play out in practice remains to be seen.

ASSESSING OPTIONS

DIFFERENT INTERNATIONAL APPROACHES

Although policymakers of developed and developing nations seem to agree on the need to reform the ISDS system, the proposals for reform are not uniform. This lack of uniformity shows not only the varying levels of frustration among countries but also the inherent difficulty of finding a solution. The following section focuses on who is pushing what agenda and why.

Whose efforts?

The TTIP and CETA are quintessential European creations, heralding the doctrinal demise of privatised ISDS. They declare that ISDS, in its ICSID and UNCITRAL formulation, has outlived its usefulness for at least Europe’s relations with the developed world. It is primarily the excesses of privatised justice that have become intolerable to the political leadership of Europe. The arbitral encroachments on sovereignty that began in Africa and moved to the Middle East, South America and Asia began to affect European and North American regulatory regimes in the name of such amorphous legal concepts as indirect expropriation and denial of fair and equitable treatment. The lack of jurisprudential coherence, resulting in conflicting outcomes in the same or similar factual and legal disputes, increased this frustration. The monopoly maintained by a limited pool of arbitrators tolerated for so long, despite developing countries’ complaints, eventually became unbearable

as conflicts of interest spiralled and an ever-increasing number of cases went to arbitration.

As a result Europe began pushing for reform, region by region: the TTIP with the US and CETA with Canada. Both rethink the ISDS system in fundamental ways. These are discussed above, but what is important to note here is that these initiatives leave the status quo of Europe's relationship with the developing world untouched.⁷¹ European investors will still have access to the same old ISDS system, whether it is the ICSID or UNCITRAL, with a limited pool of arbitrators and default appointment authority going to the secretary general of the ICSID and PCA respectively.

Although the core of the existing ISDS apparatus objects to Europe's ISDS reform effort, the TTIP and CETA seem to be sensible steps in the right direction. They seek

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to replace the out-of-control laissez faire privatised justice system with structured, institutionalised and accountable justice. Granted, there are variations in the formulation of the various reform efforts, but the key idea is the establishment of a permanent court system that avoids the unsound economic incentives that have plagued the existing arbitral system for so long. It also provides for appellate discipline, much like domestic justice systems.

Opposition to this idea almost invariably comes from the economic benefactors of the existing system, predicated on a private–private privileged partnership that cannot be easily disrupted, even within the developed world.

71 A notable exception is the EU–Vietnam Free Trade Agreement, January 2016. Comprehensive information about this FTA is available at European Commission, 'EU–Vietnam Free Trade Agreement: Agreed text as of January 2016', <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>, accessed 15 May 2017. The investment chapter is available at European Commission, 'EU–Vietnam Free Trade Agreement: Agreed text as of January 2016', 'Trade in services, investment and e-commerce', http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf, accessed 15 May 2017. The reforms to ISDS contained in this chapter are similar to CETA: 'Article 12(2) part: 2. Pursuant to Article 34(2)(a), the Trade Committee shall, upon the entry into force of this Agreement, appoint nine Members of the Tribunal. Three of the Members shall be nationals of a Member State of the European Union, three shall be nationals of Vietnam and three shall be nationals of third countries.' A footnote to this article reads: 'Instead of proposing the appointment of three Members who have its nationality or citizenship, either Party may propose to appoint up to three Members who have another nationality or citizenship. In this case, such Members shall be considered to be nationals or citizens of the Party that proposed his or her appointment for the purposes of this Article.'

Although it would appear that the US, having never lost an investment claim, was not as offended with ISDS as many others before the TPP was shelved by the Trump administration, the TPP wished to maintain the existing infrastructure, including the World Bank’s ICSID. The new US administration expressly advocates bilateralism over multilateralism. It should get credit for its honesty.

The problems are more pronounced when it comes to developing countries. As indicated above, Europe’s efforts only seek to remedy Europe’s problems. The Indian and South African efforts show that the developing world is also attempting to free itself of the inequities of privatised justice. Unfortunately, however, whether it is because of a lack of resources or simple doctrinal confusion, these efforts do not appear to be as systematic and cogent as the European efforts. The following section assesses the main merits and demerits of the European approach, on the hand, and of the Indian and South African approaches, on the other.

MAIN MERITS/DEMERITS

The merits of the European proposal include the dismantling of a largely unaccountable privatised justice system that is plagued by conflict of interests, unsound economic incentives, and a measure of self-congratulation. Unsurprisingly, this approach is Eurocentric. The proposals, if implemented, seek to regulate largely North–North relations and leave the inherent Northern advantage vis-à-vis the South untouched. It is therefore up to the developing world to seek its own solution to the problem of privatised justice. Yet the reaction from the developing world has so far been less systematic, uncoordinated and even erratic. India and South Africa’s efforts offer good examples.

Battered by no fewer than 20 treaty-based investor claims and at least one major decision that questioned the quality of its domestic justice,⁷² India sought to terminate its investment treaties and unveiled a model BIT. The original model BIT draft faced serious opposition from day one.⁷³ It was rushed, contained unreasonable and unnecessary expressions and terms,⁷⁴ and was largely viewed as a sign of frustration and even incompetence.⁷⁵ India reviewed it without delay and adopted a new model BIT draft.⁷⁶

72 *White Industries Australia Limited (Claimant) v. The Republic of India (Respondent)*, *op. cit.*

73 The Draft Model BIT was released for comment in March 2015. See *MyGov*, *op. cit.*

74 See *ibid.*, Preamble: ‘Reaffirming the right of Parties to regulate Investments in their territory in accordance with their Law and policy objectives including the right to change the conditions applicable to such Investments; and Seeking to align the objectives of Investment with sustainable development and inclusive growth of the Parties.’

75 Comments were received from different sources, including the LCI. See Hanessian G & K Duggal, *op. cit.*

76 See India, Ministry of Finance, ‘Model text of the Indian BIT’, *op. cit.*

In the approved model BIT, India made certain modifications to the ISDS system. The most important of these are the exhaustion of domestic remedies and the possibility of an appellate institutional control. As indicated above, this is not sensible in a bilateral settling because it would mean setting up as many appellate tribunals as there are cases (unless there are repeated claims by investors from the same home state). Experience shows that although it is possible to have multiple claims from the same host country, it is unusual. Therefore, this is not the most economical use of resources. In any case, the proposal is not fully developed.

South Africa's approach is similar to India's in terms of its focus on domestic remedies. However, it goes further than requiring an exhaustion of domestic remedies before accessing ISDS; it gets ride of ISDS altogether. South Africa does, however, reserve the possibility of the home state's espousing the contractual claims of the investor. This approach is, however, more in keeping with diplomatic protection under classic international law than with the improvements to the ISDS system.

As indicated above, the European proposals appear to have greater doctrinal clarity and more comprehensive development than the various ad hoc experimentations by developing countries such as India and South Africa.

LESSONS LEARNED AND RECOMMENDATIONS FOR AFRICA

Developing countries have always viewed ISDS with suspicion. ISDS rests on the assumption that their domestic legal systems and legal processes are underdeveloped and, as such, that they are unable to deliver a fair result. Although there is an element of truth to that suspicion in some parts of the developing world, the blanket solution of outsourcing the administration of justice to Europe and North America is perceived as having swung the pendulum too far in the opposite direction.

Developing countries tend to find themselves strangers in their own cases when arbitrating in Europe or North America. They often appear before all-European or all-Western arbitrators in matters administered by institutions in which they have limited or no representation at all. Over the decades, many developing countries have seen investors exploit their fear of arbitration in inappropriate ways, including through the threat of filing frivolous claims. Many have also felt misunderstood and even structurally disfavoured in arbitral decision-making. For example, numerous BITs give the default arbitral chair appointment to either the ICSID secretary general or the PCA secretary general (when UNCITRAL Rules apply). These choices are often innocuous when made, but carry significant consequences. Although many developing countries do not appreciate the weight of their choices when signing a BIT, they dread being called upon to answer charges of expropriation, denial of fair and equitable treatment, discrimination and such violations of treaty standards before all-Western tribunals. The default appointment authority appears to have been exercised in such a way that considerations of diversity and accommodation for developing countries have not been prominent. For all of these reasons, the quality of justice that has emerged from ISDS in the post-colonial era has been

unsatisfactory and even frustrating to developing countries. Yet their reactions have been isolated, ad hoc, uncoordinated, unsystematic and poorly developed. What must they do now?

The key to a successful reform effort appears to be not allowing a sense of outrage to shape policy, as it seems to have done in India and South Africa. It begins with honouring existing commitments, managing withdrawals according to rules set forth therein, and carefully planning a replacement. The core pillar of such a reform effort must aim at creating a fair and just system, rather than replacing one unjust system with another. That would necessarily mean a combination of proper domestic judicial remedies and genuinely reformed international arbitral justice. The challenge comes from the difficulty of determining the sequencing of processes and the allocation of competence or jurisdiction. These problems may not have a uniform universal solution, at least at this stage. Strong regional efforts may have to create the conditions first.

The EU has offered a European solution to a perceived European problem. This solution includes a standing court system with its own appellate oversight. This is believed to help eliminate the excesses of privatised justice and provide jurisprudential discipline and coherence.

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Because the above merely seeks to regulate the EU's relationship with selected partners, it leaves EU member states' relationship with the developing world largely unaffected. The developing world now has the opportunity to weigh its options. These include waiting until the developed world initiates reform of the system vis-à-vis the developing world, or taking its own reform initiatives. So far, most developing countries have chosen to wait and see. Some have taken the dramatic measure of leaving the ICSID (Bolivia, Ecuador, Venezuela), others have renounced their BITs and came up with new models (India), others have replaced their BITs with domestic legislation (South Africa), and still others have stayed out of the whole fiasco altogether.⁷⁷

77 Brazil is the most notable example of this. Having avoided BITs, Brazil unveiled its own approach to international investment law in 2015 through what it calls the Cooperation and Facilitation of Investment Agreement (CFIA). Its main features are a focus on cooperation, the elimination of ISDS, and ombudsman-type prevention and resolution with state-to-state arbitration reserved as a final course of action. See UNCTAD, Investment Policy Hub, 'Cooperation and Facilitation Investment Agreement between the Federative Government of Brazil and ...', <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4786>, accessed 17 July 2017. Brazil has already signed CIFAs with Angola, Chile, Colombia, Malawi, Mexico and Mozambique. For commentary, see Muniz JP, Duggal KAN & LAA Peretti, 'The new Brazilian BIT on cooperation and facilitation of investments: A new approach', *ICSID Review*, 32, 2, 2017, pp. 404–417.

This fragmentation in the reform efforts of the developing world not only muddies the legal regime but is also becoming a source of confusion and uncertainty, which will eventually have adverse consequences on investment. A few observations could assist the developing world's efforts:

- Isolated domestic remedies only address half the problem. By denying foreign investors access to a non-domestic remedy, the state might have solved its own problem of dissatisfaction with ISDS but it does not resolve the other half of the problem, which had necessitated the creation of the now discredited ISDS system in the first place. The solution might be reforming rather than abolishing the system.
- Any reform effort must be informed by existing reform efforts. A leading example is the TTIP. Developing countries, on a regional basis, could create their own international court system and ask others to sign on to it. For example, an AU–EU Investment Court could follow some of the principles of the TTIP with five AU judges, five EU judges and five judges from other jurisdictions. This is not as politically unfeasible as it might seem. The EU is already doing it with others, while the idea is representational and not inherently abhorrent to other states. It not only remedies Africa's problem of representational deficit but could also help to mature jurisprudence.
- Another possible international court system could be a China–Africa Investment Court, which could have five judges from China, five from Africa and five from other regions, with the same type of appellate system. Such regional efforts could help the devolution of power from traditional centres.
- Whatever treaty instrument creates these mechanisms should also confront the existing doctrinal confusion. The simplest way to handle that would be to properly codify the substantive principles of modern international investment law, adding interpretive tools as recent models such as the TTIP have attempted to do.
- The mechanics of implementing such an effort could be the subject of lengthy deliberations, but the main idea is giving ISDS another chance in a significantly reformed manner. The radical step of an abrupt end to such a system without addressing the underlying problems that necessitated its creation in the first place does not diminish the risk of injustice, it merely shifts it.



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