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A PERPLEXING PARADOX: “DE-STATIFICATION”[†] OF “INVESTOR-STATE” DISPUTE SETTLEMENT?

Becky L. Jacobs*

ABSTRACT

This Essay considers the perplexingly paradoxical demand that states be virtually removed from investor-state dispute settlement (ISDS). It also briefly considers the various critiques of, and possible reforms or adjustments to, existing ISDS systems, particularly those related to the right of state parties to pursue legitimate public policy objectives, such as the protection of public health, safety, the environment or public morals; social or consumer protection; or the promotion and protection of cultural diversity. Also considered are data and details of the involvement of African states in ISDS. The apparent “diversity deficit” pertaining to the participation of African nationals as arbitrators and counsel in investment arbitrations is discussed as are proposals for the inclusion, integration, and utilization of more African nationals into ISDS systems.

INTRODUCTION

If you think that conferences are boring, you clearly did not attend the Atlanta International Arbitration Society’s (AtlAS) Third Annual Conference, *Enhancing Business Opportunities in Africa: The Role, Reality and Future of Africa-Related Arbitration*. The subject of the conference implicated some of the most important and controversial aspects of international arbitration, and the dialogue among attendees reflected that debate. It was, to put it mildly, spirited.

My panel focused on arbitrating with the state—a complicated topic, facets of which were the subject of several panels at the AtlAS conference and which also are being debated in political and academic circles, in the press, and on

[†] This term is derived from the title of an article co-authored by the Honorable Charles N. Brower, a venerated international arbitrator. See Charles N. Brower & Sadie Blanchard, *From “Dealing in Virtue” to “Profiting From Injustice”: The Case Against Re-Statification of Investment Dispute Settlement*, 55 HARV. INT’L L. J. ONLINE 45, 45 (Jan. 28, 2014) [hereinafter Brower & Blanchard, *The Case Against Re-Statification*].

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television as the United States (U.S.) negotiates the Transatlantic Trade and Investment Partnership (TTIP)¹ and the Trans-Pacific Partnership (TPP).² Many critics of international investment agreements, or IIAs, such as these, including U.S. Senator Elizabeth Warren, have focused on their investor-state dispute settlement (ISDS) provisions:

Agreeing to ISDS in th[ese] enormous new treat[ies] would tilt the playing field in the United States further in favor of big multinational corporations. Worse, it would undermine U.S. sovereignty.

ISDS would allow foreign companies to challenge U.S. laws—and potentially to pick up huge payouts from taxpayers—without ever stepping foot in a U.S. court. Here’s how it would work. Imagine that the United States bans a toxic chemical that is often added to gasoline because of its health and environmental consequences. If a foreign company that makes the toxic chemical opposes the law, it would normally have to challenge it in a U.S. court. But with ISDS, the company could skip the U.S. courts and go before an international panel of arbitrators. If the company won, the ruling couldn’t be challenged in U.S. courts, and the arbitration panel could require American taxpayers to cough up millions—and even billions—of dollars in damages.

If that seems shocking, buckle your seat belt. ISDS could lead to gigantic fines, but it wouldn’t employ independent judges. Instead, highly paid corporate lawyers would go back and forth between representing corporations one day and sitting in judgment the next. Maybe that makes sense in an arbitration between two corporations, but not in cases between corporations and governments. If you’re a lawyer looking to maintain or attract high-paying corporate clients,

¹ The TTIP is a very ambitious trade and investment agreement between the United States and the European Union. *Transatlantic Trade and Investment Partnership (T-TIP)*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/ttip> (last visited Oct. 5, 2015). If agreed and implemented, it would be the world’s largest trade pact, covering 800 million people and nearly one-third of all global trade. Michaela Schiessl, *Corporation Carte Blanche: Will US-EU Trade Become Too Free?*, SPIEGEL ONLINE INT’L (Jan. 23, 2014), <http://www.spiegel.de/international/business/criticism-grows-over-investor-protections-in-transatlantic-trade-deal-a-945107.html>.

² The TPP is the free trade agreement amongst the U.S., Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam. *Trans-Pacific Partnership: Summary of U.S. Objectives*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/tpp/Summary-of-US-objectives> (last visited Oct. 5, 2015). It could be a very significant trade agreement for the U.S. as it represents forty percent of world trade and over sixty percent of U.S. exports. Joshua Meltzer, *TPP: What’s at Stake with the Trade Deal?*, BBC NEWS (Apr. 22, 2014), <http://www.bbc.com/news/business-27107349>.

how likely are you to rule against those corporations when it's your turn in the judge's seat?³

This Essay will briefly ponder the rather perplexingly paradoxical demand by proponents that states be virtually removed from investor-state arbitration, with a few thoughts on the impact of this perspective on African States. Caveat: this Essay does not focus on any one aspect of arbitration; it is rather a hodgepodge of reflections and data that pertain to this one particular conundrum that continues to puzzle me.⁴

I. BACKGROUND

As a starting point for my thoughts, I will recount one of the very lively exchanges at the AtlAS conference. After the panel in which I participated concluded, the panel moderator, University of Georgia School of Law's Dean Bo Rutledge, asked, and I paraphrase, how we, the panelists, would advise African States to preserve their ability to pursue public policy objectives when negotiating or renegotiating IIAs such as Bilateral Investment Treaties (BITs)⁵

³ Elizabeth Warren, Editorial, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), http://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html.

⁴ It also will assume some expertise on the part of the reader regarding the many acronyms associated with ISDS and the treaties, documents, and concepts that they represent.

⁵ Bilateral Investment Treaties, or BITs, are agreements between two states that establish a legal framework for private investment by nationals and companies of one country in the other country. In addition to BITs, there are multilateral investment agreements between more than two countries, such as the TPP and TTIP, as well as regional agreements. *See generally* JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* (1st ed. 2010). Most BITs authorize foreign investors from one of the signatory nations to institute arbitral proceedings directly against the other host state treaty party for alleged breaches of the relevant BIT. *See, e.g.*, Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 HARV. INT'L L. J. 1, 2 (2014) [hereinafter Roberts, *State-to-State Investment Treaty Arbitration*]. International arbitral tribunals may, and have, awarded monetary damages against host states, awards that are generally enforceable in domestic courts pursuant to the New York Convention or other regimes, such as the self-implementing ICSID enforcement system. *See generally* Crina Baltag, *Enforcement of Arbitral Awards Against States*, 19 AM. REV. INT'L ARB. 391, 392 (2008). These damage awards can be significant. One extreme example of a potentially economically crippling claim arose in an arbitration pursuant to a BIT between England and the small South American Republic of Guyana. In its 2003 claim, Big Food Group (BFG), a supermarket chain based in the U.K., sought £12 million compensation from Guyana for a debt related to Guyana's nationalization of a sugar business in 1975. Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1, 22–24 (2005). Before it defaulted during a regional economic downturn, Guyana had repaid £6 million of what was an original £13 million debt; following the default, the interest increased the debt to £12 million. *Id.* at 23. There was a large public outcry against BFG's actions: "The group's [BFG's] turnover, at £5.2 billion, dwarfs Guyana's GDP, which stands at £2.15bn. Its government's

or investor-state contracts and/or are drafting domestic investment statutes. My response, which was to suggest that states make explicit exceptions for domestic priorities and/or provide policy-related limitations on investor protections, provoked quite an impassioned and colorful response from several attendees. I will try to reconstruct the gist of some of the relevant dialogue:

Me: Let me start by saying that, while we all have heard the calls for radical reform of the investor-state dispute settlement system, even for its total elimination, I am not among those who believe that drastic measures are required. I also, however, am not among those who staunchly defend every aspect of the field, and there are a number of things I would recommend to African States. First, at a minimum, I would advise these States to more expansively apply the “national interest” principle; perhaps to include language similar to that found in Annex B(4)(b) of the 2012 U.S. Model BIT explicitly recognizing that non-discriminatory regulatory actions designed and applied to protect legitimate public policy objectives do not constitute indirect expropriations or, additively or alternatively, to exclude disputes related to such regulatory actions from arbitration or make them non-justiciable.⁶ States could also expressly provide that all investor protections must be “consistent with” other sovereign objectives and prerogatives, including sustainable development, human rights, environmental protection, etc.⁷ They also could limit the applicability of their agreements and statutes to investors with substantial business

entire annual income is just £120m—and Big Food Group is demanding a tenth of that.” *Id.* Apparently in response to this opposition, BFG dropped its claim. *Id.*

⁶ U.S. DEP’T OF STATE, MODEL BILATERAL INVESTMENT TREATY 41 (2012), <http://www.state.gov/documents/organization/188371.pdf> [hereinafter 2012 U.S. MODEL BIT]. Annex B(4)(b) reads: “Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.” *Id.* I also would advise African States to carefully consider expanding the list of public welfare objectives to include items of particular societal concern to avoid *expressio unius, ejusdem generis* or other interpretive issues. Another suggestion would be that these States carefully define what constitutes an “investment” in investment agreements to avoid surprises in an arbitral process or conflicts with its domestic law. For a thorough discussion of the current practices regarding the definition of investment in international investment agreements and a number of relevant arbitral rulings, see MAHNAZ MALIK, INT’L INST. SUSTAINABLE DEV., BULLETIN #1 DEFINITION OF INVESTMENT IN INTERNATIONAL INVESTMENT AGREEMENTS 1 (2011), http://www.iisd.org/pdf/2009/best_practices_bulletin_1.pdf.

⁷ This is similar to language found in the 2012 U.S. Model BIT. See 2012 U.S. MODEL BIT, *supra* note 6, at 16–18.

interests in both the host and its claimed home state⁸ or otherwise limit investor access to ISDS to specific agreements or protections.⁹

Attendees' Comments:

The claims regarding arbitral interference with state sovereignty are “propagandistic screed.”¹⁰

The data are clear that generally applicable regulatory measures rarely if ever give rise to expropriation, except in situations where a state has failed to honor a commitment made to induce a particular investment.¹¹

Investor-state arbitration benefits developing states, is even-handed and transparent, and offers great deference to states on policy matters.¹²

These positions are espoused by many prominent international arbitrators, practitioners, and scholars. Yet, while these ISDS champions somewhat derisively refer to doubters as “leftist academics [and] anti-globalization groups,”¹³ it is not only members of fringe groups and liberal politicians who

⁸ See, e.g., Agreement Between Canada and the Slovak Republic for the Promotion and Protection of Investments, Can.-Slovak Republic art. XV, July 20, 2010, 2010 Can. T.S. No. E105168.

⁹ Under the current system, foreign investors are able to carefully structure their business arrangements in order to claim favorable investment protections. For example, if their home countries do not maintain an IIA with the desired host state, sophisticated investors may funnel their investments through a business entity formed in a third country with which that host state does maintain an IIA. Alternatively, they might seek to utilize a Most Favored Nation clause in a favorable host state treaty. See, e.g., Julie Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach*, 54 VA. J. INT'L L. 367, 379–80 (2014). Scholar Maupin uses the high profile and very controversial *Philip Morris Asia Ltd. v. Commonwealth of Australia* dispute to illustrate the impact of this structured forum shopping. In that case, Philip Morris, a company incorporated and managed primarily in the U.S., claimed jurisdiction through its Hong Kong subsidiary in its dispute with Australia over that State's Tobacco Plain Packaging Act and associated regulations pursuant to the Hong Kong-Australia BIT. See *Philip Morris Asia Ltd. v. Commonwealth of Austl.*, PCA Case No. 2012-12, Notice of Arbitration (Nov. 21, 2011), <http://www.ag.gov.au/Internationalrelations/InternationalLaw/Documents/Philip%20Morris%20Asia%20Limited%20Notice%20of%20Arbitration%2021%20November%202011.pdf>.

¹⁰ Charles N. Brower & Sadie Blanchard, *What's in a Meme—The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 5 COLUM. J. TRANS'L L. 689, 691 (2014) [hereinafter Brower & Blanchard, *What's in a Meme*].

¹¹ Brower & Blanchard, *The Case Against Re-Statification*, *supra* note †, at 54 n.39 (citing *Methanex Corp. v. United States*, Final Award of the Tribunal on Jurisdiction and the Merits, 44 I.L.M. 1345, pt. IV, ch. D, ¶¶ 7–9 (Aug. 3, 2005); *S.D. Myers v. Canada*, Partial Award, 40 I.L.M. 1408, ¶¶ 281, 285 (Nov. 13, 2000); *Chemtura Corp. v. Canada*, Award, ¶ 266 (Aug. 2, 2010), <http://www.italaw.com/documents/ChemturaAward.pdf>; *Waste Mgmt. v. Mexico*, ICSID Case No. ARB (AF)/98/2, Award, ¶ 98 (Jan. 17, 2000); *Revere Copper & Brass, Inc. v. Overseas Private Inv. Corp.*, 17 I.L.M. 1321, 1331 (Feb. 26, 1980)).

¹² See, e.g., Brower & Blanchard, *The Case Against Re-Statification*, *supra* note †, at 45.

¹³ *Id.*; accord Brower & Blanchard, *What's in a Meme*, *supra* note 10, at 691.

are raising questions about international investor-state arbitration. The U.S. has been further delineating its sovereign policy space in free trade agreements since 2004, and the European Commission has indicated that it will reserve the right of state parties to regulate “through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity” in all current and future E.U. investment negotiations, including the TTIP.¹⁴

Distinguished scholars such as Erwin Chemerinsky, Barbara Black, Martha Field, David Luban, and more than eighty others have written to Congressional leaders to oppose the inclusion of investor-state dispute settlement provisions in the TPP and TTIP.¹⁵ Even the current, and first full-time, Secretary General of the International Centre for Settlement of Investment Disputes (ICSID), Meg Kinnear, has acknowledged that many of the criticisms of the Centre are “thoughtful” and that the ICSID should “listen carefully” and “consider concrete responses.”¹⁶ Similarly, imminent ISDS arbitrators have publicly acknowledged that a vigorous response to criticism of existing models “does

¹⁴ See, e.g., José E. Alvarez, *Why Are We “Re-Calibrating” Our Investment Treaties?*, 4 WORLD ARB. & MEDIATION REV. 143, 143–44 (2010). A 2009 report of a U.S. State Department Advisory Committee recommended that ISDS be replaced with a state-to-state mechanism in U.S. BITs and other trade agreements, or, “[i]f the administration continues to include an investor-state dispute settlement mechanism, investors should be required to exhaust domestic remedies before filing a claim before an international tribunal. That mechanism should also provide a screen that allows the Parties to prevent frivolous claims or claims which otherwise may cause serious public harm.” U.S. DEP’T OF STATE, REPORT OF THE SUBCOMMITTEE ON INVESTMENT OF THE ADVISORY COMMITTEE ON INTERNATIONAL ECONOMIC POLICY REGARDING THE MODEL BILATERAL INVESTMENT TREATY: ANNEXES (Sept. 30, 2009), <http://www.state.gov/e/eb/rls/othr/2009/131118.htm>. The Subcommittee also cautioned that investor protection standards contained in U.S. IIAs should not provide foreign investors with greater rights than those enjoyed by U.S. investors in the United States. *Id.* This Report reflected the “balanced assessment” of a diverse group of members drawn from industry, labor, academia, law firms, and NGOs, many of whom filed accompanying Annexes that expressed their particular individual or group views. *Id.* See also EUROPEAN COMM’N, DRAFT TEXT TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP—INVESTMENT § 2, art. 2 (Sept. 16, 2015), http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf [hereinafter EU DRAFT TTIP]. The Commission’s TTIP draft text also specifies that investment protection provisions shall not be interpreted as a commitment from governments that their legal frameworks will not change; clarifies a number of key provisions, including standards of investment protection and indirect expropriation; and proposes a permanent Investment Court System comprised of a Tribunal of First Instance and an Appeal Tribunal that would replace existing ISDS mechanisms. *Reading Guide to the Draft Text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership*, EUROPEAN COMMISSION (Sept. 16, 2015), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1365>.

¹⁵ See *Investor-State Dispute Settlement Sign On*, ALLIANCE FOR JUST., http://org2.salsalabs.com/o/6539/p/dia/action3/common/public/?action_KEY=19342 (last visited Oct. 5, 2015).

¹⁶ Damon Vis-Dunbar, *Meg Kinnear Elected as Secretary-General of ICSID*, INV. TREATY NEWS (Mar. 3, 2009), <http://www.iisd.org/itn/2009/03/03/meg-kinnear-elected-as-secretary-general-of-icsid>.

not mean that the present system could not be either improved or better adapted to what have turned out to be demands from its implementation in practice.”¹⁷ ISDS has even become popular cultural fodder. The February 15, 2015 episode of *Last Week Tonight with John Oliver* had an eighteen-plus minute segment on Philip Morris’s ISDS legal campaigns involving the tobacco plain packaging legislative efforts in Australia, Uruguay, and Togo.¹⁸

Critics and supporters alike have suggested various possible reforms or adjustments. While the most extreme demand would eliminate ISDS entirely,¹⁹ a plethora of others have been proposed, many of which would involve abrogating, renegotiating, or amending existing investment agreements and treaties; creating new ISDS institutions; reorganizing existing arbitral institutions and structures; or bolstering the independence of system arbitrators.²⁰

In this brief Essay, I will not even begin to restate in detail or even list all of the proposed reforms. However, as examples, some have urged that parties consider or be required to seek mediation or conciliation of their claims prior to submitting them to arbitration.²¹ Other proposals focus on procedural reforms of existing ISDS mechanisms, such as making processes more transparent, establishing statutes of limitations for the filing of claims,

¹⁷ Karl-Heinz Böckstiegel, *Investment Arbitration: Economic Issues and Replies to Challenges*, IBA ARB. NEWS (Int’l Bar Ass’n, London), Feb. 2014, at 30.

¹⁸ See *Last Week Tonight with John Oliver: Big Tobacco’s Still At It* (HBO television broadcast Feb. 15, 2015).

¹⁹ See, e.g., *An Open Letter From Lawyers to the Negotiators of the Trans-Pacific Partnership Urging the Rejection of Investor-State Dispute Settlement*, TTP LEGAL (May 8, 2012), <http://tpplegal.wordpress.com/open-letter/>. Exercising this “nuclear option” is extreme, but it likely would not, as some have warned, leave investors without possible remedies. Investor-state investment contracts, reputation, political and diplomatic pressure, or the host state’s self-interest offer “credible commitment” alternatives for the enforcement of state obligations. See, e.g., Jason Webb Yackee, *Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*, 32 FORDHAM INT’L L. J. 1550, 1571–72 (2009) (focusing on investment contracts); Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 BROOK. J. INT’L L. 405, 444–53 (2008) (citing alternative options for credible commitment).

²⁰ See generally Ahmad Ali Ghouri, *On Genealogy of Proposals to Reform Investor-State Arbitration*, 11 TRANSNAT’L DIS. MGMT. 1, 8 (2014). See also EU DRAFT TTIP, *supra* note 14, § 3(4) (proposing an “Investment Court System”).

²¹ See Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation Into Bilateral Investment Treaty Arbitration*, 18 HARV. NEGOT. L. REV. 71, 113–14 (2013); Jeswald W. Salacuse, *Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 FORDHAM INT’L L. J. 138, 140 (2007). See generally *Investor-State Disputes: Prevention and Alternatives to Arbitration*, U.N. CONF. ON TRADE & DEV. (2010), http://unctad.org/en/docs/diaeia200911_en.pdf.

requiring referrals to state party-established panels for interpretive guidance,²² allowing non-disputing party and amicus interventions,²³ amending the rules or processes of arbitral institutions to require tribunals to consider non-investor rights when deciding investor-state disputes,²⁴ establishing an appellate system at the ICSID, or perhaps expanding the annulment process and the role and authority of ICSID annulment committees.²⁵ More radical institutional reforms have been suggested, such as the creation of a single, consolidated ISDS institution²⁶ or of an international investment court comprised of a bench of full-time, tenured judges with jurisdiction to “apply public law principles when deciding on public interest issues.”²⁷ Alternatively, some have recommended that investor-state disputes involving sensitive matters with public international law implications be referred to the International Court of Justice.²⁸

Many of the reform proposals relate specifically to the arbitrators, their qualifications, the process by which they are selected, the ethical standards to which they should be held, their jurisdiction, their standard of review, the level of deference that they owe the state action at issue, and their final rulings.²⁹ Indeed, much of the distrust with ISDS appears to arise from what some perceive as the moral hazards to which the arbitrators are subject in ISDS.³⁰ One commission report in Australia expressed a number of concerns about investor-state arbitrators, including:

²² UNCTAD IIA, REFORM OF INVESTOR-STATE DISPUTE SETTLEMENT: IN SEARCH OF A ROAD MAP 6 (2013), http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf.

²³ *Id.*

²⁴ Maupin, *supra* note 9, at 424–27.

²⁵ Ghouri, *supra* note 20, at 7.

²⁶ *Id.*

²⁷ *Id.* See also EU DRAFT TTIP, *supra* note 14, § 3(4). Some have questioned the efficacy of such a world investment court to address the very issues that it would be designed to correct: “A World Investment Court, unless carefully designed as more of a political than a judicial organ, would risk further consolidating the law-making functions of [international investment law] experts while diminishing the ability of states to control system outcomes.” Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT’L L. J. 391, 403, 433–34 (2012) [hereinafter Yackee, *Controlling the International Investment Law Agency*].

²⁸ Ghouri, *supra* note 20, at 7.

²⁹ See, e.g., NATHALIE BERNASCONI-OSTERWALDER & DIANA ROSERT, INT’L INST. SUSTAINABLE DEV., INVESTMENT TREATY ARBITRATION: OPPORTUNITIES TO REFORM ARBITRAL RULES AND PROCESSES I, 11–13, 17 (2014) [hereinafter 2014 IISD REPORT]. See also Sergio Puig, *Emergence and Dynamism in International Organizations: ICSID, Investor-State Arbitration, and International Investment Law*, 44 GEO. J. INT’L L. 531, 592–93 (2013).

³⁰ AUSTL. GOV’T PRODUCTIVITY COMM’N, BILATERAL AND REGIONAL TRADE AGREEMENTS 272 (2010), <http://www.pc.gov.au/projects/study/trade-agreements/report>.

Institutional bias and conflicts of interest . . . resulting from the fact that only investors can bring arbitration claims, and the arbitration system relies on investor claims to continue. Further, conflicts of interest can arise in cases where the arbitrator in one case acts as legal counsel in other cases involving the investor.³¹

Arbitrators often simultaneously serve as an expert and as counsel in other investor-state disputes.³² They sometimes also shift back and forth from their private arbitration practices into public service; several reportedly have played official or unofficial governmental roles in the negotiation of the very types of IIAs that they adjudicate or litigate in the private sector.³³ These arbitrators also are influential in the academy, attending academic and professional conferences, producing scholarship, and moving into academia.³⁴

While the individuals who comprise this elite group of arbitrators are highly skilled experts and certainly have the highest ethical standards,³⁵ I do not think it too unreasonable for states, and for their citizens, to debate the propriety of allowing three, non-democratically-elected individuals to decide matters that implicate a sovereign's right to pursue legitimate public policy objectives,³⁶ such as the restructuring of a society's socio-economy, the provision of essential public services, or the maintenance of the very fabric of public order. This is particularly poignant in this context given that ISDS arbitral awards have only limited review mechanisms, either statutorily or judicially, within the affected state or as provided by the relevant arbitral institution's governing documents.³⁷ Given the intersecting stakeholder interests, it is not particularly productive to frame the debate dichotomously as either a strictly "private" or a "public" issue.³⁸ Nor does it, at a minimum, seem appropriate to engage in the debate using pejoratives, insults, or hyperbolic rhetoric to respond to those who question existing paradigms.

³¹ *Id.* at 273.

³² 2014 IISD REPORT, *supra* note 29, at 13.

³³ Yackee, *Controlling the International Investment Law Agency*, *supra* note 27, at 402, 405.

³⁴ *Id.* at 402–03, 405.

³⁵ *See, e.g.*, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 14, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

³⁶ Xavier Carim, *Lessons from South Africa's BITs Review*, COLUM. FDI PERSPECTIVES, Nov. 25, 2013, at 2, http://ccsi.columbia.edu/files/2013/10/No_109_-_Carim_-_FINAL.pdf.

³⁷ Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 788 (2008).

³⁸ *See generally* Maupin, *supra* note 9.

Indeed, a number of states appear to be asking those questions and have decided that the conventional ISDS narrative is not consistent with their developmental priorities.³⁹ Several countries have negotiated trade agreements without investor-state arbitration mechanisms⁴⁰ or have considered withdrawing, or actually have withdrawn, from the ICSID Convention or from individual BITs, including Bolivia, Ecuador, Venezuela,⁴¹ and Nicaragua.⁴² While many have suggested that these actions are based more upon a desire to avoid unpalatable awards rather than upon any genuine distrust of the forum as a fair and impartial one for the resolution of investment disputes, they do signal a growing discontent with ISDS, one not limited to the developing world or to polemical ideologues—the U.S.-Australia Free Trade Agreement excluded any investor-state dispute settlement.⁴³ Perhaps more importantly, a number of significant states for foreign investment such as Brazil and India have yet to accede to one of the most important ISDS treaties, the ICSID Convention.⁴⁴

³⁹ Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT'L L. 825, 846 (2011) [hereinafter Franck, *The ICSID Effect?*].

⁴⁰ Free Trade Agreement, Austl.-U.S., art. 11.16, May 18, 2004, 118 Stat. 919, https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf (providing only for consultations between the parties on developing procedures for investor-state dispute settlement instead of requiring investor-state arbitration of disputes).

⁴¹ See Karen Halverson Cross, *Converging Trends in Investment Treaty Practice*, 38 N.C. J. INT'L L. & COM. REG. 151, 163–64 (2012). Note, however, that a denunciation of the ICSID may not totally foreclose a nation's ISDS arbitration obligations depending upon the provisions of its investments treaties. Rather, it may simply eliminate one potential arbitral forum. Also, while page limits and time are not sufficient to explore the role of custom in this context, some have posited that IIAs, or some clauses thereof, might now be considered custom, which potentially would render these withdrawals, etc. . . . meaningless. See Yackee, *Controlling the International Investment Law Agency*, *supra* note 27, at 429–30 (citations omitted).

⁴² Franck, *The ICSID Effect?*, *supra* note 39, at 846.

⁴³ *Id.* at 846–47.

⁴⁴ For those not familiar with the topic, the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States, commonly referred to as the ICSID Convention, entered into force in 1966 and created the ICSID. See generally ICSID Convention, *supra* note 35. ICSID was “designed to facilitate the settlement of disputes between states and foreign investors [and was] a major step toward promoting an atmosphere of mutual confidence and thus stimulat[ing] a larger flow of private international capital into those countries which wish to attract it.” INT'L BANK FOR RECONSTRUCTION & DEV., REPORT OF THE EXECUTIVE DIRECTORS ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES § 3, ¶ 9 (1965), reprinted in INT'L CTR. SETTLEMENT INV. DISP., ICSID CONVENTION, REGULATIONS AND RULES 40 (2006), https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf. According to its 2014 Annual Report, ICSID has 159 Signatory States, and 150 Contracting States have ratified the Convention. INT'L CTR. SETTLEMENT INV. DISP., ICSID ANNUAL REPORT 7 (2014) [hereinafter ICSID ANNUAL REPORT]. ICSID is “almost synonymous with the field of international investment law.” Puig, *supra* note 29, at 533. While there are many arbitral institutions that arbitrate investor-state disputes, such as the Permanent Court of Arbitration

II. SOME AFRICAN DEVELOPMENTS AND DATA

Within the African continent, South Africa terminated its expiring BITs and is restructuring its investment legislation after conducting a thorough review of its investment policies.⁴⁵ One consideration for this undertaking was the nation's involvement in a very high profile ICSID arbitration, *Foresti v. Republic of South Africa*.⁴⁶ Although not an ICSID Contracting State or Signatory,⁴⁷ South Africa defended a claim by a group of Italian investors under the ICSID Additional Facility Rules regarding the implementation of its Black Economic Empowerment Policy (BEE Policy) in the context of the mining industry.⁴⁸ The investors argued that South Africa's Mineral and Petroleum Resources Development Act effectively expropriated their mineral rights by requiring that a certain percentage of the shares in all mining companies be owned by "historically disadvantaged South Africans."⁴⁹ The claims were brought pursuant to two BITs, one between South Africa and Italy and another between South Africa and the Belgo-Luxembourg Economic Union.⁵⁰

The arbitration garnered international attention for a number of reasons. Of course, much attention was focused on the sensitive political issues attendant to South Africa's post-apartheid efforts to address economic as well as social inequity. However, procedural issues related to the arbitration process itself also were notable. Four non-governmental organizations, two South African and two international, jointly sought to file amicus submissions with the ICSID tribunal to contextualize the public interest issues from both local and

based in The Hague and the London Court of International Arbitration, a significant number of existing investment laws and treaties, estimated to be nearly eighty percent, contain provisions under which state parties consent to submit covered investment disputes to ICSID arbitration. See Franck, *The ICSID Effect?*, *supra* note 39, at 838. As one ICSID official noted, "ICSID [may not be] the *only* institution dealing with investor-state arbitration but simply the 'leader.'" Puig, *supra* note 29, at 579.

⁴⁵ Mohammad Mossallam, *Process Matters: South Africa's Experience Exiting its BITs* 3–4 (Univ. Oxford Glob. Econ. Governance Programme, Working Paper No. 97, 2015), http://www.globaleconomicgovernance.org/sites/geg/files/GEG%20WP_97%20Process%20matters%20-%20South%20Africas%20experience%20exiting%20its%20BITs%20Mohammad%20Mossallam.pdf.

⁴⁶ See generally *Foresti v. Republic of S. Afr.*, ICSID Case No. ARB(AF)/07/1, Award (Aug. 4, 2010), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1651_En&caseId=C90.

⁴⁷ INT'L CTR. SETTLEMENT INV. DISP., 1 THE ICSID CASELOAD—STATISTICS 6 (2015), [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-1%20\(English\)%20\(2\)_Redacted.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-1%20(English)%20(2)_Redacted.pdf) [hereinafter ICSID CASELOAD].

⁴⁸ *Foresti*, *supra* note 46, ¶¶ 64–66.

⁴⁹ *Id.* ¶ 56.

⁵⁰ *Id.* ¶ 1.

international human rights perspectives.⁵¹ The International Commission of Jurists also petitioned to take part in the proceedings⁵² in order to provide international law commentary.

The tribunal granted leave to file written submissions and, despite objections from one of the parties, ordered the redacted disclosure of the parties' key filings to these non-disputing parties (NDPs) prior to the submission of their written arguments, a groundbreaking step in transparency in ISDS procedure.⁵³ While the tribunal did not authorize the NDPs to participate in the hearing, it did invite the parties and the NDPs to provide feedback concerning the procedure adopted for NDP participation in this case and committed to discuss those comments in its final award.⁵⁴

Alas, there was no final award on the merits in the *Foresti* matter. The resolution of *Foresti* is complicated: the parties did not "settle" in the traditional sense. During the pendency of the arbitration, the claimants and South Africa had reached an agreement regarding the contested mineral rights whereby South Africa granted new order mineral rights in exchange for the claimants' commitment to engage in a certain level of business activities in the country and to provide an employee ownership program.⁵⁵ While the claimants did not receive full relief, they sought, but did not receive, South Africa's consent to discontinue the proceedings.⁵⁶ In its Response to the Claimants' Request for Discontinuance, South Africa asked the tribunal to issue a default award solely on the issue of fees.⁵⁷

The tribunal⁵⁸ stated that it was:

[W]illing, and ha[d] been mandated by the parties, to proceed to a decision on the allocation of costs; but it wishe[d] to state

⁵¹ *Id.* ¶ 25. See INT'L CTR. SETTLEMENT INV. DISP., SCHEDULE C ARBITRATION (ADDITIONAL FACILITY) RULES arts. 27, 35, 39, 41(3), in ICSID ADDITIONAL FACILITY RULES (2006), https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/AFR_English-final.pdf.

⁵² E-mail from Eloise M. Obadia, Sec'y of the Tribunal, ICSID, to Jason Brickhill, Legal Res. Ctr., and Dr. Carlos Lopez, Senior Legal Officer, Int'l Comm'n of Jurists (Oct. 5, 2009), <http://www.italaw.com/sites/default/files/case-documents/ita0334.pdf>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Foresti*, *supra* note 46, ¶¶ 79–82.

⁵⁶ *Id.*

⁵⁷ *Id.* ¶ 83.

⁵⁸ Professor Vaughan Lowe, QC (President of the Tribunal); Judge Charles N. Brower; and Mr. Joseph Matthews comprised the panel. Professor Lowe is a British national, and Judge Brower and Mr. Matthews are U.S. nationals. See *id.* ¶ 5.

in the plainest possible terms that the resolution of this dispute cannot be understood in terms of success or failure for either side, but only in terms of the ultimate success of all parties in their struggle to find a fair, viable structure for the future of this particular part of the South African economy.⁵⁹

After a discussion of the parties' arguments regarding fees and costs, the tribunal, in 2010, awarded €400,000 to South Africa in respect of such fees and costs and dismissed all claims with prejudice.⁶⁰

Following this experience, South Africa engaged in an exhaustive three-year review of its investment policies, legislation, and agreements. The conclusion suggested that, as it was then configured, the system subjected "matters of vital national interest to unpredictable international arbitration that may constitute direct challenges to legitimate, constitutional and democratic policy-making."⁶¹ As a result of this conclusion, South Africa began to legally terminate its expiring BITs.⁶² It also has proposed that both domestic and foreign investment be addressed in domestic legislation in the form of the Promotion and Protection of Investment Bill 2013, a draft of which was released for public comment in November 2013.⁶³ The most current version of this legislation reportedly introduces a provision pursuant to which the government may consent to international state-to-state arbitration after exhaustion of domestic remedies.⁶⁴

While some have criticized parts of the process by which South Africa terminated its BITs,⁶⁵ it moved deliberately and with full transparency as it analyzed and debated its engagement in ISDS. Zimbabwe, on the other hand,

⁵⁹ *Id.* ¶ 113.

⁶⁰ *Id.* ¶ 133.

⁶¹ Carim, *supra* note 36, at 1.

⁶² BITs with sunset or survival clauses would continue to offer protection to covered investors for the specified time periods. While, despite the turmoil created by Zimbabwe's actions within the Southern African Development Community (SADC), some have posited that South Africa's obligations under the SADC Protocol on Trade and Investment, which, *inter alia*, requires that Member States allow foreign investors access to international arbitration, also might offer protection beyond that provided by the draft Promotion and Protection of Investment Bill. See Chantelle Benjamin, *Treaty Could Provide Investor Protection*, MAIL & GUARDIAN (Nov. 1, 2013), <http://mg.co.za/article/2013-11-01-00-treaty-could-provide-investor-protection>.

⁶³ Promotion and Protection of Investment Bill, GN 1087 of GG 36995 (1 Nov. 2013), <http://www.tralac.org/files/2013/11/Promotion-and-protection-of-investment-bill-2013-Invitation-for-public-comment.pdf>.

⁶⁴ See, e.g., Peter Leon, *Amended Bill Still Takes SA out of Step with Rest of World*, BUS. DAY LIVE (Aug. 6, 2015), <http://www.bdlive.co.za/opinion/2015/08/06/amended-bill-still-takes-sa-out-of-step-with-rest-of-world>.

⁶⁵ See Mossallam, *supra* note 45, at 17.

took an entirely different approach. As has been reported in detail in at least one article published in the *Emory International Law Review*,⁶⁶ Zimbabwe on several occasions has decided simply to ignore inconvenient, unfavorable awards.⁶⁷ For example, in *Funnekotter v. Zimbabwe*, an ICSID tribunal awarded damages to a group of Dutch farmers whose land was repossessed by the Zimbabwe government.⁶⁸ As far as I can ascertain, these farmers have yet to collect their award. They unsuccessfully have sought to satisfy their judgment by suing various Zimbabwean commercial entities in the U.S. to access their U.S. assets⁶⁹ and by approaching the European Court in Belgium to seize U.S. \$45 million worth of diamonds owned by Zimbabwean entities that were in Antwerp to be auctioned.⁷⁰

Zimbabwe's resistance to paying international arbitral awards extends beyond the ICSID to the Southern African Development Community (SADC), an organization working toward regional economic integration amongst its fifteen Southern African Member States: Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.⁷¹ The SADC Treaty created a Tribunal⁷² and developed a Protocol that established that body's jurisdiction over controversies involving the interpretation or application of the SADC Treaty;

⁶⁶ See Drew F. Cohen, *A President, an International Tribunal and a Band of Farmers Walk Into Constitutional Court—The Last Laugh: Mike Campbell v. The Government of the Republic of Zimbabwe*, 28 EMORY INT'L L. REV. 29, 34–35 (2014).

⁶⁷ In addition to Zimbabwe, there are a number of states (e.g., Russia, Kazakhstan, Kyrgyzstan, Congo, Liberia, and Senegal) that refused to voluntarily pay one or more investment arbitration awards. Charles B. Rosenberg, *The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards*, 44 GEO. J. INT'L L. 503, 508 (2013). Most nations do honor their obligations. Bolivia and Ecuador, for example, have honored awards rendered against them, despite their decisions to withdraw from the ICSID Convention and, in the case of Ecuador, from several investment treaties. *Id.* at 509. Argentina did not explicitly refuse to pay the numerous awards against it, but it took the very controversial position that that it was not required to pay adverse ICSID awards until the prevailing foreign investor initiated formal proceedings in an Argentine court. See Leon E. Trakman, *The ICSID Under Siege*, 45 CORNELL INT'L L. J. 603, 648 (2013).

⁶⁸ See generally *Funnekotter v. Republic of Zimb.*, ICSID Case No. ARB/05/6, Award, ¶ 132 (Apr. 22, 2009), <http://www.italaw.com/documents/ZimbabweAward.pdf>.

⁶⁹ See generally *Funnekotter v. Republic of Zimb.*, No. 09 Civ. 8168 (CM), 2011 WL 666227 (S.D.N.Y. Feb. 10, 2011).

⁷⁰ Itai Mazire, *Zim Wins U.S \$45 Million Diamonds Case*, ALLAFRICA (Dec. 8, 2014), <http://allafrica.com/stories/201412080992.html>.

⁷¹ See *SADC Overview*, SOUTHERN AFR. DEV. COMMUNITY, <http://www.sadc.int/about-sadc/overview/> (last visited June 11, 2015).

⁷² Treaty of the Southern African Development Community arts. 9, 16, Aug. 17, 1992, http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf.

the application or validity of other Community documents and actions of the Community institutions; disputes between Member States; and disputes between natural or legal persons and States after exhaustion of domestic legal remedies.⁷³

In a case somewhat similar to *Funnekotter*, a group of white farmers sought to prevent the Zimbabwean government from evicting them from their land, seeking relief both in the domestic courts of Zimbabwe and in the newly constituted SADC Tribunal.⁷⁴ The claimants failed in the Zimbabwean system,⁷⁵ but they secured an award from the SADC Tribunal, which concluded, generally, that the Zimbabwean government had breached its obligations under the SADC Treaty by denying the claimants the “right of access to the courts and the right to a fair hearing” and by acting in a manner that “constitutes indirect discrimination or de facto or substantive inequality.”⁷⁶ The Tribunal ordered Zimbabwe to compensate those claimants who had already been removed from their property and to take no action against those still in residence. Zimbabwe ignored its payment obligations, and the claimants’ farms were invaded.⁷⁷

The SADC Tribunal’s jurisdiction also was a victim of Zimbabwe’s unwillingness to pay the award in this claim. Zimbabwe challenged the legitimacy of the Tribunal, and the body was suspended.⁷⁸ It was not reconstituted until 2014 with a limited mandate—it no longer has jurisdiction over individual investor claims against Member States, only over claims between Member States.⁷⁹

Zimbabwe is the outlier, of course. On the whole, African countries have accepted IIAs and ISDS. Several have even established arbitration centers in

⁷³ Protocol on Tribunal in the Southern African Development Community arts. 14–15 (Aug. 7, 2000), http://www.sadc.int/files/1413/5292/8369/Protocol_on_the_Tribunal_and_Rules_thereof2000.pdf.

⁷⁴ For a thorough description of the convoluted procedural and substantive history of this case, see Daniel Hemel & Andrew Schalkwyk, *Tyranny on Trial: Regional Courts Crack Down on Mugabe’s Land “Reform”*, 35 YALE J. INT’L L. 517, 520 (2010). See also Cohen, *supra* note 66.

⁷⁵ *Mike Campbell (PvT) v. Minister of Nat’l Sec. Responsible for Land, Land Reforms & Resettlement* (Jan. 22, 2008), ZWSC 1, 57–61.

⁷⁶ *Id.* at 51.

⁷⁷ See *Out With Those White Farmers*, ECONOMIST (Sept. 17, 2009), http://www.economist.com/world/middleeast-africa/displaystory.cfm?story_id=14465671.

⁷⁸ See generally Laurie Nathan, *The Disbanding of the SADC Tribunal: A Cautionary Tale*, 35 HUM. RTS. Q. 870 (2013).

⁷⁹ See Laurence R. Helfer & Karen J. Alter, *Legitimacy and Lawmaking: A Tale of Three International Courts*, 14 THEORETICAL INQUIRIES L. 479, 489 (2013).

order to offer alternative venues for the ever-increasing numbers of ISDS and other international commercial arbitrations, many of which involve African parties, both state and private.⁸⁰ Representatives and participants from some of these fora participated in an AtlAS conference panel dedicated to the topic: *Africa Rising? Prospects for the Emerging African Arbitral Venues*. The panel discussed the Lagos Court of Arbitration and the International Centre for Arbitration and Mediation in Nigeria; the Common Court of Justice and Arbitration in Cote D'Ivoire; the Arbitration Foundation of South Africa, headquartered in South Africa; the Kigali International Arbitration Centre in Rwanda; the Cairo Regional Centre for International Commercial Arbitration in Egypt; and the Mauritius International Court of Arbitration, in partnership with the London Court of International Arbitration, in Mauritius. Also mentioned was the plan by the Law Society of Kenya to create an International Arbitration Center in Nairobi.⁸¹

Yet, despite these options, investment disputes involving African States typically are arbitrated in Washington D.C., Paris, or London⁸² with tribunals comprised of three arbitrators, who also typically are Western, and they are represented by predominantly Western law firms.⁸³

Why do African nations appear far more often as respondents than their citizens do as arbitrators in investment arbitrations? Using 2014 ICSID data as a sample, seventy percent of ICSID arbitrators are from Western Europe and North America; a mere two percent are from Sub-Saharan Africa.⁸⁴ Compare that with the claims data: one percent of ICSID cases involved Western European states as host state defendants, yet more than sixteen percent of all ICSID cases involved African State respondents.⁸⁵ Of the 148 individual arbitrator appointments made by the parties and by ICSID in 2014, only three were nationals of countries from Sub-Saharan Africa.⁸⁶ The data are similar in

⁸⁰ See, e.g., Uche Ewelukwa Ofodile, *Africa and International Arbitration: From Accommodation and Acceptance to Active Engagement*, 4 TRANSNAT'L DISP. MGMT. 1, 23–39 (2015).

⁸¹ For materials from the AtlAS conference *Enhancing Business Opportunities in Africa: The Role, Reality and Future of Africa-Related Arbitration*, see *Conference Panel Materials*, ATL. INT'L ARB. SOC'Y, <http://arbitrateatlanta.org/events/atlas-conference-on-africa-related-international-arbitration-nov-4-5-2014-atlanta/conference-panel-materials/> (last visited Oct. 5, 2015).

⁸² Won Kidane, *The China-Africa Factor in the Contemporary ICSID Legitimacy Debate*, 35 U. PA. J. INT'L L. 559, 596 (2014).

⁸³ See *id.*; see also ICSID CASELOAD, *supra* note 47, at 18.

⁸⁴ ICSID CASELOAD, *supra* note 47, at 18.

⁸⁵ Kidane, *supra* note 82, at 562–63, 572–73.

⁸⁶ ICSID ANNUAL REPORT, *supra* note 44, at 26.

other arbitral institutions: African arbitrators are not always appointed even in arbitral institutions located in Africa.⁸⁷ To quote one observer, “[a]rbitration is dominated by a few aging men, many of whom pioneered the field. In the words of Sarah Francois-Poncet of Salans, the usual suspects are ‘pale, male, and stale.’”⁸⁸ This group also has been referred to pejoratively as an invisible college, a mafia, a cartel, and a club.⁸⁹ These derogatory terms do not advance the discussion, but the criticisms are not without some basis: one study reported that “just twelve arbitrators have sat on a majority of ICSID tribunals.”⁹⁰

States are partly responsible for this disturbing situation. Pursuant to Article 13 of the ICSID Convention, each Contracting State is entitled to designate up to four persons to each institutional-level Panel, i.e., ICSID’s official Panel of Conciliators and Panel of Arbitrators, from which selections are made in individual claims.⁹¹ Yet, as of 2013, only 108 of the 158 ICSID Contracting States had availed themselves of this entitlement,⁹² and many of these nominations were arbitrators who were not nationals of the nominating State.

Commentators have recounted the many quite rational explanations for why this might be so. A common justification is that international arbitration is

⁸⁷ See Ofodile, *supra* note 80, at 5.

⁸⁸ Michael D. Goldhaber, *Madame La Presidente: A Woman Who Sits as President of a Major Arbitral Tribunal is a Rare Creature. Why?*, 1 TRANSNAT’L DISP. MGMT. 1, 1–2 (2004).

⁸⁹ Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 68 n.110 (2010).

⁹⁰ Yackee, *Controlling the International Investment Law Agency*, *supra* note 27, at 406 (citing José Augusto Fontoura Costa, *Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields*, 1 OÑATI SOCIO-LEGAL SERIES 11–12 (2011)). Another study identified fifty-two individuals with a total of 1,072 ISDS appointments between them, representing fifty-four percent of appointments in all of the reviewed, publicly-reported arbitral results from multiple fora. Robert Kovacs & Alex Fawke, *An Empirical Analysis of Diversity in Investment Arbitration: The Good, the Bad and the Ugly*, 4 TRANSNAT’L DISP. MGMT. 1, 9–10 (2015). While the authors claim that their analysis reveals that these fifty-two ISDS arbitrators “boast[] impressive diversity” in several respects, such as professional experience, legal tradition, language skills, and public international law expertise, they also admit that “the situation appears grave” as to gender and low-income country representation. *Id.* at 26.

⁹¹ ICSID Convention, *supra* note 35, arts. 12–16. State designees need not be nationals of the Contracting State. *Id.* § 13(1).

⁹² Chiara Giorgetti, *Is the Truth in the Eyes of the Beholder? The Perils and Benefits of Empirical Research in International Investment Arbitration*, 12 SANTA CLARA J. INT’L L. 263, 274 n.63 (2014) [hereinafter Giorgetti, *Is the Truth in the Eyes of the Beholder?*] (citing INT’L CTR. FOR SETTLEMENT INV. DISPUTES, MEMBERS OF THE PANELS OF CONCILIATORS AND OF ARBITRATORS 3–5 (2013), <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%2010%20-%20latest%20-%20Dec%2019%202014.pdf>).

an Anglo-European institution with “roots in the economic and legal imbalances between Anglo-European and non-Anglo-European countries.”⁹³ Relatedly, one scholar has opined that “the crisis of legitimacy of arbitration and ADR in Africa” has contributed to the underrepresentation of African arbitrators in ISDS.⁹⁴ A perception that arbitration infrastructure is weak in the continent lingers despite recent advances.⁹⁵

Another factor suggested is the geography, physical and political, of Africa.⁹⁶ The continent is enormous, and borders are restrictive, often making travel expensive with convoluted routings. Further, disparate legal systems and customs exist within the continent.⁹⁷ Based upon the contribution of these factors, African business and legal professionals often have closer ties with their U.S. or European counterparts than with fellow African professionals.⁹⁸

While English and French are widely used on the continent, it is reported that there are over 2,000 languages spoken in Africa,⁹⁹ with some 1,500-2,000 “official” languages in the African Union.¹⁰⁰ Accordingly, costly translation expenses and communication barriers certainly will influence arbitrator selection.¹⁰¹ Continental cultural understandings of familial and social relationships also may implicate conflict rules for arbitrators, as can the perception of rampant corruption in matters of business.¹⁰²

A lack of experience amongst African arbitrators is one of the most reflexively quoted excuses for the lack of arbitrator diversity, and, given that prior service as an arbitrator appears to be the most important qualification for arbitrator selections,¹⁰³ likely is one of the most significant factors contributing to the lack of diversity amongst ISDS arbitrators. This, however, is somewhat

⁹³ Courtney Dolinar-Hikawa, *Beyond the Pale: A Proposal to Promote Ethnic Diversity Among International Arbitrators*, 4 TRANSNAT'L DISP. MGMT. 1, 5 (2015).

⁹⁴ See Ofodile, *supra* note 80, at 1.

⁹⁵ *Id.* at 5.

⁹⁶ See generally Paul Ngotho, Fellow, Chartered Inst. of Arbitrators, Challenges Facing Arbitrators in Africa, Presentation at the East Africa International Arbitration Conference (July 28–29, 2014), http://www.ngotho.co.ke/assets/challenges.norfolk_july2014.pdf.

⁹⁷ Ofodile, *supra* note 80, at 10.

⁹⁸ Ngotho, *supra* note 96, at 3–5.

⁹⁹ *Official and Spoken Languages of African Countries*, ONE WORLD NATIONS ONLINE, http://www.nationsonline.org/oneworld/african_languages.htm (last visited Oct. 5, 2015).

¹⁰⁰ *Id.*

¹⁰¹ Ngotho, *supra* note 96, at 3.

¹⁰² *Id.* at 3–5.

¹⁰³ Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957, 967–68 (2005).

tautological—how can an arbitrator gain experience without being appointed or selected to arbitrate? It also begs the question as to what “experience” is necessary? One renowned arbitrator opined that a qualified investment arbitrator must have experience with substantive investment law, international public law, and arbitration proceedings; must be impartial, independent, and sensitive to economic, social, and cultural differences; must have good health and sufficient time; must be competent to manage facts and numbers; and must understand that arbitration is a service industry.¹⁰⁴ Given the large number of excellent African legal and other professionals, individuals who participate at the highest levels of their fields globally, the “lack of experience” excuses ring rather hollowly.

Regardless of the seemingly rational explanations for this situation, concerns about this issue are not new ones. African State representatives raised the issue of cultural competence and sensitivity during the African legal consultative meeting regarding the draft text of the ICSID.¹⁰⁵ However, the final text of the ICSID Convention requires only that arbitrators be individuals of “high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.”¹⁰⁶ The only references pertaining to arbitrator selection that might be considered even modestly related to diversity or cultural competence emphasize “the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.”¹⁰⁷

Yet, despite this textual silence, the “diversity deficit”¹⁰⁸ in practice has not gone unnoticed,¹⁰⁹ and, despite numerous attempts to quantify results or

¹⁰⁴ Albert Jan van den Berg, *Qualified Investment Arbitrators? A Comment on “Arbitrators in Investment Arbitrations”*, in *THE PRACTICE OF ARBITRATION: ESSAYS IN HONOUR OF HANS VAN HOUTTE* 53, 54–56 (Patrick Wautelet, Thalia Kruger & Govert Coppens eds., 2012).

¹⁰⁵ See, e.g., Kidane, *supra* note 82, at 590–91 (citing INT’L CTR. FOR SETTLEMENT INV. DISPUTES, CONSULTATIVE MEETING OF LEGAL EXPERTS: SUMMARY RECORD OF PROCEEDINGS (Apr. 30, 1964), *reprinted in* 2 *HISTORY OF ICSID CONVENTION* 236, 266 (1968)).

¹⁰⁶ ICSID Convention, *supra* note 35, art. 14, ¶ 1.

¹⁰⁷ *Id.* ¶ 2.

¹⁰⁸ Kidane, *supra* note 82, at 579. This “diversity deficit” is not limited to national or racial concerns. There are data indicating that, as of May 2010, a total of 247 individuals were appointed as arbitrators, and only ten of these were women, or four percent. In ICSID arbitrations, 75% of the 5.63% of female arbitrator appointments went to two women, Brigitte Stern and Gabrielle Kaufmann-Kohler, lowering even more the general appointment rate of women. See, e.g., Giorgetti, *Is the Truth in the Eyes of the Beholder?*, *supra* note 92, at 270–71 (citing Gus Van Harten, *The (Lack of) Women Arbitrators in Investment Treaty Arbitration*, in

present empirical analyses,¹¹⁰ difficult questions remain unanswered as to the impact of the “cultural barrier that the Africans face when appearing before tribunals composed largely of Western arbitrators represented by counsel and firms who must necessarily share the judges’ cultural backgrounds.”¹¹¹

Clearly, states involved in investor-state arbitration urgently need to make a commitment to diversify their arbitrator selections by gender, geography, and ethnicity, as do the arbitral institutions.¹¹² While ICSID rightly boasts about the increasing diversity of its roster of arbitrators,¹¹³ that boast is only valid contextually. As noted previously, from a purely numerical perspective, the record is abysmal.

While professional reputation and connections obviously influence the arbitrator selection process and contribute to this “diversity deficit,” the more difficult question is how to address it. It is unlikely that the governing legal instruments could be amended to provide for arbitrator diversity in some way,¹¹⁴ but opinions abound on alternative solutions. Many agree that it might be possible to adopt procedural changes or alter existing practices at the institutional level within administering arbitral bodies such as ICSID, the London Court of International Arbitration, the International Chamber of Commerce, or the Permanent Court of Arbitration to encourage the constitution of more diverse arbitrator tribunals. For example, it has been proposed that appointing authorities might promote diversity by “strategically utilizing” those appointments of co- and presiding arbitrators or members of ad

FDI PERSPECTIVES: ISSUES IN INTERNATIONAL INVESTMENT 193–95 (Karl P. Sauvant & Jennifer Reimer eds., 2d ed. 2012), <http://ccsi.columbia.edu/files/2012/11/FDI-Perspectives-eBook-v2-Nov-2012.pdf>.

¹⁰⁹ A discussion of whether and why diversity matters in the context of arbitrator selection in international arbitration is beyond the scope of this article. For further reading on these questions and on the responses thereto, see generally Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, 35 U. PA. J. INT’L L. 431, 480–83 (2013) [hereinafter Giorgetti, *Who Decides*].

¹¹⁰ E.g., Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT’L L. J. 435 (2009) [hereinafter Franck, *Development and Outcomes*].

¹¹¹ Kidane, *supra* note 82, at 579.

¹¹² Trakman, *supra* note 67, at 661–62.

¹¹³ “Similarly, ICSID has encouraged the development of a larger and more diverse group of case decision-makers, who reflect the diversity of ICSID’s membership. It has adopted practices to propose arbitrators and conciliators from all States and of both genders and has made progress in reaching this objective. Likewise, Member States have contributed to this objective by designating 82 new persons to the Panels of Arbitrators and of Conciliators in the past year.” ICSID ANNUAL REPORT, *supra* note 44, at 5.

¹¹⁴ “Diversity could be incorporated in the applicable legal instruments. However, amending the ICSID Convention, and amending UNCITRAL and PCA rules to mandate diversity, would hardly be possible.” Giorgetti, *Is the Truth in the Eyes of the Beholder?*, *supra* note 92, at 273.

hoc annulment committees that they control.¹¹⁵ One version of this proposal is for institutions to adopt a procedural rule that would require that the presiding arbitrator, or a sole arbitrator, be a national of a country from a different region than either of the parties.¹¹⁶ Pursuant to this option, global regions could be consciously defined so as to increase diversity, i.e., geographic regions could be divided by ethnicity, by conventional continental divides, or by development level, to minimize the dominance of Anglo-European arbitrators in a substantial percentage of cases.¹¹⁷

The arbitral entities also have been urged to be more proactive in encouraging parties to select more diverse arbitrators.¹¹⁸ International financial institutions too could exert influence over arbitral appointments in claims that arise from projects that they fund.¹¹⁹ This influence could be exercised at the contracting stage with funding conditions and appropriately tailored arbitration clauses and at the time a dispute arises.

At least one institution that administers arbitrations, the International Institute for Conflict Prevention & Resolution (CPR), has taken steps to increase diversity among its arbitrators by creating a “Diversity Commitment” similar to its very successful “ADR Pledge.”¹²⁰ This Diversity Commitment states: “We ask that our outside law firms and counterparties include qualified diverse neutrals among any list of mediators or arbitrators they propose. We will do the same in the lists we provide.”¹²¹

¹¹⁵ Susan D. Franck et al., *The Diversity Challenge: Exploring the ‘Invisible College’ of International Arbitration*, 53 COLUM. J. TRANSNAT’L L. 429, 499 (2015) [hereinafter Franck et al., *The Diversity Challenge*]. See also Giorgetti, *Is the Truth in the Eyes of the Beholder?*, *supra* note 92, at 275.

¹¹⁶ Dolinar-Hikawa, *supra* note 93, at 7.

¹¹⁷ *Id.* at 8.

¹¹⁸ Cf. Giorgetti, *Who Decides*, *supra* note 109, at 483–84.

¹¹⁹ See Ofodile, *supra* note 80, at 57.

¹²⁰ CPR’s Corporate Policy Statement on Alternatives to Litigation, or the “CPR Pledge,” was launched in the 1980’s, and more than 4,000 business entities and 1,500 law firms have signed on. The Pledge commits signatories to consider ADR before filing a lawsuit. See *ADR Pledges*, INT’L INST. FOR CONFLICT PREVENTION & RESOL., <http://www.cpradr.org/PracticeAreas/ADRpledges.aspx> (last visited Aug. 19, 2015). CPR has also introduced a separate 21st Century Corporate ADR Pledge, which not only includes a commitment to dispute-driven ADR but also to proactive dispute management and system designs. *21st Century Corporate ADR Pledge*, INT’L INST. FOR CONFLICT PREVENTION & RES., <http://www.cpradr.org/PracticeAreas/ADRpledges/21stCenturyPledge.aspx> (last visited Aug. 19, 2015).

¹²¹ *Sign the Diversity Commitment!*, INT’L INST. FOR CONFLICT PREVENTION & RES., <http://www.cpradr.org/PracticeAreas/NationalTaskForceonDiversityinADR/SigntheDiversityCommitment.aspx> (last visited Aug. 19, 2015). One author has compared the CPR Diversity Commitment to the National Football League’s “Rooney Rule,” a rule created by Dan Rooney, owner of the Pittsburgh Steelers. This rule requires that all teams interview at least one minority candidate for any available head coaching or senior operations position and that minority candidates must have the same interview experience as non-minority candidates, including

Parties, however, should not need external encouragement. As one scholar has noted, many state parties have constitutional or codified laws pertaining to diversity, laws that may be applicable to arbitrator selection, both at the institutional panel level and in individual claims.¹²² Further, while all parties certainly will seek to appoint arbitrators who will minimize their risk of loss, it has been suggested that corporate parties have incentives to promote diversity within their legal departments and have the economic bargaining power to influence the diversity hiring and arbitrator and other specialist selections of their outside counsel law firms.¹²³

Another proposal would regulate arbitration as a profession, with an independent regulatory body and a qualifying exam.¹²⁴ It also has been suggested that clarifying and more closely monitoring the ethical conduct of arbitrators would necessarily limit “repeat player” issues and potentially could result in an expanded and more diverse pool of arbitrators.¹²⁵

Various forms of structured mentorship have been suggested.¹²⁶ In one such proposal, trainees would attend hearings and act as “shadow” arbitrators, preparing “shadow” awards and responses to party motions and applications.¹²⁷ Similarly, I envision a program in which the arbitration institutions assign arbitrator candidates to shadow counsel to the parties as well as to the individual arbitrators or tribunals. This not only would provide the experiential component of an arbitrator’s “reputational” capital,¹²⁸ but it also would address

meeting with the same executives for the same amount of time. Barry Leon, *Increasing Diversity Among Arbitrators and Mediators: The Magic Bullet*, 12 *TRANSNAT’L DISP. MGMT.* 1, 1–2 (2015). See generally Monte Burke, *Why The NFL’s Rooney Rule Matters*, *FORBES* (Jan. 26, 2013), <http://www.forbes.com/sites/monteburke/2013/01/26/why-the-nfls-rooney-rule-matters/>.

¹²² Giorgetti, *Is the Truth in the Eyes of the Beholder?*, *supra* note 92, at 275.

¹²³ See, e.g., Franck et al., *The Diversity Challenge*, *supra* note 115, at 498–99.

¹²⁴ See Ingrid A. Müller, *Diversity and Lack Thereof Amongst International Arbitrators—Between Discrimination, Political Correctness and Representativeness*, 4 *TRANSNAT’L DISP. MGMT.* 1, 18–20 (2015).

¹²⁵ Puig, *supra* note 29, at 603–04.

¹²⁶ At least one commentary on the subject rejects mentoring as a means of increasing diversity in arbitration: “We consider that implementing mentoring programs to promote (only) the inclusion of women and minorities in arbitration is simply offensive, as the very suggestion implies that women and minorities are, automatically, in need of mentoring, due to the simple fact of being of the female sex or of a certain race or ethnicity.” Müller, *supra* note 124, at 14.

¹²⁷ Ngotho, *supra* note 96. Confidentiality concerns would, of course, be managed, as they are in law firms and judicial chambers in which clerks and interns work.

¹²⁸ It does not, however, address the deficit of “symbolic capital” among the many prospective arbitrators drawn from underrepresented groups and does not distinguish those arbitrators recognized as elite. “In more sociological terms, the symbolic capital acquired through a career of public service or scholarship is translated into a substantial cash value in international arbitration.” YVES DEZALAY & BRYANT G. GARTH, *DEALING IN*

the more elusive element of direct “familiarity” with a candidate’s professional qualities. There also have been suggestions for foreign investment moot court competitions and awards that would identify and reward legal talent from the developing world.¹²⁹

Arbitrator candidates might also intern in an innovative Legal Assistance Center advocated by one scholar.¹³⁰ This Center would provide developing nations access to the legal authority and expertise necessary to mount a competent defense in ISDS disputes.¹³¹ Another approach might be to create an African arbitration body with the remit to, among other things, regulate the practice of arbitration, including organizing and managing arbitration training, making arbitral appointments, planning arbitration conferences, and promoting African arbitrators.¹³²

Under one scenario, the arbitral institutions would set either specific numeric or percentage goals that law offices, chambers, and business associations of arbitrators who seek to remain or be placed on the institution’s panels or listings must meet regarding the employment and utilization of underrepresented groups such as Africans. Similarly, law firms acting as counsel to parties in institutionally-supervised matters might be required to meet these goals vis-à-vis the staffing of a particular matter. An arbitral organization might also adopt internal policies and external requirements for aggressive recruitment, mentoring, training, and utilization programs for individual members of underrepresented groups.¹³³ These programs would be comparable to those in place for U.S. federal government contractors.¹³⁴

VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL ORDER 8 (1996).

¹²⁹ Franck, *Development and Outcomes*, *supra* note 110, at 481. The author specifically mentions the Frankfurt Investment Arbitration Moot Court Competition, which reportedly gives an award for the “Best Team from a Non-OECD Member Country.” *Outline of Rules: Rule 3.3*, FRANKFURT INV. ARB. MOOT COURT, <http://investmenttreatymoot.org/rules/> (last visited Oct. 6, 2015).

¹³⁰ See Eric Gottwald, *Leveling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?*, 22 AM. U. INT’L L. REV. 237, 265, 271 (2007).

¹³¹ See *id.* at 267, 269.

¹³² Ngotho, *supra* note 96.

¹³³ Cf. Giorgetti, *Is the Truth in the Eyes of the Beholder?*, *supra* note 92.

¹³⁴ See, e.g., Exec. Order No. 11,246, 30 Fed. Reg. 12,935 (Sept. 24, 1965), *as amended* by Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 13, 1967). A discussion of the potential relevance and application of the WTO agreement and its side agreements to arbitrator diversity issues at the WTO-associated ICSID is beyond the scope of this Essay. See, e.g., Agreement on Government Procurement, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) (1980) (entered into force Jan. 1, 1981), *as amended* by Protocol Amending the Agreement on Government Procurement, GATT B.I.S.D. (34th Supp.) at 12 (1988). It is, however, worth noting that there are numerous critiques of the WTO for its apparent indifference to the rights of minority groups and its seeming

One might anticipate that institutions and parties alike will object to the cost of formal mentoring programs, but the cost of under-inclusion is also high in terms of the perception of the very legitimacy of the ISDS system.¹³⁵ Considering that the average legal costs for individual ISDS disputes are estimated to be between U.S. \$1-2 million,¹³⁶ that ICSID arbitrators are entitled to \$3,000 per day plus expenses,¹³⁷ and that elite international law firms charge \$400-750 or more per hour, per lawyer, the expense of shadow trainees surely would not be too onerous or excessive contextually. The cost of longer term and greater access for underrepresented groups is, in my opinion, certainly worth at least this much to the ISDS enterprise.

The costs of formal mentoring or training programs could be funded as part of the institution's dispute processing fees in individual disputes or could be derived from a more general Contracting State fee designated for such a purpose.¹³⁸ Such fees also could serve as an incentive for the parties to negotiate settlements of their disputes before filing formal claims. One might also adopt one author's suggestion of a funding mechanism for mentoring or training programs similar to that exercised by the U.N. Trust Fund, which provides financing to developing countries for their litigation costs before the

inattention to gender and other minority issues as well as to the impact of the international trade regime on these groups. *See, e.g.*, U.N. Conference on Trade & Development, *Report of the Expert Meeting on Mainstreaming Gender in Trade Policy*, ¶ 53, U.N. Doc. TD/B/C.I/EM.2/4 (Mar. 31, 2009); *see also Women as Economic Players in Sustainable Development*, WORLD TRADE ORG. SYMP. PROGRAMME (June 13, 2003), https://www.wto.org/english/tratop_e/dda_e/symp_devagenda_prog_03_e.htm; LOUISE O'REGAN TARDU, GENDER MAINSTREAMING IN TRADE AND INDUSTRY: A REFERENCE MANUAL FOR GOVERNMENTS AND OTHER STAKEHOLDERS 21–23 (1999).

¹³⁵ *See, e.g.*, Franck et al., *The Diversity Challenge*, *supra* note 115, at 467–69, 504–05.

¹³⁶ *See* U.N. Conference on Trade & Development, *Occasional Note: International Investment Disputes on the Rise*, at 4, U.N. Doc. UNCTAD/WEB/ITE/IIT/2004/2 (Nov. 29, 2004), http://unctad.org/en/Docs/webiteit20042_en.pdf; U.N. Conference on Trade & Development, *Investor-State Disputes Arising From Investment Treaties: A Review*, at 8, U.N. Doc. UNCTAD/ITE/IIT/2005/4 (2005), http://www.unctad.org/en/docs/iteiit20054_en.pdf (discussing the increase in number of claims). One preeminent arbitrator reported that he has “seen cost claims in the range of up to [U.S.] \$50 million from each side[.]” in arbitral proceedings. Karl-Heinz Böckstiegel, Professor, Univ. of Cologne, Practical Issues and Perspectives of Investment Arbitration Involving Russian and CIS Parties, Presentation at the Conference of International Dispute Resolution Involving Russian and CIS Companies (Feb. 27–28, 2014), http://www.arbitration-icca.org/media/3/14011073487630/bockstiegel_invarb_involving_russian_and_cis_companies.pdf.

¹³⁷ *Schedule of Fees*, INT'L CTR. FOR SETTLEMENT INV. DISPUTES (Jan. 2013), <https://icsid.worldbank.org/apps/ICSIDWEB/ICSID%20Document%20Library/ICSID%20Schedule%20of%20Fees%20January%201,%202013%20English.pdf>.

¹³⁸ For this purpose, a “user fee,” so to speak, that is collected only from those engaged in proceedings seems less regressive and more reasonable.

International Court of Justice.¹³⁹ International financial institutions can support the development of African arbitrators with funding and with targeted “capacity building initiatives.”¹⁴⁰

Mentoring is just one step in an educational process that begins in law school. African law faculties should offer more arbitration-related courses, both substantive and skills-based. ADR courses in general appear to be quite limited in law schools on the continent, due in part to the lack of experience, perhaps attributable to historical hostility to international arbitration, but also to limited resources.¹⁴¹ Bar and law societies and international arbitration institutions can support educational efforts by providing continuing education courses on arbitration as well as sponsoring and hosting conferences such as the ATLAS conference that generated this symposium.

The inclusion, integration, and utilization of more African nationals onto ISDS tribunals is a work-in-progress. Yet, despite the dismal data on arbitrator diversity, African States appear to have managed their investment arbitrations well. A 2012 report notes that:

[Of] the seventy-six proceedings that have been initiated under the ICSID Arbitration Rules against African [S]tates, fifty-six have been concluded . . . In twenty-one arbitrations (or 38%), the parties settled the claims . . . In fifteen arbitrations (or 27%), the claims were dismissed . . . Only in thirteen arbitrations (or 23%) have the claims been upheld, [and these involved] eleven different states. These are: the Central African Republic, Congo Republic (twice), Egypt (twice), Gabon, Guinea, Liberia, Senegal, Seychelles, Tanzania, Togo, and Zimbabwe. In turn, this means that thirty-three African Contracting States (or 75%) have either never been involved in ICSID proceedings, saw the claims rejected or settled the claims on terms that were agreeable to them.¹⁴²

This success and these data do not, however, reveal the nationality, race, and gender of those who represented these States in their arbitrations and of those who presided as arbitrators.

¹³⁹ Cf. S.K.B. Asante, *The Perspectives of African Countries on International Commercial Arbitration*, 6 LEIDEN J. INT'L L. 331, 349 (1993).

¹⁴⁰ See Ofodile, *supra* note 80, at 57.

¹⁴¹ See *id.* at 49.

¹⁴² Karel Daele & Mishcon de Reya, *Africa's Track Record in ICSID Proceedings*, KLUWER ARB. BLOG (May 30, 2012), <http://kluwerarbitrationblog.com/blog/2012/05/30/africa-s-track-record-in-icsid-proceedings/>.

III. A PARADOX: DE-STATIFICATION OF INVESTOR-STATE DISPUTE SETTLEMENT

While critics and challenges abound, most remain committed to ISDS in some form, and, rather than completely abandon investor-state mechanisms or continue to allow states to ignore unfavorable awards, proposals for reform are being vigorously debated.

What is baffling to me is the vehement refusal by the majority of the arbitration establishment to entertain even the most modest of proposals that would increase state involvement in the interpretation of the treaties to which they are parties.¹⁴³ And some of these proposals seemingly are moderately unexceptional, such as providing states with more control over the selection of arbitrators in investment disputes,¹⁴⁴ or, conversely, abandoning altogether the tradition of party-appointed arbitrators.¹⁴⁵

In addition to the reforms already mentioned, other proposals are more dramatic, including the creation of an investment court system structured along the lines of domestic and international courts or of an ICSID “General Assembly” modeled upon the comparable World Trade Organization (WTO) body that would be comprised of representatives from all Contracting States.¹⁴⁶ The investment court system would replace the existing ISDS system with a more traditional trial and appeal process supervised by publicly-appointed judges, and the Assembly would “exercise ‘legislative control’ over arbitral tribunals, interpret investment treaties, [issue interpretive statements to clarify] standards in existing investment treaties, and amend investment treaties where necessary.”¹⁴⁷

Rather than these sorts of “judicial” or “legislative” solutions, a venerable line of scholars has suggested an analytical framework for ISDS practices based upon an administrative model.¹⁴⁸ Under one prescriptive formulation of

¹⁴³ Brower & Blanchard, *What’s in a Meme*, *supra* note 10, at 695.

¹⁴⁴ *Id.* at 696.

¹⁴⁵ Jan Paulsson, Inaugural Lecture at University of Miami School of Law (Apr. 29, 2010), http://www.arbitrationicca.org/media/0/12773749999020/paulsson_moral_hazard.pdf.

¹⁴⁶ See EU DRAFT TTIP, *supra* note 14, § 3(4) (proposing an “Investment Court System”); Ghouri, *supra* note 20, at 8.

¹⁴⁷ See EU DRAFT TTIP, *supra* note 14, § 3(4); Ghouri, *supra* note 20, at 8.

¹⁴⁸ Gus Van Harten has espoused the view that ISDS is a sort of transnational public law order that, like domestic constitutional or administrative systems, reviews state regulatory actions. GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 72–93 (2007). See generally SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN

this framework, the U.S. notice-and-comment administrative procedure would be adapted to investor-state dispute processing so as to provide states, including the state party, the investor party's home state, and non-party states that might be impacted under a multi-lateral treaty, with formal notice as to both the filing and details of a particular dispute and with an opportunity to submit comments thereupon.¹⁴⁹ This is not a radical idea; similar notice procedures have been incorporated into several investment treaties, some of which even require that treaty parties consult or even formally convene meetings of cabinet-level administrators before a dispute proceeds to arbitration.¹⁵⁰

A bit more radical is a proposed administrative change¹⁵¹ that would require tribunals to submit drafts of their awards to the parties and to affected non-parties for comment and to consider any comments before issuing a final award, giving particular deference to comments on which the state parties are in agreement.¹⁵² There is precedent for this, too. For example, the provisions of The Dominican Republic-Central America Free Trade Agreement (FTA) accord disputing parties the right to submit written comments to the presiding arbitral panel on that panel's initial report and authorize the panel to reconsider its report after reviewing any such comments.¹⁵³ The Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement requires that

THE BIT GENERATION (2009) (describing international investment law as an emerging global administrative law); Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 122 (2006). Stephan Schill has promoted a comparative or international public law regulatory perspective on ISDS. Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 90 (2011). See also DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE 3 (Chris Arup et al. eds., 2008) (characterizing the system as "constitutionalizing economic globalization").

¹⁴⁹ Yackee, *Controlling the International Investment Law Agency*, *supra* note 27, at 434–40.

¹⁵⁰ See, e.g., The Dominican Republic-Central America-United States Free Trade Agreement chs. 19–20, Aug. 9, 2004, <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> [hereinafter CAFTA-DR].

¹⁵¹ Similar to, yet distinguishable from, the administrative perspective is a view that presents investment arbitration as an intergovernmental organization or club with a diverse membership and a fractured nature. Anna T. Katselas, *Exit, Voice, and Loyalty in Investment Treaty Arbitration*, 93 NEB. L. REV. 313, 318 (2014). Pursuant to this frame, third parties may receive benefits from the ISDS "club," but the club's primary purpose is to provide benefits to its members that they deem worthy of the costs of membership. *Id.*

¹⁵² Yackee, *Controlling the International Investment Law Agency*, *supra* note 27, at 437–38.

¹⁵³ CAFTA-DR, *supra* note 150, art. 20.13.

an arbitral tribunal give “serious consideration” to the determination of Members States on particular issues.¹⁵⁴

Another proposal that responds to calls for reform would expand upon the state-to-state arbitral provisions that are contained in a number of investment treaties.¹⁵⁵ Many international investment treaties authorize treaty parties to reach agreement on disputes about the interpretation and/or application of the treaty that will bind investor-state tribunals, and, if they fail to reach an agreement, they may refer their disagreements to a state-to-state arbitral tribunal empowered to issue a binding award.¹⁵⁶

Possible procedural permutations related to state-to-state ISDS are endless, e.g., various sequencing approaches to claims that would, alternatively, accord priority to the first claim filed¹⁵⁷ or specify a hierarchy of claims that would always privilege either the state-to-state or the investor-state options.¹⁵⁸ Some variations are designed to balance the interests of all stakeholders in investment disputes. Directly affected investors, for example, could be granted the right to intervene in state-to-state cases as they do in the 2012 U.S. Model

¹⁵⁴ Ass'n of Southeast Asian Nations [ASEAN] Comprehensive Investment Agreement art. 36(8) (entered into force Mar. 29, 2012), <http://agreement.asean.org/media/download/20140119035519.pdf> (demonstrating that this procedure applies specifically to taxation measures).

¹⁵⁵ Roberts, *State-to-State Investment Treaty Arbitration*, *supra* note 5, at 6. *But see* Jarrod Wong, *The Subversion of State-to-State Investment Treaty Arbitration*, 53 COLUM. J. TRANSNAT'L L. 6, 7 (2014) (arguing that the two arbitral regimes should be treated as mutually exclusive and that state-to-state arbitration of any issue that may properly be resolved by investor-state arbitration should be disallowed). The 2012 U.S. Model BIT provides a typical formulation on state-to-state dispute processing. 2012 U.S. MODEL BIT, *supra* note 6, art. 37(1) (“[A]ny dispute between the Parties concerning the interpretation or application of this Treaty, that is not resolved through consultations or other diplomatic channels, shall be submitted on the request of either Party to arbitration for a binding decision or award by a tribunal in accordance with applicable rules of international law.”). *See also* U.N. Conference on Trade & Development, *Dispute Settlement: State-State*, U.N. Doc. UNCTAD/ITE/IIT/2003/1, at 4–5, 13 (2003).

¹⁵⁶ Roberts, *State-to-State Investment Treaty Arbitration*, *supra* note 5, at 18, 22. There have been several state-to-state arbitrations involving, *inter alia*, diplomatic protection claims made by home states seeking compensation on behalf of their investors, interpretive disputes, and requests for declaratory relief regarding treaty compliance. *Id.* at 29.

¹⁵⁷ Article 27 of the ICSID Convention provides a prominent example of a type of sequencing, stating that

(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

ICSID Convention, *supra* note 35, art. 27.

¹⁵⁸ Roberts, *State-to-State Investment Treaty Arbitration*, *supra* note 5, at 18, 22.

BIT.¹⁵⁹ Preliminary reference mechanisms could be adopted that would require that investor-state tribunals stay their jurisdiction pending a joint interpretive ruling by the relevant states, or, failing joint agreement, the ruling of a state-to-state tribunal.¹⁶⁰ As to precedential effect, awards in state-to-state arbitrations could be binding on the state parties in a specific case and “highly persuasive” with respect to future conduct and tribunals, with prospective effect only.¹⁶¹ Other precedential impacts, of course, could be specified.

A “legislative veto” is perhaps one of the most controversial reform options.¹⁶² State parties to an investment treaty would exercise this option to jointly disapprove an arbitral award prior to, or even after, its entry into force. Similarly, some advocate state-issued post hoc interpretive statements that would be binding on arbitral tribunals.¹⁶³

Not surprisingly, the proponents of ISDS arbitration condemn proposals that would markedly increase states’ control over the arbitral process. Such “re-statifying” reforms would, they argue forcefully, “undermine the credibility of investment arbitration as a neutral method of resolving a dispute between an alien investor and a host [s]tate.”¹⁶⁴ Judge Brower’s comments at the AtlAS conference are representative of the opinions and positions espoused by many of the arbitration elite,¹⁶⁵ as are several of his scholarly articles.¹⁶⁶ In

¹⁵⁹ State-to-state tribunals are permitted to accept amicus submissions from non-disputing parties. 2012 U.S. MODEL BIT, *supra* note 6, arts. 28(3), 37(2).

¹⁶⁰ Roberts, *State-to-State Investment Treaty Arbitration*, *supra* note 5, at 63–66. Professor Roberts notes that the ASEAN-Australia-New Zealand FTA provides that an investor-state tribunal “shall, on its own account or at the request of a disputing party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute.” *Id.* at 65 (citing ASEAN-Australia-New Zealand Free Trade Agreement ch. 11, art. 27(2), Feb. 27, 2009, <http://www.asean.fta.govt.nz/assets/Agreement-Establishing-the-ASEAN-Australia-New-Zealand-Free-Trade-Area.pdf>).

¹⁶¹ *Id.* at 62–63.

¹⁶² *E.g.*, Yackee, *Controlling the International Investment Law Agency*, *supra* note 27, at 440–43. A description of the complications of such a veto in the context of a multilateral treaty are beyond the scope of this brief article, but Professor Yackee’s article provides an excellent analysis. *Id.* at 440–44.

¹⁶³ Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT’L L. 179, 210 (2010). Some view these procedures as ploys by which to circumvent official amendment processes or as cynical attempts to limit liability in the face of existing or future claims. Roberts, *State-to-State Investment Treaty Arbitration*, *supra* note 5, at 53.

¹⁶⁴ *See, e.g.*, Brower & Blanchard, *The Case Against Re-Statification*, *supra* note †, at 48–50.

¹⁶⁵ Charles N. Brower, Judge, Iran-United States Claims Tribunal, *The Need for Host States to ‘Let Go’ of the Arbitral Process*, Presentation at the AtlAS Conference on Enhancing Business Opportunities in Africa (Nov. 3–4, 2014), <http://arbitrateatlanta.org/wp-content/uploads/2014/11/Need-for-Host-States-to-Let-Go-of-Arbitral-Process.pdf>. Judge Brower certainly is not alone in these views. As a number of scholars and other observers have noted,

his defense of current ISDS practices, Judge Brower strongly remonstrates that “[t]he objective of investment protection treaties is credibly to promise foreign investors a certain level of treatment in order to permit the treaty parties (or one of them) to attract foreign investment and to lower their cost to each [s]tate and its citizens.”¹⁶⁷

However, it is not foreign investors with whom states have contracted and to whom they have made promises; it is with their state counterparts. Even while rising to defend it, members of the ISDS elite recognize this distinction: “The possibility of direct action—international arbitration without privity . . . is dramatically different from anything previously known in the international sphere.”¹⁶⁸ Historians suggest that the ICSID drafters did not contemplate the notion of arbitration without privity.¹⁶⁹ In fact, the investor-state dispute resolution clauses in a number of early investment treaties appear to have considered the possibility of investor-state arbitration only in cases where separate written agreements between investors and host states existed, with state-to-state arbitration as the primary means of dispute processing.¹⁷⁰ While drafting the ICSID Convention, the thinking appeared to be that a “situation in which a government . . . made a general statement that it would submit to arbitration a defined class of disputes with all comers [was] hardly ever likely

[T]he more subversive analysts and commentators tend to be excluded from the actual workings of the IIL agency—they are not invited to the best conferences, they are not appointed to serve as arbitrators or as counsel, they are not hired by formal IIL agencies, such as ICSID, and their scholarship is ignored by those who are professionally or intellectually committed to maintaining the IIL agency in something close to its current form.

Yackee, *Controlling the International Investment Law Agency*, *supra* note 27, at 404.

¹⁶⁶ See, e.g., Brower & Blanchard, *What's in a Meme*, *supra* note 10; Brower & Blanchard, *The Case Against Re-Statification*, *supra* note †.

¹⁶⁷ Brower & Blanchard, *The Case Against Re-Statification*, *supra* note †, at 52.

¹⁶⁸ Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232, 256 (1995).

¹⁶⁹ IAN A. LAIRD, BORZU SABAH, FRÉDÉRIC G. SOURGENS & TODD J. WEILER, INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 106–07 (7th ed. 2014).

¹⁷⁰ *Id.* at 108 n.29. These authors quote the 1976 Israel-Germany BIT:

If both Contracting Parties are members of the [ICSID Convention] the arbitral tribunal provided for above may . . . not be appealed to insofar as agreement has been reached between the national or company of one Contracting Party and the other Contracting Party under Article 25 of the [ICSID] Convention.

Id. (citing Treaty Between the Federal Republic of Germany and the State of Israel Concerning the Encouragement and Reciprocal Protection of Investments art. 10(8), June 24, 1976, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1344>).

to obtain.”¹⁷¹ Current views and practices on arbitration without privity seemingly, therefore, have evolved over time, influenced at least in part by jurisdictional decisions of arbitral tribunals.¹⁷²

Many states may not have appreciated the obligations to which they committed¹⁷³ in early investment treaties or in the ICSID Convention.¹⁷⁴ It is not surprising or unusual, then, that states may reevaluate their obligations in light of changed circumstances such as the potentially unexpected and unwelcome expansion of investment treaty jurisdiction. Their options for effectively addressing any dissatisfaction, however, are quite limited. One scholar has analogized the engagement of states with the ISDS system to membership in a club, with limited exit options.¹⁷⁵ These exit options and their difficulties and limitations—the possible economic and political consequences of ignoring awards; the complications involved when replacing or amending existing treaties; and the survival of obligations following, and political implications of, termination or denunciation—have been reviewed thoroughly by others,¹⁷⁶ but they do not appear to offer states a significant voice to effect or influence system reform.

ISDS advocates argue that “governments sometimes enact misguided, discriminatory, and harmful policies and that officials sometimes implement regulations in faulty ways.”¹⁷⁷ However, this sentiment can also be said to be true for arbitral tribunals.

[An arbitrator] is not simply deciding disputes; he is making policy. While I have no reason to doubt [the arbitrator’s] exceptional capabilities in either role, it is increasingly difficult to support the position that [arbitrators] in the [international investment law, or IIL] agency should have the final word on what IIL policy should be. States do and should have an important role to play. The key question is one of institutional design: how might we amend the IIL system in order to ensure that states retain or enhance their role as the ultimate

¹⁷¹ Puig, *supra* note 29, at 541 n.30 (quoting *Memorandum of the Meeting of the Committee of the Whole* (Dec. 18, 1962), in 2 HISTORY OF THE ICSID CONVENTION 59 (1968)).

¹⁷² Cf. LAIRD ET AL., *supra* note 169.

¹⁷³ If investment arbitration is viewed as an intergovernmental organization or club with a rapidly expanding membership, many member states may have joined without appreciating the consequences of their membership. Katselas, *supra* note 151, at 320.

¹⁷⁴ See Paulsson *supra* note 168, at 257.

¹⁷⁵ Katselas, *supra* note 151, at 335–61.

¹⁷⁶ See generally *id.*

¹⁷⁷ Brower & Blanchard, *The Case Against Re-Statification*, *supra* note †, at 53.

deciders of IIL rules, without completely abandoning the benefits that binding dispute settlement by experts probably provides?¹⁷⁸

CONCLUSION

One ISDS advocate has scoffed that reformers rely “on ideological assumptions and hypotheticals rather than demonstrating any actual harm from international investment law.”¹⁷⁹ This really is puzzling to me—is it not legitimate for states to reconsider political choices that current officials or their predecessors have made, perhaps based upon changed circumstances? That is, it seems, a sovereign prerogative. As one commentator has stated, ISDS arbitrators “autonomously resolve core questions of public law . . . itself a fundamentally sovereign act [and the lack of any sort of legislative or administrative oversight or judicial or arbitral appellate process makes them] unaccountable in the conventional sense.”¹⁸⁰ Is arbitration the proper venue to reconcile state regulatory control over its sustainable development objectives?

I do not advocate a complete return to state-to-state diplomacy in matters of international investment,¹⁸¹ but I remain confounded by the arbitral bar’s strident denunciations of even minimal system adjustments that would increase the role of the state in the ISDS process. “[A] full ‘depoliticization’ of international investment disputes is no more possible than a full depoliticization of any other international legal issue.”¹⁸² It seems obvious that any system that cannot satisfactorily accommodate the interests of states and their citizenry as well as investors will lose the appearance of objectivity that is essential to its legitimacy.¹⁸³

While opponents of re-statification dismiss counter-arguments as “based on emotion rather than on facts,”¹⁸⁴ there is inflammatory and insulting language being bandied about from all sides, none of which promotes a reasoned dialogue. “As commentators talk past each other, the conversation becomes

¹⁷⁸ Yackee, *Controlling the International Investment Law Agency*, *supra* note 27, at 445.

¹⁷⁹ Brower & Blanchard, *What’s in a Meme*, *supra* note 10, at 699.

¹⁸⁰ VAN HARTEN, *supra* note 148, at 156.

¹⁸¹ Cf. M. Sornarajah, *Starting Anew in International Investment Law*, in *FDI PERSPECTIVES: ISSUES IN INTERNATIONAL INVESTMENT 191–92* (Karl P. Sauvant & Jennifer Reimer eds., 2d ed. 2012), <http://ccsi.columbia.edu/files/2012/11/FDI-Perspectives-eBook-v2-Nov-2012.pdf>.

¹⁸² Katselas, *supra* note 151, at 320.

¹⁸³ “The key to the investment treaty system’s sustainability lies in finding mechanisms to accommodate the interests of both entities instead of systematically privileging one.” Roberts, *State-to-State Investment Treaty Arbitration*, *supra* note 5, at 5.

¹⁸⁴ See, e.g., Brower & Blanchard, *The Case Against Re-Statification*, *supra* note †, at 48–50.

fruitless.”¹⁸⁵ The experience and perspective of a stellar group of arbitration professionals *would* be fruitful and would add greatly to this debate and to any reforms that might be implemented. Their refusal to engage may ultimately limit or minimize their involvement in the process. The E.U. Commission’s TTIP draft text, for example, has been judged to be “a defeat for lawyers, and in particular arbitration lawyers, [who may be perceived to have failed] in dealing with such disputes.”¹⁸⁶

The “re-statification” debate and any resulting system modifications also would benefit greatly from an arbitrator pool that more accurately reflects the broad geographic participation of nations in ISDS systems. Noted arbitrator and scholar Jan Paulsson warned that:

Arbitration obviously cannot endure if those asked to consent to its authority are mystified and disaffected [and may be] rejected if it is perceived that while the arbitants come from the four corners of the world, rights of advocacy and the power to decide are reserved to mandarins or high priests operating in a few dominant cities.¹⁸⁷

The responsibility for addressing the “diversity deficit” rests with all system stakeholders.

Despite my perplexity, I hope that my observations demonstrate the quality of the AtlAS conference. Weighty matters were discussed, and, while perhaps not resolved, were given voice; they were debated respectfully and animatedly by an impressive group of attendees. I was honored to be there. It was a wonderful opportunity for AtlAS and for the Atlanta and Georgia Bars to confirm that AtlAS is well placed to serve as a venue for the resolution of international investment and commercial disputes.

¹⁸⁵ Puig, *supra* note 29, at 601.

¹⁸⁶ Jonathan Goldsmith, *A New International Trade Court*, L. SOC’Y GAZETTE (Sept. 21, 2015), http://www.lawgazette.co.uk/analysis/comment-and-opinion/a-new-international-trade-court/5051122.article?utm_source=dispatch&utm_medium=email&utm_campaign=GAZ-210915.

¹⁸⁷ Jan Paulsson, *Universal Arbitration—What We Gain, What We Lose*, Alexander Lecture at the Chartered Institute of Arbitrators (Nov. 29, 2012), http://www.globalarbitrationreview.com/cdn/files/gar/articles/jan_Paulsson_Universal_Arbitration_-_what_we_gain_what_we_lose.pdf.