

**DISINCENTIVIZING THE GROWING TREND OF
DENUNCIATING THE INVESTMENT TREATY
FRAMEWORK: TRACKING THE CRITICISMS AND
ANALYZING THE FUTURE OF TRANSNATIONAL
REGULATION OF INVESTMENT LAW**

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I. INTRODUCTION

Whether recognized as a legal order, regime,¹ or defunct neoliberalist ideal,² transnational investment law is undoubtedly receiving unprecedented attention and under significant scrutiny and reconsideration in today's modern globalized society.³ In particular, it appears everyone—from traditional, well-versed academics to controversial, inflamed politicians—is now, seemingly overnight, compelled to voice their concerns and recommendations regarding the current state and future of transnational investment law. In particular, the topic has narrowed in on international investment treaties.

This trisected analysis addresses the past, present, and future of the mechanisms of transnational investment law, namely bilateral investment treaties (BITs) and, to a lesser extent, multilateral investment treaties (MITs). While relevant to MITs, this paper primarily considers transnational investment trends in terms of the BIT debate. Part I provides a historical

1. Muthucumaraswamy Sornarajah, *The Case Against a Regime on International Investment Law*, in REGIONALISM IN INTERNATIONAL INVESTMENT LAW 475, 476 (Leon Trakman & Nicola Ranieri eds., 2013), available at <http://iglp.law.harvard.edu/wp-content/uploads/2014/10/IELR-8-Sornarajah-Case-Against-Investment-Regime.pdf>. I will tread lightly when conceptualizing the transnational investment legal order as such because many critics deny such a “regime” has ever existed.

2. See Nina Bandelj et al., *Signalling Demand for Foreign Investment: Postsocialist Countries in the Global Bilateral Investment Treaties Network*, 67 EUR.-ASIA STUD. 870, 870 (2015).

3. Rachel L. Wellhausen, *Recent Trends in Investor-State Dispute Settlement*, 7 J. INT'L DISP. SETTLEMENT 1, 1 (2016), http://www.rwellhausen.com/uploads/6/9/0/0/6900193/j_int_disp_settlement-2016-wellhausen-jnlids_idv038.pdf.

overview of international investment agreements (IIAs). Part II subsequently turns to the current state of affairs in the transnational investment community, juxtaposing the wide-ranging criticisms and solutions to remedy an area of law struggling to retain legitimacy.⁴ Finally, Part III features a progress report of states that have rebelled, to varying extents, against the traditional investor-state dispute resolution (ISDS) framework. Additionally, it questions the soundness of the primary objections to IIAs, along with their trademark ISDS clauses, and proposes a realistic approach to developing a functional framework for current and future transnational investments.

II. PART I

A. *A Historical Overview: The Development of Transnational Investment Law*

Today's transnational investment framework is comprised of more than 3,000 IIAs,⁵ the majority of which are BITs.⁶ To understand the modern phenomenon of state abrogation of investment treaty commitments, it is necessary to start at the beginning. The history of transnational investment law is a relatively short one. That is not to say, however, it has been uncomplicated or uneventful. Numerous publications have analyzed international investment law by characterizing trends

4. See, e.g., Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 471 (2009), <http://chicagounbound.uchicago.edu/cjil/vol9/iss2/5>; Daniel Behn, *Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art*, 46 GEO. J. INT'L L. 363, 363–64 (2015).

5. See *International Investment Agreements Navigator*, U.N. CONF. TRADE & DEV. [UNCTAD]: INV. POL'Y HUB., <http://investmentpolicyhub.unctad.org/IIA> (last visited Jan. 14, 2018).

6. See *id.* (juxtaposing the total number of BITs with the number of other investment-facilitating treaties); Mike McClure, *Multilateral Investment Treaties in Asia: Alternatives to the Investment Chapter of the Trans Pacific Partnership Agreement in Asia?*, KLUWER ARB. BLOG (June 7, 2016), <http://arbitrationblog.kluwerarbitration.com/2016/06/07/temp/> ("It is estimated that there are in excess of 3000 international investment agreements in the world . . . mostly comprising [sic] bilateral investment treaties . . .").

in the transnational investment community as “phases”⁷ or “waves.”⁸ This paper does not focus on the past, per se, but instead looks to the oft-criticized current state of the transnational investment framework and to a more optimistic future for the transnational investment community. In doing so, it necessarily begins with an overview of international investment law, starting with two of the most important events in the history of the transnational investment legal order.

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention)⁹ and the Vienna Convention on the Law of Treaties of 1969 (Vienna Convention)¹⁰ are arguably the most significant markers of the emergence of a system of international investment law.¹¹ Negotiated and adopted during the ICSID Convention, the International Centre for Settlement of Investment Disputes (ICSID) is today’s premiere governing body and ISDS mechanism for disputes arising under IIAs.¹² Moreover, the Vienna Convention codified customary international law, providing structure to bilateral and multilateral treaty practice.¹³ Although ISDS under IIAs was likely not considered a pertinent issue in

7. See Sornarajah, *supra* note 1, at 479–85 (analyzing the four “phases” of international law on foreign investment).

8. See, e.g., Srividya Jandhyala et al., *Three Waves of BITs: The Global Diffusion of Foreign Investment Policy*, 55 J. CONFLICT RESOL. 1047 (2011) (analyzing three “waves” of BITs in modern history).

9. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

10. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, available at <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> [hereinafter Vienna Convention].

11. Julian Davis Mortenson, *The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?*, 107 AM. J. INT’L L. 780, 791, 791 n.43 (2013), <https://www.asil.org/sites/default/files/AJIL.107.4.780.Mortenson.pdf>.

12. See Sergio Puig, *Emergence & Dynamism in International Organizations: ICSID, Investor-State Arbitration & International Investment Law*, 44 GEO. J. INT’L L. 531, 597–98 (2013).

13. Karan Kalia, *Denunciation of ICSID: Does It Really Mean No ICSID Arbitration?*, U. PA. J. INT’L L. (Apr. 2017), <http://pennjil.com/denunciation-of-icsid-does-it-really-mean-no-icsid-arbitration/>.

the minds of the drafters of either Conventions,¹⁴ the assemblies were nonetheless monumental in establishing many of the mainstays that now serve as guidelines for the formation and interpretation of mechanisms governing cross-border investments.¹⁵

The emergence of BITs in the mid-20th century was propelled by several factors including the private investor's need for additional security, outside of customary international law, with respect to foreign direct investment (FDI) in other countries.¹⁶ Under a traditional BIT, an aggrieved investor, as a national of one of the state parties to the treaty, may bring a claim against the host state for a violation of the investor's rights protected under a subject agreement.¹⁷ While the terms of transnational investment treaties may vary, most BITs feature, at minimum, the following three characteristics: (1) admission and establishment provisions; (2) guidelines for the treatment of FDI once established in a host country; and (3) at least one or more methods of dispute resolution, the most common of which is

14. See Gary Born, *Should Investment Treaties Have Their Own Rules of Interpretation?*, KLUWER ARB. BLOG (Feb. 3, 2015), <http://arbitrationblog.kluwerarbitration.com/2015/02/03/should-investment-treaties-have-their-own-rules-of-interpretation/> (stating only seventy-seven BITs existed at the time of the Vienna Convention); see also Matthew C. Porterfield, *Aron Broches and the Withdrawal of Unilateral Offers of Consent to Investor-State Arbitration*, IISD: INV. TREATY NEWS (Aug. 11, 2014), <https://www.iisd.org/itn/2014/08/11/aron-broches-and-the-withdrawal-of-unilateral-offers-of-consent-to-investor-state-arbitration/> (“The drafters of the [ICSID] Convention intended for it to serve as a mechanism for addressing contractual disputes between foreign investors and host States, pre-dating as it did the first investor-state arbitration clause in a treaty by several years.”).

15. See Michael Waibel, *International Investment Law and Treaty Interpretation*, in FROM CLINICAL ISOLATION TO SYSTEMIC INTEGRATION 29, 29–30 (Rainer Hofmann & Christian C. Tams eds., 2011); see also Porterfield, *supra* note 14.

16. Talkmore Chidebe, *The Legal Protection of Foreign Direct Investment in the New Millennium: A Critical Assessment with a Focus on South Africa and Zimbabwe 25* (2015) (unpublished Master of Laws degree dissertation, Nelson R. Mandela School of Law, University of Fort Hare) (“Post WW II, Bilateral Investment Treaties . . . offered foreign investors higher standards of legal protection and guarantees for foreign investments than those available under national and international investment laws.”).

17. David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement 8* (OECD, Paper for Public Consultation, 2012), <http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf>.

arbitration under ICSID.¹⁸

Beginning with the first BIT signed by Germany and Pakistan in 1959,¹⁹ the majority of early BITs were between capital-exporting and capital-importing countries.²⁰ This dynamic is often represented in terms of a North-South agreement—the “North” constituting developed, politically and economically stable states with private investors seeking to establish FDI in developing, depressed capital flow states located in the “South.”²¹ However, during the last two decades of the 20th century, more and more developing countries with similar economic and political conditions began to enter into BITs with each other.²² Consequently, there was an upturn in South-South agreements.²³ Thus, however true or useful the North-South characterization of IIAs may have once been, it was of much less utility by the turn of the 21st century²⁴ when the international investment community experienced a significant change in reality as the global power balance began to shift.²⁵

B. *The ISDS Boom*

During the 1990s, the number of BIT claims, and to a lesser

18. Jandhyala et al., *supra* note 8, at 1050. Additionally, under the majority of IIAs investors have non-ICSID, non-institutional dispute resolution options, the most common of which is arbitration governed by the UNCITRAL Arbitration Rules. V. V. Veeder, *The Investor's Choice of ICSID and Non-ICSID Arbitration Under Bilateral and Multilateral Treaties*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 5 (Arthur W. Rovine ed., 2009).

19. Treaty for the Promotion and Protection of Investments, F.R.G.-Pak., Nov. 25, 1959, 457 U.N.T.S. 23, 28–29 (1963).

20. Jandhyala et al., *supra* note 8, at 1048–49.

21. Stephan W. Schill, *The Multilateralization of International Investment Law: Emergence of a Multilateral System of Investment Protection on Bilateral Grounds*, 2 TRADE L. & DEV. 59, 68 (2010), <http://www.tradelawdevelopment.com/index.php/tld/article/viewFile/2%281%29%20TL%26D%2059%20%282010%29/41> (inferring a “North” state is one that is developed from the fact that South-South agreements are those between “developing” nations).

22. Mahnaz Malik, *South-South Bilateral Investment Treaties: The Same Old Story?* 1 (Int'l Inst. for Sustainable Dev., Background Paper, 2011), http://www.iisd.org/pdf/2011/dci_2010_south_bits.pdf.

23. See Schill, *supra* note 21, at 68.

24. See generally *id.* (promulgating the proposition that the North-South distinction is no longer relevant).

25. See Sornarajah, *supra* note 1, at 497.

extent MIT claims, skyrocketed.²⁶ Up until this period, ICSID had been utilized a mere twenty-five times to resolve disputes arising under IIAs.²⁷ By the turn of the century, ICSID's case activity constituted around fifty claims.²⁸ As of July 2017, 817 known ISDS claims had been filed by aggrieved investors against host states.²⁹ This amazing jump in ISDS filings begs the simple, yet puzzling question: Why?

In evaluating the current state of ISDS, valuable insight may be gained from an appraisal of recent ISDS trends. When examining trends in dispute resolution under IIAs, a primary takeaway is ISDS users are tremendously diverse.³⁰ Investors from at least seventy-three countries have filed ISDS claims.³¹ As of 2014, the top fifteen investor countries accounted for eighty-seven percent of all ISDS arbitration, with more claimant investors from the United States than any other country.³² Subject investments have involved a broad variety of industries, both immobile and remote.³³ At least 114 states have been sued by investors for alleged violations of BITs and, to a lesser extent, MITs.³⁴ While the list of countries against which ISDS claims have been brought is admittedly concentrated at the top, with Argentina and Venezuela occupying the highest seats, most states—including the United States—have nevertheless been

26. See Yoram Z. Haftel & Alexander Thompson, *Delayed Ratification: The Domestic Fate of Bilateral Investment Treaties*, 67 INT'L ORG. 355, 356 (2013); see also Wellhausen, *supra* note 3, at 3–4.

27. Wellhausen, *supra* note 3, at 3–4.

28. Umakrishnan Kollamparambil, *Bilateral Investment Treaties and Investor State Disputes 2* (Econ. Res. S. Africa, ERSAs Working Paper 589, 2016), https://econrsa.org/system/files/publications/working_papers/working_paper_589.pdf.

29. UNCTAD, *Special Update on Investor-State Dispute Settlement: Facts and Figures 2* (IIA Issues Note No. 3, Nov. 2017), http://unctad.org/en/PublicationsLibrary/di_aepcb2017d7_en.pdf [hereinafter IIA Issues Note 2017].

30. Wellhausen, *supra* note 3, at 2; see, e.g., OECD, *Government Perspectives on Investor-State Dispute Settlement: A Progress Report 7* (Dec. 14, 2012), <https://www.oecd.org/daf/inv/investment-policy/ISDSprogressreport.pdf> (“[An OECD] survey shows that investor-claimants range from individuals with quite limited international experience (e.g.[] an association of retirees) to major multi-national enterprises with tens and thousands of employees and global operations.”).

31. Wellhausen, *supra* note 3, at 8.

32. *Id.*

33. *Id.* at 6–7.

34. See IIA Issues Note 2017, *supra* note 29, at 2.

exposed to ISDS at some point.³⁵ Interestingly, it appears the development of countries alone is not an adequate predictor of host countries implicated in ISDS disputes.³⁶

Out of the near 530 known ISDS cases concluded as of July 2017, about one third were decided in favor of defendant host states and one quarter in favor of investors; the remaining claims were either settled or dropped.³⁷ With investor claims ranging from tens of thousands to billions of dollars, the considerable variance in the size of ISDS claims—as well as the fact that amounts awarded via ISDS judgments have been, on average, about forty percent of investors' demands—is of marked importance.³⁸ On average, successful claimant investors were awarded approximately US\$522 million,³⁹ a number significantly skewed by at least five ISDS judgments in the past several years awarding US\$1 billion or more to prevailing investors.⁴⁰

The ISDS framework forecloses a party from appealing the substantive validity of an award.⁴¹ However, states or investors unsatisfied with an ISDS judgment may still challenge the legitimacy of a tribunal's decision-making by seeking partial mitigation or full negation of an ISDS award via an annulment proceeding in accordance with the ICSID Convention.⁴² For non-ICSID rulings, a party may alternatively seek a set-aside judgment from a national court.⁴³ Between 1987 and July 2017, disputing parties initiated annulment proceedings forty-five

35. Wellhausen, *supra* note 3, at 10.

36. *Id.* at 11.

37. IIA Issues Note 2017, *supra* note 29, at 1.

38. *See id.*; Wellhausen, *supra* note 3, at 2.

39. IIA Issues Note 2017, *supra* note 29, at 1.

40. *See* Wellhausen, *supra* note 3, at 17–18 (discussing the following cases: Hulley Enter.'s v. Russ., UNCITRAL Case No. AA226 (2014) (US\$40 billion); Veteran Petrol. v. Russ., UNCITRAL Case No. AA228 (2014) (US\$8.2 billion); Yukos Universal v. Russ., UNCITRAL Case No. AA227 (2014) (US\$1.8 billion); Occidental Petrol. v. Ecuador, ICSID ARB/06/11 (2012) (US\$1.77 billion); and Venez. Holdings, B.V., et al v. Bolivarian Repub. Venez., ICSID Case No. ARB/07/27 (2014) (US\$1.6 billion)).

41. Gary Clyde Hufbauer, *Investor-State Dispute Settlement*, in TRANS-PACIFIC PARTNERSHIP: AN ASSESSMENT 209 (Cathleen Cimino-Isaacs & Jeffrey J. Schott eds., 2016), available at https://piie.com/publications/chapters_preview/7137/11ie7137.pdf.

42. *See* Christoph Schreuer, *ICSID Annulment Revisited*, 30 LEGAL ISSUES ECON. INTEGRATION 103, 103 (2003), <http://www.univie.ac.at/intlaw/pdf/67.pdf>.

43. *Id.*

percent of the time, corresponding to eighty-two judgments issued under ICSID.⁴⁴ In reported non-ICSID cases, set-aside proceedings have been initiated in national courts for seventy-one cases, approximately one third of all known non-ICSID rulings.⁴⁵ There has been notable success in challenging judgments via annulment and set-aside proceedings; however, original awards have been upheld the majority of the time.⁴⁶

C. A Mounting Anti-ISDS Movement

Resistance to the ISDS framework has been mounting since the turn of the century, at least.⁴⁷ Early signs of protest included Brazil's absolute refusal to sign or ratify any investment treaties with ISDS clauses⁴⁸ and Argentina's outright objection to paying numerous adverse arbitral awards.⁴⁹ Over the past decade, a slew of countries has denounced the ICSID Convention and/or terminated transnational investment treaties.⁵⁰ Bolivia's withdrawal from the ICSID Convention in 2007 marked the first time a Contracting Party to the Convention denounced ICSID, the most commonly invoked mechanism in investor-state dispute resolution.⁵¹ Like Bolivia, several Latin American countries have

44. IIA Issues Note 2017, *supra* note 29, at 7.

45. *Id.*

46. *See id.* at 7–8 figs.11 & 12 (detailing the statistical success of challenging ISDS judgments).

47. *See* Clint Peinhardt & Rachel L. Wellhausen, *Withdrawing from Investment Treaties but Protecting Investment*, 7 GLOB. POL'Y 571, 571 (2016).

48. Emily Osmanski, *Investor-State Dispute Settlement: Is There a Better Alternative*, 43 BROOK. J. INT'L L. 639, 659 (2018).

49. Peinhardt & Wellhausen, *supra* note 47, at 574.

50. *See Withdrawal from Investment Treaties: An Omen for Waning Investor Protection in AP?*, BAKER MCKENZIE (May 12, 2017), <http://www.bakermckenzie.com/en/in-sight/publications/2017/05/withdrawal-from-investment-treaties/> (explaining the growing trend of states rejecting the modern ISDS framework, including India's and Indonesia's denunciation of the ICSID Convention given the high number of cases ruled in favor of investors under the auspices of ICSID).

51. Emmanuel Gaillard, *The Denunciation of the ICSID Convention*, 237 N.Y.L.J. (June 26, 2007), available at [https://www.shearman.com/~/_media/Files/NewsInsights/Publications/2007/06/The-Denunciation-of-the-ICSID-Convention/Files/IA_NYLJ-Denunciation-ICSID-Convention_040308_17.pdf](https://www.shearman.com/~/_media/Files/NewsInsights/Publications/2007/06/The-Denunciation-of-the-ICSID-Convention/Files/IA_NYLJ-Denunciation-ICSID-Convention_040308_17/FileAttachment/IA_NYLJ-Denunciation-ICSID-Convention_040308_17.pdf); Amalur Marcos Ruiz, *Dispute Settlement Mechanisms in International Investment Agreements: Is There a New Way Towards the Future?* 10 (June 10, 2016) (unpublished Master thesis, Tilburg University).

taken decidedly drastic measures in protest of the traditional ISDS mechanism.⁵² In 2008, Venezuela began unilaterally terminating its BITs and withdrew from ICSID in 2012.⁵³ Ecuador first denounced the ICSID Convention in 2007,⁵⁴ and subsequently abrogated all of its remaining transnational investment treaty commitments.⁵⁵

This trend of withdrawal and termination, beginning in Latin America, has sparked a modern global phenomenon—reaching all corners of the transnational investment community—characterized by a critical reconsideration (and in some cases blatant revolt against) the transnational investment framework. Just as the North-South distinction has become arguably obsolete in relation to the signing of BITs, so too is it no longer helpful to casually typify countries that already have or will in the near future rebuke the ISDS framework.⁵⁶ Since 2010, numerous countries have unilaterally withdrawn from BITs and other IIAs

52. See William B. McElhiney III, Note, *Responding to the Threat of Withdrawal: On the Importance of Emphasizing the Interests of States, Investors, and the Transnational Investment System in Bringing Resolution to the Questions Surrounding the Future of Investments with States Denouncing the ICSID Convention*, 49 TEX. INT'L L.J. 601, 602 (2014) (“In the past several years . . . ICSID has come under fire, particularly from suspicious Latin American regimes.”).

53. Sergey Ripinsky, *Venezuela’s Withdrawal from ICSID: What It Does and Does Not Achieve*, IISD: INV. TREATY NEWS (Apr. 13, 2012), <https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>.

54. See Xavier Andrade Cadena & Marco Tulio Montañes, *Introductory Note to Ecuador’s Notice Under ICSID Article 25(4)*, 46 I.L.M. 154, 154 (2008). However, Ecuador did not formally seek withdrawal from ICSID until 2009. See ICSID, *List of Contracting States and Other Signatories of the Convention (as of February 21, 2019)*, ICSID/3, <https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf> (last visited Feb. 21, 2019).

55. Cecilia Olivet, *Why Did Ecuador Terminate All Its Bilateral Investment Treaties?*, TRANSNAT’L INST. (May 25, 2017), <https://www.tni.org/en/article/why-did-ecuador-terminate-all-its-bilateral-investment-treaties>.

56. See Colin Trehearne, *Will 2018 Mark a Tipping Point for Binding Investor-State Arbitration?*, KLUWER ARB. BLOG (Oct. 31, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/10/31/will-2018-mark-tipping-point-binding-investor-state-arbitration> (explaining that just as signing BITs became a global incident, geographic and state development levels are not helpful distinctions in predicting which countries will renounce the ISDS framework in the future, as such a diverse group of states has done so thus far).

with ISDS provisions including South Africa,⁵⁷ Indonesia,⁵⁸ India,⁵⁹ Italy,⁶⁰ and Russia.⁶¹ Perhaps the most high-profile illustrations of the trend against ISDS are embodied by the recent reconsideration of today's investment treaty regime by world superpowers. The European Union has vocalized its recent animadversion of ISDS.⁶² Moreover, the United States has experienced a recent ideological struggle with model IIAs and ISDS; this contention is exemplified by its dumping of the Trans-Pacific Partnership (TPP),⁶³ coupled with its consideration of excluding ISDS from the North American Free Trade Agreement

57. See Engela C. Schlemmer, *An Overview of South Africa's Bilateral Investment Treaties and Investment Policy*, 31 ICSID REV.: FOREIGN INV. L.J. 167, 190 (2016).

58. See Stephen L. Magiera, *International Investment Agreements and Investor-State Disputes: A Review and Evaluation for Indonesia 2* (Econ. Res. Inst. ASEAN & E. Asia, ERIA Paper Series, ERIA-DP-2016-30, 2017), <http://www.eria.org/ERIA-DP-2016-30.pdf>.

59. See Kavaljit Singh & Burghard Ilge, *India Overhauls Its Investment Treaty Regime*, FIN. TIMES (July 15, 2016), <https://www.ft.com/content/53bd355c-8203-34af-9c27-7bf990a447dc>.

60. See *Italy No Longer Member of Energy Charter Treaty, Hopes to Avoid More Arbitrations*, GLOB. INV. PROT. (Jan. 6, 2016), <http://www.globalinvestmentprotection.com/2016/01/06/italy-no-longer-member-of-energy-charter-treaty-hopes-to-avoid-more-arbitrations/>.

61. See Tania Voon & Andrew D. Mitchell, *Symposium on Treaty Exit at the Interface of Domestic and International Law: Ending International Investment Agreements: Russia's Withdrawal from Participation in the Energy Charter Treaty*, 111 AJIL UNBOUND 461, 461 (2018).

62. See Paul Stothard et al., *The EU's Proposed Reform of ISDS Investment Court Systems: The Future or a Fiasco?* 8 (Norton Rose Fulbright, Int'l Arb. Rep. Issue 8, June 2017), available at <https://www.nortonrosefulbright.com/en/knowledge/publications/ca845fc8/international-arbitration-report>; Christian Leathley et al., *Investment Treaty Protection: A Whistlestop Tour*, HERBERT SMITH FREEHILLS (Oct. 31, 2016), <https://www.herbertsmithfreehills.com/latest-thinking/investment-treaty-protection-a-whistlestop-tour>.

63. Press Release, Off. of U.S. Trade Rep., *The United States Officially Withdraws from the Trans-Pacific Partnership* (Jan. 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP> (demonstrating that while the U.S. purports to support fair trade and efficient markets, it remains hesitant to commit to international investment agreements like the TPP).

(NAFTA) and any future trade and investment agreements.⁶⁴

III. PART II

An undeniable trend of withdrawal from the ICSID Convention and outright treaty terminations has pervaded the transnational investment legal order and disrupted the global investment community. There is not a single catalyst behind this movement. Countries and other critics have identified multifarious factors influencing the decision to denounce the modern transnational investment framework. Part II highlights and opposes the numerous rationales behind and proposed solutions following a state's abrogation of its investment treaty commitments. Furthermore, it seeks to push beyond the antecedently pronounced criticisms and lays a foundation in order to catechize whether there are less publicized, underlying drivers behind this anti-ISDS campaign.

A. *Why Are States Apostatizing ISDS?*

Since the 2000s, state denunciation of obligations under previously negotiated and adopted IIAs has rocked the transnational investment community to its core.⁶⁵ The alleged motives driving such drastic actions are wide-ranging, including, but not limited to, regime change, national emergency, staggering arbitral awards, and strong pro-sovereignty sentiments⁶⁶ such as resource nationalism.⁶⁷ Before delving into the reasons behind why states are dumping investment treaties, however, it is important to underscore the following: despite all the current criticism, there was once a time, not long ago, when states were

64. See, e.g., Letter from 230 Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement (ISDS) from NAFTA and Other Pacts (Oct. 25, 2017), available at https://www.citizen.org/system/files/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf [hereinafter Letter to Trump].

65. Federico M. Lavopa et al., *How to Kill a BIT and Not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties*, 16 J. INT'L ECON. L. 869, 872 (2013).

66. See McElhiney III, *supra* note 52, at 613–14.

67. Leathley et al., *supra* note 62.

not only receptive to, but enthusiastic about ISDS.⁶⁸ Consequently, in addition to outlining numerous reasons enunciated by states for their dissatisfaction, and in some instances repulsion, with the existing system, this paper attempts to address the underlying question: Why the change in attitude?

Assuming *arguendo* a country negotiates and signs an IIA into force with the hope of enhancing foreign investment, why should it later be allowed to renege on its obligations? Setting aside for a moment the traditional principles of contract and customary international law, which would undoubtedly cut against abrogation of commitments under a negotiated agreement, what logic sanctions or in the least bit supports such behavior? Publicized protest of the current transnational investment framework bolsters the proposition that ISDS has become an exceptional burden on or threat to myriad states, as well as other public and private entities.⁶⁹ Accepted as the probable point-source outbreak of the anti-ISDS pandemic is the impracticability of harmonizing national sovereignty with investor rights in the context of the traditional IIA model.⁷⁰

The turn away from the existing ISDS framework is attributable to a variety of factors. The most palpable evidence weighing against the current system is the record high number of recently filed ISDS claims, coupled with the frequency certain

68. See *id.* (indicating that the sheer volume of 3,000 BITs worldwide, along with their multiple established benefits, demonstrates historical support of the ISDS framework).

69. See generally Public Citizen, *Selected Statements and Actions Against Investor-State Dispute Settlement (ISDS)*, https://www.citizen.org/sites/default/files/selected_statements_and_actions_against_isds_0.pdf (last updated Feb. 6, 2018) (listing a compilation of statements by various anti-ISDS entities thereby demonstrating the widespread opposition to ISDS, and arguing the inherent threats that ISDS poses to government entities and private citizens alike).

70. Peter Muchlinski, *Negotiating New Generation International Investment Agreements: New Sustainable Development Oriented Initiatives*, in *SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED* 41 (Steffen Hindelang & Markus Krajewski eds., 2016) (“First generation agreements, with their emphasis on investor rights and host State obligations, are said to be past their best and should give way to new agreements that seek to balance investor rights and duties, preserve the State’s right to regulate in the public interest[,] and to acknowledge the importance of not only economic but also social and environmental goals in their design.”).

countries are subjected to the same.⁷¹ However, the bulk of complaints against ISDS seems to be more subjective in nature. ISDS is often criticized for being unfair and procedurally flawed.⁷² Common alleged frustrations with ISDS include, but are not limited to, arbitrator bias,⁷³ inconsistent panel rulings,⁷⁴ the lack of an appeals process,⁷⁵ and the resulting encumbrance on state regulatory power.⁷⁶ In addition, perhaps the most popular argument in opposition of ISDS clauses boils down to one of the most basic lynchpins in the transnational investment law framework: the investment-ISDS tradeoff.⁷⁷ During the early years of BITs, increased prospective investment was the foremost motivation for states signing IIAs.⁷⁸ Today, there is pervasive uncertainty in the transnational investment community as to whether the state power ceded to investors in signing IIAs is worth the heightened ISDS exposure and liability.⁷⁹

B. “Experts” Weigh In on the Flailing ISDS Framework

Once a theoretical concern⁸⁰ reserved for scholars, the “*de facto* regime”⁸¹ of ISDS and the related reality of state abrogation

71. Trehearne, *supra* note 56.

72. Peinhardt & Wellhausen, *supra* note 47, at 572.

73. EUR. FED’N FOR INV. L. & ARB., *A Response to the Criticism Against ISDS* 4 (2015).

74. *Id.* at 12.

75. *Id.* at 11.

76. *Id.* at 4.

77. Chen Li, *Signing a Bilateral Investment Treaty: A Tradeoff Between Investment Protection and Regulation* 2 (Leibniz Info. Ctr. Econ., Conference Paper, 2016), available at https://www.econstor.eu/bitstream/10419/145505/1/VfS_2016_pid_6303.pdf.

78. Jandhyala et al., *supra* note 8, at 1048.

79. Peinhardt & Wellhausen, *supra* note 47, at 572 (“States and their publics are increasingly uncertain about what they are getting in exchange for ISDS exposure.”); Wellhausen, *supra* note 3, at 18 (“[The] costs may outweigh states’ willingness to comply for (only) the payoff of an abstract future reputation.”); see, e.g., Roundtable, *International Arbitration*, FINANCIER WORLDWIDE MAG. (June 2017), <https://www.financierworldwide.com/roundtable-international-arbitration-jun17/#.WqcAfpPwbOQ> (quoting Marco Tulio Venegas) (“Discussion about the scope and extent of what must be considered a public policy matter is constantly evolving, and has proved to be one of the more uncertain aspects of arbitration with public bodies.”).

80. UNCTAD, *Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims* 5 (IIA Issues Note No. 2, Dec. 2010), http://unctad.org/en/Docs/webdiaeia20106_en.pdf [hereinafter IIA Issues Note 2010].

81. Wellhausen, *supra* note 3, at 1.

of investment treaty commitments now draw unprecedented attention from diverse disciplines around world. Lawyers, economists, politicians, academics, and everyone in between seemingly have something to contribute to today's transnational investment law discussion.⁸²

Commonly citing Articles 71⁸³ and 72⁸⁴ of the ICSID Convention and Article 54⁸⁵ of the Vienna Convention, commentators often posit that while countries have been unilaterally abrogating their treaty obligations, either by withdrawing from ICSID or terminating investment treaties outright, such action does not have much of a short-term impact.⁸⁶ The import of the technical language of these three articles amounts to the following: a state's withdrawal from ICSID or termination of its investment treaties likely does not affect its existing obligations and rights under IIAs already in force. In other words, such denunciation of ISDS will probably have no immediate practical significance due to certain provisions common to transnational investment treaties. These provisions—including survival clauses and notice periods, which are contained in most IIAs—will almost always bind a host state, following a partial or entire abrogation of its commitments under an investment treaty, for years to come.⁸⁷ Often drawn from this fact, however, is a top-level, conclusory idealism that sounds

82. See, e.g., Haftel & Thompson, *supra* note 26 (“Political scientists, economists, and legal scholars have focused considerable attention on BITs in recent years.”).

83. ICSID Convention, *supra* note 9, art. 71 (“Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.”).

84. *Id.* art. 72 (“Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.”).

85. Vienna Convention, *supra* note 10, art. 54 (“The termination of a treaty or the withdrawal of a party may take place: (a) In conformity with the provisions of the treaty; or (b) At any time by consent of all the parties after consultation with the other contracting States.”).

86. Leathley et al., *supra* note 62 (“Termination of a BIT once an investment is made is unlikely to have an immediate impact”); IIA Issues Note 2010, *supra* note 80, at 3 (“[T]he termination of a BIT is of little immediate significance”).

87. See Laurence R. Helfer, *Terminating Treaties*, in *THE OXFORD GUIDE TO TREATIES* 641 (Duncan Hollis ed., 2012).

something like the following reassurance: “States are not rejecting modern investment law wholesale.”⁸⁸

Faced with the possibility of more countries denouncing the current transnational investment framework, commentators too often solely propose all too simplistic solutions. For example, IIA amendment or recalibration is commonly insinuated to be the best course of action for aggrieved states.⁸⁹ Another widely-promoted option is piecemeal withdrawal, which is arguably less detrimental to the stability of the transnational investment community.⁹⁰ Unlike termination, proponents suggest this option may actually accelerate the renegotiation process.⁹¹ It is undeniable that one school of thought—which encourages “states [to] flexibly reconsider their body of ISDS commitments without needing to reject the institution”⁹² outright—takes the stance that the least disruptive solutions are optimal courses of action for countries upset with the modern ISDS framework.

There is certainly no shortage of criticisms when it comes to the current transnational investment legal order. Inconsistency of awards is one of the most prominent factors contributing to the system’s modern legitimacy crisis; other perceived problems threatening the system’s stability include lack of transparency and the high costs of arbitration.⁹³ One recent analysis posits

88. Peinhardt & Wellhausen, *supra* note 47, at 572.

89. *See id.* at 572, 574 (noting most anti-ISDS states still likely “see too many potential gains from international capital to justify total withdrawal” and that “the system is such that states can push back without immediately resorting to a wholesale rejection of modern institutions”); *see also* Lavopa et al., *supra* note 65, at 881–82.

90. Peinhardt & Wellhausen, *supra* note 47, at 572, 574.

91. *See id.* at 574.

92. *Id.* at 572.

93. EUR. FED’N FOR INV. L. & ARB., *supra* note 73, at 24 (citing UNCTAD, INVESTOR-STATE DISPUTE SETTLEMENT: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II (2014)) (“The growing number of ISDS cases and the broad range of policy issues they raise have put the system of investment arbitration under intensive scrutiny by States, NGOs, and other stakeholders. This discontent is the result of a perceived failure in the functioning of the ISDS system, particularly, in relation to (i) its legitimacy and transparency (ii) problems of consistency of the arbitral decisions (iii) concerns about the independence and impartiality of arbitrators and (iv) the alleged costly and time-consuming nature of arbitrations.”); *see generally* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521 (2005) (detailing inconsistent investment treaty arbitration rulings and their impact on the legitimacy of the system).

BITs increase the risk of litigation and negatively impact the net benefit of countries.⁹⁴ This conclusion—coupled with the view that “[e]xcessive litigation resulting from BITs is considered to affect not only the business and the effort to attract investments by developing countries, but also the State’s regulatory capacity to pursue public interest needs through legitimate policies in the fields of health, environment, [and] security”⁹⁵—at first glance, is cause for alarm. For this exact reason, it is imperative to remember this is but one perspective in a complex, developing debate.

Over the past decade, the United Nations Conference on Trade and Development (UNCTAD) has experienced a swift rise in status to occupy one of the top coveted spots among leading institutions in the field of transnational investment law. The respected organization has systematically tracked the trends of transnational investment arbitration and issued numerous publications with suggestions for states dissatisfied with the current ISDS system.⁹⁶ UNCTAD asserts: “IIA Issues Notes are forward looking; they set the agenda for future research and policymaking.”⁹⁷ Based on its analyses, UNCTAD has drawn several conclusions, including the unavoidable supposition that some states no longer consider ICSID to be the preferred mechanism for ISDS.⁹⁸

Recognizing the growing unease with respect to the balance of states’ and investors’ rights and obligations, in addition to the related worries about the predictability, legitimacy, and transparency of the current ISDS system, UNCTAD offers various options for frustrated countries.⁹⁹

Possible avenues for addressing concerns about the ISDS

94. Kollamparambil, *supra* note 28, at 13.

95. MINISTRY OF DEV., INDUS. & FOREIGN TRADE BRAZ., *The Cooperation and Facilitation Investment Agreement*, <http://www.mdic.gov.br/arquivos/CFIA-Presentation-EN.pdf> (last visited Nov. 18, 2018).

96. See *International Investment Agreements - Issues Notes*, UNCTAD, <https://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx> (last visited Nov. 15, 2017) (providing access to IIA Issues Notes since 2009).

97. *Id.*

98. IIA Issues Note 2010, *supra* note 80, at 1, 4.

99. *Id.* at 7–8.

system include, among other things, mechanisms to strengthen the legal capacity of host countries (e.g.,] through the creation of an Advisory Facility), the fostering of dispute avoidance and preventive mechanisms (e.g.,] through the more frequent use of alternative dispute resolution (ADR) techniques such as conciliation and mediation), and efforts to improve the consistency, coherence[,] and development dimension of IIA interpretation.¹⁰⁰

Some of UNCTAD's suggestions have also included amending the ICSID Convention itself or issuing an agreed interpretation of exit provisions and their subsequent effect on a denouncing state's ISDS obligations.¹⁰¹

Furthermore, a state may take preventative action in its IIAs, such as including a provision requiring both contracting parties to be ICSID members.¹⁰² Alternatively, an aggrieved state may consider amending its IIAs to remove their ISDS clauses, instead of terminating those treaties outright.¹⁰³ UNCTAD concludes it would be inefficacious for a country, wishing to unbind itself from a prior commitment to ICSID arbitration, to both denounce the ICSID Convention and terminate its IIAs that contain clauses providing for arbitration under ICSID.¹⁰⁴ "Metaphorically, to get rid of the top floor, one would be asked to destroy the whole building."¹⁰⁵ Nonetheless, this is precisely the type of state action

100. *Id.* at 8.

101. *Id.* at 6–8.

102. *Id.* at 6–7.

103. *Id.* at 8.

104. IIA Issues Note 2010, *supra* note 80, at 6 ("This approach would not be functional, given that most BITs contain important substantive protections and offer options for arbitration other than ICSID.").

105. *Id.*

that has rattled the ISDS framework.

Taking a different approach, scholars like Laurence Helfer¹⁰⁶ view exit provisions—including termination, denunciation, and withdrawal—as highly valuable negotiation tools states can use to manage risk.¹⁰⁷ From this perspective, exit provisions are not deemed detrimental to the transnational investment framework. Thus, a state unhappy with the modern system has the power to utilize these types of leverage mechanisms to its advantage and thereby increase its voice to reshape its treaty rights and obligations.¹⁰⁸ One repeated criticism, however, condemns the potential adverse effect such encouragement may have on the parties' underlying business relationships and the investment treaty negotiation process as a whole.¹⁰⁹

The discussion about the current condition and future of the transnational investment framework is a spectrum. Considering the foregoing viewpoints, it seems helpful to bifurcate the range of opinions in the debate and articulate simply the polarized positions. The result is one side that places stability above all and promotes maintenance of the way things are, while the other is perhaps best characterized as a counterculture push for the reevaluation of modern policy. The disparity between the two camps is encapsulated by Helfer's observation:

To many commentators anxious to demonstrate that States obey international law, the pervasiveness of . . . exit options is not something to be advertised, let alone

106. Laurence R. Helfer is an expert in international law, international adjudication, and dispute settlement. *Laurence R. Helfer*, DUKE UNIV.: SCHOLARS@DUKE, <https://law.duke.edu/fac/helfer/> (last visited Aug. 15, 2018). Having authored over seventy publications, he has an established reputation as a highly esteemed lecturer and author in these fields. *Id.* Prior to becoming a law professor at Duke University School of Law, where he is co-director of Duke Law's Center for International and Comparative Law, he taught law at Vanderbilt University Law School where he directed the International Legal Studies Program. *Id.* Additionally, he is a Permanent Visiting Professor at the iCourts: Center of Excellence for International Courts at the University of Copenhagen, from which he received an honorary doctorate. *Id.*

107. Helfer, *supra* note 87, at 648.

108. See Kathryn Gordon & Joachim Pohl, *Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World 5* (OECD Working Paper on Int'l Inv., Paper No. 2015/02, 2015), <http://www.oecd.org/investment/investment-policy/WP-2015-02.pdf>.

109. See Helfer, *supra* note 87, at 648.

celebrated. For risk-averse governments, however, exit clauses are a rational response to a world plagued by uncertainty, one in which States negotiate commitments with imperfect information about the future and the preferences of other treaty parties.¹¹⁰

A keen avowal of the current climate of the modern transnational investment framework, Helfer's words not only illuminate the ISDS debate's bright party lines, but also expose the depth of the chasm dividing the transnational investment community today.

IV. PART III

While much debate relating to transnational investment law, namely IIAs and ICSID arbitration, is dedicated to matters of nationality,¹¹¹ state consent/investor acceptance,¹¹² and the impact of immune mechanisms¹¹³ on the rights and obligations of states and investors following ICSID withdrawal or treaty termination, this paper does not attempt to narrowly approach these issues. Adopting a broader scope, Part III looks at the practical implications and resulting fallout of the anti-ISDS movement. Moreover, it offers a realistic prescription—predicated on the fundamental, pragmatic values of accountability, education, and patience—for reinforcing the legitimacy of the transnational investment framework moving forward.

A. A Progress Report: What Is (Not) Happening Following Termination and Withdrawal

State action has varied following denunciation of the ICSID Convention and/or outright termination of IIAs. The one common thread running through the anti-ISDS movement is a

110. *Id.* at 647.

111. See Zeynep Tekin, *International Investment Law and Treaty Shopping Through Corporate Nationality Structuring*, U. PA. J. INT'L L. (Apr. 2017), <http://pennjil.com/international-investment-law-and-treaty-shopping-through-corporate-nationality-structuring/> (discussing investor nationality issues and treaty shopping).

112. See McElhiney III, *supra* note 52, at 610–19 (discussing IIA party consent to ISDS).

113. See Lavopa et al., *supra* note 65, at 872, 879.

nationalistic drive to restore sovereign power, once willfully surrendered by states signing IIAs in exchange for a hopeful future of increased foreign investment.¹¹⁴ Today's trend away from ISDS is characterized by countries, "North" and "South" alike, losing faith in ISDS as an effective mechanism.¹¹⁵ Having denounced the transnational investment legal order, an increasing number of states have taken steps, with national and public interests at the forefront, to define new parameters for future transnational investments in their respective countries.¹¹⁶

While less developed countries of the South were some of the first to sign up during the BIT boom, they have also been among the first to abrogate their commitments under the same investment treaties. Undeniably one of the prominent driving forces behind the anti-ISDS movement is the wave of states, starting in Latin America, that has denounced the current transnational investment legal order.¹¹⁷ Hence, it seems appropriate to take a look at how a few of these countries, arguably the leaders of the trend against ISDS, are faring following their renunciation of today's transnational investment legal order.

1. Argentina

One of the most defiant state actions taken in protest of the modern transnational investment system and ISDS, Argentina's audacious noncompliance¹¹⁸ serves as an appropriate starting point for analyzing why the current anti-ISDS movement is

114. Peinhardt & Wellhausen, *supra* note 47, at 571–72 ("ISDS thus triggers domestic frustration about the balance between foreign investors' rights and national sovereignty . . .").

115. Trehearne, *supra* note 56 ("As some developing states have turned against ISDS, recent years have seen threatened, planned, or completed BIT terminations [S]ome major developed States – those that have long driven the development of BITs and ISDS – also appear to be questioning the merits of ISDS."); IIA Issues Note 2010, *supra* note 80, at 1 (confirming "some countries no longer view ICSID as the preferred means of resolving investor-State disputes").

116. Lorenzo Cotula, *Investment Treaties and Sustainable Development: An Overview*, IIED BRIEFING (May 2014), <http://pubs.iied.org/pdfs/17238IIED.pdf>.

117. See Ripinsky, *supra* note 53, at 11–12 ("Withdrawals from ICSID by Bolivia, Ecuador[,] and now Venezuela, and termination of BITs are a radical expression of a much broader trend to revisit key aspects of an international investment regime.")

118. See Peinhardt & Wellhausen, *supra* note 47, at 574.

unsustainable. In the 2000s, Argentina, claiming national economic emergency,¹¹⁹ altogether refused to pay ICSID awards issued in connection with several judgments ruled in favor of claimant investors.¹²⁰ However, it quickly became overtly clear the cost of such defiance was too high, as Argentina's response shut off the country's access to international capital received not only in the form of FDI but from the World Bank as well.¹²¹ The apparent conclusion is that the cost of Argentina's resistance exceeded the utility of its noncompliance with its IIA obligations.¹²²

2. Ecuador

After Bolivia, Ecuador was the second country to turn against the ISDS system as part of its "citizens revolution" against colonialism.¹²³ Under former President Rafael Correa, Ecuador joined the anti-ISDS movement in 2007 with its renunciation of the ICSID Convention.¹²⁴ The country seemingly solidified its position with its termination of eight BITs shortly thereafter.¹²⁵ On May 3, 2017, Ecuador denounced twelve additional BITs.¹²⁶ Arguing Ecuador's withdrawals were part of a broader trend of states reassessing the traditional transnational investment treaty regime, a top global law firm contended, "[I]t seems likely that Ecuador will continue on its course of terminating its existing BIT arrangements under the administration of the president-elect Lenin Moreno (who acted as Vice-President to

119. McElhiney III, *supra* note 52, at 614; see also Federico Lavopa, *Opinion: Crisis, Emergency Measures, and Failure of the ISDS System: The Case of Argentina*, INTERPRESS SERV. (Aug. 12, 2015), <http://www.ipsnews.net/2015/08/opinion-crisis-emergency-measures-and-failure-of-the-isds-system-the-case-of-argentina/>.

120. Peinhardt & Wellhausen, *supra* note 47, at 571–72, 574.

121. *Id.* at 573–74; see Ezequiel Vetulli & Emmanuel E. Kaufman, *Is Argentina Looking for Reconciliation with ISDS?*, KLUWER ARB. BLOG (Oct. 13, 2016), <http://arbitrationblog.kluwerarbitration.com/2016/10/13/is-argentina-looking-for-reconciliation-with-isds/>.

122. Peinhardt & Wellhausen, *supra* note 47, at 574.

123. McElhiney III, *supra* note 52, at 602–03, 602 nn.5 & 6, 613, 613 n.92.

124. Kate Cervantes-Knox & Elinor Thomas, *Ecuador Terminates 12 BITs - A Growing Trend of Reconsideration of Traditional Investment Treaties?*, DLA PIPER (May 15, 2017), <https://www.dlapiper.com/en/mexico/insights/publications/2017/05/ecuador-terminates-12-bits-a-growing-trend/>.

125. *Id.*

126. *Id.*

President Correa)”¹²⁷

Admittedly, this prediction turned out to be true regarding the ultimate termination of Ecuador’s remaining BITs; this occurred before President Correa left office.¹²⁸ But the forecast regarding Ecuador’s future transnational investment policy—undoubtedly echoed by countless critics of today’s cross-border investment framework—turned out to be very wrong in a very important way. In a matter of mere months, Ecuador went from spearheading the revolt against ISDS and the modern transnational investment legal order to very publicly pronouncing a pro-FDI position.¹²⁹ Carlos Pérez, the new administration’s Minister of Hydrocarbons, has taken on the task of propagating Ecuador’s new stance.¹³⁰ It features investor-friendly production-sharing contracts, as well as a positive outlook and plan to reestablish BITs terminated under President Correa’s reign.¹³¹

3. Brazil

A common proposal by states unsatisfied with ISDS under the current transnational investment framework involves establishing alternative investment dispute resolution mechanisms.¹³² This attempt is exemplified by Brazil’s developing transnational investment policy. While Brazil originally signed fourteen traditional BITs in the 1990s, the country’s National

127. *Id.*

128. Daniel Uribe, *Ecuador Withdraws from Its Remaining Investment Treaties*, BILATERALS.ORG (May 24, 2017), <https://www.bilaterals.org/?ecuador-withdraws-from-its>.

129. *Cf. id.*; Cervantes-Knox & Thomas, *supra* note 124; *but see Ecuador Disputes OPEC Production Data*, ARGUS MEDIA (Nov. 9, 2017), <http://www.argusmedia.com/news/article/?id=1569419>.

130. *See La empresa privada considera al país para invertir [Private Companies Consider the Country to Invest]*, TELÉGRAFO [TELEGRAPH] (Nov. 9, 2017), <http://www.eltelegrafo.com.ec/noticias/economia/8/la-empresa-privada-considera-al-pais-para-invertir> [hereinafter Pérez Interview].

131. *Ecuador Disputes OPEC Production Data*, *supra* note 129.

132. *See Cotula*, *supra* note 116 (“[A] ‘new generation’ of II[A]s is emerging that seeks to balance investment protection with other policy considerations, including in social and environmental matters, and that promotes greater transparency in investor-state arbitration.”).

Congress refused to acquiesce to the BIT boom.¹³³ The government never ratified the BITs, which contained traditional ISDS clauses, viewing “the investor-state arbitration regime as limiting states’ right to regulate and as granting extraordinary benefits to foreign investors, hence discriminating against domestic investors.”¹³⁴ Notably, despite not having any BITs in force to date, Brazil has received considerable FDI over the past several decades.¹³⁵ Thus, it could be said that Brazil is an outlier and somewhat of an archetypical success story for countries contemplating whether to join the anti-ISDS movement.¹³⁶

After years of cooperation between the governmental sector, private sphere, and other institutions, Brazil adopted the model Cooperation and Facilitation Investment Agreement (CFIA).¹³⁷ Designed with the core goals of facilitating bilateral investment and mitigating risk, the CFIA features an institutional core comprised of a Joint Committee operating at the state-to-state-level, and the Focal Points, which provides government support to investors.¹³⁸ The primary roles of the two groups are “to promote regular exchange of information and prevent disputes and, if a dispute arises, to implement the dispute settlement mechanism, based on consultations, negotiations[,] and mediation. This mechanism aims to deter investors from judicially challenging host governments.”¹³⁹ Thus, while the CFIA may have numerous facets that distinguish it from the traditional model BIT, it unequivocally forecloses the opportunity for

133. José Henrique Vieira Martins, *Brazil’s Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments*, IISD: INV. TREATY NEWS (June 12, 2017), <https://www.iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/>.

134. *Id.*

135. *Id.*

136. *See id.*

137. *Id.*; see Fabio Morosini & Michelle Ratton Sanchez Badin, *The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?*, IISD: INV. TREATY NEWS (Aug. 4, 2015), <https://www.iisd.org/itn/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements/>.

138. Morosini & Badin, *supra* note 137, at 4.

139. *Id.*

investors to bring arbitration claims against Brazil.¹⁴⁰

4. Notable “North” States

Much of the ISDS debate has spotlighted the recent attitude shifts of developed, capital-exporting global superpowers—the United States, European Union, Canada, and Australia—which together constitute around fifty percent of the world’s GDP.¹⁴¹ Notably, the European Commission, which has consolidated treaties and demanded termination of member states’ BITs found inconsistent with EU policy and law,¹⁴² is pushing for a single international investment court with an appellate mechanism.¹⁴³ With respect to the model IIA, the EU has made its opinion clear: “For the EU ISDS is dead.”¹⁴⁴

Under the current transnational investment framework, an IIA typically includes a dispute resolution clause that provides for one or more methods of international arbitration featuring either an institutional or ad hoc tribunal.¹⁴⁵ The criticisms regarding the current methods of dispute resolution available under traditional IIAs have driven states to devise alternative solutions and draft new model agreements for future IIAs.¹⁴⁶ However, to date, reality has not reflected the benefits that these idealistic,

140. *Id.*

141. See Trehearne, *supra* note 56.

142. UNCTAD, *The Rise of Regionalism in International Investment Policymaking: Consolidation or Complexity?* 2 (IIA Issues Note No. 3, June 2013), https://unctad.org/en/PublicationsLibrary/webdiaepcb2013d8_en.pdf (“Since new EU-wide investment treaties will eventually replace BITs between the EU Member States and third parties, these negotiations will contribute to a consolidation of the IIA regime.”); see Eur. Comm’n, Press Release, Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties (June 18, 2015), europa.eu/rapid/press-release_IP-15-5198_en.pdf (reporting on the EU Commission requesting five member states to terminate their intra-EU BITs, which had features that were deemed “incompatible with EU law”).

143. *Id.*; Eur. Comm’n, Press Release, Commission Welcomes Adoption of Negotiating Directives for a Multilateral Investment Court (Mar. 20, 2018), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1819>.

144. Trehearne, *supra* note 56.

145. Kollamparambil, *supra* note 28, at 4.

146. Ripinsky, *supra* note 53, at 12 (“In recent times, a significant number of countries have been reviewing their model investment treaties and renegotiating existing agreements in order to make them clearer, more balanced[,] and conducive to fair outcomes.”).

supposedly superior alternatives purportedly offer.

While the United States under the Obama administration forged a path characterized by a pro-ISDS policy, the U.S.'s sentiment toward the current transnational investment framework has dramatically shifted.¹⁴⁷ Under the Trump administration, a deluge of anti-ISDS opinions has breached the levies of constructive criticism and flooded the political discussion.

[T]hrough ISDS, the federal government grants foreign investors – and foreign investors alone – the ability to bypass the robust, nuanced, and democratically-responsive U.S. legal framework. Foreign investors are able to frame questions of domestic constitutional and administrative law as treaty claims, and take those claims to a panel of private international arbitrators, circumventing local, state, or federal domestic administrative bodies and courts. ISDS thus undermines the important roles of our domestic and democratic institutions, threatens domestic sovereignty, and weakens the rule of law.¹⁴⁸

This attitude, if it has indeed been adopted by the current administration, explains the course of action recently taken by the U.S. with respect to its transnational investment policy: in 2017, the U.S. withdrew from the landmark TPP,¹⁴⁹ and its negotiations in connection with Transatlantic Trade and Investment Partnership (TTIP) stalled.¹⁵⁰ With North American leaders currently struggling to find common ground during

147. See, e.g., David Singh Grewal, *Investor Protection, National Sovereignty, and the Rule of Law*, 2 AM. AFF. J. 17 (2018), <https://americanaffairsjournal.org/2018/02/investor-protection-national-sovereignty-rule-law/> (juxtaposing how the “Obama administration pushed to expand ISDS as a part of the TPP and the planned Transatlantic Trade and Investment Partnership (TTIP)” while the “Trump administration’s NAFTA renegotiation now provides a major opening for the United States to reconsider its commitment to ISDS, joining the growing movement to limit or repurpose investment arbitration”).

148. Letter to Trump, *supra* note 64.

149. Press Release, *supra* note 63.

150. Daniel Boffey, *Hopes of EU-US Trade Agreement Put on Ice, Say Brussels Sources*, GUARDIAN (June 5, 2017), <https://www.theguardian.com/business/2017/jun/05/hopes-of-eu-us-trade-agreement-put-on-ice-say-brussels-sources>.

NAFTA's renegotiation rounds,¹⁵¹ the transnational investment community will likely view the ultimate outcome of NAFTA's renegotiation as a telling sign of the future of traditional IIAs and the ISDS framework.

5. Questions Left Unanswered

Uncertainty, one of primary complaints about the modern transnational investment framework,¹⁵² is also one of the most problematic issues plaguing and preventing the realization of proposed alternatives to ISDS.

- Above all, most (if not all) investors value the ISDS mechanism as the most crucial protection of FDI. How will capitalist-centric investors be able to confidently and successfully negotiate bilateral investments under Brazil's model CFIA, which precludes an aggrieved investor from bringing a claim against the country?
- In light of the time and experience necessary for a legal system to build recognition and legitimacy, how would a stand-alone international investment court, as proposed by the European Commission, function in practice? And how would such a system avoid the same legitimacy concerns currently besetting ICSID?
- How would claims arising out of the long-term investment sector—which values and requires finality—evolve if subjected to an appellate mechanism? What impact would such a mechanism have on the state of cross-border business affairs?

These questions are just a few drops in the vast, turbulent ocean of doubt and ambiguity that is drowning today's transnational

151. See Ana Swanson & Elisabeth Malkin, *NAFTA Round Closes with Talks Bogged Down by Conflict*, N.Y. TIMES (Nov. 21, 2017), <https://www.nytimes.com/2017/11/21/us/politics/nafta-talks.html>.

152. See Barbara Koremenos, *Contracting Around International Uncertainty*, 99 AM. POL. SCI. REV. 549 (2005) (giving due consideration to today's "international environment characterized by uncertainty that is at times so pronounced that it could easily make states fearful of making meaningful commitments").

investment community.

B. Feasible Prescriptions for a Functioning, Legitimate Transnational Investment Treaty Framework

The wave of states acting out in protest of the current ISDS system has sparked exceptional interest in how to curve the trend, protect investors, and what comes next following a nation's abrogation of its transnational investment treaty commitments. UNCTAD estimates that by the end of 2018, more than half of the BITs in force could be renegotiated or terminated at any time.¹⁵³ After addressing well-known as well as ancillary factors that are likely driving the anti-ISDS trend, the current turmoil infecting the health of the transnational investment legal order can be traced to the fundamental shift in global power corresponding to the peak of BIT popularity around the turn of the 21st century.

Based on the progress report in Part III, which highlights the action (or inaction) of countries that have rebelled against the model IIA and its ISDS mechanism, there are some obvious takeaways. Frustration with the transnational investment framework, and the ISDS mechanism in particular, has sparked and fueled a trend among states to terminate traditional IIAs and denounce arbitration under ICSID—historically the hallmark dispute resolution method for investor-state claims. While potential alternatives have been posited, they have mostly failed to materialize thus far. It is easy enough to propose a solution that encourages states to amend or renegotiate their investment treaties instead of denouncing the ICSID Convention or terminating their IIAs altogether. However, this overlooks the force behind underlying drivers of the anti-ISDS movement.

Without casting the anti-ISDS trend in a good-bad light, it is vital for the transnational investment community to adopt a pragmatic approach, the pillars of which should be accountability, education, and patience. Whatever the best course of action may be with respect to the future of the transnational investment legal order, it must be delineated within the context of our modern global reality. Our current situation features a fundamental

153. See Trehearne, *supra* note 56.

conflict between proponents of a regime of (1) foreign investment law and arbitration as a subset of global administrative law, and (2) state sovereignty over resources, economy, and policy.¹⁵⁴ While this ideological schism has widened over the past few decades, states have responded by dumping their IIAs, which destabilizes, delegitimizes, and devalues the concept of a transnational investment legal system. Needless to say, it is unwise to attempt to write off or downplay the anti-ISDS trend.

1. Accountability

First and foremost, it is time for a lesson in accountability. In the 21st century, country leaders must accept obligations under existing IIAs and ensure state action is in accordance with investment treaties in force. In addition, leaders must accept responsibility when state action has harmed investors whom their respective states previously agreed to protect. Regardless of a state's attitude toward today's investment treaty regime and model dispute resolution mechanism, it is unacceptable for countries to lash out through the impulsive abrogation of treaty commitments.

In judging the phenomena of traditionally "South" countries denouncing the ICSID Convention and/or their IIAs altogether, a common question is "whether they truly realized that by consenting to investment treaty arbitration, they were exposing themselves to the risk of costly litigation?"¹⁵⁵ In defense of these countries, the answer would be "no." The justifications for such a defense range from extreme and unfair (e.g., opportunistic coercion by "North" countries, so "South" countries have had no choice but to sign)¹⁵⁶ to unfortunate oversights and unintended consequences (e.g., peer pressure amongst "South" states at the expense of the prudent weighing of costs and benefits).¹⁵⁷ Without discussing which of these types of arguments are valid, if any, I am inclined to say that at least in the early stages of BIT participation, the broad answer of "no" has some force, as evinced

154. See Sornarajah, *supra* note 1, at 477–87, 497.

155. Lauge N. Skovgaard Poulsen & Emma Aisbett, *When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning*, 65 *WORLD POL.* 273, 279, 282 (2013).

156. See Sornarajah, *supra* note 1, at 481.

157. See Jandhyala et al., *supra* note 8, at 1052.

by the “strong negative effect of [a] first BIT claim on participation in BITs by developing countries.”¹⁵⁸

Nevertheless, countries are not and have never been completely helpless creatures. Thus, it is difficult to accept the contention that such an argument could fully absolve developing countries from assuming accountability for previously-negotiated agreements, even if their negotiation power was unfavorably restricted. Moreover, economic cooperation and investment treaty practice between developing countries have proliferated since 1990, with approximately twenty-six percent of today’s total BITs being “South-South” agreements. Thus, “South” countries should not be permitted to use the negotiation deficit theory as a full shield from assuming responsibility under their IIAs.

Additionally, this unequal bargaining power argument does not seem to fit as neatly when applied to the scenario of a “North” country renegeing on investment treaty commitments. A timely example of such scenario is the U.S.’s change(s) of heart regarding the TPP. Signed by the U.S. and eleven other countries on February 4, 2016, the TPP Ministers’ Statement asserted:

After more than five years of negotiations, we are honoured to be able to formalise our collective agreement of TPP which represents an historic achievement for the Asia-Pacific region. . . . TPP will set a new standard for trade and investment in one of the world’s fastest growing and most dynamic regions. . . . Our goal is to enhance shared prosperity, create jobs[,] and promote sustainable economic development for all of our nations. . . . [I]nterest [in the TPP shared by a number of other economies throughout the region] affirms our shared objective, through TPP, of creating a platform that promotes high-standards for broader economic integration in the future.¹⁵⁹

For the U.S., this optimistic attitude was short-lived. Less than a year later, in one of his first acts as President, Donald Trump

158. Poulsen & Aisbett, *supra* note 155, at 292.

159. Press Release, Off. of U.S. Trade Rep., Trans-Pacific Partnership Ministers’ Statement (Feb. 4, 2016), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/February/TPP-Ministers-Statement>.

pulled out of the agreement.¹⁶⁰ Yet, this was not the end of the story.

Almost a year following the U.S.'s withdrawal from the TPP, President Trump announced to the global investment community at the World Economic Forum in Davos that "America is open for business," and suggested a possible return to the TPP negotiating table.¹⁶¹ Trump declared: "[T]he United States is prepared to negotiate mutually beneficial, bilateral trade agreements with all countries. This will include the countries within TPP, which are very important. We would consider negotiating with the rest either individually or perhaps as a group if it is in the interests of all."¹⁶²

The U.S.'s vacillating position on the TPP is but one illustration of a world power that needs to set an example in accountability—that needs to make up its mind and stick to it. At the time of Trump's withdrawal, the TPP had been signed but not ratified; thus, withdrawing in such fashion was arguably extreme and unnecessary. After a regime change, new leaders should aim to more comprehensively survey and understand their countries' cross-border investment treaty commitments. Instead of rashly shunning investment treaty obligations, policy-makers and decision-influencers must first take time to become fully educated on the critical importance of preexisting and future investment agreements and assume accountability for any state action

160. Kaori Kaneko & Takashi Umekawa, *Trans-Pacific Trade Pact, Without U.S., to Be Signed in March: Japan*, REUTERS (Jan. 23, 2018), <https://www.reuters.com/article/us-trade-tpp-japan/trans-pacific-trade-pact-without-u-s-to-be-signed-in-march-japan-idUSKBN1FC0X3>.

161. Reuters, *Trump Woos Davos with TPP Trade Deal Shift, Says U.S. Is 'Open for Business'*, JAPAN TIMES (Jan. 27, 2018), <https://www.japantimes.co.jp/news/2018/01/27/business/economy-business/trump-woos-davos-tpp-trade-deal-shift-says-u-s-open-business#.Woi5ypM-fOR>; Jacob M. Schlesinger, *In Davos, Trump Reopens Door to Pacific Trade Pact He Long Scorned*, WALL ST. J. (Jan. 26, 2018), <https://www.wsj.com/articles/in-davos-trump-reopens-door-to-pacific-trade-pact-he-long-scorned-1516985427#print>.

162. Donald Trump, President, U.S., *Trump Davos Speech* (Jan. 26, 2018) (transcript available at <https://www.politico.com/story/2018/01/26/full-text-trump-davos-speech-transcript-370861>).

impacting the same.

2. Education

It is pertinent to recognize that while ignorance should not be an acceptable excuse, it is often a harsh reality. Developing nations are in desperate need of education pertaining to their investment treaty commitments and options; this includes both the public and private spheres. The reality is that the vast majority of developing countries arguably *needs* foreign investment. Instead of making impulsive decisions to withdraw from ICSID or terminate BITs, states wishing to do so must be aware of all legal, economic, and geopolitical implications resulting from such action. The first step in stabilizing and imparting legitimacy to the transnational investment legal order is ending the era of ignorance. States taking responsibility for current treaty commitments and future decisions involving cross-border investments is essential. Rational, informed action is key.

One grievance concerning the model investment treaty framework is it does not offer an appellate mechanism. This timely debate is far too involved and long-running to delve into in this paper.¹⁶³ However, the option of appeal in ISDS seems to run counter to the concept of finality in the context of international business and investments. The finality of a binding, non-appellable investment arbitration judgment has long been viewed as a strong advantage that traditional judicial determinations lack.¹⁶⁴ In fact, ICSID prides itself on the finality of arbitral awards issued under its auspices, which is achieved by

163. See Andrea Kupfer Schneider, *Error Correction and Dispute System Design in Investor-State Arbitration*, 5 *ARB. L. REV.* 194, 197 (2013), <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1090&context=arbitrationlawreview> (“The annulment procedure is particularly of note in the recent crisis of confidence with ICSID.”); see also Hugo Perezcano Díaz, *Enhancing the Dispute Settlement System or Much Ado About Nothing*, in 6 *INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW* 1 (2013), available at https://law.yale.edu/system/files/documents/pdf/Enhancing_Dispute_Settlement_of_Much_Ado_about_Nothing_FINAL.pdf (“The idea of an appellate mechanism for international arbitration is not new.”).

164. Katia Yannaca-Small, *Annulment of ICSID Awards: Limited Scope but Is There Potential?*, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* 631 (Katia Yannaca-Small ed., 2010).

foreclosing the option of appeal.¹⁶⁵ It is well-known that states can seek partial or full annulment of an ICSID judgment by challenging the legitimacy of the arbitration process.¹⁶⁶ Again, this paper does not seek to analyze the long-winded arguments for and against appeal. Nevertheless, it is important to keep in mind that an appellate mechanism in the context of investor-state arbitration would very probably “bring additional delays, costs[,] and caseload, and lead to the politicization of the system.”¹⁶⁷ And regardless of whether it is an advantage or disadvantage for parties to ISDS, finality is arguably a necessity in the context of long-term cross-border investments.

Another common complaint criticizes the lack of transparency in connection with ISDS mechanisms. However, dissidents should not overlook the numerous transparency-promoting measures adopted in recent years.¹⁶⁸ For example, UNCTAD—which has been condemned by many for the secretiveness of investment arbitrations conducted under its rules—adopted new procedural rules promoting increased transparency that went into effect in April 2014.¹⁶⁹

As discussed earlier in this paper, perhaps two of the most potent arguments against the modern transnational investment framework are that IIAs (1) restrict state sovereignty and (2) fail to actually increase foreign investment. However, at least on their face, these attacks are arguably conclusory and unfounded.

165. Eugenia Bouras, *To Appeal or Not to Appeal in International Arbitration*, 16 GLOBETROTTER 1, 1 (2012), http://www.oba.org/en/pdf/sec_news_int_jun12_bou_arb.pdf.

166. *Id.* at 2; ICSID, *Updated Background Paper on Annulment for the Administrative Council of ICSID 23* (May 5, 2016), <https://icsid.worldbank.org/en/Documents/resources/Background%20Paper%20on%20Annulment%20April%202016%20ENG.pdf>.

167. Yannaca-Small, *supra* note 164, at 631.

168. *Bilateral Investment Treaties and Investor-State Dispute Resolution*, U.S. COUNCIL FOR INT’L BUS., https://www.uscib.org/docs/ncs_key_messages.pdf (last visited Oct. 1, 2018).

169. See Julia Salasky & Corinne Montineri, *Transparency in Investor-State Arbitration: The New UNCITRAL Rules on Transparency*, UNCTAD: INV. POL’Y HUB. BLOG (Mar. 26, 2014), <http://investmentpolicyhub.unctad.org/Blog/Index/29> (“The Rules provide for a regime of disclosure in investor-State disputes that acknowledges the public interest in investor-State disputes, and gives the public, as a matter of course, broad access to a wealth of documents in a dispute. The Rules also provide for a default rule of open hearings and a qualified right for third parties (upon meeting certain criteria and if it does not unduly burden the proceedings) to make submissions.”).

Addressing the first contention, ISDS does not, in and of itself, restrict states from implementing new policy. “Contrary to some suggestions, investors cannot use investment provisions to bring a claim against a state just because their profits might be affected by a new government policy.”¹⁷⁰ Furthermore, in response to the latter argument, there does not seem to be conclusive, across-the-board evidence that IIAs detrimentally affect FDI.¹⁷¹ In fact, there is a wealth of evidence in support of the proposition that BITs, coupled with strong ISDS provisions, have favorable economic and political implications on host countries.¹⁷²

The legitimacy crisis plaguing the transnational investment framework appears to be largely driven by political agendas and imperfect logic. For example, the U.S. rationalized its withdrawal from the TPP, in part, because it allowed “corporate attacks on

170. *Bilateral Investment Treaties and Investor-State Dispute Resolution*, *supra* note 168. See *Philip Morris Brands Sàrl v. Oriental Repub. Uru.*, ICSID Case No. ARB/10/7, Award, para. 9 (July 8, 2016), for an example of a recent ICSID judgment involving regulation of public health policy issued in favor of the respondent host state. This award “illustrates the debate about the impact of international investment agreements (IIAs) on the right of States to regulate. More specifically, it provides a salutary answer to those critics who decry international investment law as preventing States from regulating.” Yannick Radi, *Philip Morris v Uruguay: Regulatory Measures in International Investment Law: To Be or Not to Be Compensated?*, 33 ICSID REV.: FOREIGN INV. L.J. 74, 74 (2018).

171. See Lisa E. Sachs & Karl P. Sauvant, *BITs, DTTs, and FDI Flows: An Overview*, in *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES AND INVESTMENT FLOWS* (Lisa E. Sachs & Karl P. Sauvant eds., 2009), available at <http://ccsi.columbia.edu/files/2014/01/Overview-SachsSauvant-Final.pdf> (noting the “absence of conclusive evidence as to the effect of BITs . . . on FDI flows”); see also James Zhan, *The FDI Impact of IIAs - Can Econometric Studies Help Understand the Relationship?*, UNCTAD INV. POL’Y HUB.: BLOG (Sept. 10, 2014), <http://investmentpolicyhub.unctad.org/Blog/Index/32>.

172. See, e.g., Michael Frenkel & Benedikt Walter, *Do Bilateral Investment Treaties Attract Foreign Direct Investment? The Role of International Dispute Settlement Provisions* 21 (WHU – Otto Beisheim Sch. Mgmt., Working Paper 17/08, 2017) (concluding “international dispute settlement provisions indeed play a crucial role in the FDI-enhancing effect of BITs”); see also Lindsay Oldenski, *What Do the Data Say About the Relationship Between Investor-State Dispute Settlement Provisions and FDI?*, PETERSON INST. INT’L ECON.: TRADE & INV. POL’Y WATCH (Mar. 11, 2015, 1:00 PM), <https://piie.com/blogs/trade-investment-policy-watch/what-do-data-say-about-relationship-between-investor-state> (“Studies of the impact of BITs on FDI show that these treaties do have a positive effect on increasing investment.”).

[U.S.] laws.”¹⁷³ However, such an objection is arguably misplaced. “ISDS would curb anti-free market practices that hurt U.S. businesses, not critical laws that protect ordinary citizens.”¹⁷⁴ This being one of countless examples of a lack of understanding surrounding ISDS, an advisable path moving forward would be for all interested parties to go back to the basics and obtain and consider up-to-date information on the current landscape of the transnational investment framework.

Three valuable considerations when dealing with cross-border investments in today’s overlapping transnational investment treaty framework include determining (1) which investments are protected, (2) when a subject IIA applies, and (3) the term of protection.¹⁷⁵ Remembering “[not] all BITs are created equal,”¹⁷⁶ these guidelines would be useful not only to attorneys, but also to state policy-makers and other players in the transnational investment legal order in assessing current and potential future FDI, IIAs, and ISDS claims.

Interestingly, while intra-“South” investment treaty practice has increased significantly, it appears that developing countries have not deviated much from traditional “North-South” model IIAs. Manifold arguments justifying denunciation of the investment treaty framework by traditionally “South” states would be mooted if these countries would “[take] advantage of the more ‘equal’ negotiating space, free of traditional political pressures associated with North-South, post-colonial relationships, to design more bespoke provisions to their treaties.”

In 2017, total world FDI plummeted 16% to US\$1.52

173. Robert D. Blackwill & Theodore Rappleye, *Trump’s Five Mistaken Reasons for Withdrawing from the Trans-Pacific Partnership*, FOREIGN POL’Y (June 22, 2017, 10:56 AM), <http://foreignpolicy.com/2017/06/22/trumps-five-mistaken-reasons-for-withdrawing-from-the-trans-pacific-partnership-china-trade-economics/>.

174. *Id.*

175. See Helena Sprenger & Bouke Boersma, *The Importance of Bilateral Investment Treaties (BITs) When Investing in Emerging Markets*, BUS. L. TODAY (Mar. 2014), https://www.americanbar.org/groups/business_law/publications/blt/2014/03/01_sprenger/.

176. *Id.*

trillion.¹⁷⁷ Increased FDI would stimulate the global economy by creating new jobs, heightening standards of living, increasing tax revenue,¹⁷⁸ and promoting overall sustainable development.¹⁷⁹ The countries with the most BITs are also those with the highest and most rapid FDI outflows.¹⁸⁰ Developing countries in particular must take advantage of the current transnational investment climate by garnering educated support to shape and maintain cross-border investment policy.¹⁸¹ Such support may involve “learning from international best practice; peer-to-peer lesson sharing among low-income country governments, and among civil society organisations or parliamentarians; mechanisms that effectively harness existing capacity in the country (for instance in academia or private practice); and strategic partnerships with international centres of excellence.”¹⁸²

3. Patience

Evinced by the emergence of North-North ISDS claims, it is vital to recognize the flow of capital is no longer North-South.¹⁸³ Moreover, when contemplating a new and improved transnational investment framework, it is important to acknowledge an act of a state can be legal at a national level, but illegal at the international or transnational level. In other words, the national, international, and transnational legal orders are no

177. *Global Foreign Direct Investment Slipped in 2017*, UNCTAD (Jan. 22, 2018), <http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1659>.

178. *Bilateral Investment Treaties and Investor-State Dispute Resolution*, *supra* note 168.

179. *See Global Foreign Direct Investment Slipped in 2017*, *supra* note 177.

180. Malik, *supra* note 22, at 2.

181. Cotula, *supra* note 116 (“[C]apacity support is needed in lower-income countries: for governments to make informed policy choices and negotiate better deals; for parliamentarians and civil society to provide effective ‘checks and balances’; and for federations of domestic producers that stand to gain, or to lose, from proposed II[A]s.”).

182. *Id.*

183. Christine Qiang, *Foreign Direct Investment and Development: Insights from Literature and Ideas for Research*, WORLD BANK: PRIVATE SECTOR DEV. BLOG (Nov. 24, 2015), <http://blogs.worldbank.org/psd/foreign-direct-investment-and-development-insights-literature-and-ideas-research> (explaining FDI “no longer flows from ‘North’ to ‘South’, but also from ‘South’ to ‘South’ and from ‘South’ to ‘North’”).

longer separate and distinct.¹⁸⁴

U.S. Trade Representative Robert Lighthizer expressed in his Senate testimony that he was “always troubled by the fact that nonelected non-Americans can make the final decisions that the United States law is invalid . . . [.] This is a matter of principle I find . . . offensive.”¹⁸⁵ My response is simple: we now live in a dynamic, multipolar world characterized by an interconnected, overlapping system of laws, norms, and policies. Instead of vehemently fighting against those upset with the current investment treaty framework, the transnational investment community needs to ride the waves of change while learning and adapting for a better future. Over fourteen years ago, this journal published a prophetic article by Dr. Ewell Murphy that reflected on and addressed this very issue.

Those are heady thoughts, difficult for lawyers to comprehend, and particularly difficult for U.S. lawyers of my generation, who were schooled in the doctrine that national authority is the exclusive source of law. . . . The dimension of the law we learned in law school and encountered in the early years of our practice was *national*. . . . Occasionally we glimpsed, floating above national law, law of a second dimension, something called *international* law. But that international law seemed to be a rather wispy sort of law that did not directly affect our clients. . . . But then our clients’ lives became more complicated. Sally bought Blackacres overseas; Jack and Jill contracted across national borders; Betty committed torts abroad. To deal with such matters, sovereigns enacted laws about things that cross borders. Because such enactments of one sovereign tended to conflict with those of another sovereign, sovereigns made *international* agreements to resolve

184. Philip Bobbitt, *The Shield of Achilles: War, Peace, and the Course of History* (2003) (ebook) (predicting correctly that today’s “world market . . . is no longer structured along national lines but rather in a way that is transnational and thus in many ways operates independently of states”).

185. Bob Davis, *U.S. Bid to Exit NAFTA Arbitration Panels Draws Ire from Businesses*, WALL ST. J. (Aug. 22, 2017), <https://www.wsj.com/articles/u-s-bid-to-exit-nafta-arbitration-panels-draws-ire-from-businesses-1503423680>.

those conflicts, and some of those agreements were given effect in *national* law. Those innovations created law in the third dimension, law that addresses things that cross borders. Whether sourced *national* enactments or in *international* agreements, in scope and effect the new law is *transnational*. . . . The lesson for lawyers is obvious. To come to grips with globalization we must discard our old mind-set completely and enter the world of law in the third dimension. We must train ourselves to evaluate every law we encounter in terms of its transnational scope and effect. We must learn to think and practice in the new transnational dimension of law.¹⁸⁶

It is critical for the transnational investment community to keep in mind that ISDS mechanisms are, relative to most national legal systems and laws, brand new. While put into effect in the 1960s, ICSID did not handle a meaningful caseload until the 1990s.¹⁸⁷

Unintentionally analogizing to the familiar, I was repeatedly reminded of the early American judicial system when exploring ICSID's legitimacy crisis. One of the first Constitutional case studies for novice legal scholars in the U.S. is *Marbury v. Madison*.¹⁸⁸ At the time of the case, the U.S. judiciary was in its infancy and under attack, which threatened the continued existence of the Supreme Court of the United States (SCOTUS).¹⁸⁹ While SCOTUS's authority has and always will continue to be subject to popular debate, the Court undoubtedly exercised a

186. Ewell E. Murphy, Jr., *Charting the Transnational Dimension of Law: U.S. Free Trade Agreements as Benchmarks of Globalization*, 27 HOUS. J. INT'L L. 47, 53–54, 56–57 (2004).

187. See Jane Y. Willems, *The Settlement of Investor State Disputes and China New Developments on ICSID Jurisdiction*, 8 S.C. J. INT'L L. & BUS. 1, 1–2 (2011) (“In the 1990s, the ICSID experienced a multiplier effect in new arbitration filings.”).

188. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553, 554, 559 (2003).

189. See *Marbury v. Madison Establishes Judicial Review*, HISTORY.COM, <http://www.history.com/this-day-in-history/marbury-v-madison-establishes-judicial-review> (last visited Oct. 2, 2018); see also Eric J. Beckerman, Paper, *Great Ironies of History: The Peculiar Historic Fable of Marbury v. Madison*, 1990 HOFSTRA L. STUDENT WORKS 29–30 (discussing the historical context of the *Marbury* decision).

delicate balance of interests in the case, which greatly influenced the establishment of SCOTUS's legitimacy as the supreme interpreter of U.S. law.¹⁹⁰

The drama of the early U.S. Supreme Court serves as a paradigm in this paper's analysis, from which can be extracted a lesson in patience. Expertise takes time to develop and refine; then, in time, legitimacy will likely follow. The transnational investment legal order is learning its own lessons, and has been adapting accordingly. For example, while there is traditionally no *stare decisis* in international law,¹⁹¹ there is a strong argument that legal precedent has been used (and advocated for) in the transnational investment arbitration context.¹⁹² With patience and support from the transnational investment community, there is a considerable likelihood ISDS arbitration judgments will gain consistency, which will consequently greatly bolster the legitimacy of the IIA framework.

As discussed above, renegotiation can be a potent tool for states unhappy with their IIAs and/or ISDS. However, prior to taking any state action involving transnational investments, countries should do so only after engaging in open, educated, and patient deliberation.¹⁹³ "[N]egotiating II[A]s involves a delicate balancing act between entering into binding commitments on the

190. See *Sex, Ducks, and the Founding Feud*, RADIOLAB (Dec. 19, 2013), <http://www.radiolab.org/story/sex-ducks-and-founding-feud/>; see also Cliff Sloan, *Marbury: It Wakes You Up*, SLATE (Mar. 5, 2009), <https://slate.com/culture/2009/03/marbury-it-wakes-you-up.html>.

191. Christopher Greenwood, *Sources of International Law: An Introduction* (2008), http://legal.un.org/avl/pdf/lsgreenwood_outline.pdf ("[T]here is no doctrine of binding precedent in international law.")

192. Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 *ARB. INT'L* 357, 368 (2007) ("While tribunals seem to agree that there is no doctrine of precedent per se, they also concur on the need to take earlier cases into account."); see, e.g., *El Paso Energy Int'l Co. v. Argentine Rep.*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, para. 39 (Apr. 27, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0268_0.pdf ("ICSID arbitral tribunals are established ad hoc, . . . and the present Tribunal knows of no provision . . . establishing an obligation of *stare decisis*. It is nonetheless a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals.")

193. See Cotula, *supra* note 116 ("Countries considering negotiating investment treaties need proper reflection and public debate on . . . policy choices.")

one hand and preserving policy space on the other. It is important that decisions on whether to conclude an II[A], and on its wording, are based on **informed reflection and debate**.¹⁹⁴ Without accountability and education, patience is worth very little when looking to fortify the foundation of the transnational investment framework. And, even more, a future *legitimate* transnational investment legal order requires the integrated exercise of all three aforementioned considerations—accountability, education, and patience—beginning now.

4. The Ultimate Question

So, the ultimate question looms: What will come of the anti-ISDS trend? Of course, no one can be sure. My best prediction for the future of the transnational investment framework was embodied during a recent interview of Ecuador's Minister of Hydrocarbons. In response to a line of inquiries regarding potential future FDI by U.S. investor ExxonMobil, Minister Pérez conceded, "We are aware a bilateral treaty is needed for companies to have the security of investing in [Ecuador]."¹⁹⁵ He then qualified this admission, contending a future BIT between Ecuador and the United States "must contain different modern concepts that do not expose the country."¹⁹⁶

Thus, we unequivocally must continue to evolve, pressing forward and accommodating state policies and investor interests. There is no question that it is no longer permissible (if it ever was) for one part of the world to impose its preferred standards, cloaked as altruistic objectives, on the less fortunate while bolstering and facilitating the monetization of its private sphere.¹⁹⁷ Nevertheless, I cannot help but grin after reading Pérez's statement. It appears in a short matter of years, Ecuador has come full circle and is now showing a seemingly renewed faith

194. *Id.* (emphasis added).

195. Pérez Interview, *supra* note 130.

196. *Id.*

197. See Sornarajah, *supra* note 1, at 481–82.

in a future, legitimized transnational investment regime.

V. CONCLUSION

The recent spike in state withdrawal from the ICSID Convention and outright termination of BITs and other IIAs has resulted in an atmosphere of uncertainty and distrust in the transnational investment community. With global economic and political climates in mind, an analysis of recent state behavior in dealing with investment treaties provides a glimpse into the future norms, or potential reforms, of transnational regulation of investment law. This paper has reviewed recent instances and tracked trends of state abrogation of investment treaty commitments. It has highlighted the criticisms of today's transnational regulation of investment law and proffered solutions to save a system struggling to retain legitimacy. Finally, it has addressed the oft-avoided question: What's next for the future of transnational investment policy?

Many critics recommend remedial maintenance measures to avoid any future state action that might further disrupt the transnational investment framework as we know it. However, this mindset overlooks the passion, commitment, and momentum of the anti-ISDS movement. Instead, a critical consideration and understanding of the trend turning away from traditional IIAs and ISDS is requisite in order for the transnational investment community to most effectively cope with the modern shifts in geopolitical and economic power. The key to a feasible and functional future transnational investment framework lies not in short-sighted idealisms, but in forward-looking, sustainable solutions. The ultimate end of a successful transnational investment regime requires a realistic approach. The means by which to achieve this end begin with the prescriptive guidelines of accountability, education, and patience.

