BALANCING THE BENEFITS OF ISDS PROVISIONS IN DEVELOPING ECONOMIES: COLOMBIA FACES ITS FIRST INVESTOR-STATE DISPUTES IN ICSID AND DEMONSTRATES THE RISKS ASSOCIATED WITH ISDS CLAUSES

Comment

> "[Trade] protection accumulates upon a single point the good which it effects, while the evil inflicted is infused throughout the mass. The one strikes the eye at a first glance, while the other becomes perceptible only to close investigation."
>
> — Frédéric Bastiat[1]

I. INTRODUCTION

After signing its first free-trade agreement (FTA) over twenty years ago, Colombia was one of the few countries that has not been a respondent in an investor-state dispute in international arbitration.[2] In 2016, Colombia caught wave of its first round of investment disputes by three different investors: the first, a Canadian-American mining company over allegations of fraud and expropriation of a mining concession[3]; the second, a Swiss mining company for allegations of unjustly raising royalty payments made to the Colombian government[4]; and the third, a multi-million dollar telecommunications company for allegations of direct expropriation of assets.[5] More claims are projected to come through the flood gates as Colombia begins to realize the implications of investor-state dispute settlement (ISDS) provisions in its international investment treaties.[6]

Investor-state disputes settlement provisions allow foreign investors to challenge the actions of state entities toward foreign investments.[7] Colombia is now faced with the following questions: Are

---

1. FRÉDÉRIC BASTIAT, SOPHISMS OF THE PROTECTIVE POLICY, 14 (D.J. McCord trans., New York, George P. Putnam 2nd ed. 1848). Frédéric Bastiat was a famous French economist and author. *See Biography of Frédéric Bastiat*, LIBRARY OF ECON. AND LIBERTY (2008), http://www.econlib.org/library/Enc/bios/Bastiat.html.

2. *See* Eduardo Zuleta Jaramillo, *National Report for Colombia in* INT'L COUNCIL FOR COMMERCIAL ARBITRATION: INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 78 (Jan Paulsson & Lise Bosman eds., Kluwer Law International, Supp. No. 78, March 2014)(1984).

3. *See Cosigo Resources, Ltd., Cosigo Resources Sucursal Colombia, Tobie Mining and Energy, Inc. v. Republic of Colom., UNCITRAL*, ITALAW (last visited Februrary 10,2018), http://www.italaw.com/cases/3961.

4. *See* Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6, Constitution of Tribunal (August 4, 2016), https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/16/6(pending).

5. *See* América Móvil S.A.B. de C.V. v. Republic of Colombia, ICSID Case No. ARB(AF)/16/5, Constitution of Tribunal (July 7, 2017), https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB(AF)/16/5 (pending).

6. *See El Club De La Pelea: Ola De Demandas Contra, Pelitos*, DINERO (March 31, 2016, 12:00A.M.), http://www.dinero.com/edicion-impresa/caratula/articulo/la-polemica-fronteriza-con-nicaragua-y-otras-demandas-que-colombia-enfrenta/221885 (article title translates to "The Fight Club: Wave of Lawsuits Against Colombia" in lawsuits section)(Sp.).

7. *See* TOM CUMMINS & BEN GIARETTA, *Investment Treaty Arbitration, in* DISPUTE RESOLUTION IN THE ENERGY SECTOR: A PRACTITIONER'S HANDBOOK, 225(Ronnie King Ed., Globe Law and Business 2012).

ISDS clauses needed to achieve "free trade"? Are the benefits of foreign direct investment balanced with the risks of being sued by a private entity?

The answer to these questions lies in a thorough analysis of the implications of ISDS clauses. This article reviews the protections that investors inherit when their home countries sign an international investment agreement (IIA) with an ISDS clause. This article argues that Colombia and countries with smaller economies should reorganize their IIAs to mitigate the risks of investor-state disputes or establish methods to help protect the state from a regulatory freeze. Part I gives an overview of the importance of foreign direct investment in developing countries. Part II provides an introduction to IIAs and the investor-state arbitration system. Part III analyzes the difficulties that arise with investor-state dispute provisions, and the reality of what economies need ISDS clauses. Finally, Part IV provides alternatives that Colombia and other countries with developing economies should consider instead of ISDS provisions. Part V concludes with a warning that if a developing country does not narrow the scope of its international arbitration clauses, it may be the next victim of a regulatory freeze.

II. THE IMPORTANCE OF FOREIGN DIRECT INVESTMENT IN DEVELOPING ECONOMIES

Foreign direct investment (FDI) occurs when an investor based in one country acquires an asset in another country with the intent to manage that asset.[8] The management feature is what distinguishes FDI from portfolio investment in foreign stocks, bonds, and other financial instruments.[9] There are three main categories of FDI: equity capital, reinvested earnings, and capital made in short- or long-term borrowing and lending.[10] A foreign direct investment is distinct from foreign trade itself, as a FDI involves establishing operations or acquiring tangible assets, including domestic structures, organizations, and equipment.[11]

The benefits of FDI in developing countries are well documented.[12] FDI benefits a developing country by triggering technology spillovers, assisting in human capital formation, contributing to international trade integration, and enhancing enterprise development domestically.[13]

---

8. RICHARD BLACKHURST & ADRIAN OTTEN, WORLD TRADE ORG., *Trade and Foreign Direct Investment* (October 9, 1996), https://www.wto.org/english/news_e/pres96_e/pr057_e.htm.

9. *Id.*

10. *Id.*

11. *See id.*

12. ORG. FOR ECON. CO-OPERATION AND DEV., Foreign Direct Investment for Development: *Maximizing Benefits, Minimizing Costs* 5 (2002), *https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf* (2002).

13. *Id.*

Studies have demonstrated a correlation between the amount of inward and outward FDI relative to a growth in GDP.[14]

In contrast, foreign trade is the exchange of capital, goods, and services across international borders through imports and exports.[15] The flow of imports and exports are regulated through taxes or other barriers assessed by the countries affected.[16]

When a country feels that another country is creating trade barriers or unfair competition, it may bring a case with the World Trade Organization (WTO).[17] Foreign trade is a state-state issue rather than an investor-state issue, as investors do not have standing to bring a case on behalf itself at the WTO.[18] However, the manipulation or unfair treatment of a foreign direct investment is an investor-state issue that may be brought by the investor in its individual capacity in international arbitration.[19]

III. AN OVERVIEW OF INVESTOR-STATE ARBITRATION

A. International Investments Agreements

Initially, the only way an investor could seek remedy for a debt or mistreatment in a foreign country was through "gunboat diplomacy" using military forces.[20] At the start of the twentieth century, investors began seeking diplomatic protection from their home state, which would only result in the dispute being dropped or settled based on diplomatic considerations that implicated the country as a whole.[21]

However, following World War II and Europe's economic recovery, wealthier states began to sign treaties premised on "friendship, commerce, and navigation" (FCN Agreements).[22] These FCN

---

14. *See generally Eduardo Borensztein et al., How Does Foreign Direct Investment Affect Economic Growth?* (Nat'l Bureau of Econ. Research, Working Paper No. 5057, 1995).

15. Ifeoma P. Osamor et al., *An Empirical Analysis of the Impact of Globalisation on Performance of Nigerian Commercial Banks in Post-Consolidation Period*, 5 European J. of Bus. And Man. 37, 41 (2013).

16. *See id.* at 38–39.

17. *Understanding The WTO: Basics, What Is The World Trade Organization?*, WORLD TRADE ORGANIZATION(last visited January 26, 2018), https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm.

18. *Dispute Settlement System Training Module: Chapter 1, Introduction to the WTO dispute settlement System*, WORLD TRADE ORGANIZATION(last visited March 3, 2018), https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s4p1_e.htm.

19. *See* Eric E. Bergsten, *Dispute Settlement*, U.N. CONF. ON TRADE & DEV. 4 (2005), http://unctad.org/en/docs/edmmisc232add38_en.pdf.

20. *See* CUMMINS & GIARETTA, *supra* note 7, at 225.

21. *See* GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE, 417-49 (Kluwer Law International, 2d ed. 2015).

22. *See* CUMMINS & GIARETTA, *supra* note 7, at 225; *see, e.g.*, Treaty of Friendship, Commerce and Navigation Between the United States of America and the Republic of China, U.S.-China, Jan. 12,

Agreements included investment protections in non-market economies and helped create consistent standards for the treatment of investors of one state in the territory of another.[23]

As multinational corporations began investing larger amounts of capital in foreign markets, the need for a more sophisticated instrument became prominent. On November 11, 1959, Germany and Pakistan created the first modern international investment agreements: the bilateral investment treaty (BIT) and the multilateral investment treaty (MIT).[24]

A BIT promotes foreign direct investments between the two signatory countries by agreeing to protect an investment made by a national of one signing party from unfair treatment in the territory of the other signing party.[25] In addition, the MIT is essentially the same instrument except with more than two parties involved.[26] Familiar examples of MITs are: the North American Free Trade Act (NAFTA)[27]; the Energy Charter Treaty (ECT)[28]; and the Trans-Pacific Partnership Agreement (TPP).[29] Although the initial BIT and MIT model created fair-treatment obligations to the signatory countries, it did not contain a dispute resolution clause to resolve a breach of the treaty protections.[30]

On June 11, 1969, Chad and Italy entered into the first bilateral investment treaty that included an investor-state dispute settlement provision in international arbitration.[31] Soon after, the number of investment treaties increased from 52 in 1970, to over 1,000 in 1995.[32] Despite this growth in investment agreements, it was not until 1987 that

---

1949, 63 Stat. 1299, https://www.loc.gov/law/help/us-treaties/bevans/b-cn-ust000006-0761.pdf.

23. *See* CUMMINS & GIARETTA, *supra* note 7, at 225.

24. *See* Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, Ger.-Pak., Nov. 25, 1959, 457 U.N.T.S. 23, http://investmentpolicyhub.unctad.org/IIA/country/78/treaty/1732 [hereinafter Germany-Pakistan BIT].

25. *See id.*

26. *See* CUMMINS & GIARETTA, *supra* note 7, at 226.

27. *See* North American Free Trade Agreement, Dec. 12, 1992, 32 I.L.M. 296, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2412 [hereinafter NAFTA].

28. *See* The Energy Charter Treaty, Dec. 17, 1994, 34 I.L.M. 381, http://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty [hereinafter Energy Charter].

29. *See* Trans-Pacific Partnership Agreement, Feb. 4, 2016, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text [hereinafter TPP].

30. *Cf.* Germany-Pakistan BIT, *supra* note 24, at art. 11.

31. *See* Treaty between the Republic of Chad and the Italian Republic for the Promotion and Protection of Investments, It.-Chad, June 11, 1969, http://investmentpolicyhub.unctad.org/Download/TreatyFile/659 [hereinafter Chad-Italy BIT].

32. *See* Martin Hearson, *Learning from Past Mistakes in Tax and Investment Treaties*, TAX, DEV. & INT'L REL. (Oct. 7, 2014), https://martinhearson.wordpress.com/2014/10/07/learning-from-past-mistakes-in-tax-and-investment-treaties.

the first arbitration arising exclusively from an ISDS provision in a BIT was filed in international arbitration: a UK investor seeking damages from the government of Sri Lanka following the destruction of his shrimp farming enterprise.[33]

International arbitration differs from domestic arbitration because it either involves: a transaction that is in a State other than the place of arbitration, a transaction that took place in more than one State, or a transaction between parties from different States.[34] This added complexity changes the applicable law and rules that govern the arbitration.[35] Today, investors have initiated over 800 investor-state arbitrations under an investment treaty protection.[36]

B. SSDS and ISDS Provisions in International Investment Agreements

State-state dispute settlement provisions (SSDS) in international investment agreements generally cover disputes relating to the interpretation or application of the treaty.[37] For example, in the Germany-Liberia BIT (1961), the state-state dispute mechanism provides:

> Article 11
>
> (1) Disputes concerning the interpretation or application of the present Treaty should, if possible, be settled by the Governments of the two contracting parties.
>
> (2) If a dispute cannot thus be settled, it shall upon the request of either contracting party be submitted to an arbitral tribunal.
>
> (3) Such arbitral tribunal shall, in each individual case, be constituted as follows: Each contracting party shall appoint one member, and these two members, so appointed, shall agree upon a national of a third State as their chairman to be appointed by the Governments of the two contracting parties . . .[38]

---

33. *See* Asian Agric. Prods., Ltd. (AAPL) v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 1 (June 27, 1990) http://www.italaw.com/sites/default/files/case-documents/ita1034.pdf.

34. *See* Bergsten, *supra* note 19, at 13.

35. *Id.*

36. *See Investment Dispute Settlement Navigator*, INVESTMENT POLICY HUB (July 31, 2017), http://investmentpolicyhub.unctad.org/ISDS.

37. *See* Nathalie Bernasconi-Osterwalder, *Best Practices Series: State-State Dispute Settlement in Investment Treaties,* INT'L INST. FOR SUSTAINABLE DEV. 1,3 (2014), https://www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf.

38. Treaty between the Federal Republic of Germany and the Republic of Liberia for the promotion and reciprocal protection of investments, Ger.-Liber., Dec. 12, 1961,

SSDS provisions provide the forum and process for a signatory country to bring a dispute against another signatory country to the treaty.[39] In SSDS provisions the parties in the disputes must be the actual states in their sovereign capacity.[40]

In comparison, investor-state dispute settlement provisions (ISDS) provide the process and forum for *investors* to file a dispute against the state in international arbitration when it feels that the contracting state has breached a duty in the international investment agreement.[41] An example of this provision is in the US-Colombia Free Trade Agreement:

> Section B: Investor-State Dispute Settlement
>
> Article 10.16: Submission of a Claim to Arbitration
>
> 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
>
> (a) the claimant, on its own behalf, may submit [a claim] to arbitration under this Section . . .[42]

Investor-state dispute settlement clauses are important to investors because they help protect investors from the political risks related to working with host governments.[43] A host government has the unilateral power to change the national legal regime in which the investor initially contracted into through legislative enactments or executive initiatives.[44] In investor-state disputes, the presiding tribunal must be comprised of nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute.[45] This feature helps neutralize the forum to avoid bias concerns in domestic courts.[46] Obviously, the practice of investing inevitably has risks, but ISDS provisions help protect against "unfair dealings" by one side of the transaction's power to unilaterally change

---

http://investmentpolicyhub.unctad.org/Download/TreatyFile/1360 [hereinafter Germany-Liberia BIT].

39. *See* Bernasconi-Osterwalder, *supra* note 37, at 3.

40. *Id.* at 3–4.

41. *See* CUMMINS & GIARETTA, *supra* note 7, at 225.

42. *See* United States-Colombia Trade Promotion Agreement Implementation Act, Pub. L. No. 112-42, art. 10.16, 125 Stat. 462 (2006) [hereinafter US-Colombia BIT].

43. *See* Srikar Mysore & Aditya Vora, *Tussle for policy space in international investment norm setting: The search for a middle path?*, 7 JINDAL GLOBAL L. REV. 135, 137 (2016).

44. *See generally* Vesty Group Limited v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/06/4, Award, ¶1–2 (Apr. 15, 2016), http://www.italaw.com/sites/default/files/case-documents/italaw7230.pdf (showing an example of a contracting government changing the national law towards foreign investments).

45. *See* ICSID Convention, Regulations and Rules, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 39, Oct. 14, 1966 [hereinafter ICSID Convention].

46. *See id.* (noting that arbitrators who are nationals of the same State as either one of the Contracting State parties may be permitted in instances only when agreed upon).

the environment in which both sides contracted into; said differently, ISDS provisions protect against a State changing the investment climate by adding taxes, changing laws, or creating obstacles for the investor to receive his initial expected return on investment.[47] For example, in 2007, then Venezuelan President, Hugo Chavez, unilaterally decided to change the relevant laws and contract terms applicable to four oil projects that estimated $30 billion in revenue.[48] The multinational companies involved with the projects were constructively removed from Venezuela and forced to forfeit their property.[49] Soon after Exxon Mobil and ConocoPhillips, among other companies affected by the expropriations, filed international arbitration claims under investment treaties that Venezuela signed with the United States and the Netherlands, recovering $908 million dollars.[50] Aside from neutrality concerns, international institutions also help create a more secure environment.

In the initial years of international arbitration clauses, investors had the option to bring the arbitration under facility rules such as the International Chamber of Commerce (ICC) and the United Nations Conference on Trade and Development (UNCTAD).[51] Although each played its part in harmonizing the arbitration procedure, on March 18, 1965, the World Bank created a more prominent institution for investor-state disputes: the International Centre for Settlement of Investment Dispute (ICSID).[52] ICSID is a branch of the World Bank that adjudicates investment disputes between states and nationals of other states.[53] The creation of ICSID led to an increase in countries entering into BITs that include an ICSID arbitration clause.[54] ICSID's strict annulment and enforcement procedures, as well as its sponsorship by the World Bank, increase the trust and legitimacy of the system.[55] Under Article 54, "[e]ach Contracting State shall recognize an award rendered pursuant to [the ICSID] Convention as binding and enforce the

47. *See id.* at art. 66 (mandating that proposed amendments to the Convention be circulated amongst and ratified by all Contracting States who are parties to the dispute).

48. *See Factbox: Venezuela's nationalizations under Chavez*, REUTERS (Oct. 7, 2012, 9:51 PM), https://www.reuters.com/article/us-venezuela-election-nationalizations/factbox-venezuelas-nationalizations-under-chavez-idUSBRE89701X20121008.

49. *See id.*

50. *Id.*

51. *See* Bergsten, *supra* note 19, at 27.

52. *See id.*

53. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965, 4 I.L.M. 524 (1965), Art. 63, http://www.jus.uio.no/lm/icsid.settlement.of.disputes.between.states.and.nationals.of.other.states.convention.washington.1965/doc.html.

54. *See ICSID and The Rise of Bilateral Investment Treaties: Will ICSID Be The Leading Arbitration Institution In The Early 21st Century?*, 94 AM. SOC'Y INT'L. PROC. 41 (2000).

55. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *supra* note 53, at Art. 52.

pecuniary obligations imposed by the award within its territories as if it were a final judgment of a court in that State."[56]

By 2017, a total of 2,952 international investment agreements were signed and 817 known treaty-based investor-state arbitrations had been initiated under ICSID.[57] The energy industry has given rise to the highest proportion of investor-state arbitration disputes, totaling forty-one percent in 2017.[58] This is a result of the large amount of capital invested in long-term concessions and licenses where the country is pressured to get its "fair take" in the profits.[59] Additionally, the increase of commodity prices since the twenty-first century fueled unilateral actions by host states in South America to Central and Eastern Europe, generating large settlements in the international arbitration courts.[60]

Colombia has signed two types of relevant agreements: free trade agreements (FTA) with investment chapters, and bilateral investment treaties (BIT).[61] An FTA is similar to a BIT, but instead of focusing solely on foreign direct investment, an FTA focuses on broader issues—such as restraints on free trade, energy exports, and specialized imports.[62] Moreover, these trade agreements include investment protection chapters with the same or similar protections contained in a BIT.[63] The first FTA signed by Colombia was in 1994 between Colombia, Mexico, and Venezuela.[64] More than ten years later, Colombia signed its second FTA—this time with the United States.[65] Colombia also signed similar FTAs with Chile, El Salvador, Honduras, Guatemala, and Canada.[66] Colombia currently has six BITs in force with the following countries: Peru, Spain, Switzerland, China, and India.[67]

---

56. *Id.* at art. 54.

57. *See* United Nations Conference on Trade and Development Division on Investment and Enterprise, *International Investment Agreements Navigator,* INVESTMENT HUB POLICY, (February 2017), http://investmentpolicyhub.unctad.org/IIA.

58. *See The ICSID Caseload – Statistics Issue 2017-2,* INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20(English)%20Final.pdf.

59. *See* CUMMINS & GIARETTA, *supra* note 7, at 227.

60. *See id.*

61. *See* Zuleta, *supra* note 2, at 77.

62. *Id.*

63. *See* C. O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned into a* Battle, 28 GW J. INT'L & ECON. 2, 8 (1994).

64. *See* Zuleta, *supra* note 2, at 77.

65. *Id.*

66. *See Colombia Country Commercial Guide: Colombia-Trade Agreements,* U.S. DEP'T OF COM. (July 31, 2017), https://www.export.gov/article?id=Colombia-Trade-Agreements.

67. *Id.*

IV. PROBLEMS WITH ISDS CLAUSES

A. Consent to international arbitration may occur without privity of contract and specific consent of the State.

In every first-year law student's legal career, the terms "consent" and "privity" usually appear when discussing whether or not the parties agreed on the stipulated terms. "Consent" is the concurrence of wills that may be expressly given by voice or in writing.[68] "Privity" means mutual or successive relationship to the same rights of property.[69] Recent ISDS case law allows for a stretch on these basic principles.[70] Consent in investor-state arbitration may appear in one of three ways: a contract, a local national law, or by way of an international investment treaty.[71] The latter two examples drive the first topic of concern in ISDS clauses. When a country passes a national law or signs an international investment agreement stipulating investor-state arbitration as a dispute resolution mechanism for foreign investors, it has unilaterally offered irrevocable consent to international arbitration under institutions such as ICSID and UNCITRAL until the removal of that statute or treaty.[72] The first example of this was in *Southern Pacific Properties (Middle East)Limited v. Arab Republic of Egypt.*[73]

In *Southern Pacific Properties (Middle East)Limited v. Arab Republic of Egypt*, the then President of Egypt passed a national law to promote foreign investment into Egypt.[74] The new law provided that, "investment disputes in respect of the implementation of the provisions of this Law shall be settled in a manner agreed upon by the investor . . . within the framework of to which Egypt has adhered . . . where such Convention applies.[75] Southern Pacific Properties (SPP), a hotel company led by Canadian businessmen and incorporated in Hong Kong, was the first proposed foreign investor approved under the new law.[76] The investment between Egypt and SPP provided for the construction of two destination resorts.[77] After a public uproar for the risk of damaging antiquities near the pyramids, the new government took a

---

68. *Consent*, Black's Law Dictionary (10th ed. 2014).

69. *Privity*, Black's Law Dictionary (10th ed. 2014).

70. *See* S. Pac. Prop. (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award on the Merits, ¶ 37-41 (1992).

71. *See* Jan Paulsson, *Arbitration Without Privity*, 10 ICISD REV. F.I.L.J. 232 (1995).

72. *Id.* at 234.

73. *See also* Andrew Smolik, Comment, *The Effect of Shari'a on The Dispute Resolution Process Set Forth in The Washington Convention*, 2010 J. DISP. RESOL. 151 (2010).

74. *See Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, ¶ 42-44 (1992).

75. *See id.* at ¶ 78.

76. *Id.* at ¶ 1.

77. *Id.* at ¶ 108.

series of measures to make the venture impossible.[78] After unsuccessfully collecting compensation from Egypt for the project value, SPP brought a case under ICSID through the national law that allowed investor-state dispute arbitration.[79] The Egyptian government objected to several jurisdictional grounds including: 1) that there was already a previous decision under the International Court of Arbitration (ICC) on this issue, 2) that the law was simply an invitation but not an offer, and 3) that the underlying contract did not have an ICSID clause.[80] The Tribunal rejected the objections and ruled that an offer to ICSID in national law is irrevocable until the law is repealed.[81] This case serves as an example that a State may consent to international arbitration with an unknown investor by simply passing a national law to that effect.[82] A State may also create a unilateral offer to international arbitration by signing an international investment agreement.[83]

In *AAPL v. Sri Lanka*, the United Kingdom and Sri Lanka entered into a BIT for the "full protection and security of investments" which contained an ICSID arbitration clause.[84] Subsequently, AAPL, a British corporation, invested in Serendib Seafood Ltd., a Sri Lankan shrimp producer.[85] Following AAPL's investment, government security forces destroyed Serendib's shrimp farm during a military action against local rebels operating at or near the farm.[86] AAPL then requested eight million USD in damages for the violation of the full protection and security provision of the UK-Sri Lanka BIT.[87] The tribunal ruled that the provision in the BIT was an irrevocable offer until the treaty was denounced by either contracting party.[88]

These two examples demonstrate the extension of the principles of privity and consent in international law. Neither case contained a contract in which both parties—the state and the foreign investor—agreed to specifically resolve disputes with the other party in international arbitration; rather, the two signatory *States* agreed to resolve disputes in international arbitration.[89] This doctrine also allows a foreign investor who was not a party to the treaty to invoke the

78. *Id.* at ¶ 62–64.

79. *Id.* at ¶ 160, 170, 175.

80. *Id.* at ¶ 15, 18–21.

81. *Id.* at ¶ 8–10.

82. *See* YVES DERAINS & ERIC A. SCHWARTZ, *A Guide to ICC Rules of Arbitration* 95 (2005).

83. *See* Doak Bishop, *Drafting Arbitration Agreements in the International Arena*, 25 THE ADVOC. (TEXAS) 32 (2003).

84. *See* Asian Agricultural Products Limited v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 45 (1990).

85. *Id.* at ¶ 3.

86. *Id.*

87. *Id.* at ¶ 9.

88. *Id.* at ¶ 20.

89. *See* Paulsson, *supra* note 71, at 236.

consent of the state lacking privity of contract.[90] These unilateral offers place the contracting party at risk of being pulled into international arbitration regardless of a local court decision, contract dispute clause stating an alternate course of action, or an ongoing international arbitration dispute under a different arbitration facility.[91]

B. Treaties remove the bargaining power of each transaction and apply broad protections to the investment.

Every transaction between the host government and a foreign investor is unique.[92] Having an ISDS clause in the international investment treaty removes the significance of a dispute resolution clause that contracting parties may have agreed to and instead applies broad obligations to the investor that are not included in the contract.[93] For example, an investor and a country may agree that the country will not be liable for any security breaches by a third party. An international investment agreement, however, may still impose security measures towards the same foreign investment.[94] An example of this is in Article 10.4 of the US-Colombia FTA which states, "[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection of security."[95] "Full protection and security" has been interpreted by the international tribunals as both physical and legal security.[96]

An example of unexpected protections this broad language can create is in *CME v. Czech Republic*.[97] Here, the tribunal ruled that Czech Media Council, a government regulation body, had stripped CME of its legal protections by allowing CME's local partner to terminate the contract upon which CME's investment relied.[98] The tribunal held that:

> The Media Council's actions in 1996 and its actions and inactions in 1999 were targeted to remove the security and legal protection

---

90. *Id.* at 233.

91. *Id.* at 232.

92. *See* ABBAS GHANDI & C.Y. CYNTHIA LIN, *Oil and Gas Service Contracts Around the World: A Review, in* ENERGY STRATEGY REVIEWS 3 63, 64 (2014)(comparing model concession contracts around the world).

93. *See* Paulsson, *supra* note 71, at 250.

94. KATIA YANNACA-SMALL, *Essential Security Interests Under International Investment Law, in* INTERNATIONAL INVESTMENT PERSPECTIVES: FREEDOM OF INVESTMENT IN A CHANGING WORLD 93, 94 (OECD ed., 2007).

95. US-Colombia BIT, *supra* note 42, at art. 10.4.

96. Mahnaz Malik, *The Full Protection and Security Standard Comes of Age: Yet Another Challenge for States in Investment Treaty Arbitration?*, IISD (Nov. 2011), http://www.iisd.org/pdf/2011/full_protection.pdf.

97. *See* CME Czech Republic B.V. (The Netherlands) v. The Czech Republic, UNCITRAL, Partial Award, ¶ 2 (2001).

98. *Id.* at ¶ 614.

> of the Claimant's investment in the Czech Republic. The Media Council's (possible) motivation to regain control of the operation of the broadcasting after the Media Law had been amended as of January 1, 1996 is irrelevant. The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued.[99]

Therefore, even if the specific contract did not provide for protection from third parties, an investment treaty may still impose this obligation.

Similarly, the host government contract may provide a dispute resolution clause that is different from the treaty provision, allowing the investor essentially "two bites at the apple."[100] For example, Article 33 of the India model production sharing petroleum contract provides the applicable procedural law for the dispute resolution of the contract being the Arbitration and Conciliation Act of 1996:

> 33.9 The arbitration agreement contained in this Article 33 shall be governed by the Arbitration and Conciliation Act, 1996 (Arbitration Act). Arbitration proceedings shall be conducted in accordance with the rules for arbitration provided in Arbitration Act...[101]

However, Article 10.3(c) of the India-Colombia BIT provides that ICSID is the applicable procedural law:

> c. [A]rbitration in accordance with ... [t]he International Centre for Settlement of Investment Disputes (ICSID), under the rules of the Convention on Settlement of Disputes between States and Nationals of other States...[102]

Therefore, even if the country negotiates a specific dispute resolution option in the contract, it may still be obligated to abide by the dispute resolution provision in the treaty. This means that when a country includes an ISDS clause in the international investment agreement, it removes its bargaining power and adds obligations to the transaction that may not have been accounted for by the parties.[103]

---

99. *Id.* at ¶ 613.

100. *Id.* at ¶ 621.

101. *India Model Production Sharing Contract*, art. 33 (2005), http://petroleum.nic.in/sites/default/files/MPSC%20NELP-V.pdf.

102. Bilateral Investment Treaty, Colom.-India, art. 10.3, https://www.aseanbriefing.com/userfiles/resources-pdfs/India/BIT/Asia_BIT_India_Colombia.pdf.

103. *See* Paulsson, *supra* note 71, at 232.

C. *State entities may trigger liability for the state.*

When countries agree to ISDS clauses in international arbitration clauses, they are subjected to actions made not only by the state organs (legislative branch, judicial branch, executive branch), but also by state entities (national oil companies, federal post office, etc.) and state organizations.[104] International arbitration case law has broadened the net of liability for the state, making it difficult for a state to keep its ducks in a row and avoid liability toward foreign investments.[105]

A state organ may include the legislative branch, judicial branch or executive branch of a government.[106] Under Article 4 of the UN General Assembly Resolution 56/83, "Responsibility of States for International Wrongful Acts", "the conduct of any State organ shall be considered an act of the State under international law, whether the organ exercises legislative, executive, [or] judicial [power]."[107] Therefore, any action or inaction by a state organ may result in liability for the state.[108]

For example, in *Tecmed v. Mexico*, the National Ecology Institute of Mexico (an organ of the executive branch of Mexico) denied a permit to Tecmed and the denial resulted in liability to the investor.[109] Similarly, in *AAPL v. Sri Lanka*, the Sri Lanka military's inaction to protect the agriculture of the investor resulted in liability for the state.[110]

A state entity is different from a state organ or agency, because a state entity may have its own legal personality.[111] For state entities to create liability for the state, the state must either be attributed to its actions, or the state entity must be under the control of the state.[112] An example of this is when a national oil company works on downstream investments internationally.[113] A tribunal must determine how close the relationship is between the state and a national oil company.[114]

According to international arbitral awards, a state entity can be defined as an entity of the state which: "(1) has its own legal personality;

---

104. *See* IAI *SERIES ON INTERNATIONAL ARBITRATION NO. 4,* STATE ENTITIES IN INTERNATIONAL ARBITRATION 1, 19 (Emmanuel Gaillard & Jennifer Younan eds., 2008).

105. *See* Alex Genin v. Republic of Estonia, ICSID Case No. ARB/99/2, Award, ¶ 327 (2001)(demonstrating that liability may reach organizations not directly affiliated with government).

106. Gaillard, et al., *supra* note 104, at 32.

107. G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts art. 4 (Jan. 28 2002).

108. *Id.*

109. Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 43 (May 29,2003).

110. Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 3 (1990).

111. Gailard, *supra* note 104, at 19.

112. *Id.* at 28.

113. *Id.* at 24.

114. *Id.* at 249.

(2) was created by the [s]tate with a specific purpose . . .; and (3) is controlled by the [s]tate."[115] International tribunals have used the state entity concept for three main purposes: (1) to apply an arbitration provision entered by a State entity; (2) to attribute the acts of a state entity to its parent state; and (3) to reject claims by a state entity that its non-performance of a contract was caused by a government decision constituting force majeure.[116] Therefore, if a tribunal feels the state entity's actions were attributed to the State, the country may be liable for those actions.

Actions by organizations that attribute to the state may also invoke liability towards a state.[117] For example, the French Model BIT provides, "[e]ach Contracting Party is responsible for the actions and omissions of its political subdivision. . . or any other entities under the supervision of the Contracting party.[118] In *Alex Gebnin v. Estonia*, the Tribunal held that the Estonian central bank was a state agency because of the BIT language stating:

> Each party shall ensure that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under this Treaty wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses. . .[119]

The tribunal held because the central bank had the governmental authority to grant licenses, it was attributed to the state.[120] An entity may also be attributed to a state if it has been empowered to exercise elements of governmental authority.[121]

Under the Responsibility of States for Internationally Wrongful Acts, Article 5 states:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of the State to exercise elements of governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in the capacity in the particular instance.[122]

---

115. *Id.* at 36.

116. *Id.* at 200.

117. *See French Model BIT*, art. 2 (1999), available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2827.

118. *See id.*

119. Alex Genin v. Republic of Estonia, ICSID Case No. ARB/99/2, Award, ¶ 327 (2001).

120. *Id.* at ¶ 85.

121. G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts (Dec. 12, 2001).

122. *Id.*

Therefore, if the state entity was empowered by the law of the State to exercise elements of governmental authority, those actions may also create liability of the state.

These are several examples demonstrating that including an ISDS clause in an international investment agreement not only places broad obligations on state organs towards foreign investments, but also places broad obligations on state entities and organizations that attribute to a State.[123] After understanding the risks involved in ISDS clauses, the next analysis is whether the country *needs* these protections to obtain the goals of the international investment treaty.

D. There is an uneven balance of foreign direct investment risk.

On February 14, 2014, the Congressional Research Service released the Background and Issues Report for Congress explaining the history and goals of the US-Colombia FTA.[124] The two expectations explained in the report were to "provide economic benefits for both the United States and Colombia as the trade increases between the two countries"; and that it "will provide investor confidence and increase foreign direct investment".[125] Two statistics demonstrate the mutual benefits from trade in comparison to the uneven balance of foreign direct investments which ISDS clauses protect: first, trade has been relatively increasing between Colombia and the US over the past few years; and second, Colombia has significantly less foreign direct investment in the US.[126] In other words, FTAs may increase the trade between two countries (a state-state issue), but statistical data does not show the same increase between foreign direct investments (an investor-state issue) that would require the ISDS clause. Large economies need these ISDS clauses for their FDI outflows, but smaller economies do not have enough FDI outflows to absorb the risk of ISDS clauses.[127]

The United States and Colombia signed the US-Colombia FTC in 2006 and the FTC entered into force on May 5, 2012.[128] Figure 1 below demonstrates the trade between the partners has almost tripled since 2006 when the United States and Colombia signed the FTC.[129]

---

123. *See* Gaillard, *supra* note 104, at 32.

124. M. Angeles Villareal, *The U.S.-Colombia Free Trade Agreement: Background and Issues* (2014), https://fas.org/sgp/crs/row/RL34470.pdf.

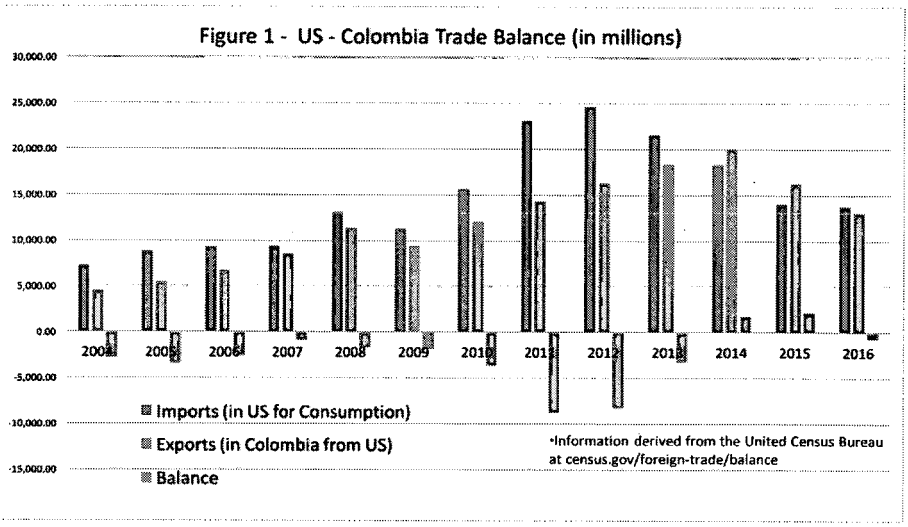
125. *See id.* at 1.

126. *See id. at 11.*

127. *See* Antonio Jacinto Simões et al., *The Impact of Fiscal Policy on Foreign Direct Investment*, 32 J. TAX'N INV. 47, 48 (2015).

128. *See* Villareal, *supra* note 124.

129. *See* Figure 1. *Foreign Trade*, UNITED STATES CENSUS BUREAU, https://www.census.gov/foreign-trade/statistics/country/index.html (last visited Apr. 9, 2018).

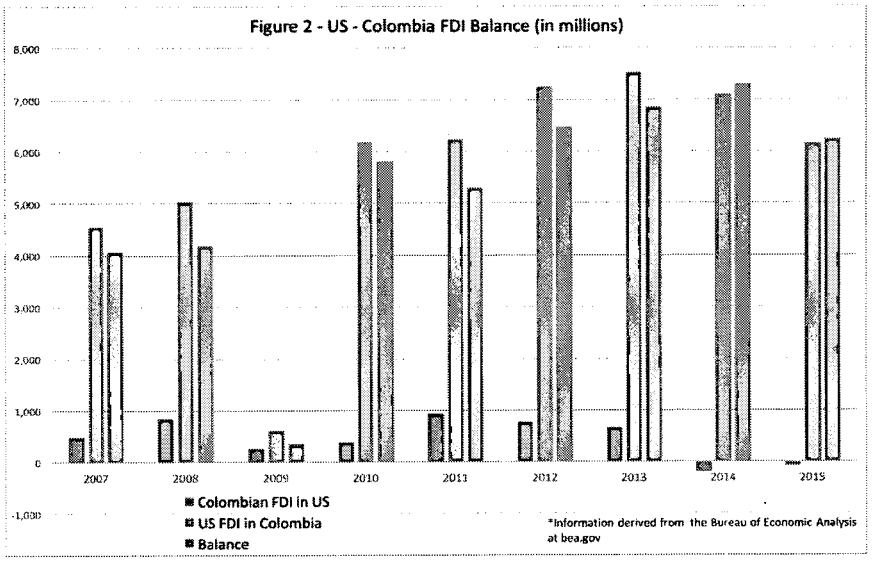


Nevertheless, the FDI balance paints a different picture.

Figure 2 below demonstrates the unequal balance of FDI from US into Colombia in comparison to FDI from Colombia into US.[130] This statistic further demonstrates that the ISDS clauses are much more relevant to countries with large economies like the US that have a several corporations contributing to global markets than countries with developing economies like Colombia.[131]

130. *See* Figure 2. *International Data*, UNITED STATES BUREAU OF ECONOMIC ANALYSIS, https://bea.gov/iTable/iTable.cfm?ReqID=2&step=1#reqid=2&step=1&isuri=1 (last visited Apr. 9, 2018).

131. *See id.*



ISDS clauses significantly increase the chances of a regulatory freeze in Colombian policy-making due to the fear of being sued in international arbitration by the investors that are affected by changes in the investment climate.[132] In return, the US bears a much smaller risk of investor-state lawsuits because the Colombian FDI outflow to the US is not even among the leading 20 countries.[133] To illustrate this, imagine 5,000 landmines (several American investors in Colombia that may bring an arbitration against the state) in your front yard in comparison to one landmine (one Colombian investor in the U.S. that may bring a case against the state) in your neighbor's yard.

E. Recent ICSID claims equate to a significant portion of the national budget of smaller economies.

In addition to considering the likelihood of a claim landing at the doorstep of a nation's capital, a country must ask whether it has the financial capital to enter into ISDS disputes.[134] Recent ISDS awards, have equated to a large portion of several developing countries' economy.[135]

---

132. *See* Rachel L. Wellhausen, *Recent Trends in Investor-State Dispute Settlement*, J. INT. DISP. SETTLEMENT 117, 125 (2016); *see also* Mysore & Vora, *supra* note 43, at 138.

133. *See* ORGANIZATION FOR INTERNATIONAL INVESTMENT, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: SEPTEMBER 2016 REPORT 4 (2016), http://ofii.org/sites/default/files/Foreign%20Direct%20Investment%20in%20the%20United%20States%20-%20September%202016_0.pdf.

134. *See* Don Quijones, *Colombia Pays the Steep Cost of So-Called "Free"* Trade, Wolf Street (Apr. 7, 2016), https://wolfstreet.com/2016/04/07/colombia-pays-the-steep-cost-of-so-called-free-trade/.

135. *See* Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, Final Award, ¶ 394 (2014)(1.8 billion); *see also* Occidental Petroleum Corporation

For example, in *Yukos Universal Limited v. The Russian Federation*, Yukos Oil company brought claims arising out of a series of actions undertaken by the government of Russia, including arrests, large tax assessments and liens, and the auction of the main Yukos facilities which led to the bankruptcy of the company and eliminated all value of Russia's shares in Yukos.[136] The tribunal held for Yukos and granted an award for $1.8 billion.[137] In *Occidental Petroleum Corporation v. The Republic of Ecuador*, Occidental Petroleum (Oxy) brought a claim against the Ecuadorian government for terminating a participation contract between Oxy and Petro Ecuador, the Ecuadorian national oil company, for the exploration of hydrocarbons in the Ecuadorian Amazon region.[138] The tribunal held for Oxy and granted an award for $1.76 billion.[139] Finally, Venezuela was on the receiving end of two different expropriation allegations for the nationalization of two oil projects and the termination of a mining contract.[140] The tribunal in both cases ruled against Venezuela and awarded $1.6 billion and $1.2 billion respectively.[141]

Although there are countries with large economies like the United States, whose national budget expenditures may equal up to 3.9 trillion dollars each year, this financial stability is not the same for countries with developing economies.[142] CIA.gov reports that at least fifty-four countries have less than one billion in their national budgets each year, rendering payments of these awards effectively impossible.[143] Large tobacco companies have recently threatened suit in international arbitration against eight African countries for regulatory attempts to limit the harm caused by smoking.[144] The latest claim against Colombia for allegations of expropriation of a mining concession equates to nearly

---

and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶ 876 (Oct. 5, 2012) (1.76 billion).

136. *See* Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, Final Award, ¶ 89, 98-99 (2014).

137. *See id.*

138. *See* Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, ¶ 2,3 (Oct. 5, 2012).

139. *See id.* at ¶ 825

140. *See* Venezuela Holdings, B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award, ¶ 86 (Oct. 9, 2014); *see also* Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, ¶ 7 (Apr. 4, 2016).

141. *See* Venezuela Holdings, B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award, ¶ 404 (Oct. 9, 2014); *see also* Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, ¶ 961 (Apr. 4, 2016).

142. *See Library: The World Fact Book Budget*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/fields/2056.html.

143. *Id.*

144. *See* Sarah Boseley, *Threats, bullying, lawsuits: tobacco industry's dirty war for the African market*, THE GUARDIAN (July 12, 2017 00:48 EDT), https://www.theguardian.com/world/2017/jul/12/big-tobacco-dirty-war-africa-market

twenty percent of the national budget.[145] These are all examples that developing economies must consider when placing their State's assets at risk by passing a regulatory measure that may affect an investor's return on investment.

IV. ALTERNATIVES TO THE ISDS CLAUSE IN INTERNATIONAL INVESTMENT AGREEMENTS

A. Remove ISDS Clauses from treaties but include ISDS Clauses in contracts.

The first option that a developing country has to reduce the risk of ISDS clauses is to remove the ISDS clauses in international investment agreement and include them in the host government contracts. This would give the foreign investor the same protections for its large FDI inflows into a country so long as there is a contract between the government and the investor"[146] The only difference from the ISDS being located in the contract and not the IIA is there would be privity of contract and consent in writing by both sides regarding a specific transaction.[147] This helps even the balance of consent to international arbitration and further helps a developing country monitor which investments are subjected to international arbitration.[148] Keeping the ISDS clause in the contract also prevents the dispute resolution from wasting time and money litigating in state courts that have no weight in international arbitration disputes.[149]

B. Provide more specific definitions in international investment agreements.

The second option a host government has to reduce the risk of ISDS clauses is to be more specific in the language used in international investment agreements.[150] For example, including a narrow definition of what an "investment" is, when a claimant can bring a case in international arbitration, and for what a claimant can bring a case in international arbitration.[151] The main problem with ISDS clauses in IIAs is that international tribunals have interpreted the ISDS clauses to

---

145. *See* Quijones, *supra* note 134.

146. W. Michael Tupman, *Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes*, 35 INT'L & COMP. L.Q. 813, 819-20 (1986).

147. *See* Paulsson, *supra* note 71, at 235.

148. *Id.*

149. *See* Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award on the Merits, ¶ 8 (1992)(the parties brought the case in local courts and international arbitration under ICC before submitting the case to ICSID).

150. *See* Paulsson, *supra* note 71, at 238.

151. *See id.* at 238.

provide broad protections to foreign investments.[152] An example of a broad language in an IIA is in the U.S.-Argentina BIT definition of "investment".[153] The treaty provides "investment" as including "every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation . . ." and the document then provides an expansive list of investments.[154] In contrast, a country can provide a narrow definition of "investment" as being a "productive" investment having been *approved* by the host state and guaranteed by the state of the investor."[155] This language helps a country keep track of the foreign investments entering the country and removes the risk of claims against the government without a contractual agreement.[156]

Another language-specific change that a country can use to protect from liability is establishing a prerequisite to reaching an international tribunal.[157] For example, the Japan-Sri Lanka BIT contains an ISDS clause that allows the investor to bring forth a claim immediately.[158] In contrast, adding a "cooling off" period, exhaustion of local remedies requirement, or a "fork in the road" clause may help deter frivolous claims.[159] The United States-Ecuador BIT provides for a six month cooling period before an investor can bring a dispute in front of ICSID.[160] In contrast, the U.K.-Colombia BIT provides that the claimant may not bring a case in front of ICSID if it has brought a case in the local courts.[161] Stipulating the type of disputes for which the ISDS clause may be invoked for may also help deter broad claims.[162] The China-Peru BIT provides that UNCITRAL arbitral arbitration may be invoked only to

---

152. *See* David A. Gantz, *Simplified Company: The TPP and RCEP: Mega-Trade Agreements for the Pacific Rim*, 33 ARIZ. J. INT'L & COMP. LAW 57, 66 (2016).

153. *See* Treaty Between the United States of America and The Argentina Republic Concerning Reciprocal Encouragement and Protection of Investment, U.S.-Argentina, art. 1, Nov. 14, 1991.

154. *See id.*

155. *See* Paulsson, *supra* note 71, at 237 (emphasis added).

156. *See id.* at 237.

157. Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, art. 6(3), Aug. 27, 1993.

158. *See generally* Agreement concerning the promotion and investments, Japan-Sri Lanka, Mar. 1, 1982, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1735.

159. *See* Paulsson, *supra* note 71, at 236, 239.

160. *See* Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, art. 6(3), Aug. 27, 2017.

161. Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia, U.K.-Colombia, art. 9, Mar. 17, 2010.

162. *See, e.g.*, Gantz, *supra* note 152, at 311.

disputes concerning the "amount of compensation."[163] This helps narrow the scope of the ISDS clause and prevents the tribunal from creating ways to apply the ISDS clause to international obligations.[164]

C. *Follow the Brazilian Model: Agreements on Cooperation and Facilitation of Investments.*

After signing BITs with 14 different countries, Brazil has yet to ratify one.[165] Each time a BIT is brought up to vote, the Brazilian Congress has opposed the risks that come with ISDS clauses and denied ratification.[166] In March of 2015, after Brazil's investments abroad totaled to $355 billion, the international ministry of Brazil developed an alternative to the traditional ISDS clause, called an Agreement on Cooperation and Facilitation of Investments (ACFI).[167] The design of the ACFI considers the economic specificities of a developing country such as Brazil, "a historical recipient of investment and a latecomer exporter of capital."[168] The ACFI models the traditional state-state dispute settlement resolutions with an important modification: rather than having states arbitrate cases on behalf of their investors, the ACFI creates two types of institutions to govern the agreements.[169] The first, Ombudsmen (focal points) of government authorities that address suggestions and concerns from nationals to the government; and the second, the joint committee, provides for a panel of representatives from each country to mediate the disputes.[170] The purpose of these two institutions is to avoid investor claims in international arbitration and focus on dialog and mediation alternatives.[171] The ACFI require each state to provide a representative rather than forcing an investor to attempt to communicate with its national consulate for diplomatic protection.[172] Despite not having an international investment provision in any of its IIAs, Brazil remains the largest recipient of FDI in Latin

---

163. *See* Agreement between the Government of the Republic of Peru and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investment, Peru-China, art. 8(3), Sept. 6, 1994.

164. *See* Gantz, *supra* note 152.

165. Lucas Bento, *Time to Join the "BIT Club"? Promoting and Protecting Brazilian Investments Abroad*, 24 AM. REV. INT'L ARB. 271, 311 (2013).

166. *See id.*

167. Fabio Morosini & Michelle Ratton Sanchez Badin, *The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?* (August 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.

168. *Id.*

169. *Id.*

170. *See* Mysore & Vora, *supra* note 43, at 150-51.

171. *See id.*

172. *See id.*

America and the 14th largest recipient in the world, attracting $828 billion in FDI in 2015.[173] Such success demonstrates that a country can still attract investments without having an ISDS clause in the IIA.[174]

> When I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all [...]. Three private individuals are entrusted with the power to review, without any restriction or appeal procedure, all actions of the government, all decisions of the courts, and all laws and regulations emanating from parliament.
>
> — Juan Fernandez-Armesto[175]

V. CONCLUSION

Initially, an investor-state dispute provision was a legitimate need for protection against unilateral retaliations by the host government; however, investor-state jurisprudence broadened the scope of liability so much that could risk the seizure of several of a State's assets around the world.[176] A developing country has several alternatives to curtail the risks of ISDS clauses before it is too late. In the age of global health awareness, and under public emergencies, a country with a developing infrastructure must be cautious of what it is promising foreign investors before its police power is frozen by multinational corporations.

Daniel Avila II

---

173. *See The World Factbook: Stock of Direct Foreign Investment - At Home,* CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/Publications/the-world-factbook/rankorder/2198rank.html.

174. *See Brazil: Foreign Investment,* SANTANDER - TRADEPORTAL, https://en.portal.santandertrade.com/establish-overseas/brazil/foreign-investment (last visited Mar. 10, 2018).

175. Ruth Townsend, *When trade agreements threaten sovereignty: Australia beware,* THE CONVERSATION (Nov. 14, 2013, 2:45PM), http://theconversation.com/when-trade-agreements-threaten-sovereignty-australia-beware-18419. Juan Fernandez-Armesto is an ICSID arbitrator from Spain.

176. *See, e.g.,* Emily Schmall, *Seizure of Ship from Argentina Forces Shake-Up,* NEW YORK TIMES (Oct. 18, 2012), http://www.nytimes.com/2012/10/19/world/americas/seizure-of-argentine-ship-forces-shake-up.html (demonstrating a seizure of an Argentinian ship for payment of an ICSID claim).