



## CCSI Working Paper 2019

# Alternatives to Investor-State Dispute Settlement

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## Introduction

In Part One of this two-part series we considered the ways in which international investment agreements (IIAs) and the investor-state dispute settlement (ISDS) mechanism contained therein are not effective, or at least not optimally effective, at advancing the four often-cited objectives of IIAs and ISDS:<sup>2</sup> (1) promoting investment flows; (2) depoliticizing disputes; (3) promoting the rule of law; and (4) providing compensation for harms to investors. We also touched on the important question of whether the objectives themselves should be fundamentally revisited to meet 21<sup>st</sup> century needs and priorities, including the Sustainable Development Goals.<sup>3</sup>

Here, we consider four alternative approaches to ISDS – whether under ad hoc arbitration or a more permanent body, such as an “investment court” – that, when used alone or in combination, might better serve the oft-stated objectives, looking in particular at how those alternatives might advance revisited objectives, aligned with 21<sup>st</sup> century priorities. These alternatives include:

- strengthening domestic legal systems,
- the use of risk insurance by investors,
- using state-state cooperation and dispute settlement mechanisms, and
- using existing human rights mechanisms for certain kinds of redress.

The actual and potential roles of these alternatives raise questions about continued reliance on ISDS, challenging assumptions that ISDS is necessary or even optimal for sound investment promotion or governance aims. Rather than continuing to integrate ISDS within investment treaties, it is therefore important to take a closer look at these alternatives, their complementary functions, and their advantages and disadvantages as tools to support modern, and even traditional, objectives.

### Strengthening Domestic Legal Systems

Efforts to strengthen domestic legal systems can be made and implemented on a unilateral basis. However, treaties could also play a role in supporting, monitoring, and enforcing those efforts. Treaties could, for example, establish:

- an agreed definition of the “rule of law” to be employed by treaty parties in the context of the agreement, and commitments by the states to uphold and promote the rule of law as defined;
- commitments and/or mechanisms for financial and/or technical assistance to build capacity, or cooperation to identify or address existing issues regarding domestic rule of law;
- mechanisms for monitoring the rule of law;
- triggers for dialogue between the states, or dialogue between the states and a treaty body or expert institution in order to address identified issues;

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<sup>2</sup> Lise Johnson, Brooke Güven, Jesse Coleman, 'Investor-State Dispute Settlement: What Are We Trying to Achieve? Does ISDS Get us There?' (*Columbia Center on Sustainable Investment*, 11 December 2017) <[ccsi.columbia.edu/2017/12/11/investor-state-dispute-settlement-what-are-we-trying-to-achieve-does-isds-get-us-there/](http://ccsi.columbia.edu/2017/12/11/investor-state-dispute-settlement-what-are-we-trying-to-achieve-does-isds-get-us-there/)> accessed 1 April 2019.

<sup>3</sup> For an extensive discussion of how IIAs and their dispute settlement mechanisms align with the development objectives of governments, see Lise Johnson, Lisa Sachs, Nathan Lobel, ‘Aligning International Investment Agreements with the Sustainable Development Goals’ forthcoming 2019; see also Emma Aisbett, Bernali Choudhury, Olivier de Schutter, Frank Garcia, James Harrison, Song Hong, Lise Johnson, Mouhamadou Kane, Santiago Peña, Matthew Porterfield, Susan Sell, Stephen E. Shay, Louis T. Wells, ‘Rethinking International Investment Governance: Principles for the 21st Century’ (2018).

- an independent body responsible for issuing reports on the rule of law in the treaty parties; and/or
- mechanisms for enforcement of rule of law standards and commitments, and/or sanctions for non-compliance.

One example of a treaty-based mechanism for addressing rule of law challenges can be found in the EU: under Article 7 TEU<sup>4</sup> and the Framework on the Rule of Law,<sup>5</sup> the European Commission can address, among other concerns, serious and systemic rule of law failures.

As compared to ISDS, which only is relevant when rule of law failures negatively impact foreign investors, treaty mechanisms to strengthen domestic legal systems would *improve domestic rule of law* for all stakeholders, and would commit treaty parties to address rule of law problems irrespective of which stakeholder group was negatively impacted.

Insofar as a strong and stable domestic judicial system is a consideration for investors when making locational investment decisions, such efforts to strengthen the domestic judicial system and corresponding institutions should improve the attractiveness of host governments for *increased foreign investment* and continued reinvestment.

Implementing this alternative would likely entail and, indeed, depend upon inter-state diplomatic engagement, particularly but not only when one country adopts measures that negatively impact the investors of another country. Thus, this approach *may not de-politicize all investor-state disputes* that arise; nevertheless, as noted in our earlier piece on the objectives of ISDS,

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<sup>4</sup> “1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

*The Council shall regularly verify that the grounds on which such a determination was made continue to apply.*

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

*The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.*

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.”

<sup>5</sup> ‘Effective Justice’ (European Commission) <ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice\_en> accessed 1 April 2019.

“politicization” is not necessarily bad. It is not synonymous with “gunboat diplomacy”<sup>6</sup> of the past and can be useful for finding reasonable solutions to disputes.<sup>7</sup> Giving governments a framework and tools for systematically addressing rule of law matters may also help improve political dialogue on these issues.

Efforts to help improve domestic rule of law, such as those in place in the EU, are designed to address systemic failures; in contrast to ISDS, they are not designed to provide monetary or other relief in particular cases to particular aggrieved individuals or entities. Thus, such dedicated systems for establishing and maintaining the rule of law for all stakeholders, including investors, may not score as high on the **“providing aggrieved investors compensation” objective as ISDS** currently does. Indeed, IIAs and ISDS provide covered investors greater rights than are available under domestic legal systems, including legal systems with relatively strong, independent courts and property rights protections.<sup>8</sup> Thus, doing away with those IIA/ISDS preferences and focusing instead on ensuring effective access to protections and remedies available under domestic law may narrow the claims investors are permitted to bring against states and the financial awards they can recover. But, as discussed further in our blog on objectives, that outcome – reducing the scope of potential claims and financial awards – may not be bad, as the relatively broad powers ISDS provides investors to sue and recover damages from states arguably do not make sound policy sense.<sup>9</sup>

Additionally, a more solid foundation for the rule of law and strengthened domestic institutions may prevent some losses in the first place, and may be particularly important for domestic citizens and companies (e.g., the employees, suppliers, and consumers of foreign invested firms whose economic and social well-being and confidence can be crucial to foreign investors’ interest and success), as well as for small- and medium-sized foreign investors for whom ISDS is likely impractical due to the costs and duration of such cases.

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<sup>6</sup> Geoffrey Gertz, Srividya Jandhyala, Lauge N. Skovgaard Poulsen, ‘Legalization, Diplomacy, And Development: Do Investment Treaties De-Politicize Investment Disputes?’ (2018) 107 *World Development* 238.

<sup>7</sup> Jason Yackee, ‘Politicized Dispute Settlement in the Pre-Investment Treaty Era: A Micro-Historical Approach’ [2017] Univ. of Wisconsin Legal Studies Research Paper No. 1412.

<sup>8</sup> See, e.g., ‘Opening Statement of USTR Robert Lighthizer to the House Ways and Means Committee’ (*Office of the United States Trade Representative*, 21 March 2018) <[ustr.gov/about-us/policy-offices/press-office/press-releases/2018/march/opening-statement-ustr-robert](http://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/march/opening-statement-ustr-robert)> accessed 1 April 2019 (noting that ISDS provides foreign investors greater rights than domestic investors); Shawn Nichols, ‘Expanding Property Rights Under Investor-State Dispute Settlement (ISDS): Class Struggle In The Era Of Transnational Capital’ (2018) 25(2) *Review of International Political Economy* 243; Lise Johnson, Lisa Sachs, Jeffrey Sachs, ‘Investor-State Dispute Settlement, Public Interest and US Domestic Law’ (2015) CCSI Policy Paper <<http://ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-U.S.-Domestic-Law-FINAL-May-19-8.pdf>> accessed 1 April 2019; David Gaukroger, ‘Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law’ (2014) OECD Working Papers on International Investment 2014/2 <[http://www.oecd.org/daf/inv/investment-policy/WP-2014\\_02.pdf](http://www.oecd.org/daf/inv/investment-policy/WP-2014_02.pdf)> accessed 1 April 2019.

<sup>9</sup> See, e.g., Robert Howse, ‘International Investment Law and Arbitration: A Conceptual Framework’ (2017) Institute for International Law and Justice Working Paper 2017/1 <[https://www.iilj.org/wp-content/uploads/2017/04/Howse\\_IILJ\\_2017\\_1-MegaReg.pdf](https://www.iilj.org/wp-content/uploads/2017/04/Howse_IILJ_2017_1-MegaReg.pdf)> accessed 1 April 2019 (discussing concerns regarding approaches to compensation for losses due to regulatory activity).

## Political and Other Risk Insurance

Political risk insurance<sup>10</sup> (PRI) covers political events<sup>11</sup> and the direct and indirect actions of host governments including: expropriation, currency inconvertibility, transfers restriction, political violence (war, terrorism, civil disturbance), breach of contract, and arbitration award default. Some providers also offer insurance protection for certain regulatory risks<sup>12</sup> including material changes to feed-in-tariff schemes, critical changes to taxation or other regulations affecting the project's ability to operate, and revocation of necessary licenses or permits. Companies may also be able to secure insurance for losses associated with government penalties and fines, exposure due to mistaken and overly aggressive tax positions, critical changes to taxation, and liability to private parties for environmental or other torts.<sup>13</sup>

Each of those types of risks has been the subject of a successful ISDS claim.<sup>14</sup> Given that the risk insurance (RI) market – which includes both political risk insurance and other commercial risk insurance available through private sector providers – may offer protections that are also offered by investment treaties and ISDS, it is important to consider whether and how the costs and benefits of RI for those risks compares with ISDS.

This alternative is perhaps most relevant to the goal of investment promotion. RI, like ISDS, *can potentially encourage investment that would have otherwise been deterred due to concerns about risk*. However, unlike ISDS, which effectively acts as broad, exclusion-free and premium-free RI,<sup>15</sup> RI requires the investor, at least to some extent, to internalize the costs of the risk it is taking. Based on the cost of premiums, limitations on insurance, and/or exclusions from coverage, RI, can send important market-based signals about the riskiness of any particular investment or investment location. In some cases, it makes policy sense to ensure those signals regarding risk are strong. It would be hard to make a policy case, for instance, that we should be shielding investors from the

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<sup>10</sup> Kathryn Gordon, 'Investment Guarantees and Political Risk Insurance: Institutions, Incentives and Development' [2008] OECD Investment Policy Perspectives, 91.

<sup>11</sup> World Investment and Political Risk 2013. Washington, DC: MIGA, World Bank Group.

<sup>12</sup> 'Regulatory Risk' (OPIC) <[www.opic.gov/what-we-offer/political-risk-insurance/types-of-coverage/regulatory-risk](http://www.opic.gov/what-we-offer/political-risk-insurance/types-of-coverage/regulatory-risk)> accessed 1 April 2019.

<sup>13</sup> See, e.g., Omri Ben-Shahar, Kyle Logue, 'Outsourcing Regulation: How Insurance Reduces Moral Hazard' (2012) 111 Michigan Law Review 197; Kyle D. Logue, 'Tax Law Uncertainty and the Role of Tax Insurance' (2005) 25 Virginia Tax Review 339.

<sup>14</sup> See, e.g., Novenergia II – Energy & Environment (SCA) v Spain, SCC Case No 2015/063, Final Arbitral Award (February 15, 2018) (finding a breach of the FET obligation relating to a reduction in subsidies for renewable energy projects); Perenco v. Ecuador, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, September 12, 2014 (holding Ecuador liable adoption of "windfall profits" taxes); Bear Creek v. Peru, ICSID Case No. ARB/14/2, Award, November 30, 2017 (finding Peru liable for revocation of an authorization necessary to hold and develop a mining concession); Occidental Petroleum Corporation v. Ecuador, ICSID Case No. ARB/06/11, Award, October 5, 2012 (finding Ecuador liable for exercising contractual termination clause on the ground that it was a disproportionate response or too punitive); Chevron v. Ecuador, UNCITRAL, PCA 2009-23, Second Partial Award on Track II, August 30, 2018 (finding, *inter alia*, that the government violated the investment treaty by allowing tort plaintiffs' claims against Chevron to proceed in court); Hulley Enterprises Limited (Cyprus) v. Russia, UNCITRAL, PCA Case No. AA 226, Final Award, July 18, 2014 (finding the government liable for its response to the claimant's aggressive tax strategies); Yukos Universal Limited (Isle of Man) v. Russia, UNCITRAL, PCA Case No. AA 227, Final Award, July 18, 2014 (same); Veteran Petroleum Limited (Cyprus) v. Russia, UNCITRAL, PCA Case No. AA 228, Final Award, July 18, 2014 (same).

<sup>15</sup> Phil Levy, 'Critique of NAFTA Provision Highlights Team Trump's Misconceptions on Investment Abroad' (*Forbes*, 23 October 2017) <[www.forbes.com/sites/phillevy/2017/10/23/should-team-trump-encourage-investment-in-mexico/#1268a86f70b4](http://www.forbes.com/sites/phillevy/2017/10/23/should-team-trump-encourage-investment-in-mexico/#1268a86f70b4)> accessed 1 April 2019.

risk that future government regulation will require stranding of their fossil fuel assets; or that we should be shielding companies adopting aggressive tax planning strategies from the risk that governments will modify laws (or interpretation thereof) to combat base erosion and profit shifting. In other cases, we may indeed want to decrease risk, for instance to encourage sustainable investment into conflict-afflicted regions, or to support use of innovative technologies or practices.

Policy discussions of insurance therefore often involve complex but fundamental questions regarding what types of behavior insurance should and should not encourage and how to avoid moral hazards promoting undesirable risk-taking. While these issues are central in discourse on insurance and insurance regulation, they rarely figure in discussions of investment treaties and ISDS. Investment treaties and ISDS generally protect – and therefore presumably aim to promote – investments irrespective of their activities or impacts. There is little, if any, consideration of the moral hazards that might be created for investors by protecting them from – or giving them powerful tools to combat – a broad range of risks such as changes in tax law, policies halting new fossil fuel projects, and tort claims brought by domestic citizens.

Relatedly, investments supported by RI may be more likely to provide sustainable development benefits in their host countries (or, at least, not cause harms). This is crucial due to the fact that, as noted in the discussion on objectives, not all foreign investment is beneficial for host (or home) countries and therefore worth promoting. RI providers (who are themselves subject to human rights obligations)<sup>16</sup> can specifically require compliance with certain international human rights, anti-corruption, environmental and other sustainable development norms. For example, OPIC, the United States Government's overseas political risk insurance provider, imposes on policy holders standards relating to the environment, labor, human rights, and the development effects in the host state.<sup>17</sup> Indeed, as noted by some commentators, both public and private insurers can play a crucial quasi-regulatory role to help improve the conduct, and reduce the undesirable risk-taking, of their insured.<sup>18</sup> Due to the knowledge and expertise they have about the conduct of their policyholders and the factors giving rise to risks, their incentives to limit payouts, and their ability to set premiums and other contract terms, RI providers can develop and encourage adherence to best practices in the range of areas they cover.<sup>19</sup> Therefore, unlike with ISDS, with RI, risk is assessed based on the specific investment, the investor internalizes some of this risk through premiums, deductibles, and exclusions, and sustainable development norms can be more meaningfully encouraged, monitored and enforced.

In terms of impacts on domestic rule of law, *there are some ways RI can potentially help improve domestic legal systems*, or at least avoid rewarding substandard conduct. Authoritarian governments can use ISDS to reduce the riskiness of doing business in their territories without engaging in any

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<sup>16</sup> Office of the United Nations High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect And Remedy" Framework' (UN 2011) <[https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf)> accessed 1 April 2019.

<sup>17</sup> 'Political Risk Insurance' (OPIC) <[www.opic.gov/content/eligibility](http://www.opic.gov/content/eligibility)> accessed 1 April 2019.

<sup>18</sup> Omri Ben-Shahar, Kyle Logue, 'Outsourcing Regulation: How Insurance Reduces Moral Hazard' (2012) 111 Michigan Law Review 197; Kernaghan Webb, 'Political Risk Insurance and the Mining Sector: An Analysis of the Regulatory Effects of Contracts' (2012) 54 International Journal of Law and Management 394; Howard Kunreuther, Matthew W. White and Haitao Yin, 'Risk-Based Pricing and Risk-Reducing Effort: Does the Private Insurance Market Reduce Environmental Accidents?' (2011) 54 Journal of Law and Economics 325; Christian Lahnstein, 'Tort Law and the Ethical Responsibilities of Liability Insurers: Comments from a Reinsurer's Perspective' (2011) 103 Journal of Business Ethics 87, 91, 93..

<sup>19</sup> See sources cited *supra* n. 18.

real domestic legal reforms.<sup>20</sup> Governments can cater to and capture benefits offered by foreign investors (e.g., through signing bonuses for contracts, tax and royalty payments, and bribery), while suppressing the rights and voices of their domestic citizens. When an investor is covered by an investment treaty and ISDS, it benefits from a set of legal protections and tools that largely insulates the investor from the domestic legal context, and pays nothing for that protection. In contrast, the price of RI will vary based on the host country, where higher prices charged for insurance in risky countries compared to less risky countries may serve to help channel investment away from the riskiest destinations and toward the better governed ones. While RI generally may make investors more willing to invest in risky locations, pricing of RI can still make investing in certain locations undesirable. This, in turn, and in contrast to ISDS, can send host governments signals that if they want to attract investment, they need to improve their domestic climates.

Looking at impacts on state-state relations, in some cases, *risk insurance – particularly government-provided political risk insurance – might give rise to politicization*. While host government action triggering an insurance claim or payout may not spur home government involvement if the insurance provider is a private company, the situation may be different if the insurance provider is an entity of the home country, such as the United States' OPIC,<sup>21</sup> or a multilateral public RI provider, such as the World Bank's Multilateral Investment Guarantee Agency.<sup>22</sup> *From the perspective of the investor, however, the dispute would not be “politicized”*: as with ISDS, an investor covered by RI can decide whether and when to bring a claim for compensation for covered losses (subject to the terms of its policies), and the investor's recovery would not depend on its home government to pursue a claim. If the RI provider is a government entity, however, the investor may be able to benefit from some “political” engagement as there are indications that the actual or potential involvement of home country or multilateral risk insurance providers can be helpful in resolving or avoiding investment disputes.<sup>23</sup> Thus, as noted above, de-politicization may not always be the right objective as judged from the perspective of different stakeholders.

Finally, with respect to the objective of *investor compensation*, risk insurance offers advantages and disadvantages as compared with ISDS. RI may decrease the likelihood of harms because of project selection and coverage criteria, and engagement with investors and host governments. Additionally, when a loss does occur, litigation over whether and what payment is due may be less costly and lengthy as those issues would be governed by contractual provisions that are more specific and certain than the infamously vague standards of IIAs. Disadvantages from the perspective of the investor include that recovery under an insurance policy may be subject to caps and other contractual limitations not in place under investment treaties; grounds for recovery may be narrower than protections under investment treaties; exhaustion of remedies may be required under the insurance contract as a condition of filing a claim for compensation; and recovery will need to take into account premiums and/or deductibles paid. While such limits are not necessarily best-case options for individual investors, they may have important policy and practical rationales, such as avoiding moral hazards, as discussed above.

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<sup>20</sup> See, e.g., Eric Arias, ‘Cooperative Autocracies: Leader Survival, Creditworthiness, and Bilateral Investment Treaties’ (2018) 62 *American Journal of Political Science* 905; Mark Fathi Massoud, ‘International Arbitration And Judicial Politics In Authoritarian States’ (2014) 39 *Law & Social Inquiry* 1.

<sup>21</sup> <[www.opic.gov/](http://www.opic.gov/)> accessed 1 April 2019.

<sup>22</sup> <[www.miga.org/](http://www.miga.org/)> accessed 1 April 2019.

<sup>23</sup> Efraim Chalamish, Robert Howse, ‘Conceptualizing Political Risk Insurance: Toward a Legal and Economic Analysis of the Multilateral Investment Guarantee Agency (MIGA)’ in Mathias Audit, Stephan Schill (eds), *Transnational Law of Public Contracts* (Bruylants 2016).

## State-state Dispute Settlement

State-state dispute settlement clauses that allow states to initiate claims against their treaty-partners with respect to harm to investors already exist in many investment treaties, sometimes alone, but more commonly alongside ISDS.<sup>24</sup> In addition, some matters are expressly carved out of ISDS provisions and left to states to resolve exclusively or before the issues can proceed to ISDS. These carve-outs serve to narrow the role of ISDS and put more control over designated issues or policy areas into the hands of states for political and/or legalized dispute resolution by domestic officials and/or treaty bodies. States have done this for particularly complex or sensitive areas, such as financial services, tax measures, ad-hoc issues such as tobacco controls, and potentially broad categories of “public welfare” measures.<sup>25</sup>

### New Alternatives Re-examining “Political” Resolutions

While the incorporation of ISDS into IIAs was based, in large part, on the desire to “depoliticize” investment disputes and remove the home-state from involvement, the reality and desirability of this premise is increasingly being questioned and some very recent treaties have incorporated new thinking on the role for states in investment disputes. Brazil, for example, has been promoting and signing a breed of investment treaties (Cooperation and Investment Facilitation Agreements (CIFAs)) that rely entirely on inter-state mechanisms to identify, avoid, and resolve barriers to cross-border investment and disputes between investors and states.<sup>26</sup> Brazil’s CIFAs focus on cooperation and investment facilitation and promote amicable dispute settlement with state-state dispute resolution as a last resort. The CIFAs create a joint governmental committee that monitors and implements the CIFA, and also has a mandate to coordinate investment cooperation among governments, the private sector and civil society, including preventing and resolving conflicts in an amicable way.<sup>27</sup> Each party to a CIFA is required to establish an ombudsman to provide support to foreign investors and to provide information or assistance with domestic legal or treaty issues.<sup>28</sup> When a dispute does arise, and if mandatory governmental consultations and negotiations surrounding disputes fail, a party is permitted to initiate a proceeding before the joint committee in which the investor, government agencies and civil society are permitted to participate.<sup>29</sup> In replacing ISDS with a joint governmental committee, Brazil is edging back toward the “politicization” that was once feared, but with a new approach.

Regarding impacts on *investment flows*, the ways that state-state dispute settlement would potentially influence investment flows – by providing a signaling function, demonstrating a credible commitment, and impacting the rule of law – align with the theories regarding why ISDS might influence investor decisions, though there are some differences. With state-state dispute

<sup>24</sup> Nathalie Bernasconi-Osterwalder, ‘State-State Dispute Settlement In Investment Treaties’ in Kavaljit Singh, Burghard Ilge (eds) *Rethinking Bilateral Investment Treaties* (Both Ends, Madhyam, SOMO 2014).

<sup>25</sup> See, e.g., Australia-China FTA, arts. 9.11(4)-(8), 9.19; Australia-Hong Kong Investment Agreement, art. 13(5).

<sup>26</sup> Nathalie Bernasconi-Osterwalder, Martin Dietrich Brauch, ‘Brazil’s Innovative Approach to International Investment Law’ (*IISD Blog*, 15 September 2015) <[www.iisd.org/blog/brazils-innovative-approach-international-investment-law](http://www.iisd.org/blog/brazils-innovative-approach-international-investment-law)> accessed 1 April 2019; Martin Dietrich Brauch, ‘The Brazil-Mozambique and Brazil-Angola Cooperation and Investment Facilitation Agreements (CIFAs): A Descriptive Overview’ (*Investment Treaty News*, 21 May 2015) <[www.iisd.org/itn/2015/05/21/the-brazil-mozambique-and-brazil-angola-cooperation-and-investment-facilitation-agreements-cifas-a-descriptive-overview/](http://www.iisd.org/itn/2015/05/21/the-brazil-mozambique-and-brazil-angola-cooperation-and-investment-facilitation-agreements-cifas-a-descriptive-overview/)> accessed 1 April 2019.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

settlement, the enforceability of the commitment may not be as strong, as the number of potential claimants is reduced. On the other hand, some have found that ISDS claims against a host state (even claims that are ultimately unsuccessful) are linked to a drop in FDI in that state.<sup>30</sup> If the claims are based on an interpretation of treaty obligations that go beyond what the state parties to the treaty intended, then the existence ISDS cases may be poor and overbroad proxies for whether states' commitments to investors are in fact credible. In tension with the increasing-investment-flows objective, this means that ISDS can potentially do undue reputational harm to host countries, causing drops in FDI for even treaty-compliant conduct. State-state dispute settlement could help avoid this outcome by producing fewer claims alleging unduly broad interpretations of IIA commitments.

With respect to ***domestic rule of law***, state-state mechanisms (such as that established in the EU to address systemic rule of law challenges in EU Member States) can play a better role in supporting just, effective and rule-based domestic governance.

In terms of the "***depoliticization***" objective, here, as well, state-state dispute settlement could offer some advantages over ISDS. The introduction of ISDS into IIAs is said to have been motivated in part by eliminating the "political" role of home states in determining whether to bring or settle cases, and in preventing home-host state relations from being soured by investor-state disputes. Depoliticization can be useful to the investor (who, with ISDS, is relatively free to bring claims irrespective of its home state's support or approval), the home state (who, with ISDS, can tell its investors it won't engage on their behalf, focusing on other diplomatic priorities), and the host state (who, with ISDS, can resolve investor-state disputes in legalized dispute settlement free from added pressure by home states).

Commentators are increasingly questioning whether it is prudent, desirable, and even possible,<sup>31</sup> to truly depoliticize investment disputes by eliminating participation by home states in relation to claims of their investors (see box). There may, instead, be reasons for placing different types of disputes at different places along the spectrum between purely political, and strictly legalized, dispute resolution; indeed, evidence from other fora demonstrate that state-state disputes can still be "legalized".<sup>32</sup>

State-state mechanisms (including domestic law and policy to implement those mechanisms) could also be designed to better ensure that decisions on whether to advance cases are taken on objective, principled and merit-based grounds, and not, for instance, on capture and cronyism, in which those companies with the greatest political connections and clout are most likely to secure home country support. There could be criteria and procedures adopted at the domestic level to govern, for instance, whether or when a state should or should not pursue claims of one of its investors or a

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<sup>30</sup> Emma Aisbett, Matthias Busse, and Peter Nunnenkamp, 'Investment Treaties as Deterrents of Host-Country Discretion: The Impact of Investor-State Disputes on Foreign Direct Investment in Developing Countries' (2018) 154 *Review of World Economics* 119; Todd Allee and Clint Peinhardt, 'Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment' (2011) 65 *International Organization* 401.

<sup>31</sup> Theodore Posner, Marguerite Walter, 'The Abiding Role of State-State Engagement in the Resolution of Investor-State Disputes' in Jean E. Kalicki, Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System* (Brill Nijhoff 2015).

<sup>32</sup> Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, 'The Concept of Legalization' (2000) 54(3) *International Organization* 401.

class of investors, transparency regarding decisions, and structural mechanisms for insulating those decisions from political pressure.<sup>33</sup>

Additionally, once a case has been initiated, treaties could establish strictly legalized dispute resolution systems so that matters are resolved based on the rule of law rather than on power, or variations that include more political aspects, depending, for instance, on the type of claim. As noted above, state investment treaty practice currently reflects an interest by states in retaining a political role for some important and sensitive issues,<sup>34</sup> while also establishing a mechanism for legalized dispute resolution of others.

Importantly, thoughtful improvements to state-state consultation and dispute settlement mechanisms can improve outcomes not only for investors (for whom ISDS is not necessarily attractive or feasible), but also for host states. Host states continue to face political pressure notwithstanding the availability of ISDS,<sup>35</sup> and also face uncertainty regarding whether the home state will or will not intervene in ISDS disputes to address issues of treaty interpretation.<sup>36</sup> Thoughtful approaches to state-state dispute settlement can also better account for the broader interests sought to be protected by treaties' environmental, labor, human rights, and governance-related provisions. There have been important studies documenting the failed promise of these sustainable development-related provisions, highlighting the limited effectiveness and utility to date of state-state mechanisms for raising and resolving broader environmental and social interests and concerns that can be caused and exacerbated by the treaties' liberalization and protection provisions.<sup>37</sup> Thus, reformed and updated approaches to state-state engagement and dispute settlement could help address a range of issues and priorities held by various state and non-state actors.

Finally, in terms of **securing compensation for losses**, it is plausible that some investors will judge state-state dispute mechanisms less favorably than ISDS. States do, and under a state-state system may remain likely to, bring fewer claims than investors would under the same circumstances. As such, to the extent that investors win awards in ISDS cases (which is the case) a transition to a state-state system may have a negative impact on investors' ability to secure financial awards. But there may also be advantages for investors seeking relief.<sup>38</sup> In addition to enabling the investor to stay behind-the-scenes, state-state proceedings could be used, for instance, to secure declaratory

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<sup>33</sup> See Gordon Christenson, 'International Claims Procedure Before the Department of State' (1961) 13 *Syracuse Law Review* 527, 531–32.

<sup>34</sup> See, e.g., Australia-China FTA, arts. 9.11(4)–(8), 9.19.

<sup>35</sup> See, e.g., Public Eye, *Glivec in Colombia: New Leaked Letter from Novartis Attests to Pressure at the Highest Level* (5 February 2018), <https://www.publiceye.ch/en/news/detail/glivec-in-colombia-new-leaked-letter-from-novartis-attests-to-pressure-at-highest-level>

<sup>36</sup> See Lise Johnson and Lisa Sachs, 'Inconsistency's Many Forms in Investor-State Dispute Settlement and Implications for Reform' 7 (CCSI Policy Paper, November 2018).

<sup>37</sup> See, e.g., James Harrison, et al., 'Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters' (2019) 57 *Journal of Common Market Studies* 260, 269–270; Clint Peinhardt, Alisha A. Kim, and Viveca Pavon-Harr, 'Deforestation and the United States-Peru Trade Promotion Agreement' (2019) 19 *Global Environmental Politics* 52; Franz Christian Ebert & Pedro A. Villarreal, 'The Renegotiated "NAFTA": What Is In It for Labor Rights?' (EJIL: Talk! 11 October 2018); United States Government Accountability Office, *Free Trade Agreements: Office of the U.S. Trade Representative Should Continue to Improve Its Monitoring of Environmental Commitments*, (Report to Congressional Requesters, November 2014); United States Government Accountability Office, *Free Trade Agreements: U.S. Partners Are Addressing Labor Commitments, but More Monitoring and Enforcement Are Needed*, (Report to Congressional Requesters, November 2014).

<sup>38</sup> *Supra* n. 27.

judgment that a certain domestic measure in the host state is inconsistent with the treaty. That, in turn, could help advance domestic reform for the benefit of a broader class of investors, not just the claimants. This might be especially important for small investors, or when the challenged measure has low or minimal dollar-value effects. State-state actions for declaratory relief might also make it easier for individual investors to seek remedies before the host state's courts, human rights fora, or under political risk insurance.

Similarly, state-state mechanisms could be used to reach a global settlement of all claims by the home state's investors impacted by the host state's conduct, and potentially distribute the benefits of that settlement to affected investors. The state could also use state-state mechanisms to establish claims proceedings in particular circumstances.

Thus, despite perceptions that investors prefer to go-it-alone without interference by their home states, that home states use investment treaties to resist their investors' requests to provide diplomatic support, and that home states' engagement with host states is always forceful and undesirable, reality paints a more nuanced picture, demonstrating an existing and potentially increasing role for home states in helping investors secure relief in investor-state disputes.

## Human Rights Mechanisms

Much like ISDS, the range of monitoring and enforcement mechanisms established under international human rights treaties are notable within the broader sphere of public international law for providing beneficiaries with direct rights of action against states, despite the fact that, like investors, human rights petitioners are generally not considered "subjects" of public international law.<sup>39</sup> Resort by investors to human rights mechanisms may thus be appropriate in certain limited circumstances where fundamental rights have been infringed. This alternative could complement the availability of other options discussed in this working paper, such as state-state mechanisms, by creating a "fallback guarantee" in the context of egregious acts or omissions committed by host states with respect to investors, including cases involving denials of justice.

With respect to *encouraging investment flows*, a host state's compliance with human rights law, coupled with the availability of human rights monitoring and enforcement mechanisms, could be argued to create similar perceptions or "signals" regarding the rule of law, transparent legal frameworks, and credible commitments concerning these standards, as are alleged of IIAs. Indeed, the links between human rights law and improvement of the rule of law in host states are likely to be stronger and more positive than those argued to exist between ISDS and domestic rule of law.

Parallels can also be drawn between the *depoliticization aims* of ISDS and the depoliticization of human rights cases. Like ISDS, human rights law seeks to insulate consideration of cases and enforcement of states' obligations from interference by political pressures and interests. It provides individuals, groups, and (in some cases) legal entities with direct rights of action against states. While diplomatic and political interests and pressures can play a role in the determinations rendered by human rights tribunals and other authorities, and in the enforcement of those determinations, the limited research available on depoliticization in ISDS suggests that there, too, political engagement may continue alongside, and not be entirely replaced by, private actors' direct rights of action against states.<sup>40</sup> In both systems, the questions therefore relate to understanding

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<sup>39</sup> James Crawford, *Brownlie's Principles of Public International Law* (8<sup>th</sup> edn, Oxford University Press 2012) 121-123.

<sup>40</sup> *Supra* n. 5.

desirable/undesirable relationships between diplomatic engagement and legalized claims, and how to govern those relationships effectively.

With respect to the objective of strengthening rule of law, human rights mechanisms specifically **prioritize the strengthening of domestic governance** for all stakeholders.<sup>41</sup> From a procedural perspective, claimants must exhaust local remedies prior to bringing a grievance before a human rights tribunal or UN treaty body, unless they can justify non-exhaustion on specific grounds.<sup>42</sup> This requirement gives domestic judicial systems and institutions the opportunity and the incentive to rectify a harm caused, both with respect to a specific case and more generally regarding improvement of domestic legal and regulatory frameworks or processes. By contrast, exhaustion of local remedies is required by a relatively small number of IIAs,<sup>43</sup> and ISDS creates a substitute system for the determination or settlement of investment disputes that can undermine – or at least dis-incentivize – strengthening of legal and other institutions at the domestic level.

Moreover, protection under international human rights law is not contingent on nationality nor on possession of certain economic assets. As a result, the rule of law concerns that ISDS raises – concerns relating to unequal access to justice and inequality under the law<sup>44</sup> – do not arise in the context of human rights law and related enforcement mechanisms.

With respect to the objective of providing compensation, international human rights law requires that **states must provide effective remedies** for violated rights. The ICCPR, for example, requires state parties to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.”<sup>45</sup> The Human Rights Committee underscored the importance of reparation under international human rights law, noting that “[w]ithout reparation... the obligation to provide an effective remedy... is not discharged.”<sup>46</sup> The right to an effective remedy is also

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<sup>41</sup> See e.g., Veronika Fikfak, ‘Judicial Strategies and their Impact on the Development of the International Rule of Law’ in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart Publishing 2014); André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press 2011).

<sup>42</sup> ECHR, art. 35(1) requires exhaustion of “all domestic remedies” that “relate to the breaches alleged and at the same time are available and sufficient,” both in theory and practice. Exhaustion requirements are also included in ACHR art. 46(1) and ACHPR arts. 50, 56(5). Claimants must also exhaust domestic remedies prior to submitting a claim to UN treaty bodies. See Office of the United Nations High Commissioner for Human Rights ‘Individual Complaint Procedures under the United Nations Human Rights Treaties’ (UN 2013) <[www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf](http://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf)> accessed 1 April 2019.

<sup>43</sup> See David Gaukrodger, Kathryn Gordon, ‘Investor- State Dispute Settlement: A Scoping Paper for the Investment Policy Community’ (2012) OECD Working Paper on International Investment 2012/3, 15 <[www.oecd.org/daf/inv/investment-policy/WP-2012\\_3.pdf](http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf)> accessed 1 April 2019 (this 2012 study found that only 8% of a sample of 1,660 IIAs included exhaustion of local remedies as a precondition to bringing a claim before an investment tribunal). On exhaustion requirements in recently negotiated treaties, see Lise Johnson, Lisa Sachs, and Jesse Coleman, ‘International Investment Agreements, 2014: A Review of Trends and Approaches’ in Andrea Bjorklund (ed), *Yearbook on International Investment Law & Policy* (OUP 2016) 46-48.

<sup>44</sup> Lisa Sachs, Lise Johnson, ‘Investment Treaties, Investor-State Dispute Settlement and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities’ in José Antonio Ocampo (ed), *International Rules and Inequality: Implications for Global Economic Governance* (Columbia University Press 2019); See also ‘Access to Justice’ (*Columbia Center on Sustainable Investment*) <[ccsi.columbia.edu/work/projects/access-to-justice/](http://ccsi.columbia.edu/work/projects/access-to-justice/)> accessed 1 April 2019.

<sup>45</sup> ICCPR, art. 2(3).

<sup>46</sup> UN Human Rights Committee ‘General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant General Comment’ 26 May 2004 CCPR/C/21/Rev.1/Add. 13 31, paras. 15-17.

enshrined in regional and other international human rights instruments.<sup>47</sup> While ISDS has tended to focus primarily on compensatory relief, a range of remedies are commonly applied under international human rights law, including *inter alia* restitution, monetary compensation, rehabilitation (in the form of medical, psychological, social or legal services), satisfaction (relating directly to the nature of each violation), and non-repetition (directed at preventing future violations).<sup>48</sup>

Notably, however, regional human rights courts and UN treaty bodies primarily accept complaints from natural persons, not legal entities. At the regional level, only the European Court of Human Rights (ECtHR) has consistently and explicitly allowed corporations to directly bring claims before the Court. Regional mechanisms also offer much narrower protections, if any, for minority and indirect shareholders, than protections enforced under ISDS.<sup>49</sup> The distinction between the legal standing of investors under international human rights and investment law, respectively, should prompt a closer examination of whether and, if so, why investors as a specific group of claimants merit a higher level of protection at the international level than that available to all natural (and in some cases legal) persons under human rights law. Nevertheless, while human rights protections for legal entities are limited, human rights frameworks could be used to address a subset of harms individuals and, in some contexts, firms, may face when investing and operating abroad.

Another limitation of human rights mechanisms as compared to ISDS is that international human rights law does not tend to protect property and other economic interests to the same extent as ISDS. While compensation requirements for expropriation exist under the European Convention on Human Rights (ECHR) and American Convention on Human Rights (ACHR), the African Charter on Human and Peoples' Rights (ACHPR) does not explicitly require compensation for legal takings of property.<sup>50</sup> Furthermore, in applying the requirements under the ECHR, the ECtHR has often deferred to national authorities with respect to compensation, and has also tended to consider the nature of the public interest underlying the taking in determining the quantum.<sup>51</sup> Similarly, the ECtHR tends to engage in a balancing assessment between public and private interests when determining compensation for indirect expropriations.<sup>52</sup> By contrast, investment tribunals have tended to focus more singularly on the impact of the alleged indirect expropriation

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<sup>47</sup> See e.g., ACHR, art. 25 and ECHR arts. 13 and 41. For further information on remedies under human rights law, see e.g., Olivier De Schutter, *International Human Rights Law* (2<sup>nd</sup> edn, Cambridge University Press 2014), at Chapter 8.

<sup>48</sup> See United Nations General Assembly 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' 21 March 2006 A/RES/60/147. With respect to the ECtHR, note that the Court's determinations generally consist of declaratory judgments that establish breaches of the ECHR, coupled with damages. The principle of subsidiarity not only requires exhaustion of local remedies to ensure that domestic courts have an opportunity to address alleged violations, but also that the measures necessary for execution of the Court's judgments (other than monetary compensation) are often left for determination by the respondent state as supervised by the Committee of Ministers of the Council of Europe.

<sup>49</sup> See e.g., Lise Johnson, Lisa Sachs, Jeffrey Sachs, 'Investor-State Dispute Settlement, Public Interest and US Domestic Law' (2015) CCSI Policy Paper < <http://ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-U.S.-Domestic-Law-FINAL-May-19-8.pdf>> accessed 1 April 2019; David Gaukroger, 'Investment Treaties As Corporate Law: Shareholder Claims And Issues Of Consistency' (2013) OECD Working Papers on International Investment 2013/3 < [www.oecd.org/investment/investment-policy/WP-2013\\_3.pdf](http://www.oecd.org/investment/investment-policy/WP-2013_3.pdf)> accessed 1 April 2019; Ursula Kriebaum, 'Is the European Court of Human Rights an Alternative to Investor-State Arbitration?' (2009) 1 Transnational Dispute Management.

<sup>50</sup> Lorenzo Cotula, *Human Rights, Natural Resource and Investment Law in a Globalised World: Shades of Grey in the Shadow of the Law* (Routledge 2012) 45, 63-66.

<sup>51</sup> Cotula (2012), *supra* n. 50, at 65.

<sup>52</sup> Cotula (2012), *supra* n. 50, 67-68.

on the investor.<sup>53</sup> These and other factors may account for the higher levels of compensation generally awarded by investment tribunals as compared to the amounts awarded by human rights tribunals.<sup>54</sup>

Furthermore, there is a legitimate position that *human rights* fora should not be used or relied upon for the benefit of corporate interests because the origin of human rights as a matter of dignity differs from the origins of corporate protection, corporate interests already wield immense power at the global and local levels, and funneling such disputes through human rights fora may further burden an already over-burdened system, thereby undermining access to justice for non-investor individuals and groups.

Resort to human rights mechanisms is therefore only likely to be appropriate in very limited circumstances where host states are alleged to have committed grave or systemic violations of the rights of investors as individuals or, in the case of the ECHR, as legal entities. Nonetheless, this alternative is important to consider among the mix of instruments and tools that investors can use to protect their rights and pursue remedies, and that codify, establish, and seek to enforce relevant international norms of state conduct.

## Conclusion

As has been discussed widely elsewhere, ISDS can be very costly with very few proven benefits.<sup>55</sup> The alternatives set forth here, especially when used in concert, have the ability to address many of the objectives envisioned for ISDS without the same costs. Eliminating ISDS does not raise perils of gunboat diplomacy, where legalized dispute settlement is replaced by use of power and force. Investors would still be able to secure compensation for unlawful government conduct, while preserving respect for the rule of law, international obligations, and broad rights of access to justice. These alternatives, alone and together, do not necessarily serve each of the four often stated objectives of ISDS to the same extent as ISDS does. The alternatives may outperform ISDS in some areas but underperform in others, such as in the case of providing compensation to corporations for economic losses. It is worth noting, however, that the oft-stated objectives of ISDS may themselves be outdated and would benefit from a refresh; as noted extensively above and in our companion piece on ISDS objectives, depoliticization should not be a primary objective, nor should efforts to incentivize all kinds of cross-border financial flows, or to offer broad protections for the economic interests of investors. The globally-agreed Sustainable Development Goals (SDGs) may provide a more useful framework for updating the objectives, and assessing the impacts of IIAs and their dispute settlement mechanisms on those aims. Nevertheless, whether from the perspective of the traditional or revisited objectives, it is valuable to consider the benefits and costs of each alternative mechanism for resolving disputes, and whether and how they could be utilized to better catalyze and govern international investment than the ISDS model pursued in recent decades.

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<sup>53</sup> Cotula (2012), *supra* n. 50, at 67-68.

<sup>54</sup> See Kriebaum (2009), *supra* n. 49, at 26-27 for a comparison of amounts of compensation awarded by ISDS tribunals and the ECtHR. Enforcement of decisions rendered by human rights authorities and ISDS tribunals also differs. Once monetary awards have been issued by ISDS tribunals, the New York Convention and ICSID Convention allow for enforcement of the awards in the domestic courts of states parties. By contrast, enforcement of determinations rendered by regional human rights tribunals and UN treaty bodies can depend on the political will of the respondent state, or political action taken by other states, international organizations, supranational entities, or non-governmental organizations.

<sup>55</sup> Lise Johnson, Lisa Sachs, Brooke Guven, and Jesse Coleman, 'Costs and Benefits of Investment Treaties: Practical Considerations for States' (2018) Columbia Center on Sustainable Investment Policy Paper March 2018 <[ccsi.columbia.edu/files/2018/04/Cost-and-Benefits-of-Investment-Treaties-Practical-Considerations-for-States-ENG-mr.pdf](http://ccsi.columbia.edu/files/2018/04/Cost-and-Benefits-of-Investment-Treaties-Practical-Considerations-for-States-ENG-mr.pdf)> accessed 1 April 2019.