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Improving the Impact of International Arbitration on Economic Development

Amanda Rawls

(*)

I Introduction

The opening recital of the 1965 ICSID Convention states that the Contracting States have agreed to establish the International Centre for Settlement of Investment Disputes "Considering the *need forinternational cooperation for economic development*, and the role of private international investment therein." (1) This recital sets the stage for consideration of the question, some fifty-plus years later, of whether international arbitration does in fact support economic development, and how it could have a larger positive impact.

Though some professional arbitration specialists contend that the qualitative impact of arbitration on development is irrelevant and outside of the mandate of the profession, the Sustainable Development Goals reflect a global consensus that, as an integral component of sustainable development, economic development is a priority challenge for the next fifteen years. (2) Economic development outcomes are relevant to governments negotiating Bilateral Investment Treaties (BITs), to the corporate social responsibility arms of corporations investing in poor countries – and possibly to the shareholders and leadership of those corporations as well – to the general public in countries hosting and seeking to host considerable foreign investment, and to civil society and non-governmental organizations seeking to promote equitable and sustainable development around the world.

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This paper does not seek to weigh in on the debate over the moral obligation of arbitration professionals to consider economic development outcomes of their work. ● Rather, it takes as a starting point this global desire to foster economic development and examines contributions – positive and negative – that international arbitration might make to this effort. (3) To this end, it develops a "theory of change" that sets out hypotheses about the building blocks of economic development, identifies potential linkages between international arbitration and these building blocks, and considers how international arbitration might be structured or implemented differently in order to improve development outcomes.

In Sect. II, I look briefly at different understandings of and metrics for economic development – possible answers to the questions "what do we mean by economic development, how do we measure it, and how will we know if we have achieved it?" In Sect. III, I select three factors that might contribute to economic development – government regulation, domestic courts, and accountability mechanisms – and discuss the rationale for believing that strengthening each of these components would lead to the change we hope to see – improvement in economic development.

Sect. IV then turns to international arbitration with a focus on investor-State arbitration, exploring the potential impacts of Bilateral Investment Treaties, the selection of arbitral panel members and location of arbitration proceedings, and the confidentiality of final arbitration decisions on each of the above factors. This section poses such questions as (a) How do BITs constrain the ability of governments to manage the negative externalities of international investments? How does arbitration affect the redress mechanisms that exist for third-party stakeholders who are negatively affected by international investments? (b) How does the growth of international arbitration impact domestic dispute resolution institutions? What impact might this have on domestic investment? (c) What is the potential for international arbitration to contribute positively to the evolution of the rule of law in developing countries? How does confidentiality of proceedings and outcomes affect the public perception of the value of transparency and accountability? Finally, in Sect. V, I share a few concluding thoughts on ways in which technical assistance providers might support these sorts of reforms.

II What is Economic Development?

Proponents of the assertion that international arbitration contributes positively to economic development are likely using growth as a proxy for development, asserting that the option of international arbitration as a dispute resolution mechanism – whether introduced into a developing country economy through individual commercial contracts or through a bilateral investment treaty – encourages foreign investment, and increased foreign investment leads to economic growth (growth in GDP). The logic here is that ● international arbitration is a more reliable dispute resolution mechanism than domestic courts, and so investors feel more secure investing in the country.

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Setting aside the question of whether international arbitration contributes positively to economic growth, (4) growth is itself a poor proxy for economic development, which is a broader concept. (5) Professor Michael Todaro defines economic development as "an increase

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in living standards, improvement in self-esteem needs and freedom from oppression as well as a greater choice". (6) A country can of course have robust economic growth while living standards decline and oppression deepens, (7) a reality sufficiently accepted in international development practice today that the recently adopted "Sustainable Development Goals" have just one goal that explicitly references economic growth – Goal 8, which reads "Promote inclusive and sustainable economic growth, employment and decent work for all." (8)

Growth is used as a proxy for economic development in part because it can be measured in the same way in different countries, and then compared; living standards and freedom from oppression are more complicated to measure, and to compare. The United Nations annual Human Development Report is perhaps the primary global tool for making this comparison, though it takes an even broader view of "human development" and compares countries on three core dimensions of human development – life expectancy at birth; years of schooling (mean and expected); standard of living (measured by per capita gross national income). In addition, the Human Development Report includes additional indices which measure the extent of inequality, gender disparities in Human Development Index (HDI) values, and non-income dimensions of poverty. (9)

As Todaro indicates, economic development includes political freedom and greater choice, and so we might look to other more targeted metrics to complement the annual Human Development Reports, for example through global indices targeting civil liberties, the rule of law, or the business regulatory environment. Corruption works against economic development, undercutting economic growth, discouraging innovation, exacerbating inequity, and counteracting social spending, and so measures of corruption might themselves be indicative of economic development. The following annual indices take up these challenges: ●

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- Freedom House's *Freedom in the World Index* (10) reflects measures of civil liberties and political rights around the world.
- The World Justice Project *Rule of Law Index* (11) reflects the public experience of related issues such as corruption, constraints on government powers, regulatory enforcement, and criminal justice.
- The World Bank's *Doing Business Index* (12) focuses much of its data analysis on factors that affect domestic firms, such as the difficulty of starting a new business, accessing credit, or enforcing a contract.
- Transparency International's annual *Corruption Perceptions Index* (13) examines perceptions of corruption both inside countries, and in their international actions.
- Global Integrity's *Africa Integrity Indicators* (14) assess the legal framework and implementation of social, economic, political, and anti-corruption mechanisms in fifty-four African countries.

Collectively, these global indices track dozens of indicators of economic development. In order to develop a theory of change that links positive progress on economic development to concrete reforms of aspects of international arbitration, we articulate hypotheses regarding the change we want to see. In the following section, three such hypotheses are laid out, upon which the following discussion rests.

III Access, Institutions, and Transparency

The relationship between investment and economic development is intricately tied up in access to justice and the rule of law. The following three hypotheses attempt to articulate those linkages, essentially asserting that equitable distribution of the benefits of growth requires access to justice; domestic investment demands public confidence in dispute resolution; and reducing corruption requires public confidence in government integrity, which requires transparency. A brief statement of each hypothesis is presented here, followed by a more detailed argument in favor of the justice-based solution that each hypothesis proposes.

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1. *Access:* Significant economic investment, foreign or domestic, will contribute more to reducing inequality – central to economic development – when public needs and priorities are taken into account by government in its regulation of that investment – ● including such areas as regulation of the health and environmental impacts of industry, protection of labor rights, and fair compensation for harms. Government regulation is more likely to address public priorities when the public has access to information, access to public participation, and access to justice (redress).
2. *Institutions:* The positive impact of foreign direct investment on economic development will be multiplied – and more sustainable – when it is matched by significant domestic investment. Domestic investors are motivated by essentially the same factors as international investors, including a desire for reliable dispute resolution mechanisms. Domestic dispute resolution mechanisms are strengthened when governments are incentivized to invest in domestic courts, and the capacity of domestic justice personnel is strengthened.

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3. *Transparency:* The fight against corruption will be strengthened through successfully institutionalizing integrity within governments, international corporations, and the general public. Accountability mechanisms help to institutionalize integrity by combatting impunity. Transparency and broad public access to information enable accountability mechanisms to function, by making it more difficult to obscure illicit financing arrangements, and empowering the public to speak out against illegal acts.

These hypotheses can be tested through empirical research that is outside of the scope of this paper – for example, the content of government regulation could be measured against implementation of access to information laws, and measures of inequality. What follows here is a brief theoretical discussion of the thinking underlying each of the above hypotheses, and linking to an aspect of international arbitration with the potential for constructive reform.

1 The Argument for Access

The first element of Todaro's definition of economic development – an increase in living standards – is a combination of multiple metrics. The World Bank's Living Standards Measurement Study, for instance, consists of different surveys for households, businesses, and communities, measuring everything from education levels, migration history, the value of a household and its assets, number of children and access to family planning, to business inventory, number of employees, access to and use of credit, and availability of sufficiently staffed schools and health services, sanitation facilities, public utilities, and more. (15)

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In poor countries with weak social services, foreign investment – particularly long-term investment as is seen in the extractive industries – may be anticipated by the public to provide what government cannot or has not. (16) In such cases, investors often sign ● Community Development Agreements with representatives of the communities in which they plan to invest (sometimes required by local law), outlining the services they pledge to provide. Community members thus become key stakeholders in the investment agreement; though they are not a contracting party, their consent may have been required to lease the land, they are most likely to suffer from the social and environmental "externalities" of the activity, and their opposition can potentially derail activities.

One step further removed from having a direct relationship between investors and community members, some countries have established revenue sharing mechanisms to facilitate government use of revenue from foreign investment for local development or service provision. (17) For these types of initiatives to fulfill their potential of contributing to improved living standards, investors must be incentivized to establish strong but realistic commitments; governments must be incentivized to both oversee the implementation of Community Development Agreements and responsibly manage resource funds for the public benefit.

Civil society can play a crucial role in creating incentives for government, when the public has three key forms of access that enable them to demand social accountability of government, and government has the flexibility to regulate in response to their demands:

- *Access to information*: including public access to information about planned investments, mechanisms for public participation in related decision-making, anticipated positive and negative impact on communities, timelines for activities with direct social impact, development commitments made by investors, and mechanisms for redress;
- *Access to public participation*: including involvement in pre-investment studies or surveys, consultation over location of activities, inclusion in mitigation plans for anticipated negative effects, discussion of impacts on local business interests;
- *Access to justice/redress*: including a forum to register concerns and complaints, procedures for accessing mediation services or contacting an ombudsman, timelines for non-judicial resolution of disputes, standing to bring cases, timelines for case disposition, appeals procedures.

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In Sect. IV, we will look specifically at innovations in the Southern African Development Community (SADC) model BIT that addresses some of these concerns in a context directly relevant to international arbitration, as well as at a proposal from the ● human rights community to create a parallel form of international arbitration to address directly cases in which third parties' rights have been violated in the context of international investment.

2 The Argument for Domestic Institutions

In its April 2013 Note, the United Nations Conference on Trade and Development noted that

"Domestic investment is both a driver and an engine of growth in developed and developing countries. It is necessary to sustain growth, create employment and lay the foundation for poverty reduction. Over the past decade there has been a rapid increase in Africa's needs for resources to finance the development of infrastructure and productive capacity, but domestic investment has not grown fast enough to match these needs." (18)

The reasons for this lag in domestic investment are many and varied, but among them has been noted a lack in investor confidence in available dispute resolution mechanisms. In his essay on BITs in Sub-Saharan Africa, Alec Johnson notes, "Domestic investors are motivated by the same goals as foreigners – maximizing returns and minimizing risk. Inefficient or corrupt

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local courts deter domestic investment just as they deter FDI." (19) This is the foundation for his argument that countries that have increased FDI but low levels of domestic investment may be suffering from low domestic confidence in the local judiciaries to protect their investments, and an expectation that their investments will be treated unfairly vis-à-vis international investments. Johnson proposes that countries in this position "level the playing field" by encouraging confidence in domestic courts, through such efforts as supporting judicial independence, efficiency and transparency. (20)

In addition to these judicial attributes requiring political support, leveling the playing field in some countries might also require targeted education for domestic lawyers and judges in the details of investment law that arise in complex international commercial mediation, negotiation, litigation and arbitration. The World Bank's Doing Business reports reference this important capacity measure in their metric on Enforcing Contracts, which was broadened in 2016 to test not only the time and cost of resolving a standard commercial dispute in the domestic courts, but also "quality of judicial processes", through the adoption of a "series of good practices that promote quality and efficiency in the commercial court system". (21) The fifteen areas covered by this new index include such measures as the availability of a specialized commercial court, the publication of judgments, the availability of performance measurement mechanisms, and the availability and regulation of arbitration. In this first year of measurement under this new index, Sub-Saharan African economies were found to have the fewest judicial good practices in place. (22)

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In Sect. IV, we will look specifically at arguments that international arbitration risks substituting for, rather than complementing, domestic dispute resolution institutions, and will consider potential State initiatives to combat this, through both modifications to BITs and requests for technical assistance.

3 The Argument for Transparency

Corruption, broadly defined as using the public resources for personal or private gain, is acknowledged as a tremendous drain on investment, foreign and domestic. Institutions and initiatives devoted to combatting corruption, such as Transparency International, Publish What You Pay, Global Integrity, the Natural Resource Governance Institute, and others promote transparency and information sharing as key techniques to combat corruption. By its nature, corruption can be difficult to observe or identify, harder still to prosecute; transparency counters impunity by making concealment of illicit activity more difficult, empowering whistle-blowers, and educating the public as to the mechanisms through which corruption might be concealed. Combined with concrete accountability mechanisms, transparency can channel public frustration with official misconduct into complaints procedures and legal proceedings, contributing to the institutionalization of integrity that is essential to bring corruption under control.

This push for transparency and accountability is part of a global effort to institutionalize integrity, not only within government, but in relationships between government, corporations and the public. This will require shifts in a number of interdependent variables – for access to information laws to work, information must be demanded by the public as well as supplied by the government. For international standards to influence domestic legal frameworks, the standards must be known and understood by the domestic public; for these standards to be adopted by international investors, they must be known to interest groups able to shift the incentives of industry. For government and industry to eschew back-room deals in violation of legal frameworks, the risks (financial, legal, or reputational) must outweigh the potential benefits.

In Part IV, we consider how the confidentiality of arbitration proceedings might counteract or impede the institutionalization of integrity, how BITs could be modified to reduce these risks, and why parties might find it in their affirmative interest to elect to abandon confidentiality.

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IV Arbitration and Economic Development

Despite the ICSID Convention's preamble statement professing a motivation originating in "the need for international cooperation for economic development", (23) there may be no necessary obligation of international arbitration to affirmatively seek to strengthen economic development. However, as illustrated above, decisions about how international investors interact with Host States have the potential to measurably impact economic development. With that in mind, this section explores three ways that Host States, civil society interest groups, and investors themselves could advocate for reforms with the potential to positively impact development outcomes.

1 Improving Access

Public access to information, access to public participation, and access to justice could be promoted and protected in Bilateral Investment Treaties. Furthermore, BITs and individual contracts could also carve out additional flexibility for Host States to regulate in the public interest on the basis of the priorities and needs expressed through public participation avenues and judicial proceedings.

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a BIT reform and access

The 2013 BIT signed between Benin and Canada provides examples of concrete ways that public access can be prioritized in arbitration. For example, Art. 33 provides for open public arbitral hearings, while Art. 34 permits consideration by the tribunal of submissions from third parties with a significant interest in the arbitration (amicus curiae submissions). (24) The SADC Model BIT similarly introduces investor obligations on compliance with domestic law (Art. 11), and provision of information (Art. 12). (25)

Additional participation obligations could be introduced into international dispute resolution, either through direct inclusion in future BITs, or through BIT provisions that defer to domestic law, with accompanying national laws mandating community consultation in advance of decision-making that impacts upon citizen rights, such as land tenure; prioritizing robust community development agreements; or insisting upon collaboratively conducted and publicly vetted social and environmental impact assessments well in advance of investment projects.

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Access to justice/redress might be provided for through prioritization of dispute resolution mechanisms through which not only investors and States, but affected third parties, have access to the forum and standing to bring a complaint. Provisions calling for exhaustion of local remedies are discussed below in the context of strengthening domestic dispute resolution mechanisms, but such provisions simultaneously serve to give preference to fora in which domestic legislation can grant access to third-party stakeholders. The SADC Model BIT includes an additional provision through which the State or private persons can bring civil claims against investors in domestic courts.

A more radical proposition seeks to not simply expand the access of the directly affected public to arbitration proceedings addressing issues that concern them, but to create a parallel arbitration regime to supplement voluntary codes of corporate conduct, in which directly affected third parties are potential claimants, when the State has failed to protect their rights. (26)

This has been proposed particularly in the case of protected minority groups, like indigenous peoples, whose rights as reflected in the international legal context may create a competing legal claim outside the competence of an arbitration panel. (27) In such cases, the affected population should properly have a claim in the domestic court system; however, Vadi argues that to the extent that the prevailing dispute resolution framework has taken cases in which the investor is a plaintiff out of the hands of the domestic courts, the authority of these courts to hear disputes in which the investor is a defendant has been undercut. (28) The issue of strengthening domestic courts is taken up below; in a handful of related cases, domestic interest groups have recast their claims as claims against their own States for failure to protect, and have pursued these in regional human rights tribunals – an interesting approach that unfortunately strays beyond the scope of this paper. (29)

b BIT reform and regulatory flexibility

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A Host State seeking the dual benefits of creating space for international arbitration, while also preserving regulatory flexibility, might wish to negotiate BITs that promote these ends. (30) The SADC Model BIT provides an example of such modifications, widening the space for the State to promote economic development, while also establishing affirmative obligations on foreign investors. For instance, the SADC Model BIT includes in its exceptions clause taxation measures, measures considered necessary for the protection of national security interests, and introduces protectionist measures such as explicitly permitting preferential treatment for qualifying investments in the interest of national development objectives, and removing the "non-discriminatory" condition on lawful expropriation. (31) It also introduces regulatory obligations on investors in addition to the access obligations noted above, such as environmental and social impact assessment (Art. 13), and grants broad power to the Host State "to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives" (Art. 20.1). (32)

2 Strengthening Domestic Institutions

As outlined in Sect. III, strong domestic courts are an institutional prerequisite for increasing domestic investment, and thereby strengthening economic development. The related challenge to international arbitration centers on the claim that, as currently structured, arbitration undercuts domestic courts by substituting international dispute resolution forums, thereby dis-incentivizing Host States from investment in domestic institutions. (33) In his analysis of empirical data that could speak to this possibility, Tom Ginsburg found declines in a measured "Rule of Law" variable following adoption in Host States of BITs, suggesting that in some cases the presence of the international dispute resolution alternative "might undermine the quality of the local legal system". (34) While not predictive, this data point suggests that the potential for a negative impact on domestic courts is real. Host States and investors could seek to counter this possibility by affirmatively seeking to strengthen domestic dispute resolution capacity through structural shifts codified in BITs to encourage selection of domestic courts for dispute resolution, and to rely upon local courts for enforcement of award, and selection of both arbitrators and venues. (35)

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a Encourage use of domestic courts

Johnson has asserted that BIT provisions that permit investors to circumvent Host State courts entirely reduce incentives for reforms that would make these courts more efficient and reliable. (36) The SADC Model BIT provides for an exhaustion requirement, and then goes further by permitting counterclaims for damages against investors to be brought in domestic courts. These counterclaims can be brought not only by the respondent State, but also by private persons or organizations – supporting the access to justice consideration above. Alternative BIT reforms, stopping short of requiring exhaustion of local remedies, might nonetheless encourage initial attempts to use domestic institutions for dispute resolution – Johnson proposes including an express right to choose, accompanied by a waiting period between the filing domestically and the referral of a case to arbitration. (37)

As domestic courts increase in efficiency and adherence to the rule of law, they are likely to prove easier, faster, and cheaper than international tribunals, and domestic investors will no longer be disadvantaged in this realm. These gains in efficiency and reliability in the handling of complex international commercial disputes may not take place simply from greater use of these forums; rather, domestic legal and judicial professionals would likely benefit from targeted training in these areas of law and practice.

b Localize arbitration in Africa

Johnson notes that there are relatively few African arbitrators, (38) and that Africa is rarely an arbitration venue. This perpetuates a mistrust of arbitration as a dispute resolution mechanism and results in arbitrators less familiar with the context. From the point of view of seeking to strengthen domestic dispute resolution institutions, it also minimizes the potential for positive spillover effects into the creation of domestic arbitration bodies, and application of parallel legal principles in domestic proceedings. (39) While initiatives like the Kigali International Arbitration Centre are working to establish rosters of qualified arbitrators, correcting this imbalance is not only a matter of identifying and selecting more African arbitrators, but of investing in training arbitration professionals, to create a larger pool from which to draw. Locating more panels in Africa would complement this effort, creating opportunities to increase exposure to arbitration as a dispute resolution mechanism, increasing the possibility of positive spillover of legal norms, and inspiring more legal professionals to become involved or specialize in arbitration.

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3 Ensuring Transparency

Historically, enforcing information sharing and transparency has been a primary weapon in the fight against corruption worldwide. Asset disclosures, public scrutiny of financial flows, and freedom of information laws are just a few of the ways this principle has manifest in policy and practice. In the context of international arbitration, the possibility of confidential proceedings and undisclosed awards may be very attractive to both investors and States seeking to resolve their disputes quietly. Greater openness would have the potential to positively impact initiatives to combat corruption – and so to strengthen economic development – in the following two ways.

a Reinforce good governance

Fighting corruption is partly about prosecuting incidence and holding individuals accountable, but it is also about creating a culture of integrity, evidenced through openness in sharing data – including data that reflects badly on government, organizations, or individuals in positions of power. The primary argument for greater transparency in relation to international arbitration is therefore modeling – providing the example of powerful government and private sector actors willing to practice what anti-corruption activists preach. This applies to all elements of an international dispute resolution – the underlying contract, documentation relating to contract negotiations, data on contract performance, unanticipated outcomes, deliverables, delays, etc.

This applies equally to transparency regarding arbitral awards against a Host State – demonstration of the State's willingness to respect the outcome of arbitration presents a model for the appropriate application of the rule of law that can then bolster confidence in domestic governance more broadly. (40)

BITs can provide for greater transparency of proceedings and outcomes. The SADC Model BIT provides for transparency of investment information generally (Art. 8), and for greater transparency in dispute resolution proceedings as well. In the absence of this governing treaty law, individual investment agreements can incorporate transparency standards, and Host States can incorporate them by reference when they are codified in domestic law.

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b Spillover of legal norms

From the point of view of the development of legal principles in host countries, transparency of arbitration proceedings – particularly the outcomes of tribunals – has great potential to influence the domestic legal community's approach to handling international investment questions, as well as related legal issues such as property rights, land tenure, and enforcement of judgments. (41)

Of course, the reforms discussed here reinforce each other – recourse to domestic courts in the pursuit of local remedies (or evidence of exhaustion) contributes to the development of

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domestic legal thought and legal expertise; exposure to international arbitration drives demand for arbitration options for domestic dispute resolution, with a corresponding demand for more training opportunities for African arbitrators. Application of international standards in domestic courts builds confidence in domestic legal reasoning, and contributes to leveling the playing field between international and domestic investors, incentivizing increased domestic investment. Such spillover is then reflected in the next generation of BITs, which are likely to incorporate newly internalized standards.

c Empowering watchdog organizations

Finally, greater transparency creates a substantial resource for civil society watchdog groups seeking to use publicly accessible information as an accountability tool – to challenge investment decisions, press for increased or modified regulatory regimes, trace financial flows, question tax revenue and expenditure, challenge predatory investors or unconscionable contract terms, monitor enforcement of judgments, etc.

On its face, these may be all of the reasons that both investors and States prefer that information remains confidential. However, this public accountability and the resulting confidence in the rule of law is what ultimately creates and sustains the secure legal context that both domestic and foreign investors want, and the socio-political context in which economic development becomes self-perpetuating.

V Technical Assistance

As a final note, I would like to touch briefly on what it means to provide technical assistance as a means of addressing the reform issues enumerated in Sect. IV. Many of these proposed reforms represent negotiating positions that a Host State might take in hammering out a new BIT, or advocacy positions that civil society in a Host State might adopt when seeking to persuade their government to take a particular position, or to pressure a foreign investor to do more to foster domestic development. They may seem removed from the daily work of arbitration professionals.

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Technical assistance might begin with a conversation, workshop, or brief assessment conducted with partners from government, civil society, or industry, to determine the primary gap in knowledge, skills, tools, or implementation capacity that assistance might be able to fill. As a result of this initial step, technical assistance initiatives might be developed for example to:

- Support Host State negotiators to develop the legal argument for their negotiating position on a draft bilateral or model national BIT;
- Identify international experts in BIT drafting to participate in the creation of a new sub-regional model BIT;
- Produce a handbook for industry on rights and obligations under a new model BIT;
- Train civil society leaders on conducting community needs assessments and using the findings to craft a media campaign;
- Create a curriculum for a national bar association to train attorneys in the intricacies of international investments and arbitration skills;
- Bring together investors, community leaders, and government representatives to develop a coordinated policy on community consultations and resource mapping;
- Develop implementing regulations to operationalize provisions of a freedom of information act; train media on making requests, government agencies on responding to requests, and courts on handling disputes over denied requests.

As global law and justice professionals, we are in a position to both advocate for updated investment treaty provisions and support technical assistance initiatives such as these to enhance access, strengthen institutions, and promote transparency – considering the need for international cooperation for economic development, and the role of private international investment therein.

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24) As referenced in F. SEATZU and P. VARGIU, "Africanizing Bilateral Investment Treaties ('BITs'): Some Case Studies and Future Prospects of a Pro-active African Approach to International Investment", 20 Conn. J. Int'l L. (2015) p. 143 at p. 161.
25) Additional discussion of the SADC Model BIT provisions is provided by Uche Ewelukwa OFODILE, *Africa and the System of Investor-State Dispute Settlement: To Reject or Not to Reject?* Africa International Legal Awareness (AILA)(2014), available at <http://blogaila.com/2014/10/12/africa-and-the-system-of-investor-state-dispute-settlement-to-reject-...>.

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26) See e.g. Todd WEILER, "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order", 27 B.C. Int'l & Comp. L. Rev. (Spring, 2004) p. 429, suggesting that the time has come for a human rights claims mechanism in future international investment protection agreements, acknowledging investor responsibility for complicity in human rights abuses perpetuated by State officials, and for acts that constitute a de facto exercise of state power.

27) Valentino Vadi explores this interplay in the context of indigenous cultural heritage rights, in "When Cultures Collide: Foreign Diret Investment, Natural Resources, and Indigenous Heritage in International Investment Law", 42 Colum. Human Rights Rev. (2011) p. 797.

28) *Ibid.*, at p. 832.

29) See, e.g., V. VADI, *ibid.*, at p. 854, discussing the case of *Burlington v. Ecuador* in which the investor's claim against the Host State for failing to provide adequate protection against indigenous opposition to its hydrocarbon concession in the Amazonian rainforest was dismissed on procedural grounds, while related cases brought by the same indigenous people against Ecuador before the Inter-American Commission on Human Rights for violations of their rights related to the hydrocarbon concession moved forward in that forum.

30) One common critique of international arbitration alleges that the outcomes of arbitration are themselves biased against less developed countries. Susan Franck has undertaken considerable empirical research on this question, and did not find evidence of such bias. She concludes that "the outcome of investment treaty arbitration was not reliably associated with the development status of the respondent state, the development status of the presiding arbitrator, or some interaction between those two variables". Susan D. FRANCK, "Development and Outcomes of Investment Treaty Arbitration", 50 Harv. Int'l L.J. (2009) p. 435 at p. 487.

31) *Ibid.*, at pp. 153, 164.

32) U.E. OFODILE, supra fn. 25.

33) See Tom GINSBURG, "International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance", 25 Int'l Rev. L. & Econ. (2005) p. 107 at p. 119.

34) *Ibid.*, at p. 27.

35) Mark Fathi Massoud posits that autocratic regimes use international arbitration to consolidate wealth by promoting FDI that is directed toward strengthening the State, and that this goes hand-in-hand with maintaining weak domestic courts. Mark Fathi MASSOUD, "International Arbitration and Judicial Politics in Authoritarian States", 39 Law & Soc. Inquiry (Winter, 2014) p. 1. While essential to acknowledge and consider when facilitating investment in autocratic regimes, this type of predatory state is outside the scope of this paper.

36) A.R. JOHNSON, supra fn. 19, at p. 942.

37) *Ibid.*, at p. 943.

38) *Ibid.*, at p. 965.

39) Another argument in favor of increasing the number of arbitration professionals from the global South – to counter bias in arbitrators from the global North in favor of investors who share their background – was largely invalidated by empirical research by Susan Franck, who demonstrated, using country of nationality as a proxy for development status of the arbitrator, that the outcome of arbitration – whether measured through win/loss, or through the size of awards against governments, "was not reliably associated with … the development status of the presiding arbitrator". Susan D. Franck, "Symposium: The Future of Law and Development, Part II: Investment Treaty Arbitration and Law & Development", 104 Nw. U. L. Rev. Colloquy (2009) p. 178 at p. 180.

40) See Sergio PUIG, "Recasting ICSID's Legitimacy Debate: Towards a Goal-Based Empirical Agenda", 36 Fordham Int'l L.J. (2013) p. 465, arguing that the restoration of confidence is one of the primary outcomes of arbitration.

41) See A.R. JOHNSON, supra fn. 19, at p. 942 on the potential for greater transparency to spur legal change.

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