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### Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law

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#### Recommended Citation

Lise Johnson, Jesse Coleman, Brooke Güven & Lisa E. Sachs, *Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law*, (2018).

Available at: [https://scholarship.law.columbia.edu/sustainable\\_investment\\_staffpubs/154](https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/154)

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# Columbia Center on Sustainable Investment

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CCSI Policy Paper  
April 2018

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## Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law

### The Context:

This is a crucial moment in international investment policymaking. Two factors have converged, calling for a new direction. The first is that it has become increasingly difficult to justify investor-state dispute settlement (ISDS); even governments that had been among its strongest proponents are now changing course. The second is a greater awareness of the need to design appropriate policies to maximize the contributions of cross-border investment to sustainable development objectives.

Many reform processes related to investment policy are underway at national, bilateral, and multilateral levels. Particularly those at the bilateral and multilateral levels could facilitate the alignment of the thousands of existing investment treaties (including their dispute

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settlement mechanisms) with modern challenges and opportunities presented by investment. Those processes, however, will likely be slow; and in the meantime, governments and their stakeholders remain tied to an outdated system that is widely acknowledged to be ill-suited for modern investment policy objectives, with increasingly concerning consequences.

This paper recommends that governments explore two near-term options to address the most concerning aspect of the current investment regime, ISDS, alongside their longer-term work on reform of substantive treaty standards and procedural dispute settlement mechanisms. These are (1) a joint instrument on withdrawal of consent to investor-state arbitration, and/or (2) a joint instrument on termination of investment treaties.

It is important to emphasize that these steps toward coordinated withdrawal of consent to investor-state arbitration and/or termination are not anti-investment, anti-investor, anti-foreigner, anti-globalization, or anti-international law. Rather, they would reflect an important conscientious effort to govern effectively and fairly, ensuring that investment treaties and their dispute settlement mechanisms achieve their desired ends, produce legitimate decisions that are respected by countries (even those that lose their cases), and do not undermine international economic cooperation and sustainable development more broadly.

To elaborate on these points, this paper first discusses the two factors driving change: mounting concerns regarding ISDS and a growing understanding of the importance of aligning investment policy with sustainable development objectives. Second, this paper briefly considers potential ISDS reform options, and advantages and disadvantages of those options. Third, it provides an overview of the current UNCITRAL<sup>1</sup> process. Finally, the paper outlines two pragmatic options that can be pursued for addressing the current stock of thousands of treaties with ISDS, namely, a joint instrument on withdrawal of consent to ISDS and/or termination of investment treaties, and suggests how progress on these two options could be addressed in connection with ongoing negotiations at UNCITRAL.

## Factor One: ISDS and its Present Reality

After decades of inclusion in thousands of investment treaties, ISDS is losing political support.

In international,<sup>2</sup> regional<sup>3</sup> and national fora and institutions,<sup>4</sup> governments and other stakeholders—including traditional state backers such as the US<sup>5</sup> and EU member states<sup>6</sup>—have raised a range of fundamental, systemic and inter-related issues relating to ISDS such as:

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<sup>1</sup> UNCITRAL is the United Nations Commission on International Trade Law. In 2017, UNCITRAL gave its Working Group III a broad mandate to work on the possible reform of investor–state dispute settlement (ISDS). The Working Group will proceed in three phases: (1) identifying concerns regarding ISDS, (2) considering whether reform is desirable and, (3) if so, develop recommendations. Discussions began at a week-long session on November 27, 2017, and continued for their second week April 23-27, 2018. The negotiations are expected to continue at least through 2018. The UNCITRAL process is presently the key forum for multilateral negotiations on ISDS reform.

<sup>2</sup> In addition to work by and dialogue at UN bodies such as UNCITRAL and UNCTAD, both of which are discussed further below, questions have also been raised about ISDS in other contexts in the UN. For example, ten special rapporteurs and independent experts to the Office of the UN High Commissioner for Human Rights issued a statement raising concerns about ISDS and its potential to negatively impact human rights. See Office of the UN Nations High Commissioner for Human Rights, News and Events, UN Experts Voice Concern Over Adverse Impact of Free Trade and Investment Agreements on Human Rights (June 2, 2015), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031>. See also Office of the UN Nations High Commissioner for Human Rights, News and Events, International Trade: UN Expert Calls for Abolition of Investor-State Dispute Settlement Arbitrations (October 26, 2015), available at

- the eroding legitimacy of the mechanism,
- the lack of consistency and coherence in interpretation of the law,
- its asymmetrical nature, implications for incentives of litigators and adjudicators, and consequent impacts on development of the law,
- the lack of (mechanisms for ensuring the) independence and impartiality of adjudicators and arbitral institutions, and questions regarding whether and to whom those decision-makers and institutions are accountable,
- the limited ability of those interested and affected by the disputes to meaningfully participate in them;
- the limited means to challenge awards for errors of fact or law, and, under the ICSID Convention, for inconsistency with public policy;
- and, relatedly, the limited avenues for public oversight and control of settlement agreements.<sup>7</sup>

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<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16650&LangID=E>. Additionally, questions about the relative costs and benefits of investment treaties and ISDS have been raised in work by the OECD. Joachim Pohl, “Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence”, OECD Working Papers on International Investment, 2018/01, OECD Publishing, Paris, available at, <http://dx.doi.org/10.1787/e5f85c3d-en>, pp. 14-36, 37-39.

<sup>3</sup> In the EU, for instance, after a series of public consultations, “detailed discussions with Member States, the European Parliament, national parliaments and stakeholders,” the EU Trade Commissioner Cecilia Malmström determined that “there is a fundamental and widespread lack of trust by the public in the fairness and impartiality of the old ISDS model,” and announced the European Commission’s decision to move away from that system. Cecilia Malmström, Blog Post: Proposing an Investment Court System (September 16, 2015).

<sup>4</sup> A range of countries, including Bolivia, the Czech Republic, Ecuador, India, Indonesia, Poland, and South Africa, have all, for instance, taken steps to terminate investment treaties and/or conventions for the enforcement of arbitral awards due to concerns about ISDS.

<sup>5</sup> US Trade Representative Robert E. Lighthizer has specifically criticized ISDS, and indicated the US’s desire to opt out of it in a renegotiated NAFTA. See US House of Representatives, Committee on Ways and Means: Full Committee Hearing on the US Trade Policy Agenda, Wednesday, March 21, 2018, 10:00 am, available at <https://waysandmeans.house.gov/event/hearing-u-s-trade-policy-agenda-2/>. See also, e.g., William Mauldin, “Canada, Mexico Reject Proposal to Rework NAFTA Corporate Arbitration System: US says ISDS system erodes sovereignty by allowing multinational companies to circumvent domestic courts,” The Wall Street Journal (January 28, 2018). See also Statement by Delegate from the United States in UNCITRAL Working Group III, November 30, 2017, at 9:58:29 (The US Delegate identified various strategies states have adopted to try to address identified problems, including strategies for protecting their rights to regulate; controlling interpretation of certain particularly sensitive areas and issues; and combatting frivolous claims, parallel claims, and treaty shopping. Many of these steps have been taken in the negotiation of *new* treaties and cannot necessarily be adopted for *existing treaties* absent tools such as interpretation, amendment, replacement, and/or termination).

<sup>6</sup> See, e.g., Statement by Delegate from Germany in UNCITRAL Working Group III, 34<sup>th</sup> Session, November 30, 2017, at 15:54:52 (stating that current fragmentation of case law in ISDS “destroys the credibility of the system and its legitimacy” and that the issue of “consistency and coherence ... screams for a systematic revision of the system that we have”); Statement by Delegate from Switzerland in UNCITRAL Working Group III, 34<sup>th</sup> session, November 30, 2017, at 16:06:41 (stating that the lack of consistency in the present system is “undoubtedly a major concern in ISDS” and “certainly a problem”; and noting that a dispute settlement system “that over time produces conflicting results will eventually lose the confidence of its users and its stakeholders, and with the confidence it will lose the credibility and with the credibility it will lose the legitimacy and that ... is what brings us here” to discuss reform at UNCITRAL); Statement by Delegate from the Netherlands in UNCITRAL Working Group III, 34<sup>th</sup> session, November 30, 2017, at 16:18:50 (noting that ISDS tribunals have given diverging interpretations to the same or similar provisions, and describing that as a “serious problem” for the “legitimacy of the system,” one that raises questions for the rule of law and could give rise to a “lawyers’ paradise” at the expense of disputing parties; also noting that this is particularly worrying since we are talking about cases against the state in which important public interests may be at stake); Statement by the Delegate from the European Union in UNCITRAL Working Group III, 34<sup>th</sup> session, November 30, 2017, at 16:56:51 (indicating that certain existing tools available to states to reform investment law, such through the issuance of binding interpretations, may not be adequate to fully resolve issues of the lack of consistency and predictability in ISDS that had been identified by states).

<sup>7</sup> This list is not exhaustive. Other issues include those related to duration and cost (including allocation of costs and use of third party funding); the nature of remedies and relief ordered by tribunals (including concerns about awards of damages that are

While concerns about the system have been rising, evidence of its benefits remains lacking. Indeed, an important paper recently published by the OECD extensively canvasses evidence on purported benefits of international investment agreements (IIAs) (and, presumably, the ISDS mechanism within them), and finds that evidence is inconclusive on whether they lead to increased foreign direct investment (FDI), much less on whether any FDI that is influenced by the treaties is positive for the host and/or home country.<sup>8</sup> Evidence is also inconclusive on whether “IIAs make a positive contribution to any of the ultimate goals of depoliticisation”<sup>9</sup> of disputes and whether they impact domestic institutions and, if so, what the costs and benefits of such impacts are for investors and other stakeholders.<sup>10</sup>

## Factor Two: Sustainable development and its role in investment policy

States widely recognize that there is a positive and fundamental role for foreign investment in advancing sustainable development at home and abroad. Foreign investment can lead to improved development outcomes through, for example, development of infrastructure, increased employment, additional tax revenues, technology transfer, and other economic linkages. States are similarly aware that attracting and maintaining such investment requires attractive legal and business climates and appropriate protections for investor rights.

But states and their stakeholders also recognize that not all foreign investors and not all foreign investments are the same or have the same impacts. While foreign investment and, in particular, FDI, can provide important and long-lasting benefits for the host (and home) country, such benefits do not always materialize. It is well known that the activities of multinational enterprises (i.e., investors and their investments) can cause harms to the environment, social structures, individuals, and economy in the host country, and their international corporate structures can make it difficult if not impossible for governments and citizens to effectively secure relief for such harms. Outcomes can vary based on such factors as the motives of the investor, the nature of the investment, and, crucially, the legal and policy frameworks of the home and host states. Thus, while FDI is recognized as essential to meeting the Sustainable Development Goals (SDGs), its positive contribution is not automatic. Governments have a crucial role to play in shaping what FDI does,<sup>11</sup>

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effectively punitive, questions regarding the appropriateness of “tax gross-ups”, and concerns about awards of injunctive relief); use and powers of emergency arbitrators; continuing lack of transparency; and methods for determining arbitrator challenges and appointing arbitrators. There are also a whole host of issues regarding the appropriateness of different substantive standards such as the fair and equitable treatment standard. See also Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, November 27 -December 1, 2017), A/CN.9/930, para. 27 (noting that the issues that formed the basis for Working Group III’s discussion were not exhaustive). For a discussion of settlement agreements, see e.g., Lise Johnson and Brooke Skartvedt Güven, “The Settlement of Investment Disputes: A Discussion of Democratic Accountability and the Public Interest,” *Investment Treaty News* (March 13, 2017), available at <https://www.iisd.org/itm/2017/03/13/the-settlement-of-investment-disputes-a-discussion-of-democratic-accountability-and-the-public-interest-lise-johnson-and-brooke-skartvedt-guven/>.

<sup>8</sup> Joachim Pohl, “Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence”, OECD Working Papers on International Investment, 2018/01, OECD Publishing, Paris, available at <http://dx.doi.org/10.1787/e5f85c3d-en>, pp. 14-36, 37-39; Johnson et al., Costs and Benefits of Investment Treaties: Practical considerations for States (CCSI 2018).

<sup>9</sup> Pohl, *supra* n. 8, at 54.

<sup>10</sup> *Id.* at 55-69.

<sup>11</sup> E.g., by banning or taxing certain types of activities, or providing incentives or subsidies to encourage others.

where it goes,<sup>12</sup> and what impacts it has.<sup>13</sup> This role can include policies seeking certain kinds of investments and discouraging or at least not providing investment incentives to those that have negative impacts on society and the environment.

As debates over IIAs and ISDS increasingly recognize, however, IIAs, especially old-generation treaties, and ISDS are blunt and powerful instruments that do not look at international investment or FDI with such nuance or purpose. They provide all covered investors and investments what is effectively free, government-subsidized political risk insurance, and do so largely irrespective of the investors' motives or the investments' impacts. IIA standards enforceable through ISDS provide compensable protection to relatively liquid portfolio investment and FDI alike, irrespective of the fact that, as a general matter, those two categories have important differences in terms of their contributions to the host state's development and vulnerability to host government policy changes; similarly, IIAs cover investments that governments, in other policy fora, are actually seeking to discourage (or, at a minimum, not subsidize). A key example of this is that IIAs provide this free risk insurance to investors investing in the development of new fossil fuel reserves, regardless of the host states' commitments under the Paris Agreement.<sup>14</sup> And IIAs provide these protections despite the fact that the presence of an IIA is generally not influential or material to investors' decisions regarding whether and where to invest in the first place (but may be influential in how investments are structured).

Thus, ISDS and treaty protections are both ineffective in terms of investment attraction and misguided in terms of governance, often undermining policies for ensuring foreign investment aligns with and advances the SDGs. They can also be very costly in their consequences.<sup>15</sup> Given the scarcity of public resources and the significant challenges of sustainable development, they are ill-suited for modern realities. As governments are thinking carefully about how to attract and benefit from FDI, it is important to be able to shift away from old tools and identify ones that are fit for purpose. Some of these issues primarily arise due to the substantive standards of investment treaties, but are given teeth by the ISDS system. Thus, especially while there are no real multilateral efforts to reform substantive standards in existing treaties, ISDS is rightly receiving critical attention.

## Strategies for Reform

In light of the growing awareness of and discontent with ISDS, and disappointment with IIAs' effectiveness in advancing their key purported aims, various reform efforts are underway. The UN Conference on Trade and Development (UNCTAD), which for years has supported such efforts, refers to this as "Phase II of IIA Reform," and has catalogued ways in which problems with "old-generation

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<sup>12</sup> E.g., by providing preferential risk insurance policies or loans, or providing information and diplomatic assistance.

<sup>13</sup> Legal regimes can shape impacts through, for example, direct obligations on conduct, and also through accountability and liability schemes.

<sup>14</sup> See Nathan Lobel and Matteo Fermeglia, *Decarbonization and ISDS*, CCSI Working Paper (April 2018).

<sup>15</sup> See, e.g., Johnson et al., *Costs and Benefits of Investment Treaties: Practical considerations for States* (CCSI 2018). The issue of potential costs, and how they might be assessed, is also discussed in Pohl (n 8); Lauge N. Skovgaard Poulsen et al., *Analytical Framework for Assessing Costs and Benefits of Investment Treaties* (LSE Enterprise, March 2013).

treaties” can be addressed.<sup>16</sup> For treaties in force, Phase II can involve such tools as treaty interpretation, amendment, replacement, consolidation, and termination.<sup>17</sup>

Each of those options has certain advantages and disadvantages in terms of ease and effectiveness; similarly, they differ in terms of the extent to which they address issues of substance and/or process.<sup>18</sup> But, overall, the investment treaty system is particularly resistant to reform. For one, states are often party to dozens of bilateral agreements. If a given state wants to amend its agreements to resolve an issue of scope, or reach an interpretive agreement with its treaty partners to clarify the substantive meaning of standards, it may have to do so on an individual treaty-by-treaty basis. That exercise is not only time consuming but, as anecdotal evidence indicates,<sup>19</sup> often unsuccessful, due to asymmetries in power between the treaty parties or other misaligned interests.

One potential avenue to address these issues is to adopt a new multilateral instrument to reform multiple treaties at once. Indeed, this was precisely the idea behind the Mauritius Convention on Transparency in Treaty-Based Investor-State Arbitration (“Mauritius Convention”), drafted within the United Nations Commission on International Trade Law (UNCITRAL) as part of its effort to “ensur[e] transparency in investor-state arbitration.”<sup>20</sup> Yet even though that Convention – which was designed expressly to reform rules and practices applicable under existing treaties – illustrates a promising strategy for effecting change, it also reveals challenges: UNCITRAL embarked on its transparency reform project in 2010,<sup>21</sup> and began drafting the Mauritius Convention in 2013.<sup>22</sup> The Convention entered into force in October 2017, and, as of March 1, 2018, had only three parties.<sup>23</sup> This timeline with respect to the relatively narrow issue of transparency indicates that broader and more comprehensive change will take years, if not decades, to realize.

## Current UNCITRAL Process

Based on its work on transparency, UNCITRAL has entrusted Working Group III with a mandate to explore further reform of ISDS including through an instrument such as the Mauritius Convention capable of reforming existing treaties. But how, whether, and when that reform will occur is still uncertain as various options are being considered within UNCITRAL and in other fora. If, for instance, the Working Group agrees to pursue reform through changes to relevant UNCITRAL rules, that will not adequately address issues that have arisen under existing treaties. Not only will the reforms be limited in scope (to those issues that can be addressed through the rules), but any revised rules may only apply prospectively to treaties concluded after the new rules’ adoption. Such an approach would have little practical use for those states whose existing treaties pose the greatest risks.

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<sup>16</sup> See UNCTAD, Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties, IIA Issues Note, Issue 2 (June 2017).

<sup>17</sup> *Id.*

<sup>18</sup> For discussions of these issues, see *id.* See also the “rapporteurs’ report back” documents for the break-out sessions at UNCTAD’s High-level Annual IIA Conference: Phase 2 of IIA Reform (October 9-11, 2017), available at <http://investmentpolicyhub.unctad.org/Pages/2017-edition-of-unctad-s-high-level-annual-ia-conference-phase-2-of-ia-reform>.

<sup>19</sup> This is based on comments made in UNCTAD’s session on “Clarifying and modifying treaty content” at its High-level Annual IIA Conference in October 2017, as well as in conversations the authors have had with officials from a number of countries.

<sup>20</sup> Report of the United Nations Commission on International Trade Law, Forty-first session, June 16 – July 3, 2008, A/63/17, para. 314.

<sup>21</sup> See Report of Working Group II, Fifty-third session, October 4-8, 2010, A/CN.9/712.

<sup>22</sup> See, Report of Working Group II, Fifty-ninth session, September 16-20, 2013, A/CN.9/794.

<sup>23</sup> See the UN Treaty Collection,

[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXII-3&chapter=22&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-3&chapter=22&lang=en) (as of March 1, 2018).

Some governments are pursuing the creation of a multilateral investment court (potentially through the UNCITRAL process). Others, however, fear that creation of a court would simply entrench ISDS and give investors even greater substantive protections under international law,<sup>24</sup> particularly in the absence of both meaningful reforms to IIA substantive standards and new protections for the rights and interests of other stakeholders affected by the investment disputes.

Due to these and other areas of disagreement, it is unclear whether work on a multilateral dispute settlement mechanism will ultimately be agreed upon in UNCITRAL, and even more unclear whether any instrument creating such a mechanism will ultimately be approved by the UNCITRAL negotiators. One challenge is that these discussions on ISDS are among UNCITRAL's 60 member states,<sup>25</sup> brought together by virtue of their membership in UNCITRAL not by a common vision of what problems exist and how to resolve those problems. Importantly, UNCITRAL almost always works by consensus.<sup>26</sup> In the rare event that the members are not able to reach consensus, they will vote by majority of those present and voting.<sup>27</sup> This allows for the possibility that the objectives of some governments (e.g., those seeking to establish a multilateral investment court) may be overridden by the objections of others. Moreover, even if UNCITRAL agrees to a path forward on ISDS reform, it may be decades before enough states take the domestic action necessary (e.g., signature and ratification of the relevant treaty) to establish the court and authorize it to receive investment claims.

Given that any output from UNCITRAL may be inadequate to address the unjustified risks of ISDS and IIAs both in scope and in urgency, it is important to consider what actions can be pursued in parallel. This note suggests two options that member and observer states can pursue through the UNCITRAL process:

- a declaration withdrawing advance consent to ISDS, which states could sign and which could also contain commitments by states to waive objections to their treaty parties' withdrawals of consent to ISDS, and
- an agreement to begin work on an instrument for joint termination of existing investment treaties.<sup>28</sup>

These options are discussed further below.

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<sup>24</sup> Brooke Skartvedt Guven, "[Inclusion of ISDS Arbitration or an Investment Court in the TTIP: Unresolved Concerns](#)," Presentation at TTIP Stakeholder Briefing (April 28, 2016).

<sup>25</sup> See UNCITRAL, Origin, Mandate and Composition of UNCITRAL, available at <http://www.uncitral.org/uncitral/en/about/origin.html>.

<sup>26</sup> UNCITRAL, A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law (United Nations, 2013), para. 14. A

<sup>27</sup> Id. To date, there have only been two occasions on which consensus could not be reached and a vote had to be taken. The second occurred in the first meeting of Working Group III on ISDS reform, when delegates could not reach consensus on who would chair the negotiations. See Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, November 27-December 1, 2017), paras. 11-15.

<sup>28</sup> Matthew C. Porterfield, [Aron Broches and the Withdrawal of Unilateral Consent in Investor-State Arbitration](#), Investment Treaty News (August 11, 2014) (discussing legal basis for and implications of withdrawals of consent); Rob Howse, [A Short Cut to Pulling out of Investor-State Arbitration under Treaties: Just Say No](#), International Economic Law and Policy Blog (March 9, 2017).



## Policy Option One: Withdrawal of consent to investor-state dispute settlement

Withdrawal of consent to ISDS would help to address state concerns with existing treaties while enabling countries to focus on developing new, progressive approaches to investment policy. At the same time, it would signal continued state commitment to an international legal framework as states would nevertheless remain bound by obligations under existing treaties. Those obligations would remain subject only to state-state dispute settlement mechanisms, allowing states to provide their respective interpretations of treaty protections and appropriate redress in the case of breach. State-state dispute settlement would be less likely to result in exorbitant and frivolous claims, in challenges of legitimate policy measures, and in outcomes that are contrary to public policy.<sup>29</sup> States could confirm that the decision to pursue this withdrawal-of-consent path is not anti-foreign investment or anti-international law, but simply taken to responsibly and promptly address a widely-recognized problem with ISDS.

There is a possibility that investors would continue to bring cases, challenging the legality of a state's decision to withdraw consent to arbitrate, and arbitrators could potentially find in their favour. Thus, the effectiveness of this option is not certain.<sup>30</sup>

Similarly, home states (or capital exporting states) may contend that a host-state's declaration of intent to withdraw consent to ISDS would violate the host state's obligations under the treaty. As noted above, however, home states themselves have increasingly publicly recognized the fundamental and systemic problems with ISDS. Home states' declarations that they would waive objections to treaty breach based the host states' withdrawal of consent would evidence the home states' good faith in engaging in reform efforts.

One option is for states to expressly provide such waivers as part of a package agreed to in connection with ongoing reform discussions at UNCITRAL. More specifically, states could stipulate that, as a condition for agreeing to proceed with discussions of a multilateral investment court in UNCITRAL, however concerned they may be with that proposal, states in UNCITRAL will commit to waive objections to their treaty parties' decisions to withdraw advance consent to ISDS.

While withdrawal of consent could be done by states on an individual basis, such a multilateral instrument (which could take the form of a declaration or opt-in agreement) could provide political and/or legal support for that move. When parties to this new instrument are also parties to underlying investment treaties, this new instrument could be used to amend the underlying treaty to

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<sup>29</sup> See discussion in Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 *Harvard Journal of International Law* 1, 25-26 (2014).

<sup>30</sup> Some treaties, however, appear to prevent investors from challenging withdrawals of consent. In Section B of the investment chapter (Chapter 11) of the North American Free Trade Agreement, for instance, the state parties provide their consent to arbitration. Section B, which is the section that provides for ISDS, further specifies that covered investors are only able to bring ISDS claims for breaches of Section A (setting forth Chapter 11's substantive obligations). Thus, the NAFTA does not seem to allow investor claims relating to consent or other obligations set forth in Section B.

excise advance consent to ISDS from that agreement;<sup>31</sup> a subsequent agreement to withdraw consent could also be used to

- reflect a subsequent agreement clarifying that only the home state, not the investor, has the power to challenge withdrawals of consent;<sup>32</sup>
- operate as a political statement of intent to withdraw and/or an intent to waive objections to treaty parties' withdrawal.

This instrument could apply to

- all underlying treaties concluded by adherents, all treaties specifically identified, or all treaties except those specifically identified; and/or
- all types of claims, or only certain claims (e.g., withdrawing consent to ISDS for all claims except those for denial of justice after exhaustion of remedies, direct expropriations, and intentional discrimination based on foreign nationality).

## Policy Option Two: Termination of IIAs

A second, and more absolute, option available to states is termination of existing IIAs. While termination of IIAs has arguably been controversial, termination of treaties more generally is not rare. One 2005 study, for instance, found:

1,546 instances of denunciation and withdrawal from 5,416 multilateral agreements registered with the UN between 1945 to 2004. It also found that, although older treaties are denounced more frequently than recently adopted ones, the rate of exit 'has held relatively constant or declined only slightly over the last fifty years, even after controlling for the large increase in ratifications and the emergence of new nations in the 1960s and 1970s'. Based on these findings, the study concluded that 'denunciations and withdrawals are a regularized component of modern treaty practice—acts that are infrequent but hardly the isolated or aberrant events that the conventional wisdom suggests'.<sup>33</sup>

When termination becomes effective and "survival clauses" have expired, states' investment treaty obligations regarding treatment of foreign investors will no longer exist (though states would retain obligations under customary international law, and may retain obligations under other treaties such as some human rights instruments or trade treaties addressing issues such as trade in services, financial services, and intellectual property). For states that believe that the costs of their treaties outweigh the benefits, termination of existing IIAs arguably makes good policy sense. It would also give host states greater certainty regarding their potential exposure to claims or liability and could establish a clean slate on which host and home states could develop and implement policies that take into account evidence on attracting and governing investments in a manner consistent with the SDGs.

This approach could be hampered in its effectiveness due to "survival clauses." Unless amended and stricken from the treaty at or before termination, those provisions can result in the treaty remaining in force—and subjecting states to ISDS claims—for 10, 15 or 20 years or more after termination. As discussed below, moving work on termination to a multilateral fora could allow for joint amendment

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<sup>31</sup> Vienna Convention on the Law of Treaties, 23 May 1969, UN Doc. A/Conf.39/27 / 1155 UNTS 331 / 8 ILM 679, arts 30, 40, 41.

<sup>32</sup> *Id.*, art. 31(3)(b).

<sup>33</sup> *Id.* (quoting Laurence R. Helfer, "Exiting Treaties," 91 *Virginia L.Rev.* 1579, 1602-05 (2005)) (internal footnotes deleted).

of treaties to eliminate survival clauses while also enabling efficient termination of earlier agreements.

While a state could, as some have already done, unilaterally indicate its intent to terminate all or some of its treaties, an advantage of a multilateral opt-in approach is that it might lessen the pressure on terminating governments, allowing them to coordinate and more clearly and loudly express that their actions are not directed against international investors but against ISDS, and are taken in accordance with, and with continued respect for, international law. In an opt-in multilateral instrument, each state could:

- specify the treaties it seeks to terminate according to their respective terms, and the treaties it wishes to terminate with immediate effect;<sup>34</sup>
- indicate its intention to waive any notice periods or other conditions for termination by its treaty partners;<sup>35</sup>
- indicate that it aims to amend underlying treaties by excising the survival clause from those underlying identified or non-excluded treaties, which can operate as an amendment when its treaty parties similarly indicate intention to excise the survival clause;<sup>36</sup> and
- set forth certain affirmations, including commitments to continue to provide foreign investors and investments treatment required by customary international law and other relevant legal instruments.

Again, as with the option for withdrawal of consent, states could work on multilateral termination within UNCITRAL's ISDS reform mandate, possibly as a condition for continued discussion about the multilateral court proposal.

## Continued investor protections

Taking steps toward coordinated withdrawal of consent to arbitrate and/or termination are not inherently anti-investment, anti-foreigner, or anti-international law. Even in the absence of ISDS, treaty and customary international law remains in place to set forth relevant state obligations and provide a framework for evaluating conduct, and state-to-state dispute settlement remains to address issues of breach. Moreover, investors

- retain rights under domestic systems (systems that are often assumed, but not established, to be inadequate),
- have options to purchase risk insurance, and,
- in some regions and for some harms, have the ability to seek international relief through pursuit of human rights claims.

Thus, far from denying international law a role and leaving investors without recourse for harms, using withdrawal of consent and termination to clear the path for meaningful reform would reflect an

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<sup>34</sup> While some treaties, such as certain human rights treaties, may not permit a right of withdrawal, investment treaties do not appear to be of such a type. See discussion in Laurence R. Helfer, Terminating Treaties, in *The Oxford Guide to Treaties* 634, 637-40 (Duncan Hollis, ed., Oxford University Press, 2013).

<sup>35</sup> For more on unilateral denunciation and withdrawal, see *id.*

<sup>36</sup> Vienna Convention on the Law of Treaties, 23 May 1969, UN Doc. A/Conf.39/27 / 1155 UNTS 331 / 8 ILM 679, arts 30, 40, 41.

important conscientious effort to recognize and address the opportunities and challenges of different ISDS reform strategies.

## Concluding Remarks

Withdrawal of consent to arbitration and termination of treaties are two strategies governments can pursue in the near-term to address pressing concerns about ISDS, as part of a new strategy toward international economic engagement that supports sustainable development within and across countries.

While both termination and withdrawal of consent can be done unilaterally, coordinated action could be more efficient, enabling states to address multiple treaties at once. Moreover, coordinated action could help clarify the legal and political meaning of such steps, indicating that states are not disengaging from an international investment regime, but readjusting the terms of that engagement in light of experiences, evidence, and priorities.

The negotiations ongoing at UNCITRAL present a potentially important opportunity for such multilateral action. To signal states' good faith efforts at reform, states could approach the UNCITRAL process as a package: in order to continue discussion on all reform options, including the possibility of a multilateral court option, states would agree (1) not to challenge their treaty parties' decisions to withdraw consent to ISDS as a treaty breach, and (2) to add to the negotiating agenda the creation of a multilateral mechanism for efficiently terminating existing treaties. Such a negotiation package could help build consensus on a way forward, which is essential for any solutions to be agreed and ultimately successfully implemented.

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