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Ray Worthy CAMPBELL and Ellen Clair CAMPBELL

Drafting an Optimal Dispute Resolution Clause in Investment Treaties
Jayoung JEON

STUDENT NOTE

A Look into Protection of Preferred Stockholders’ Rights Under the Context of State-owned Enterprise Reform
LING Tong

Analysis of the Third Party Involvement as A New Development in Chinese International Arbitration Rules
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DRAFTING AN OPTIMAL DISPUTE RESOLUTION CLAUSE IN INVESTMENT TREATIES

Jayoung Jeon*

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*Judicial Fellow, U.S. District Court. Thanks are due to Professors Guillermo Aguilar-Alvarez and W. Michael Reisman of Yale Law School, who inspired this article and guided me throughout the entire research and writing process. Any and all errors are mine.

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I. INTRODUCTION

Dispute resolution provisions in investment treaties play an important role in the broader framework of investment protection as they provide mechanisms to resolve disputes between foreign investors and host states.\(^1\) Evidencing their importance, more than 3,000 bilateral investment treaties (BITs) and free trade agreements (FTAs),\(^2\) which account for 93% of the existing investment treaties, contain some form of investor-state dispute settlement (ISDS).\(^3\) However, despite the significance of dispute resolution mechanisms, they have been provided differently by different investment treaties,\(^4\) often without any policy explanation.\(^5\)

The current landscape of dispute resolution provisions renders it crucial to provide a mechanism that prescribes an appropriate role to the domestic courts of host states in resolving investment disputes and that serves the virtues of dispute resolution. Surprisingly, the existing literature fails to address this important issue,\(^6\) with a few exceptions. Even these exceptions address only part of the issue, rather than engaging in an extensive analysis. I


\(^{4}\) Id. at 3 (“The study also found little evidence of general convergence of approaches towards regulating ISDS in BITs.”).

\(^{5}\) Id. (“The survey also highlights the diversity that characterizes the design of ISDS: over a thousand different combinations of rules regulating ISDS can be found in only 1,660 bilateral treaties, with variation found both at editorial and substantial level. Differences in policy approaches between countries are the source of some of this variance, but it appears that much of it may not reflect differences in policy.”)

\(^{6}\) Professor Guillermo Aguilar-Alvarez of Yale Law School was puzzled by the dearth of discussions on this issue in the scholarly circle. His inspirations, in large part, motivated this Paper.

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discuss these exceptions below in the order of increasing relevance.

Interaction of International Tribunals and Domestic Courts in Investment Law by Schreuer, most notably, recognizes that domestic courts have a role to play in resolving investment disputes, even in the presence of an agreement to arbitrate. Then, it offers “a broad overview of the interplay between international tribunals and domestic courts,” but, as the article itself admits, does “no more.” Relevantly, though, it discusses competing jurisdiction between international arbitration and domestic courts, and, in particular, examines the fork-in-the-road provisions that “offer the investor a choice between the host state’s domestic courts and international arbitration.”

Application of International Investment Agreements by Domestic Courts by Yimer et al. similarly provides an overview of the current role that local courts play in investment arbitration. It discusses different types of dispute resolutions clauses, including those providing for waiting periods, fork-in-the-road provisions, and those consisted of three options. However, this discussion remains descriptive at most. The article limits its analytical discussion to examining the pros and cons of domestic courts’ involvement in investment dispute settlement, and those of international arbitration.

Dispute Settlement Provisions in International Investment Agreements by Pohl et al. surveys a sample of 1,660 BITs. Based on the survey results, this paper highlights the diversity of the ISDS designs, categorizing them into seven options: domestic court only; investment arbitration only; choice between judicial review in the host state and international arbitration final and exclusive; choice not final or exclusive; chronological sequence;

8 Id. at 78.
9 Id. at 78.
11 Mashigo & Nohen, supra note 3.
subject matter; and miscellaneous criteria. However, it fails to
discuss the policy implications of each option.

Dispute Settlement: Investor-State produced by a team led
by Sauvant and Roffè, as part of the United Nations Conference
on Trade and Development Series on issues in international in-
vestment agreements, seems to advance the literature the most.
It recognizes that states have various options when drafting in-
vestment dispute settlement provisions and categorizes them into
six options: exclusivity of national dispute-settlement methods in
a host country; international dispute settlement is subject to a re-
quirement of prior exhaustion of local remedies in a host country;
non-binding preference for national dispute settlement; choice of
national or international dispute settlement; compulsory interna-
tional dispute settlement; and establishment of a specialized dis-
pute settlement body under the investment agreement itself. Then,
it considers the fairness implications of each option to the in-
vestor and to the host country. This discussion, although commend-
able, fails to present a complete picture because fairness to the par-
ties is not the only virtue that an ISDS provision should serve, as
will be discussed in Part II.

This Paper fills in the gap in the literature by making a two-
fold contribution. Descriptively, this Paper categorizes different
investment dispute settlement options by building on the existing
literature and by considering their practical implications. Norma-
tively, it identifies the primary virtues of investment dispute reso-
lution provisions and the proper role of domestic courts in resolv-
ing investment disputes, and, based on these considerations, pro-
poses the optimal way to draft dispute resolution clauses in in-
vestment treaties.

The remainder of the Paper proceeds as follows. Part I cat-
egorizes different dispute resolution clauses in investment treaties
into five options. Part II identifies the four primary virtues of in-
vestment dispute resolution provisions. Part III prescribes a pro-
er role to local courts in resolving investor-state disputes. Based
on the discussions in Parts II and III, Part IV provides the optimal
design of dispute resolution clauses. Then, this Paper concludes

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12 U.N. Conf. on Trade and Dev., Dispute Settlement: Investor-State,
by summarizing the discussions in previous Parts and suggesting areas of further research.

II. DIVERGENT ROLES OF DOMESTIC COURTS IN RESOLVING INVESTMENT DISPUTES AS PRESCRIBED BY BITs

BITs assign divergent roles to the domestic courts of host states in resolving investment disputes. This divergence is striking because it contrasts with remarkable convergence of substantive investment protection standards. BITs commonly guarantee fair and equitable treatment, full protection and security, national treatment, and most-favored-nation treatment, and protect investors against arbitrary and discriminatory treatment, expropriation, and war and civil unrest.

This Part updates and refines the categorization of ISDS clauses previously conducted by scholars as follows: domestic court only; international arbitration only; choice between domestic court adjudication and international arbitration final and exclusive; choice not final or exclusive; and domestic court, waiting period, then international arbitration. In addition to advancing the descriptive literature, this categorization will prove useful when discussing the optimal ISDS design in Part IV, as I will refer back to these categories of ISDS clauses.

Note that this categorization leaves out ISDS clauses that restrict access to arbitration of “claims concerning alleged breaches of specific treaty provisions, such as the amount of compensation for expropriation, provisions on compensation for losses, or free transfers.” This Paper makes a conscious choice

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13 Ignacio Suarez Anzorena & William K. Perry, The Rise of Bilateral Treaties: Protecting Foreign Investments and Arbitration, 58 IN-HOUSE DEF. Q. 59 (2010) (“The degree of protection provided to foreign investors varies among BITs and depends on the specific terms of each treaty. However, BITs generally provide the following standard protections.”).


15 Mashigo & Nohen, supra note 3, at 14; see, e.g., Agreement between the Government of Australia and the Government of the People’s Republic of China
not to discuss this type of ISDS clauses because: first, they are very few in number; and, second, they have gradually been abandoned for use, with the last such provision appearing in 2003.

A. Option 1: Domestic court only

Some ISDS clauses allow only domestic courts to hear the disputes. The Korea-Bangladesh BIT is an example. It provides in Article 5.1:

The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

This Paper argues that there is a type of ISDS provisions that should belong to Option 1, although they had previously been classified as a separate category by scholars: provisions that allow recourse to international arbitration in case the decision rendered by domestic courts turns out to be “manifestly unjust” or to have violated the provisions of an international agreement.

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16 Only forty-four out of a sample of 1,660 treaties contained ISDS provisions that limit access to arbitration based on subject matter. Mashigo & Nohen, supra note 3, at 14.
17 Id. at 15.
19 See, e.g., Mashigo & Nohen, supra note 3, at 14.
This argument is based on the practical implication of such provisions. In practice, these provisions are likely to function just like Option 1 because the modern interpretation of the “manifestly unjust” language sets a very high bar to allowing international arbitration. For example, in *Loewen v. USA*, the arbitral tribunal limited the application of the language to *procedural* denial of justice, excluding *substantive* denial of justice: although the tribunal found that the verdict in the previous domestic litigation was “clearly improper and discreditable,” it did not conclude that the minimum standards of international law and fair and equitable treatment have been violated because the claimant, Loewen, was granted all the *procedural* safeguards of a trial. Thus, the *Loewen* precedent interprets the “manifestly unjust” language to be, by and large, powerless, rendering provisions with this language essentially equivalent to the domestic court-only provisions. The *Loewen* tribunal’s view has subsequently been supported by Paulsson and Monti.

**B. Option 2: International arbitration only**

In contrast to Option 1 (domestic court-only), some international agreements provide that disputes be resolved only by international arbitration. Such agreements include: Egypt-Netherlands BIT; Austria-Bolivia BIT; Belgium/Luxembourg-Cyprus BIT; Belgium/Luxembourg-Estonia BIT; Belgium/Luxembourg-Georgia BIT; Belgium/Luxembourg-Mongolia BIT; Belgium/Luxembourg-Vietnam BIT; France-Haiti BIT; Hungary-Croatia BIT; and South Africa-Iran BIT. The Egypt-Netherlands BIT provides:

> Each Contracting Party hereby consents to submit any legal dispute arising between that Con-

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21 Loewen Group, Inc. and Raymond L. Loewen v. U.S., ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003).
tracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party, at the choice of the national concerned, to

– the International Centre for Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965 . . . .

– a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law,

– the Regional Centre for International Commercial Arbitration in Cairo,

– the Court of Arbitration of the Paris International Chamber of Commerce . . . .\(^\text{26}\)

This Paper points out, however, that Option 2 is unlikely to achieve its literal purpose: to limit the mechanism of investment dispute resolution to international arbitration. Investors will probably have recourse to domestic courts, even when bound by an agreement with an international arbitration-only provision, for the following reasons.

First, from a textualist perspective, an investment treaty that does not explicitly exclude domestic remedies would not necessarily deny access to domestic courts. Analogize Option 2 to investment treaties that do not contain any reference to ISDS. There are more than a handful of such treaties.\(^\text{27}\) However, scholars and practitioners have not necessarily interpreted the absence of an ISDS provision in BITs as denying the contracting parties access to justice, whether it be in front of domestic courts or arbitral tribunals.\(^\text{28}\)

\(^{26}\) Agreement on Encouragement and Reciprocal Protection of Investments between the Arab Republic of Egypt and the Kingdom of the Netherlands, Egypt-Neth., art. 9.1, Jan. 17, 1996, T.S. No. 66.

\(^{27}\) Mashigo & Nohen, supra note 3, at 10 n.2 (finding that 4% of the 1,660 bilateral treaties in the sample do not mention any ISDS mechanism).

\(^{28}\) See id. at 10.
Second, even if the international agreement does exclude the option of domestic remedies, investors can bring claims to domestic courts based on domestic law for the same measure being complained of. Investors may even bring a lawsuit complaining a breach of an investment treaty if the host state is a monist country that treats “international law, including treaties, as domestic law.” In other words, at least in monist states, a treaty violation that gives rise to arbitral jurisdiction automatically grants domestic courts the jurisdiction to rule on the treaty violation.

**C. Option 3: Choice between domestic court adjudication and international arbitration final and exclusive (fork-in-the-road)**

Rather than providing one option of either domestic courts or international arbitration to the exclusion of the other, international agreements can provide for a choice between the two, making the choice final and exclusive. Such provisions are commonly known as the “fork-in-the-road.” The South Africa-Zimbabwe BIT, for example, provides:

If the dispute has not been settled within six (6) months from the date at which it was raised in writing, the dispute may at the choice of the investor, after notifying the party concerned of its intention to do so in writing, be submitted—(a) to the competent courts of the Party in whose territory the investment is made; (b) to arbitration by the International Centre for the Settlement of Investment Disputes (ICSID) established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington DC on 18 March 1965; or (c) an ad hoc arbitration tribunal, which unless otherwise agreed upon by the parties to the dispute, is to be established under the Arbi-

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30 Id.
31 Mashigo & Nohen, supra note 3, at 12.
If the investor submits the dispute to the competent court of the host Party or to international arbitration mentioned in sub-Article (2), the choice shall be final.  

D. Option 4: Choice between domestic court and international arbitration not final or exclusive

International agreements, such as the China-Netherlands BIT and Austria-Mexico BIT, provide for a choice between domestic court and international arbitration, making the choice neither final nor exclusive. The China-Netherlands BIT, for example, provides:

An investor may decide to submit a dispute to a competent domestic court. In case a legal dispute concerning an investment in the territory of the People’s Republic of China has been submitted to a competent domestic court, this dispute may be submitted to international dispute settlement, on the condition that the investor concerned has withdrawn its case from the domestic court. If a dispute concerns an investment in the territory of the Kingdom of the Netherlands an investor may choose to submit a dispute to international dispute settlement at any time.

A few treaties that fall under Option 4 explicitly allow investors to simultaneously pursue a claim in both arbitration and

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However, more often, international agreements within the scope of Option 4 have a waiver requirement, according to which investors are obliged to waive their right to other proceedings before they can refer the matter to international arbitration.

The waiver requirement is intended to bring the following benefits: it prevents the risk of double jeopardy and recovery; it eliminates the possibility of inconsistent decisions by arbitral tribunals and domestic courts; and it reduces the burden on states by forbidding parallel proceedings.

E. Option 5: Domestic court, waiting period, then international arbitration

Some dispute resolution provisions require that investors first present their dispute to domestic courts, then, after a certain period of time, give the option to arbitrate. The Argentina-Netherlands BIT is an example, which states:

If within a period of eighteen months from submissions of the dispute to the competent organs mentioned in paragraph (2) above, these organs have not given a final decision or if the decision of the aforementioned organs has been given but the parties are still in dispute, then the investor concerned may resort to international arbitration or conciliation.

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III. PRIMARY VIRTUES OF INVESTMENT DISPUTE RESOLUTION PROVISIONS

This Part identifies four primary virtues that should be served by ISDS provisions: fairness to the parties; decisional accuracy; efficient resolution of disputes; and procedural integrity.

A. Fairness to the parties

ISDS provisions should be fair to all contracting parties. Dispute resolution provisions that are fair will generally have the following characteristics: they prevent forum shopping by claimants, eliminate excessive cost burden on one party, disallow double recovery, etc. However, there are some considerations more specific to “investment” dispute resolution. First, a fair ISDS provision would be sensitive to both the investors’ commercial interests and the host states’ public interests, including the right to regulate:38

An investor-state disputes arises between a private commercial party and a state administration or agency and as such includes a public interest and policy element. This cannot be wholly disregarded against the commercial interests of the private party, nor, indeed, can the legitimate interests and expectations of the commercial party always take second place to the public interest.39

Second, an ISDS provision should also take into account the parties’ preferred forum. Host states would like to be given the opportunity to correct the alleged violations themselves through their domestic court system.40 On the other hand, investors would prefer to bring the claims in their home countries. However, the courts of the investors’ home countries are not a viable option because

[I]n most cases they lack territorial jurisdiction over investments taking place in another State. An addi-

39 Dispute Settlement, supra note 12, at 80.
tional obstacle to using domestic courts outside the host State would be State immunity. Host States dealing with foreign investors will frequently act in the exercise of sovereign powers (jure imperii) rather than in a commercial capacity (jure gestionis).  

The investors’ second choice would, then, be international arbitration, which they consider to be “independent and neutral,” at least more so than local courts in host states, and where they can bring their claims under treaty standards.

Note the significance of fairness in drafting ISDS provisions. An unfair provision would fail to preserve the relationship and good will of the parties and “make it more difficult to resolve the dispute without litigation.” More fundamentally, an unfair provision may cause one or more parties to the investment treaty to withdraw from it. For example, South Africa and Indonesia have recently begun to withdraw from BITs, which they viewed as unfairly focused on the investors’ interests, ignoring the concerns for developing countries. Thus, the repercussions of unfair provisions are not limited to specific disputes but may pose a threat to the workings of the overall system.

B. Decisional Accuracy

An ISDS provision should enable the decision-makers to resolve the disputes fairly. Many disputants highly value decisional accuracy, even when compared to other virtues of dispute

41 Schreuer, supra note 7, at 72.
42 Some Facts and Figures, supra note 2, at 3; see also TTIP: What Exactly, supra note 1, at 1 (“[I]nternational obligations may not automatically be applied in domestic courts.”).
resolution processes.\textsuperscript{46} One can enhance decisional accuracy by ensuring that the legal system hearing the disputes has the requisite expertise and experience.\textsuperscript{47} Alternatively, one can institute redundancy in the resolution mechanism—by allowing appeals or multiple proceedings—and correct any errors and inconsistencies in decisions.

\textbf{C. Efficient resolution of disputes in terms of time and cost}

A good ISDS provision should encourage early and effective resolution, and lower the costs of managing disputes.\textsuperscript{48} However, “speed is not an unqualified virtue,”\textsuperscript{49} as no one would think that flipping a coin is more than a capricious decisional method. Accordingly, although a speedy resolution has benefits, it should not compromise fairness to the parties and decisional accuracy.

\textbf{D. Procedural integrity}

A good ISDS clause should promote procedural integrity. This means several things in practice. First, it should be written in a way that clearly directs the procedures to be followed. In the same vein, the U.S. National Alternative Dispute Resolution Advisory Council has noted that “[d]isputes relating to the interpretation of . . . [dispute resolution] clauses [that lack clarity] may result in litigation, and such clauses may be found to be void for uncertainty.”\textsuperscript{50} Second, it should promote transparency in proceedings by, for example, publishing arbitral awards, holding public hearings, etc. Third, it should provide a resolution mecha-

\begin{flushleft}
\textsuperscript{47} See \textit{International Dispute Resolution, LL.M.}, DONAU-UNIVERSITÄT KREMS, http://www.donau-uni.ac.at/en/studium/international_dispute_resolution/20424/index.php (last visited Mar. 22, 2016) (“[T]he quality of the tribunal has a significant impact on maintaining the confidence of the parties involved in arbitration as a system that works.”).
\textsuperscript{50} Bihancov, \textit{supra} note 43, at 5 (quoting NADRAC, ADR in the Civil Justice System—Issues Paper (Mar. 2009, Commonwealth of Australia)).
\end{flushleft}
nism that leads to enforceable results.\textsuperscript{51} Lack of clear enforcement mechanisms would render the resolution process less certain for investors. Fourth, it should lead to results that are reasonably predictable and consistent. Predictable results are of significant importance to investors because “[o]nce the investor has sunk in its resources, it becomes vulnerable to changes in the position of the host [s]tate.”\textsuperscript{52} In order to counter these uncertainties, investors would want to examine, prior to their investment, how investment disputes are settled, and predict the associated risks. Perhaps not to the same extent as foreign investors, but consistency is also appreciated by states. They surely would not want to be subject to the whims of some decision-maker.

As much as clarity is important, however, where possible and appropriate, “disputes should be resolved in a confidential context,”\textsuperscript{53} even if such resolution comes at the expense of transparency.

IV. THE OPTIMAL ROLE OF DOMESTIC COURTS IN INVESTMENT DISPUTE RESOLUTION

This Part makes a normative argument for what the role of domestic courts should be in resolving investment disputes, after considering the pros and cons of their involvement against the four virtues identified in Part II.

A. Domestic Courts Should Play Some Role

First, where parties feel comfortable,\textsuperscript{54} domestic courts should play at least some role in resolving investment disputes. This is not an unprecedented view. Scholars have recognized that “[n]ational courts are an important complement to the resolution of investment disputes.”\textsuperscript{55} Susan D. Franck, for one, argued that,


\textsuperscript{52} Schreuer, \textit{supra} note 14, para. 1.


\textsuperscript{54} Part IV explains the reason for inserting this qualifying phrase, by rejecting mandatory adjudication by domestic courts.

“as many BITs permit investors to bring their claims in national courts, under appropriate circumstances, investors may elect to litigate treaty violations,” and encouraged governments to move away from a model of mandatory arbitration.\textsuperscript{56} Reviewing the domestic courts’ involvement under the primary virtues of dispute resolution gives additional reasons why domestic courts should play a role.

\textit{Fairness to the parties.} It is fair to give local courts an opportunity to correct the alleged violations themselves. Denial of this opportunity would unsettle the balance between the rights of the investors and the right of the host country to regulate the investment that takes place within its territory.\textsuperscript{57} The host country’s right to self-regulate becomes even more important when foreign investment intertwines with the important interests of the local population, which often is the case.\textsuperscript{58}

\textit{Decisional accuracy.} Domestic courts can increase the chances of accurately resolving disputes by correcting errors through the appeal system.\textsuperscript{59} This is so “because more people, judges and attorneys alike, will have had a chance to evaluate the issue, and make different and better arguments.”\textsuperscript{60}

Prospectively, by hearing more investment disputes, domestic courts can develop the rule of law and hone their decision-making in this area.\textsuperscript{61} Excluding local courts from investment dispute resolution would deny them such learning process and a chance to boost the accuracy of their decision-making.

\textit{Procedural integrity.} Domestic courts make trials open to public except “in the most exceptional circumstances (e.g. Official Secrets),”\textsuperscript{62} and publish judgments.\textsuperscript{63} This creates precedent

\textsuperscript{56} Id.
\textsuperscript{58} Schreuer, supra note 14, para. 2.
\textsuperscript{60} Mishra, supra note 57.
\textsuperscript{61} Franck, supra note 55, at 368.
\textsuperscript{62} An Overview, supra note 59, at 2.
\textsuperscript{63} Id.
for later cases and puts prospective or current investors on notice of the courts’ treatment of investment disputes. In contrast, arbitration hearings can be held in private, and the awards and other documents produced kept confidential. Moreover, arbitral awards “do not give rise to any binding precedent or res judicata vis-a-vis other parties.” Admittedly, however, this comparative advantage of domestic court adjudication is minimal in the investor-state arbitration context because “virtually all ICSID, NAFTA, and Energy Charter awards are made public, as well as many ... rendered under UNCITRAL and IAC rules.”

B. Domestic Courts’ Jurisdiction Should Not Be Exclusive

Second, although domestic courts could play some role, they should not be given the exclusive authority to resolve investment disputes. Investors should also have the option of international arbitration because of the limitations of domestic court adjudication and comparative advantages of arbitration discussed below.

Fairness to the parties. International agreements, including investment agreements, do not form a part of the domestic legal system, with the exception of a few monist countries. Thus, domestic courts of most countries cannot apply domestic laws to the settlement of investment disputes, which unfairly denies investors the opportunity to bring their claims under treaty stand-

64 Id.
66 An Overview, supra note 59.
67 Id. at 3.
69 Some Facts and Figures, supra note 2, at 3.
As the tribunal in *Maffezini v. Spain* recognized, “[t]raders and investors . . . have traditionally felt that their rights and interests are better protected by recourse to international arbitration than by submission of disputes to domestic courts.”

In addition, many investors worry that domestic courts may be vulnerable to political influences and biases against them. This concern is aggravated when the counterparty is a state entity, as in investment disputes. Further compounding the fairness concern are the “distance and the disadvantages . . . [that investors] face[] (foreign court system, language, and culture unfamiliar to them).” Thus, fairness concerns counsel against providing domestic court adjudication as the exclusive dispute resolution option.

Moreover, such non-exclusivity not only benefits investors but also may promote foreign investment in host states. It signals to potential investors that the country harbors a safe environment to invest, and may attract foreign investment, by creating “the appearance and reality of fairness in the dispute-settlement process.” Anecdotally, for example, American investors, such as Ronald Lauder, have testified that they based their investment decisions in the Czech Republic largely on the knowledge that the investment was protected under the standards of BITs. Empirically, some scholars, called “treaty protagonists,” analyzed data on foreign investment and argued that investment treaties tend to attract foreign investment. For example, in the context of U.S.

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70 Alschner, *supra* note 36, at 289.
71 Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on objections to jurisdiction, para. 55 (Jan. 25, 2000).
73 *An Overview*, *supra* note 59, at 3.
75 *Dispute Settlement*, *supra* note 12, at 2.
77 Franck, *supra* note 55, at 352.
BITs, Salacuse and Sullivan found strong evidence for BITs’ positive impact on foreign direct investment.\textsuperscript{78} Neumayer and Spess, Swensen, and Egger and Pfaffermayr\textsuperscript{79} reached similar conclusions about other BITs.

\textit{Decisional accuracy.} As mentioned above, domestic courts most often apply their own laws, rather than treaty standards, in resolving investment disputes.\textsuperscript{80} Accordingly, they may fail to properly resolve the disputes that may be best described as treaty violations.

Moreover, domestic court judges are more likely to be general practitioners than arbitrators who are appointed to specific cases because of their “more focused skills, applicable knowledge, and expertise.”\textsuperscript{81} Thus, where a dispute raises technical or scientific issues of fact, it would require substantial efforts and resources for domestic court judges to understand the issues and

\textsuperscript{78} Id. at 352 n.80 (citing Jeswald W. Salacuse & Nicholas P. Sullivan, \textit{Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain}, 46 HARV. INT’L L.J. 67, 109, 111 (2005)) ("They conclude the following: (1) a ‘U.S. BIT is more likely than not to exert a strong and positive role in promoting U.S. investment’; (2) a ‘U.S. BIT is more likely than not to exert a strong and positive role in promoting overall investment’; and (3) a ‘U.S. BIT is likely to exert more of an impact than other OECD BITs in promoting overall investment.’").

\textsuperscript{79} Id. at 352 n.81 (citing Eric Neumayer & Laura Spess, \textit{Do Bilateral Investment Treaties Increase Foreign Direct Investment in Developing Countries?}, 3 WORLD DEV. 31 (2005)); Id. at 352 n.82 (citing Deborah L. Swenson, \textit{Why Do Developing Countries Sign BITs?}, 12 U.C. DAVIS J. INT’L L. & POL’Y 131, 152–55 (2005)) (finding BITs, particularly those with the United States, were positively correlated with larger investment flows but acknowledging that these results may be influenced by other variables such as alternative investment promotion measures); Peter Egger & Michael Pfaffermayr, \textit{The Impact of Bilateral Investment Treaties on Foreign Direct Investment}, 32 J. COMP. ECON. 788 (2004) (reviewing OECD data and finding investment treaties exert a significant positive effect on FDI, particularly if they are implemented and noting that simply signing a treaty has positive—although less significant—effects on FDI). However, note also the existence of contrary views. See, e.g., Jennifer Tobin & Susan Rose-Ackerman, \textit{Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties}, Center for Law, Economics and Public Policy Research Paper No. 293 (May 2, 2015) ("We find a very weak relationship between BITs and FDI. Further, we find that rather than encouraging greater FDI in riskier environments, BITs only have a positive effect on FDI flows in countries with an already stable business environment. Overall, BITs seem to have little positive effect either on foreign investment or on outside investors’ perception of the investment environment in low- and middle-income countries.").

\textsuperscript{80} See Some Facts and Figure, supra note 2.

\textsuperscript{81} Oehmke, supra note 74, § 5.
render an informed decision. In the absence of such efforts, domestic court judges would be “ill prepared” to hear complex cases and may fail to resolve them fairly.

**Efficient resolution.** At least in theory, adjudication by domestic courts is not expected to be as efficient as its alternative, arbitration, for the following reasons. First, domestic courts may draw out proceedings by allowing appeals, whereas arbitration typically disallows appeals. Second, parties can more easily “adapt procedures to the needs of a particular dispute in arbitration than in court,” thereby saving time and money. Third, parties can avoid extensive document production in arbitration, whereas litigation in the United States, for example, may subject them to aggressive American style discovery—an idea foreign to those from the Continental legal system.

However, arbitration’s expected advantage in efficiency has been challenged by many international arbitration practitioners and in-house counsels. Along the same lines, arbitral tribunals have drawn attention to the fact that arbitration often incurs substantial costs. Statistics support their view: arbitration costs in

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83 Becky L. Jacobs, *A Perplexing Paradox: “De-Statification” of “Investor-State” Dispute Settlement?,* 30 Emory Int’l L. Rev. 17, 25 (2015) (“This is particularly poignant in this context given that ISDS arbitral awards have only limited review mechanisms, either statutorily or judicially, within the affected state or as provided by the relevant arbitral institution’s governing documents.”).
85 William W. Park, *Arbitrator Integrity, in The Backlash Against Investment Arbitration: Perceptions and Reality* 189, 203 (Michael Waibel et al. eds., 2010) (“For instance, a party hoping to avoid extensive document production may prefer a French professor over an American litigator, given that American style ‘discovery’ has traditionally been foreign to the Continental legal system.”).
88 Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011). The arbitral tribunal in Abaclat and Others v. Argentine Republic also drew attention to the fact that the parties to the dispute had incurred arbitration costs of at least $39 million. David Gaukrodger, *Inter-Governmental Consideration of Investor-State Dis-
recent cases have averaged over $8 million, with costs exceeding $30 million in some cases.  

Moreover, domestic courts may be able to resolve investment disputes more quickly than arbitral tribunals. This possibility has already been realized in GAMI investments, Inc. v. Mexico, where Mexican courts reversed the expropriation of the sugar mills before the arbitrators reached the adjudication of the NAFTA dispute. Admittedly, Gami may be an outlier. At the same time, however, it may not be, if we consider the fact that domestic court judges can impose sanctions on parties delaying matters and use their coercive powers to induce timely resolution of disputes, unlike arbitrators. Because of these arguments to the contrary, the efficiency argument does not present the best argument against the domestic courts’ exclusive authority.

Procedural integrity. Unlike arbitral tribunals, domestic courts lack an international regime for enforcement of their judgments, and are subject to “local laws governing enforcement and execution.” This exposes investors to the risk that their hard-earned judgments remain merely symbolic. Although some countries have reciprocal arrangements for the recognition and enforcement of judgments, many do not. In contrast, it is relatively clear that arbitral awards will be enforced. An extensive enforcement regime for arbitration awards exists under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the ICSID Convention. These conventions also limit the grounds for re-

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91 An Overview, supra note 59, at 3.
92 Natalie Reid & David Rivkin, Lecture at Yale Law School (Mar. 28, 2016).
93 Dammann & Hansmann, supra note 65, at 33 (“[T]he Hague Convention on Choice of Court Agreements, which would guarantee similar advantages with respect to foreign court decisions, has still not entered into force.”).
94 An Overview, supra note 59, at 2.
95 Id. at 1.
96 Stone Sweet, supra note 68, at 32 (“The ICSID Convention establishes its own autonomous enforcement regime: there is no ‘seat,’ and the courts of ‘each
fusal to recognize and enforce the awards to limited exceptions. The New York Convention limits them to seven grounds: incapacity of a party; failure to give proper notice to a party, or the inability of a party to present his/her case; the award fell outside the scope of the arbitration agreement; the selection of the arbitrators violated the agreement; if the agreement did not address selection, the selection process violated the law; the law of the country in which enforcement is sought prohibits arbitration on the subject matter of the issue in dispute; or the recognition or enforcement of the award would be contrary to the public policy of that country.\textsuperscript{97} Similarly, under the ICSID Convention, there are only five grounds for authorizing an \textit{ad hoc} committee to annul an ICSID award: the tribunal was not properly constituted; the tribunal “manifestly exceeded its powers”; one of the arbitrators was corrupt; there was a serious departure from a fundamental rule of procedure; or the award has failed to state the reasons on which it is based.\textsuperscript{98}

To summarize, with consent of the parties, domestic courts should play a role in resolving investment disputes, but they should not be the exclusive option to investors. The option of investment arbitration should also be made available.

V. THE APPROPRIATE DESIGN OF INVESTOR-STATE DISPUTE SETTLEMENT PROVISIONS

Based on the primary virtues of investment dispute resolution provisions in Part II and the assessment of the optimal role of domestic courts in Part III, this Part proposes the appropriate design of ISDS clauses.
Before discussing the details, however, let us ensure that we have the discretion to modify ISDS provisions. Recent trends demonstrate that we can. In the last few years, contracting parties have become more creative in writing ISDS provisions by adapting forums to their needs and choosing more cost-effective ways of dealing with their disputes.\textsuperscript{99} Some scholars have even encouraged creativity in writing ISDS provisions because they believe that it better serves the interests of contracting parties and avoids protracted proceedings in an unfavorable forum.\textsuperscript{100}

What form should an optimal ISDS provision take? First of all, consideration of the role of domestic courts rules out Option 1 and Option 2 because domestic courts should play at least some role in resolving disputes, with parties’ consent, but not an exclusive role.\textsuperscript{101} Accordingly, an optimal ISDS design should allocate the role of domestic courts to somewhere on the continuum between Option 1 and Option 2.

If domestic courts should play some role, should we mandate domestic court adjudication? The answer is no, because the mandate undermines procedural integrity.

\textit{Procedural integrity}. Such mandate translates to adopting the local remedies rule, which is “a standard of customary international law that requires parties who have been injured in a foreign nation to exhaust all other available remedies prior to seeking international redress.”\textsuperscript{102} In contrast, most BITs do not mention exhaustion of local remedies, except regarding the denial of justice claims, and many scholars have interpreted this silence as waiving the local remedies rule.\textsuperscript{103} Some BITs even explicitly include an obligation not to apply the local remedies rule if claimants submit the dispute to investment arbitration.\textsuperscript{104} For ex-

\textsuperscript{99} An Overview, supra note 59, at 2.
\textsuperscript{100} Id. at 5.
\textsuperscript{101} See discussions in Part III.
\textsuperscript{102} Bradford K. Gathright, Comment, \textit{Step in the Wrong Direction: The Loewen Finality Requirement and the Local Remedies Rule in NAFTA Chapter Eleven}, 54 EMORY L.J. 1093, 1124 (2005) (“The local remedies rule is a standard of customary international law that requires parties who have been injured in a foreign nation to exhaust all other available remedies prior to seeking international redress.”).
\textsuperscript{103} CHRISTOPHER F. DUGAN ET AL., INVESTOR-STATE ARBITRATION 347 (2008).
\textsuperscript{104} UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), BILATERAL INVESTMENT TREATIES 1995–2006: TRENDS IN INVESTMENT RULEMAKING,
ample, the Austria-United Arab Emirates BIT provides, “If the investor chooses to file for arbitration, the host Contracting Party agrees not to request the exhaustion of local settlement procedures . . . .” Thus, mandating adjudication by domestic court would create inconsistencies within the BITs, causing confusions in the process.

How about slightly deviating from the local remedies rule and adopting Option 5 instead, which mandates domestic court adjudication but only for a certain period of time? Unfortunately, Option 5 also fails to provide an optimal design for the following reasons.

_Fairness to the parties._ By setting the waiting period too short, Option 5 denies states a realistic chance to resolve the disputes in their domestic courts. Let us consider, for example, the Belgium/Luxembourg-Botswana BIT, which sets a waiting period of only six months. In most circumstances, six months would not be sufficient for domestic courts to fully deliberate on an investment dispute. It would merely “give an investor ‘a feel’ for whether the judges are independent and impartial, and whether it is worth continuing the domestic proceedings,” giving an unfair advantage to investors. It is also hard to remedy this problem because a single waiting period is unlikely to account for the particularities of each dispute. For instance, the tribunal in _Abaclat v. Argentina_ found that the eighteen-month waiting period in the Argentina-Italy BIT was not long enough to effectively resolve the claims brought by the claimants. On the other hand, the same eighteen-month period was suggested to be sufficient by the tribunal in _BG Group v. Argentina_ “under normal circum-

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107 UNCTAD Series, _supra_ note 29, at 83.

stances.” Such conflicting views would invite further thorny issues, such as the normality versus abnormality of circumstances. Moreover, Option 5 is not budget neutral: by requiring investors to first seek recourse in domestic courts, Option 5 unfairly imposes additional costs on investors who eventually want to arbitrate the dispute.

Procedural integrity. The waiting period under Option 5 often raises interpretive questions, such as “whether the claimant must pursue local remedies diligently or can sit on its hands for the stipulated period.” Many arbitrators have also refused to give effect to waiting periods by allowing arbitration to proceed before the claimant had waited the required period on various grounds, including that the treaty was not sufficiently clear and precise, that the issue of the wait period was insignificant because the tribunal would have allowed the claim to be re-submitted in due course, that imposing the wait period would have little effect other than to increase any damages owed by the state, that the respondent state’s obligation to provide most-favored-nation treatment extended to dispute settlement processes such that wait periods were removed or shortened for all claimants, or that giving effect to a wait period would nullify the treaty’s role to provide access to international arbitration regardless of whether an investor resorted to other remedies.

Thus, fairness and clarity concerns advise against mandating domestic court adjudication. I argue, instead, that it should be offered as one of the resolution options to investors, along with international arbitration. I argue so because it better serves at least two of the virtues of dispute resolution: fairness to the parties and decisional accuracy.

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111 Id.
Fairness to the parties. Giving the option of domestic court adjudication avoids the unfairness associated with mandatory adjudication. At the same time, it leaves open the opportunity for domestic courts to resolve the disputes. Moreover, by allowing investors to freely choose between the two options—investment arbitration and domestic court adjudication—it respects party autonomy, which is the fundamental principle of international arbitration.\footnote{Olena S. Perepelynska, Party Autonomy v. Mandatory Rules in International Arbitration, THE UKRAINE J. OF BUS. L., Jan.–Feb. 2012, at 38 (2012) ("This basic principle of arbitration is known as party autonomy. According to one of the classical books in international arbitration—'Party autonomy' is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitration institutions and organizations. The legislative history of the Model Law shows that the principle was adopted without opposition . . . ") (quoting A. REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 265 (2004)).}

Decisional accuracy. Redundancy in recourse, made possible by the options of arbitration and domestic court adjudication, is likely to lead to more accurate results. Analogously, in the domestic context, Robert Cover argued in favor of concurrent jurisdiction at both the state and federal levels because he believed: first, concurrent forum fights the corrupt interest of judges;\footnote{Robert Cover, The Uses of Jurisdictional Redundancy: Interest, Ideology, & Innovation, 22 WM. & MARY L. REV. 639, 658–62 (1981).} second, to the extent that the jurisdictional alternatives differ with respect to the supposed salient social determinants of ideology, complex concurrency constitutes a strategy for coping with ideological impasse among different parties;\footnote{Id. at 665.} and, third, multiplicity of forums “means an innovation is more likely to be tried,”\footnote{Id. at 674.} which confirms the norm if several authorities articulate the same norm or reveals “different social conditions and/or ideologies” if different authorities articulate different norms.\footnote{Id. at 674–75.} The third consideration seems most applicable to the context of investment disputes. Just as concurrent jurisdiction in state and federal courts would either confirm their decisions or reveal areas of inconsistencies, which, in turn, contributes to higher decisional accuracy through communication and experimentation by decision-
messaging,\textsuperscript{117} concurrent jurisdiction in arbitral tribunals and local courts is likely to increase their decisional accuracy.

The idea of giving investors two options narrows down the best ISDS design to either Option 3 or Option 4. However, Option 3 fails to make the best design because it may be unfair to host states.

\textit{Fairness to the parties.} As mentioned above, local courts do not apply treaty standards when deciding investment disputes; they apply their own laws. This poses a serious fairness problem for host states. Under Option 3, investors are forced to give up the right to bring their claims under the treaty standards, by litigating in local courts. Accordingly, investors would always elect to arbitrate the claims and never litigate in local courts. Thus, in practice, Option 3 is likely to deny local courts a real opportunity to hear investment disputes.

Neither is Option 4 perfect for the following reasons.

\textit{Fairness to the parties.} Option 4 unfairly benefits investors by allowing them to forum shop between domestic courts and arbitration.\textsuperscript{118} Forum shopping becomes an even more serious problem if we consider the possibility of parallel \textit{commercial} arbitration on contract claims, in addition to the \textit{options} of investment arbitration and domestic court adjudication.\textsuperscript{119} Moreover, the possibility of parallel proceedings under Option 4 subjects host states to the risk of double jeopardy.\textsuperscript{120}

\textit{Efficient resolution.} Final resolution of investment disputes, and thus \textit{justice}, will be delayed under Option 4 if investors exhaust remedies at both local courts and arbitral tribunals. In addition, Option 4 makes parallel proceedings possible, forcing host states to respond to lawsuits in multiple forums and unfairly subjecting them to excessive legal costs.

\footnotesize{\textsuperscript{117} Id. at 676–80.  
\textsuperscript{119} Reid & Rivkin, \textit{supra} note 92.  
\textsuperscript{120} Id. at 191.}
Procedural integrity. There is much ambiguity surrounding the non-exclusivity of the investors’ choice under Option 4. This ambiguity arises, in part, because the fork-in-the-road clauses often make only one of the two choices—domestic courts and arbitration—explicitly final. For example, the Peru-Singapore FTA makes only the choice of domestic courts, but not of international arbitration, final by providing: “unless . . . the investor concerned has already submitted the dispute for resolution before the courts or administrative tribunals of the disputing Party . . . , the investor concerned may submit the dispute for settlement to arbitration.” Complicating the issue, in some cases, tribunals have interpreted the investor’s choice between domestic court and international arbitration to be final without any explicit language. For example, the tribunal in Pantechniki v. Albania interpreted the dispute resolution clause in the Greece-Albania BIT to make the investor’s choice final and exclusive, although the treaty did not explicitly indicate so. Pantechniki is not unprecedented; the tribunal in Middle East Cement v. Egypt has similarly read a forum-selection clause as a fork-in-the-road provision, despite the absence of language to that effect.

Fortunately, however, these problems with Option 4 can be remedied by obliging investors to waive their right to other proceedings before initiating arbitration. Indeed, as discussed in Part I, many investment agreements that can be classified as Option 4 include a waiver requirement. The waiver requirement can stop

121 Peru-Singapore Free Trade Agreement, Peru-Sing., art. 10.17, May 29, 2008, http://www.sice.oas.org/TPD/PER_SGP/Final_Texts_PER_SGP_e/10_20investment.pdf; see also Agreement Between Japan and Brunei Darussala for an Economic Partnership, Japan-Brunei, art. 67.4, June 15, 2007, available athttp://www.mofa.go.jp/region/asia-paci/brunei/epa0706/agreement.pdf (“[I]f the disputing investor has not submitted the investment dispute for resolution under courts of justice or administrative tribunals or agencies, the disputing investor may submit the investment dispute to one of the following international conciliations or arbitrations.”).

122 Pantechniki S.A. Contractors & Engineers v. Republic of Albania, ICSID Case No. ARB/07/21, Award (July 30, 2009).

investors from forum shopping and eliminate the risk of double jeopardy. By disenabling parallel proceedings,\(^\text{124}\) it also prevents delays in the final resolution of disputes.

One may question how the waiver requirement is preferable to the exclusivity inherent in Option 3, given that both purport to prevent parallel proceedings once the investors have made a choice between international arbitration and domestic court adjudication. In addition to the fairness concern that Option 3 may deny states a realistic chance to hear the disputes, there are at least two other considerations that advise in favor of the waiver requirement and against Option 3.

**Fairness to the parties.** If one adopts Loewen as a true statement of international law (that claims of denial of justice require domestic remedies be exhausted first), a fork-in-the-road provision may render denial of justice claims impossible.\(^\text{125}\) This is so because, once the investor brings a claim to domestic courts in order to satisfy the Loewen requirement, his choice will be made final, denying him the option to arbitrate later. No tribunal has squarely addressed this issue to this day, leaving this possibility a lurking concern.

**Procedural integrity.** It is well-established in principle and has been confirmed in a number of decisions\(^\text{126}\) that a fork-in-the-road clause serves as a bar to international arbitration only if the same dispute, same parties, and the same cause of action had been brought before domestic courts.\(^\text{127}\) Due to these cumulative requirements, arbitral tribunals rarely bar arbitral proceedings based on fork-in-the-road clauses.\(^\text{128}\) In fact, according to Yimer et al., *Pantechniki v. Albania* is the only public case in which “the previous domestic court proceedings of the claimant barred it from having access to international arbitration.”\(^\text{129}\) Thus, Option 3 is

\(^\text{124}\) Alschner, *supra* note 36.
\(^\text{126}\) Schreuer, *supra* note 7, at 79 n.28.
\(^\text{127}\) *Id.* at 79.
\(^\text{128}\) Yimer et al., *supra* note 10, at 11.
\(^\text{129}\) *Id.*; see also Marshall, *supra* note 123.
unlikely to achieve its purported goal as effectively as a waiver requirement.\footnote{See Doak Bishop, \textit{A Practical Guide for Drafting International Arbitration Clauses}, KING & SPALDING 44, http://www.kslaw.com/library/pdf/bishop9.pdf (last visited Mar. 22, 2016) ("[T]he U.S. position appears to be that the inclusion of ‘final and binding’ language and the adoption of arbitral rules deeming a waiver of the right to appeal are not sufficient to preclude court review of an award under the limited, but fundamental, defenses provided by the New York Convention. To waive the right to review under these defenses, the arbitral clause must clearly and expressly provide for such a waiver.").}

The waiver requirement, however, can be inefficient at times: upon finding a waiver defective, the arbitral tribunal dismisses the case in its entirety, rather than allowing the party to amend the waiver and then bring it back to the same tribunal. Since a newly formed tribunal should examine the amended waiver, proceedings get delayed and protracted. This was the case in \textit{Waste Management, Inc. v. Mexico}.\footnote{Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2, Arbitral Award (June 2, 2000), http://www.italaw.com/sites/default/files/case-documents/ita0892.pdf.} When the claimant failed to submit a requisite waiver under the North American Free Trade Agreement (NAFTA) Article 1121, the \textit{Waste Management} tribunal ruled that it lacked jurisdiction to hear the claims. Such waivers rejected as defective are re-evaluated by a different tribunal, which delays proceedings.

Parties to investment agreements can counter this problem by tweaking the language of investment treaties. Tweaks can take various forms. Parties can expressly stipulate that tribunals treat the waiver requirement as an admissibility issue. Alternatively, it can eliminate the ambiguity in the existing provisions. For illustration, let us take the example of Article 1121 of the NAFTA, which provides the waiver requirement as one of the “Conditions Precedent to Submission of a Claim to Arbitration.” On its face, the phrase “Submission of a Claim to Arbitration” could be interpreted to relate to either the admissibility or jurisdictional issue, leaving uncertain which way it should be interpreted. Thus, by clarifying that the phrase relates to the admissibility issue, parties can produce a more efficient waiver.

Such modifications have been proposed already. For example, Keith Highet, in his dissenting opinion in \textit{Waste Management}, wrote that the majority “transformed what should . . . have been a
question of admissibility into a question of jurisdiction” by treating the waiver requirement as a jurisdictional issue.\textsuperscript{132} Defining jurisdiction as “the power of the tribunal to hear the case” and admissibility as “whether the case itself is defective,”\textsuperscript{133} Highet concluded that the waiver requirement is a matter of admissibility because he believed that insufficiency of the claimant’s waiver was “the only element that could legally affect jurisdiction under Article 1121” of the NAFTA.\textsuperscript{134}

Analogously, the tribunal in \textit{Abaclat v. Argentina} interpreted an analogous phrase in Argentina-Italy BIT\textsuperscript{135} as relating to the admissibility issue. Article 8 of the BIT provides for the “conditions for implementation of Argentina’s consent to ICSID jurisdiction and arbitration,” like Article 1121 of the NAFTA. Although the requirement at issue was not a waiver but the negotiation and eighteen-month litigation requirements, the Abaclat tribunal’s interpretation of the phrase as an admissibility issue despite the inclusion of the term “jurisdiction” shows that arguments can be made in favor of viewing waiver requirements as an admissibility issue.\textsuperscript{136}

Thus, consideration of the virtues of investment dispute resolution and the proper role of domestic courts in resolving disputes suggests that Option 4 with a waiver requirement and modifications to view it as an admissibility issue would provide the best model for ISDS clauses.

VI. CONCLUSION

This Paper categorizes different forms of ISDS clauses into five options: domestic court only; international arbitration only; choice between domestic court adjudication and international ar-

\textsuperscript{132} \textit{Id.} at para. 56.
\textsuperscript{133} \textit{Id.} at para. 58.
\textsuperscript{134} \textit{Id.} at para. 59.
\textsuperscript{136} Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, para. 496 (Aug. 4, 2011) (“The Tribunal is of the opinion that the negotiation and 18 months’ litigation requirements relate to the conditions for implementation for Argentina’s consent to ICSID jurisdiction and arbitration, and not the fundamental question of whether Argentina consented to ICSID jurisdiction and arbitration.”).
bitration final and exclusive; choice not final or exclusive; and domestic court, waiting period, then international arbitration. It then identifies the four primary virtues of ISDS clauses: fairness to the parties; decisional accuracy; efficient resolution in terms of time and cost; and procedural integrity. Based on the consideration of these virtues, this Paper prescribes that, with consent of the parties, domestic courts should play a role in resolving investment disputes, but not to the exclusion of the option of international arbitration. It wraps up the discussion by proposing Option 4 (choice between domestic court adjudication and international arbitration not final or exclusive) with a waiver requirement and some modifications to render the requirement an admissibility issue to be the optimal design of ISDS clauses that takes into account the optimal role of domestic courts and the primary virtues of dispute resolution.

Future scholarship should critically evaluate and expand on this Paper. Specifically, it should identify any additional virtues of dispute resolution and analyze the proposed ISDS design against these virtues. If possible and appropriate, it should also introduce more creativity to designing ISDS provisions.