The Cape Town Convention’s Improbable-but-Possible Progeny Part Two: Bilateral Investment Treaty-Like Enforcement Mechanism

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INTRODUCTION

This Essay is Part Two of a two-part essay series that outlines and evaluates two possible future international instruments. Each proposed future international instrument draws substantial inspiration from both the Cape Town Convention, and in particular, its Aircraft Protocol. In addition to both the Cape Town Convention and the Aircraft Protocol, this Essay will address components of any other Protocol that might enter into force in the future. (For convenience, unless otherwise noted or implied from the context, subsequent references to “Cape Town” refer to the Cape Town Convention, the Aircraft Protocol, and other such Protocols together that might enter into force in the future. More specific references to the “Convention” or a particular “Protocol” refer in particular to the identified instruments.) This Introduction first will provide background on Cape Town then outline the two possible future projects. It will begin by summarizing the project presented in Part One of the essay series. Part One assessed the first project on its merits as well as its feasibility from

1. For present purposes, I use “international instruments” in the broadest sense to include commentary, model laws, international conventions, and any other texts generated through international organizations.


5. Much of this overview derives from the Introduction to Part One and from Charles W. Mooney, Jr., The Cape Town Convention: A New Era for Aircraft Financing, AIR & SPACE LAW, Summer 2003, at 4.

practical and political perspectives. Part Two will take the same approach in presenting and analyzing the second possible future project. The Convention and the Aircraft Protocol were opened for signature on November 16, 2001, following a diplomatic conference in Cape Town. While the Convention contains the basic legal regime for secured financing and leasing of equipment, the Aircraft Protocol consists of specialized provisions adapting the Convention for financing and leasing of aircraft and aircraft engines.

The Convention and the Aircraft Protocol provide a legal regime for security interests (“international interests”) in large airframes, aircraft engines, and helicopters. The scope of the Convention’s international interest embraces the interests of a lessor and a conditional seller of an aircraft object. The Convention and Aircraft Protocol also apply to contracts of sale.

At the time the Convention project began, domestic legal systems in many states were inadequate to support secured, asset-based financing. Absent reforms, some transactions could not occur at all; some could only be consummated with higher financing costs; and still others could only be accomplished with the credit support of a state’s sovereign obligations. The Convention and Aircraft Protocol offer the necessary reforms to overcome the inadequacies of domestic regimes and have both been enormously successful. Both the Convention and Aircraft Protocol entered into force on March 1, 2006. The Convention has been adopted by sixty-
six Contracting States, including the United States and the European Union, and the Aircraft Protocol by fifty-eight.¹²

The success of both instruments, in particular that of the Aircraft Protocol's international registry, inspired the development of the first future international instrument outlined in Part One. Part One contemplated the creation of a new international registry, where each adopting state would agree that the new registry would provide that state’s domestic secured transactions registry under that state’s domestic law.¹³

The second project, as explained in this Essay (Part Two), contemplates an international instrument that would be available for adoption and use only by Cape Town’s Contracting States and only in connection with Cape Town. The second project would involve an amendment of Cape Town under which adopting Contracting States would agree to binding arbitration for the benefit of investors (i.e., in Convention terminology, “creditors”)¹⁴ for the purpose of enforcing the Contracting States’ obligations under Cape Town. This enforcement mechanism would be patterned on those that have become common under various bilateral investment treaties (BITs)¹⁵ and certain other international investment agreements (IIAs).¹⁶ Such a mechanism is often referred to as an investor-state dispute settlement (ISDS) or investor-state arbitration.¹⁷

The proposal for an ISDS presented here is tentative. The goal of this Essay will be to provide sufficient background, analysis, and structure to support the initiation of an informed discussion that would provide for serious consideration of the proposal for a Cape Town ISDS. In addition to the specific proposal for incorporation into Cape Town, this Essay will

¹². Convention — Status, supra note 11; Aircraft Protocol — Status, supra note 11. Note that the European Union’s adoption extends only to matters on which it has competency, which is quite limited. As to other matters, European Union members have competency to adopt the Convention. See Declarations Lodged by the European Union Under the Cape Town Convention at the Time of the Deposit of Its Instrument of Accession, Apr. 28, 2009, available at http://www.unidroit.org/status-2001capetown?id=1658.

¹³. See Mooney, Jr., Part One, supra note 6.

¹⁴. Under the Convention, the term “creditor” means a chargee (under a security agreement), a lessor (under a leasing agreement), or a conditional seller (under a title reservation agreement). Convention, supra note 2, art. 1(i).

¹⁵. The BITs entered into by the United States are typical in this respect. See United States Bilateral Investment Treaties, U.S. DEPT OF STATE, http://www.state.gov/e/eb/ifd/bit/117402.htm (last visited Apr. 11, 2015) (listing the BITs to which the United States is a party).


¹⁷. Part II.A.3.b. of this Essay will consider whether the creditors that would be entitled to utilize the arbitration mechanism should be limited to those located in a Contracting State other than the Contracting State that has (or is alleged to have) failed to comply with its Convention obligations (i.e., limited to “foreign” creditors).
seek to introduce more generally the idea of incorporating ISDS into transnational commercial law instruments.18

I. OPERATION AND BENEFITS OF THE CAPE TOWN CONVENTION: CENTRALITY OF IMPLEMENTATION AND COMPLIANCE BY CONTRACTING STATES

A. Contracting State Compliance and the Underlying Economic Assumptions of Cape Town

Cape Town is about lowering the costs of financing and leasing aircraft through embracing modern principles of asset-based financing. As explained by Saunders et al. in their 1999 study of aircraft financing (the “1999 Study”):

The key principles underlying the lender’s ability to extend asset-based financing are that a financier or lessor: (1) should be able to determine and assure itself that its proprietary interest in a financed or leased asset is superior to all potential competing claims against that asset; (2) upon default, will be able to promptly realize the value of the asset and/or redeploy that asset for purposes of generating proceeds/revenues to be applied against amounts owed; and (3) will not have their rights described in (1) and (2) above qualified or modified in the context of bankruptcy or insolvency. In this study, such principles shall be referred to as the “asset-based financing principles.”

Whether a legal system or law reform initiative embodies asset-based financing principles and is economically valuable depends crucially on three key factors: (1) the quality and transparency of the registry of property interests; (2) the speed with which legal enforcement is available; and (3) the ability to enforce contractual rights when a borrower or lessee is bankrupt or insolvent.19

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18. While the statement in the text is accurate, on September 6, 2014, I discovered that Brian Havel and John Mulligan, in a since-published draft paper, explored the question whether existing BITs could be employed to provide remedies for a creditor against a Contracting State that fails to comply with its Cape Town obligations. Brian F. Havel & John Q. Mulligan, The Cape Town Convention and the Risk of Renationalization: A Comment in Reply to Jeffrey Wool and Andrej Jonovic, 2014 CAPE TOWN CONVENTION J. 81. The authors prepared the draft paper for presentation at the Cape Town Academic Project Third Conference, held September 9–10, 2014, at the University of Oxford. As explained below, in my view a targeted ISDS designed specifically for Cape Town would be the best approach. See infra Part II.A.3.a. of this Essay. Based on conversations during that conference, it seems that the authors were unaware of my work on this project, although I distributed slides explaining the proposal to a large number of academics and others in February 2014.

This Essay focuses on the second and third principles of asset-based financing mentioned in the passage above — prompt rights to enforcement and relief coupled with enforceability in insolvency proceedings. If the courts and officials of a Contracting State do not provide the relief on default and treatment in insolvency proceedings promised by Cape Town then the benefits of lower-cost financing will not become available. Stated more precisely, achieving these benefits depends on ex ante confidence by potential creditors that, should the occasion of default or insolvency arise, the mechanisms provided by Cape Town will be available and effective.

The 1999 Study concluded that the adoption and effective implementation of the Convention and Aircraft Protocol would produce estimated economic gains of several billion dollars annually. Note that this conclusion is qualified by the condition that the Convention and Aircraft Protocol be “effectively implemented.” The study further concluded that “[t]hese gains will be widely shared among airlines and manufacturers, their employees, suppliers, shareholders, and customers, as well as the national economies in which they are located.” A more recent study by Vadim Linetsk (the “2009 Study”) highlights similar results by focusing on reductions in post-default repossession delays afforded by the implementation of Cape Town. That study estimated that savings attributable solely to reducing post-default repossession delay from ten months to two months would amount to $161 billion between 2009 and 2030. The 2009 Study’s conclusions, as with the 1999 Study, are conditioned on the effective implementation of Cape Town by Contracting States.


22. Id. at 352.

23. VADIM LINETSKY, ECONOMIC BENEFITS OF THE CAPE TOWN TREATY 2–4 (2009), available at http://www.awg.aero/assets/docs/economicbenefitsofCapeTown.pdf [hereinafter LINETSKY, 2009 STUDY]; see also VADIM LINETSKY, ACCESSION TO THE CAPE TOWN CONVENTION BY THE UK: AN ECONOMIC IMPACT ASSESSMENT STUDY 2 (2010), available at http://www.awg.aero/assets/docs/UKCTC%20Econ%20Impact%20Final%20Version.pdf (concluding that if the United Kingdom acceded to, and implemented, the Convention and Aircraft Protocol with the Sector Understanding on Export Credits for Civil Aircraft (ASU)-qualifying declarations (discussed infra Part I.B. of this Essay), then (i) U.K.-based airlines would reduce funding costs for aircraft deliveries by 538 million–2,705 billion GBP over the next two decades; (ii) U.K. lenders and lessors would benefit from less risk; (iii) U.K. manufacturers would benefit from greater sales volume; and (iv) the U.K. flying public would benefit from better aircraft).


25. Id. (“To produce maximum benefits, [Cape Town] must be effectively implemented, including all actions necessary to ensure that their provisions will be strictly and reliably enforced by national authorities. The study results are predicated on full implementation and compliance.”).
There is concrete evidence that Cape Town has lowered the costs of financing in connection with officially (i.e., state) supported credits for the sale or lease of aircraft. Qualifying persons (operators, buyer/borrowers, or lessors) can receive a reduction of up to ten percent of the minimum premium rates (i.e., finance charges or the equivalent) provided in the Sector Understanding on Export Credits for Civil Aircraft (ASU) which was established under the auspices of the Organisation for Economic Co-operation and Development (OECD). This is known as the “Cape Town Convention Discount” (CTC Discount). To qualify, the person must be located in a Cape Town-qualifying Contracting State. A qualifying Contracting State is one that has made certain insolvency- and enforcement-related “qualifying declarations” under the Convention and Aircraft Protocol. In addition to making the qualified declarations, a qualifying Contracting State must also “[h]ave implemented the Cape Town Convention, including the qualifying declarations, in its laws and regulations, as required, in such a way that the Cape Town Convention commitments are appropriately translated into national law.” As Jeffrey Wool has explained, “implementation’ of a treaty means that it has the force of national law, and in the case of conflict, prevails over any inconsistent national law.”

By tying lower financing costs to the qualifying declarations and implementation of the Convention, the ASU’s approach clearly contemplates that the declarations and implementation will lower the risks attendant to insolvency and default. The principal effects of the insolvency-related provisions of the Convention and Aircraft Protocol do not ensure


27. Id. arts. 34-1, 36.

28. Id. arts. 35(b), 37(b), Annex 1. Annex 1, paragraphs 1–2, of the ASU specify the “qualifying declarations” as: (i) remedies on insolvency (Aircraft Protocol, supra note 3, art. XI (Alternative A) (with no more than a sixty calendar-day waiting period)), (ii) deregistration and export (Aircraft Protocol, supra note 3, art. XIII), (iii) choice of law (Aircraft Protocol, supra note 3, art. VIII), and (iv) either (a) non-judicial remedies (Convention, supra note 2, art. 54(2)), or (b) expedited court remedies (Aircraft Protocol, supra note 3, art. X)). For an overview of these provisions, see infra Part I.B of this Essay. Certain other declarations would be disqualifying. As part of what constitutes “qualifying declarations,” Annex 1 also identifies the disqualifying declarations in its Article 3 as: (i) opting out of the application of Convention Articles 13 and 43, unless a qualifying declaration under Convention Article 54(2) has been made; (ii) opting out of Aircraft Protocol Article XXIV, which provides that the Convention supersedes the Rome Convention of 1933 as to aircraft; and (iii) making a declaration under Convention Article 54(1), which renders unavailable a chargee’s remedy of leasing a charged object.

29. ASU, supra note 26, app. 2, art. 38(c).

effective enforcement in actual insolvency proceedings of debtors; rather “the principal effects will take place outside bankruptcy in the form of the facilitating financing that would be unavailable (or available only at a substantially higher cost) under the prevailing domestic legal regimes of many states.”

B. Insolvency- and Enforcement-Related Provisions of Cape Town

This Subpart provides an overview of the principal Cape Town provisions and declarations that are the basis for the CTC Discount. Article XI of the Aircraft Protocol outlines a creditor’s remedies if its debtor becomes insolvent. A Contracting State that is a debtor’s “primary insolvency jurisdiction” may use a declaration to opt for either “Alternative A” or “Alternative B,” or it may decide not to make a declaration at all. The adoption of Alternative A is a qualifying declaration.

Alternative A closely resembles Section 1110 of the United States Bankruptcy Code. Alternative A is more protective of a creditor’s interests than Alternative B. For this reason, a declaration that applies Alternative A is a qualifying declaration under the ASU. Under Alternative A, the debtor’s “insolvency administrator” must give possession of the relevant aircraft object to the creditor holding an international interest in

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31. Mooney, Jr., Insolvency, supra note 20, at 39.
33. Of course, there are other important insolvency-related effects of the Convention that apply regardless of any declarations. See, e.g., Convention, supra note 2, art. 30(1) (providing that a registered international interest is effective in insolvency proceedings, subject to avoidance powers and rules of procedure mentioned in Convention, supra note 2, art. 30(3)).
34. Aircraft Protocol, supra note 3, art. 1(2)(n) (defining “primary insolvency jurisdiction” as “the Contracting State in which the centre of the debtor’s main interests is situated”).
35. Id. arts. XI(1) (stating Article XI applies only if a declaration is made under Article XXX(3)), XXX(3) (listing declarations concerning Article XI); see infra note 38 (differentiating the alternatives).
36. As mentioned above, in addition to a Contracting State affirmatively making the qualifying declarations it must not have made certain other declarations in order to be eligible for the Cape Town List. See ASU, supra note 26, arts 35(b), 37(b).
38. The Official Commentary describes Alternative A as the “‘hard’, or rule-based, version,” of Article XI and Alternative B as the “‘soft’, or discretion-based, version.” GOODE, OFFICIAL COMMENTARY, supra note 7, at 458.
39. As the Official Commentary explains: “Work in advance of the diplomatic Conference identified this provision as the single most significant provision economically. If the sound legal rights and protections embodied in the Convention and Aircraft Protocol are not available in the insolvency context, they are not available when they are most needed.” Id.
40. Convention, supra note 2, art. 1(k) (defining “insolvency administrator” as “a person authorised to administer the reorganisation or liquidation, including one authorised on an interim basis, and includes a debtor in possession if permitted by the applicable insolvency law”).
the object before the expiration of the “waiting period.” Instead of specifying a period of time following the commencement of insolvency proceedings, such as the sixty-day period provided by Section 1110, Alternative A permits a Contracting State, in its declaration, to specify the applicable “waiting period” that will apply when the Contracting State is a debtor’s primary insolvency jurisdiction. For a Contracting State’s declaration to be a qualifying declaration, it must specify a waiting period of sixty days or less. However, as under Section 1110, if the insolvency administrator or debtor “cure[s] all defaults . . . and has agreed to perform all future obligations under the agreement,” the insolvency administrator or debtor “may retain possession of the aircraft object.”

Both “de-registration of the aircraft” (as a condition of changing the nationality by re-registering it in another state) and “export and physical transfer of the aircraft object from the territory in which it is situated” are remedies found in Article IX(1) which provide additional protections to a creditor when a debtor defaults. Related to and supplementing Article IX(1), a declaration by a Contracting State to apply Article XIII is another qualifying declaration under the ASU. Under that article, the debtor may issue an “irrevocable de-registration and export request authorisation” (IDERA) in substantially the form specified by the Aircraft Protocol and may submit the IDERA to the registry authority to be recorded. An IDERA authorizes a specified “authorized party” to “be the sole person entitled to exercise the remedies specified in Article IX(1).” As an “authorized party,” a creditor (or its designee, on its behalf) may exercise

41. Aircraft Protocol, supra note 3, art. XI(2) (Alternative A).
42. Id. art. XI(3) (Alternative A).
43. Of the Contracting States that have adopted the Aircraft Protocol and made declarations as to Article XI, forty-two declared Alternative A as applicable, and one (Mexico) chose Alternative B. Aircraft Protocol — Status, supra note 11. Of the Contracting States choosing Alternative A, most chose a sixty-day waiting period; one chose two months; one chose forty days; and eleven chose thirty days. Id. Inasmuch as Bankruptcy Code Section 1110 applies under United States law, the United States did not make a declaration concerning Article XI, thus opting for the continued applicability of Bankruptcy Code Section 1110 when the United States is the primary insolvency jurisdiction. Id.
44. Aircraft Protocol, supra note 3, art. XI(7) (Alternative A). However, “a default constituted by the opening of insolvency proceedings” need not be cured. Id.
46. Aircraft Protocol, supra note 3, art. IX(1).
47. See supra note 28; Aircraft Protocol, supra note 3, arts. XIII(1) (stating Article XIII applies only if a declaration is made under Article XXX(1)), XXX(1) (listing declarations concerning Article XIII).
48. Aircraft Protocol, supra note 3, arts. I(o) (defining “registry authority” as “the national authority of the common mark registering authority, maintaining an aircraft register in a Contracting State and responsible for the registration and de-registration of an aircraft in accordance with the Chicago Convention”), XIII(2) (explaining that if “the debtor has issued an irrevocable de-registration and export request authorisation substantially in the form annexed to this Protocol and has submitted such authorisation for recordation to the registry authority, that authorisation shall be so recorded”).
the remedies of de-registration, export, and physical transfer without further consent or agreement by the debtor.

Another important qualifying declaration would make applicable Aircraft Protocol Article VIII, which provides that parties may agree as to the law that will govern their contractual rights and obligations.\(^49\) This qualifying declaration signals respect for party autonomy and provides the parties with additional \textit{ex ante} certainty.

Finally, either of two additional qualifying declarations is necessary under the ASU for a Contracting State to be eligible for the Cape Town List. The first is a declaration under Convention Article 54(2) to the effect that remedies not expressly requiring application to a court can be exercised “without leave of the court.”\(^50\) The second is a declaration that the Contracting State will apply Aircraft Protocol Article X (other than paragraph 5), dealing with timely remedies and specifying the time limits for purposes of Article X(2) (“speedy . . . relief”) as ten calendar days for certain remedies and thirty calendar days for others.\(^51\)

\textbf{C. Contracting State Non-Compliance: Is There a Problem?}

This Subpart considers whether there is a need to provide a formal remedy for a Contracting State’s non-compliance with its Cape Town obligations. The paradigmatic setting for the analysis assumes that a Contracting State fails to comply with its obligations and thereby causes loss or damage to a creditor.\(^52\) It is such a creditor that would be entitled to assert a remedy against the Contracting State.

When the Cape Town Convention enters into force in a Contracting State, the state “is bound by international law to perform its obligations under the Convention even if this conflicts with national law.”\(^53\) A Contracting State could fail to comply with its obligations as a result of action or inaction of its courts. For example, a court might fail to honor the parties’ choice of applicable law under Aircraft Protocol Article VII or fail to provide the timely relief required by Alternative A of Article XI.

\(^{49}\) Aircraft Protocol, \textit{supra} note 3, arts. VIII(1) (stating Article VIII applies only if a declaration is made under Article XXX(1)), XXX(1) (listing declarations concerning Article VIII).

\(^{50}\) ASU, \textit{supra} note 26, Annex 1, para. 2(d); Convention, \textit{supra} note 2, art. 54(2).

\(^{51}\) ASU, \textit{supra} note 26, Annex 1, para. 2(e); Aircraft Protocol, \textit{supra} note 3, arts. X(1) (providing that Article X applies only if a declaration is made under Article XXX(2)), XXX(2) (declarations concerning Article X).

\(^{52}\) Given this setting, the following discussion does not contemplate that a Contracting State’s failure to implement Cape Town would be an independent, freestanding instance of non-compliance for which a creditor would be entitled to a remedy. In the case of such a failure, it would be difficult or impossible to determine in the abstract any creditor’s loss or damage resulting from the ineffectiveness of the state’s adoption of Cape Town. Of course, a failure to implement could be a \textit{causus} of non-compliance for which a creditor could be entitled to a remedy.

\(^{53}\) \textsc{Goode, Official Commentary}, \textit{supra} note 7, at 19.
Alternatively, a Contracting State might be in breach of its obligations if the relevant officials failed to provide the required de-registration and export and physical transfer permission under Aircraft Protocol Articles IX and XIII. In these cases, it is important to distinguish between intentional violations of a Contracting State’s Convention obligations and misinterpretation or misapplication of the applicable rule. This dichotomy contemplates, for example, that there is a meaningful difference between a court's or official's mistake while acting in good faith and a court's or official's (and thereby a Contracting State's) non-compliance with clear international obligations under Cape Town.$^{54}$

Consider an example. Articles 35, 36, and 37 of the Convention$^{55}$ provide an ingenious approach that incorporates the priority rules and effects of insolvency applicable to international interests (Convention Articles 29 and 30$^{56}$) and applies those rules to assignments of “associated rights.”$^{57}$ These assignment-related provisions work well, but they are compact and subtle. Fortunately, the Official Commentary provides clear guidance on how to apply these rules and on how to parse the subtlety that exists.$^{58}$ Nonetheless, it is easy to imagine that a court could interpret these provisions incorrectly, perhaps as a result of its lack of sophistication or because of a lawyer’s poor argumentation. One might imagine the same with respect to other provisions as well, including the Convention’s baseline priority rules found in Articles 29 and 30.$^{59}$

A Contracting State’s non-compliance with Convention obligations could arise from a variety of causes. One cause might be that the state failed to implement the Convention such that it became the state’s national law and achieved primacy over other conflicting national law. Similarly, if the Convention has not been translated into the language used by the state’s courts, as a practical matter the courts would not be in a position to apply its provisions. Even if the Convention has been fully implemented, inadequate resources, weaknesses in institutional frameworks, and lack of

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$^{54}$ As discussed below, however, I do not underestimate the difficulties of drawing such a line between the two. See infra Part II.A.3.a. of this Essay.

$^{55}$ Convention, supra note 2, arts. 35–37 (application of priority and insolvency rules to assignments).

$^{56}$ Id. arts. 29–30 (priority and insolvency rules for international interests in aircraft objects).

$^{57}$ Id. art. 1(c) (defining “associated rights” as “all rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object”).

$^{58}$ GOODE, OFFICIAL COMMENTARY, supra note 7, at 360–71.

$^{59}$ The non-compliance and remedy considered here do not contemplate that every time a creditor is dissatisfied with a determination made by a court or an official of a Contracting State the creditor would be entitled to “relitigate” the matter in the context of a remedy for non-compliance. I return to this issue in the context of discussing the type or types of non-compliance for which a remedy might be fashioned. See infra Part II.A.3.a. of this Essay.
ready access to the courts could account for delays in providing creditors with Convention remedies.\textsuperscript{60}

Returning to the question raised above, is non-compliance with Cape Town obligations by Contracting States a problem in reality? Writing in 2012 and recognizing that Cape Town is a relatively new treaty,\textsuperscript{61} Wool argued for a “strong” presumption of state compliance with international commercial treaties generally,\textsuperscript{62} and more recently a “fairly strong” presumption of the same.\textsuperscript{63} The special circumstances in the case of Cape Town should “significantly increase compliance incentives.”\textsuperscript{64} Such a presumption would reflect the market’s confidence in compliance so as to support the lower costs of financing and leasing that Cape Town contemplates.

Wool has argued that a Contracting State’s non-compliance with Cape Town obligations would be costly, and he noted several factors that make non-compliance less likely. First, the ASU provides a proxy for enforcement of Cape Town obligations inasmuch as non-compliance would impose on a Contracting State ineligibility (or loss of eligibility) for the Cape Town List.\textsuperscript{65} Second, the International Civil Aviation Organization (ICAO) is a

\textsuperscript{60} See van Zwieten, supra note 32, at 75.

\textsuperscript{61} Wool, Treaty Design, supra note 30, at 646 (“CTC is a new treaty system. It does not apply to transactions that closed prior to entry into force in Contracting States. There have, therefore, been few examples of formal legal action governed by the CTC.”).

\textsuperscript{62} Id. at 647 n.34 (emphasis omitted).

\textsuperscript{63} Jeffrey Wool, Compliance with Transnational Commercial Law Treaties — A Framework as Applied to the Cape Town Convention, 2014 CAPE TOWN CONVENTION J. 5, 14 n.43 [hereinafter Wool, Compliance] (emphasis omitted).

\textsuperscript{64} Wool, Treaty Design, supra note 30, at 643. The “specific circumstances” include the distinct benefits of a state’s qualifying for the Cape Town List. Wool did note that the AWG would be “undertaking a major project monitoring, summarising, and evaluating all” actions in which Cape Town remedies are asserted. Id. at 646.

\textsuperscript{65} Id. at 647.
co-sponsor, with the International Institute for the Unification of Private Law (UNIDROIT), of Cape Town, and ICAO has “a long-standing compliance culture” in which non-compliance would impose “substantial political costs.”

Third, because Cape Town is a part of investment law, non-compliance would send a negative signal as to a Contracting State’s investment climate and would “adversely impact its position in competing for foreign investment.”

Finally, ongoing efforts to promote a culture of strict compliance through transparency and publicity will “increase the reputational costs on non-compliance.”

To this list one might add that non-compliance could negatively affect assessments by rating agencies in respect of debt securities secured by aircraft equipment. Additionally, by making the response system “more timely, interactive, and transparent” under the ASU, non-compliance becomes more costly.

He further noted that steps are being taken “to minimise the risk, severity, and length of unintentional non-compliance.”

Notwithstanding these factors, there are concrete examples of states’ non-compliance with their Convention obligations. For example, Donald G. Gray and Auriol Marasco explain that:

After GE Capital Aviation Services Ltd. (GECAS) attempted to terminate a lease with Air Midwest Nigeria (Air Midwest) for certain defaults, and repossess its aircraft, Air Midwest brought an action before the Federal High Court in Nigeria against GECAS to prevent the termination of the lease and subsequent repossession of the aircraft. The alarming part about this action and the resulting decision is that it only casually references the Convention and only in respect to whether Air Midwest, having no proprietary rights in the aircraft, could rely on the Convention to its benefit. The Nigerian court’s decision considered neither this argument nor the Convention, and, instead, because parallel proceedings had been commenced in England, the court determined that it lacked jurisdiction to hear the case. While the decision ultimately led to a

66. Id.
67. Id.
68. Id. at 648.
69. See van Zwieten, supra note 32, at 73 (discussing the influence of the Convention on the rating of securities backed by aircraft equipment).
70. Wool, Compliance, supra note 63, at 25. Significantly, Wool summarized specific proposals for these enhancements. Id. at 26–28 (outlining enhancements to improve the processes for loss and re-acquisition of eligibility for the CTC discount and for the active use and searching of compliance-based databases).
71. Id. at 25.
favorable outcome for GECAS, it did not establish a helpful precedent.\textsuperscript{72}

In Wool’s more recent article, he notes that public data on such non-compliance is limited.\textsuperscript{73} Not only is Cape Town a relatively new treaty system but much of the Cape Town-related governmental activities are administrative in nature, not judicial, explaining at least in part the dearth of data.\textsuperscript{74} Based on the available data, Wool has found that non-implementation-based non-compliance deals mainly with recording and enforcement issues related to IDERAs and to government-asserted non-consensual rights or interests.\textsuperscript{75} As to the IDERAs, “there have been \textit{limited instances of unintentional non-compliance}.”\textsuperscript{76}

Putting aside these discrete examples of non-implementation-based non-compliance and assuming \textit{arguendo} that they are highly aberrational, in 2012 Wool recognized that implementation problems have also produced a number of instances of non-compliance in some Contracting States.\textsuperscript{77} So long as the Convention has not been implemented in a Contracting State then it is likely that the Convention remedies would not be available in that state. This could happen either by the state failing to make the Convention a part of its national law or by not affording it priority when it conflicts with other national laws. This failure to implement creates a latent or


\textsuperscript{73} Wool, \textit{Compliance}, supra note 63, at 22–23.

\textsuperscript{74} Id. He also pointed out that the Cape Town Convention Academic Project (CTCAP) is establishing databases on both judicial and administrative activity. Id.

\textsuperscript{75} \textit{See Convention, supra note 2, art. 16} (defining “non-consensual right or interest” as “a right or interest conferred under the law of a Contracting State which has made a declaration under Article 39 to secure the performance of an obligation, including an obligation to a State, State entity or an intergovernmental or private organisation”). Wool further observes that “[t]o our knowledge, there have been no CTC reported actions involving attempts at physical repossession or sale or the treatment of CTC rights in insolvency proceedings.” Wool, \textit{Compliance}, supra note 63, at 23.

\textsuperscript{76} Wool, \textit{Compliance}, supra note 63, at 23 (emphasis in original).

\textsuperscript{77} Wool, \textit{Treaty Design}, supra note 30, at 646 (“Experience has been mixed on implementation of the CTC. There have been problems in a substantial number of Contracting States.”); Id. at 645 n.29 (observing that not all of the Contracting States that have made the qualifying declarations have implemented Cape Town).
potential non-compliance that would ripen if and when the state was called upon to perform its Convention obligations.\textsuperscript{78}

In his recent update on implementational compliance and non-compliance, Wool observed that although the situation has been “varied,” “the trajectory is broadly positive.”\textsuperscript{79} The implementation problems do not usually occur because of failure to incorporate the Convention into national law, but rather from failure to afford it primacy over conflicting national law.\textsuperscript{80} Specifically Wool notes that “there have been significant problems in a substantial minority of contracting states.”\textsuperscript{81} These problems generally have arisen as a result of the absence of necessary general legislation or the absence of necessary specific Cape Town-related regulations.\textsuperscript{82}

One can only guess whether over time these problems will be solved or exacerbated. It is possible that a few serious instances in which Contracting States fail to abide by their Cape Town obligations will undercut the presumption of compliance and ultimately the confidence states have in the Cape Town system. Would the effects of such isolated breaches be to penalize only (debtors in) offending Contracting States? Or, might they undermine confidence as to compliance more generally by Contracting States? Ultimately, I reach no conclusion here as to whether these examples of actual and latent non-compliance are sufficiently serious so as to justify the creation, under the Cape Town auspices, of an ISDS. At present there does not appear to be available the volume and quality of data necessary to support a conclusion one way or the other. Hopefully, the ongoing monitoring, evaluation, data collection, and education under the auspices of the AWG and the Cape Town Convention Academic Project will provide additional insights and understanding in the future.\textsuperscript{83}

At this time, Wool does not favor the adoption of additional legal consequences for non-compliance. He considers such a step to be unnecessary given the ongoing progress in promoting compliance and the

\textsuperscript{78} This latent non-compliance is in addition to non-compliance consisting solely of the state’s failure to implement. See supra note 52.


\textsuperscript{80} Wool, \textit{Compliance}, supra note 63, at 22.

\textsuperscript{81} Id.

\textsuperscript{82} Id. at 22. Havel and Mulligan identify a more insidious potential problem, future “renationalization” of Cape Town through interpretation by domestic courts that would be influenced by local law. Havel & Mulligan, supra note 18, at 81–88. They cite experience with the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG). Id. at 89–90. Given the level of specificity in the Cape Town texts when compared with that of the CISG, I am less concerned.

\textsuperscript{83} See Wool, \textit{Treaty Design}, supra note 30, at 646; see also supra note 74.
costs associated with implementing new legal consequences.\textsuperscript{84} Although I hope that Wool’s position is correct and an ISDS for Cape Town is not necessary to ensure compliance, at this time the uncertainty of the effectiveness of the current legal framework in ensuring compliance means that a concrete proposal for remedying non-compliance should not be foreclosed at this stage of the discussion. I address a number of factors including costs and related issues below in discussing the feasibility of adopting an ISDS.\textsuperscript{85}

Perhaps implicit in Wool’s view is that proponents of treaty revision should bear the burden of persuasion as to necessity and cost effectiveness. I would not disagree, and I recognize that the question whether additional legal consequences should be adopted for non-compliance by Contracting States is, to my mind, a very difficult question. It is one on which informed observers reasonably can disagree with various levels of (un)certainty. On the other hand, in my view, the failure to include an ISDS feature in Cape Town from the outset was a serious mistake. I regret that I must share in the blame for this failure.\textsuperscript{86} With hindsight, the issue of non-compliance, including non-implementation, was entirely foreseeable. Unfortunately, the foreseeable was not foreseen in fact.

An assessment of the merits of an ISDS mechanism for Cape Town may turn in part on the nature of the system that would emerge. For this reason, Part II outlines how such an ISDS might be achieved and makes recommendations as to its scope and content. It proceeds on the working assumption that there are non-compliance problems that, at least, justify serious consideration of the adoption of an ISDS.

II. The Proposal: An Amendment on Investor-State Enforcement

A. Investor-State Enforcement: The BIT Model as Applied to Cape Town Transactions

1. Cape Town Creditors as Investors

In the past few decades, BITs have proliferated.\textsuperscript{87} The ISDS feature proposed here is based on the typical structure of BITs. There have been

\textsuperscript{84} Wool, Compliance, supra note 63, at 26–27.
\textsuperscript{85} See infra Part II.C. of this Essay.
\textsuperscript{86} Although I was a member of the United States delegation and was its position coordinator, creditor-state enforcement never appeared on my radar screen. Of course, I do recognize that in this failure I had some very distinguished company.
spirited political and academic debates over the merits of BITs, and in particular their ISDS provisions; these debates continue. Whether or not BITs have succeeded, there appears to be general agreement as to what they are intended and supposed to achieve. The basic thesis is that by providing various protections for foreign investors, a BIT encourages investors situated in each state party to the treaty to invest in the other state. The BIT is designed to achieve this result by reducing the risks imposed on a foreign investor. For example, BIT investor protections that have become relatively standard include (i) protection of foreign investments against expropriation or nationalization, including full compensation if such an event occurs; (ii) permitting foreign investors to freely transfer capital, funds, profits, royalties, and personnel across borders; (iii) a requirement of

By the end of 2012, the regime of international investment agreements (IIAs) consisted of 3,196 treaties. Today, countries increasingly favour a regional over a bilateral approach to IIA rule making and take into account sustainable development elements. More than 1,300 of today’s 2,857 bilateral investment treaties (BITs) will have reached their “anytime termination phase” by the end of 2013, opening a window of opportunity to address inconsistencies and overlaps in the multi-faceted and multi-layered IIA regime, and to strengthen its development dimension.

88. See, e.g., Jeswald W. Salacuse, The Emerging Global Regime for Investment, 51 HARV. INT’L L.J. 427 (2010). Salacuse concludes that notwithstanding the benefits of investment treaties for home states, the threats to the investment regime, which have been characterized as “clarion calls to roll back the foreign investment regime,” are real, and they may have the power to cause a divergence of state expectations and thus undermine the regime that has been painstakingly constructed over the last sixty years.

89. See, e.g., Jeswald W. Salacuse & Nicholas P. Sullivan, Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, 46 HARV. INT’L L.J. 67 (2005). The authors identify three principal purposes of BITs: protection of foreign direct investment (FDI), promotion of FDI, and liberalization of national economies stimulated by FDI. Id. at 75–78. They conclude that that BITs generally have been successful in reaching the goals of protection, and thereby promotion, of FDI. Id. at 90, 106–07, 111. As to economic liberalization, they conclude:

BITs may also have an indirect positive effect on liberalization of host country economics. Under certain circumstances, the introduction of FDI can contribute to that liberalization. . . . Economic liberalization is a complex process that cannot be brought about by any single magic bullet. It requires a host of sound policies, laws, and institutions across a wide domain of human activity. BITs are just one policy instrument among many others that may facilitate the process.

Id. at 94–95. For a different view, see Jason Webb Yackee, Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence, 51 VA. J. INT’L L. 397, 438 (2011) (concluding “that BITs generally have little causal role in promoting foreign investment”).
fair and equitable treatment of foreign investors; (iv) most favored nation (MFN) treatment, under which foreign investors must receive treatment no less favorable than that afforded to investors from any other state; and (v) national treatment, under which foreign investors must receive treatment no less favorable than that afforded its national, domestic investors. In addition, BITs typically have “teeth” to protect investors by providing that a state’s obligations under the BIT are enforceable under an ISDS.

Cape Town reflects precisely the same risk-reduction principle embodied in typical BITs. By reducing the risks that a creditor faces in entering into a secured financing or leasing transaction, Cape Town allows a debtor to obtain a lower-cost financing or lease. Like a BIT for investors, Cape Town’s risk-reduction approach provides inducements to a prospective creditor. The proposal here recognizes that Cape Town is indeed a form of investment treaty and that its economic rationale follows precisely the rationale under which states enter into BITs. Unlike the regime for investors under a typical BIT, however, Cape Town has no “teeth” allowing a creditor to enforce a Contracting State’s obligations. The proposal here would provide such an ISDS for Cape Town’s investors — creditors — for the purpose of enforcing compliance with a Contracting State’s obligations. Inspired by the typical ISDSs under BITs, a noncomplying Contracting State would be subject to binding arbitration and liable for damages to an aggrieved creditor.

2. The Cape Town Amendment Process

The Convention and the Aircraft Protocol each contain an article in their final provisions on “Review Conferences, amendments and related matters.” Except for the internal references to the Convention or the Aircraft Protocol, as the case may be, each article is identical. Each provides for the convening of a “Review Conference” if requested by “not

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92. In one relevant respect, however, Cape Town differs from a BIT. Cape Town draws no distinctions based on the location or nationality of a creditor whereas BITs normally protect only nationals of the state parties. Part II.A.3.b. of this Essay considers whether creditors that would be entitled to utilize an arbitration mechanism under Cape Town should be limited to those situated in a Contracting State other than the Contracting State that has (or is alleged to have) failed to comply with its Cape Town obligations (i.e., limited to “foreign” creditors).
93. Convention, supra note 2, art. 61; Aircraft Protocol, supra note 3, art. XXXVI. The corresponding provisions of the Rail Protocol and the Space Protocol are identical and the following discussion applies equally to them. Rail Protocol, supra note 4, art. XXXIII; Space Protocol, supra note 4, art. XLVII.
94. There is one exception to the statement in the text, Convention Article 61(4), discussed below. See infra text accompanying note 99.
less than twenty-five [percent] of the States Parties” to the Convention or Protocol. Among the matters to be considered by a Review Conference is “whether any modifications to this [Convention]/[Protocol] or the arrangements relating to the International Registry are desirable.” An amendment to the Convention or Aircraft Protocol must “be approved by at least a two-thirds majority of States Parties participating in the Conference.” Even if an amendment were approved, it would enter into force with respect to a state only upon that state’s ratification, acceptance, or approval of the amendment.

Convention Article 61(4) provides that if a proposed amendment would apply to more than one type of equipment, approval requires a two-thirds majority of states party to the relevant Protocol for such equipment and which are participating in the Review Conference. At the time of this writing, Luxembourg is the only state party to the Rail Protocol and no state is a party to the Space Protocol. Hypothetically, were a vote conducted at a Review Conference today, amendments applicable to the Space Protocol would require a two-thirds majority of participants and amendments applicable to the Rail Protocol would require such a two-thirds majority that includes Luxembourg.

As a conceptual matter there are other possible approaches for imposing a Cape Town ISDS that would not involve a Review Conference and amendment. For example, Contracting States could enter into a bilateral arrangement for enforcement. Alternatively, Contracting States party to a BIT could amend a BIT that is already in place to include the Cape Town obligations within its scope. However, both of these methods have large transaction costs, would cause delay, and are unlikely to produce widespread adoption. Thus the amendment process seems by far a more straightforward and appealing approach.

As should become apparent from the following discussion of the scope and content of an amendment, the amendment would involve highly technical aspects of the Convention and the three Protocols. In my view, a successful project would require a study group of experts, under the auspices of UNIDROIT, to prepare the text of the amendment in as close

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95. Convention, supra note 2, art. 61(2); Aircraft Protocol, supra note 3, art. XXXVI(2).
96. Convention, supra note 2, art. 61(2)(d); Aircraft Protocol, supra note 3, art. XXXVI(2)(d).
97. Convention, supra note 2, art. 61(3); Aircraft Protocol, supra note 3, art. XXXVI(3).
98. Convention, supra note 2, art. 61(3); Aircraft Protocol, supra note 3, art. XXXVI(3).
99. Convention, supra note 2, art. 61(4).
as possible to “final form” for submission to a Review Conference. Initially, a subgroup of two or three individuals should be tasked with the preparation of an initial draft. Additionally, the draft should be accompanied by an explanatory memorandum.

3. Scope and Content of the Amendment

a. Scope: Covered Obligations

It was suggested above that there should be a dichotomy between a Contracting State’s court or public official making a mistake, such as misinterpreting or misapplying Cape Town’s provisions, and a Contracting State’s non-compliance with its clear Cape Town obligations. The amendment and ISDS proposed here would provide remedies for an aggrieved creditor in the case of the latter (non-compliance), but not in the case of the former (a mistake). This approach would take account of which risks creditors can be presumed to have assumed and which risks they should be protected from.

Consider an example. Convention Article 11(1) provides that “[t]he debtor and the creditor may at any time agree in writing as to the events that constitute a default or otherwise give rise to the rights and remedies specified in Articles 8 to 10 and 13.” Creditors may be presumed to understand that they may need to use a court of a Contracting State in order to assert the rights and remedies mentioned in Article 11 and that a court would condition the availability of such rights and remedies upon the creditor establishing that a default has occurred. In that connection, a creditor also may be presumed to have accepted the risk that the court could disagree with the creditor’s view of the facts and determine, contrary to the creditor’s position, that a default has not occurred. On the other hand, if the court determines that no default has occurred because it will not honor the parties’ agreement as to what constitutes a default, then that would appear to be the sort of risk that the creditor should not be presumed to have assumed. In the latter case, the proposed ISDS would be available to provide a remedy to the creditor.

The dichotomy may not always be clear, which could present difficulties when trying to establish which risks are presumed to be assumed by a creditor. For that reason, the proposal calls for a precise identification of a Contracting State’s Cape Town obligations as to which the ISDS would be

102. See supra text accompanying note 54.
103. Convention, supra note 2, art. 11(1).
104. See also supra text accompanying notes 55–59 (discussing the example of mistakes or misinterpretations in the application of Cape Town’s priority rules).
applicable.\textsuperscript{105} While I do not offer here a definitive listing of these obligations, I do identify below the obligations or types of obligations as to which serious consideration should be given for the applicability of an ISDS.

My tentative list of enforceable obligations includes a Contracting State’s obligation to provide:

(i) a creditor’s right to take possession of an object in the event of default,\textsuperscript{106} and the additional remedies of sale, lease, or collection afforded to a chargee;\textsuperscript{107}

(ii) a conditional seller’s or lessor’s right of termination;\textsuperscript{108}

(iii) a chargee’s right of vesting;\textsuperscript{109}

(iv) respect for the parties’ agreement as to a default or other trigger for rights and remedies;\textsuperscript{110}

(v) speedy relief pending final determination;\textsuperscript{111}

(vi) respect for the parties’ agreement as to choice of applicable law;\textsuperscript{112}

(vii) de-registration of an aircraft and export and physical transfer of an aircraft object;\textsuperscript{113}

(viii) modifications to speedy relief pending final determination (when applicable);\textsuperscript{114}

(ix) remedies on insolvency (Alternative B, when applicable);\textsuperscript{115}

(x) insolvency assistance (when applicable);\textsuperscript{116} and

(xi) all of the OECD ASU qualifying declarations.\textsuperscript{117}

Before settling on which Cape Town obligations should be covered by an ISDS, more discussion is needed. Moreover, each potential enforceable obligation should be tested with hypothetical factual scenarios in order to assess how enforcement might (or might not) be effective in practice. Every effort should be made to ensure that the list of covered obligations is not
materially under- or over-inclusive. The foregoing list is presented solely as a starting point for discussion.

This discussion highlights the uniqueness of a Cape Town ISDS when compared to typical disputes under BITs. In the BIT context, the ISDS normally involves applying the dispute resolution procedure *in lieu of* resort to the host state’s courts. In the Cape Town context, the ISDS mechanism (binding arbitration) often would be invoked *after* resorting to the courts. Under Cape Town, court relief might first be sought to enforce remedies against the debtor. Then the ISDS enforcement mechanism could later be invoked to provide a remedy against the allegedly offending Contracting State.

b. Scope: Covered (Protected) Creditors

The discussion has proceeded thus far on the basis of the favorable comparisons between typical BITs and Cape Town in the context of the underlying economic rationales. BITs generally protect only foreign investors, however, not national or domestic investors. Cape Town, on the other hand, provides rights and remedies to creditors irrespective of a creditor’s nationality and is not limited to the protection of foreign creditors. This raises the question whether creditors that would be entitled to utilize an ISDS under Cape Town should be limited to those situated in a Contracting State *other* than the Contracting State that has (or is alleged to have) failed to comply with its Cape Town obligations (i.e., limited to “foreign” creditors). I have not yet formed an opinion on this question. But it is one which a Review Conference would likely be called upon to consider.

c. Implementation Provision

An amendment also could provide a declaration mechanism that would be directed toward overcoming implementation problems. Under this approach, a state could make a declaration to the following effect with respect to the covered Cape Town obligations: “The obligations of [Contracting State] with respect to the provisions of the Convention and the Protocol[s] listed below are effective and binding on the government of [Contracting State], including its courts and other tribunals and its officials, immediately upon the entry into force of the [Cape Town amendment] in respect of the government of [Contracting State], without further executive, legislative, or administrative action or implementation of any kind and notwithstanding any conflicting rule of law under the laws of [Contracting State].” The extent to which such a provision and declaration
would or would not overcome implementation problems in any particular state is beyond the scope of this Essay.118

d. Structure of ISDS for Award of Damages

Given the unique aspects of an ISDS in the Cape Town context it is undoubtedly the case that ISDS under various BITs would not provide ideal examples. Even so, considering a prospective Cape Town ISDS in the context of typical BIT dispute resolution arrangements will provide helpful examples and a checklist of considerations. For this purpose, the 2012 U.S. Model Bilateral Investment Treaty (2012 Model BIT) offers a useful point of departure.119

As with any well-drawn “arbitration clause,” an amendment under Cape Town should identify the disputes that would be subject to the ISDS. To do so in the context of Cape Town, it should specify the obligations of a Contracting State the breach of which would be within the scope of binding arbitration. A starting point for this list has been mentioned above in Part II.A.3.a.

Consider next the temporal dimension of an ISDS. Section B of the 2012 Model BIT requires a claimant to first attempt to resolve a dispute by consultation and negotiation.120 It further provides that at least ninety days before a claimant submits a claim to arbitration, the claimant must deliver to the respondent written notice of its intention to submit the claim, and Section B specifies the required content of this notice.121 The notice is, in effect, the claimant’s “pleading” in which it states its claim. Finally, a claimant may submit a claim to arbitration only after “six months have elapsed since the events giving rise to the claim.”122 A Review Conference would have to consider whether time restrictions similar to those provided by the 2012 Model BIT (which are typical) would be appropriate. Given the

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118. Because the relationship between a treaty and national domestic law is a matter governed by the national law, states may differ in their treatment of a treaty provision such as the one set out in the text. See ROY GOODE ET AL., TRANSNATIONAL COMMERCIAL LAW: INTERNATIONAL INSTRUMENTS AND COMMENTARY 2 (2d ed. 2012) (“Domestic law, usually constitutional in nature, determines whether and the extent to which a treaty needs to be incorporated or otherwise transformed into domestic law by further act.”). I note in passing that if a Review Conference were to be convened it also would present the opportunity to rectify any drafting errors or “glitches” in the texts of Cape Town, without opening the door for the reconsideration of basic policy issues resolved by Cape Town.


120. 2012 Model BIT, supra note 119, art. 23.

121. Id. art. 24(2).

122. Id. art. 24(3). The 2012 Model BIT also provides for a statute of limitations under which claims may not be submitted to arbitration “if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged.” Id. art. 26(1).
discrete provisions of Cape Town that would be appropriate for submission to arbitration, when compared to the broad protections generally provided by BITs, it may be that the time-frames for notice and submission to arbitration could be considerably shorter.

Under the 2012 Model BIT a claimant may submit a claim to arbitration under one of three sets of rules: (i) under the International Centre for Settlement of Investment Disputes (ICSID) Convention and the ICSID Rules of Procedure for Arbitration Proceedings,\(^{123}\) (ii) under the ICSID Additional Facility Rules,\(^{124}\) or (iii) under the UN Commission on International Trade Law (UNCITRAL) Arbitration Rules.\(^{125}\) In addition, the claimant and respondent may agree to use other arbitration institutions or rules.\(^{126}\) The 2012 Model BIT’s approach would be quite plausible for an amendment to the Convention and the three Protocols as there does not appear to be anything about a dispute under Cape Town that would require rules that deviate from those typically applied in binding arbitration under BITs.\(^{127}\)

An amendment should be clear as to when a breach of a Contracting State’s Cape Town obligation accrues. For example, if the Contracting State’s court fails to provide a creditor with a Cape Town-mandated remedy, such a breach should provide the creditor with a remedy under the ISDS — subject of course to applicable timing requirements on notification and submission to arbitration. The creditor should not be required to pursue appellate or other additional proceedings. The Contracting State’s judicial system having (allegedly) failed the test, the creditor’s rights under the amendment should be triggered.

The amendment also could resolve many aspects of an ISDS by adopting the approach taken in various other contexts in Cape Town, allowing discretion through the use of declarations. For example, as to the timing issues discussed above, a Contracting State could in a declaration

\(^{123}\) Id. art. 24(3)(a); INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES [ICSID], Rules of Procedure for Arbitration Proceedings (Arbitration Rules), in ICSID CONVENTION, REGULATIONS AND RULES, at 99, ICSID Doc. ICSID/15 (2006). The claimant may choose the ICSID Rules only if the respondent state and the “non-disputing Party” (i.e., the claimant’s home state) are parties to the ICSID Convention. Id. at 5.

\(^{124}\) 2012 Model BIT, supra note 119, art. 24(3)(b); ICSID, ICSID ADDITIONAL FACILITY RULES, ICSID Doc. No. ICSID/11 (2006). The claimant may choose the Additional Facility Rules only if either of the respondent or the non-disputing Party is a party to the ICSID Convention.


\(^{126}\) 2012 Model BIT, supra note 119, art. 24(3)(d).

\(^{127}\) Of course, the same holds true for various other aspects of an ISDS under Cape Town, such as the selection of arbitrators that will compose the arbitral tribunal. For example, the 2012 Model BIT provides for the claimant and respondent each to name an arbitrator and for a third, the presiding arbitrator, to be appointed by agreement between the claimant and respondent. Id. art. 27(1).
select from a menu of alternative time limits or simply specify a time limit that it chooses to adopt.\textsuperscript{128} Similarly, a Contracting State that found one set of arbitration rules to be unacceptable could declare that claimants against it could not choose those rules. The same approach could be taken for the identification of the obligations covered by the ISDS and for other details. While the ISDS applicable to any particular Contracting State must be clear, it would not be necessary for every Contracting State to be subject to an identical regime.

A final consideration to be addressed here is the relief that should be available under a Cape Town ISDS. Under the 2012 Model BIT, a “tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; and (b) restitution of property.”\textsuperscript{129} In the case of restitution, however, the award must “provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.”\textsuperscript{130} It follows that a respondent state could not be ordered to take any specific action other than restitution and even then it would have the option to pay damages. A Cape Town regime could provide that a Contracting State in breach of its covered obligations may be ordered to comply. For example, it could provide that an arbitral award could require the debtor to turn over an object to the creditor. Additionally, it could even provide that such an arbitral award could be specifically enforced in a court of the Contracting State. This outcome is highly unlikely though, because it is doubtful whether Contracting States would agree to give an arbitral tribunal that degree of power. As a practical matter, relief would likely be limited to damages. The ISDS would not function as an in-kind substitute for the rights and remedies to which a creditor is entitled under Cape Town. However, the 2012 Model BIT does provide that “[a] tribunal may also award costs and attorney’s fees in accordance with this Treaty and the applicable arbitration rules.”\textsuperscript{131} It further requires each state party to “provide for the enforcement of an award in its territory.”\textsuperscript{132} One might expect a similar package of provisions relating to awards in a Cape Town ISDS.

While a thorough analysis of all of the issues that must be addressed when fashioning a Cape Town ISDS to provide for binding arbitration is beyond the scope of this Essay, the foregoing provides some examples of how BIT ISDS can inform the Cape Town ISDS discussion. It also

\textsuperscript{128} The latter approach was taken with respect to Aircraft Protocol Article XI for the relevant time period. Aircraft Protocol, \textit{supra} note 3, arts. XI(3) (Alternative A), XI(2) (Alternative B), XXX(3).

\textsuperscript{129} 2012 Model BIT, \textit{supra} note 119, art 34(1).

\textsuperscript{130} \textit{Id}.

\textsuperscript{131} \textit{Id}.

\textsuperscript{132} \textit{Id.} art. 34(7).
suggests some respects in which a Cape Town regime may need to find its own path.

B. Current Debates on BITs and Investor-State Enforcement: Red Herring

In some quarters “BIT” is a “four-letter word.” The UN Conference on Trade and Development (UNCTAD) noted in 2012 that the negotiation of IIAs, including BITs, “continues to lose momentum.” It attributed this development in part to “a gradual shift towards regional treaty making.” More pertinent to this discussion, it pointed to “the fact that IIAs are becoming increasingly controversial and politically sensitive, primarily owing to the spread of IIA-based investor-state arbitrations.” For example, in 2011, Australia announced that it would no longer include ISDS provisions in its IIAs. Also in 2011, Bolivia denounced its BIT with the United States. In 2012, Venezuela announced its plan to withdraw from the ICSID Convention — an action already taken by both Bolivia and Ecuador. Argentina has refused to pay large and long-outstanding arbitral awards to United States firms. Moreover, in the past several years there has been a substantial and rapid increase in the number of ISDS cases. This may be attributable to increased investor awareness (and that of their counsel), significant increases in foreign direct investment, states’ “reassertion of their role in regulating and steering the economy, as implemented through a number of national regulatory changes,” and “[i]ncreased nationalizations, especially in Latin America” (Venezuela and Argentina being examples).

As UNCTAD has summarized: “Over time, the public discourse about the usefulness and legitimacy of the ISDS mechanism has been gaining momentum, sometimes taking place at the national level . . . and sometimes having an international dimension . . .”

For those of the BIT-is-a-four-letter-word persuasion, the suggestion of adding an ISDS to Cape Town (or anything else) prompts a knee-jerk

133. For readers unfamiliar with this idiom, see Four-Letter Word, DICTIONARY.COM http://dictionary.reference.com/browse/four-letter+word (last visited Apr. 15, 2015) (defining “four-letter word” as “any of a number of short words, usually of four letters, considered offensive or vulgar because of their reference to excrement or sex” and as “any word, typically of four letters, that represents something forbidden, disliked, or regarded with extreme distaste”).
135. Id.
136. Id.
137. Id. at 87.
138. Id.
139. Id.
140. Id.
141. Id. at 86.
142. Id. (emphasis in original).
143. Id. at 88 (emphasis in original) (citation omitted).
reaction — the idea is a non-starter. However, the serious criticisms of BITs and other IIAs, including their use of ISDS, do not apply in the context of an ISDS for Cape Town. I take no side here in the BIT/ISDS debate and need not do so in order to support serious consideration of an ISDS for Cape Town.

To make the point, the following discussion examines a potential Cape Town ISDS from the perspective of one of the harshest critical evaluations of investment arbitration to date — Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom (“Profiting”). Although this article reads more like a polemical rant than an objective assessment, it still serves as a useful framework for identifying some of the evils that people have associated with investment arbitration. The following discussion first summarizes the principal theses on which Profiting’s critique is based. It then explains why the critique, even assuming it is warranted on the merits, would not apply to a Cape Town ISDS.

The overarching theme of Profiting is that investment arbitration does not provide an independent and fair dispute resolution process, because it has become a lucrative industry that is dominated by lawyers and law firms (as well as arbitrators) primarily motivated by a profit incentive.

144. PIA EBERHARDT & CECILIA OLIVET, CORPORATE EUR. OBSERVATORY & TRANSNATIONAL INST, PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELLING AN INVESTMENT ARBITRATION BOOM (2012), available at http://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf. Profiting was published by Corporate Europe Observatory (CEO) and Transnational Institute (TI). CEO’s website explains that it “is a research and campaign group working to expose and challenge the privileges of an informal “club” or “inner circle,” how arbitrators and lawyer tend to “shun” those who are not members of its staff. See, e.g., id. at 18–33 (Chapter 3, “Legal Vultures: Driving Demand for Investment Arbitration”). This chapter discusses, inter alia, the lucrative nature of the business for the twenty busiest investment arbitration law firms, how these law firms create de facto barriers to entry into that business, their familiarity with the arbitrators, how governments are frightened into submission by threats of investment disputes, and the lobbying of lawyers to deter treaty reforms.

145. Id. at 15.

146. Id. at 18–33 (Chapter 3, “Legal Vultures: Driving Demand for Investment Arbitration”). This chapter discusses, inter alia, the lucrative nature of the business for the twenty busiest investment arbitration law firms, how these law firms create de facto barriers to entry into that business, their familiarity with the arbitrators, how governments are frightened into submission by threats of investment disputes, and the lobbying of lawyers to deter treaty reforms.
This theory is used to explain the enormous growth in the numbers of cases brought using ISDS frameworks, the huge damage awards, and the staggering attorney and arbitrator fees. It also argues that real and potential conflicts of interests among arbitrators and attorneys, as well as the familiarity of the specialized arbitration attorneys with the repeat-player arbitrators, have encouraged the increase in numbers of cases and the size of awards.

In addition to this main thesis, Profiting argues that BITs and other IIAs that provide for investment arbitration were imposed on the states that now are suffering the consequences. Another theme highlights how investment arbitration serves as an assault on governments’ social policies. “For law firms looking to maximise profits from arbitration, state regulations to protect the environment, public health and social security have become lucrative business opportunities.” Profiting highlights a number of examples that exemplify its claims and which demonstrate the enormous reach and breadth of BITs and other IIAs. Philip Morris sued Uruguay and Australia under BITs, claiming damages from those states’ respective anti-smoking laws. Vattenfall (Swedish energy firm) sued Germany for 1.4 billion Euro over environmental restrictions placed on coal-fired power plants. Vattenfall also sued Germany for 3.7 billion Euro for lost profits from its nuclear power plants after Germany decided to phase out the use of nuclear energy following the disaster in Fukushima. Many firms brought cases against Argentina based on its freezing of utility rates and devaluation of currency during its 2001–2002 financial crisis.

The foregoing sketch of Profiting’s theses and conclusions is sufficient for the present purposes of considering its critique in the context of a Cape Town ISDS. BITs and many other IIAs with investment arbitration mechanisms cover a broad range of protections that affect enormously varied types of investments reaching across a state’s entire economy. Cape

critical of the system, and the fifteen arbitrators who have decided fifty-five percent of the investment treaty disputes.

149. Id. at 13–15 (discussing growth of investment arbitration industry and fees of arbitrators and lawyers).

150. See supra notes 147–48.

151. EBERHARDT & OLIVET, supra note 144, at 11 (“Historically, [the treaties] were put in place by Western governments wanting to protect their companies when they invested abroad.”).

152. Id. at 24.

153. Id. at 13.

154. Id.

155. Id. at 13, 27. Both Vattenfall cases were brought under the multilateral Energy Charter Treaty, which makes provision for investor arbitration similar to provisions found in typical BITs. Id. at 13; see Energy Charter Treaty, supra note 16.

156. EBERHARDT & OLIVET, supra note 144, at 13, 19 (“By the end of 2008, awards against . . . [Argentina] had reached a total of US$1.15 billion.”) (footnote omitted).
Town, on the other hand, does not. Cape Town addresses only discrete items of mobile equipment and related associated rights with respect to which debtors have voluntarily entered into contractual arrangements to create international interests governed by its asset-based financing and leasing regime. The obligations of Contracting States under Cape Town are likewise discrete and precisely targeted to the realization of the rights and remedies inherent in asset-based financing and leasing.

Not only is the reach of Cape Town’s targeted and discrete regime wholly unlike that of typical BITs, but the occurrence of a creditor’s exercise of remedies, and thereby the most likely potential for a Contracting State to run afoul of its obligations, is likely to be a highly unusual and infrequent event. The nine-plus years since the Convention and the Aircraft Protocol entered into force have generally supported this prediction.157

From these unique features, it is difficult to imagine how a Cape Town ISDS could present any realistic potential for interference with a Contracting State’s public health and safety, environmental, social welfare, or other regulatory domains. It also follows that it is equally unimaginable that a lucrative industry providing enormous economic benefits to lawyers and arbitrators would emerge from the adoption of a Cape Town ISDS.

A BIT regime and Cape Town are alike in their common purpose — to induce investment.158 Were an amendment to incorporate an ISDS for Cape Town there would be a second common attribute — the provision for binding investor-state arbitration. But a binding investor-state arbitration regime under Cape Town would nonetheless be distinguishable from that under a BIT in the context of the impairment of a state’s sovereignty. If BITs were “put in place by Western governments” as Profiting asserts,159 presumably that was a product of unequal bargaining power. This would not be the case if a Cape Town ISDS were adopted. Instead the Convention, the Aircraft Protocol, and any future Protocol or amendment would reflect a multilateral convention which many Contracting States willingly joined in order to achieve the benefits of lower-cost financing and leasing.

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157. *Convention — Status, supra note 11; Aircraft Protocol — Status, supra note 11.*

158. See supra Part I.A. of this Essay. Whether and to what extent BITs have fulfilled this purpose is not clear. *Compare Salacuse & Sullivan, supra note 89, at 90, 106–07, 111 (finding that BITs generally have been successful in reaching the goals of protecting investors and thereby promoting investment), with Yackee, supra note 89, at 438 (“BITs generally have little causal role in promoting foreign investment.”).* It does seem clear, based on the operation of the ASU and the CTC Discount, that the Convention and the Aircraft Protocol have succeeded in this respect. See supra Part I.A. of this Essay.

159. *EBERHARDT & OLIVET, supra note 144, at 11.*
C. Feasibility of a Convention Amendment on Investor-State Enforcement: Should the Problem Be Addressed?

Given Cape Town's economic rationale of providing lower-cost financing and leasing, there should be no principled objection to including an ISDS feature in Cape Town. ISDS provisions could only increase the ex ante market confidence that Contracting States would comply with their Cape Town obligations. Any objections based on sovereignty also fail. As already explained, even if an amendment adding an ISDS feature were approved by a Review Conference, the amendment would bind a Contracting State only upon its ratification, acceptance, or approval of the amendment. Consequently, any plausible objections must be based on the feasibility of the project, not the likely consequences of creating an ISDS feature for Cape Town. This Subpart discusses the feasibility question.

The principal test for feasibility of the project would be whether there would exist sufficient state support for including an ISDS feature in Cape Town. Part of the states' attitudes could turn on the level of interest in and priority of such a project within the UNIDROIT Secretariat and Governing Council, which in turn would be influenced by scarce resources and competing demands for funding and time commitments. The support of states and UNIDROIT for such a project could be influenced substantially by prevailing views on the question of whether there really are compliance problems that should be addressed. Given imperfect data and the absence of a functional crystal ball, if and when states are asked to weigh in on that question they will have to make their best assessment under the circumstances. Even if there were a consensus that such problems exist and should be addressed, states (and UNIDROIT) also would be called upon to consider whether a substantial number of Contracting States would have any interest in adopting an amendment incorporating an ISDS feature. Notwithstanding the argument made above, some states may take the view that BIT investor-state arbitration is so toxic that an ISDS project would never get off the ground.

160. See, e.g., Wool, Compliance, supra note 63, at 21 ("[a] treaty [ ] imposes binding legal consequences for noncompliance (such as arbitration initiated by [a] party[ ]), compliance is more likely.").

161. Consider the requirement of twenty-five percent of the Contracting States necessary even to call for a Review Conference and the two-thirds majority necessary for the approval of an amendment. See supra text accompanying notes 95–97.

162. I do not know whether ICAO would have an interest in pursuing with UNIDROIT an ISDS amendment. But if ICAO wished to maintain the partnership formed with UNIDROIT in developing the Convention and the Aircraft Protocol, then its interest would have to be taken into account as well.

163. See supra Part I.C. of this Essay (discussing whether there is a compliance problem).

164. See supra Part II.B. of this Essay.
Why would — or should — a Contracting State have any interest in adopting an ISDS regime for Cape Town? Clearly its adoption would contribute credible evidence of the state’s intention to comply with its Cape Town obligations. But would that provide sufficient marginal benefits? If it turns out that the credit markets were to perceive sufficient risks of non-compliance with Cape Town obligations, then the ASU might be modified to provide additional benefits (by way of reductions in financing costs) for states that adopt an ISDS regime. One approach would be for the ASU to treat the adoption as a qualifying declaration. Some states with a less than pristine compliance history, which may not have qualified for the CTC Discount (or which may have lost it), might adopt the ISDS feature in order to repair their reputations. Clearly consultation would be needed to determine the marginal benefits each country could receive under an ISDS framework; however, it would be unfortunate if the ISDS proposal offered here were simply dismissed without further serious consideration.

Some feasibility considerations are the same as those that would be involved in a project to develop an international secured transactions registry of general application, addressed in Part One of this essay series. These include the opportunity costs to UNIDROIT of pursuing an ISDS project, presumably to the exclusion of other potential projects. Additionally, there are substantial costs involved with a preliminary study and with holding the sessions of a Review Conference to finalize an amendment. However, these costs may be mitigated by ongoing developments. The UNIDROIT Governing Council has approved a preliminary study of the potential for a Fourth Protocol for Cape Town to cover mining, agricultural, and construction equipment (dubbed “MAC equipment”). The Study Group held its first and second meetings at UNIDROIT headquarters in Rome from December 15–17, 2014, and April 8–9, 2015. If the Study Group were supportive of an ISDS for the Fourth Protocol and included such a feature in a preliminary draft protocol, then it could be considered during subsequent governmental experts meetings and, eventually, at a diplomatic conference. A Review Conference could be convened to consider adding an ISDS for the Convention and its three existing Protocols during the course of those meetings. In this fashion, an ISDS amendment project could free-ride on the MAC project. While this approach might require adding a few extra days to the meeting

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165. See Mooney, Jr., Part One, supra note 6, at 181–85.
166. However, as already mentioned, two or three individuals might be assigned the preparation of an initial draft accompanied by an explanatory memorandum. See supra Part II.A.2. of this Essay.
schedules, it would still drastically reduce the costs associated with a Review Conference when compared to those of freestanding sessions.\footnote{169}

CONCLUSION

This Essay has explored whether an ISDS feature for Cape Town is needed, plausible, and feasible. Adopting an ISDS for Cape Town would recognize that the extension of credit through asset-based financing and leasing is an investment that requires protection just as does foreign direct investment covered by BITs and other IIAs. Increased protection induces the extension of credit (investment). An ISDS component of Cape Town could only enhance its effectiveness.

The Essay also considered whether there are problems of implementation and compliance that would justify the costs of adopting an amendment to Cape Town to create an ISDS, largely relying on the thorough and invaluable research, investigation, and analysis of Jeffrey Wool. While it reaches no firm conclusion on this question, given the scarcity of data, the Essay argued that it is too early to foreclose serious consideration of a Cape Town ISDS. With hindsight, it was an unfortunate mistake that an ISDS for Cape Town was not addressed at the outset of the negotiation process.\footnote{170}

The Essay then turned to the substance of a Cape Town ISDS. It outlined the potential scope and content of an ISDS for Cape Town and explored the feasibility of adopting an amendment to incorporate an ISDS into the Convention and its Protocols. It then explained that the criticisms leveled at ISDS for BITs and other IIAs would not be applicable to a Cape Town ISDS.

Wholly aside from the prospect of an ISDS for Cape Town, one overarching goal of this Essay was to advance, introduce, and raise consciousness of the idea of an ISDS in a transnational commercial law regime outside the typical domain of BITs and IIAs. As far as I know, this is a novel approach. As to whether the idea has legs, however, only time will tell.

\footnote{169} There is some precedent for convening meetings in joint capacities. In 1999 and 2000 there were three joint sessions of a UNIDROIT Committee of Governmental Experts and a Sub-Committee of the ICAO Legal Committee. \textit{GOODE, OFFICIAL COMMENTARY, supra note 7, at 6}. This is not precisely what the approach suggested in the text would entail, however.

\footnote{170} I do not suggest that had the issue been addressed an ISDS feature would have emerged from the process. However, given the success of Cape Town’s flexible approach toward permitted declarations and the widespread acceptance of Aircraft Protocol Article XI, Alternative A, had the issue been raised it certainly is plausible that an optional ISDS would have emerged.