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A Response to the Criticism against ISDS by EFILA

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(*)

Abstract

This article analyzes the validity of some of the most often-heard criticism against ISDS. It concludes that most of that criticism is neither supported by statistical evidence nor by the practice of international arbitration law. Consequently, this article cautions against the current hyper-activism to reform or even to dismantle some of the salient features of investor-state dispute settlement (ISDS), and instead, calls for a rational and balanced debate based on facts with a view to improving the ISDS system where necessary in an orderly fashion.

1 INTRODUCTION

Since the Lisbon Treaty entered into force almost six years ago, the European Commission began developing its own European Union (EU) investment policy. The core of this new investment policy is the agreement of trade and investment treaties with strategically important countries.

In the context of these negotiations, the critique against investor-state dispute settlement (ISDS), which is contained in practically all Bilateral Investment Treaties (BITs) as well as in recently concluded Free Trade Agreements (FTAs) such as the EU-Canada Treaty (CETA) and the EU-Singapore Treaty, has become more vocal. It seems that the current heated debate in Europe regarding the EU's investment policy is comparable to what the United States went through in the past decade when it updated its Model BIT text of 2004, and more recently of 2012. Europe is experiencing similar growing pains as the United States when calibrating its investment policy. However, the situation of the EU is more complicated because in the previous fifty years the Member States developed individually their investment policy by concluding about 1,500 BITs with the rest of the world.

^{P1} More specifically, since June 2013, the EU and the United States have been negotiating the Transatlantic Trade and Investment Partnership (TTIP) Agreement, the first preferential trade and investment agreement between the two dominant economic players worldwide. The European Commission is negotiating the agreement on the basis of Directives issued by the Council and it consults continuously with the Member States, members of the European Parliament and civil society throughout the process. The defenders of TTIP argue that the agreement would result in multilateral economic growth, ⁽¹⁾ while its critics claim that it would increase corporate power-houses and make it more difficult for governments to regulate markets for public benefit. ⁽²⁾

The inclusion of ISDS in the Agreement is considered to encourage investment flows. ⁽³⁾ The European Commission argues that ISDS helps to attract, and more importantly maintain US Foreign Direct Investment (FDI) flows into the EU and, therefore, needs to be included in the trade agreement. ⁽⁴⁾ However, some radical critics see it as a 'Trojan horse' enhancing the power of US companies at the expense of national sovereignty and interests. ⁽⁵⁾ In an attempt to appease the critics, the European Commission had paused the negotiations on ISDS for a few months and launched a public consultation on the topic. ⁽⁶⁾ European Federation for Investment Law and Arbitration (EFILA) also participated in this consultation. ⁽⁷⁾ The results of this consultation were that about 150,000 submissions were received by the European Commission. These submissions motivated changes in EU investment policies such as discussions on the introduction of an appellate mechanism or the creation of a permanent court.

Among the concerns raised were the supposedly pro-investor interpretation of investment treaty provisions and their perceived unpredictability; the alleged lack of transparency of arbitral proceedings; the alleged lack of independence and impartiality of arbitrators. It was also alleged that ISDS bypasses the operation of domestic law and national courts and stymies the right of states to regulate. Criticisms have also been raised against the investor-state arbitration process itself, claiming that it allows partisan, self-interested arbitrators to secretly overrule governments with no right of appeal. This article will examine the validity of all those criticisms by providing an in-depth analysis, based on arbitration practice and literature.

2 PRO-INVESTOR INTERPRETATION OF SUBSTANTIVE TREATY PROTECTIONS

2.1 Pro-investor interpretation of investment treaties

To verify the validity of the argument that arbitral tribunals apply a broad pro-investor

interpretation of substantive protection provisions, (8) it would be necessary (at least at an initial stage of research) to implement a quantitative and qualitative analysis of investment arbitration final awards 'favouring' the investor on the merits. From the outset, it is important to make some (general) language differentiations; an award decided in favour of the state is an award in which the investor's claims are dismissed and/or counterclaims are successful; an award decided in favour of the investor is an award in which the investor's claim wins on the merits and is entitled to payment and/or compensation; and a pro-jurisdiction award is an award where the tribunal finds jurisdiction without deciding on the merits of the dispute. Some literature has tried to argue that a tribunal upholding its jurisdiction is in favour of the investor. However, there is no causal link between a finding on jurisdiction and an arbitral tribunal ultimately being pro-investor on the merits of the case.

In fact, the United Nations Commission on International Trade Law (UNCTAD) World Investment Report of 2014 contains the following statistics: 'arbitral developments...brought the overall of concluded cases to 274, of these, approximately 43% of cases were decided in favour of the State, 31% in favour of the investor and 27% were settled.' (9) The 2014 UNCTAD statistics also reveal that from all the cases where the tribunal found that it had jurisdiction, a majority was eventually decided in favour of states. In this context, the suggestion that a pro-investor interpretation is applied to substantive protections seems not to be accurate. Rather, one could argue that ISDS provides for a stable balance between the protection of investors and the protection of states' regulatory powers. Indeed, UNCTAD figures confirm that states continue to win more cases than investors, thus the pro-investor argument is unfounded. This is also confirmed by the latest International Centre for Settlement of Investment Disputes (ICSID) statistics (2015-1), which show that only 46% of all ICSID awards upheld claims in part or in full, while 53% of the claims were dismissed either for lack of jurisdiction or on the merits. One per cent of the claims were manifestly without legal merit. (10) At the very least, the outcomes of all known investment arbitration cases indicated that by the end of 2014 arbitral tribunals were in most cases ruling not in favour of investors, but rather in favour of states.

The above statistics serve only to dispel the claim that the majority of investment cases are decided in favour of the investor. In this regard it is worth highlighting that the measure of whether arbitral tribunals are fair or pro-investor cannot be conclusively ascertained by looking at the percentage of cases won. Critics of the system who focus on the numbers of cases won or lost are masking the more vital question: Do investors win more cases than they should win, because ISDS is somehow canted in their favour? Such a question, which will be addressed below, cannot be objectively determined through statistics.

It is not a coincidence that most currently existing International Investment Agreements (IIAs) contain very broad definitions of protected investments and investors as well as broad provisions describing substantive levels of protection (fair and equitable treatment, direct expropriation, etc.). States realize that by broadening the scope of the protection of investors and investments they increase their chances of attracting FDI. (11) It is not a broad and creative interpretation by arbitral tribunals, which expands the field of investment arbitration, but precisely the consciously broad wording of IIAs, which constitute boundaries for arbitral tribunals. In other words, based on a calculation of advantages offered by the IIAs, i.e., greater flow of FDIs, it has been a conscious decision of states parties to IIAs to include very broad language which provides protection to all imaginable investments and investors. The validity of this approach has been confirmed by a recently published study of the Dutch Statistical Office which shows that FDI flows increase by 35% after ratification of a BIT. (12) Of course, states are equally able to limit the scope of protected investors and investments in future IIAs. Indeed, we can observe this trend in relation to the treaties signed or currently negotiated by the EU (CETA and TTIP). (13)

2.2 Available means of interpretation

Moving from case outcomes to legal content analysis, so far there is no qualitative research to prove a pro-investor expansive approach on issues of legal interpretation of substantive standards. (14)

Previous analysis on diversity and harmonization of treaty interpretation (15) has found that there is no preferable method of treaty interpretation. In particular, there are no findings proving a preference for expansive interpretation of substantive protections, but rather a diversified system using a wide range of treaty interpretation mechanisms depending on the specific needs of the case in dispute. Due to the broad substantive protections granted to investors in BITs, arbitral tribunals have sought to rely on restrictive, expansive, and neutral interpretation techniques commonly known in the international public law sphere.

All IIAs, as treaties signed by two or more states, are governed by public international law. Therefore, the point of departure for all arbitral tribunals to interpret IIAs is the Vienna Convention on the Law of Treaties of 1969 (VCLT), an instrument concluded by most states in the world and reflecting customary international law. As correctly pointed out in a recent study prepared at the request of the European Parliament: (16)

[b]y abandoning the methodology of interpretation enshrined in the Vienna Convention on the Law of Treaties the tribunals would free themselves from the bonds of their masters, i.e. the state parties to the investment treaties. (17)

In fact, arbitral tribunals in investment cases always rely on means of interpretation provided in Article 31 (General rule of interpretation) of the VCLT. Sometimes, but very rarely, tribunals also rely on Article 32 which provides supplementary means of interpretation. Article 31 of the VCLT states that:

[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Article 32 VCLT further clarifies that the context of a treaty should comprise, *inter alia*, its text, Preamble, annexes, and other documents prepared in connection with the conclusion of the treaty or documents accepted as such by the parties. The purpose and object of all IIAs, usually found in Preambles, (18) is encouragement and reciprocal protection of investments. (19) Accordingly, prima facie, the perception may arise that the interpretation of broad provisions of the IIAs may be favourable for investors. (20) However, despite such broad language included in Preambles and the Treaty itself, many arbitral tribunals chose to follow 'a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments'. (21)

P6 For example, a restrictive approach has been used when arbitral tribunals have found ambiguity in the scope of *umbrella clauses*. Tribunals tend to choose a more conservative and prudential approach under the principle of '*in dubio pars mittor est sequenda*' (*SGS v. Pakistan* and *Noble Ventures v. Romania* (22)).

Equally, some tribunals have embraced an 'expansive' interpretative method in accordance with the object and purpose of the BIT, which is 'to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other'. (23) Given that the intention of states in negotiating and creating BITs is to create a broad framework to attract FDI and create legal certainty, it is somewhat difficult to argue that an expansive approach is favourable for the investor, since arbitral tribunals are only interpreting treaty provisions in line with the states' express intention at the time of the BITs' creation.

Furthermore, as indicated by UNCTAD in its most recent World Investment Report, many of the most recently concluded IIAs contain in their Preambles sustainable development-oriented features, which are further supplemented by 'treaty elements that aim more broadly at preserving regulatory space for public policies of host countries and/or at minimizing exposure to investment arbitration'. (24)

Moreover, sometimes in their reasoning arbitral tribunals review past decisions related to similar provisions found in other IIAs in order to arrive at their own judgment. However, as the principle of precedent does not exist in international law, (25) it is claimed that this may lead to inaccurate decisions which disregard the actual intention of the states parties to the particular treaty under consideration. (26) On this basis, critiques recommend that the ISDS system should be reformed and that there should be an appeal mechanism system to ensure that states remain masters of their treaties or that states should be able to issue a binding interpretation of provisions of the treaties. (27)

P7 This conclusion not only fails to recognize that international courts and tribunals, such as the International Court of Justice (ICJ) itself, often rely on their past decisions. (28) It also fails to recognize the fact that the states parties when creating the ISDS system have already established a necessary system of checks and balances in order to protect them from the creative interpretation of arbitral tribunals. The ultimate sanction imposed by the ISDS system on arbitral tribunals for failure to respect the limits imposed on it by states parties to the investment treaties is annulment of the awards. Indeed, states have successfully used the annulment procedure. (29) Nevertheless, it is recognized by many practitioners of investment arbitration that the annulment system as currently designed has some shortcomings and should be improved. (30)

To conclude, statistical evidence proves that states continue to win more cases, which means that arbitral tribunals do not decide pro-investor. On the contrary, arbitral tribunals make balanced decisions, which are informed by the relevant jurisprudence and literature.

3 DIVERGENT INTERPRETATION OF SIMILAR OR IDENTICAL IIA PROVISIONS: INCONSISTENCY AND UNPREDICTABILITY OF DECISIONS

Another often heard critique is that even though many IIAs contain very similar or identical provisions, investment arbitral tribunals tend to interpret them differently from case-to-case. This, critics say, precludes the emergence of a consistent body of law. However, it must be recalled from the outset that international investment law is not based on one multilateral treaty, but rather on a web of more than 3,000 investment treaties, FTAs, and other similar instruments designed to foster international trade and protect foreign investors and their investments. These treaties have been negotiated between different states parties, which logically reflect divergent preferences and needs.

P8 Since investment arbitral tribunals are established on an ad hoc, one-off basis, based on each individual treaty, the decisions of the tribunals are based on the respective treaty. Consequently, the decisions of these tribunals are bound to be based upon the substantive rules on a case-by-case basis. This fact clearly is a significant limitation towards achieving convergence.

Nonetheless, it must also be acknowledged that no arbitral tribunal is operating in 'clinical isolation', but rather refers extensively to previous relevant decisions of other arbitral tribunals. At the same time, it is important to note that the system of binding precedent is not applicable in international investment law. (31) Indeed, the system of a binding precedent is generally not applied in public international law. Similarly, to investment arbitral tribunals, judgments of the ICJ have no binding force except between the parties and in respect of the particular case. (32) Even if the system of binding precedent were incorporated into the system of international law, tribunals would not be able to fully rely on the interpretation of similar or identical provisions by other tribunals as the states parties' intent and negotiating history differ from treaty to treaty.

This reality has long been recognized by investment arbitral tribunals and other tribunals, as confirmed by a tribunal in *Methanex Corporation v. United States of America*:

As to the third general principle, the term is not to be examined in isolation or *in abstracto*, but in the context of the treaty and in the light of its object and purpose. One result of this third general principle, being relevant to *Methanex's* first argument on GATT jurisprudence and Article 1102 NAFTA, is that, as noted by the International Tribunal for the Law of the Sea in the *MOX Plant* case (as also applied in the *OSPAR* case): 'the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*.' (33)

P9 The facts of the cases decided by arbitral tribunals in investment disputes, even though similar, differ substantially, and at least as much as the economic and political realities differ between those sovereign states which signed the investment protection agreements. In other words, by their very nature investment disputes are bred from diverging realities and so this is sometimes reflected in the decisions of arbitral tribunals. When arbitral tribunals sometimes arrive at diverging views and different interpretations, one should not regard this as a failure of the system, but rather as a reminder that by its very nature the system is fragmented. (34)

In the absence of a multilateral investment treaty to regulate the entire body of investment law some divergences in treaty interpretations are a natural consequence of the system – system which over the past thirty years has nonetheless produced a fairly robust body of investment case law. Based on this case law, it can instead be argued that in spite of the web of broadly similar but not identical treaties on which investment law is based, there is still a high degree of consistency amongst tribunal decisions.

4 LACK OF TRANSPARENCY IN INVESTMENT DISPUTES

Investment arbitration is continually evolving and the question of transparency of the arbitral process is no exception. Transparency has been a principle under development for the last twenty years of the ISDS system, which has been taken into account for a long time as an evolving principle of the investment arbitration practice in its different expressions (i.e., Dominican Republic–Central America–United States Free Trade Agreement (CAFTA-DR), North American Free Trade Agreement (NAFTA), *amicus curiae*, and third party rights, etc.). (35) Transparency has evolved into its new role by positioning itself as a global norm in international investment law by means of the 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, (36) which has been adopted by the members of UNCITRAL.

4.1 Transparency in CAFTA, NAFTA and ICSID 2006 amendments

P10 The evolving practice of transparency in investor-state arbitration can be seen in the Central America Free Trade Agreement (CAFTA) and the North American Free Trade Agreement provisions, which allow non-disputing party participation. This Free Trade Agreement practice arose due to the fact that despite arbitral awards having confined and binding effects only on the disputing parties, (37) other non-disputing states parties can have the opportunity to influence the treaty interpretation analysis of future awards.

For example, Article 10.20.2 of the CAFTA-DR includes the possibility of a non-disputing state party (but CAFTA signatory (38)) to participate in an on-going investor-state arbitration case by submitting its opinion on issues of treaty interpretation that arise in that specific case. For this purpose, CAFTA, Article 10.21 obliges the respondent (state party) to transmit certain documents in relation to the arbitral procedure to the non-disputing states parties which permits them to become fully informed on the issues of that case before submitting their briefs to the arbitral tribunal (*Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. El Salvador*). (39)

P11 The CAFTA provisions on the participation of non-disputing states parties were influenced by the NAFTA practice. NAFTA, Article 1128 was the first treaty provision stipulating the right to make submissions by a non-disputing state party, which has been invoked in many NAFTA cases (*Pope & Talbot Inc. v. Canada*; (40) *Methanex Corp. v. United States* and *UPS Inc. v. Canada*; (41) *Mobil v. Canada*; (42) *ADF v. United States*; (43) *Bayview Irrigation et al. v. Mexico*; (44) *Chemtura Corp. v. Canada et al.*, (45) and most recently in *Mesa Power Group LLC v. Canada* (46)). Overall, the CAFTA and NAFTA practice of allowing participation of a non-disputing state party into arbitral proceedings dismisses the argument of lack of transparency in investment arbitration. Conversely, it illustrates the efforts investment law has made in pursuing transparency in many and diverse ways, for example, by monitoring not only pending cases but also by influencing

and submitting opinions on issues affecting treaty interpretation of further disputes.

Moreover, in 2006 the ICSID Rules were amended in order to enable non-dispute parties to intervene in arbitration proceedings and attend hearings. The new rules promote the disclosure of ICSID awards.

The other relevant amendment is in ICSID Rule 48, according to which the Centre must promptly include in its publications excerpts of the legal rules applied by arbitral tribunals. The aim of this amendment is to provide public access to the legal reasoning of the tribunals. (47) Indeed, all ICSID awards, which comprise about two-thirds of all ISDS awards, are published on the ICSID website and are freely accessible to the public. (48) This amendment to Rule 48 contributes to the construction of public case law and that in turn serves not only to provide persuasive reasoning for future ICSID tribunals but also ensures arbitral tribunals are subject to public scrutiny.

4.2 Amicus curiae

In addition to the submissions by non-disputing states parties, international investment law has also accepted amicus curiae (meaning 'friend of the court') submissions by non-disputing third parties. With an amicus curiae brief a non-disputing third party seeks to participate in a specific investment arbitration dispute in order to provide a neutral and well-supported opinion regarding an issue of public concern. Mostly, amicus participants in investment arbitration proceedings have been non-governmental organizations (NGOs). Arbitral tribunals have recognized the important value of amicus briefs, (49) highlighting that in addition to representing civil society, an amicus should demonstrate how its background, experience, expertise, and special perspectives can assist the tribunal in the particular case. (50) Thus, the amicus practice has accompanied and supported the development of transparency in investment arbitration by enabling issues concerning the general public interest to be considered within the arbitral process. (51)

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4.3 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

Although, there is no general obligation of confidentiality in investment arbitration, (52) there has been a general presumption of respecting the principles of confidentiality and privacy in investment treaty arbitration procedures. The new 2014 UNCITRAL Rules on Transparency reverse the general presumption on confidentiality by seeking to establish a balance between protecting confidential business information and national interests, on the one hand, and openness, on the other hand. (53) The UNCITRAL Transparency Rules cover all stages of the arbitration proceedings, including submissions to arbitral tribunals, arbitral awards, and the participation of non-disputing third parties such as the already mentioned amicus curiae. Moreover, these Rules are not only available for UNCITRAL or ad hoc arbitrations, but also for other arbitral proceedings initiated under other rules if they opt into them. Moreover, the free publication of information and documents submitted in arbitration proceedings has been a well-established practice by some widely well-known free databases, (54) including the List of Pending and Concluded ICSID Cases, (55) the publication of ECT cases, and the Permanent Court of Arbitration (PCA) Repository. (56) The UNCITRAL Transparency Rules reinforce this practice by providing for free publication of all the information submitted in an arbitral procedure (Articles 2 and 3), as well as requiring open hearings (Article 6). Indeed, the trend continues towards even more transparency, as is underlined by the new draft investment treaties between the EU and Canada and Singapore, respectively. (57)

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At the same time, international investment arbitration literature (58) has also discussed the possible downsides of unrestricted transparency, which fall under four categories: cost; delay; impaired confidentiality; and weakened secrecy. The first two elements are closely related as the prolongation of the process typically will be reflected in the financial costs (i.e., the logistics in order to make some information public, such as translations, and make it available could incur costs in personnel needed); (59) publicity also is related to the danger of politicization of investment disputes. (60)

To conclude, over the past decade, the investment arbitration community and states have continuously sought to implement a wide range of effective tools that support its legitimacy as a system of investment global governance, where transparency has been a key tool for the accountability of investment arbitration.

Transparency has different expressions, with all of them being exercised within the sphere of investment arbitration practice. The new UNCITRAL Transparency Rules have been welcomed by the investment arbitration community since they seek to strike an appropriate balance between confidentiality and more openness. Indeed, the participation of non-disputing parties, the submission of amicus curiae briefs, the expansion of investment arbitration scholarship, and free access to many case law databases, have played an important role in supporting the argument of investment arbitration as a transparent system. Furthermore, in the TTIP negotiations, the EU and its Member States have been actively pushing for more transparency in the investment chapter. (61) The reality is that the system has never been so transparent and the criticism that there is a lack of transparency in ISDS is not supported by the developments and improvements of the past decade.

5 LACK OF INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS

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Some critics claim that investment arbitration proceedings are affected by lack of independence and impartiality of the arbitrators. If true, such allegations could indeed have severe consequences and certainly might raise legitimate concerns as to the viability of the system. However, such allegations need to be analyzed and reviewed on a case-by-case basis and not as a general objection against the investment arbitration system. In other words, it is up to the parties in the individual dispute to prove any lack of independence and impartiality of the arbitrators or any other procedural irregularities by challenging the arbitrators. Therefore, the appropriate question is rather whether the system of investment arbitration includes mechanisms (at the parties' disposal) envisaging challenge procedures and designed to avoid partiality and prejudice of arbitrators, and not whether all arbitrators are biased, since they (financially) depend on the survival of the investment arbitration system in its current shape. (62)

A closer analysis proves that impartiality and independence can be (and regularly are) challenged on different levels of the investment arbitration system, namely, pursuant to (i) national laws (if applicable); (ii) institutional rules; and (iii) the International Bar Association Guidelines on Conflicts of Interest in International Arbitration ('IBA Guidelines'). These three levels will be discussed in turn.

First, let us examine a hypothetical example at the national law level. For illustrative purposes, it has been decided to select Dutch and Swedish law, which arguably are very influential in the investment arbitration context. The choice is not accidental. According to the UNCTAD World Investment Report 2014, (63) most arbitration proceedings are conducted (respectively) by the UNCITRAL International Arbitration Rules (UNCITRAL Rules) and the Arbitration Rules of the Stockholm Chamber of Commerce (SCC Rules). All the UNCITRAL cases considered by UNCTAD in their statistics were cases administered by the PCA. Presumably, in most of the cases being held in the PCA which may also have The Hague as the seat of arbitration, Dutch law is of relevance. The same applies to Swedish arbitration law, when the SCC Rules are applicable to the dispute and the seat of arbitration is Stockholm. The Dutch Arbitration Act (DAA), which entered into force as of 1 January 2015, (64) states in Article 1033 that: 'an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.'

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Moreover, a challenge can, at the request of either party, eventually be brought before the President of the District Court in The Hague, who will decide on the merits of the challenge. (65) Section 8 of the Swedish Arbitration Act (SAA) provides a fairly detailed definition of what constitutes impartiality and allows for recourse to the court with regard to a challenge. (66)

Second, in case of ICSID proceedings, it is also provided that in case of an arbitrator's presumable bias, parties may bring an adequate action against this member of the arbitral tribunal. For example, the ICSID Convention explicitly requires arbitrators to 'be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment' (67) and an arbitrator may be disqualified if he/she manifestly lacks any of the above-mentioned qualities. (68) Indeed, in recent ICSID cases (e.g., *Caratube v. Kazakhstan*; (69) *Blue Bank v. Venezuela*; (70) and *Burlington Resources, Inc. v. Republic of Ecuador* (71)) arbitrators were successfully disqualified on the basis of these circumstances. Similarly, the 2010 UNCITRAL Rules provide that '[a]ny arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.' (72) Finally, the SCC Rules also oblige individuals serving as arbitrators to be independent and impartial. (73) Interestingly, a challenge may be brought not only in circumstances giving rise to justifiable doubts as to the arbitrator's impartiality or independence, but also if an arbitrator does not possess qualifications agreed by the parties. (74) All of these rules not only allow submitting a challenge in case of doubt, but also require candidates for arbitrators to submit a statement of independence confirming their independence and impartiality. Those rules also pre-emptively cover the issue whether the prospective arbitrator may accept an appointment or where a certain risk of bias exists. (75)

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Third, reference must be made to the IBA Guidelines. (76) In a nutshell, the IBA Guidelines comprise two parts: the first part introduces general standards of impartiality, independence, and disclosure, whereas the second part entitled 'Practical Application of the General Standards' sets out three lists (red, orange, and green) of potential conflicts of interests that may occur in arbitration. Clearly, the application of the IBA Guidelines helps to identify the circumstances in which there is a likelihood of conflict of interests. The IBA Guidelines are regularly relied upon in cases of challenges of arbitrators. In addition, conceivably, they gain additional weight and authority by being mentioned in (draft) investment treaties such as CETA. (77)

In sum, the system of investment arbitration includes effective mechanisms that can be used against an allegedly biased arbitrator. These tools include actions for challenge before national courts and within the arbitral institutions. The arbitration community took a bottom-up initiative to improve the standard of impartiality and independence applicable to the arbitrators (see IBA Guidelines). While 'new' and 'better' standards can still be developed, the investment arbitration system in its current form ensures that arbitrators are impartial and independent.

6 'ELITE' GROUP OF ARBITRATORS

Corporate Europe Observatory identified fifteen individuals, which it called 'an elite 15' and claimed that '15 arbitrators have captured the decision making in 55% of the total investment treaty cases known today'. (78) What the report fails to properly address, however, is the underlying fundamental principle of international arbitration, namely, the principle of party autonomy. In the system of international arbitration, parties are free to structure the procedure as they wish, but also, most importantly, to select and appoint an arbitrator of their own choice.

P17 (79) This freedom of selecting the arbitrator applies to both the claimant (the investor) and to the respondent (the state). As a consequence, the fact that some arbitrators are more often selected than others is a result of party choice.

The Corporate Europe Observatory Report itself highlights that 'the elite 15 have been repeatedly ranked as top arbitrators by well-known surveys'. (80) It only proves that these individuals are at the top of their profession and, as such, it does not come as a surprise that, where the stakes are high, parties to the proceedings (thus both the investor and the state) prefer to have seasoned arbitrators on the tribunal. The Corporate Europe Observatory table (assuming that it contains correct information) with 'a few biographic details you might not find in the industry's own rankings' (81) shows exactly that this 'elite 15' is a highly experienced group of arbitrators. In fact, it lists individuals that were judges of international courts and tribunals, persons with experience in policy-making, and former diplomats. It is fair to assume that these individuals are perfectly capable of dealing with complex disputes of public law character and have broad experience, which is clearly not restricted to commercial law disputes.

Moreover, the Corporate Europe Observatory Report shows the 'frequency of elite arbitrators sitting side-by-side as co-arbitrators', (82) inclining, as the title of the section suggests, to 'keep investment arbitration cases in the family'. Again, it must be stressed that parties appoint arbitrators (but for a presiding arbitrator). Therefore 'elite arbitrators' can (generally) sit together on one panel only when: parties appointed them, or where one of them was appointed and the second one is a presiding arbitrator. Presiding arbitrators will be selected by (i) agreement of the parties; (83) or (ii) joint decision of party-appointed arbitrators (thus indirectly by the parties); (84) or (iii) the appointing authority (such as ICSID, the SCC or the PCA). It is therefore not accurate to present these fifteen arbitrators as a clique that has the decisive vote on how a composition of a tribunal in a random case is formed, since it is only the parties to the dispute that have a vote in the selection procedure.

P18 For example, the Corporate Europe Observatory Report itself describes Brigitte Stern as the 'State's favourite choice as arbitrator'. Indeed, recently she has been challenged in several cases for her repeat appointments by states (e.g., *CEAC Holdings Ltd. v. Montenegro* (85) and *Highbury International AVV, Compañía Minera de Bajo Caroní AVV, and Ramstein Trading Inc. v. Venezuela* (86)). As highlighted earlier, parties are free to choose their appointees to the arbitral panel. It is logical that they will select persons they expect to be more sensitive to their positions. Consequently, if one concludes that 'pro-investor' arbitrators profit from the system, one must similarly conclude that also 'pro-state' arbitrators exist and also gain from the investment system. Be that as it may, since states and investors can select the arbitrators of their choice, the parties are able to maintain the balance of interests within the tribunal. (87)

Moreover, if states are not satisfied with the current system of appointments of arbitrators, they are able to change it. For example, the roster system as introduced in CETA may have an influence in changing the dynamics of the selection procedure. According to the new CETA system, if the party-appointed arbitrators fail to make the appointments within the prescribed time limits, the arbitrators will be appointed by the Secretary-General of ICSID based on a list, which was pre-determined by the CETA contracting parties. (88) The fact that the roster will be compiled exclusively by the CETA contracting parties will allow them to select 'pro-state' arbitrators for the roster. This will tilt the balance within the arbitral tribunal to their advantage, because the respondent state can potentially select two of the three arbitrators, namely, its own arbitrator and the chair from the roster, if no chair has been appointed by the arbitrators. This may undermine the very foundations of arbitration (and of justice): the equality of arms between the parties.

P19

Similarly, the proposal of the European Commission for a permanent investment court system (ICS) (89) will allow states to select all the judges of this two-tier court system exclusively, thereby they can exclude any arbitrator/judge they consider to be 'pro-investor'. Hence, investors will no longer be able to choose an arbitrator/judge of their choice. Thus, there is already a trend visible towards enabling states to exclusively select the arbitrators/judges, while at the same time excluding the involvement of the investors/claimants.

To conclude, it should be noted that investment arbitration is traditionally based on a system of party autonomy in which the disputing parties appoint their own arbitrators. In doing so both parties choose individuals they believe are likely to be sympathetic to their cause. If states feel uncomfortable with the current pool of arbitrators, they are free to expand that pool by selecting 'new' individuals. In this way, states can also actively widen and improve the diversity of the pool of arbitrators/judges, for instance, by selecting more women and non-Western individuals.

7 COSTS: DIVERSION OF PUBLIC MONEY FROM PUBLIC GOODS AND SERVICES

The growing number of ISDS cases and the broad range of policy issues they raise have put the system of investment arbitration under intensive scrutiny by states, (90) NGOs, and other stakeholders. This discontent is the result of a perceived failure in the functioning of the ISDS system, particularly, in relation to (i) its legitimacy and transparency; (ii) problems of consistency of the arbitral decisions; (iii) concerns about the independence and impartiality of arbitrators; and (iv) the alleged costly and time-consuming nature of arbitrations. (91) This section seeks to provide some clarity regarding the alleged high costs of investment arbitration.

P20 FDI is positively correlated with the quality of domestic legal institutions. (92) In a recent study by the International Monetary Fund (IMF) in relation to the Italian judicial system, it was found that, 'the inefficiency of the Italian judicial system has contributed to reduced investments, slow growth, and a difficult business environment'. (93) Therefore, the reduction of FDI as a result of inefficient domestic courts should be taken into account when evaluating the relative costs of ISDS. Notwithstanding the high costs associated with international arbitration, (94) businesses often still prefer ISDS as a mode of dispute resolution over litigation in many domestic courts because it is less time-consuming, more effective, and, as a result, often less expensive. National courts, as an alternative to ISDS, do not necessarily inspire greater confidence. (95)

Despite the largest cost component identified in ISDS cases relating to the fees and expenses incurred for each party's legal counsel, (96) there is no comprehensive study that shows that litigation in domestic courts is less costly or that states need to allocate fewer resources within their own jurisdictions. Indeed, the actual costs of the domestic court system are difficult to measure because they are 'hidden' and covered by the national budget, i.e., the various costs are 'generalized' and covered by the whole population.

The IIA universe consists of more than 3,200 agreements, made up of 2,902 BITs and 334 other IIAs (such as FTAs or economic partnership agreements with investment provisions). Yet only 568 treaty-based cases have been reported, in which ninety-eight states have acted as respondents. This must be compared to the thousands (or tens of thousands) of claims that domestic courts must deal with on an annual basis, and the tens of millions of euros required by states to establish an independent judiciary. In-house lawyers, everyday expenses of running national courts, staff, etc. all come at a cost.

P21 Looking at the established nations in the EU and the United States, the judicial systems are very diverse and vary from state to state. The single 'justice' market does not exist and will not exist in the foreseeable future in the EU. Indeed, the 2015 EU Justice Monitor confirms the significant divergences in the quality of the judicial system in the various EU Member States. (97) Similarly, the quality and expertise of the judiciary also differ from state to state in the United States. One of the most important considerations to ensure that foreign investors consider all EU Member States and all U.S. States equally attractive is to provide the same high standard of protection across these regions. Otherwise, more developed EU Member States and US States with more developed judicial systems will attract greater investment and the gap will only increase.

While the public debate continues to gain momentum, weighing the pros and cons of ISDS and its (real) alternatives deserves careful attention. As the domestic judicial systems do not seem to be better equipped for the resolution of investment arbitration disputes, ISDS offers a more suitable mechanism to deal with this task. The alleged high costs of such a private justice procedure are limited to those incurred mostly for each party's legal counsel. (98) At the same time, it is clear that, often, foreign investors do not feel comfortable bringing a claim against the host state before its domestic courts. Indeed, studies confirm that many judicial systems are not meeting the minimum standards of the rule of law and are slow and inefficient. Therefore, international arbitration is a necessary and useful alternative for resolving international disputes. Despite the high costs of international arbitration and the low chances of ultimately receiving compensation, foreign investors still prefer international arbitration rather than domestic courts.

8 'CHILLING EFFECT' ON STATE REGULATORY POWERS

P22 For a useful discussion of the regulatory chill theory, it is first of all necessary to provide a workable definition. In their study for the Netherlands Ministry of Foreign Affairs, Professor Tietje and Associate-Professor Baetens extensively touch on the issue of regulatory chill. They define regulatory chill as the situation in which 'a State actor will fail to enact or enforce bona fide regulatory measures because of a perceived or actual threat of investment arbitration' in which they distinguish between (a) not drafting particular legislation in anticipation of arbitration; (b) chilling legislation upon awareness of arbitration risks; and (c) chilling legislation after the outcome of a specific dispute. (99) The definition rightfully assumes that the chilling of *male fide* regulatory measures via ISDS is beneficial and therefore does not merit any discussion. Regrettably, discussion has still arisen from those who publicly voice favouring the exclusion of ISDS in any BIT as 'local citizens and [local] companies do not have this option either'. (100)

The regulatory chill theory appears to presuppose that ISDS impacts on legislative processes. However, as Tietje and Baetens show, of all concluded ICSID cases up to 2014, 47% relate to

executive or administrative acts, such as permits and licenses, whereas only 9%, or fourteen cases, relate to legislative acts. Citing researchers Jeremy Caddel and Nathan Jensen, they note that 'given the low rate of disputes involving legislative branch activity, arguments that investor-state arbitration may encroach on the legitimate prerogatives of domestic governments appear to be overstated. Democratic legislatures should embrace investor-state arbitration as an additional check on executive branch misbehavior.' (101)

Keeping the above-mentioned in mind, the following scenario might be helpful to illustrate the underlying issues. Chilling effect on state regulatory powers may, for instance, arise if a government concludes that oil and gas production ought to be state-controlled. It believes this should enhance the government's international geopolitical standing, while domestic price control would shield the population from international oil prices fluctuations. The government therefore decides to expropriate half the ownership of a large foreign-owned gas production facility without paying just compensation. It also enacts laws that empower the government to set the consumer gas prices independently whilst restricting gas exports. This government and its Parliament believe that the government action serves the public interests. However, the compensation of the investor in these cases is also an important parameter. In this context, should these regulations be 'chilled' to a level that respects property rights? If so, would the local judiciary necessarily strike down the public policy choices made by the legislative and executive branches of government? Practices in countries like Argentina or Venezuela suggests that the judiciary of a country taking such radical decisions may not be able or willing to counter the will of its government. This is precisely why IIAs contain provision for ISDS. The contracting states permanently offer foreign investors their agreement to engage with an independent, non-political forum for dispute settlement in instances where a foreign investor feels its investment is treated discriminatorily or expropriated without just compensation and informal dispute resolution no longer seems fruitful.

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Although in many ISDS cases the problem is not this straight-forward, it is useful to bear in mind the basic rationale behind international arbitration as a solution to investor-state disputes. Foreign investors do not lightly decide to request international arbitration. As discussed in the previous section, it is expensive with no guarantee of success, and although it may resolve the legal and financial aspects of a dispute, the relationship with the host state will not necessarily be restored through the process. Countries that seek to align their laws and regulations regarding, e.g., employment or environmental protection, with international standards pertaining to these policy fields, are not likely to be successfully challenged by foreign investors via ISDS. (102) So, from what do the allegations of 'regulatory chill' derive?

8.1 Accessible logic of the 'regulatory chill' theory

If a person were to face significant liabilities in taking a particular action, that person would be less likely to take that action. That is, in essence, the rationale behind the 'regulatory chill' argument against ISDS. In a democracy, policy-making and enacting regulation centres around finding a balance between all interests involved in a way that enjoys the majority support in the legislative branch. Consequently, there can be a minority or minorities, – business, labour unions, academic experts or non-governmental groups – that would like to see a different balance being struck in a specific instance. For example, a government can decide to re-allow nuclear power activities, leading environmental groups to argue that energy-related and environmental legislation has been 'chilled' in favour of economic interests.

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If a legal act has been enacted without due process or if it defies the rule of law, for example because of its discriminatory nature or its inconsistency with overarching legal principles, the act, its implementation, or enforcement could be 'chilled' by the judiciary branch on the basis of a lawsuit filed by an interested party. (103) Indeed, chilling regulation is at the core of policy- and law-making by the legislative and executive branch and it depends on where one stands in a specific discussion whether the (perceived) chill provokes a good or unwanted outcome. However, of all influences on the regulatory process of a host state, does ISDS have an inappropriately chilling effect? Does it unduly restrict states' regulatory powers?

8.2 Can 'regulatory chill' be measured?

Measuring the aforementioned categories of 'chill' that result from ISDS is virtually impossible, as it is would not be possible to discover which draft legislation has been withheld or whether ISDS-related risks, more than other risks (e.g., related to domestic legal procedures by nationals) constituted the determining factor in chilling proposed legislation. As Tietje and Baetens rightfully note, 'regulations related to public interests such as the environment, health and natural resources are often fraught with political debate, and the possibility of ISDS may be just one of a number of factors leading to the regulatory chill'. (104) Often-cited on the matter of regulatory chill is the well-known tobacco company Philip Morris, which filed investment claims against Uruguay and Australia over the adoption of legislation to restrict tobacco marketing. These cases are still pending and have not led to actual changes in legislation. (105) In fact, France and New Zealand are now considering following Australia in introducing mandatory plain packaging of cigarettes. (106) It seems hard to imagine that these countries presented such legislation without being aware of the similar laws Australia enacted and the challenges it faced upon that enactment.

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In any event, arbitral awards do not call upon, let alone force, host states to chill their laws and

regulations. They only deal with the question of the right to compensation under the given circumstances on the basis of the relevant BIT. The government's persuasion to roll back specific legislation may come from the substantial motivation laid down in the award, leading to a government's reconsideration of which other measures can equally lead to its policy ends while observing its international law obligations.

Even where a state has indicated that the apparent risk of ISDS or the outcome of a particular case forms a risk to its regulatory powers, such a statement could be made for political reasons. For example, the recent terminations of several BITs by Indonesia and South Africa may indeed serve to protect these countries' regulatory powers, however, not necessarily with the aim to protect public interests such as human rights or the environment. Protectionist motives could also play an important role in a government's position *vis-à-vis* investor protection and ISDS, which seek to eliminate discriminatory treatment.

In short, a wide array of factors lead to particular laws being enacted and other options being set aside, whereby the compromise of relevant interests that is made with each law or policy implies that all government action is chilled *vis-à-vis* certain interests. It is impossible to measure the influence of ISDS as a potential factor on law- and policy-making processes, although ISDS is not likely to have more influence on these processes than, e.g., the legal actions domestic stakeholders can initiate within the local legal system.

Law and policies are enacted within the boundaries of general principles of law, such as due process and human rights, and of policy principles, such as proportionality and subsidiarity. Where such boundaries are crossed, legislative or executive acts can be chilled by various mechanisms, such as parliamentary debate, the local judiciary, or ISDS. However, describing ISDS as a force that unduly restricts countries' legislative branch in exercising its sovereign powers to regulate, or that unduly chills existing or proposed legislation, has no basis in political science or analysis of international (investment) law and ISDS statistics. The fact that regulatory chill cannot be measured may help those who support the theory when influencing public opinion. However, in the scholarly or policy debate, this impossibility should nullify the regulatory chill theory, as does the fact that the vast majority of ISDS cases are not brought on the basis of legislative acts, but rather due to executive acts. Although cases often cited in this respect, such as those concerning *Phillip Morris* and *Vattenfall*, may stem from legislative acts, the fact that thus far such acts have not been 'chilled' – let alone unduly chilled – further invalidates the 'regulatory chill' claim.

P26

9 ISDS ALLOWS INTERNATIONAL COMPANIES TO BY-PASS NATIONAL JUDICIAL SYSTEMS

One of the main arguments against the inclusion of an ISDS provision in the TTIP is that this mechanism allows foreign companies to by-pass national judicial systems, possibly at the expense of domestic investors. Therefore, the critics argue that this kind of provision would grant foreign investors greater procedural rights than domestic investors, who do not have access to this parallel, extra-judicial legal track. Moreover, the EU and United States have well-functioning domestic legal systems and provide for robust protection of property rights. The question that follows these arguments is whether there is truly a need for international arbitral procedures when investors have access to such trustworthy domestic judicial systems. (107)

Instead of viewing the IIA system as a way to by-pass domestic courts, it would be more productive to explore the complementary role it plays in the effective protection of investors. As a starting point, a number of IIAs oblige investors to exhaust domestic remedies before referring the dispute to international arbitration. In a recent award, the tribunal in *Dede v. Romania* dismissed the investor's claims and concluded that it lacked jurisdiction in relation to the matter before it because the investor had not satisfied the jurisdictional requirement in the Romania-Turkey BIT (1996). (108) Under this BIT, the investor's right to submit the dispute to arbitration was subject to either the local litigation being unfinished within one year, or the exhaustion of local remedies.

Moreover, investors are often unable to submit a claim before domestic courts on alleged violations of an IIA. To date, investors' claims before national tribunals have been based solely on domestic law and not international law. (109) For example, investors are precluded from submitting NAFTA-based claims in the domestic courts of Canada and the United States. (110)

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Finally, it may be difficult in some countries to ensure that the rule of law is applied by domestic courts or their executive branches in an impartial and independent way which results in a final decision consistent with fundamental principles of public law. One example where this was an issue was in *Transglobal Green Energy v. Panama*. In this case, the investor had to resort to international arbitration because the Panamanian government failed to implement the decision of Panama's Supreme Court and, thereby, breached the Panama-United States BIT. (111) Another example is the recent *Yukos* case, which revealed that it was in practice impossible for the Yukos shareholders to resort to domestic courts due to their lack of independence. (112)

Article 26 of the ICSID Convention allows states to make exhaustion of domestic remedies a condition of consent to arbitration. However, relatively few states have included such a requirement in their investment treaties. On the contrary, over the years, developed countries have sought to grant their investors direct access to international arbitration. By removing the

requirement of exhaustion of domestic remedies and allowing immediate access to international procedures, BITs guarantee faster and more efficient proceedings. Although the average BIT arbitration nowadays takes three years, (113) this is still considerably faster than the time it takes to exhaust available remedies in many developed national judicial systems.

The preference for international arbitration for investors involved in a dispute against the host state based on an international investment treaty is understandable since investors seek a neutral forum to resolve their disputes. With this understanding, investment arbitration should not be seen as simply the viable route in the face of 'untrustworthy' domestic courts, but rather the most viable option in light of the international character of the dispute.

P28 Another option for foreign investors is the practice of espousal of claims in the framework of diplomatic protection offered by the states. (114) However, this option has been regarded as arbitrary and unsatisfactory for investors. This is because the investor's home state has complete discretion over the commencement, prosecution, and settlement of such a claim, as well as whether the investor will in the end obtain full compensation, even if the state received it. (115) Moreover, litigation in domestic courts of states other than the host state is liable to lead to state immunity and territorial jurisdiction problems—hardly a promising alternative.

In general, domestic courts of the EU Member States do provide reliable mechanisms for resolving disputes. However, the quality (assessed from effectiveness, efficiency, and accessibility standpoints) of domestic judicial systems differs from one state to another. (116) A notable example of inefficiency in the domestic dispute resolution system is the use of the so-called 'Italian torpedoes'. In essence, 'Italian torpedo' is an abuse of the *lis pendens* rule. The rule is set forth in the EU Regulation on jurisdiction, recognition, and enforcement of judgments in civil and commercial matters ('Brussels I Regulation') (117) and embodies a formal criterion to avoid parallel proceedings: if another court is already seized of a matter, the court second seized must decline jurisdiction. Although the very purpose of this jurisdictional criterion is to ensure predictable, certain, and neutral litigation outcomes, it has been used strategically to delay the proceedings by instituting a legal action in Italy regardless of whether or not Italian courts have jurisdiction, taking advantage of significant delays characterizing Italian courts. (118) Shortcomings of domestic judicial systems have also been identified in the United States.

P29 For example, the NAFTA tribunal in *Loewen v. United States*, reviewing the Mississippi trial, characterized it as 'a disgrace' '[b]y any standard of measurement'. (119)

Granting foreign investors access to international arbitration constitutes an effective protection tool. IIAs provide for the national treatment of foreign investors (120) in order to safeguard equal treatment between national investors and foreign investors and to secure that states will conform to internationally set minimum standards of treatment. Moreover, since foreign investors are less familiar with local laws and court practices and domestic courts may be perceived by foreigners to favour local parties, investment arbitration appears as a strong alternative.

10 TRADING ISDS FOR GREATER MARKET ACCESS?

Opening up one's market to foreign investments with non-discrimination guarantees is quite a big step after merely liberalizing trade in the greater scheme of international economic integration. Whilst domestic producers in critical sectors could still be protected via import tariffs, such protection is much harder to maintain when sectors are faced with foreign investors in their own market.

The extent to which market access will be granted, how investors' rights are defined, and what courses for redress are offered will be the result of negotiations between the parties to an international investment agreement. This can either be a BIT or a FTA that also covers FDI. Obviously, given their broad remit, the number of potential hurdles and bargaining chips in FTA negotiations is much larger compared to when negotiating a more limited BIT. From the outside it may prove very hard to reverse-engineer the bargains made during such negotiations. Whether the inclusion of ISDS or the limitation of market access came first may then seem like a 'chicken or egg' story: has market access been limited because ISDS was included, or was ISDS accepted because market access already was limited for other policy reasons?

P30 An important pre-determinant is whether one starts from a post-establishment or already made investments-only basis, or a pre- and post-establishment basis, which also includes market access. The standards of treatment of foreign investors under European BITs mostly apply to post-establishment investments only. However, the new EU FTAs that include an investment chapter also deal with the liberalization of trade in services. Those provisions can be relied upon in relation to pre-investment activities, but without the ISDS guarantees that the investment chapter provides. The standards of treatment included in the US Model-BIT, and those of several other developed non-EU countries, apply to both pre- and post-establishment rights. (121) This approach creates additional discussions on market access, more so than the post-investments-only approach. (122) In this case, states can negotiate on the basis of positive lists, which only name the sector to which foreign access is allowed, or negative lists, which only comprise of the banned sectors, for example, for national security reasons.

From a legal perspective, once a country opens up its market (fully or partially) to foreign investors on the basis of an international investment agreement, it must ensure the observance of the standards of treatment included therein. Traditionally, observance of these standards of

treatment was ensured through the country's inclusion of ISDS provisions in the investment agreement. ISDS, as such, should therefore not affect a country's considerations on the extent to which it will open its markets to foreign investors. Countries can address specific concerns, *inter alia*, by carefully drafting the definition of investment and of services, working with positive or negative lists, and by enacting or amending additional, non-discriminatory national legislation regarding critical markets. For example, national investments by subsidiaries of foreign investors in healthcare or education could be addressed by putting in place laws dealing with ownership and management of investments in those markets, requiring, e.g., a minimum of 51% domestic ownership or a majority of nationals on the management board.

P31 In sum, granting internationally recognized standards of treatment, such as non-discriminatory and fair and equitable treatment, to foreign investors via an international investment agreement may raise questions regarding the extent of market access for those investors. The inclusion of ISDS provisions – a standard practice – will not grant additional market access to foreign investors. Market access is a legitimate policy matter influenced by various factors that are weighed differently by each government. Where different treaty practices on market access and investment protection meet, the success of the negotiations will depend on the contracting states' willingness to overcome hurdles by finding creative solutions and effective drafting. The draft CETA text in which the ISDS provisions are explicitly intended only to apply to established investments may serve as an example in that regard.

11 RECEIVING FDI WITHOUT INVESTMENT TREATIES

Virtually all countries worldwide, whether a developed or developing one, seek to increase FDI levels with the aim of financing public infrastructure projects, bringing capital, technology, know-how, and access to new products and markets. As a general rule, for policy- and law-makers FDI helps improve the countries' productive capacity by benefitting from the global economy. Accordingly, in recent years, the proliferation of IIAs has been the result of the fierce competition for FDI inward flows and the protection of the country's investors abroad.

Against this background, an important public policy debate has focussed on whether IIAs help attract FDI flows, particularly to developing countries, and the potential impact of IIAs on FDI flows. Critics of the system have pointed out that countries, such as Brazil, without an IIA relationship with their partners, are still major recipients of FDI flows from these very same countries. (123) While this fact highlights the relevance of other FDI determinants, for instance, the existence of natural resources, regulatory and institutional frameworks, as well as sound domestic policies, the whole picture should be kept in view. In this context, it should be borne in mind that clear and enforceable rules established by international agreements in order to protect foreign investors reduce political risks and thereby increase the attractiveness of host countries. (124)

Although their prime role is to add an international dimension to investment protection and foster transparency, predictability, and stability of the investment framework in host countries, IIAs undoubtedly impact FDI inflows by guaranteeing foreign investors a minimum standard of treatment and providing a mechanism for dispute settlement. As a result, IIAs reduce the risks associated with investing abroad and provide a symbol of the host country's credibility in the international arena. (125)

P32 Studies in relation to the impact of IIAs on FDI, despite the existing limitations related to data constraints and methodological challenges, have provided very heterogeneous results. However, as a common feature, none of these studies have determined that IIAs have a negative effect on FDI flows. On the contrary, the majority of studies in this field have concluded that IIAs, and specifically BITs, do promote inflow levels of FDI. (126) For example, the US share of FDI stock in Brazil, China, India, or South Africa ranges between 5% and 15%, which is considerably lower than the US share in global inward FDI stock (i.e., around 25%). Indeed, as mentioned above, a recently published study by the Dutch Statistical Office has found that FDI flows increase by 35% after the ratification of a BIT. (127)

All of the above suggests caution with respect to drawing direct conclusions when criticizing the relevance of IIAs or BITs on the decision by companies to invest in a given country. A survey of 602 transnational corporations conducted for UNCTAD during the first half of 2007 on whether the existence of an international agreement (for instance, a BIT) may influence the company's decision on which market to invest in, gave the following outcome: (128)

- 24% of responses: 'to a very great extent';
- 48% of responses: 'to a limited extent';
- 23% of responses: 'do not use them at all';
- 9% of responses: 'do not know'.

P33 This would mean that, for an overwhelming majority of companies (72%), the existence of IIAs that have entered into force remain a factor in order to make an investment decision. The same survey concluded that IIAs, specifically BITs, ranked in the middle of FDI determinants for developing countries. The most important factors identified by the survey affecting investment decisions by transnational corporations were (i) the host country's macroeconomic and political stability; and (ii) the strength of the country's regulatory and institutional environment. (129)

Additionally, IIAs and BITs particularly matter for small and medium-sized enterprises (SMEs), which unlike powerful transnational corporations, do not have the ability to negotiate individual investment contracts with host governments. Evidence of this is the fact that a significant number of investment arbitration claims were submitted by such smaller companies. (130)

Any potential impact of international, bilateral, or regional agreements with investment provisions in attracting FDI should be seen in the context of a myriad of determinants. Key among these is the economic attractiveness of FDI recipient countries because of (1) their market's size and growth rate; (2) average income per capita; (3) the availability and costs of raw materials and natural resources; as well as (4) other factors (skills, cheap labour, infrastructure, etc.); and (5) the institutional characteristics of the host country (its judiciary system, red tape, and corruption levels). (131)

The challenges to enhance the attractiveness to FDI within the public policy arena have led to a situation where countries decide to pursue different paths. The decision on which path to follow, and whether or not to have IIAs as part of it, is a matter of choice for governments which need to consider a number of factors. These factors may include the level of the country's economic development, geopolitical characteristics, comparative trade and investment advantages, and the general approach to bilateral or regional cooperation.

For instance, Brazil has very recently signed new generation BITs with Mozambique and Angola. (132) While these BITs do not include the classic ISDS provisions, they contain a whole toolbox of dispute avoiding and dispute resolution tools. These BITs prove that even Brazil considers it necessary to create an international legal framework, mainly with a view to support its investors, who are increasingly investing abroad.

P34 To conclude, investment treaties are an important tool for states in attracting FDI. Of course, they are not the only instruments to attract FDI and states may well choose not to enter into them and still have a stable and attractive investment climate. No available studies have concluded that IIAs have a negative effect on FDI flows. In any case, investors normally know perfectly well how to calculate risks, and investment treaties with ISDS provisions are one (important) factor in this calculation.

12 GENERAL CONCLUSION AND OUTLOOK

This EFILA article attempts to address most of the criticisms against ISDS in the context of the EU FTAs negotiations. The research has revealed that most of the criticisms are supported neither by the facts nor by the investment arbitration practice and case law. In particular, this article reveals that the ISDS system is still the most suitable forum for resolving international investment disputes and that it generally provides for adequate resolution of investment disputes, for both investors and states. In this context, it is important to reiterate that states have been consistently winning more disputes than investors, which defeats the general claim that ISDS is supposedly pro-investors. In addition, the ISDS system contains a number of safeguards to ensure that the arbitration procedures are conducted in an efficient, impartial, and proper manner.

The article highlights the incremental improvements of the system over time. The users of ISDS have not stood still but continue to improve the system where necessary. Improvements were initially made in NAFTA and have now been adopted by the EU in its current FTA negotiations such as in CETA, EU-Singapore, and TTIP. The improvements relate in particular to the increase of the transparency of arbitral proceedings and the tightening up of the codes of conduct for arbitrators, requiring higher standards for impartiality and independence.

At the same time, the article also sheds light on areas that could be, and are being, further improved upon. For instance, the European Commission seeks further improvements to the ISDS system by proposing the creation of a new Investment Court System (ICS) with an appeal mechanism. (133) This proposal would fundamentally alter the current system of party-appointed arbitrators by providing for pre-selected judges, who will be solely appointed by the contracting parties. Accordingly, the investor would no longer have any say in the selection of the judges of the ICS. This change would counter any remaining critique regarding the supposedly existing conflicts of interests of arbitrators. However, it cannot be excluded that the contracting parties would appoint judges who may be particularly receptive to arguments of the states, when they are respondents in disputes. In order to avoid the creation of a 'pro-state' investment court, the contracting parties would have a particular responsibility to avoid any such perceptions when making the appointments – otherwise investors will not use the system.

P35 In addition, the European Commission's proposal provides for the creation of a permanent Appellate Tribunal, comparable to the one within the WTO. (134) While this would provide the opportunity for both states and investors to have a second shot by reviewing the decision of the tribunal which decided the dispute, this would delay the proceedings further and make them more expensive for both parties. There is a clear risk that this would prevent in particular SMEs from using the system, because of the increased costs. It also carries the risk that states will abuse the appeal possibility by artificially driving up the costs for the claimant. In order to avoid such risks, it would be necessary to add a mechanism for throwing out 'frivolous' appeal requests, and ordering the party which is found to have submitted a 'frivolous' appeal to bear all the costs, including those of the other party. In addition, it may well be worth considering

the creation of a special fund for legal assistance for SMEs, in order to ensure their access to the system.

In short, the Commission's proposals are interesting, but it remains to be seen if, and how, they are implemented. The first reaction by the United States has been rather unenthusiastic. (135) The main challenge for the contracting parties will be to create an ICS that will be efficient, fair, independent, affordable, and accessible for all investors, including SMEs.

References

- *) The European Federation for Investment Law and Arbitration (EFILA) is a Think Tank established in Brussels to promote the knowledge of all aspects of EU and international investment law, including arbitration, at the European level. This article is a collective work that represents the position of EFILA and does not represent the particular opinion of each individual. EFILA welcomes any comments and questions on this article and remains committed to continue its efforts also in the future.
- 1) See, e.g., European Commission, *Impact Assessment Regarding the Benefits of TTIP*, available at <http://europa.eu/rapid/press-release_MEMO-13-211_en.htm> (accessed 17 Aug. 2015); see also K. Clarke, *This EU-US Trade Deal Is No 'Assault on Democracy'*, *The Guardian*, available at <www.theguardian.com/commentisfree/2013/nov/11/eu-us-trade-deal-transatlantic-trade-and-investment-pa...> (accessed 17 Aug. 2015).
- 2) G. Monbiot, *This Transatlantic Trade Deal Is a Full-Frontal Assault on Democracy*, *The Guardian*, <www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy> (accessed 17 Aug. 2015).
- 3) According to some commentators, the investment provisions of TTIP are meant to be 'a blueprint for any future investment agreement with countries whose investment climate is less stable than the one in Europe and the United States', and thus the basis for a global investment protection framework, not limited to regional purposes, see J. Höffken, *More than Regional Investment Protection – ISDS in the EU-US trade agreement*, *Global Policy*, 14 Mar. 2014, available at <www.globalpolicyjournal.com/blog/14/03/2014/more-regional-investment-protection-%E2%80%93-isds-eu-us...> (accessed 17 Aug. 2015).
- 4) European Commission, *Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, available at <http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf> (accessed 17 Aug. 2015). Office of the United States Trade Representative, U.S. objectives, *USA Benefits in TTIP: A Detailed View*, available at <www.ustr.gov/about-us/press-office/press-releases/2014/March/US-Objectives-US-Benefits-In-the-TTIP-a...> (accessed 17 Aug. 2015).
- 5) See, *inter alia*, The Greens (European Free Alliance) in the European Parliament, *EU-US Trade Negotiations (Ttip) Investor Dispute Mechanism Trojan Horse Must Be Excluded from Ttip*, available at <www.greens-efa.eu/eu-us-trade-negotiations-ttip-11492.html> (accessed 17 Aug. 2015).
- 6) See S. Schill, *Transparency as a Global Norm in International Investment Law*, *Kluwer Arbitration Blog*, 15 Sep. 2014, <<http://kluwerarbitrationblog.com/blog/2014/09/15/transparency-as-a-global-norm-in-international-inve...>> (accessed 17 Aug. 2015).
- 7) EFILA also submitted its observations to the UK BIS Committee inquiry on TTIP. This submission is also available on the EFILA website at <<http://efila.org/publications/>> (accessed 2 Oct. 2015).
- 8) P. Eberhardt, C. Olivet, T. Amos et al., *Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom*, *Corporate Europe Observatory* (CEO) 2012, available at <<http://corporateeurope.org/sites/default/files/publications/profitting-from-injustice.pdf>> (accessed 17 Aug. 2015). This report argues that investment arbitration is a system of 'pro-investor interpretation of the treaties'. This argument is given without any qualitative support in regard to the ratio of final awards on the merits. The CEO report frames its methodology exclusively by interpreting Prof. Gus Van Harten's research which is only based on the analysis of jurisdictional awards, but not on final/substantive awards. The CEO report omits the conclusion of Prof. Van Harten that 'there is no ... conclusive evidence of the presence or absence of systematic bias in investment arbitration'. See G. Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 *Osgoode Hall L. J.* 211 (2012), available at <<http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1036&context=ohlj>> (accessed 17 Aug. 2015). See also G. Van Harten, *Pro-Investor or Pro-State Bias in Investment-Treaty Arbitration? Forthcoming Study Gives Cause for Concern*, *Investment Treaty News*, IISD, 13 Apr. 2012, available at <www.iisd.org/itn/2012/04/13/pro-investor-or-pro-state-bias-in-investment-treaty-arbitration-forthcom...> (accessed 17 Aug. 2015). D. Ikenson, *Eight Reasons To Purge Investor-State Dispute Settlement From Trade Agreements*, *Forbes*, 14 Mar. 2014, available at <www.forbes.com/sites/danikenson/2014/03/04/eight-reasons-to-purge-investor-state-dispute-settlement-...> (accessed 17 Aug. 2015).

- 9) UNCTAD, *World Investment Report 2014*, available at <http://unctad.org/en/publicationslibrary/wir2014_en.pdf> (accessed 17 Aug. 2015), 126.
- 10) ICSID Caseload statistics (issue 2015-1), available at <<https://icsid.worldbank.org/apps/ICSIDWEB/Pages/News.aspx?CID=42&ListID=74f1e8b5-96d0-4f0a-8f0c-2f3a...>> (accessed 17 Aug. 2015).
- 11) See section 11 *Infra* on receiving FDI without investment treaties, discussing the impact of investor protection on FDI.
- 12) A. Lejour, M. Salfi, *The Regional Impact of Bilateral Investment Treaties on Foreign Direct Investment*, CPB discussion paper 298, 16 Jan. 2015, available at <www.cpb.nl/publicatie/de-regionale-effecten-van-bilaterale-investeringsverdragen-op-directe-buitenla...> (accessed 17 Aug. 2015).
- 13) On the scope of investor protection in CETA and TTIP see generally Jan Kleinheisterkamp & Lauge Poulsen, *Investment Protection in TTIP: Three Feasible Proposals* (The Global Economic Governance Programme, December 2014), available at <www.globaleconomicgovernance.org/sites/geg/files/Kleinheisterkamp%20and%20Poulsen%20December%202014....>.
- 14) G. Van Harten admits that: 'Notably, the coded issues were limited to questions of jurisdiction and admissibility and did not include, for example, substantive standards or procedural issues', *supra*n. 8.
- 15) C. Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, 2006 TDM 2, available at <www.univie.ac.at/intlaw/pdf/cspubl_85.pdf> (accessed 17 Aug. 2015), p 3.
- 16) P.J. Kuijper, I. Pernice, S. Hindelang et al., *Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements*, Volume 2-Studies (September 2014), available at <www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/hindelangs/Studie-fuer-...> (accessed 17 Aug. 2015).
- 17) *Ibid.* 69–70.
- 18) Schreuer, *supra*n. 15.
- 19) See, e.g., the Treaty between the Federal Republic of Germany and Bosnia and Herzegovina concerning the Encouragement and Reciprocal Protection of Investments, available at <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/472>> (accessed 17 Aug. 2015).
- 20) See, e.g., *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, at 81, available at <www.italaw.com/sites/default/files/case-documents/ita0788.pdf> (accessed 17 Aug. 2015).
- 21) *Saluka v. Czech Republic*, Partial Award, 17 Mar. 2006, at 299–300, available at www.italaw.com/cases/documents/963 (accessed 17 Aug. 2015).
- 22) *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, available at <<https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?CaseNo=ARB/01/13&tab=DOC>>; and *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, available at www.italaw.com/cases/documents/748 (both accessed 17 Aug. 2015).
- 23) *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, available at <<https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?CaseNo=ARB/02/6&tab=DOC>>; and *Eureko B.V. v. Republic of Poland*, available at <www.italaw.com/cases/412> (both accessed 17 Aug. 2015).
- 24) UNCTAD, *World Investment Report 2014*, *supra*n. 9.
- 25) *Land and Maritime Boundary (Cameroon v. Nigeria)* (Preliminary Objections), ICJ, Judgment, 11 Jun. 1998, para. 28, available at www.icj-cij.org/docket/index.php?p1=3&p2=3&k=74&case=94&code=cn&p3=4 (accessed 17 Aug. 2015).
- 26) Kuijper et al., *supra*n. 16, at 67. 'Hence, creating "consistency" by a "de facto precedent system" which sidesteps the primary means of interpretation comes at great costs. By abandoning the methodology of interpretation enshrined in the Vienna Convention on the Law of Treaties the tribunals would free themselves from the bonds of their masters, i.e., the State parties to the investment treaties.'
- 27) *Ibid.*, 69–70.
- 28) *Land and Maritime Boundary (Cameroon v. Nigeria)*, *supra*n. 25, para. 28: 'It is true that, in accordance with Article 59, the Court's judgments bind only the parties to and in respect of a particular case. There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases.'
- 29) From 2011–2014 in the annulment proceedings of the ICSID Convention, 68 Convention awards were rendered: *ICSID Caseload Statistics (Issue 2015-1)*, available at <<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-1%20%28Engl...>> (accessed 27 Oct. 2015).
- 30) H. Gharavi, *ICSID Annulment Committees: The Elephant in the Room*, *Global Arbitration Review*, 24 Nov. 2014, available at <http://globalarbitrationreview.com/news/article/33193/icsid-annulment-committees-elephant-room/?utm_...> (accessed 17 Aug. 2015).
- 31) On the issue of precedent in international arbitration see Gabrielle Kaufmann-Kohler, *Arbitral Precedent Dream, Necessity or Excuse?*. 23.3 *Arb. Intl.* 357 (2007).

- 32) *Ibid.*, 361.
- 33) *Methanex Corp. v. United States*, Final Award of the Tribunal on Jurisdiction and Merits, 3 Aug. 2005, Part II, Chapter B, para. 16, available at <www.italaw.com/sites/default/files/case-documents/ita0529.pdf> (accessed 17 Aug. 2015).
- 34) For more on fragmentation in the international legal order see the Martti Koskenniemi, Report of the Study Group of the International Law Commission: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, A/CN.4/L.682 (13 Apr. 2006), available at <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> (accessed 1 Nov. 2015).
- 35) ICSID Rules 32(2) and 37.
- 36) The text of the UNCITRAL Rules on Transparency 2014 is available at <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html> (accessed 17 Aug. 2015).
- 37) A. Escobar & M. Lennon, *CAFTA-DR Chapter Ten: Substantive Obligations and Arbitration Procedures*, in: L. Mistelis, L. Shore, *World Arbitration Reporter* (2d ed., Juris 2015).
- 38) The CAFTA-DR Agreement entered into force for the United States, El Salvador, Guatemala, Honduras, and Nicaragua in 2006, for the Dominican Republic in 2007, and for Costa Rica in 2009. The CAFTA-DR text is available at <<https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-...>> (accessed 17 Aug. 2015).
- 39) *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 Mar. 2011, available at <www.italaw.com/cases/296> (accessed 1 Nov. 2015).
- 40) *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award, 6 Sep. 2000, available at <www.italaw.com/cases/863> (accessed 1 Nov. 2015).
- 41) *Methanex Corp. v. United States & UPS Inc. v. Canada*, UNCITRAL, Award on Jurisdiction, 3 Aug. 2005, available at <www.italaw.com/cases/683> (accessed 1 Nov. 2015).
- 42) *Mobil v. Canada*, ICSID Case No. ARB(AF)/07/4, Award, 20 Feb. 2015, available at <www.italaw.com/cases/1225> (accessed 1 Nov. 2015).
- 43) *ADF v. United States*, ICSID Case No. ARB (AF)/00/1, Award, 9 Jan. 2003, available at <www.italaw.com/cases/43> (accessed 1 Nov. 2015).
- 44) *Bayview Irrigation et al. v. Mexico*, ICSID Case No. ARB(AF)/05/1, Award, 19 Jun. 2007, available at <www.italaw.com/cases/134> (accessed 1 Nov. 2015).
- 45) *Chemtura Corp. v. Canada et al.*, UNCITRAL, Award, 2 Aug. 2010, available at <www.italaw.com/cases/249> (accessed 1 Nov. 2015).
- 46) *Mesa Power Group L.L.C. v. Canada*, UNCITRAL, PCA Case No. 2012-17, available at <www.italaw.com/cases/1619> (accessed 1 Nov. 2015).
- 47) N. Amriani & P.L. Rika Fatimah, *Confidentiality versus Transparency of ICSID Arbitration Award: Sustainability of the Quality Practice for Good Governance and Investor to Support Public Accountability*, 2 Intl. J. Advanced Stud. Humanities & Soc. Sci., 223-231, available at <www.ijashss.com/index.php/2-uncategorised/26-volume-2-issue-2> (accessed 17 Aug. 2015).
- 48) See ICSID, <<https://icsid.worldbank.org/apps/icsidweb/cases/Pages/AdvancedSearch.aspx>> (accessed 1 Nov. 2015).
- 49) Amicus curiae briefs are accepted under the general power of the arbitral tribunal pursuant to ICSID Convention, Art. 44.
- 50) See *Suez, Sociedad General de Aguas de Barcelona S.A. & InterAguas Servicios Integrales del Agua S.A v. Argentina*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, 17 Mar. 2006, available at <www.italaw.com/cases/1048> (accessed 1 Nov. 2015).
- 51) 'At the European Court of Justice...you have the Advocate General, who is there to bring the public interest of the Communities to bear...amicus briefs are a substitute for the Advocate General', see Th. Wälde, *Transparency, Amicus Curiae Briefs and Third Party Rights*, 2 OGEL (2004).
- 52) Some other arbitral institutional rules stipulate it explicitly, e.g., ICC Arbitration Rules, Appendix I, Art. 6; SCC Arbitration Rules, Art. 46; and LCIA Arbitration Rules, Art. 30.
- 53) For a commentary on the new rule, see, *Transparency in International Investment Arbitration A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (Dimitrij Euler, Markus Gehring & Maxi Scherer eds, CUP 2015).
- 54) International Arbitration Case Law (IACL) Database, <www.internationalarbitrationcaselaw.com>; Investment Treaty Arbitration Law, available at <<http://italaw.com>>. Also, there is a high level of transparency in sources such as Global Arbitration Review, <www.globalarbitrationreview.com>, and Investment Arbitration Reporter, <www.iareporter.com>, which publish and discuss even unpublished cases (all accessed 17 Aug. 2015).
- 55) ICSID, *List of Pending and Concluded Cases*, available at <<https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx>> (accessed 17 Aug. 2015).
- 56) Permanent Court of Arbitration, *Cases*, available at <www.pccases.com/web/> (accessed 17 Aug. 2015).

- 57) Consolidated CETA Text, Art. 6, available at <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> (accessed 28 Oct. 2015); EU-Singapore Free Trade Agreement, Chapter 14, available at <http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151767.pdf> (accessed 28 Oct. 2015). See also *supra*n. 53.
- 58) J. Delaney & D. Barstow Magraw, *Procedural Transparency*, in *The Oxford Handbook of International Investment Law*, 762 (P. Muchlinski, F. Ortino & C. Schreuer eds, OUP 2008).
- 59) *Ibid.*
- 60) N. Rubins, *Opening the Investment Arbitration Process: At What Cost, for What Benefit?* 3 TDM 6–8 (2006).
- 61) EU Negotiating Texts in TTIP, available at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>><<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>> (accessed 28 Oct. 2015).
- 62) Eberhardt et al., *supra*n. 8, suggest that, ‘if an arbitrator’s main source of income and career opportunities depends on the decision of companies to sue, we should wonder how impartial their decisions are’ (at 36).
- 63) UNCTAD, *World Investment Report 2014*, available at <http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf> (accessed 18 Aug. 2015).
- 64) Dutch Code of Civil Procedure, Book 4.
- 65) Dutch Code of Civil Procedure, Art. 1035(2), available at <www.dutchcivillaw.com/civilprocedureleg.htm> (accessed 18 Aug. 2015).
- 66) Swedish Arbitration Act, ss 8 and 10, available at <<http://swedisharbitration.se/wp-content/uploads/2011/09/The-Swedish-Arbitration-Act.pdf>> (accessed 18 Aug. 2015).
- 67) ICSID Convention, Art. 14(1), available at <<https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Convention.aspx>> (accessed 18 Aug. 2015).
- 68) ICSID Convention, Art. 57; the procedure of the disqualification has been further explained in ICSID Rule 9, available at <<https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Convention.aspx>> (accessed 18 Aug. 2015).
- 69) Decision on the Proposal for Disqualification of Mr Bruno Boesch, ARB/13/13, 20 Mar. 2014, available at <www.italaw.com/cases/2131> (accessed 1 Nov. 2015).
- 70) Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal, ARB/12/20, 12 Nov. 2013, available at <www.italaw.com/cases/1513> (accessed 1 Nov. 2015).
- 71) See Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ARB/08/5, 13 Dec. 2013, available at <<https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=ARB/08/5&tab=DOC>> (accessed 16 Sep. 2015).
- 72) 2010 UNCITRAL Rules, Art. 12(1); the same standard exists in Art. 10(1) of the 1976 UNCITRAL Rules which may also occasionally be applicable nowadays.
- 73) SCC Rules, Art. 14(1): (‘Every arbitrator *must* be impartial and independent’ (emphasis added)).
- 74) SCC Rules, Art. 15.
- 75) See ICSID Rule 6; 2010 UNCITRAL Rules, Art. 11; 1976 UNCITRAL Rules, Art. 9; and SCC Rules, Art. 14(2).
- 76) International Bar Association (IBA), *Guidelines 2014: Conflict of Interest in International Arbitration*, available at <www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> (accessed 18 Aug. 2015).
- 77) See Consolidated CETA Text, Art. X.25: ‘Arbitrators shall comply with the International Bar Association Guidelines on Conflict of Interest in International Arbitration or any supplemental rules adopted pursuant to Article X.42(2)(b)’, available at <www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=544> (accessed 18 Aug. 2015).
- 78) *Ibid.* What the report fails to highlight is that the cases were decided by three members’ tribunals, and it does not provide details on the outcome of these cases (at 38).
- 79) If parties fail to create an appropriate appointing tool, the institutional rules will provide for the fall-back mechanism in case of parties’ default. Since most of the investment arbitration cases are governed by the ICSID Convention/Rules and the UNCITRAL Rules, the relevant default rules in these texts are that either each party appoints its arbitrator and the parties will also jointly agree to the appointment of the presiding arbitrator (see ICSID Rule 3 in connection with ICSID Convention, Art. 37(2)(b), if the tribunal is not constituted within ninety days, see ICSID Rule 4); or that each party appoints its arbitrator and party-appointed arbitrators choose the presiding arbitrator (see 1976 UNCITRAL Rules, Art. 7(1) and 2010 UNCITRAL Rules, Art. 9(1). Where the party-appointed arbitrators do not agree on the choice of the presiding arbitrator within thirty days of the appointment of the second arbitrator, see 1976 UNCITRAL Rules, Art. 7(3) and 2010 UNCITRAL Rules, Art. 9(3).
- 80) Eberhardt et al., *supra*n. 8, at 38.
- 81) *Ibid.*, 38–41.
- 82) Eberhardt et al., *supra*n. 8, at 42.
- 83) For appointment of arbitrators under ICSID Rules.
- 84) For arbitral appointment under UNCITRAL Rules.

- 85) See S. Perry, *Stern Challenged Over Montenegro Appointments*, available at <<http://globalarbitrationreview.com/news/article/33768/stern-challenged-montenegro-appointments/>> (accessed 16 Sep. 2015).
- 86) *Highbury International A.V.V., Compañía Minera de Bajo Caroní A.V.V., & Ramstein Trading Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/14/10, available at <www.italaw.com/cases/documents/2994#sthash.92X8D8Rw.dpuf> (accessed 16 Sep. 2015).
- 87) Again, it is necessary to stress that having a better understanding of the position of an investor or a state does not amount to prejudice of arbitrators and it does not affect arbitrators' obligation to remain independent and impartial.
- 88) See Consolidated CETA Text, Art. X.25(2): 'If a Tribunal has not been constituted within 90 days from the date that a claim is submitted to arbitration, or where the disputing parties have agreed to appoint a sole arbitrator and have failed to do so within 90 days from the date the respondent agreed to submit the dispute to a sole arbitrator, the Secretary-General of ICSID shall appoint the arbitrator or arbitrators not yet appointed in accordance with paragraph 3.
- The Secretary-General of ICSID shall, upon request of a disputing party, appoint the remaining arbitrators from the list established pursuant to paragraph 4. In the event that such list has not been established on the date a claim is submitted to arbitration, the Secretary-General of ICSID shall make the appointment at his or her discretion taking into consideration nominations made by either Party and, to the extent practicable, in consultation with the disputing parties. The Secretary-General of ICSID may not appoint as presiding arbitrator a national of either Canada or a Member State of the European Union unless all disputing parties agree otherwise.'
- 89) Press Release of the European Commission regarding a new International Investment Court (16 Sep. 2015), available at <http://europa.eu/rapid/press-release_IP-15-5651_en.htm> (accessed 1 Nov. 2015).
- 90) See, e.g., Christoph Schreuer, *Denunciation of the ICSID Convention and Consent to Arbitration*, in *The Backlash against Investment Arbitration: Perceptions and Reality*, Chapter 15, 353–368 (Michael Waible, Asha Kaushal, Kyo-Hwa Liz Chung et al. eds, 2010).
- 91) UNCTAD, *Investor-State Dispute Settlement*, UNCTAD Series on Issues in International Investment Agreements II, available at <http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf> (accessed 18 Aug. 2015).
- 92) See A. Benassy-Quere, M. Coupet & T. Mayer, *Institutional Determinants of Foreign Direct Investment*, 30 *The World Economy* 764–782 (2007).
- 93) G. Esposito, S. Lanau & S. Pompe, *Judicial System Reform in Italy – A Key to Growth*, IMF Working Paper, 2014, available at <www.imf.org/external/pubs/ft/wp/2014/wp1432.pdf> (accessed 18 Aug. 2015).
- 94) The OECD has surveyed publicly available information about ISDS costs. The survey showed that legal and arbitration costs for the parties in ISDS cases averaged over USD 8 million. See OECD, *Investor-State Dispute Settlement, Public Consultation: 16 May–9 July 2012*, at 18, available at <www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf> (accessed 18 Aug. 2015).
- 95) M. Waibel, A. Kaushal et al., *The Backlash against Investment Arbitration: Perceptions and Reality* xxxvii–li (Kluwer Law International 2010).
- 96) OECD, *Investor-State Dispute Settlement*, *supra* n.87. Legal counsel and experts' fees are estimated to average 82% of the total costs of a case. Arbitrator's fees average about 16% of costs and institutional costs amount to 2% of the total.
- 97) European Commission Press Release, *2015 EU Justice Scoreboard: Supporting Member States to improve their justice systems' effectiveness*, <http://europa.eu/rapid/press-release_IP-15-4575_en.htm> (accessed 18 Aug. 2015).
- 98) OECD, *Investor-State Dispute Settlement*, *supra* n. 94.
- 99) See C. Tietje, F. Baetens & Ecorys Rotterdam, *The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership*, 2014, Study prepared for the Minister of Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, para. 68, available at <www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2014/06/24/the-impact-of-investor-state-dis...> (accessed 18 Aug. 2015).
- 100) See Corporate Europe, *Still Not Loving ISDS: 10 Reasons to Oppose Investors' Super-Rights in EU Trade Deals*, available at <<http://corporateeurope.org/international-trade/2014/04/still-not-loving-isds-10-reasons-oppose-inves...>> (accessed 18 Aug. 2015).
- 101) J. Caddel & N. Jensen, *Columbia FDI Perspectives: Perspectives on Topical Foreign Direct Investment Issues by the Vale Columbia Center on Sustainable International Investment No. 120, Which Host Country Government Actors are Most Involved in Disputes with Foreign Investors?*, available at <<http://academiccommons.columbia.edu/catalog/ac:173529>> (accessed 18 Aug. 2015).

- 102)** Avoiding disputes between states and investors by providing clarity to investors on internationally recognized standards relating to various public policy areas is one of the ways in which the OECD Declaration on International Investment seeks to promote international investment. These standards, in the form of recommendations to investors pertaining, *inter alia*, to corporate governance, human rights, employment, environment, anti-bribery, and taxation, are set at OECD, ILO, or UN level by governments in cooperation with business and trade unions. Although recognizing foreign investors' right to seek arbitration, these recommendations embodied in the OECD Guidelines for Multinational Enterprises, the annex to the said OECD Declaration, also serve as an implicit indication of what standards should not be challenged by investors. More information on the OECD's work on investment can be found at <www.oecd.org/investment/>. See also *Chemtura v. Canada*, where the existence of a governmental decision taken for a public purpose makes the standard for challenging the regulatory decision very high. *Chemtura Corp. (formerly Crompton Corp.) v. Canada*, NAFTA Award, 2 Aug. 2010, available at <www.italaw.com/cases/documents/250> (accessed 20 Aug. 2015).
- 103)** An interesting example can be found in the preliminary questions to the CJEU that have been asked by administrative courts in Austria and the Netherlands, respectively, in relation to the interpretation and implementation by the governments of these two countries of the 2009 EU Emissions Trading System Directive. See *Uitspraak 201311081/1/A4*, Decision of the Dutch Court, 11 Jun. 2014, available at <www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=79518>. In the Dutch case, the claimants allege that the Netherlands has wrongfully interpreted the scope of the aforementioned EU Directive in a narrow manner, which led to less emission rights than claimants alleged they were entitled to. Indeed, business interests were allegedly 'chilled' in favour of reducing Dutch emissions.
- 104)** See *supran.* 99, para. 72.
- 105)** See the Philip Morris cases: *FTR Holdings S.A. (Switzerland) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 Request for Arbitration, 19 Feb. 2010, available at <<https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/10/7>> (accessed 28 Oct. 2015); *Philip Morris Asia Ltd. (Hong Kong) v. Commonwealth of Australia*, PCA Case No. 2012-12, Notice of Arbitration, 21 Nov. 2011, available at <www.pccases.com/web/view/5> (accessed 28 Oct. 2015); see also oil and gas company Lone Pine who filed its claim against Canada after it adopted a change in its legislation on shale gas extraction: *Lone Pine Resources v. Canada*, ICSID Case No. UNCT/15/2, Notice of Arbitration, 6 Sep. 2013, available at <<https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=UNCT/15/2>> (accessed 28 Oct. 2015).
- 106)** *France to adopt plain tobacco packaging and restrict e-cigarettes*, Financial Times, 25 Sep. 2014, available at <www.ft.com/intl/cms/s/0/06f8731c-44bf-11e4-bce8-00144feabdc0.html#axzz3FLl05Eil> (accessed 18 Aug. 2015).
- 107)** See 2014 EU Justice Scoreboard, Figure 29, available at <http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2014_en.pdf> (accessed 18 Aug. 2015). The European Commission's overview of the European judicial systems reveals that 14 Member States have a judicial independence ranking under 50, and 4 under 100.
- 108)** *Ömer Dede & Serdar Elhuseyni v. Romania*, ICSID Case No. ARB/10/22, Award, paras 219, 254, available at <<https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?caseno=ARB/10/22>> (accessed 20 Aug. 2015).
- 109)** See *supran.* 102, at 81; <<https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=ARB/10/22>> (accessed 18 Aug. 2015).
- 110)** See for the United States, the North American Free Trade Agreement Implementation Act, Pub. L. 103-82, s. 102(c); and, for Canada, the North American Free Trade Agreement Implementation Act, SC 1993, c. 44, s. 6(2).
- 111)** *Transglobal Green Energy L.L.C. & Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28, Request for Arbitration, 19 Sep. 2013, available at <<https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=ARB/13/28>> (accessed 18 Aug. 2015).
- 112)** *Yukos Universal Ltd. (Isle of Man) v. Russian Federation*, UNCITRAL, PCA Case No. AA 227, available at <www.pca-cpa.org/showpage8d50.html?pag_id=1599> (accessed 18 Aug. 2015).
- 113)** See A. Sinclair, L. Fisher & S. Macrory, *ICSID Arbitration: How Long Does It Take?*, 4 Intl. J. Com. & Treaty Arb. (GAR), available at <www.goldreserveinc.com/documents/ICSID%20arbitration%20%20How%20long%20does%20it%20take.pdf> (accessed 18 Aug. 2015).
- 114)** Under this public law notion, governments take over an investment claim of their nationals against another state after they have exhausted all local remedies, make it their own claim and then proceed to litigate it on a state-to-state basis, see C. Schreuer, *The relevance of Public International Law in International Commercial Arbitration: Investment Disputes*, available at <www.univie.ac.at/intlaw/pdf/csunpublpaper_1.pdf> (accessed 18 Aug. 2015).

- 115) *Ibid.* See also A. Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 Harv. Intl. L. J. 1 (2014), available at <www.harvardilj.org/wp-content/uploads/2014/03/HILJ_55-1_Roberts.pdf> (accessed 18 Aug. 2015).
- 116) For a recent overview of European judicial systems see European Commission for the Efficiency of Justice (CEPEJ), *Report on European judicial systems – Edition 2014 (2012 data): Efficiency and Quality of Justice*, 9 Oct. 2014, available at <www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf> (accessed 18 Aug. 2015).
- 117) Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2010] OJ L351 (recast), 12 Dec. 2012, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF>> (accessed 18 Aug. 2015).
- 118) See further L. Gorywoda, *The New Design of the Brussels I Regulation: Choice of Court Agreements and Parallel Proceedings*, 19 Colum. J. Eur. L., 1 (2013), available at <www.cjel.net/wp-content/uploads/2013/04/Gorywoda-Final.pdf> (accessed 18 Aug. 2015).
- 119) *Loewen Group Inc. & Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award, 26 Jun. 2003, para. 119, available at <www.italaw.com/cases/632> (accessed 20 Aug. 2015). In this case, Canadian investor Loewen sought to appeal the USD 500 million judgment of a Mississippi court rendered against it but was confronted with the application for payment of an appellate bond. Mississippi law requires an appeal bond for 125% of the judgment as a condition of staying execution on the judgment but allows the bond to be reduced or dispensed with for ‘good cause’. In spite of the investor’s ‘claim that there was good cause to reduce the appeal bond, both the trial court and the Mississippi Supreme Court refused to reduce the appeal bond at all and required Loewen to post a USD 625 million bond within seven days in order to pursue the appeal without facing immediate execution of the judgment. According to Claimants, that decision effectively foreclosed Loewen’s appeal rights.’ *Ibid.* para. 6.
- 120) A national treatment provision requires the host state to afford equivalent treatment to foreign investors as it does to entities which are nationals of the host state.
- 121) See Tietje & Baetens, *supra*n. 99, para. 218.
- 122) Indeed, also covering the pre-establishment phase of investments in the FTA whilst also including ISDS provisions may create a risk of a shockwave of claims, if domestic measures to protect sensitive industries are in place.
- 123) Brazil receives large flows of FDI from Spain and Belgium. It has no IIA with Spain and the IIA it signed with Belgium is not in force, see UNCTAD World Investment Report, *Reforming International Investment Governance* (2015) 63, available at <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iialInnerMenu>> (accessed 28 Oct. 2015).
- 124) J.W. Salacuse & N.P. Sullivan, *Do BITs Really Work? an Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 Harv. Intl. L. J. 67–130 (2005).
- 125) M. Hallward-Driemaier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit and They Could Bite*, World Bank Policy Research Paper, WPS 3121 (2003).
- 126) See, e.g., C. Bellak, *Economic Impact of Investment Agreements*, Working paper no. 200, Vienna University of Economics and Business, August 2015, available at <<https://epub.wu.ac.at/4625/1/wp200.pdf>> (accessed 24 Aug. 2015); A. Berger, M. Busse, P. Nunnenkamp et al., *Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box*, 10 Intl. Econ. Econ. Policy, 147–177 (2013); A. Tortian, *The Impact of Bilateral Investment Treaties and Financial Development on Foreign Direct Investment: Evidence from Eurasia*, Paper Submission for the Armenian Economic Association Conference, 13–14 Oct. 2012, Yerevan (Armenia), available at <www.aea.am/files/papers/w1213.pdf> (accessed 24 Aug. 2015); C.H. Oh & M. Fratianni, *Do Additional Bilateral Investment Treaties Boos Foreign Direct Investments?*, Indiana University, Kelley School of Business, Department of Business Economics and Public Policy, Working Papers (2010), available at <<http://econpapers.repec.org/paper/iukwpaper/2010-04.htm>> (accessed 24 Aug. 2015); S. Guerin, *Do the European Union’s Bilateral Investment Treaties Matter? The Way Forward After Lisbon*, CEPS Working Document No. 333 (2010), available at <www.ceps.eu/system/files/book/2010/07/WD333%20Sariso%20Guerin%20on%20Bilateral%20Investment%20Treat...> (accessed 24 Aug. 2015); E. Neumayer & L. Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 World Dev., 1567–1585 (2005); T. Büthe & H.V. Milner, *Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis*, in *The Effects of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (K.P. Sauvant & L.E. Sachs eds, OUP 2009).
- 127) Lejour & Salfi, *supra*n. 12.
- 128) *World Investment Prospects to 2011: Foreign Direct Investment and the Challenge of Political Risk?*, 96 (L. Kekik & K.P. Sauvant eds, EIU and CPI 2007), available at <http://works.bepress.com/karl_sauvant/132/> (accessed 24 Aug. 2015).
- 129) *Ibid.*, at 61.
- 130) See R.J. Orr, *The Impact of BITs on FDI: Do Investors Now Ignore BITs?*, 4 TDM (2007).

- 131)** UNCTAD, World Investment Report 1998: Trends and Determinants, available at <<http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=650>> (accessed 24 Aug. 2015).
- 132)** See J. de Paiva & Luis Peretti, *Brazil Signs New BITs with Mozambique and Angola: New Approach to BITs or 'Toothless Lions'?*, Global Arbitration News, 7 Apr. 2015, available at <<http://globalarbitrationnews.com/20150407-brazil-signs-new-bilateral-investment-treaties/>> (accessed 24 Aug. 2015).
- 133)** See European Commission, Press Release regarding a New Investment Court System (ICS), 16 Sep. 2015, available at <http://europa.eu/rapid/press-release_IP-15-5651_en.htm> (accessed 11 Oct. 2015).
- 134)** *Ibid.* See also WTO Appellate Body, <www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm> (accessed 28 October 2015); WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Art. 17, available at <www.wto.org/english/docs_e/legal_e/28-dsu.pdf> (accessed 28 Oct. 2015).
- 135)** K. Hughes & P. Blenkinsop, *US Wary of EU Proposal for Investment Court in Trade Pact*, Reuters, 29 Oct. 2015, available at <www.reuters.com/article/2015/10/29/us-trade-ttip-idUSKCN0SN2LH20151029> (accessed 1 Nov. 2015).

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