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Investor-State Dispute Settlement ('ISDS') and alternatives of dispute resolution in international investment law

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Study

Prepared for the European Parliament's Committee on International Trade

Investor-State Dispute Settlement ('ISDS') and alternatives of dispute resolution in international investment law

Abstract

Investor-State Dispute Settlement (ISDS) is a useful means of enforcing substantive investment protection standards contained in international investment agreements. The mechanism should therefore continue to form part of European international investment policy. However, the EU has to address four major challenges tied to this dispute settlement tool, i.e. (1) mitigating inconsistency, (2) securing the right balance between private and public interests, (3) establishing integrity of arbitral proceedings and (4) preventing misuse, allowing for error-correction and managing financial risk associated with ISDS.

Among others, this study suggests (1) strengthening the role of the state parties to international investment agreements, (2) establishing an appeals facility, (3) giving well-functioning domestic court systems an adequate role in resolving investor-state disputes by introducing a novel elastic local remedies rule and (4) considering the implementation of tenured judges; at least on an appeals level.

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1. EXECUTIVE SUMMARY[1]

1.1 The universe of investor-state dispute settlement (ISDS) mechanisms

ISDS mechanisms vary in terms of access, procedure and consequences of a breach of a substantive standard – such as fair and equitable treatment – contained in an investment instrument[2], as well as in respect of enforcement of an award. Nonetheless, they display features roughly common to all:

The investor can – due to a general consent of the host state given in the investment instrument and independent from its home state – initiate international arbitral proceedings against a host state. In doing so the investor may challenge its host state's measures on the grounds that they were incompatible with the substantive standards in the investment agreement. These measures typically accrue from the exercise of public authority of the host state and can be executive, legislative or judicial in nature. Usually, three ad-hoc arbitrators – two party-appointed, the third appointed in consensus or, in lieu thereof, by a third person – sit on a case. If a violation of a substantive standard can be established, an enforceable remedy – mainly pecuniary – is awarded. An arbitral tribunal's decision is binding on the host state and, in principle, final. It can be challenged only on exceptional grounds. An appeals facility is currently not provided for.

1.2 Virtues of ISDS

ISDS *as a concept* is prescribed as one of the most effective tools to manage political risk and to promote the international rule of law (below 2.2.1 (p. 17)). By largely replacing state-driven enforcement mechanisms in public international law, ISDS renders substantive commitments in investment instruments more credible and contributes towards a de-politicisation of investment disputes (below 2.2.2 (p. 19)). Mainly developing states have signed up to international investment instruments with the expectation it would facilitate attracting foreign investment (below 2.2.3 (p. 21)).

ISDS' contribution to the promotion of an international rule of law should be stressed in particular. Bilateral and regional investment protection treaties can be viewed as the extension of a century-old idea within public international law: that everyone is entitled to a minimum standard of treatment abroad at any given time. ISDS is a key mechanism to hold an investor's host state accountable for conduct falling short of certain standards without having (largely) to rely on domestic judicial relief, which might be unavailable precisely then when it is desperately needed.

1.3 Conquering challenges associated with ISDS

Critique of ISDS is as old as the system itself. Lately, though, criticism has reached also the middles of those societies which commonly supported robust investment protection backed up by strong ISDS mechanisms.

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[1] This study is one out of a series of three interrelated studies dealing with the European international investment policy. The author would like to thank Prof. Dr. Dr. h. c. Ingolf Pernice and Prof. Dr. Pieter Jan Kuijper for their cooperation in the course of preparing the studies and wishes to express his gratitude to cand. iur. Pauline Brosch, stud. iur. Daniel Ncube, and cand. iur. Sebastian Schreiber for their highly appreciated editorial support. Cf. for the other studies and the EP workshop documents http://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/hindelangs/Studie-fuer-Europaeisches-Parlament/index.html (visited 03 October 2014).

[2] For the purpose of this study, the term 'investment instrument' refers to treaties relating to the protection of foreign investment concluded by states or the EU with other states or international organisations in public international law, such as bilateral or regional investment (protection) treaties or investment chapters in so-called comprehensive free trade agreements.

1.3.1 Mitigating inconsistency

ISDS practice has been criticized by civil society, academia and even by business organisations for *not producing consistent and predictable outputs* so that especially host states lack guidance on their obligations accepted under a certain investment instrument.

'Inconsistency' in decision making in ISDS *is, first and foremost, the result of the current state of international investment law*, atomized into over 3.000 investment instruments and dozens of arbitration rules. Arbitral awards are rendered on the basis of similarly worded but legally hardly comparable investment instruments. One must, hence, be careful not to compare apples with oranges when drawing parallels between arbitral awards handed down on the basis of different investment instruments. Overall, it appears to be more appropriate to speak of *fragmentation* instead of 'inconsistency' of ISDS practice (below 2.3.1 (p. 24)).

1.3.1.1 Long-term: true multilateralisation

While a *multilateral investment agreement with a centralised dispute resolution mechanism and/or appeals facility* replacing the over 3.000 bilateral or regional investment instruments might be well suited to counter current 'inconsistency' concerns and should, therefore, be a long-term goal, political prospects of such a proposal currently appear to be dim (below 2.3.1.1 (p. 27)).

1.3.1.2 Short- and medium-term: strengthening the role of the state parties; establishing an appeals facility

Investment tribunals themselves want to advance 'consistency' by way of *'de facto precedent'* and similar concepts, i.e. relying on previous rulings by other arbitral tribunals for interpreting an investment instrument. Attractive as it may be at first glance, such concepts seem *highly problematic* when sidestepping the binding methodology of interpretation in public international law enshrined in the Vienna Convention on the Law of Treaties (VCLT). By abandoning this methodology, a tribunal frees itself from the bonds of its masters: the state parties to the treaty as the legitimate guardians of the common good (below 2.3.1.2 (p. 33)).

State parties have largely been inactive in continuously monitoring the interpretation of investment instruments. The EU and its treaty partners should consider taking a proactive approach in their investment instruments (below 2.3.1.3 (p. 36)) by endowing these with

- a *treaty committee*[3], staffed with representatives of all state parties, which perpetually monitors ISDS practice and puts forth authoritative[4] interpretations of the provisions of the investment instrument if perceived necessary and, in addition,
- a *preliminary reference procedure* to provide authoritative interpretation or a *mandatory review procedure for draft awards*, conducted with a view to preserving consistency in interpretation.

[3] A treaty committee may be established to specifically monitor ISDS practice evolving from a given investment instrument. In the context of a comprehensive trade agreement, such a task may be attributed to a 'general' treaty committee or a sub-committee charged with the task to perpetually monitor the implementation of the said treaty or parts of it.

[4] There is some confusion in legal literature as to the precise meaning of the term 'authoritative' interpretation. For the purpose of this study it shall refer to a (joint) interpretation of a treaty in public international law, *binding* beyond an individual case, issued by the state parties to this agreement or a treaty committee charged with such a task.

As long as there is no multilateral agreement on substantive standards in international investment law, the consistency effect of an appeals facility would be limited to the individual investment instrument. However, if a rather large number of claims on the basis of a single EU investment instrument – such as the TTIP – is expected, the EU should seriously consider, right from the outset,

- the establishment of an *appeals mechanism* in order to correct erroneous awards and secure consistency in interpretation (below 2.3.1.1.2 (p. 31)).[5]

While *less openly drafted substantive standards* in investment instruments can contribute to *some predictability* of outcomes in ISDS, not each and every possible contentious constellation can be anticipated. Furthermore, the more detailed international investment instruments become, the *less flexible* they are to adapt to later shifts in policy priorities. In contrast, the more openly phrased they are, the more room is left for adjudicative bodies to put forward interpretations which may not match the mutual intentions of the state parties or contradict previous decisions on the basis of the same agreement (below 2.3.1.5 (p. 38)).

Other tools such as the *consolidation* of different claims involving similar questions of law and fact (below 2.3.1.4 (p. 38)) also appear suitable to cushion inconsistency concerns but equally entail drawbacks.

1.3.2 Securing the 'right balance' between private and public interests

Investment tribunals deal with *highly sensitive political issues* in host states. They are asked to rule on the introduction of cigarette plain packaging, nuclear power phase-outs or crisis-related austerity measures. High-profile cases contribute towards the growing *perception*, especially among members of civil society but also in some state governments and academia, *that ISDS practice is unduly interfering with democratic policy choices.*

These fears have been gathering momentum as tribunals have, for some time, had to face reasonable questions of whether they are willing and able to sufficiently take into account public interests such as human rights, financial stability, environmental protection, public health or others.

Securing the 'right balance' – i.e. preserving space for democratic policy choices and, simultaneously, respecting private property interests – has, among others, been at the centre of the ongoing reform debate on ISDS.

Abandoning ISDS provided for in international agreements *entirely and replacing it* by domestic courts (below 2.3.2.2.1.1 (p. 43)), arbitration based on investor-state contracts or national legislation (below 2.3.2.2.1.2 (p. 46)), diplomatic protection, state-state arbitration (below 2.3.2.2.1.3 (p. 48)) and/or non-binding dispute resolution mechanisms (below 2.3.2.2.1.4 (p. 49)) is seemingly *not an attractive option for the EU.*

Rather, ISDS should be *re-adjusted* with a view to securing preservation of the 'right balance' the state parties – and not subsequently the tribunals – struck when they concluded the investment instrument. However, states should be aware that making an appeal to tribunals to treat the issue of balancing private and public interests with 'more caution' might not suffice to sustainably address the issue.

[5] In such situations a preliminary reference procedure to seek authoritative interpretation or a mandatory review procedure for draft awards would not necessarily be required.

1.3.2.1 Drafting treaty texts more precisely, strengthening authoritative interpretation by state parties

Providing explicitly for public objectives considered important to the state parties in the preamble or elsewhere in an investment treaty helps preserving the intended balance between private and public interests. This way, tribunals have not to engage in looking for such objectives beyond the investment instrument itself; a task in which they have not been overly successful as yet. However, taking public interests into consideration and balancing them with private interests does not say anything about the weight given to each of them. This would require *further specification* in an investment instrument if not intended to be left to tribunals.[6]

Turning to the post-ratification period, arbitral tribunals have not always faithfully followed the binding international rules on treaty interpretation. Instead, some tribunals superposed the rules on interpretation contained in the VCLT by a highly problematic 'system of de facto precedent' which is basically backward looking, path-dependent and prone to repeating old mistakes. In the worst case, the balance reached in treaty negotiations between private and public interests might be distorted or even replaced by a new one struck by the arbitrators.

To hedge in (to some extent) power-seizing processes inherent in treaty interpretation by ad-hoc tribunals, state parties should make use more extensively of a *treaty committee*[7], as outlined before. If necessary, authoritative interpretative notes could be issued; even with regard to ongoing arbitrations. Such interpretation would have to be taken into consideration by tribunals (below 2.3.2.2.2.1 (p. 50)).

Further tools which lend themselves for securing the 'right balance' between private and public interests comprise, inter alia, the redrafting of substantive standards (below 2.3.2.2.2.2 (p. 54)) and the restriction or delay of access to ISDS (below 2.3.2.2.2.3 (p.55)). In respect of the latter, a novel elastic exhaustion of local remedies rule in particular appears to be central to preserve the 'right balance' between private and public interests.

1.3.2.2 Introducing a novel elastic local remedies rule

In contrast to other areas of public international law, in international investment law an investor is hardly required to exhaust local remedies before resorting to ISDS ('local remedies rule'). This has rendered ISDS an alternative to national courts, a circumstance which sits uncomfortably with international investment law's original idea, i.e. the notion of ISDS as a backup for foreign investors in case legal remedies available in the host state fail to provide sufficient protection.

This overall development does not sufficiently reflect the advantages of resorting to local courts before initiating international arbitration. Moreover, it seems to operate on the questionable assumption that all domestic legal systems are more or less the same: biased, inefficient and incapable of guaranteeing a sufficient level of protection for foreign investment.

Regarding the advantages of resorting to domestic courts (below 2.3.2.2.2.3.2.1 (p. 56)): domestic courts, at least in developed legal systems with a strong rule of law[8], may operate in a legal environment more *consistent and predictable* than current ISDS practice. Also, in contrast to the

[6] Achieving such aims presupposes, of course, that the state parties succeed in clarifying the scope of the substantive standards and, furthermore, that tribunals would abide by the more detailed directions given by the state parties.

[7] On the notion of 'treaty committee' see above footnote 3.

[8] Factors indicating a strong rule of law might relate, inter alia, to effective constraints on government powers, the absence of corruption, open government essential for effective public oversight, strong fundamental rights and assurance of security of persons and property.

current ISDS model, *erroneous decisions can be corrected* by appeals mechanisms. Furthermore, domestic courts can, under certain circumstances, provide a *single forum* in which the dispute is adjudicated in respect of both whether the host state measure was in compliance with domestic laws and the international commitments of the host state. Even if domestic courts are prevented from directly applying an international investment instrument, this would still be no argument against their involvement prior to ISDS. Protection against misuse or abuse of governmental powers is a standard feature of domestic law. At least in advanced systems, the standard should *generally* not fall below what is offered in international investment law.

These may not be the only advantages of prior involvement of domestic courts: when states are worried that investment tribunals do not pay sufficient attention to public interests in the process of balancing them with private property interests, domestic courts might be better suited to take a first shot. Domestic courts are experienced in considering an investment case against the background of the whole domestic legal system. This system mirrors the elaborate, complex and refined balance of private and public interests agreed to in the host state. Domestic courts may be in a better position to comprehensively appreciate this balance than arbitral tribunals.

If the domestic court fails to resolve the dispute to the satisfaction of the investor and the latter initiates investment arbitration, a tribunal may benefit from the 'pre-processing' of facts and the (domestic) law. Especially the domestic court's treatment of its domestic law can inspire the tribunal's holdings to the extent that it conforms to the investment instrument. Overall, such arbitral awards might be closer to the consensus present in the host state and, hence, may be more easily accepted and perceived as legitimate by the public in that state. Ultimately, it would render ISDS what it was actually meant to be: a safety net present in the event of a failure of the domestic system; not an alternative to it.

Certainly, possible virtues of taking recourse to domestic courts before resorting to investment arbitration may vary significantly across national jurisdictions and would hold true generally only for advanced legal systems. The EU should make concessions to the fact that domestic jurisdictions exhibit different levels of development.

State practice on investment treaty negotiation shows that it is possible to negotiate investment agreements which differentiate between states and their level of development. Insofar concerns that we might see a 'race to the bottom' in terms of the general level of protection advanced by investment instruments can be allayed.

On a pragmatic level, treaty negotiators would be well-advised to go beyond the classic option of merely deciding in favour of or against a local remedies rule in an investment instrument. Opting for a treaty stipulation prescribing a fixed time period in which the investor is obliged to pursue domestic remedies before proceeding to arbitration on an international level might also not be the ideal solution; such a regulation does not do justice to the diversity of legal issues at stake in investment conflicts. If one were to allow investors to initiate investor-state arbitration prior to expiry of the fixed time period prescribed in the local remedies rule by arguing that the domestic system falls short of certain criteria – which should be previously specified in an investment instrument – one would very carefully need to evaluate the 'intrinsic' motivations of those who shall be charged with deciding over such an investor's plea.

Instead, one should consider an *elastic time period for pursuing local remedies.* This time period would be *attached to a third-party index measuring the potential of domestic courts to produce effective solutions to claims of (foreign) investors.* A 'low-ranking' domestic legal system would lead

to a waiver of the local remedies rule. Significant improvements in the rule of law in a state would result in an increasing involvement of local courts and vice versa.

Such an approach would, first, signal that *no formal distinction is made between developed and developing states* and, hence, tribute is paid to the notion of formal equality of states. At the same time, second, such a *rule would* also *recognise* that there are *factual differences between states.* Such a local remedies rule would even allow for flexibility within one agreement without having to compromise the idea that both state parties to a treaty are bound by the same rules. (below 2.3.2.2.2.3.2.2 (p. 58))

1.3.2.3 Reflecting critically on other suggested policy tools

Another tool states have already deemed appropriate to preserve their policy space better is to limit remedies in ISDS to pecuniary remedies. However, whether this instrument is indeed effective or rather counterproductive has yet to be critically assessed (below 2.3.2.2.2.3.2.2 (p. 58)). Likewise, in order to give sufficient weight to public interests in investment arbitration, some observers suggest allowing for host state claims. While this idea has some merit it also encounters several difficulties which might offset the advantages (below 2.3.2.2.2.5 (p. 63)).

Since the interpretation of an investment instrument in ISDS, especially when containing novel or innovative clauses is difficult to predict, it is essential to preserve some flexibility for future changes without having to renegotiate the whole agreement. *Review periods and/or termination clauses specific to certain investment provisions and ISDS clauses would lend themselves to control treaty practice better*. (below 2.3.2.2.2.6 (p. 64)).

1.3.3 Establishing integrity of arbitral proceedings

When allowing international tribunals to review administrative, judicial and legislative acts of host states, the public in these states has a vital interest in securing the integrity of the proceedings. However, ISDS has largely been carried out behind closed doors and arbitral awards are not published by default. Only lately criticism has mounted in Europe that this is not acceptable anymore. *Clear improvements in terms of transparency* can already be witnessed in EU draft agreements or negotiating directives (below 2.3.3.1 (p. 66)).

Another serious matter of concern is the alleged *appearance of bias of arbitrators and arbitration institutions* in favour of investors. If one subscribes to the view that not only justice must be done, but it must also be seen to be done, overcoming this issue without significantly altering the current system of ad-hoc nominated arbitrators will prove challenging (below 2.3.3.2 (p. 69)).

1.3.4 Preventing misuse, allowing for error correction, managing financial risks

Like any other litigation or commercial arbitration instrument, ISDS also carries in it the potential for misuse. Investors might restructure their investments after a dispute arose in order to take advantage of the protection offered by a certain investment instrument (below 2.3.4.1 (p. 73)). Furthermore, initiating investment arbitration without having a substantiated case can form a tool to pressure host states into compromises to which they would otherwise not have agreed to (below 2.3.4.2 (p. 76)). Mechanisms to prevent such behavior are accessible to treaty drafters. To which extent they are employed largely depends on political priorities.

Given the issues at stake in investor-state arbitration, investment instruments should also provide for sufficient safeguards to correct erroneous decisions. Current agreements hardly provide for meaningful

correction mechanisms. The creation of an appeals facility could open up the possibility to correct errors of law and fact. In light of the considerable public interests at issue it can hardly be argued that poorly reasoned or erroneous decisions would be more acceptable than (slightly) prolonged proceedings (below 2.3.5 (p. 76)).

Last but not least, the financial risks involved in ISDS (below 2.3.6 (p. 78)) – in terms of both arbitration costs and the amount of damages awarded – are significant. Tools to improve predictability of costs and control these risks better – at least to some extent – are available but would involve respective policy choices.

2. ANALYSIS

2.1 Introduction

International investment law is *at a crossroads*: rising numbers of investor-state-disputes and newly signed investment agreements suggest the *continuous importance and attractiveness* of this field of law. In 2012, 58 new investor–state claims were filed, the highest number of disputes ever registered in one year, confirming foreign investors' steadily increasing reliance on this system[9]. Equally, bilateral investment agreements (BITs) and so-called comprehensive free trade agreements (FTAs), which include chapters on investment, enjoy continuing popularity and support among many state governments around the globe. Recent events, such as the accession of Canada to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID-Convention)[10], the inclusion of an investment protection chapter in the negotiation agendas of both the EU and the USA on the Transatlantic Trade and Investment Partnership (TTIP)[11], that of the EU and Canada on the Comprehensive Economic and Trade Agreement (CETA)[12] as well as the opening of negotiations between the EU and China on an investment agreement highlight this trend[13].

At the same time, *contestations* are also growing: Some countries, such as South Africa[14] or Indonesia[15], have not renewed or have even terminated existing BITs while others, such as Ecuador, have withdrawn from the ICSID-Convention[16]. In addition, high-profile cases against industrialised countries such as the pending arbitrations in matters of *Vattenfall v. Germany*[17], *Philip Morris v. Australia*[18], or *Eli Lilly v. Canada*[19] lead to continuously growing public opposition to investor-state

[9] Note that not all arbitrations initiated might be publicly known. UNCTAD, *World Investment Report 2013*, p. 110. In 2013, at least 57 arbitrations were initiated. Cf. UNCTAD, *Recent Developments in Investor-State Dispute Settlement (ISDS)*, IIA Issues Note 2014/1, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf (visited 28 April 2014).
[10] https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp (visited 28 April 2014).
[11] http://ec.europa.eu/trade/policy/in-focus/ttip/ (visited 28 April 2014).
[12] http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada/ (visited 28 April 2014).
[13] EU-China 2020 Strategic Agenda for Cooperation, available at http://eeas.europa.eu/delegations/china/documents/news/20131123.pdf (visited 28 April 2014).
[14] Cf. Woolfrey, S., in: Hindelang/Krajewski (eds.), *Shifting Paradigms in International Investment Law (provisional title)*, Oxford University Press, forthcoming 2015.
[15] In March 2014, Indonesia informed the Netherlands that it has decided to terminate the Bilateral Investment Treaty. As a side note the Indonesian Government indicated that it intends to terminate all of its 67 bilateral investment treaties. Cf. http://indonesia.nlembassy.org/organization/departments/economic-affairs/termination-bilateral-investment-treaty.html (visited 28 April 2014). See for an in-depth analysis of the recent shift in Indonesia's foreign direct investment policy Knörich, J./Berger, A., *Friends of foes? Interactions between Indonesia's international investment agreements and national law*, Studies of the German Development Institute, Bonn, 2014.
[16] In 2009 Ecuador informed the World Bank that it would renounce the ICSID-Convention. Cf. https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement20 (visited 28 April 2014). In respect of general Latin American developments cf. Aidid, A. and Clarkson, St., *Researching International Norm Diffusion: Brazilian and Latin American Resistance to Investor-State Dispute Settlement*, Annual Congress of the International Studies Association, San Francisco, 6.4.2013, abstract available at http://ssrn.com/abstract=2252721 (visited 2. May 2014).
[17] *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, documents available at http://www.italaw.com/cases/documents/1655 (visited 28 April 2014).
[18] *Philip Morris Asia Limited v. The Commonwealth of Australia*, Uncitral, PCA Case No. 2012-12, documents available at http://www.italaw.com/cases/851 (visited 28 April 2014).
[19] *Eli Lilly and Company v. Government of Canada*, documents available at http://italaw.com/sites/default/files/case-documents/italaw1582.pdf (visited 28 April 2014).

dispute settlement by way of ad-hoc arbitration (ISDS). Calls by governments[20], civil society[21], think tanks[22], business associations[23] and in academic literature for preserving (more) policy space are yet another indication that the perception of international investment law is undergoing a profound change. Latest signs of this trend are policy proposals by inter-governmental organisations such as the United Nations Conference on Trade and Development (Unctad)[24] or the Commonwealth Secretariat[25] for the (re-)negotiation of BITs with a stronger focus on sustainable development.

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[20] Cf. e.g. German government in respect of TTIP Deutscher Bundestag, Antwort der Bundesregierung auf die Kleine Anfrage der Fraktion der SPD, Drucksache 17/14724, 24 September 2013, p. 2 ('Investitionsschutz gehört in den Verhandlungen über die TTIP nicht zu den offensiven Interessen der Bundesregierung, da die USA als Mitglied der Organisation für wirtschaftliche Zusammenarbeit und Entwicklung EU-Investoren hinreichend Rechtsschutz vor nationalen Gerichten gewähren und US-Investoren in der EU hinreichende Rechtsschutzmöglichkeiten vor nationalen Gerichten besitzen.'); see also Zacharakis, Z. and Endres, A., Regierung gegen Investorenschutz im Freihandelsabkommen, *ZEIT online*, 13 March 2014, available at http://www.zeit.de/wirtschaft/2014-03/investitionsschutz-freihandelsabkommen-bundesregierung-ttip (visited 2 May 2014); Pinzler, P., Ein Herz für Kanadas Konzerne, *ZEIT online*, 10 April 2014, available at http://www.zeit.de/wirtschaft/2014-04/TTIP-Kanada-Investorenschutzklagen-Kommentar (visited 2 May 2014); in respect of the UK cf. House of Lords, European Union Committee, *The Transatlantic Trade and Investment Partnership*, 14th Report of Session 2013-14, available at http://www.publications.parliament.uk/pa/ld201314/ldselect/ldeucom/179/179.pdf (15 May 2014), para 169 ('We nonetheless conclude that proponents of investment protection provisions enforced by an ISDS mechanism have yet to make a compelling case for their inclusion in TTIP or to convincingly dispel public concerns.'); see also Wright, O. and Morris, N., British sovereignty 'at risk' from EU-US trade deal: UK in danger of surrendering judicial independence to multinational corporations, warn activists, *The Independent*, 14 January 2014, available at http://www.independent.co.uk/news/uk/politics/british-sovereignty-at-risk-from-euus-trade-deal-uk-in-danger-of-surrendering-judicial-independence-to-multinational-corporations-warn-activists-9057318.html (visited 2 May 2014).

[21] Cf., e.g. open letter entitled 'Stop the Corporate Giveaway! A transatlantic plea for sanity in the EU–Canada CETA negotiations' addressed to the EU Commission and the Canadian Government and signed by over 100 NGOs, available at http://www.s2bnetwork.org/fileadmin/dateien/downloads/Stop_the_Corporate_Giveaway_-_A_transatlantic_plea_for_sanity_in_the_EU_Canada_CETA_negotiations.pdf (visited 2 May 2014); see also Bernasconi-Osterwalder, N., and Rosert, D., *Investment Treaty Arbitration: Opportunities to reform arbitral rules and processes*, The International Institute for Sustainable Development, January 2014, available at http://www.iisd.org/sites/default/files/pdf/2014/investment_treaty_arbitration.pdf (visited 2 May 2014); Bernasconi-Osterwalder, N. and Mann, H., *A Response to the European Commission's December 2013 Document "Investment Provisions in the EU-Canada Free Trade Agreement (CETA)"*, The International Institute for Sustainable Development, February 2014, available at http://www.iisd.org/sites/default/files/pdf/2014/reponse_eu_ceta.pdf (visited 5 May 2014); McDonagh, Th., *Unfair, Unsustainable and Under the Radar - How Corporations use Global Investment Rules to Undermine a Sustainable Future*, The Democracy Center, 2013, available at http://democracyctr.org/wp/wp-content/uploads/2013/05/Under_The_Radar_English_Final.pdf (visited 28 April 2014).

[22] Ikenson, D., The Transatlantic Trade and Investment Partnership: A Roadmap for Success, *Free Trade Bulletin*, No. 55, 14 October 2013, available at http://www.cato.org/publications/free-trade-bulletin/transatlantic-trade-investment-partnership-roadmap-success (visited 28 April 2014).

[23] Bundesverband der Deutschen Industrie e.V., *Positionspapier: Schutz europäischer Investitionen im Ausland: Anforderungen an Investitionsabkommen der EU*, Bundesverband der Deutschen Industrie e. V. (BDI), March 2014, available at http://www.bdi.eu/download_content/GlobalisierungMaerkteUndHandel/Schutz_europaeischer_Investitionen_im_Ausland.pdf (visited 28 April 2014).

[24] E.g. UNCTAD, *Investment Policy Framework for Sustainable Development*; UNCTAD, 2012, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf (visited 5 May 2014); see also Hindelang/Krajewski (eds.), *Shifting Paradigms in International Investment Law (provisional title)*, Oxford University Press, forthcoming 2015 - conference proceedings on *International Investment Agreements – Balancing Sustainable Development and Investment protection*, Freie Universität Berlin, 10-11 October 2013, conference website, available at http://www.internationalinvestmentlaw.com (visited 2 May 2014).

[25] VanDuzer, J. et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 28 April 2014).

In the light of these contradictory developments, the international investment law regime is currently in a 'state of transition', albeit not for the first time. The principles and basic functions of international investment law can be traced back to the century-old international law of aliens[26]. A first major evolutionary step towards the paradigm of international investment law currently attracting much criticism can be envisaged in the *emergence of bilateral investment treaties in the late 1950s*[27] spelling out substantive protection standards for foreign investment ('substantive standards')[28]. However, it was not until the *1970s* when so-called *investor-state dispute settlement clauses*[29] were included in such treaties[30] and, subsequent to the fall of the 'Iron Curtain', that those gained practical significance. Today, the vast majority of bilateral and regional investment treaties (hereafter jointly also referred to as 'investment instruments[31]') provide for investor-state dispute settlement[32]. This, however, should not lead to the erroneous conclusion that there is a single legal regime on international investment law or one ISDS mechanism. In fact, there are as many ISDS mechanisms as there are investment instruments; over 3.000 by the end of 2012 according to Unctad[33].

While *ISDS mechanisms vary in terms of access, procedure and consequences of a breach of a substantive standard* contained in an investment *instrument, as well as in respect of enforcement of an award*, they nonetheless display features roughly common to all: The investor can – due to a general consent of the host state given in the investment instrument[34] and independent from its home state – initiate international arbitral proceedings against a host state challenging its measures on grounds that they were incompatible with the substantive standards in the investment agreement. These measures accrue from the exercise of public authority of the host state and can be executive, legislative or judicial in nature[35]. Usually, three ad-hoc arbitrators – two party-appointed, the third appointed in consensus or, in lieu thereof, by a third person – sit on a case. If a violation of a substantive standard

[26] Sornarajah, M., *The International Law on Foreign Investment*, Cambridge University Press, New York, 3th Edition, 2010, pp. 19 et seqq.; Herdegen, M., *Principles of International Economic Law*, Oxford University Press, Oxford,2013, pp. 13 et seqq.
[27] The first being the 1959 Germany-Pakistan BIT, Bundesgesetzblatt (German Law Gazette) II 1961, p. 793.
[28] Such substantive standards frequently relate to fair and equitable treatment, national and most-favoured-nation treatment, full protection and security and non-discrimination. Such treaties also stipulate criteria for a lawful expropriation.
[29] These ISDS clauses were generally included alongside state-state dispute settlement provisions. According to Newcombe, A. and Paradell, L., *Law and practice of Investment Treaties: Standards of Treatment*, Kluwer Law International, The Hague, 2009, pp. 44-45 the first BIT which included an unqualified consent to investor-state arbitration was the 1969 Italy-Chad BIT. Only since the late 1980s have investment instruments generally contained strong and broad ISDS clauses. See Yackee, J., Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties, *Brooklyn Journal of International Law*, Vol. 33 (2008), pp. 405 et seqq., pp. 423–33.
[30] Pohl, J. et al., *Dispute settlement provisions in international investment agreements: A large sample survey*, OECD Working Papers on International Investment No. 2012/2, available at http://www.oecd.org/daf/inv/investment-policy/WP-2012_2.pdf (visited 28 April 2014), p. 11.
[31] See also above footnote2.
[32] According to the OECD, among the 1.660 bilateral investment treaties considered in a sample study, 96% mention ISDS mechanisms. Cf. Pohl, J. et al., *Dispute settlement provisions in international investment agreements: A large sample survey*, OECD Working Papers on International Investment No. 2012/2, available at http://www.oecd.org/daf/inv/investment-policy/WP-2012_2.pdf (visited 28 April 2014), p.10.
[33] UNCTAD, *Towards a New Generation of International Investment Policies: Unctad's Fresh Approach to Multilateral Investment Policy-Making*, IIA Issues Note 2013/5, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d6_en.pdf (visited 28 April 2014), p. 4.
[34] Cf. for a view on the nature of this consent Van Harten, G., *Investment Treaty Arbitration and Public International Law*, Oxford University Press, Oxford, 2007, p. 63.
[35] By and large, administrative acts have been put up for review in ISDS, cf. Caddel, J. and Jensen, M., *Which host country government actors are most involved in disputes with foreign investors*, Columbia FDI Perspectives, No. 120, available at http://www.vcc.columbia.edu/content/which-host-country-government-actors-are-most-involved-disputes-foreign-investors (visited 28 April 2014).

can be established, an enforceable remedy – mainly pecuniary – is awarded[36]. An arbitral tribunal's decision is binding on the host state and, in principle, final. It can be challenged only on exceptional grounds. An appeals facility is not provided for.

States, so far, have *defined* the *procedural framework* in which arbitral proceedings are conducted *rather loosely* compared to domestic procedural frameworks. This remains true even if the default arbitration rules in the ICSID-Convention[37] and the Uncitral arbitration rules[38], which are the most frequently proposed ones in investment instruments[39], are taken into consideration. Most basic issues, such as the composition of tribunals, applicable law, remedies, allocation of costs are often not addressed in investment instruments but in more (or rather less) detail in arbitration rules[40].

It is this very concept of enforcing substantive protection standards to which the European Parliament[41], Council[42] and Commission[43] have expressed their fundamental backing – albeit to a significantly varying degree – on several occasions since major competences were conferred upon the European Union (EU) in the area of foreign investment with the entry into force of the Lisbon

[36] Cf., e.g. Articles 37-40 (constitution of the tribunal), Articles 49-55 (award, recognition and enforcement) Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID-Convention, adopted 18 March 1965, entered into force 14 October 1966); Articles 8-10 (appointment), Article 34 (award) Uncitral Arbitration Rules as revised in 2010; Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, adopted 10 June 1958, entered into force 7 June 1959).
[37] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID-Convention, adopted 18 March 1965, entered into force 14 October 1966), available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (visited 1 May 2014).
[38] Available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf (visited 1 May 2014).
[39] OECD, *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures*, OECD Working Papers on International Investment No. 2005/01, available at http://www.oecd.org/daf/inv/internationalinvestmentagreements/34786913.pdf (visited 6 May 2014), p. 3.
[40] Pohl, J. et al., *Dispute settlement provisions in international investment agreements: A large sample survey*, OECD Working Papers on International Investment No. 2012/2, available at http://www.oecd.org/daf/inv/investment-policy/WP-2012_2.pdf (visited 28 April 2014).
[41] Cf., e.g. European Parliament resolution of 9 October 2013 on the EU-China negotiations for a bilateral investment agreement, EP Doc No P7_TA-PROV(2013)0411 (Procedural file 2013/2674(RSP)); European Parliament resolution of 23 May 2013 on EU trade and investment negotiations with the United States of America, EP Doc No P7_TA(2013)0227 (Procedural file 2013/2558(RSP)); European Parliament resolution of 8 June 2011 on EU-Canada trade relations EP Doc No P7_TA(2011)0257 (Procedural file 2011/2623(RSP)); Note also European Parliament Research Service (EPRS), *Investor-State Dispute Settlement (ISDS) - State of play and prospects for reform*, Briefing 21.1.2014, available at http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/130710/LDM_BRI%282014%29130710_REV2_EN.pdf (visited 1 May 2014).
[42] Cf., e.g. Council of the European Union, *Conclusions on a comprehensive European international investment policy*, 3041st Foreign Affairs Council Meeting, 25 October 2010, available at https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf (visited 5 May 2014); note also the mandates approved by the Council at its 3109th meeting, 12 September 2011, available at http://www.s2bnetwork.org/themes/eu-investment-policy/eu-documents/text-of-the-mandates.html (visited 1 May 2014); European Commission, *Recommendation for a Council Decision authorising the opening of negotiations on a comprehensive trade and investment agreement, called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America*, COM(2013) 136, 12 March 2013, available at http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150760.pdf (visited 1 May 2014).
[43] European Commission, *Towards a comprehensive European international investment policy*, COM(2010)343 final, 7 July 2010, idem., *Investment Protection and Investor-to-State Dispute Settlement in EU agreements*, November 2013, available at http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf (visited 1 May 2014); idem., *Investment Provisions in the EU-Canada free trade agreement (CETA)*, 3 December 2013, available at http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf (visited 1 May 2014); for more documents go to EU Commission, DG Trade website, available at http://ec.europa.eu/trade/policy/ (visited 1 May 2014). Note also Hoffmeister, F. and Alexandru, G., A First Glimpse of Light on the Emerging Invisible EU Model BIT, *Journal of World Investment & Trade*, Vol. 15 (2014), pp. 379 et seqq.

Treaty[44]. So far, all negotiation mandates[45], negotiation positions[46] and treaty draft texts[47] provide for investor-state dispute settlement by means of ad-hoc arbitration[48].

The rationales the EU might pursue when proposing to include an ISDS mechanism in its free trade or stand-alone investment agreements are several: ISDS is perceived as a forceful tool to *manage political risk* and to *promote the international rule of law* (below 2.2.1 (p. 17)). It is said to *make substantive commitments in investment instruments credible* and, at the same time, contributes towards a *de-politicisation of investment disputes* (below 2.2.2 (p. 19)). Developing states in particular often sign up to international investment instruments in the *belief that these constitute an instrument to attract foreign investment* (below 2.2.3 (p. 21)).

However, ISDS may not be without significant political, legal, and economic costs. ISDS practice has been criticised for *not creating a predictable legal environment* for host states and investors due to contradictory interpretations in arbitral awards (below 2.3.1 (p. 24)). Moreover, ISDS practice is suspected of being *preoccupied with the protection of individual economic interests against political risk*. It is accused of not paying sufficient attention to legitimate public interests such as human rights, environmental protection, public health or labour standards and, hence, *excessively curtails national regulatory space to implement policies directed at general welfare* (below 2.3.2 (p. 39)). Investor-state

[44] Cf. on the EU law issues with respect of evolving European international investment policy Pernice, I., *International Investment Protection Agreements and EU Law*, Study for the European Parliament. See also Hindelang, S., Der primärrechtliche Rahmen einer EU-Investitionsschutzpolitik: Zulässigkeit und Grenzen von Investor-Staat-Schiedsverfahren aufgrund künftiger EU Abkommen, in: Bungenberg/Herrmann (eds.), *Die Gemeinsame Handelspolitik der Europäischen Union „nach Lissabon"*, Nomos, Baden-Baden, 2011, pp. 157 et seqq., also available at: Der primärrechtliche Rahmen einer EU Investitionsschutzpolitik: Zulässigkeit und Grenzen von Investor-Staat-Schiedsverfahren aufgrund künftiger EU Abkommen, WHI-Paper 01/11, 2011, available at http://www.whi-berlin.eu/tl_files/documents/whi-paper0111.pdf (visited 4 May 2014); an abridged version in the English language can be found at Hindelang, S., The Autonomy of the European Legal Order – EU Constitutional Limits to Investor-State Arbitration on the Basis of Future EU Investment-related Agreements, in: Bungenberg/ Herrmann (eds.), *Common Commercial Policy after Lisbon - Special Issue to the European Yearbook of International Economic Law*, Springer; New York, 2013, pp. 187 et seqq.

[45] China, India, Singapore (initialed; according to a statement issued by DG Trade on 20 September 2013 negotiations on the investment protection chapter are ongoing, cf. European Commission, DG Trade website, available at cf. http://trade.ec.europa.eu/doclib/press/index.cfm?id=961 (visited 1 May 2014)), Japan, Thailand, and Vietnam, Tunisia, Morocco, Jordan, and Egypt. Cf. European Commission, DG Trade website, available at http://ec.europa.eu/trade/policy/accessing-markets/investment/ (visited 1 May 2014); Seattle to Brussels Network website, available at http://www.s2bnetwork.org/themes/eu-investment-policy/eu-documents/text-of-the-mandates.html (visited 1 May 2014); Bilaterals.org Website, available at http://www.bilaterals.org/?-Negotiations-&lang=en. (visited 1 May 2014). For the EU negotiation position on TTIP to be concluded with the USA please refer to http://www.s2bnetwork.org/themes/eu-investment-policy/eu-documents/text-of-the-mandates.html (visited 1 May 2014). Note though that all 'EU-related documents' not made publicly available by the EU institutions themselves might not be authentic.

[46] Cf. for TTIP negotiations Pinzler, P., EU will laut Geheimdokument Sonderrechte für Konzerne, *ZEIT online*, 27 February 2014, available at http://www.zeit.de/wirtschaft/2014-02/freihandelsabkommen-eu-sonderrechte-konzerne (visited 1 May 2014).

[47] Cf. e.g. for CETA text EU Investment Policy: Looking behind closed doors, Website, http://eu-secretdeals.info/ceta/ (visited 3. May 2014) and European Commission, *Commission to consult European public on provisions in EU-US trade deal on investment and investor-state dispute settlement*, IP/14/56, 21 January 2014, available at http://europa.eu/rapid/press-release_IP-14-56_en.pdf (visited 1 May 2014). Note though that all 'EU-related documents' not made publicly available by the EU-related institutions themselves might not be authentic.

[48] In January 2014 the Commission stopped negotiations on the investment chapter in TTIP and launched a public consultation. Cf. *Commission to consult European public on provisions in EU-US trade deal on investment and investor-state dispute settlement*, IP/14/56, 21.1.2014, available at http://europa.eu/rapid/press-release_IP-14-56_en.pdf (visited 1 May 2014); idem, Questions and Answers: Public online consultation on investor protection in TTIP, MEMO/14/206, 27 March 2014, available at http://europa.eu/rapid/press-release_MEMO-14-206_en.pdf (visited 1 May 2014).

arbitrations have frequently been conducted *behind closed doors*, full-length awards are not published by default and *party-appointed arbitrators and arbitration institutions face allegations of bias towards the investors' interests*. Taking into account that investor-state tribunals review the exercise of public authority, such charges are capable of eroding the integrity and legitimacy of the ISDS mechanism (below 2.3.3 (p. 65)). Other concerns relate to *abusive claims* brought only to pressure the host state into compromises it would otherwise not have agreed to (below 2.3.4 (p. 73)), to *difficulties to correct erroneous decisions* of tribunals (below 2.3.5 (p. 76)) and to *high costs* for host states responding to investor-state claims (below 2.3.6 (p. 78)).

The EU and its institutions are well advised to carefully evaluate each of the inadequacies, thoroughly verify whether and to which extent they can be mitigated in a specific investment instrument and weigh them against the perceived virtues before subscribing to a particular model of adjudication; legacy alone should be no argument. The evaluation process must be conducted with even more rigour, considering that investment protection related clauses, especially in comprehensive free trade agreements, are not easily renegotiated or terminated.

A critical assessment also includes *all* possible policy instruments being put up for review, as ISDS is not the only adjudicative mechanism available to settle claims of foreign investors against their host states. For example, ISDS mechanisms can be supplemented or replaced by investor-state consultations and mediation, domestic court proceedings, contract-based dispute settlement, diplomatic protection, state-state arbitration or state-state international court proceedings. Each of these policy options exhibit specific advantages and disadvantages (below 2.3.2.2.1 (p. 42)). Providing for a policy mix in EU agreements might partly compensate for the disadvantages resulting from the sole application of a specific tool.

One illusion is to be warned against right from the outset: due to the current fragmented state of international investment law and ISDS practice, there is neither an easy nor quick solution to the challenges posed. Rather, it will take years, if not decades, to address them properly. However, the EU as a major new player entering the 'great game' of investment treaty making is presented with the unique opportunity to lay the foundations to a more predictable and balanced approach of protecting foreign investment and preserving sufficient policy space with a view to adequately addressing the puzzling regulatory questions of the future in a common interest.

Due to the study's limited scope and mandate it constrains itself to focus on main virtues, to address selected issues associated with current ISDS practice and to point to some policy options and tools to tackle the most pressing challenges in this field. In order to tie the study's recommendations to the evolving EU international investment policy, at suitable places reference is made to the Comprehensive Economic and Trade Agreement between the EU and Canada and its 'Investor-to-State Dispute Settlement text' of 4 February 2014 (CETA Draft of 4 February 2014)[49] and of 3 April 2014 (CETA Draft of 3 April 2014)[50] and the text of the 'Investment Chapter' of 21 November 2013 (CETA Draft Investment Text of 21 November 2013)[51] and of 4 April 2014 (CETA Draft Investment

[49] Available through EU Investment Policy: Looking behind closed doors, Website, available at http://eu-secretdeals.info/upload/EU-COM_CETA-ISDS_text_February4th-2014_clean.pdf (visited 5 May 2014).
[50] Available through EU Investment Policy: Looking behind closed doors, Website, available at http://eu-secretdeals.info/upload/2014/02/EU-Canada-CETA_Draft-ISDS-text-April3-2014_clean.pdf (visited 5 May 2014).
[51] Available through EU Investment Policy: Looking behind closed doors, Website, available at http://eu-secretdeals.info/upload/COM-doc-CETA_-investment-protection-newText-Nov-21-2013_clean.pdf (visited 5 May 2014).

Text of April 2014)[52]. Due to the nature of those documents any statement in this respect can only be preliminary and is meant to be illustrative only. Although a strict distinction is sometimes hard to achieve, the study focuses on procedural issues; concerns raised in respect of substantive standards contained in investment instruments which arise during arbitration are dealt with only cursorily[53]. With a view to improving readability, when this study refers to states and state parties this also includes the EU.

2.2 Perceived virtues of ISDS

ISDS as a concept can be prescribed as one of the most effective tools to manage political risk and to promote the international rule of law (below 2.2.1 (p. 17)). By largely replacing state-driven enforcement mechanisms ISDS renders substantive commitments in investment instruments more credible and contributes towards a de-politicisation of investment disputes (below 2.2.2 (p. 19)). Developing states in particular have signed up to international investment instruments with the expectation it would facilitate attracting foreign investment (below 2.2.3 (p. 21)).

2.2.1 Managing political risk and promoting an international rule of law

As soon as a foreign individual or corporation has entered the territory of a certain state it is subject to its jurisdiction. In that state, governments, policies and legal systems might change; not just for better but also for worse. And foreigners might be affected by these changes more the stronger their individual and/or financial commitment is set for the long term. The foreign individual or corporation might not just face policy changes occurring 'naturally' over time and part of the ordinary risk of life or doing business. It might suddenly be exposed to discrimination, unfair or arbitrary treatment or face expropriation of its property or even threats to life and limb. In such situations foreigners may turn to the courts of the host state. However, those courts could fail to dispense justice due to being biased in favour of their own government or due to a lack of independence from the same. Courts may be corrupt or simply lacking the competence or adequate capacities to render a decision in respectable quality and reasonable time[54].

While it is a public international law truism that a foreigner is generally subject to the jurisdiction of its host state, today it is also (again) widely accepted that home states cannot treat foreigners at their discretion but must conform to minimum standards in terms of an international rule of law. This minimum standard is embodied in the so-called law of aliens[55].

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[52] Available through EU Investment Policy: Looking behind closed doors, Website, available at http://eu-secretdeals.info/upload/2014/02/EU-Canada-FTA-Negotiations-Investment-chapter-4-April-2014_clean.pdf (visited 5 May 2014).

[53] See on this as well as the interrelation of investment and WTO agreements Kuijper, P. J., *Investment Protection Agreements as Instruments of International Economic Law*, Study for the European Parliament.

[54] VanDuzer, J. et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 28 April 2014), p. 400; Guzman, A., Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties, *Virginia Journal of International Law*, Vol. 38 (1998), pp. 639 et seqq., pp. 658 et seqq.; Hindelang, S., Bilateral Investment Treaties, Custom and a Healthy Investment Climate - The Question of Whether BITs Influence Customary International Law Revisited, *The Journal of World Investment and Trade*, Vol. 5 (2004), pp. 789 et seqq.

[55] OECD, *Fair and Equitable Treatment Standard in International Investment Law*, Working Papers on International Investment No. 2004/03, available at http://www.oecd.org/daf/inv/internationalinvestmentagreements/33776498.pdf (visited 5 May 2014), p. 8.

In pursuit of the idea that everyone is entitled to a minimum standard of treatment abroad at any given time, bilateral and regional investment protection treaties appeared at a time when the formerly universal consensus in customary international law was challenged. The Communist bloc and developing countries in the course of de-colonisation claimed that foreign nationals were not entitled to an international minimum standard and subject to the national jurisdiction of the host state only.

Today, over 3.000 investment instruments afford individuals and corporations active in cross-border investment with a *tool to manage and mitigate political risk*. They do so by providing an advanced adjudicative mechanism in public international law to hold the host state accountable for conduct falling short of the standards[56] described in the individual instrument without having (exclusively[57]) to rely on national means of judicial relief.

Certainly, it is true, and regrettable at the same time, that not all elements of the international minimum standard for aliens were developed further with equal focus and lasting success like international investment law which now forms a comprehensive legal sub-field of public international law affording, at least partially, *protection beyond a minimum standard*[58]. The *grand idea* underlying these efforts should, however, not be forgotten: *limiting governmental arbitrariness* towards foreigners by stipulating *legal* standards enforceable in *independent* arbitral proceedings[59].

It is therefore somewhat ironic to see some of the same civil society groups who have vigorously fought for an international rule of law in areas such as human rights now find themselves on the side of those states which engage in curtailing or demolishing another facet of this very international rule of law. To be clear on this point: ISDS, as it currently operates, generates harsh criticism, some of which is rightfully voiced[60]. However, significantly weakening or even completely renouncing ISDS calls into question part of the achievements made in respect of an international rule of law.

Instead of approaching the challenges posed by current ISDS practice with a destructive attitude, one should seize the moment of transition and put forward reform proposals which aim in two directions: First, options should be explored on how to improve the situation of those individuals who currently do not or only insufficiently benefit from the protection of public international law by strengthening human rights and the law of aliens in respect of non-economic activities. Second, the operation of international investment law in general and ISDS in particular should be critically assessed and reformed with a view to preserving the achievements made in respect of an international rule of law. At the same time, however, aberrations of international investment law must be cut back to its initial idea: providing a *safety net in case the primary means available in a host state fail* to prevent or remedy abuse of sovereign power. Put differently, international investment law and ISDS can only regain legitimacy when they do *not aim at replacing national administrative and judicial safeguards* but back them up in case of failure[61].

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[56] Cf. in respect of the substantive investment protection standards Kuijper, P. J., *Investment Protection Agreements as Instruments of International Economic Law*, Study for the European Parliament.

[57] For the question of the prerequisite of exhausting local remedies cf. 2.3.2.2.2.3.2 (p. 58).

[58] Cf. e.g. Johnson, L. and Volkov, O., Investor-State Contracts, Host-State "Commitments" and the Myth of Stability in International Law, *American Review of International Arbitration*, Vol. 24 (2013), pp. 361 et seqq.

[59] Cf. Montt, S., *State Liability in Investment Treaty Arbitration*, Hart Publishing, Oxford, 2009, p. 83 who even argues that there is a collective international interest in developing *general* standards governing investment.

[60] Cf. below 2.3 (p. 24).

[61] In pursuit of the old idea to be ruled by laws, and not by men, the furthering of the rule of law can be a source of legitimacy of investment arbitration. However, this presupposes, inter alia, that norms directing (state) conduct are crystallised – at least to a large extent – before an adjudicative process takes place. However, the broad substantive standards commonly contained in investment instruments coupled with current ISDS practice of 'de facto precedent' (cf. 2.3.1.2 (p. 34)), among others, cast serious doubts that one could advance such an

The idea of providing a fallback, a last line of defence, can equally be applied to developing as well as developed legal systems if we want to accept that even the most advanced legal system may fall short of certain standards in exceptional cases[62]. In principle, providing for ISDS among developed countries as well signals that international investment law is not about 'post-colonialism' or directed against developing countries, but rather about an international rule of law. At the same time, it is also reasonably clear that such a 'rough' fallback mechanism – not available without significant political, legal and economic costs[63] – must fade into the background when there are domestic courts capable of diligently resolving foreign investment disputes. Most of all, investment instruments providing for ISDS must not negate factual differences between individual states and undermine the domestic rule of law and democratic governance. What is needed, therefore, is a flexible approach which takes into consideration both aspects[64].

2.2.2 Making substantive commitments in investment instruments credible and, at the same time, contributing towards a de-politicisation of investment disputes

While *ISDS is not the only mechanism available to force a host state to comply* with material commitments taken up in an investment instrument[65], it is *certainly one of the most effective ones*. Absent ISDS in an investment instrument, on the international level individuals would mainly have to rely on their home state resorting to the mechanism of 'diplomatic protection' to enforce substantive investment protection standards against the host state[66].

Traditionally, the law of aliens[67] – though not undisputed in legal writing[68] – does not treat individuals and corporations as subjects of public international law. In respect of the protection of alien property this means that rights and obligations exist exclusively between sovereign states. The injured individual is not privy to this legal relationship and cannot claim the international law obligations in his own right[69]. He must turn to his home state which claims injury and reparation towards the other state, i.e. exercising diplomatic protection.

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argument in respect of the present state of the system. Cf. Montt, S., *State Liability in Investment Treaty Arbitration*, Hart Publishing, Oxford, 2009, pp. 146 et seqq. Nonetheless, this is not to say that the 'rule of law' could not serve as a source of legitimacy.

[62] In this respect it is worth noting that the EU is far away from being a monolithic bloc in terms of the rule of law. Cf. European Commission, The 2014 EU Justice Scoreboard, Speech Viviane Reding, SPEECH/14/225, 17 March 2014, available at http://europa.eu/rapid/press-release_SPEECH-14-225_en.htm (visited 14 May 2014).

[63] See below 2.3 (p. 24).

[64] See below 2.3.2.2.2.3.2 (p. 58).

[65] See below 2.3.2.2.1 (p. 44).

[66] The following paragraphs rely on Hindelang, S., Restitution and Compensation – Reconstructing the Relationship in International Investment Law, in: Hofmann/Tams (eds.), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration*, Nomos, Baden-Baden, 2011, pp. 161 et seqq.; also available as Hindelang, S., *Restitution and Compensation – Reconstructing the Relationship in International Investment Law*, WHI-Paper 02/11, 2011, http://www.whi-berlin.eu/tl_files/documents/whi-paper0211.pdf (visited 1 May 2014).

[67] Janis, M., Individuals as Subjects of International Law, *Cornell International Law Journal*, Vol. 17 (1984), pp. 61 et seqq.

[68] Opposing: de Visscher, C., Cours général de droit international public, *Collected Courses of the Hague Academy of International Law*, Vol. 86 (1954), pp. 507 et seqq.; see in this respect also Garcia-Amador, F., Sixth Report on State Responsibility, *Yearbook of the International Law Commission*, 1961, Vol. II, Document A/CN.4/134 & Add. 1, p. 1, para. 176: *'The "injury" or "damage" should be considered in terms of the subject in fact harmed — i.e., the alien — and reparation should be considered in terms of its real and only object — i.e., not as reparation "due to the State", but as reparation due to the individual in whose behalf diplomatic protection is being exercised.'*

[69] *'Anyone who mistreats a citizen indirectly offends the State.'* Cf. de Vattel, E., *Le droit des gens ou les principes de la loi naturelle*, Vol. 1, Paris, 1835, p. 368.

Diplomatic protection is *characterised by political discretion and political arbitration*. Pursuing and resolving investment disputes under the concept of diplomatic protection carries with it potential spill-over effects into other, unrelated policy areas as the host state in particular will aim at expanding its bargaining powers on the diplomatic stage. It also involves 'diplomatic humiliation' by way of being exposed to a claim in traditional international judicial *fora*, such as the International Court of Justice (ICJ). Hence, due to political considerations and constraints, the home state might decide not to pursue a claim against the host state or could choose not to pass along reparation taking the form of, e.g., compensation to the individual. In many domestic legal orders it is difficult for an individual to legally force his home state to exercise diplomatic protection as the latter enjoys an enormous margin of appreciation[70].

If the *individual investment dispute* is *'de-politicised' by taking recourse to ISDS* – i.e. relegated from the diplomatic stage or traditional international judicial *fora* – it *helps preventing individual investment disputes straining general inter-state relations* and, in turn, promotes the intended stability in economic and non-economic inter-state relations[71]. 'De-politicisation' of investment relations has been effectuated by nominating the investor – an 'international law lightweight' – as a claimant in investment arbitration and making him responsible for collecting any relief directly attributed to him. To draw a realistic picture, however, due to the nature of conflict at hand – i.e. the balancing of private and public interests – a *complete 'de-politicisation'* has been *difficult to achieve*[72].

In sum, while the host state of an investor might be caught in a web of multiple political interests and diplomatic constraints, an investor will primarily seek to protect its property interests. Opening up the possibility to initiate international arbitration at the discretion of the investor makes an enforcement of substantive investment standards in case of violations more likely. Hence, given the increased risk of enforcement, the host state should be inclined to pay attention to the substantive standards in the first place, rendering the commitments taken up more credible.

[70] Decisions by the Bundesverfassungsgericht (Federal Constitutional Court) of Germany and the Bundesverwaltungsgericht (Federal Administrative Court) of Germany, for example, have repeatedly accorded the Federal Government a great degree of discretion in granting such requests made by German citizens, Ruffert, M., Diplomatischer und konsularischer Schutz, in: Isensee/Kirchhof (eds.), *Handbuch des Staatsrechts*, Band X, C. F. Müller, Heidelberg, 3rd ed., 2012, p. 87.

[71] Shihata, I., Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA, *ICSID Review*, Vol. 1 (1986), pp. 1 et seqq.; Schreuer, C., *The ICSID Convention: A Commentary*, Cambridge University Press, Cambridge, 2nd Edition, 2009, pp. 415 et seqq.

[72] Note, for example, the tensions in the German-Philippine bilateral relations due to *Fraport's* expropriated investment in the Philippines: *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25, Award of 16 August 2007; Decision on the Application for Annulment of 23 December 2010, documents available at http://www.italaw.com/cases/456 (visited 1 May 2014). Despite the (provisional) defeat of the investor in an – although not uncontroversial – investment arbitration the Auswärtiges Amt (German Federal Foreign Office) declared on its website: '*Economic relations between Germany and the Philippines were, however, marred by the Philippine government's expropriation, in December 2004, of Manila Airport's new international terminal, construction of which by a German-Philippine consortium was completed in December 2002.'* (Auswärtiges Amt, Website, available at http://www.auswaertiges-amt.de/EN/Aussenpolitik/Laender/Laenderinfos/01-Nodes/Philippinen_node.html (visited 26 Feburary2014).

2.2.3 Instrument perceived to attract foreign investments

An investment instrument which also provides for ISDS demonstrates a strong *commitment to a stable and predictable investment environment* in the host state. Many states have *perceived* investment instruments *as strategic means to attract or encourage investment* in their territories with a view to promoting economic development by raising or stabilising living conditions[73].

The commitment to substantive investment protection standards and the threat with or even the defeat in international investment arbitration might also initiate a *learning process* and *could facilitate internal judicial or administrative reform politically* in countries with weak institutions and poor legal systems in order to live up to the substantive standards contained in an investment instrument[74]. At the same time it may discourage future governments from turning back reforms 'to the worse' in terms of the rule of law; at least with regard to the foreign investor[75]. In this sense ISDS might even be seen as *one element of development policy* which[76], of course, in certain cases needs to be accompanied by substantial technical assistance such as institution-building and rule of law training.

[73] Cf. Poulsen, L., Bounded Rationality and the Diffusion of Modern Investment Treaties, *International Studies Quarterly*, Vol. 58 (2013), pp. 1 et seqq., p. 12 who suggests that esp. *developing states wanted to believe that investment instruments help attract foreign investment*. Whether they indeed do attract foreign investment is a different question. The more universal similarly worded international investment instruments become, the less of a comparative advantage over other competing states they might be able to provide. Cf. Mills, A., Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration, *Journal of International Economic Law*, Vol. 14 (2011), pp. 469 et seqq., p. 487. Economists have not reached consensus on the effects of investment instruments on economic development, cf. Aisbett, E., Bilateral Investment Treaties and Foreign Direct Investment: Correlation Versus Causation, in: Sauvant/Sachs (eds.), *The Effect of Treaties on Foreign Direct Investments*, Oxford University Press, New York, 2009, pp. 395 et seqq.; Peinhardt, C. and Allee, T., Failure to Deliver: The Investment Effects of US Preferential Economic Agreements, *World Economy*, Vol. 35 (2012), pp. 757 et seqq.; Berger, A. et al., Do trade and investment agreements lead to more FDI? - Accounting for key provisions inside the black box, *International Economics and Economic Policy*, Vol. 10 (2013), pp. 247 et seqq.; Sasse, J., *An Economic Analysis of Bilateral Investment Treaties*, Gabler, Wiesbaden, 2011; all with further references. Note also the study by Poulsen, L. et al., *Costs and Benefits of an EU-USA Investment Protection Treaty*, 2013, available at http://www.italaw.com/sites/default/files/archive/costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf (visited 1 May 2014), p. 18: 'Overall, we find it unlikely that an EU-US investment protection agreement would have an tangible impact on the amount of US investment flowing to the UK.'

[74] Admittedly, this process may take longer as the example of Central and Eastern Europe shows. Some EU Member States have gathered considerable experience in defending a multitude of investor-state claims. As we still see a steady flow of new requests for arbitration being filed, one may wonder whether the pressure exercised on the respective governments was not sufficient to bring about substantial change to the internal legal and administrative structures to prevent future arbitrations. See also Gutbrod, M. and Hindelang, S., Externalization of Effective Legal Protection against Indirect Expropriation – Can the Legal Order of Developing Countries Live up to the Standards Required by International Investment Agreements? A Disenchanting Comparative Analysis, *The Journal of World Investment and Trade*, Vol. 7 (2006), pp. 59 et seqq.

[75] VanDuzer, J. et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 28 April 2014), p. 401. See generally O'Hara, E. and Ribstein, L., *The Law Market*, Oxford University Press, Oxford, 2009; Elkins, Z. et al., Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000, *International Organisation*, Vol. 60 (2006), pp. 811 et seqq.

[76] Cf. also 2.3.2.2.2.3.2.2 (p. 60). Note also Reisman, W. and Robert, R., Indirect Takings and its Valuation in the BIT generation, *British Yearbook of International Law*, Vol. 74 (2003), pp. 115 et seqq., p. 117; disillusioning Ginsburg, T., International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance, *International Review of Law and Economics*, Vol. 25 (2005), pp. 107 et seqq., pp. 118 et seqq.

2.3 Perceived challenges of ISDS

Critique of ISDS is as old as the system itself[77]. Lately, though, criticism has also reached the middles of those societies which commonly supported robust investment protection backed up by strong ISDS mechanisms[78]. To begin with, ISDS practice has been criticised by civil society, academia and even by business organisations[79] for *not producing consistent and predictable outputs* so that especially host states lack guidance on their obligations accepted under a certain investment instrument (below 2.3.1 (p. 24)). While several improvements have been suggested, not each appears equally politically feasible or legally suitable to address these concerns.

While a *multilateral investment agreement with a centralised dispute resolution mechanism and/or appeals facility* might be well suited to counter current inconsistency concerns and should be targeted in the long run, currently political prospects of such a proposal appear to be dim (below 2.3.1.1 (p. 27)).

Investment tribunals themselves want to advance 'consistency' by way of *'de facto precedent'* and similar concepts, i.e. relying on previous rulings by arbitral tribunals for interpreting an investment instrument. Attractive as it may be at first glance, such concepts seem *highly problematic* when sidestepping the binding methodology of interpretation in public international law. Abandoning the methodology of interpretation enshrined in the Vienna Convention on the Law of Treaties (VCLT)[80], the tribunals would free themselves from the bonds of their masters: the state parties to an investment treaty (below 2.3.1.2 (p. 33)). Other tools such as *securing and strengthening authoritative interpretation* of an investment instrument by state parties (below 2.3.1.3 (p. 36)), the *consolidation* of different claims involving similar questions of law and fact (below 2.3.1.4 (p. 38)) or drafting of *less vague substantive standards* (below 2.3.1.5 (p. 38)) appear more suitable to cushion inconsistency concerns but also entail drawbacks. Due to the overall fragmented character of international investment law and absent any multilateral arrangement, *only modest improvements of consistency and predictability can be expected*.

Investment tribunals deal with *highly sensitive political issues* in host states[81]. They are asked to rule on the introduction of cigarette plain packaging with a view to addressing health risks associated with

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[77] For an early critic cf. Sornarajah, M., *The International Law on Foreign Investment*, Cambridge University Press, New York, 3th Edition, 2010.

[78] Cf., in the press e.g. Pinzler, P., Extrarechte für Multis, *DIE ZEIT*, 5 December 2013; Henrich, A. et al., Schattenjustiz im Nobelhotel, *WirtschaftsWoche*, 29 April 2013; Ludwig, G., Klagerechte für Konzerne unter der Lupe, *Handelsblatt*, 28 March 2014; Kohlenberg, K. et al., Im Namen des Geldes, *DIE ZEIT*, 27 February 2014; Schiessl, M., Der Freifahrtschein, *DER SPIEGEL*, 20 January 2014.

[79] The Federation of German Industries concedes in a recent position paper that concerns in respect of ISDS have to be taken seriously and current investment instruments and ISDS practice display diverse weaknesses. Cf. Bundesverband der Deutschen Industrie e.V., *Positionspapier: Schutz europäischer Investitionen im Ausland: Anforderungen an Investitionsabkommen der EU*, available at http://www.bdi.eu/download_content/GlobalisierungMaerkteUndHandel/Schutz_europaeischer_Investitionen_im_Ausland.pdf (visited 28 April 2014). See also Verband der Chemischen Industrie e.V,, *Fragen und Antworten der Chemischen Industrie zu TTIP*, 2014, available at https://www.vci.de/Downloads/PDF/Fragen%20und%20Antworten%20der%20chemischen%20Industrie%20zu%20einem%20Freihandelsabkommen%20EU%20USA.pdf (visited 1 May 2014).

[80] Vienna Convention on the Law of Treaties, adopted 22 May 1969, entered into force 27 January 1980, available at https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf (visited 26 April2014).

[81] Cf. for an overview of host state measures challenged in 2013 UNCTAD, *Recent Developments in Investor-State Dispute Settlement (ISDS)*, IIA Issues Note, 2014/1, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf (visited 19 May 2014), pp. 5 et seq.

smoking in Australia[82] and Uruguay[83], the nuclear power phase-out in Germany[84] or crisis-related austerity measures taken by Belgium in the course of the European financial crisis[85]. Such high-profile cases contribute towards the growing *perception*, especially among members of civil society, *that ISDS practice is unduly interfering with democratic policy choices*[86]. In the past, tribunals have repeatedly faced questions of whether they are willing and able to sufficiently take into account public interests such as financial stability, environmental protection, public health or others. In legal terms, what has been criticised is that tribunals' awards seem to inaccurately reflect in their interpretation of a given investment instrument the 'right balance' between private property protection and the public interests which the state parties to the investment instrument meant to strike in their investment treaties[87].

Securing the 'right balance' – i.e. preserving space for democratic policy choices and, at the same time, respecting private property interests – has, among others, been at the centre of the reform debate on ISDS.

More radical suggestions call for *abandoning ISDS and replacing it* by domestic courts (below 2.3.2.2.1.1 (p. 43)), arbitration based on investor-state contracts or national legislation (below 2.3.2.2.1.2 (p. 46)), diplomatic protection and state-state arbitration (below 2.3.2.2.1.3 (p. 48)) or non-binding dispute resolution mechanisms (below 2.3.2.2.1.4 (p. 49)).

Others want to preserve the possibility for individuals or corporations to bring claims against a sovereign. They aim to *re-balance ISDS* with a view to preserving the 'right balance' the state parties – and not subsequently the tribunals – struck when they concluded the investment instrument. Tools which lend themselves for such an objective comprise, inter alia, the activation of the power of authoritative interpretation of an investment instrument by the state parties (below 2.3.2.2.2.1 (p. 50)), the redrafting of substantive standards (below 2.3.2.2.2.2 (p. 54)) and the restriction or delay of access to ISDS. In respect of the latter, a novel elastic exhaustion of local remedies rule (below 2.3.2.2.2.3.2 (p. 56)) appears to be central to preserving the 'right balance' between private and public interests.

[82] Philip Morris Asia Limited v. The Commonwealth of Australia, Uncitral, PCA Case No. 2012-12, documents available at http://www.italaw.com/cases/851 (visited 1 May 2014); see also Voon, T. and Mitchell, A., Implications of international investment law for plain tobacco packaging: lessons from the Hong Kong–Australia BIT, in: Voon/Mitchell/Libermann/Ayres (eds.), *Public Health and Plain Packaging of Cigarettes: Legal Issues*, Edward Elgar, Cheltenham, 2012, pp. 137–172, also available at SSRN http://ssrn.com/abstract=2377919 (visited 1 May 2014).

[83] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), documents available at http://www.italaw.com/cases/460 (visited 1 May 2014).

[84] *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, documents available at http://www.italaw.com/cases/documents/1655 (visited 1 May 2014).

[85] *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium*, ICSID Case No. ARB/12/29, documents available at http://www.italaw.com/cases/2042 (visited 1 May 2014).

[86] Johnson, L. and Volkov, O., State Liability for Regulatory Change: How International Investment Rules are Overriding Domestic Law, *Investment Treaty News*, Vol. 5 (2014), pp. 3 et seqq., see also an open letter by various international NGOs addressed to US Trade Representative Michael Froman and EU Trade Commissioner Karel de Gucht calling for dismissing ISDS from TTIP, available at http://action.sierraclub.org/site/DocServer/TTIP_Investment_Letter_Final.pdf?docID=14701 (visited 1 May 2014).

[87] This study operates with the assumption that state parties to investment instruments never wanted to provide for completely unqualified private property protection but – even though not always spelling it out in detail within an investment instrument – wanted to see private property interests balanced with public interests, referenced in the same or other international agreements, or other sources of public international law or found in the domestic legal context.

Another tool states have already deemed appropriate to better preserve their policy space is to limit remedies in ISDS to (monetary) compensation. However, whether this instrument is indeed effective or rather counterproductive has yet to be critically assessed (below 2.3.2.2.2.4 (p. 61)). Likewise, in order to give sufficient weight to public interests in investment arbitration, some observers suggest allowing for host state claims. While this idea has some merit it also entails several difficulties which might offset the advantages (below 2.3.2.2.2.5 (p. 63)).

Since the interpretation of an investment instrument in ISDS, especially when containing novel or innovative clauses, can hardly be predicted, it is decisive to preserve some flexibility for future changes without having to renegotiate the whole agreement. Aside from tools for authoritative interpretation, review periods and/or termination clauses specific to certain investment provisions and ISDS clauses would lend themselves to better control treaty practice (below 2.3.2.2.2.6 (p. 64)).

When allowing international tribunals to review administrative, judicial and legislative acts of host states, the public in this state has a vital interest in securing the integrity of the proceedings. However, ISDS has been carried out behind closed doors and arbitral awards are not published by default[88]. Only lately criticism has mounted in Europe that this is not acceptable anymore. Clear improvements in terms of transparency can already be witnessed in EU draft agreements or negotiating directives (below 2.3.3.1 (p. 66)). Another serious matter of concern is the alleged appearance of bias of arbitrators and arbitration institutions in favour of investors. If one subscribes to the view that not only justice must be done, but it must also be seen to be done, overcoming this issue without significantly altering the current system of ad-hoc nominated arbitrators will prove challenging (below 2.3.3.2 (p. 69)).

Like any other litigation or arbitration instrument, ISDS also carries in it the potential for misuse. Investors might restructure their investments after a dispute arose in order to take advantage of the protection offered by a certain investment instrument (below 2.3.4.1 (p. 73)). Furthermore, simply by bringing an investment claim (even if the case is not a substantiated one), foreign investors can gain a bargaining chip to pressure host states into compromises to which they would otherwise not have agreed to (below 2.3.4.2 (p. 76)).

Given the issues at stake in investor-state arbitration, investment instruments should also provide for sufficient safeguards to correct erroneous decisions. Current agreements hardly provide for meaningful correction mechanisms (below 2.3.5. (p. 76)).

Last but not least, the financial risks involved in ISDS – in terms of both arbitration costs and the amount of damages awarded (below 2.3.6 (p. 78)) – are significant. Tools to control these risks better, at least to some extent, are available. Negotiating state parties only need to make respective policy choices.

2.3.1 Consistency and predictability

It is commonly held that consistency in decision making, i.e., resolving the same or similar legal or factual questions in the same or similar way in a sequence of cases, is not just a matter of equality,

[88] Note in this respect that – in contrast to popular belief – ICISID also does not publish awards in full by default but only by consent of the parties to the disputes. Excerpts of the legal reasoning in an award are published where a party does not agree to publish that award, cf. Article 48(4) ICSID-Arbitration Rule.

legitimacy and perceived fairness of an adjudicative mechanism but also allows for predictability and long term planning of those subjected to this system[89].

However, when it comes to ISDS there is *neither a single legal basis for a claim, nor* is there *a single global adjudicative mechanism:*

Ad-hoc tribunals render decisions on the basis of over 3.000, by and large, *similar but rarely identically worded,* mostly bilateral investment instruments containing broad or even vague substantive protection standards. Other substantive rules applicable in addition to the investment instrument may vary from case to case[90]. Such additional rules may relate to domestic law, rights and duties under customary international law and such flowing from other treaties concluded between the state parties to the investment instrument[91].

In a nutshell, the Vienna Convention on the Law of Treaties, containing the compulsory[92] means of interpretation (hereafter referred to as 'Vienna rules'), establishes, among others, a duty to interpret an investment instrument in the broader context of the entire legal relations of the state parties[93]. In the case of a bilateral investment treaty, the bunch of bilateral rights and duties between two states hardly ever resemble the bunch of bilateral rights and duties between two other states. Just imagine the bilateral legal relations between Germany and the USA on the one side and such between Malaysia and the United Arab Emirates on the other. Hence, *each bilateral investment instrument has its unique broader context in the light of which it has to be interpreted.*

[89] Franck, S., The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions, *Fordham Law Review,* Vol. 73 (2005), pp. 1521 et seqq., p. 1584; Brower, C., Structure, Legitimacy, and NAFTA's Investment Chapter, *Vanderbilt Journal of Transnational Law,* Vol. 36 (2003), pp. 37 et seqq., p. 51; Bucher, A., Is There a Need to Establish a Permanent Reviewing Body?, in: Gillard (ed.), *The Review of International Arbitration Awards*, JurisNet, Huntington, 2010, pp. 285 et seqq., pp.290 et seqq.; Franck, T., *The Power of Legitimacy among Nations*, Oxford University Press , New York, 1990, p. 52; Kalb, J., Creating an ICSID Appellate Body, *UCLA Journal of International Law and Foreign Affairs,* Vol. 10 (2005), pp. 179 et seqq., pp. 196 et seqq.; Montt, S., State Liability in Investment Treaty Arbitration, Hart Publishing, Oxford, 2009, pp. 137 et seqq.

[90] Absent a pre-determination of the applicable law in the investment instrument and, furthermore, if the parties to the dispute have not specified it, the determination of the applicable substantive law in investment arbitration depends on the arbitration (default) rules such as Article 42(1) 2. Sentence ICSID-Convention which offer little guidance. The provision reads: 'In the absence of such agreement [on the rules], the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.' The CETA draft determines in Article x-12 (1) CETA draft of 4 February 2014 = Article x-27(1) of CETA draft of 3 April 2014 that the applicable law is the investment instrument itself, interpreted in accordance with the Vienna Convention on the Law of Treaties and other rules and principles of international law applicable between the state parties.

[91] The Vienna Convention on the Law of Treaties significantly controls the relationship of the investment instrument to other treaties such as environmental, human rights or border treaties which may be relevant to the dispute, cf. Articles 30, 59 VCLT.

[92] Absent the agreement of the state parties to abandon or vary the Vienna rules.

[93] Article 31 VCLT stipulates that the provisions of a treaty have to be interpreted, inter alia, in its context. Along with the context any subsequent agreements between the state parties regarding the interpretation of the treaty (Article 31(3) lit a VCLT), subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (Article 31(3) lit b VCLT) and *any relevant rules of international law applicable in the relations between the parties* (Article 31(3) lit c VCLT) are to be taken into account.

Furthermore, arbitral proceedings are governed by *a variety of procedural norms* – such as ICSID or Uncitral arbitrational rules. Investment instruments frequently provide for a selection of arbitration rules[94] from which the claimant can choose.

Taken together, these points should make it reasonably clear that investment disputes are *hardly ever governed by 'the same set of rules'*; neither in substantive nor in procedural terms[95]. Speaking of international investment law as 'a legal system' such as the World Trade Organisation (WTO) or similar multilateral arrangements would clearly be a depiction *de lege ferenda*[96]. As soon as two foreign investors in a host state do not share the same home state, they have to make their claims based on different investment instruments. Even if the disputes might arise from one and the same governmental measure and the substantive provisions of the investment instruments governing the disputes are identical, the provisions of each investment instrument still have to be interpreted in their unique broader (bilateral) contexts.

In such a regulatory environment, *consistency and predictability* are, *by necessity*, *limited*[97]. Hence 'inconsistency' in decision making in ISDS is first and foremost the result of the current state of

[94] Cf. Article x-8(2) CETA draft of 4 February 2014 = Article x-22(2) of CETA draft of 3 April 2014: ICSID-Convention, ICSID Additional Facility and Uncitral Arbitration Rules, and any other agreed on by the disputing parties.

[95] A notable exception are, for example, the Argentina cases on the basis of the US-Argentina BIT: CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (12 May 2005), available at http://www.italaw.com/sites/default/files/case-documents/ita0184.pdf (visited 8 May 2014); CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Annulment Decision (25 September 2007), available at http://www.italaw.com/sites/default/files/case-documents/ita0184.pdf (visited 8 May 2014); Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3 (also known as: Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic), documents available at http://www.italaw.com/cases/401 (visited 8 May 2014); Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3 (also known as: Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic), Award (22 May 2007), available at http://www.italaw.com/sites/default/files/case-documents/ita0293.pdf (visited 8 May 2014); Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3 (also known as: Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic), Annulment Decision (30 July 2010), available at http://www.italaw.com/sites/default/files/case-documents/ita0299.pdf (visited 8 May 2014); LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006), available at http://italaw.com/sites/default/files/case-documents/ita0460.pdf (visited 8 May 2014); Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award (28 September 2007), available at http://www.italaw.com/sites/default/files/case-documents/ita0770.pdf (visited 8 May 2014); Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Annulment Decision (29 June 2010), available at http://www.italaw.com/sites/default/files/case-documents/ita0776.pdf (visited 8 May 2014); Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB/03/9 (5 September 2008), Annulment Decision (16 September 2011), available at http://www.italaw.com/sites/default/files/case-documents/ita0231.pdf (visited 8 May 2014).

[96] Ten Cate, I., The Costs of Consistency: Precedent in Investment Treaty Arbitration, *Columbia Journal of Transnational Law*, Vol. 51 (2013), pp. 418 et seqq., p. 425 with further references. For an account of the impact of the multitude of investment instruments on customary international law see Hindelang, S., Bilateral Investment Treaties, Custom and a Healthy Investment Climate - The Question of Whether BITs Influence Customary International Law Revisited, *The Journal of World Investment and Trade*, Vol. 5 (2004), pp. 789 et seqq.

[97] Some have chosen to style the situation of an 'inconsistency by structure' in terms of a 'legitimacy crisis' in international investment law. Cf. Burke-White, W. and von Staden, A., Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations, *Yale Journal of International Law*, Vol. 35 (2010), pp. 283 et seqq., p. 299; Schreuer, C. and Weiniger, M., *Conversations Across Cases – Is There a Doctrine of Precedent in Investment Arbitration?*, pp. 1 et seqq., available at http://www.univie.ac.at/intlaw/conv_across_90.pdf (visited 25 July 2014); Kingsbury, B. and Schill, S., Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law, in: van den Berg (ed.), *50 Years of the New York Convention: ICCA International*

international investment law, atomized into over 3.000 investment instruments and dozens of arbitration rules. It would therefore be more appropriate to speak of *fragmentation* instead of 'inconsistency' as the latter appears to presuppose the application of identical or at least comparable legal rules which form the basis of a tribunal's decision. However, as explained above, identity or comparability of the legal basis of a tribunal's decision exist *stricto sensu* only to a very limited extent. One must, therefore, be careful not to compare apples with oranges when comparing arbitral awards handed down on the basis of different investment instruments.

This overall situation renders any reliable prediction of conformity of a certain state measure with a given investment instrument a risky and resource-intensive task[98]. For host states a diligent assessment would require an evaluation of any state measure with relevance for private property in the light of *each* individual investment instrument and its broader public international law context. And still, even if a host state would be able to devote sufficient resources, such assessments would still be burdened with a considerable degree of uncertainty.

A high degree of consistency – beyond arbitral awards handed down on the basis of one and the same investment instrument – is an illusion absent a treaty with a broad geographic coverage and (more) centralised adjudicative mechanisms (below 2.3.1.1 (p. 27)). Even worse, calling for more consistency of awards rendered on the basis of *different* investment instruments effectuated by mechanisms such as 'de facto precedent' might involve the danger of depriving the state parties of their control over the investment instruments (below 2.3.1.2 (p. 33))[99]. Rather, state parties to an investment instrument should activate their power of authoritative interpretation (below 2.3.1.3 (p. 36)), provide for consolidation of claims (below 2.3.1.4 (p. 38)) and more clearly define substantive standards in investment instruments (below 2.3.1.5 (p. 38)).

2.3.1.1 Establishment of a permanent investment court or an appeals mechanism

2.3.1.1.1 Permanent investment court

Introducing a standing investment court with tenured judges has for long been rejected on the grounds that standing courts, compared to ad-hoc tribunals, supposedly show a stronger tendency of construing their own jurisdiction expansively and developing it in directions not desired by states. When opting for ad-hoc arbitration and bilateral investment treaties, states may have exchanged inconsistency for avoiding unintended developments in the jurisprudence of a permanent court and have so circumvented answering the questions of, first, what the 'right development' would be and, second, who would control such a permanent court absent a multilateral governance structure. Hence, ad-hoc arbitration might have intentionally been chosen to limit powers of 'dispute resolvers' and much better protect the state parties' intentions and interests balanced and fixed in a given investment treaty[100].

Arbitration Conference, Kluwer Law International, The Hague,2009, pp. 5 et seqq. For a recent example on ISDS practice making reasonably obvious the 'limitations on consistency' cf. *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, para. 485 et seqq., available at http://www.italaw.com/sites/default/files/case-documents/italaw3035.pdf (visited 8 May 2014).

[98] See on this issue also Brühl, J., Europa vor Gericht, *Sueddeutsche.de*, 1 May 2014), available at http://www.sueddeutsche.de/wirtschaft/investitionsschutz-im-freihandelsabkommen-ttip-europa-vor-gericht-1.1947266 (visited 5 May 2014).

[99] Cf. below 2.3.1.2 (p. 34).

[100] Montt, S., *State Liability in Investment Treaty Arbitration*, Hart Publishing, Oxford, 2009, pp. 155 et seqq.

However, as experience with the North American Free Trade Agreement (NAFTA)[101] has demonstrated[102], it can be doubted that ad-hoc tribunals effectively perform the claimed role of a guardian of the state parties' intentions. On the contrary, if tribunals had respected the intentions of the state parties in interpreting an investment instrument – to which they were compelled by the binding rules of interpretation of treaties in public international law – there would not have been the need for the NAFTA Free Trade Commission – bringing together the state parties to NAFTA to authoritatively decide on questions of interpretation – to fix the substantive treatment standards of fair and equitable treatment and full protection and security to the customary international law minimum standard of treatment of aliens[103]. Previous to the interpretative note, some tribunals construed the standard more broadly[104].

What is more, the alleged (but hardly proven) power-limiting effect is no argument against a permanent court's possible contribution towards more consistency in ISDS practice[105]. In the name of equality, predictability and credibility[106], such a court, endowed with an institutional memory, would in tendency better ensure that like cases would indeed be treated alike. If many cases are potentially decided on the basis of *one and the same investment instrument* the establishment of a permanent court would probably contribute to more consistency. For example, if a standing court had adjudicated the claims of US American investors against Argentina in the aftermath of its financial crisis, it would probably have avoided the conflicting decisions of the different ad-hoc tribunals[107]. Depending on the

[101] NAFTA was signed by Canada, Mexico, and the United States of America. It created a trilateral rules-based trade bloc in North America. In Chapter 11 it contains substantive as well procedural rules on foreign investment; text available at https://www.nafta-sec-alena.org/Default.aspx?tabid=97&ctl=SectionView&mid=1588&sid=539c50ef-51c1-489b-808b-9e20c9872d25&language=en-US (visited 5 May 2014).

[102] See below 2.3.2 (p. 40).

[103] Cf. NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions (Article 1105 and the Availability of Arbitration Documents)*, 31 July 2001, available at http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp (last visited 1 May 2014).

[104] In the aftermath, arbitrators reacted in a 'flexible' manner to the perceived 'challenge' by holding 'both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development'. Cf. *ADF Group v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award (9 January 2003), para. 179, available at http://www.italaw.com/sites/default/files/case-documents/ita0009.pdf (visited 8 May 2014). See also Brower II, C. H., Structure, Legitimacy, and NAFTA's Investment Chapter, *Vanderbilt Journal of Transnational Law*, Vol. 36 (2003), pp. 37 et seqq., pp. 84 et seqq. on the issue of distinguishing authoritative interpretation from treaty amendment. In order to avoid any doubts, treaty parties should make explicit in their treaty texts that tribunals are not allowed to reject an authoritative interpretation by the state parties on the grounds that it would allegedly or actually amount to a treaty amendment or modification (cf. Art. 39 VCLT). See also UN General Assembly, International Law Commission, Special Rapporteur Nolte, G., *Second report on subsequent agreements and subsequent practice in relation to treaty interpretation*, A/CN.4/671 of 26 March 2014, para. 56-57, 143-145, 150-155, 165.

[105] The establishment of a permanent investment court could also contribute towards the resolution of other issues regularly referred to with ISDS, i.e. transparency of decision making and the independence and impartiality of adjudicators. Cf. below 2.3.3 (p. 67).

[106] Note also the differently tailored argument in favour of a permanent court which suggests that it is the nature of the legal question dealt with in ISDS, i.e. to review the legality of the use of sovereign authority towards an individual, which renders private models of adjudication inadequate. Cf. Van Harten, G., *A Case for International Investment Court*, Inaugural Conference of the Society for International Economic Law, 16 July 2008, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153424 (visited 1 May 2014).

[107] Cf. for a more detailed discussion of the Argentina cases which were adjudicated on the basis of the same investment instruments and departed in particular on the question of the relationship between host state defences under the instrument and under customary international law: Ten Cate, I., International Arbitration and the Ends of Appellate Review, *New York University Journal of International Law and Politics*, Vol. 44 (2012), pp. 1109 et seqq., p. 1180; Ten Cate, I., The Costs of Consistency: Precedent in Investment Treaty Arbitration, *Columbia Journal of Transnational Law*, Vol. 51 (2013), pp. 418 et seqq.

number of claims expected[108], establishing *a permanent court could*, hence, *also make sense in the EU-US or EU-Canada relations* when it comes to consistency. However, in such an institutional setting consistency is also bought at the expense of a 'dialogue' among different ad-hoc tribunals on what is the 'right' interpretation of the investment instrument. A middle course option would be to allow for ad-hoc tribunals and establish a permanent appeals facility which guarantees some consistency[109].

Consistency effects flowing from an international investment court charged to adjudicate *on a regional or global scale*[110] would currently be limited due to the fragmented state of international investment law. Such a court would have to rule on the basis of many (yet still) different bilateral or regional investment instruments. As mentioned above, bilateral or regional investment treaties might be roughly similar but not necessarily identical. Even if they might be identical, when interpreting a certain bilateral investment treaty other bilateral legal obligations between the state parties to the investment treaty would have to be taken into account (cf. Article 31 VCLT). The bunch of bilateral rights and duties between two states hardly ever resemble the bunch of bilateral rights and duties of two other states. Hence, provisions are interpreted and cases are adjudicated in different bilateral legal contexts. As will be explained in more detail further below[111], the transfer of an interpretation of a substantive standard from one bilateral context to another is fraught with problems: The intentions of the state parties encapsulated in the substantive standards of an individual investment treaty could be replaced by interpretations developed in another bilateral context; by arbitrary choice of the court.

Hence, only in the event of states concluding regional or multilateral agreements containing common substantive standards, consistency effects flowing from a permanent global or regional investment

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[108] Cf. Poulsen, L. et al., *Costs and Benefits of an EU-USA Investment Protection Treaty*, 2013, available at http://www.italaw.com/sites/default/files/archive/costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf (visited 1 May 2014), pp. 21 et seqq. who, with regard to the UK, predict a higher number of cases brought by US investors on the basis of TTIP than, in the NAFTA context, initiated by US investors against Canada. In respect of the EU one could make the following rough calculations which are certainly statistically inadequate but nevertheless may provide some initial indication on the possible number of claims: Canada – home of about 7.8 percent of US FDI stock in 2012 – had to respond to 33 claims (notice of intent filed) by US investors within the period of 20 years. In 2012, the EU was home of 50 percent of US FDI stock. Hence, if a NAFTA-like agreement between the USA and the EU would enter into force today, the EU could have to respond to about *211 claims by US investors in 20 years or about ten claims per year*. Cf. for the numbers on FDI stock UNCTAD, *Bilateral FDI Statistics*, 2014, available at http://unctad.org/en/Pages/DIAE/FDI%20Statistics/FDI-Statistics-Bilateral.aspx (visited 5 May 2014). It would be interesting to see a study on the expected caseload for the whole of the EU. See also UNCTAD, *Investor-State Dispute Settlement: An Information Note on the United States and the European Union*, IIA Issues Note 2014/2, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d4_en.pdf (visited 22 July 2014).

[109] Cf. 2.3.1.1.2 (p. 31).

[110] An approach which appears suitable for establishing an international investment court *without having to revise all bilateral or regional investment instruments* would be the one chosen for the Uncitral Rules on Transparency in Treaty-based Investor-State Arbitration. Article 1(1), (2) lit a of these Rules reads: 'The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency") shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors ("treaty")* concluded on or after 1 April 2014 unless the Parties to the treaty** have agreed otherwise. […] In investor-State arbitrations initiated under the Uncitral Arbitration Rules pursuant to a treaty concluded before 1 April 2014, these Rules shall apply only when: […] The Parties to the treaty or, in the case of a multilateral treaty, the State of the claimant and the respondent State, have agreed after 1 April 2014 to their application.' Hence, what the state parties essentially agreed on was to apply the Uncitral Transparency Rules 'on top' of their investment instruments. Taken the 'institutional cloud' and reputation of Uncitral such approach might lend itself to a more far-reaching 'step-by-step multilateralisation' and harmonisation of the fragmented body of international investment law.

[111] Cf. 2.3.1.2 (p. 34).

court would significantly increase[112]. This, however, would require a major policy shift in regulating international investment by a large number of states which would not only have to agree on a common set of procedural but also substantive rules[113].

[112] In such situations, interpretation would not be scattered by binary relations as only such other treaties have to be taken into account to which all parties to the multilateral investment treaty are also party to. Cf. McLachlan, C., The Principle of Systematic Integration and Article 31 (3) (C) of the Vienna Convention, *International and Comparative Law Quarterly*, Vol. 54 (2005), pp. 279 et seqq., p. 315; see also International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, 2006, para. 21.

[113] UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, IIA Issues Note 2013/2, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf (visited 19 May 2014), p. 10.

2.3.1.1.2 Appeals facility

An appeals facility, so it is hoped, could correct erroneous decisions and, coincidentally, would contribute to more consistency and predictability in investment law decision making[114]. Especially domestic legal experience shows that lower courts or tribunals would, in tendency, be inclined to follow the jurisprudence of an appeals facility in order not to get overturned, even if former decisions of the appeals facility would not be legally binding upon the lower level. A combination of a multitude of courts or tribunals at entry level and an appeals facility may enable a judicial dialogue on the questions of interpretation among the lower level[115].

However, currently, there is *no appeals mechanism in ISDS*. Challenging awards is restricted to *annulment* or *setting aside proceedings* which can only lead to the *invalidation* of an individual decision or *refusal of its enforcement*. Introducing an appeals facility in ISDS, in contrast, may allow for *modifying* a decision of a tribunal and, thus, can contribute – subject to the conditions set out further below – to harmonising investment law jurisprudence in the way described above[116].

WTO experience demonstrates that establishing a (permanent) appeals facility must *not necessarily* be *related to a significant increase in costs and time*[117]. Some may nevertheless want to argue that the finality of arbitration proceedings – i.e. only very limited or no appeals mechanisms – was one of the advantages of investment arbitration over domestic court systems as it puts an end to a dispute. This might in turn contribute to a de-politicisation of an investment conflict as it is quickly taken off the public agenda[118]. However, since investment arbitration involves considerable public interests such as

[114] Burke-White, W and von Staden, A., Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations, *Yale Journal of International Law*, Vol. 35 (2010), pp. 283 et seqq., p. 299; Blackaby, N., Public Interest and Investment Treaty Arbitration, in: van den Berg, A. (ed.), *International Commercial Arbitration: Important Contemporary Questions*, Kluwer Law International, The Hague, 2003, pp. 355 et seqq., p. 364. Cf. also for a general account Sauvant, K. (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, New York, 2008; see for a summary of a discussion among OECD countries OECD, *Improving the System of Investor-State Dispute Settlement: An Overview*, OECD Working Papers on International Investment No. 2006/1, available at http://www.oecd.org/daf/inv/internationalinvestmentagreements/36052284.pdf (visited 5 May 2014); for an optimistic view see also UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, IIA Issues Note 2013/2, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf (visited 19 May 2014), p. 9.

[115] Ten Cate, I., International Arbitration and the Ends of Appellate Review, *New York University Journal of International Law and Politics*, Vol. 44 (2012), pp.1109 et seqq., pp. 1185-1187.

[116] A follow-up question would be whether an appeals facility would be permanent or ad-hoc. While an ad-hoc appeals tribunal might be able to correct real or perceived errors or provide a second opinion, a permanent appeals facility would bring an institutional memory and contribute to some consistency in respect of the interpretation of a certain investment instrument.

[117] Gaukrodger, D. and Gordon, K., *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment No. 2012/03, available at http://dx.doi.org/10.1787/5k46b1r85j6f-en (visited 20 May 2014), p. 59. Max. 90 days are reserved for the appeals procedure at the WTO. Cf. Article 17(5) DSU.

[118] Legum, B., Visualizing an Appellate System, in: Ortino, F. et al. (eds.), *Investment Treaty Law: Current Issues- Vol. 1*, British Institute of International and Comparative Law, London, 2006, pp. 121 et seqq.; Paulsson, J., Avoiding Unintended Consequences, in: Sauvant/Chiswick-Patterson (eds.), *Appeals Mechanism in Investment Disputes*, Oxford University Press, New York, 2008, pp. 241 et seqq., pp. 258 et seqq.; Qureshi, A. and Khan S., Implications of an Appellate Body for Investment Disputes from a Developing Country Point of View, in: Sauvant/Chiswick-Patterson (eds.), *Appeals Mechanism in Investment Disputes*, Oxford University Press, New York, 2008, pp. 267 et seqq., pp. 277 et seq.; Laird, I and Askew, R., Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System?, *Journal of Appellate Practice and Process*, Vol. 7 (2005), pp. 285 et seqq., p. 290, p. 302; Bucher, A., Is There a Need to Establish a Permanent Reviewing Body?, in: Gaillard (ed.), *The Review of international Arbitration Awards No. 6*, Juris Publishing, Huntington, 2010, pp. 285 et seqq., pp. 290 et seqq. Note though that the average length of ICSID arbitration is well above three years.

product safety, environmental protection, labour standards, public health or nuclear power phase-outs accepting the – not just theoretical – risk of inconsistent and/or poorly reasoned or erroneous decisions appears hardly justifiable in the name of finality of arbitration.

As establishing an appeals' facility might involve incremental law making in the sense that it develops the law and adopts it to new situations, legitimacy concerns may be raised. In a domestic legal context, judicial activism is checked and balanced by the legislature which is absent in an international context. Again, WTO experience – which might, overall, be described as positive[119] – can provide a useful case study here[120]. Furthermore, establishing a treaty committee vested with the power to hand down authoritative interpretations on behalf of the state parties might mitigate legitimacy concerns as it could also 'correct' interpretations adopted by an appeals facility[121].

As already explained with regard to a permanent investment court[122], the current fragmented regulatory environment is anything but ideal to actually realise the potential for more consistency inherent in an appeals facility[123]. As long as international investment law consists predominantly of binary relations, consistency can be achieved (lawfully) only with regard to the awards rendered on the basis of one and the same investment instrument. The situation is even further complicated by the choice of arbitral fora generally provided for in investment instruments[124].

Absent a single multilateral investment instrument, calling for more 'consistency' across different (basically bilateral) investment instruments through 'interpretation' – could not only collide with the Vienna rules on treaty interpretation but may involve power shifting from state parties of the investment instruments to the investment tribunals and the appeals facility. Again, each investment instrument reflects a specific balance between public and private interests established in the negotiations between states. By importing standards from one investment instrument into another one

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The longest lasted over ten years, the shortest a little over one year. Cf. Sinclair, A. et al., ICSID arbitration: how long does it take? *Global Arbitration Review*, Vol. 4 (2009), Issue 5, p. 14 et seqq.

[119] Gantz, D., An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges, *Vanderbilt Journal of Transnational Law*, Vol. 39 (2006), pp. 39 et seqq., pp. 56–57; see for problems of transferring the WTO model on investment arbitration McRae, D., The WTO Appellate Body: A Model for an ICSID Appeals Facility?, *Journal of International Dispute Settlement*, Vol. 1 (2010), pp. 371 et seqq., pp. 382–87; Legum, B., Options to Establish an Appellate Mechanism for Investment Disputes, in: Sauvant/Chiswick-Patterson (eds.), *Appeals Mechanism in Investment Disputes*, Oxford University Press, New York, 2008, pp. 231 et seqq., pp. 234–235.

[120] Ioannidis, M., A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law, *German Law Journal*, Vol. 12 (2011), pp. 1175 et seqq., pp. 1190–91; cf. von Bogdandy, A. and Venzke, I., Beyond Dispute: International Judicial Institutions as Lawmakers, *German Law Review*, Vol. 12 (2011), pp. 979 et seqq., p. 994; Alvarez, J., The Emerging Foreign Direct Investment Regime, *Proceedings of the Annual Meeting – American Society of International Law*, 2005, pp. 94, 96.

[121] Cf. on authoritative interpretation more generally 2.3.1.3 (p. 37).

[122] Cf. 2.3.1.1.1 (p. 29). See for a possible approach on how to establish a single multilateral appeals facility for arbitrations on the basis of already existing and future investment instruments footnote 105.

[123] Ten Cate, I., International Arbitration and the Ends of Appellate Review, *New York University Journal of International Law and Politics*, Vol. 44 (2012), pp. 1109 et seqq., p. 1188; note also McRae, D., The WTO Appellate Body: A Model for an ICSID Appeals Facility?, *Journal of International Dispute Settlement*, Vol. 1 (2010), pp. 371 et seqq., p. 387; Tams, C., An Appealing Option? The Debate about an ICSID Appellate Structure, in: Tietje, et al. (eds.), *Essays in Transnational Economic Law*, No. 57/June 2006, available at http://telc.jura.uni-halle.de/sites/default/files/altbestand/Heft57.pdf (visited 2 May 2014). Very sceptical from a practitioner's perspective Legum, B., Options to Establish an Appellate Mechanism for Investment Disputes, in: Sauvant/Chiswick-Patterson (eds.), *Appeals Mechanism in Investment Disputes*, Oxford University Press, New York, 2008, pp. 231 et seqq.

[124] For a summary of problems to be overcome see Ten Cate, I., International Arbitration and the Ends of Appellate Review, *New York University Journal of International Law and Politics*, Vol. 44 (2012), pp. 1109 et seqq., pp. 1200 et seqq.

at the discretion of an appeals facility, this facility would turn into a powerful self-styled and unchecked lawmaker[125].

In the CETA draft Canada and the EU appear merely to be able to agree on a *commitment to consult* on the establishment of an appeals facility or the subjection of decisions rendered on the basis of CETA to an appeals facility pursuant to other institutional arrangements outside CETA[126]. Absent the actual establishment of an appeals facility, the commitment to consult might exercise some (very modest) disciplining effect on ad-hoc tribunals not to depart too significantly from the original balance struck by the state parties.

Ultimately, the number of claims[127] and the degree of departure of the tribunals' holdings from the balance between public and private interests which was envisaged by the state parties to the agreement may decide on the prospects of successful negotiations on the establishment of an appeals facility[128].

2.3.1.2 'De facto precedent system'- Quis custodiet ipso custodes?

There is no general doctrine of precedent in public international law[129], nor do investment instruments or arbitration rules prescribe past decisions as legally binding on later investor-state tribunals[130]. However, in current ISDS practice a significant number of tribunals tend to justify their interpretation of a substantive standard by reference to the interpretation adopted in previous awards rendered by ad-hoc tribunals on the basis of different investment instruments[131]. Some claim that such a 'de facto precedent system' might contribute to more coherence in international investment arbitration[132].

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[125] Cf. 2.3.1.2 (p. 34).

[126] Article x-26(1) lit c CETA draft of 4 February 2014 = Article x-42(1) lit C of CETA draft of 3 April 2014. Note also the 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 (visited 5 May 2014), which contains in its Annex to Question 12 a 'teaser text' of a provision establishing an appellate mechanism.

[127] Cf. above footnote 108.

[128] Since providing for an appeals facility may also increase legal complexity and require devoting more resources to a legal conflict, an EU investment instrument with less and least developed countries or other international arrangements may provide for technical or legal assistance to them.

[129] Land and Maritime Boundary (Cameroon v. Nigeria), 1998 International Court of Justice, Preliminary Objections, Judgement, I.C.J Reports pp. 275, 292. Cf. for an overview of the use of precedent on the international level Guillaume, G., The Use of Precedent by International Judges and Arbitrators, *Journal of International Dispute Settlement*, Vol. 2 (2011), pp. 5 et seqq.

[130] Cf. e.g. Article 59 ICSID-Convention.

[131] Cf. e.g. *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, para. 67, available at http://www.italaw.com/sites/default/files/case-documents/ita0733.pdf (visited 8 May 2014); *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, para. 30-33, available at http://www.italaw.com/sites/default/files/case-documents/ita0011.pdf (visited 8 May 2014). For a more detailed review of approaches taken by tribunals cf. Sureda, A., *Investment Treaty Arbitration – Judging Under Uncertainty*, Cambridge University Press, Cambridge, 2012, pp. 117 et seqq.

[132] For prior decisions of investment tribunals as persuasive authority cf. Bjorklund, A., The Emerging Civilization of Investment Arbitration, *Penn State Law Review*, Vol. 113 (2009), pp. 1269 et seqq., p. 1273; Commission, J., Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence, *Journal of International Arbitration*, Vol. 24 (2007), pp. 129 et seqq., pp. 143-154; Schill, S., Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach, *Virginia Journal of International Law*, Vol. 52 (2011), pp. 57 et seqq., pp. 82 et seqq.; Stone Sweet, A., Investor-State Arbitration: Proportionality's New Frontier, *Law and Ethics of Human Rights*, Vol. 4 (2010), pp. 47 et seqq., p. 61; Sureda, A., Precedent in Investment Treaty Arbitration, in: Binder, C. et al. (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford University Press, Oxford, 2009, pp. 830 et seqq., pp. 833 et seqq.; as '*jurisprudence constante*' (i.e. a line of consistent awards) cf. Kaufmann-Kohler, G., Is Consistency a Myth?, in: Banifatemi/Gaillard (eds.), *Precedent in International Arbitration Law*, Juris Publishing, Huntington, 2008, pp. 137 et seqq., pp. 138 et seqq., 146 et

Empirical evidence[133] confirms that a significant number of tribunals prefer to support their findings by referring to previous awards *instead of diligently following the arduous path of interpreting* the substantive provisions of a certain investment instrument governing the dispute *in accordance with the binding rules* on interpretation contained *in the Vienna Convention on the Law of Treaties*[134].

The Vienna rules prescribe a certain methodology of interpretation in order to secure a transparent interpretive process and a legitimate result most close *to the intention of the state parties to the treaty*. According to Article 31 VCLT, a tribunal is charged to interpret an investment instrument in good faith in accordance with its ordinary meaning to be given to the terms of the treaty in their context, and in the light of its object and purpose.

If a tribunal *sidesteps* this methodology by entertaining a 'de facto precedent system', it basically engages in 'cherry-picking' previous awards allegedly supporting a tribunal's reading of a certain treaty provision. In this context, it is important to recall that the precise meaning of substantive standards in a given bilateral investment instrument is also the result of unique bilateral legal relations of the state parties – cf. Article 31(3) VCLT – in which it is inextricably embedded. Arbitrarily choosing from a selection of interpretations of similarly worded provisions previously developed in different, usually incomparable bilateral contexts, carries the risk that the state parties' intentions with regard to the substantive standards in a specific investment instrument might be replaced by other, extraneous intentions. Put differently, the tribunal would not enforce values that the state parties collectively agreed to enshrine in the authoritative legal text but values it – consciously or unconsciously – deems worth promoting[135].

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seqq.; Brower, C. and Schill, S., Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?, *Chicago Journal of International Law*, Vol. 9 (2009), pp. 471 et seqq., p. 474; Wälde, T., Confidential Awards as Precedent in Arbitration: Dynamics and Implication of Award Publication, in: Banifatemi/Gaillard (eds.), *Precedent in International Arbitration Law*, Juris Publishing, Huntington, 2008, pp. 113 et seqq., p. 115; Bjorklund, A., Investment Treaty Arbitral Decisions as Jurisprudence Constante, in: Picker, C. et al. (eds.), *International Economic Law: The State and Future of the Discipline*, Hart Publishing, Oxford, 2008, pp. 265 et seqq., pp. 272-273. See also Sureda, A., *Investment Treaty Arbitration – Judging Under Uncertainty*, Cambridge University Press, Cambridge, 2012, pp. 130 et seqq.; Schill, S., *The Multilateralization of International Investment Law*, Cambridge University Press, New York, 2009, pp. 321 et seqq.

[133] Studies show that tribunals often pay nothing more than lip service to the Vienna rules: For the case of ICSID tribunals, see Fauchald, O., The Legal Reasoning of ICSID Tribunals – An Empirical Analysis, *European Journal of International Law*, Vol. 19 (2008), pp. 301 et seqq., p. 314. See also Waibel, M., International Investment Law and Treaty Interpretation, in: Hofmann/Tams (eds.), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration*, Nomos, Baden-Baden, 2011, pp. 29 et seqq.; Arsanjani, M. and Reisman, W., Interpreting Treaties for the Benefit of Third Parties: The "Salvors' Doctrine" and the Use of Legislative History in Investment Treaties Editorial Comment, *American Journal of International Law*, Vol. 104 (2010), p. 597 et seqq.; Berner, K., in: Hindelang/Krajewski (eds.), *Shifting Paradigms in International Investment Law (provisional title)*, Oxford University Press, forthcoming 2015.

[134] Cf. Schill, S., *The Multilateralization of International Investment Law*, Cambridge University Press, New York, 2009, pp. 328-338, who perceives this as 'delegated law making'. One may wonder whether one should speak of delegation or, instead, rather of accroached law making since the state parties obviously have never suspended arbitral tribunals from applying the Vienna rules. See also UNCTAD, *Interpretation of IIAs: What States Can Do*, IIA Issues Note 2011/3, available at http://unctad.org/en/Docs/webdiaeia2011d10_en.pdf (visited 19 May 2014), p. 5.

[135] Also Article 38 (1) lit d in connection with Article 59 Statute of the International Court of Justice (ICJ Statute) would not justify a 'de facto precedent system'. According to this provision, judicial decisions may give *evidence* of a source of international law – treaty, custom, or general principle – mentioned in Article 38 (1) lit a-c ICJ Statute. The crucial question then would be the one of which rule an arbitral tribunal provides evidence when interpreting an investment instrument. An award of an arbitral tribunal, first and foremost, provides evidence of the rules of the specific investment instrument the tribunal is charged to interpret. If another ad-hoc tribunal, later on, interprets a rule by reference to a previous award handed down *not* on the very same investment instrument, it does not refer to 'evidence' of the rule it interprets but to evidence of a different,

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.

While a tribunal could arguably turn to previous decisions of tribunals as *supplementary means of interpretation* according to Article 32 VCLT[136], it is *not allowed to disregard the primary means of interpretation* contained in Article 31 VCLT. According to Article 32 VCLT, recourse to previous decisions of tribunals as supplementary means of interpretation is *only* possible 'in order to *confirm* the *meaning* resulting from the application of Article 31, or to *determine* the meaning *when* the interpretation according to Article 31 (a) leaves the *meaning ambiguous or obscure*; or (b) leads to a result which is manifestly absurd or unreasonable'[137]. If a tribunal finds itself in such a position, it is under the obligation to make this reasonably clear before simply jumping to any arbitrarily chosen 'de facto precedent'[138]. Otherwise it would too easily subject itself to the criticism of illegitimate and unchecked law making[139].

In summary, a tribunal's primary task is to decide the dispute presented to it in accordance with the governing rules by using the means of interpretation prescribed for in the VCLT. Interpretation is the task of establishing the intention of the masters of the investment instrument, i.e. the state parties[140]. Referring to arbitrarily chosen previous decisions rendered on treaties different to the one under consideration does not spare a tribunal from interpreting a treaty in accordance with the primary means of interpretation in Article 31 VCLT. A call for a 'persuasive precedent'[141], for a '*jurisprudence*

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completely unrelated rule from another treaty, which merely is worded similarly. Too permissible in this respect Schill, S., *The Multilateralization of International Investment Law*, Cambridge University Press, New York, 2009, p. 326.

[136] For such an approach cf. NAFTA tribunal in Canadian Cattlemen, para. 50. Even stricter, not wanting to accept previous awards as supplementary means of interpretation Orakhelashvili, A., Principles of Treaty Interpretation in the NAFTA Arbitral Award on Canadian Cattlemen, *Journal of International Arbitration*, Vol. 26 (2009), pp. 159 et seqq., p. 167; Ten Cate, I., The Costs of Consistency: Precedent in Investment Treaty Arbitration, *Columbia Journal of Transnational Law*, Vol. 51 (2013), pp. 418 et seqq., p. 427.

[137] Italics added.

[138] Cf. Dörr, O., in: Dörr/Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, Springer, Berlin, 2012, Article 32, para. 27, 34. See also Waibel, M., *Uniformity versus Specialisation: A Uniform Regime of Treaty Interpretation?*, University of Cambridge Faculty of Law Legal Studies Research Paper Series, Paper Nr. 54/2013, November 2013, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2353833 (visited 22 May 2014).

[139] Cf. Orakhelashvili, A., Principles of Treaty Interpretation in the NAFTA Arbitral Award on Canadian Cattlemen, *Journal of International Arbitration*, Vol. 26 (2009), pp. 159 et seqq., pp. 169 et seqq.; on a metaphysical level Schultz, Z., Against Consistency in Investment Arbitration, in: Douglas/Pauwelyn/Viñuales (eds.), *The Foundations of International Investment Law*, Oxford University Press, Oxford, 2014, pp. 297 et seqq.

[140] *Kurtz* appears to argue in broadly similar directions when he notes that 'arbitral tribunals should be understood as exercising a constrained agent function with an expectation that their authority is exercised closely in line with immediate state preferences und objectives.' Cf. Kurtz, J., *Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence and the Identification of Applicable Law*, Melbourne Legal Studies Research Paper No. 670, Melbourne Law School, p. 50. A different view is taken by *Roberts*, who wants to create an 'interpretative balance between treaty parties and tribunals created by investment treaties', which would amount to nothing less than a disguised partial disempowerment of the state parties to an investment treaty. In order to reach such a conclusion *Roberts* purposefully equates human rights and investment treaties. Cf. Roberts, A., Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States, *American Journal of International Law*, Vol. 104 (2010), pp. 179 et seqq., p. 225. On principle critical towards 'special' rules on interpretation for certain kinds of treaties Dörr, O., in: Dörr/Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, Springer, Berlin, 2012, Article 31, para. 29.

[141] See Fn. 132.

constante'[142] or for any other form of a 'de facto precedent system' in deviation of the Vienna rules is a call for a power shift: away from the state parties as the legitimate guardians of the common good towards self-styled new guardians[143].

European investment instruments should carefully address the danger inherent in 'interpretation'. Reminding tribunals to apply the Vienna Convention on the Law of Treaties might be important[144], but at the same time will probably not suffice. Decisions must be monitored *on a regular basis* regarding whether they still represent the balance envisaged by the state parties. If decisions show signs of deviation from the original balance, mechanisms – such as those on authoritative interpretation by state parties – should be in place to regain control over the content of the agreement.

2.3.1.3 Strengthening authoritative interpretation of investment instruments by state parties

Delegating to the investment tribunal the task of resolving a certain issue between the host state and an investor does not mean cutting off the agreement's ties to its state parties. Quite to the contrary, state parties remain the masters of the treaty and retain the right to provide an authoritative interpretation of its provisions[145]. Put differently, they have 'the last word' on the meaning given to provisions of their investment instrument[146]. They have yet to make use of these powers more proactively[147].

Consistency in interpretation and outcome across different cases which are all adjudicated on the basis of *one and the same investment instrument* can, to some degree, be achieved by the issuance of *ad-hoc authoritative interpretations*[148]. If the state parties notice that the interpretation of a certain provision – for example that on fair and equitable treatment or indirect expropriation – advanced by different arbitral tribunals divert from each other, they could issue such a joint interpretation. According to Article 31(3) lit a VCLT, an investment tribunal would be under the obligation to take this into

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[142] See Fn. 132.

[143] Cf. Ten Cate, I., The Costs of Consistency: Precedent in Investment Treaty Arbitration, *Columbia Journal of Transnational Law*, Vol. 51 (2013), pp. 418 et seqq. for more arguments against a 'de facto precedent system', albeit from a more legal policy and theory point of view.

[144] Cf. x-12 (1) CETA draft of 4 February 2014 = Article x-27(1) of CETA draft of 3 April 2014.

[145] '[I]t is too often forgotten that the parties to a treaty, that is, the states which are bound by it at the relevant time, own the treaty. It is their treaty. It is not anyone else's treaty. In the context of investment treaty arbitration there is a certain tendency to believe that investors own bilateral investment treaties, not the states parties to them. So, for example, when the North American Free Trade Agreement (NAFTA) provides for interpretation of its provisions by a Commission of the state parties, that is regarded as somehow an infringement on the inherent rights of the investors under NAFTA. That is not what international law says. International law says that the parties to a treaty own the treaty and can interpret it.' Cf. Crawford, J., A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties, in: Nolte (ed.), *Treaties and Subsequent Practice*, Oxford University Press, Oxford, 2013, pp. 29 et seqq., p. 31, See also Dörr, O., in: Dörr/Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, Springer, Berlin, 2012, Article 31, para. 20.; cf. for the legal treatment in WTO law von Bogdandy, A., Law and Politics in the WTO - Strategies to Cope with a Deficient Relationship, *Max Planck Y.B. U.N. L.*, Vol. 5 (2001), pp. 609 et seqq., 628, 632.

[146] Cf. Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina), Advisory Opinion, 1923 Permanent Court of International Justice (Series B) No. 8, p. 37; Kasikili/Sedudu Island (Botswana v. Namibia), 1999 International Court of Jusitce, Judgement of 13 December 1999 para. 63. Some investment instruments make this explicit, cf. 2012 U.S. Model BIT, Article 30(3), available at http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (visited 4 May 2014); 2004 Canada Model BIT, Arts. 40(2), 41, 51(2)(b), available at http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf (visited 4 May 2014); Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement, Article 40(3); 2012 Canada-China FIPA, 74, arts. 18(1)(b), 30, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=eng&view=d (visited 4 May 2014).

[147] UNCTAD, *Interpretation of IIAs: What States Can Do*, IIA Issues Note 2011/3, available at http://unctad.org/en/Docs/webdiaeia2011d10_en.pdf (visited 19 May 2014) p. 4.

[148] Cf. 2.3.2.2.2 (p. 52).

account while interpreting the investment instrument.[149] In the event of state parties perceiving certain interpretations adopted by tribunals as inappropriate but disagreeing on a joint interpretation, they could initiate state-state arbitration to resolve such questions[150].

A *more formalised approach* would comprise the establishment of a *treaty committee*. Such a committee would be staffed with representatives of all state parties, monitor the adjudicative practice of the tribunals and issue authoritative interpretations of treaty provisions if required.[151] It appears that this route is taken by the EU.[152] In the CETA draft Canada and the EU intend to establish a *Committee on Services and Investment* which may, on agreement of the parties, and after completion of the respective legal requirements and procedures of the parties, decide to recommend to the *CETA Trade Committee* the adoption of interpretations of provisions on non-discrimination and investment protection where serious concerns arise as regards matters of interpretation[153].

Institutionalising the power of authoritative interpretation is not limited to the establishment of a treaty committee which basically reacts to consistency issues. The state parties could provide for a *preliminary reference procedure* built in the arbitral proceedings in order to allow tribunals to actively request authoritative interpretation of treaty clauses[154]. Alternatively, or complementing such a

[149] Article 31 VCLT ('General rule of interpretation') describes interpretation as a 'single combined operation' in which all means of interpretation referred to thereunder do not form a hierarchy. This, arguably, may preclude automatically attaching 'higher authority' to subsequent agreements between the parties to the treaty in accordance with Article 31(3) lit a VCLT. Cf. UN General Assembly, International Law Commission, *First report on subsequent agreements and subsequent practice in relation to treaty interpretation*, A/CN.4/660 of 19 March 2013, para. 68; UN General Assembly, International Law Commission, *Subsequent agreements and subsequent practice in relation to treaty interpretation, Text of draft conclusions 1-5 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission*, A/CN.4/L.813 of 24 May 2013, para. 6. UN General Assembly, International Law Commission, Special Rapporteur Nolte, G., *Second report on subsequent agreements and subsequent practice in relation to treaty interpretation*, A/CN.4/671 of 26 March 2014, para. 56-57, 143-165. To avoid any uncertainty as to the effect of such an ad-hoc authoritative interpretation, the negotiating parties can and should expressly provide in the treaty text for the binding effect of such interpretation on a tribunal.

[150] Cf. 2.3.2.2.1.3 (p. 49). In this respect Article x-24 CETA draft of 4 February 2014 = Article x-40 of CETA draft of 3 April 2014 should be examined critically whether it overly and unnecessarily curtails the role of the state parties as masters of the treaties to the benefit of investor-state tribunals.

[151] See footnote 153.

[152] If all Member States were party to an agreement alongside the EU (mixed agreement), the EU and the Member States should make arrangements to be able to speak with one voice once the agreement enters into force in order not to diminish the effectiveness of the mechanism. Furthermore, in order to efficiently fulfil its monitoring tasks a treaty committee should be granted unrestricted access to arbitral proceedings.

[153] Article x-26(3) lit a in connection with Article x-12('3') CETA draft of 4 February 2014 = Article 42(3) lit a in connection with Article x-27(2) CETA draft of 3 April 2014. To avoid any uncertainty as to the effect of an interpretative note, the negotiating parties should (1) make its binding effect on a tribunal explicit, i.e. stressing that an interpretative note is not just one out of many means of interpretation in a single combined operation of treaty interpretation but the prevailing means and (2) stress that a tribunal may not question an interpretative note on the grounds that it would be a 'ultra vires' treaty modification in accordance with Art. 39 VCLT. Cf. in respect of NAFTA experience Brower II, C. H., Structure, Legitimacy, and NAFTA's Investment Chapter, Vanderbilt Journal of Transnational Law, Vol. 36 (2003), pp. 37 et seqq, 84 et seqq. See also UN General Assembly, International Law Commission, Special Rapporteur Nolte, G., *Second report on subsequent agreements and subsequent practice in relation to treaty interpretation*, A/CN.4/671 of 26 March 2014, para. 56-57, 143-145, 150-155, 165.

[154] Cf. *Republic of Ecuador v. United States of America*, PCA Case No.2012-5, documents available at http://www.italaw.com/cases/1494 (visited 4 May 2014); Cf. also Kaufmann-Kohler, G., In Search of Transparency and Consistency: ICSID reform proposal, *Transnational Dispute Management*, Vol. 2(2005), pp. 1 et seqq., available at http://www.lk-k.com/data/document/search-transparency-and-consistency-icsid-reform-proposals-transnational-dispute-management.pdf (visited 8 May 2014); Kaufmann-Kohler, G., Arbitral Precedent: Dream, necessity or excuse, *Arbitration International*, Vol. 23 (2007), pp. 357 et seqq.

procedure[155], a *mandatory review process of draft arbitral awards* by the state parties[156] before their issuance could be established[157]. Here one could, for example, borrow from the WTO dispute settlement mechanism[158]. If the state parties unanimously would come to conclude that the interpretation of the investment instrument does not mirror their mutual intentions and/or previous awards they could refer the draft award – perhaps even together with interpretative guidance – back to the tribunal for re-consideration.[159]

2.3.1.4 Consolidation of claims

Cases brought by different claimants but arising out of the same circumstances, having a question of law or fact in common and adjudicated on the basis of the *same* investment instrument, can be consolidated if an investment instrument provides so[160]. Consolidation reduces the risk of differing outcomes on identical questions of fact or law. A decision on consolidation should not be left to the consent of the disputing parties but to a tribunal newly established to rule on the request when raised by either party to the dispute. In this respect it is important that the economic incentives for the arbitrators are set rightly to ensure an effective and cost-efficient functioning of the mechanism. However, should the tribunal established to rule on the consolidation decide to assume jurisdiction only on part of the claims, this mechanism might lead to some more consistency but also to additional proceedings, i.e. two or more 'initial' arbitrations which claims shall be consolidated and one or more 'consolidated tribunals' ruling on specific claims or issues common to all 'initial' arbitrations.

2.3.1.5 Less vague substantive standards

The predictability of outcomes of arbitral proceedings could at least be increased[161] by more detailed and precisely worded substantive standards[162]. At the same time, more detailed and precise substantive standards in the investment instrument might better 'lock-in' the balance struck by the state parties between public and private interests[163].

A (modestly) increasing regulatory density in investment instruments over the last four decades might also be perceived as a response to growing concerns in respect of hardly predictable outcomes in ISDS[164]. However, more detailed provisions and arguably a higher degree of predictability of

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[155] The success or failure of a preliminary reference procedure would largely depend on the tribunals' attitude taken towards it if not coupled with some compelling element such as an annulment.
[156] Such functions could also be performed by a treaty committee.
[157] Such a process should be tied to a strict and short timeline.
[158] Cf. Article 17(14) DSU. A report is adopted if the state parties do not decide *by consensus* to reject the report.
[159] In order to counter legitimacy concerns possibly raised from the outset, state parties to an investment instrument should consider providing for a transparent working procedure governing a 'preliminary reference procedure', a 'mandatory review process' or the authoritative interpretation issued by a treaty committee.
[160] See for a semi-effective consolidation procedure Article 1126 NAFTA. Note also Yannaca-Small, C., Consolidation of Claims: A Promising Avenue for Investment Arbitration?, in: OECD (ed.) *International Investment Perspectives*, 2006, available at http://www.oecd.org/investment/internationalinvestmentagreements/40079691.pdf, (visited 22 May 2014); cf. Article x-25 CETA draft of 4 February 2014 = Article x-41 of CETA draft of 3 April 2014.
[161] Any effort to more clearly or even narrowly define substantive standards might be frustrated by an unqualified most-favoured-nation treatment clause which allows the import of standards from other investment instruments.
[162] The reform of substantive standards is not part of this study and is therefore only briefly touched upon here.
[163] Cf. also 2.3.2.2.2.2 (p. 55). However, interpretive approaches adopted by tribunals could also easily frustrate such efforts as NAFTA experience tells. Cf. footnote 241.
[164] Just compare the development of the US Model BIT: Alvarez, J., Comparison U.S. Model BIT (1984) and U.S. Model BIT (2004), *Transnational Dispute Management*, Vol. 7 (2010), pp. 23 et seqq.; Vandevelde, K., A Comparison of the 2004 and 1994 US Model BITs, in: Sauvant (ed.), *Yearbook on International Investment Law*

outcomes of arbitral proceedings is traded in for a decreased flexibility of an investment instrument to adapt to international policy shifts. Over time emphasis on either public or private interests in investment instruments might change[165]. Broader – but not boundless – standards coupled with a well-functioning treaty committee charged with the power of authoritative interpretation might be an alternative to (overly) detailed substantive standards. Such an approach would open up the possibility for state parties to react to future developments – in terms of major policy shifts or 'unwanted' interpretations by investment tribunals – without having to renegotiate the whole agreement. Renegotiation of substantive standards is likely to become even more difficult when investment instruments are included in comprehensive free trade agreements which represent complex compromises extending beyond the investment protection chapter.

2.3.2 Public interests

One of the objectives of investment instruments is to provide legal protection against the abuse of power and egregious behaviour of governments[166]. Nowadays, abuse rarely involves treatment such as 'outright' nationalisation without compensation and expulsion of the investor solely for the benefit of some cronies of a corrupt host state government. Power abuse to the detriment of the foreign investor often comes more subtle. Licenses necessary to operate a certain business may suddenly be revoked on mere formal grounds, tax or environmental regulations are enforced more rigorously towards the foreign investor than towards nationals. Permissions previously promised by officials are suddenly not issued. Or certain public health standards are introduced or raised with the knowledge or intention that the changes hit mainly the foreign investor.

However, this is just one side of the coin. Adapting to new situations, governments may alter their regulatory framework in good faith in order to better promote public welfare. Due to newly available scientific research, environmental standards may be raised or certain health-damaging products may be banned. A state may decide to abandon certain energy production methods on a precautionary basis as it finds the risks involved unacceptable.

Pursuing legitimate aims in a 'good faith attitude' does not, however, justify any means to reach a given end. Due to a lack of knowledge and experience, weak institutional structures or careless regulatory adaptations may easily lead to disproportionate 'collateral harms' negatively impacting an investment.

All state measures – irrespective of whether taken in bad faith for personal advantage by a corrupt official or in bona fide attitude by parliament in a democratic process with a view to serving the general welfare – can negatively impact an investment, foreign and domestic alike. The great challenge is to distinguish those state measures negatively impacting an investment which shall be compensable and those which have to be borne as part of the ordinary risk of life or business.

Certainly, investment instruments cannot reasonably be construed in a way that state parties wanted to surrender their right to regulate and compensate for any change in the regulatory environment subsequent to the establishment of a foreign investment. Implicitly or explicitly, international

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and Policy 2008-2009, Oxford University Press, New York, 2009, pp. 283 et seqq.; sceptical in respect of an actual success of such drafting exercises Ortino, F., Refining the content and role of investment 'rules' and 'standards': A bolder approach to international investment treaty-making, *ICSID Review*, Vol. 1 (2013), pp. 152 et seqq.

[165] Sullivan, K., Foreword: the Justices of Rules and Standards, *Harvard Law Review*, Vol. 105 (1993), pp. 22 et seqq., pp. 66-67.

[166] See above 1.3.1 (p. 7).

investment instruments recognise the right to regulate[167], which arises out of the basic attributes of sovereignty[168]. Simultaneously, the mere pursuit of a legitimate public policy goal like environmental protection and product safety cannot sanction any state measure adversely impacting an investment. Treating an investment fair and equitably, for example, would also entail a duty to implement new policies diligently and in a transparent and in itself consistent manner which might include transition periods or sufficient consideration given to specific situations.

Achieving the 'right' balance between the interests of investors and those of the host state implementing its policies has been subject to critical discussions over the last years. And it is not hard to predict that discussions will continue as policy priorities keep shifting over time: At some moment, market-oriented convictions dominate which tend to emphasis property protection as a key element of personal freedom and view state intervention sceptically. At other times economic theories wanting to strike a balance between free markets and state intervention in support of social wellbeing might gain the upper hand.

Moreover, the focus on property protection or preservation of policy space might shift when a state changes its role from a capital importer to (also) a capital exporter or vice-versa.[169] Equally, the number of claims 'own' businesses file against other states and the number of claims received from investors might impact the perception of the 'right' balance between the protection of property and the preservation of regulatory space[170].

In the first place, it is *the task of the state parties to an investment instrument to strike a* certain *balance* which reflects domestic policy decisions and the result of the treaty negotiation process[171]. *Investment tribunals are charged* with the task of deciding a specific case, thereby *interpreting the investment instrument so as to best reflect the intentions of the state parties*. Such tribunals have, however, repeatedly been accused of failing to sufficiently take into account public interests such as human rights, environmental protection, public health or others. Hence, tribunals are blamed of inaccurately reflecting the 'right balance' between private and public interests in their interpretation of a given investment instrument (below 2.3.2.1 (p. 41)). Some states have already reacted to ensure that their regulatory space is not restricted beyond the point they perceive as acceptable. However, their policy approaches vary greatly (below 2.3.2.2 (p. 42)).

[167] UNCTAD, *Towards a New Generation of International Investment Policies: Unctad's Fresh Approach to Multilateral Investment Policy-Making*, IIA Issues Note 2013/5, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d6_en.pdf (visited 19 May 2014), p. 6.
[168] Cf. Crawford, J., *Brownlie's Principles of Public International Law*, 8th edition, 2012, pp. 448 et. seqq.; Brownlie, I., *Principles of Public International Law*, 7th edition, 2008, pp.292-293.
[169] Cf., e.g., *Eurostat*, Foreign direct investment statistics, Website, available at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Foreign_direct_investment_statistics (visited 22.6.2014).
[170] Cf. for a more detailed depiction Spears, S., The Quest for Policy Space in a new Generation of International Investment Agreements, *Journal of International Economic Law*, Vol. 13 (2010), pp. 1037 et seqq., pp. 1039 et seqq.
[171] Mills, A., Antinomies of Public and Private at Foundations of International Investment Law and Arbitration, *Journal of International Economic Law*, Vol. 14 (2011) pp. 469 et seqq., p. 490.

2.3.2.1 Challenges to the 'right balance' between private and public interests

While legal commentators are divided over the real reason[172], many of them broadly agree on the finding that investment tribunals have not been overly successful in adequately paying attention to public interests of the host state when interpreting, in particular, the fair and equitable treatment standards and their exceptions or (indirect) expropriation clauses[173]. Recent research has demonstrated that, thanks to the extensive interpretation of substantive standards on part of investment tribunals, protection afforded by investment instruments goes beyond what the US legal order would provide in respect of regulatory changes impacting on investor-state contracts[174]. Such findings would not warrant any further consideration if the US system were to fall short of an international minimum standard. However, if the protection afforded on the national level is already far beyond this standard, ISDS practice must critically ask itself on which rationale it actually wants to place such rulings.

Furthermore, ISDS is increasingly associated with exercising a so-called 'chilling effect' on governments. The latter refrain from regulatory measures taken in the public interest due to the threat of investment arbitration. This 'regulatory chill' is said to exist because governments would face difficulties in assessing the precise content and scope of their obligations under international investment law. Ever broader interpretations of substantive standards advanced by arbitral tribunals would exacerbate the situation. Recent empirical studies show that this may be true at least for

[172] E.g. Neo-liberal bias of arbitrators Sornarajah, M., A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration, in: Sauvant (ed.), *Appeals Mechanism in International Disputes*, Oxford University Press, New York, 2008, pp. 39 et seqq.; Sornarajah, M., The Retreat of Neo-Liberalism in Investment Treaty Arbitration, in: Rogers/Alford (eds.), *The Future of Investment Arbitration*, Oxford: Oxford University Press, New York, 2009, pp. 199 et seqq., pp. 278, 293; Van Harten, G., *Investment Treaty Arbitration and Public Law*, Oxford University Press, Oxford, 2007, pp. 136 et seqq.; a neo-liberal bias encapsulated in investment instruments Alvarez, J., Book Review of Gus Van Harten, Investment Treaty Arbitration and Public Law, *American Journal of International Law*, Vol. 102 (2008), pp. 909 et seqq.; Alvarez, J., The Evolving BIT, Address at Juris Conference on Investment Treaty Arbitration: Interpretation in Investment Arbitration, 30 April 2009; Alvarez, J. and Khamsi, K., The Argentine Crisis and Foreign Investors, in: Sauvant (ed.), *Yearbook on International Investment Law and Policy 2008–2009*, Oxford University Press, New York, 2009, pp. 379 et seqq., p. 414; annulment fears Brower II, C., Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes, in: Sauvant (ed.), *Yearbook on International Investment Law and Policy 2008–2009*, Oxford University Press, New York, 2009, pp. 356 et seqq., p. 375.

[173] Spears, S., The Quest for Policy Space in a new Generation of International Investment Agreements, *Journal of International Economic Law*, Vol. 13 (2010), pp. 1037 et seqq., pp. 1046 et seq.; see also Stone Sweet, A., Investor-State Arbitration: Proportionality's New Frontier, *Law & Ethics of Human Rights*, Vol. 47 (2010), pp. 47 et seqq., pp. 63 et seq.; McLachlan, C. et al., *International Investment Arbitration: Substantive Principles*, Oxford University Press, Oxford, 2007, p. 67; Alvarez, J. and Khamsi, K., The Argentine Crisis and Foreign Investors, in: Sauvant (ed.), *Yearbook on International Investment Law and Policy 2008–2009*, Oxford University Press, New York, 2009, pp. 379 et seqq., pp. 447 et seqq.; Brower II, C., Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes, in: Sauvant (ed.), *Yearbook on International Investment Law and Policy 2008–2009*, Oxford University Press, New York, 2009, pp. 356 et seqq., pp. 356 et seqq.; see also Burke-White, W., The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System, in: Waibel/Kaushal/Chung/Balchin (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality*, Kluwer Law International, The Hague, pp. 407 et seqq.; note also the detailed analysis in Kulick, A., *Global Public Interest in International Investment Law*, Cambridge University Press, Cambridge, 2012, pp. 258—268 (environmental concerns), pp.300-306 (human rights), pp. 327—341. For a general critique of the current system cf. Van Harten, G., *Investment Treaty Arbitration and Public International Law*, Oxford University Press, Oxford, 2007; apparently of a different view Schwebel, S., The overwhelming merits of bilateral investment treaties, *Suffolk Transnational Law Review*, Vol. 32 (2009), pp. 263 et seqq.

[174] Johnson, L. and Volkov, O., Investor-State Contracts, Host-State "Commitments" and the Myth of Stability in International Law, *American Review of International Arbitration*, Vol. 24 (2013), pp. 361 et seqq.; see also Wells, L., Backlash to Investment Arbitration: Three Causes, in: Waibel/Kaushal/Chung/Balchin (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality*, Kluwer Law International, The Hague, 2010, pp. 341–352.

developed countries capable to some reasonable degree of appreciating their international legal obligations with respect to foreign investments[175]. A 'chilling effect' can be exemplified by New Zealand's decision to postpone plain packaging regulation[176] due to an ongoing investment claim brought by *Philip Morris* against *Australia* (Hong Kong-Australia BIT)[177].

2.3.2.2 Preserving the 'right balance' between private and public interests

States have increasingly realised that making an appeal to tribunals to treat the issue of balancing private and public interests with 'more caution' might not suffice. In order to preserve the regulatory space deemed necessary by states to implement policies without having to fear that ordinary business risks are socialised by way of ISDS on the basis of international investment instruments they are presented with a variety of options, some of them already tested in practice. They can basically be divided into two broad strands:

States may decide to withdraw from international investment instruments altogether *or* assess and decide – on a case-by-case basis – whether to include ISDS provisions in investment instruments (below 2.3.2.2.1 (p. 42)). Some commentators suggest that such a move would not significantly influence international investment flows. Going abroad simply also involves subjecting oneself to a foreign jurisdiction and foreign investors are, in principle, quite capable of evaluating risks in a host state compared to the expected returns. Political risks could be mitigated through purchasing additional insurance through market mechanisms[178].

Alternatively, instead of abandoning ISDS in investment instruments, states may want to adapt their negotiation guidelines to tackle perceived deficits of current ISDS practice (below 2.3.2.2.2 (p. 50)).

2.3.2.2.1 Abandoning ISDS in investment instruments

Some states chose to pull out of investment instruments altogether[179] or adopted a policy of deciding on a case-by-case basis whether to conclude investment instruments with other states (cf. South

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[175] Poulsen, L., Bounded Rationality and the Diffusion of Modern Investment Treaties, *International Studies Quarterly*, Vol. 58 (2013), pp. 1 et seqq.

[176] Poulsen, L., *Submission to House of Lords EU Sub Committee on External Affairs: The Transatlantic Trade and Partnership Agreement*, 5 March 2014; Turia, T., Government moves forward with plain packaging of tobacco products, *Beehive.govt.nz: The Official Website of the New Zealand Government*, 19 February 2013, available at http://www.beehive.govt.nz/release/government-moves-forward-plain-packaging-tobacco-products (visited 4 May 2014): 'To manage this [the legal risk], Cabinet has decided that the Government will wait and see what happens with Australia's legal cases, making it a possibility that if necessary, enactment of New Zealand legislation and/or regulations could be delayed pending those outcomes.'

[177] Philip Morris Asia Limited v. The Commonwealth of Australia, Uncitral, PCA Case No. 2012-12, documents available at http://www.italaw.com/cases/851 (visited 4 May 2014); Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, available at http://unctad.org/sections/dite/iia/docs/bits/hongkong_australia.pdf (visisted 4 May 2014).

[178] Ikenson, D., A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement, *Free Trade Bulletin*, No. 57; 4.3.2014, p. 2; who is of the opinion that, in economic terms and policy, there is no need for ISDS at all, at least in respect of TTIP.

[179] Some Latin American countries are beginning to reject investment instruments for investor-state arbitration and espouse the absolute competence of their domestic courts. In 2008, Venezuela abrogated its investment treaty with the Netherlands. Since 2009, Ecuador is pursuing plans to cancel several BITs. In 2012, Bolivia announced the termination of its bilateral investor protection agreement with the United States. Cf. https://www.federalregister.gov/articles/2012/05/23/2012-12494/notice-of-termination-of-united-states-bolivia-bilateral-investment-treaty (visited 5 May 2014). Furthermore, Bolivia, Ecuador, and Venezuela have withdrawn from the ICSID Convention. See ICSID, *List of Contracting States and Other Signatories of the Convention*, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&Req

Africa[180]). Others, while still negotiating investment instruments, have abandoned ISDS as a standard feature in their investment instruments and include it only when perceived opportune in the individual case (cf. Australia[181]). In both constellations, foreign investors might have to rely on alternative avenues to seek redress in case of interference with their property.

Absent ISDS provided in an investment instrument and any other specific arrangement, foreign investors would have to take recourse to domestic courts (below 2.3.2.2.1.1 (p. 43)). In lieu thereof, foreign investors could approach a host state with a view to concluding an investment contract providing for international arbitration. Host states may choose to offer foreign investors access to international arbitration through national legislation (below 2.3.2.2.1.2 (p. 46)). Foreign investors could also lobby their home state to take up 'their case' in state-state arbitrations if they feel mistreated by the host state government (below 2.3.2.2.1.3 (p. 48)). Opening up investment instruments for non-binding dispute resolution mechanisms might help to settle a dispute with a host state amicably in an early stage (below 2.3.2.2.1.4 (p. 49)).

2.3.2.2.1.1 Domestic courts

Absent any ISDS mechanism or other specific procedural arrangements, foreign investors would have to turn to *domestic courts* – the *'natural forum'*, so to say – in whose territorial jurisdiction the dispute arose.

Domestic courts – at least in advanced legal systems – operate in an environment of long established procedures and rules which lend some *consistency and predictability* to the adjudicative process. *Erroneous decisions* of the court of entry *can* in many cases *be corrected* by a higher domestic court[182]. Moreover, some domestic legal systems provide for courts specialised and, thus, experienced in reviewing the exercise of governmental authority towards the individual; i.e. administrative and constitutional courts[183].

In terms of substantive standards, at least advanced legal systems provide for a multitude of safeguards for investors against an abuse of governmental powers, such as the right to property or the freedom of profession enshrined in domestic constitutions. When appreciating an investor's claim the domestic

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From=Main (visited 4 May 2014). In March 2014, Indonesia informed the Netherlands that it has decided to terminate the Bilateral Investment Treaty. Cf. above footnote 15.

[180] Woolfrey, S., in: Hindelang/Krajewski (eds.), *Shifting Paradigms in International Investment Law (provisional title)*, Oxford University Press, forthcoming 2015.

[181] Cf. Gillard Government's Trade Policy Statement, *Trading our way to more jobs and prosperity*, April 2011, available at http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf (visited 4 May 2014), which abandoned ISDS in future treaties. Australia-Unites States Free Trade Agreement contains no ISDS, but merely the possibility to initiate state party consultations in case one state party sees the need to introduce ISDS, available at https://www.dfat.gov.au/fta/ausfta/final-text/chapter_11.html (visited 4 May 2014); likewise, the Australia-Japan Economic Partnership Agreement is reported also not to include ISDS, cf. http://www.smh.com.au/federal-politics/political-opinion/isds-the-trap-the-australiajapan-free-trade-agreement-escaped-20140407-zqrwk.html and http://www.dfat.gov.au/fta/jaepa/downloads/jaepa-key-outcomes.pdf (both visited 4 May 2014); but see the Korea-Australia FTA, Chapter 11 which includes ISDS (Article 11.15 et seqq.) provisions, available at https://www.dfat.gov.au/fta/kafta/downloads/KAFTA-chapter-11.pdf (visited 4 May 2014).

[182] Domestic courts only rarely award pecuniary remedies in actions against administrative measures. The primary remedy would be *restitutio in rem*. Furthermore, legislative acts cannot regularly be challenged in domestic legal orders. Liability for judicial acts is frequently restricted.

[183] For a brief overview on remedies in advanced systems of domestic administrative law cf. Gaukrodger, D. and Gordon, K., *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment No. 2012/03, available at http://dx.doi.org/10.1787/5k46b1r85j6f-en (visited 20 May 2014), pp. 79 et seqq.

court will usually consider it against the background of the whole domestic legal system. Such a system reflects an elaborate, complex and refined balance of private and public interests to which the society in which the foreigner voluntarily chose to do its business agreed in a democratic process. When a court decides a case its *holding would echo this societal consensus and is more likely to be accepted and perceived as legitimate by the public*.

Investments are frequently also protected by international or supranational law such as regional[184] or global human rights conventions[185] or the fundamental freedoms in the Treaty on the Functioning of the European Union[186]. States may of course choose to even further fortify protection of (specifically foreign) investors by concluding international investment instruments stipulating substantive standards for the treatment of foreign investment.

If domestic courts are allowed[187] – and here traditions vary greatly among states[188] – also to apply and interpret international treaties including any given investment instrument *one single forum* would exist in which a dispute is adjudicated in respect of whether the host state measure was in compliance with domestic laws *and* international obligations of the host state[189]. Domestic courts of a considerable number of states even engage in interpreting domestic law in accordance with international treaties despite the fact that those might not be directly applicable in the domestic forum[190].

In any event, even if international treaties, such as comprehensive trade agreements, cannot be applied and interpreted by domestic courts and, hence, a foreign investor could not directly rely on the provisions of an investment instrument in domestic proceedings, this does not mean that recourse to domestic courts would be fruitless. A state is free to decide in which way it secures the observance of its international obligations. The protection advanced by an investment instrument can therefore be

[184] Cf., e.g., Article 1 of Protocol 1 to the European Charter of Human Rights and Fundamental Freedoms; Article 17 of the Charter of Fundamental Rights of the European Union; Article 21 of the American Convention on Human Rights; Articles 13, 14 and 21 African Charter on Human and Peoples' Rights.
[185] Cf. Article 17 of the Universal Declaration of Human Rights; Article 5 (v) of the International Convention on the Elimination of All Forms of Racial Discrimination; Articles 15 and 16 Convention on the Elimination of All Forms of Discrimination against Women.
[186] Cf. esp. Articles 49, 63(1) TFEU.
[187] In order to put this question beyond doubt, state parties to investment instruments might be in the position to explicitly stipulate that the respective provisions of the instruments shall be directly applicable in their domestic courts. See for a more recent (contrarian) approach of the EU in respect of its international agreements on trade Semertzi, A., The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements, *Common Market Law Review*, Vol. 51 (2014), pp. 1125 et seqq.
[188] Cf. Jacobs/Roberts (eds.), *The Effect of Treaties in Domestic Law*, Sweet & Maxwell, London, 1987; Sloss (ed.), *The Role of domestic courts in treaty enforcement*, Cambridge University Press, Cambridge, 2009.
[189] In disputes involving foreign investment questions of national and international law are often intertwined. For example, when a permission or concession is removed the question of whether the investor was expropriated or not treated fair and equitably within the meaning of an investment instrument also depends on whether the host state authorities acted in conformity with national law. Cf. Robert Azinian, Kenneth Davitian, and Ellen Baca v. United Mexican States, ICSID Case No. ARB (AF)/97/2, documents available at http://www.italaw.com/cases/114 (visited 5 May 2014); Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1, documents available at http://www.italaw.com/cases/671 (visited 2 May 2014); See also McLachlan/Shore/Weiniger (eds.), *International Investment Arbitration - Substantive Principles*, Oxford University Press, Oxford, 2007, pp. 99 et seqq.
[190] Cf. in respect of Germany Frowein, J., Federal Republic of Germany, in: Jacobs/Roberts (eds.), *The effect of treaties in domestic law*, Sweet & Maxwell, London, 1987, pp. 63 et seqq., p. 73. Obviously, the degree to which national law can be brought in line with international obligations by domestic courts greatly varies from state to state. However, at least in tendency one can say that domestic courts are not ignorant to international treaties. Cf. Van Alstine, M., The Role of Domestic Courts in Treaty Enforcement: Summary and Conclusions, in: Sloss (ed.), *The Role of domestic courts in treaty enforcement*, Cambridge University Press, Cambridge, 2009, pp. 555 et seqq., pp. 593 et seqq.

contained in domestic legislation – especially and typically enshrined in constitutions – which might also predate a specific investment instrument[191].

Furthermore, by charging domestic courts with the task of adjudicating disputes involving foreign and domestic investors alike, *criticism that investment instruments favour foreigners over locals by granting additional legal remedies*[192] *could be mitigated.*

However, as already pointed out earlier, domestic courts may also fail to impartially adjudicate a conflict between a host state and a foreign investor[193]. They might be, rightly or wrongly, perceived by investors as being biased towards the host state government[194]. Domestic courts may also be corrupt or lack expertise in resolving a dispute in reasonable quality and time.

While some of those concerns associated with domestic courts could be mitigated to some degree[195], others cannot. The issue of perceived or real bias in domestic courts – if one does not want to subscribe to the view that these are also just an item in a cost and benefit analysis of an investor – are difficult to overcome as long as one wants to stick with the host state courts as the only appropriate forum. Allowing, for example, a claimant to name an 'associated judge', i.e. person he considers trustworthy[196], would possibly raise many complicated constitutional questions. Such a suggestion is unlikely to be implemented politically. Within the context of regional investment instruments it was, furthermore, suggested to entrust a domestic court of a non-disputing state party with the resolution of a dispute[197]. This would, however, require, inter alia, a comparable quality of the domestic legal

[191] It would therefore be no argument against the involvement of domestic courts that a foreign investor cannot rely directly on the provisions of an investment treaty in domestic court proceedings as long as the national legal system provides a similar standard of protection. Note in this respect the Australia-Unites States Free Trade Agreement. Neither US American nor Australian courts may apply the treaty. Cf. Dodge, W., Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement, *Vanderbilt Journal of Transnational Law*, Vol. 39 (2006), pp. 1 et seqq., p. 25. An investor has to rely on domestic provisions granting the same standard of protection or resort to diplomatic protection by its home state to get the substantive standards enforced against its host state.

[192] Investor-state arbitration provided for in an international investment instrument would only be available to foreign investors vis-à-vis its host state, i.e., for example, in case of CETA a Canadian investor could initiate arbitration proceedings vis-à-vis the EU or an EU Member State, dependent on who afforded the treatment challenged. An EU national, affected by the same measure, would have to turn to national and EU courts. It is the respective domestic legal order, in particular the fundamental rights in national constitutions and other fundamental rights documents as well as the fundamental freedoms contained in the TFEU, which determines the extent to which a state or the EU can subscribe to such a situation. These questions are, however, beyond the scope of this study.

[193] Kurtz, J., Australia's Rejection of Investor–State Arbitration: Causation, Omission and Implication, *ICSID Review*, Vol. 27 (2012), pp. 65 et seqq., p. 75; Sornarajah, M., *The International Law on Foreign Investment*, Cambridge University Press, New York, 3th Edition, 2010, p. 250; Schreuer, C. et al, The ICSID Convention: A Commentary, Cambridge University Press, Cambridge, 2nd Edition, 2009, p. 5 et seqq.

[194] For example, a domestic court could be more inclined to uphold public interest defences than to protect foreign private property. Cf. Trakman, L., Choosing Domestic Courts Over Investor–State Arbitration: Australia´s Repudiation of the Status Quo, *UNSW Law Journal*, Vol. 35 (2012), pp. 979 et seqq., p. 1001.

[195] What concerns quality of adjudication, by providing for the *establishment of specialised domestic investment courts* in investment instruments, the general level of judicial expertise in a host state could be raised. Basic procedural requirements and qualifications of judges could also be stipulated in investment instruments. If necessary, e.g. in case of developing countries, such commitments could be coupled with bilateral technical assistance or involvement of international organisations in order to facilitate the building up of adjudicative capacities. In this sense, investment instruments could directly contribute to the promotion of the rule of law from which not only foreign investors would benefit.

[196] Randón de Sansó, H., Proposed Changes to the Investment Dispute-Resolution System: A South American Perspective, *Investment Treaty News*, Vol. 5 (2014), pp. 10 et seqq.

[197] Randón de Sansó, H., Proposed Changes to the Investment Dispute-Resolution System: A South American Perspective, *Investment Treaty News*, Vol. 5 (2014), pp. 10 et seqq.

systems involved and, even more important, similar perceptions of the balance struck between public and private interests in the courts of the respective non-disputing party. Such conditions render the idea difficult to implement.

In sum, given that the capacities of domestic courts vary greatly from state to state and European investors could indeed face serious challenges to exercise and enforce property rights in some foreign domestic courts and, furthermore, accepting that also in advanced legal systems courts can fall short of the international standards in the individual case, allowing for domestic fora *only* in EU agreements appears no preferable option. In the CETA draft the EU goes to the other extreme and provides for ISDS as an *alternative* route to domestic courts which, in turn, might not sufficiently appreciate the positive part domestic courts may play in adjudicating (foreign) investment disputes[198].

2.3.2.2.1.2 Dispute settlement mechanisms based on investor-state contracts (investment contracts) or national legislation (investment laws)

2.3.2.2.1.2.1 Investor-state contracts

With a view to avoiding host state jurisdiction, a foreign investor could enter into contractual arrangements with the host state and agree on a neutral forum, i.e. resorting to international arbitration or, rarely, to submitting to foreign courts[199]. Dispute settlement clauses can be included and are frequently found in all kinds of contracts such as concessions, project agreements or built-and-operate agreements[200].

Entering into an investment contract appears not open to any foreign investor but only to those whose investment appears particularly beneficial to a host state's economy or, which might go hand-in-hand, to such investors with significant bargaining power towards the host state. Small- and medium-sized undertakings would probably end up without such a safety net.

Against this background, popular criticism on ISDS resolution on the basis of a general consent to arbitrate provided for in an investment *treaty* governed by public international law (investment instrument) appears in a completely different light. Depicting ISDS as free private fast-lane legal protection for multinational corporations[201] seems less than half the truth: in many situations multinational corporations could even do without ISDS provided for in an investment instrument. Small- and medium-sized undertakings – already facing many more hurdles than multinationals when

[198] See below 2.3.2.2.2.3.2 (p. 58).

[199] Cf. generally Bishop/Crawford/Reisman (eds.), *Foreign Investment Disputes*, Kluwer Law International, The Hague, 2005, pp. 213 et seqq.; Dugan, C. et al., *Investor-State Arbitration*, Oxford University Press, Oxford, 2008, pp. 225 et seqq.; Alvik, I., *Contracting with Sovereignty: State Contracts and International Arbitration*, Hart Publishing, Oxford, 2011; Salacuse, J., *The Three Laws of International Investment*, Oxford University Press, Oxford, 2013, pp. 159 et seqq.; see in respect of Brazil's approach which neither ratified investment instruments nor enacted specific legislation to promote or protect FDI Levy/de Borja/Pucci (eds.), *Investment protection in Brazil*, Kluwer Law International, The Hague, 2013.

[200] 19 percent of all ICSID claims are based on investment contracts. Cf. ICSID, *The ICSID Caseload Statistics (Issue 2014-1)*, 2014, pp. 10 et seqq., available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English51 (visited 4 May 2014).

[201] Open letter by various international NGOs directed at US Trade Representative Michael Froman and EU Trade Commissioner Karel de Gucht calling for dismissing ISDS from TTIP, available at http://action.sierraclub.org/site/DocServer/TTIP_Investment_Letter_Final.pdf?docID=14701 (visited 4 May 2014); McDonagh, T., *Unfair, Unsustainable and Under the Radar* - How Corporations use Global Investment Rules to Undermine a Sustainable Future, The Democracy Center, available at http://democracyctr.org/wp/wp-content/uploads/2013/05/Under_The_Radar_English_Final.pdf (visited 28 April 2014); Pinzler, P. et al., Im Namen des Geldes. *DIE ZEIT*, 27 February 2014.

pursuing an internationalisation strategy – would be those who might lose most if access to ISDS in investment instruments is generally abandoned[202].

Furthermore, in case a conflict arises, jurisdiction of arbitral tribunals established on the basis of a contract is frequently challenged with the argument that the very same contract was invalid or terminated and, hence, the consent to arbitrate void. Such issues do not arise in equal measure when consent to arbitrate is given in an investment instrument[203].

2.3.2.2.1.2.2 National legislation

Host states occasionally provide their consent to resort to international arbitration in disputes with foreign investors in national legislation, commonly in (foreign) investment laws which establish a special regime for the promotion, admission and treatment of foreign investment[204]. The advantage of such an approach for host states would be that it is at their discretion to set conditions or even to withdraw consent to arbitration by altering the law. If there is an offer to enter into arbitration in national legislation, then this is usually made to the *whole* foreign investment community. In contrast, consent provided in investment contracts operates inter partes. The general consent to arbitrate in bilateral investment treaties includes only nationals and corporations of the state parties to the agreement. In practice, investment laws exhibit a great variety in terms of language and 'degree' of exposure to arbitration[205]. In consequence, debate frequently arises whether and to which extent a certain national legislation indeed allowed for the initiation of investor-state arbitration[206]

[202] Admittedly, small- and medium-sized undertakings struggle to cover the costs of arbitration also in the current system of ISDS based on consent provided in an investment instrument. Here, the introduction of a small-claims centre might be helpful. See for the cost issue 2.3.6.1 (p. 80).

[203] Dugan, C. et al., *Investor-State Arbitration*, Oxford University Press, Oxford, 2008, pp. 226 et seq.

[204] Early ISCID arbitrations were commenced this way. Cf. Southern Pacific Properties v Arab Republic of Egypt, ICSID Case No. ARB/84/03 (1992); see generally in respect of national investment law Investment Climate Advisory Services of the World Bank Group, *Investment Law Reform - A handbook for development practitioners*, 2010, available at https://www.wbginvestmentclimate.org/uploads/Investment-Law-Reform-Handbook.pdf (visited 4 May 2014), pp. 49 et seqq.; Schreuer, C., Investment arbitration based on national legislation, in Hafner/Matscher/Schmalenbach (eds.), *Völkerrecht und die Dynamik der Menschenrechte - Liber Amicorum Wolfram Karl*, Facultas, Wien, 2012, pp. 527 et seqq.; Salacuse, J., *The Three Laws of International Investment*, Oxford University Press, Oxford, 2013, pp. 89 et seqq.

[205] Cf. Moïse Mbengue, M., Consent to Arbitration Through National Investment Legislation, *IISD Treaty News*, 19 July 2012, available at http://www.iisd.org/itn/2012/07/19/consent-to-arbitration-through-national-investment-legislation/#_ftn6 (visited 4 May 2014).

[206] Dugan, C. et al., *Investor-State Arbitration*, Oxford University Press, Oxford, 2008, pp. 230 et seqq.; on the issue of interpretation Caron, D., The Interpretation of National Foreign Investment Laws as Unilateral Acts Under International Law, in: Arsanjani/Cogan/Sloane/Weissner (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, Martinus Nijhoff Publishers, Leiden/Boston, 2011, pp. 649 et seqq.; Tejera Pérez, V., Do Municipal Laws Always Constitute a Unilateral Offer to Arbitrate? The Venezuelan Investment Law: A Case Study, in: Laird/Weiler (eds.), *Investment Treaty Arbitration and International Law*, JurisNet, Huntington, 2008, pp. 89 et seqq.

2.3.2.2.1.3 Diplomatic protection and state-state arbitration

2.3.2.2.1.3.1 Diplomatic protection

After having exhausted local remedies[207], the investor can approach its home state asking to enforce the substantive standards contained in an investment instrument which does not provide for ISDS through exercising *diplomatic protection on behalf of its national*[208]. Recourse to diplomatic protection would include a wide spectrum of means such as mediation, arbitration or judicial proceedings between the home and host state of the investor. *Taking up the case*, however, *would usually be at the discretion of the home state*. Put differently, the home state would weigh its interest in pursuing the cause of its national against other interests. If the home state choses to pursue its national's cause, political friction in the relationship with the host state is likely to occur. Even if the home state should be able to secure damages from the host state, the investor would not be entitled to benefit from this settlement, although the home state may choose to pass them on to its own national.

While diplomatic protection is of little benefit to the investor, a perceived advantage of diplomatic protection – from the perspective of the home state – is that it allows for screening for frivolous claims, which, of course, also comes at some bureaucratic cost[209]. The host state benefits from the exhaustion of local remedies rule as it receives a chance to correct the foreigners' mistreatment before the matter receives publicity on the international level[210]. This rule can be understood as an expression of respect towards the judiciary of a sovereign which is, as a starting point, perceived as being capable of doing justice[211].

2.3.2.2.1.3.2 State-state arbitration

Since 1959, with the conclusion of the first BIT between Germany and Pakistan[212], investment instruments have provided for *state-state arbitration* geared towards settling disputes *concerning their interpretation and application*. Today, investment instruments rarely provide for such modes of settlement only but usually do so alongside with ISDS.

If the home state takes up the cause of its national in state-state arbitration with a host state then this can also be described as a form of exercising diplomatic protection[213]. State-state arbitration has also

[207] Exhaustion of local remedies is a precondition for the exercise of diplomatic protection. Cf. Mavrommatis Palestine Concessions (Greece v. United Kingdom), 1924 Permanent Court of International .Justice (Series A) No. 2, at p. 12; Interhandel Case (Switzerland v. United States of America), 1959 International Court of Justice, Judgment of 21 March 1959, pp. 5, 27.
[208] Draft Articles on Diplomatic Protection, art. 1, UN Doc. A/CN.4/L.647 (INT'L L. COMM'N 2004) ('Diplomatic protection consists of resorting to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State.'). Cf. also Mavrommatis Palestine Concessions (Greece v. United Kingdom), 1924 Permanent Court of International .Justice (Series A); cf. also 2.2.2 (p. 21).
No. 2, at 12 (Aug. 30).
[209] Bjorklund, A., Waiver and the Exhaustion of Local Remedies Rule in NAFTA Jurisprudence, in: Weiler, T. (ed.), *NAFTA Investment Law and Arbitration*, Transnational Publishers, Ardsley, 2004, pp. 253 et seqq., p. 258.
[210] Dodge, W., Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement, *Vanderbilt Journal of Transnational Law*, Vol. 39 (2006), pp. 1 et seqq., pp. 6 et seqq.
[211] Borchard, E., *The Diplomatic Protection of Citizens Abroad*, The Banks Law Publishing, New York, 1925, p. 817.
[212] Article 11(2) lit b. 1959 Germany-Pakistan BIT, Bundesgesetzblatt (German Law Gazette) II 1961, p. 793.
[213] E.g. Republic of Italy v. Republic of Cuba, Sentence préliminaire, (Ad-hoc Arb. Trib. 15 March 2005), available at http://italaw.com/sites/default/files/case-documents/ita0434_0.pdf (visited 4 May 2014); Republic of

been used differently, however, e.g. for interpretive issues[214] or for seeking a declaratory decision in abstract terms that an investment instrument has or has not been violated[215].

Providing for state-state arbitration in investment instruments only would be of little benefit for a foreign investor as, in essence, he would face all the disadvantages associated with diplomatic protection[216].

If an investment instrument would make available both investor-state and state-state arbitration, the latter could be utilised to control the activities of investor-state arbitral tribunals, e.g. by way of providing authoritative interpretations if the state parties cannot agree on such amicably.[217]

2.3.2.2.1.4 Non-binding means – investor-state consultations and mediation, and conciliations

Most investment instruments provide for *consultations* between the investor and host state for a fixed period of time before a claim can be submitted to binding investor-state arbitration. Consultations aim at an amicable and mutually satisfactory settlement of a dispute with the view of avoiding an adversarial legal procedure involving winners and losers which could damage long-term relationships[218]. The absence of a fixed procedural framework may, for example, avoid possible inflexible rules regarding evidence and allows stakeholders other than the investor and the host state to

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Italy v. Republic of Cuba, Sentence finale (Ad-hoc Arb. Trib. 15 January 2008), available at http://italaw.com/sites/default/files/case-documents/ita0435_0.pdf (visited 4 May 2014).

[214] E.g. Peru v Chile Arbitration, cf. Peterson, L., ICSID Tribunal Declines to Halt Investor Arbitration in Deference to State-to-State Arbitration, *INVEST-SD: Investment Law and Policy Weekly News Bulletin*, 19 December 2003, available at http://www.iisd.org/pdf/2003/investment_investsd_dec19_2003.pdf (visited 4 May 2014); Ecuador v. United States, PCA Case No. 2012-5, Request for Arbitration, 1 (Perm. Ct. Arb. 2011), available at http://www.italaw.com/sites/default/files/case-documents/ita1056.pdf (visited 8 May 2014); Hepburn, J. and Peterson, L., US-Ecuador Inter-State Investment Treaty Award Released to Parties - Tribunal Members Part Ways on Key Issues, *Investment Arbitration Reporter*, 30 October 2012, available at www.iareporter.com/articles/20121030_1 (visited 4 May 2014).

[215] E.g. In Cross-Border Trucking Services (United Mexican States v. United States of America), Case No. USA-MEX-98-2008-01, North America Free Trade Agreement Chapter 20 Arb. Trib. Panel Decision, Final Report, 2, (6 February 2001), available at http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_20/USA/ub98010e.pdf (visited 4 May 2014).

[216] Cf. Republic of Ecuador v. United States of America (PCA Case No. 2012-5), Expert Opinion with Respect to Jurisdiction of Michael Reisman, available at http://www.italaw.com/sites/default/files/case-documents/ita1061.pdf (visited 5 May 2014), p.21. *Reisman* fears that allowing for a greater role of state-state tribunals would endanger the rights created for third party beneficiaries (investors) whereby he equals the substantive standards in investment instruments with human rights. In order to effectively protect or preserve those rights he essentially wants to create a jurisdictional monopoly for investor-state tribunals in this respect. However, *Reisman's* interpretation does not appear compelling as it lacks persuasive evidence – firmly grounded on a prudent interpretation based on ordinary meaning, context and object and purpose of investment instruments – that state parties wanted to deprive themselves of the role of master of the treaty. Cf. Roberts, A., State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority, *Harvard International Law Journal*, Vol. 55 (2014), pp. 1 et seqq., pp. 10 et seqq.

[217] In this respect, Article X-24 CETA draft of 4 February 2014 = Article x-40 of CETA draft of 3 April 2014 should be examined critically whether it overly and unnecessarily curtails the role of the state parties as masters of the treaty to the benefit of investor-state tribunals.

[218] Cf also Echandi, R. and Kher, P., Can International Investor–State Disputes be Prevented? - Empirical Evidence from Settlements in ICSID Arbitration, *ICSID Review*, Vol. 29 (2014), pp. 41 et seqq. Note also the initiatives taken by the Pacific Alliance (Chile, Colombia, Mexico, and Peru) on dispute prevention. Instead of abandoning ISDS they set up projects which aim to communicate host state investment commitments to stakeholders and provide training for government agencies in order to secure compliance. Cf. Clarkson, S. et al., *Looking South While Looking North: Mexico's Ambivalent Engagement with Overlapping Regionalism*, Paper presented to Kolleg-Forschergruppe on 'The Transformative Power of Europe' conference on 'Dealing with Overlapping Regionalism: Complementary or Competitive Strategies?', Freie Universität Berlin, 16 May, 2014.

take part more easily in the dispute resolution process[219]. With the same overall rationale, investment instruments may also provide for mediation and conciliation (all three modes are hereafter referred to as 'alternative dispute resolution (ADR)') whereby the borders between the individual concepts are blurred. *Mediation* commonly refers to a technique of amicable dispute resolution with the assistance of a neutral third person. The mediator may either evaluate the legal merits of the dispute or assist the parties in defining the issue[220]. *Conciliation* would describe situations in which the neutral third person suggests possible solutions of the conflict to the parties. In both concepts binding decisions are left to the disputing parties. Due to a less legally regulated discourse allegedly not requiring (costly) legal expertise, some praise ADR as being more cost efficient than such occurring in domestic courts or in arbitration[221].

To some extent ADR could help resolve a dispute between an investor and its host state. Without pressure of a binding dispute settlement mechanism – like ISDS – in the background, the parties to the dispute might however be less inclined to come to an amicable solution.

The CETA draft provides for mandatory consultation[222] before the submission of a claim to arbitration[223] as well as for a voluntary mediation[224] which would not preclude subsequent access to arbitration.

2.3.2.2.2 Reforming ISDS

Instead of abandoning ISDS as a standard concept in international investment instruments, states may choose to activate the power of authoritative interpretation of state parties to an investment instrument (below 2.3.2.2.2.1 (p. 50)), to re-draft substantive standards in investment instruments (below 2.3.2.2.2.2 (p. 54)), to restrict or delay access to ISDS (see below 2.3.2.2.2.3 (p. 55)), to restrict available remedies within investor-state arbitration (below 2.3.2.2.2.4 (p. 61)), to allow more broadly for host state claims (below 2.3.2.2.2.5 (p. 63)) or to include review or termination clauses specific to the investment-related provisions in an international agreement (below 2.3.2.2.2.6 (p. 64)).

2.3.2.2.2.1 Activating the power of authoritative interpretation resting with state parties

Older investment treaty texts hardly refer to public interests[225]. This, however, would not foreclose sufficient consideration of such interests in investment arbitration. The Vienna Convention on the Law of Treaties explicitly stipulates in Article 31(3) lit c to interpret substantive standards in the light of

[219] Consultations can also be more institutionalised by providing an *ombudsman* for foreign investors. Cf. Constain, S., Mediation in Investor–State Dispute Settlement - Government Policy and the Changing Landscape, *ICSID Review*, Vol. 29 (2014), pp. 25 et seqq., 30 et seqq.

[220] On mediation generally in investment disputes cf. Franck, S., Using Investor–State Mediation Rules to Promote Conflict Management - An Introductory Guide, *ICSID Review*, Vol. 29 (2014), pp. 66 et seqq.; Constain, S., Mediation in Investor–State Dispute Settlement - Government Policy and the Changing Landscape, *ICSID Review*, Vol. 29 (2014), pp. 25 et seqq.

[221] However, calls for the introduction of formalised, *compulsory* mediation or conciliation must be viewed with caution as it is also subject to professionalisation – not different to ISDS – and, like every industry, seeks to extend its market share. Cf. Welsh, N and Schneider, A., The Thoughtful Integration of Mediation into Bilateral Investment Arbitration, *Harvard Negotiation Law Review*, Vol. 18 (2013), pp. 71 et seqq.,p. 72, who recommend 'the establishment of a small pool of well-known and well-respected investment treaty mediators who will offer a reasonably strong and pragmatic guarantee of quality in the short-term and engender a heightened perception of trust in the process.'

[222] Article x-4 CETA draft of 4 February 2014 ≈ Article x-18 of CETA draft of 3 April 2014.

[223] Article x-7(1) lit b CETA draft of 4 February 2014 = Article x-21(1) lit b of CETA draft of 3 April 2014.

[224] Article x-5 CETA draft of 4 February 2014 = Article x-19 of CETA draft of 3 April 2014.

[225] Spears, S., The Quest for Policy Space in a new Generation of International Investment Agreements, *Journal of International Economic Law*, Vol. 13 (2010), pp. 1037 et seqq., p. 1045.

other international rules applicable between the state parties which may include such on human rights, environmental protection or social security[226]. The Vienna rules offer, hence, an open and neutral tool to take into account public interests shared by the state parties to the investment instrument.

However, as shown elsewhere in this study[227], arbitral tribunals have not always faithfully followed the binding rules on treaty interpretation[228]. Instead, some tribunals superposed the Vienna rules by a highly problematic 'system of de facto precedent' which is basically backward looking, path-dependent and prone to repeating old mistakes[229].

If arbitral tribunals interpret substantive standards contained in investment instruments in the light of self-chosen previous awards without paying attention to the fact that they were handed down on the basis of different investment instruments, the balance reached in treaty negotiations between private and public interests might be distorted or even replaced by a new one struck by the arbitrators[230].

Irrespective of the controversy of whether there might be incentives in the structure of ISDS which work in favour of private interests[231] or whether a re-balancing in favour of private interest is merely the consequence of some arbitrators 'just' wanting to strike some sort of equitable compromise in the particular case, state parties are constantly threatened with losing power over the ultimate determination of the content of the investment instrument.

Hence, *making the host state's right to regulate explicit* in an investment instrument might be useful to preserve the 'right balance' envisaged by the state parties in the course of interpretation of an investment instrument by an arbitral tribunal. The EU may employ a variety of measures to prevent power-gripping by tribunals:

At the drafting stage the EU may include in the ISDS section in an investment instrument a *reference to the Vienna Convention on the Law of Treaties* in order to signal to a tribunal to rigorously follow its rules on interpretation. *Stipulating that 'other rules of international law between the parties' –* including, but not limited to such on human rights or environment – *are to be taken into account* when interpreting the investment instrument, reiterates Article 31(1), (3) lit c VCLT[232].

Providing explicitly for public objectives considered important to the state parties in the preamble or elsewhere in an investment treaty also helps preserving the intended balance between private and

[226] Cf. Berner, K., in: Hindelang/Krajewski (eds.), *Shifting Paradigms in International Investment Law (provisional title)*, Oxford University Press, forthcoming 2015 who equally demonstrates that Article 31(3) lit c VCLT has not convincingly been used by investment tribunals. Cf. also McLachlan, C. et al., *International Investment Arbitration: Substantive Principles*, Oxford University Press, Oxford, 2007, p. 67; McLachlan, C., Investment Treaties and General International Law, *International & Comparative Law Quarterly*, Vol. 57 (2008), pp. 361 et seqq., pp. 395 et seqq.; Brower II, C., Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes, in: Sauvant (ed.), *Yearbook on International Investment Law and Policy 2008–2009*, Oxford University Press, New York, 2009, pp. 356 et seqq., pp. 374 et seq.

[227] Cf. 2.3.1.2 (p. 34).

[228] Cf. also Van Harten, G., *Investment Treaty Arbitration and Public International Law*, Oxford University Press, Oxford, 2007, pp. 122 et seqq., who points to a variety of interpretive approaches adopted by tribunals originating from commercial arbitration which appear ill-fitting for the public international law context in which investment arbitration operates.

[229] Alexander, L., Constrained by Precedent, *Southern California Law Review*, Vol. 63 (1989), pp. 1 et seqq., p. 10.

[230] Cf. 2.3.1.2 (p. 34).

[231] In particular the economic interests of arbitrators may encourage strengthening private interests in ISDS since arbitrations are initiated by investors in nearly all cases. Cf. Van Harten, G., *Investment Treaty Arbitration and Public International Law*, Oxford University Press, Oxford, 2007, pp. 167 et seqq.

[232] Cf. Article x-12(1) CETA draft of 4 February 2014 = Article x-27(1) of CETA draft of 3 April 2014.

public interests as the tribunal is then freed from looking for such objectives beyond the investment instruments itself[233]. As a tribunal is obliged to interpret a treaty, inter alia, in the light of its objective (Article 31(1) VCLT) explicit references should at least ensure interpretative consideration[234]. However, taking public interests into consideration and balancing them with private interests does not say anything about the weight given to each. This would require further specification in an investment instrument if not intended to be left to tribunals[235].

According to the Canadian Technical Summary of Final Negotiated Outcomes[236], the preamble of CETA reaffirms the state parties' right to regulate in a manner consistent with the agreement[237]. In principle, such a reference can influence the meaning of a substantive standard[238]. However, such language would not put *additional* emphasis on public interests or may not create an inherent assumption that a regulatory measure taking in the public interest would be in compliance with the investment agreement[239].

Turning to the post-ratification period, after an investment treaty has entered into force, the state parties have further means at hand to control the interpretation of an investment instrument. NAFTA-experience[240] demonstrates that – as in the case of inconsistency of ISDS practice – *a committee* staffed with representatives from both state parties and *charged with the power to authoritatively interpret the substantive standards contained in the treaty* can be of assistance[241] in hedging in (to some extent) power-seizing processes inherent in treaty interpretation by ad-hoc tribunals in the course of dispute resolution[242]. If provided for in EU agreements – the CETA draft does so[243] – such a committee does not only facilitate exchange and cooperation among the state parties but could constantly monitor the activity of arbitral tribunals subsequent to the entry into force of the agreement.

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[233] Spears, S., The Quest for Policy Space in a new Generation of International Investment Agreements, *Journal of International Economic Law*, Vol. 13 (2010), pp. 1037 et seqq., pp. 1065 et seqq.
[234] Cf. UNCTAD, *Interpretation of IIAs: What States Can Do*, IIA Issues Note 2011/3, available at http://unctad.org/en/Docs/webdiaeia2011d10_en.pdf (visited 19 May 2014), pp. 8 et seqq.
[235] For policy options see Spears, S., The Quest for Policy Space in a new Generation of International Investment Agreements, *Journal of International Economic Law*, Vol. 13 (2010), pp. 1037 et seqq., pp. 1048 et seqq.
[236] Technical Summary of Final Negotiated Outcomes, Canada-European Union Comprehensive Economic and Trade Agreement, p. 24. Available at http://www.actionplan.gc.ca/sites/default/files/pdfs/ceta-technicalsummary.pdf (visited 4 May 2014).
[237] See also Article 7.1(4) EU-South Korea FTA: 'Consistent with this Chapter, each Party retains the right to regulate and to introduce new regulations to meet legitimate policy objectives.'
[238] Cf. Article 31 (1) VCLT.
[239] Of the view that such treaty language would even lead to the contrary, i.e. emphasising property interests Bernasconi-Osterwalder N. and Mann, H., *A Response to the European Commission's December 2013 Document "Investment Provisions in the EU-Canada Free Trade Agreement (CETA)"*, IISD Report, March 2014, available at http://www.iisd.org/sites/default/files/pdf/2014/reponse_eu_ceta.pdf (visited 2 May 2014), p. 2.
[240] Cf. NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (Article 1105 and the Availability of Arbitration Documents), 31 July 2001, available at http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp (visited 4 May 2014).
[241] The NAFTA Free Trade Commission, in its interpretive note, bound the substantive treatment standards of 'fair and equitable treatment' and 'full protection and security' to the customary international law minimum standard of treatment of aliens (cf. NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions (Article 1105 and the Availability of Arbitration Documents)*, 31 July 2001, available at http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp (visited 4 May 2014)). Arbitrators, however, reacted 'flexibly' by, among others, holding 'both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development'. Cf. ADF Group v United States of America, ICSID Case No. ARB(AF)/00/1, Award (9 January 2003), para 179, available at http://www.italaw.com/sites/default/files/case-documents/ita0009.pdf (visited 8 May 2014).
[242] Mills, A., Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration, *Journal of International Economic Law*, Vol. 14 (2011), pp. 469 et seqq., pp. 490 et seqq.
[243] Cf. Article x-26(2) CETA draft of 4 February 2014 = Article x-42(2) of CETA draft of 3 April 2014.

If necessary, interpretative notes could be issued. Such authoritative interpretation would have to be taken into consideration by tribunals along with any *ad-hoc authoritative interpretation* by the state parties[244]. Such ad-hoc authoritative interpretation can for example be brought about when (all) the non-disputing (state) parties intervene in the proceeding in support of the defendant state party regarding the interpretation of the investment instrument[245].

While providing an authoritative interpretation on substantive standards to influence ongoing arbitrations might be seen as conflicting with the idea of equality of arms in ISDS and should be handled with caution, it nevertheless remains within the discretion of the state parties as the masters of the treaties in the same way they are entitled to remove or to modify the benefits enjoyed by the investor[246]. Since an authoritative interpretation requires the consent of all state parties, the investor is to some degree shielded from inappropriate case-driven interferences with ongoing proceedings if the home state of the investor perceives the claim as having some merit. On the other hand, issuing an interpretative note may not be confused with negotiations conducted in the context of exercising 'classic' diplomatic protection. Discussions on authoritative interpretations – even issued during ongoing arbitrations – would have to focus on the interpretation of the investment instrument not (just) in the individual case but in all future cases. The host state of today's claimant might be tomorrow's respondent and vice-versa.

As explained already elsewhere in this study[247], authoritative interpretation could equally be 'institutionalised' by providing for a *preliminary reference procedure* to request authoritative interpretation of a clause through state-to-state consultation or arbitration[248] or allowing for a *mandatory review process* of draft awards by the state parties or a treaty committee[249].

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[244] Cf. in respect of the effect of such interpretation and advisable clarifications in future EU agreements above footnotes 149 and 153. See also UNCTAD, *Interpretation of IIAs: What States Can Do*, IIA Issues Note 2011/3, available at http://unctad.org/en/Docs/webdiaeia2011d10_en.pdf (visited 19 May 2014), pp. 4 et seqq., pp. 11 et seqq.

[245] UNCTAD, *Interpretation of IIAs: What States Can Do*, IIA Issues Note 2011/3, available at http://unctad.org/en/Docs/webdiaeia2011d10_en.pdf (visited 19 May 2014), p. 14. The CETA draft allows for such non-disputing (state) party intervention in Article x-19(2) CETA draft of 4 February 2014 = Article x-35(2) of CETA draft of 3 April 2014. For certain problems faced by the non-disputing parties to gain access to oral submissions in a NAFTA-dispute cf. Detroit International Bridge Company v The Government of Canada, PCA Case No. 2012-25, Procedural Order No. 8 (12 May 2014), available at http://www.italaw.com/sites/default/files/case-documents/italaw3169.pdf (visited 22 July 2014).

[246] Arguably, substantive standards neither create rights for individuals nor can the latter have legitimate expectations that state parties refrain from clarifying or modifying substantive standards. Cf. Hindelang, S., Restitution and Compensation – Reconstructing the Relationship in International Investment Law, in: Hofmann/Tams (eds.), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration*, Nomos, Baden-Baden, 2011, pp. 161 et seqq.; also available as Hindelang, S., *Restitution and Compensation – Reconstructing the Relationship in International Investment Law*, WHI-Paper 02/11, 2011, http://www.whi-berlin.eu/tl_files/documents/whi-paper0211.pdf (visited 1 May 2014); Cf. also Van Harten, G., *Investment Treaty Arbitration and Public International Law*, Oxford University Press, Oxford, 2007, p. 131: 'Investment treaty arbitration is a matter of pacta sunt servanda between state parties, not between disputing parties.' In order to avoid doubts, treaty makers should make it explicit in the text of an agreement that authoritative interpretation can also have binding effect in ongoing arbitrations.

[247] See above 2.3.1.3 (p. 37).

[248] The state-to-state arbitration mechanism built in virtually any investment instrument would provide a convenient tool in each case in which the state parties cannot agree amicably on the authoritative interpretation.

[249] Cf. for a similar solution adopted in WTO-law Article 16 (4) DSU which reads 'Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of

2.3.2.2.2.2 Redrafting substantive standards

Balancing public and private interests by adapting substantive provisions should be approached with the necessary prudence and, in any event, be a conscious policy decision. Lately, organisations such as Unctad promote the idea of defining *substantive* standards in investment instruments more clearly and thereby also reducing their scope in order to preserve more policy space for states[250]. When talking about preserving or even increasing policy space at home, in many cases what is not explicitly mentioned is that this often goes along with reducing the standard of property protection abroad. This is not to suggest any specific balance but merely to stress that state parties and the societies represented by them should carefully evaluate their interests and make informed and more widely accepted policy choices before entering into negotiations.

Whatever balance state parties may be able to strike between public and private interests in treaty negotiations, in any event they should carefully review the treaty language adopted *and* provide for authoritative interpretation mechanisms to preserve the balance struck. By rule of thumb, the more open the substantive standards are formulated the more leeway investment tribunals enjoy later[251] and, hence, the stronger the tools securing authoritative interpretation should be. However, it is also worth mentioning that past experience has demonstrated that state parties' attempts at trimming certain substantive standards were met with some 'avoidance strategies' by tribunals[252].

Another issue already mentioned[253] and associated with more clearly and/or narrowly defined substantive standards is the ensuing reduction of flexibility in adapting a treaty text to possibly different future policy priorities without having to renegotiate. While today, say the 'public finance sector' might be perceived as a very sensitive policy area and is carved out from the scrutiny of international arbitration, tomorrow it might be a different one for which social groups mobilise public indignation in domestic arenas.

Members to express their views on a panel report.'; see also Article 18(14) DSU for adoption of appellate body reports.

[250] Cf., e.g., UNCTAD, *Investment Policy Framework for Sustainable Development*, 2012, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf (visited 4 May 2014); for a current suggestion of redrafting the expropriation and FET clauses in investment instruments cf. Ortino, F., Refining the content and role of investment 'rules' and 'standards': A bolder approach to international investment treaty-making, *ICSID Review*, Vol. 28 (2013), pp. 152 et seqq., pp. 160 et seqq.

[251] Cf. Trachtman, J., The Domain of WTO Dispute Resolution, *Harvard International Law Journal*, Vol. 40 (1999), pp. 333 et seqq., p. 335 phrases the issue in legitimacy terms: '[W]here decision-making authority is allocated to a dispute resolution body, less specific standards are consistent with a transfer of power to an international organization—the dispute resolution body itself—while more specific rules are more consistent with the reservation of continuing power by member states. From a more critical standpoint, it might be argued that allocation of authority to a transnational dispute resolution body by virtue of standards can be used as a method to integrate sub rosa, and outside the visibility of democratic controls'.

[252] For example, linking the fair and equitable treatment standard to the minimum standard in customary international law (Cf. NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions (Article 1105 and the Availability of Arbitration Documents)*, 31 July 2001, available at http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp (visited 4 May 2014) did not lead to the desired outcome of significantly reducing its scope. Rather, tribunals adopted an expansive 'interpretation' of the minimum standard in customary international law *without* a thorough analysis of actual evidence of state practice and *opinio juris*; both necessary to identify a rule of customary international law. Instead, some tribunals again relied on the highly questionable doctrine of 'de facto precedent' (cf. 2.3.1.2 (p. 37) and 2.3.2.2.2.1 (p. 52)) to back up their reading of fair and equitable treatment and hereby 'rebalanced' the investment instrument. Cf., e.g. Railroad Development Corp. v. Guatemala, ARB /07/23, Award paras. 212 et seqq., esp. para 219, available at http://www.italaw.com/sites/default/files/case-documents/ita1051.pdf (visited 8 May). See for a notable exception Glamis Gold, Ltd. v. United States of America, Uncitral, Award (8.6.2009), paras. 600-605, available at http://www.state.gov/documents/organization/125798.pdf (visited 8 May 2014).

[253] Cf. above 2.3.1.5 (p. 39).

Since a review of the substantive treatment standards is not part of this study, suffice it to say that the CETA draft Investment Text contains all 'traditional' substantive standards. As of writing it is unclear, however, whether there will be an 'umbrella clause'. As a general exception clause for non-discrimination commitments contained in the CETA draft Article XX GATT, whose operation in investment arbitration remains yet to be seen, is incorporated[254]. While progress appears to have been made in more clearly defining indirect expropriation and, in particular, carving out non-discriminatory measures to protect legitimate public welfare objectives such as health, safety and the environment except in rare circumstances[255], doubts exist as to whether the negotiation partners succeeded in a more precise definition of the fair and equitable treatment standard which would offer clearer guidance to investment tribunals[256].

Even if the CETA negotiation parties would finally agree on placing a stronger emphasis on public interests or even on restricting the scope of the substantive treatment standards, the current language of the most-favoured-nation treatment clause[257] would allow for importing broader substantive standards from other investment instruments – in respect of the EU, for example, i.e. the Energy Charter Treaty – to which the state parties subscribed or will subscribe.[258]

2.3.2.2.2.3 Restricting and delaying access to ISDS

2.3.2.2.2.3.1 Excluding certain sectors or economic activities from ISDS

An alternative or cumulative approach to limit the exposure to ISDS would be to address concerns about sufficient policy space by way of curtailing access to ISDS.

For example, sensitive policy areas such as national security, the review of incoming investments, measures to protect the environment, health and human rights, tax measures or sovereign bonds could simply be *excluded from an investor-state tribunal's jurisdiction*. However, in the course of later arbitration, such an approach will probably lead to discussions circling around the question to which policy area a certain contested state measure has to be attributed. Such exercises often involve difficult, hardly clear-cut and, at times, unpredictable delineation processes. Furthermore, sectors or governmental activities perceived as very sensitive to the host state might change over time and, hence, a given list of activities might be over- or under-representative when a dispute arises in the future.

The jurisdiction of investor-state arbitral tribunals can in principle be even further curtailed – and, thus, protection of private interests further reduced – by excluding certain substantive standards, such

[254] Cf. 'Article X: General exceptions' CETA draft Investment Text of 4 April 2014. In earlier drafts, cf. 'Article X: General Exceptions' CETA draft Investment Text of 21 November 2013, the exception applied to the *whole* investment chapter and did not incorporate but largely reproduced Article XX GATT. See. also General Agreement on Tariffs and Trade, available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf (visited 7 May 2014).
[255] Article X.11 in connection with 'Annex: Expropriation' CETA draft Investment Text of 21 November 2013 = Article X.11 in connection with 'Annex X.11: Expropriation' CETA draft Investment Text of 4 April 2014.
[256] Cf. Article X.9(1)-(5) CETA draft Investment Text of 21 November 2013 ≈ Article X.9(1)-(4) CETA draft Investment Text of 4 April 2014. For a critical view cf. Bernasconi-Osterwalder, N. and Mann, H., *A Response to the European Commission's December 2013 Document "Investment Provisions in the EU-Canada Free Trade Agreement (CETA)"*, February 2014, available at http://www.iisd.org/sites/default/files/pdf/2014/reponse_eu_ceta.pdf (visited 5 May 2014), pp. 5 et seqq.
[257] Cf. Article X.8 CETA draft Investment Text of 21 November 2013 ≈ Article X.8 CETA draft Investment Text of 4 April 2014.
[258] Arguably, even existing Member States' BIT could lend themselves to such exercise, if the investment instrument is concluded as a so-called 'mixed agreement', i.e. asides the EU also Member States would become party to the investment instrument.

as fair and equitable treatment, from the jurisdiction of a tribunal. Alleged breaches of excluded substantive standards could then only be enforced by means of diplomatic protection and, possibly, in domestic courts. To some degree such a drafting approach could be – depending on the perspective – frustrated or absorbed by tribunals switching to other substantive standards still included in their jurisdiction. These standards would simply be interpreted broader. Especially the substantive standards of fair and equitable treatment and indirect expropriation lend themselves to such tactics as they partly overlap[259].

The CETA drafters appear to have carved in particular market access provisions[260]. Apart from that, negotiators seem to focus on more clearly defining, re-balancing or restricting substantive standards.

2.3.2.2.2.3.2 Exhaustion of local remedies

2.3.2.2.2.3.2.1 Advantages of prior involvement of domestic courts

In contrast to other areas of public international law[261], in international investment law an investor is hardly required to exhaust local remedies before resorting to ISDS ('local remedies rule')[262]. This is due to the silence of most investment instruments on this point which was read – in conjunction with other evidence[263] – by tribunals as a 'waiver' of the local remedies rule[264].

[259] Kläger, R., *'Fair and Equitable Treatment' in International Investment Law*, Cambridge University Press, Cambridge, 2011, pp. 296 et seqq.; Reed, L. and Bray, D., Fair and Equitable Treatment: Fairly and Equitably Applied in Lieu of Unlawful Indirect Expropriation?, in: Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2007*, Martinus Nijhoff Publishers, Leiden, 2007, pp. 13 et seqq., p. 14.

[260] Cf., e.g., Article x-1(1) CETA draft of 4 February 2014 = Article x-17(1) of CETA draft of 3 April 2014.

[261] Cf. in respect of the requirement of exhaustion of local remedies in other fields Bjorklund, A., Waiver and the Exhaustion of Local Remedies Rule in NAFTA Jurisprudence, in: Weiler, T. (ed.), *NAFTA Investment Law and Arbitration*, Transnational Publishers, Ardsley, 2004, pp. 253 et seqq., p. 258 et seqq. See also Article 35(1) European Convention on Human Rights (ECHR).

[262] Certain 'variations' of the local remedies rule have surfaced in ISDS practice in situations in which investor-state contracts contained exclusive jurisdiction clauses pointing to local courts or as a substantive requirement to be met within protection standards in investment instruments such as indirect expropriation or fair and equitable treatment. Cf. Schreuer, C., Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration, *The Law & Practice of International Courts and Tribunals*, Vol. 4 (2005), pp. 1 et seqq.; Foster, G., Striking a Balance between Investor Protections and National Sovereignty - The Relevance of Local Remedies in Investment Treaty Arbitration, *Columbia Journal of Transnational Law*, Vol. 49 (2011), pp. 201 et seqq., available at http://ssrn.com/abstract=1865489 (visited 4 May 2014); Dodge, W., *Local Remedies under NAFTA Chapter 11*, 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2217059 (visited 4 May 2014). For a discussion of the current interplay of investment tribunals and domestic courts cf. Bubrowski, H., *Internationale Investitionsschiedsverfahren und nationale Gerichte*, Mohr Siebeck, Tübingen, 2013.

[263] For example, in respect of ICSID arbitration such a reading is, inter alia, supported by Article 26 ICSID-Convention which stipulates that states are required to expressly state that they no *not* dispense with the requirement of exhausting local remedies.

[264] E.g. Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar, ASEAN I.D. Case No. ARB/01/1, Award (31 March 2003), para. 40, available at http://www.italaw.com/sites/default/files/case-documents/ita0909.pdf (visited 9 May 2014); Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003), paras. 142 et seq., available at http://www.italaw.com/sites/default/files/case-documents/ita0470.pdf (visited 9 May 2014); SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Jurisdiction (6 August 2003), paras. 35 et seq., available at http://www.italaw.com/sites/default/files/case-documents/ita0779.pdf (visited 9 May 2014). Cf. Articles 1117 and 1121 NAFTA require the claimant to waive their right to initiate or continue before any administrative tribunal or court under the law of any party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing party that is alleged to be in breach with the substantive standards in NAFTA. This was taken by arbitral tribunals as an implicit waiver of the local remedies rule by the state parties. Cf. Bjorklund, A., Waiver and the Exhaustion of Local

Apart from textual considerations, eminent commentators justify the dropping of the local remedies rule in ISDS, as a choice of principle, with arguments such as the following: host states' courts are perceived as *lacking objectivity*, are often bound to *apply domestic law only* even though this falls short of international investment protection standards and *domestic litigations* would mean *additional costs and delay* for the foreign investor[265].

However, such or similar justifications tend not just to blind out the virtues of resorting to local courts before initiating international arbitration but also seem to operate on the assumption that all domestic legal systems are more or less the same: biased, inefficient and incapable of guaranteeing a sufficient level of protection for foreign investment[266].

Advantages of resorting to domestic courts were already pointed out elsewhere in this study[267]. In a nutshell: domestic courts, at least in advanced systems, may operate in a legal environment more *consistent and predictable* than current ISDS practice. Also, in contrast to the current ISDS model, e*rroneous decisions can be corrected* by appeals mechanisms. If permitted to apply and interpret the given investment instrument as well[268], domestic courts can provide a *single forum* in which the dispute is adjudicated in respect of both whether the host state measure was in compliance with domestic laws and the international commitments of the host state. While some might argue that domestic judges are less experienced in international law matters than arbitrators, this does not mean that they are inexperienced. In many domestic courts public international law is applied or accommodated on a rather frequent basis[269]. And even if domestic courts are prevented from directly applying an international investment instrument, this would still be no argument against their involvement prior to ISDS[270]. Protection against misuse or abuse of governmental powers is a standard feature of domestic law. At least in advanced systems the standard should *generally* not fall below what is offered in international law[271].

These may not be the only advantages of prior involvement of domestic courts: when states are worried that investment tribunals do not pay sufficient attention to public interests in the process of balancing them with private property interests, domestic courts might be better suited to take a first

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Remedies Rule in NAFTA Jurisprudence, in: Weiler, T. (ed.), *NAFTA Investment Law and Arbitration*, Transnational Publishers, Ardsley, 2004, pp. 253 et seqq., pp. 260 et seqq.; Van Harten, G., *Investment Treaty Arbitration and Public International Law*, Oxford University Press, Oxford, 2007, pp. 110 et seqq.

[265] Schreuer, C., Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration, *The Law & Practice of International Courts and Tribunals*, Vol. 4 (2005), pp. 1 et seqq.; very critical Sornarajah, M., *The International Law on Foreign Investment'*, Cambridge University Press, New York, 3th Edition, 2010, p. 219 with reference to the case of Elettronica Sicula S.p.A. (ELSI), United States of America v. Italy before the ICL, Judgement (20 July 1989), available at http://www.icj-cij.org/docket/index.php?sum=395&p1=3&p2=3&case=76&p3=5 (visited 5 May 2014).

[266] Also ideas of creating 'competition' between developed domestic systems and ISDS are rather ill-fitting when it comes to reviewing of the exercise of public authority as 'competition' might not only encourage working more efficiently but also could initiate a race to the bottom in terms of quality of control if competition conditions are not comparable.

[267] Cf. 2.3.2.2.1.1 (p. 45).

[268] See for a study Yimer, B. et al., *Application of International Investment Agreements by Domestic Courts*, Trade and Investment Law Clinic, The Graduate Institute Geneva, 2011, available at http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Law%20Clinic/Memoranda%202011/UNCTAD_Memo.pdf (visited 4 May 2014).

[269] EU law, while not strictly international law in nature for domestic courts, as well the ECHR can serve as obvious examples.

[270] This argument appears true at least as long as we stick to the idea that ISDS is a subsidiary means of legal redress. For an investor it cannot make a difference if a wrong is remedied on the basis of national or international law as long as national law does not fall below the standard of international law.

[271] Cf. 2.3.2.2.1.1 (p. 45).

shot. Domestic courts are experienced in considering an investment case against the background of the whole domestic legal system. This system mirrors the elaborate, complex and refined balance of private and public interests agreed to in the host state. Domestic courts might be in a better position to comprehensively appreciate this balance than arbitral tribunals; the latter operating in a comparatively loosely defined, 'minimalistic' legal environment not always highly sensitive to legitimate policy choices made in a host state[272].

If the domestic court would fail to resolve the dispute to the satisfaction of the investor, i.e. falling below the international standard – which could happen even in jurisdictions which regard themselves as most advanced[273] – and the latter would initiate investment arbitrations, a tribunal may benefit from the 'pre-processing' of facts and the (domestic) law. Especially the domestic court's treatment of its domestic law, echoing a societal consensus between private and public interests, can inspire the tribunal's holdings to the extent that it conforms with the investment instrument. Overall, such arbitral awards might be closer to the consensus present in the host state and, hence, may be more easily accepted and perceived as legitimate by the public in that state. In the end, it would render ISDS what it was actually meant to be: a safety net in case of a failure of the domestic system, not an alternative to it[274].

2.3.2.2.2.3.2.2 Responding to varying capacities of domestic courts

Certainly, possible *advantages of taking recourse to domestic courts* before resorting to investment arbitration may *vary significantly across national jurisdictions* and would hold true generally only for advanced legal systems. This leads to the question of whether states should make concessions to the fact that domestic jurisdictions exhibit different levels of development[275]. Put differently, should the EU, for example, allow for direct ISDS claims of investors, i.e. waive the exhaustion of local remedies, in a possible investment instrument concluded with Canada (ranked 11th out of 99 in the World Justice Project Rule of Law Index 2014[276]) in the same way as in a possible agreement with China which ranks 76/99 in the same index?

Considering the potential weight and significance of interests and far-reaching consequences at stake in investment arbitrations, the potential contributions domestic courts can make to get the decision

[272] Note also the in-depth analysis of consequences of disregarding domestic legal systems in ISDS practice by Montt, S., *State Liability in Investment Treaty Arbitration*, Hart Publishing, Oxford, 2009, pp. 293 et seqq.; esp. pp. 366 et seqq.

[273] Cf. Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, documents available at http://www.italaw.com/cases/632 (visited 8 May 2012); see also European Union, The 2014 EU Justice Scoreboard, Speech Viviane Reding, EU Commission, available at http://europa.eu/rapid/press-release_SPEECH-14-225_en.htm (visited 4 May 2014).

[274] Also in this direction Burke-White, W. and von Staden, A., Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations, *Yale Journal of International Law*, Vol. 35 (2010), pp. 283 et seqq. pp. 332-333;. Hachez, N. and Wouters, J., *International Investment Dispute Settlement in the 21st Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model?*, Leuven Centre for Global Governance Studies Working Paper No. 81, pp. 20 et seqq., available at: http://ssrn.com/abstract=2009327 or http://dx.doi.org/10.2139/ssrn.2009327 (both visited 4 May 2014); cf. also Montt, S., *State Liability in Investment Treaty Arbitration*, Hart Publishing, Oxford, 2009, pp. 153 et seqq.

[275] Such seems also to be suggested by the European Parliament, *Report on the Future European International Investment Policy*, 22 March 2011, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0070+0+DOC+XML+V0//EN (visited 4 May 2014). Very critical on this Sattorova, M., Denial of Justice Disguised? – Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct, *International and Comparative Law Quarterly*, Vol. 61 (2012), pp. 223 et seqq., p. 230 who fears that the local remedies rule would only be waived for developed states which she perceives as unfair.

[276] http://data.worldjusticeproject.org/ (visited 4 May 2014).

'right' and, ultimately, widely accepted suggests that the *requirement of exhausting local remedies should be waived only where the domestic courts and domestic legal systems generally fail to meet international standards*.

An argument which is commonly advanced against a local remedies rule is that it is difficult to negotiate investment agreements which differentiate between states. What is feared is a 'race to the bottom' in terms of the level of protection. If, for example, the EU would prescribe for exhaustion of local remedies in relation to Canada, China would, so the argument continues, also demand such a clause. Obviously, there is a difference in development between those two domestic legal systems and European investors would end up having to go through the instances in China before pursuing arbitration; a cumbersome exercise, some may say.

However, such a 'negotiator's argument' can be confronted in three ways: First, *on a factual level* it can be argued that states – like Australia – seem to be able to differentiate in their negotiations with other states. Some agreements contain ISDS mechanisms, others do not[277]. Second, *on a more fundamental level*, one must question whether a (currently incalculable) success[278] in ongoing treaty negotiations with China would justify completely denouncing a domestic courts system in all other EU agreements, especially when it comes to protecting foreign property originating from, e.g., Canada or the USA. ISDS practice has encountered some serious problems in delivering legally and, even more importantly, societally more widely acceptable decisions on balancing private and public interests[279]. In contrast, an advanced, well-functioning domestic legal system may work as a more predictable and societally established solver or at least pre-processor of investment disputes. In respect of the latter, even if domestic courts might not satisfactorily resolve an investment dispute in the individual case, it might lend legitimacy to the subsequent arbitration as the community in which the dispute arose at least had *the chance* to tackle the dispute with its own means. Third, *on a pragmatic level* one could consider a solution which avoids hard choices by going beyond the classic options of 'no local remedies', 'full exhaustion of local remedies' and requiring a fixed time period in which the investor has to pursue domestic remedies before proceeding to arbitration[280].

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[277] Australia-Unites States Free Trade Agreement contains no ISDS, but merely the possibility to initiate state party consultations in case one state party sees the need to introduce ISDS. (Article 11.16); available at https://www.dfat.gov.au/fta/ausfta/final-text/chapter_11.html (visited 4 May 2014), but see the Korea-Australia FTA, Chapter 11 which includes ISDS (Article 11.15 et seqq.) provisions, available at https://www.dfat.gov.au/fta/kafta/downloads/KAFTA-chapter-11.pdf (visited 4 May 2014).

[278] Success would probably mean a strong protection of European investment in China, including a waiver of the local remedies rule.

[279] Cf. 2.3.2.1 (p. 41).

[280] Prescribing a fixed time period might just be the second best option as it does not do justice to the diversity of legal issues at stake. However, prescribing a reasonable fixed time period might be better than no exhaustion of local remedies rule at all in an investment instrument due to the reasons stated above. The time period should not be set too short in order to allow for domestic appeals also. The argument that this would lead to more costs and additional delay on part of the investor should not be given weight except for the situation that domestic court proceedings take up an excessive time period amounting to a denial of justice. This having been said some additional flexibility could be brought about by allowing investors to initiate investor-state arbitration *before* expiry of the fixed time period provided for in the exhaustion of local remedies rule by arguing that the domestic system falls short of certain criteria previously specified in an investment instrument. Criteria could comprise such which typically characterise a functioning judiciary built on the rule of law. However, before allowing for such a model one would carefully need to evaluate the 'intrinsic' motivations of those who shall be charged with deciding over such an investor's plea. Furthermore, it is worth noting that in those situations in which the investment instrument expressly stipulated a duty to pursue local remedies for a certain period of time, claimants were able to import more favourable arbitration clauses, i.e. such which do not prescribe for local remedies, via the most-favoured nation treatment standard. Cf. Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 January 2000), paras. 38 et seq., available at

A pragmatic solution could involve prescribing what is referred to as an '*elastic' local remedies rule* here. Such a rule would *link the obligation to pursue local remedies to a third-party index which measures the potential of domestic courts to produce effective solutions to claims of foreign investors.* Regress could be taken for example to the already mentioned World Justice Project (WJP) Rule of Law Index[281] or any other index which appears suitable to the state parties[282]. A lower rank of a domestic legal index could lead to a waiver of the local remedies rule. Improvements in the rule of law would lead to an increasing involvement of local courts and vice versa. An elastic local remedies rule would not just differentiate between a waiver of local remedies and full exhaustion, but prescribe for different levels of domestic court involvement depending on their capacities[283].

Such an approach would, first, signal that *no formal distinction is made between developed and developing states* and, hence, tribute is paid to the notion of formal equality of states. At the same time, second, such a *rule would* also *recognise* that there are *factual differences between states.* A notion of *common but differentiated commitments* would be given a fresh twist and may even *encourage internal reform* of the judicial system with reference to achieving a better ranking in a given rule of law index and bringing investment claims back home to domestic courts.[284] Such a local remedies rule would even allow for flexibility within one agreement without having to compromise the idea that both state parties to a treaty are bound by the same rules.

Finally, concerns that an arbitral award deviating from a final court decision in a host state might face resistance as it would not be possible to pass it off politically can easily be dispelled. Longstanding experience with the jurisprudence of the European Court of Human Rights (ECtHR)[285], the Court of

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http://www.italaw.com/sites/default/files/case-documents/ita0479.pdf (visited 8 May 2014); Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004), paras. 82 et seq., available at http://www.italaw.com/sites/default/files/case-documents/ita0788.pdf (visited 8 May 2014).

[281] http://www.worldjusticeproject.org/.

[282] The choice or development of a suitable index will certainly prove to be a crucial point, yet also a thorny issue in treaty negotiations. Among others, international organisations such as the UN developed rule of law 'indicators' for specific situations. Cf. Office of the High Commissioner for Human Rights, The United Nations Rule of Law Indicators, available at http://www.un.org/en/peacekeeping/publications/un_rule_of_law_indicators.pdf (visited 5 May 2014); See also the project of the Bertelsmann Stiftung, Bertelsmann Transformation Index, Political Transformation, Website, available at http://www.bti-project.org/bti-home/ (visited 6 May 2014).

[283] Levels of domestic court involvement can be pre-determined in the investment instrument and linked to a certain rank in a justice index. For example, a rank among the top 15 in the WJP Rule of Law Index would require full exhaustion of local remedies, a rank among the top 30 would require pursuing local remedies for a period of not more than e.g. five years, etc. A rank in the lowest 50-70 could lead to a waiver of local remedies. For the sake of foreseeability, an elastic local remedies rule could be adjusted automatically to new factual situations in the host country, reflected in the respective justice index, not on a daily basis but every two to three years. Moreover, even *regional differences* in terms of development of the rule of law within a state or the EU – cf. above footnote 62 – could be taken into consideration. In addition, a novel elastic local remedies rule could also *differentiate in respect of the nature of the claim* advanced by the investor. If, for example, the claim is based on a free transfer of capital clause in an investment instrument and, hence, might be time sensitive, exhaustion of local remedies would only be required in the most advanced domestic legal orders while claims based on expropriation might initially also be dealt with by domestic jurisdictions only reaching a medium ranking in terms of their 'rule of law capacities'. See in respect of the latter also Pernice, I., *International Investment Protection Agreements and EU Law*, Study for the European Parliament.

[284] Not infrequently international law recognises factual differences in the development of states with a view to reach a common goal. Examples comprise international trade and environmental law. One might wonder why this should not be possible for international investment law.

[285] Council of Europe, Supervision of the Execution of Judgements and Decisions of the European Court of Human Rights, 7th Annual Report of the Committee of Ministers 2013, available at http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2013_en.pdf (visited 4 May 2014).

Justice of the European Union (CJEU)[286], the European Free Trade Association (EFTA) Court[287] or even the International Court of Justice (ICJ)[288] demonstrates that the unsuccessful state party generally implements an international ruling without further ado despite the fact that its domestic courts initially held differently.

In the CETA draft the EU addresses the issue of *parallel claims* in domestic and international fora by the rule that a claimant has to waive domestic claims before pursuing arbitration, essentially mimicking the NAFTA model. However, *nothing in the CETA draft encourages the use of domestic courts.* In contrast, CETA would allow for initiating investment arbitration *without* having to engage in domestic court proceedings.[289] Given the growing unease with tribunals' past treatment of public concerns in their interpretative approaches such a text appears insensitive. The EU might seriously consider including an *elastic exhaustion of local remedies* rule in its agreements out of the reasons provided above.[290].

2.3.2.2.2.4 Restricting available remedies to (monetary) compensation?

In today's investor-state arbitration practice the most commonly awarded form of reparation is (pecuniary) compensation. Restitution, i.e., for example, the order of repeal of a challenged administrative act or law or the restitution of property previously taken is rare[291].

[286] Cf. CJEU, *Annual report 2013 – Provisional Full Version*, http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-03/en_version_provisoire_web.pdf (visited 4 May 2014); see also Andersen, S., *The Enforcement of EU Law: The Role of the European Commission*, Oxford University Press, Oxford, 2012; Brian, J., Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgements?, *European Law Journal*, Vol. 19 (2013), pp. 404 et seqq.

[287] Baudenbacher, C., The Implementation of Decisions of the ECJ and of the EFTA Court in Member States' Domestic Legal Orders, *Texas International Law Journal*, Vol. 40 (2004), pp. 383 et seqq.

[288] Llamzon, A., Jurisdiction and Compliance in Recent Decisions of the International Court of Justice, *European Journal of International Law*, Vol. 18 (2007), pp. 815 et seqq.

[289] As a side note, it appears that, so far, no convincing justification has been offered by the EU for a different treatment of foreign and domestic investors in terms of access to judicial remedies.

[290] Also, from a EU constitutional perspective including an (elastic) local remedies clause might help addressing possibly arising issues of autonomy of EU law in respect of ISDS, cf. Note also Pernice, I., *International Investment Protection Agreements and EU Law*, Study for the European Parliament; Hindelang, S., Der primärrechtliche Rahmen einer EU-Investitionsschutzpolitik: Zulässigkeit und Grenzen von Investor-Staat-Schiedsverfahren aufgrund künftiger EU Abkommen, in: Bungenberg/Herrmann (eds.), *Die Gemeinsame Handelspolitik der Europäischen Union „nach Lissabon"*, Nomos, Baden-Baden, 2011, pp. 157 et seqq., also available at: *Der primärrechtliche Rahmen einer EU Investitionsschutzpolitik: Zulässigkeit und Grenzen von Investor-Staat-Schiedsverfahren aufgrund künftiger EU Abkommen*, WHI-Paper 01/11, available at http://www.whi-berlin.eu/tl_files/documents/whi-paper0111.pdf (visited 4 May 2014); an abridged version in the English language can be found at Hindelang, S., The Autonomy of the European Legal Order – EU Constitutional Limits to Investor-State Arbitration on the Basis of Future EU Investment-related Agreements, in: Bungenberg/ Herrmann (eds.), *Common Commercial Policy after Lisbon - Special Issue to the European Yearbook of International Economic Law*, Springer; New York, 2013, pp. 187 et seqq.

[291] This section draws on Hindelang, S., Restitution and Compensation – Reconstructing the Relationship in International Investment Law, in: Hofmann/Tams (eds.), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration*, Nomos, Baden-Baden, 2011, pp. 161 et seqq.; also available as Hindelang, S., *Restitution and Compensation – Reconstructing the Relationship in International Investment Law*, WHI-Paper 02/11, 2011, http://www.whi-berlin.eu/tl_files/documents/whi-paper0211.pdf (visited 1 May 2014).; For non-pecuniary provisional remedies cf. Article 47 ICSID-Convention, ICSID Arbitration Rule 39, note also Article 1134 NAFTA; see also Gaukrodger, D. and Gordon, K., *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment No. 2012/03, available at http://dx.doi.org/10.1787/5k46b1r85j6f-en (visited 20 May 2014), pp. 28 et seqq.; Malintoppi, L., Provisional Measures in Recent ICSID Proceedings: What Parties Request and what Tribunals Order, in: Binder/Kriebaum/Reinisch/Wittich (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford University Press, Oxford, 2009, pp. 157 et seqq.

Only occasionally do investment instruments explicitly prohibit non-compensatory relief[292]. In most cases they are silent on this question which would arguably call for application of the rules in general public international law where restitution is the primary form of reparation[293].

The preference granted to a pecuniary remedy is often explained in the way that it would suit, in most cases, the interest of the investor and, furthermore, preserve regulatory space for the host state which would not have to repeal a certain measure but 'just' pay compensation[294].

However, it appears that this is just one perspective on the question of whether arbitral tribunals should be able to order restitution – separately or in combination with a pecuniary remedy – or even give priority to it. To begin with, the threat of a substantial final monetary award can have effects similar to a restitution order. This is particularly true when the contested measure is of a general nature, such as a law, and affects more than just one foreign investor. Copy-cat cases are not unknown to international investment arbitration[295]. Especially for developing countries with considerable budgetary constraints it might be preferable to repeal a certain measure instead of paying substantial compensation and thereby possibly putting at risk vital governmental activities such as providing basic medical healthcare, schooling and so forth.

Broadening the picture, restitution of, e.g., unlawfully taken property could mean continued presence and perhaps retention of business activities in a host state. Compensation often opens up the possibility to seek new investment opportunities beyond the borders of the host state. Restitution or compensation, remaining invested or leaving the country – perhaps in this, admittedly simplified, way one could sketch the choice to be made when deciding between the two forms of reparation in investment arbitration. Viewed against this background, prioritising restitution may better contribute to the overall aim of the state parties to the investment instrument to establish and maintain *long term*

[292] Articles 1135 et seqq. NAFTA.

[293] Cf. Articles 34-39 of Articles on state responsibility. Restitution is said to conform 'most closely to the general principle of the law on responsibility according to which the author State is bound to 'wipe out' all the legal and material consequences of its wrongful act by re-establishing the situation that would exist if the wrongful act had not been committed'. Cf. Arangio-Ruiz, G., Preliminary Report on State Responsibility, in: International Law Commission (ed.), *Yearbook of the International Law Commission*, Vol. II, United Nations Publications, Geneva, 1988; UN Document No. A/CN.4/416 & Corr. 1 & 2 and Add.1 & Corr.1, para. 114. In fact, the question of whether investment tribunals are or should be allowed to order restitutio in rem is contentious. Cf. Hindelang, S., Restitution and Compensation – Reconstructing the Relationship in International Investment Law, in: Hofmann/Tams (eds.), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration*, Nomos, Baden-Baden, 2011, pp. 161 et seqq.; also available as Hindelang, S., *Restitution and Compensation – Reconstructing the Relationship in International Investment Law*, WHI-Paper 02/11, 2011, http://www.whi-berlin.eu/tl_files/documents/whi-paper0211.pdf (visited 1 May 2014).; Possibly of a different view Crawford, J., The ILC`s Articles on Responsibility of States for Internationally Wrongful Acts – A Retrospective, *American Journal of International Law*, Vol. 96 (2002), pp. 874 et seqq., p. 881; see also Marboe, I., State responsibility and Comparative state liability for administrative and legislative harm to economic interest, in: Schill (ed.), *International Investment Law and Comparative Public Law*, Oxford University Press, Oxford, 2010, pp. 377 et seqq.

[294] 'The judicial restitution required in this case would imply modification of the current legal situation by annulling or enacting legislative and administrative measures that make over the effect of the legislation in breach. The Tribunal cannot compel Argentina to do so without a sentiment of undue interference with its sovereignty.' LG*&E Energy Corp.*, LG*&E Capital Corp., and* LG*&E International, Inc. .v. Argentine Republic*, ICSID Case No.ARB/02/1, Award (25 July 2007), para. 87, available at http://italaw.com/sites/default/files/case-documents/ita0462.pdf (visited 8 May 2014).

[295] Two examples are highly illustrative in this respect: in the wake of the Argentine economic crisis at the turn of the century, several US investors took recourse to ISDS, modelling their cases along similar lines; see above at footnote 95. Similarly, an erratic change in its energy policy led to a wave of ISDS arbitrations against Turkey in various arbitration fora; see Hindelang, S. et al., Turkey – Soon to Face a Wave of International Investment Arbitrations?, *Journal of International Arbitration*, Vol. 26 (2009), pp. 701 et seqq.

and *stable* investment relations on the basis of the rule of law. Among others, this is because it may – to some extent – render it less attractive for a host state to employ (internationally) wrongful means to rid itself of a 'disliked' foreign investor. The possibility of 'buying oneself out' of the investment relationship by way of paying compensation would be restricted. Seen positively, prioritising restitution would give the host state a second chance to present itself as being committed to establishing and maintaining long term and stable investment relations on the basis of the rule of law. Already by knowing that it might see the foreign investor 'again', the host state has an increased interest in constantly working on the relationship. Of course, absent an express statement in the investment instrument to the contrary, restitution must not be ruled out by the claimant in the arbitral proceedings, still be possible and not constitute an excessive onerousness[296]. Furthermore, if an investment instrument would provide for restitution as the primary remedy, it would also have to specifically address compliance and enforcement questions[297].

The CETA draft appears to take a somewhat middle ground position. While an order to repeal a law or court or administrative decision would not be possible, a tribunal may award restitution of property. Besides that, it has missed the opportunity to explore further advantages associated with non-pecuniary remedies[298].

2.3.2.2.2.5 Host state claims

ISDS could be criticised for discriminating against public interests by not putting host states on equal footing with the investor regarding access to arbitration. It is the investor who typically initiates arbitration and counterclaims by host states – while not an overly rare instance – are still infrequent[299]. Investment instruments have predominantly been designed to facilitate claims of investors against host states; not vice versa. It has been argued that the right to initiate investment arbitration against a host state is not really a unilateral advantage of the investor but a modest 'compensation' for the fact that a host state has all powers to hold a foreigner operating in its territory accountable and force them to comply with domestic law[300].

Currently the admissibility of counterclaims depends very much on the precise wording of the individual investment instrument's general arbitration offer[301] as well as the nature of the claim and counterclaim. Investment instruments generally do not impose any direct obligations on investors[302].

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[296] Hindelang, S., Restitution and Compensation – Reconstructing the Relationship in International Investment Law, in: Hofmann/Tams (eds.), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration*, Nomos, Baden-Baden, 2011, pp. 161 et seqq., p. 167, also available as Hindelang, S., *Restitution and Compensation – Reconstructing the Relationship in International Investment Law*, WHI-Paper 02/11, 2011, http://www.whi-berlin.eu/tl_files/documents/whi-paper0211.pdf (visited 5 May 2014), p. 5.

[297] Gaukrodger, D. and Gordon, K., *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment No. 2012/03, available at http://dx.doi.org/10.1787/5k46b1r85j6f-en (visited 20 May 2014), pp. 98 et seqq.

[298] Cf. Article x-20(1) CETA draft of 4 February 2014 = Article x-36(1) of CETA draft of 3 April 2014.

[299] On current arbitration practice, cf. Hoffmann, A., Counterclaims in Investment Arbitration, *ICSID Review*, Vol. 28 (2013), pp. 438 et seqq., Laborde, G., The Case for Host State Claims in Investment Arbitration, *Journal of International Dispute Settlement*, Vol. 1 (2010), pp. 97 et seqq.

[300] Schwebel, S., The Overwhelming Merits of Bilateral Investment Treaties, *Suffolk Transnational Law Review*, Vol. 32 (2009), pp. 263 et seqq.

[301] Arbitration rules allow for counterclaims, cf., e.g. Article 46 ISCID 'Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.'

[302] Substantive obligations of the host state as well as potential obligations of investors are not part of the assignment and therefore not further discussed here. See on the question of whether investment instruments

Therefore, counterclaims are more likely to arise from concession contracts posing difficult questions of applicable law and might compel a tribunal to apply even more extensively domestic law; for which expertise might be limited[303].

The policy question which has to be answered by the negotiating state parties is whether they want to allow for host state claims more broadly by adapting the treaty language respectively. In favour of such an approach it may be argued that by allowing more broadly for host state claims the inquiry into an investment conflict is centralised as the conflict could be appreciated and adjudicated in respect of alleged 'misconduct' of both the investor and the host state. This may avoid diverging results in different fora and disputes might be resolved more efficiently[304]. Investors having to expect counterclaims on a regular basis would also more carefully assess their claim before submitting it to arbitration which would have an overall moderating effect on ISDS. Furthermore, in respect of developing states it would possibly avoid the charge of double standards: a host state is told to 'surrender' sovereignty by allowing direct arbitral claims due to weak domestic institutions, but then denied to bring counterclaims in the neutral international forum with the argument that the host state has all powers to hold a foreigner operating in its territory accountable; occasionally this might be difficult to achieve with the said weak institutions[305].

The question of counterclaims does not seem to be addressed directly in the CETA draft. As the CETA draft allows for claims and awards 'against a respondent' only[306] and reserves the latter role for the state parties to the agreement[307], it appears that counterclaims – arguably – are not permissible[308].

2.3.2.2.2.6 Review or expiration of investment instruments and ISDS mechanisms

Political and economic costs associated with the operation of specific designs of the substantive standards and dispute settlement provisions in an investment agreement can often only be evaluated by the state parties after a certain period of time has elapsed[309]. When deficiencies are identified it often requires considerable political effort as well as time and other resources to start and successfully conclude re-negotiation of an investment instrument[310]. 'Built-in flexibility' in the treaty appears vital to react to new political, economic or other challenges in the future. Against this background, if state parties feel that the risk of unexpected developments is beyond effective control by means of

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should contain substantive investor obligations VanDuzer, J. et al., '*Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries',* Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 28 April 2014), pp. 104 et seqq.; see also Articles 10 et seqq. 2012 Southern African Development Community Model Bilateral Investment Treaty, http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf (visited 5 May 2014).

[303] Kalicki, J., Counterclaims by States in Investment Arbitration, *IISD Investment Treaty News*, Vol. 3 (2013), pp. 3 et seqq.

[304] Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Declaration (28 November 2011) of Prof. M. Reismann, available at http://www.italaw.com/sites/default/files/case-documents/ita0724.pdf (visited 5 May 2014).

[305] Kalicki, J., Counterclaims by States in Investment Arbitration, *IISD Investment Treaty News*, Vol. 3 (2013), pp. 3 et seqq.

[306] Cf. Article x-20(1) CETA draft of 4 February 2014 = Article x-36(1) of CETA draft of 3 April 2014.

[307] Cf. Article x-3 CETA draft of 4 February 2014 = Article x-0 of CETA draft of 3 April 2014.

[308] In Article x-21 CETA draft of 4 February 2014 = Article x-37(1) of CETA draft of 3 April 2014.the text briefly touches upon counterclaims in the context of indemnification or other compensation.

[309] Cf generally on treaty renewal, UNCTAD, *International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal*, IIA Issues Note 2013/4, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9_en.pdf (visited 5 May 2014).

[310] The possibility of 'exit' can also be a source of legitimacy, cf. Montt, S., *State Liability in Investment Treaty Arbitration*, Hart Publishing, Oxford, 2009, 145 et seqq.

authoritative interpretation then investment chapters or specific provisions in comprehensive free trade agreements could be coupled with a time component. An investment chapter or a certain provision can be subjected to automatic renewal in case the state parties acquiesce to it, or they may expire or be suspended for review in a certain frequency.

The CETA draft Investment Text does not appear to provide for automatic termination or renewal. It provides merely for a 'sunset-clause' preserving the substantive protection standards and ISDS for further 20 years after termination of the *entire* free trade agreement[311]. While the envisaged CETA Committee on Services and Investment shall provide a forum for consultations of state parties on the implementation and improvement of the investment chapter, it may adopt and amend supplementary arbitration rules, mediation rules and such on transparency only. Substantive standards and core arbitration rules are not covered by this mandate.

2.3.3 Procedural integrity

By concluding investment instruments state parties restrict their policy space by promising to each other to treat an investor of the other state party in accordance with the substantive standards contained in an investment instrument. Investor-state arbitral tribunals shall determine whether a state party acted inconsistently with these substantive standards. In fulfilling this task, arbitral tribunals predominantly[312] review the exercise of governmental powers by the host state towards a private party. Such *disputes do not* arise *out of a reciprocal relationship between investor and state* but are characterised by a legal relationship in which the state exercises powers that are not vested in any private person but only in the state. In this way *ISDS displays significant functional similarities to domestic constitutional and administrative courts*[313].

Despite these striking resemblances, current investment instruments rely heavily on an ad-hoc commercial arbitration model which is characterised by the concept of party autonomy, sanctity of contract and confidentiality[314]. Thus, most *ISDS proceedings are not accessible* by the public and *awards* are *not made available to the public* for scrutiny *by default* but by consent of the disputing parties[315]. There is no general obligation to publish decisions in full length. Many *investment instruments do not contain procedural rules* including such on transparency. Hence, the degree of transparency depends basically on the chosen arbitration rules[316]. Arbitrations administered by the International Centre for Settlement of Investment Disputes (ICSID) are currently the most transparent

[311] Article X.18 CETA draft Investment Text of 21 November 2013 = Article X.04 (to be included in the 'Final Provisions part of the Agreement') CETA draft Investment Text of 4 April 2014.
[312] There is a debate of whether investment instruments cover, by way of umbrella clauses, (also) mere private disputes arising out of contracts between the investor and the host state or whether a regulatory measure must interfere with the said contract. Cf. Dolzer, R. and Schreuer, C., *Principles of International Investment Law*, Oxford University Press, Oxford, 2nd Edition, 2012, pp. 153 et seqq.*; El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (27 April 2006), paras. 81, 82, available at http://www.italaw.com/sites/default/files/case-documents/ita0268_0.pdf (visited 8 May 2014); Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction (29 November 2004), para. 155, available at http://www.italaw.com/sites/default/files/case-documents/ita0735.pdf (visited 8 May 2014).
[313] Van Harten, G., *Investment arbitration and public law*, Oxford University Press, Oxford, 2007, Chapters 3, 5; Montt, S., *State Liability in Investment Treaty Arbitration*, Hart Publishing, Oxford, 2009, p. 137.
[314] On the character of investment arbitration cf. Van Harten, G., *Investment arbitration and public law*, Oxford University Press, Oxford, 2007, pp. 59 et seqq.
[315] In 2002, NAFTA state parties chose to authoritatively interpret the Treaty in a way allowing them to make submissions and decisions publicly available. Cf. NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions (Article 1105 and the Availability of Arbitration Documents)*, 31 July 2001, available at http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp (last visited 5 May 2014).
[316] Ultimately, the parties to the dispute can largely dispose of the arbitral rules, including those on transparency.

ones, providing lists of submitted claims and abstracts of awards[317]. Other arbitration institutions – in particular the International Chamber of Commerce[318] – are more secretive. Thus, in some cases it might not even be publicly known that a claim was adjudicated.

The current ISDS model, furthermore, relies on *party appointed arbitrators* which are subject to only relatively few and usually broadly drafted qualification, transparency, disclosure and impartiality[319] rules frequently contained in the respective arbitration rules[320], sometimes also found in an investment instrument itself[321] and/or in a specific code of conduct[322].

In contrast to many domestic jurisdictions and their courts charged to control the exercise of public authority – and alien to the concept of arbitration itself – *arbitrators do not enjoy security of tenure*.

The obvious functional similarities of domestic constitutional and administrative courts and ISDS proceedings on the one hand and the equally obvious deviation in public control (below 2.3.3.1 (p. 66)) and in institutional and procedural design safeguarding impartial and independent adjudication (below 2.3.3.2, (p. 69)) on the other – coupled with the bypass of domestic courts provided for in most investment instruments – has led to critique among domestic governmental[323] and international[324] institutions, academia[325] and civil society[326].

2.3.3.1 Transparency

[317] OECD, *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures*, OECD Working Papers on International Investment No. 2005/01, available at http://www.oecd.org/daf/inv/internationalinvestmentagreements/34786913.pdf (visited 6 May 2014), p. 3.
[318] See Article 1 to Appendix II of the International Chamber of Commerce's rules of Arbitration, available at http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/ICC-Rules-of-Arbitration/ (visited 3 May 2014).
[319] Such rules address questions such as whether there is evidence of an attitudinal bias (e.g. from previous writing or speeches) or whether the arbitrator maintains or maintained ties with one of the disputing parties.
[320] Cf. for a comparison of DC Bar International Law Section – International Dispute Resolution Committee, Working Group on Practical Aspects of Transparency and Accountability in International Treaty Arbitration, *Comparison Chart on Arbitrators' Standards of Conduct*, available at http://www.dcbar.org/sections/international-law/upload/for_lawyers-sections-international_law-conductChart.pdf (visited 2 May 2014); see by way of comparison The World Trade Organization Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, available at http://www.wto.org/english/tratop_e/dispu_e/rc_e.htm (visited 3 May 2014).
[321] Cf., e.g., Article 29(2) of the 2004 Canadian model Foreign Investment Promotion and Protection Agreement, available at http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf (visited 5 May 2014); Article 23(2) of the 2009 ASEAN-Australia-New Zealand Free Trade Agreement, available at http://www.asean.fta.govt.nz/chapter-11-investment/ (visited 5 May 2014).
[322] Cf., e.g., Code of Conduct for Dispute Settlement Procedures under Chapters 19 and 20 of NAFTA (state-state arbitration), available at www.worldtradelaw.net/nafta/19-20code.pdf (visited 3 May 2014).
[323] Deutscher Bundestag, Antwort der Bundesregierung auf die Kleine Anfrage der Fraktion der SPD – Drucksache 17/14724 – 24 September 2013; see also Zacharakis, Z. and Endres, A., Regierung gegen Investorenschutz im Freihandelsabkommen, *ZEIT Online*, 13 March 2014, available at http://www.zeit.de/wirtschaft/2014-03/investitionsschutz-freihandelsabkommen-bundesregierung-ttip (visited 3 May 2014).
[324] UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, IIA Issues Note 2013/2, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf (visited 5 May 2014).
[325] Cf. e.g. VanDuzer, J., Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation, *McGill Law Journal*, Vol. 52 (2007), pp. 681 et seqq.
[326] McDonagh, T., *Unfair, Unsustainable and Under the Radar* - How Corporations use Global Investment Rules to Undermine a Sustainable Future, The Democracy Center, available at http://democracyctr.org/wp/wp-content/uploads/2013/05/Under_The_Radar_English_Final.pdf (visited 28 April 2014); Eberhard, P. and Olivet, C., *Profiting from Injustice - How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom*, Corporate Europe Observatory, November 2012, available at http://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf (visited 2 May 2014).

The lack of transparency might be owed in part to ISDS' roots in commercial arbitration which is characterised by secrecy. However, transparency in ISDS has steadily been improving over the last years[327]. Whether it has reached a satisfactory level is debatable. In any event, transparency of arbitral proceedings would allow *parliament and the public* not only to *better scrutinise* whether *their government* has honoured its international commitments and whether it does not compromise essential public interests in bargaining with the investor in the course of the arbitration proceedings. It might also allow for scrutinising investors' claims. *Public attention could deter from bringing claims with little chance of succeeding if investors have to fear consumers' choices to substitute one product by another.*

Those who champion (more) transparency in ISDS proceedings and the publicity of awards mainly base their claim on the *nature of the conflict* adjudicated, i.e. the review of exercise of public authority towards an individual[328], and are influenced by domestic perceptions of democracy[329]. Resorting to current public international law as the basis for a claim that investment arbitration proceedings have to be conducted more openly would by any means be challenging[330]. From a legal perspective it is the domestic laws of the contracting state parties which essentially control the degree of openness or secrecy of ISDS to which they can lawfully subscribe in an international treaty[331]. National governments traditionally enjoy a wide margin of appreciation in external affairs[332]. This having been said, the degree of transparency of ISDS proceedings on the basis of a given investment instrument is thus to a large extent a political discretionary decision of the state parties influenced by their internal legal conditions and political situations and the result of bargaining in the treaty negotiations.

Amici curiae – a concept more widely used in common law but also in public international law[333] – usually intervene in proceedings without request of an investment tribunal[334]. Often they believe to

[327] Cf. e.g. Article 1137(4) NAFTA and Annex 1137.4; Article 28 Canada-China BIT, 2006 amendment to Article 37(2) ICSID Rules, 2014 Uncitral Rules on Transparency in Treaty-based Investor-State Arbitration. See also Maupin., J., Transparency in International Investment Law: The Good, the Bad, and the Murky, in: Bianchi, A., Peters, A. (eds.), *Transparency in International Law*, Cambridge University Press, Cambridge, 2013, pp. 142 et seqq.

[328] E.g. Van Harten, G., *Investment Treaty Arbitration and Public International Law*, Oxford University Press, Oxford, 2007, p. 161; Wälde, T., Transparency, Amicus Curiae Briefs and Third Party Rights ,*The Journal of World Investment & Trade*, Vol. 5 (2004), pp. 337 et seqq.; Blackaby, N., Public Interest and Investment Treaty Arbitration, in: van den Berg (ed.), *International Commercial Arbitration: Important Contemporary Questions*, ICCA Congress Series, Vol. 11 (2003), Kluwer Law International, The Hague, 2003, pp. 355 et seqq., p. 358; Magraw, D. and Amerasinghe, N., American Branch ILA/American Society of International Law Joint Study on the Implementation of Transparency Norms in International Commercial Arbitration – Part I, *ILSA Journal of International & Comparative Law*, Vol. 15 (2008-2009), pp. 337 et seqq., pp. 338 et seq.

[329] States are accountable to their people who must be in the position to control the exercise of public authority. A different question is whether these domestic concepts can easily be transferred to the international realm. See for an attempt in respect of the WTO dispute settlement mechanism Reusch, R., *Die Legitimation des WTO-Streitbeilegungsverfahrens*, Duncker & Humblot, Berlin, 2007.

[330] Sackmann, J., *Transparenz im völkerrechtlichen Investitionsschiedsverfahren*, Nomos, Baden-Baden, 2012, pp. 132 et seqq.; see also Kingsbury, B., Donaldson, M., Global Administrative Law, in: Wolfrum, R. (ed.) *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, para. 21; Chesterman, S., Rule of Law, in: in: Wolfrum, R. (ed.) *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2007, para. 20.

[331] In respect of constitutional limits in Germany cf. Wolff, J., Nicht-öffentliche Schiedsverfahren mit Beteiligung der öffentlichen Hand am Maßstab des Verfassungsrechts, *Neue Zeitschrift für Verwaltungsrecht*, 2012, pp. 205 et seqq.

[332] Cf. for a discussion of EU law obligations to provide access to arbitration-related documents Sackmann, J., *Transparenz im völkerrechtlichen Investitionsschiedsverfahren*, Nomos, Baden-Baden, 2012, pp. 209 et seqq.

[333] Cf. Article 36 ECHR in connection with Rule 44 of the 2014 'Rules of Court', available http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf (visited 8 may 2014); Rule 103 International Criminal Court Rules of Evidence and Procedure, available at http://www.icc-

have an interest in the outcome of the proceedings or claim to advocate public interests. *Amici curiae* – these can be public interest groups such as environmental activists, affected local communities, business associations but also supranational organisations such as the EU – may function as sources of information and/or expert advice for a tribunal[335]; often, the *amici* aim at influencing the decision[336]. While *amicus curiae* interventions can certainly create additional legitimacy of an arbitral decision due to the submission and possible appreciation of additional information or public interest considerations, it is difficult to find evidence[337] of a contribution to transparency of arbitral proceedings, although often claimed[338]. While in ISDS practice tribunals have in principle accommodated for the submission of *amicus curiae* briefs, though largely at their discretion[339], access to documents and participation in the proceedings was frequently denied[340]. Arguments against greater participation basically rested on the concept of secrecy of proceedings; still dominant in the arbitration rules of the different arbitration institutions[341]. If one wants to strengthen the role of *amici curiae* in this respect, one would have to

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cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf (visited 8 May 2014). For the ICJ's approach cf. Shelton, D., The Participation of Non-government Organizations in. International Judicial Proceedings, *American Journal of International Law*, Vol. 88 (1994), pp. 611 et seqq., pp. 617, 619 et seqq. For the WTO cf. United States of America – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998, para. 104-109; United States of America – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steal Products, WT/DS138/AB/R, 10 May 2000, para. 39-42; European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, 12 March 2001, para. 39 et seqq.

[334] For a concise depiction of recent trends cf. Bastin, L., Amici Curiae in Investor-State Arbitration - Eight Recent Trends, *Arbitration International*, Vol. 30 (2014), pp. 125 et seqq.

[335] Bartholomeusz, L., The Amicus Curiae before International Courts and Tribunals, *Non-State-Actors and International Law*, Vol. 5 (2005), pp. 209 et seqq., pp. 278 et seqq.

[336] Ala'i, P., Judicial Lobbying at the WTO: The Debate over the Use of Amicus Curiae Briefs and the U.S. Experience, *Fordham International Law Journal*, Vol. 24 (2000), pp. 62 et seqq.; Umbricht, G., An 'Amicus Curiae Brief' on Amicus Curiae Briefs at the WTO, *Journal of International Economic Law*, Vol. 4 (2001),pp. 773 et seqq., p. 778.

[337] Convincing Sackmann, J., *Transparenz im völkerrechtlichen Investitionsschiedsverfahren*, Nomos, Baden-Baden, 2012, pp. 173, 176 et seqq., 189, 195 et seqq., see also Maxwell, I., Transparency in Investment Arbitration – Are Amici Curiae the Solution?, *Asian International Arbitration Journal*, Vol. 3 (2007), pp. 176 et seqq., p. 183.

[338] *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 (formerly *Aguas Argentinas, S.A.,Suez, Sociedad General de Aguas de Barcelona*, S.A.*and Vivendi Universal, S.A. v. Argentine Republic)*, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 January 2005, para. 22, available at http://italaw.com/sites/default/files/case-documents/ita0815.pdf (visited 8 May 2014); *Methanex Corporation v. United States of America*, NAFTA/Uncitral Arbitration Rules, Decision on Petition from Third Persons to Intervene as 'Amici Curiae', 15. January 2001, para. 22, available at http://italaw.com/sites/default/files/case-documents/ita0517_0.pdf (visited 8 May 2014); Methanex Corporation v. United States of America in reference to this assessment; Biwater Gauff (Tanzania) Ltd. v. Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 5, 2. February 2006, para. 54, available at http://www.italaw.com/sites/default/files/case-documents/ita0091_0.pdf (visited 8 May 2014).

[339] Cf. Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 (formerly Aguas Argentinas, S.A.,Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic), Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 January 2005, where amici curia were allowed to submit briefs for the first time. For a full discussion of arbitral practice in relation to Uncitral and ICSID arbitration cf. Sackmann, J., *Transparenz im völkerrechtlichen Investitionsschiedsverfahren*, Nomos, Baden-Baden, 2012, pp. 139 et seqq.; For the first time on the basis of Article 37(2) ICSID Rules of procedure Biwater Gauff (Tanzania) Ltd. v. Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 5, 2 January 2007, (submission of brief, but no participation in the hearings, no document access). See also the brief case study on Glamis Gold Ltd. v. United States of America in the Annex.

[340] Cf. Bastin, L., Amici Curiae in Investor-State Arbitration - Eight Recent Trends, *Arbitration International*, Vol. 30 (2014), pp. 125 et seqq., p. 142.

[341] See Article 1 to Appendix II of the International Chamber of Commerce's rules of Arbitration, available at http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/ICC-Rules-of-Arbitration/ (visited 3 May 2014); Rule 15 of the ICSID Rules of Procedure for Arbitration Proceedings,

provide explicitly for transparency of proceedings – e.g. by way of access to the hearings and documents – in the investment instruments first. In this way they could subsequently render better informed submissions.

The CETA drafts of 4 February 2014 and of 3 April 2014 provide for reference to the 2014 Uncitral Rules on Transparency in Treaty-based Investor-State Arbitration (2014 Uncitral rules) and to an 'Annex I'[342]. The 'Annex I', which was attached to the CETA draft of 15 November 2013 but disappeared in the CETA draft of 4 February 2014, contained substantial rules on transparency of arbitral proceedings and *amicus curiae* submissions similar to the 2014 Uncitral rules.

Even ISDS critics from civil society concede that the EU's intensified efforts in respect of transparency and amicus curia participation are 'a very welcome development'[343]. In fact, partly – for example in respect of publication of submissions[344] – they go beyond the level of transparency which can be found in developed domestic legal orders.

2.3.3.2 Qualified independent adjudication

The current ISDS model, characterised in particular by the missing element of security of tenure[345], has been criticized for being biased in two ways in particular:

Firstly, the discretionary powers over the unfolding of a dispute settlement system vested in *arbitration institutions* like ICSID[346] could be perceived as vulnerable to (mis-)use in favour of certain investors and/or certain influential states dominating the arbitration institution by selecting a specific individual as arbitrator[347]. While ICSID appointments are sketched as appointments 'through the political process of an international organisation' in which certain states exercise a dominant role[348], other arbitration institutions, such as the International Chamber of Commerce, describe themselves as

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available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (visited 5 May 2014); Uncitral Rules on Transparency in Treaty-based Investor-State Arbitration, available at http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf (visited 5 May 2014).

[342] Article x-18 CETA draft of 4 February 2014 ≈ Article x-33 of CETA draft of 3 April 2014.

[343] Bernasconi-Osterwalder, N. and Mann, H, *A Response to the European Commission's December 2013 Document "Investment Provisions in the EU-Canada Free Trade Agreement (CETA)"*, IISD Report, February 2014, p. 20.

[344] Cf., e.g. §§ 169, 171a - 175 Gerichtsverfassungsgesetz (German code on court constitution), Bundesgesetzblatt I 1975, p. 1077; § 1(1) Informationsfreiheitsgesetz (German Freedom of Information Act), Bundesgesetzblatt I 2005, p. 2722; see also Article 15(3), subsection 3 TFEU.

[345] Another issue relates to an issue of qualification, c.f. VanDuzer, J. et.al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 28 April 2014), pp. 423 et seqq.

[346] ICSID appoints the presiding ad-hoc arbitrators in case of disagreement of disputing parties. If one assumes that every disputing party appoints an arbitrator which best suits its predominant goal – i.e. to win the case – and, hence, party-appointed arbitrators might split on crucial questions of law and fact in a tribunal's deliberation, the role of the presiding arbitrator appears crucial. Cf. also Gaukrodger, D. and Gordon, K., *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment No. 2012/03, available at http://dx.doi.org/10.1787/5k46b1r85j6f-en (visited 20 May 2014), pp. 89 et seqq. on selection of presiding arbitrators. Furthermore, arbitration institutions decide on arbitrator challenges on grounds of conflict of interests and name ad-hoc arbitrators sitting on an annulment tribunal.

[347] Van Harten, G., Perceived Bias in Investment Treaty Arbitration, in: Waibel/Kaushal/Chung/Balchin (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality*, Kluwer Law International, The Hague, 2010, pp. 433 et seqq., pp. 441 et seq.; Van Harten, G., *Investment Treaty Arbitration and Public International Law*, Oxford University Press, Oxford, 2007, p. 169.

[348] Paulsson, J., Arbitration Without Privity, *ICSID Review*, Vol. 10 (1995), pp. 232 et seqq., p. 244.

business organisations, are staffed accordingly and might lead to a public perception of a business bias when nominating arbitrators which shall resolve matters of great public concern[349]. In fact, the possibility that appointing institutions might develop a life of their own has always been viewed critically in arbitration, commercial and investment alike. One way to respond to this concern was allowing for party-appointment of ad-hoc arbitrators[350].

Secondly, offence is taken at the *employment of ad-hoc arbitrators* itself, *with changing professional roles as adjudicator and party representative* from case to case[351]. It is argued that they could be – i.e. not saying that they actually are[352] – perceived by the general public as having an interest in interpreting an investment instrument in a way encouraging more and more investment claims and, thereby, advancing their business model, hoping for re-appointment as arbitrator or party representative. As it is the *investor* who *brings the claim* the public might suspect inherent bias in favour of the investor is present; broadening available remedies under an investment instrument would allow for more claims[353].

If one subscribes to the view that *not only justice must be done, but it must also be seen to be done*[354] – and this is what investment arbitration should aspire to[355] – then the aforementioned criticism should be taken seriously if investor-state arbitration should not be accused of failing to produce high quality independent adjudication too easily[356].

Some statistics commonly used in an attempt to counter or prove bias are only of limited value. Pointing to UN statistics on ISDS, stakeholders suggest that there is little evidence of bias since the

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[349] Van Harten, G., Perceived Bias in Investment Treaty Arbitration, in: Waibel/Kaushal/Chung/Balchin (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality*, Kluwer Law International, The Hague, 2010, pp. 433 et seqq., pp. 444 et seq.

[350] Paulsson, J., *Moral Hazard in International Dispute Resolution*, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law, 29.4.2010, p. 13.

[351] Critically on the dual hat role: Buergenthal, T., The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law, *Arbitration International*, Vol. 22 (2006), pp. 495 et seqq., p. 498; Marshall, F., *Defining New Institutional Options for Investor-State Dispute Settlement*, IISD, 2009, available at http://www.iisd.org/pdf/2009/defining_new_institutional_options.pdf (visited 2 May 2014), pp. 8-14. The dual role could indeed further nourish public concerns about a lack of integrity of investor-state arbitration. In particular the operation of the 'de facto precedent' system in investment arbitration might lead to the perception that an arbitrator could be influenced in his or her decision by his or her interests as a counsel. It is not denied that individual arbitrators might be able to distance themselves from their role when simultaneously or consecutively acting as counsel in proceedings involving similar legal issues. This appears however not only an intellectually challenging task but it appears also difficult not deny that there could be a public perception of bias.

[352] Van Harten, G., *Investment Treaty Arbitration and Public International Law*, Oxford University Press, Oxford, 2007, pp. 172 et seqq.

[353] Van Harten, G., *Investment Treaty Arbitration and Public International Law*, Oxford University Press, Oxford, 2007,p. 169; Van Harten, G., Perceived Bias in Investment Treaty Arbitration, in: Waibel/Kaushal/Chung/Balchin (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality*, Kluwer Law International, The Hague, 2010, pp. 433 et seqq., p. 445; Van Harten, G., Arbitrator Behaviour in Asymmetrical Adjudication - An Empirical Study of Investment Treaty Arbitration, *Osgoode Hall Law Journal*, Vol. 50 (2012), pp. 211 et seqq.

[354] R v Sussex Justices, Ex parte McCarthy, [1924] 1 KB 256, [1923] All ER Rep 233.

[355] A different standard of impartiality would be to blind out 'the structural settings' of ISDS and look at the individual arbitrator and arbitration only and ask for 'hard evidence' of an actual bias in the individual case. Opposing Van Harten, G., *Sovereign Choices and Sovereign Constrains - Judicial Restraint in Investment Treaty Arbitration*, Oxford University Press, Oxford, 2013).

[356] The *legally* required level of transparency and judicial independence and impartiality is mainly informed by the domestic legal system. Hence, when signing an international treaty state parties must critically ask themselves whether – by outsourcing adjudication – they are still in compliance with the standards set by their constitutions.

majority of all investment cases up to 2012 was won by states[357]. Others – trying to prove the opposite – point to the fact that in 2012 over 70 percent of those cases which proceeded to the merits stage were decided in favour of the investor[358].

However, all those numbers might be beside the point. They all are meant to show that there is or is no *actual* bias which would be a different, a lower standard to which most advanced legal systems would aspire to. Furthermore, they fail to take into account that an outcome of arbitration can have a multitude of reasons. To demonstrate further the trouble with statistics one might want to consider the following example: In 2012, in less than 10 percent of all cases in German administrative courts the private claimant succeeded fully or in part[359]. If put in relation to the success rate in ISDS should we take this as proof of an investor bias in ISDS where private claimants seem to perform three to five times better than in German administrative courts? This appears questionable to say the least. However, there is a perspective which appears worth considering when looking at the German case: Despite an extremely low probability of succeeding against government in German administrative court proceedings, to the best of the author's knowledge nobody seriously accuses German administrative judges of a bias towards the government.

This indeed might have to do with the fact that in domestic courts of democratic societies, judges are granted security of tenure[360] and other privileges in order to make them independent from government and other powerful forces in a society. It is, inter alia, their *perceived* independence (and impartiality) on which their legitimacy to control other branches of government rests.

When conferring jurisdiction to control the exercise of state powers upon ISDS mechanisms state parties should very critically assess (and cross-check against their constitutional constraints) how close these adjudicative bodies should or even must be modelled on the 'normative claim of impartiality' made in democratic societies and to which extent judicial standards can be moderated in order to facilitate other legitimate ends. In practice no court, no judge, no tribunal and no arbitrator are perfectly independent (nor would complete independence be desirable). However, the closer one gets to the 'normative claim' also in respect of investor-state arbitration the more likely a decision will be regarded as legitimate by those affected.

State parties have, inter alia, the following policy options available to improve public perception of independence of the adjudicative process in ISDS; some of which more of a long term goal, others readily implemented.

An international investment court, modelled e.g. on the International Court of Justice or the WTO Appellate Body with tenured judges might be a solution 'closer to the ideal' as it abolishes arbitration institutions as appointing arbitrators and would also provide personal independence by way of long

[357] EU Commission, *Incorrect Claims about Investor-State Dispute Settlement*, available at http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151790.pdf (visited 5 May 2014); Bundesverband der Deutschen Industrie e.V., *Positionspapier: Schutz europäischer Investitionen im Ausland: Anforderungen an Investitionsabkommen der EU*, available at http://www.bdi.eu/download_content/GlobalisierungMaerkteUndHandel/Schutz_europaeischer_Investitionen_im_Ausland.pdf (visited 28 April 2014), p. 8.

[358] UNCTAD, *Recent Developments in Investor-State Dispute Settlement (ISDS)*, IIA Issues Note 2013/1, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf (visited 19 May 2014)., p. 5.

[359] Statistisches Bundesamt, Fachserie 10 Reihe 2.4, Rechtspflege, Verwaltungsgerichte 2012, published 2013, available at https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Verwaltungsgerichte2100240127004.pdf?__blob=publicationFile (visited 2 May 2014).

[360] I.e. office is referred upon them for a period of time or even for lifetime and sufficient financial means are provided regardless of their performance in the individual case.

term office coupled with financial independence[361]. However, since the current system of ISDS rests on thousands of bilateral and regional investment instruments and dozens of arbitration institutions, not to be succeeded by a multilateral regime with centralised adjudication overnight, one should be prepared for compromise and look for pragmatic solutions until the best of options finally prevails.

When pondering possible pragmatic improvements to the current ISDS system, major factors to keep in mind are the fragmentation of international investment law and the dubious 'de facto precedent system' which allows for migration of 'interpretative' concepts from treaty to treaty. Rules which are directed at securing the public perception of independence and impartiality of arbitrators should not require a multilateral framework but work within the scope of one, mostly bilateral, investment instrument.

In order to reduce the perception of bias in respect of the *arbitration institution* appointing, for example, the presiding arbitrator in case of disagreement between the disputing parties, the introduction of an *objective element in the selection process* should be considered. A simple but effective way would be to maintain a public list of highly qualified arbitrators which are *appointed in fixed order of their appearance* on the list and not reappointed until the list has been exhausted. The critical question then becomes the one of who nominates potential arbitrators, to which we shall turn in a moment.

Regarding the *perceived bias of individual arbitrators* towards investors, a solution would be to break or at least to weaken the link, real or perceived, between expanding the breadth of ISDS and thereby expanding its arbitrator's business model.

A possible approach would be to put host states on equal footing with the investor concerning initiating arbitration[362]. In such situations, one might argue, favouring the investor would not make sense anymore. However, if such 'equality of arms' would only be created in one or a few out of over 3.000 investment instruments, an alleged pro-investor bias could still pay out. Certain interpretations supposedly favouring the investor developed in the context of investment instruments in which states could also initiate arbitration could be relied on by other tribunals as 'de facto precedent' in arbitrations in which states could not bring claims. In this way – one may argue – a business bias would still pay out as it expands the ISDS system which might increase the likelihood of reappointment. Thus, by placing the host state on equal footing in terms of commencement of arbitration in just one or few investment instruments the appearance of bias could hardly be avoided.

Irrespective of whether one wants to stick to the investor as the one who initiates arbitration or not, one of the crucial questions appears to be *how to insulate an investment instrument from the others in order not to frustrate the efforts taken in an agreement to confine appearance of bias.* If one wants to stick *with ad-hoc arbitrators* making their living from regular appointments and/or party representation this appears *difficult to achieve*.

State parties with considerable negotiation power might, however, achieve a *modest improvement over time*: Within the scope of an investment agreement it would be possible to *weaken the perceived link* between 'investor-friendly biased application' and 'business interest of the arbitrator'. Currently, only a very small number of people are active as arbitrators in investor-state disputes. Among this group an

[361] If there were no possibility of reappointment then this would further strengthen independence.
[362] The question of host state claims – in itself not unproblematic – has been discussed elsewhere in this study. Cf. 2.3.2.2.2.5 (p. 65).

even smaller fraction executes an incredibly large portion of the adjudicative work[363]. If the *group of arbitrators would drastically be expanded* and if, at the same time, the *number of engagements of one individual arbitrator* within a certain period of time would *dramatically be reduced*, an arbitrator's likelihood to benefit from an investor-friendly bias by way of re-appointment or counsel work modestly declines. This would require creating a roster of arbitrators from which arbitrators are appointed in order of their appearance on the list. In order to keep the re-appointment numbers low, the list should be opened up for self-nomination[364]. A treaty committee or a suitable third party institution would police that requirements set out in greater detail in an investment instrument are met by a successful candidate.

However, as mentioned before, such a mechanism installed in one agreement alone would not mitigate the appearance of investor-friendly bias, as 'everything would remain as it is' outside of the agreement. Only if a dominant state party can convince other states to adopt such a model, the link between the perceived 'investor-friendly bias' and own business interests might be weakened in the long term.

The CETA draft basically mimics the ICSID model. Under the ICSID-Convention[365] as well as the CETA draft[366] parties to a dispute are free to agree on arbitrators. Each appoints one arbitrator in its own account. In case of disagreement between the disputing parties on the third, presiding arbitrator the CETA draft provides for nomination by the Secretary General of ICSID from a roster of at least 15 arbitrators compiled and maintained by the treaty committee[367]. Against the background of the discussion above, it remains doubtful that this procedure 'will [fully] eliminate the risk of vested interests', as the Commission claims[368].

2.3.4 Perceived misuse

2.3.4.1 Treaty shopping, multiple claims, and forum shopping

Most investment instruments do not only protect investments of nationals and corporations of one state made *directly* in another state but also so-called *indirect investments*. Such indirect investments are established in a state party to the investment instrument but controlled by investors established in a non-party state. Although no mass-phenomenon[369] and tax considerations being a more important

[363] Van Harten, G., Beware the discretionary choices of arbitrators, *Columbia FDI Perspectives*, No. 110 (2013), with further references.
[364] A self-nomination roster would also have another advantage. In an ideal world state parties would perhaps nominate those professionally as well as personally best-qualified for a given roster of arbitrators. However, as for example the story of nominating judges for the ECtHR teaches us, in everyday life things are far from ideal. Cf. Bubrowski, H., Qualifikation ist auch nur ein Wort, *Frankfurter Allgemeine Zeitung*, 10 March 2014, p. 4; Engel, N., More Transparency and Governmental Loyalty for Maintaining Professional Quality in the Election of Judges to the European Court of Human Rights, *Human Rights Law Journal*, Vol. 32 (2012), pp. 448 et seqq. In order to prevent the mere pretense of cronyism, to obviate the development of an oligopoly and securing competition and quality among arbitrators the EU should strongly *resist the temptation to agree on exclusive state party nomination*.
[365] ICSID maintains a list of Conciliators and Arbitrators. Cf. Articles 12 ff ICSID-Convention, see also Regulation 21 of the ICSID Administrative and Financial Regulations.
[366] Article x-10 (1) CETA draft of 4 February 2014 = Article x-25(1) of CETA draft of 3 April 2014.
[367] Article x-10(2), (3) CETA draft of 4 February 2014 = Article x-25(2), (3) of CETA draft of 3 April 2014.
[368] European Union Commission, *Fact sheet - Investment Protection and Investor-to-State Dispute Settlement in EU agreements*, 26.11.2013, available at http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf (visited 2 May 2014), p. 9.
[369] Cf. survey in respect of US businesses which hardly structure their investment according to the protection offered by investment instruments Yackee, J., Do Bilateral Investment Treaties Promote Foreign Direct

factor for corporate structuring[370], companies can engage in nationality planning in order to bring an investment within the scope of application of an investment instrument[371] and/or to benefit from those investment instruments offering the highest protection standards (‘*treaty shopping*’).

Frequently minority shareholders also qualify as investors which may have various nationalities[372]. The value of their shares might be diminished due to certain measures taken in respect of a company operating and incorporated in the host state. If the host state ratified investment instruments with many or all home states of the minority shareholders, it can easily face multiple claims in respect of one and the same investment and the same regulatory measure. Consolidating claims brought on the basis of different investment instruments is hard to achieve[373]. In an attempt to (partly) overcome this deficiency parties could agree to appoint the same arbitrators[374]. However, even if a claim is brought on the basis of one and the same investment instrument, absent the consent of the parties to the disputes or an explicit provision in the investment instrument[375], in most cases a consolidation would fail due to the fact that the frequently used arbitration rules – i.e. the ICSID-Convention and Uncitral – do not provide for such.

As discussed above[376], the CETA draft addresses this issue and provides for the consolidation of claims brought under *this* investment instrument[377]. Treaty shopping shall be made more difficult by requiring for enterprises ‘substantial business activities’ in the home state – similar to Article 1113(2)

Investment? - Some Hints from Alternative Evidence, *Virginia Journal of International Law*, Vol. 51 (2010), pp. 397 et seqq.

[370] This is probably one of the reasons why many investment claims are brought on the basis of Dutch investment instruments. Cf. Knottnerus, R. and van Os, R., The Netherlands: A Gateway to ‘Treaty Shopping’ for Investment Protection, *Investment Treaty News*, Vol. 2 (2011), pp.10 et seqq. Against this background statistics on the origin of claims should also be read with some caution as they usually do not look beyond the shell company.

[371] Australia argues that Philip Morris structured its investment in a manner to benefit from the Australia-Hong Kong BIT. Cf. Philip Morris v. Australia, Australia's Response to the Notice of Arbitration (21 December 2001), para. 7, 29 et seqq. available at http://www.ag.gov.au/Internationalrelations/InternationalLaw/Documents/Australias%20Response%20to%20the%20Notice%20of%20Arbitration%2021%20December%202011.pdf (visited 2 May 2014).

[372] The claims brought against Argentina in the aftermath of its economic crisis provide a meaningful case study. Cf. OECD, *Improving the System of Investor-State Dispute Settlement: An Overview*, OECD Working Papers on International Investment No. 2006/1, available at http://www.oecd.org/daf/inv/internationalinvestmentagreements/36052284.pdf (visited 5 May 2014), para. 72 et seqq.

[373] E.g. in the cases CME Czech Republic B.V. v. Czech Republic, Uncitral, documents available at http://italaw.com/cases/documents/1250 (visited 7 May 2014) and Ronald S. Lauder v. Czech Republic, Uncitral, documents available at http://www.italaw.com/cases/610 (visited 7 May 2014) the Czech republic refused to consolidate.

[374] Cf. for examples in investment arbitration, e.g. OECD, *Improving the System of Investor-State Dispute Settlement: An Overview*, OECD Working Papers on International Investment No. 2006/1, available at http://www.oecd.org/daf/inv/internationalinvestmentagreements/36052284.pdf (visited 5 May 2014), para. 88 et seqq.

[375] Cf. Article 1126 NAFTA was probably the first investment instrument to provide for consolidation. The first request came from Mexico, cf. Corn Products International, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/04/1, Order of the Consolidation Tribunal (20 May 2005), available at http://www.italaw.com/sites/default/files/case-documents/ita0242.pdf (visited 8 May 2014). Consolidation clauses spread in particular through investment instruments to which either the US or Canada is a party. Cf. OECD, *Improving the System of Investor-State Dispute Settlement: An Overview*, OECD Working Papers on International Investment No. 2006/1, available at http://www.oecd.org/daf/inv/internationalinvestmentagreements/36052284.pdf (visited 5 May 2014), para. 86.

[376] Cf. 2.3.1.4 (p. 39).

[377] Article x-25 CETA draft of 4 February 2014 = Article x-41 of CETA draft of 3 April 2014.

NAFTA – in order to qualify as an investor under CETA[378]. This would exclude the possibility of merely registering a 'mailbox company' in the territory of the state parties to make use of the investment instrument.

Another phenomenon – different from 'treaty shopping' – in international investment arbitration is '*forum shopping*' by the claimant[379]. The latter refers to options offered to investors in an investment instrument or elsewhere to pursue its claim before an investment arbitral tribunal under different arbitration rules (ICSID, ICSID additional Facility, Uncitral, etc.) and/or national courts of the host state[380]. The rationale behind allowing for a choice is that different fora come with different advantages and disadvantages depending on the nature of a dispute. In order to prevent duplication of claims and double recovery, state parties can include so-called 'fork-in-the-road clauses' in investment instruments: Once the claim has been submitted to either national courts, commercial or investment arbitration, the remaining avenues are barred. An alternative approach would be to require a claimant's waiver of other judicial choices before it can initiate investment arbitration[381]. Such a waiver clause can be found in Article 1121 NAFTA und is, on principle, also allowed for in the CETA draft[382]. The effectiveness of such treaty clauses is not uncontested, however, considering arbitral tribunals' 'liberal' practice on jurisdiction. It has been debated whether the tribunals' approach is driven by the motivation to protect the investor from (exclusive) jurisdiction clauses in investor-state contracts imposed upon them by an 'almighty' host state with a view to confounding effective legal protection or by self-serving interests of arbitrators[383].

[378] Cf. Article X.3 CETA draft Investment Text of 21 November 2013 = Article X.3 CETA draft Investment Text of 4 April 2014

[379] An investor may engage in a combination of treaty and forum shopping. See generally on forum shopping Salles, L. E., *Forum Shopping in International Adjudication: The Role of Preliminary Objections*, Cambridge University Press, Cambridge, 2014.

[380] Gaukrodger, D. and Gordon, K., *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment No. 2012/03, available at http://dx.doi.org/10.1787/5k46b1r85j6f-en (visited 20 May 2014), p. 53.

[381] While a fork-in-the-road-clause would automatically eliminate the remaining options of solving a dispute once the investor opts for an available forum, a waiver clause (e.g. Article 1121 NAFTA) would require the investor to expressly refrain from initiating or continuing dispute resolution in any other forum in order to be permitted to commence with ISDS.

[382] Cf. x-7(1) lit f and g CETA draft of 4 February 2014 = Article x-21(1) lit f and g of CETA draft of 3 April 2014. Note, though, that this waiver applies only to a claim or proceeding seeking *compensation or damages* before a tribunal or court under domestic or international law but not to claims seeking redress other than pecuniary damages.

[383] The overlap of contract and investment treaty-based claims has long been subject to discussion in literature. For a critical account of a perceived de facto policy of allowing for parallel claims Van Harten, G., The Boom in Parallel Claims in Investment Treaty Arbitration, *Investment Treaty News*, Vol. 5 (2014), pp. 7 et seqq.

2.3.4.2 Frivolous claims

In order to control arbitration costs and to save other host state resources bound by responding to investment claims one can seek to eliminate those claims in an early stage of the proceedings which have no chance of succeeding as they are brought in bad faith merely to harass a respondent, mostly with the view of gaining a better bargaining position[384].

While frivolous investment claims have not been a significant issue on a global scale, the inclusion of provisions explicitly addressing the issue in the CETA draft might emanate from NAFTA experience where a significant number of claims were filed[385] by US investors against Canada but later withdrawn or became inactive[386]. In the context of ongoing TTIP negotiations it might be worth reflecting on assessments of government agencies such as 'UK Trade and Investment (UKTI)'[387] depicting US investors as extensively using litigation and arbitration as a strategic device[388].

The CETA draft appears to address such claims twice as 'claims manifest without legal merit' [389] and 'claims unfounded as a matter of law'[390]. While these clauses might provide useful tools for arbitrators to dismiss frivolous claims, much of the provisions' effectiveness depends on the incentive structure present in the tribunal to eliminate frivolous claims as early as possible in arbitration proceedings. In itself, these provisions do not restrict the access to investment arbitration or broaden regulatory space of the host state.

2.3.5 Erroneous decisions

In current ISDS practice correcting erroneous awards is difficult to achieve. Under the ICSID-Convention an ad-hoc ICSID Committee may *annul*[391] a decision of a tribunal according to Article 52(1) ICSID

- when the tribunal was not properly constituted;
- the tribunal has manifestly exceeded its powers;
- there was corruption on the part of a member of the tribunal;
- there has been a serious departure from a fundamental rule of procedure; or
- the award has failed to state the reasons on which it is based.

Such narrowly defined grounds of annulment have not only been criticised[392] for *not allowing correcting decisions even if 'manifest errors in law' would be discovered*[393]. Review under existing

[384] Cf. also Article 41(5) ICSID-Convention Article 28 USA-Uruguay BIT.
[385] 'Filed' meaning that a notice of intent was sent to the respondent.
[386] Poulsen, L. et al., *Costs and Benefits of an EU-USA Investment Protection Treaty*, 2013, available at http://www.italaw.com/sites/default/files/archive/costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf (visited 1 May 2014).
[387] Cf. https://www.gov.uk/government/organisations/uk-trade-investment (visited 2 May 2014).
[388] UKTI Trade Services, *Establishing a business presence in the USA*, London, 2013, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/301343/Establishing_a_Business_Presence_in_the_USA.pdf (visited 2 May 2014).
[389] Article x-14 CETA draft of 4 February 2014 ≈Article x-29 of CETA draft of 3 April 2014.
[390] Article x-15 CETA draft of 4 February 2014 ≈ Article x-30 of CETA draft of 3 April 2014.
[391] Annulment is different from appeal. While an annulment can only lead to the invalidation of the decision, an appeal may end in modifying a decision. Cf. OECD, *Improving the System of Investor-State Dispute Settlement: An Overview*, OECD Working Papers on International Investment No. 2006/1, available at http://www.oecd.org/daf/inv/internationalinvestmentagreements/36052284.pdf (visited 5 May 2014), para. 12.
[392] UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, IIA Issues Note 2013/2, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf (visited 19 May 2014), p. 3.

rules does not contribute to consistency either as individual awards are reviewed by individual ad-hoc committees which may diverge in their views on the grounds of annulment contained in Article 52(1) ICSID-Convention and in the way they review the tribunals' decisions *in concreto*[394].

If arbitration is conducted outside ICSID, review is controlled by the law applicable at the seat of arbitration. Hence, grounds for setting aside or not enforcing awards vary from arbitration seat to arbitration seat. To some extent grounds are 'harmonised' by Uncitral Model Law on International Commercial Arbitration (Uncitral Model Law)[395] which references Article 5 of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)[396]. Many countries have adopted similar provisions in their domestic laws. A correction of errors of law is not envisaged in the Uncitral Model Law.

2.3.5.1 Correcting erroneous decisions

The *creation of an appeals facility* could open up the possibility to correct errors of law and fact and, at the same time, contribute to some consistency in arbitration practice. In light of the considerable public interests at stake in investment arbitration it would be questionable whether poorly reasoned or erroneous decisions would be more acceptable than (slightly) prolonged proceedings.

As explained above, the CETA draft opts for a 'wait-and-see' approach by providing for a commitment to consult on the establishment of an appeals facility in the agreement[397].

2.3.5.2 Preventing erroneous decisions

Some arbitration rules[398] or investment instruments[399] provide for a quality control of the decision before issuance in order to correct obvious *formal* mistakes.

Securing high standards with regard to arbitrators which are legible to serve on an investment tribunal could be another way to decrease the error rate from the outset. It would not only be necessary to prescribe for sufficient *expertise in public international law*, in particular international investment law[400] but also to ensure that *sufficient time and other resources* are devoted to an individual case. The

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[393] Cf. CMS Gas Transmission Company v.The Republic of Argentina, ICSID Case No.ARB/01/8, Decision of the ad-hoc Committee on the application for annulment (25 September 2007), paras. 97, 127, 136, 150, 157-159, available at http://www.italaw.com/sites/default/files/case-documents/ita0187.pdf (visited 8 May 2014).

[394] So for example in respect of the Argentina crisis: Ten Cate, I., International Arbitration and the Ends of Appellate Review, *New York University Journal of International Law and Politics*, Vol. 44 (2012), pp. 1109 et seqq., p. 1180.

[395] Article 36(1) Uncitral Model Law http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (visited 2 May 2014) mentions: incapacity of the parties to enter into the arbitration agreement or invalidity of the arbitration agreement; 2) lack of proper notice to a party or incapacity to present its case; 3) inclusion in the award of matters outside the scope of submission; 4) irregularities in the composition of the tribunal or the arbitral procedure; 5) non-arbitrability of the subject matter and 6) violation of domestic public policy.

[396] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, adopted 10 June 1958, entered into force 7 June 1959), available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (visited 2 May 2014).

[397] Article x-26(1) lit c CETA draft of 4 February 2014 = Article x-42(1) lit c of CETA draft of 3 April 2014.

[398] Article 27 ICC Court of Arbitration rules.

[399] Cf. 2012 U.S. Model BIT, Article 28(9), available at http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (last visited 4 May 2014).

[400] Cf. Article x-10(5) CETA draft of 4 February 2014 = Article x-25(5) of CETA draft of 3 April 2014: 'Arbitrators appointed pursuant to this section shall have expertise or experience in public international law, in

quality of reasoning and reaching at the *correct legal result*, it is recalled, might prove to be an important source of legitimacy of an arbitral decision.

While in well-functioning legal orders institutionalised selection processes usually exist which signal to the public that those sitting in court are capable of resolving a legal dispute in a sufficient minimum quality and hereby increase trust in the judicial body, *selecting ad-hoc arbitrators in ISDS is currently a highly non-transparent process*. Whether government-sponsored rosters of arbitrators always follow the logic of expertise is also open to debate[401]. If one would like to stick with the notion of party-appointed arbitrators which *ideally* would also contain some elements of competition, state parties should specify in greater detail qualifications, experience and other prerequisites to be met by arbitrators and police arbitrators' nominations more rigorously, e.g. by treaty committees. The award is not only as good as the law on which a dispute is decided but the outcome also significantly depends on the qualifications of arbitrators.

2.3.6 Financial risks

Both arbitration costs (below 2.3.6.1 (p. 78)) as well as the amount of damages awarded (below 2.3.6.2, p. 81)) have lately become of concern, not just to the general public but also to governments and academia.

2.3.6.1 Arbitration costs

The OECD has calculated that the average cost for both parties participating in investor-state arbitration amounts to US$ eight million[402]. In some cases costs exceed US$ 30 million. Eighty-two percent of the total costs occurring in investor-state arbitration are allocated to party representatives and expert witnesses for fees and expenses. Sixteen percent of costs relate to arbitrators and two percent are payable to the arbitration institution administering a case[403]. It is argued, for example by Unctad in one of its *IIA Issues Notes*, that these facts 'put into doubt the oft-quoted notion that arbitration represents a speedy and low-cost method'[404].

The explanations offered by commentators for these average costs vary greatly. Some point to the arbitrators: Only a very small group of people[405] are frequently nominated and accept appointment despite heavy caseloads. Hence, some might be overworked and/or suffer from weak case management despite some secretarial support by arbitration institutions and assistance by law clerks. Procedural issues might also play a role. Since arbitral awards can be challenged on grounds that

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particular international investment law. It is desirable that they have expertise or experience in international trade law, and the resolution of disputes arising under international investment or international trade agreements.'

[401] The problems encountered nominating suitable judges for the ECtHR in Strasbourg can serve as a telling example. Cf. Bubrowski, H., Qualifikation ist auch nur ein Wort, *Frankfurter Allgemeine Zeitung*, 10 March 2014, p. 4; Engel, N., More Transparency and Governmental Loyalty for Maintaining Professional Quality in the Election of Judges to the European Court of Human Rights, *Human Rights Law Journal*, Vol. 32 (2012).

[402] OECD, Investor-State Dispute Settlement, Public Consultation: 16 May–23 July 2012, p. 19, available at: http://www.oecd.org/daf/inv/investment-policy/ISDSconsultationcomments_web.pdf (5 May 2014); Franck, S., Rationalizing Costs in Investment Arbitration, *Washington University Law Review*, Vol. 88 (2011), pp. 769 et seqq.

[403] Gaukrodger, D. and Gordon, K., *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment No. 2012/03, available at http://dx.doi.org/10.1787/5k46b1r85j6f-en (visited 20 May 2014), p 19.

[404] UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, IIA Issues Note 2013/2, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf (visited 19 May 2014), p. 4.

[405] Cf. 2.3.3.2 (p. 71).

arbitrators denied fair hearing, they could tend to allow for broad latitude to counsels presenting their case which increases billable hours on both sides.

Others tend to make counsels responsible for the occurring costs in arbitration. International law firms frequently employed in investment arbitration might resort to expensive litigation techniques. Party-appointed expert witnesses can also cause considerable costs[406].

However, charges of 'excessive costs' should not be made all too quickly. While specialised in-house investment arbitration departments – such as the ones the USA and Canada already maintain – might save costs (and would help accumulate knowledge and expertise which might be even more important), they would require a steady flow of cases to justify the fixed costs. For developing countries, setting up specialised arbitration departments would hardly be an option anyway. Transparent public procurement procedures and qualified controlling of party representatives by the respective disputing parties could contribute to more cost efficiency. Equally, active dispute prevention[407] and resorting to alternative dispute resolution techniques[408] or functioning domestic courts[409] might reduce some costs. Terminating frivolous investment arbitration claims at an early stage of proceedings[410] could also contribute to some cost reduction. Above all, a clear rule, e.g. contained in the investment instrument, that the unsuccessful party has to bear all costs and expenses of the proceedings would certainly be helpful containing costs on both the claimant's as well as respondent's side[411]. However, one should not give in to the world of illusions by assuming that such a rule would seriously deter financially robust claimants from resorting to arbitration if it would serve strategic interests.

Currently it is extremely difficult to predict the outcome of cost awards[412]. Due to only broad guidelines on costs and their attribution in arbitration rules[413] and investment instruments, arbitral

[406] Gaukrodger, D. and Gordon, K., *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment No. 2012/03, available at http://dx.doi.org/10.1787/5k46b1r85j6f-en (visited 20 May 2014), pp. 20 et seqq.
[407] Note, e.g., the initiatives taken by the Pacific Alliance (Chile, Colombia, Mexico, and Peru). Instead of abandoning ISDS they set up projects which aim at communicating host state investment commitments to stakeholders and provide training for government agencies in order to secure compliance. Cf. Clarkson, S. et al., Looking South While Looking North: Mexico's Ambivalent Engagement with Overlapping Regionalism, Paper presented to Kolleg-Forschergruppe on 'The Transformative Power of Europe' conference on 'Dealing with Overlapping Regionalism: Complementary or Competitive Strategies?', Freie Universität Berlin, 16 May, 2014.
[408] UNCTAD, *Investor–State Disputes: Prevention and Alternatives to Arbitration*, UNCTAD Series on International Investment Policies for Development, New York and Geneva,2010, available at http://unctad.org/en/docs/diaeia200911_en.pdf (visited 5 May 2014). Cf. also 2.3.2.2.1.4 (p. 51).
[409] Cf. 2.3.2.2.1.1 (p. 45) and 2.3.2.2.2.3.2 (p. 58).
[410] Cf. ICSID Rule 41(5) and Diop, A., Objections under Rules 41(5) of the ICSID Arbitration Rules, *ICSID Review*, Vol. 25 (2010), p. 312 et seqq., p. 312; See also Global Trading Resource Corp. and Globex International, Inc. v. Ukraine, ICSID Case No. ARB/09/11, documents available at http://www.italaw.com/cases/documents/507 (visited 5 May 2014); RSM Production Corporation v. Grenada, ICSID Case No. ARB/05/14, documents available at http://www.italaw.com/cases/940 (visited 5 May 2014); See Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/07/25, documents available at http://www.italaw.com/cases/documents/1114 (visited 5 May 2014); Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/3, documents available at http://www.italaw.com/cases/174 (visited 5 May 2014). Cf. also 2.3.4.2 (p. 77).
[411] Article x-20(5) CETA draft of 4 February 2014 ≈ Article x-36 of CETA draft of 3 April 2014.
[412] Cf. Schreuer, C. et al, *The ICSID Convention: A Commentary*, Cambridge University Press, Cambridge, 2nd Edition, 2009, p. 1229 ('the practice of ICSID tribunals in apportioning costs is neither clear nor uniform'). In respect of Uncitral or SCC ISDS cases cf. Smith, D., Shifting Sands: Cost-and-Fee Allocation in International Investment Arbitration, *Virginia Journal of International Law*, Vol. 51 (2011), pp. 749 et seqq., pp. 775, 780.
[413] Article 61(2) ICSID-Convention requires a final award to address the issue. Rules 42(1) and 40(2) Uncitral 2010 provide for costs to be borne on principle by the unsuccessful party, but the tribunal may decide otherwise.

tribunals enjoy broad discretion and have split over the attribution question[414]. In more than half of the cases by 2011 they applied the rule generally used in public international law, i.e. each party has to bear its own costs and arbitrators and institutional costs are split. Others tend to shift at least some costs to the unsuccessful party[415]. Unctad argues that not allocating all reasonable occurred costs to the unsuccessful party would put a significant burden especially on developing countries' budgets. The threat of high arbitration costs could even be used to force governments into compromise in cases where such would not be necessary[416]. This logic, however, would also apply to small and medium sized investors, whose access to arbitration might be diminished by high costs[417].

However, one illusion should be shattered: recalling that investor-state disputes often involve complex questions of law and fact, touching sensible areas of the common good, dispensing justice cannot be expected to be 'free of charge', neither in investment arbitration nor in domestic courts.

When criticising the *length of arbitral proceedings*, one also has to reflect on the average duration of court proceedings in domestic fora.[418]. Furthermore, while one may question whether the length of the average investment arbitration is still reasonable, at the same time one may wonder why only a very small group of arbitrators are entrusted with a significant number of all cases[419]. State parties to the investment instrument, even the parties to a dispute, are free to more strictly regulate arbitration proceedings by providing incentives for speedy *and* yet high quality arbitral proceedings.

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[414] For a discussion cf. Franck, S., Rationalizing Costs in Investment Arbitration, *Washington University Law Review*, Vol. 88 (2011), pp. 769 et seqq.; Smith, D., Shifting Sands: Cost-and-Fee Allocation in International Investment Arbitration, *Virginia Journal of International Law*, Vol. 51 (2011), pp. 749 et seqq.; Reed, L., More on Corporate Criticism of International Arbitration, Kluwer Arbitration Blog, 16 July 2010, available at http://kluwerarbitrationblog.com/blog/2010/07/16/more-on-corporate-criticism-of-international-arbitration/ (visited 2 May 2014); Ulmer, N., The Cost Conundrum, *Arbitration International* , Vol. 26 (2010), pp. 221 et seqq.; Lalive, P., Dérives arbitrales (II), ASA Bulletin 1/2006, available at http://www.lalive.ch/data/publications/pla_derives_arbitrales_2.pdf (visited 2 May 2014).

[415] Smith, D., Shifting Sands: Cost-and-Fee Allocation in International Investment Arbitration, *Virginia Journal of International Law*, Vol. 51 (2011), pp. 749 et seqq., p. 753.

[416] The access of less-developed countries to high-quality legal defense at a reasonable price could be afforded through technical assistance and at a bilateral or multilateral level. Cf. UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, IIA Issues Note 2013/2, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf (visited 19 May 2014), p. 7; see also Gaukrodger, D. and Gordon, K., *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment No. 2012/03, available at http://dx.doi.org/10.1787/5k46b1r85j6f-en (visited 20 May 2014), p. 23.

[417] Gaukrodger, D. and Gordon, K., *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment No. 2012/03, available at http://dx.doi.org/10.1787/5k46b1r85j6f-en (visited 20 May 2014), p. 23. Small- and medium-sized undertakings could benefit from a small 'small claims center' with simplified procedures and lower costs in order to allow for access to ISDS.

[418] European countries which pride themselves on having one of the most developed legal systems are also criticised by the ECtHR for excessive length of court proceedings. Cf. European Court of Human Rights, R v. Germany, Application No. 46344/06; European Court of Human Rights, S v. Germany, Application No. 75529/01; European Court of Human Rights, Tetu v. France, Application No. 60983/09; European Court of Human Rights, Ferantelli and Santangelo v. Italy, Application No. 19874/92; European Court of Human Rights, C v. Ireland, Application No. 24643/08; European Court of Human Rights, Schouten and Meldrum v. The Netherlands, Application Nos 19005/91; 19006/91; See also damages proceedings for excessive length of administrative court proceedings Bundesverwaltungsgericht (German Federal Administrative Court), Judgement of 11.7.2013, Az. 5 C 23.12 D u. 5 C 27.12 D.

[419] Cf. for measures taken by the ICSID to reduce costs and speed up proceedings Gaukrodger, D. and Gordon, K., *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment No. 2012/03, available at http://dx.doi.org/10.1787/5k46b1r85j6f-en (visited 20 May 2014).

The CETA draft addresses the issue of arbitration costs on several levels. It provides for termination of frivolous claims in an early stage in investment arbitration[420]. It establishes, as a basic rule, that the unsuccessful party has to bear the costs[421]. Furthermore, the CETA draft provides for the possibility to resort to mediation before going to arbitration[422].

2.3.6.2 Damages awards

In developed administrative law systems pecuniary remedies are usually secondary to non-pecuniary remedies such as annulling an administrative measure or prohibiting certain governmental conduct when found illegal[423]. Legislative acts cannot regularly and only under certain strict conditions be challenged in domestic legal orders. Liability for judicial acts is frequently restricted. These constraints generally do not exist in investment arbitration. Hence, a host state can be held accountable for administrative, legislative and judicial measures falling below the substantive standards contained in an investment instrument. As mentioned earlier, most frequently pecuniary damages are awarded[424].

Depending on the state measure, damages awarded can reach billions of US$. The (extreme) example frequently cited[425] in this respect is *Occidental Petroleum v. Ecuador*[426] awarding to the claimant US$ 1,77 Billion (US$2.3 billion with interest applied) which equals about five or 6,3 percent respectively of Ecuador's annual budget in 2012[427]. Unctad and others do not fail to point out that such amounts of damages have the potential of exerting significant pressure on public finances. Critics take this as evidence of the aberration of the system[428]. However, while one can certainly criticize ISDS in general and investment tribunals in particular in respect of many aspects[429], one should not be surprised that tribunals actually fulfil their task and allocate responsibility between host states and investors and award damages for governmental conduct falling short of the substantive standards in an investment instruments.

Most *investment agreements are silent on the question of remedies and the calculation of damages* which opens up recourse to public international law which requires generally 'to wipe out' all

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[420] Articles x-14, x-15 CETA draft of 4 February 2014 ≈Articles x-29, x-30 of CETA draft of 3 April 2014; cf. also 2.3.4.2 (p. 77).
[421] Article x-20(5) CETA draft of 4 February 2014 = Article x-36(5) of CETA draft of 3 April 2014.
[422] Article x-5 CETA draft of 4 February 2014 = Article x-19 of CETA draft of 3 April 2014; cf. also 2.3.2.2.1.4 (p. 51).
[423] For a more detailed account cf. Gaukrodger, D. and Gordon, K., *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment No. 2012/03, available at http://dx.doi.org/10.1787/5k46b1r85j6f-en (visited 20 May 2014), p. 26 and Annex 4.
[424] Cf. 2.3.2.2.2.4 (p. 63).
[425] McDonagh, T., Unfair, *Unsustainable and Under the Radar - How Corporations use Global Investment Rules to Undermine a Sustainable Future*, The Democracy Center, available at http://democracyctr.org/wp/wp-content/uploads/2013/05/Under_The_Radar_English_Final.pdf (visited 28 April 2014). p. 11.
[426] Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award (5 October 2012), available at http://italaw.com/sites/default/files/case-documents/italaw1094.pdf (visited 2 May 2014). On 11.10.2012 Ecuador filed a request for annulment of the award which is pending on 20 March 2014. Cf. https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=viewCase&reqFrom=Home&caseId=C80 (visited 2 May 2014).
[427] In 2012 it was 35,5 billion US$. Cf. CIA world fact book, available at https://www.cia.gov/library/publications/the-world-factbook/geos/ec.html (visited 5 May 2014).
[428] McDonagh, T., *Unfair, Unsustainable and Under the Radar - How Corporations use Global Investment Rules to Undermine a Sustainable Future*, The Democracy Center, 2013, available at http://democracyctr.org/wp/wp-content/uploads/2013/05/Under_The_Radar_English_Final.pdf (visited 28 April 2014), p. 8.

[429] Cf. above 2.3 (p. 24).

consequences of a wrongful act which indeed also contains 'hypothetical elements' including lost profit or consequential damages[430].

If states feel the need to restrict damages they are free to do so in investment instruments. Means to control damages awards would relate to more clearly defining the standard of compensation – i.e. for example excluding lost profits –, excluding certain types of damages such as moral or punitive damages, agreeing on certain methods of damages calculation, or even introducing absolute amounts of damages possibly awarded, like insurance companies frequently do in cases of a high degree of uncertainty. Depending on the economic and political situation of a state and its eagerness to attract foreign investment, such limits could be set accordingly.

Furthermore, it should be explored whether and in which way greater weight can be given to non-pecuniary remedies in investment instruments[431]. In respect of investor-state tribunals this would in any event require removing existing insecurities among tribunals of whether they possess the relevant competence to grant non-pecuniary remedies[432].

The CETA draft provides that a tribunal may only award pecuniary damages (and interest) as well as restitution of property[433]. It further specifies that pecuniary damages shall not be greater than the loss suffered by the claimant, reduced by any prior damages or compensation already provided. For the calculation of pecuniary damages, a tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure. A tribunal may not award punitive damages. Lost profit appears not to be excluded from a possible damages award.

[430] Arangio-Ruiz, G., Preliminary Report on State Responsibility, in: International Law Commission (ed.), *Yearbook of the International Law Commission*, Vol. II, United Nations Publications, Geneva, 1988; UN Document No. A/CN.4/416 & Corr. 1 & 2 and Add.1 & Corr.1, para. 114.

[431] Cf. Gaukrodger, D. and Gordon, K., *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment No. 2012/03, available at http://dx.doi.org/10.1787/5k46b1r85j6f-en (visited 20 May 2014) pp. 28 et seqq., Annex 6; opposite view UNCTAD, *Investment Policy Framework for Sustainable Development*; UNCTAD, 2012, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf (visited 5 May 2014), p. 57.

[432] Cf. Hindelang, S., Restitution and Compensation – Reconstructing the Relationship in International Investment Law, in: Hofmann/Tams (eds.), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration*, Nomos, Baden-Baden, 2011, pp. 161 et seqq.; also available as Hindelang, S., *Restitution and Compensation – Reconstructing the Relationship in International Investment Law*, WHI-Paper 02/11, 2011, http://www.whi-berlin.eu/tl_files/documents/whi-paper0211.pdf (visited 1 May 2014); cf. also 2.3.2.2.2.4 (p. 63).

[433] Article x-20(1) CETA draft of 4 February 2014 = Article x-36 (1) of CETA draft of 3 April 2014.

3. RECOMMENDATIONS

- *Investor-state dispute settlement (ISDS) as a tool to enforce substantive investment protection standards should continue to be part of European investment instruments*[434]. Reliance on state-state arbitration, diplomatic protection, investment contracts or laws or domestic remedies only would not form an equivalent alternative.
- At the same time, the *protection offered to foreign investment in domestic legal orders should not be discounted*. Some domestic legal orders do not only provide meaningful legal remedies but national jurisdictions can also lend legitimacy to ISDS when approached first before recourse is taken to arbitration. Hence, ISDS should be shaped in a way constituting *no alternative but, rather, a subsidiary legal remedy* to the domestic legal system.
- An adequate role of domestic legal systems in protecting foreign investments is secured by a novel drafting approach to the *exhaustion of local remedies rule* in all European investment instruments. *This rule must be furnished with elasticity*; i.e. responding to the changing capacities of the domestic legal system in providing meaningful legal redress over time without operating with a rigid period reserved for local remedies.
- In order to *improve consistency* of ISDS practice in respect of an investment instrument and to *secure the 'right balance' between private and public interests* the role of the *state parties as 'masters of the treaty' must be strengthened*. This is achieved by *activating the powers of authoritative interpretation*[435]. In a first step, European investment instruments should therefore provide for a treaty committee, staffed with representatives of all state parties, which *continuously monitors ISDS practice* and *puts forward authoritative interpretations* of the provisions of the investment instrument as necessary.
- If a rather large number of claims on the basis of a single EU investment instrument – such as the TTIP – is expected, the EU should establish, right from the outset, an *appeals mechanism in order to correct erroneous awards* and *secure consistency in interpretation*.
- If no appeals facility is established, European investment instruments should at least make available *a preliminary reference procedure* to seek authoritative interpretation or a *mandatory review procedure for draft awards*, conducted with a view *to preserving consistency in interpretation* and the *balance between private and public interests* enshrined in the investment instrument.
- *Concepts like 'de facto precedent' or 'jurisprudence constante'* found in ISDS practice *do not sit well with general public international law* but pose a *serious challenge to the state parties' ownership of the investment instrument*. State parties should make provisions in their treaties to counter such attempts.
- European agreements should provide for *broad transparency* rules such as those found in the 2014 Uncitral Rules on Transparency in Treaty-based Investor-State Arbitration.
- If one subscribes to the view that *not only justice must be done, but it must also be seen to be done*, overcoming the *issue of alleged appearance of bias of arbitrators and arbitration institutions* without significantly altering the current system of ad-hoc nominated arbitrators

[434] The term 'investment instrument' refers to treaties concluded by states or the EU among one another in public international law, such as bilateral or regional investment (protection) treaties.

[435] There is some confusion in legal literature as to the precise meaning of the term 'authoritative' interpretation. For the purpose of this study it shall refer to a (joint) interpretation of a treaty in public international law, binding beyond an individual case, issued by the state parties to this agreement or a treaty committee charged with such a task.

will prove challenging. The EU should consider providing for *tenured judges*; at least on an appellate level.

4. ANNEX – CASE STUDIES

In its assignment, the European Parliament asked for the provision of two concise studies of cases some of its Members perceive as critical.

4.1 Ethyl Corporation v. Government of Canada[436]

4.1.1 Factual and Legal Background

In the *Ethyl Corp. v. Canada* arbitration, an issue was put up for (re-)assessment on the international level which is also addressed in the domestic realm, i.e. what amounts to a compensable taking and what is to be regarded as regulatory non-compensable taking[437]. More precisely, the question to be answered by the tribunal was that of what level of harm inherent in a certain economic activity has to be borne by society and which by the individual entrepreneur. Ultimately it was left open due to a settlement by the disputing parties.

'In that case, a U.S. company that made a gasoline additive called MMT challenged a law by Canada that banned the *importation* or *inter-provincial trade* of MMT. This substance was claimed to have [evident indirect potential[438]] toxic properties that were feared to cause health concerns, and to cause certain equipment on car exhaust systems to malfunction.'[439] However, production and sale of MMT in Canada itself was not banned as long as it was not brought across a Canadian provincial or state border but manufactured and distributed entirely within each of Canada's provinces[440]. Ethyl Corp. claimed US$ 251 million in damages plus interest asserting that the measure violated NAFTA's prohibition on performance requirements [[441]] and national treatment discrimination [[442]], as well as [NAFTA's] expropriation [clause[443]]. After a NAFTA tribunal rejected Canada's defence that it lacked jurisdiction over the case, the case was ultimately settled for approximately U.S. $13 million in damages, and Canada withdrew the legislation and provided a letter admitting that there was no [conclusive] *scientific evidence* of any health risk of MMT or any adverse impact on car exhaust systems.'[444]

[436] Award on jurisdiction available at http://italaw.com/sites/default/files/case-documents/ita0300_0.pdf (visited 2 May 2013); all procedural documents can be accessed through http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ethyl.aspx?lang=eng (visited 2 May 2014).
[437] UNCTAD, *Taking of Property*, UNCTAD Series on Issues in International Investment Agreements, New York and Geneva, 2000, available at http://unctad.org/en/docs/psiteiitd15.en.pdf (visited 19 May 2014), p. 6.
[438] Ethyl Corporation v Government of Canada Statement of Defence, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ethyl-05.pdf (visited 5 May 2014), para. 70.
[439] Emphasis added Sampliner, G., Arbitration of Expropriation Cases Under U.S. Investment Treaties - A Threat to Democracy or the Dog That Didn't Bark?, *ICSID Review*, Vol. 18 (2003), pp. 1 et seqq., pp. 27 – 28.
[440] So at least claimed by Ethyl Corp. Cf. Ethyl Corporation v Government of Canada Preliminary Tribunal Award on jurisdiction, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ethyl-08.pdf (visited 5 May 2014), para. 6.
[441] Article 1106 NAFTA.
[442] Article 1102 NAFTA.
[443] Article 1110 NAFTA.
[444] Emphasis added Sampliner, G., Arbitration of Expropriation Cases Under U.S. Investment Treaties - A Threat to Democracy or the Dog That Didn't Bark?, *ICSID Review*, Vol. 18 (2003), pp. 1 et seqq., pp. 27 – 28.

4.1.2 Brief discussion

'Some point to the first NAFTA arbitration filed by Ethyl Corp. against Canada, as a case that demonstrates the dangers of NAFTA's investment chapter to environmental regulation.'[445] Civil society campaigners criticised the outcome of the Ethyl case as 'a precedent where, under NAFTA and similar agreements, a government would have to compensate investors when it wishes to regulate them or their products for public health or environmental reasons.'[446] Moreover, offence was taken that corporate interests appear to weigh more than democratic laws. Some argued: 'A government bill approved by the Parliament of Canada has been vetoed by Ethyl Corp. of Virginia. This is the substance of the matter. What is not of substance is whether MMT poisons the air, destroys catalytic converters, is harmful to children, older people, and those suffering from respiratory ailments, or frightens the horses - or whether it doesn't. The Canadian government and Parliament, whether certain, uncertain, or indifferent, has the sovereign power to pass whatever laws it wishes. At least, that had been the case.'[447]

However, such criticism clearly misses the point. It, to begin with, fails to mention that NAFTA – like the MMT regulation – was also voted on and approved by the Canadian parliament. Hence, the Canadian people opened up the possibility to let their governmental acts be scrutinised against the protection standards contained in an international treaty. While the effects of NAFTA initially might not have been well understood by all stakeholders, one cannot accept international commitments and later claim 'unfettered sovereignty.'

Furthermore, this case can also not be interpreted as a *clash* of different approaches towards the regulation of risk on domestic and international levels as the NAFTA tribunal simply did not render a decision on the merits[448]. Claiming that a corporation 'vetoed' a parliamentary act by taking recourse to NAFTA chapter 11 appears rather populistic. In fact, Canada adopted a precautionary approach towards MMT in its regulation[449] that could not even be sustained in domestic proceedings as it was held to be disproportionate[450].

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[445] Sampliner, G., Arbitration of Expropriation Cases Under U.S. Investment Treaties - A Threat to Democracy or the Dog That Didn't Bark?, *ICSID Review*, Vol. 18 (2003), pp. 1 et seqq., p. 27.

[446] Sforza, M. and Vallianatos, M., NAFTA & Environmental Laws: Ethyl Corp. v. Government of Canada - Chemical Firm Uses Trade Pact to Contest Environmental Law, 1997, available at http://www.globalpolicy.org/component/content/article/212/45381.html (visited 5 May 2014).

[447] Camp, D., You Can Thank Free Trade Agreement for MMT Travesty, *Toronto Star*, 29 July 1998, p. 1, available at http://pqasb.pqarchiver.com/thestar/doc/437783099.html?FMT=ABS&FMTS=ABS:FT&type=current&date=Jul+29%2C+1998&author=&pub=Toronto+Star&edition=&startpage=&desc=You+can+thank+free+trade+agreement+for+MMT+travesty (visited 5 May 2014); see also Dale, S., NAFTA-Based Lawsuit Angers Activists, *Albion Monitor*, 6 October 1996, available at http://www.monitor.net/monitor/9610a/naftammt.html (visited 5 May 2014).

[448] In this respect it is worth mentioning that Article 1114 (1) NAFTA explicitly addresses environmental measures providing: 'Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure *otherwise consistent with this Chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.' [Emphasis added]. The italicised phrase has proved critical in investment disputes as Article 1114 (1) NAFTA does not exempt any environmental measure taken in a bona fide attitude from review, but allows only for such which are 'otherwise' consistent with the substantive standards of protection contained in NAFTA chapter 11.

[449] In the Ethyl case the arguments advanced in defense of the MMT measure were not so much based on international (environmental) commitments taken up by Canada, in contrast, e.g. to Compañiá del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica, ICSID Case No. ARB/96/1, award available at http://italaw.com/documents/santaelena_award.pdf (visited 8 May 2014) where the respondent built its defence of restrictive measure on the compliance with commitments in public international law. The tribunal was not overly successful in appreciating such an argument in the light of its obligations under Article 31(3) lit c VCLT.

4.2 Glamis Gold Ltd. v. United States of America[451]

4.2.1 Factual and Legal Background

In *Glamis Gold Ltd. v. Canada*, 'a Canadian corporation engaged in the mining of precious metals, submitted a claim to arbitration alleging that certain federal government actions and California measures, with respect to open-pit mining operations [in south-eastern California], were in violation of the United States' obligations under NAFTA. The California measures included regulations requiring backfilling and grading for mining operations in the area of sacred Native American sites.'[452] Glamis Gold claimed that these measures violated the 'minimum standard of treatment under international law (including full protection and security and fair and equitable treatment of its investment) guaranteed by Article 1105 and … expropriated Glamis … valuable mining property interests without providing prompt and effective compensation as guaranteed by Article 1110 [NAFTA]'.[453] Glamis sought damages of US $50 million plus interest and costs.

4.2.2 Brief discussion

The decision is worth highlighting in respect of two aspects, one procedural and another substantive[454]. In *Glamis* the tribunal expanded *amicus curiae* participation in a NAFTA ISDS context. The tribunal accepted written statements by a coalition of non-governmental organizations, by a business association, and by a Native American tribe which would have been affected by mining operations[455].

In terms of substantive treatment of the claim the tribunal appears to have adopted a test to determine whether an indirect expropriation had taken place which grants significant greater policy space than tests applied previously[456], as for example in *Metalclad Corporation v. United Mexican States*[457]. The

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Cf. Berner, K., in: Hindelang/Krajewski (eds.), *Shifting Paradigms in International Investment Law (provisional title)*, Oxford University Press, forthcoming 2015.

[450] Report of the Article 1704 Panel Concerning a Dispute Between Alberta and Canada Regarding the Manganese-Based Fuel Additives Act, Winnipeg 12 July 1998, available at http://www.international.alberta.ca/documents/international/ait_ab-can_mmt_rpt-12june98.pdf (visited 2 May 2014).

[451] All documents including the award are available at http://www.state.gov/s/l/c10986.htm (visited 2 May 2014).

[452] Grandbois, M. and Buchard, M-C., Public Participation in Transnational Law: Access to Justice in Environmental Matters in North American Treaties, *Macquarie Journal of International and Comparative Environmental Law*, Vol. 7 (2011), pp. 1 et seqq., p. 17.

[453] Glamis Gold, Ltd. v. United States of America Notice of Arbitration, available at http://www.state.gov/documents/organization/27320.pdf (visited 5 May 2014).

[454] See also for a discussion Schill, S., Glamis Gold Ltd. v. United States – Award, *The American Journal of International Law*, Vol. 104 (2010), pp. 253 et seqq.; Mann, H., Glamis Gold Ltd. v. United States of America, in: Bernasconi-Osterwalder/Johnson (eds.), *International Investment Law and Sustainable Development - Key cases from 2000–2010*, 2011, available at http://www.iisd.org/sites/default/files/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf (visited 2 May 2014), pp. 59 et seqq.; for a critical account in terms of policy Oxfam America, *Glamis Gold: A Case Study of Investing in Destruction*, available at http://www.oxfamamerica.org/static/oa3/files/OA-Glamis_Gold_English.pdf (visited 5 May 2014), p. 4.

[455] Mann, H., Glamis Gold Ltd. v. United States of America, in: Bernasconi-Osterwalder/Johnson (eds.), *International Investment Law and Sustainable Development - Key cases from 2000–2010*, 2011, available at http://www.iisd.org/sites/default/files/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf (visited 2 May 2014), pp. 59 et seqq., pp. 61 – 62.

[456] Glamis Gold, Ltd. v. United States of America, Uncitral, available at http://www.italaw.com/sites/default/files/case-documents/ita0378.pdf (visited 2 May 2014), para. 356 et seqq.; 536.

[457] Metalclad Corporation v. United Mexican States, ICSID Case No. ARB (AF)/97/1, documents available at http://www.italaw.com/cases/671 (visited 2 May 2014).

tribunal seems to have adopted the same prudent approach in respect of its treatment of the international minimum standard[458]. Here as well, the tribunal paid due regard – in contrast to, e.g. *Metalclad Corporation v. United Mexican States*[459], *S.D. Myers, Inc. v. Government of Canada*[460], *Pope & Talbot Inc. v. Government of Canada*[461] or *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* [462] – to the binding authoritative interpretation issued by the NAFTA state parties in 2001[463].

[458] Mann, H., Glamis Gold Ltd. v. United States of America, in: Bernasconi-Osterwalder/Johnson (eds.), *International Investment Law and Sustainable Development - Key cases from 2000–2010,* 2011, available at http://www.iisd.org/sites/default/files/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf (visited 2 May 2014), pp. 59 et seqq., pp. 62-63.
[459] Metalclad Corporation v. United Mexican States, ICSID Case No. ARB (AF)/97/1, documents available at http://www.italaw.com/cases/671 (visited 2 May 2014).
[460] S.D. Myers, Inc. v. Government of Canada, Uncitral (NAFTA), documents available at http://www.italaw.com/cases/documents/977 (visited 2 May 2014).
[461] Uncitral (NAFTA), documents available at http://italaw.com/cases/documents/865 (visited 2 May 2014).
[462] Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, documents available at http://www.italaw.com/cases/1087 (visited 2 May 2014).
[463] Glamis Gold, Ltd. v. United States of America Award, available at http://www.italaw.com/sites/default/files/case-documents/ita0378.pdf (visited 2 May 2014), para. 542 et seqq.

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