INVESTOR-STATE ARBITRATION BETWEEN DEVELOPED DEMOCRATIC COUNTRIES

ABOUT THE INVESTOR-STATE ARBITRATION PROJECT

Launched in November 2014, this project is addressing a central policy issue of contemporary international investment protection law: is investor-state arbitration (ISA) suitable between developed liberal democratic countries?

The project will seek to establish how many agreements exist or are planned between economically developed liberal democracies. It will review legal and policy reactions to investor-state arbitrations taking place within these countries and summarize the substantive grounds upon which claims are being made and their impact on public policy making by governments.

The project will review, critically assess and critique arguments made in favour and against the growing use of ISA — paying particular attention to Canada, the European Union, Japan, Korea, the United States and Australia, where governments, legal establishments and civil society groups have come out against ISA. The project will examine the arguments that investor-state disputes are best left to the national courts in the subject jurisdiction. It will also examine whether domestic law in the countries examined gives the foreign investor rights of action before the domestic courts against the government equivalent to those provided by contemporary investment protection agreements.

Contributors to the Investor-State Arbitration project are Marc Bungenberg, Charles-Emmanuel Côté, David Gantz, Shotaro Hamamoto, Youmsik Kim, Howard Mann, Csongor István Nagy, Luke Nottage, Ucheora Onwuamaegbu, Carmen Otero, Hugo Perezcano, August Reinisch and David Schneiderman.

AB	Appellate Body
AUSFTA	Australia-United States Free Trade Agreement
BIT	bilateral investment treaty
CETA	Comprehensive Economic Trade Agreement
CIETAC	China International Economic and Trade Arbitration Committee
CJEU	Court of Justice of the European Union
DSU	Dispute Settlement Understanding
ECHR	European Court of Human Rights
FET	fair and equitable treatment
FIPA	Foreign Investment Protection Agreement
FTA	free trade agreement
GATT	General Agreement on Tariffs and Trade
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIA	international investment agreement
IISD	International Institute for Sustainable Development
ISA	investor-state arbitration
ISDS	investor-state dispute settlement
LCIA	London Court of International Arbitration
MAI	Multilateral Agreement on Investment
MFN	most-favoured nation
MNE	multinational enterprise
NAFTA	North American Free Trade Agreement
NT	national treatment
OECD	Organisation for Economic Co-operation and Development
RTA	regional trade agreement
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
TRIMS	Trade Related Investment Measures
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

The basic standards set out in BITs have remained relatively constant since 1959. They include, principally, the standards of most-favoured nation (MFN) and national treatment (NT), a guarantee of fair and equitable treatment (FET) and often also full protection and security. They also include a prohibition against certain forms of performance requirements binding the foreign investor to perform specific obligations as a condition precedent to allowing the investment.[11] Finally, virtually all BITs repeat the public international law prohibition against expropriation of foreign-owned assets unless for a public purpose and accompanied by prompt and effective compensation. These key protections are included in most BITs, but they may be worded in different ways and there is no uniform format for all BITs. Other protections, such as the determination of whether the standards are applied only after the investment is allowed or whether it applies also to the pre-investment phase, may be added according to the policies of the negotiators. What has changed over time is the length and complexity of the BITs. The early so-called gold standard BITs concluded by European governments are seldom more than 10 pages in length and are limited to setting out basic general principles. More recently, for a variety of reasons that will be discussed below, model BITs have become much more extensive, as far as their substantive and procedural provisions are concerned, and set out the principles in much greater detail. They also tend to set out a wide range of exceptions, interpretations and detailed provisions designed to protect the exercise of authority by contracting governments, with the aim of protecting public policies regulating commercial transactions, consumer protection, environmental and health standards and the protection of human rights.[12]

This new approach to drafting has been particularly evident in the context of RTAs subsequent to the conclusion of NAFTA in 1994, and has characterized virtually all RTAs with investment chapters concluded in recent years by the European Union, Canada, the United States and Japan.[13] But the new approach has by no means been restricted to RTAs and has come to characterize many recently concluded BITs of Canada,[14] the United States[15] and Japan,[16] and has clearly been adopted by the European Union since it acquired competence over foreign direct investment matters in 2009.[17] Some states have adopted more radical approaches. Recently, South Africa suggested it would withdraw from many BITs,[18] while Indonesia and India have issued new model BITs for the future[19] and UNCTAD

11 It is noteworthy, however, that the prohibition of performance requirements, which can be described as an innovation of the *North American Free Trade Agreement* (NAFTA), is encountered less often in investment agreements than the other traditional standards of protection.

12 See e.g. Canadian Model FIPA (2004), arts 10, 11, 16 and 17; US Model BIT (2012), arts 12, 13, 18, 20 and 21; Norway Model BIT (2007), arts 24, 25, 26 and 28.

13 See e.g. CETA, *supra* note 5; the TPP's (supra note 7) leaked investment chapter; the investment chapter (Chapter 8) of the *Free Trade Agreement Between Canada and Korea*, 22 September 2014, online: <investmentpolicyhub.unctad.org/IIA/country/35/treaty/3486>; the investment chapter (Chapter 10) of the *Free Trade Agreement Between Canada and Honduras*, 5 November 2013 (entered into force 1 October 2014), online: <investmentpolicyhub.unctad.org/IIA/country/35/treaty/3403>; the investment chapter (Chapter 10) of the *Free Trade Agreement Between the United States and Panama*, 28 June 2007 (entered into force 31 October 2012), online: <investmentpolicyhub.unctad.org/IIA/country/223/treaty/3219>; the investment chapter (Chapter 14) of the *Agreement Between Australia and Japan for an Economic Partnership*, 8 July 2014, online: <investmentpolicyhub.unctad.org/IIA/country/105/treaty/3487>.

14 See e.g. Canada-China BIT (2012), art 33, Benin-Canada BIT (2013), arts 15 and 20 or the Canada-Mali BIT (2014), arts 15 and 17.

15 See e.g. arts 12, 13, 18, 20 and 21 of the Rwanda-United States BIT (2008).

16 See e.g. arts 7, 16, 18, 19 and 21 of the Japan-Korea BIT (2002) or art 25 of the Japan-Ukraine BIT (2015).

17 This approach is most apparent in the recently signed CETA. See also European Commission, *Towards a comprehensive European international investment policy*, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Brussels (7 July 2010), COM (2010) 343 ýnal, online: <trade.ec.europa.eu/doclib/html/147884.htm> and Council of the European Union, *Conclusions on a comprehensive European international investment policy*, 3041st Foreign Affairs Council meeting, Luxembourg (25 October 2010), online: <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf>.

18 South Africa is indeed engaged in the process of terminating several bilateral investment treaties with European countries. For instance, it terminated its BIT with the Belgian-Luxembourg Economic Union, Germany, the Netherlands or Spain. See ñInternational

reports that no less than 45 states are reviewing their BITs. Venezuela, Bolivia and Ecuador have taken the step of withdrawing from the ICSID Convention.[20]

BITs were originally designed to deal with capital transfers between capital-exporting (usually First World) and capital-importing (usually Developing World) countries.[21] Some 1,200 BITs exist between European and developing countries. But today the majority of BITs are concluded on a South-South basis. Until the fall of the Berlin Wall, it was also common for many Western countries to conclude BITs with states in the Communist Bloc.[22] Very few BITs were concluded between developed democracies.[23] One early exception was the Freedom, Commerce and Navigation agreement (known as the FCN) between the United States and Italy, which became the object of the *E S* decision of the International Court of Justice (ICJ).[24] When Canada and the United States concluded an important trade agreement in 1988, it included a groundbreaking investment chapter, but no ISA.[25] However, when Canada, the United States and Mexico negotiated an even more influential trade agreement (NAFTA) in 1994,[26] Part B of Chapter 11 dealing with investments was devoted to ISA in order to deal with problems perceived to exist in Mexico. There is reason to believe that NAFTA began the process of including ISA in the investment chapters of RTAs, which is currently playing itself out with the conclusion of mega-regional RTAs involving developed democracies as well as a variety of other countries.

The European Union constitutes a particularly interesting and complex case, in that it is made up of many of the countries that originated the practice of concluding BITs, such as Germany, France, the Netherlands and the United Kingdom. In 2009, the member states of the European Union took the important step of transferring competence over foreign direct investment to the European Union.[27] This is part of the Common Commercial Policy and is thus, in principle, an exclusive competence of the European Union, although some doubts remain as to the precise ambit of the competence, and the Court of Justice of the European Union (CJEU) has yet to rule on the issue.[28] EU member states have signed some 1,200 BITs with other states and, as a result of the adhesion of the 12 central European states in 2004 and 2006, there are now some 190 BITs between EU member states themselves.[29]

The transfer of competence to the European Union has had the result of forcing the member states and the commission to adopt a new, specifically EU approach to negotiating BITs and investment chapters in RTAs. Some states and observers[30] were of the view that the European Union should continue to negotiate on the basis of the traditional gold standard model of the member states; however, a lively debate quickly arose in the EU Parliament as to the apprehended dangers of the traditional approach

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20 Pursuant to article 71 of the ICSID Convention, the Plurinational State of Bolivia notiýed its intention to withdraw from the ICSID Convention on 2 May 2007, which took effect on 3 November 2007. Similarly, Ecuador submitted the written notice of its withdrawal on 6 July 2009, which became effective on January 2010. Ecuador is also engaged in a global process of withdrawal from several IIAs. (“In 2008, Ecuador terminated nine BITs with Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay. Other denounced BITs include those between El Salvador and Nicaragua, and the Netherlands and the Bolivarian Republic of Venezuela. In 2010, Ecuador’s Constitutional Court declared arbitration provisions of six more BITs (China, Finland [since then the Ecuador-Finland has been terminated], Germany, the UK, Venezuela and United States) to be inconsistent with the countryôs Constitution.ò [UNCTAD, ñDenunciation of the ICSID Convention and BITs: Impact on Investor-State Claimsò, (December 2010) IIA Issues Note No 2, UN Doc UNCTAD/WEB/DIAE/IA/2010/6]). Finally, the World Bank received the Bolivarian Republic of Venezuelaôs written notice of denunciation of the ICSID Convention on 24 January 2012, which took effect on 25 July 2012. Venezuela thus became the third state to withdraw from the ICSID Convention.

21 See Dolzer & Schreuer, *supra* note 10 at 17ff. See also UNCTAD, *World Investment Report 2014: Investing in the SDGs: An Action Plan* (Geneva: United Nations, 2014) at 123, online: <unctad.org/en/PublicationsLibrary/wir2014_en.pdf>.

22 In particular, before NAFTA, Canada mainly entered into BITs with the USSR and several countries of the Soviet Bloc.

23 In this regard, UNCTADôs *2014 World Investment Report* (

and many parliamentarians, inspired by the experience of Canada, the United States and Mexico under NAFTA Chapter 11,[31] argued for a new approach designed to protect the capacity of member states and the European Union to adopt regulatory measures to protect consumers, the environment, public health and human rights without fear of contestation by foreign investors under ISA. Some parliamentarians and governmental ministers in Germany and France[32] have even called for the abandonment of ISA in BITs. As a result of these debates, the commission has adopted an approach based on public policy protection and broad exceptions in its first trade and investment negotiations with Canada[33] and Singapore,[34] and is apparently taking the same approach with India and the United States. This latter negotiation has elicited a particularly strident debate over ISA, with many calling for the abandonment of recourse to ISA in the future TTIP.[35]

The recent debate in the European Union and some of its member states seems to reflect the fact that an increasing number of BITs and RTA investment chapters are being concluded between developed democracies and, as a direct result, the governments of these democracies have been placed in the unfortunate and unexpected position of being sued by foreign investors. During the early years, when Germany, France, the United Kingdom, the Netherlands and others were concluding BITs with developing countries, or even during the 1990s, when UNCTAD was encouraging developing countries to sign BITs with capital-exporting countries as part of the Washington Consensus approach to international development,[36] there was little, if any, contraversy, and certainly none in developed democracies. The BITs were adopted in the developed world virtually without comment and no question was raised publicly or in national parliaments concerning the propriety of ISA as a means of guaranteeing respect for investment treaty commitments.

The first significant change in this pattern occurred in 1994 with the entry into force of NAFTA, a treaty binding two developed democracies with a third party that was a developing democracy. The American and Canadian negotiators apparently considered[37] it necessary to include ISA in NAFTA

Until the mid-part f the twentieth century, judges in a number f c untries, including Canada, sh wed c nsiderable hesitati n in all wing and enf rcing judgments by arbitrat rs. But as a result f legislative interventi n and a change f appr ach, judges in Canada and m st dem cratic c untries accept and enf rce arbitral decisi ns with ut questi n as t their legitimacy. Arbitrati n and ther f rms f alternative dispute res luti n have bec me a valuable, and in s me cases bligat ry, alternative t rec urse t the cr wded c urt d ckets.

One can argue that ISA is a special case in that it inv lves a unique mix f private and public interests. This is a central issue. As recently as 2005, judges f the superi r c urts f K rea expressed seri us reservati ns as t the legitimacy f ISA.[79] But after a peri d f study they appear t have withdrawn their reservati ns. Seni r members f the legal c mmunity in Australia and New Zealand, am ng thers, expressed similar c ncerns in a petiti n in 2012.[80] The current Australian g vernment d es n t appear t share all these reservati ns and has recently c ncluded a trade agreement that includes ISA pr visi ns.[81]

Arguably, the mere fact f mixing public and private interests in an arbitrati n d es n t necessarily make the pr cess illegitimate. Recent decisi ns by the Supreme C urt f the United States have held that c mpetiti n law issues may legally be subjected t arbitrati n between private parties.[82] The CJEU appears t h ld a similar view,[83] as d es the Supreme C urt f Canada.[84] There d es appear t be a devel ping p licy all wing the arbitrati n f an increasing range f public issues in litigati n between private parties. This certainly remains a sensitive issue and s me critics f ISA suggest that it cr sses the line. But if ne c nsiders these arguments in light f the ever-expanding r le f arbitrati n in a great many f rms f litigati n, these arguments f principle against arbitrati n are n w unlikely t prevail.

ISA is cond cted in secret and ISA proced res are generall non-transparent

Arbitration involves the choice of privately selected judges who are authorized to render a legally binding decision. Once invoked, the choice of arbitration is irrevocable. Commercial arbitration almost always takes place in a private and con dential environment. This is thought to be one of the advantages of arbitration, together with ef cacy, speed, lower costs and the right to choose the procedure and applicable law. When ISA was rst established, it was assumed that the proceedings would be private and con dential and that the award need not be made public, absent agreement among the parties. Some arbitral administering organizations such as the London Court of International Arbitration (LCIA),[85] which as of today does not administer ISAs, and the International Chamber of Commerce (ICC),[86] which has administered a relatively small number

to require greater transparency.[89] Thus, many investor-state proceedings continue to be conducted in private, at the behest of the parties.

Many forms of commercial arbitration are indeed conducted in secret and the decisions remain confidential, although they normally have to be made public if a party goes to court to seek enforcement. It is of the nature of commercial arbitration that parties should have the flexibility to choose

chosen from a very small and unrepresentative group who have expertise in law, but no expertise in the broader social, economic or environmental issues of public policy that are often posed in ISA. Particularly disquieting to many is the fact that some, but by no means all, arbitrators also serve as counsel in other cases and may thus be perceived to have a personal interest in accepting or promoting certain arguments over others. In short, there is a perception of systemic or personal bias. More broadly, there is a concern that arbitrators are unprepared or even personally unwilling to deal with the broad policy issues that may be posed in ISA cases and there is a strong feeling that the paradigm of international commercial arbitration is unsuitable for ISA cases that pose public policy

the national treatment and MFN standards are limited so as to protect the right of states to protect public health, the environment, etc.; and

clearer and broader exceptions clauses are written in to protect the right of states to adopt regulatory standards of various kinds.

panel of arbitrators appointed by ICSID member states. It was proposed[106] to change this rather limited and blunt procedure into a genuine appeals process for the entire ICSID Convention. This would have covered a large number of ISA awards and had the potential to bring about a major change in ICSID law. As of 2015, ICSID has administered 70 percent of all ISA arbitrations. The annulment committee process only applies to arbitrations conducted under the ICSID Convention Rules and not under the Additional Facility Rules, so it does not reach all arbitrations administered by ICSID. Unfortunately, there was no support among the broad membership of ICSID; the proposal is currently dormant,[107] but efforts are now under way to revive it. The greatest difficulty will be for any amendment of the ICSID Convention to receive unanimous support in order for it to be implemented.

The creation of an appeals tribunal for all 3,200 BITs and FTAs is an utterly daunting task and would be impossible to achieve. The only way to achieve this would be to revive the Multilateral Agreement on Investment (MAI), which died for want of support in 1998.[108] Another possibility, albeit much more limited, would be the creation of individual appeals processes for major new initiatives such as CETA, the TTIP or the TPP. A further possibility would be the submission of all ISA complaints to a single international court. The likelihood of being adopted is slight.

The establishment of a fixed roster of trusted arbitrators to be chosen to hear all ISA cases is sometimes proposed as a means of enhancing public trust in the ISA process. There are a number of obvious objections, including perceptions of bias against private investors, which make this approach unpalatable.

A further refinement would be a standing roster of arbitrators to serve as judges in a general appeals procedure. This is also an interesting approach but suffers from the difficulties of giving jurisdiction to a single appeals court discussed above.

In conclusion, while a universal court of appeal is an idea that has much to commend it, the practical and political difficulties in the way of its creation may prove to be insuperable.

ISA allows foreign companies to challenge normal domestic regulation

This is perhaps the central and most pervasive criticism that has emerged since the entry into force of NAFTA Chapter 11. Some critics consider that ISA claims constitute a challenge to the right of states to regulate and to make public policy choices. This sentiment has recently been voiced by German officials

fails to meet the standard set by the treaty. A further point that can be made that, at least in democracies subject to the rule of law, claims are made before domestic courts against all kinds of public policy every day of the week. The same German ministers of industry who objects to Vattenfall's arbitral claim as an attaint to German sovereign right to make energy policy, does not appear to see any impropriety in the fact that German nuclear energy companies are complaining about the same measure before the German courts.

The objection, therefore, must be against ISA as a process and not against the right to challenge public policy. Here it must be admitted that a court seems to enjoy a greater degree of legitimacy in the public eye. A good example is the case law of the CJEU concerning the action in damages for serious violations of EU law by member states.[112] In creating the action in damages against member states for serious breaches of EU law, the CJEU took care to balance the rights of those suffering economic loss against the interests of states as economic regulators, something that arbitrators have trouble articulating openly, due to their limited mandate. But, in conclusion, the mere fact of an action in damages based on the abuse of regulatory powers is hardly a novelty in democratic societies.

ISA process and ISA restrains domestic regulator options and threatens environmental, labour and human rights standards: it leads to a 'regulator chill'

The previous criticism frequently takes the form of the allegation that the existence of potential ISA claims acts as a "regulatory chill." This criticism was first advanced in Canada by Howard Mann writing for the IISD[113] and has subsequently been taken up by Gus van Harten in his books[114] as well as Elizabeth May, leader of the Green Party of Canada,[115] and labour unions.[116] Similar criticism, in virtually the same terms, has been voiced in the debates of the European Parliament and by other European public interest groups since the transfer of competence over foreign direct investment to the European Union.[117] In Japan, ISA in the TPP is seen as a threat to the integrity of Japanese agriculture. Similar sentiments have been strongly voiced by the legal community in Australia.[118]

Central to these concerns is the fear that public policies in favour of environmental protection, public health, employment in the public sector, agricultural production policies and human rights standards may be particularly subject to challenge. As a result of this potential challenge, it is alleged that governments and public servants will be reluctant to adopt new regulations in the public interest. Critics point to various challenges to environmental regulations under NAFTA

112 See e.g. *Francovich v Italy and Bonifaci and Others v Italy*, Joined Cases C-6/90 and C-9/90, [1991] ECR I-5357, , online: <eur-lex.

perspective, are the actions currently pending against Spain, allowing from disputes arising out of the cancellation of solar energy supply contracts. These cases are seen as evidence of the dangers of ISA commitments in the face of economic difficulties and their outcome may weigh heavily in the coming policy debate in the European Union.

The expectation regarding ISA claims against developed democracies originally suggested that these states would not be sued at all or would come out the strong winners. The basic paradigm of ISA was created for the protection of foreign investments in developing countries. This picture has grown more complex in recent years, as more agreements provide for ISA between developed democracies.

ISA standards of protection are open to all kinds of abusive interpretation

Another significant criticism of ISA focuses not on the procedure but on the substantive standards of protection set out in various investment treaties such as NAFTA Chapter 11. It is argued that these standards, such as national treatment, most favoured nation treatment, fair and equitable treatment, full protection and security, prohibition of certain "performance requirements" and the prohibition of expropriation without full and prompt compensation, are very difficult to define and are thus subject to overly expansive interpretation. The result of this ambiguity is that it is feared that arbitrators can expand the definitions indefinitely with a view to protecting private interests. In support of this argument, critics point to various decisions under NAFTA Chapter 11 and other treaties interpreting the fair and equitable treatment standard and suggest that it is subject to almost infinite expansion at the discretion of arbitrators. The result of the ambiguity of the substantive rules is that governments can never be sure that their laws and decisions will not be subject to challenge by foreign investors.

Finally, there is the fear that hedge funds or some law firms may seek out potential claims and offer to fund and manage them on a contingency basis, thus increasing the possibility that claims will be made.

A first point that should be made is that arbitrators are bound by their mandate, the law and their professional ethics; they are not permitted to give way to personal prejudices. Furthermore, arbitrators are appointed to the panel to serve the interests of justice, not the interests of the party that nominates them. Any arbitrator who departs from this standard debases the whole process. It may happen, but in the main arbitrators serve with a high degree of professional and ethical conduct. The second point is that observers of ISA should not equate the claim with the final award. Advocates make big claims, but are seldom awarded anything close to their claim when they succeed.[130] There have been some very large awards, but most awards cut the claims down drastically. Claims are made and based on the different standards set out in the BIT they are argued in as strong a manner as possible in the case. In the majority of cases, however, states prevail. Claims are frequently based on the facts, rather than on a forced expansion of the meaning of a standard of protection. Examples under NAFTA include *P T* ,[131] in which the claimant made broad allegations of denial of fair and equitable treatment but received damages only for the abusive behaviour of Canadian civil servants in the conduct of the case. In a later case, *A. . G* ,[132] after extensive inquiry, the tribunal discovered that the claim was based on the fraudulent manipulation of company records. The awards in *E* [133] and *S.D. M* [134] aun2.6 a 10el7

It must be pointed out that a number of NAFTA claims have been abandoned or have not been pursued and will thus be deemed to be abandoned in time.[136] It is one thing to make a claim, in effect to try it on for size; it is quite another to pursue it successfully. The more the arguments are forced and implausible, the less likely they are to succeed. Another factor militating against frivolous claims is their cost. ISA claims are complex matters and require a serious commitment of funds. Contingency

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and virtually all BITs and trade agreements with investment chapters. NAFTA Chapter 11 innovated by covering acts "tantamount to" expropriation.[152] Critics[153] view these provisions as hardening and giving credit to what is seen as an overly onerous and controversial international customary standard. They also consider that the concept of indirect expropriation is far too vague and that its use opens the door to abusive and even frivolous attacks on legitimate domestic regulation. Such claims have been made without success under NAFTA but with greater success in litigation under some other BITs and trade agreements.[154]

A rst p. int t. be made is that restricti. ns. n discrimina. ry and uno. mpensated expr. priati. ns have b. ng been the. bject. f cust. mary internati. nal law. Arguably m. st BITs d. n. t inn. vate with respect t. the general internati. nal pr. hibiti. n. n discrimina. ry and uno. mpensated expr. priati. n. What they d. is pr. vide an internati. nal remedy in arbitrati. n. The essential questi. n is thus whether ISA o. nstitutes a better remedy than nineteenth-century gunb. ats and esp. usal. f claims by states. Critics resp. nd that d. mestic o. urts sh. uld be left t. determine the legality. f expr. priati. n under the law . f each state. Here the best is clearly the enemy . f the g.. d. Experience . ver centuries has sh. wn that there are t.. many situati. ns in which a g. vernment decides t. act unilaterally and f. r a variety . f reas. ns d. es n. t feel o. mpelled . r able t. . ffer pr. mpt and adequate o. mpensati. n. Cust. mary internati. nal law has devel. ped . ver the years t. deal with a genuine pr. blem. BITs . nly add a new legal remedy; they d. n. t create new law. In this area, as in all . f the debate . ver ISA, there are tw. interests: th. se . f states and th. se . f f. reign invest. rs. Devel. ped dem. cratic states themselves are . ften t. rn between tw. imperatives: they d. n. t like being sued, but they wish t. ensure that their citizens investing abr. ad enj. y suitable pr. tecti. n fr. m unfair treatment.

In . ne area, internati. nal investment law may well have c. ntributed t. the emergence . f new law . n expr. priati. n in that it has helped t. f. ster the emergence . f a d. ctrine . f indirect expr. priati. n.[155] The cl. sest anal. gy in d. mestic law (and a clear s. urce . f inspirati. n) is the d. ctrine . f regul. t. ry takings in US c. nstituti. nal law.[156] The c. ncept . f indirect expr. priati. n captures the reality . f situati. ns in which the value . f a f. reign investment is entirely nulli ed by new laws, regulati. ns . r decisi. ns (. r the failure t. take necessary decisi. ns) that make it imp. ssible t. pr. ceed with the investment . nce begun. Capital is sunk and then the bene ts cann. t be realized. Such situati. ns may arise . ut . f c. nfused and dysfuncti. nal decisi. n making, as well as m. re . vert discriminati. n . r the emergence . f new regul. t. ry regimes that have unf. reseen c. nsequences. Charges . f indirect expr. priati. n . ften raise acute questi. ns . f public p. licy and may be met with the defence fr. m the state that it was dealing with a situati. n . f necess7 Tw it i7ed by ntal -hw ip(.y)11192.1 (.)36.8 (arbitrst. ts cay bcapelleupti. r

with ut ISA. The studies d ne by the WTO d n t seem t be c nclusive,[164] and s me recent OECD studies tend t suggest that they may make a marginal difference.[165] The ec n mic case f r ISA between devel ped dem cracies is even harder t make. Vast investments have been made between devel ped dem cracies with ut ever instituting BITs in general r ISA in particular. If devel ped dem cracies d n t institute full ISA between themselves, little is likely t change in the existing pattern f f reign investment between them: trade agreements enhancing access and regulat ry c perati n will d much m re than ISA t pr m te trade and investment ws. The utility f ISA between devel ped dem cracies can nly be argued as a marginally useful phen men n and f r ther p litical and legal reas ns.

ISA ma be a reasonable option in certain de eloped co ntries b t is not appropriate bet een de eloped democracies

A nal argument, heard from time to time, is more selective. It is that while ISA may be useful in relations between developed, capital-exporting and developing, capital-importing states, it has no place in the economic relations between developed democracies. The move toward ISA in NAFTA was taken and the further drift in this direction has been a serious policy mistake. This is a position that appeared to have been adopted by the Government of Australia for some years but now seems to have been abandoned.

It sh uld be admitted that ISA is n t the primary g al between devel ped dem cracies: market access f r g ds, services and investments is far m re signi cant an bjective than securing ISA between them. This being said, there are de nitely situati ns arising in devel ped dem cracies where a law r administrative decisi ns can be ad pted against which there are n remedies, as happened in the New undland B water expr priati n. Certain p licies, such as the US Buy American rules, can be imp ssible t challenge bef re d mestic c urts. Parliamentary supremacy in the United Kingd m, Canada, Australia, New Zealand, and even in the United States, can pr vide c ver f r the ad pti n f laws against which there is n adequate d mestic remedy. This is perhaps less true f r EU law and Germany but even Germany has except ns in which f reign inves rs w uld have t uble challenging a d mestic law vi lating the standards f a BIT. This seems t be true f r m st EU member states.[166] P st-c mmunist c untries f the Eur pean Uni n c ntinue t have pr blems, either with new laws such as th se curtailing the interest rates n m rtgages den minated in f reign currency, r administrati n f laws f r d mestic p litical purp ses, as in the Czech Republic.[167] The administrati n f justice is n t th ught t be f the highest standard in Bulgaria and R mania.[168] T the extent that this can still happen, causing pr blems f r f reign inves rs, rec urse t ISA is arguably justi ed.

The mere fact that g vernmental p licies are challenged in ISA is surely f itself n t a reas n t reject it; g vernments may n t like t have their p licies challenged under ISA but this happens in d mestic administrative law and c nstituti nal law and EU law pr ceedings every day f the week and they live

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164 See Axel Berger, Berger " Berger ger Mk ʎ l ᴰ ger, ger! Mk

with it. Is there really a difference due to the recourse to arbitration instead of courts? Many US FTAs posit that they do not grant rights exceeding those available under domestic law.[169] So long as this is generally true, and so long as arbitration is accepted as a genuine alternative to courts, is there really a tenable argument in principle?

There is a further major argument advanced in support of recourse to ISA between developed democracies: what would result if all developed democracies decided to follow Australia? Can there be one law for a few and another for most states? How would China respond to being designated as risky while Norway is not? Would this not destroy the whole edifice of BITs? Some might welcome this result, outmmXJ0.0Tc tXEFF0Tw TXhe whoh ng6membgpmna result, o(ecight welcom. Sinar haurc)XJ0 w TXt

It should be noted that the Canadian and US model BITs, for some time, as well as several recently concluded RTAs of the European Union, contain references to the creation of an appellate court at some point in the future, but no concrete steps have been taken.

Set up a Single ISA Court

One step toward a genuine appellate process that may be contemplated is the amendment of the ICSID Convention to change the existing ad hoc annulment committee process into an appeal or reference process. This could only be done by treaty amendment. The ICSID Secretariat dated this idea in 2004-2005.[175] Unfortunately, there was virtually no support among ICSID parties and the idea was dropped. Perhaps it is time to revive the idea, as it is the surest way toward adding an appellate or reference process that would apply to a significant proportion of all ISA cases. It cannot be said as yet that there is a groundswell of support but amendment of the ICSID Convention has the potential to provide an appeals process for a very large number of ISA awards.

Establish a Standing, Closed Roster of Arbitrators

It is sometimes argued that if states came together to name a small roster of highly quali ed arbitrators from whose number all ISA arbitrators would be chosen, there would be much greater public con dence in the decisions rendered by panels of these arbitrators, rather than awards by individually selected arbitrators.

Arbitrators for the ICSID ad hoc committee are chosen from a relatively small group of very experienced and respected arbitrators and it has been suggested by some commentators that an appeals process might be founded on a roster of arbitrators rather than an appeals court. This proposal suffers from all the same dif culties as the creation of a standing appeals tribunal.

The concept of a standing, closed roster of arbitrators is also suggested as a partial answer to the question of public con dence in the ISA process. It is suggested that public con dence would be raised if all ISA arbitrations were decided by arbitrators chosen in advance by states from among a roster of arbitrators who could be trusted to understand the signi cance of their mandate to rule on both private and public interests. Like many of the suggestions from critics of the ISA system, this proposal is one

applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.

Finally, several provisions codify the various principles of transparent and open proceedings that they both defend within their own judicial systems and internationally.[194]

The net effect of these provisions, some entirely new, others expanding on NAFTA provisions or taken from model BITs, is to provide extensive protection, if not sometimes total exemption, of a range of regulatory measures and policies. It must be noted that some of these exemptions and interpretations rely on provisions outside the investment chapter.

Subject to the interpretative pitfalls alluded to above, the decision to expand the scope of explicit exemptions and clari cations is understandable. In the face of the NAFTA case experience, and in the face of public criticism of the ISA process, this approach constitutes the most effective response readily available to both parties.

In resp nse t these criticisms, it may be said that the exempti ns and excepti ns are s pervasive and c mplex that ne must ask whether there is a risk that they may be self-defeating. The early BITs were n m re than 10 pages in length, ften sh rter. The Canadian FIPA, n which this is m delled, is 45 pages in length. CETA Chapter 10 has 38 pages and is supplemented by pr visi ns el n,i2C2length. Chapted is

be envisaged if devel ped dem cracies were willing t pay the price. Bilateral c mmitments t ISA between devel ped dem cracies are n t yet numer us, if ne assumes that the Eur pean C mmissi n will succeed in its quest t have EU member states aband n their 190 BITs with each ther, inherited fr m days bef re the adhesi n f Eastern Eur pean states t the Eur pean Uni n. Canada is planning t aband n its BITs with several EU states when CETA enters int f rce. But the pr blem f RTAs and the Energy Charter is much m re seri us. ISA pr visi ns in the Energy Charter have been used m re than any ther ISA pr cedure. They have been used nly twice against Germany but have been inv ked against several ther EU member states and by EU member states. This is n t a treaty that the Eur pean Uni n can safely c mpr mise.

Further c mplicating the situati n is the fact that ISA is part f the CETA and EU-Singap re trade agreements. W uld Canada agree t withdraw the ISA pr visi ns fr m CETA at the last minute? Is Singap re a devel ped dem cracy in the eyes f the Eur pean Uni n and, if it is, h w w uld Singap re resp nd t the idea f eliminating its ISA pr tecn1 sta720061006C is, h w w uld ca Tw T(Eur)18 (pean UI Evainst

e Centre for International Governance Innovation is an independent, non-partisan think tank on international governance. Led by experienced practitioners and distinguished academics, CIGI supports research, forms networks, advances policy debate and generates ideas for multilateral governance improvements. Conducting an active agenda of research, events and