PANEL 4

Investment Treaties and Arbitration: Should We Seek a Different Way to Settle Disputes Between States and Investors?

READINGS:

1. **Julie BédardTimothy G. NelsonJennifer Permesly, "Mexico Signs ICSID Convention", January 16, 2018.**
2. **Karl P. Sauvant, "Promoting sustainable FDI through international investment agreements", Columbia FDI Perspectives, 2019.**
3. **Andrew Kerner, 'What Can We Really Know about BITs and FDI?', in Meg Kinnear and Campbell McLachlan (eds), ICSID Review - Foreign Investment Law Journal, (© The Author(s); Oxford University Press 2018, Volume 33 Issue 1) pp. 1 – 13.**
4. **Seung-Woon Lee, 'ISDS Reform: Analysis on Establishing a Multilateral Investment Court System', in Stavros Brekoulakis (ed), Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, (© Kluwer Law International; Kluwer Law International 2021, Volume 87 Issue 4) pp. 484 – 506.**
5. **Andrea Carska-Sheppard, 'Issues Relevant to the Termination of Bilateral Investment Treaties', Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2009, Volume 26 Issue 6) pp. 755 – 771.**
6. **Gordon Nardell and Laura Rees-Evans, 'The agreement terminating intra-EU BITs: are its provisions on 'New' and 'Pending' Arbitration Proceedings compatible with investors' fundamental rights?', in William W. Park (ed), Arbitration International, (© The Author(s); Oxford University Press 2021, Volume 37 Issue 1) pp. 197 – 237.**
7. **Gustavo Adolfo Guarin Duque, 'The Termination Agreement of Intra-EU Bilateral Investment Treaties: A Spaghetti-Bowl with Fewer Ingredients and More Questions', in Maxi Scherer (ed), Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2020, Volume 37 Issue 6) pp. 797 – 826.**
8. **Patrick W. Pearsall, "The Role of the State and the ISDS Trinity", in "Introduction to the Symposium on Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law,' and Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration'.", American Journal of International Law, 2018.**
9. **Kabir Duggal and Laurens Hubert van de Ven, 'The 2019 Netherlands Model BIT: riding the new investment treaty waves', in William W. Park (ed), Arbitration International, (© The Author(s); Oxford University Press 2019, Volume 35 Issue 3) pp. 347 – 374.**
10. **Victoria Shannon Sahani, 'A Thought-Experiment Regarding Access to Justice in International Arbitration', in Jean Engelmayer Kalicki and Mohamed Abdel Raouf (eds), Evolution and Adaptation: The Future of International Arbitration, ICCA Congress Series, Volume 20 (© Kluwer Law International; International Council for Commercial Arbitration/Kluwer Law International 2019) pp. 504 – 519.**
11. **Duarte Gorjão Henriques and Avani Agarwal, 'Chapter 15: Access to Justice and the Costs of ICSID', in Leonardo V. P. de Oliveira and Sara Hourani (eds), Access to Justice in Arbitration: Concept, Context and Practice, (© Kluwer Law International; Kluwer Law International 2020) pp. 319 – 332.**

Skadden

Mexico Signs ICSID Convention

January 16, 2018

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On January 11, 2018, Mexico became the 162nd country to sign the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Convention).

The ICSID Convention, which entered into force in 1966, is a multilateral treaty formed under the auspices of the World Bank designed to facilitate investments among countries by providing an independent, nonpolitical forum for the resolution of disputes arising out of those investments. The International Centre for Settlement of Investment Dispute (ICSID or the Centre) administers international arbitrations and conciliation procedures for “any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”[1] In most cases, states have made themselves amenable to ICSID arbitration (in terms of the treaty, expressed "consent" to ICSID jurisdiction) by agreeing to ICSID arbitration in the text of bilateral investment treaties (BITs) or the investment chapters of free trade agreements. In some other instances, states have entered contracts with ICSID arbitration clauses, or enacted "foreign investment laws" providing for ICSID arbitration of foreign investor claims.

In a typical case, a BIT will provide assurances to investors from a particular home state that seek to invest in the host state — *i.e.*, it will state there will be no expropriation of investments except upon payment of prompt, adequate and effective compensation, and/or that investors will be treated fairly and equitably. If the state violates these assurances, the investor can bring arbitration against it in a designated forum such as ICSID, and (if its claims are upheld) the investor will be entitled to damages. Investor-state arbitral claims, including under the ICSID

Convention, are typically adjudicated before a three-person arbitral tribunal in an neutral venue.[2]

Arbitration under the ICSID Convention has several noteworthy and potentially advantageous features, including that ICSID arbitral awards have the status of a final judgment in the domestic courts of all ICSID member states — meaning that recognition or enforcement of an ICSID award is not subject to the grounds available to resist recognition and enforcement under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[3] This places ICSID Convention awards outside the review of national courts — instead, ICSID awards are subject to limited review by *ad hoc* "annulment" committees established under the ICSID Convention.[4]

Mexico has long been proactive in seeking to attract foreign investment, notably through the ratification of 29 bilateral investment treaties and 15 other international agreements containing investment provisions, including the investment chapter of the North American Free Trade Agreement (NAFTA). A majority of these treaties contain an arbitration clause designating arbitration under ICSID Convention or, alternatively, other systems such as the ICSID Additional Facility or UNCITRAL Arbitration Rules. Indeed, since 2000, there have been a number of significant investment disputes brought against Mexico, including under Chapter XI of NAFTA, and these have led, in some cases, to significant damages awards against Mexico in cases where an investor was treated unfairly.[5]

Because Mexico had not signed or ratified the Convention, however, investment disputes involving Mexico could not be arbitrated under the ICSID Convention. As a consequence, arbitration cases against Mexico (brought under UNCITRAL Arbitration Rules or ICSID Additional Facility Rules) were subject to review and enforcement before national courts and could be challenged in the courts of the "seat" of arbitration, on the same grounds as would have applied to commercial arbitration awards venued in those places. For example: (i) in 2001 the British Columbia courts partially overturned a NAFTA award rendered against Mexico for supposed excess of power by the arbitral tribunal, finding its annulment power in the fact that the NAFTA tribunal had been "seated" in Vancouver[6]; and (ii) in 2007, an investor who had *lost* a claim against Mexico sought (ultimately unsuccessfully) to overcome this result by bringing a petition for vacatur before the courts of Washington, D.C., pursuant to the vacatur provisions of the U.S. Federal Arbitration Act.[7] Had the ICSID Convention applied to those arbitrations, the national courts would not have had this power.

The converse is also true: Mexican investors seeking relief against other states for violation of their own investment rights (to the extent they are contained in BITs or free trade agreements

executed by Mexico) have, to date, been unable to reap the advantages of the ICSID Convention.[8]

At this point, Mexico has merely acceded to the ICSID Convention. To be fully bound by it, it needs to ratify the Convention, which will require the approval of the Mexican Senate. Once ratified, the ICSID Convention will come into force *vis-à-vis* Mexico 30 days after the deposit of its instrument of ratification, acceptance or approval.[9] In the meantime, the arbitration avenues already designated under applicable treaties or contracts remain available to foreign investors who may wish to bring investor-state claims against Mexico. Additionally, Mexico's accession to the ICSID Convention will not affect the substantive investment protection standards that already apply in Mexico by virtue of the bilateral and multilateral treaties currently in force — rather, it will only provide an additional pathway for investors to seek redress for any breaches of these standards.

Mexico's signing of the ICSID Convention may be driven in part by the renegotiations of NAFTA, which have created uncertainty as to NAFTA's future, including the continued existence of the investor-state arbitration mechanism available under NAFTA, which has been criticized by the United States negotiating team.[10] Mexico's accession to the ICSID Convention will open another avenue for investors to settle their investment disputes with Mexico — and for Mexican investors to exercise their own investment rights — under the distinctive legal and procedural framework of the ICSID Convention and the ICSID Arbitration Rules, and signifies Mexico's continued commitment to attracting foreign investment.

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1 ICSID Convention, art. 25(1).

2 *I.e.*, the investor picks one arbitrator, the respondent state picks another and a third arbitrator is appointed either by agreement or by an institution. In arbitration under the ICSID Convention, "default" appointments are made from a list of arbitrators held by the ICSID secretary-general.

3 ICSID Convention, arts. 53-55.

4 *See* ICSID Convention, arts. 50-52; ICSID Arbitration Rules 50-55.

5 *See, e.g., Gemplus S.A. v. Mexico; Talsud S.A. v. Mexico*, Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award (ICSID 2010) (awarding damages against Mexico for breach of the fair and equitable treatment guarantees of the France-Mexico BIT and Argentina-Mexico BIT, after

the state cancelled a vehicle registration concession); *Técnicas Medioambientales Tecmed S.A. v. Mexico*, No. ARB(AF)/00/2, Award (ICSID 2003) (awarding damages against Mexico under the Spain-Mexico BIT for expropriation and unfair treatment of a landfill owned by a U.S. investor); *Metalclad Corp. v. Mexico*, No. ARB(AF)/97/1, Award (ICSID 2000) (awarding damages against Mexico for failure to provide fair and equitable treatment under NAFTA to a U.S. investor in a hazardous waste transfer center).

6 *The United Mexican States v. Metalclad Corporation*, Decision of the Supreme Court of British Columbia on the challenge by the petitioner, The United Mexican States, of the Arbitration Award issued on August 30, 2000, 2001 BCSC 664 (May 2, 2001).

7 *In re: Arbitration between International Thunderbird Gaming Corporation and the United Mexican States*, 473 F. Supp. 2d 80 (D.C. Dist. 2007).

8 In some instances, investors (including Mexican investors) have been able to take advantage of investment treaties signed by other countries that, by their explicit terms, protect companies incorporated in those countries (such as The Netherlands), regardless of where those companies' shareholders are located.

9 ICSID Convention, art. 68(2).

10 For more information on this issue, see our July 31, 2017, client alert titled "What to Expect From NAFTA Renegotiations" and December 2017 *Latin America Dispute Resolution Update*.

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Perspectives on topical foreign direct investment issues

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Promoting sustainable FDI through international investment agreements*

by

Karl P. Sauvant**

The Washington Consensus promoted the liberalization of inward FDI regimes as a tool to advance development. Accordingly, governments have sought to attract as much FDI as possible, focusing on the quantity rather than the quality of FDI.

This strategy is becoming progressively more nuanced. While countries continue to seek to attract FDI in general, increasingly they focus on FDI that they consider particularly desirable for their economic development. While this is not new—many governments have targeted specific types of FDI in the past—a broader debate on how to define, and seek, quality investment is now underway. Indeed, even OECD members are discussing "FDI qualities", and linking it to the concept of "sustainable FDI": "commercially viable investment that makes a maximum contribution to the economic, social and environmental development of host countries and takes place in the framework of fair governance mechanisms."[1]

Promoting sustainable FDI is particularly important, considering that the UN's sustainable development goals (SDGs) have become the lodestar of international economic policy, and FDI can contribute to closing the SDG financing gap.

That FDI must contribute to host countries' development is not new in international investment relations. Apart from referring to the protection of investors—which remains the focus of international investment agreements (IIAs)—the preambles of a growing number of agreements include specific references to sustainable development,[2] and some IIAs now contain specific provisions in this respect.[3] This is a beginning. The pressing challenge is to operationalize and firmly anchor this objective in the text of these treaties and their application, so that investment has indeed a substantial sustainable development impact. Options include:

- The *Salini* criteria, sometimes used to define "investment" for the application of IIAs, can be a starting point.[4] While four of the *Salini* criteria are gaining acceptance (duration, substantial commitment of capital or other resources, expectation of gain or profit, assumption of risk), the fifth—contribution to the economic development of the host country—has received less attention. Moreover, accepting the *Salini* criteria is a matter for tribunals' discretion; also, the criteria have been elaborated in relation to the ICSID Convention, and do not necessarily come into play in arbitrations conducted under other procedural rules. Still, they offer an entry point for tribunals that recognize the need for investment to contribute to sustainable development.

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- Beyond application, IIAs have generally been hesitant about requiring that covered investment must contribute to the development of host countries. This could indicate a hesitation to narrow IIAs' protections, linked perhaps to uncertainty about the interpretation of what constitutes such a contribution. However, governments have indicated in many instruments the contributions they expect from investors, and investors have identified in many instruments the contributions they seek to make to host countries' sustainable development—and there is considerable overlap concerning such "sustainable FDI characteristics".[5]

- IIAs could define "investment" explicitly by reference to the five *Salini* criteria—clarifying what investments would qualify as sustainable investment (or tribunals would have to do so). This, too, is tricky: the term "sustainable investment" is open to interpretation, but the sustainable FDI characteristics could help provide a way forward.

- IIAs could allow governments to deny protection to investments that fall short of the sustainable investment definition, through a denial-of-benefits clause.

- IIAs could allow governments to grant preferential treatment to investment that has certain sustainability characteristics (similar to using targeted incentives to invest in renewable energy), permit sustainability exceptions, make sustainability characteristics part of the "like circumstances" analysis for national treatment,[6] or focus investment facilitation preferentially on such investment. The last approach is particularly relevant, given the WTO's structured discussion on investment facilitation for development.

- Finally, incorporating binding references to corporate social responsibility (CSR) in IIAs can advance sustainable investment. References to such international CSR instruments as the OECD Guidelines for Multinational Enterprises import into treaties widely accepted provisions that encourage sustainable investment (relating to, e.g., environmental management, technology transfer, local capacity building). IIAs have begun to do so in the preambles and/or texts of treaties. For example, CETA's Preamble encourages enterprises operating within the territory of the contracting parties or subject to their jurisdiction to respect internationally recognized CSR standards, including the OECD Guidelines. While often incorporated as soft law references to date, a growing body of work aims at expanding these references to hard law (in IIAs, domestic laws and international contracts), to enhance their impact. This CSR approach reflects a broader reorientation of IIAs, toward recognizing the responsibilities of investors in general.

Governments are intensifying efforts to attract sustainable investment. Operational IIA provisions favoring sustainable investment for sustainable development would support these efforts—to help achieve the SDGs.

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[1] Karl P. Sauvant and Howard Mann, "Towards an indicative list of FDI sustainability characteristics" (Geneva: ICTSD and WEF, 2017), p. 2.

[2] Kathryn Gordon et al., "Investment treaty law, sustainable development and responsible business conduct", *Columbia FDI Perspectives*, no. 157, September 28, 2015.

[3] For example, the Morocco-Nigeria BIT.

[4] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco,* ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52.

[5] Sauvant and Mann, op. cit.

[6] See the Pan-African Investment Code approach.

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哥伦比亚国际投资展望

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FDI 热点问题的观点

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通过国际投资协定以促进可持续型 FDI[*]

Karl P. Sauvant[**]

“华盛顿共识”促进了 FDI 流入制度的自由化，并将其作为促进发展的工具。因此，各国政府一直试图吸引尽可能多的 FDI，并将重点放在了 FDI 的数量而不是质量上。

这种策略正在变得越来越微妙。虽然各国都继续寻求吸引 FDI，但越来越多的国家将重点放在了他们认为有益于其经济发展的 FDI 上。虽然这不是新的现象——许多政府在过去都有针对特定类型 FDI 的政策——一场关于如何界定和寻求优质投资的辩论正在广泛兴起。实际上，甚至经合组织成员国也在讨论“FDI 质量”，并将其与“可持续型 FDI”的概念相联系：“为东道国的经济、社会和环境发展作出最大贡献的、商业上可行的投资，并符合公平治理机制的要求。”[1]

考虑到联合国的可持续发展目标（SDG）已经成为了国际经济政策的标志，FDI 有助于缩小可持续发展目标的融资缺口，且促进可持续型 FDI 在这一过程中显得尤为重要。

‘FDI 必须促进东道国的发展’之类的观点在国际投资关系中并不新鲜。除了提到投资者的保护——这仍然是国际投资协定（IIAs）的重点——越来越多协议的前言具体提及可持续发展[2]，且一些国际投资协定现在包含了该方面的具体规定[3]。 这是一个开始。我们所面临的迫切挑战是将这一目标落实并牢固地纳入这些条约的文本及应用中，以便投资确实产生实质性的可持续发展影响。可能的选项包括：

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- 萨里尼标准（Salini Criteria），有时被用于定义国际投资协定应用中的“投资”，可以作为一个起点[4]。虽然萨里尼的四项标准正在获得认可（持续时间、资本或其他资源的实质承诺、对收益或利润的预期和承担风险），但对东道国经济发展的第五项贡献却较少受到关注。此外，是否接受萨里尼标准由法庭自行决定；同时，有关 ICSID 公约的标准已经制定，尽管并不一定在根据其他程序规则进行的仲裁中发挥作用。尽管如此，它们仍为法庭提供了一个切入点，即承认投资需要为可持续发展做出贡献。

- 除了实际应用之外，国际投资协定一直在是否要求所涵盖的投资必须有助于东道国的发展这一问题上犹豫不决。这可能表明了对缩小国际投资协议保护范围的犹豫不决，而这种犹豫可能与对这种贡献构成的解释的不确定性有关。然而，各国政府已在许多文书中表明了他们对投资者的期望，而投资者也已通过各种渠道阐明了他们想要为东道国的可持续发展所做的贡献——而且这种“可持续型 FDI 的特征”[5]存在高度的重叠。

- 国际投资协定可以参照五个萨利尼标准来明确地界定“投资”——澄清哪些投资符合可持续投资的要求（或法庭必须这样做）。这也是棘手的：“可持续投资”一词可以有不同的解释，但可持续型 FDI 的特征可以提供前进的方向。

- 国际投资协定可以允许政府通过拒绝受益条款来拒绝不符合可持续型投资定义的投资提供保护。

- 国际投资协定可以允许政府对具有某些可持续性特征的投资给予优惠待遇（类似于对可再生能源投资使用有针对性的激励措施）、允许可持续性例外、使可持续性特征成为国民待遇的“类似情况”分析的一部分[6]，或重点关注投资便利化并优先考虑此类投资。鉴于世贸组织关于投资促进发展的结构性讨论，最后一种方法尤为重要。

- 最后，在国际投资协定中纳入对企业社会责任（CSR）的约束性参考可以促进可持续投资。诸如《经合组织跨国企业指南》等国际企业社会责任文书将广泛接受的鼓励可持续投资的条款（涉及环境管理、技术转让、地方能力建设等）引入国际投资协定之中。国际投资协定已经开始在条约的序言和/或文本中这样做。例如，CETA 的序言鼓励在缔约方领土内或在其管辖范围内运营的企业遵守国际公认的企业社会责任标准，包括经合组织准则。虽然迄今为止这些通常作为软法引用，但越来越多的工作旨在扩大这些对硬法（在国际投资协定、国内法和国际合同中）的提法，以增强其影响。这种企业社会责任方法反映了对国际投资协定的更为广泛的重新定位，以便承认投资者的责任。

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各国政府正在加紧努力以吸引可持续型投资。有利于可持续发展的可持续投资的国际投资协定条款将支持这些努力——帮助实现可持续发展目标。

（南开大学国经所赵泽堃 译）

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[1] Karl P. Sauvant and Howard Mann, "Towards an indicative list of FDI sustainability characteristics" (Geneva: ICTSD and WEF, 2017), p. 2.

[2] Kathryn Gordon et al., "Investment treaty law, sustainable development and responsible business conduct", *Columbia FDI Perspectives*, no. 157, September 28, 2015.

[3] 例如 Morocco-Nigeria BIT.

[4] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco,* ICSID Case No. ARB/00/4, *Decision on Jurisdiction, 23 July 2001*, para. 52.

[5] Sauvant 和 Mann，同上。

[6] 详情可参见 Pan-African Investment Code.

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What Can We Really Know about BITs and FDI?

Andrew Kerner

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ABSTRACT

Political scientists, economists, legal scholars and others write widely on Bilateral Investment Treaties (BITs). A central (and ongoing) debate in the literature is an empirical question of whether or not BITs 'work.' Do BITs catalyze investments into the capital importing countries that sign them? In this article I make the case that one likely driver of the literature's inability to come to a firm conclusion on this matter is that the FDI flow data typically used in it are poorly suited to the task. To make that case I note various ways in which those data are (a) poorly measured, and (b) poorly suited to the question even if they were measured well.

1. INTRODUCTION

Political scientists, economists, legal scholars and others have written widely on Bilateral Investment Treaties (BITs). [(2)] BITs, as readers of the *ICSID Review*are surely aware, are treaties between two countries establishing for foreign direct investors a set of legal rights covering investments flowing from one signatory country to the other. Importantly, BITs typically allow those investors recourse to investor-state dispute settlement (ISDS) in the event that those treaty-defined rights are violated. For capital importing countries BITs represent a tradeoff: states give up a degree of policy autonomy, and do so in the hope it catalyzes foreign direct investment (FDI) by credibly assuring direct investors that their long term, illiquid investments will not be undermined by adverse policy actions in the future.

Academia's fascination with BITs is well grounded. BITs are an important part of the legal architecture underpinning global FDI, and an increasingly controversial one at that. We *should* know as much about these treaties as we can. But even apart from their substantive importance, BITs pose a series of interesting questions about the politics of international economics. To list a few:
P 2

•Why are some governments but not others willing to expose their countries to potential litigation in order to attract more FDI? Why is that tradeoff more popular at some times than others? [(3)]

•What are the economic implications of being sued under ISDS? [(4)]

•What drives variation in BIT design, and what are the consequences of that variation? [(5)]

•Do BITs complement existing domestic political institutions, or do they substitute for them? [(6)]

But above all else, academic work on BITs asks a simple empirical question: Do BITs catalyze investments into the capital importing (ie developing) countries that sign them? [(7)] In other words: Do BITs work? The answer to that question is of more than 'just' academic interest; it is also of obvious interest to the trade and investment professionals who must decide whether or not to pursue BITs as a tool for FDI promotion. Catalyzing inward FDI flows is not the only rationale for signing BITs, but the case for signing them (and especially for subjecting the state to ISDS) is substantially stronger if doing so can reasonably be expected to deliver economic benefits.

Whether BITs work is a simple enough question to ask, but a surprisingly difficult one to answer. Social scientists have been unable to reach widely accepted conclusions. Indeed, that inability has become one of literature's defining features. So much so that it is almost a cliché for contributions to this literature to be framed explicitly around settling debates stemming from 'mixed results,' turning
P 3
those mixed results themselves into of object of academic curiosity; somewhat apart from the underlying phenomenon which they cannot quite seem to get a clear picture of. [(8)]

Multiple issues contribute to our inability as a field to come to a firm conclusion about BITs' effects. [(9)] This paper focuses on one of those: empirically testing theories of BITs effects on MNC behavior invariably requires a quantification of that behavior, and the FDI flow data typically used are unsuitable for the task. That may sound like a cheap critique: virtually all non-trivial macroeconomic data are at least slightly ill suited for social scientific purposes, and yet the vast majority of those necessarily imperfect data can nonetheless be used to generate reliable estimates of socio-economic processes. [(10)] But the problems that FDI flows data pose to the accumulation of reliable knowledge about BITs effects are especially substantial, and it is important that they be better understood within academic and practitioner communities alike. [(11)]

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This article describes why FDI flow data are poorly designed to test most theories relating to BITs, and does so from the perspective of empirical social science. It is not an exhaustive cataloging of the various imperfections of FDI flow data, but rather a contextualization of some of those imperfections in a broader framework about measurement error and it effects on quantitative empirical social science. In doing so, this article sets out to do three things, with each 'task' occupying its own section. Section II describes what makes macroeconomic data useful or not for social scientific purposes, without any specific references to FDI data. The briefly stated lesson from that section is that macroeconomic data need not be perfect to be useful—which is good, because a large portion of empirical social science would otherwise be rendered impossible—but that some categories
P 4
of imperfections are more tolerable than others. Section III describes what FDI flow data measure, and how these data and their application to the study of BITs relate to the previously described concepts. Suffice it here to say that I argue that FDI flow data fall into the 'less tolerably imperfect' category. Section IV asks what, if anything, can be done to produce reliable knowledge and to interpret existing data in more fruitful ways.

II. WHAT DO SOCIAL SCIENTISTS WANT OUT OF MACROECONOMIC DATA?

Macroeconomic statistics are an unavoidable tool for empirical research in wide swathes of political science, economics, sociology and other fields invested in what can broadly be termed 'political economy' relationships. To know if a policy intervention or social attribute causes growth, we need some measure of growth. To know if a set of treaties or institutions promotes trade, we need some measure of trade volumes. And so on. To be sure, there has been innovation in these fields to get beyond reliance these data (12) , but for many important questions they are unavoidable and will remain so.

The ubiquity of these data belies the difficulty and expense of generating reliable macroeconomic data suitable for making cross-national comparisons, and even more so the difficulty of doing so in a developing country context. The data that we rely on are inevitably imperfect, and sometimes wildly so. (13) That is not a new revelation: these imperfections have long been known in academic and policy circles—going back at least to Morgenstern. (14) However, the perfect need not be the enemy of the good. Imperfect data can be used to build up reliable social scientific knowledge. What is important is not whether the data are imperfect but in what ways. To that end, we can broadly categorize data imperfections as those that would generate 'noise' in a regression context, and those that would generate 'bias.'

A. *Noise*

Virtually all non-trivial economic data are subject to some degree of measurement error. To illustrate with an example, consider that macroeconomic statistics are often built on raw data derived from surveys of representative samples of firms. Some of those surveys will contain errors. Perhaps an accountant was sleepy and mistyped a numeral on the survey, or misunderstood which quantities the survey was requesting. Perhaps the modeling assumptions used to generate the
P 5
representative sample were flawed in some way, and the sample of surveyed firms was unrepresentative of the broader population. The result of these inevitable errors is measurement error.

In more exact terms, we can think of any particular data point **Y*** as decomposable into the true value **Y** plus some error component **I**. Perhaps **Y** represents the actual but unobservable rate of fixed capital formation, while **Y*** represents the observable but slightly inaccurate version of that statistic, which in this case rendered inaccurate by the sleep-deprived accountant. While sleep deprived accountants might not be entirely random, the resulting imprecision very likely is. As long as sleep-deprived accountants are as likely to mistakenly replace a larger numeral for a smaller one, and vice-versa, the average value of **I** should be 0 and the consequent measurement error is essentially 'noise.' The more significant the gap between **Y** and **Y***, the 'noisier' is the data. But even in noisy data the mean value of **Y*** in large samples should converge towards **Y**. The dispersion of data around the mean is likely over-estimated, but not biased in one direction or another.

Regressions that use noisy data produce imprecise estimates of the mis-measured variables' relationships to other variables. (15) The result is an increased probability of a false negative (a so-called type II error), wherein the researcher has posited an accurate theory but the data are so imprecise that they fail to produce convincing evidence of it. False negatives undermine the accumulation of social scientific knowledge. But as long as consumers of social scientific findings

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constrain the instinct to over-interpret null findings, they are not misleading. Empirical social science can and does live with a fairly significant degree of random measurement error. If anything, random measurement error can have a conservatizing effect, making it harder to find evidence of weaker relationships. A relationship that consistently reveals itself *despite* imperfectly measured data is likely a strong relationship.

B. *Bias*

A more threatening consequence of imprecisely measured data is bias. Bias occurs when the error component in a piece of data is systematic, rather than random. To illustrate, reconsider the above-noted parable of the sleepy accountant generating random measurement error by putting typos in firm surveys. In this reconsideration the errors are non-random. Some firms' surveys are inaccurate because well-rested accountants had an incentive to underreport certain activities. And consider further the possibility that those incentives are indicative of political or economic conditions that exist in some countries but not others. That would results in non-random measurement error, and a biased measure.

Put differently: the average gap between **Y** and **Y***—**I**—in the above scenario is negative, not zero. The mean value of **Y*** in large samples of data subject to non-random measurement error will not converge towards **Y**. Moreover, the average value of **I** is not uniform. Rather, **I** is systematically more negative in countries whose political-economic environments encourage underreporting.
P 6

Regressions using biased measures can produce biased results. Consider the possibility that you wanted to measure the effect of 'law and order' on economic outcome **Y**. If the absence of 'law and order' is, or is correlated with, the qualities that lead to underreporting, regressions using the observable **Y*** as a proxy for **Y** will produce coefficient estimates that are biased upward. That is, even if there is no actual relationship between 'law and order' and **Y**, the positive relationship between 'law and order' and **I** (and thus **Y***) will generate the appearance of one in the regressions. If the true relationship between 'law and order' and **Y** is negative, the systematic measurement error in **Y*** would bias coefficient estimates upwards towards 0 and possibly higher. That sort of error (a so-called type I error) is serious, and renders the use of the data more problematic.

The above discussion assumes that measurement error stems from an inability to perfectly measure complex concepts. That is an important source of measurement error, but it is not the only one. Sometimes the economic quantity we wish to observe is not actually measured by anyone, perfectly or imperfectly. That happens quite a lot: there is no limit to the number of economic phenomena that social scientists can theorize about, but only so many of them are actually recorded, let alone recorded consistently across multiple countries and over a sustained period of time. And that gap between even a perfectly measured piece of economic data and the slightly different economic concept it is meant to proxy for generates its own, potentially non-random, gap between **Y** and **Y***, with it all of the same pathologies described above.

In short, then, the ideal for political economists using macroeconomic data for empirical research is for that data to be perfectly measured. Because that ideal can very rarely (if ever) be reached, the practical ideal is for measurement error to be random and relatively small. The most vexing problems come from data for which measurement error is non-random, and when the source of that non-randomness is empirically or theoretically connected to the political object whose relationship to economic outcomes we wish to study. It is very hard to generate reliable estimates of politics' effects on economics when politics also affects how economies are measured.

And that difficulty underscores the importance of empirical researchers understanding—and grappling with—the process by which data are made and the extent to which that process intersects with politics or other concepts whose effects on economics we often wish to understand. I provide an (abridged) overview of those issues as they pertain to FDI flow data below.

III. WHAT DO FDI FLOW DATA MEASURE?

FDI stock (alternatively known as the FDI position) represents the total financial claims of foreign parent corporations on local affiliates, net of the claims that those same affiliates have on the parent corporation. [(16)] FDI flows, which are more commonly used in research on BITs, measure the sum of capital transactions that affect that position occurring within a single year. [(17)] For brevity's sake, I focus
P 7
discussion on the more directly relevant FDI flow data. But many of the same problems noted below apply equally to stock data. Indeed many of the developing countries whose FDI inflows are most relevant to testing BITs' efficacy calculate the FDI stock as the over-time accumulation of FDI

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inflows. [18]

Inward FDI flow data aggregate across several categories of financial flows, which occur between affiliates firms in one country and their MNC parents abroad. More specifically, FDI flow data sum across flows of intercompany debt (including bonds, loans, trade credits and other forms of debt relationships), equity (shares, reserves and capital contributions) and reinvested earnings, which refer to the parent's share of affiliate earnings that are retained locally, rather than remitted back to the parent MNC. Any of these components can flow in either direction. The equity portion of FDI inflows increases when the parent MNC establishes the affiliate, when it purchases additional shares in the affiliate, or when it makes other forms of capital contributions. [19] The equity portion decreases if the parent divests its interest in the affiliate, or in the rare case of an affiliate taking an equity position in the parent. The debt portion of FDI inflows increases as the parent MNC loans money to the foreign affiliate, and decreases when the foreign affiliate loans money back to the parent MNC. The reinvested earnings component increases when revenue is earned and invested, but decreases when the affiliate loses money, or if dividends paid out to the investor are greater than the affiliate's recorded income. While we typically use FDI flows to represent the scale of MNCs investment activity over the course of a year, it is more accurate to think of FDI flows as the net influence that MNCs' foreign affiliates have on the host country's capital account.

FDI inflows are an important concept, and there are many important questions for which it is precisely the concept that analysts ought to be measuring. But it is not, strictly speaking, the concept that most theories relating to BITs implicate. If BITs 'work' it is by decreasing corporate perceptions of political risk, and catalyzing foreign corporations to undertake more political risk-sensitive investments in signatory countries. Those activities should, in turn, generate an increase in FDI inflows, but the link between the two is far more tenuous than is initially obvious. That is to say: FDI inflows are only ever imperfectly measured, and even if they were perfectly measured, many factors that have nothing whatsoever to do with the extension of political risk-sensitive investments can affect FDI inflows. At best those divergences create noisy measures and regression estimates that fail to validate accurate hypotheses; at worst they generate biased and more severely misleading regression estimates.

Below I note a few of the more notable, and more problematic, drivers of random and non-random measurement error in the measurement of FDI inflows.
P 8

A. *Not All Assets Counted by FDI Flows Serve Long-Term or Political Risk Sensitive Investment*

The central premise of using FDI inflows to test BITs' efficacy is that those flows represent illiquid investments meant to serve long-term projects that are especially vulnerable to political risk. The link between the two may not be as tight as commonly thought, however. In fact, much of what counts as FDI is neither illiquid, nor intended to serve long-term investments. Blanchard and Acalin show that FDI inflows are remarkably responsive to quarterly changes in US monetary policy. [20] As US interest rates go up, FDI inflows to developing countries go down; as US interest rates go down, FDI inflows to developing countries go up. This is precisely what we would expect of portfolio flows, [21] but it runs counter to expectations for direct flows. Kerner and Lawrence similarly shows that a change in the United States' tax law—the 2004 Homeland Investment Act—reduced US outbound FDI substantially, [22] but had no perceptible impact on the actual operations of American MNCs' foreign affiliates. It suggests that much of what counts as FDI is neither illiquid nor part of any production process, let alone a production process that would be sensitive to the political risk reduction offers by BITs. The equation of FDI flows with long term-oriented capital flows is at best incomplete and at worst misleading. Much of what counts of FDI is better thought of as FPI, and subject to a whole other set of political pressures.

Kerner and Lawrence note similar patterns with respect to the balance sheets of foreign affiliates of American MNCs. [23] Excluding financial industry firms and holding companies, the 2004 benchmark survey of US MNCs indicates that 43 per cent of US MNCs' affiliates balance sheets are accounted for by current assets—ie highly liquid assets that are either in case or expected to be converted into cash within a year under normal operating conditions. Plant, property and equipment, including the value of physical structures, land, machinery, equipment, and the book value of land, timber, mineral and similar rights made up 24 percent of assets. That is not to say that *only* plant, property should count as FDI—firms obviously need liquid forms of capital to operate—but that a substantial portion of the assets that we assume are illiquid and potentially unrecoverable in the event of an adverse regulatory event, are not, and may not be especially relevant to questions of political risk.

At a minimum, the liquidity—and, apparently, short-term profit seeking—of much FDI creates a gap

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between what we want to measure—capital invested in the service of long-term political risk-sensitive projects—and the FDI inflows that we use to proxy for it. More problematically, the noise introduced by that gap varies non-randomly by industry and by country. PPE makes up a much higher percentage of the corporate balance sheet in the mining and utilities industries, for example, than it does in the service sector. And the extent to which FDI inflow is really FPI inflow in disguise varies by country as well, with the largest

P 9

discrepancies being found in countries with amenable corporate taxes and the relevant corporate tax treaties. (Though, as Blanchard and Acalin show, the negative elasticity between FDI inflows and US interest rates is present even in countries not generally know as tax havens.) Neither the variation in a country's industrial mix nor the extent to which governments have installed MNC-friendly policies exist in a vacuum, are very likely correlated with the extent of a country's BIT programs, and are thus potential sources of bias.

B. *Not All Assets Meant to Serve Long-Term Investments are Financed Through FDI*

MNC's foreign affiliates finance their activities through a variety of means. FDI—defined as financial transfers from their parent-corporation, plus reinvested earnings—are a main source, but many foreign affiliates rely on local financial markets to help meet their financing needs, or on capital raised from non-affiliated firms. (24) This capital is not included in FDI flow data. This is not a problem with the data *per se*. Capital raised by foreign affiliates on local financial markets, or through investments from non-affiliated firms that do not implicate a lasting interest by a foreign entity quite clearly are not FDI, and should not be counted as such. But the distinction between capital raised on local capital markets or loaned from the parent corporation is not an obviously meaningful one to most substantive applications, suggesting that even a perfectly measured version of FDI inflows may inaccurately characterize the extent of capital flowing into foreign affiliates.

I am unaware of any reason why the extent of BIT protection would be conditioned by the extent of external debt financing. The fact of such financing generates another divergence between the object we would like to observe—capital invested in foreign owned, political-risk sensitive projects—and what we can observe—the portion of the capital invested in foreign owned, political-risk sensitive projects financed via FDI.

At a minimum this generates downward bias in the data. All FDI inflow data understate the object of interest by ignoring assets financed locally (or through other non-FDI means). But, as with the extent of liquid capital being counted as FDI, the extent to which foreign affiliates rely on local financing is not random, and very likely the product of the same political-economic milieu that gives rise to BITs. Firms make more use of external financial markets in countries with strong creditor rights. (25) The extent of creditor's rights—effectively a distribution of rents between creditors and borrowers—is assuredly endogenous to politics and related (albeit perhaps obliquely) to a country's BIT program. That financing is also quite clearly a product of the interest rate environment, which is also and more directly related to the likelihood of countries signing and ratifying BITs. (26)

P 10

C. *FDI Flow Data Focus on the Proximate Rather than the Ultimate Investor*

FDI flow data capture flows between the immediate source of the capital and the immediate recipient of FDI. That would be fine if the immediate sender and recipient of capital were also the ultimate sender and recipients of capital, but much of global FDI does not work like that. Rather, much FDI is routed through intermediate destinations for tax purposes. In the case of 'round tripped' capital, domestic investors route their domestic investments through a foreign entity to take advantage of the legal and tax protections available to investors there. The use of offshore investment vehicles in this way can lead FDI flow data to suggest warped views of where capital is being deployed and by whom. (27) The result is the appearance of FDI in intermediate countries where no political risk-bearing investment actually exists, the confusion of domestic, but round-tripped capital with 'real' FDI, and the inability of dyadic datasets to accurately characterize FDI's source country and, thus, whether or not an investment is BIT-protected.

The scale of the problem is substantial. Holding companies accounted for 36 percent of the United States direct investment position abroad in 2008. (28) Sutherland and Anderson note that between 2003 and 2010, around 80 percent of outbound Chinese FDI flows were destined for Hong Kong, the Cayman Island or the British Virgin Islands. (29) Borga reports that reconstituting FDI statistics around the ultimate rather than the immediate investor suggests the Spanish firms are, in fact, the second largest source of Spanish FDI inflows, and that half—half!—of Russian FDI consists of

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round tripped capital originating in Russia but stored in tax havens such as Cyprus before returning to be invested. [30]

Those misattributions can be problematic in a number of ways. For one, the economic and social implications of round-tripped capital are different than the economic and social implications of foreign direct investment. Round tripped capital does not bring with it foreign managerial expertise, or technological spillover, not does it meaningfully contribute to the domestic capital stock. And, as such, it invites a situation in which BITs could 'work' in the sense that the extra legal protections granted by round tripping capital through a BIT-covered jurisdiction might make long-term, political risk-sensitive investment more feasible and thus more common, but it would not carry with it the benefits that FDI—and thus, BITs—are generally thought to have.

More generally, the use of offshore holding companies makes it very difficult to properly know how much FDI a country is actually getting, which FDI flows are protected by BITs and which are not, and where a country's FDI inflows are coming from. Even if those matters are clearer when the data can be inspected on a more granular level, empirical social science in this area has of necessity relied on national aggregates in which those patterns are obscured.

This feature of FDI data has some non-BIT related consequences as well. Consider that a 2015 surge in Irish FDI distorted that country's GDP data to the
P 11
point that it indicated a 26.3 percent annual growth rate. The Irish economy did not grow at 26.3 percent in 2015. The FDI that warped GDP figures was due to corporate inversions and other vehicles through which firms took advantage of the Irish corporate tax rate. That surge of capital had virtually no relationship with real economic activity in Ireland, and certainly no bearing or perceptions of political risk there. [31] The fact that FDI inflow data is by definition divorced from actual production by foreign firms rendered Irish GDP virtually useless as s descriptor of the Irish economy. The empirical literature on BITs should apply a similar lesson. FDI inflows are a poor descriptor of the extent and location of political risk-sensitive economic activities. It should be especially keen to learn that lesson because there is absolutely nothing random about the distribution of this particular form of measurement error. That it happened to Ireland, and not France, has everything to do with political-economic decisions made by the Irish government and not by the French government. There is no reason to assume that the distortions cause by FDI flow data's failure to properly locate the ultimate investor is not correlated with BITs and other efforts to provide a pro-corporate business environment.

D. *Countries Vary Substantially in their Treatment of Reinvested Earnings*

Of the three components of FDI inflow—intercompany debt, equity and reinvested earnings—reinvested earning stand out for being collected through firm surveys rather than by central banks as a byproduct of monitoring the balance of payments. [32] That distinction is intuitive: reinvested earnings never actually cross a border, even if the money nominally transfers from MNC parent to foreign affiliate. That, in and of itself, is not a problem—many of the macroeconomic statistics social scientists rely on are based on firm surveys. But firm surveys are expensive to administer and difficult to do well, and those difficulties are especially binding on developing countries whose data are most relevant to the question of BITs' efficacy.

And as shown in Jerven and Kerner and Crabtree, there is *nothing* random or apolitical about which countries choose (or are able to choose) to carry out meaningful surveys of their economies. [33] Indeed, those capacities are profoundly tied to the nature of the political system and, especially, a government's relationship to international financial institutions. Those works focus on the production of GDP data, but similar issues appear to affect the recording of reinvested earnings data as well. The Survey of Implementation of Methodological Standards for Direct Investment (SIMSDI) notes that many developing countries and several developed countries do not perform the surveys necessary to collect reinvested earnings data, or do not report the data that they do collect as part of their FDI flow data. [34] This leads some countries to systematically underreport
P 12
FDI figures. [35] Trends in this area are encouraging, but substantially divergent reporting standards persist today and are especially problematic for data prior to the year 2000. [36]

That suggests that some countries' failure to report reinvested earnings is less akin to the sleepy accountant whose random errors generate noise in the data (and regressions using that data) than it is to accountants whose underreporting stems in some way from the political-economic context in which they exist. That is not to say that there is a direct link between a robust BIT regime and a country's propensity to collect reinvested earnings data, but the assumption that measurement error in FDI is unrelated to BITs seems unjustified. It is reasonable to suspect, for example, that a

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government's decision to commit resources to accurately measuring FDI and to attracting FDI through BITs are jointly determined by an underlying and unobservable appreciation for FDI's development potential. More prosaically, an active relationship with the international financial institutions that provide assistance to national statistical offices *and* who typically recommend policies liberalize FDI policies could jointly cause more BITs and (at least the appearance of) more FDI. To the extent that the current or historical distribution of capacities to collect reinvested earnings data reflects either of those it poses substantial problems for our ability to discern BIT's effects on FDI from the broader context's effect on how FDI is measured.

IV. WHAT IS TO BE DONE?

To summarize, all non-trivial macroeconomic data are flawed to some degree, but FDI inflow data are flawed in ways that make it difficult to use them to make conclusive statements about the relationship between BITs and the investment behaviors of MNCs. FDI inflow data measure a set of financial transaction that are only tangentially related to the behaviors BITs are meant to catalyze, they measure those concepts imperfectly, and both forms of measurement error are very plausibly correlated with the scale and nature of a country's BIT program. That is a big problem. Not so big that studies using these data should be summarily ignored, but big enough that the details of the specific study—the sample, the estimations strategy, etc.—should be considered with the deficiencies of FDI inflow data in mind. To the extent that studies using these data corroborate findings using other data, so much the better. But these data should not, on their own, be used as the basis for forming non-trivial beliefs about BITs and their consequences.

There are some proactive things we can do as well. Perhaps the easiest and best thing we (as researchers and as consumers of research) can do is to move away from large-N studies that rely on a global sample of host countries over many decades. The only available data that could populate those samples are FDI inflow data and those data simply are not up to the task. Smaller studies based on more granular data, often from a single host and/or single source country, can be an invaluable adjunct to the broader studies that we already have. Those studies can,
P 13
for example, examine the actual operations of foreign affiliates active in a host country, how much to commit to fixed capital, etc. rather than rely on FDI inflow data to form a proxy. Such studies are not a panacea; they trade off a degree of external validity—ie the extent to which dynamics observed in a study can be generalized to the broader population—for a greater degree of internal validity—ie the extent to which the study's findings are believable on their own terms. But to the extent that multiple smaller scale studies tell a similar story it presents a more reasonable basis to form beliefs about BITs.

A second, and related, prescription is for more qualitative work on the topic, especially work that includes more direct engagement between the researchers and the firms whose behaviors are implicated by their theories. Firms take in and process information about political risk in a variety of ways, and when they perceive that the political risk environment has shifted they can react to that in a variety of ways. Not all of those reactions should be expected to cleanly manifest in the aggregate FDI data. By design such studies could not speak to broader trends, but by describing firm reactions (and non-reactions) to BITs in more detail such studies could help inform the research designs that are used on the broader data sets.

A final prescription that, again, applies equally to researchers and consumers, is to not over-react to the findings of any one particular study. Meta-analyses such as Bellak [(37)] can be helpful, but so too can a greater degree of humility. In my opinion, no single study employing FDI inflow data is capable of providing dispositive evidence of BITs' effects. The data are just not good enough. But by the same token, the extent of measurement error in these data means that the failure to find convincing evidence of such an effect using these data is not terribly surprising either. The absence of evidence really and truly is not evidence of absence.

There is only so much that can be very confidently said about BITs' effects on FDI flows using traditional FDI flow data. Moving away from that data necessarily means utilizing smaller, and not necessarily representative, samples. The smaller scale undermines any one study's claims to definitely characterize BITs effects, but that, in my opinion, is a small and in any event, necessary price to pay for confidence that the various forms of measurement error noted above do not warp the results.
P 13

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2)

It's a crude measure, to be sure, but entering the phrase 'bilateral investment treaty' into the Google scholar database reveals over 20,000 available pieces of scholarship at least mentioning that phrase, with over 15,000 of those authored just in the last 10 years.

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Andrew Kerner and Jane Lawrence, 'What's the Risk? Bilateral Investment Treaties, Political Risk and Fixed Capital Accumulation' (2014) 44(1) B J Pol Science 2; Falvey and Foster-McGregor (n 7) 635; Jason W Yackee, 'Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?' (2008) 42(4) L Soc Rev 805–32.

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Two other reasons, neither of which are the focus of this paper, are worth briefly mentioning. The first is that BITs are not randomly assigned to governments. They are often responses to a perception among countries that there is a significant potential for bilateral FDI flows, and often come as part of a broader (and not always easily perceptible) shift towards policies meant to catalyze that FDI. It is difficult in most circumstances to convincingly separate BITs' effects from its context. A second hurdle worth mentioning is the lack of cumulative theoretical development. BITs' effects on MNCs' behaviors appears to be highly contingent. That is as it probably should be. BITs vary in their treaty design, and BIT signatories vary in their wealth, the quality of their domestic politics and investment environment, the *ex ante* plausibility of significant FDI flows between them, and the industrial mix of investment opportunities in them. It would be odd if BITs' effects were not similarly heterogeneous. A substantial part of clarifying the empirical evidence on BITs' effects thus requires a broad acceptance of when we should expect those effects in the first place. And such a consensus has been slow to build.

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More precisely, increasing random measurement error in the dependent variable increases the standard errors associated with the regressions estimate; increasing random measurement error in the independent variable biases the coefficient estimate to zero.

16)

Investment counts as foreign direct investment, as opposed to foreign portfolio investment, if the parent firm as at least a 10 percent stake in the foreign affiliate. Ten percent is regarded as sufficient to indicate a lasting interest, even if it does not necessarily indicate control.

17)

Outward FDI flows represent FDI from parent firms within a country to their affiliates abroad. A country's inward and outward FDI flows have (at least in a computational sense) nothing to do with each other.

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18)

While many countries calculate stock in that way, the value of the FDI stock is not, according to a strict application of the balance of payments manual, the same thing as the accumulation of FDI flows over time. If anything, FDI stock data is harder to calculate consistently across different contexts, and the resulting data are *more* problematic than flow data for social scientific purposes. See Kerner (n 11), Karl Sauvant, 'Beware of FDI Statistics!' Columbia FDI Perspectives, No 215 (18 December 2017) <https://ssrn.com/abstract=3089794> accessed 12 October 2017. Citations therein for references to problems that are unique to stock data.

19)

Share purchasing provokes a bit of an accounting dilemma. Consider a parent MNC that acquires a lasting interest by purchasing 1 percent of a foreign firm's shares every year for 11 years. The first 10 years of share acquisition do not count as FDI, because those acquisitions were made in the absence of a lasting interest in the firm. Only share purchases occurring after the 10 percent threshold is met count as FDI.

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ISDS Reform: Analysis on Establishing a Multilateral Investment Court System

Seung-Woon Lee

(*)

The idea of establishing an appeal mechanism for Investor-State Dispute Resolution (ISDS) awards is not novel. Currently, the United Nations Commission on International Trade Law Working Group III (WG III) is discussing potential reform of the ISDS system, including an appeal mechanism and a Multilateral Investment Court (MIC) system. This article does not argue whether the ISDS reform is necessary. Instead, it will use WG III's finding that the ISDS reform is necessary as a starting point to analyse the establishment of a MIC system. The article will briefly review commonly raised reasons for the ISDS reform and the European Union's (EU's) proposal to create the MIC system. It will then analyse the structure of the appellate mechanism – a stand-alone appellate body – especially focusing on the challenge of arbitrators and the enforcement of appellate awards. The article considers whether, if the MIC system is adopted, to create a single MIC system or a multiple MICs system. Finally, it notes that there are issues that need further consideration on creating the MIC system, specifically the scope of review and the double hatting issue.

1 INTRODUCTION

Initiatives on Investor-State Dispute Settlement (ISDS) reform are not a new concept. (1) In 2004, the International Centre for Settlement of Investment Disputes (ICSID) considered reforming ISDS, including the creation of an ICSID appeals facility. (2) ICSID ultimately dropped its discussion on creating an appellate mechanism
P 485
by concluding it was premature to discuss. (3) In 2017, the United Nations Commission on International Trade Law Working Group III (WG III) took a task to discuss a broad range of ISDS reform options to address issues confronted by the current ISDS regime. (4) The mandate of the WG III discussion is limited to procedural aspects. (5) WG III discusses both incremental and structural reform. The incremental reform approach focuses on improving some features of the ISDS system without changing the overall structure of the current ISDS regime. (6) On the other hand, structural reform (which is mainly supported by the European Union [EU]) suggests changing the overall structure of the current ISDS system by creating an appellate mechanism such as a Multilateral Investment Court (MIC). (7)

This article does not discuss whether ISDS reform is required. Indeed, much has already been written on this controversial topic. Rather, it will use as a starting point WG III's finding on the necessity of ISDS reform, (8) and discuss the consequences and further considerations for creating the MIC system.

In section 2, this article will briefly address commonly raised reasons for ISDS reform and summarize the EU's approach to the creation of the MIC system. In section 3, the article will address the structure of the potential appellate system. In doing so, it will consider the advantages and disadvantages of a stand-alone appellate body and the MIC system considering issues such as the procedure for challenging arbitrators, the enforceability of an award rendered by an appellate tribunal, and achieving consistency in awards. It will then address whether to create a single MIC system or a multiple MICs system. Section 4 will address further considerations for creating the MIC system, focusing on issues of the scope of review and double hatting.

2 THE REASONS FOR CREATING AN APPELLATE SYSTEM AND THE EU'S PROPOSAL

2.1 The reasoning underlying the proposed appellate system reform

There are both substantive and procedural reasons for proposing ISDS reform and the creation of an appellate system. Frequently raised reasons include (1)
P 486

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consistency and the predictability of arbitral awards; (2) the states' right to interpret a treaty; (3) concern about arbitrators' impartiality and independence; and (4) procedural tactics such as parallel proceedings. [(9)] These reasons are discussed below.

2.1[a] Consistency and Predictability

The purported lack of consistency and predictability of arbitral awards has been raised consistently as one of the reasons to establish an appellate system. [(10)] However, it is important not to overemphasize the importance of pursuing consistency and predictability. [(11)] Commentators have already discussed this issue and noted that it is important to consider the origin of inconsistencies. [(12)]

Inconsistency in arbitral awards can arise when different tribunals reach different outcomes involving similar factual circumstances, or interpret treaty provisions such as the fair and equitable treatment (FET) standard or most favoured nation (MFN) clauses differently. [(13)] This can be a problem when claims involve the same treaty. For example, if two different tribunals held divergent interpretations of an MFN clause in the same treaty, there is less predictability to the outcome of the case involving the same treaty. Thus, avoiding this type of inconsistency could increase predictability and efficiency.

In other cases, different tribunals can reach inconsistent interpretations on treaty provisions when different treaties contain similar language. However, the appearance of inconsistency under different treaties involving MFN clauses should be distinguished from inconsistency involving the same treaty. Apparent inconsistency can result due to different treaties being applicable to a case. [(14)] Currently, the ISDS system is composed of more than 3,300 international investment agreements (IIA). [(15)] Inconsistency due to different treaty standards and language, therefore, is somewhat natural. [(16)]

P 487

Additionally, pursuing consistency on standards such as FET under different treaties would not be achieved by creating an appellate mechanism under the current WG III debate which is only considering procedural reform. [(17)] Rather, this kind of consistency could be achieved by entering into a treaty to unify 'the language of substantive obligations' in IIAs, which is not in the scope of WG III mandate and is another controversial topic. [(18)]

Finally, it must be emphasized that consistency is different from correctness. Establishing an appellate mechanism could achieve greater consistency compared to the current ISDS system. [(19)] However, there is also a possibility that it could lead to decisions that are *consistently* inaccurate. [(20)] WG III recognized this possibility and stated that '[i]t was also agreed that seeking to achieve consistency should not be to the detriment of the correctness of decisions, and that predictability and correctness should be the objective rather than uniformity'. [(21)]

2.1[b] State's Right to Interpret a Treaty

The lack of a binding effect of a state's right to interpret treaties or the tribunal's tendency to not consider the state's treaty interpretation has been criticized in the current ISDS regime. [(22)] In this context, Member States have suggested adopting a joint (multilateral) treaty interpretation by treaty parties in WG III. It is suggested that treaty parties release a joint statement on treaty interpretation to make their interpretation binding on arbitral tribunals. [(23)] Another suggestion is to use a unilateral statement on treaty interpretation. [(24)] A non-disputing treaty party can release a unilateral statement on treaty interpretation. [(25)] For example, when a Korean investor

P 488

brings a claim against the United States under an MFN clause, the Korean government could release a unilateral statement interpreting an MFN clause. [(26)] The tribunal could consider a unilateral statement without being bound by it. These suggestions are already included in some modern IIAs. [(27)]

Under a joint treaty interpretation, treaty parties could jointly interpret specific provisions of the treaty even after the treaty has entered into force. [(28)] In WG III, Russia submitted that if a joint interpretation is binding, then the arbitral tribunal would be precluded from 'introducing new meaning into the text of an international treaty or taking decisions based on considerations that go beyond the interpretation of the law'. [(29)]

Whether a joint treaty interpretation should bind the tribunal on a pending case needs special attention. Currently, the Dutch Model BIT expressly precludes the binding effect of a joint interpretation on a pending case. [(30)] In the case of the EU-Canada Comprehensive Economic and Trade Agreement (CETA), Article 8.31 provides that 'the CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date'. However, the Court of Justice of the European Union (CJEU) held that the CETA Joint Committee's interpretation does not retroactively bind the tribunal. [(31)] Other IIAs are silent on whether a joint interpretation binds the tribunal on a pending case (e.g., United States-Korea FTA and the India-Kyrgyzstan BIT).

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Retroactive application of a binding joint interpretation could compromise foreign investors' rights since the joint interpretation did not exist when the dispute was filed. Moreover, the independence of the tribunal is an important factor to consider. If a joint interpretation could bind a tribunal on a pending case, it could compromise the tribunal's ability to adjudicate the dispute between the parties. By agreeing to ISDS in IIAs, contracting states delegate the power to resolve disputes between foreign investors and states to the tribunal. The ISDS tribunal should adjudicate a case, interpret a treaty, and apply it. Upon making this determination, the tribunal should independently and impartially make its decision. Requiring a joint interpretation to be binding on a pending case may compromise
P 489
the tribunal's power to independently interpret a treaty and apply it to a pending dispute.

Some modern BITs provide a mechanism where a non-disputing treaty party can submit treaty interpretations to the tribunal. (32) Unilateral submissions cannot be binding on the tribunal but could be used as guidance. However, in reality, a non-disputing treaty party submission is not often utilized. (33) A study by the Columbia Centre for Sustainable Investment (CCSI) identified that the reasons why a non-disputing treaty party may elect not to submit unilateral submission include 'cost-benefit calculations', lack of knowledge of pending cases, or 'political considerations'. (34)

2.1[c] Arbitrators' Impartiality and Independence

Concerns related to the arbitrator's role in the current ISDS regime have been raised as one of the reasons to reform the ISDS system. (35) These concerns include (1) states being hesitant to give arbitrators the power to rule on their right to regulate or public policy, and (2) lack of independence and impartiality of arbitrators. (36) Especially, issues on lack of independence and impartiality include concern over a party-appointed arbitrator, repeat appointments, and the so-called 'double hatting' issue, where arbitrators act as both counsel and arbitrator. (37)

The creation of the MIC could cure some of the issues raised above. However, the appointment of arbitrators in a new system could also raise new issues. Under the current EU proposal, MIC arbitrators would be appointed by the states. With this mechanism, there could be various issues such as (1) lack of diversity of arbitrators to represent various states' interests, and (2) risk of appointment becoming politicized. (38)

In relation to lack of diversity, the panel of arbitrators within the MIC could not reflect all Member States' interest if the number of panels is not large enough to include arbitrators from every Member State, which would most likely not be
P 490
the case. (39) Some Member States may have greater numbers of arbitrators on the roster due to their larger contribution to the MIC budget. (40)

Appointment of arbitrators to the MIC by states could 'create a risk of judicial appointments becoming politicized'. (41) For example, the WTO model of the appointment has been widely criticized for becoming 'politicized and unbalanced against SMEs'. (42) Thus, it is highly important to establish a transparent and reliable mechanism to avoid these potential risks on appointing arbitrators in establishing an appellate mechanism.

To address the concerns related to the arbitrator, WG III is also addressing the issue of appointing arbitrators and their ethical requirements. (43) On 1 May 2020, the Secretariats of ICSID and UNCITRAL published the Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement (Draft Code of Conduct). (44) The Draft Code of Conduct addresses impartiality and independence of arbitrators and their duty to conduct proceedings with 'integrity, fairness, efficiency and civility'. (45) The publication of the code of conduct for ISDS tribunals could provide better guidelines specifically tailored to ISDS proceedings. The Code can be widely used to improve impartiality and independence of arbitrators similar to the IBA Guidelines on Conflicts of Interest in International Arbitration.
P 491

2.1[d] Parallel Proceedings

Parallel proceedings in the current ISDS regime have been frequently criticized. (46) In the current ISDS regime, an investor may pursue its claim in different fora, such as international commercial arbitration and domestic courts, rather than pursuing ISDS proceedings. (47) Parallel proceedings could lead to inconsistent and contradictory outcomes or sometimes result in double recovery. Not all parallel proceedings are problematic; there could be legitimate circumstances where access to justice warrants parallel proceedings. (48) The current ISDS regime addresses parallel proceedings based on (1) *lis pendens*, (2) *res judicata*, (3) consolidation and joinder, and (4) abuse of process. (49) However, there has been criticism that the application of these methods has been limited and largely ineffective. (50)

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The effectiveness of controlling parallel proceedings would ultimately depend on the structure of an appellate mechanism. For example, the ISDS reform may lead to a multiple MICs system rather than creating a single MIC. In that case, consolidation among different MICs may not be possible absent unified procedural rules allowing consolidation among the different appellate systems. A similar issue arises in international commercial arbitration where consolidation between different arbitral institutions is not possible. To address this limitation, the Singapore International Arbitration Centre (SIAC) made a proposal on cross-institution cooperation for the consolidation of international arbitral proceedings, which calls for adoption of a protocol enabling consolidation of two or more arbitrations initiated under different arbitral institutional rules. (51) A similar approach could be implemented to address consolidation between different MICs. (52)

To ultimately eliminate parallel proceedings, it would be necessary to create a single forum to bring entire ISDS claims. If there are multiple appellate mechanisms, an effective tool to address this issue would be necessary.
P 492

2.2 The European Union's reform proposal

The EU proposes creation of a single MIC, an international court to adjudicate ISDS disputes under various IIAs. (53) As a starting point, the EU replaced traditional ISDS dispute resolution mechanisms with a bilateral investment court system (ICS) in its recent IIAs including CETA, the EU-Vietnam Investment Protection Agreement (IPA), and the EU-Singapore IPA. (54) At present, each IIA envisions the establishment of a standing appellate tribunal that only would adjudicate cases under a specific treaty. (55) Once the ICS is established, it will substitute each standing appellate tribunal created under these IIAs. (56)

These IIAs provide a mechanism where each state appoints a certain number of arbitrators from the EU, from the other state's nationality, and from the nationality of third countries to the roster. (57) Individuals from each country's nationality and one individual from third countries will become the appellate tribunal to resolve ISDS disputes. (58)

They also provide that appellate tribunal members should 'refrain from acting as counsel or as party-appointed experts or witnesses in any pending or new investment protection dispute under this or any other agreement or under domestic laws and regulations'. (59) Under the EU-Singapore IPA, this restriction is even stronger, stated as follows:

> The Appeal Tribunal Members shall serve on a full-time basis and the Committee shall fix their remuneration and related organizational matters. In that event, the Appeal Tribunal Members **shall not be permitted to engage in any occupation**, whether gainful or not, unless exemption is exceptionally granted by the President of the Appeal Tribunal. (60)

P 493
These strict restrictions on so-called double hatting are problematic as they could limit practitioners from serving as ISDS arbitrators. The issue of strict prevention of double hatting will be discussed in detail below.

Additionally, the EU proposes to expand the scope of appeal in these IIAs by including error in the interpretation/application of law and misapplication of facts as grounds for appeal. (61) These grounds are not available under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) nor the current ICSID annulment process. Under the EU approach, the appellate tribunal could modify or reverse the previous award upon finding the above grounds. (62) Expanding the scope of appeal could lead to greater consistency and opportunities to correct incorrect decisions. However, it could also hamper the finality of an award and increase time and cost for the parties. This issue will be discussed in detail below.

3 ESTABLISHING THE MIC

This section addresses the potential structure of an appellate system. In doing so, it will examine the advantages and disadvantages of a stand-alone appellate body and the MIC system. Additionally, it will discuss whether to create a single MIC system or multiple MICs.

3.1 Stand-alone appellate body or MIC system?

There are two main potential mechanisms for establishing an appellate system. First, a stand-alone appellate body exclusively dealing with appeals could be considered. The stand-alone appellate body could be established (1) under specific treaties, (2) on an ad hoc basis by the disputing

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parties, or (3) under an institution such as ICSID. (63) In WG III, Member States preferred a single stand-alone appellate body under the ICSID framework rather than establishing multiple stand-alone appellate bodies under different treaties. (64) Once a stand-alone appellate body is created, an ad hoc tribunal will hear the first instance dispute, maintaining
P 494
the current ISDS regime. Under this approach, an appellate tribunal system could be implemented while maintaining most of the current ISDS features. (65) An appellate tribunal could review the first instance award with expanded grounds (broader than the annulment grounds of the ICSID Convention and national arbitration legislations) and would have recourse other than an annulment (e.g., remand to the first-instance tribunal or overrule the first instance tribunal's finding).

Second, an independent MIC incorporating two-tier adjudication system could be established to address ISDS claims. (66) Under this approach, traditional ISDS claims submitted to an ad hoc tribunal will be submitted to the first instance tribunal under the MIC. An appellate tribunal could be established as a second-tier tribunal under the MIC, which will hear an appeal of the first instance award. Thus, the MIC system will substitute the current ISDS regime where the parties submit their claim to an ad hoc tribunal. The ISDS reform could lead to a single MIC system as proposed by the EU or a multiple MICs system.

There are several issues to consider with regard to which system should be implemented to establish an appellate mechanism. These issues include (1) challenge of arbitrators, (2) enforcement issues, and (3) consistency and predictability.

3.1[a] Challenge Process of an Arbitral Tribunal

In respect to the method of appointing arbitrators, both a stand-alone appellate tribunal and the MIC system could use the same method of nominating arbitrators; for example, to nominate adjudicators from a roster and select a three-member panel upon the appeal of a case.

However, there is an issue of who would decide on the challenge of the arbitrator in the appellate tribunal. In the case of a stand-alone appellate body system there are various possibilities on this issue. Similar to the current ICSID challenge process, if one member of the tribunal is challenged, remaining members of the appellate tribunal could decide the issue. (67) However, this mechanism would not work when the majority of the tribunal is challenged, or remaining members of the tribunal are equally divided. In this case, there should be a separate authority to decide on the matter.
P 495

In the case of a stand-alone appellate tribunal, the institutional structure to handle a challenge may be lacking if a stand-alone appellate tribunal is not established under the ICSID framework. Lacking an institutional mechanism, the parties could designate an authority to resolve the challenge. If a stand-alone appellate tribunal is established under the specific treaty, the treaty could introduce a separate roster of arbitrators to decide on the challenge.

On the other hand, if a stand-alone appellate tribunal is established under the ICSID framework, the Chairman of ICSID could decide on the matter as in the current regime. (68) Alternatively, the tribunal could introduce a separate roster of arbitrators to decide on the challenge. Practically, it could be burdensome for the Chairman of ICSID to decide on the challenge. The numbers of the challenge of arbitrators in an appellate tribunal could be significant. Additionally, the Chairman still would need to decide on the challenge of the first instance tribunal under the ICSID Convention.

On the other hand, the MIC system could introduce more flexible resolution on who would decide on the challenge. In the MIC system, the court is comprised of a two-tier system to handle both the first instance and appeal of the first instance case. Thus, the MIC will have to consider the challenge of arbitrators in both the first instance and appellate tribunals. Regarding the challenge of arbitrators in the first instance tribunal, there are several possibilities. First, if one member of the tribunal is challenged, the remaining members of the tribunal can decide. When the majority of the tribunal is challenged, or remaining members of the tribunal are equally divided, then arbitrators included in the appellate tribunal's roster could decide on this matter. Alternatively, for the efficiency of the proceeding, challenges on any first instance tribunal could be directed to arbitrators included in the appellate tribunal roster in the first place.

On the other hand, in terms of the challenge of the appellate tribunal, the MIC as the institution could decide on this matter rather than leaving the decision to arbitrators. The MIC president could decide on this matter, or the MIC could designate the board members to decide on this matter. Designating separate authorities to handle the challenge on the first instance tribunal and the appellate tribunal could be a practical resolution to balance the workload.

3.1[b] Enforcement of Appellate Awards

In the current ISDS regime, awards rendered by the ISDS tribunal are enforceable under the New York Convention or the ICSID Convention. When the UNCITRAL Arbitration Rules or other

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institutional rules apply to ISDS proceedings,
P 496
the enforcement of the award would generally be subject to the New York Convention. (69) The ISDS awards under the ICSID proceeding are enforceable under the ICSID Convention. (70) The enforceability of appellate awards remains uncertain under the New York Convention, and is inconsistent with the current ICSID enforcement regime. To resolve this uncertainty, Member States could develop a new enforcement regime upon creating an appellate mechanism, requiring enforcement of appellate awards in Member States. This would address the enforceability of appellate awards under the current ISDS regime.

3.1[b][i] Enforceability of the Appellate Award Under the New York Convention

In the context of the enforceability of appellate awards made by an appellate tribunal under the New York Convention, the initial question to be addressed is whether the appellate award is in fact an arbitral award under the New York Convention. (71) Article 1 of the New York Convention only applies to 'the recognition and enforcement of *arbitral awards*'. (72) However, the New York Convention does not provide a clear definition on the meaning of 'arbitral awards'. (73) Ultimately, whether appellate awards would be deemed as arbitral awards under the New York Convention would depend on the applicable law to the award, most commonly the law of the seat. (74)

The enforceability of appellate awards made under a stand-alone appellate body may face fewer issues under the New York Convention than appellate awards made under the MIC system. (75) In a stand-alone appellate body, the appeal
P 497
process can be considered as an internal appellate review. (76) Commentators noted that containing an internal appellate review process would not affect the enforceability of an award under the New York Convention. (77) Thus, appellate awards under a stand-alone appellate body would most likely be considered arbitral awards in the meaning of the New York Convention.

On the other hand, whether appellate awards made under the MIC system qualify as arbitral awards remains uncertain. Arguably, appellate awards rendered under the MIC system could be considered arbitral awards made by 'permanent arbitral bodies' under Article 1(2) of the New York Convention. (78) However, the use of 'permanent arbitral bodies' does not provide 'any meaningful definition of the term'. (79) The drafters of the New York Convention suggested including the phrase 'to which parties have voluntarily submitted' referring to permanent arbitral bodies in Article 1(2). (80) The delegates agreed that the test of whether awards were rendered by permanent arbitral bodies depends on the party's voluntary submission. (81) Thus, if the party were subjected to bring a claim under arbitration due to the mandatory law, it would be judicial in nature. (82) However, the final text of the New York Convention does not include this phrase. (83)

Although the phrase was omitted, the voluntary nature of arbitration remains an important factor in determining whether the MIC constitutes a permanent arbitral body. (84) Proponents suggest that the MIC system would not lack the voluntary nature of the arbitration. (85) Often proponents focus on the precedent of the Iran-US Claims Tribunal being qualified as a permanent arbitral body under
P 498
the New York Convention. (86) Thus, proponents focus on voluntary submission of the claim on deciding whether the MIC could qualify as a permanent arbitral body. (87) The MIC system does not have a compulsory nature, as Member States would agree on establishing the appellate court and investors must decide whether to initiate claims against states.

On the other hand, there is a criticism that the MIC system would not qualify as a permanent arbitral body. (88) The main concern is that the MIC system would not allow the parties to appoint arbitrators. (89) It is suggested that it is difficult to consider the MIC as a permanent arbitral body when the parties lose their ability to appoint arbitrators. (90) On the other hand, other commentators suggest that the ability to appoint arbitrators is not an essential factor for permanent arbitral bodies. (91)

Therefore, the appellate award rendered by both a stand-alone appellate body and the MIC may be enforced under the New York Convention. However, the MIC system may face more difficulty to justify that the appellate award is enforceable under the New York Convention. If the MIC system is adopted, the Member States should consider the method to address this issue. The Member States could release a multilateral interpretation stating that the MIC qualifies as a permanent arbitral body, or the treaty or statute creating the MIC could contain such language.

3.1[b][ii] Enforceability of the Appellate Award Under the ICSID Convention

In terms of the ICSID Convention, the appellate award under both a stand-alone appellate body and the MIC would not be enforceable without modifying the ICSID Convention and Rules. The ICSID award is enforceable under Article 54 where an enforcing court would not be able to refuse enforcement. (92) However, the automatic recognition and enforcement mechanism of Article 54 only applies to the ICSID award. (93) The appellate award under both a stand-alone appellate body and

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the MIC is inconsistent with the ICSID Convention and Rules.

For example, Article 53 of the ICSID Convention provides that the award should 'not be subject to any appeal or to any other remedy except those provided
P 499
for in the Convention'. The appeal process created under a different treaty would be inconsistent with Article 53. The ICSID Convention does not provide any appeal mechanism. (94) Accordingly, the creation of the appeal process itself will be contrary to Article 53. Other inconsistencies also exist, such as the method of the constitution of appellate tribunals and ad hoc committees under the current ICSID regime. (95)

Upon establishing a stand-alone appellate body or the MIC, amendment of the ICSID Convention would be necessary to make the appellate award enforceable. Member States could amend the ICSID Convention pursuant to Article 66. (96) However, no amendment proposal has been made by Member States so far. (97) The amendment process has practical difficulties where it essentially requires all contracting states to ratify, accept and approve the amendment. (98) In practice, amendment of the ICSID Convention could only occur after all contracting states had agreed which appellate mechanism should be adopted in the future.

Another method is through an *inter se* modification of the ICSID Convention following the procedure under Article 41 of the Vienna Convention on the Law of Treaties (VCLT). (99) *Inter se* modification only requires agreement among relevant parties to be bound by the modification whereas amendment under Article 66 of the ICSID Convention requires all contacting states' consent. (100) For example, the EU-Vietnam IPA and CETA contain a provision where the final award 'shall qualify as an award under Chapter IV, section 6 of the ICSID Convention'. (101) Regardless of whether they choose a stand-alone appellate body system or the MIC system, contracting states could mutually agree with the enforceability of an award under the ICSID Convention. However, it should be noted that this binding effect created through *inter se* modification would not apply to third countries. (102) The most effective way to resolve enforceability of appellate awards is to adopt a separate treaty on agreeing on an enforcement regime of appellate awards, ranging cases under both ICSID and non-ICSID proceedings among states, even if there are various practical difficulties involved. If a new treaty could be concluded and adopted widely by
P 500
Member States, then, regardless of what appeal mechanism is chosen, enforceability of appellate awards in the ISDS regime could be secured.

3.1[c] Consistency and Predictability

Finally, the appeal mechanism would have an impact on promoting greater consistency and predictability. A stand-alone appellate body may lack consistency in applying and interpreting treaty standards. (103) The award rendered by a stand-alone appellate tribunal would most likely not bind other appellate tribunals. Without proper measures to resolve inconsistency involving the interpretation of the treaty, inconsistency could still exist in a stand-alone appellate body system. If a stand-alone appellate body is created under the ICSID regime, ICSID could develop proper measures to resolve this issue. For instance, it could create a separate panel to resolve inconsistent interpretations of the treaty. ICSID also could allow treaty parties to submit a joint statement on treaty interpretation once inconsistent awards exist.

This could also be true in the case of the MIC system; however, the MIC as an institution could take various measures to resolve inconsistency among the appellate panels' interpretation or the application of the treaty standard. Other than the measures discussed above, the court could for instance hear the case en banc to resolve existing inconsistencies. (104) Or the court could release a separate opinion on proper interpretation *sua sponte.* These measures should be considered when forming a stand-alone appellate body or the MIC to resolve inconsistency, given the fact that the parties are not able to appeal an inconsistent award.

3.2 Toward a single MIC system

In the previous section, this article addressed the advantages and disadvantages of a stand-alone appellate body and the MIC system. In this section, this article will address whether to create a single MIC system or a multiple MICs system if the MIC system is to be established. The current EU proposal aims to create a single MIC. (105) If multiple MICs are to be established, this could face difficulties in
P 501
regulating parallel proceedings and promoting consistency on the challenge decision.

In the case of a multiple MICs system, the consolidation of cases would be similar to the current international arbitration regime, where consolidation between different institutions or different arbitration rules is not available unless there is an agreed rule on consolidating parallel proceedings

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among the different MICs. Even if this rule is introduced, some MICs may refuse to adopt the rule. The ultimate solution to eliminate parallel proceedings and increase efficiency on the ISDS proceeding is to create a single MIC system.

Additionally, a single MIC could promote greater consistency and predictability related to the decision on challenge to the arbitrator. Once a single MIC obtains sufficient experience or develops a body of case law on challenges, decision-makers in the MIC could provide more consistent decisions where the facts and circumstances are similar. Along with the Code of Conduct for Adjudicators in ISDS, consistent decisions would provide predictability, which eventually could contribute to reducing conflict of interest concerns in the ISDS regime.

One practical consideration related to creating a single MIC is whether the court could sufficiently handle the workload. In fiscal year 2020, ICSID administered 303 ICSID cases. (106) Considering non-ICSID proceedings, the total number of ISDS cases in a single year would be larger. Additionally, once the appeal mechanism is available, ISDS caseloads could significantly increase. The losing party may have a second chance to argue its case depending on the scope of appeal. Similar to other national court systems, a single MIC may have difficulty ensuring efficiency in handling cases and the capacity to handle the workload. In this regard, it will be highly important to appoint enough people to the appellate panel to serve as arbitrators, as well as sufficient support staff.

4 CREATING THE MIC SYSTEM: FURTHER CONSIDERATIONS

In this section, this article will address further considerations with creating the MIC system. There are two main considerations that need to be addressed on the creation of the MIC system: (1) expansion of the scope of appeal, and (2) addressing the double hatting issue.
P 502

4.1 Expansion of the scope of appeal

The scope of appeal as a result of the creation of a MIC system could change the generally accepted rule that the reviewing court would not review the merits of the arbitral award. The EU proposal to create a single MIC system broadens the scope of traditional grounds under the ICSID Convention by adding two additional grounds, which are where the tribunal errs in interpretation or application of the law or where the tribunal 'manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law'. (107) During the WG III discussion, Ecuador expressed that 'it would be appropriate for the ISDS regime to allow also for the merits of cases to be reviewed'. (108) The purpose of broadening the scope of appeal is to pursue greater consistency in arbitral awards. (109) If the MIC lacks power to review the merits of the case, it may not be able to promote greater consistency.

An appeal is different from the annulment of an award. (110) Annulment of an award does not address the 'substantive correctness' of an award. (111) Rather it is a remedy to preserve the legitimacy of an award. (112) Accordingly, the scope of review is narrower than an appeal. (113) Annulment of an award is limited to the number of grounds under the ICSID Convention, which does not include errors of law/facts as annulment grounds. (114) Many national arbitration legislations also do not include errors of law/facts as annulment grounds. (115)

Additionally, the legal effect of an annulment is different from an appeal. Annulment invalidates an award under the ICSID Convention. (116) Enforcing courts may refuse to recognize and enforce an award annulled at the seat of arbitration under the New York Convention, (117) whereas an appeal allows the award to be rewritten, corrected, or remanded to the first panel. (118)

However, opening up the scope of the appeal to merits review should be carefully balanced against the finality of arbitral awards and the efficiency of the
P 503
arbitral proceeding. Most national legislation, the New York Convention, and the ICSID Convention do not allow the reviewing court to conduct merits review. (119) The reasons for this include promoting the finality of the arbitral award and the efficiency of the arbitral proceeding. (120)

Merits review would hamper the finality of the arbitral award by increasing uncertainty. (121) The two-stage proceeding would necessarily lead to inefficiency and an increase in cost and time. (122) There also are concerns that allowing merits review would result in the first panel considering 'themselves as no more than the first round in a dispute that will almost inevitably be finally resolved by another tribunal at a later stage. That is unlikely to encourage good arbitral practice'. (123)

4.2 Addressing the double hatting issue

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Under the current EU proposal, adjudicators on an appellate panel will be nominated by states. [124] As noted above, the EU proposal requires an appellate panel to refrain from [125] or prevent [126] engaging in other roles in ISDS such as acting as counsel or party-appointed experts in other unrelated cases. For example, the CETA provides that 'upon appointment, [the members of the appellate panel] shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement'. [127] This provision effectively prohibits the recurring issue of double hatting in the current ISDS regime. However, this limitation could prevent experienced arbitrators and newly appointed arbitrators from acting as arbitrators in the MIC system.
P 504

Many experienced arbitrators play multiple roles in the current ISDS regime. [128] Preventing arbitrators from taking any other role in the ISDS regime to accept a full-time position to serve on an appellate panel would likely lead to experienced arbitrators rejecting the appointment.

On the other hand, Article 4 of the Draft Code of Conduct Version Three contains three options, where Option 2 provides a narrower approach on the double hatting issue as:

> Unless the disputing parties agree otherwise, an Adjudicator in an IID shall not act concurrently as a legal representative or expert witness in another IID [or other proceeding] involving: (a) the same measures; (b) [substantially] the same legal issues; (c) one of the same disputing parties or its subsidiary, affiliate, parent entity, State agency, or State-owned enterprise; or [and] (d) [the same treaty]. [129]

The Draft Code of Conduct noted that 'an outright ban may exclude a greater number of persons than necessary to avoid conflicts of interest and would interfere with the freedom of choice of adjudicators and counsel by states and investors'. [130]

Similarly, an outright ban on double hatting in the first instance panel would prevent numbers of experienced arbitrators from serving as arbitrators. [131] It could negatively impact the quality of ISDS proceedings where the parties would lose their chance to bring their claim to experienced arbitrators. [132]

Additionally, the restriction on the first instance panel could make it difficult for younger arbitrators to serve on the panel. [133] Unlike experienced arbitrators, first-time appointed arbitrators could not afford to become a full-time arbitrator. The Draft Code of Conduct shared this concern:

> A ban on double-hatting also constrains new entrants to the field, as few counsel are financially able to leave their counsel work upon receiving their first adjudicator
> P 505
> nomination. Indeed, many arbitrators receive only one ISDS case in their career and requiring them to abandon their other sources of income to accept a case would be a barrier to entry. [134]

Thus, an outright ban on double hatting would reduce the overall pool of candidates to serve as an arbitrator in the first instance tribunal. In this sense, the Draft Code suggests 'to introduce a phased approach so that an adjudicator may overlap in a small number of cases at the start of their adjudicator career'. [135]

An outright ban on the first instance panel could negatively impact improving diversity in the ISDS tribunal. [136] It is noted that the current ISDS tribunal lacks gender and geographical diversity. [137] In recent years, the importance of gender and regional diversity has been recognized. [138] Arbitrators who have been appointed for the first time tend to augment gender and geographical diversity. [139]

The EU's approach implementing an outright ban on double hatting provides a simple solution to resolve potential conflicts of interest related to the double hatting issue. However, it could unnecessarily exclude many arbitrators from serving on an ISDS panel. The limited prohibition on double hatting suggested by the Draft Code of Conduct could provide an efficient mechanism to address the double hatting issue. Thus, it is necessary to consider whether the outright ban on double hatting is essential.
P 506

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5 CONCLUSION

Creating an appeal mechanism in the ISDS regime could resolve many criticisms of the current ISDS regime. It could (1) bring greater consistency and predictability in awards; (2) improve a state's right to interpret a treaty; (3) address concerns about arbitrators' impartiality and independence; and (4) resolve procedural tactics such as parallel proceedings.

If an appeal mechanism is created, careful consideration of the structure of an appeal mechanism is needed. This article has addressed the advantages and disadvantages of a stand-alone appellate body and the MIC system in terms of the enforcement regime, how challenges to arbitrators will be addressed, and how consistency in awards will be achieved.

If the MIC system is to be adopted, a single MIC system would be more efficient than a multiple MICs system. When creating the MIC system, serious consideration is required on several factors such as the scope of appeal and addressing the double hatting issue.

Establishing the MIC system involves various challenges in substantive and procedural aspects. It is important to respond to the many reasons raised for ISDS reform, but it is equally important not to compromise the entire ISDS system in order to achieve these goals. In the end, the survival and prosperity of the ISDS system lie in its users. States engaging in discussions on creating the MIC system should remember that investors will be users of the system. The MIC system should refrain from compromising investors' rights too much as well as from compromising the overall quality of ISDS proceedings.
P 506

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*)

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17)

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24)

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25)

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26)

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27)

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CJEU, *Opinion 1/17 of the Court* (30 Apr. 2019).

32)

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36)

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37)

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38)

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40)

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42)

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See ibid., para. 46.

49)

See Emmanuel Gaillard, *Abuse of Process in International Arbitration*, 32(1) ICSID Rev. 17 (2017).

50)

See A/CN.9/964, *supra* n. 46, para. 49.

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51)

G. Born, the president of the SIAC, initiated a proposal on cross-institution cooperation for the consolidation of international arbitral proceedings. The proposal is aimed at adopting 'a protocol permitting the cross-institution consolidation of arbitrations subject to different institutional arbitration rules'. *See Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol* (2017), https://siac.org.sg/images/stories/press_release/2017/Memorandum%20on%20Cross-Institutional%20Consol... (accessed 24 May 2020).

52)

For a more detailed discussion on this topic, *See* Dina Prokić, *SIAC Proposal on Cross-Institution Consolidation Protocol: Can It Be Transplanted into Investment Arbitration?*, 36 J. Int'l Arb. 171 (2019).

53)

European Commission, *Factsheet on the Multilateral Investment Court* (2017), http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf (accessed 10 Jan. 2021).

54)

CETA, Art. 8.28; EU-Vietnam IPA, Art. 3.39; EU-Singapore IPA, Art. 3.10.

55)

Ibid.

56)

CETA, Art. 8.29 ('The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements'); EU-Vietnam IPA, Art. 3.41; EU-Singapore IPA, Art. 3.12. *See also* Netherlands draft model BIT, Art. 15.

57)

CETA, Art. 8.27; EU-Vietnam IPA, Art. 3.38; EU-Singapore IPA, Art. 3.9.

58)

For example, Appellate tribunals under the EU-Vietnam IPA and the EU-Singapore IPA would be constituted of three-member panels selected from a set of six members, comprising two adjudicators from the EU Member States, two adjudicators from Vietnam / Singapore, and two adjudicators from third countries. Three panels would be constituted with one member from the EU Member States, one adjudicator from Vietnam / Singapore, and one adjudicator from a third country.

59)

EU-Vietnam IPA, Art. 3.40, para. 1; CETA, Art. 8.30, para. 1.

60)

EU-Singapore IPA, Art. 3.10, para. 13 (emphasis added).

61)

EU's proposal for the scope of appeal are as follows: (1) that the Tribunal has erred in the interpretation or application of the applicable law; (2) that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or (3) those provided for in Art. 52 of the ICSID Convention, in so far as they are not covered by subparagraphs (a) and (b). *See* EU-Vietnam IPA, Art. 3.54, para. 1; EU-Singapore IPA, Art. 3.19, para. 1.

62)

EU-Vietnam IPA, Art. 3.54, para. 3; EU-Singapore IPA, Art. 3.19, para. 3.

63)

See Possible Reform of Investor-State Dispute Settlement (ISDS), Appellate and Multilateral Court Mechanisms, Note by the Secretariat, A/CN.9/WG.III/WP.185 (29 Nov. 2019), https://undocs.org/en/A/CN.9/WG.III/WP.185 (accessed 11 Jan. 2021).

64)

See ibid., para. 44.

65)

See ibid., para. 40 ('The development of a model appellate mechanism would ensure that the appellate process available in ISDS would be harmonized to the extent that the users would not alter it').

66)

See ibid., para. 51.

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67)

ICSID Convention, Art. 58. *See* 'Initial Draft on Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters' Draft Provision 9 ('A member may be removed from office in case of substantial misconduct or failure to perform his or her duties by a unanimous decision of all members except the member under scrutiny. A member may resign from his or her position through a letter addressed to the President of the Tribunal. The resignation shall become effective upon acceptance by the President … '.).

68)

ICSID Convention, Art. 58.

69)

van den Berg, *supra* n. 15, at 171.

70)

ICSID Convention, Art. 54.

71)

van den Berg, *supra* n. 15, at 178–179. *See also Possible Reform of Investor-State Dispute Settlement (ISDS), Appellate Mechanism and Enforcement Issues*, Note by the Secretariat, A/CN.9/WG.III/WP.202 (12 Nov. 2020), para. 42, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/acn9_wg.iii_wp.202.p... (accessed 12 Jan. 2021) ('The possible application of the enforcement mechanism under the New York Convention to decisions rendered by an appellate mechanism would depend on how such a mechanism would be set up, in particular, the extent to which its decisions could qualify as arbitral awards').

72)

NewYork Convention Art. 1. ('1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. 2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted'.).

73)

See Chapter 4: The Obligation to Enforce Awards, in *The 1958 NewYork Convention in Action* 114 (Marike R. P. Paulsson ed. 2016).

74)

van den Berg, *supra* n. 15, at 179.

75)

Ibid., at 179–180. *See also* A/CN.9/WG.III/WP.202, *supra* n. 71, para. 42.

76)

See A/CN.9/WG.III/WP.202, *supra* n. 71, para. 42. *See also* Gabrielle Kaufmann-Kohler & Michele Potestà, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection With the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? – Analysis and Roadmap* (2016) (CIDS first report), para. 199, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455511 (accessed 12 Jan. 2021).

77)

Kaufmann-Kohler & Potestà, *supra* n. 76, para. 199. *See also* G. Born, *International Commercial Arbitration* (3d ed. 2021), §24.08 ('Where parties agree to internal appellate review, there is no reason not to give full effect to this mechanism. Indeed, this result is required by both the New York Convention and modern arbitration legislation'.).

78)

See Colin M. Brown, *Chapter 13: The EU's Approach to Multilateral Reform of Investment Dispute Settlement*, in *The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court* 231 (Ana Stanič & Crina Baltag eds 2020); Brian McGarry, *Chapter 20: Enforcement of Investment Court Decisions under the New York Convention: A Search for Defining Elements*, in *The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?* 459 (Alan M. Anderson & Ben Beaumont eds 2020). *See also* Kaufmann-Kohler & Potestà, *supra* n. 76, para. 154.

79)

Born, *supra* n. 77, §22.02 [B][1]. *See also* Kaufmann-Kohler & Potestà, *supra* n. 76, para. 149.

80)

See Paulsson, *supra* n. 73, at 121.

81)

Ibid.

82)

Ibid.

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83)

Ibid.

84)

Kaufmann-Kohler & Potestà, *supra* n. 76, para. 152.

85)

Ibid.

86)

Ibid., para. 154 (*citing Ministry of Defense v. Gould Inc.*, 887 F. 2d 1357, 1362 (9th Cir. 1989)).

87)

Ibid., para. 152.

88)

See Alvaro Galindo et al., *Chapter 27: The New York Convention's Concept of Arbitration and the Enforcement of Multilateral Investment Court Decisions*, in *60 Years of the New York Convention: Key Issues and Future Challenges* 463–466 (Katia Fach Gomez & Ana M. Lopez-Rodriguez eds 2019).

89)

Ibid., at 463–465.

90)

Ibid., at 464.

91)

Kaufmann-Kohler & Potestà, *supra* n. 76, para. 152.

92)

ICSID Convention, Art. 54. *See also* van den Berg, *supra* n. 15, at 175.

93)

See Chapter 6: Recognition, Enforcement and Execution of ICSID Awards, in *Guide to ICSID Arbitration* 180 (Lucy Ferguson Reed et al. eds 2010).

94)

See Part III: ICSID Arbitration Mechanism, in *International Centre for Settlement of Investment Disputes (ICSID)* (4th ed., Yarik Kryvoi ed. 2020), para. 356.

95)

ICSID Rules, Art. 52.

96)

A/CN.9/WG.III/WP.202, *supra* n. 71, para. 48.

97)

Ibid., para. 50.

98)

ICSID Convention, Art. 66.

99)

A/CN.9/WG.III/WP.202, *supra* n. 71, para. 53.

100)

Ibid.

101)

CETA, Art. 8.41, para. 6; EU-Vietnam IPA, Art. 3.57, para. 8.

102)

van den Berg, *supra* n. 15, at 176; Richard Happ & Sebastian Wuschka, *From the Jay Treaty Commissions towards a Multilateral Investment Court: Addressing the Enforcement Dilemma*, 6 Indian J. Arb. L. 113, 123 (2017).

103)

See Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of Morocco, A/CN.9/WG.III/WP.195, 3 (11 Feb. 2020), https://undocs.org/en/A/CN.9/WG.III/WP.195 (accessed 22 Jan. 2021).

104)

This measure would depend on the number of arbitrators in the appellate panel roster. If there are too many arbitrators in the roster, a limited numbers of arbitrators (e.g., a nine-member tribunal) could hear the case.

105)

CETA, Art. 8.29; EU-Vietnam IPA, Art. 3.41.

106)

2020 ICSID Annual Report, 20, https://icsid.worldbank.org/sites/default/files/publications/annual-report/en/ICSID_AR20_CRA_Web.pdf (accessed 15 Oct. 2020).

107)

EU-Vietnam IPA, Art. 3.54, para. 1; CETA, Art. 8.28.

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108)

Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of Ecuador, A/CN.9/WG.III/WP.175 (17 July 2019), https://undocs.org/en/A/CN.9/WG.III/WP.175 (accessed 26 May 2020).

109)

Menaker, *supra* n. 13, at 609.

110)

See Christoph Schreuer, *From ICSID Annulment to Appeal Half Way Down the Slippery Slope*, 10 L. & Prac. Int'l Cts. & Trib. 211, 212 (2011). *See also* van den Berg, *supra* n. 15, at 174; Kryvoi, *supra* n. 94, at 356.

111)

Schreuer, *supra* n. 110, at 212.

112)

Ibid.

113)

Ibid.

114)

ICSID Convention, Art. 52(1).

115)

See Born, *supra* n. 77, §25.03.

116)

Schreuer, *supra* n. 110, at 212.

117)

New York Convention, Art. V(1)(e).

118)

See A/CN.9/WG.III/WP.202, *supra* n. 71, para. 24. *See also* Kryvoi, *supra* n. 94, at 356.

119)

See Paulsson, *supra* n. 73, at 168–171. *See also* Kateryna Bondar, *Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review*, 32 J. Int'l Arb. 621, 636 (2015), ('The drafters of the ICSID Convention did not intend ICSID annulment to operate like an appeal, as it would increase the time and cost to reach the final decision'.).

120)

See Paulsson, *supra* n. 73, at 169 ('the delegates believed a review on the merits would have opened the floodgates to an impermissible judicial review and attempted delaying tactics by respondent'). *See also* Bondar, *supra* n. 119, at 624 ('The drafters of the ICSID Convention did not intend ICSID annulment to operate like an appeal, as it would increase the time and cost to reach the final decision').

121)

See Menaker, *supra* n. 13, at 627.

122)

Ibid.

123)

Vaughan Lowe, *Changing Dimensions of International Law*, Oxford Legal Studies Research Paper Ser., Working Paper No. 4/2007 (2007), SSRN, https://ssrn.com/abstract=970727 (accessed 15 Dec. 2020).

124)

See EU-Vietnam IPA; EU-Singapore IPA.

125)

EU-Vietnam IPA, Art. 3.40, para. 1; CETA, Art. 8.30, para. 1.

126)

EU-Singapore IPA, Art. 3.10, para. 13.

127)

CETA, Art. 8.30, para. 1.

128)

The Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, para. 69 ('Many of the persons currently named to the ICSID Panel of Arbitrators by States concurrently act as counsel or experts in investment cases or concurrently act as counsel or Judges in other international courts and tribunals').

129)

Initial Draft Code of Conduct and Version 2 only provided limit restrictions on double hatting rather than an outright ban. However, Version 3 provides three options – Option 1 'Full Prohibition'; Option 2 'Modified Prohibition'; and Option 3 'Full Disclosure (With Option to Challenge)'.

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130)

The Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, para 68. *See also* Code of Conduct Version 3, para 59 ('The policy rationale for Option 2 as suggested by commentators is that it achieves the ethical objectives of a prohibition but with fewer adverse consequences on diversity and party freedom of adjudicator selection").

131)

See Code of Conduct Version 3, para. 59 ('[Option 2] would exclude fewer qualified Adjudicators').

132)

The Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, para. 69. ('Were [arbitrators'] participation to be barred by an absolute prohibition on double-hatting, a significant number of highly expert persons already nominated to the ICSID lists by member States could not be appointed. This would certainly increase the difficulty of selecting adjudicators who are experienced, available, and otherwise meet the requirements of the Convention and the expectations of parties'.).

133)

See Code of Conduct Version 3, para. 59 ('[Option 2] is less likely to create barriers to new entrants to the field').

134)

The Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, para. 68. *See also* United Kingdom Comment on Draft WP on Selection and Appointment of ISDS tribunal members, para. 2, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/selection_of_arbitra... (accessed 15 Dec. 2020). ('We believe any reforms should maintain flexibility to ensure that the rules can evolve over time and that the most qualified candidates are not made ineligible by strict double hatting requirements, while supporting the need for greater diversity of arbitrators'.).

135)

The Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, para. 68.

136)

See Code of Conduct Version 3, para 59 ('by creating fewer barriers to entry [through Option 2], it encourages diversity of Adjudicators'). *See also* Vanina Sucharitkul, 'ICSID and UNCITRAL Draft Code of Conduct: Potential Ban on Multiple Roles Could Negatively Impact Gender and Regional Diversity, as well as Generational Renewal' Kluwer Arbitration Blog (20 June 2020), http://arbitrationblog.kluwerarbitration.com/2020/06/20/icsid-and-uncitral-draft-code-of-conduct-pot... (accessed 20 Jan. 2021).

137)

In 2020, out of 211 appointments in ICSID cases, 181 arbitrators were male, and 122 arbitrators were from Western European countries and North America (US, Canada, Mexico). *See* 2020 ICSID Annual Report, at 26–28.

138)

For more discussion on this issue, *see* Andrea K. Bjorklund, Daniel Behn, Susan Franck, Chiara Giorgetti, Won Kidane, Arnaud de Nanteuil & Emilia Onyema, *The Diversity Deficit in International Investment Arbitration*, 21 J. World Invest. & Trade 410 (2020).

139)

In 2020, out of 211 appointments in ICSID cases, 15% were appointed for the first time. Forty-two per cent of first-time appointed arbitrators were from low- or middle-income countries, 19% were female. *See* 2020 ICSID Annual Report, at 26.

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Issues Relevant to the Termination of Bilateral Investment Treaties

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(*)

Abstract
Unlike the umbrella clauses contained in bilateral investment treaties (BITs), the termination clauses and issues relevant to the termination of BITs have not sparked the same level of legal interest. BITs occupy an area in the legal system at the intersection of sensitive political and legal issues and, as such, the process of termination of BITs is not void of its complexities. This article discusses some of the issues of termination of BITs by first setting up a brief background on the termination of treaties. It then focuses on BITs and their termination effectuated pursuant to the provisions of the treaty, before turning to supposed premature termination of BITs. The discussion on damages resulting from improper termination is integrated into the debate on the benefits of renegotiation over termination. Neweconometric studies are more conclusive on the impact of BITs on economic growth in the host states. In this politically sensitive area, when combined with the complex political and legal considerations, the ideal of the survival of the relationship after a termination seems to be the preferred choice.

The issue of termination, negotiation, and renegotiation of investment contracts has been discussed much in the legal community. But what happens when the instrument subject to termination and/or renegotiation is not an investment contract but instead a bilateral investment treaty (BIT)?

It appears that when it comes to the termination of a BIT, there is very little experience compared with the wealth of knowledge associated with the cancellation of investment contracts. Nevertheless, the issue of termination of BITs is not uncommon. For instance, Venezuela has surprised the Dutch government by sending "a formal communication in which it signaled its intention to terminate the treaty as of November 1, 2008, on the fifteen year anniversary." (1) The Dutch government responded by expressing their interest to renegotiate the BIT when the communication of unilateral termination had already been sent. (2) As another example, reports circulated in the autumn of 2008 that the Czech government would be talking to its partners regarding the termination of BITs. (3)

Unlike the simple termination of contracts, the termination of BITs is politically very sensitive, bearing important economic consequences not only for the parties

P 756

involved but also on the foreign investment climate in that particular state. The recent study of the relationship between foreign direct investment (FDI) and growth shows that "when FDI is in sufficient quantity, it makes substantial contribution to economic growth." (4) Unlike other treaties, the life of a BIT is relatively short (ten to fifteen years), so the natural tendency is to allow the BIT to expire rather than to engage in a complicated and politically sensitive process of premature termination. Bearing in mind these consequences, it appears that it would not be practical for a state to engage in such a process. (5) Nevertheless, indications are that it is not totally out of the question that this could occur. As such, the following review addresses some issues that would be relevant in the event of a unilateral termination of a BIT.

I Background to Treaty Termination

The stability of the legal framework in the host country is one of the factors considered by potential investors. The negotiated terms of a BIT are binding for the life of the treaty and the investors are entitled to rely on them. The rules regulating foreign investments are both international as well as national and the substantive international law protecting foreign investors consists of treaty law, contained mostly in BITs, but also multilateral treaties such as North American Free Trade Association (NAFTA) and the Energy Charter Treaty. (6) The customary international law that remains relevant for regulating foreign investments includes various aspects of state responsibility and such issues as denial of justice, the law on expropriation and rules relating to the nationality of individuals and corporations. (7)

The Vienna Convention on the Law of Treaties (8) ("Vienna Convention") codifies the customary international law on termination of treaties. (9) Article 56 of the Vienna Convention addresses situations of denunciation of, or withdrawal from, a treaty which has no specific provision regarding termination, denunciation, or withdrawal. In such a case, a treaty is not subject to denunciation or withdrawal unless "it is established that the parties intended to admit the possibility of denunciation

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or withdrawal or a right of denunciation or withdrawal may be implied by the nature of the treaty." Where a treaty falls under Article 56, the notice of intention to denounce or withdraw from a treaty must be no less than twelve months. (10)

P 757
The Vienna Convention identifies such circumstances as supervening impossibility of performance (Article 61) and fundamental change of circumstances (Article 62) which can be invoked by a party terminating or withdrawing from the treaty. Over the years, the jurisprudence of the International Court of Justice (I.C.J.) has developed very high thresholds for their application. It is clear that a breach by one party (including unlawful denunciation) does not automatically terminate the treaty, and even material breach can be invoked as a ground for terminating or suspending a treaty and does not effectuate termination of the treaty itself. (11)

As an introduction to this article, it is worth examining these provisions in more detail.

A Impossibility of performance

The notion of "impossibility" allows for the discharge of duties where it is impossible to perform them. Typically, the impossibility must be objective and must arise after the contract has been entered into. The notion of impossibility may be temporary or permanent. Under Article 61 of the Vienna Convention, impossibility allows the discharge of a party from the duty to perform under the following circumstances:

(1)A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

(2)Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

The I.C.J. has determined in *Gabčíkovo-Nagymaros Project* (12) that Hungary's notification of termination of the 1977 Treaty and related instruments on May 19, 1992 did not legally terminate them (and that they are consequently still in force and govern the relationship between the parties). In order to justify the termination of a treaty on the grounds of impossibility, Article 61, paragraph 1 requires the "permanent disappearance or destruction of an object indispensable for the execution." The I.C.J. further referred to the legislative history of Article 61 of the Vienna Convention and noted that serious
P 758
financial difficulties could not be a ground for terminating or suspending a treaty. The I.C.J. held as follows:

> During the [Vienna] conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties … Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept. (13)

B Fundamental change of circumstances

It is generally accepted that fundamental changes in circumstances would justify termination of a treaty relationship. The customary international law on unilateral termination or breach of treaty is codified in Article 62 of the Vienna Convention on the Law of Treaties:

> Article 62 Fundamental change of circumstances
>
> (1) A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
>
> (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

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> (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
> (2) A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
>
> (a) if the treaty establishes a boundary; or
> (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
> (3) If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

In *Germany v. Iceland*, [(14)] the I.C.J. has set a high threshold for treaty termination on the ground of fundamental change of circumstances. The I.C.J. has ruled, inter alia, that Iceland was not entitled unilaterally to exclude their fishing vessels from the disputed area. The I.C.J. responded to Iceland's argument of fundamental change of circumstances referring to Article 62 of the Vienna Convention on the Law of Treaties. The I.C.J. stated that:

> International law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the
> P 759
> obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty. Moreover, in order that a change of circumstances may give rise to a ground for invoking the termination of a treaty it is also necessary that it should have resulted in a radical transformation of the extent of the obligations still to be performed. [(15)]

The I.C.J. described the changes as "rendering the performance something essentially different from that originally undertaken". [(16)]

Iran-United States Claims Tribunal Case No. 56 confirmed that a change of circumstances never automatically terminates a treaty. The Tribunal analyzed the procedure for termination of a treaty and it noted that the:

> formal notification of treaty termination is not necessary in every case. The intent of a party to terminate a treaty can be implied from its conduct. Yet such conduct may be construed as an implicit denunciation only if it clearly demonstrates the intent of the party concerned to terminate the treaty. [(17)]

C Force majeure

During arbitrations, *force majeure* is often pleaded in relation to impossibility. [(18)] *Force majeure* may be relevant when a state finds itself in a situation that makes it impossible to perform an obligation, but only in the rarest circumstances will this rule apply in the context of an investment treaty. [(19)] A premature unilateral termination of a BIT is a decision within the control of the state and, as such, it cannot be effectively employed in this context. In *Gabčíkovo-Nagymaros Project*, the I.C.J. has also stated that necessity is not a ground for termination of a treaty (even if it is found to exist) and "[i]t may only be invoked to exonerate from its responsibility a state which has failed to implement a Treaty. Even if found justified, it does not terminate a Treaty." [(20)] As long as the condition of necessity continues to exist, the treaty may be "ineffective" or "dormant" and continue to exist unless the parties by mutual agreement terminate the treaty.

II Termination of BITs

The power to conclude treaties is an expression of state sovereignty. The rules of customary international law do not oblige any state to admit foreign investment in its territory because "the right to exclude and regulate foreign investment is an expression
P 760

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of state sovereignty." [21] The assumption behind BITs is that the parties share the joint purpose which is mutually compatible and the implementation of a BIT is consistent with its terms. It is recognized that the state is under an obligation to protect the investor:

> This obligation may arise either as a part of an international minimum standard under customary international law or on the basis of the obligation contained in a BIT or other treaty. Under customary international law as well as under investment treaties, host states are under an obligation to protect investors against illegal interference. In BITs the standard is either described as full protection and security or is seen as party of the fair and equitable treatment standards. [22]

Similar to the decision to conclude a BIT, the underlying factor of termination of a BIT is a policy choice made by the particular state. The policy judgment is tricky because "the policy choice on the part of the host state is based on the policy judgment, the nature of which escapes precise abstract evaluation inasmuch as it is based on the assumptions about the effect of the treaty, which is objectively uncertain." [23]

The process of balancing the benefits against costs when considering the conclusion of the BIT is considered to be complex, [24] although most recent research [25] on the relationship between FDI and economic growth is more conclusive about the effects of FDI on the economy of the host state.

Based on a non-linear growth regression study, it was shown that "when FDI is in sufficient quantity, it makes a substantial contribution to economic growth. It increases the growth rate of GDP per capita by between 0.83 and 1.57 percentage points each year, depending on the actual amount of FDI." [26] The study also concluded that the quantity of FDI required to trigger growth rate responses was relatively low: "The FDI threshold is not high, occurring at 18 times per capita GDP." [27] The study of the relationships between FDI, growth, and cross-country income convergence was conducted in 128 countries over three ten-year periods spanning 1970–1999.

However, regardless of economic benefit, where a state does not want to be bound by the standards of protection established in the treaty and instead renounces the financial benefits derived from the treaty-based promotion of foreign investments, it may terminate a treaty in accordance with its terms.

P 761

A Termination in accordance with the terms of a BIT

The least intrusive solution to termination of a BIT which will not erode the perception of a sufficient degree of legal stability is termination in accordance with the terms of a BIT. A sample survey of BITs (see Annex below) shows that they tend to be for terms of an initial period of ten years, [28] and after expiry of this stated period, may be denounced by either party subject to the proper notice of termination, which is generally one year. The BITs take into account long-term objectives of investors in the host state by providing extended protection for investments prior to the date of termination.

As this brief survey shows, the language of the extended protection found in different BITs is not uniform. Article 13(3) of the Chinese Model BIT (2003) provides the following protection: "[w]ith respect to investments made prior to the date of termination of this Agreement, the provisions of Articles 1 to 12 shall continue to be effective for a further period of ten years from such a date of termination"; Article 12 of the French Model BIT provides that "les investissements effectués pendant qu'il était en vigueur continueront de bénéficier de la protection de ses dispositions pendant une période supplémentaire de vingt ans"; Article 14(3) of the German Model BIT (2005) states that "[i]n respect of investments made prior to the date of termination of this Treaty, the provisions of the proceeding Articles shall continue to be effective for a further period of twenty years from the date of termination of this Treaty." Article 14 of the UK Model BIT (2005) is more specific and makes reference to rules of general international law: "[p]rovided that in respect to investments made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of twenty years after the date of termination and without prejudice to the application thereafter of the rules of general international law." The drafters of the US Model BIT (2004) also use more specific termination language, providing that "[f]or ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered instruments." [29] "Covered investment" [30] is defined with respect to a party as "an investment in its territory of an investor of the other party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter." [31]

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Article 14(3) of the Agreement Between Australia and the Czech Republic on the Reciprocal Promotion and Protection of Investment refers not only to extended protection for the "investments made" but adds the alternative term "investments acquired."

P 762

These provisions indicate that BITs typically provide extended protection in the range of ten years to twenty years. (32) Depending on the type of investment, this period may not be long enough to adequately restructure the investments and to prepare for the loss of the BIT protection. In the case of natural expiration of the BIT, the terms of the BIT need to be honored and the investors have no recourse. However, they will face a different situation if a state renounces the BIT before its natural expiration.

B Termination not in accordance with the terms of a BIT

Once the treaty is concluded, the host state "deliberately renounces an element of its sovereignty in return and the balancing of interests and aspirations contained in the treaty will no longer be subject to a unilateral decision that would alter the terms of the treaty." (33) Suppose, where a state makes a decision to renounce a BIT prior to its natural expiry, and as such alters the term of the agreement, the non-breaching party which is willing but unable to perform can sue for breach of the BIT. The premature termination of the BIT may trigger two kinds of disputes, one between contracting states, the other investor-state cases. Though the former are rare due to the investors' direct access to effective means of international dispute settlement, the BITs contemplate that disputes may arise also between states as a consequence of violation of international law. (34) The BITs typically contain the dispute settlement mechanism for the resolution of disputes between contracting parties and first require resolving the disputes by consultation and negotiation. (35) For example, within the United States-Czech Republic BIT, the requirement to consult is found in Article 12, which requires that parties "consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty." (36)

The mere fact that the state has initiated its own proceedings will not preclude the investor-state proceedings. Professors Dolzer and Schreuer, relying on the history of the International Centre for Settlement of Investment Disputes (ICSID) Convention and *Lucchetti v. Peru*, (37) say persuasively that "there seemed to be consensus that interstate arbitration should neither interfere in investor-state cases nor affect the finality of ICSID awards." (38) As such, the second category of disputes would arise on the investor-state level.

As already noted above, BITs provide extended protection for investments made prior to the date of termination. Additional examples include the United States-Czech

P 763

Republic BIT which continues to be effective for ten years from the date of termination; (39) the Japan-Russia BIT, (40) which provides fifteen-year extended protection for capital investments made prior to the termination date; (41) the Netherlands-Bolivia BIT which provides protection in respect of investments before the date of termination for a further period of fifteen years from the date of the termination. (42)

When a BIT is terminated not in accordance with its terms, the investors will be strongly inclined to challenge such an act, especially if they would perceive it as an arbitrary and capricious decision. From the state's perspective, it may be better to wait a decade and let the BIT expire rather than expose the state to the risk of claims by aggrieved investors asserting their rights under the BIT. While it may be mystifying why a state would not follow this strategy, if that happens and the state withdraws from the BIT prior to its natural expiration, the aggrieved party can sue for breach of the BIT. If this happens, what remedies are available to the aggrieved party?

III Consequences of Improper Termination

The Vienna Convention addresses the issue of the consequences of breach of treaty in Article 60, which specifies that the remedies are termination or suspension of operation in whole or in part, but does not spell out any alternatives for damages that would be available to the plaintiff:

(1)A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

(2)A material breach of a multilateral treaty by one of the parties entitles:

(a)the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State, or

(ii)as between all the parties;

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(b)a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

P 764
(c)any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

When confronted with the application of this article, it was held in *British Petroleum Co. (Libya) Ltd. v. Government of the Libyan Arab Republic*, [43] that Article 60 remedies are inadequate and public international law outside of the Vienna Convention must be applied in order to compensate the non-breaching party:

> The arbitrator, however, considered that the Convention conspicuously lacks any rules on remedies. The answer as to what remedies are available must therefore be found in customary international law, and particularly in the case law of international tribunals. The sole provision in the Convention which had, in the opinion of the arbitrator, a direct bearing on the questions under consideration, was that contained in Art. 60 para. 1, which reads "… It would indeed appear singularly inconsistent to take a different position on the effect of a breach of treaty as an opposite view would be tantamount to denying the principle of *pacta sunt servanda* enshrined in Article 26. However, Article 60, while implicitly resting on the proposition that a treaty continues in effect despite its unilateral abrogation by one party, falls short of providing that the innocent party is entitled in such a situation to demand specific performance or, as the case may be, *restitutio in integrum*. Public international law outside the Convention thus must be resorted to for determining the remedies available to the innocent party besides its right under Article 60 to suspend its own performance, or terminate the treaty on account of other party's repudiation of it. [44]

The party that has been injured by the breach of a treaty may seek additional remedies to those available under the Vienna Convention. These may be one or more of the following: cessation of wrongful conduct, assurances and guarantees of non-repetition, satisfaction, restitution in kind, and compensation. Additionally, the non-breaching party may be entitled to countermeasures. [45] Typically, satisfaction such as nominal compensation or an apology is sought in addition to another remedy. The same applies to *restitutio in integrum* and as Anthony Aust points out, "[a]lthough a state should only seek other remedies if restitution is not possible, in practice many do not seek restitution even when it would be possible." [46]

Lord Nair identified, inter alia, the following rights and remedies which accrue upon a breach of a treaty by one party (including unlawful denunciation) to the other party: a right of unilateral abrogation (i.e., a wronged party may seek from a competent international tribunal or authority declaration that the treaty has ceased to be binding); retaliatory suspension of performance of the corresponding provision of a treaty; a right to receive reparation and to institute arbitral or judicial proceedings (i.e., the I.C.J. can declare that the breach is of a nature to justify the wronged party to abrogate the treaty and the right of reparation in the form of restitution or indemnity and right to request
P 765
interim measures); a right to take certain non-forcible measures to secure reparation (i.e., economic or financial such as blocking accounts, etc.); a right to invoke sanctions, if any, stipulated in the treaty; and a right in certain circumstances to prosecute individuals. [47]

The most common remedy is compensation and it "includes any economically assessable damage, including loss of profit and interest." [48] Appropriate responses to the breach of treaty are also countermeasures and retorsion. The countermeasures are considered to be "convenient, quick and effective means of dealing with a breach of bilateral treaties which create reciprocal rights and obligations between two parties." [49] For instance, *Gabčíkovo-Nagymaros Project* has defined conditions which have to be met in order for the countermeasures to be justified. [50]

In cases where the BIT is breached unilaterally lacking adequate legal grounds, the investors can take recourse against the breach of international obligation under international law. It is well established under international law that the principal consequence of committing a wrongful act is the obligation for the party to repair the injury caused by that act. [51] This was reiterated in *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*. [52] Good guidance in this

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case, as well as in many others, continues to be the statement from *Factory of Chorzów*that any award should “as far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed.” (53) The claimant has to be put into the position in which it would have been had the breach not occurred.

In investment arbitrations, the most common remedy is monetary compensation, which often requires complex calculation. (54) The investments contemplate a long-term commitment to the host country and as such “events subsequent to the illegal act may affect the damage caused and must be taken into account.” (55) The award may, for example, include lost profits, consequential damages and diminution of value. The nature of direct investment is such that it involves, inter alia, a longer term project with the aim of obtaining the regular income which entails business risk. The participating investors not only finance projects and provide advice; they are also personally invested in the projects and expect the returns. If a state undertakes to honor its obligation under the BIT for a certain period of time and then turns around and denounces it, then under the concept of legitimate expectation the investor can be compensated. The concept of legitimate expectation
P 766
may be employed usefully in a number of settings. (56) In *Azurix v. Argentina*, the tribunal held that the expectations “are not based on a contract but on assurances explicit or implicit, or on representations made by the State which the investor took into account in making investments.” (57) Failure to live up to assurances as to the duration of investment protection can act as a basis of claim.

Furthermore, the BIT's “effective system of dispute settlement is likely to have an effect even without its actual use. The mere availability of effective remedy will influence the behavior of the parties to potential disputes. It is likely to have a restraining influence on investors as well as on host states.” (58)

It is apparent that states seeking to terminate the BIT without proper cause and prior to the natural expiry of the BIT risk being exposed not only to international displeasure, but also to damage claims from other states or investors. These may turn out to be a costly proposition for taxpayers, who would ultimately bear the damages awarded and other costs, of course assuming that the breaching state would honor the award of the international court or the arbitration tribunal.

IV Ideal of Preservation of Relationship

As opposed to termination, the preferred solution for states is to update their old obsolete BITs and to engage in renegotiation which may keep alive the relationship between the parties. (59)

The idea of renegotiation equates to the situation when a BIT is discharged by a new BIT and the second BIT revokes the first. The survival of the relationship also occurs in an accord and satisfaction situation. The principle of survival of the relationship is commonly adhered to in the context of renegotiation of contracts, which often stipulate the obligation to renegotiate. (60) Likewise, the text of treaties typically stipulates that parties should engage in a consultation process in order to resolve any contentious issues. For example, within the United States-Czech BIT, the requirement to consult is found in Article 12, which requires that parties to “consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty.” (61)

The process of negotiation and renegotiation of BITs is very complex and can be long. The objective is to “capture a proper balance between establishing legal protection to investments, in order to fulfill the treaty's objective, and, at the same time, provide
P 767
well-defined rules and standards, of both substance and procedure, which give legal certainty and prevent, to a reasonable extent, frivolous claims.” (62) In order to assist with the renegotiating process, Wolfgang Berger has articulated renegotiation guidelines for investment contracts which, to a large extent, can also apply to BITs. (63) These principles naturally need to be adapted to each situation. At the same time, keeping them in mind can enhance the technical competency of negotiators and provide them with helpful tools. (64) But ultimately, the success of renegotiation will be based “on the continued good will of both parties to a dispute.” (65) A threat of termination of a BIT can be used as a strategic tool during the negotiating/renegotiating process. But this strategy is not likely going to produce much goodwill between parties, which is an important factor for a successful renegotiating process.

BITs contribute to economic growth in the host state. The research by the North-South Institute on the relationship between FDI and economic growth concluded “that the quantity of FDI required to trigger growth rate responses is relatively low.” (66) The conclusions of the study also confirmed that “poorer countries tend to benefit more from FDI, which is necessary if they are to catch up to richer countries.” (67) These results, gathered over three ten-year periods spanning 1970–1999 in 128

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countries, indicate why it is worth preserving and/or renegotiating BITs.

V Conclusion

Governments seeking to terminate BITs prematurely should assess the legal consequences of such an act. Unless there are justifiable grounds, such as for example the impossibility of performance or fundamental changes of circumstances, unilateral termination can expose a state to damage claims. It makes more political sense to let the BIT expire in accordance with its terms. But even such an act will likely be a reason for international displeasure. To circumvent these risks, it is more appropriate to opt for the renegotiation of a BIT. The indications are that the process of renegotiation of BITs is on
P 768
the rise, with countries like Germany and Japan "upgrading" or renegotiating their BITs, [(68)] and Latin America will very likely follow this trend. [(69)] The ideal of survival of the relationship rather than termination, particularly in this politically sensitive area where complex political and legal considerations are combined, seems to be the preferable choice.

Annex

P 769
P 770
P 771
P 771
Termination language used in selected BITs

BIT	*Article*
Chinese Model BIT (2003) [(70)]	Article 13 This Agreement shall enter into force on the first day of the following month after the date on which both the Contracting Parties have notified each other in writing that their respective internal legal procedures necessary therefore have been fulfilled and remain in force for a period of ten years. This Agreement shall continue to be in force unless either Contacting Party has given a written notice to the other Contracting Party to terminate this Agreement one year before expiration of the initial ten year period or at any time thereafter. With respect to investments made prior to the date of termination of this Agreement, the provisions of Articles 1 to 12 shall continue to be effective for a further period of ten years from such date of termination. This Agreement may be amended by written agreement between the Contracting Parties. Any amendment shall enter into force under the same procedures required for entry into force of the present Agreement.

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Termination language used in selected BITs

BIT	*Article*
French Model BIT	Article 12 Entrée en vigueur et durée Chacune des Parties notifiera à L'autre L'accomplissement des procédures internes requises pour L'entrée en vigueur du présent accord, qui prendra effet un mois après le jour de la réception de la dernière notification. L'accord est conclu pour une durée initiale de dix ans. Il restera en vigueur après ce terme, à moins que L'une des Parties ne le dénonce par la voie diplomatique avec préavis d'un an. A L'expiration de la période de validité du présent accord, les investissements effectués pendant qu'il était en vigueur continueront de bénéficier de la protection de ses dispositions pendant une période supplémentaire de vingt ans.
German Model BIT (2005) [71]	Article 14 This Treaty shall be subject to ratification; the instruments of ratification shall be exchanged as soon as possible. This Treaty shall enter into force one month after the date of exchange of the instruments of ratification. It shall remain in force for a period of ten years and shall be extended thereafter for an unlimited period unless denounced in writing through diplomatic channels by either Contracting State twelve months before its expiration. After the expiry of the period of ten years this Treaty may be denounced at any time by either Contracting State giving twelve months' notice. In respect of investments made prior to the date of termination of this Treaty, the provisions of the proceeding Articles shall continue to be effective for a further period of twenty years from the date of termination of this Treaty.
U.K. Model BIT (2005) [72]	Article 14 Duration and termination This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other. Provided that in respect to investments made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of twenty years after the date of termination and without prejudice to the application thereafter of the rules of general international law.

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Termination language used in selected BITs

BIT	*Article*
U.S. Model BIT (2004) [73]	Article 22 Entry in force, duration and termination 1. This Treaty shall enter into force thirty days after the date the Parties exchange instruments of ratification. It shall remain in force for a period of ten years and shall continue in force thereafter unless terminated in accordance with paragraph 2. 2. A Party may terminate this Treaty at the end of the initial ten-year period or any time thereafter by giving one year's written notice to the other Party. 3. For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered instruments.
United States-Czech Republic BIT	Article 14 1. This Treaty shall enter into force thirty days after the date of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 2 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter. 2. Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten year period or at any time thereafter. 3. With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such date of termination.
Agreement Between Australia and the Czech Republic on the Reciprocal Promotion and Protection of Investment	Article 14 Entry into force, duration and termination 1. This Agreement shall enter into force thirty days after the date on which the Contracting Parties shall have notified each other that their constitutional requirements for the entry into force of this Agreement have been fulfilled. It shall remain in force for a period of fifteen years and thereafter shall remain in force indefinitely, unless terminated in accordance with paragraph (2) of this Article. 2. Either Contracting Party may terminate this Agreement at any time after it has been in force for fifteen years by giving one year's written notice to the other Contracting Party. 3. Notwithstanding termination of this Agreement pursuant to paragraph (2) of this Article, the Agreement shall continue to be effective for a further period of fifteen years from the date of its termination in respect of investments made or acquired before the date of termination of this Agreement.

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Termination language used in selected BITs

BIT	*Article*
Agreement Between the Czech Republic and the United Mexican States on the Promotion and Reciprocal Protection of Investments	Article 25 Entry into force, duration and termination 1. The Contracting Parties shall notify each other in writing on the compliance with their constitutional requirements in relation to the approval and entry into force of this Agreement. 2. This Agreement shall enter into force thirty (30) days after the date of the final notification, through diplomatic channels used by both Contracting Parties to notify the fulfillment of the requirements referred to in paragraph (1). 3. This Agreement shall remain in force for a period of ten (10) years and shall remain in force thereafter for an indefinite period of time, unless either of the Contracting Parties gives to the other Contracting Party written notice of its intention to terminate the Agreement, through diplomatic channels, twelve (12) months in advance. 4. In respect of investments made prior to the termination of this Agreement, the provisions of this Agreement shall continue to be effective for a period of ten (10) years from the date of termination. 5. This Agreement may be modified by mutual consent of the Contracting Parties and the agreed modification shall come into effect in conformity with the procedures established in paragraphs (1) and (2).
Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic	Article 13 1. The present Agreement shall enter into force on the first day of the second month following the date on which the Contracting Parties have notified each other in writing that the procedures constitutionally required therefore have been complied with, and shall remain in force for a period of ten years. 2. Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly for periods of ten years, each Contracting Party reserving the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity. 3. In respect of investments made before the date of the termination of the present Agreement the foregoing Articles thereof shall continue to be effective for a further period of fifteen years from that date. 4. Subject to the period mentioned in paragraph (2) of this Article, the Government of the Kingdom of the Netherlands shall be entitled to terminate the application of the present Agreement separately in respect of any of the parts of the Kingdom.

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Termination language used in selected BITs

BIT	*Article*
Agreement Between the Czech and Slovak Federal Republic and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments	Article 12 Final provisions 1. This Agreement shall enter into force on the day when both Contracting Parties have notified each other that they have complied with the constitutional requirements for the conclusion and entry into force of international agreements, and shall remain binding for a period of ten years. Unless written notice of termination is given six months before the expiration of this period, the Agreement shall be considered as renewed on the same terms for a period of five years, and so forth. 2. In case of official notice as to the termination of the present Agreement, the provisions of Articles 1 to 11 shall continue to be effective for a further period of ten years for investments made before official notice was given.

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*)

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1)

Dutch Ministry of Foreign Affairs, I.A. Reporter 1 (May 16, 2008), *Venezuela surprises the Netherlands with termination notice for BIT; treaty has been used by many investors to route investments into Venezuela*, *available at* <www.iareporter.com/Archive/IAR-05-16-08.pdf>; <www.minbuza.nl/verdragen/en/static/actuel/Opzegging-IBO-Venezuela.html>.

2)

Squire Sanders, Latin Counsel, *Termination of the Treaty for the Promotion and Reciprocal Protection of Investments Between the Republic of Venezuela and the Kingdom of the Netherlands of 1993* (December 2, 2008), *available at* <www.latincounsel.com/eng/noticiaampliada.php?nid=6854>.

3)

Czech Television, *Vláda se chce vyhnout arbitrážím vypovězením smluv o ochraně investic* 24 (August 27, 2008), *available at* <www.ct24.cz/ekonomika/26632-vlada-se-chce-vyhnout-arbitrazim-vypovezenim-smluv-o-ochrane-investic>. The Czech Republic has signed 79 BITs, *see* ICSID Database on Bilateral Investment Treaties, *available at* <http://icsid.worldbank.org/ICSID/FrontServlet>.

4)

R. Schmidt, Enough Foreign Direct Investment Quickens Economic Growth Everywhere (forthcoming, 2009).

5)

Communication with Antonio Parra (2009).

6)

Rudolf Dolzer & Christopher Schreuer, Principals of International Investment Law 265 (2008).

7)

Id.

8)

Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. When applying the Vienna Convention, it is necessary to ascertain whether the country at issue has ratified it and/or applies specific provisions as to the matter of customary international law.

9)

The Vienna Convention on the Law of Treaties addresses issues related to invalidity, termination, and suspension of a treaty in Part V (arts. 42–72). Material breach of a treaty is described in art. 60(3) as (a) a repudiation of the treaty not sanctioned by the present Convention, or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

10)

Vienna Convention, art. 56(2).

11)

Anthony Aust, Modern Treaty Law and Practice 237 (2000).

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12)

Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7. In its judgment of September 25, 1997, the I.C.J. found that both Hungary and Slovakia had breached their legal obligations. It called on both states to negotiate in good faith in order to ensure the achievement of the objectives of the 1977 Budapest Treaty, which it declared was still in force, while taking account of the factual situation that had developed since 1989.

13)

Id. para. 102, at 63, reproduced in Doak Bishop, James Crawford, & W. Michael Reisman, Foreign Investment Disputes Cases, Materials and Commentary 1182 (2005).

14)

Fisheries Jurisdiction (Germany v. Iceland), 1973 I.C.J. 49, 62–65 (February 2).

15)

Id.

16)

Id.

17)

Amoco Int'l Finance Corp. v. Iran, 15 Iran-U.S. C.T.R. 189 (1987).

18)

See discussion *in* Bishop, Crawford, & Reisman, *supra* note 13, at 1184. The authors point out that in some instances, such as in the case of material impossibility (e.g., where a state aircraft is forced, due to damage or loss of control of the aircraft due to weather, into the airspace of another state without the latter's authorization), these arguments have been accepted, while arguments on increased difficulty of performance and the plea of *force majeure* have failed.

19)

Dolzer & Schreuer, *supra* note 6, at 171.

20)

Gabčíkovo-Nagymaros Project, *supra* note 12, para. 101.

21)

Dolzer & Schreuer, *supra* note 6, at 7.

22)

Id. at 8 (footnotes omitted).

23)

Id. at 8, 23, citing Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 World Development 1567 (2005); Zachary Elkins, Andrew Guzman, & Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties*, *1960–2000, in* Berkley Program in Law and Economics (Annual Papers, 2006); Mary Hallward-Driemeyer, *Do Bilateral Investment Treaties Attract Foreign Investment?* (World Bank Policy Research Working Paper No. 3121).

24)

This is so, because “[n]one of the benefits and consequences is open to any qualitative or quantitative objective assessment, and each state will exercise its sovereign prerogative in determining its preferences and priorities.” *See* Dolzer & Schreuer, *supra* note 6, at 8.

25)

Schmidt, *supra* note 4.

26)

Id.

27)

Id.

28)

Each of the Chinese Model BIT (2003), French Model BIT, German Model BIT (2005), U.K. Model BIT (2005), U.S. Model BIT (2004) provide for an initial period of 10 years; however, the Agreement Between Australia and the Czech Republic on the Reciprocal Promotion and Protection of Investment may be terminated only after 15 years by giving one year's written notice.

29)

U.S. Model BIT (2004), art. 22(3). The U.S. Model BIT is in the review process and it will be interesting to see what/if any revisions will be incorporated into the termination provision.

30)

U.S. Model BIT (2004), art. 1.

31)

Id.

32)

For example, the French Model BIT, German Model BIT (2005) and U.K. Model BIT (2005) contemplate extended protection of twenty years after the date of termination.

33)

Dolzer & Schreuer, *supra* note 6, at 23.

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34)

Id. at 212–13.
35)

Id. at 213–14.
36)

Available at <www.state.gov/documents/organization/43557.pdf>.
37)

Lucchetti v. Peru, Award of Jurisdiction, February 7, 2005, paras. 7–9.
38)

Dolzer & Schreuer, *supra* note 6, at 214.
39)

United States-Czech Republic BIT, art. 22(3): "For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments."
40)

Agreement Between the Government of the Russian Federation and the Government of Japan on the Encouragement and Protection of Capital Investments (November 13, 1998).
41)

Art. 17(3) states "[i]n respect of the capital investments made prior to the termination date of the present Agreement the provisions of the present Agreement's Articles 1–16 shall remain valid during the further fifteen years after that date."
42)

Agreement Between the Kingdom of the Netherlands and the Republic of Bolivia. on Encouragement and Reciprocal Protection of Investments, art. 14(3): "In respect of investments made before the date of the termination of the present Agreement the foregoing Articles thereof shall continue to be effective for a further period of fifteen years from that date."
43)

See P. Sanders, *Award on the Merits of October 10, 1973*, 5 Y.B. Comm. Arb. 143–57 (1980).
44)

Id. at 144.
45)

Aust, *supra* note 11, at 301.
46)

Id. at 302.
47)

Lord McNair, The Law of Treaties 540–86 (1961).
48)

Aust, *supra* note 11, at 302.
49)

Id. at 303.
50)

1997 I.C.J. 7, paras. 82–87, 37 I.L.M. 162, 191 (1998): (1) it must be taken in response to a previous international wrong of another state and directed against the state; (2) the injured state must have called on the other state to discontinue its wrongful conduct or make reparation for it; (3) the purpose must be to induce the other state to comply with its obligations (i.e., to resolve the dispute, not to escalate it); and (4) the effect of the countermeasures must be proportionate to the injury suffered, taking account of the rights in question, and therefore the countermeasures must be reversible.
51)

Factory at Chorzów (Germany v. Poland), 1928 P.C.I.J. (ser. A) No. 17, 21.
52)

ICSID Case No. ARB/04/19, 123, para. 467.
53)

Germany v. Poland, *supra* note 51, at 47; ICSID Case No. ARB/04/19, 123.
54)

For discussion of damages and compensation in investor v. state disputes, *see* Dolzer & Schreuer, *supra* note 6, at 271–77.
55)

Id. at 273.
56)

Id. at 104.
57)

Azurix v. Argentina, Award dated July 14, 2006, para. 318.

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58)

Dolzer & Schreuer, *supra* note 6, at 222.

59)

M. Sornarajah, The Settlement of Foreign Investment Disputes 118 (2000).

60)

The renegotiation process in the context of investment contracts is typically driven by the content of the adaptation clause; when the contracts do not have an adaptation clause, the circumstances for renegotiation of the contract depend on the law applicable to the investment contract. *See* Stefan Kroll, *The Renegotiation and Adaptation of Investment Contracts, in* N. Horn & S. Kroll, Arbitrating Foreign Investment Disputes, Procedural and Substantive Legal Aspects 457 (2004).

61)

Available at <www.state.gov/documents/organization/43557.pdf>.

62)

An interview with Alejandro Faya-Rodriguez, special legal advisor, Mexican Ministry of Economy, Investment Treaty News, July 17, 2008, *available at* <www.investmenttreatynews.org/cms/news/archive/2008/07/28/an-interview-with-alejandro-faya-rodriguez-special-legal-advisor-mexican-ministry-of-economy.aspx>.

63)

Kroll, *supra* note 60, at 445. The principles articulated by W. Berger are (1) keeping to the negotiation framework set out by the clause; (2) respecting the remaining provisions of the contract; (3) having regard to the prior contractual practice between the parties; (4) making a serious effort to reach agreement; (5) paying attention to the interests of the other side; (6) producing information relevant to the adaptation; (7) willingness to compromise; (8) flexibility in the conduct of negotiations; (9) searching for reasonable and appropriate adjustment solutions; (10) making concrete and reasonable suggestions for adjustment instead of general declarations of willingness; (11) avoiding rushed adjustment suggestions; (12) giving appropriate reasons for one's own adjustment suggestions; (13) obtaining expert advice in difficult and complex consensus proceedings; (14) responding promptly to adjustment offers from the other side; (15) making an effort to maintain the price-performance relationship taking into consideration the parameters regarded as relevant by the parties; (16) avoiding an unfair advantage or detriment to the other side ("no profit, no loss" principle); (17) prohibition on creating established facts during negotiations except in emergencies (ban on escalation); (18) maintaining efforts to reach agreement for an appropriate length of time; (19) avoiding unnecessary delays in the consensus proceedings.

64)

UNCTAD provides invaluable support to many governments in enhancing negotiating and drafting skills.

65)

Dolzer & Schreuer, *supra* note 6, at 78.

66)

Schmidt, *supra* note 4.

67)

Id.

68)

The UNCSTAD statistics for 2004 show that during 2004, 10 out of 73 BITs concluded that year replaced earlier BITS. UNCSTAD Research Note, August 30, 2005.

69)

Analysis: Damon Vis-Dunbar, *Latin America's MewModel Bilateral Investment Treaties*, Investment Treaty News, July 17, 2008, *available at* <www.investmenttreatynews.org/cms/news/archive/2008/07/17/in-depth-latin-america-s-new-model-bilateral-investment-treaties.aspx>. On termination of treaties, *see* Athanassios Vamvoukos, Termination of Treaties in International Law (1985); Bhek Pati Sinha, Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party (1966); Lord McNair, The Law of Treaties (1961); Sir Ian Sinclair, The Vienna Convention on the Law of Treaties (2d ed. 1984); Aust, *supra* note 11; S.K. Agrawala, Essays on the Law of Treaties (1972); Jan Klabbers, The Concepts of Treaty in International Law (1996); Arie David, The Strategy of Treaty Termination (1975); Nancy Konton, Termination and Revision of Treaties in the Light of the New Customary International Law (1994).

70)

Agreement Between the Government of the People's Republic of China and the Government of […] on the Promotion and Protection of Investments.

71)

Treaty Between the Federal Republic of Germany and […] Concerning the Encouragement and Reciprocal Protection of Investments.

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72)

Draft Agreement Between the Government of the United Kingdom and the Government of […] for the Promotion and Protection of Investments.

73)

Treaty between the Government of the United States of America and the Government of […] Concerning the Encouragement and Reciprocal Protection of Investment.

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The agreement terminating intra-EU BITs: are its provisions on ‘New’ and ‘Pending’ Arbitration Proceedings compatible with investors’ fundamental rights?

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ABSTRACT

On 5 May 2020, 23 Member States of the EU signed a plurilateral treaty with the purpose of terminating the nearly 130 Bilateral Investment Treaties (BITs) between them (the so-called ‘intra-EU BITs’) and the 11 sunset clauses that continue in effect in intra-EU BITs that have already been terminated. The treaty, entitled the ‘Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union’, marks the beginning of the next—but by no means the final—chapter in the controversy over the status of intra-EU BITs. In this article, we examine one of the many important legal questions raised by the Agreement; namely, whether its attempt to undercut arbitrations commenced well before the Agreement came into force, including those resulting in awards rendered before the *Achmea* judgment, is compatible with investors’ rights under the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. We argue that by purporting to deprive investors of the fruits of valid claims in this way, the Agreement infringes Article 1 of the First Protocol to the ECHR (‘A1P1’) and may also breach the rights of access to justice and a fair hearing under Article 6(1) (and their equivalents in the Charter).

1. INTRODUCTION

On 5 May 2020, 23 Member States of the European Union (EU) (all but Austria, Finland, Ireland and Sweden) signed a plurilateral treaty with the purpose of terminating the nearly 130 Bilateral Investment Treaties (BITs) between them (the so-called ‘intra-EU BITs’) and the 11 sunset clauses that continue in effect in intra-EU BITs that have already been terminated (together, the ‘impacted BITs’). The treaty, entitled the ‘Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union’ (the ‘Agreement’) [(1)] marks the beginning of the next—but by no means the final—chapter in the many years of controversy within the EU over the status of intra-EU BITs. At the time of writing (November 2020), the agreement has entered into force for five States (first as between Denmark and Hungary, on 29 August 2020, followed by Croatia, Cyprus and Slovakia). It will enter into force for Malta by the end of November, and for Bulgaria in December 2020. Meanwhile Spain is applying the Agreement provisionally.

The Agreement raises numerous difficult and important questions about its legal and practical effects. Some primarily concern its impact on the substantive rights granted under intra-EU BITs—for example, whether its attempt to terminate sunset clauses that would otherwise have continued to be valid will have the intended effect. Others concern its consequences for arbitral and related proceedings, in particular, domestic set-aside applications and annulment proceedings pursuant to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (‘ICSID Convention’), [(2)] as well as enforcement steps within and outside the EU. Much has been, and surely will be, written on these and other elements of the consequences of the Agreement, addressing legal issues ranging across public international law, EU law, and the constitutional and arbitral law of individual States. In this article, we examine one topic with potential relevance to all proceedings connected to impacted BITs: is the Agreement, as a result of its impact on investors with claims arising before it comes into effect, compatible with those investors’ rights under the European Convention on Human Rights (ECHR) [(3)] and the Charter of Fundamental Rights of the EU (‘Charter’) [(4)] ?

We argue that by purporting to deprive investors of the fruits of valid claims that arose before the Agreement’s entry into force, the Agreement infringes Article 1 of the First Protocol to the ECHR (‘A1P1’) and may also breach the rights of access to justice and a fair hearing under Article 6(1). The circumstances bear a striking resemblance to the *Stran Greek* case, [(5)] in which the European Court of Human Rights (ECtHR) held that Greek legislation purporting to reverse the result of arbitral proceedings that had led to an award against the State violated both Articles. The drafting of some of the Agreement’s provisions suggests a conscious attempt to sidestep *Stran Greek*. But, in our view, the attempt fails.

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The Agreement's incompatibility with A1P1 and Article 6 is at its clearest in relation to awards which were already confirmed or were no longer challengeable (in set-aside or annulment proceedings), but remained unpaid, before the judgment of the Court of Justice of the European Union (CJEU) in *Achmea* in March 2018 ('*Achmea*'). [(6)] In relation to that stark and retrospective attempt to reverse the parties' settled fortunes, it is no answer for the State to say it was simply implementing EU law. For the same reasons, there is also a probable incompatibility between the Agreement and the corresponding provisions of the Charter, Articles 17 and 47.

Investors also have a compelling case under these provisions in relation to pre-*Achmea* awards which, as of March 2018, were still amenable to challenge or were already the subject of pending set-aside or annulment proceedings. The position is less clear, but still properly arguable, in relation to later awards (including those rendered in currently incomplete arbitral proceedings) where the alleged breach of the BIT took place before its effective termination, whether before or after *Achmea*.

It is open to an investor holding an award the Agreement seeks to nullify to raise these arguments in arbitral or judicial proceedings (including those contemplated by the Agreement itself) in which the validity or enforceability of the award is at issue; and, if necessary (and subject to exhaustion of any available and effective local remedies), in the ECtHR itself.

2. THE PURPOSE AND EFFECT OF THE TERMINATION AGREEMENT

The European Commission has long been of the view that intra-EU BITs are unnecessary and incompatible with EU law. [(7)] For the Commission, *Achmea* presented a long-awaited opportunity to 'intensif[y] its dialogue with all Member States' with a view to terminating all intra-EU BITs [(8)]; the Agreement is therefore the culmination of that dialogue and implements *Achmea*. [(9)] The Agreement's preamble indicates that the signatory States take a similar view. [(10)]

But *Achmea* was not concerned with the compatibility of intra-EU BITs with EU law as such—at any rate, as regards the *substantive* obligations undertaken by a Member State towards investors of another. [(11)] Rather, the CJEU's judgment addressed the incompatibility between Articles 267 and 344 TFEU and a particular type of *procedural mechanism* in intra-EU BITs—that is, those intra-EU investor–state dispute settlement (ISDS) clauses that may require an arbitral tribunal to interpret or apply EU law. [(12)] Conflating the procedural problem identified in *Achmea* with the Commission's substantive agenda for intra-EU investor–State relations is problematic. As we will see, the ECHR issue arises precisely because of the way the signatory States have addressed the *procedural* consequences of terminating their substantive engagements. It is on those consequences that this section focuses.

When the Agreement enters into force for two Member States who are party to an intra-EU BIT listed in the Annexes to the Agreement (an 'impacted BIT'), Article 2(1) terminates the impacted BIT. [(13)] Leaving aside the complex question of sunset clauses, [(14)] the termination of an impacted BIT eliminates both the substantive protections: the BIT previously conferred on intra-EU investors and the ISDS clause through which those rights could be vindicated. So far so straightforward. However, the Agreement also sets out a detailed scheme for the treatment of 'Arbitration Proceedings' [(15)] commenced under impacted BITs *before* those BITs are terminated by Article 2(1).

The only 'Arbitration Proceedings' to escape the reach of the Agreement are 'Concluded Arbitration Proceedings'; that is, those that have 'ended with a settlement agreement or with a final award issued prior to 6 March 2018' (the date of the *Achmea* judgment) *and* where either: (i) 'the award was duly executed prior to 6 March 2018' (and no challenge or enforcement proceeding was pending on that date); or (ii) where the 'award was set aside or annulled before the date of entry into force of this Agreement' (Article 1(4)). Proceedings in this category, according to Article 6(1), 'shall not be reopened'.

That leaves the Agreement to bite on two categories of Arbitration Proceedings: 'Pending Arbitration Proceedings', ie those 'initiated prior to 6 March 2018 and not qualifying as Concluded Arbitration Proceedings, regardless of their stage on the date of the entry into force of this Agreement' (Article 1(5)); and 'New Arbitration Proceedings', ie those initiated on or after 6 March 2018.

Three features of these definitions stand out. First, arbitral proceedings commenced before 6 March 2018 and not falling within the narrow confines of 'Concluded' proceedings are treated as 'Pending', even if a final award had been issued and upheld in set-aside or annulment proceedings before that date. The fact that an award has not been 'executed', whether or not a challenge or set-aside application was pending (or had even already been decided in the investor's favour), is

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enough to make it a 'Pending' proceeding. In this context, 'executed' appears to mean 'paid or otherwise enforced'. [16] Even if set-aside or annulment proceedings are in progress, it is a linguistic oddity to describe the *arbitral* proceedings as 'pending'. On ordinary principles, a final award generally concludes the proceedings and is presumptively valid and enforceable unless and until annulled or set aside by the competent decision maker (either an *ad hoc* committee at the International Centre for Settlement of Investment Disputes ('ICSID') or the curial court of the seat). Still less is an arbitral proceeding 'pending' if a final award has been upheld at the seat or in an ICSID annulment proceeding. Yet the Agreement defines it as such.

Secondly, the key date is that of the *Achmea* judgment—not the date of signature of the Agreement, nor its provisional application or entry into force for the States concerned (which could be months or even years away). Yet the moment it comes into force, arbitral proceedings commenced as long ago as, say, April 2018, in reliance on an impacted BIT then fully in force and well before the first appearance of a (leaked) draft of the Agreement in November 2019, [17] or of the declarations of the Member States in January 2019, [18] immediately become 'New' proceedings.

Thirdly, even though the Agreement distinguishes between 'Pending' and 'New' proceedings (which, as we have seen, covers arbitrations resulting in a final award prior to *Achmea*, all the way up to proceedings commenced after the signature of the Agreement but before its provisional application or entry into force for the relevant Member States), the Agreement largely treats both types of proceeding in the same way. In the first place, it purports to render ISDS clauses in impacted BITs ineffective as the basis of consent for Pending and New Arbitration Proceedings (Articles 4(1) and 5). Article 4, entitled 'Common provisions', provides at subparagraph (1):

> The Contracting Parties hereby confirm that Arbitration Clauses are contrary to the EU Treaties and thus inapplicable. As a result of this incompatibility between Arbitration Clauses and the EU Treaties, as of the date on which the last of the parties to a Bilateral Investment Treaty became a Member State of the European Union, the Arbitration Clause in such a Bilateral Investment Treaty cannot serve as legal basis for Arbitration Proceedings. [19]

That operates retroactively because—as just noted—it undercuts arbitrations commenced well before the Agreement came into force, including those resulting in awards rendered before the *Achmea* judgment. In the second place, it requires Contracting Parties to Pending and New Arbitration Proceedings under impacted BITs to 'inform … arbitral tribunals about the legal consequences of the *Achmea* judgment as described in Article 4' (Article 7(a)). And finally, it requires Contracting Parties who are parties to judicial proceedings concerning an arbitral award issued on the basis of an impacted BIT to 'ask the competent national court, including in any third country [ie outside the EU], as the case may be, to set the arbitral award aside, annul it or to refrain from recognising and enforcing it' (Article 7(b)).

The main difference in the Agreement's treatment of 'Pending' as compared to 'New' proceedings is that it establishes 'transitional measures' only for Pending Arbitration Proceedings (other than those which conclude with a final award finding that the host State conduct at issue did not violate the applicable impacted BIT) (Article 8). Those transitional measures consist of a 'settlement procedure' and the reinstatement or extension of national time limits to challenge disputed measures in domestic courts (Articles 9 and 10, respectively).

The transitional measures appear framed as a *quid pro quo* for the undercutting by Articles 4 and 7 of arbitral claims commenced pre-*Achmea* (those commenced post-*Achmea* do not qualify). But the measures are of questionable value to the investors to whom they apply. Article 9—headed 'Structured dialogue for Pending Arbitration Proceedings'—sets out a procedure for 'structured dialogue' with a view to the parties reaching an amicable settlement, based (*inter alia*) on 'the case-law of the CJEU on the extent of reparations of damages under Union law'. [20] The right of an investor to invoke the settlement procedure set out in Article 9 is conditional on the investor undertaking not to start, or requesting suspension of, proceedings for the recognition, execution, enforcement, or payment of an award in a Member State or in a third country (Article 9(1)). Crucially, a Member State appears to be bound to engage in such a 'structured dialogue' only if the CJEU or a national court has found that the State measure being contested in the arbitral proceedings violates Union law (Article 9(3)), and positively barred from entering into such a dialogue if the CJEU or a national court has found that the measure does not violate Union law (Article 9(4)). If neither Article 9(3) or (4) applies, the settlement procedure may only be entered into 'if a potential violation of *Union law*' can be identified [21]; in other words, it is entirely irrelevant whether an arbitral tribunal has already established any violation of an impacted BIT.

Article 10—headed 'Access to national courts'—by subparagraph (1) entitles an investor to 'access the judicial remedies under national law against a measure contested in Pending Arbitration

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Proceedings' and extends (or revives, if expired) the national limitation period to enable proceedings to be brought. But, like Article 9, the same paragraph subjects that right to the condition that the investor first withdraws the Pending Arbitration Proceedings, 'waives all rights and claims' pursuant to the BIT, 'renounces execution of an award already issued' and 'commits to refrain from issuing New Arbitration Proceedings'. Much as for the 'structured dialogue', Article 10(3) makes plain that the impacted BIT 'shall not be considered as part of the applicable law' in the new judicial proceedings. (22)

Thus, neither the structured dialogue nor the judicial proceedings the Agreement envisages is a substitute forum for determining the accrued claim under the BIT, and certainly not for enforcing an award in the investor's favour. On the contrary, the investor is required to renounce its rights pursuant to the BIT together with the fruits of any arbitral proceedings already pursued (often at great expense) and must take its chances with whatever available cause of action—and corresponding standard of compensation—it may be able to identify in relation to the underlying alleged wrongdoing by the State.

The Agreement offers nothing to investors who are unable to identify any such cause of action based on national or Union law. Where one exists, the Agreement assumes that it will be effective and give rise to appropriate compensation. Indeed, the preamble refers to the protection of transnational investment flows within the EU on the basis that they may constitute the exercise of fundamental freedoms (establishment, free movement of capital, etc) under the Treaties and are therefore subject to the usual rules limiting Member State derogations from those freedoms. However, the extent to which such protection can be assimilated to rights conferred by a BIT is a matter of genuine debate and uncertainty. Even taking the most optimistic view of succeeding on a claim based on EU law (and recovering damages comparable to those recoverable pursuant to an impacted BIT), there remains a world of difference between, on the one hand, a final, reasoned award entitling an investor to a quantified pecuniary remedy for a breach of its rights; and on the other, the right to present evidence and argument, in fresh negotiations or in proceedings before a domestic court, in an effort to persuade the facilitator or court that a remedy should be granted on the basis of a different cause of action. What is, on analysis, a mere contingency is a poor swap for a valuable vested entitlement. These are creatures different in kind, not just degree.

Of course, not every investor impacted by the Agreement is in quite this stark position. At one end of the scale are those who may in future be subject to conduct which, but for the Agreement, would arguably have been a breach of an impacted BIT and who would have been able to ventilate their claim through the ISDS process. Then there are those who have already submitted disputes to arbitration (whether pre- or post-*Achmea*), but whose claims have not yet resulted in an award prior to entry into force of the Agreement. (23)

The most significant impact, though, will undoubtedly be on those who hold, or may come into possession of, a final award under an impacted BIT that has not yet been executed (in the sense described above). For the purposes of this analysis, it is helpful to divide these unpaid awards into three principal categories: (i) those that, at the time the Agreement enters into force for the relevant parties, have been successfully defended in set-aside or annulment proceedings; (ii) those that, at that time, remain subject to pending set-aside or annulment proceedings; and (iii) those that are rendered only after the Agreement enters into force for the relevant parties but which relate to claims filed previously.

The number and value of these awards is significant. As of November 2020, there are two awards in the public domain which may already fall into category (i): *Horthel Systems v Poland*, a 2017 award worth US$9.3 million which was upheld in challenge proceedings before the Swiss courts shortly before the Judgment in *Achmea*, in December 2017 (24); and *UAB E energija v Latvia*, an award worth €3.7 million, which survived an annulment challenge in a decision rendered on 9 April 2020. (25) There are also a number of awards currently in category (ii), which may, by the time the Agreement enters into force for the relevant parties, move to category (i). They include *Dan Cake v Hungary* (a 2017 award worth over €10 million, including interest and costs); *Sodexo Pass v Hungary* (a 2019 award worth €73 million); and *UP and C.D Holding v Hungary* (a 2018 award worth €23 million). (26) As of November 2020, there are at least 19 further claims pending under impacted BITs, with a total value (based on publicly available information) of around €2 billion.

3. IS THE AGREEMENT COMPATIBLE WITH THE ECHR?

The question of the Agreement's compatibility with the ECHR arises primarily in relation to the rights guaranteed in A1P1 (the right to property) and Article 6 (the right to a fair trial).

The ECtHR has interpreted A1P1 as comprising three distinct 'rules': first, the general rule regarding the peaceful enjoyment of possessions; secondly, the rules applicable to 'deprivation' of

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possessions; and thirdly, the recognition that States may 'control the use' of property in accordance with the public interest. As the ECtHR explained in *Holy Monasteries v Greece*, '[t]he second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, are to be construed in the light of the general principle laid down in the first rule.' (27) The ECtHR's guide to A1P1 acknowledges that it is difficult, in some cases, to qualify a measure as either a deprivation or a control of property; in those cases, the Court tends either to analyse the circumstances of the case under the first (general) rule or simply not to indicate expressly which part of A1P1 applies. (28) In any event, the Court applies the same criteria of assessment to a measure, irrespective of the classification of the interference.

Article 6(1) guarantees a fair hearing before an independent and impartial tribunal in the determination of 'civil rights and obligations'. It is well established that this provision not only entitles a party to a fair procedure in relation to proceedings already in progress, but by implication also guarantees a right of access to the machinery of justice to ventilate a civil claim. The ECtHR regards that right as a fundamental facet of the rule of law. (29)

3.1 The right to property and right to a fair hearing in the jurisprudence of the ECtHR

The ECtHR's jurisprudence on commercial arbitration awards as 'possessions' for the purposes of A1P1 begins with *Stran Greek*, (30) a case concerning Greece's introduction, during the pendency of set-aside proceedings it had brought in Greece against Stran Greek's arbitral award, of legislation rendering unenforceable arbitral awards adjudicating claims arising from contracts concluded during the period of Greek military rule (1967–1974).

Stran contracted with the military government to construct an oil refinery, but government action frustrated implementation of the project. In 1975, following the return to democracy, the Greek Parliament enacted new legislation under which the contract was terminated.

Stran brought judicial proceedings against Greece seeking compensation for abortive expenditure and return of sums deposited. The State objected to the court's jurisdiction, relying on the arbitration clause in the contract. The court accepted jurisdiction, finding that Stran's claim lay outside the clause. However, the State separately commenced arbitral proceedings in reliance on the clause. The arbitral tribunal, reaching the opposite conclusion to the court, found that it had jurisdiction because the dispute fell within the scope of the arbitration clause. It rendered an award on the merits, finding the State 70 per cent responsible for non-performance of the contract, and ordered the government to reimburse Stran for the expenditure it had incurred prior to the termination of the contract.

The State applied to set the award aside on the basis that termination of the contract also terminated the arbitration clause. The Athens Court of First Instance and Court of Appeal held (not surprisingly) that the arbitration clause was autonomous of the remainder of the contract, and upheld the award. The State appealed to the Court of Cassation.

While that appeal was pending—and after the judge-rapporteur for the Court of Cassation had issued an opinion favouring Stran's case—the Greek Parliament passed Act 1701/1987. Section 12 paragraph (1) declared that termination of this type of contract pursuant to the 1975 legislation also terminated the arbitration clause, depriving an arbitral tribunal of jurisdiction. Paragraph (2) declared arbitration awards rendered under such contracts no longer valid or enforceable. Paragraph (3) deemed time-barred any claim against the State arising from such contracts; and paragraph (4) declared 'void' any pending court proceedings. The plenary Court of Cassation ruled that section 12 paragraphs (1) and (2) were not unconstitutional (paragraph (2) was, in its view, a legitimate intervention by the legislature to 'interpret' the effect of the 1975 act on arbitration clauses and spell out the consequences of that interpretation). The plenary Court declined to examine paragraph (3) but found paragraph (4) unconstitutional because it violated the principle of the separation of powers. The plenary Court remitted the case to the First Division of the Court of Cassation, which overturned the judgment of the Athens Court of Appeal and declared Stran's arbitral award void, leaving Stran with no award enforceable under domestic law.

Stran framed its Article 6 complaint as a lack of both access to a court and a fair trial. The ECtHR analysed the issue as one of fairness (though without rejecting the access complaint). It reiterated that fairness includes equality of arms, that is 'each party must be afforded a reasonable opportunity to present its case—under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent'. (31) It noted the 'timing and manner of the adoption' of section 12; that the provision was 'in reality aimed at the applicant', at a time when judicial proceedings in which the State was a party were pending. (32) Greece submitted that section 12 did not in itself render the award void; rather it 'presupposed judicial examination of the nullity provided for in paragraph (1)', and the applicants had the opportunity to address the First Division on the merits following the plenary

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Court's ruling. [33] The ECtHR rejected that, finding that 'fairness applies to proceedings in their entirety'—not just to the conduct of hearings. [34] It was not enough that 'the appearances of justice were preserved'; what mattered was the substance, and here the law itself 'effectively excluded any meaningful examination of the case' by the First Division. [35] The State infringed Article 6(1) by 'intervening in a manner which was decisive to ensure that the—imminent—outcome of proceedings to which it was a party was favourable to it'. [36]

Turning to A1P1, the ECtHR found that Stran's original court proceedings on the contract (in which the first instance court had merely accepted in principle Stran's claim to a debt owed by the State and directed the taking of further evidence) were not a 'possession' but merely a 'hope' that the claim would succeed. [37] As regards the award, the State contended that the arbitral award was a 'precarious legal basis for [Stran's] financial claims until the question of its validity had been irrevocably settled'. [38] However, the Court found in a now oft-quoted passage that:

> In order to determine whether the applicants had a 'possession' for the purposes of [A1P1], the Court must ascertain whether judgment no. 13910/79 of the Athens Court of First Instance and the arbitration award had given rise to a debt in their favour that was *sufficiently established to be enforceable*. [39]

Applying that test to the facts, the Court noted that the award at issue was, on its face (and in Greek law), 'final and binding; it did not require any further enforcement measure and no ordinary or special appeal lay against it'. [40] The fact that Greek law provided certain, limited, grounds for appealing against an award (excluding an appeal on the merits) did not detract from that conclusion. Nor did the fact that the award was 'revocable' in the sense that it could still theoretically, but for the Act, have been set aside by the Court of Cassation (overturning the judgments of the Athens Court of First Instance and Court of Appeal, which had each rejected the State's application to set aside the award). [41] So, at the moment Act 1701/1987 was passed, the award 'conferred on the applicants a right in the sums awarded'; and that was a 'possession' under A1P1. [42]

The ECtHR held that although the measure was not a 'deprivation' of possessions (ie a measure tantamount to expropriation), it was nevertheless an 'interference with peaceful enjoyment' within A1P1, [43] rendering it:

> impossible for the applicants to secure enforcement of an arbitration award having final effect and under which the State was required to pay them specified sums in respect of expenditure that they had incurred in seeking to fulfil their contractual obligations or even for them to take further action to recover the sums in question through the courts. [44]

The ECtHR proceeded to consider whether the interference was justified, by reference to the familiar proportionality or 'fair balance' test. [45] In striking that balance, Greece was entitled to attach greater weight to eradication of the legacy of the dictatorship than to maintaining transactions concluded with the military regime. So it was entitled to end the contract. But it was not entitled to override the long-established international law principle that exercise of sovereign power to terminate a contract requires payment of compensation. The Court noted that in both international and Greek law, an arbitration clause is autonomous and survives the termination of the contract. By 'choosing to intervene at that stage of the proceedings … by a law which invoked the termination of the contract … in order to declare void the arbitration clause and to annul the arbitration award', the legislature 'upset … the balance that must be struck' between private rights and the public interest. [46] Accordingly, it found that Greece had violated A1P1. [47]

As just satisfaction, the ECtHR awarded Stran the compensation ordered in the arbitral award plus simple interest at 6 per cent over 10 years.

Subsequent ECtHR decisions have confirmed the principle articulated in *Stran Greek* that a 'claim' (including one established in an arbitration award) can constitute a 'possession' provided it is 'sufficiently established to be enforceable'. [48] The interpretation of 'possession' in *Stran Greek* has been enlarged to include pending claims where there is a sufficiently strong 'legitimate expectation' of success even though no final judgment or award has been rendered—an important safeguard ensuring that the ECtHR can examine a measure whose effect is precisely to prevent the claim from proceeding to a conclusion. [49]

In *Smokovitis and others v Greece*, [50] the applicants complained that Greece had violated their rights under Article 6(1) and A1P1 through enactment of a law discontinuing all pending court cases (of which theirs was one) seeking payment of a supplement to the salaries of polytechnic teachers. The law purported to interpret an earlier ministerial decision granting these payments and had a

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retroactive effect. It was enacted shortly after the applicants had succeeded at first instance, and while the school's appeal was pending. (51)

On Article 6(1), the Court reaffirmed that 'the principle of the rule of law and the notion of fair trial … preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute'. (52) It found that the State had violated the applicants' rights under Article 6(1) by 'intervening in a manner which was decisive to ensure that the outcome of proceedings in which it was a party was favourable to it'. (53)

On A1P1, the Court found that the applicants' claims could be regarded as 'possessions' because, before the legislative interference, the domestic courts had considered on 'several occasions' that the benefit provided for by the ministerial decision extended to the applicants' situation. In the Court's view, the domestic courts 'had therefore created "a legitimate expectation" that they would have found in favour of the applicants if they had applied the provisions of the relevant ministerial decision as they were understood prior to the legislative interference'. The Court found that, by 'extinguish[ing] the applicants' claims', enactment of the law was an unjustified interference with the applicants' peaceful enjoyment of their possessions. (54)

3.2 The Agreement and A1P1

Against the backdrop of that jurisprudence, this section first considers whether awards rendered in 'Arbitration Proceedings' under impacted BITs constitute 'possessions'; secondly, it assesses whether the Agreement constitutes an 'interference' with those possessions; thirdly, where it does, it considers whether that interference is justified, and offers some tentative conclusions regarding the compatibility of the Agreement with A1P1. (55)

3.2.1 Do awards rendered in 'Arbitration Proceedings' under impacted BITs constitute 'possessions'?

Awards in 'Concluded Arbitration Proceedings'—ie those executed prior to 6 March 2018 and not subject to set aside or annulment proceedings at that time—would plainly constitute a 'possession' of the creditor investor within the meaning of A1P1, as interpreted in *Stran Greek*. The Agreement, quite rightly, does not interfere with those awards. As explained above (Section 2), it instead makes clear that those proceedings 'shall not be reopened'.

Certain categories of award rendered in 'Pending' or 'New' arbitration proceedings are also almost certainly 'possessions', within the meaning of A1P1. At the end of Section 2, we divided such awards into three categories: (i) those that, at the time the Agreement enters into force for the relevant parties, have been successfully defended in set-aside or annulment proceedings; (ii) those that, at that time, remain subject to pending set-aside or annulment proceedings; and (iii) those rendered only after the Agreement enters into force for the relevant parties but which relate to claims filed previously.

3.2.1.1 Category (i) awards

It appears clear that most, if not all, 'category (i)' unpaid awards constitute 'possessions'.

Category (i) includes final awards rendered, and upheld in set-aside or annulment proceedings, before 6 March 2018, but not 'executed' by that date (*Horthel Systems v Poland* (56) may be an example). The Agreement defines such awards as 'Pending Arbitration Proceedings'. In the words of the ECtHR in *Stran Greek*, however, those awards are 'final and binding' and are no longer 'revocable', since set-aside or annulment proceedings have been exhausted. Moreover, any ICSID awards of this type do not require 'any further enforcement measure'. (57) While New York Convention awards usually do require 'further enforcement measure[s]', such as an exequatur or other form of recognition by a domestic court, the jurisprudence of the ECtHR subsequent to *Stran Greek* suggests that the need for such further measures would not undermine their classification as 'possessions', since the award-holder had (at least at the time of *Achmea*) a sufficiently strong 'legitimate expectation' of success in enforcement proceedings. (58)

Then there are those awards rendered prior to 6 March 2018 which were still, at that time, subject to pending set-aside or annulment proceedings, but which were subsequently (and prior to entry into force of the Agreement) upheld. Again, these awards are defined as 'Pending Arbitration Proceedings' in the Agreement but are, in ECtHR terms, 'final and binding' and no longer 'revocable'. To the extent that such an award had been 'executed' prior to 6 March 2018 despite the pending challenge proceedings (eg *Edenred v Hungary* (59)), it would also not require any 'further enforcement measure'. Either way, for the same reasons as just described, there is a strong basis for regarding these awards as constituting 'possessions' within A1P1.

The next type of category (i) awards are those rendered after 6 March 2018 in proceedings initiated before that date but confirmed in set-aside or annulment proceedings, again prior to the entry into

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force of the Agreement. Once more such awards are defined as 'Pending Arbitration Proceedings', but are likely to constitute 'possessions' within the meaning of A1P1 for the same reasons as already set out.

Less obvious is the case of any awards relating to proceedings initiated after 6 March 2018, which were rendered before the Agreement comes into force but have not yet been executed. The Agreement defines these awards as 'New Arbitration Proceedings'. The fact that such proceedings were initiated after *Achmea* could make it more difficult—though by no means impossible—for an investor to demonstrate that it had a 'legitimate expectation' of obtaining effective enjoyment of a property right (eg through enforcement of its right to any damages ordered to be paid in the arbitration). After all, the CJEU in *Achmea* did not address directly the validity, as a matter of EU law, of the arbitration agreement between the investor and the Member State (ie, the agreement concluded by the investor's acceptance of the State's standing offer to arbitrate contained within the BIT). It addressed only the validity of an ISDS clause like that in the Slovakia–Netherlands BIT. (60) Not all investors in this subcategory would need to resort to the 'legitimate expectation' test, however. For example, the holder of an ICSID award, successfully defended in annulment proceedings prior to entry into force of the Agreement in respect of the impacted BIT, would by that time be the holder of a 'final and binding' award, not 'requir[ing] any further enforcement measure', and with 'no ordinary or special appeal' available against it. (61)

3.2.1.2 Category (ii) awards

We consider that most, if not all, category (ii) awards constitute 'possessions' in the light of the ECtHR jurisprudence. (62) Although such awards remain 'revocable', they are, in general, in a position broadly comparable to Stran Greek's, since the ICSID Convention and most national laws only allow such awards to be annulled or set aside (as the case may be) on limited grounds, and do not provide for any appeal on the merits. (63) So, to put it another way, the mere possibility that the award might be set aside is—to flip the ECtHR's observations on Stran Greek's claim for damages in the Athens court—no more than a 'hope' (64) on the State debtor's part; it cannot remove the legal force of the award, which on ordinary principles is final and binding unless and until set aside by a competent court or tribunal.

That said, the 'revocability' of category (ii) awards means that the extent to which the investor's 'expectation' of success is 'legitimate' could come into play in the analysis of whether the award constitutes a 'possession'. As a result, the date on which the arbitral proceeding was initiated (ie pre- or post-*Achmea*) could be of greater significance in relation to category (ii) awards than it is in relation to category (i) awards rendered in proceedings initiated post-*Achmea*. (65)

3.2.1.3 Category (iii) awards

In contrast to categories (i) and (ii) awards, category (iii) awards—those rendered only after the Agreement enters into force for the parties to the impacted BIT but which relate to claims filed previously—face greater challenges in meeting the necessary attributes of a 'possession' under A1P1, irrespective of the date on which the claim was filed. Unlike in *Smokovitis v Greece*, where consistent jurisprudence of the domestic courts 'created a "legitimate expectation" that [the courts] would have found in favour of the applicants', (66) it would usually be much harder for an investor to demonstrate the same level of 'expectation' as to the outcome of an investment treaty proceeding. Such claims are notoriously fact-sensitive, while differently constituted tribunals can vary markedly in their approach to the standard of protection offered by similarly—or even identically worded BIT provisions. A pending BIT claim more closely resembles the 'hope' of the inchoate court proceedings in *Stran Greek* than the 'expectation' of a favourable outcome in *Smokovitis*.

3.2.2 Does the agreement constitute an 'Interference'?

In *Stran Greek*, both the 'possession' (the arbitral award, in turn arising out of the government contract) and the subsequent legislative interference were entirely creatures of the domestic legal system. The Agreement, instead, is a creature of international law and bites on a 'possession'—an arbitral award under a BIT—which is likewise a product of obligations contracted on the international plane. The 'legislature' for this purpose is not the national parliament of the debtor State, but the executive of that State acting in concert with that of the other Contracting Party to the impacted BIT. (67) But that does not undermine the analogy with the *Stran Greek* line of cases, nor does it exclude the operation of the ECHR, which applies broadly to sovereign acts attributable to a Contracting State. (68)

Thus, where an investor holds a BIT award constituting a 'possession', as soon as the Agreement comes into force between the debtor State and the other State Party to the impacted BIT (ie the home State), the legal effect of the Agreement is, on the face of it, clear and straightforward: as noted above, (69) Article 4(1) (in the case of 'Pending' arbitration proceedings) or 5 (for 'New' proceedings) purports retrospectively to render the ISDS clause in the BIT ineffective as the basis of consent, and the award is consequently to be regarded as 'void and unenforceable'—a legal effect identical to that of the law at issue in *Stran Greek*. The purpose of these Articles, much as in

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Stran Greek, is to 'clos[e] the proceedings in issue once and for all' [(70)] and to do so in favour of the debtor State. That is, on the face of it, an interference—and a significant one—with the investor's possession.

It is also necessary, however, to consider those effects in the light of the other provisions of the Agreement, notably Article 7 and the 'transitional' measures in Articles 8–10. Article 7, it will be recalled, obliges the State(s) to 'inform … arbitral tribunals about the legal consequences of the *Achmea* judgment as described in Article 4' and to 'ask the competent national court, including in any third country, as the case may be, to set the arbitral award aside, annul it or to refrain from recognising and enforcing it'. This adds complexity because it is here that the declared effect of the Agreement in international law interacts with further arbitral or judicial proceedings—the latter including domestic judicial proceedings for set aside or enforcement of an award, as well as, potentially, domestic court proceedings brought in accordance with the transitional provisions.

It is in those proceedings—in particular, proceedings for set-aside or enforcement—that the ultimate fate of an award purportedly negated by Article 4(1) or 5 is likely to be decided. A court or tribunal might accept or reject the proposition that an extant award falls to be set aside, or not enforced, as a result of the Agreement. But that contingency makes the Agreement, at the moment it comes into force, no less an interference with the investor's possession. On the contrary, it is precisely in those proceedings that the arguments founded on A1P1 are available to the investor *because of* the interference effected by Articles 4(1) and 5. If the investor eventually succeeds in upholding and enforcing the award—whether on the basis of A1P1 or some other argument [(71)]—that does not negate the proposition that the Agreement constitutes an interference. It simply means that at the conclusion of the process, the investor can no longer claim to be a 'victim' of the alleged violation of the Convention, so has neither need nor entitlement to complain to the ECtHR. [(72)] If, however, that process ends in the setting aside of the award, or refusal of enforcement, on the basis of the Agreement, then the end result will mirror that presented to the ECtHR in *Stran Greek*: the investor, having complied with the requirement to exhaust domestic remedies, would have found enforcement of the award 'impossible' and could complain to the ECtHR as a 'victim' of the interference.

Article 7 (especially (b)) may have been delicately crafted precisely to avoid any obligation on Contracting Parties to enact domestic legislation requiring their local courts to conclude or determine that an arbitral award must be set aside or not recognized or enforced. That would have had more obvious direct parallels with the legislation at issue in *Stran Greek*. For the reasons just explained, however, this provision does not detract from the character of the interference brought about by the Agreement.

The (optional) 'transitional measures' set out in Articles 8–10 do little to alter those conclusions. As a preliminary point, those measures do not apply to every category of award that could potentially constitute a 'possession' (according to the analysis set out in Section 3.2.1). They are available only to investors party to 'Pending Arbitration Proceedings', such that the holder of an award rendered in a 'New Arbitration Proceeding' would not be able to access them (Article 8). They are also available only to investors who have 'not challenged before the competent national court the measure that is subject to the dispute' (also Article 8). Many investors may well have done just that —without success—prior to commencing arbitral proceedings. [(73)]

For those proceedings to which the transitional measures do apply, the right to 'enter into a settlement procedure' with the respondent State (Article 9) and to 'access the judicial remedies under national law against a measure contested in Pending Arbitration Proceedings' (Article 10) provides a mere contingency: that is, that a domestic court can be persuaded that a comparable remedy should be granted on the basis of a different cause of action, or the possibility that a settlement agreement will be reached on favourable terms. Many, if not all investors, will already have (unsuccessfully) sought 'amicable settlement' prior to bringing arbitral proceedings, since many BITs require such an attempt as a precondition to initiating arbitration. [(74)] And investors who chose not to challenge before the competent national court the measure that is subject to the dispute may have had good reason not to do so, for example, because the 'measure' subject to the dispute was the conduct of the national courts themselves, or because of a perception that the domestic courts did not offer an effective remedy.

In sum, these 'transitional measures' offer investors—in the words of the ECtHR in *Stran Greek*—precious little more than a 'hope' that the claim might succeed. [(75)] They are poor cousins indeed to the vested right—ie to compensation payable under an award—that must be renounced in order to benefit from them. They do little (or nothing, for those investors to whom they are not available) to mitigate the interference that flows from ratification, approval, or acceptance of the Agreement, in particular, as a result of Articles 4(1) and 5.

That leaves one last point to consider. The European Commission (and, presumably, signatories to the Agreement) would argue that Articles 4(1) and 5 go no further than to spell out the direct

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consequences of *Achmea*; in other words, that they are purely 'declaratory' of the *status quo*. [(76)] This is precisely the interpretation of *Achmea* that the Commission articulated in its July 2019 Communication on intra-EU investment. [(77)] In the authors' view, however, the statement reflected in both Articles 4(1) and 5 goes beyond the judgment in *Achmea* in multiple respects. In particular, as explained above, *Achmea* did not address the validity (as a matter of EU law) of the arbitration agreement between the investor (in that case, Achmea BV) and the Member State (in that case, the Slovak Republic) [(78)]; nor did it address the validity of ISDS clauses in intra-EU BITs beyond the specific genre of clause at issue in that proceeding. [(79)] Moreover, the judgment in *Achmea* certainly did not address the validity of these arbitration agreements or ISDS clauses as a matter of international law, in the way that the Agreement (as a creature of international law) now does. [(80)]

It simply cannot be assumed that, absent the Agreement, all Member State courts—still less those of third countries—seized with a set-aside application or enforcement proceeding relating to any intra-EU BIT would conclude that *Achmea* necessarily invalidates retrospectively all awards rendered in proceedings corresponding to 'Pending' and 'New' arbitration proceedings as defined in the Agreement. In this complex area, individual courts' interpretations of *Achmea* and its application to awards in these categories are difficult to predict. [(81)] The Agreement intervenes by purporting to resolve such uncertainty decisively in the debtor State's favour—once again, the very vice identified by the ECtHR in *Stran Greek*.

3.2.3 Is the Interference Justified?

Where a court or tribunal finds that a measure constitutes an 'interference' with a property right protected by A1P1, the next question is whether that interference is justified; ie whether the measure strikes a fair balance between the demands of the general interest of the community and the requirements of protection of the individual's fundamental rights. That requires the court to consider whether there is a 'reasonable relationship of proportionality' between the legitimate aim of the measure on the one hand and the means by which the measure pursues that aim on the other. [(82)]

The object of the signatory States in entering into the Agreement could be understood in wide terms corresponding to the European Commission's view that Member States are bound to ensure 'full application of EU law' by 'remov[ing] intra-EU … BITs from their legal orders' pursuant to the Commission's 'long-standing position' that intra-EU BITs 'overlap and conflict with Union law because they discriminate between EU investors on the basis of nationality'. [(83)] Alternatively, the 'legitimate aim' could be framed more narrowly, and consistently with the preamble to the Agreement itself, as 'bring[ing] their legal orders in conformity with Union law' by 'draw[ing] the necessary consequences from Union law as interpreted in the judgment of the CJEU in Case C-284/16 *Achmea* (*Achmea* judgment)'. The ECtHR has consistently recognized the aim of ensuring full and general compliance with a State's obligations under EU law as 'a legitimate general-interest objective of considerable weight'. [(84)]

However, it is one thing to state the aims of the Agreement; it is quite another to justify the particular effects of the Agreement on awards in the categories we have identified. On a general policy level, it is no doubt open to the signatory States to accept the Commission's position that intra-EU BITs are anomalous features of the EU investor protection landscape, and should therefore be brought to an end—perhaps to be replaced in due course with a new framework rooted in EU law. [(85)] But that offers no logical support for the very different proposition that the Agreement should lay down, as a new rule of international law, that a final arbitral award, rendered under an impacted (intra-EU) BIT (and which may have been successfully defended in annulment or set-aside proceedings) long before the Agreement comes into force and terminates that BIT, should immediately be nullified. As already noted, if the Agreement were to be given that effect in the legal order of a contracting State, it would pre-empt the creditor's rights in precisely the manner found unacceptable in *Stran Greek.* [(86)] Moreover, in seeking to produce that effect retrospectively (in a dual sense, ie not only before the entry into force of the Agreement but also in relation to proceedings pending as at the date of *Achmea* itself [(87)]), the Agreement engages a specific line of ECtHR jurisprudence, evolved to some extent since *Stran Greek*, emphasizing that 'special' justification is required for such measures. [(88)]

The legitimate aim that the State relied on in *Stran Greek*—eradicating the legacy of military rule—may have justified legislative intervention in principle in relation to dictatorship-era contracts, but not the uncompensated extinction of the vested rights obtained by Stran through the operation, in good faith, of the arbitral process to which the parties had agreed. [(89)] Even if, by analogy, the aims of the Agreement can justify removing impacted BITs (their ISDS clauses as well as their substantive protections, and perhaps even their sunset clauses) from the intra-EU investment rule book, retrospective extinction of the corresponding rights obtained by an award creditor lies well outside the margin of appreciation of the debtor State acting in concert with the other State Party to the impacted BIT. For the reasons already explained, [(90)] the possibility of accessing the transitional

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measures under the Agreement (where they apply at all) in no sense ranks as 'compensation' for the loss of rights under the award.

For similar reasons, we doubt whether a Contracting Party could resist a claim of breach of A1P1 by contending that the Agreement does no more than strictly implement the obligations incumbent on it as an EU Member State. In *Bosphorus v Ireland*, the ECtHR found that State action taken in compliance with legal obligations flowing from its membership of an international organization (such as the EU) 'is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides'. (91) The ECtHR has repeatedly found that the legal order of the EU secures the protection of fundamental rights in a manner equivalent to that provided by the Convention system, and this presumption has applied *a priori* since the date of entry into force of Article 6 (amended) of the Treaty on European Union (TEU) (conferring on the Charter the same value as the Treaties). (92)

Where—as with the EU legal order—such equivalence exists, 'the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation' (the so-called '*Bosphorus* presumption'). (93) The presumption of equivalent protection in the legal system of the EU is subject to two conditions: first, that the impugned interference must have been a matter of strict international legal obligation for the respondent State, to the exclusion of any margin of manoeuvre on the part of the domestic authorities; and secondly, the full potential of the supervisory mechanism provided for by EU law, which the ECtHR has recognized as affording equivalent protection to that provided by the Convention, must have been deployed. (94)

In our view, on the basis of the ECtHR's jurisprudence examining whether a State had a 'margin of manoeuvre', the first of these two conditions is not met. The ECtHR has found that implementation of Directives (which leave Member States a choice of form and methods) involves some 'margin of manoeuvre', while Regulations (which are binding in their entirety on and directly applicable in all the Member States) do not. (95) It has also found that compliance with a CJEU judgment in the context of infringement proceedings did not 'mandate [] how compliance was to be effected', such that the respondent State was 'not wholly deprived of a margin of manoeuvre'. (96) In short, the ECtHR has found that 'the presence of *some* margin of manoeuvre is capable of obstructing the application of the presumption of equivalent protection'. (97) It appears clear to us that compliance with the *Achmea* judgment (and the EU law underlying its conclusions) does not strictly require Member States to enter into the Agreement, but rather leaves Member States a 'margin of manoeuvre'. Once more, it would have been open to the States to agree (either plurilaterally or bilaterally) (98) simply to terminate their intra-EU BITs, including their ISDS clauses, prospectively without seeking to unravel retrospectively arbitral claims already made or completed.

Absent application of the *Bosphorus* presumption, the ECtHR would proceed to consider whether the interference was justified according to its well-established case law. (99) In addressing that question, the ECtHR recognizes that the State has a certain 'margin of appreciation' in selecting the measure it considers necessary to pursue the aim in question; but that margin will be exceeded where, among other things, the measure imposes on the applicant (or on the class to which the applicant belongs) an 'individual and excessive burden'. (100)

Overall, then, the act of entering into the Agreement has disproportionately severe consequences for the defined (and relatively limited) pool of investors concerned. It declares, in favour of the debtor State, the 'inapplicability' of ISDS clauses, and thereby purports to undercut the validity of the arbitration agreement underlying an award. It offers in return significantly inferior—or no—alternatives. By 'choosing to intervene' in this way, the contracting State 'upset[s], to the detriment of the [award-holders], the balance that must be struck between the protection of the right of property and the requirements of public interest'. (101) That points strongly towards the proposition that the Agreement violates the A1P1 rights of those impacted award-holders who can demonstrate that its provisions amount to an interference with their possession. However, that is not quite the end of the matter because, as we pointed out earlier, there are differences between the positions of award-holders in the various categories we have identified, and those differences may have consequences for the way the A1P1 balance is struck. We now return to this point in seeking to draw some tentative conclusions on A1P1.

3.2.4 Some tentative conclusions on A1P1

In general terms, in relation to awards within categories (i) and (ii) (ie those that have either been fully upheld, or which remain subject to set-aside or annulment proceedings, at the time of the Agreement's entry into force), the position seems to us fairly clear: for the reasons just explained, award creditors in these categories are made to bear 'an individual and excessive burden' going well beyond any justification found in the aims underlying the Agreement, violating their A1P1 rights.

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However, there is a possible caveat to this conclusion, relating to investors holding an award rendered in a 'New Arbitration Proceeding'. Such an award might fall within any one of the three categories set out at the end of Section 2 above.

The common feature of awards rendered in 'New Arbitration Proceedings'—namely, that those proceedings were initiated after *Achmea*—might be relevant in determining: (i) whether the award constitutes a 'possession'; (ii) whether the Agreement constitutes an interference; and (iii) the weight that the protection of the 'possession' attracts in striking the 'fair balance'.

As to (i), we noted that where such an award is a New York Convention category (i) award (so, unlike an ICSID award, remains subject to 'further enforcement measures') or a category (ii) award (ie with an available 'ordinary or special appeal' against it), the 'legitimate expectations' of the investor may come into play in determining whether the award constitutes a 'possession' for the purposes of A1P1. (102) The ECtHR has made clear that no 'legitimate expectation' can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national court. (103) For these awards, the 'dispute' as to the 'correct interpretation and application of domestic law' would relate to the validity, as a matter of EU law, of the arbitration agreement between the investor and the Member State, and therefore the validity and enforceability of any award rendered pursuant to that agreement, in the light of the CJEU's judgment in *Achmea*. A debtor State might argue that, both at the time the investor initiated proceedings and at the time of entry into force of the Agreement in respect of the Contracting Parties to the impacted BIT, there was no sufficient basis in national law for an investor's proprietary interest in an ISDS claim under an impacted BIT because *Achmea* made it clear—or at least raised the serious possibility (104) —that that interest did not exist as a matter of EU law. If such an argument were to be successful, the Court might conclude that the investor had no 'legitimate expectation' of obtaining an 'asset' (ie a valid arbitral award) for the purposes of A1P1 and therefore no 'possession' attracting protection. In that situation, the effect of the Agreement is immaterial: the A1P1 claim fails at the first hurdle. Such an argument is likely to be more persuasive in relation to a category (ii) than a category (i) award.

As to (ii), a debtor State might argue that the Agreement constitutes no interference because the 'possession' was always going to be subject to existing EU law concerning the validity of ISDS clauses, which (for New Arbitration Proceedings) was set out, by the time the proceedings were initiated, in the judgment of the CJEU in *Achmea*. (105) In the authors' view, this argument is far from decisive given the lack of certainty over the scope of application of *Achmea* and, in particular, the effect of the CJEU's findings on the validity of the arbitration agreement itself. (106) The position is very different from that in, for example, the English case of *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank*. (107) In that case, the 'possession' in question (a farm) had been subject to a clear and binding legal obligation continuously for many centuries (including at the time of its acquisition by the defendants, Mr and Mrs Wallbank) to pay the cost of repairing the chancel of the local parish church, such that enforcement of that obligation against the Wallbanks as owners of the farm could not be regarded as an interference with their property.

That leaves (iii): the weight that attaches to the award creditor's property right in striking the 'fair balance'. It could be argued that the Agreement imposes less of an 'individual and excessive burden' in relation to New than to Pending Arbitration Proceedings. In bringing proceedings post-*Achmea*, investor claimants might be viewed as having voluntarily accepted the risk that any award they may obtain through such proceedings might be vulnerable to set aside or annulment or might otherwise be unenforceable under applicable domestic law. On that basis, the legitimate aim relied on in support of the Agreement might be sufficient to outweigh this more precarious species of possession.

In this regard, the decision of the ECtHR in *Draon v France* is instructive. (108) In *Draon*, the applicants had filed a medical negligence claim against a French public hospital for its failure to diagnose during pregnancy the severe disability of their son. The hospital admitted liability, but proposed that the issue of compensation be determined by the French courts. Shortly before a hearing before the first instance court, France passed Law No 2002-303 of 4 March 2002. That law applied a new liability rule to facts which had occurred before its entry into force and which had given rise to legal proceedings which were still pending at that time. In doing so, the Law cancelled the effects of 'settled and consistent[]' case law of the administrative courts holding that public health institutions providing a public hospital service were subject to the rules of ordinary law on liability for negligence. (109) The ECtHR held that the retrospective effect of the law did not 'necessarily in itself upset the requisite fair balance'. However, it found the interference disproportionate because the Law 'abolished … with retrospective effect, one of the essential heads of damage, relating to very large sums of money', and the alternative form of compensation provided by the Law was not 'capable of providing [the applicants] with payment of an amount reasonably related to the value of their lost asset'. (110) Accordingly, the State's 'retrospective

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action', which deprived 'the applicants, without sufficient compensation, of a substantial portion of the damages they had claimed', made them bear 'an individual and excessive burden'. (111) The ECtHR held that insofar as the law applied to proceedings pending on the date of entry into force of the law at issue, it breached A1P1. (112)

A debtor State might draw on this logic to argue that the interference effected by the Agreement does not upset the 'fair balance' because, even if *Achmea* did not change the law, it put investors seeking to file proceedings subsequently on notice that in doing so they took the risk that arbitration agreements pursuant to intra-EU BITs might be found to be invalid. On the other hand, the creditor might rely on the fact that the Agreement provides no alternative form of compensation (or right of action) for investors pursuing 'New Arbitration Proceedings', bearing in mind that *Achmea* did not purport to eliminate the substantive rights of investors under BITs containing the species of ISDS clause in question. Thus, an investor whose claim has arisen before termination of the impacted BIT by the Agreement is *de facto* treated as if its underlying rights had been eliminated retrospectively, upsetting the 'fair balance'. (113)

Awards in 'New Arbitration Proceedings' may well prove to be the most interesting battleground in A1P1 claims arising from the Agreement. However, the doubts surrounding creditors' A1P1 rights in such cases bring into focus the guarantees available under Article 6 ECHR. The protection of rights guaranteed by that provision does not depend on prior establishment of a property right: rather, as the ECtHR made clear in *JS and AS v Poland*, 'once a genuine and serious dispute concerning the existence of property rights arises, the guarantees of Article 6 § 1 become applicable'. (114) It is this provision to which we now turn.

3.3 The Agreement and Article 6(1)

Article 6(1) is the ECHR *lex specialis* for defining the standard of fairness required of domestic proceedings. It applies to disputes concerning 'civil rights and obligations' regardless of whether the claim involves a substantive Convention right. However, concepts of procedural fairness pervade the thinking of the ECtHR across the range of Convention provisions. In general terms, the ECtHR is more likely to find an interference with a substantive Convention right proportionate if the measure in question attracts adequate procedural safeguards, and vice versa. (115) Thus in *Stran Greek*, the interaction of the 1987 Act with pending judicial proceedings not only led to the ECtHR finding a breach of Article 6(1) but undoubtedly reinforced its view that the measure upset the fair balance between the applicants' rights and the public interest for the purposes of A1P1. Nevertheless, the procedural element was plainly subsidiary to the Court's A1P1 analysis: the real vice was the State abusing its sovereign legislative power to target and eradicate an established pecuniary debt it owed its creditor. The device of intervening in proceedings in the Court of Cassation was a means to an end.

As already mentioned, the separate finding of a violation of Article 6 is, however, significant in this context because of the applicability of that provision where a party to proceedings cannot point to a right reliably enough established to form a 'possession' within A1P1. For the purpose of Article 6(1), it is not necessary for a party to demonstrate a right to succeed on its claim, or even an expectation of success. It is enough to pass the relatively modest threshold of showing a claim on 'arguable grounds' to a right recognized by domestic law. (116) So this provision may assist an investor whose impacted BIT claim falls within one of the categories, considered above, in which a legitimate expectation of success may be difficult to establish for A1P1 purposes, or whose claim under A1P1 falls at the final 'fair balance' hurdle.

As regards an investor who holds an award rendered before the Agreement comes into force for the States Party to the impacted BIT (ie category (i) or (ii) awards), Article 6(1) is likely to apply to subsequent domestic proceedings relating to the award, so long as the proceedings are 'decisive' for the investor's rights. In *Stran Greek*, the ECtHR found that the proceedings on the award were decisive for a 'civil right', namely 'the right to recover' the sums awarded in the arbitration. (117) The Court also readily dismissed Greece's contention that the dispute did not concern rights of a 'civil' character. (118) Proceedings which determine whether the award under the BIT is recognized as valid in the domestic legal order—which would include both set-aside and enforcement proceedings—are likely to be regarded as 'decisive' for the right concerned. (119)

What, then, is the effect of the Agreement on the proceedings? No doubt it would be open to the State to mount an argument that, even absent the Agreement, the award is invalid and liable to be either set aside or not enforced on the basis of the legal principles applied by the CJEU in *Achmea*—ie the incompatibility with the EU Treaties of the underlying ISDS clause in the BIT. That, after all, is precisely the argument upheld by the BGH in the set-aside proceedings brought by the Slovak Republic against Achmea's award in the German courts. (120) But the Agreement on its face goes much further than that, and in doing so underlines the difference in character between ordinary judicial development of the law in proceedings concerning a party's rights and obligation as against

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the State, and legislative (or, in this case, executive) intervention by the State in such proceedings.

As we have explained, *Achmea* was concerned with the ISDS clause in a specific BIT. It did not lay down and was not directly concerned with the applicability of its findings to different kinds of intra-EU investment treaty or differently worded ISDS clauses, or indeed with the effect of its findings on awards rendered under specific types of BIT. Strictly its ruling bound only the parties in the individual case before it. Naturally, the principles laid down may be expected to be applied by national courts in EU Member States, and to be followed in subsequent decisions of the CJEU. But the precise outcome of an individual case will depend on its unique facts, the wording of the particular BIT, the arbitral rules, and any other relevant obligations binding on the States concerned, such as the ICSID and New York Conventions and, indeed, the ECHR (or domestic legal provisions corresponding to it). (121) It cannot be assumed that a court will read the *Achmea* ruling as depriving an arbitral tribunal of jurisdiction in every subsequent case. (122)

Still less does the *Achmea* ruling automatically invalidate any previous award which had not been challenged successfully (or at all) at the time the CJEU issued its judgment. A court judgment may, in theory, declare the law as it has always been (ie it may, as *Achmea* does, apply *ex tunc*). But that does not disturb the outcome of procedures which were previously completed under the law as it was then understood. As noted earlier, an arbitral award, whatever objection might theoretically have been available to its contents—remains valid and enforceable unless and until set aside following the applicable challenge procedures, initiated within the prescribed time. This is a facet of the fundamental principle—in EU law as in most systems—of legal certainty. (123)

All this brings into sharp focus the extent to which the Agreement seeks to impinge on the judicial process. In any judicial proceedings on an award in the 'Pending' or 'New' proceedings categories that are extant at the time it comes into force, the Agreement makes a blanket declaration of invalidity of the ISDS clause of every impacted BIT as the basis for the award. Analogously with the 1987 Act in *Stran Greek*, it seeks to displace argument on the merits of the individual case and to tilt the scales decisively in the debtor State's favour. It is precisely this kind of misuse of sovereign power to undermine the other party's claim in mid-stream—a power which that party of course lacks—that fuelled the finding of inequality of arms, and hence unfairness, in *Stran Greek*.

Of course, much as in relation to A1P1, whether that ultimately produces a violation of Article 6(1) by the State depends on the domestic court's reception of the Agreement. (124) If the court accepts that the Agreement is determinative and on that basis declines to consider arguments which (but for the Agreement) would have tended to support the validity or enforceability of the award, then the outcome, like that in *Stran Greek*, will point to a violation of Article 6(1)—or at any rate a powerfully arguable case to go to the ECtHR. If the court rejects that and, despite the Agreement, properly examines the merits of the arguments either way, then it will have met the requirements (of fairness) and avoided a violation of Article 6(1).

Before leaving Article 6, it is worth considering briefly whether the Agreement may bring into play the 'access to court' element of this provision. The ECtHR has recognized that the right of 'access' extends beyond the right to the adjudication of civil claims; it guarantees also an effective machinery to enforce an adjudication. In *Hornsby v Greece*, it found that the right of access would be 'illusory if a Contracting State's legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party'. Accordingly, '[e]xecution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6'. (125) Since the ICSID Convention requires States Parties to recognize and enforce an ICSID award as if it were a final judgment of a local court, the reasoning of *Hornsby* would clearly apply to such awards. (126) Though the ECtHR does not appear to have had occasion to consider the point, there seems no reason of principle not to extend the reasoning of *Hornsby* to New York Convention arbitral awards. (127)

The right of access is not absolute, but any restriction on its exercise must be justified as proportionate and must not impair the 'essence' of the right. (128) Could this provision conceivably be invoked by an investor whose enforcement of a category (i) or (ii) award is frustrated by the Agreement? Indeed, could it be invoked by an investor whose claim accrues before the Agreement comes into force (ie it relates to conduct of the State committed while the BIT is still in effect) but falls short of a 'possession'—ie a 'category (iii)' award or even a claim that is yet to be brought—and who is deprived, following entry into force of the Agreement, of the opportunity to pursue that claim in reliance on the BIT provisions?

In relation to an investor whose enforcement of a category (i) or (ii) award is frustrated by the Agreement, a relevant factor in a court's assessment of the legitimacy and proportionality of the impairment, resulting from the Agreement, of that investor's right to enforce the award may be the extent to which, despite the Agreement, enforcement of the award remains open in other jurisdictions. In *AIG v Kazakhstan*, for example, the English High Court found that the restriction posed by the State Immunity Act 1978 on enforcement of an ICSID award against assets held in England and Wales on behalf of the National Bank of Kazakhstan was 'both legitimate and

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proportionate'. [129] The Court reached that finding on the basis (among others) that 'the fact that the Claimants would not be able to enforce the ISCID award against the [Bank's assets] [did] not mean that the award [was] ineffective and a nullity'. In particular, the Court referred to the possibility that 'other assets might be available for enforcement purposes', and the lack of any evidence before the Court 'to indicate that the Claimants would be left without a remedy worldwide'. [130]

Article 6(1) does not prescribe any particular content for domestic legal rights; rather, as noted above, it is engaged where a party can demonstrate the existence of a legal right on 'arguable' grounds. [131] An investor whose claim accrues before the Agreement comes into force but falls short of a 'possession' will not always have a right under Article 6 to insist on the protection of the BIT in the domestic legal order of the State in whose territory the investment takes place. However, there are two situations where it might. First, in a monist legal system (ie one in which international law, including treaties, automatically forms part of domestic law), the right to rely on the BIT as part of domestic law may accrue automatically. Secondly, in a dualist system, the Member State might have incorporated the substantive protections of the BIT into domestic law, for example, by operation of some kind of foreign investment law. Even in those situations, the investor cannot insist on the ongoing protection of the BIT following its termination—that is, in relation to conduct by the State after the Agreement comes into force. [132] However, where an investor in such a jurisdiction seeks to complain of pre-termination conduct, that might generate an 'arguable' claim sufficient for Article 6 purposes. In that situation, assuming that the Agreement effectively bars any new arbitral proceedings based on the substantive BIT provisions, there is a strong case for the proposition that Article 6(1) entitles the investor to access to a domestic court to pursue its claim. Any attempt by the State, in purported implementation of the Agreement, to prevent the domestic court from determining the claim on its merits, and (if established) granting an effective remedy, would require adequate justification in order not to fall foul of Article 6(1). [133]

That may require the court to examine whether alternative causes of action based on domestic law, EU law, or indeed the ECHR were of sufficient scope, in the circumstances, to offer a basis for examination of the State's conduct meeting the requirements of the rule of law. [134] We stress once more that the (currently entirely speculative) possibility of bringing the facts of an investor–State complaint within one or other of these potential causes of action is plainly no substitute for the vested rights arising from a pre-termination arbitral award under an impacted BIT where those amount to a 'possession' under A1P1. But their sufficiency may arise as an issue in the specific situation considered here, where an investor has no 'possession' (or where application of the 'fair balance' test does not result in a finding of an unjustified interference under A1P1), but can demonstrate an 'arguable' claim for Article 6(1) purposes.

3.4 The applicable standard of compensation under the ECHR in the event of a finding of a violation of Article 6(1) or A1P1

If an investor's ECHR claims ever reached the ECtHR, Article 41 of the ECHR empowers the Court to award 'just satisfaction' to an applicant whose Convention rights have been found to have been violated. Just satisfaction can include compensation for pecuniary damages, as well as reasonable legal costs and expenses actually incurred in trying to prevent a violation occurring, or to obtain redress for one that has occurred.

Compensation by way of 'just satisfaction' for a violation is not automatic, and the level of awards by the ECtHR, where made, tends notoriously to be lower than what an investor might expect to achieve in an investment treaty proceeding relating to the same measure(s). As Sergey Ripinsky and Kevin Williams explain, the ECtHR's 'general approach to measuring compensation manifests itself in the doctrine of "fair balance" between the demands of the general community and the requirement of the protection of the individual's fundamental rights'. [135] Accordingly, in echoes of the Court's approach to the substantive provisions of the ECHR, the 'terms of compensation should be such as not to impose a "disproportionate" or an "individual and excessive" burden on the person concerned – instead, a "fair balance" needs to be struck'. [136] This means that the ECHR does not guarantee in all circumstances a right to full compensation. [137] That said, the Court has demonstrated its preparedness to award significant compensation where it deems it justified—the most obvious example being its order that Russia pay €1.87 billion to the applicants for pecuniary damage found to have been suffered in the well-known *Yukos v Russia* case. [138] Moreover, where the interference with A1P1 rights amounts to the effective divestment or elimination of an asset, the ECtHR will generally seek to compensate for the value of the asset (applying the *restitutio in integrum* principle), even if the assessment of value is likely to be undertaken on a more approximate basis than might be usual in arbitral proceedings. [139]

So how do these principles apply in the context of a violation of A1P1 and/or Article 6 as a result of an interference with an ISDS arbitral award? In particular, would the ECtHR treat just satisfaction as requiring compensation reflecting the full value of the award, or might it award a lesser amount

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reflecting its own assessment (perhaps along the lines of *Yukos*) of fair compensation for the debtor State's underlying breach of the impacted BIT?

As regards the violation of A1P1, *prima facie*, as the applicants argued in *Stran Greek*, only the payment in full of the amount awarded in the arbitration (plus some form of interest) could fully compensate them for the pecuniary damage suffered as a result of the interference with the award. (140) The Court agreed and awarded the 'reimbursement' of the sums awarded in the award plus interest (without which, it said, 'the adequacy of the compensation would be diminished' in view of the time that had lapsed since the arbitral award was rendered). (141) In its examination of the merits, the ECtHR noted that the arbitral award reflected Stran's abortive expenditure on the contract rather than its expectation of profit had the contract been performed. (142) It is not easy to discern from the judgment what significance, if any, the ECtHR attached to that point in reaching its conclusions. However, many arbitral awards under BITs include compensation for lost future profit. It is conceivable that the ECtHR might be sympathetic to an argument that, as part of its 'fair balance' approach to fixing compensation, it should dissect the sums awarded by an arbitral tribunal into their constituent elements to determine whether it would be 'just' to require the State to meet the entire value of the award.

Since *Stran Greek*, the Court has taken the same approach in other cases involving interference with an arbitral award under A1P1. (143) There is—to date, at least—no indication of any inclination on the part of the ECtHR to go behind the quantum of the award to examine the 'fairness', or otherwise, of requiring the State to compensate for individual constituent elements. Indeed it is conceivable that the Court might order as 'just satisfaction' the reinstatement of an arbitration agreement or arbitration award, rather than merely directing compensation in lieu of the award itself, though to the authors' knowledge it has not to date done so. (144)

The level of compensation is likely to be less straightforward with respect to a self-standing Article 6 claim (ie where the investor fails also to establish an A1P1 claim). In general terms, in both civil and criminal cases, the ECtHR is reluctant to speculate on the prospects that a claim or defence would have succeeded had the guarantees of Article 6(1) been met, hence the necessary causal connection between the violation and any alleged loss of the benefit of the underlying claim is lacking. (145) Rather, where an award of compensation is made at all, it is directed to the pecuniary and non-pecuniary impact on the claimant of the proceedings themselves. The Court may make an exception if satisfied that the breach of Article 6 has resulted in a 'real loss of opportunity', (146) in which case that loss will be quantified on an equitable, and usually modest, basis. But such cases are unusual. (147) Thus, unless the facts are particularly compelling, success on a claim under Article 6(1) alone is likely to prove something of a pyrrhic victory for an investor impacted by the Agreement.

4. IS THE AGREEMENT COMPATIBLE WITH THE EU CHARTER?

This article's analysis of the Agreement's compatibility with the ECHR raises the parallel question of what relevance the EU Charter might hold in domestic proceedings concerning an award rendered in 'Pending' or 'New' proceedings. Framing the investor's claim as one under the Charter may enable a court to test, for the first time, the competing imperatives of controls on 'contracting out' of the EU's dispute resolution mechanisms on the one hand (the basis of *Achmea*), and its protection of fundamental rights on the other.

The Charter, like the ECHR, protects the right to property (Article 17) and the right to an effective remedy and to a fair trial (Article 47). Under Article 52(1) of the Charter, any limitation on those rights must be provided for by law and respect the 'essence' of those rights. Limitations must also respect the principle of proportionality, such that they may be made 'only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'. (148) The Charter may be invoked against Member States 'only when they are implementing Union law' (Article 51), which means that the Charter is binding on Member States when they are acting within the scope of EU law. (149) That includes State action giving effect to, or derogating from, an EU law obligation. (150)

The first question that arises, then, is whether there is a sufficient connection with EU law for an investor to rely on the Charter as against a Member State which has entered into the Agreement. This issue may at first blush seem straightforward and even resolved on the face of the Agreement itself: the preamble indicates in a number of places that it is intended to give effect to *Achmea*. (151) While the Agreement goes beyond *Achmea* in multiple respects (as this article has discussed), that does not necessarily detract from the conclusion that a Member State's entry into the Agreement is an act designed (at least in part) to implement an obligation imposed on that State by EU law, and therefore one that falls within Article 51(1) of the Charter. (152) On the other hand, it is not altogether

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certain that action designed to give effect to a judgment of the CJEU—as opposed to implementation of (or derogation from) a rule directly of legislative origin—creates the necessary connection. There is also, of course, the complicating factor that the 'implementation' takes place on the international plane by executive action, rather than by legislative or administrative action on the domestic plane. However, while the position may be clearer in relation to ECtHR rights, [153] in our view there is no reason of principle why the international nature of the implementation should detract from the application of Charter rights, when it is the Agreement's effect in domestic law that constitutes the interference with an investor's rights.

If a sufficient connection with EU law for the purposes of Article 51 is established, the next question is what is the scope of the Charter rights at issue and whether they offer investors any additional protections to those provided by the ECHR. Pursuant to Article 52(3), the meaning of Charter rights, which correspond to those guaranteed by the ECHR, 'shall be the same as those laid down by the said Convention'. Union law may, however, provide more extensive protection (also Article 52(3)). [154] The explanations drawn up as a way of providing guidance in the interpretation of the Charter (to which courts of the Union and of Member States must have 'due regard' [155]) confirm that, notwithstanding the differences in wording, the 'meaning and scope' of Article 17 Charter are the same as those of A1P1 for the purposes of Article 52(3), while Article 47 (second paragraph) corresponds to Article 6(1) ECHR in relevant part. [156] It is therefore the case that a finding of breach of A1P1 would also entail a breach of Article 17 Charter. In an investor's complaint founded on the Agreement, a finding of breach of Article 6(1) ECHR would also be likely to entail a breach of Article 47 Charter.

One subtle respect in which the Charter, as applied judicially within the EU legal order, may provide 'more extensive' protection than the ECHR is in the operation of the proportionality test. Proportionality is a highly developed concept in EU law, originating in judicial control of national derogations from the fundamental economic freedoms—including free movement of goods and capital—that have long lain at the heart of the Treaties. For that reason, the application of the proportionality principle to the Charter may connote in some respects a more rigorous and intensive standard of review than that developed, separately and in parallel, within the ECHR system. That is of particular relevance in the case of A1P1, where the ECtHR's rather open-textured articulation of the test ('fair balance', 'reasonable relationship of proportionality'), coupled with the generous margin of appreciation habitually accorded to the State in economic matters, means that review of State conduct under this provision may be less exacting than in relation to other ECHR provisions such as Article 8 (private life) or 10 (freedom of expression).

In *R (Lumsdon) v Legal Services Board*, the UK Supreme Court recognized the distinction between the ECHR and Charter standards of proportionality in the context of the right to property. [157] Its analysis implies, in particular, that in EU law the court's assessment is likely to focus closely on the question of whether the objective of the measure could be attained by less onerous means, [158] whereas under the ECHR that question often dissolves into a more generalized assessment of 'fair balance'. The distinction is a nuanced one but could make a difference in a borderline case—which might well be the position where the proceedings relate to an award rendered in New Arbitration Proceedings and the State contends that this diminishes the weight that the 'possession' in question attracts in the A1P1 balance. [159]

There may also be differences in the remedy available under the two strands of law. Under Article 6(1) of the TEU, the Charter has the same legal value as that of the EU Treaties and is, as such, a binding source of primary law. The impact of a finding of incompatibility between the application of the Agreement and a Charter right therefore will, at least in some jurisdictions, have a more immediate and stark effect than an equivalent incompatibility with an ECHR right. The impact of a finding of incompatibility between a domestic statutory provision and a Charter right is the disapplication of that statutory provision. On the other hand, in some jurisdictions, the equivalent finding in respect of an ECHR right results only in a declaration of incompatibility, requiring remedial action by the legislature. [160] How the disapplication of an incompatible statutory provision translates to circumstances where the violation is effected by a treaty like the Agreement is not straightforward, and is likely to depend, for example, on the status of the Agreement within the domestic legal system. A finding that there has been a Charter violation may also lead to a different outcome on compensation than that which could be expected in the event the ECtHR were to find a violation of the ECtHR, particularly where only Article 6 ECHR/Article 47 Charter is violated.

The possibility of an ECHR claim arising out of Member State conduct purportedly required by EU law raises the spectre of a significant clash of regimes. As one commentator has observed, while the CJEU has so far avoided addressing directly the question, *Achmea* casts doubts on whether ECtHR proceedings involving claims by individuals against Member States raising issues of EU law are compatible with the Treaties. [161] This should be borne in mind by any investor considering pursuing its claims through domestic courts of the EU and, ultimately, referring its claim to the ECtHR. A Member State against whom the ECtHR has rendered an adverse judgment in relation to

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the Agreement might seek to resist implementation of the ECtHR's judgment on *Achmea* grounds, which could in turn result in a fresh legal battle that could only be resolved by the CJEU (through the preliminary reference procedure). For that reason alone, an investor might wish to consider invoking in domestic proceedings its Charter rights under Articles 17 and 47, thereby (if successful) providing the platform for a direct route to the CJEU, whose judgment would have direct effect within the referring Member State and be subject to no further threat within the legal system of the Union.

5. CONCLUSION

We offer no view about the legal or policy merits of the termination—bilaterally or plurilaterally—of intra-EU BITs. If the Agreement effected no more than the termination of those BITs, it would not have raised the particular difficulties we have examined in this article (though, as appears from the ongoing *Achmea* litigation, comparable issues based on the effect of the CJEU's *Achmea* judgment and its application by Member State courts may have arisen in any event). In relation to the Agreement, the source of the difficulties we have examined lies in the extension of its reach to proceedings before arbitral tribunals established to resolve disputes between an investor from one Member State and another Member State in accordance with impacted BITs instituted before the moment at which those BITs terminate.

The formulation of the Agreement's provisions—for example, the carve-out for 'Concluded Arbitration Proceedings' (putting aside the rather arbitrary distinction it draws between executed and unexecuted awards) and the obligation on Member States being to 'ask the competent national court … to set the arbitral award aside, annul it or to refrain from recognising and enforcing it' (Article 7(b)), as opposed to definitively mandating Member State courts to set aside or not enforce —indicates that those preparing the text were conscious of the potential impact of the principles reflected in the ECtHR's *Stran Greek* line of authority. This 'outsourcing' of the ultimate decision on the Agreement's effect on 'Pending' and 'New' proceedings to the court or tribunal before which the validity or enforcement of the award is in issue does not in itself, however, avoid the problem. Rather, it focuses the spotlight on those proceedings, which become the battleground between, on the one hand, the Agreement's 'declaratory' undercutting of the legal basis for the award (Articles 4 and 5) and, on the other, the arguments available to the award creditor, including those based on the ICSID or New York Conventions as well as those developed in this article.

For the reasons we have explained, the award creditor may advance a case in domestic set-aside, recognition, or enforcement proceedings founded on A1P1, alternatively Article 6(1), and their Charter counterparts. The precise strength of its case will depend on factors including the date of the award or of commencement of the ISDS claim, and whether the award is made in ICSID proceedings (so requiring compliance without the need for exequatur or equivalent domestic process). However, in a significant proportion of cases—particularly those where the facts most firmly underpin the status of the award as a 'possession' in A1P1 terms—the creditor seems likely to have a compelling basis for securing the upholding or enforcement of the award even in the face of arguments founded on the Agreement.

So far as the award creditor relies on the Charter in judicial proceedings in a Member State, a preliminary reference may provide the CJEU with its first opportunity to examine the implications of *Achmea* in the light of rights based on EU law which have not yet featured in its examination of ISDS-related issues. If arguments based on the Agreement prevail in domestic proceedings so as to denude an extant award of effect, the award creditor may bring a complaint before the ECtHR as a 'victim' of an alleged violation of its ECHR rights. So, that court too may find itself with a first opportunity to examine the interplay between arbitral proceedings under a BIT and the principles applied in *Stran Greek*.

Finally, the issues discussed in this article raise broader questions about the kinds of rights and remedies that may in future be in play in judicial proceedings involving intra-EU investments. As things stand, the prospect of a remedy, based on generic provisions of EU law, for the underlying conduct of the debtor State is far too contingent and uncertain to stand as an acceptable swap for the accrued asset that a final award rendered in ISDS proceedings represents. But as that point is debated in Member State courts, those courts will doubtless wish to examine the scope and effectiveness of these protections, and might even begin to develop a body of case law defining them. As part of that process, the courts may well draw on the learning of the ECtHR on A1P1 and Article 6 in the context of foreign investment (such as the *Yukos* case). As time goes on, and especially once the Agreement comes into force for each pair of States, the ECHR and Charter could well become increasingly popular first ports of call for investors rather than merely a rearguard means of defending the fruits of pre-Agreement proceedings. All the more so if, as seems likely, a comprehensive legislative framework for the protection of cross-border investments within the Internal Market is still some distance away.

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1)

Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union [2020] OJ L169/1.

2)

575 UNTS 159 (ICSID Convention).

3)

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) 312 ETS 5 (ECHR).

4)

[2012] OJ C326/391 (Charter).

5)

Stran Greek Refineries and Stratis Andreadis v Greece (1994) 19 EHRR 293.

6)

Case C-284-16, *Slowakische Republik v Achmea* (2018) EU:C:2018:158. An example of such an award in the public domain could be *Horthel Systems v Poland*, which was confirmed by the Swiss courts in December 2017 (*Horthel Systems BV, Poland Gaming Holding BV and Tesa Beheer BV v Poland*, PCA Case No 2014-31, Award, 16 February 2017).

7)

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8)

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9)

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10)

Agreement (n 1), fourth, fifth, and sixth preambular paragraphs. The fourth paragraph provides that: '… in compliance with the obligation of Member States to bring their legal orders in conformity with Union law, they must draw the necessary consequences from Union law as interpreted in the judgment of the CJEU in Case C-284/16 *Achmea* …'.

11)

The preamble to the Agreement also recognizes that *Achmea* left open the question of the compatibility between EU law and substantive provisions of intra-EU BITs: the ninth preambular paragraph provides that 'this Agreement is without prejudice to the question of compatibility with the EU Treaties of substantive provisions of intra-EU bilateral investment treaties'.

12)

That is ISDS clauses whose 'choice of law' clause requires a tribunal to resolve a dispute with reference to 'the law in force of the contracting party concerned' and/or to 'other relevant agreements between the contracting parties', as in art 8(6) of the Netherlands–Slovakia BIT (*Achmea* (n 6) paras 40–42). See also CJEU Opinion 1/17, which upheld the compatibility of the ISDS mechanism in the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the EU and its Member States, of the other part ('CETA') with EU law. There, the CJEU found that the ISDS mechanism in CETA was distinct from that at issue in *Achmea* in part on the basis that the latter 'established a tribunal that would be called upon to give rulings on disputes that might concern the interpretation or application of EU law', whereas the former permitted a tribunal to take into account domestic law only 'as a matter of fact' (Opinion 1/17 of the Court (Full Court), EU:C:2019:341, paras 126, 130 and 131).

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13)

art 2(1) provides that 'Bilateral Investment Treaties listed in Annex A [ie those that remain in force as at the date of signature of the Agreement] are terminated according to the terms set out in this Agreement.' The Agreement does not specify what the consequences are for an impacted BIT where one or more of the parties to that BIT are merely applying the Agreement provisionally.

14)

The Agreement defines 'Sunset Clauses' in art 1(7) as 'any provision in a Bilateral Investment Treaty [ie any investment treaty listed in Annex A or B of the Agreement] which extends the protection of investments made prior to the date of termination of that Treaty for a further period of time' and provides that they 'are terminated' and 'shall not produce legal effects' (arts 2(2) and 3). The effect of the parties' decision to terminate a sunset clause on the ability of a covered investor to bring a claim pursuant to the applicable treaty is a controversial—and untested—question. See eg Johannes Tropper, 'The Treaty to End All Investment Treaties: The Termination Agreement of Intra-EU BITs and Its Effect on Sunset Clauses' (*Völkerrechtsblog*, 12 May 2020) <https://voelkerrechtsblog.org/articles/the-treaty-to-end-all-investment-treaties/> accessed 16 November 2020.

15)

The Agreement (n 1) art 1(2) defines 'Arbitration Proceedings' as 'any proceedings before an arbitral tribunal established to resolve a dispute between an investor from one Member State of the European Union and another Member State of the European Union in accordance with a Bilateral Investment Treaty'.

16)

The Agreement provides no definition of the term 'executed'. The interpretation of 'executed' as 'paid or otherwise enforced' is supported by the language versions other than English reviewed by the authors (French, Italian and Spanish), all language versions of the treaty being equally authentic (art 18). The English version of the text refers at art 1(4)(a) to 'executed', but elsewhere (also in art 1(4)(a), and in arts 9(1)(b), 9(14)(a)(i) and 10(1)(a)) to 'enforced or executed'; the French, Italian, and Spanish versions of the treaty use at these places the terms '*exécutée*', '*esecuzione [o applicazione definitiva]*' and '*ejecutado*' (respectively). Similarly, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards uses the term 'enforcement' in the English version (eg art 1(1)), while the authentic French and Spanish versions refer to the '*execution*' and '*ejecución*' (respectively), and the non-authentic Italian translation also refers to '*esecuzione*' (330 UNTS 3 (New York Convention)).

17)

Damien Charlotin, 'Revealed: Previously-unseen Draft Text of EU Termination Treaty Reveals How Intra-EU BITs – and Sunset Clauses Are to Be Terminated; Treaty Also Creates EU Law-focused Facilitation Process Designed to Settle Pending BIT Claims' (*IAReporter*, 4 November 2019) <www.iareporter.com/articles/revealed-previously-unseen-draft-text-of-eu-termination-treaty-reveals-h...> accessed 16 November 2020.

18)

European Commission, Financial Stability, Financial Services and Capital Markets Union, 'Declaration of the Member States of 15 January 2019 on the Legal Consequences of the Achmea Judgment and on Investment Protection' (*European Commission*, 17 January 2009) <https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en> accessed 16 November 2020 (especially operative para 2). (The declarations of 16 January 2019 are also accessible at this page.)

19)

Agreement (n 1) art 4(1). Art 5 simply provides that 'Arbitration Clauses shall not serve as legal basis for New Arbitration Proceedings.' While there is no equivalent specifically addressing 'Pending Arbitration Proceedings', the carve-out for 'Concluded Arbitration Proceedings' in art 6(1) implies that Pending Arbitration Proceedings are captured by art 4(1).

20)

ibid, art 9(10).

21)

ibid, art 9(6) (emphasis added).

22)

Arguably, this provision has the potential to leave investors party to Pending Arbitration Proceedings who choose to pursue domestic remedies pursuant to art 10 in a worse position than those to New (or even Pending) Arbitration Proceedings for whom domestic limitation periods have not yet expired. That is because the removal by the Agreement of the provisions of the impacted BIT from the applicable law in proceedings brought before a national court applies only to investors party to Pending Arbitration Proceedings who choose to pursue the mechanism set out in art 10, but not to those who choose to pursue any such available remedies outside the framework of the Agreement.

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23)

On ordinary international law principles, leaving aside any argument based on the ECHR, a tribunal seized of such a dispute may well find that the arbitration agreement between the investor and the State was perfected before the impacted BIT was terminated by the Agreement and thus remains valid. The numerous tribunals seized with an objection to jurisdiction based on the intra-EU nature of the BIT post-*Achmea* to have considered this point (albeit *obiter*) are largely in accord (eg *Marfin Investment Group v The Republic of Cyprus*, ICSID Case No ARB/13/27, Award, 26 July 2018, para 593 ('once … consent has been given and has been accepted by an investor through the initiation of arbitral proceedings, this consent may not be withdrawn unilaterally by Respondent'); *Eskosol S.p.A. in liquidazione v Italian Republic*, ICSID Case No ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019, para 226 ('it would be inconsistent with general notions of acquired rights under international law to permit States effectively to non-suit an investor part-way through a pending case'); *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v Hungary*, ICSID Case No ARB/17/27, Award, 13 November 2019, paras 213 and 214 ('the consent to arbitrate, in the sense of a meeting of the minds, which is perfected by the investor's acceptance of the State's offer to arbitrate expressed in the BIT would not be retroactively invalidated by a subsequent termination of the BIT' (para 214)). On the other hand, the tribunal in *Addiko Bank AG and Addiko Bank d.d. v Republic of Croatia* indicated that a provision (art 11(2)) of the applicable (Austria-Croatia) BIT which stated that the parties 'are not bound by the present Agreement insofar as it is incompatible with the legal acquis of the … (EU) in force at any given time' might preclude investors from initiating arbitration under that BIT after the judgment in *Achmea* (ICSID Case No ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020, paras 279 and 280).

24)

Horthel Systems (n 6), upheld in the Decision of the Swiss Federal Supreme Court on the Set-Aside of the Award, 14 December 2017. It is arguable that a final award issued prior to 6 March 2018, where no challenge or enforcement proceeding was pending on that date, but that was 'duly executed' by a Member State after 6 March 2018, would not constitute a 'Concluded Arbitration Proceeding'. Accordingly, the provision confirming that 'Concluded Arbitration Proceedings' 'shall not be reopened' would not apply to such an award. This raises the question of whether a Member State that has executed such an award after *Achmea* might seek to recover its payment to an investor. Arguably it might even render such a payment ultra vires under its domestic law (given the statement in art 4(1) that 'as of the date on which the last of the parties to a[n] [impacted BIT] became a Member State of the [EU]', the 'Arbitration Clause cannot serve as legal basis for Arbitration Proceedings'), though that depends on the status of the Agreement in general, and this provision in particular, in domestic law. If Poland paid the *Horthel Systems* award after 6 March 2018, it may be an example of such an award. The April 2017 award in *Gavazzi and Gavazzi v Romania* could be another example, if the award was executed after 6 March 2018 and no challenge proceedings were pending on that date (*Marco Gavazzi and Stefano Gavazzi v Romania*, ICSID Case No ARB/12/25, Award, 18 April 2017).

25)

UAB E energija (Lithuania) v Republic of Latvia, ICSID Case No ARB/12/33, Award, 22 December 2016. Another potentially relevant award, albeit not 'unpaid', is that in *Edenred v Hungary*, rendered in 2016 and worth €23 million (*Edenred S.A. v Hungary*, ICSID Case No ARB/13/21, Award, 13 December 2016). The award was upheld by an annulment committee in a decision of 9 March 2020. According to industry media, Hungary paid the award voluntarily prior to the *Achmea* ruling (see Sebastian Perry and Jack Ballantyne, 'Hungary Fails to Reopen Intra-EU BIT Awards' (*Global Arbitration Review*, 18 March 2020) <https://globalarbitrationreview.com/article/1216373/hungary-fails-to-reopen-intra-eu-bit-awards> accessed 16 November 2020). However, as we have seen, such execution is not enough to place the award beyond the reach of the Agreement. Given that the annulment proceeding was pending on 6 March 2018 (it had been filed on 18 April 2017), the award/proceeding would appear to fall within the definition of 'Pending Arbitration Proceedings' and therefore be subject to the scheme for 'Pending Arbitration Proceedings' set out above.

26)

Dan Cake S.A. v Hungary, ICSID Case No ARB/12/9, Award, 21 November 2017; *Sodexo Pass International SAS v Hungary*, ICSID Case No ARB/14/20, Award, 28 January 2019; *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v Hungary*, ICSID Case No ARB/13/35, Award, 9 October 2018.

27)

Holy Monasteries v Greece (1995) 20 EHRR 1, para 56. See also *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35, para 61; *James and others v UK* (1986) 8 EHRR 123, para 37 and *Pressos Compania Naviera SA and others v Belgium* (1995) 21 EHRR 301, para 33.

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28)

ECtHR, 'Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights: Protection of Property' (31 August 2020) paras 86–89 <www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf> accessed 18 August 2020.

29)

Golder v UK (1975) 1 EHRR 524.

30)

Stran Greek (n 5).

31)

ibid, para 46.

32)

ibid, para 47.

33)

ibid, para 48.

34)

ibid, para 49.

35)

ibid.

36)

ibid, para 50.

37)

ibid, para 60.

38)

ibid, para 58.

39)

ibid, para 59 (emphasis added).

40)

ibid, para 61.

41)

ibid, para 62. Elsewhere in its Judgment, the Court observed, however, that the Court of Cassation's judge-rapporteur had 'sent his opinion, which had been favourable to the applicants' arguments, to the parties before' the initial date of the hearing (4 May 1987) (ibid, para 19). See also ibid, para 73.

42)

ibid, para 62.

43)

ibid, paras 66–68.

44)

ibid, para 67.

45)

ibid, paras 69-74.

46)

ibid, para 74.

47)

ibid, para 75. See generally ibid, paras 72–75.

48)

Burdov v Russia (2004) 38 EHRR 29, para 40; *Regent Co v Ukraine* App No 773/03 (ECtHR, 3 April 2008), para 61; *Kin-Stib v Serbia* App No 12312/05 (ECtHR, 20 April 2010), paras 83 and 84 (finding, among other things, that 'the claim established in the arbitration award undisputedly amounts to a possession within the meaning of [A1P1]').

49)

A series of judgments affirm the principle that A1P1 'protects "possessions", which can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right': *Pressos v Belgium* (n 27), para 31; *Kopecký v Slovakia* (2005) 41 EHRR 43, para 35; *Von Maltzan v Germany* (2006) 42 EHRR SE 11, para 74; *JA Pye (Oxford) Ltd and JA Pye (Oxford) Land Ltd v UK* (2008) 46 EHRR 45, para 61.

50)

Smokovitis v Greece App No 46356/99 (ECtHR, 11 April 2002).

51)

ibid, paras 8–15.

52)

ibid, para 23.

53)

ibid, para 28.

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54)

ibid, paras 32–34. In particular, the Court found 'nothing in the facts of the case to justify legislating with retrospective effect with the aim and consequence of depriving the applicants of their claims for payment of the benefit. By choosing to intervene at that stage of the proceedings before the Court of Appeal, the legislature upset, to the detriment of the applicants, the balance that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights' (ibid, para 34).

55)

Consistent with the approach of the ECtHR in *Stran Greek*, this article assumes that if the Agreement gives rise to an interference, it would be assessed under the general (first) rule under A1P1. A case might nonetheless be arguable that the interference should be assessed under the more specific second (deprivation) rule, as in *Pressos v Belgium* (n 27), para 34; see also Stephen Fietta and James Upcher, 'Public International Law, Investment Treaties and Commercial Arbitration: An Emerging System of Complementarity?' (2013) 29(2) Arb Intl 187, 218, 219.

56)

Horthel Systems (n 6).

57)

Under the terms of the ICSID Convention, States Parties are under an obligation to recognize and enforce an ICSID award as if it were a final judgment of a local court (ICSID Convention (n 2), art 54(1)). The English courts have already confirmed that an ICSID award constitutes a 'possession' for the purposes of A1P1: *AIG Capital Partners, Inc v Kazakhstan* [2005] EWHC 2239 (Comm), [2006] 1 WLR 1420 [86] and [87], albeit finding that there was no 'interference' on the facts of that case.

58)

See Section 3.1 above. As Stephen Fietta and James Upcher observed, the ECtHR has not addressed the New York Convention in any detail in its jurisprudence to date. However, 'there is no reason in principle why an arbitrary extinguishment of an arbitration agreement or award in violation of the New York Convention … should not amount to an unlawful deprivation for the purposes of [A1P1]' (n 55, 218 and 219).

59)

Edenred (n 25).

60)

In particular, the CJEU concluded that 'Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the [Netherlands–Slovakia] BIT' (*Achmea* (n 6) para 60). An investor might argue that notwithstanding *Achmea*, it continued to expect, in good faith, that the arbitration agreement remained valid under EU law. That question has not been definitively settled by the CJEU and has been heavily debated in set-aside proceedings before the *Bundesgerichtshof* (German Federal Supreme Court) ('BGH') (*Slovak Republic v Achmea BV*, Case I ZB 2/15, German Federal Supreme Court (*Bundesgerichtshof*) Order, 31 October 2018, paras 25–28), the *Svea Hovrätt* (Svea Court of Appeal, Sweden) (*Republic of Poland v PL Holdings*, Cases T 8538-17 and T 12033-17; Judgment of the Svea Court of Appeal, 22 February 2019, 41–44 (in the English translation)) and the *Högsta domstolen* (Swedish Supreme Court) (Case C-109/20 *PL Holdings*, Request for a preliminary ruling, 4 February 2020). See also above n 23. The authors' view is that the fact proceedings were initiated following *Achmea* does not prevent a category (i) award constituting a possession, but may affect the weight that its protection attracts in striking the 'fair balance' (as further explained below, Section3.2.4).

61)

In the words of the ECtHR in *Stran Greek* (n 5) paras 61 and 62 (see above, Section 3.1).

62)

We note, however, that the BGH in its *Achmea* set-aside decision appears to have reached the view that the arbitral award at issue in that case—which, at the time of the CJEU's *Achmea* judgment, was a final and binding arbitral award subject only to set-aside proceedings—did not constitute an 'asset' (BGH *Achmea* Order, 31 October 2018 (n 60) para 72: '*Der Antragsgegnerin wird infolge der Aufhebung des Schiedsspruchs auch keine Vermögensposition entzogen*' ['Nor is the defendant deprived of any asset as a result of the setting aside of the arbitral award' (authors' translation)]).

63)

This particular aspect of an award's 'revocability' will require a case-by-case assessment of the applicable rules relating to annulment or set-aside. Even in an English-seated arbitration, where s 69 of the Arbitration Act 1996 provides an appeal limited to a point of law, that appeal is only available in cases where the parties have not excluded the section and where a high leave threshold is met. That falls some way short of a true appeal on the merits.

64)

Stran Greek (n 5) para 60.

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65)

If an award in this category is treated as a possession, the timing of commencement of proceedings may be a factor in the weight attributed to the investor's property right when striking the A1P1 balance: see below, Section 3.4.

66)

Smokovitis (n 50) para 32.

67)

It might also be argued that the executives of the contracting Member State in which the seat is located, as well as (if different) a contracting Member State in which an investor seeks to enforce the award, are also in a comparable position, depending on the effect their entry into the Agreement has on pending set-aside or enforcement proceedings. The perception that the signature of the Agreement by Germany (the seat of Achmea BV's proceeding against the Slovak Republic being Frankfurt) would negatively impact Achmea BV's rights appears to have been the motivation behind Achmea's application to the *Bundesverfassungsgericht* (German Federal Constitutional Court) ('BVerfG') for an injunction preventing the German Government signing the Agreement before the BVerfG had considered Achmea's pending appeal. The BVerfG rejected Achmea's application on the basis that it was (among other things) premature. The BVerfG also observed—consistently with the Federal Government's submissions—that it was unclear that Germany's participation in the Agreement (as opposed to that of the Netherlands and the Slovak Republic, the parties to the *Achmea* BIT) would have any effect on Achmea BV's rights: Case 2 BvQ 6/20, Decision of 23 March 2020, para 23.

68)

The ECtHR has made clear that 'a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude part of a Contracting Party's "jurisdiction" from scrutiny under the Convention' (*'Bosphorus Airways' v Ireland* (2005) 42 EHRR 1, para 153; see also *United Communist Party of Turkey v Turkey* (1998) 26 EHRR 121, para 29; *Matthews v UK* (1999) 28 EHRR 361, para 29). In particular, the Court has found that a Contracting Party is responsible *ratione materiae* under art 1 of the Convention for the consequences of entering into a treaty (*Matthews v UK*, para 33).

69)

See Section 2.

70)

Stran Greek (n 5) para 66.

71)

For example, on the basis that the arbitration agreement between the investor and the State was perfected before the impacted BIT was terminated by the Agreement and thus remains valid, notwithstanding *Achmea* (nn 23 and 60).

72)

By art 34 ECHR, a complaint is admissible before the Court only if the applicant can claim to be the 'victim' of the alleged violation. This is closely linked to the ECHR requirement to exhaust 'all domestic remedies' before making an application to Strasbourg (art 35(1)). If the Court of Cassation in *Stran Greek* had ruled the legislative interference unconstitutional (in reliance on the ECHR or otherwise) and consequently upheld the award, the domestic remedy would essentially have nullified the interference with rights and Stran Greek would no longer have been a 'victim'. The exhaustion requirement applies only to remedies which are available and effective. So, if an ICSID *ad hoc* committee were to annul an award on the basis of the Agreement, there would be no available domestic mechanism for challenging that, and a complaint would lie directly to the ECtHR.

73)

Though the 'fork in the road' provisions of some intra-EU BITs might have deterred that course. See Gordon Nardell and Richard Power, '*Slovak Republic v Achmea* – See You in Court' (*Twenty Essex*, 23 March 2018), observing that investors seeking to pursue BIT claims in the aftermath of *Achmea* might well contemplate proceedings in the host State's national courts instead, founded on the BIT provisions. It is not known how many such claims have in fact been attempted (<https://twentyessex.com/wp-content/uploads/2019/06/Achmea-judgement_Report_GN.pdf> accessed 16 November 2020).

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74)

For example, Belgium–Luxembourg Economic Union–Hungary BIT, art 9: '*1. Tout différend entre l'une des Parties contractantes et un investisseur de l'autre Partie contractante, relative à l'expropriation, la nationalisation ou toutes autres mesures similaires touchant les investissements, fait l'objet d'une notification écrite accompagnée d'un aide-mémoire détaillé adressée par l'investisseur de l'une des Parties contractantes à l'autre Partie contractante. Dans la mesure du possible, ce différend est réglé à l'amiable entre parties. 2. Si le différend ne peut être réglé dans un délai de six mois à compter de la date de la notification écrite visée au paragraphe 1er, il est soumis à l'arbitrage* …' ['1. Any dispute between one of the contracting Parties and an investor of the other contracting Party, relating to expropriation, nationalisation or other similar measures affecting investments, shall be subject to a written notification accompanied by a detailed explanation sent by the investor of one of the contracting Parties to the other contracting Party. As far as possible, the dispute is to be settled amicably between the parties. 2. If the dispute cannot be settled amicably within six months of the date of the written notification referred to in paragraph 1, it shall be submitted to arbitration …' (authors' translation)]. Similar provisions are also found in the Belgium–Luxembourg Economic Union–Poland BIT (art 9), the Croatia–Denmark BIT (art 8), and undoubtedly many other impacted BITs.

75)

Stran Greek (n 5) para 60.

76)

Some commentators—and Achmea BV itself—have raised a separate question, beyond the scope of this article, as to the legality of the CJEU's judgment in *Achmea*. Following the decision of the BGH setting aside Achmea BV's arbitral award, Achmea BV lodged a complaint to the BGH that the BGH's decision violated its right to be heard. The BGH rejected that complaint by a decision of 24 January 2019 (Case No I ZB 2/15). Achmea now has a constitutional complaint pending before the BVerfG (Case No 2 BvR 559/19). As one commentator has observed, in this proceeding, the German Federal Constitutional Court 'is now in a position to review the CJEU's *Achmea* judgment and the [BGH's] confirmation thereof along the same lines as it did regarding the CJEU's judgment concerning the ECB [ie *Bundesverfassungsgericht*, Judgment of the Second Senate of 5 May 2020—2 BvR 859/15, concerning Case C-493/17, *Weiss and Others*]. Thus, the BVerfG could conclude that [the] CJEU went beyond its powers and thus acted *ultra vires* when it ruled that the investor-State dispute settlement provision of the Netherlands-Slovakia BIT is incompatible with EU law, which effectively annulled the *Achmea* award of the arbitral tribunal' (Nikos Lavranos, 'The CJEU – German Constitutional Court Debate and Impact on Achmea and the Termination Agreement' (*Kluwer Arbitration Blog*, 21 May 2020) <http://arbitrationblog.kluwerarbitration.com/2020/05/21/the-cjeu-german-constitutional-court-debate-...> accessed 16 November 2020). Any such conclusion would relate to the position in German constitutional law, but (like the *Weiss* ruling) would doubtless have broader repercussions.

77)

The Commission explained that *Achmea* 'implies that all investor-State arbitration clauses in intra-EU BITS [*sic*] are inapplicable and that any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a valid arbitration agreement. *As a consequence, national courts are under the obligation to annul any arbitral award rendered on that basis and to refuse to enforce it.* Member States that are parties to pending cases, in whatever capacity, must also draw all necessary consequences from the Achmea judgment. Moreover, pursuant to the principle of legal certainty, they are bound to formally terminate their intra-EU BITs.' (Commission, 'Protection of intra-EU investment' (Communication) COM (2018) 547 final, introduction (emphasis added)).

78)

Text to n 60.

79)

Text to n 12.

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80)

As the tribunal in *Eskosol v Italy* (n 23) observed, 'in their statements regarding legal issues on the first pages of the January 2019 Declaration [which includes a statement to the same effect as that set out in art 4(1) of the Agreement], the signatories have gone far beyond the actual holding in the *Achmea* Judgment' and that the 'particular assertions' of the Member States, including that reflecting what has now become art 4(1) of the Agreement, 'are not grounded in the express findings of the CJEU in the *Achmea* Judgment'. In particular, the tribunal noted that 'the *Achmea* Judgment was restricted to a discussion of EU law, and nowhere purported to discuss the broader international law consequences of its findings regarding EU law. … It certainly did not explain, as a matter of either VCLT conflicts analysis or VCLT rules on invalidity of treaty provisions, that intra-EU arbitration clauses are "inapplicable" and "would have to be disapplied," with the effect that "an arbitral tribunal established on the basis of [such] clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate".' (n 23, paras 213–16, citations omitted). Achmea BV, similarly, pointed out in its application to the BVerfG for an injunction preventing Germany from signing the Agreement that 'the agreement perpetuates and deepens the constitutional objections already raised against the judgment of the [CJEU in *Achmea*]' by bringing about an independent and separately binding manifestation of the judgment (BVerfG *Achmea* injunction decision (n 67), para 9 (authors' translation)).

81)

For example, the BGH and Svea Court of Appeal have both concluded that, in the light of *Achmea*, a Member State's standing offer to arbitrate contained within an intra-EU BIT is contrary to EU law (BGH *Achmea* Order, 31 October 2018 (n 60) and *PL Holdings*, Svea Court of Appeal, Judgment 22 February 2019 (n 60)). However, that question has been left open by the Swedish Supreme Court in its request for a preliminary ruling from the CJEU in the same proceeding (*PL Holdings*) (the Swedish Supreme Court ruled that a 'possible conclusion' of the invalidity of the ISDS clause in the Belgium–Luxembourg Economic Union–Poland BIT, 'is … that the standing proposal [offer] to commence arbitration proceedings which the State may be deemed to have made to an investor by the dispute settlement provision is also invalid, since the proposal [offer] is closely linked to the investment contract [agreement]' (para 54) (CJEU's working translation from the Swedish original) (Swedish Supreme Court, Request for a preliminary ruling, 4 February 2020 (n 60)). Each of these proceedings involved substantially similar ISDS clauses. At the time of writing, no EU domestic court has yet considered the validity of a standing offer to arbitrate in a materially different ISDS clause in an intra-EU BIT.

82)

The way the ECtHR approached this question in *Stran Greek* is outlined above, text to nn 45–47.

83)

Commission, 'May Infringements Package: Key Decisions' (Infringements decisions) INF/20/859: 'Intra-EU BITs: Commission Urges FINLAND and the UNITED KINGDOM to Terminate Their Bilateral Investment Treaties with Other EU Member States'; see also COM (2018) (n 77), s I.

84)

O'Sullivan McCarthy Mussel Development Ltd v Ireland (2019) 68 EHRR 6, para 109 (referring, *inter alia*, to *Bosphorus Airways* (n 68) para 150 and *Michaud v France* (2014) 59 EHRR 9, para 100).

85)

As the Agreement's preamble indicates ('Member States and the Commission will intensify discussions without undue delay with the aim of better ensuring complete, strong and effective protection of investments within the European Union. Those discussions include the assessment of existing processes and mechanisms of dispute resolution as well as the need and, if the need is ascertained, the means to create new or improve relevant existing tools and mechanisms under Union law') (fifteenth preambular paragraph). The Commission launched a public consultation in May 2020 as part of its assessment of the current system of investment protection and facilitation within the EU: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12403-Investment-protectio...> accessed 16 November 2020.

86)

See Section 3.2.2.

87)

See Section 2.

88)

Pressos v Belgium (n 27) para 43; *Bäck v Finland* (2005) 40 EHRR 48, paras 68–70. For a précis of authority in this area, see the judgment of the UK Supreme Court in *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill (Reference by the Counsel General for Wales)* [2015] UKSC 3, [2015] 1 AC 1016 [49]–[53].

89)

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90)

See Section 3.2.2.

91)

Bosphorus (n 68) para 155.

92)

For example, *M & Co v Federal Republic of Germany* App No 13258/87 (Commission Decision, 9 February 1990); *Bosphorus Airways* (n 68) para 165; *Povse v Austria* App No 3890/11 (ECtHR, 18 June 2013), paras 77 and 78; *Michaud v France* (n 84) para 106; *Avotiņš v Latvia* (2017) 64 EHRR 2, para 102.

93)

Bosphorus (n 68) para 156.

94)

ibid, paras 156 and 157; *Michaud v France* (n 84) paras 102–04 and 113–15; *Avotiņš v Latvia* (n 92) paras 101–05; *O'Sullivan v Ireland* (n 84) para 110.

95)

O'Sullivan v Ireland (n 84) para 111, citing *Avotiņš v Latvia* (n 92) para 106 and *Michaud v France* (n 84) para 113; cf *Bosphorus Airways* (n 68) para 148.

96)

O'Sullivan v Ireland (n 84) para 112.

97)

ibid (emphasis added). Examples of where an EU Member State's conduct has raised issues of EU law but been found to fall outside its 'strict international legal obligations', and therefore no presumption of equivalent protection has applied, include *MSS v Belgium and Greece* (2011) 53 EHRR 2, para 340; *Michaud v France* (n 84) para 113; *O'Sullivan v Ireland* (n 84) para 112; *Ilias v Hungary* App No 47287/15 (ECtHR, 21 November 2019) para 97.

98)

The Commission's description of the infringement proceedings commenced against Finland appears to confirm that bilateral termination of intra-EU BITs (without negating the effects of pre-existing proceedings) would be considered an adequate response to the underlying policy aim (INF/20/859 (n 83)). This is precisely the approach that the Czech Republic took in 2010 to terminate its BITs with Denmark, Slovenia, Malta, and Italy (Luke Peterson, 'Czech Republic Terminates Investment Treaties in Such a Way as to Cast Doubt on Residual Legal Protection for Existing Investments' (*IAReporter*, 1 February 2011) <www.iareporter.com/articles/czech-republic-terminates-investment-treaties-in-such-a-way-as-to-cast-d...> accessed 16 November 2020). Similarly, the authors understand that the Member States that chose not to sign the Agreement but who remain parties to intra-EU BITs (namely, Austria, Finland, and Sweden) are all taking steps bilaterally to terminate those BITs. For some of the other differences between, on the one hand, what the Agreement actually does and, on the other, what Member States are required to do to 'implement' the legal obligations on them flowing from their membership of the EU, see Section 3.2.2 above.

99)

In the event that the Court were to find (contrary to our view) that Member States had no discretion in relation to the implementation of their EU legal obligations by way of the Agreement, the next question would be whether—in a particular case—the application of the *Bosphorus* presumption is displaced by the lack of deployment of the full potential of the supervisory mechanism provided by EU law. In *Avotiņš v Latvia* (n 92), the Court found that this requirement should be applied 'without excessive formalism' and whether the full potential of the supervisory mechanisms provided for by EU law was deployed 'should be assessed in the light of the specific circumstances of each case' (paras 109 and 111). In that regard, a relevant (though not dispositive) factor would be whether a domestic court has requested a preliminary reference from the CJEU where a genuine and serious issue arises with regard to the protection of fundamental rights by EU law (ibid, para 109). Even in those circumstances where the presumption applies, the Court has confirmed that it 'can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights ….' (*Bosphorus Airways* (n 68) para 156; see also *Michaud v France* (n 84), para 103 and *Avotiņš v Latvia* (n 92), para 112.) We do not consider further here whether the test of 'manifest deficiency' would be met, but we note that the ECtHR has never made such a finding.

100)

Sporrong and Lönnroth (n 27) paras 69 and 73; see also *James and others* (n 27) paras 46, 50 and 54.

101)

To paraphrase the conclusion of the Court in *Stran Greek* (n 5), para 74.

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102)

Section 3.2.1 above.

103)

Kopecký v Slovakia (n 49) para 50; *Anheuser-Busch Inc v Portugal* (2007) 45 EHRR 36, para 65; *Centro Europa 7 SRL and di Stefano v Italy* App No 38433/09 (ECtHR, 7 June 2012) para 173; *Béláné Nagy v Hungary* App No 53080/13 (ECtHR, 13 December 2016) para 75; *Karachalios v Greece* (dec) App No 67810/14 (ECtHR, 24 January 2017) para 46.

104)

As the ECtHR found in *Kopecký v Slovakia*, 'the Court's case-law does not contemplate the existence of a "genuine dispute" or an "arguable claim" as a criterion for determining whether there is a "legitimate expectation" protected by [A1P1]'. Rather, a proprietary interest in the nature of a claim 'may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it' (n 49, para 52). See also *Béláné Nagy* (n 103) para 77.

105)

See eg *AIG v Kazakhstan* (n 57) [87], in which Aikens J distinguished the claimants' A1P1 claim in that case from the facts at issue in *Stran Greek* on the basis that AIG's claim involved an 'ICSID arbitration procedure, [an] award that resulted from it and [a] judgment obtained using the *1966* [Arbitration (International Investment Disputes)] *Act*', which were all 'subject to the existing law', including the impugned provision of the State Immunity Act 1978, s 14(4). By contrast, *Stran Greek* involved legislation passed '*after* the award to render it invalid and unenforceable' (emphasis in the original).

106)

Text to nn 23, 60 and 81.

107)

[2003] UKHL 37, [2004] 1 AC 546.

108)

Draon v France (2006) 42 EHRR 40.

109)

ibid, para 80.

110)

ibid, paras 82 and 83.

111)

ibid, para 85.

112)

ibid, para 86.

113)

The application—or otherwise—of the *Bosphorus* presumption (Section 3.2.3 above) might also prove relevant in relation to this category of investor in that it might be more difficult for the investor to show that the protection of its Convention rights was 'manifestly deficient'.

114)

App No 40732/98 (ECtHR, 24 May 2005) para 51.

115)

In relation to A1P1, see eg *AGOSI v UK* (1987) 9 EHRR 1, paras 52–55 (the Court must consider (*inter alia*) 'whether the procedures in question afforded the applicant company a reasonable opportunity of putting its case to the responsible authorities' (para 55)). See also *Air Canada v UK* (1995) 20 EHRR 50.

116)

Masson and Van Zon v the Netherlands (1996) 22 EHRR 491, para 44; *Athanassoglou v Switzerland* (2001) 31 EHRR 13, para 43; cf (in relation to A1P1) *Kopecký v Slovakia* (n 49) paras 42–52 and *Draon v France* (n 108), para 68.

117)

Stran Greek (n 5) para 40.

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118)

ibid, paras 38–40. The ECtHR distinguishes for the purposes of art 6 between 'civil' rights (to which art 6 applies) and rights arising purely as a matter of public administration (to which it does not). However, it approaches the 'civil' character of a right as an 'autonomous concept', meaning that it is not bound by the characterization of the measure in domestic (or, by extension, international) law (ibid, paras 38 and 39). The ECtHR in *Stran Greek* rejected Greece's claim that the award emanated from an arbitration clause accorded as a 'privilege … within a very specific legislative context', against the background of foreign investment legislation which 'pursued a public interest aim' (ibid, para 38). An arbitral award under a BIT gives rise to a pecuniary right arising from State conduct in the field of commercial investments, which are in turn typically governed by domestic laws on foreign investment. For the purpose of this article, we assume without analysing the point in detail that the ECtHR would view a dispute arising from such an award as relating to rights sufficiently 'civil' in character to fall within art 6(1). See by analogy, and in relation to the interface between BIT claims and domestic law, *AIG v Kazakhstan*, where the English High Court found that s 14(4) of the UK State Immunity Act 1978 impinged 'on the rights of access of parties to the enforcement jurisdiction of the UK courts and so Article 6(1) is involved' (n 57, [78]).

119)

Questions may arise as to the possibility (and significance) of conflicting findings of domestic courts of different States on the enforceability of an award; eg the possibility that a court of a third State in which assets are available to satisfy an award might recognize and enforce it even where an EU Member State court would give effect to the Agreement and set aside the award. However, the focus for the purpose of applicability of art 6 is on whether the proceedings are decisive within the domestic legal order of the State concerned. The possibility of enforcing an award elsewhere goes more appropriately to the proportionality of a restriction on access to court, where that is in issue (below, text to n 130).

120)

BGH *Achmea* Order, 31 October 2018 (n 60) paras 25–28. As explained above (n 76), following this decision, Achmea BV lodged a complaint to the BGH that the decision violated its right to be heard. The BGH rejected that complaint. Achmea now has a constitutional complaint pending before the BVerfG which, albeit indirectly, effectively challenges the CJEU judgment in *Achmea* itself.

121)

See generally, Luke Tattersall, 'Challenges to International Investment Law Within the European Union' (2019) 10 Eur Yrbk Intl Econ Law 315, 328.

122)

Text to n 60.

123)

The contrast between 'retrospective' judicial development of the law in the ordinary course of litigation and legislative intervention to effect a retrospective change in the position of a class of persons was emphasized in *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales* (n 88) and was among the factors leading the UK Supreme Court to conclude that the legislation in question overstepped the A1P1 'fair balance'. The conclusion of a treaty by the executive of a State is not a 'legislative' act in the classical constitutional sense, but its effect—the laying down or abrogation of rules on the plane of international law—plainly bears greater resemblance to a 'legislative' act than a judicial one.

124)

See Section 3.2.2 above. *Draon v France* is again illustrative on this point (n 108). There, the first instance court (Paris Administrative Court) sought an opinion on interpretation of the provisions of the Law No 2002-303 from the *Conseil d'Etat*. In its opinion, the *Conseil d'Etat* found that the Law was 'not incompatible with the requirements of Article 6 § 1' or with other Convention rights, including A1P1. On the basis of that opinion, the Paris Administrative Court rendered a ruling ordering the payment of compensation to the applicants based on the new Law. The ECtHR found that the application of the Law to the applicants' proceeding constituted an 'interference with the exercise of the right to compensation which could have been asserted under the domestic law applicable until then' (ibid, paras 29–34, 51 and 71).

125)

Hornsby v Greece (1997) 24 EHRR 250, para 40. See also *AIG v Kazakhstan* (n 57) [63].

126)

For example, *AIG v Kazakhstan* (n 57) [71].

127)

See *Regent Co v Ukraine* (n 48) paras 54–56 for the ECtHR's consideration of the applicability of art 6(1) to arbitral proceedings.

128)

For example, *Baka v Hungary* (2017) 64 EHRR 6, para 120.

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129)

AIG v Kazakhstan (n 57) [79], [84].

130)

ibid [83].

131)

Text to nn 114 and 116.

132)

So art 6 would not provide a basis for challenging the termination of a sunset clause—that is, the (attempted) foreclosure by the termination of sunset clauses of claims of investors with investments made prior to the Agreement's entry into force against State conduct post-dating the Agreement.

133)

This raises the question of whether the effect of the Agreement is considered substantive (ie the cause of action and thus the 'civil right' is effectively removed) or procedural (ie the underlying right remains intact but national law removes the jurisdiction of the court to determine or enforce it). This distinction is a further example of an 'autonomous concept' (ie that the Court is not bound by the characterization of the measure in domestic (or, by extension, international) law) in the jurisprudence of the ECtHR: eg *Al-Adsani v UK* (2001) 34 EHRR 273. The CJEU in *Achmea* itself went no further than finding the ISDS clause in the Netherlands–Slovakia BIT incompatible with EU law; it made no equivalent finding in relation to that BIT's substantive provisions (see above Section 2 and Nardell and Power (n 73)). Thus, if the Agreement is intended, in this respect at least, merely to give effect to *Achmea* (as its preamble suggests), then the underlying 'civil right' survives (Agreement (n 1) preambular paras 4–6 and 9).

134)

This appears to have been one of the issues at play in the BGH's determination of Achmea's appeal against the BGH's set-aside decision. As explained above (n 76), following the BGH's decision setting aside its award, Achmea complained to the BGH that the decision violated its right to be heard. It argued that the BGH had failed adequately to address its submissions, *inter alia*, on the denial of effective legal protection—in particular, that the BGH had failed to recognize that the CJEU's judgment in *Achmea* denied it effective legal protection. Dismissing Achmea's claims, the BGH found that Achmea was able to obtain effective legal protection before the Slovak courts and therefore was not deprived of its substantive claims. The BGH did not, however, conduct any examination of whether alternative causes of action based on domestic law, EU law, or even the ECHR, were of sufficient scope. Rather, it appears to have taken the view that such causes of action must be assumed to be of sufficient scope in accordance with the principle of mutual trust articulated by the CJEU in *Achmea*. See BGH *Achmea* decision, 24 January 2019 (n 76) para 8, referring to BGH *Achmea* Order, 31 October 2018 (n 60) para 72 (in turn referring to *Achmea* (n 6) para 34). See also Susanne Schwalb and Marcus Weiler, 'German Federal Supreme Court Rejects Achmea's Complaint That Its Right to Be Heard Was Violated' (*Lexology*, 3 April 2019) <www.lexology.com/library/detail.aspx?g=a81cee7f-7f86-48df-96bd-36da8ba66a88> accessed 16 November 2020.

135)

Damages in International Investment Law (BIICL 2008) 81.

136)

ibid (especially fn 88).

137)

ibid.

138)

Oao Neftyanaya Kompaniya Yukos v Russia (2014) 59 EHRR SE12. The successful applicants presented a claim for just satisfaction of just under €38 billion. The Yukos shareholders' parallel ISDS claims under the Energy Charter Treaty resulted in three arbitral awards ordering compensation of nearly US$50 billion (those awards are currently subject to set-aside proceedings in the Netherlands, where Russia's appeal of the Court of Appeal decision reinstating the awards is pending before the Dutch Supreme Court).

139)

See, as examples of the ECtHR's approach to quantifying pecuniary loss, the awards in *Eko-Elda Avee v Greece* App No 10162/02 (ECtHR, 9 March 2006) paras 33–38; *Basarba OOD v Bulgaria* App No 77660/01 (ECtHR, 20 January 2011) paras 19–26 (especially the brief reasoning at para 26); *Centro Europa v Italy* (n 103) paras 214–22; *East/West Alliance Ltd v Ukraine* App No 19336/04 (ECtHR, 23 January 2014) paras 245–53.

140)

Stran Greek (n 5) para 77.

141)

ibid, paras 81 and 82.

142)

ibid, paras 10, 40 and 67.

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143)

In *Regent Co v Ukraine* (n 48), the Court ordered Ukraine to pay in 'full and final settlement of the claim for pecuniary damage' the amount of the arbitration award (para 66). The Court dismissed the applicant's claim for US$10 million in respect of 'non-pecuniary damage and lost income', holding that its finding of a violation of art 6(1) and A1P1 'constitutes sufficient just satisfaction'. Relevant to the Court's conclusion was the applicant company's awareness, when it purchased the award debt, that there were problems with the enforcement of the award at issue (ibid, paras 64 and 67). Similarly, in *Kin-Stib v Serbia* (n 48), the 'effective result' was that the Court ordered compensation for Serbia's failure to ensure enforcement of the arbitration award in full, even though the Court was unable 'to enforce the specific terms of the underlying arbitration award', plus non-pecuniary damages (Fietta and Upcher (n 55) 213).

144)

Fietta and Upcher (n 55) 220, referring to the ECtHR's decision in *Papamichalopoulos v Greece*, in which the Court recognized its ability to order restitutionary relief as a matter of international law ((1996) 21 EHRR 439, paras 34–36).

145)

For example, *Ezeh v UK* (2004) 39 EHRR 1, paras 140–43.

146)

ibid, para 141; see also *Whitfield v UK* (2005) 41 EHRR 44, para 57.

147)

See the discussion in *Whitfield v UK* (n 146) paras 54–58. In *Yukos*, the Court found a violation of art 6(1) as well as A1P1, but in declining to award compensation in respect of art 6(1) reiterated the 'no speculation' principle (n 138, paras 18 and 19).

148)

ibid, art 52(1).

149)

Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17 (explanation on art 51); see also Case C-617/10 *Åkerberg Fransson* (2013) EU:C:2013:105, para 20 (and generally, paras 16–22). Cf the test of implementation of a 'strict international legal obligation' for the purposes of the application of the ECtHR's *Bosphorus* presumption (text to nn 91–98).

150)

Angela Patrick, 'Mapping the Great Repeal: European Union Law and the Protection of Human Rights' (A background paper for the Thomas Paine Initiative, October 2016) <https://eachother.org.uk/app/uploads/2016/12/Mapping-the-Great-Repeal-Thomas-Paine-Initiative-Novemb...> accessed 16 November 2020, para 50.

151)

See n 11 and Agreement (n 1), preambular paras 4–6.

152)

Analogously, the CJEU in *Åkerberg Fransson* (n 149) found that the fact that national legislation upon which tax penalties and criminal proceedings were founded had 'not been adopted to transpose' a particular EU Directive did not undermine the conclusion that tax penalties and criminal proceedings for tax evasion 'constitute *implementation* of [the Directive] … and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter' (para 27, emphasis added). The application of the national legislation was 'designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the [TFEU] to impose effective penalties for conduct prejudicial to the financial interests of the European Union' (para 28; see also para 29).

153)

See n 68.

154)

Relatedly, Charter (n 4) art 53 provides that '[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the [ECHR], and by the Member States' constitutions.'

155)

ibid, art 52(7).

156)

Charter Explanations (n 149) 23, 29 and 30 (explanations on arts 17 and 47).

157)

[2015] UKSC 41, [2016] AC 697 [23]–[26] and the lengthy discussion at [33]–[82].

158)

ibid [55], [104] and [105].

159)

See Section 3.2.4 above.

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160)

Such is the case in England and Wales, where the consequences of incompatibility between a statutory provision and the ECtHR are governed by the Human Rights Act 1998, s 4. See, as to the distinction with incompatibilities between statutory provisions and the Charter, *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2019] AC 777 [78].

161)

Paolo Iannuccelli, 'La Corte di giustizia e l'autonomia del Sistema giurisdizionale dell'Unione europea: *quousque tandem*?' ['The Court of Justice and the Autonomy of the Judicial System of the European Union: For How Much Longer?' (authors' translation)], DUE 2/2018 281, 288 and 289. This point is related to the larger question of whether the EU can lawfully accede to the ECHR system as presently constituted, based on the draft agreement providing for the accession—answered in the negative by the CJEU in Opinion 2/13—Accession of the EU to the ECHR, 18 December 2014, paras 174–77, 191–94, 205–14 and 237.

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The Termination Agreement of Intra-EU Bilateral Investment Treaties: A Spaghetti-Bowl with Fewer Ingredients and More Questions

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(*)

This article deals with the issue of the implementation of the Achmea *judgment of the Court of Justice of the European Union (CJEU) through the Termination Agreement of Bilateral Investment Treaties ('Termination Agreement', TA) between some Member States of the European Union (EU). The article focuses on the analysis of the TA provisions that terminate Bilateral Investment Treaties ('intra-EU BITs') and investor-State dispute settlement (ISDS) among EU Members. It also describes TA provisions regulating concluded, new, and pending arbitration proceedings having as a reference the date the CJEU issued the* Achmea *judgment. Also, it examines how the TA regulates pending arbitration proceedings and discusses how TA Members are allowed to resort to transitional measures to resolve their dispute, throughout an amicable resolution proceeding, if they fulfil some conditions. Further, the article analyses some systemic issues of the TA, some related to the EU investment protection regime, others regarding the legal implications for intra-EU BIT provisions for EU Member States which did not sign the TA. Further, the article examines some possible issues related to the legal nature of the TA under international law and EU law.*

1 INTRODUCTION

On 5 May 2020, twenty-three Member States from the European Union (EU) signed the Termination Agreement (TA) of Bilateral Investment Treaties (BITs) (1)

P 798

and investor-State dispute settlement (ISDS) among EU Members. It implements the *Achmea* judgment, (2) a preliminary ruling by the Court of Justice of the European Union (CJEU) from March 2018, about a case between the Slovak Republic and Achmea B.V. The Court concluded that the arbitration clauses in the BIT were incompatible with the EU Treaties.

The *Achmea* judgment answered the question of whether arbitration clauses in BITs between Members of the EU ('intra-EU BITs') were contrary to EU law. The CJEU concluded that the ISDS clause contained in Article 8 of the 1991 Netherlands-Czech and Slovak Republic BIT (3) is not compatible with EU law because it removes from the judicial system remedies provided by EU law. (4) Following the judgment rationale, through the TA, Member States of the EU decided to eliminate 130 intra-EU BITs currently in force, (5) removing some ingredients of the spaghetti bowl of the legal investment regime.

This article presents a description of the *Achmea* judgment, its implementation by EU Member States, domestic courts, arbitral tribunals, and the view of the European Commission ('Commission') up until the signing of the TA of intra-EU BITs. Further, it describes the situations regulated in the TA, including its procedure for 'pending arbitration proceedings' and 'transitional measures'. Finally, it discusses some systemic issues for international investment arbitration.

2 THE *ACHMEA* JUDGMENT

2.1 Background to the judgment

The *Achmea* judgment was a preliminary ruling from the CJEU. The EU legal issue arose as a result of Slovakia's effort to set aside a 2012 investment arbitral decision issued in relation to a dispute between an insurance company (Achmea, formerly Eureka) and Slovakia.

P 799

In 2006, Slovakia prohibited the distribution of profits made by the company. As a consequence, Achmea brought an investment arbitration claim against Slovakia, alleging the violation of the investment BIT's standards of fair and equitable treatment (FET) and the right of free transfer of payment, among other things. (6) The tribunal was seated in Germany and, in its final 2012 award, founded that Slovakia violated the FET and the transfer of payments standards, and ordered it to pay the principal amount of EUR 22.1 million of damages to Achmea. (7)

Slovakia then brought an action to set aside that arbitral award before the Higher Regional Court in

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Frankfurt am Main. When that court dismissed the action, it appealed the decision before the Federal Court of Germany (the Bundesgerichtshof, BGH). The BGH asked the CJEU three questions. First, whether Article 8 of the BIT (the dispute resolution clause) between the Netherlands and the Czech and Slovak Federal Republic concluded in 1991 [8] were incompatible with EU law, in particular being contrary to the non-discrimination obligation under Article 18 of the Treaty on the Functioning of the European Union (TFEU).

Secondly, the BGH asked whether deciding the question of compatibility was necessary to enable it to give judgment under Article 267 TFEU (Preliminary rulings concerning the interpretation of the Treaties).

Thirdly, the BGH asked whether the dispute concerning the interpretation or application of the BIT fell within the scope of Article 344 TFEU (the obligation not to submit a dispute concerning a treaty's interpretation or application to a different method of settlement than the EU Treaties), as 'such disputes did not concern the interpretation of the EU Treaties'. [9]

In the Opinion of Advocate General Wathelet, [10] he concluded that the application of the Netherlands-Czech and Slovak Republic BIT did not constitute discrimination by granting preferential treatment to Dutch investors. He also stated that the tribunal established under a BIT was a 'court or tribunal of a Member State' and, therefore, able to request the CJEU to issue a preliminary ruling on questions of EU law, and ISDS did not fall within the scope of Article 344 TFEU. [11] The Advocate General also referred to the Energy Charter Treaty
P 800
(ECT), a plurilateral treaty on investment in the area of energy which operates between the Member States. [12] He concluded that the material provisions for the protection of investments provided for in the ECT and the ISDS mechanism also operate between the Member States and are likely to be compatible with EU law, as no EU Member had previously asserted its incompatibility before the CJEU. [13]

2.2 Decision of the CJEU

On 6 March 2018, the CJEU ruled that 'Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement between Member States such as Article 8 of the BIT'. [14] Thus, Articles 267 and 344 TFEU should be understood as impeding an arbitration provision in an international agreement concluded between the Member States. [15] In the CJEU's view, the arbitration clause embedded in Article 8 of the BIT eliminated disputes concerning EU law from the mechanism of judicial review provided by the EU legal framework. [16] Therefore, EU law should be considered 'the law in force in every Member State and as deriving from an international agreement between the Member States'. [17]

The CJEU evaluated the interaction between investor-State dispute resolution (ISDR) and EU law and concluded that in the application of intra-EU investment laws, tribunals 'may be called on to interpret or indeed to apply EU law'. [18] For example, Article 8(6) of the BIT requires tribunals to take both of these types of legislation into account, particularly the provisions concerning the fundamental freedoms, 'including freedom of establishment and free movement of capital'. [19]

The Court, however, considered that investment tribunals are not courts or tribunals of a Member State under Article 267 TFEU. [20] Investment courts have an 'exceptional nature', and they are not part of the EU judicial system. [21] Accordingly, the possibility of submitting disputes to a body that is not part of the judicial system of the EU, under an agreement concluded not by the EU but
P 801
by the Member States, is not capable of ensuring the uniform application of EU law. [22]

The CJEU did not find it necessary to assess the compatibility of the BIT with the non-discrimination principle of Article 18 TFEU since it applied only to nationals of the two contracting Member States, a result that is intrinsic in bilateral agreements concluded between them. [23] However, it clarified that the confining by an intra-EU bilateral agreement of a privilege to nationals of two 'Member States is discriminatory only if the nationals of other Member States who do not enjoy that advantage are in an objectively comparable situation'. [24]

The CJEU ruled that Article 8 of the BIT might be contrary to the principles of mutual trust between the Member States, the preservation of the particular nature of the law established by the Treaties. [25] Also, Article 8 was not compatible with the principle of sincere cooperation. [26]

In conclusion, the CJEU ruling provided that EU law precludes such provisions in international agreements concluded between the Member States, such as the ISDR provisions in the Netherlands-Czech and Slovak Republic BIT. The decision came to a different conclusion from that of the German Federal Court of Justice, as well as that of Advocate General Wathelet. [27]

The judgment left many related issues unresolved. For instance, although Advocate General

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Wathelet [28] did touch upon the ECT [29] and its compatibility with EU law, the CJEU did not address the issue. [30] Furthermore, the CJEU did not refer to the question of whether its interpretation will only apply to provisions identical to ISDS under Article 8 of the Netherlands-Czech and Slovak Republic BIT, or whether it encompassed 'comparable provisions in other international agreements of a similar nature'. Nor did the judgment analyse whether the decision had effect for other current intra-EU disputes, creating confusion as to how the judgment ought to be applied to investor-state disputes initiated, concluded, or pending before *Achmea.* [31] The lack of clarity with regard to related issues has
P 802
created debate concerning the ruling's applicability to similar intra-EU ISDS provisions and the intra-EU application of the ECT. [32]

2.3 Discussions about the scope of the *Achmea* judgment

Soon after the ruling in *Achmea*, the discussion about its consequences for international investment law commenced. Those deliberations concentrated on two main issues related to its scope of application: first, concerning the limited or broader scope of the judgment with respect to similar and not-that-similar BITs, i.e. whether it only applied to the Netherlands-Czech and Slovak Republic BIT and to a set of intra-EU BITs with similarly applicable clauses [33] providing for ISDS to be resolved under the United Nations Commission on International Trade Law (UNCITRAL) Rules [34]; second, whether *Achmea* also applies to BITs that the EU and its Member States have concluded with third countries, [35] including the ECT. [36]

Concerning the issue of the limited or broader scope of the judgment to similar and not-that-similar BITs, some scholars and arbitral tribunals argued that the *Achmea* judgment was not binding on ISDS tribunals, and also that the judgment did not bear on International Centre for Settlement of Investment Disputes (ICSID) arbitration. [37] This was on the grounds that the *Achmea* judgment applied only to the Treaty between the Netherlands and Slovakia [38] and to intra-EU BITs which contain a similar rule on the applicability of domestic laws. Therefore, the applicability of the judgment was a matter for consideration by domestic jurisdictions and arbitration tribunals on a case by case basis. [39]

Others, led by the European Commission, [40] advocated that the *Achmea* judgment had consequences for all arbitration clauses in all intra-EU BITs. [41]
P 803
Therefore, the scope and consequence of the judgment was to require the termination of all of the intra-EU BITs and pending arbitral proceedings, [42] because all investor-State arbitration clauses therein were inapplicable and any arbitration tribunal that might be constituted lacked jurisdiction. Therefore, the EU Member States were obliged to terminate them, [43] and 'national Courts were under obligation to annul any arbitral award rendered on that basis and to refuse to enforce it'. [44]

The question of whether *Achmea* applied to BITs that the EU and its Member States concluded with third countries was no less controversial. While the Commission argued that the *Achmea* judgment did not have implications for extra-EU BITs and international agreements concluded by the EU, [45] others claimed that its implications were systemic. [46] The CJEU, in Opinion 1/17, ruled that the ISDS provisions in a free trade agreement (the Comprehensive Economic and Trade Agreement, CETA) [47] 'differs from the ISDS in intra-EU BITs as it relates to agreements with third states and, as a consequence, does not involve considerations concerning the principle of mutual trust'. [48] Thus, the judgment is of no consequence in relation to treaties with third countries.

Another aspect of the discussion concerned the consequences of the ruling in *Achmea* for the ECT. In this case, the Commission's view was to limit the application of the ruling in respect of the ECT to intra-EU relations and investment disputes. However, due to the existence of non-EU ECT parties, [49] it was pointed out that the provisions of the ECT must be applicable also in intra-EU
P 804
relations and investment disputes, [50] because an intra-EU modification would deprive non-EU ECT investors of their rights. Instead, the EU would need to come to an agreement with non-EU ECT parties [51] to include this issue among the topics for the ECT modernization. [52]

2.4 *Achmea* in the EU domestic courts and arbitration awards

On 31 October 2018, the Federal Court of Germany (BGH) ruled that the BIT between Slovakia and the Netherlands was incompatible with EU law because the arbitration clauses therein were not valid. [53] Immediately afterwards, EU Members States began to challenge awards before domestic courts on this ground. However, domestic courts were reluctant to apply the judgment in other EU jurisdictions.

For example, a challenge by Poland before a Swedish court regarding two arbitral awards based on the Poland-Belgium and Luxemburg BIT [54] concluded that the arbitration clause did not

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automatically imply that the awards were manifestly incompatible with the Swedish public order. (55) The court stated that the content of the arbitral awards did not violate the fundamental principles of EU law. (56) On 27 February 2020, the Swedish Supreme Court requested for a preliminary reference to the CJEU as to whether Poland could consent to intra-EU
P 805
arbitration by failing to raise jurisdictional objection in the early stage of an arbitration proceeding. (57)

Further, several arbitral tribunals examined intra-EU objections to jurisdiction based on the *Achmea* judgment. In general, the judgment did not influence the decisions. (58) Arbitral tribunals tended to reject objections to jurisdiction based on the judgment as they did not consider themselves to be bound by the CJEU's decision. (59) Tribunals dealing with intra-EU BITs continued to uphold the argument (60) that the subject matter in intra-EU BITs was not covered by EU law. (61) For instance, in *Investment Group*, (62) the tribunal stated that the Cyprus-Greece BIT did not regulate the same subject matter as the EU law. (63)
P 806

The decision in *Eskosol v. Italy*, dated 7 May 2019, probably contained the most detailed discussion on *Achmea.* (64) The tribunal concluded that the *Achmea* judgment, accepted as an ultimate decision concerning intra-EU BITs within the European legal order, 'does not disturb its jurisdiction to decide a dispute in the international legal order under the ECT'. (65) Hence, the tribunal held that the *Achmea* judgment, from the standpoint of EU law, did not affect the jurisdiction of an ECT tribunal. (66)

This conclusion was based on three main arguments. First, the wording used by the CJEU in its judgment referred only to bilateral treaties among the EU Member States, and not to multilateral treaties which the EU itself had ratified. (67) Therefore, the decision in *Achmea* has effect in relation to comparable and similar BIT provisions. (68) Second, the judgment did not include the EU itself, which is a contracting party to the same international agreements as its various Member States. (69) Third, according to the judicial interpretation of investment protection treaties, the dispute settlement mechanisms established by these agreements concern only the application and interpretation of the agreement and not the interpretation of EU law, (70) as was the case of the BIT in *Achmea.* (71)

2.5 Declarations of the Member States on the legal consequences of the *Achmea* judgment and on investment protection

On 15 January 2019, twenty-two EU Members signed the Declaration of the Member States on the legal consequences of the *Achmea* judgment and on investment protection, (72) which expressed their intention to terminate all BITs
P 807
concluded between them, whether plurilateral or bilateral treaties, including the ECT. (73) One day later, on 16 January 2019, five EU Member States, (74) and Hungary separately, (75) issued two more Declarations, clarifying their opinion that it 'was inappropriate to express views as regards the compatibility with Union Law of the intra application of the ECT'. (76)

According to all the Declarations, it was necessary to inform domestic courts about the invalidity of 'proceedings relating to an intra-EU investment arbitration award and require [them] to set these awards aside or not to enforce them'. (77) The Declarations provided that the termination of the treaties should have come into force no later than 6 December 2019. (78) Later, a draft of the TA was leaked in December 2019. (79)

The tribunal in *Eskosol v. Italy* also examined these January Declarations. (80) It observed that in their Declaration on January 15, the signatories have gone far beyond the holding in the *Achmea* judgment. The tribunal reaffirmed that it was not clear that the *Achmea* judgment should be interpreted as meaning that 'all investor-state arbitration clauses contained in BITs are contrary to Union law'. (81) Also, even if the *Achmea* judgment did
P 808
apply to 'all' intra-EU BITs, it did not directly address the ECT, or provide that the ECT's arbitration clause 'would be incompatible with the Treaties'.

3 TERMINATION AGREEMENT OF INTRA-EU BITS: NEW SPAGHETTI-BOWL (82) WITH FEWER INGREDIENTS AND MORE QUESTIONS

After years of deliberations, (83) on 5 May 2020, twenty-three (84) EU Member States signed the TA implementing the *Achmea* judgment. (85) It provides for the termination of intra-EU BITs (86) and their

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sunset [87] clauses [88] and confirms that intra-EU Member States dispute resolution mechanisms are contrary to the EU Treaties and thus inapplicable. Accordingly, specified BITs would be terminated and will not produce legal effects. [89] The TA eliminated 130 intra-EU BITs [90] currently in force, [91] removing some ingredients of the spaghetti bowl of the legal investment regime.

Currently, the TA is subject to Members' incorporation. The agreement will enter into force 'after the date on which the Secretary-General of the Council of the European Union receives the second instrument of ratification, approval or acceptance'. [92]
P 809

The TA also terminated sunset clauses in agreements already terminated, but still applicable due to their extensive application. Sunset clauses allowed the application of the BITs for five to twenty years after their termination. [93] For instance, Romania, Poland, Ireland, and Italy, had already terminated their intra-EU BITs, unilaterally or bilaterally, [94] but they still applied due to their sunset clauses.

The TA applies only to intra-EU BITs. It does not relate to the obligations of the EU and its Member States set out in the ECT, [95] or to BITs with non-EU Member States. EU investors would no longer be able to invoke an intra-EU BIT's standard of protection, nor recourse to ISDS. The EU legal system would instead offer adequate and effective protection for cross-border investors in the EU single market.

The TA covers all ISDS proceedings based on intra-EU BITs. [96] It covers any arbitration convention or set of rules. [97] States which are parties to arbitration proceedings 'shall inform arbitral tribunals about the legal consequences of the *Achmea* judgment'. [98] In practice, this provision will apply to thirty-one pending (until December 2019) intra-EU BIT arbitrations. [99]

3.1 Temporal scope of the Termination Agreement

Parties to the TA agreed to deviate from the rules of the Vienna Convention on the Law of Treaties (VCLT) about the application of treaties as regards time. The VCLT provides that treaties may not produce retroactive effects [100] nor
P 810
'affect any right, obligation, or legal situation of the parties created through the execution of the Treaty before its termination' [101] unless the treaty otherwise provides. [102]

In *Eskosol v Italy*, [103] the tribunal discussed the issue of retroactivity concerning the Termination Declarations. The tribunal asserted that in the unlikely event that those Declarations had a binding effect, it was unable to accept their force 'to require the termination of a pending arbitration, initiated in good faith by an investor years before the Declaration was issued, and indeed already sub judice as of its issuance'. [104]

Additionally, the TA could be contrary to the principle of security enshrined in Article 25(1) of the ICSID Convention, which provides that '[w]hen the parties have given their consent, no party may withdraw its consent unilaterally'. [105]

Regarding current claims made under intra-EU BITs, the TA's effect on proceedings differs depending on the date and stage of the arbitration proceedings. The TA regulates arbitration, taking into consideration three different dates: (1) the date on which the last of the parties to the TA became a Member State of the European Union; (2) the date of the *Achmea* judgment, i.e. 6 March 2018 [106] ; and (3) the date when the TA enters into the force. [107] Figure 1 depicts the relevant dates for arbitration proceedings affected by the TA. Consequently, for concluded, new, and pending intra-EU arbitration proceedings, the TA provides different treatment. [108]
P 811

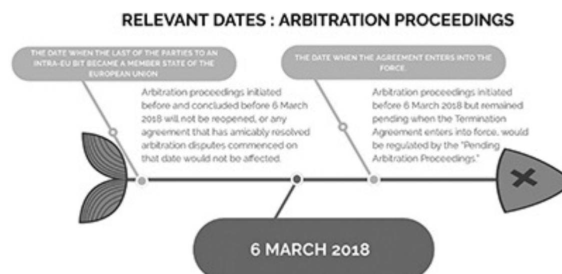

Figure 1

Relevant Dates provided in the Termination Agreement

Source: Termination Agreement

3.2 'New arbitration proceedings' and 'Concluded arbitration

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proceedings'

New legal claims and arbitration proceedings based on intra-EU BITs' arbitration clauses, i.e. those initiated on or after 6 March 2018, will not serve as a legal basis for new arbitration proceedings, [(109)] as the TA includes a mandate to terminate arbitration proceedings initiated on or after this date. [(110)] 'Concluded proceedings', [(111)] i.e. those which ended before 6 March 2018, or were finally executed, set aside, or annulled prior to the date of entry into force of the TA, will not be reopened, and any agreement that has amicably resolved arbitration disputes initiated on that date will not be affected. [(112)]

3.3 'Pending arbitration proceedings'

In respect of 'pending arbitration proceedings' (proceedings started before 6 March 2018, but not qualifying as 'concluded arbitration proceedings'), TA Members are
P 812
allowed to resort to 'transitional measures' to resolve the dispute through 'amicable resolution' [(113)] or a claim before a domestic court.

A 'facilitator' may assist the 'amicable resolution' of the dispute. [(114)] This alternative method of solving international disputes is a hybrid between mediation [(115)] and conciliation. [(116)] The facilitator designated by the agreement of the parties organizes the settlement negotiations and makes a final proposal for an amicable settlement. Such a proposal is not obligatory. Nevertheless, a lack of acceptance of the facilitator's proposal should be justified in writing. [(117)]

The TA does not provide for recourse if a pending arbitration fails, and no successful settlement is reached. A pending arbitration procedure may not necessarily conclude with an agreement. Investors may bring claims before domestic courts within six months from the date a counterparty rejects a transitional measure procedure, even if otherwise applicable time limits have expired under domestic law. [(118)]

3.3[a] 'Amicable Resolution Assisted by a Facilitator'

Transitional measures apply to the procedure between the parties involved in a confidential amicable dispute resolution assisted by a facilitator. [(119)] No arbitral
P 813
tribunal or court adjudicate the dispute. [(120)] Transitional measures are not applicable if an award concluded that the measure does not fall under the scope of an intra-EU BIT, or violates it. [(121)] The TA also exhorts parties in a pending arbitration proceeding to engage in other alternative methods of conflict resolution, including an amicable resolution, provided the solution complies with EU law. [(122)]

An investor who is a party to pending arbitration proceedings may request the TA party involved in those proceedings to engage in a settlement procedure and access the judicial remedies under national law, provided some conditions are met. [(123)] Transitional measures apply when an investor is a party in pending arbitration proceedings and has not challenged the measure that is subject to the dispute before the competent national court. Also, transitional measures would apply if the state has not brought counter-claims. [(124)]

3.3[a][i] Scope of amicable resolution assisted by a facilitator

Transitional proceedings only apply to pending arbitration proceedings in two situations: first, when pending arbitration is inactive due to a party's request for suspension, its inactivity or intention not to engage in legal action; second, when there is an EU legal decision against the Member State.

Inactive pending arbitration occurs when: (1) the investor requested to suspend intra-EU BIT arbitration; (2) a final award has been issued, and the investor does not start proceedings for its recognition, execution, enforcement, or payment; or (3) an intra-EU BIT tribunal renders the final award and the investor requests the suspension of its recognition, execution, enforcement, or payment in a Member State or a third country. [(125)]

Transitional procedures also apply when the CJEU, or a national court, or the Commission has adopted a decision concluding that the Member State contesting a measure in the proceedings has violated EU law. [(126)] In contrast, it is not possible to initiate a settlement procedure if the CJEU, or a national court, or the Commission have adopted a definitive decision concluding that the state measure being contested in the proceedings does not violate EU law. [(127)] The TA provides for
P 814
suspension of the initiation of the settlement procedure until domestic or EU court proceedings have resulted in a final judgment. Then, the Member State concerned must inform the investor within two weeks of such a decision. [(128)]

3.3[a][ii] The facilitator

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The parties conduct a confidential settlement procedure assisted by a facilitator, to find an amicable settlement of the dispute. (129) The parties designate by common agreement an independent and impartial facilitator with in-depth knowledge of EU law. The facilitator is in charge of organizing the settlement negotiations and supporting the parties to reach an amicable settlement. The facilitator cannot be a national of either the Member State in which the investment took place or the home Member State of the investor and must not be in a position of conflict of interests. (130)

If within one month after the settlement procedure initiates, there is no agreement on the facilitator, the respondent in the pending arbitration proceeding must ask the Director-General of the Legal Service of the Commission to designate a former member of the CJEU, after having consulted each party to the dispute. (131)

3.3[a][iii] Procedure of amicable resolution assisted by a facilitator

As depicted in Figure 2, the procedure involves three stages: the initiation, the settlement process, and the agreement (or disagreement).

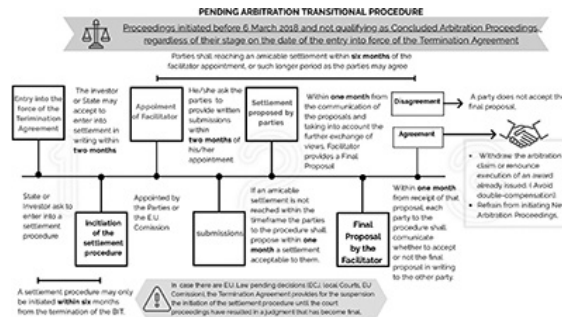

Figure 2

The Procedure of Amicable Resolution Assisted by a Facilitator

Source: Termination Agreement

(1)*Initiation:* The procedure initiates when an investor or Member State involved in pending arbitration proceedings requests the counterparty to enter into a settlement procedure, and its counterparty accepts in writing within two months, provided that the conditions set out in the TA are met. (132) The settlement procedure must be initiated within six months from the entry into force of termination of the intra-EU BIT on which the legal claim for the pending arbitration proceedings is based. (133)

(2)*Settlement process:* The settlement process is encouraged by the facilitator after appointment by the parties, who are required to present their written submissions within two months from the appointment. (134) The CJEU and EU
P 815
Institutions may have a voice in the procedure if required. (135) The facilitator must organize the settlement negotiations and support the parties to reach an amicable settlement within six months of their appointment, or at a later date if the parties agree. (136) If, within that period, the parties cannot reach an amicable settlement, they may propose a settlement acceptable to them within one month. A party must communicate its observations in writing to the other party. (137) Based on such communications, the facilitator must direct the negotiations to find a mutually acceptable solution to the dispute. (138)
P 816

The facilitator must make a final written proposal for an amended amicable settlement within one month from the parties' communications, taking into account the former exchange of views. (139) Then, each party to the procedure decides whether to accept the final proposal and communicates that decision in writing to the other party within one month after the receipt of the facilitator's proposal. (140) If a party does not accept the final proposal, it must provide a written explanation of its reasons to the other party to the procedure. (141)

(3) Agreement: The final part of the procedure is the agreement (or disagreement). Parties may reach an agreement, and they must then accept those terms in a legally binding manner. The terms of the settlement must include an obligation for the investor to withdraw the arbitration claim or renounce execution of an award already issued, but not yet definitively enforced or executed, and, where relevant, take into account any compensation previously paid in the pending arbitration proceedings to avoid double-compensation. The settlement also may include a commitment to refrain from initiating new arbitration proceedings, and a waiver of all other rights and claims related to the measure that is the subject of the proceedings.

3.3[b] Access to Domestic Courts

An investor also may bring claims before domestic courts against a respondent EU Member State,

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if the investor withdraws claims and abandons all rights under the relevant BIT. (142) Also, an investor can access local courts if they renounce enforcement of the arbitral award and refrain from claiming new arbitration proceedings. (143)

An investor may bring a claim before a domestic court within six months from the termination of the relevant intra-EU BIT, or from the date a counterparty rejects a transitional measure procedure, even if otherwise applicable time limits have expired under domestic law. (144) Local domestic courts must apply only domestic law and EU law, rather than the substantive investment rights under intra-EU BITs.
P 817

3.4 Entry into the force and ratification of the Termination Agreement

The TA will enter into force after just the second Member ratifies the Treaty, (145) a novel solution as regards multilateral treaties. This approach may avoid the problematic situation where two Member States, parties to an intra-EU BIT, still apply the BIT, because other states have not yet ratified the TA. They would then have to wait for others to adhere to the treaty, causing a legal effect in their bilateral relations.

As the entry into force of the TA will create international obligations, EU Member States will have to go through the process of ratification, approval, and acceptance, and incorporate the TA as national law; domestic courts and ISDS tribunals will not be bound by the TA until then.

The manner in which the TA enters into force, and the fact that sunset clauses are addressed in the TA, may contravene CJEU Opinion 1/17 on the provisional application of the ISDS mechanism of the CETA. (146) The Opinion reaffirmed that investment provisions should not enter into force before the ratification by all Member States, each following its constitutional procedures. (147)

The TA also raises some questions concerning its conformity with fundamental principles recognized by the CJEU, (148) such as legal certainty, non-retroactivity and the protection of legitimate expectations. (149) When states agree on a treaty by mutual consent and include sunset clauses, 'they acknowledge that long-term interests of investors who have invested in the host State in reliance on the treaty guarantees must be respected'. (150)
P 818

Further, different arbitral awards may have different effects for respondent EU Member States depending on whether the investors are from states parties to the TA, the ECT or other intra-EU BITs. Also, investment tribunals and domestic courts will need to assess how the TA interacts with Member States' obligations under the ICSID Convention and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

3.5 Critical points about the new 'spaghetti bowl' after the Termination Agreement

The TA affects the rights, obligations, and legal situation of its Members through the execution of the Treaty. It terminates intra-EU BITs, and their sunset clauses, the sunset clauses of BITs terminated previously, and regulates the settlement of pending procedures within intra-EU arbitration. It also imposes a burden on investors in pending arbitration procedures.

The TA therefore raises some critical issues, as discussed below.

3.5[a] Non-Parties to the Termination Agreement

A relevant question is what would be the status of arbitral proceedings under intra-EU BITs, in which Austria, Finland, Ireland, and Sweden are parties, while they remain outside of the TA (non-TA EU Member States). Some of their intra-EU BITs are still applicable, and even some previously terminated BITs through the operation of sunset clauses.

For those non-TA EU Members, their BITs with EU Members who are parties to the TA would still be applicable. For instance, in the case of Austria, (151)
P 819
Finland, (152) and Sweden, (153) their BITs with other EU Members would still apply. In the case of Ireland, it had already ended all its intra-EU BITs in 2012, but some of them are still applicable because of sunset clauses. (154)

On 18 May 2015, the Commission requested the termination of the intra-EU BITs between Austria and Sweden (non-TA EU Members) and the Netherlands, Romania, and Slovakia through infringement proceedings. (155) These proceedings did not succeed, as Romania was the only country to terminate its intra-EU BITs in March 2017 unilaterally. (156) On 14 May 2020, the Commission began

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P 820

infringement proceedings against both Finland (non-TA EU Member) and the United Kingdom [157]; neither the United Kingdom nor Finland replied. [158] However, in mid-March 2020, the Finnish Government submitted to the Finnish Parliament a proposal to bilaterally terminate its intra-EU BITs. [159]

Not surprisingly, the United Kingdom did not sign the TA. Although the termination of ten BITs between the United Kingdom and other Member States [160] was scheduled in the draft treaty, [161] this did not appear in the final

P 821

version of the TA. Thus, the United Kingdom's BITs with some other EU Members [162] will still be enforceable. It is a fair assumption that BITs between the United Kingdom and EU Members States will continue to apply until the conclusion (post-Brexit) of an 'economic partnership encompassing a Free Trade Agreement that allows facilitating trade and investment', [163] which would formalize a single BIT among parties to such a free trade agreement.

A related matter is the issue of recognition, enforcement, execution, and payment of awards in a non-TA EU Member State or a non-EU state. The TA would not apply to non-TA states' domestic courts in intra-EU pending arbitrations when an investor pursues to enforce the award in a non-EU state or a non-TA EU Member. Therefore, a court in a non-TA state would not be bound to accept that an award issued before an intra-EU BIT tribunal in pending arbitration is null or invalid, and thus would not be obliged to set aside, or refuse to recognize or enforce such an award. [164]

3.5[b] Pending Arbitration Proceedings in the Termination Agreement

The TA does not provide for recourse if pending arbitrations fail. Pending arbitration procedures may conclude without an agreement. Investors may bring claims before domestic courts within six months from the date a counterparty rejects a transitional measure procedure, even if otherwise applicable time limits have expired under domestic law. [165] However, if there is no agreement, the TA does not offer investors any remedy after six months. This may constitute an incentive for investors to continue pending arbitration proceedings rather than initiate the TA's procedure of amicable resolution assisted by a facilitator.

Furthermore, the TA diminishes the procedural rights of investors who are involved in pending arbitration. This may be contrary to the principles of equal treatment, effective remedy, and non-retroactivity recognized by the CJEU. In particular, Opinion 1/17 on the CETA concluded that although the safeguards of no retroactive effect and no direct effect on pending cases are not expressly provided for in the CETA, the consent of the EU to 'any decision about its interpretation will have to comply with EU primary law and, in particular, with the right to an effective remedy'. [166] Accordingly, the CETA cannot be interpreted

P 822

as permitting the EU to consent to decisions on its interpretation that would produce adverse effects on the handling of disputes that have already been dealt with or are pending. [167] This rationale also should apply in the case of the TA.

In investment arbitration, jurisdiction arises by the consent of the parties who have agreed to ISDS. In pending arbitration proceedings, it is relevant to ask whether parties can agree to the non-application of the ISDS mechanism, in circumstances where, under intra-EU BITs, investors had acquired procedural rights before the conclusion of the TA. This issue is particularly complex in ICSID arbitration. According to the ICSID Convention, no party may withdraw its consent unilaterally. [168] Given the fact that pending arbitration proceedings deal with arbitration after the investor has initiated proceedings under intra-EU BITs that are still in force and applicable, one could argue that the host state has consented to arbitration under the BIT. Therefore, the state cannot withdraw its consent unilaterally.

3.3[c] 'In Domestic (And EU Law) We Must Trust'

The TA derogates from all substantial and procedural norms of intra-EU BITs. Therefore, investors would have to rely on their rights under EU law, and on the EU Member State's domestic law regulation. This approach differs from the *Achmea* judgment, which, although it eliminated the BITs' dispute resolution clauses, permitted substantial protection under an intra-EU BIT before EU domestic courts. [169]

After the TA enters into force, EU investors would have to pursue remedies of damages under national standards of protection equivalent to those under the BITs, and may do so before EU and domestic courts. [170] However, it is not clear whether those remedies will be of practical value for investors, as they do not provide an independent private party adjudicative solution, [171] nor do they envisage something different which they already have under EU law: the possibility of access to domestic courts.

Investors would not have remedies comparable to those in BITs under EU law. They could file

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claims before the European Court of Human Rights (ECtHR), provided that local remedies have been exhausted first, and before the
P 823
CJEU for the violation of EU property rights and EU standards. [172] Substantive rights under the Charter of Fundamental Rights of the European Union ('EU Charter') could be claimed, such as the freedom to conduct businesses, [173] the right to property, [174] non-discrimination, [175] and, most importantly, the right to an effective remedy and a fair trial. [176]

A question for EU investors arises as to whether a less favourable treatment accorded to non-EU investors under foreign investment treaties may be a case of discrimination between EU investors, as they would have no resort to comparable BIT standards under EU law. Following the *Achmea* judgment and Opinion 1/17 on the CETA, while foreign investors who invest within the EU are in situations comparable to investors of the Member States who invest in a foreign country, their situation is not, on the other hand, comparable to investors of the Member States who invest within the EU. [177] Thus, a comparable situation would be between EU investors who invest in the EU. Hence, the issue of discrimination within the EU becomes complex when assessing the situation of EU investors under the ECT, and in non-TA EU Members. The ECT and other intra-EU BITs (outside the scope of the TA) provide substantive and procedural rights to intra-EU parties, leaving investors from non-ECT and non-TA states outside the equation of investment protection regimes.

The TA did not cover intra-EU proceedings based on Article 26 of the ECT [178] for obvious reasons. [179] However, it is clearly the intention of the
P 824
Commission to terminate intra-EU investment settlement between EU Member States within the ECT. To achieve such a goal, the EU would need to come to an agreement with non-EU ECT states to include it among the topics for ECT modernization. [180] Indeed, the Commission is trying to pursue ECT amendment via different avenues. [181]

The author is of the view that what will be needed is an intra-EU investment protection regime [182] that confers substantive rights at least equivalent to those which investors have under investment treaties. They also should have the right to seek protection using alternative dispute resolution (ADR) methods, including ISDS arbitration. The EU has the opportunity to overcome the systemic issues of ISDS. [183] Domestic courts and the CJEU could help to bring coherence to the intra-EU investment system.

3.6 Differentiating investment regimes

The TA is the result of years of Commission pressure to differentiate EU domestic investment regimes from international investment regimes. This is also complemented by active EU participation in the UNCITRAL Working Group III on Investor-State Dispute Settlement Reform. Although the EU is not a Member State of the UNCITRAL (not being a state), it is an active participant, as being the 'voice' of the EU Member States. The EU and its Member States are active supporters of an Investment Court System (ICS) for investment disputes outside the EU. The ICS would serve as an investment appellate court, an international organ, whose structure, members and procedures resemble that of national Courts. [184]

In the same direction, the EU and its Member States have developed a modern ICS in the EU's bilateral agreements, such as CETA, and the
P 825
Investment Protection Agreements with Vietnam and Singapore. Further, a proposal for modernization of the ECT includes a systemic reform of ISDS through bilateral ICS and, in the medium term, a permanent Multilateral Investment Court.

3.7 Legal nature of the Termination Agreement under the VCLT and EU law

There is also a theoretical question about the legal nature of the TA under international law. Given the express mention of customary rules embedded in the VCLT, [185] one can affirm that the TA could constitute termination of a treaty 'by consent of all the parties' under Article 54(b) VCLT. [186] Given its plurilateral nature, with a direct connection with the 'EU internal market', [187] 'harmonious development', and 'the common commercial policy of foreign direct investment' within the EU, [188] it could be a fair assumption that the TA would qualify as a subsequent agreement concerning the interpretation of the EU Treaties, under Article 31.3 (a) VCLT. [189]

Further, TA Members consented in its dispute settlement clause that the Agreement is 'a special agreement between the parties related to the subject matter of the EU Treaties', within the meaning of Article 273 TFEU. However, according to CJEU case law, consent is irrelevant to qualify the TA as 'a special agreement'. [190] The provision requires that the 'dispute' brought before the Court

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‘relates to’ EU law, i.e. that the subject matter would be the same. (191) Thus, although there is a clear link between the TA and the subject matter of the TFEU, it is a relevant question whether the TA regulates the same subject matter as the EU Treaties, and therefore whether this dispute settlement clause could be applied. (192)
P 826

4 CONCLUSION

The implementation of the *Achmea* judgment has been a complex issue. EU Member States have engaged in a very innovative commitment regarding the elimination of intra-EU arbitration proceedings through the TA.

The TA terminated intra-EU BITs, and sunset clauses in BITs already terminated. Legal claims under intra-EU BIT’s would not serve as the legal basis for new arbitration proceedings. Arbitration proceedings initiated on or after the date of the *Achmea* judgment were terminated. Proceedings which, before that date, were finally executed, set aside, or annulled would not be reopened, and any agreement that had amicably resolved arbitration disputes initiated before that date would not be affected. In pending arbitration proceedings, TA Members were allowed to resort to ‘transitional measures’ to resolve their disputes through an ‘amicable resolution’ of the dispute, provided some conditions were met.

The TA raises some systemic issues. First, the TA derogates from all substantive and procedural norms of intra-EU BITs. Therefore, investors would have to rely on their rights under EU and domestic laws that may not be equivalent to those provided in the BITs. Second, the TA does not provide for recourse if pending arbitration fails, leaving investors in legal limbo if domestic and EU law is already inapplicable. Third, intra-EU BIT provisions would still apply to non-TA EU Members, and parties to the ECT, causing an intricate web of applicable laws that may be discriminatory in respect of some intra-EU investors. The issue is even more complicated with regard to enforcement of pending arbitration awards. The TA would not apply to non-TA states and their domestic courts, as regards investors seeking enforcement of awards in non-TA states. Fourth, given the fact that pending arbitration proceedings deal with arbitration after the investor has initiated proceedings under intra-EU BITs that are still in force and applicable, one could argue, especially concerning ICSID arbitration, that the host state has consented to arbitration under an intra-EU BIT and the state cannot withdraw its consent unilaterally.

Finally, there is also a theoretical question about the legal nature of the TA under international law and EU law. Given the express mention of customary rules embedded in the VCLT and Article 273 TFEU, one can affirm that the TA could constitute a ‘termination of a treaty’ made by consent of the parties under Article 54 VCLT. A related EU law issue may be whether the TA is a special agreement between the parties related to the EU Treaties within the meaning of Article 273 TFEU, so that therefore its dispute settlement clause could be applied.
P 826

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3)

'(1) All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if possible, be settled amicably. (2) Each Contracting Party hereby consents to submit a dispute referred to in para. (1) of this article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement'. Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic ('Netherlands–Czech and Slovak Republic BIT'), Art. 8 (29 Apr. 1991), https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2650/netherland... (accessed on 8 June 2020).

4)

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12)

Ibid., para. 45.

13)

Ibid.

14)

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15)

Ibid., para. 60.

16)

Ibid., para. 58.

17)

Ibid.

18)

Ibid., para. 42.

19)

Ibid.

20)

Ibid., para. 48.

21)

Ibid., para. 45.

22)

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23)

Ibid., para. 22.

24)

Ibid.

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Ibid., para. 54.

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26)

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Hess, *supra* n. 9, at 8..

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Ibid., para. 45.

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81)

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82)

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83)

On 24 Oct. 2019, the Commission announced that the EU Member States had agreed on the text of a plurilateral treaty to terminate intra-EU BITs (the Termination Agreement), as envisaged by the declaration from Jan. 2019, *see*, https://ec.europa.eu/info/publication/200505-bilateral-investment-treaties-agreement_en (accessed 8 June 2020).

84)

Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.

85)

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86)

It does not surprise the author that Austria, Finland, Ireland, and Sweden did not sign the Agreement.

87)

Sunset clauses are provisions that allow for the temporary protection of an investor who made its investment before the termination of the BIT.

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88)

Recital 7 of the Termination Agreement states the following: 'Noting that certain intra-EU bilateral investment treaties, including their sunset clauses, have already been terminated bilaterally, and that other intra-EU bilateral investment treaties have been terminated unilaterally and the period of application of their sunset clauses has expired'.

89)

Termination Agreement, Art. 3.

90)

Ibid., Art. 2, Annex A.

91)

About 190 BITs, 8% of existing worldwide binding BITs. Anderer, *supra* n. 5.

92)

Termination Agreement, Preamble.

93)

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95)

Termination Agreement, Preamble, recital 10.

96)

Ibid., Preamble, recital 7.

97)

'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and the ICSID Arbitration Rules, the Permanent Court of Arbitration (PCA) Arbitration Rules, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Arbitration Rules, the International Chamber of Commerce (ICC) Arbitration Rules, the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, and ad hoc arbitration'. Termination Agreement, Preamble.

98)

Ibid., Art. 7.

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Szilárd Gáspár Szilágyi & Maxim Usynin, *The Uneasy Relationship between Intra-EU Investment Tribunals and the Court of Justice's Achmea Judgment*, 4 Eur. Investment L. & Arb. Rev. Online 31–36 (19 Dec. 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3496797 (accessed 8 June 2020).

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103)

Eskosol S.p.A. v. Italian Republic, *supra* n. 64.

104)

Ibid., para. 226.

105)

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, International Centre for Settlement of Investment Disputes (ICSID), Washington 1965 ('ICSID Convention').

106)

'The EU Member States must inform tribunals aware of pending arbitration proceedings that investor-State arbitration clauses in intra-EU BITs cannot serve as a legal basis for arbitration proceedings'. Termination Agreement, Art. 5.

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107)

The Termination Agreement will enter into the force 30 days after the Depositary (the EU Council) receives the second instrument of ratification, approval or acceptance: Termination Agreement, Arts 4(2), 11, 15, 16. A Member State may also decide to apply the Termination Agreement provisionally, under its constitutional requirements: Termination Agreement, Art. 17.

108)

'Intra-EU BIT arbitration proceedings' are defined as procedures where an arbitral tribunal is established to resolve a dispute between an investor from one Member State of the European Union and another Member State of the European Union: Termination Agreement, Art. 1.

109)

Ibid., Art. 5.

110)

Ibid., Art. 1, Definitions (6).

111)

Ibid., Art. 1, Definitions (4).

112)

Ibid., Art. 9.7.

113)

Ibid.

114)

Ibid.

115)

'Mediation is negotiation facilitated by a neutral third party. A flexible process with dozens of variations, but all forms of mediation rely on the self-determination of the parties in resolving the dispute. That is, the process is voluntary rather than coercive, and parties preserve their control over the outcome. The mediator guides the process along and facilitates communication between the parties. Typically, a mediation begins with an initial conference between the parties and the mediator, where the mediator explains the process and ground rules. This introduction is followed by an initial exchange of information, either in conference or by written submissions. The bulk of the mediation is then spent in a series of joint or private sessions with the mediator, wherein the mediator gathers information, listens to the parties, and asks questions. If the parties reach an agreement, the mediator might assist in clarifying and drafting that agreement'. *Mediation of Investor-State Conflicts*, 127(8) Harv. L. Rev. 2543 (20 June 2014), https://harvardlawreview.org/wp-content/uploads/2014/06/vol127_mediation_of_investor_state_conflicts... (accessed 8 June 2020).

116)

'Conciliation is a process in which an intermediary meets with parties to gather information and, typically, seeks concessions by independently evaluating the relative merits of each party's legal claims. The ICSID conciliation procedures create a formal and adversarial process that acts as a non-binding mini arbitration that could involve time and expense comparable to a full arbitration. UNCITRAL Conciliation Rules are more flexible and leave much to the conciliator's discretion, though the rules make clear that evaluating the merits of the dispute and making recommendations for settlement are important aspects of the conciliator's role. In addition to conciliation, ICSID offers rules for a formal fact finding process, the focus of which is to prevent rather than settle disputes. Parties are free under many IITs to use other processes, including mediation, but there is no data concerning which processes are used or how frequently'. *Ibid.*, at 2546–2547, https://harvardlawreview.org/2014/06/mediation-of-investor-state-conflicts/.

117)

Termination Agreement, Art. 9.12.

118)

Ibid., Art. 10.1.

119)

Ibid., Art. 9.7.

120)

Ibid.

121)

Ibid., Arts 9.3, 9.4, 9.5.

122)

Ibid., Arts 8.4, 9.4.

123)

Ibid., Arts 9 and 10.

124)

Ibid., Art. 9.1.

125)

Ibid., Arts 9.3, 9.4, 9.5.

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126)

'A settlement procedure shall not be entered into if the CJEU or a national court has found, in a judgment that has become final, that the State measure being contested in the proceedings does not violate Union law': *Ibid.*, Arts 9.4, 9.5.

127)

Ibid.

128)

Ibid., Art. 9.5.

129)

Ibid., Art. 9.

130)

Ibid., Art. 9.8.

131)

Ibid.

132)

Ibid., Art. 9.1.

133)

Ibid., Art. 9.2.

134)

Ibid., Art. 9.9.

135)

The facilitator would take into account definitive rulings of the CJEU and national courts and decisions of the European Commission on the matter, also the actions taken in order to comply with the relevant rulings of the CJEU by the contracting party concerned, and the case-law of the CJEU on the extent of reparations of damages under EU law. The facilitator would request the Commission to provide advice on the relevant issues related to EU law, when the amicable resolution assisted by a facilitator is based on potential violation of EU law caused by the State measure. However, to date there has been no procedure or final decision by the CJEU, domestic court, or the Commission.

136)

Termination Agreement, Art. 9.10.

137)

Ibid., Art. 9.11.

138)

Ibid., Arts 9.4, 9.10, 9.11, and 9.12.

139)

Ibid.

140)

Ibid.

141)

Ibid.

142)

Ibid., Arts 9.14(a)(i), 10.1(a), 10.2.

143)

Ibid., Art. 7.(b).

144)

Ibid., Art. 10.1.

145)

Ibid., Art. 16.

146)

Comprehensive Economic and Trade Agreement (CETA) (30 Oct. 2016), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22017A0114(01)&from=EN

147)

CJEU, Opinion 1/17, *supra* n. 48, para. 45.

148)

European Commission v. Kingdom of Denmark, Case 143/83, CJEU, judgment on equal pay for men and women (30 Jan. 1985).

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149)

'1. In the context of economic rules such as those governing the common organization of agricultural markets, if in order to deal with individual situations the community institutions have laid down specific rules enabling traders in return for entering into certain obligations with the public authorities – as regards transactions definitively undertaken - to protect themselves from the effects of the necessarily frequent variations in the detailed rules for the application of the common organization, the principle of respect for legitimate expectation prohibits those institutions from amending those rules without laying down transitional measures unless the adoption of such measures is contrary to an overriding public interest. On the other hand, the field of application of this principle cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules in the absence of obligations entered into with the public authorities. This is particularly true in a field such as the common organization of the markets, the purpose of which necessarily involves constant adjustment to the variations of the economic situation in the various agricultural sectors'. *Ditta Angelo Tomadini S.n.c. v. Amministrazione delle finanze dello Stato*, Case 84/78, CJEU, reference for a preliminary ruling (Pretura di Trento, Italy, monetary compensatory amounts), judgment (16 May 1979).

150)

Magyar Farming C. Ltd., Kintyre KFT & Inicia ZRT v. Hungary, Case ARB/17/27, ICSID, Award, (13 Nov. 2019), paras 222–223, www.italaw.com/sites/default/files/case-documents/italaw10914.pdf (accessed 8 June 2020). Conversely, in another intra-EU investment dispute, a tribunal seems to have accepted the possibility of removing the sunset clause of a BIT holding that: 'As is undisputed, neither Hungary nor France has made any attempt to renegotiate, modify, or shorten the relevant "survival" period. Accordingly, … the Tribunal would still have jurisdiction to hear this case'. (*UP & CD Holding Internationale v. Hungary*, Case ARB/13/35, ICSID, Award (9 Oct. 2018), para. 265, www.italaw.com/sites/default/files/case-documents/italaw10075.pdf (accessed 8 June 2020)). Johannes Tropper, *The Treaty to End All Investment Treaties. The Termination Agreement of Intra-EU BITs and Its Effect on Sunset Clauses*, Völkerrechtsblog (12 May 2020), doi: 10.17176/20200513-013127-0.

151)

Malta, Slovenia, Czech and Slovak Federal Republic, Estonia, Latvia and Romania. Agreement between the Republic of Austria and Malta on the Promotion and Mutual Protection of Investments (entered into force 1 Mar. 2014); Agreement between the Republic of Austria and the Republic of Slovenia on the Mutual Promotion and Protection of Investments (entered into force 1 Feb. 2002); Agreement between the Republic of Austria and the Republic of Croatia for the Promotion and Protection of Investments (entered into force 1 Nov. 1999); Agreement between the Republic of Austria and the Republic of Bulgaria on Mutual Promotion and Protection of Investments (entered into force 2 Nov. 1997); Agreement between the Republic of Austria and the Republic of Lithuania for the Promotion and Protection of Investments (entered into force 1 July 1997); Agreement between the Republic of Austria and the Republic of Hungary for the Promotion and Protection of Investments (entered into force 1 Sept. 1989); Agreement between the Republic of Austria and the Czech and Slovak Federal Republic on the Protection and Promotion of Investments (entered into force 1 Oct. 1991); Agreement between the Republic of Austria and the Republic of Estonia (entered into force 1 Nov. 1995); Agreement between the Republic of Austria and the Republic of Latvia over the Claim and Protection of Investments (entered into force 1 May 1996); Agreement between the Republic of Austria and the Republic of Romania over the Claim and Protection of Investments (entered into force 1 July 1997).

152)

With the Czech and Slovak Federal Republic, Estonia, Latvia, Romania, Lithuania, Bulgaria, Slovenia, Croatia, and Lithuania. Agreement between the Government of the Republic of Finland and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investment (entered into force 23 Oct. 1991); Agreement between the Government of the Republic of Finland and the Government of Estonia for the Promotion and Protection of Investments (entered into force 2 Dec. 1992); Agreement between the Government of the Republic of Finland and the Government of the Republic of Latvia for the Promotion and Protection of Investments (entered into force 7 Dec. 1992); Agreement between the Government of the Republic of Finland and the Government of the Republic of Latvia for the Promotion and Protection of Investments (entered into force 6 Jan. 1993); Agreement between the Government of the Republic of Finland and the Government of the Republic of Lithuania for the Promotion and Protection of Investments (entered into force 6 Jan. 1993); Agreement between the Government of the Republic of Finland and the Government of the Republic of Bulgaria on the Promotion and Protection of Investments (entered into force 16 Apr. 1997); Agreement between the Government of the Republic of Finland and the Government of the Republic of Slovenia on the Promotion and Protection of Investment (entered into force 3 June 2000); Agreement between the Government of the Republic of Croatia and the Government of the Republic of Finland on the Reciprocal Promotion and Protection of Investments (entered into force 1 Nov. 2002).

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153)

BITs with Romania, Croatia, Slovenia, Malta, Estonia, Lithuania, Bulgaria, Czech and Slovak Federal Republic, and Hungary. Agreement between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments (entered into force 1 Apr. 2003); Agreement between the Government of the Republic of Croatia and the Government of the Kingdom of Sweden on the Promotion and Reciprocal Protection of Investments (entered into force 1 Aug. 2002); Agreement between the Government of the Republic of Slovenia and the Government of the Kingdom of Sweden on the Promotion and Mutual Protection of Investments (entered into force 12 May 2001); Agreement between the Government of the Kingdom of Sweden and the Government of Malta on the Promotion and Reciprocal Protection of Investments (entered into force 1 Jan. 2002); Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Estonia on the Promotion and Reciprocal Protection of Investments (entered into force 20 June 1992); Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Lithuania on the Promotion and Reciprocal Protection of Investments (entered into force 1 Sept. 1992); Agreement between the Czech and Slovak Federal Republic and the Kingdom of Sweden on the Promotion and Reciprocal Protection of Investments (entered into force 23 Sept. 1991); Agreement between the Government of the Kingdom of Sweden and the Government of the Hungarian People's Republic for the Promotion and Reciprocal Protection of Investments (entered into force 24 Apr. 1987).

154)

World Investment Report 2017: Investment and the Digital Economy, by United Nations Conference on Trade and Development (UNCTAD) 116 (8 June 2017).

155)

European Commission, Press Release, Commission asks Member States to terminate their intra-EU bilateral investment treaties (Brussels, 18 June 2015).

156)

'On 8 Mar. 2017, the Romanian Parliament approved and referred for promulgation to the Romanian President a law approving the termination of the 22 bilateral investment treaties that Romania currently has in place with other Member States of the European Union (the "intra-EU BITs")'. *Romania set to terminate its intra-EU BITs*, Volterra Fietta (27 Mar. 2017) www.volterrafietta.com/romania-set-to-terminate-its-intra-eu-bits/ (accessed 8 June 2020).

157)

European Commission, *May Infringements Package: Key Decisions, Infringement Decisions* (Brussels, 14 May 2020), https://ec.europa.eu/commission/presscorner/detail/en/inf_20_859 (accessed 8 June 2020).

158)

Article 258 TFEU gives the Commission, acting as Guardian of the Treaties, the power to take legal action against a Member State which is not respecting its obligations under EU law. The infringement procedure begins with a request for information (a 'Letter of Formal Notice') to the Member State concerned, which must be answered within a specified period, usually two months. If the Commission is not satisfied with the information and concludes that the Member State in question is failing to fulfil its obligations under EU law, the Commission may then send a formal request to comply with EU law (a 'Reasoned Opinion'), calling on the Member State to inform the Commission of the measures taken to comply within a specified period, usually two months.

159)

Helen Lehto & Anna-Maria Tamminen, *Termination of Intra-EU BITs: Finland's Way Forward and a Feedback Request from the EU Commission* (2 June 2020), www.hannessnellman.com/news-views/blog/termination-of-intra-eu-bits-finland-s-way-forward-and-a-feed... (accessed 8 June 2020).

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160)

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Romania for the Promotion and Reciprocal Protection of Investments (entered into force 10 Jan. 1996); Agreement between the Government of the Polish People's Republic and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Reciprocal Protection of Investments (entered into force 14 Apr. 1988); Agreement between the Government of the Republic of Malta and the Government of the United Kingdom of Great Britain and Northern Ireland on the Promotion and Reciprocal Protection of Investments (entered into force 4 Oct. 1986); Agreement between the Government of the Hungarian People's Republic and the Government of the United Kingdom of Great Britain and Northern Ireland for the Encouragement and the Reciprocal Protection of Investments (entered into force 27 Aug. 1987); Agreement between the Government of the Republic of Lithuania and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments (entered into force 21 Sept. 1993); Agreement between the Government of the Republic of Latvia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments (entered into force 16 Feb. 1997); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Croatia for the Promotion and Reciprocal Protection of Investments (entered into force 16 Apr. 1998); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Estonia for the Promotion and Reciprocal Protection of Investments (entered into force 16 Dec. 1997); Agreement between the Government of the Czech and Slovak Federal Republic and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments (entered into force 16 Oct. 1992); and Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Bulgaria for the Promotion and Reciprocal Protection of Investments (entered into force 24 June 1997).

161)

Draft Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (Nov. 2019), http://arbitrationblog.kluwerarbitration.com/wp-content/uploads/sites/48/2019/12/a-draft-agreement-h... (accessed 10 June 2020).

162)

Romania, Poland, Malta, Hungary, Lithuania, Latvia, Croatia, Estonia, Czech and Slovak Republic and Bulgaria.

163)

Brexit Political Declaration (19 Oct. 2019), paras 16–18.

164)

Sidley Austin LLP, *Termination of Intra-EU Bilateral Investment Treaties – What's Next for Investor Claims?* (12 May 2020), www.sidley.com/en/insights/newsupdates/2020/05/termination-of-intraeu-bilateral-investment-treaties-... (accessed 10 June 2020).

165)

Termination Agreement, Art. 10.1.

166)

CJEU, Opinion 1/17, *supra* n. 48, para. 237.

167)

Ibid.

168)

ICSID Convention, Art. 25(1).

169)

Allen & Overy, *23 EU Member States Sign an Agreement to Terminate Intra-EU Bilateral Investment Treaties* (12 May 2020), www.allenovery.com/en-gb/global/news-and-insights/publications/23-eu-Member-States-sign-an-agreement... (accessed 10 June 2020).

170)

Ibid.

171)

Termination Agreement, Art. 11.

172)

For example, rights provided in the European Convention on Human Rights (as amended by Protocols Nos. 11 and 14 (4 Nov. 1950), E.T.S. 5 (ECHR)). When EU institutions or servants in the performance of their duties commit a harmful act, investors would be able to pursue an action for damages against the EU pursuant Art. 340 TFEU.

173)

Article 16 EU Charter (freedom to conduct a business). The freedom to conduct a business in accordance with EU law and national laws and practices is recognized.

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174)

Article 17 EU Charter (right to property): '1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. 2. Intellectual property shall be protected'.

175)

Article 21 EU Charter (non-discrimination): '1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited'.

176)

Article 47 EU Charter (right to an effective remedy and to a fair trial): 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice'.

177)

CJEU, Opinion 1/17, *supra* n. 48, para. 79.

178)

Termination Agreement, recital 10.

179)

Basedow, *supra* n. 36.

180)

On the ECT, *see infra* n. 52.

181)

Ibid.

182)

'Potential allies outside the EU legal system for promoting respect for the rule of law in the EU Member States include not only international organizations, such as the Council of Europe, the OECD and the United Nations, but also less obvious (and more controversial) candidates, such as ad hoc arbitral tribunals constituted under international investment protection treaties to decide the claims of investors against Member States of the EU', Wojciech Sadowski, *Protection of the Rule of Law in the European Union Through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?*, 55(4) Common Mkt. L. Rev. 1025, 1027 (2018).

183)

Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its thirty-sixth Session, Vienna (Oct. 29–2 Nov. 2018), paras 40, 53, 63 and 83, UNCITRAL, A/CN.9/964 (6 Nov. 2018).

184)

UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), Submission from the European Union and its Member States A/CN.9/WG.III/WP.159/Add.1 (24 Jan. 2019), paras 1–2, 6–15; Lukasz Kulaga, *A Brave, New, International Investment Court in Context. Towards a Paradigm Shift of the ISDS*, Polish Y.B. Int'l L. (2018), 136–140 (Sept. 2019).

185)

Termination Agreement, recital 2.

186)

Ibid., Art. 54: '*Termination of or withdrawal from a treaty under its provisions or by consent of the parties.* The termination of a treaty or the withdrawal of a party may take place: (1) in conformity with the provisions of the treaty; or (2) at any time by consent of all the parties after consultation with the other contracting States'.

187)

Article 3(1) TFEU.

188)

Article 207 TFEU.

189)

Article 31 VCLT (General Rule of Interpretation): '3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions … '.

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190)

Republic of Austria v. Federal Republic of Germany, Case C-648/15, CJEU, judgment, para. 29, ECLI: EU: C: 2017:664 (12 Sept. 2017); *Pringle v. Government of Ireland*, Case C-370/12, CJEU, judgment, para. 172, EU: C: 2012:756 (27 Nov. 2012).

191)

Austria v. Germany, *supra* n. 190, para. 23.

192)

Termination Agreement, Preamble, para. 13 of explicitly states that "disputes between the Parties concerning the interpretation or application of this Agreement pursuant to Art. 273 TFEU shall not concern the legality of the measure i.e. the subject of investor-State arbitration proceedings based on a bilateral investment treaty covered by this Agreement".

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SYMPOSIUM ON SERGIO PUIG AND GREGORY SHAFFER, "IMPERFECT ALTERNATIVES: INSTITUTIONAL CHOICE AND THE REFORM OF INVESTMENT LAW," AND ANTHEA ROBERTS, "INCREMENTAL, SYSTEMIC, AND PARADIGMATIC REFORM OF INVESTOR-STATE ARBITRATION"

THE ROLE OF THE STATE AND THE ISDS TRINITY

*Patrick W. Pearsall**

In their article *Imperfect Alternatives: Institutional Choice and Reform of Investment Law*, Sergio Puig and Gregory Shaffer develop a clear and discerning comparative framework to evaluate alternatives to the current system of investor-state dispute settlement (ISDS).[1] In her essay *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, Anthea Roberts offers us a bracingly candid typology to describe the various actors involved in the recent efforts toward reform.[2] My essay is meant to complement these excellent contributions and to focus unflinchingly on the tripartite role of the state itself. What I call the ISDS Trinity can be understood as shorthand for the state's systemic role as (1) law-giver, (2) protector of investment, and (3) respondent. Looking at current and future design trade-offs, I suggest that whether an institutional choice is embraced within the ISDS system has a lot to do with how well the reform validates each of these three roles. In this way, the ISDS Trinity offers further insight into how each state will approach the various trade-offs and intercamp dynamics described by Puig and Shaffer, and by Roberts, within the current debate. Put another way, the ISDS Trinity sheds additional light on whether a reform to the system will be well-received by a state and thus enjoy a greater chance of adoption.

ISDS Reform and the Centrality of the State

With the United Nations Commission on International Trade Law (UNCITRAL) Working Group III's "government-led" reform process underway,[3] and with significant revisions to the International Centre for the Settlement of Investment Disputes arbitration rules already in draft,[4] we are in a time of profound change within the ISDS system. Gone are the more palliative descriptions of the system as one experiencing "growing pains,"[5] and instead a far more existential rhetoric fills the current debates.[6] Whether we are in a time of productive reform and evolution remains to be seen. Evolution does not necessarily result in survival.

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[1] Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AJIL 361 (2018).

[2] Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AJIL 410 (2018).

[3] Rep. of UN Comm'n on Int'l Trade Law of its Fiftieth Session, UN Doc. A/72/17, paras. 260–64 (2017).

[4] *See* Proposals for Amendment of ICSID Rules – Consolidated Draft Rules, 2 ICSID Secretariat (Aug. 2, 2018).

[5] Sylvia Constain, *ISDS Growing Pains and Responsible Adulthood*, 11 Transnat'l Disp. Mgmt. 1, 1 (2014).

[6] *See, e.g.*, Won Kidane, *Alternatives to Investor-State Dispute Settlement: An African Perspective* (GEGAfrica Discussion Paper, Jan. 2018).

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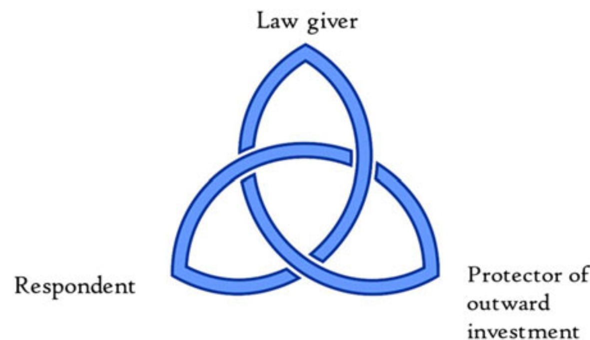
In this context, the role of the state looms large.[7] The state as institutional designer—whether incremental, systemic, or paradigmatic in its approach to the current debates—will ultimately decide whether the current system of international adjudication will persist and on what terms. States are the dynamic actors in the process of reform. They are all at once the reactionaries and the revolutionaries within the ISDS system. In addition, the role of the state is always primary and always essential at the early design stages of a procedural innovation. Thus, states have unique and leading roles within the ISDS system.

Explanation of the ISDS Trinity

In particular, states occupy three distinct yet interconnected roles—what I call the ISDS Trinity. First, they are the law-givers through their treaty and rule-making function. Second, they are the protectors of outward investment in that they establish transnational obligations and depoliticized systems for efficient adjudication of disputes for investors who seek to invest capital abroad. And third, they are respondents through their offers to arbitrate in international investment agreements and subsequent participation in the arbitral process. Each role has different attendant interests and thus each state necessarily calibrates the emphasis it puts on the three roles in its own parochial way based on its perceived needs. Moreover, states occupy the three roles at the same time. Even when a state is not a respondent in an active investment arbitration, it is nonetheless aware of its role as a potential respondent. Similarly, even if a state is not the recipient of large amounts of foreign direct investment, it is nonetheless aware of the interests associated with the promotion of investment abroad. Thus, while every state must take account of each role within the ISDS Trinity, no state is likely to approach its role identically to any other. A visual depiction of the ISDS Trinity in perfect balance might look like this:



For any given state, the ISDS Trinity is dynamic and typically unbalanced. Indeed, a state's posture within the ISDS Trinity shifts internally depending on the dominant role it is playing within the ISDS system. A state may privilege certain interests when it is sitting as a law-giver. For example, at the negotiating table of an international investment agreement or within the plenary of the UNCITRAL Working Group III meeting, a state may prioritize international norms, state-to-state cooperation, and diplomacy.[8] The state may consider other interests of primary

[7] The role of the state in investment arbitration has long been the subject of many excellent works of scholarship. Without necessarily aligning myself with the views expressed therein one way or another, perhaps one of the best is Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AJIL 179 (2010).

[8] *See, e.g.*, Puig & Shaffer, *supra* note 1, at 376 ("In our view, the rule of law provides the guiding principle for international investment law.").

importance when it is a respondent in an active investment arbitration. For example, a state may be most concerned with vindicating interests of sovereignty or cost-efficient proceedings in this role. Similarly, respondent interests may be more important to the state when sitting as law-giver if the state is traditionally a capital-importing state with an emerging regulatory apparatus to handle investment. A state may, on the other hand, privilege strong investment protection ideals if it has yet to face a claim and has a strong economy of outward-bound investment.

These variations in emphasis do not necessarily mean that the state is acting solely in its own self-interest or without care to its other roles within the system (i.e., the other points of the Trinity). Nor are a state's interests mutually exclusive. The state must understand the interests underpinning each of the roles it plays within the ISDS Trinity at every systemic decision-point. When law-giver, it must be mindful of its role as respondent and protector. When respondent, it must be mindful of its role as law-giver and protector. To take some liberty and extend the framework put forward by Puig and Shaffer, "these decision-making processes are biased in different ways because of the dynamics of participation within them" and "any meaningful public policy analysis must involve comparative institutional analysis of real-world (rather than ideal) alternatives."[9] In other words, states are weighing and comparing their tripartite institutional roles within the system at every moment.

By way of example, here is a nonexhaustive list of the kinds of interests that dominate each attendant role within the ISDS Trinity:

Role in ISDS Trinity	Application of Interest
Law-Giver	Interest in legitimacy, rule of law, consistency, and correctness of treaty interpretation and application. Obligations run primarily to other states.
Respondent	Interest in protecting regulatory power and general public welfare measures, sovereignty, and concern for acceptance by local constituencies. Obligations run primarily to investors from other states and home-state domestic constituencies.
Protector of Outward Investors	Interest in the depoliticization of disputes, due process, and the efficiency of a neutral and enforceable system of dispute resolution. Obligations run primarily to domestic champions seeking outward investment opportunities.

We can apply the ISDS Trinity to any number of moments when a state must decide upon a course of action within the investor-state dispute system. When the reform being proposed is well-balanced within the Trinity, there is a greater likelihood that the reform will proliferate rapidly and become successful. As Puig and Shaffer remind us, "Contexts differ across States, and choices should depend on those contexts."[10] The ISDS Trinity provides insight into the roles attendant to a state within the system and into how a state may understand the contingent contexts for any given decision. Mapped onto the question of reform, the ISDS Trinity placed in "context" can help us to anticipate how a state may react when "facing different challenges to select from a menu of imperfect international alternatives in light of their trade-offs."[11] In other words, when a reform proposal is supportive of each of the state's roles within the ISDS Trinity, a state will have an easier time accepting it and ensuring its proliferation.

[9] *Id.* at 380.
[10] *Id.* at 408.
[11] *Id.* at 409.

Nevertheless, one need not refer to the tripartite role of the state only in the context of ISDS reform debates. Indeed, one could also apply the ISDS Trinity to any number of questions when a state must engage with the ISDS system, including how a state may approach a non-disputing-party submission, negotiate an obligation within an investment treaty, or approach a settlement negotiation. In this way, the Trinity is generally useful as a heuristic by which to ascertain and evaluate state positions.

Example of the ISDS Trinity in Practice

The availability of third-party submissions in an investment arbitration helps to illustrate the ISDS Trinity in practice.[12] The number of third-party submissions has grown steadily since 2001.[13] These submissions are now nearly universally possible, as institutions, states, arbitrators, and most practitioners have accepted the concept of third-party submissions with exceptional speed.

Third-party submissions did not evolve gradually—they burst onto the scene and found a home within the system almost immediately. In August 2000, a third party for the first time requested permission to participate in an investor-state arbitration as an amicus curiae—the International Institute for Sustainable Development (IISD) asked the *Methanex Corporation v. United States of America* North American Free Trade Agreement (NAFTA) Chapter 11 tribunal for "permission to submit an *Amicus Curiae* brief to the Tribunal on critical legal issues of public concern in the arbitration."[14] The application was concise, spare, and persuasive. In explaining why they should be permitted to file, the petitioners anticipated many of the substantive criteria that would later govern third-party motions, noting that "[t]he legal issues raised in this case are of immense public importance," that the ruling "will have a critical practical impact on environmental and other public welfare law-making at the federal, state and provincial levels throughout the NAFTA region," and that the subjects under consideration "are matters of public interest distinct from the commercial issues that arbitration processes normally handle."[15]

The various submissions of the NAFTA parties in response to IISD's request suggest that third-party submissions are manifestly consistent with the idea that the state holds the tripartite role of law-giver, respondent, and protector.[16] All three NAFTA parties submitted views: the United States (in this case in its express role as a disputing party) in October 2000,[17] and both Mexico and Canada (as nondisputing parties pursuant to a request by the tribunal and the express authority granted by NAFTA Article 1128) in November 2000.[18]

[12] I expand upon this example in a forthcoming article. *See* Patrick Pearsall, *The ISDS Trinity and Early State Practice in Investor-State Arbitration* (ICCA Congress Series No. 20, forthcoming 2018).

[13] Sophie Lamb et al., *Recent Development in the Law and Practice of Amicus Briefs in Investor-State Arbitration*, 5 INDIAN J. ARB. L. 72, 87 n. 72 (2017) (noting that "[t]he ratio of tribunal decisions on amicus applications to cases registered with ICSID was approximately 1:6 in 2015 and 1:7 in 2016 (January to September)" and that these ratios "stood at 1:31 in 2001 and 1:23 in 2006 (ICSID tribunals did not make any decisions on amicus applications between 2002 and 2005)").

[14] Methanex Corporation v. U.S., Petition to the Arbitral Tribunal by the International Institute for Sustainable Development para. 1.1 (NAFTA/UNCITRAL, Aug. 25, 2000).

[15] *Id.* at paras. 3.1-3.3.

[16] Statement of the Free Trade Commission on Non-Disputing Party Participation para. 1 (Oct. 7, 2003).

[17] Methanex Corporation v. U.S., Statement of Respondent United States of America Regarding Petition for Amicus Curiae Status (NAFTA/UNCITRAL, Oct. 27, 2000) [hereinafter Methanex Corporation v. U.S., Respondent Statement].

[18] Methanex Corporation v. U.S., Mexico's Submission in Response to Application for Amicus Standing (NAFTA/UNCITRAL, Nov. 10, 2000) [hereinafter Methanex Corporation v. U.S., Mexico's Submission]; Methanex Corporation v. U.S., Submission of the Government of Canada (NAFTA/UNCITRAL, Nov. 10, 2000) [hereinafter Methanex Corporation v. U.S., Canada's Submission].

Consider how those views illustrate the ISDS Trinity: The United States did not simply approach the question of the propriety of a third-party motion as a respondent. It understood that it was the respondent but also kept its systemic roles as "law-giver" and "protector of investment" at the fore by noting that ISDS is of a "fundamentally different nature than a typical international commercial dispute" and that the Tribunal's decision on the merits "may have a significant effect beyond the two parties to the dispute."[19] Mexico, too, sought to balance its role within the context of the ISDS Trinity and raised concerns regarding the integrity of both its own legal system and its obligations under a multinational agreement—echoing the Puig and Shaffer framework that a state will act in response to differences in "capital endowment, market size, ideology, institutional development, and historical legacy."[20] Mexico pointed out that third-party participation is not provided for in civil law jurisdictions, that the tribunal must be sensitive to the fact that NAFTA's investor-state dispute system draws "a careful balance between the procedures of common law countries and those of civil law countries (such as Mexico)," and that the "fact that a specific procedure or legal concept may exist in a Party's domestic law cannot serve as grounds to transport it into the international plane."[21] Finally, Canada recognized the "importance of ensuring uniformity and predictability in the rules and procedures governing the settlement of investment-state disputes," noted that there "are numerous complex legal and technical issues raised by the question of whether and how a NAFTA Chapter Eleven tribunal should receive submissions from persons other than the disputing Parties or the non-disputing NAFTA Parties," and therefore implored the "NAFTA partners to work together on the issue of *amicus curiae* participation as a matter of urgency in order to provide guidance to Chapter Eleven tribunals."[22] The debate among the three NAFTA parties ultimately resulted in a compromise consensus position. Sitting as the authoritative Free Trade Commission (FTC),[23] the NAFTA parties issued an official statement favoring the availability of third-party participation.[24]

Much can be written on this debate, how tribunals who looked at this question prior to the FTC interpretation helped move the narrative, and the shifting rhetoric employed by each state as it sought to balance itself within the ISDS Trinity. Nevertheless, if one looks at the debate in detail one can see that the NAFTA parties found comfort in the fact that the divergent and sometimes conflicting interests reflected in the Trinity were in sufficient balance. The United States, Canada, and Mexico each approached the question whether to support admission of third-party submissions first within their immediate context (as protector, respondent, and law-giver), then with reference to the different nondominant roles within the ISDS Trinity, and finally as custodians of the system in the posture of reformer. Each submission struggled to place procedural innovation in the appropriate context and balance with the various roles of the state. In other words, the decision to allow third-party submissions adequately promoted each of the competing interests of the ISDS Trinity—even when those interests did not necessarily support the state's immediate role as respondent or protector of an investor.

Conclusion

We are now in a time of rising populism and resurgent nationalism. The question of ISDS reform echoes within a larger conversation regarding global trade and investment. The extent to which states understand investment arbitration as a transnational and cosmopolitan good will vary, and this fact is likely to further complicate the

[19] Methanex v. U.S., Respondent Statement, *supra* note 17, at 4-5.

[20] Puig & Shaffer, *supra* note 1, at 409.

[21] Methanex Corporation v. U.S., Mexico's Submission, *supra* note 18, at para. 13.

[22] Methanex Corporation v. U.S., Canada's Submission, *supra* note 18, at para. 4.

[23] North American Free Trade Agreement art. 2001(2), Dec. 17, 1992, 32 ILM 289; Gabrielle Kaufmann-Kohler, *Interpretive Powers of the Free Trade Commission and the Rule of Law*, *in* FIFTEEN YEARS OF NAFTA CHAPTER 11 ARBITRATIONS 175 (Emmanuel Gaillard ed., 2011).

[24] Statement of the Free Trade Commission on Non-Disputing Party Participation (Oct. 7, 2003).

debate currently underway at the UNCITRAL Working Group III meetings and elsewhere in international investment agreement negotiations. However, in grappling with these particular challenges, states that participate in the ISDS system are likely to test the various proposed innovations in the years to come against the crucible of their roles within the ISDS Trinity.

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The 2019 Netherlands Model BIT: riding the new investment treaty waves

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ABSTRACT
Investor–state arbitration is undergoing a paradigm shift with several countries and regional blocs rethinking the best way to protect investor rights while retaining sovereign prerogatives. This is where the Netherlands fits into the narrative. Its decision to modernize appears to follow the contemporary developments in investment arbitration, including heightened public scrutiny on the effect of investment treaties on regulatory space and the investor-to-state dispute settlement system, as well as the Post-Treaty of Lisbon European Union framework for investment arbitration. On 16 May 2018, the Dutch Ministry of Foreign Affairs published a draft for a new Model Bilateral Investment Treaty (BIT) on the Government's website. This was done with a view to updating the earlier Model BIT which dates. Through public consultation, individuals and interest groups were invited to share their views. The Government amended the 2018 Draft Model BIT after deliberating on the public reactions it had received, and circulated a new draft on 19 October 2018. Subsequently, after parliamentary debate in February 2019, the Dutch Government published an updated Model BIT on 22 March 2019. In this article, we critically examine the 2019 Final Dutch Model BIT and examine it in light of the global rethink on investment law and policy.

1. INTRODUCTION

> Not to know certain things is a great part of wisdom.
>
> (Quote attributed to Hugo Grotius)

Investor–state arbitration is undergoing a paradigm shift with several countries and regional blocs rethinking the best way to protect investor rights while retaining
P 348
sovereign prerogatives. India, [(1)] Colombia, [(2)] and Brazil [(3)] have prepared new Model Bilateral Investment Treaties (BITs), while the negotiations of recent multilateral treaties such as Trans-Atlantic Trade and Investment Partnership (T-TIP) amplify the debate with the European Commission proposing a court in place of traditional investor–state arbitration. [(4)]

This is where the Netherlands fits into the narrative. Its decision to modernize appears to follow the contemporary developments in investment arbitration, including heightened public scrutiny on the effect of investment treaties on regulatory space and the investor-to-state dispute settlement (ISDS) system, as well as the Post-Treaty of Lisbon European Union (EU) framework for investment arbitration. On 16 May 2018, the Dutch Ministry of Foreign Affairs published a draft for a new Model Bilateral Investment Treaty ('2018 Draft Model BIT') on the Government's website. [(5)] This was done with a view to updating the earlier Model BIT which dates from 2004. [(6)] Through public consultation, individuals and interest groups were invited to share their views until 18 June 2018. [(7)] Further, commentators and scholars have all been interested in the 2018 Draft Model BIT. [(8)] The Government amended
P 349
the 2018 Draft Model BIT after deliberating on the public reactions it had received, and circulated a new draft on 19 October 2018 ('2018 Model BIT'). [(9)] Subsequently, after parliamentary debate on 20 February 2019, the Dutch Government published an updated Model BIT on 22 March 2019 ('2019 Final Dutch Model BIT'). [(10)]

In this article, we critically examine the 2019 Final Dutch Model BIT and examine it in light of the global rethink on investment law and policy. In order to do so, we will first take a look at The Netherlands' investment treaty practice in Section 2. In Section 3, the recent debate surrounding the investor–state arbitration regime is addressed. Then, in Section 4, the 2019 Final Dutch Model BIT is analysed in detail in a comparative perspective. We will end with a conclusion in Section 5.

2. THE INVESTMENT TREATY PRACTICE OF

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THE NETHERLANDS

The Netherlands has historically been an active and prolific actor in the international investment regime. The Netherlands concluded its first BITs in the early 1960s and was one of the earliest countries to have embarked on signing BITs. Initially, most of the BITs were concluded with African and Southeast Asian countries. (11) From the mid-1980s onwards, other regions followed. In the early 1990s, a wave of BITs were concluded, in particular with Eastern European states in the wake of the Soviet Union's dissolution. The most recent BIT concluded by the Netherlands is the BIT with the United Arab Emirates in November 2013. In total, the Netherlands has concluded 104 BITs, of which 90 are currently still in force, (12) making the Netherlands one of the countries with the most dense BIT-network worldwide. (13) It is important
P 350
to note that BITs are concluded on behalf of the Kingdom of the Netherlands, which, together with the Netherlands, also comprises Aruba, Curaçao, and Saint Maarten. Most BITs bind all four constituent parts altogether, although a minority of them only binds some Caribbean parts. (14)

The Dutch Government traditionally viewed BITs an important tool in its foreign investment policy, and had been a strong proponent of investment protection by means of investment treaties. (15) The Directorate-General for Foreign Economic Relations of the Ministry of Foreign Affairs is charged with the negotiation and conclusion of investment treaties. (16) Dutch BITs have made the Netherlands an attractive home state for investors. The favourable corporate tax regime has without doubt also contributed to this development. Many multinationals have moved their corporate seat to the Netherlands or have incorporated entities in the Netherlands. The Netherlands also has concluded a wide network of double taxation treaties, which in combination with investment treaties have provided an appealing set-up for foreign investors. (17) As a result, a significant number of investment arbitrations have been initiated on the basis of Dutch BITs since the late 1990s. (18) According to a 2015 study by the United Nations Conference on Trade and Development (UNCTAD), in three-quarters of the Dutch cases, the investor's ultimate owners were not technically Dutch. (19) In total, there are 108 known investment arbitrations involving Dutch BITs. (20) This makes the Netherlands—after the USA—the state with the most
P 351
number of investment disputes. Without a single exception, investment arbitrations were initiated by Dutch investors against the host state. (21) Over the years, investment disputes involving Dutch BITs have produced several significant investment arbitrations, such as *ConocoPhillips Co and others v Bolivarian Republic of Venezuela*, *Eureko BV v Poland*, and *Achmea BV v The Slovak Republic*. (22)

This is not to imply that the Dutch investment policy has been without criticisms. In the past decade, a noteworthy number of BITs have been terminated or were not renewed, most notably by a number of developing countries. (23) Commentators also take a grim view of the fact that investors were able to structure their investments in the Netherlands with no real connection to the Netherlands. (24)

The 2018 Model BIT replaces the earlier Model BIT from 2004 (the '2004 Dutch Model BIT'). (25) During the drafting process of the new 2018 Draft Model BIT, the
P 352
Ministry consulted with syndicates, civil society, local governments within the framework of regular meetings (*Breed Handelsberaad*). (26)

3. BACKGROUND TO THE 2018 MODEL BIT: RECENT DEBATE SURROUNDING THE INVESTOR–STATE ARBITRATION REGIME

Since 2004, the landscape of investor–state arbitration has changed radically and has come to face unprecedented scrutiny. (27) These developments have not gone unnoticed in the Netherlands either.

3.1 Recent global debates surrounding the investor–state arbitration regime

Investment treaties have been made subject to public debate at large, and its key characteristics have been put to question. In particular, Dutch society has been perceptive to ISDS, the expansive protection for investors, the use of investment arbitration by mailbox companies, the lack of transparency, and the fact that national law could potentially be 'circumvented'. (28) Further, the T-TIP and EU–Canada Comprehensive Economic and Trade Agreement (CETA) negotiations have led to heated debates around policy space and deregulation, genetically modified food often taking central stage. (29) NGOs have actively campaigned for reform of the ISDS system, and called upon

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the Government to make BITs more servient to wider societal goals, such as development, sustainability, and corporate social responsibility. (30) In the meantime, a number of developing states terminated or refused to renew existing BITs with the Netherlands, including India, South Africa, Indonesia, Venezuela, and Tanzania. (31) In addition, the UK is on the brink of seceding from the EU,
P 353
disproportionally impacting Dutch investors, which entertain close trading relationships with the UK. (32)

The former Dutch Minister of Trade and Development Ms Lilianne Ploumen decided to respond to the criticisms surrounding BITs. In 2016, she called for a new type of trade agreements that offer 'more honest, more transparent and non-discriminatory' trade rules, focus on a fairer division of profit, environment and climate, and contribute to the realization of the global goals. (33) Under the Minister's lead, the Netherlands advocated for reform of the ISDS system within the TTIP-dominated discussions in the EU, where it advocated for preservation of policy space, quality and independence standards, ethical standards for arbitrators, and prohibition of forum shopping. (34) Simultaneously, pending BIT negotiations were suspended while the Government started the drafting process for the 2018 Draft Model BIT. (35) The current Minister of Trade and Development Ms Sigrid Kaag has continued her predecessor's course. In May 2018, the Government's priority for the preservation and enhancement of the multilateral trade and investment regime was reiterated. (36) However, it was also clarified that the international trade and investment system must be 'future-proof' and stimulate sustainable growth and development, (37) and
P 354
small- and medium-sized enterprises should also benefit from trade agreements. (38) The Government noted that its goal in renegotiating its model was to achieve these objectives and to strike a better balance between the rights and obligations of governments and investors, to retain policy space for governments, and to exclude mailbox companies from investment treaty protection. (39)

3.2 Recent European debates surrounding the investor–state arbitration regime

Since the enactment of the 2004 Model BIT, developments at the European level have also drastically impacted the system of investment treaty protection of the Member States. As these developments are well known, we address them concisely.

First, the Treaty of Lisbon, which entered into force on 1 December 2009, enlarged the EU's exclusive competence in the area of Common Commercial Policy with Foreign Direct Investment (FDI). (40) Since, only the EU may legislate and adopt legally binding acts within this area. Free Trade Agreements (FTAs) and investment treaties are a matter of the EU's External Action Service. In the past few years, the EU signed FTAs with *inter alia* Singapore, (41) Canada, (42) and Vietnam, (43) and is currently conducting negotiations with countries, such as China, India, and Japan. (44) The scope of the EU's competence to conclude investment treaties has been subject to discussion since then. (45) The Court of Justice of the EU (CJEU) has, however, recently provided some direction. In scrutinizing the EU–Singapore FTA, it held in *Opinion 2/15* that substantive standards of protection are part of the EU's exclusive
P 355
competences, and *inter alia* ISDS and non-direct investment are part of the EU's shared competence. (46) As a result, FTAs remain an affair of both the EU and its Member States.

Secondly, a related issue concerns the compatibility of agreements between Member States ('Intra-EU BITs') with EU law. (47) Intra-EU BITS are generally considered to conflict with EU law. Under pressure of the Commission, (48) certain Member States have terminated or are in the process of phasing out existing Intra-EU BITs. (49) The Court of Justice of the EU recently gave a landmark ruling in *Achmea*, deciding that the ISDS provision in the Netherlands–Slovakia BIT conflicted with EU law. It held that ISDS provisions such as the one in the Netherlands–Slovakia BIT conflict with both the prohibition of Member States to submit disputes concerning the interpretation of the EU treaties to dispute settlement methods other than provided for in those treaties and the preliminary reference procedure. (50)

The repercussions of the *Achmea* ruling are significant, and calls into question the compatibility of other Intra-EU BITs. In 2017, the total amount of intra-EU investment arbitrations amounted to 20 per cent of all investment treaties. Pursuant to the decision, the Netherlands decided to terminate all of its Intra-EU BITs. (51)

Host countries in pending arbitrations are seizing the *Achmea* ruling to argue for dismissal of the claims instituted against them for lack of jurisdiction. For instance, Germany has argued in

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Vattenfall AB and others v Federal Republic of Germany, [52] an arbitration which the Swedish investor Vattenfall brought on the basis of the ECT that Vattenfall's claim is inadmissible, based on the argument that *Achmea* has made out that proceedings between investors from the EU and EU Member States are by nature contradicting EU law. [53] Spain has asked the Swedish Court of Appeal in the
P 356
setting-aside proceedings of the award in *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain* [54] to seek an answer from the CJEU on the compatibility of the ECT with EU law through a preliminary ruling. Similarly, Intra-EU issues arise in the various solar-related investment arbitrations initiated against the Czech Republic, Italy, and Spain on the basis of Intra-EU BITs and the ECT. The *Achmea* decision also underlines the complications related to the enforcement of awards issued under Intra-EU BITs.

Enforcement of such decisions may equally violate EU law. A striking example is *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, [55] where the European Commission prohibited Romania from paying an ICSID award as this would violate EU state aid law. The European Commission has warned Spain that any compensation awarded by an arbitration tribunal to investors for depreciation of their solar-related investments pursuant to Spain's mandatory alignment of its energy regulation with European requirements would constitute state aid, which is only permissible pursuant to authorization by the European Commission. [56]

Thirdly, the EU is pushing on a global level for reform of the ISDS system. It is taking serious steps to replace the traditional framework for settlement of disputes with an arbitration tribunal that has a permanent investment court. In the FTAs with Vietnam and Canada, the EU included the Investment Court System (ICS). [57] The EU Council has given the European Commission negotiation directives to conduct negotiations under the auspices of United Nations Commission on International Trade Law (UNCITRAL) for a convention establishing a permanent multilateral investment court (MIC) on 1 March 2018. [58] These negotiations are now conducted within a dedicated UNCITRAL Working Group. [59] The idea behind the MIC is that signatories to investment treaties can opt in for ISDS at the Court. [60] As for the
P 357
procedural law, the EU would like to include, *inter alia*, provisions on frivolous and parallel claims, the possibility of appeal, and rules on the appointment and qualification requirements for members of the MIC. [61]

Altogether, these developments have exercised and continue to exercise a significant influence over Member States' bilateral investment treaties. For the Dutch Government, it means that new BITs would likely account for the following: (i) BITs are concluded with non-EU Member States, (ii) BITs need to align with the Commission's standards, and (iii) BITs need to accommodate for future reforms, such as the introduction of the MIC.

4. COMPARATIVE ANALYSIS OF THE 2019 FINAL DUTCH MODEL

In this section, the 2019 Final Dutch Model BIT's most important provisions are analysed and compared to recently concluded BITs and multilateral investment treaties. [62]

As an initial matter, the 2019 Final Dutch Model BIT follows the global trend of incorporating increasingly detailed provisions in investment treaties, for instance, on expropriation and dispute settlement. It also shows considerable sensitivity to societal concerns and traditional areas that investment protection was intended to protect; for example, it offers specific protection for small- and medium-sized enterprises and against gender-based discrimination. [63] It contains strong carveouts for regulatory policy, taking the power away from tribunals to weigh key regulatory objectives against investment protection for the benefit of (national) governments. [64] The 2019 Final Dutch Model BIT latches on to many international rules and standards, in particular with respect to corporate social responsibility and sustainable development, and incentivizes the parties to take affirmative action. [65] Lastly, the 2019 Final Dutch Model BIT introduces novel rules on dispute settlement, aimed at more transparent proceedings, supervised by non-party-appointed tribunals empowered to penalize and deny benefits to misbehaving investors. [66]

4.1 Jurisdictional requirements

Whether an investment enjoys protection under the 2019 Final Dutch Model BIT depends on a number of factors. The most important factors are: the character of the investment, the nature of the business activity in the home state, whether the investor has timely invoked his right, and the investor's behaviour.

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4.1.1 Definition of 'investment' and 'investor'

Article 1(a) of the 2019 Final Dutch Model BIT defines 'investment' broadly ('every kind of asset') and includes an open list of forms and shapes that protected investments can take. However, investments must be (i) of a certain duration, and
P 358
involve (ii) the commitment of capital or other resources, (iii) the expectation of gain or profit, and (iv) an assumption of risk. Several, [(67)] but not all, [(68)] recently concluded investment treaties require that investments have such characteristics. This is a new requirement, and none of the previous BITs contained this threshold. By way of example, Article 1(a) of the 2019 Final Dutch Model BIT is compared to the most recent BIT that the Netherlands concluded with the United Arab Emirates:

2019 Final Dutch Model BIT (Art. 1(a))	Netherlands-United Arab Emirates BIT (Art. 1(a))
'investment' means every kind of asset that has the characteristics of an investment, which includes a certain duration, the commitment of capital or other resources, the expectation of gain or profit, and the assumption of risk. Forms that an investment may take include: (. . .)	the term 'investments' means every kind of asset and more particularly, though not exclusively: (. . .)

P 359
Further, claims to money arising exclusively from commercial contracts for the cross-border sale of goods or services, and judgments and arbitral awards, are excluded from the definition of investment.

Article 1(b) of the 2019 Final Dutch Model BIT defines 'investor' to include both 'natural' persons and 'juridical' persons. Only natural persons with the nationality of one of the parties and legal persons constituted under the laws of the parties that have substantial business in the territory of the party under whose laws it is constituted, as well as subsidiaries constituted under the laws of the parties that are directly or indirectly owned, are protected.

This 'substantive business requirement' is further defined in the text under Article 1(c) (the 2018 Draft Model BIT included these in a footnote), which merits attention as it lists 'indications of having substantive business activities'. These indications, to be assessed on a case-by-case basis, include the investor's registered office and administration, the investor's headquarters and management, the establishment of an office, production facility or research laboratory, the total number of employees, and turnover of the investor. The substantial business requirement rule will likely exclude purely mailbox companies. As discussed above, Dutch BITs have been often used by mailbox companies, and substantive business activity in the home state (more often than not, the Netherlands) is now expressly provided for. Until now, only the Netherlands–Chile BIT contains an express substantial business requirement: 'the term “nationals” shall comprise . . . legal persons . . . having real economic activities, in the territory of that same Contracting Party'. [(69)] Substantial business requirement rules are common among recent other BITs [(70)] and multilateral investment treaties. [(71)] Dual nationals are not excluded. [(72)]

4.1.2 Denial of benefits

Article 16(2) of the 2019 Final Dutch Model BIT also provides for a denial of benefits clause. [(73)] It provides that a tribunal shall decline jurisdiction 'if the investment has been made through fraudulent misrepresentation, concealment, corruption, or similar bad faith conduct amounting to abuse of process'. The 2018 Draft Model BIT stated that claims arising under such investments 'may not [be] submit[ted]'. This has been changed in the 2019 Final Dutch Model BIT to '[t]he Tribunal shall decline jurisdiction.' This has benefited the provision's clarity, as the language in the 2018 Draft Model BIT could be interpreted as offering an objection to admissibility. Now it is clear that the tribunal lacks jurisdiction to deal with investments that have
P 360
been illegally acquired. Similar provisions have made their way into other recent treaties, [(74)] some of which explicitly list tax evasion, [(75)] bribery, [(76)] money laundering, and terrorism [(77)] as protection-depriving activities. Some treaties even include an obligation on states to fight corruption [(78)] or even prosecute. [(79)] Whether the investment is tainted is to be determined by the tribunal. [(80)]

Closely related to both the aforementioned denial of benefits and substantive business requirement rules is Article 16(3) of the 2019 Final Dutch Model BIT. It clarifies that when the investor has specifically changed its corporate structure to come within the protective scope of the BIT when the 'dispute had arisen or was foreseeable', the 'Tribunal shall decline jurisdiction'. The 2018 Draft Model BIT, on the other hand, had provided other language, namely that the contracting party 'may deny' benefits, which would give the defending state the discretion to make use of this defence. In contrast to Article 16(2) of the 2018 Draft Model BIT, Article 16(3) of the 2018 Draft Model BIT did

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not provide an absolute bar to admissibility. [81] The 2019 Final Dutch Model BIT aligned Articles 16(3) with 16(2) and prescribes that tribunal's lack jurisdiction to consider claims brought forward by an investor that changed its corporate structure to come within the ambit of treaty protection.

4.2 Substantive investment protection

If the investment falls within the 2019 Final Dutch Model BIT's protective scope, the question whether the investor is entitled to compensation is determined by the rules on substantive investment protection. Article 9(1) 2019 Final Dutch Model BIT requires states to provide 'fair and equitable treatment': '[e]ach Contracting Party shall ensure fair and equitable treatment of the investment of investors of the other Contracting Party.' Such investments shall also be granted 'full physical security and protection'. [82] Article 9(2) lists outcomes of measures constituting a breach.
P 361
These are, *inter alia*, denial of justice for the investor or manifest arbitrariness. An innovative form of prohibited treatment is one that is discriminatory based on 'wrongful grounds'. These 'wrongful grounds' are identified (non-exhaustively) as 'gender, race, nationality, sexual orientation or religious belief'. This provision would typically focus on the identity of individual investors rather than corporations. However, discrimination on the ground of nationality also protects corporations.

Contracting states are also bound by national treatment and most-favoured-nation obligations in Article 8(1) and (2) 2019 Final Dutch Model BIT. Third-country investors may receive better treatment if they can benefit more from a more favourable treaty, as follows from the exception to the most-favoured-nation obligation in Article 8(3).

Investors are offered protection when the host state intends to expropriate the investment in Article 12 of the 2019 Final Dutch Model BIT. The host state may only expropriate if the measure is taken: (i) 'in the public interest', (ii) 'under due process of law', (iii) 'in a non-discriminatory measure', and (iv) 'against prompt, adequate and effective compensation'. Indirect expropriation, which has 'deprive[d] the investor of the fundamental attributes of property in its investment', is now [83] also protected against under Article 12(3). Article 12(4) provides a tripartite test to be applied in a 'case-by-case, fact-based inquiry' to determine whether there has been indirect expropriation, considering the economic impact, duration, and character of the measure. A number of recent investment treaties contain a similar test. [84]

For 'adequate' compensation for lawful and unlawful expropriation, [85] Article 12(5) of the 2019 Final Dutch Model BIT aligns with the fair market value of the investment, to be assessed at the 'time immediately before the expropriation or the impending expropriation became known, whichever is earlier'. In case of indirect expropriation, whether (a first measure in a series of) impending measures constitute expropriation may only become clear in hindsight. This issue can be resolved if an objectified standard of knowledge of impending expropriation is applied. The date of expropriation also has a bearing on the height of interest that is due on top of the compensation until payment under Article 12(6). Article 12(5) further specifies that valuation criteria include declared tax value and going concern value.

Article 12 of the 2019 Final Dutch Model BIT offers more guidance than its predecessor. Article 6 of the 2004 Model BIT left much more discretion for tribunals to determine the amount of compensation, providing that expropriated investors were entitled to 'just' compensation representing the 'genuine value' of the investments concerned, together with interest until payment.

Further, the 2019 Final Dutch Model BIT has retained a conditional umbrella clause in Article 9(5). A breach of any contractual obligation is elevated to a breach of the treaty if the breach 'causes loss or damage to the investor or its investment'.
P 362
The 2004 Dutch Model BIT contained a classic umbrella clause, as is shown in the comparison below with the 2019 Final Dutch Model BIT:

2019 Final Dutch Model BIT (Art. 9(5))	2004 Dutch Model BIT (Art. 3(4))
When a Contracting Party has entered into a written commitment with investors of the other Contracting Party regarding a specific investment, that Contracting Party shall not, either itself or through an entity exercising governmental authority, breach the said commitment through the exercise of governmental authority in a way that causes loss or damage to the investor or its investment (emphasis added).	Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.

The 2019 Final Dutch Model BIT makes clear that there has to be a 'written commitment' between the investor and host state. Further, it resolves potential 'privity of contract' issues on the part of the

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states [86] by explicating that entities exercising governmental authority can also be responsible for a breach of Article 9(5). Umbrella clauses have been invoked in investment arbitrations on the basis of Dutch BITs with Poland and Venezuela in *Eureko BV v Poland* and *Fedax NV v Venezuela*, respectively. [87]

4.3 Positive obligations on State Parties

What is striking about the 2019 Final Dutch Model BIT is that it contains many obligations upon the parties to pursue goals that go well beyond affirmative action to protect foreign investors. The 2019 Final Dutch Model BIT contains a considerable amount of references to international standards that the parties should strive to comply with. In fact, Article 6(6) 2019 Final Dutch Model BIT even makes parties to be 'committed to cooperate as appropriate on investment-related sustainable development matters of mutual interest in multilateral fora'. Article 7(5) states: '[t]he Contracting Parties express their commitment to the international framework on Business and Human Rights, such as the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, and commit to strengthen this framework.'

The 2019 Final Dutch Model BIT has made the promotion of sustainable development, a prominent objective. Pursuant to Article 3(4), parties are to promote and sustain investments that contribute to sustainable development, and under Article 3(1) 'encourage the creation of favorable conditions for responsible investment in its
P 363
territory that contribute to sustainable economic development'. [88] Measures taken to attracting foreign investors should not come at the cost of lowering domestic standards enshrined in environmental and labour legislation pursuant to Article 6(3) 2019 Final Dutch Model BIT. Instead, Article 6(2) instructs parties to strive for 'high levels of environmental and labor protection'. With respect to sustainable development, environmental protection, human rights, and labour standards, the 2019 Final Dutch Model BIT contains references in Articles 3(3) and 6(5) to the G20 Guiding Principles for Global Investment Policymaking, the Paris Agreement, the fundamental ILO Conventions, and the Universal Declaration of Human Rights. Explicit references to such international standards, in particular to human rights standards, seem fairly rare. The Morocco–Nigeria BIT contains a reaffirmation of the ILO labour standards and applicable international human rights agreements. [89] Other treaties contain human rights references within provisions on corporate social responsibility or in their preambles. [90]

Closely related are the references to international corporate social responsibility standards. Pursuant to Article 7(2) of the 2019 Final Dutch Model BIT, states are to encourage investors to voluntary adhere to international standards on corporate social responsibility, including the OECD guidelines for multinational enterprises, the UN Guiding Principles on Business and Human Rights and Recommendation CM/REC(206). References to international standards on corporate social responsibility are more common and can be found in numerous recent treaties. [91] Lastly, pursuant to Article 17(5) of the 2019 Final Dutch Model BIT, '[t]he Contracting Parties express their commitment to the international framework on Business and Human Rights, such as the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, and commit to strengthen this framework.'

Further, the 2019 Final Dutch Model BIT contains in Article 5 an innovative provision entitiled 'Rule of Law', which states:

1.The Contracting Parties shall guarantee the principles of good administrative behavior, such as consistency, impartiality, independence, openness and transparency, in all issues that relate to the scope and aim of this Agreement.

2.Each Contracting Party shall ensure that investors have access to effective mechanisms of dispute resolution and enforcement, such as judicial, quasi-judicial or administrative tribunals or procedures for the purpose of prompt
P 364
review, which mechanisms should be fair, impartial, independent, transparent and based on the rule of law.

3.As part of their duty to protect against business-related human rights abuse, the Contracting Parties must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy. These mechanisms should be fair, impartial, independent, transparent and based on the rule of law.

Obligations to guarantee investors due process of law are included in the Brazil–Suriname and Brazil–Ethiopia. [92]

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4.4 Positive obligations on investors

Along with negative obligations, ie conduct that may restrict access of investors to treaty benefits, investors are also to adhere to positive obligations. Article 7(1) of the 2019 Final Dutch Model BIT requires that '[i]nvestors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights environmental protection and labor laws.' Such rule affirming that investors are bound by the host state's domestic law can be found in a number of recently concluded investment treaties. (93)

When it comes to liability for 'significant damage, personal injuries or loss of life in the host state', however, Article 7(3) of the 2019 Final Dutch Model BIT states that investors are liable 'in accordance with the rule concerning jurisdiction of their home state' if the damage relates to 'acts or decisions made in relation to the investment'.

An obligation of a different character can be found in Article 7(3) of the 2019 Final Dutch Model BIT: '[t]he Contracting parties reaffirm the importance of investors conducting a due diligence process to identify, prevent, mitigate and account for environmental and social risks and impacts of its investment.' This provision appears to encourage investors to conduct due diligence to account for the wider impact of their projected investments. It is, however, unclear what consequences flow from the failure to exercise such due diligence.

4.5 Preserving the policy space of investors

The 2019 Final Dutch Model BIT takes account of the generally perceived prohibitive effect of investment treaties on regulatory or policy space of countries. The preamble and Article 2(2) states that the Agreement does not 'affect the right of the Contracting Parties to regulate within their territories necessary to achieve legitimate policy objectives such as the protection of public health, safety, environment, public morals, labor rights, animal welfare, social or consumer protection or for prudential financial reasons'.

Specifically with respect to indirect expropriation, the 2019 Final Dutch Model BIT in Article 12(8) permits non-discriminatory indirect expropriation 'designed and applied in good faith to protect legitimate public interests, such as the protection of
P 365
public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity'. This provision undoubtedly aims to extend more deference to states in making their own assessment when weighing legitimate policy objectives against their expropriatory effects. The appreciation for regulatory space when it comes to measures that have indirect expropriatory effect is a recent development. (94) It has made its way into a number of investment treaties, most of which only recognize measures undertaken to protect the health, safety, and environment as legitimate objectives. (95)

4.6. Dispute resolution

In this section, we will consider the 2019 Final Dutch Model BIT's dispute settlement mechanism and focus on the following aspects: (i) submitting a claim, (ii) appointment of arbitrators, (iii) consolidation and mass claims, (iv) bifurcation, (v) transparency, (vi) disclosure of third-party funders, (vii) the final award, (viii) the MIC, and (ix) innovations relating to diversity.

4.6.1 Submitting a claim

At the outset, we note that the dispute settlement provision in the 2019 Final Dutch Model BIT is much more expansive than its predecessor, the 2004 Model BIT. The latter only contains a concise dispute settlement provision, deferring to the ICSID rules for the specific staging of the arbitral proceedings:

> Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to the [ICSID]. (96)

Under the 2019 Final Dutch Model BIT after attempts to amicably settle the dispute through negotiations as prescribed by Article 17 have failed, investors can initiate consultations by a written request to the host state pursuant to Article 18(1). Article 18(2) sets out what information such consultation request should contain. Consultations are held within 60 days of the submission of the request for consultations pursuant to Article 18(3).

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Article 18(4) provides for additional conditions that need to be met in terms of timing:

a.five years of the date on which the investor first acquired, or should have first acquired, knowledge of the treatment alleged to be inconsistent with a provision in Section 4 [*i.e.*, Investment Protection] of this Agreement, and of the loss or damage alleged to have been incurred thereby; or
P 366

b.two years of the date on which the investor or, as applicable, the locally established company, exhausts or ceases to pursue claims or proceedings before a tribunal or court under the domestic law of a Contracting Party; and, in any event, no later than ten years after the date on which the investor first acquired, or should have first acquired knowledge, of the treatment alleged to be inconsistent with a provision in Section 4 of this Agreement, and of the loss or damage alleged to have been incurred thereby.

If consultations do not lead to resolution of the dispute, the investor may—after six months—submit a claim under (i) the ICSID Convention (or ICSID Additional Facility) or (ii) the UNCITRAL Arbitration Rules wherein the Permanent Court of Arbitration (PCA) shall administer the arbitration.

Article 19(5) 2019 Final Dutch Model BIT introduces a waiver clause. Upon submission of a claim, investors must have withdrawn or discontinued any other existing proceedings, whether constituted under domestic litigation or international law. By filing the submission, the investor waives his right to initiate any claim with respect to the measure at play before another court or tribunal under national or international law in the future.

Article 21(2) of the 2019 Final Dutch Model BIT gives the state the opportunity to file an objection within 30 days after constitution of the division of the Tribunal, arguing that a claim is manifestly without legal merit. The Tribunal will then suspend proceedings and issue a decision or award after having heard the parties.
P 367

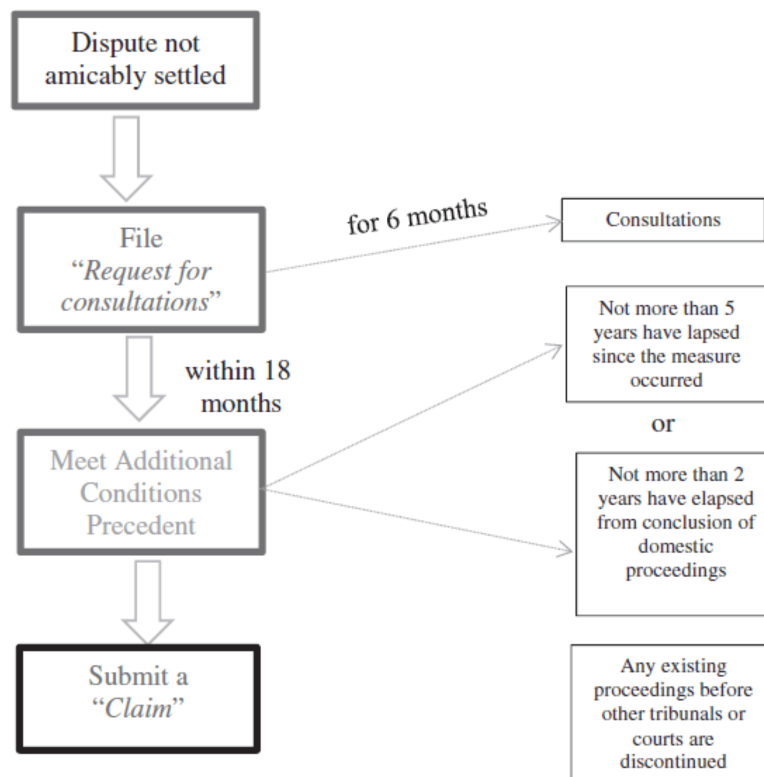

Figure 1.

4.6.2 Appointment of arbitrators

The 2019 Final Dutch Model BIT governs the constitution of the tribunal. Probably the most striking novelty of the 2019 Final Dutch Model BIT, it provides in Article 20(1) that all arbitrators are appointed by appointing authority. Thus, the Secretary-General of ICSID or the PCA appoints the entire arbitral bench. The 2019 Final Dutch Model BIT is the first investment treaty that steps away from unilateral appointment by the parties, which has been a key feature of international arbitration since its inception. This rule seems to offer a concrete answer to the generally perceived lack of full independence of party appointed arbitrators, a topic that has been subject to discussion for many years. [97] According to the Government, this rule ensures 'independent and impartial adjudication'. [98]

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Some have made the case for institutional appointment of all arbitrators in international arbitration generally, pointing to the inherent bias of party-appointed arbitrators in favour of the parties that appointed them. (99) Others have defended the parties' right to nominate arbitrators, which would actually reinforce the legitimacy of the arbitration process. They see it as a 'basic and important element of international arbitration' that boosts parties' confidence, (100) and institutional appointment would be undesirable, for this could hardly ever achieve the degree of 'user confidence' experienced when arbitrators are selected by the parties. (101) The former view has prevailed in the 2019 Final Dutch Model BIT. Interestingly, as a matter of tradition, the Secretary-General of the PCA is a Dutch national. (102) The appointment authority can only appoint arbitrators that meet certain requirements. They must be qualified to be appointed to judicial office in their home jurisdictions, or be jurists of recognized competence, although in the case of ICSID proceedings, the appointing authority is not bound to the Panel of Arbitrators, as follows from Article 20(2).
P 368
The same provision adds that '[i]n appointing the Members of the Tribunal, the appointing authority shall strive for gender and geographic diversity.' This progressive requirement was not yet included in the 2018 Draft Model BIT. On this point, it seems that the Government took note of the suggestions made in the public consultation. (103) Article 20(5) dictates that the appointment authority must ensure that the 'members of the Tribunal, either individually or together, possess the necessary expertise in public international law, which includes environmental and human rights law, international investment law, as well as in the resolution of disputes arising under international agreements'. This practically rules out people without a law degree. The 2018 Draft Model BIT required members of the tribunal to have expertise in international trade law rather than environmental and human rights law. Application of the 2019 Final Dutch Model BIT may indeed require an understanding of environmental and human rights law, and the purported philosophy behind this requirement seems to form tribunals that have more sensitivity to environmental and human rights issues.

The appointing authority is thus held to actively compose a tribunal that meets this standard. The imposition of requirements that arbitrators must possess is also reflected in other recent investment treaties, which either define the standard that arbitrators must have or refer to external benchmarks. (104) For instance, the Brazil–Suriname BIT demands arbitrators to comply with the WTO's Rules of Conduct for Understanding of controversies, (105) and the Brazil–Ethiopia BIT provides that rules of conduct are to be further worked out by the Contracting Parties. (106)

Next to the qualitative requirements that arbitrators must possess, the 2019 Final Dutch Model BIT also introduces requirements of a temporal nature. Pursuant to Article 20(5) 2019 Final Dutch Model BIT, arbitrators cannot simultaneously act as legal counsel or have acted as legal counsel in investment disputes in the past five years. This is a requirement that reflects the well-known criticism of investment arbitration of double hatting, ie arbitration lawyers operating within a closed network, acting as both counsel and arbitrator, which makes them particularly susceptible to be conflicted. The explicit requirement that arbitrators cannot have acted as legal counsel in the preceding five years in investment arbitration is noteworthy, and in theory contributes to a clearer demarcation of the roles of counsel and arbitrator. Similarly, the Argentina–Chile FTA provides that arbitrators cannot act as adviser, party-appointed expert or witness in any pending investment dispute when serving
P 369
as arbitrator. (107) Article 20(6) of the 2019 Final Dutch Model BIT lays down rules that should further safeguard arbitrators' independence. Arbitrators may not be 'affiliated with or take instructions from' the disputing and Contracting Parties with respect to matters pertaining to the dispute, and they are to refrain from participation if that would lead to 'direct or indirect conflict[s] of interest'. This also applies to participation as party-appointed expert or witness. Arbitrators must also comply with the IBA Guidelines on Conflicts of Interest in International Arbitration. This obligation has also been included in other recent investment treaties. (108) The 2019 Final Dutch Model BIT, contrary to the 2018 Draft Model BIT, contains detailed rules on challenging members of the tribunal in Article 20(7) and 20(8), providing that the President of the International Court of Justice rule on the challenge.

4.6.3 Consolidation and mass claims

Article 19(7) 2019 Final Dutch Model BIT permits either party to the dispute to request consolidation of arbitrations 'if two or more claims have been submitted' and 'the claims have a question or law or fact in common and arise out of the same events or circumstances'. The consolidation order can be requested from either tribunal. This is novel insofar as the 2004 Model BIT is tacit on consolidation, and the ICSID Convention currently does not address consolidation of claims. (109) The twin provision in the 2018 Draft Model BIT only allowed claimants arbitrations to seek a consolidation

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order at 'a Tribunal'. The Article further states that after hearing all disputing parties, the tribunal 'shall in principle accept such requests for consolidation, especially where the claimants are small and medium-sized enterprises'. Small- and medium-size enterprises are not defined in terms of size or nature. It is therefore within the tribunal's discretion to decide whether to make use of this rule to consolidate proceedings that are otherwise legally or factually insufficiently connected, to be adjudicated conjointly. This rule appears to be accommodating large-scale multiparty (collective) arbitration proceedings. Mass claims have proliferated in recent years in commercial arbitration in the USA. They are, however, rare in other jurisdictions. (110) In investment arbitration, the tribunals in three cases against Argentina (*Abaclat*, *Ambiente*, and *Alemanni*) accepted jurisdiction to rule on substantial numbers of claims submitted by different claimants, ie Italian bondholders who argued that their investment in Argentine sovereign debt was compromised pursuant to Argentina's attempts to restructure its sovereign debt. (111) These cases show that collective
P 370
arbitration proceedings do not bounce off against jurisdictional and admissibility hurdles under the ICSID Convention. (112) This has not been uncontroversial, as witnessed by Professor Abi-Saab's dissenting opinion in the *Abaclat* case, which concluded that sovereign bonds did not qualify as investments under the Argentine–Italy BIT and that the ICSID Convention did not provide jurisdiction for such collective mass claims action. (113)

At the same time, the 2019 Final Dutch Model BIT does impose limits on claims by public debtholders. The Protocol on Public Debt to the 2019 Final Dutch Model BIT excludes claims with respect to investments that are affected by 'negotiated restructuring' of public debt. (114) Investors with investments affected by 'non-negotiated restructurings' can bring claims only after 270 days from the date of submission of the request for consultations, (115) and should keep in mind that domestic debtholders may be treated more favourably on prudential grounds, taking into account the macroeconomic impact (systemic risks or spillover effects) and eligibility (of domestic investors of the contracting state) for debt restructuring. (116) These specific rules (i) that negotiated restructurings can take away investors' protection even after they have initiated arbitrations and (ii) that claims with respect to non-negotiated restructurings can only be brought after 270 days after submission of the request for consultations will impede investors from initiating investment protection if case restructurings are impending. The driving philosophy likely behind the restrictions imposed by the Protocol on Public Debt is to disincentive investors from initiating arbitrations as preventive strikes in such cases, which they may do in order to 'lock in' investment protection and obtain a more favourable position *vis-a-vis* other debtholders. The 2004 Model BIT did not provide for any specific rules for public debtholders.

4.6.4 Bifurcation

Article 20(11) lays down a preference for non-bifurcated proceedings. Issues on jurisdiction and merits shall 'generally' be dealt with together. Parties can agree otherwise, and it remains within the tribunal's discretion to bifurcate proceedings, but
P 371
tribunals are advised to be reluctant in allowing bifurcation. Article 20(9) is related to Article 21 on preliminary objections. According to Article 21, jurisdictional objections must be made as early as possible, latest by the first written submission. (117) Despite the requirement for parties to come forward with jurisdictional objections right away so as to avoid sandbagging, the tribunal can defer its decision on jurisdiction until its final award. This contrasts with recently concluded investment treaties, which force the tribunal to (expeditiously) rule on jurisdictional and admissibility objections, right away, while suspending the proceedings on the merits. (118) Pursuant to Article 20(12), tribunals are only to consider the legality of state action against the agreement, not against domestic law. They may, however, consider the domestic law of the host country as a matter of fact.

4.6.5 Transparency

Another rule that is to enhance transparency is incorporated in Article 20(4) 2019 Final Dutch Model BIT, which obliges the appointing institution to publish—on its website—the tribunal's composition, the date of the tribunal's constitution, the names of the disputing parties, the claim's legal basis, and the relief sought. Publication rules of key information on pending cases have been imposed by other recent investment treaties, some in the shape of a right for the defending party to disclose, (119) in others—like in the 2019 Final Dutch Model BIT—bearing a mandatory character. (120) Deviating from publication rules in other investment treaties, (121) the 2019 Final Dutch Model BIT does not demand that the final award be published, and does not contain rules on confidentiality and the right to restrict information for security reasons. (122) However, Article 20(13) declares the UNCITRAL Transparency Rules applicable, which contains detailed rules providing for the disclosure to the public of information pertaining to the case. (123) Article 20(13) explicitly orders the tribunal and parties to give positive consideration to third parties requesting to submit amicus curiae

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submissions, [124] and if 2019 Final Dutch Model BIT reinforced this rule as compared to the 2018 Draft Model BIT by adding that if the tribunal rejects a third party's request to submit an amicus curiae, it must give reasons to deny such request. It is not specified whether also the parties are informed hereof. As noted above, especially the European Commission has recently been particularly active as a third party.

4.6.6 Disclosure of third party funders

Article 19(8) 2019 Final Dutch Model BIT imposes a mandatory disclosure rule for parties that use a third party funder. Disclosure of the name and address of the third
P 372
party funder must be done upon submission of the claim, or if the funder only comes in play later, from the moment the funding has been granted. The requirement upon investors to make known that a third party is funding their representation reflects a growing trend in international investment arbitration to use third-party funding. Similar disclosure obligations have made their way into recent investment treaties, such as Argentina–Chile FTA [125] and CETA, [126] as well as in institutional rules. [127] This provision implies both an explicit permission of third-party funding, as it may be seen as an acknowledgement that third-party funding comes with peculiarities and potential conflicts of interest.

4.6.7 The final award

Article 22(1) of the 2019 Final Dutch Model BIT lays down an obligation on the tribunal to conduct the proceedings expediently. It reads: '[t]he Tribunal shall endeavour to issue its final award within 24 months' after the investor submitted its claim. If the proceedings exceed the 24 months deadline, the tribunal shall give an explanation. Comparatively, an even more ambitious time frame is imposed on tribunals operating under certain Brazilian BITs, which give them six and nine months, respectively, from the moment of appointment of the chairperson to render an award. [128] When it comes to allocation of costs, Article 22(5) of the 2019 Final Dutch Model BIT introduces a cost allocation rule. The starting point is that the losing party shall compensate the prevailing party for reasonable costs incurred, unless the tribunal finds such allocation unreasonable depending on the particular circumstances of the case. The 2019 Final Dutch Model BIT provides a number of circumstances that the tribunal may take into account, including the behaviour of the prevailing party (having raised frivolous objections or unjustifiable invocation of preliminary objections) and the identity of the losing party (small- and medium-sized enterprise may be spared). Article 23 of the 2019 Final Dutch Model BIT gives the tribunal a stick to penalize investors who, although prevailing on the merits, have misbehaved by lowering the amount of damages it awards. This can be done if the investor failed to fulfil its commitments under the UN Guiding Principles on Businesses and Human Rights and the OECD Guidelines for Multinational Enterprises.

4.6.8 MIC

Article 15(1) of the 2019 Final Dutch Model BIT states: 'upon the entry into force between the Contracting Parties of an international agreement providing for a multilateral investment court applicable to disputes under this Agreement, the relevant provisions set out in this Section shall cease to apply'. This provision kicks in when
P 373
both contracting states sign up to the new agreement establishing the MIC. As we have noted above, the negotiations for a MIC are ongoing. The MIC is to replace the conventional system of adjudication by arbitral tribunals. A similar provision to Article 15 can be found in the Argentine–Chile FTA, which in addition to a MIC anticipates the advent of a multilateral appellate review mechanism. [129] The CP-TPP also contains a provision in preparation for a future court of appellate review. However, both the Argentina–Chile FTA and the CP-TPP are opt-in clauses, enshrining the parties' possibility to agree to refer disputes to the multilateral (appeal) court, whereas Article 15(1) is imperative. Article 15(2) provides that transitional arrangements be made given investors' legitimate expectations in pending disputes pursuant to the dispute settlement chapter of the 2019 Final Dutch Model BIT. We read this provision to mean that upon entry into force of the agreement establishing the MIC, investors in pending disputes will not be forced to pursue their claim before the MIC, and the rules of the dispute settlement chapter of the 2019 Final Dutch Model BIT will continue to apply before tribunals adjudicating on the basis of the 2019 Final Dutch Model BIT.

4.6.9 Innovations relating to diversity

A notable addition in the 2019 Final Dutch Model BIT is the addition of a gender perspective in achieving sustainable development. This is included to Article 6 (entitled 'Sustainable

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Development').

Article 6 (3) of the 2019 Final Dutch Model BIT provides:

> The Contracting Parties emphasize the important contribution by women to economic growth through their participation in economic activity, including in international investment. They acknowledge the importance of incorporating a gender perspective into the promotion of inclusive economic growth. This includes removing barriers to women's participation in the economy and the key role that gender-responsive policies play in achieving sustainable development. The Contracting Parties commit to promote equal opportunities and participation for women and men in the economy. Where beneficial, the Contracting Parties shall carry out cooperation activities to improve the participation of women in the economy, including in international investment.

Article 6(3) of the 2019 Final Dutch Model BIT builds on recent developments to expressly include gender-related considerations in trade agreements. (130) Gender-related provisions have also been included in some of Canada's investment agreements. For instance, the Canada–Chile FTA contains a reference to gender-related issues in the context of investment agreements. (131) While this provision is not

P 374

binding, it reaffirms the commitment to creating a more equitable investment regime. This is a positive development and the authors hope that subsequent treaties incorporate and build upon such obligations.

5. CONCLUSION

The new 2019 Final Dutch Model BIT is a fresh expression of the rapidly shifting landscape of investment treaties, and reflects the significant changes since the last Dutch Model BIT from 2004. The system of investment treaty protection has received considerable public scrutiny since. The EU has interfered with Member States' system of concluding and using bilateral investment treaties. Multilateral trade and investment agreements are on the rise. The 2019 Final Dutch Model BIT accommodates those changes, and is considerate of the interests involved in cross-border investment, beyond only those of the foreign investor. The 2019 Final Dutch Model BIT latches on to the most progressive BITs and multilateral agreements concluded in the past years by incorporating extensive references to international standards on corporate social responsibility, human rights and sustainable investment, and otherwise offering clear and detailed rules. Both parties and investors are positively obliged to respect international standards. Unequivocal carveouts are introduced to safeguard states' regulatory space. The 2019 Final Dutch Model BIT is truly novel when it comes to the appointment of the entire arbitral bench by the appointing authority, measures to penalize misbehaving investors, denial of benefits for mailbox companies, and focusing on gender-related considerations in investment policies.

P 374

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See BIT between the Government of the Republic of India and ___, Ministry of Finance, <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf> accessed 1 August 2019. See also Grant Hanessian and Kabir Duggal, 'The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?' (2017) 32 ICSID Review Foreign Investment Law Journal 216.

2)

BIT between the Republic of Colombia and ____ (2017).

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See Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and __ 2015 <https://www.investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/downlo...> accessed 1 August 2019. See also Joaquim P Muniz, Kabir AN Duggal and Luis AS Peretti, 'The New Brazilian BIT on Cooperation and Facilitation of Investments: A New Approach in Times of Change' (2017) 32 ICSID Review - Foreign Investment Law Journal, 404.

4)

See 'European Proposal on the Transatlantic Trade and Investment Partnership' ch II <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> accessed 1 August 2019.

5)

The 2018 Draft Model BIT can be accessed here <https://globalarbitrationreview.com/digital_assets/ 820bcdd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model... > accessed 1 August 2019.

6)

Agreement on Encouragement and Reciprocal Protection of Investments between __ and The Kingdom of Netherlands (2004 Model BIT) <https://www.internetconsultatie.nl/investeringsakkoorden> accessed 1 August 2019.

7)

1657 reactions were published on the Government's website. Some of the comments called for the repeal of the ISDS mechanism, exclusion of mailbox companies from the Model BIT's scope, higher standards for the protection of human rights, animal rights and the environment, inclusion of a requirement that BITs may only be concluded with states that have signed fundamental human rights treaties (eg ILO conventions), inclusion of a limitation of treaty benefits to companies that can demonstrate adherence to the Paris Agreement, and other safeguards for a state's regulatory powers. The public reactions can be viewed online at <https://www.internetconsultatie.nl/investeringsakkoorden/reacties> accessed 1 August 2019. Out of the 1657 reactions, approximately 20 were considered unique by the Minister. The reactions were taken into account to improve the 2018 Draft Model BIT. See Letter by the Minister of Foreign Trade and Development to Parliament on the adoption of the 2018 Model BIT (26 October 2018) <https://www.rijksoverheid.nl/documenten/kamerstukken/2018/10/26/kamerbrief-over-modeltekst-investeringsakkoorden> accessed 1 August 2019.

8)

See eg 'New Model Treaty to Replace 79 Existing Dutch Bilateral Investment Treaties' (*De Brauw Blackstone Westbroek*, 17 May 2018) <https://www.debrauw.com/newsletter/new-model-treaty-to-replace-79-existing-dutch-bilateral-investmen...> accessed 1 August 2019; 'The New Draft Dutch BIT: What Does It Mean for Investor Mailbox Companies?' (*Lexology*, 30 May 2018) <https://www.lexology.com/library/detail.aspx?g=0c1442a8-9c5b-41f7-9ba2-3ca031ced8f7> accessed 1 August 2019; 'Newsflash: The Netherlands' New Draft Model Bilateral Investment Treaty, A Proposal For A New Investment Protection Regime', (*Hogan Lovells Publications*, 6 May 2018) <https://www.hoganlovells.com/en/publications/newsflash-the-netherlands-new-draft-model-bilateral-inv...> accessed 1 August 2019; 'Going Dutch–A Model for Rebalancing Investment Treaties to Address Human Rights Concerns?' (Herbert Smith Freehills, 24 May 2018) <https://www.herbertsmithfreehills.com/latest-thinking/going-dutch-%E2%80%93-a-model-for-rebalancing-...> accessed 1 August 2019.

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The 2018 Model BIT can be accessed at <https://www.rijksoverheid.nl/documenten/publicaties/2018/10/26/modeltekst-voor-bilaterale-investerin...> accessed 1 August 2019.

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Agreement on Reciprocal Promotion and Protection and of Investments between ___ and the Kingdom of the Netherlands (22 March 2019) <https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/20...> accessed 1 August 2019. Below is a summary of some of the key provisions of the 2019 Final Dutch Model BIT. Art 15(1) provides that both Contracting Parties shall pursue *with each other* and *other interested parties* the multilateral reform of ISDS. Further, art 17 on alternative dispute resolution mandates that *mutually agreed solutions* shall be made public. However, such information shall not contain any information that *a disputing party has designated as confidential.* art 20(6) requires the Contracting Parties to *negotiate a Code of Conduct* with an aim to provide additional requirements on ethics for members of the arbitral tribunal. Whereas art 23 of the 2018 Dutch Model BIT provides the arbitral tribunal the option of taking into account non-compliance with commitments under UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises, the 2019 Final Dutch Model BIT *expects* the tribunal to do so. As is apparent the focus of these provisions is on reform and great transparency in investor-state arbitration. Apart from these clauses and art 6(3) dealing with gender diversity (discussed below in greater detail), both the 2018 Model BIT and the 2019 Final Dutch Model BITs are identical in content.

11)

From its first BIT that concluded with Tunisia in 1963 until the mid-80s, the Netherlands concluded BITs with Ivory Coast (1965), Cameroon (1965), Indonesia (1968), Uganda (1970), Sudan (1970), Kenya (1970), Malaysia (1971), Morocco (1971), Singapore (1972), Thailand (1972), Korea (1974), Egypt (1976), Senegal (1979), Sri Lanka (1984), the Philippines (1985), Yemen (1985), and China (1985). There is one outlier, the Netherlands–Yugoslavia BIT concluded in 1976.

12)

This includes all 12 intra EU-BITs.

13)

See UNCTAD, 'Treaty-Based ISDS Cases Brought under Dutch IIAs: An Overview' (30 June 2015) 14.

14)

See Nico Schrijver and Vid Prislan, 'The Netherlands' in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP 2013) 545, 546 ('The large majority of existing BITs apply to the Kingdom of the Netherlands as a whole. An exception are the BITs with the Philippines, Ghana, Malta, Sri Lanka, and Yemen, which apply to the Netherlands only, and the BITs with Bangladesh, Hungary, Cape Verde, Mongolia, Nigeria, Oman, Pakistan, Turkey, and Vietnam, which apply to the Netherlands and Aruba, but not to the former Netherlands Antilles. On the other hand, there are currently no BITs concluded by Aruba or the former Netherlands Antilles separately with third States.').

15)

Schrijver and Prislan, ibid 540 ('Because of the manifold international activities of Dutch companies, the Netherlands has traditionally attached great importance to an adequate system for the protection of foreign investment—both bilaterally and multilaterally.''); Minister's Policy Note, 'Wat de wereld verdient: een nieuwe agenda voor hulp, handel en investeringen' (5 April 2013) 36 ('The Netherlands is one of the biggest investors in the world, partly due to the nearly hundred investment protection treaties . . . that we have concluded. These agreements protect investors from both sides inter alia against expropriation. The authority to conclude [investment protection treaties] has been passed on to the EU under the Treaty of Lisbon. We are a strong proponent of [investment protection treaties] that offer a high level of protection.') (translation from Dutch original: 'Nederland is één van de grootste investeerders ter wereld, mede door de bijna honderd investeringsbeschermingsovereenkomsten (IBO's) die we hebben afgesloten. Deze akkoorden beschermen investeerders van beide kanten onder andere tegen onteigening. De bevoegdheid om IBO's af te sluiten is met het Verdrag van Lissabon overgegaan naar de EU. Wij maken ons in de EU sterk voor IBO's met ons hoge beschermingsniveau.).

16)

Ministry of Foreign Affairs, *Organization Decree* (2017) art 5(1). Tax treaties are negotiated by the Ministry of Finance.

17)

See Schrijver and Prislan (n 14) 570 ['Especially the country's good corporate governance laws, effective legal framework (both in regulatory and enforcement terms), and competitive tax system make it very attractive for foreign companies to locate their European operations in the Netherlands.].

18)

UNCTAD (n 13) 2, 3.

19)

Ibid 1 ('In two-thirds of those cases, the relevant foreign-owned group of companies does not appear to engage in substantial business activities in the Netherlands.').

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20)

UNCTAD, 'World Investment Report 2018, Investment and New Industrial Policies' 93 <https://www.unctad.org/en/PublicationsLibrary/wir2018_en.pdf> accessed 1 August 2019; 'Investment Dispute Settlement Navigator' (*Investment Policy Hub*, 31 December 2018) accessed 19 March 2019.

21)

The Chinese investor Ping An was close to initiating a proceedings against the Netherlands in 2012 on the basis of the Netherlands–China BIT, see Simon Rabinovitch and James Fontanella-Khan, 'Ping An in Arbitration Claim over Fortis' *Financial Times* (Brussels, 24 September 2012) <https://www.ft.com/content/87437290-0620-11e2-bd29-00144feabdc0> accessed 1 August 2019; Adriana Homolova and others, 'Grote David Tegen Kleine Goliath' *De Groene Amsterdammer* (Amsterdam, 25 November 2015) <https://www.groene.nl/artikel/grote-david-tegen-kleine-goliath> accessed 1 August 2019.

22)

ICSID Case No ARB/07/30, Decision on Jurisdiction and Merits (3 September 2013); Partial Award, UNCITRAL Award (19 August 2005); PCA Case No 2008-13, Award (7 December 2012).

23)

The following countries have terminated their BITs with the Netherlands: (i) Venezuela (2008), see Luke Peterson, 'Venezuela Surprises the Netherlands with Termination Notices for BIT; Treaty Has Been Used by Many Investors to "Route" Investments into Venezuela' <https://www.iareporter.com/articles/venezuela-surprises-the-netherlands-with-termination-notice-for-...> accessed 1 August 2019; (ii) Bolivia (2009), see Aldo Lopez, 'Bolivia Denounces Its Bilateral Investment Treaties and Attempts to Put an End to the Power of Corporations to Sue the Country in International Tribunals' <https://www.alainet.org/en/active/75151> accessed 1 August 2019; (iii) Indonesia (2014), see 'Indonesia Terminates Its Bilateral Investment Treaty (BIT) with the Netherlands from 1 July 2015 and May Terminate All of Its BITs' (*Hogan Lovells Publications*, 26 March 2014) <http://ehoganlovells.com/rv/ff0016549f7c87287ab893563e449f578557285d> accessed 1 August 2019, (iv) South Africa (2014), see Robert Hunter, 'South Africa Terminates Bilateral Investment Treaties with Germany, Netherlands and Switzerland' <www.rh-arbitration.com/south-africa-terminates-bilateral-investment-treaties-with-germany-netherland...> accessed 1 August 2019; (v) India (2016), see 'India Terminates Bilateral Investment Treaties (BITs)' <www.bothends.org/en/Whats-new/News/India-terminates-bilateral-investment-treaties-BITs-> accessed 1 August 2019; Ecuador (2017) See 'Ecuador terminates 12 BITs – A Growing Trend of Reconsideration of Traditional Investment Treaties?' (*DLA Piper*, 15 May 2017)' <https://www.dlapiper.com/en/uk/insights/publications/2017/05/ecuador-terminates-12-bits-a-growing-tr...> accessed 1 August 2019.

24)

See eg George Kahale III, 'The New Dutch Sandwich: The Issue of Treaty Abuse' (No 48, Columbia FDI Perspectives 2011) ('Companies from all over the world having little if anything to do with The Netherlands seek to acquire Dutch nationality to take advantage of the protections offered by Dutch BITs.').

25)

See the 2004 Dutch Model BIT (n 6). Previous model texts date from 1979, 1987, 1993, and 1997. For more information on the history of model BITs in the Netherlands, see Schrijver and Prislan (n 14) 544, 545 ('The first Model Agreement on Encouragement and Reciprocal Protection of Investments was drafted in 1979 . . . . Since the first version, the Model Text has regularly been updated and amended, although the changes have only been minor, often amounting to not more than slight variations in the wording of specific provisions. The latest Model Text is from March 2004, while previous versions were published or otherwise made publicly available in February 1987, June 1987, May 1993 and 1997.'). See also Timothy Nelson, 'Going Dutch - The Many Virtues of the Netherlands Model BIT' (2012) 6(2) Dispute Resolution International 162,163.

26)

Foreign Trade and Development, 'National Yearly Report 2017' (Rijksjaarverslag 2017, Buitenlandse Handel en Ontwikkelingssamenwerking) 21.

27)

See eg Claire Provost and Matt Kennard, 'The Obscure Legal System That Lets Corporations Sue Countries' *The Guardian* (London, 10 June 2015) <https://www.theguardian.com/business/2015/jun/ 10/obscure-legal-system-lets-corportations-sue-states...> accessed 1 August 2019; Manuel Pérez-Rocha, 'When Corporations Sue Governments' *The New York Times* (New York, 3 December 2014) <https://www.nytimes.com/2014/12/04/opinion/when-corporations-sue-governments.html> accessed 1 August 2019.

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28)

For an overview of the criticism, see eg Marijn Duintjer Tebbens, 'Nederland Is “claimwalhalla” voor Multinational' (*Nieuwsuur*, 10 June 2015) <https://nos.nl/nieuwsuur/artikel/2040608-nederland-is-claimwalhalla-voor-multinationals.html?title=n...> accessed 1 August 2019; Jesse Frederik, 'Hoe Nederland een claimparadijs voor multinationals werd' (*De Correspondent*, 10 January 2014) <https://decorrespondent.nl/510/hoe-nederland-een-claimparadijs-voor-multinationals-werd/36893744250-...> accessed 1 August 2019; Homolova and others (n 21).

29)

See eg Alexander Weissink, 'Heeft Nederland iets te winnen bij handelsverdrag TTIP?' (*Het Financiële Dagblad*, 27 April 2015) <https://www.fd.nl/economie-politiek/1101255/heeft-nederland-wel-iets-te-winnen-bij-ttip> accessed 1 August 2019.

30)

See eg Roeline Knottnerus and others, '50 jaar ISDS. Een mondiaal machtsmiddel voor multinationals gecreëerd en groot gemaakt door Nederland' 13 January 2018 <https://www.somo.nl/nl/wp-content/uploads/sites/2/2018/01/50-jaar-ISDS.pdf> accessed 1 August 2019; Roos van Os and Roeline Knottnerus, 'Dutch Bilateral Investment Treaties: A Gateway to 'Treaty Shopping' for Investment Protection by Multinational Companies' (December 19, 2011).

31)

See eg Gerard Reijn, 'India is rechtsvorm zat en zegt 57 handelsverdragen op' (*de Volkskrant*, 27 September 2016) <https://www.volkskrant.nl/economie/india-is-rechtsvorm-zat-en-zegt-57-handelsverdragen-op~b3ec7d78/> accessed 1 August 2019; Frederik (n 28); Ministry of Foreign Affairs, 'Notice on Termination Bilateral Investment Agreement Netherlands – Tanzania' <https://www.netherlandsandyou.nl/latest-news/news/2019/03/22/notice-on-termination-bilateral-investm...> accessed 1 August 2019.

32)

Johannes Bollen and others 'Nederlandse kosten Brexit door minder handel', (Policy Brief 2016/07, Bureau for Policy Analysis (*Centraal Planbureau*) 2016).

33)

Lilianne Ploumen, 'Reset handelspolitiek: afscheid van wilde globalisering' (*Clingndael Spectator*, 6 December 2016) <https://spectator.clingendael.org/en/node/4150> accessed 1 August 2019. In 2013, the government had already promulgated its desire to include rules on sustainability in investment treaties, see Ministry's Policy note 'Wat de wereld verdient: een nieuwe agenda voor hulp, handel en investeringen' (5 April 2013) 36 ('Next to [promoting investment treaties with a high degree of protection] we are working on new agreements with important investment partners like China. We take account of the larger role of developing economies and the growing need for an integral approach of our objective in areas pertaining to sustainable development. Within the EU framework, we remain committed to our goal of implementing sustainability chapters in investment treaties.') (translated from the Dutch original: '*Daarnaast werken we aan nieuwe overeenkomsten met belangrijke investeringspartners als China. We houden rekening met de grotere rol van opkomende economieën en de toenemende noodzaak voor een integrale benadering van onze doelstelling op gebieden van duurzame ontwikkeling. In EU&verband blijven we ons ervoor inzetten dat in investeringsbeschermingsovereenkomsten een duurzaamheidshoofdstuk op wordt genomen*.').

34)

See eg Letter of the Minister of Foreign Trade and Development to Parliament (21 501-02 Nr 1481, 9 April 2015); Letter of the Minister of Foreign Trade and Development to Parliament (21 501-02 Nr 1465, 6 March 2015).

35)

See Minister Ploumen, 'Kritische herziening' (Op-ed Article by the Minister Ploumen to Volkskrant, 1 April 2015).

36)

Minister's Policy Note, 'Investeren in Perspectief' (18 May 2018) 10 ('The Netherlands is at the forefront for preserving and enhancing the multilateral trade and investment system. The Cabinet presents inter alia a new model text for bilateral investment treaties and will renegotiate them in order to balance the rights and obligations between the government and investor.') (translated from the Dutch original: '*Nederland staat op de bres voor behoud en verdieping van het multilaterale handels- en investeringssysteem. Het kabinet presenteert onder andere een nieuwe modeltekst voor bilaterale investeringsakkoorden en gaat deze heronderhandelen om rechten en plichten van overheid en investeerder beter in balans te brengen*.').

37)

Minister's Policy Note (n 36) ('The Netherlands champion . . . a future-proof multilateral trade and investment system that stimulates sustainable growth and development.') (translated from the Dutch original: '*Nederland maakt zich daarbij sterk voor . . . een toekomstbestendig multilateraal handels- en investeringssysteem dat duurzame groei en ontwikkeling stimuleert*.').

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38)

Ibid ('The Cabinet wishes that enterprises benefit more from trade agreement. The use of trade agreements by Dutch entrepreneurs is due to the lack of knowledge lacking behind compared to certain other countries. (. . .) The study [commissioned by the Ministry into the causes of this backlog] is specifically focussed on the position of small and medium sized enterprises.') (translated from the Dutch original: '*Het kabinet wil dat bedrijven meer profijt hebben van handelsakkoorden. Het gebruik van handelsakkoorden door Nederlandse ondernemers blijft door een gebrek aan kennis achter ten opzichte van sommige andere landen . . .. Het onderzoek besteedt bijzondere aandacht aan de positie van het mkb.*'').

39)

Minister's Policy Note (n 36) 71 ('The Netherlands introduce a new model text for bilateral investment treaties, which provides for a better balance between rights and obligations of multinational enterprises, guarantees policy space of (foreign) governments and excludes mailbox companies from protection. On the basis of this model text, the Cabinet will start renegotiating of the Dutch bilateral investment treaties this year, in so far as there are no European investment treaties.') (translated from the Dutch original: '*Nederland introduceert een nieuwe modeltekst voor bilaterale investeringsakkoorden, die zorgt voor een evenwichtiger balans tussen rechten en plichten van multinationale ondernemingen, beleidsvrijheid garandeert van (buitenlandse) overheden en brievenbusmaatschappijen uitsluit van bescherming. Op basis van deze modeltekst start het kabinet dit jaar met het heronderhandelen van de Nederlandse bilaterale investeringsakkoorden, voor zover er met die landen geen Europees investeringsakkoord bestaat.*').

40)

art 3(1)(e) in conjunction with art 207 of the Treaty on the Functioning of the European Union.

41)

FTA between the European Union and the Republic of Singapore (presented 18 April 2018).

42)

Comprehensive Economic and Trade Agreement (CETA) (signed 30 October 2016 provisionally applicable from 21 September 2017).

43)

FTA between the European Union and the Socialist Republic of Vietnam (negotiations concluded 2 December 2015).

44)

See European Commission, 'Proposal for a Council Decision on the Conclusion of the Economic Partnership Agreement Between the European Union and Japan' <https://www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0192> accessed 1 August 2019.

45)

See generally August Reinisch, 'The EU on the Investment Path' (2014) 12(1) Santa Clara Journal of International Law 135.

46)

Opinion 2/15 of 16 May 2017, ECLI:EU:C:2017:376; FTA between the European Union and Singapore (signed 19 October 2018). See Hannes Lenk, 'More Trade and Less Investment for Future EU Trade and Investment Policy' (2018) 19 Journal of World Investment & Trade 305.

47)

Council Regulation (EC) No 1219/2012 of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries (2012) L351/40, Preamble, [15]. Similarly, the intra-EU application of the Energy Charter Treaty has been questioned.

48)

On 18 June 2015, the Commission initiated infringement proceedings against five Member States, including the Netherlands, requesting them to terminate Intra-EU BITs; see European Commission Press Release, 'Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties' (18 June 2015) <http://europa.eu/rapid/press-release_IP-15-5198_en.htm> accessed 1 August 2019.

49)

See eg UNCTAD, 'Investment Policy Monitor' (Issue 16 November 201) <https://www.investmentpolicy.unctad.org/investment-policy-monitor> accessed 1 August 2019. See also Marie Davoise and Markus Burgstaller, 'Another One BIT the Dust: Is the Netherlands' Termination of Intra-EU Treaties the Latest Symptom of a Backlash Against Investor-State Arbitration?' (*Kluwer Arbitration Blog*, 11 August 2018) <http://arbitrationblog.kluwerarbitration.com/2018/08/11/another-one-bit-dust-netherlands-termination...> accessed 1 August 2019.

50)

Judgment-284/16 of 6 March 2018, ECLI:EU:C:2018:158 Treaty on the Functioning of the European Union, arts 267 and 344.

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51)

Letter of the Minister of Foreign Trade and Development to Parliament (Document No 21 501-02 nr 1863, 26 April 2018). The Intra-EU BITs are not terminated insofar as they apply to the Caribbean parts of the Kingdom of the Netherlands.

52)

ICSID Case No ARB/12/12, Decision on the *Achmea* issue (31 August 2018).

53)

'The Aftermath of *Achmea*: Germany Requests Dismissal of *Vattenfall* Case after CJEU's *Achmea* Decision' *Global Arbitration News* (14 May 2018) <https://globalarbitrationnews.com/aftermath-achmea-germany-requests-dismissal-vattenfall-case-cjeus-...> accessed 1 August 2019. See also *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain*, ICSID Case No ARB/14/1, Award (16 May 2018).

54)

SCC Case No 2015/063, Final Award (15 February 2018).

55)

ICSID Case No ARB/05/20, Decision on Annulment (26 February 2016); Commission Decision (EU) 2015/1470 of 30 March 2015. See Hanno Wehland, 'The Enforcement of Intra-EU BIT Awards: *Micula v Romania and Beyond*' (2016) 17 Journal of World Investment & Trade 942.

56)

European Commission, 'Spain — Support for Electricity Generation from Renewable Energy Sources, Cogeneration and Waste' (C(2017) 7384 final State aid SA.40348 (2015/NN), 10 November 2017) 32.

57)

The Court of Justice is currently reviewing the compatibility of ICS's CETA with EU law. Belgium requested the Court of Justice to assess the compatibility of its ICS provisions with EU law after the regional Walloon government had threatened to block CETA from entering into force. See also 'Minister Reynders Submits Request for Opinion on CETA' (Kingdom of Belgium: Foreign Affairs, Foreign Trade and Development Cooperation) <https://www.diplomatie.belgium.be/en/newsroom/news/2017/minister_reynders_submits_request_opinion_ce...> accessed 1 August 2019.

58)

Council of the European Union, 'Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes' (Document 12981/17 ADD 1, 1 Match 2018) 3, 4. See also Commission, 'Recommendation of a Council Decision Authorizing the Opening of Negotiations of a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes' (Document COM(2017) 493 Final, 13 September 2017).

59)

UNCITRAL Working Group III (Investor-State Dispute Settlement Reform). See eg European Commission and Government of Canada, 'The Case for Creating a Multilateral Investment Dispute Settlement Mechanism' (*Informal Ministerial Meeting World Economic Forum Switzerland*, 20 January 2017 Davos) <http://trade.ec.europa.eu/doclib/docs/2017/ january/tradoc_155264.pdf> accessed 1 August 2019.

60)

Council of the European Union, (n 58) [6]–[8].

61)

ibid, [9]–[11].

62)

This comparison is not meant to be exhaustive. We have reviewed all or nearly all significant and publically available treaties that were concluded in the past few years.

63)

2019 Final Dutch Model BIT (n 10) arts 9(2)(d), 19(7), 20(3), and 22(5).

64)

Ibid, arts 2(2) and 12(8).

65)

Ibid, arts 3, 6, and 7.

66)

Ibid, art 5.

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67)

See eg Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and The Government of the Federal Republic of Nigeria (signed 3 December 2016) (hereafter, Morocco–Nigeria BIT) art 1; Bilateral Agreement for the Promotion and Protection of Investments between the Government of the Republic of Colombia and the Government of the United Arab Emirates (signed 12 November 2017) (hereafter, Colombia–UAE BIT) art 1; Treaty between the Republic of Argentina and the Republic of Chile for the Promotion and Reciprocal Protection of Investments (signed 2 August 1991 entered into force 1 January 1995) art 8.1; Agreement between the Republic of Rwanda and the United Arab Emirates on the Promotion and Reciprocal Protection of Investments (signed 1 November 2017) (hereafter, Rwanda–UAE BIT) art 1; Mainland and Hong Kong Closer Economic Partnership Arrangement Investment Agreement, art 2; Agreement between Japan and the State of Israel for the Liberalization, Promotion and Protection of Investment (signed 1 February 2017, entered into force 5 December 2017) (hereafter, Japan–Israel BIT) art 1; and for multilateral treaties, see CETA (n 42) art 8.1; *Trans-Pacific Partnership*, 4 February 2016 <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/...> accessed 1 August 2019 (hereafter, TPP) art 9.1; CP-TPP Comprehensive and Progressive Agreement for Trans-Pacific Partnership <https://www.mfat.govt.nz/assets/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Part...> accessed 1 August 2019 (hereafter, CP-TPP) ch 9; Agreement between the Government of the Republic of Korea and the Government of the Republic of South Africa on the Promotion and Protection of Investments (signed 7 July 1995 entered into force 28 June 1997) (hereafter, Korea–Rep CA) ch 9, s C; Agreement on Investment among the Governments of the Hong Kong Special Administrative Region of the People's Republic of China and The Member States of the Association of Southeast Asian Nations (signed 12 November 2017) (hereafter, Hong Kong–Asean) art 1; Pacific Agreement on Closer Economic Relations Plus (negotiations concluded 20 April 2017) <https://dfat.gov.au/trade/agreements/not-yet-in-force/pacer/Pages/documents.aspx> accessed 1 August 2019 (hereafter, PACER Plus) ch 9, art 1 ; Southern Common Market Agreement <https://idatd.cepal.org/Normativas/MERCOSUR/Ingles/Treaty_of_Asuncion.pdf> accessed 1 August 2019 (hereafter, Mercosur) art 3.

68)

Investment treaties without this requirement are the Agreement between the Macedonian government and the Government of Kingdom of Denmark for the Protection and Reciprocal Protection of Investments (signed 8 May 2015, entered into force 30 June 2016), and the Treaty on the Eurasian Economic Union.

69)

Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Chile (signed 30 November 1998) art 1(b).

70)

See eg Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (signed 19 January 2016, entered into force 30 August 2017) (hereafter, Slovakia–Iran BIT) art 1; Morocco–Nigeria BIT (n 67) art 22; Colombia–UAE BIT (n 67) art 25; Japan–Israel BIT (n 67) art 1; Rwanda–UAE BIT (n 67) art 24(1).

71)

See eg CETA (n 42) art 8.1; TPP (n 67) art 9.15; CP-TPP (n 67) art 9.15; Korea–Rep CA (n 67) ch 9, art 9.12; Hong Kong–ASEAN (n 67) art 19; PACER Plus (n 67) ch 9, art 18.

72)

This follows from art 1(b). For the purposes of the 2019 Final Dutch Model BIT, the dual national is considered a natural person only of the party of his or her 'dominant and effective nationality'. Dual nationals are also not excluded in Dutch BITs.

73)

None of the existing Dutch BITs contain such clause.

74)

See eg Slovakia–Iran BIT (n 70) art 14(2); Morocco-Nigeria BIT (n 68) art 17; Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the Republic of Suriname (signed 02/05/2018) (hereafter, Brazil–Suriname BIT) arts 14, 16; Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation (signed 11 April 2018) (hereafter, Brazil–Ethiopia BIT) art 15; Colombia–UAE BIT (n 67) art 1; Argentina–Chile BIT (n 67) art 8.24.

75)

Slovakia–Iran BIT (n 70) art 14(2).

76)

Morocco–Nigeria BIT (n 67) art 17; Slovakia–Iran BIT (n 70) art 14(2); Brazil–Suriname BIT (n 74) arts 14(b) and 16(2).

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77)

Brazil–Suriname BIT, ibid, art 16(1).

78)

ibid, art 16(1); Brazil–Ethiopia BIT (n 74) art 15(1).

79)

Morocco–Nigeria BIT (n 67) art 17(5).

80)

Cf The Colombia–UAE BIT (n 67) art 1(3) which specifies that protection does not have to be granted to investments acquired through criminal offences for convicted offences, or has been 'deemed to have been convicted of', which gives the investor the right for court review of his (deemed) conviction.

81)

Whether this difference would have been of any practical relevance depends on whether tribunals would have applied art 16(2) *ex officio*. It is hard to imagine that tribunals would do so after the defending state failed to raise such issues itself.

82)

The vast majority of Dutch BITs contains such clauses. Many recently concluded investment treaties do too; see eg Slovakia–Iran BIT (n 70) art 3; Morocco–Nigeria BIT (n 67) art 7; Colombia–UAE BIT (n 67) art 5; Argentina–Chile BIT (n 67) art 8.7; Hong Kong–China BIT (n 67) art 4; Japan–Israel BIT(n 67) art 4; CETA (n 42) art 8.10; TPP (n 67) art 9.6; CP-TPP (n 67) ch 9, art 9.6; Korea–Rep CA (n 67) ch 9, art 9.5; Hong Kong–ASEAN (n 67) art 5; PACER Plus (n 67) ch 9, art 9.

83)

The Dutch BITs do not contain a worked-out protective obligation against indirect expropriation.

84)

See eg Morocco–Nigeria BIT (n 68) art 8(b); Colombia–UAE BIT (n 67) art 7(2); Rwanda–UAE BIT (n 67) art 8(8); Hong Kong–China BIT (n 67) annex 3(2); CETA (n 42) annex 9-A(2); TPP (n 67) annex 9-B(3); CP-TPP (n 67) annex 9-B(3); Korea–Rep CA (n 67) annex 9-C(4).

85)

The 2018 Draft Model BIT left in the dark whether art 12(5) also applies to indirect expropriation. The 2019 Final Dutch Model BIT has also made clear that the amount of compensation for unlawful expropriation must be determined in accordance with art 12(5).

86)

See Raul Pereira de Souza Fleury, 'Treaty-Protected Investment Agreements: Of Umbrella Clauses and Privity of Contract' (2016) 23(2) Willamette Journal of International Law and Dispute Resolution 325.

87)

Partial Award (UNCITRAL 19 August 2005) para 245; Case No ARB/96/3, Award (9 March 1998).

88)

art 3(1) of the 2018 Draft Model BIT did not contain the qualifier that the investments the parties should promote are to be responsible and contributive to sustainable economic development.

89)

Morocco–Nigeria BIT (n 67) art 15.

90)

Agreement for the Promotion and Protection of Investment between the Government of the Republic of Austria and the Government of the Kyrgyz Republic (signed 22 April 2016) (hereafter, Austria–Kyrgyzstan BIT) Preamble; Brazil–Ethiopia BIT (n 74) art 14; Brazil–Suriname BIT (n 74) art 15.

91)

See eg Slovakia–Iran BIT (n 70) art 10(3); Morocco–Nigeria (n 67) art 24; Brazil–Ethiopia BIT (n 74) art 14; Argentina–Chile BIT (n 67) art 8.17; TPP (n 67) art 9.17; CP-TPP (n 67) ch 9, art 9.17; PACER Plus (n 67) ch 9, art 5(2). Not referring to international standards as such: Brazil–Suriname BIT (n 74) art 15; Mercosur (n 67) art 14.

92)

Brazil–Suriname BIT (n 74) art 4(2); Brazil–Ethiopia (n 74) art 4(2).

93)

See eg Brazil–Suriname (n 74) art 14(a); PACER Plus (n 67) ch 9, art 5; Mercosur (n 67) art 13(1).

94)

See also Caroline Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality analysis and the Standard of Review in Investor-State Arbitration' (2012) 15(1) Journal of International Economic Law 223, 255.

95)

See eg Slovakia–Iran BIT (n 70) art 6(5); Austria–Kyrgyzstan BIT (n 90) art 7(4).

96)

2004 Final Model BIT, art 9.

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97)

See eg Michael Schneider, 'Forbidding Unilateral Appointments of Arbitrators — A Case of Vicarious Hypochondria?' (2011) 2 ASA Bulletin 273.

98)

Letter by the Minister of Foreign Trade and Development to Parliament on the adoption of the 2018 Model BIT (26 October 2018) 3: 'The new model text guarantees independent and impartial adjudication due to appointment of the tribunal by the Secretary General of the Permanent Court of Arbitration or the Secretary General of the International Centre for the Settlement of Disputes.' (translated from the Dutch original: '*De nieuwe modeltekst garandeert onafhankelijke en onpartijdige rechtspraak door het tribunaal te laten benoemen door de Secretaris-Generaal van het Permanent Hof van Arbitrage of door de Secretaris-Generaal van het International Centre for Settlement of Investment Disputes.*').

99)

See Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25 ICSID Review; Hans Smit, 'The Pernicious Institution of The Party-Appointed Arbitrator' (No 33, Columbia FDI Perspectives 2010) ('In my judgment, all arbitrators sitting in investment disputes should be appointed by a neutral institution; bilateral investment treaties should be amended to achieve this. International investment arbitration would thus set a potent example for general emulation in international arbitrations.').

100)

Charles N Brower, 'The (Abbreviated) Case for Party Appointments in International Arbitration' (2013) 1(1) ABA Section of International Law 10; see also Alexis Mourre, 'Are Unilateral Appointments Defensible? On Jan Paulsson's Moral Hazard in International Arbitration' (*Kluwer Arbitration Blog*, 5 October 2010) <http://arbitrationblog.kluwerarbitration.com/2010/10/05/are-unilateral-appointments-defensible-on-ja...> 1 August 2019.

101)

Brower, ibid.

102)

'Secretary General' (PCA) <https://www.pca-cpa.org/en/about/introduction/secretary-general/> accessed 1 August 2019.

103)

For example, ClientEarth encouraged the Government to 'ensure that arbitrators are appointed from a diverse background taking into account gender, geographic representativeness, and expertise in areas of environmental, social, and human rights law'. See ClientEarth, 'Consultation on the New Dutch Model Bilateral Investment Agreement—Comments by ClientEarth' (18 June 2017) 4, 5 <https://www.documents.clientearth.org/wp-content/uploads/library/2018-06-18-clientearth-submission-t...> accessed 1 August 2019.

104)

See eg CP-TPP (n 67) ch 9, art 9.22(6); Brazil–Ethiopia BIT (n 74) art 24(7); Brazil–Suriname BIT (n 74) art 25(8); Colombia–UAE BIT (n 68) art 17; Argentina–Chile BIT (n 67) art 8.28; Korea–Rep CA (n 67) art 9.20(5); Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, on the one part, and the Republic of Armenia, on the other part (signed 24 November 2017) art 339(2).

105)

Brazil–Suriname BIT (n 74) art 25(8); WTO/DSB/RC/1, dated of 11 December 1996.

106)

See eg CP-TPP (n 67) ch 9, art 9.22(6); Brazil–Ethiopia BIT (n 74) art 24(7).

107)

Argentina–Chile (n 67) art 8.28.

108)

See eg Argentina–Chile BIT (n 67) art 8.28; Rwanda–UAE BIT (n 67) art 18(4).

109)

Introducing explicit rules on consolidation of claims is currently debated, see Proposals for Amendment of the ICSID Rules - Working Paper, 207–210 <https://icsid.worldbank.org/en/Documents/Vol_1.pdf> accessed 1 August 2019.

110)

Charlie Caher and Jonathan Lim, 'Class, Collective and Mass Claims in Arbitration' [2016] ICLG <https://www.lexology.com/library/detail.aspx?g=cd1ea98b-2d93-4a96-bf99-d0884cdbc09e> accessed 1 August 2019; Gary Born, *International Commercial Arbitration* (2nd edn, Wolters Kluwer Law & Business 2014) 1523.

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111)

Abaclat and other v The Argentine Republic, ICSID Case No ARB/07/5 Decision on Jurisdiction and Admissibility (4 August 2011); *Ambiente Ufficio SPA and others v The Argentine Republic*, ICSID Case No ARB/08/9 Decision on Jurisdiction and Admissibility (8 February 2013); *Giovanni Alemanni and others v The Argentine Republic*, ICSID Case No ARB/07/8 Decision on Jurisdiction and Admissibility (17 November 2014).

112)

Stacie Strong, *Class, Mass, And Collective Arbitration In National And International Law*(Oxford University Press 2013) 37,38; Carolyn B Lamm, Eckhard R. Hellbeck and Onur Saka, 'Mass Claims in Investment Arbitration: Jurisdiction and Admissibility' in Bernard Hanotiau and Eric A Schwartz (eds), *Class and Group Actions in Arbitration* (ICC, 2016) 114-226.

113)

Dissenting opinion of Abi-Saad in *Abaclat and other v The Argentine Republic*, ICSID Case No ARB/07/5 Decision on Jurisdiction and Admissibility Dissenting Opinion Professor George Abi-Saab (28 October 2011).

114)

A negotiated restructuring is defined as either: (i) 'a modification or amendment of debt instruments, as provided for under their terms, including their governing law' or (ii) 'a debt exchange or other similar process in which the holders of no less than 66% of the aggregate principal amount of the outstanding debt subject to restructuring, excluding debt held by that Contracting Party or by entities owned or controlled by it, have consented to such debt exchange or other process'. See art 1 of the Protocol on Public Debt. Even if the restructuring is negotiated only after the submission of the claim, investors at once lose treaty protection (after the arbitration has been initiated pursuant to art 19).

115)

Protocol on Public Debt art 2.

116)

ibid, art 3.

117)

Claimant can make jurisdictional objections against ancillary claims in its response to respondent's first written submission.

118)

CP-TPP (n 67) art 9.23(4); Korea–Rep CA (n 67) art 21(4).

119)

Argentina–Chile BIT (n 67) art 8.32; Japan–Israel BIT (n 67) art 24(14).

120)

CP-TPP (n 67) art 9.24(1); Korea–Rep CA (n 67) art 9.22(1).

121)

Argentina–Chile BIT (n 67) art 8.32(1); CP-TPP (n 67) art 9.24(1); Korea–Rep CA (n 67) art 9.22(1); Japan–Israel BIT (n 67) art 24(14).

122)

Cf Japan–Israel BIT (n 67) art 24(14); CP-TPP (n 67) art 9.24(3); Korea–Rep CA (n 67) art 9.22(3).

123)

UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration.

124)

This option is also provided for in eg CP-TPP (n 67) art 9.23(3) and Korea–Rep CA (n 67) art 9.21(3).

125)

Argentina–Chile BIT (n 67) art 8.27.

126)

CETA (n 42) art 8.26.

127)

Investment Arbitration Rules of the Singapore International Arbitration Centre (1st edn, 1 January 2017) (SIAC IA Rules 2017) R 24(l) ('the Tribunal shall have the power to: (. . .) order the disclosure of the existence of a Party's third‑party funding arrangement and/or the identity of the third party funder and, where appropriate, details of the third‑party funder's interest in the outcome of the proceedings, and/or whether or not the third‑party funder has committed to undertake adverse costs liability').

128)

Brazil–Ethiopia BIT(n 74) art 24(8); Brazil–Suriname BIT (n 74) art 25(10).

129)

Argentina–Chile BIT (n 67) art 8.40(13).

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130)

See eg European Parliament's Study for the FEMM Committee, 'Gender Equality in Trade Agreements' (November 2016); UNCTAD's Policy Brief No 53, 'The New Way Of Addressing Gender Equality Issues in Trade Agreements: Is It a True Revolution?' (October 2017).

131)

FTA between the Government of Canada and the Government of the Republic of Chile (signed 5 December 1996 entered into force 5 July 1997). Also see the Canada-Israel Free Trade Amending Protocol 2018 to the 1997 Canada-Israel Free Trade Agreement (signed 28 May 2018) art 13.

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A Thought-Experiment Regarding Access to Justice in International Arbitration

Victoria Shannon Sahani

(*)

I Introduction

One reason for the public outcry against third-party funding is the widespread perception that third - party funding is unbalancing our notions of party-driven dispute resolution processes and even-handed tribunals. (1) In the aspirational vision of idyllic dispute resolution, an arbitrator or judge oversees the proper administration of the proverbial "scales of justice" in an orderly manner and "balances" out party power differentials calmly through procedural evenhandedness. Yet, third-party funding indisputably puts a gold-weighted thumb on the scale in favor of funded parties, particularly since funded cases already tend to be calculable winners on the merits, and since third-party funders seeking a profit generally do not fund cases that are demonstrably likely to lose on the merits. (2)

P 505

Thus, we are left with the promising potential for winners to be more likely to win with third-party funding, and the alarming realization that not all parties are offered this same chance to win. For example, traditional for-profit third-party funders only fund cases from which they can make a profit; thus, many merit-based winners whose claims are too expensive to pursue relative to their claim value are turned down. Second, it is likely that longshot- winners – cases too risky even for a third-party funder that are, for example, rightfully arguing for a change in the law or relying on creative theories that require mental and verbal jujitsu to convince the decision-maker (i.e., the stuff of Hollywood films about courageous lawyers and citizens fighting against insurmountable odds) – are less likely to be funded as well. Third, defendant-winners may be less likely to be funded unless those defendants already have hefty funds at their disposal through which to pay the funder either a periodic premium or are willing to pay the funder from their own pockets (rather than from the proceeds of an award) upon winning the case. (3) Fourth, non-financial winners – parties seeking non-financial remedies – are not likely to be funded unless they are willing to pay the funder from their own pockets, since there will be no monetary judgment upon winning the case. Fifth, political-winners are not likely to be funded, as many funders choose not to engage in funding of controversial positions and parties, which may be viewed as courageous or cowardly, depending on the type of party or issue at stake in the case.

The foregoing examples collectively engender a larger, fundamental question: If funders are picking primarily winners – and more specifically winners that suit their business model – then what does real access to justice in international arbitration look like in an era of third-party funding? Would real access to justice need to involve third-party funders funding impecunious innocent respondents, or expensive long-shot claimants, or righteous injunctions with no monetary recovery, or unprofitable cases that espouse some worthy yet controversial position?

Much has been written about access to justice in international arbitration. (4) This Article contributes to the conversation by presenting one theoretical framework to assess

P 506

the level of access to justice that currently exists in international arbitration and determine pathways to increasing access to justice. This Article proposes a working definition of access to justice in international arbitration and then presents a simple thought experiment to assess which parties currently have access to justice in international arbitration and which parties may lack such access. This Article concludes by suggesting some next steps regarding how to increase access to justice in international arbitration.

II Assumptions Made

First, what is access to justice? Access to justice could be defined in many ways depending on the context. For this Article, simple working definitions are appropriate. This Article defines "justice" as the assumption that the system of international arbitration and international arbitrators, viewed as a whole, reliably and regularly decides cases in a fair and enforceable manner that upholds due process of the law for all parties involved (leaving aside the idiosyncratic errors or biases of individual arbitrators). Of course, this is a seemingly rosy assumption that may be challenged by

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those critical of the international arbitration system. Nevertheless, for the purposes of this thought experiment, such an assumption is necessary – like a mathematical constant, if you will – to examine access from a financial perspective.

In addition, it is important to note that the definition of "justice" used in this Article does not address the merits of a particular claim or defense. In other words, this Article assumes that losers have just as much right as winners to bring their claims or marshal their defenses in international arbitration and, therefore, losers deserve as much *procedural* justice as winners do, even though the merits of their substantive positions may be shaky. Again, such an assumption could be challenged, but this Article adopts this assumption as necessary to the conclusions of this thought experiment, discussed further below.

This Article also assumes that "access" relates to the *financial* ability to proceed forward in arbitration. Thus, "access" in this context does not address non-financial barriers to arbitration, such as jurisdictional requirements, defective arbitration clauses, non-participating parties, substantive arbitrability, the availability of class or mass arbitration, or any similar non-financial barrier. In sum, this Article assumes that the phrase "access to justice" simply means having or acquiring the financial resources needed to bring your claim or muster your defense in international arbitration.

In applying this definition, there are an endless number of ways in which a party could have or acquire financial resources for pursing a claim in arbitration or defending against
P 507
it. For example, many parties self-finance their claims or defenses. Parties may also acquire liability insurance or political risk insurance, which may include paying the costs of arbitration. Subsidiaries may be able to tap into the resources of their parent corporations. States may use their internal legal teams or tap into their treasuries to pay external law firms. A client may hire an attorney or law firm on a contingent or conditional fee basis, if allowed in the relevant jurisdiction. And then there's third-party funding. This Article adopts the ICCA-Queen Mary Task Force on Third-Party Funding definition of "third-party funding" in Chapter 3: Definitions, which reads as follows:

> "The term 'third-party funding' refers to an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party,
>
> (a)funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and
> (b)such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment." (5)

Given the plethora of financing options, this Article must draw an arbitrary dividing line in the sand for the purpose of assessing access to justice. On one side of that line, the party definitely has access to justice and, on the other side, the party could potentially lack access to justice for the purpose of this thought experiment. It is important to note that this is not a line between the "haves" and the "have nots". Instead, this is a line between those who most certainly have access to justice and those whose access to justice is predicated on the outcome of the decision-making process of a financier not present at the time the dispute arises. Thus, for the purpose of this thought experiment, the line will be defined as whether the party's dispute financing is based on a *pre-existing* financial relationship with the financier *prior* to the incident that led to the claim in the arbitration. Of course, this line could be defined by other characteristics of a party or its case, but since this Article focuses on financial access to justice, the choice to draw the line according to the status of the source of a party's funding seems most appropriate.

To illustrate how this line functions, the simplest example is that a party with the financial resources to self-finance arbitration has a preexisting relationship with itself (the financier) before the claim arose; thus, that party has access to justice, according to this definition. Similarly, a subsidiary has a pre-existing relationship with a parent corporation prior to the claim in arbitration. If the parent corporation has the ability and willingness to provide financial support for a viable claim or defense, then the subsidiary has access to justice. Furthermore, if a party acquires liability insurance or political risk insurance at the outset of a contract or prior to making a foreign direct investment in a host state, and if such insurance covers the costs of arbitration, then the party has access to justice. On the other side of the line, an attorney or law firm will not enter into a
P 508
contingent or conditional fee arrangement with a client until after the incident that gives rise to the claim has taken place. Thus, if the party needs such contingent or conditional fee arrangement in order to pursue arbitration, then the party is in danger of not having access to justice if it is unable to

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obtain such an arrangement. Similarly, third-party funding – as traditionally envisioned – is tied to the existence of events that give rise to an arbitration claim.

It is important to note that, since the definition of “access to justice” articulated above involves engaging the machinery of the international arbitration process, this Article assumes that types of outside funding not tied to the existence of a dispute are more in the realm of corporate finance transactions and are not contemplated within this Article's definition of “access to justice”. The assumption here is that if a party has the wherewithal to enter into a corporate finance transaction independent of any pending disputes, then it also likely has access to adequate resources to pursue a claim or defend itself in international arbitration; therefore, it has access to justice. Furthermore, any insurance agreement entered into *after* the incident that gives rise to the claim has taken place, which is often termed “after-the-event insurance”, is categorized on the same side of the line as third-party funding and contingent or conditional fee arrangements.

This line in the sand is crucial, because the “access” in “access to justice” is an indicator of possibility, not certainty. In other words, having “access to justice” means that a party *could* financially pursue arbitration even if it chooses not to do so or is unable to do so for other non-financial reasons. For example, if a subsidiary could bring a viable claim with the help of the parent corporation, but *chooses* not to do so for business reasons, the subsidiary has access to justice, according to the definition in this Article. In addition, if the subsidiary could bring the claim with the help of the parent corporation, but the parent corporation believes that the claim is not viable enough to bring, then the subsidiary has access to justice, according to the definition in this Article. Furthermore, if a party is the respondent with sufficient financial resources to self-finance and nevertheless *refuses* to participate in the arbitration (thinking that the claim is bogus, for example), then the party has access to justice, according to the definition in this Article.

On the other hand, if a party is the *respondent* and does *not* have sufficient financial resources to self-finance while wanting to participate in the arbitration, then whether such a respondent has access to justice depends on the type of financier that could finance the party's defense. If the respondent can obtain a financier through a preexisting financial relationship, such as a parent corporation or a pre-existing insurance agreement, then the respondent has access to justice. If the respondent's financial relationship with the financier arises after the incident that led to the claim in the arbitration – such as a contingent or conditional fee arrangement with a law firm, after-the-event insurance or traditional third-party funding – then the respondent may have no access to justice if it is unable to create such a financial relationship.

This highlights a crucial point about access to justice, however it may be defined. Any proper assessment of “access to justice” must examine the situation of parties that have no choice in the matter: respondents. Respondents in all types of arbitration have no choice regarding whether the arbitration will bind them, regardless of whether they are financially able to participate in the arbitration or not. Thus, respondents *must* have access to justice – defined in this Article as having or acquiring the financial resources
P 509
needed to muster their defenses in international arbitration – in order for the system to be considered “just” at all. (6)

There is also a cost component to access to justice, namely, whether the financier's willingness to pay the costs of arbitration is predicated on some relationship between the costs of arbitration and the magnitude of the claim. Some types of financiers – such as self-financiers, parent corporations, and liability insurance – will pay the costs of arbitration regardless of the amount of the claim or the type of defense. Other types of financiers – such as third-party funders or after-the-event insurers – might only agree to pay the costs of arbitration if the costs are some order of magnitude less than the amount of the claim, or if the party provides the financier with some other alternative form of remuneration. Attorneys on contingent or conditional fees are likely somewhere in the middle. While the amount of the attorney's fees may not be directly tied to the costs of the arbitration, the attorney may turn down a case that might be too expensive relative to the amount the attorney could expect to be paid if the party wins the case, especially since most jurisdictions have a legislative cap on attorney contingent or conditional fees. (7) In light of this, the cost of arbitration is a crucial component to consider when determining whether a party had adequate access to justice.

To further complicate the matter of costs, it is nearly impossible to calculate in advance precisely how much a case will cost. The only exception may be that certain types of financiers, such as third-party funders or law firms working on a contingent or conditional fee, may include in their contracts provisions capping the amount that they will spend on arbitration costs. In addition, there are different fee provisions under the various arbitral rules – whether calculated on an hourly or daily rate or based on the amount in dispute – and for *ad hoc* arbitration the basis for the fees is even more variable. Moreover, there are certain types of claims that may require more extensive resources – such as class arbitration – or that may require the services of an emergency arbitrator – such as an

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injunction. The costs of such types of proceedings may be highly variable and not at all connected to the economic value of the result. Furthermore, some types of claims have no damage award attached to them, such as injunctive or declarative relief, in which case the costs will always mathematically outweigh the dollars recoverable from the claim, even if the claim is otherwise worthy and winnable. Finally, there is the question of timing and settlement. If all other parameters are equal, a case that settles early usually results in cheaper costs than a case that goes all the way to an award, which
P 510
in turn results in cheaper costs than a case that leads to enforcement or set-aside proceedings in a national court.

In sum, a case may be wildly expensive or may settle cheaply. One cannot predict in advance exactly which of these scenarios will happen in a particular case. Considering the high variability in cost structures and amounts, the thought experiment in this Article makes a simple assumption about costs. It assumes that the costs for a hypothetical party to an arbitration are reasonable and proportional for the type of case and type of claim or defense at issue, even though many cases may be extraordinarily expensive or surprisingly inexpensive. This assumption regarding costs is necessary for there to be any generalizable conclusions to be drawn from this thought experiment regarding access to justice.

There are a few less controversial assumptions in this thought experiment as well. This Article addresses only two types of international arbitration: commercial and investment arbitration. This Article does not address state-to-state arbitration, which may involve, for example, boundary or trade disputes. In addition, this Article addresses only single parties of three types: a corporation, a state, or an individual. A state- owned entity is categorized as a corporation for the purpose of this Article. [(8)] Multi-party actions – such as class, mass, or representative actions – are not contemplated. Furthermore, this Article categorizes the relief requested by a claimant as either damages or non-financial relief, such as an injunction, specific performance, or declarative relief. For respondents, the relief requested (that is, the respondents "claim") is characterized as "no liability" (namely, asking the tribunal to decide that the defendant is not liable for the injury the claimant alleges) in order to consider respondents and claimants together in this study. There may be other hybrid, unusual or less common types of relief that parties may request, but the aforementioned categories encompass the vast majority of types of claims or defenses brought in international arbitration.

Finally, since it is virtually impossible to predict with certainty the outcome of a case, this study addresses only two possibilities with respect to outcome – likely winner or likely loser – keeping in mind, however, that for some cases a party may be just as likely to win or lose. The reason that this study addresses only those two possibilities is that we know that all parties, including those who are self-financing, engage in some sort of analysis regarding the likelihood of winning the case when deciding whether or how to proceed. Most parties or their legal counsel have at least some expectation regarding whether the party is more likely to win or more likely to lose the case, and funders analyze this question and draw their conclusions often before the arbitration has even commenced. Moreover, some financiers enter the case at some point in the middle of the proceedings or finance enforcement proceedings at the end of the case, and those financiers will have a different viewpoint regarding the likelihood of winning than the financier who considers the case at the outset. Thus, the categories "likely winner" and "likely loser" are rough and inexact but help draw another necessary line in the sand,
P 511
similar to this Article's arbitrary dividing line in the sand for the purpose of assessing access to justice, as articulated above.

III Results of the Thought Experiment

This Article now presents a thought experiment based on the aforementioned assumptions to assess what types of international arbitration parties are in danger of not having access to justice. This thought experiment begins by excluding parties that definitely have access to justice. From the foregoing assumptions, any party that has a preexisting financial relationship with the financier prior to the incident that led to the claim in the arbitration has access to justice. This means that any party that has the guaranteed ability to self-finance or to obtain funding from a parent corporation or preexisting insurance contract (liability insurance or before-the-event insurance) has access to justice. This is true regardless of whether the party is more likely to win or lose, regardless of the type of claim, and regardless of whether the party is a claimant or respondent. This is also true if the party chooses not to pursue the claim or defense, despite having the financial resources to do so. In contrast, a party in danger of lacking access to justice must enter into a new financial relationship after the incident that gives rise to the claim. This means that the thought experiment will focus on avenues for financial support for arbitration that are available only after the incident that gives rise to

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the claim has happened. These avenues include contingent or conditional fee agreements with attorneys, after-the-event insurance agreements, bank loans, and traditional third-party funding arrangements.

The second phase of the thought experiment narrows down the categories of international arbitration parties that need dispute financing by separating those likely to win from those likely to lose. Most avenues for dispute financing that are available after the incident that gives rise to the claim are tied to the likelihood of winning. Attorneys and law firms will generally only enter into a contingent or conditional fee agreement if they believe the case is a likely winner. Similarly, after-the-event insurers and third-party funders will generally only enter into an arrangement in which they expect to make money, which is usually tied to the party winning the case. There are some structures for third-party funding or after-the-event insurance (often, but not exclusively, on the defense side) in which the financier receives some remuneration even if the party loses the case. In most situations, however, financiers that enter into an agreement with a party after the dispute has arisen want to fund likely winners on the merits rather than likely losers, if such a characteristic can be gleaned at the outset. Thus, in contrast to the situation described in the prior paragraph in which the party is virtually guaranteed access to justice, a party with no preexisting financial relationship to the financier, and who is also likely to *lose* its claim or defense, has almost no access to justice. The word "almost" is used because there may be rare instances of financiers willing to back a case with a small chance of winning (sometimes called a "long shot"), [(9)] but doing so on a regular basis would likely not be lucrative for such financiers. Thus, parties likely to lose are likely to remain largely unfunded unless a preexisting financier
P 512
is available. Therefore, such parties are likely to lack access to justice, according to the framework presented in this thought experiment.

This lack of access to justice for likely losers can be viewed in two different ways. On the one hand, one could argue that claimants who have a high likelihood of losing should not be able to bring their claims, perhaps (for example) because those claims might be frivolous. Similarly, one could argue that respondents who have a high likelihood of losing should not need to muster a zealous defense, perhaps because they truly did injure the claimant and the magnitude of that injury is equal to the relief that the claimant alleges. On the other hand, one could argue that both claimants and respondents may have a high likelihood of losing not because the claim or defense is invalid or frivolous, but rather due to a defect in the law applied to the case, or the party's lack of access to evidence to submit to the tribunal (for example, if the opposing party is in possession of the majority of the key evidence), or the party's (perhaps less expensive) legal counsel being inexperienced in international arbitration. In addition, even losers deserve the opportunity to zealously advocate for reducing the magnitude of their losses by arguing in favor of a set-off claim, a partial award, a lower cost award to the winner, or a lower interest rate on the damages (if applicable).

Nevertheless, since winning and losing on a spectrum is a matter of nuance (and perhaps even a philosophical query to some extent), this study focuses purely on winners or losers on the *merits only*. The result is that likely losers on the merits that need dispute financing typically do not obtain such financing and, therefore, lack access to justice. This is our first access to justice problem that this thought experiment has uncovered: *How can we provide access to justice for "unfunded losers"?*

If we remove the foregoing parties with preexisting access to funding and remove the unfunded losers, we are left with what our introduction calls "unfunded winners": claims or defenses that are likely to win on the merits if the party is able to obtain dispute financing. At this point it is useful to divide our "unfunded winners" according to the type of arbitration: commercial or investment arbitration. This is because types of parties and types of claims are treated differently depending on the type of arbitration. Beginning with commercial arbitration, the parties are all fungible, meaning that any party can be on any side and bring any claim. Jurisdictionally, since commercial arbitration arises from a contract, corporations, individuals and states can all serve as claimants or respondents. In addition, respondents in commercial arbitration can bring counterclaims or set-off claims, which gives them the ability to simultaneously serve as claimants while also serving as respondents. In light of this, the type of party is irrelevant to determining whether access to justice is available to unfunded winners in commercial arbitration.

Instead, one must examine the type of claim in order to assess access to justice for "unfunded winners" in international commercial arbitration. Damages claims are understandably attractive to dispute financiers, because there will be a pot of money to share if the party wins. Non-financial claims and "no liability" claims (defenses) are less attractive and may be completely unattractive because such claims do not automatically create a pot of money to share, even though such claims may be worthy on the merits. Dispute financiers that arrive on the scene after the dispute has arisen are typically looking for a cash profit. This is where the access to justice problem arises in commercial arbitration. The one exception is what one may call "not-for-profit" funders, which are

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P 513
funders that take an interest in the specific merits outcome of the case for non-financial reasons and do not expect to make a profit. [(10)] However, "not-for-profit" funders are not general market players in this space; they typically fund cases on a one-off, case-by-case basis and cannot be counted on to categorically fund all the cases regarding a certain industry, country, treaty or legal issue. Thus, "not-for -profit" funders cannot provide a solution that is generalizable to arbitration as a whole and, therefore, cannot solve the problem of access to justice in commercial arbitration. This brings us to our second access to justice problem that this thought experiment has uncovered: *How can we provide access to justice for "unfunded winners" with non-damages claims or defenses?*

Turning to investment arbitration, the picture becomes more complicated. "Unfunded winners" in investment arbitration must first be divided by party. Due to jurisdictional constraints, corporations or individuals are always claimants in investment arbitration and states are always respondents in investment arbitration. [(11)] Furthermore, jurisdictional constraints restrict the types of claims that can be brought. The treaty must specifically name the substantive rights that claimants may vindicate in investment arbitration. In vindicating those rights, the claimant may request damages or non-financial relief, such as restitution in kind [(12)] or specific performance, but only if such remedies are allowed by the treaty.

Traditional investment treaties do not provide for rights of the respondent state, [(13)] while some investment treaties negotiated in modern times do contain rights of respondent states and corresponding obligations of the individual or corporate investor. [(14)]
P 514
Under traditional investment treaties, the respondent state has no rights under which to bring a counterclaim, so the only "claim" a respondent state could have is a claim of "no liability", which translates as its defense as defined above. Under more modern investment treaties, respondent states may have the jurisdictional ability to bring substantive counterclaims and the corresponding rights within the treaty that may be vindicated in investment arbitration. [(15)] Nevertheless, the right to bring a counterclaim is necessarily predicted on the claimant bringing the original claim first. Thus, it is exceedingly rare to see a host state bring an initial claim (rather than a counterclaim) against an investor under a treaty. Such a scenario would most certainly be possible under a contract, as discussed above. Therefore, in the context of pure treaty arbitration under traditional investment treaties, the host state appears to be perpetually stuck in the respondent role with almost no jurisdictional or substantive access to counterclaims. This means that the respondent always has a "no liability" claim but almost never will have any other type of claim under a traditional investment treaty.

In contrast, the individual or corporate investor has the ability to bring both damages claims and non-financial claims in investment treaty arbitration, and, if the respondent state were able to overcome a jurisdictional challenge to a counterclaim, then the investor would also have a "no liability" claim vis-à-vis that counterclaim. This means that the individual or corporate investor has the ability to subsidize the cost of bringing the non-financial claims through the damages claims, meaning that the marginal cost of bringing two (or three) claims instead of one is significantly reduced. In fact, most investors bring at least one damages claim even if they intend to raise non-financial claims as well. Thus, the potential recovery on the damages claim could be enough to cover the costs of the additional non-financial claims such that a dispute financier would agree to finance the representation. In contrast, a respondent state that is denied the ability to bring a damages claim or counterclaim through dispute financing is denied the ability to subsidize its "no liability" claim or other non-financial claim (such as a request for an injunction mandating that an investor stop polluting the environment in the host state). As mentioned above, not-for-profit dispute financiers may be willing to step into the breach for some respondents, [(16)] but they will not do so systematically, regularly or predictably and, therefore, do not present a viable solution to this problem.

P 515
Since both claimants and respondents in investment arbitration may have both damages claims and non-financial claims, the problem is not the type of claim, but rather the type of party. Unsurprisingly, respondents in investment arbitration generally are not attractive targets for investment by for- profit dispute financiers. [(17)] This brings us to our third and final access to justice problem that this thought experiment has uncovered: *How can we provide access to justice for respondents in investment arbitration?* The term "respondents" is appropriate instead of "respondent states", because, although exceedingly rare, a few treaties permit a host state to initiate a claim against an investor. [(18)]

IV Suggestions for Increasing Access to Justice in International Arbitration

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The thought experiment above has raised the following question: *Howcan we provide access to justice for three types of parties in international arbitration: unfunded losers, unfunded winners with non-damages claims or defenses, and respondents in investment arbitration?* This Article concludes with a few ideas regarding how to address this question and thereby improve access to justice in international arbitration.

The first step is for the international arbitration community to decide whether the international concept of procedural due process requires that parties in these three
P 516
categories have adequate access to dispute financing. This is more of a philosophical question than an empirical one, and thus, this question is largely beyond the scope of this brief intervention. The short answer, from this Author's point of view, is that the right to adequate resources for loss mitigation – i.e., a party's right to argue for a tribunal to reduce the amount of the party's loss – is a right that the international arbitration community should recognize as part of the international concept of procedural due process. Arguing in favor of loss reduction may take the form of pursing a claim that is likely to lose, requesting an injunction or other non-monetary relief, arguing for paying less costs despite losing on the merits, or presenting a viable defense. This Article will assume that the international arbitration community would answer the question in the affirmative in order to proceed to the next step in the analysis, although compelling arguments could also be made on the opposing side. (19)

Assuming that these three categories of parties have a right to adequate financing for their claims or defenses, the next question is how to pay for this. This Article presents three categories of possible solutions. The first category of potential solutions involves donations of time or money. For example, perhaps third-party funders, after -the-event insurers, and law firms should engage in pro bono funding for a subset set of worthy claims or defenses that may be long-shot winners, which are seemingly worthy but likely to lose, or non-damages claims. One could include in this category worthy investment claims against judgment -proof sovereigns, meaning that the claimant investor would likely win the case but may be unlikely to be able to collect the award from the respondent. In the latter case, due to the push for transparency in investment arbitration, an unpaid award could perhaps have symbolic, political or public value that would make the award worthwhile for non-monetary reasons.

Another paradigm to consider is that the attorney Bar in some countries asks attorneys to donate a small percentage of their annual hours (e.g., fifty hours on average in the United States) (20) to pro bono efforts or for attorneys to donate money to the pro bono efforts of other attorneys, in lieu of performing the work directly. Similarly, perhaps law firms should take on some international arbitration cases pro bono, without any expectation of reimbursement, and third-party funders or after-the-event insurers should donate some small percentage of their portfolio funds toward pro bono efforts. Arbitrators could agree to hear some cases on a pro bono basis by not charging fees or expenses to the parties. In addition, a defense fund for needy respondents could be
P 517
established, perhaps even from the funds donated pro bono by third-party funders, law firms, and after-the-event insurers. (21) Finally, crowdfunding by multiple individual donors – which already exists – may provide a potential solution in this context. (22)

The second category of potential solutions involves changes in the law or arbitration rules. For example, arbitral institutions could adjust their fee scales to give indigent parties a discount on the fees. Alternatively, arbitral institutions could adopt a rule that a party against whom an injunction is granted must pay the costs of the party awarded the injunction. This latter solution would allow law firms to take on injunction requests on a contingent or conditional basis on the theory that their fees will be repaid if the party is granted the injunction. This solution has the drawback, however, that it would only help parties likely to have their injunctions granted.

Another more controversial idea, which is also less likely to be implemented, is the renegotiation of investment treaties to allow for claims by host states against investors as well as counterclaims by respondents. This one is much harder to implement, since many countries no longer have the political will to ratify a renegotiated treaty, no matter how problematic the existing treaty may be. Nevertheless, countries whose investment treaties have expired, who are engaged in renegotiating their treaties for other reasons, or who are entering into new treaties could consider including provisions to allow for host state claims. Most notably, the recent European Court of Justice decision in *Slowakische Republik v. Achmea BV* may signal that all the investment treaties in Europe may soon need to be renegotiated, at least in part. (23) This is one provision that could be included in those renegotiated treaties or in any EU-wide investment treaty that may be negotiated in the future.

Finally, a third category of solutions involves financiers modifying their criteria when deciding which cases to fund. For example, a third-party funder might modify its algorithms and decision-making

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processes to include other ideals as factors to weigh in
P 518
determining whether to fund a case in order to increase access to justice in international arbitration. One of those ideals could be ensuring that respondent states have access to justice by having access to third-party funding. Notably, respondent states can fall into all five categories of unfunded winners mentioned in the introduction to this Article. Respondent states can be longshot winners, defendant winners, non-financial winners, and political winners all at the same time, depending on the facts and circumstances of the dispute. Respondent states – particularly ones that have viable counterclaims – can also be merit-based winners whose claims are too expensive to pursue relative to their claim value when offset by the cost to defend against the investor's original claim.

Furthermore, third-party funders have a much more dubious reputation in investment arbitration, when compared to commercial arbitration. Gallons of ink have been spent arguing against allowing third-party funding in investment arbitration for a variety of reasons. (24) If third-party funders financed some respondent states in investment arbitration, then perhaps the participation of third-party funders in investment treaty cases would be viewed as more balanced, perhaps even viewed positively. In addition, investment arbitration, as a whole, may be viewed as more legitimate if respondent states have more regular access to third -party funding. This Author would even go so far as to assert that, if third-party funders in international arbitration choose to fund only one category from the three categories of parties mentioned above in order to increase access to justice, then respondent states in investment arbitration are a prime category with which to begin.

To address a broader question, the solutions presented in this Article depart from the poverty paradigm that is often used to argue that dispute financiers should modify their choices regarding which cases to fund to promote access to justice. (25) For example, since so few respondent states are currently being funded, to this Author's knowledge, both poor and wealthy respondent states alike are equally denied third-party funding from most for-profit funders. Instead, this Article presents an argument that other worthy aspects of the case itself may be the true foundation of “access to justice” that funders should espouse and support financially, such as upholding the health and safety laws of a country, (26) defending against abusive investment practices, ensuring the stability of a country's legal system, stopping damaging environmental practices of investors, clarifying the meaning of ambiguous treaty language, and so on. This Article argues that
P 519
those are worthy ideals worth pursuing and financing regardless of the wealth or poverty of the respondent nation or the potential for profit (or lack thereof).

V Conclusion

The thought experiment presented in this Article intends to provoke discussion and deep thought about the legitimacy crisis in international arbitration and investment arbitration as viewed through the lens of financial access to justice. The assumptions made herein may seem rudimentary and the solutions presented may seem idealistic, but this is merely a starting point for a global discussion. This Author invites those readers who have far greater empirical skills to confer with those who have the data – the arbitral institutions and the financiers – to devise a way to measure empirically the availability of access to justice or lack of access to justice in international arbitration. If such research occurs, then targeted solutions could be developed that may be more viable to implement than those solutions presented herein.

P 519
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*)

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1)

See, e.g., Chris HAMBY, *Secrets of a Global Super Court: A BuzzFeed News Investigation*, BuzzFeed.com, (28 Aug. – 12 Oct. 2016) <www.buzzfeed.com/globalsupercourt> (last accessed 2 Feb. 2019) (a six-article series); Rebecca LOWE, "Speculate and Arbitrate to Accumulate", IBA Global Insight (Apr/May 2013); Pia EBERHARDT, "A Response to the Critics of 'Profiting from Injustice'", Kluwer Arbitration Blog, (2 Jan. 2013), <http://arbitrationblog.kluwerarbitration.com/2013/01/02/a-response-to-the-critics-of-profiting-from...> (last accessed 2 Feb. 2019); Transnational Institute and Corporate Europe Observatory, *Profiting from Injustice* (Brussels/Amsterdam, Nov. 2012), available at <https://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf> (last accessed 23 May 2018).

2)

But see Kate BROWN DE VEJAR and Chloe BALDWIN, "The Economics of Access: Systemic Imbalances in ISDS", this volume, p. 520 at p. 541 ("Certainly, third-party funders have no incentive to back a losing claim, and they generally have skilled teams of lawyers who assess the claim before determining whether to invest. But studying the form guide doesn't mean that the punter will pick the winning horse. The fact that the third-party funder has studied what is known about the case at a certain point (usually before anything is known of the respondent State's position) and is financially incentivized to bet on a winner does not mean that because the funder decides to invest, the case is bulletproof, or even that it is likely to end in a result favorable to the investor. It also does not mean that a fundamentally unmeritorious claim, which should never have been brought, will not receive third-party funding.") (parentheses in original).

3)

There may be at least one notable exception. Narghis Torres, Co-Founder and CEO of LexFinance (<www.lex-finance.com>), publicly stated that his firm regularly finances respondent states in investment arbitration at an event titled "Third-Party Funding in Investor-State Dispute Settlement" hosted by Columbia Law School on 17 October 2017. This lends credence to the solution presented in Sect. IV of this Article, below.

4)

See e.g., Ylli DAUTAJ and Bruno GUSTAFSSON, "Access to Justice: Rebalancing the Third-Party Funding Equilibrium in Investment Treaty Arbitration" (18 Nov. 2017), <http://arbitrationblog.kluwerarbitration.com/2017/11/18/access-justice-rebalancing-third-party-fund...> (last accessed 2 Feb. 2019); Jaroslav KUDRNA, "Arbitration and Right of Access to Justice: Tips for a Successful Marriage", Transnational Notes Blog (22 Feb. 2013) <https://blogs.law.nyu.edu/transnational/2013/02/arbitration-and-right-of-access-to-justice-tips-for-...> (last accessed 2 Feb. 2019); Petra BUTLER and Campbell HERBERT, "Access to Justice vs Access to Justice for Small and Medium-Sized Enterprises: The Case for a Bilateral Arbitration Treaty", 26 New Zealand Universities Law Review (Dec. 2014) p. 186; Brooks W. DALY and Sarah MELIKIAN, "Access to Justice in Dispute Resolution" in Krista Nadakavukaren SCHEFER, ed., *Poverty and the International Economic Legal System: Duties to the World's Poor* (Cambridge University Press 2013) pp. 211-224; Francesco FRANCIONI, "Access to Justice, Denial of Justice and International Investment Law", 20 European Journal of International Law (1 Aug. 2009, issue 3) pp. 729-747 <https://doi.org/10.1093/ejil/chp057> (last accessed 2 Feb. 2019).

5)

Chapter 3: Definitions, p. 50, The ICCA Reports No. 4: ICCA-Queen Mary University of London Task Force Report on Third-Party Funding in International Arbitration (International Council for Commercial Arbitration, 2018) (numbering and spacing in original), <www.arbitration-icca.org/publications/Third-Party-Funding-Report.html> (last accessed 2 Feb. 2019).

6)

This same argument could potentially be applied in a domestic criminal prosecution context. In that context, the equivalent to a respondent state winner would be an innocent criminal defendant, for whom funding is non-existent, since all funding is currently limited to civil litigation in all the jurisdictions in which this Author found the existence or regulation of third-party funding (over sixty countries). See generally Lisa Bench NIEUWVELD and Victoria Shannon SAHANI, *Third-Party Funding in International Arbitration*, 2nd. ed. (Wolters Kluwer 2017). Presenting and analyzing this undoubtedly controversial argument in favour of allowing third-party funding in criminal defence cases is beyond the scope of this Article.

7)

See generally Lisa Bench NIEUWVELD and Victoria Shannon SAHANI, *Third-Party Funding in International Arbitration*, 2nd. ed. (Wolters Kluwer 2017) (citing contingent or conditional fee caps in the Canada, China, New Zealand, South Africa, the United Kingdom and the United States). There are also likely many other countries that cap contingent or conditional fees, but which were not included in the aforementioned book due to the lack of information available from those countries regarding the availability of third-party funding.

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8)

For reasons beyond the scope of this Article, the Author takes the view that states and state-owned entities that are parties in a contractually-based international commercial arbitration are in a fundamentally different position than respondent states sued in investment treaty arbitration. For example, one key difference is that contractual rights are bilateral whereas rights under classic investment treaties are unilateral in favor of investors and against states.

9)

See e.g. K. BROWN DE VEJAR and C. BALDWIN, supra fn. 2, at p. 541.

10)

See Victoria Shannon SAHANI, “Revealing Not-for-Profit Third-Party Funders in Investment Arbitration”, Oxford University Press Investment Claims Blog (1 Mar. 2017), <http://oxia.ouplaw.com/page/third-party-funders> (last accessed 2 Feb. 2019).

11)

For arguments in favour of granting states jurisdiction to bring claims in investment arbitration, see, e.g., Victoria SHANNON, “The Structural Challenge of Investment Arbitration Viewed Through the Lens of Third-Party Funding”, Oxford University Press Investment Claims Blog (9 Jun. 2015) <http://oxia.ouplaw.com/page/491/the-structural-challenge-of-investment-arbitration-viewed-through-th...> (last accessed 2 Feb. 2019); Gustavo LABORDE, “The Case for Host State Claims in Investment Arbitration”, 1 Journal of International Dispute Settlement (1 February 2010, issue 1) pp. 97-122, <https://doi.org/10.1093/jnlids/idp008> (last accessed 2 Feb. 2019).

12)

See, e.g., Michael E. SCHNEIDER, “Non-Monetary Relief in International Arbitration: Principles and Arbitration Practice” in *Performance as a Remedy*, ASA Special Series no. 30 (Juris 2011); Brooks E. ALLEN, “The Use of Non-Pecuniary Remedies in WTO Dispute Settlement: Lessons for Arbitral Practitioners” in *Performance as a Remedy*, ASA Special Series no. 30 (Juris 2011); Christoph SCHREUER, “Non-Pecuniary Remedies in ICSID Arbitration”, 20 Arbitration International (2004, no. 4) pp. 325-332.

13)

For a basic explanation of jurisdiction in investment treaty arbitration, See, e.g., Christoph SCHREUER, “Jurisdiction and Applicable Law in Investment Treaty Arbitration”, 1 McGill Journal of Dispute Resolution (MJDR) (2014, issue 1) (republished in Transnational Dispute Management (2015, no. 6), available at <www.transnational-dispute-management.com> (last accessed 2 Feb. 2019)).

14)

See, e.g., Tarcisio GAZZINI, “The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties” (26 Sep. 2017), <www.iisd.org/itn/2017/09/26/the-2016-morocco-nigeria-bit-an-important-contribution-to-the-reform-of-...> (last accessed 2 Feb. 2019) (describing the innovations in this treaty, including putting obligations on investors to comply with the laws of the host state and providing a state the opportunity to sue an investor in the courts of its home country for violations of the treaty obligations). While this treaty does not allow for a state to bring an investment arbitration claim against an investor, the treaty does provide a judicial route through which the state may be compensated for any wrongs the investor commits under the treaty. In addition, the treaty is silent regarding whether states may bring counterclaims against investors in investment treaty arbitration, which may open the door to jurisdiction over such claims. The effects of these provisions will be tested if a case is eventually commenced under the treaty.

15)

For some examples of how tribunals have responded in cases in which host states have tried to bring counterclaims under traditional investment treaties, see Jean KALICKI, “Can States Assert Counterclaims Against Investors in BIT Proceedings?”, Kluwer Arbitration Blog (16 Jan. 2012), <http://arbitrationblog.kluwerarbitration.com/2012/01/16/can-states-assert-counterclaims-against-inve...> (last accessed 2 Feb. 2018).

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16)

See Victoria Shannon SAHANI, Mick SMITH and Christiane DENIGER, “Third-Party Financing in Investment Arbitration” in Christina BEHARRY, ed., *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration* (Brill Nijhoff 2018) p. 49 (“In addition, not-for-profit funding may be a viable option for respondents in international arbitration – particularly respondent States in investment arbitration – since a financial return on investment would not normally be required.”). For example, in *Philip Morris v. Uruguay*, Uruguay's defence was funded by a not-for- profit funder called the Campaign for Tobacco-Free Kids, and the Anti-Tobacco Litigation Fund (a Bloomberg Foundation and Gates Foundation collaboration) is funding respondent states facing similar challenges. See <www.bloomberg.org/press/releases/bloomberg-philanthropies-bill-melinda-gates-foundation-launch-anti-...> (last accessed 2 Feb. 2019). These are both not-for-profit funders, however, which invites the question, should only not-for-profit funders fund respondent states? This Article argues for answering this question in the negative, but cogent arguments could be made on the other side. For example, in the political campaign finance arena, arguments have been raised about the impropriety of corporate influence over elections and governmental functions through lobbying and financial contributions; one could argue that for-profit third-party funders funding states generally could yield similar negative effects. This Article avoids this question by choosing *respondent* states (not claimant states) as the paradigm. Respondent states, by definition, do not commence arbitrations and, therefore, theoretically there can be no corporate influence on the respondent state with respect to stirring up the arbitration itself. But some have argued that third-party funders may themselves fall within the definition of “investor” within a treaty and, thus, the same investor-host state problems that exist in the foreign direct investment system could thereby infect third-party funding, if funders begin to fund respondent states regularly. See, e.g., Duarté G. HENRIQUES, “Third-Party Funding: A Protected Investment?”, Spain Arbitration Review (2017, no. 30).

17)

There is potentially one dispute financier that would finance a respondent state's “no liability” claim (i.e. its defence), but one dispute financier is not enough to solve a systemic, structural problem. See description of LexFinance, supra fn. 3.

18)

See supra fn. 14 (describing the 2016 Morocco-Nigeria BIT which allows host state claims against investors in national courts and, arguably, may allow host state counterclaims in an investment arbitration initiated by the investor under this treaty).

19)

For example, in *Essar v. Norscot* [2016] EWHC 2361 (Comm), the High Court upheld an ICC tribunal's ruling requiring the respondent to pay the claimant's cost of third-party funding because the court found that the respondent so damaged the claimant's financial position as to require the claimant to seek third-party funding in the first place. For a description of the *Essar* case, see, e.g., Maximilian SZYMANSKI, “Recovery of Third Party Funding Ordered by ICC Tribunal and Confirmed by the English High Court – An Under-Theorised Area of the Law”, Kluwer Arbitration Blog (8 Oct. 2016) <http://arbitrationblog.kluwerarbitration.com/2016/10/08/recovery-of-third-party-funding-ordered-by-i...> (last accessed 2 Feb. 2019).

20)

See American Bar Association, Model Rules of Professional Conduct, Rule 6.1 (“Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year…. In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.”) (parentheses in original).

21)

For an example of a proposal for funding states in WTO dispute settlement, see, e.g., Mauritius NAGELMUELLER, “Guest Post: Dispute Finance for Sovereigns in WTO Disputes – Access To Justice for Developing Countries”, International Economic Law and Policy Blog (12 Sep. 2017) <http://worldtradelaw.typepad.com/ielpblog/2017/09/dispute-finance-for-sovereigns-in-wto-disputes-acc...> (last accessed 2 Feb. 2019) (proposing that for-profit dispute financiers should provide financing to developing states in WTO dispute settlement proceedings).

22)

See, e.g., Manuel GOMEZ, “Crowdfunded Justice: On the Potential Benefits and Challenges of Crowdfunding as a Litigation Financing Tool”, 49 U.S.F. L. Rev. (2015) p. 307; Ronen PERRY, “Crowdfunding Civil Justice”, 59 B.C. L. Rev. (2018) p. 1357.

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23)

Slowakische Republik v. Achmea BV, Case C-284/16, Decision of the Court of Justice of the European Union, (6 Mar. 2018). For a description of the decision and its impact, See, e.g., Court of Justice of the European Union, Press Release: No. 26/18 – *The arbitration clause in the Agreement between the Netherlands and Slovakia on the protection of investments is not compatible with EU law*(6 Mar. 2018) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180026en.pdf> (last accessed 2 Feb. 2019); Reuters, "EU Court Rules Against Tribunals Settling Intra-EU Disputes" (6 Mar. 2018), <www.reuters.com/article/us-eu-court-arbitration/eu-court-rules-against-tribunals-settling-intra-eu-d...> (last accessed 2 Feb. 2019); Center for International Environmental Law, *Press Release: NewEuropean Court of Justice (ECJ) ruling could signal end of intra-EU investor-state dispute settlement* (6 Mar. 2018), <www.ciel.org/news/new-european-court-justice-ecj-ruling-signal-end-intra-eu-investor-state-dispute-s...> (last accessed 2 Feb. 2019).

24)

See supra fn. 1.

25)

See, e.g., United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UNOHRLLS) and the International Development Law Organization (IDLO), *Investment Support Programme for the Least Developed Countries (ISP/LDCs): Programme Document*, p. 5 and fn. 11 (6 Sep. 2017), available at <https://res.cloudinary.com/lbresearch/image/upload/v1506335575/isp_ldcs_programme_document_6_septemb...> (last accessed 2 Feb. 2019) (proposing a system for providing support to poor states for, among other endeavours, "[f]oreign investment-related dispute settlement between the Client and a foreign entity, including arbitration or any other alternative dispute resolution proceeding" and "if the applicable rules to the dispute allow, the ISP/LDCS may also seek to identify and field the Client's party-appointed arbitrator").

26)

See supra fn. 16 for an example of a non-profit funder supporting a state's laws regarding packaging of tobacco products for public health and safety reasons.

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Chapter 15: Access to Justice and the Costs of ICSID

Duarte Gorjão Henriques; Avani Agarwal

Access to justice has been recognised by the international legal community to be a fundamental right. The right deals with the ability of a person to ensure that their grievance is heard and appropriately redressed. This right is protected in investor-state transactions because states enter into bilateral investment treaties to provide investors with access to neutral arbitral tribunals. However, the costs of ISDS proceedings are so high, that they may negatively impact the ability of parties to approach arbitral tribunals. ICSID is one of the most significant institutions in the world for ISDS, thus making it crucial to consider its cost structure distinctly from average ISDS costs. This chapter looks at past empirical work dealing with ICSID proceedings in order to establish average costs. The ICSID Convention, the Administrative and Financial Regulations, the Schedule of Fees, as well as information about costs that has been made publicly available by the centre are all analysed. Lastly, various ICSID awards are studied along with prior literature, to ascertain the existence of any pattern in how costs are allocated. Not only can no such pattern be found, but different factors have been used with varying frequency by different tribunals, due to the amount of discretion provided to them. Such uncertainty is detrimental to the ability of parties to make informed choices about entering into ISDS proceedings. Based on these discussions, it is concluded that the right of parties to access justice is restricted by the increasing costs of ICSID Arbitration.

§15.01 INTRODUCTION

The international legal framework has recognised that there are some fundamental rights that belong to each human being, such as the right to a fair trial, the right to a proper medical care system, the right to employment, the right to a condign housing and many other rights recognised by international legal instruments such as the UDHR.

P 320

Among those rights one may also find the right to 'own property alone as well as in association with others' (Art. 17(1) of the UDHR). As a consequence, the principle that 'no one shall be arbitrarily deprived of his property' (Art. 17(2) of the UDHR) is a corollary of these fundamental rights.

These rights have also produced some crucial ramifications implied in international transactions, particularly the contractual freedom and the right to undertake in, promote and exploit investments in foreign countries. That is, not only is the right to invest and maintain investments in countries different from those of the national investor a recognition of the contractual freedom, but also and more importantly it is a recognition of the dignity of the human being and of the relevance of the relationships between sovereign states. In other words, international relationships between civilised sovereign states assume and promote the paramount importance of the contractual freedom, of the right to invest and maintain investments in foreign soil, and thus entail the need for a stronger protection of those investments.

As a consequence, many sovereign states enter into agreements for the protection of foreign investments with other states in order to secure equal status among nationals of both states. In this regard, the most popular instrument is the BIT, counting around 4,000 instruments as of today. Those treaties are designed to promote economic cooperation, stimulate the flow of capital and economic development of the parties, maximise the utilisation of resources, improve living standards, and 'providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration'. (1)

Consistently, virtually every BIT contains provisions aimed at assuring a treatment to foreign investments equal to that conferred to national ones, obliging the compliance with international standards such as the 'fair and equitable treatment', and 'full protection and security' and the prohibition of expropriation except under strict circumstances and always against fair

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compensation. Along with these usual provisions, bilateral treaties and other instruments for the protection of investments also provide for the settlement of disputes via negotiation, mediation and, more frequently, ad hoc arbitration under the UNCITRAL Rules or institutional arbitration under ICSID Arbitration Rules, established under the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of other States.

On the one hand, bringing forward a claim against a host state can be costly – extremely costly to be more precise – especially if considering the situation where foreign investors are deprived of all their assets as a result of expropriation measures without proper compensation or have become otherwise impecunious to pursue their claims, rendering almost impossible to get redress of their deprivation. On the other hand, the investor-state dispute settlement setting does not provide for 'legal aid' (except in the conspicuous case of the World Trade Organisation framework, which in any event is yet of too little help). Further, more often than not, resorting to local state courts is not a viable option (which may well happen for a number of reasons,
P 321
including those cases where the judicial system does not deliver a remedy in a timely manner).

This brings into question a potential violation of another equally crucial and fundamental right, that of access to justice. The right may be broadly defined as the 'ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances'. [(2)] It has been recognised in the EU Charter of Fundamental Rights (Article 47), the United Nations International Covenant on Civil and Political Rights (Article 2(3) and 14) and even the UDHR (Article 8). While the scope of the right has been restricted in these documents to instances where other fundamental rights are violated or where there is a threat of criminal sanctions, a broader construction has been recognised. Indeed, in the case of *Mondev International Ltd v. United States of America,* [(3)] an ICSID tribunal heard an argument premised on the denial of access to justice and found it to be viable.

The UN has acknowledged that one of the most significant obstacles in accessing justice is the cost of legal advice and representation. [(4)] Within the ISDS framework, these costs are compounded by the expenses of accessing and using the established mechanisms. It is therefore worth addressing the structure of these costs under the ICSID framework. In the following sections, we will address this topic and assess if and how it challenges the right of access to justice.

§15.02 COSTS IN THE ISDS FRAMEWORK

The first step in this analysis is to determine what is meant by costs. While each institution is likely to have its own definition, the UNCITRAL Rules, as updated in 2010, are reflective of the general standard. Article 40 defines costs as:

> (a)The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
> (b)The reasonable travel and other expenses incurred by the arbitrators;
> (c)The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
>
> P 322
> (d)The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
> (e)The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
> (f)Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.

This is taken to be an exhaustive list under the rules, since the article uses the word '*only*' before listing out the potential expenses.

Costs in investor-state arbitration may be classified into two main categories: arbitration costs, which include the costs of using an institution, fees paid to arbitrators and various administrative expenses; and legal costs, which include the parties' own costs such as legal fees. Most procedural rules in investor-state proceedings make it a point to distinguish between the two. [(5)]

The average costs of an investment arbitration have been estimated to be USD 10 million per case, with each party paying nearly USD 5 million, if an assumption is made that parties share these costs equally, at least before the award. [(6)] This has been recognised as a significant, staggering

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sum by commentators. (7) A survey conducted by the Corporate Council International Arbitration Group found that 100% of corporate counsel participants considered international arbitration to be too expensive, with much of the criticism targeted towards investor-state arbitration in specific. (8)

Based on a survey of publicly available information in 2012, commentators point out that combined costs exceed even USD 30 million in some cases. (9) For instance, in the case of *Abaclat v. Republic of Argentina,* (10) nearly USD 40 million was spent, with the claimant investor alone shelling out USD 27 million of the costs.

The largest component of these expenses are legal costs, estimated to average at 82% of the total costs of a case. (11) Arbitrator fees makes up for 16% while institutional costs usually amount to no more than 2% of the total expenditure. (12) In terms of average figures, legal costs are estimated to be anywhere between USD 4.4-4.5 million. Tribunal costs are estimated to fall around USD 750,000. (13)

P 323

The overall costs borne by investors and states are equivalent. (14) However, the impact of the high costs is felt disproportionately by some parties due to extraneous factors as well. For instance, studies note that developing countries may lack the requisite legal experience domestically and may have to bring in outside counsel. This in turn increases the legal costs they must incur. (15)

The high costs of the process also mean that some parties will be more likely to settle the dispute, often at values that they may not find to be just. A good example of this is the empirical study conducted by Anton Strezhnev, which proved that with an equivalent claimant firm, high-income respondent states were 22% more likely to receive a final award in comparison to low- and middle-income respondents. (16)

The average amounts awarded to successful claimants under the ISDS framework is nearly USD 76 million, with the median falling just around USD 10.5 million. If costs amount to USD 10 million, they are a massive and significant portion of the financial outcome. (17)

There have been some discussions in existing literature as to the reasons behind the high costs. Some explanations attribute the costs to the way lawyers deal with ISDS. It is argued that lawyers use expensive litigation techniques that have been borrowed from corporate practices or litigation before US courts (such as discovery), and bill up to USD 1,000 per hour. Further, lawyers must spend a substantial amount of time on researching and selecting arbitrators. Legal costs also increase due to the use of high-cost party appointed experts and detailed discussions of procedural and discovery-related issues. (18)

Another set of explanations focuses more on arbitration costs, discussing instead the limited availability of arbitrators and the tendency of parties to appoint from within the same pool of arbitrators, thus creating an asymmetrical market. (19)

Some other explanations also refer to the nature of cases and the law that is applicable, high damage claims that coincide with high tribunal costs as well as uncertain cost shifting rules. (20)

Further, it is crucial that parties considering entering into or responding to an ISDS proceeding know how costs will be distributed as this will allow them to make fully informed decisions about whether or not to enter into the proceeding, whether or not to accept a settlement offer, etc. (21) Two broadly defined approaches to cost allocation have arisen in international commercial arbitration: that each party bears its own costs; or that the successful party is reimbursed for its costs, thus encapsulating a

P 324

notion that ‘costs follow the event’. (22) In commercial disputes, successful parties tend to recover at least some of their costs. (23) This is a well-reasoned approach because it compensates the party while also discouraging ‘unmeritorious actions’. (24) Unfortunately, in investor-state arbitration it is not a generally established practice to reimburse the winning party for their costs. Indeed, in a significant number of awards, the tribunal requires for the parties to bear their own costs. (25)

A review of 168 final awards, rendered between 2006 and 2013, reveals that ISDS has no specific approach to cost allocation. (26) Out of these awards, 47% compensated the prevailing party while 53% awards required that parties pay their own expenses. (27)

Tribunals have shown an inclination to awarding costs when claimants succeed, more often that when respondent states do. Even though claimants win only 41% of cases, they get a positive costs order in 53% of the disputes they win, compared to successful respondents who only get such orders in 38% of the cases. (28)

A direct consequence of these high costs has been that organisations such as the UNCTAD are starting to discuss how to replace investment arbitration with more effective alternatives. (29) This is incredibly unfortunate, considering the many advantages associated with arbitration as a dispute

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resolution mechanism.

§15.03 COSTS UNDER ICSID

ICSID is the world's primary institution in the field of international investment dispute settlement. It has administered a majority of all international investment disputes and features in most international investment treaties. (30) The centre has its own procedural rules, which are popularly referred to, and also administers cases under other rules. The number of cases registered by ICSID is only growing. (31) Thus, costs in ICSID arbitrations are likely to impact a large number of investors and states. Consequently, these costs must be examined in specific detail.

P 325

In 2015, an effort was made to examine 138 ICSID arbitrations, concluded over the period of the five preceding years, in order to collect and evaluate data-related to costs. (32) This study revealed that on an average, the legal costs under ICSID for a claimant were approximately USD 5.6 million, with costs for respondents falling around USD 4.9 million. Additionally, tribunal costs came up to USD 882,668. (33)

It must be noted here that not only are the costs significantly higher than average ISDS costs, but there is also a significant disparity between the costs being paid by claimants and respondents. Further, data was not available for many of the 138 proceedings, thus limiting the scope of the study to a large extent.

ICSID tribunal costs are noticeably higher than the average costs arrived at by an Allen & Overy study conducted in 2012, which estimated them to be USD 769,000. (34) However, the same study noted that ICSID tribunal costs have the tendency to be 10% lower than costs under UNCITRAL Rules. (35) This is because ICSID has imposed a cap on arbitrators' fees. (36) Thus, it appears that the ICSID rules may have attempted to resolve some of the issues associated with costs.

ICSID administers cases under its own rules and also under other procedural rules. Under the ICSID Rules, costs consist of a party's private legal expenditures, the advances paid to ICSID for the fees and expenses of arbitrators as well as the centre's expenses and administrative charges, and the lodging fee that must be paid to institute proceedings. (37) There are also additional charges associated with special services or for the use of the Secretary-General as an appointing authority. (38)

As previously noted, legal costs in ICSID arbitrations are fairly high. These costs are not dealt with under the rules. Article 60 of the ICSID Convention provides a general framework related to costs and is a good starting point. It states that the tribunal shall determine fees and expenses within the limits that are laid out by the administrative council, after consultation with the Secretary-General. Alternatively, parties can agree with the tribunal in advance to fix the expenses payable to the members.

Thereafter, the Administrative and Financial Regulations need to be looked at to understand the cost structure. Regulations 14, 15 and 16 deal with the cost of a proceeding.

Regulation 14 refers to the direct costs of individual proceedings. Regulation 14(1) provides that each member of a tribunal, a commission or an *ad hoc* committee is entitled to receive a fee for each day on which he participates in meetings of the body

P 326

he is a member of (a), a fee for the equivalent of each eight-hour day for all other work performed in relation to the proceedings (b), a *per diem* allowance (c), travel expenses and (d) reimbursements for any direct expenses reasonably incurred. The amounts payable under (a) and (b) are determined by the Secretary-General, with the approval of the chairman, from time to time. The current fee is fixed as USD 3000 per day of participation in meetings and USD 375 for each hour of related work. If members wish to receive a higher amount, they must make a request for the same through the Secretary-General and the request must be approved by the disputing parties. (39) This is a significantly helpful measure as it puts a limit on the most significant portion of arbitration costs. The amounts under (c) and (d) are based on norms that have been fixed for the Executive Banks of the World Bank. (40)

Regulation 14(2) states that all costs and reimbursements related to members, witnesses, experts, the secretariat and hosts of proceedings held away from the centre will be payable only to the centre, which shall allot them. While this has no impact on the magnitude of the costs, it reduces the likelihood of costs being arbitrarily increased via private transactions as well as the loss of objectivity that such transactions can lead to.

Regulation 14(3) provides that the parties must make advance payments to the centre, instead of paying as and when costs arise. Costs likely to be incurred over three to six months are determined by the Secretary-General, in consultation with the President of the concerned body as well as the

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parties so far as it is possible. This mechanism, while administratively efficient, is detrimental to the idea of access to justice because during the institution of proceedings, the assets of investor parties may have been seized, or at the least negatively affected, and their financial capacity may have been reduced. They further have no binding say in the determination of costs. The first advance cost has been estimated to be USD 100,000-USD 150,000 per party. (41) The parties can also be asked to make additional supplementary payments if the Secretary-General and the President of the body believe this is necessary. However, before making such a demand, the Secretary-General is required to assess actual expenses incurred to ensure that more funds are actually needed. This prevents the parties from being made to pay excessively.

The costs governed by Regulation 14 are to be paid equally by both parties, although this arrangement may be changed during the final decision. All advances are payable the moment the Secretary-General makes a demand, and in whatever currency he denotes. The Secretary-General can stay the proceeding after forty-five days of non-payment, and can permanently discontinue the proceeding if it has been stayed for six consecutive months by reason of non-payment. This raises the concern that there may be situations where a state party can restrict the claimant's financial capacity for just long enough to avoid the proceeding.

P 327
The advance payable under Regulation 14 is inclusive of the administrative fee payable for use by the centre. Instead of charging based on actual use, the centre charges USD 42,000 as an annual fee, payable equally by both parties. (42) Since states are likely to make more use of the centre than individual investors, it is possible that this cost impacts investors disproportionately despite being objectively equal for both sides.

Regulation 15 deals with the fees for 'Special Services' that a party may want, such as translation or copies of documents. Special services will only be performed if the party concerned deposits the due fee in advance. The costs of such services are determined based on a schedule created by the Secretary-General and the parties or the tribunal have no say in the matter. (43) Services like translation are often crucial for parties to be fully able to participate in proceedings and this increased cost invariably means that some parties will find it tougher to take part in the arbitration than others will.

Regulation 16 describes the lodging fees payable for use by the centre. The party that wishes to institute arbitration proceedings, or to request a supplementary decision, rectification, interpretation, revision or annulment of an arbitration award or to resubmit a dispute to a tribunal after annulment, must pay a non-refundable fee to the centre. This fees under the current schedule is USD 25,000 for institution and annulment, and USD 10,000 for supplementary decisions, rectification, interpretation, revision and resubmission. (44) This cost remains the same even if the case is instituted under the Additional Facility rules, which deal with disputes that do not fall under the Convention. (45) This lodging fee must be paid along with the submission of the relevant request. For a post-award remedy, the fee must be paid within a prescribed time limit. (46) Additionally, while other costs of the proceeding, such as those of the centre and the tribunal, are split equally between the parties, the lodging costs are payable only by the party that files the request. This creates a situation where the party who seeks justice, or wishes to rectify perceived injustice, pays more. Given that claimants already have higher average legal costs, this additional expenditure only makes it harder for them to go through these proceedings.

When it comes to cost allocation, ICSID Rules have been called an 'outlier' (47) for being the most vague and uncertain. They neither provide a default position nor do they lay out the relevant factors that ought to be considered while determining who should pay what amount. (48) Article 61 of the Convention merely states that the tribunal will assess the expenses associated with the proceedings and decide 'how and by whom those expenses, the fees and expenses of the members of the tribunal and the
P 328
charges for the use of the facilities of the centre shall be paid'. This determination of costs is to be a part of the award. At the end of the proceeding, parties are invited to submit submissions on cost which include their arguments on how costs should be allocated along with an assessment of the costs they have incurred. (49) The Convention or any other rules do not provide any substantive criteria to guide the tribunal in cost allocation after parties have made their submissions (50). The only exception to the absolute discretion given to the tribunal is if the parties manage to agree on how costs should be distributed.

The *travaux préparatoires* to the ICSID Convention complicates the matter of cost allocation further. Various drafts of the Convention contained an express rule that parties should pay their own costs, unless a party has instituted proceedings in bad faith. (51) However, this was removed from the final draft and a long process of negotiation. (52) During the negotiations it was often discussed that equal sharing of costs was 'consistent with the character of the ICSID regime', (53) which imagines

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friendlier proceedings. [(54)] However, various delegates from Latin America were in favour of extending the scope of cost recovery beyond bad faith actions. [(55)] It was feared by delegates that equal apportionment would discourage small- and medium-sized investors from submitting disputes to the tribunal. [(56)] This means that the influence of costs on access to justice was explicitly recognised by the drafters of the ICSID Convention. Unfortunately, it was dismissed at the time and delegates arrived at the conclusion that creating a limiting schedule of fees would sufficiently deal with the concern. [(57)] Since no consensus could be reached on cost allocation, Austria proposed that tribunals be allowed to make the decision on a case-by-case basis, unless parties agreed otherwise. [(58)] This proposal was accepted and included in the final draft of the Convention. As a consequence of the lack of instructions, no pattern in cost apportionment can be identified. Data suggests that 36% of awards compensate the prevailing parties while 63% awards make parties bear their own expenses. [(59)]

§15.04 ICSID DECISIONS RELATING TO COSTS

ICSID Decisions are reflective of how the centre's financial rules impact access to justice. For instance, in *Commerce Group Corp & San Sebastian Gold Mines, Inc. v.*
P 329
Republic of El Salvador, [(60)] the tribunal discontinued an arbitration proceeding after over three years, because the claimants failed to pay the advance amount due. It was cognisant of the financial difficulties of the claimant as well as its numerous efforts to secure funding. The only decision where this factor was considered was the allocation of costs. The tribunal asked the parties to bear their own costs, despite the claimant having caused the cancellation, since it lacked monetary resources.

It has been argued that ICSID proceedings offer no predictability with respect to how costs will be allocated. [(61)] This section looks at available awards to see if a pattern can be identified.

As the tribunal in *Helnan International Hotels A/S v. Egypt*, [(62)] tribunals take various circumstances into consideration since the Convention provides no specific criteria for decisions on costs. It appears that when a tribunal asks parties to pay their own expenses, it normally does not provide any reasoning. [(63)] Some of the earliest examples of this are *Vacuum Salt v. Ghana* [(64)] and *Tanzania Electric Supply Co v. Independent Power Tanzania Ltd*. [(65)] In both these cases, the parties were asked to pay their own legal costs along with one-half each of the arbitration costs. This lack of reasoning suggests that tribunals accept this allocation to be the starting point. [(66)]

However, tribunals do sometimes provide reasons even when they do not adjust costs. A study of ICSID awards revealed that 15% of cases have used the reasoning that parties have acted in a bona fide manner and that worthy issues have been presented. [(67)] In *Atlantic Triton v. Guinea*, [(68)] the tribunal held that it was not adjusting costs because both parties had acted in good faith and cooperated with the tribunal. In *Wintershall*
P 330
AG v. Argentina, [(69)] the tribunal dismissed the case for lack of jurisdiction but did not adjust costs because it found that the arguments were reasonable and were 'concisely presented to it by both parties'. Similarly, in *Compania de Aguas v. Argentina*, [(70)] costs were not adjusted because it was found that the claimant had 'raised a set of novel and complex issues not previously addressed'.

In the same study, it was found that 45% of the cases referred to relative success or failure as a rational for how costs were allotted. [(71)] In *SOABI v. Senegal*, [(72)] the tribunal cited the fact that neither party had been wholly successful while saying that costs will be shared equally. In *Tradex Albania v. Albania*, [(73)] the claimant won on procedural issues and the respondent prevailed on the merits. The tribunal used this to conclude that both parties should bear their own costs. [(74)] However, in *AAPL v. Sri Lanka*, [(75)] the tribunal found that neither party had been fully successful but treated the cost allocation differently. It allocated costs to reflect the relative success of each party, with the claimant paying 40% of the arbitration costs and one-third of its legal costs, and the respondent paying the remaining expenses.

There are also various awards where tribunals have shifted costs without much explanation. [(76)] An example of this is the case of *GEA Group v. Ukraine*, [(77)] where the state was awarded the entirety of its costs. The tribunal simply stated, '[w]ithout entering upon this debate here, the Tribunal considers that this particular case is an appropriate one for the exercise of its discretion … in the Respondent's favour'. [(78)]

Alternatively, costs may be awarded with an intent to penalise the losing party. This has been used as the reason in 21% of all awards analysed in the mentioned study. [(79)] In *LETCO v. Liberia*, [(80)] the respondent did not participate in the proceedings and instituted a case with its national courts, in violation of Article 26 of the ICSID Convention. Consequently, the tribunal awarded full costs to the claimant in light of the respondent's 'procedural bad faith'. Similarly, in *Telenor v. Hungary*, [(81)] the respondent was awarded over USD 2.5 million, because the claimant's case was found to be

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P 331

vague and poor. In *Cementownia v. Turkey*, (82) the tribunal explicitly stated that 'ICSID tribunals can award costs against parties as a sanction against what they see as dilatory or otherwise improper conduct in the proceeding'. In that case, the respondent was awarded costs because the claimant had filed fraudulent claims, delayed the proceedings and tried to dispose of its assets during the proceeding.

§15.05 CONCLUSION

ISDS proceedings have been found to be expensive and studies have indicated that the costs are significant both in an objective sense but also in the opinion of arbitration counsel. Empirical data suggests that ICSID cases are more expensive than average ISDS disputes. While the centre has a comprehensive set of rules to deal with costs, the only rule that serves to limit costs is that tribunal fees cannot exceed the values set by the Secretary-General. An appropriate manner of cost adjustment can serve to reduce this issue. However, this raises additional questions.

It may be argued that if the winning party will be awarded costs, it can arrange for external funding with the certainty of repayment. However, there are multiple issues with this argument. First, *access* to justice deals with the ability of all parties to seek justice, and it cannot be ascertained by merely ensuring that the party that wins will *post facto* have the capacity to pay. Second, certainty of victory is, more often than not, only a theoretical possibility. Lastly, given that there are rising concerns of bias and external factors influencing the final award, (83) it may be considered inequitable and unjust to impose the entire cost of the process onto the losing party. This leads to the inference that parties should be made to pay for their own costs. There is evidence to suggest that this is the starting position for various tribunals. However, being compensated for costs may be really crucial for some prevailing parties, especially if they have had to source external funding. Indeed, as the discussion shows, both forms of cost allocation have been found to be unjust at different times. While the drafting committee was concerned that paying their own costs may be a hurdle to parties, a tribunal refused to adjust costs to the respondent due to the claimant's financial difficulties. Consequently, it appears that having a fixed method may not serve the interest of ensuring access.

At the same time, having some awareness about how costs may be allocated is incredibly crucial in allowing parties to make the right decisions and to negotiate better settlement options. Consequently, the best solution may be to provide criteria that will serve as a guide to the tribunal while still making cost allocation more predictable. An analysis of ICSID rules and cases reveals that such principles are neither found in the Convention nor can they be conclusively defined based on past cases.

P 332

Based on these factors, it may be concluded that costs under ICSID are high enough to create inequities and to dissuade parties from ensuring that they get the remedies they seek. This situation is not remedied in any significant manner. Thus, costs of proceedings under ICSID restrict the fundamental right of parties to access justice.

P 332

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