THE CONTINUING EVOLUTION OF INVESTOR-STATE ARBITRATION AS A DYNAMIC AND RESILIENT FORM OF DISPUTE SETTLEMENT

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Abstract

In recent years, the investor-State dispute settlement (ISDS) system has faced a barrage of criticism from a variety of critics, including lawmakers from different countries, Non-Governmental Organizations, and sections of the general public. These critics generally allege that the ISDS system unfairly acts as a deterrent on the ability, and sovereign right of a State, to enact regulations and pursue policies that are in its public interest. Furthermore, these critics contend that the ISDS system is non-transparent and tilted in favour of the private investors, often large corporations, which bring claims against the sovereigns. While the scope of this article does not present a comprehensive rebuttal to all of these criticisms, it does explain that many of these criticisms are fundamentally misplaced and fail to take into account the historical context and rationale for the ISDS system. Furthermore, the article explains that critics of the ISDS system largely ignore or fail to appreciate that the ISDS system is dynamic, and allows sovereigns to recalibrate and tailor their international law obligations vis-à-vis foreign investors in response to developments. The article also shows that arbitrators have been at the forefront of driving many positive procedural changes to the ISDS system, often in response to feedback from the users and other affected parties, while also preserving the system's emphasis on due process. In sum, the ISDS system is an effective form of dispute resolution that is capable of adapting itself to the needs of its users.

I. Introduction

International investment law is in the midst of a watershed moment. Even as the scale and scope of cases increase with each passing year,[1] the investor-State dispute settlement ["**ISDS**"] system is facing heated criticism from several quarters over its perceived deficiencies. This has resulted in a powerful campaign that questions the inherent legitimacy of the system and seeks to dismantle or at a minimum, substantially alter it. The debate over the virtues of the ISDS system is dominating headlines across the globe, not only in countries in Asia, Africa, and Latin America where most disputes traditionally arose, but equally in the European Union ["**EU**"] and the United States ["**U.S.**"].

Common criticisms levied against the ISDS system are of two types. The first is substantive; critics believe that the laws under which disputes are adjudicated are unfair.[2] These critics assert

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[1] *See The ICSID Caseload – Statistics (Issue 2016-2)*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES 7 (2016) *available at* https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx [*hereinafter* "The ICSID Caseload – Statistics"] ("As of June 30, 2016, ICSID had registered 570 cases under the ICSID Convention and Additional Facility Rules") (also showing that 52 new cases were registered in 2015, 27 cases in 2005, and 3 cases in 1995); *see also* United Nations Conference on Trade and Development, *World Investment Report 2016*, 104 (2016) *available at* http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf [*hereinafter* "UNCTAD Report"] ("As of January 1, 2016, the total number of publicly known ISDS claims had reached 696").

[2] *See, e.g.,* Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST, Feb. 25, 2015; Peter Muchlinski et al., *Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP),* KENT LAW SCHOOL (July 15, 2014) *available at* https://www.kent.ac.uk/law/isds_treaty_consultation.html; Press Release, An Open Letter from U.S. State Legislators to Negotiators of the Trans-Pacific Partnership Urging the Rejection of Investor-State Dispute

that the international law obligations assumed by States are vague; resulting in States being held liable for legitimate actions, which they never intended to be subject to ISDS. This system, they claim, prevents States from exercising their sovereign right to regulate in the public interest, creating a "*regulatory chill*" that dampens a State's efforts to promote human rights, protect the environment, and improve public health. In essence, these critics contend that international arbitral tribunals are regulating public policy, a role traditionally reserved for sovereign States.

Second, critics assert that the arbitral procedure is opaque; their narrative holds that an exclusive "*club*" of unaccountable arbitrators interprets States' obligations in secrecy, and that arbitrators are biased against States from emerging markets while unduly favouring corporations from the developed world.[3] These criticisms, albeit largely misguided, nonetheless deserve the attention of, and a fully considered response from, the arbitration community. It is the community's responsibility to improve awareness and promote transparency to ensure that all stakeholders have a full and accurate understanding of how the system operates, which is a vital prerequisite to building consensus around the system and appreciating its invaluable contribution to advancing the rule of law.

This article addresses how the ISDS system has responded to these criticisms in recent years by organically evolving to address the above challenges. The first section briefly touches upon the origins of ISDS and the rationale for its continued existence. The second section explains how substantive international legal protections have improved through States recalibrating their investment treaty obligations in response to developments in the ISDS system. The third section discusses how arbitrators, who act as the guardians of the system, have also responded to challenges in adjudicating disputes while continuing to preserve the system's emphasis on due process.

This article does not claim to present comprehensive rebuttals and/ or solutions to the criticisms enumerated above. Instead, it demonstrates that those criticisms are misguided, as intrinsic to the system are methods for various actors – particularly States and arbitrators – to understand and respond to these challenges. And, as the authors show, those actors are indeed using the techniques available to them to constantly improve the system. States are actively refining their treaties, seeking to balance investor protection with sovereign regulation. Governments from every region are participating in this process of treaty reform, many through multilateral initiatives, facilitating the development of new norms in international investment law. At the same time, arbitrators are responding to procedural challenges by developing innovative and flexible methods that balance arbitral efficiency with inclusivity.

Settlement (July 5, 2012) *available at* https://www.citizen.org/documents/State-Legislators-Letter-on-Investor-State-and-TPP.pdf [*hereinafter* "Open Letter"]; Chris Hamby, *The Court that Rules the World,* BUZZFEED (Apr. 28, 2016), *available at* https://www.buzzfeed.com/chrishamby/super-court?utm_term=.ipkwqzqDz#.esAOWXW7X; *but see* European Federation for Investment Law and Arbitration, *A response to the criticism against ISDS* (May 17, 2015) *available at* http://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf; Press Release, An Open Letter about Investor-State Dispute Settlement, FORTIER CHAIR IN INTERNATIONAL ARBITRATION & INTERNATIONAL COMMERCIAL LAW (Apr. 20, 2015), *available at* https://www.mcgill.ca/fortier-chair/isds-open-letter.

3 Open Letter, *supra* note 2 ("Investor-state dispute settlement (ISDS) clauses allow foreign investors the right to sue governments directly in offshore private investment tribunals, bypassing the courts and also allowing a 'second bite' if the investors do not like the results of domestic court decisions.").

II. Rationale for, and Benefits of, the ISDS System

Judge Stephen Schwebel, former President of the International Court of Justice, endorsed the creation of the investment treaty regime as the "*boldest innovative step in the modern history of international cooperation concerning the role and protection of foreign investment*".[4] This view is well-founded. In addition to their considerable substantive protections, described below, the regime provides investors with a neutral forum in which to bring claims against States. Investment is also one of the few areas of international law with a reliable enforcement regime.[5]

By way of background, the historical basis for investment treaties can be traced back to 1778, when the U.S. and France concluded a treaty regulating commerce between the two nations.[6] Many similar treaties were subsequently concluded between the U.S. and countries in Latin America and Europe.[7] While these treaties covered primarily trade issues, they also included prohibitions on expropriation without compensation.[8] After the First and Second World Wars, many States concluded treaties of friendship, commerce, and navigation ["**FCN**"]. The FCN era marked a transition in treaties' focus from trade to foreign investment, granting rights to establish certain types of businesses, most favoured nation clauses, national treatment clauses, and compensation clauses.[9]

However, under an FCN treaty, an aggrieved foreign investor did not have the ability to invoke robust procedural mechanisms. Instead, these investors relied on diplomatic protection, a process by which an aggrieved investor would plead with its government to espouse its claim against the host State and seek damages through State-to-State dispute resolution. As such, the investor's ability to seek compensation for the harm suffered was completely dependent upon its government, contingent upon the intricacies of State-to-State relationships, and affected substantially by larger diplomatic considerations.

These FCNs served as a foundation for contemporary investment treaties, which can be traced back to the conclusion of the first Bilateral Investment Treaty ["**BIT**"] between Germany and Pakistan in 1959.[10] That treaty introduced the ISDS framework, allowing foreign investors the ability to directly assert their legal rights against a host State, free of diplomatic considerations. Investment treaties provide substantive protections to investors, including for example, the right to fair and equitable treatment by the host State, prohibitions against unlawful expropriation, and an assurance of full protection and security from the sovereign. Today, approximately 3,300 BITs have been concluded,[11] with much of the growth in the conclusion of such agreements taking place over the last few decades. India, for example, concluded its first BIT with the United

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4 Judge Stephen M. Schwebel, Keynote Address to International Council on Commercial Arbitration: In Defense of Bilateral Investment Treaties (April 6, 2014) quoting RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 9 (2d ed., 2012).

5 Steffen Hindelang & Markus Krajewski, *Towards a More Comprehensive Approach in International Investment Law*, *in* SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED 13 (Steffen Hindelang & Markus Krajewski eds., 2016).

6 RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 6 (2d ed. 2012).

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 UNCTAD Report, *supra* note 1, xii.

Kingdom in 1994, entered into 26 BITs by 1999,[12] and to date has signed 84 BITs, 82 of which are still in force.[13]

The post-Cold War era saw the expansion of economic integration arrangements like the North American Free Trade Agreement ["**NAFTA**"], concluded between Canada, Mexico, and the U.S. in 1992. Beginning with NAFTA, free trade agreements started to include investment chapters that entailed investment protections and ISDS. More recently, some States have pushed for even larger multilateral trade and investment agreements. The Trans-Pacific Partnership ["**TPP**"], involving 12 nations surrounding the Pacific Ocean, was signed in February 2016 and is the largest such agreement in global history. The Transatlantic Trade and Investment Partnership ["**TTIP**"] between the U.S. and the EU is also in negotiation, and if concluded would be equally consequential.[14] In light of the recent U.S. elections and other political developments, it is highly unlikely that the United States will ratify the TPP, or conclude the TTIP, in the near future.[15] Nonetheless, it cannot be ruled out that agreements like the TPP and TTIP will be reworked and ratified at a future date, in addition to serving as a template for other future BITs or multilateral agreements. Additionally, press reports suggest that China is now even more actively promoting the Regional Comprehensive Economic Partnership, involving 16 nations and providing for resolution of disputes through ISDS, as an alternative to the TPP.[16] In sum, despite the stalling of the TPP, ISDS continues to occupy a central role as a means of dispute settlement between foreign investors and States.

In addition to robust substantive protections, these treaties are subject to interpretation and resolution through a dynamic dispute resolution mechanism that delivers advanced procedural safeguards and accommodations in comparison to most national courts. The substantive protections granted by the BITs to investors would be significantly weaker in the absence of a neutral forum for the resolution of claims. ISDS allows parties to select their preferred arbitral forum and ensures that proceedings are tailored to the parties' schedules and needs. It also grants discretion to each party, including the sovereign, to select an arbitrator of its own – contrary to the allegation that arbitrations are administered by biased tribunals who are predisposed towards corporate interests. These arbitrators are often selected from the ranks of distinguished

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12 DOLZER & SCHREUER, *supra* note 6, at 7.

13 *India*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT INVESTMENT POLICY HUB, *available at* http://investmentpolicyhub.unctad.org/IIA/CountryBits/96.

14 Recent political developments – particularly the United Kingdom's decision to withdraw from the EU in June 2016 and the November 2016 U.S. presidential elections – have created significant challenges to the finalization of TPP and TTIP. However, the conclusion of TPP demonstrates that many States are interested in advancing economic integration in a manner that includes ISDS. Other States have also concluded major multilateral trade and investment agreements; for example, Canada and the EU concluded the Comprehensive Economic and Trade Agreement [CETA] in 2016 and are currently awaiting ratification by EU member States.

15 *See, e.g.*, Enda Curran & Laurence Arnold, *China's Free Trade Opening without the U.S.*, BLOOMBERG (Nov. 22, 2016), *available at* https://www.bloomberg.com/news/articles/2016-11-22/china-s-free-trade-opening-in-a-world-without-tpp-quicktake-q-a (reporting on President-elect Trump's decision to not ratify the TPP and assessing China's promotion of the Regional Comprehensive Economic Partnership).

16 *Id.*

academicians or practitioners, many with long histories of public service as judges or government officials.[17]

Without ISDS, investors would lack recourse to comparable legal remedies. In such a scenario, the protection of a party's investment would be completely dependent on the laws of the host State, and contingent on its bargaining power vis-à-vis the host government at the time of the conclusion of the relevant investment contract.[18] Equally critical, a party would only be able to seek legal recourse for resolution of any dispute in a national court, typically a more unpredictable and less impartial forum, or alternatively be compelled to rely on its national government to consider asserting any customary international law claims in a State-to-State arbitration.

Host States would also forego an opportunity to improve their investment climates and demonstrate their adherence to the rule of law.[19] The prolific and seamless flow of capital across borders is an integral feature of the contemporary global economic landscape and as States compete to attract foreign investment, the availability of investment treaties and ISDS is therefore "a factor in [investors'] overall decisional matrix" when deciding whether or not to invest in a foreign State.[20]

The data demonstrates that ISDS works in practice, both for investors and States. Investors have been able to recoup losses caused by State actions in contravention of promises of protection. Contrary to the beliefs of some vocal critics, the system is not, however, tilted in favour of investors. Rather, in nearly 450 known cases concluded by the end of 2015, only 27% of these disputes were decided in favour of investors while States prevailed in 36% of cases (the remainder were either settled, discontinued, or found a breach by the State resulting in no damages).[21] Further, a 2015 study examined the 159 publicly available ISDS cases that issued awards resulting in a damage determination.[22] It found that while investors in these cases had claimed an average of US$660 million, the average amount awarded was under $17 million.[23] This figure included cases where investors were not awarded any damages; however, taking into account only those cases where investors were awarded damages through an award or settlement, the study found an average amount of $46 million was awarded, with a median value of just $11 million.[24] The data thus reveals that the same arbitrators accused of defending corporate interests

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17 As ISDS has grown, the forums for resolving disputes have become more diverse. The EU has recently introduced an "investment court" system, implemented in its 2016 free trade agreements with Vietnam and Canada. Under this system, a permanent roster of "judges" (as opposed to arbitrators) is appointed, with equal proportions coming from the EU, the other State party to the treaty, and neutral third party States. These judges are experts in international law and are qualified to hold judicial office in their home countries. The system provides protections to ensure the impartiality of judges, and includes an appellate mechanism.

18 TRINH HAI YEN, THE INTERPRETATION OF INVESTMENT TREATIES 191-192 (2014).

19 Christoph Schreuer, *Do We Need Investment Arbitration?*, *in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 879, 884 (Jean Kalicki & Anna Joubin-Bret eds., 2015).

20 Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law,* 19 Global Bus. & Dev. L. J. 337, 340 (2007).

21 UNCTAD Report, *supra* note 1.

22 Susan D. Franck & Lindsey E Wylie, *Predicting Outcomes in Investment Treaty Arbitration,* 65 Duke L. J. 459, 494 (2015).

23 *Id.* at 467.

24 *Id.* at 494-495.

behind closed doors are in fact, rejecting a large proportion of claims made by corporations, or awarding amounts drastically less than claimed.

Moreover, as elaborated below, the ISDS system is dynamic and resilient, with a demonstrated ability to make improvements based on user experience, including specifically that of State parties. These improvements are both substantive and procedural in nature. With respect to substantive improvements, as highlighted below, States enjoy flexibility to calibrate their treaty obligations by amending or renegotiating treaties to strike the desired balance between attracting foreign capital and ensuring adequate regulatory space.[25] With respect to procedural developments, as explained below, arbitrators, who serve as the guardians of the system, have been at the vanguard of adjudicating complex disputes in a transparent manner and with respect for the principles of due process. The fact that the relatively young ISDS system is experiencing growing pains is not a reason for its abolition; on the contrary, these challenges help refine the system.

III. Substantive Responses: States as Active Participants in Shaping ISDS

States have responded to the growing criticisms of ISDS in vastly different ways. A select few States – for example South Africa and Indonesia – have either terminated their treaties or declined to renew them.[26] Others, such as Venezuela, Bolivia and Ecuador, have withdrawn from the ICSID Convention.[27] The disengagement of these few States is not fatal to the regime; many other States have recognized that investment treaties continue to provide the vast array of benefits enumerated above.[28] Even countries such as India that have recently terminated a number of BITs, do not seek to withdraw completely from the system, but have instead sought to renegotiate their BITs, which continue providing for ISDS. These States recognize that they enjoy a unique ability, available only to sovereigns, to craft the ISDS regime by tailoring it to meet their needs and arrive at a consensus with their negotiating partners, taking into account the specific regional context, economic climate, and negotiating strength of the sovereigns involved.

In response to the perception that their regulatory space was becoming increasingly restricted, States have sought to reshape and rebalance the nature of their international law obligations vis-à-vis foreign investors. This rebalancing is generally manifested in newer investment treaties in three ways: (1) asserting the importance of government objectives other than investor protection; (2) refining and clarifying the scope of protection; and (3) placing affirmative obligations on investors in order to reduce harm and increase benefit to States. Many treaties adopt more than one of these approaches.

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25 Tarcisio Gazzini, *States and Foreign Investment: A Law of the Treaties Perspective*, *in* THE ROLE OF THE STATE IN INVESTOR-STATE ARBITRATION 41 (Shaheeza Lalani & Rodrigo Polanco Lazo eds., 2015).

26 South Africa, for example, has chosen to replace its system of international law protections with a domestic legal framework for protecting investments. *See* Engela C. Schlemmer, *An Overview of South Africa's Bilateral Investment Treaties and Investment Policy*, 31(1) ICSID Rev. 167 (2015).

27 *See* Sergey Ripinsky, *Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve*, INVESTMENT TREATY NEWS, Apr. 13, 2012, *available at* https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/(reporting on Venezuela's withdrawal from ICSID on Jan. 1, 2012, and noting Bolivia and Ecuador's prior denunciations of the ICSID convention.).

28 *See* UNCTAD Report, *supra* note 1, xii (showing that 31 new investment treaties were concluded in 2015).

A. Asserting Government Objectives beyond Investor Protection

Critics of ISDS have contended that States are forced to curtail their regulatory initiatives due to the threat of arbitration, "allow[ing] big multinationals to weaken labour and environmental rules" along with regulation in a variety of other areas.[29] These concerns arise partly from the perception that investors have used ISDS cases to unfairly challenge a State's sovereign right to exercise its regulatory powers and in the process contributed to a so-called "regulatory chill", wherein States refuse to enact regulatory measures due to the threat of arbitration. In seeking to make their case, critics point to, for example, the filing of investor claims related to Philip Morris's challenges to Australia and Uruguay's attempts to regulate tobacco, and Germany's phasing out of nuclear power after the Fukushima nuclear accident.[30]

Despite these allegations, there is no evidence to suggest that an investor's purported threat to file an investor-State claim has resulted in a so-called "regulatory chill". To the contrary, the record shows that States have generally sought to proceed to act in what they believe is their best interests and have defended against claims where their regulatory powers have been called into question. Equally important, tribunals have rejected at least some of these claims, such as the cases initiated by Philip Morris, while the case against Germany remains pending. With respect to the Philip Morris cases, for example, the company initiated separate arbitrations against Uruguay and Australia respectively after the former country implemented a number of anti-smoking laws and the latter required cigarettes to be sold in plain packages. Both cases were dismissed – the case against Australia after the tribunal found it had no jurisdiction, and the case against Uruguay after that tribunal found no treaty violations.[31] The tribunal in the Uruguay case found that under the applicable international law obligations an investor "*does not enjoy an absolute right of use [of its trademark], free of regulation, but only an exclusive right to exclude third parties from the market so that only the trademark holder has the possibility to use the trademark in commerce, subject to the state's regulatory power*."[32] The tribunal also ordered Philip Morris to cover Uruguay's legal fees as well as the costs of the arbitration.[33]

Independent of the outcome of these cases challenging a State's right to enact regulatory measures in the public interest, States have also drafted new BITs by expressly seeking greater sovereign policy space to emphasize the importance of ensuring that regulatory goals are met

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29 Warren, *supra* note 2; S*ee, e.g.*, United Nations Human Rights Council, *Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework*, Report of the Special Representative of the Secretary General, ¶ 30A/HRC/11/13 (2009) ("[R]ecent experience suggests that some treaty guarantees and contract provisions may unduly constrain the host Government's ability to achieve its legitimate policy objectives, including its international human rights obligations. That is because under threat of binding international arbitration, a foreign investor may be able to insulate its business venture from new laws and regulations, or seek compensation from the Government for the cost of compliance.").

30 Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12; Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia, PCA Case No. 2012-12; Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016) [*hereinafter* "Philip Morris"]; Methanex Corp. v. United States of America, Final Award on Jurisdiction and Merits (Aug. 19, 2005) 12 I.I.C. 167 (2005) (UNCITRAL) [*hereinafter* "Methanex"].

31 Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec. 17, 2015); Philip Morris, ICSID Case No. ARB/10/7, Award (July 8, 2016).

32 Philip Morris, ICSID Case No. ARB/10/7, Award (July 8, 2016), ¶ 271.

33 *Id.* ¶ 590(2).

alongside the objective of attracting and protecting foreign investment.[34] For example, concerns over possible attempts to curtail a State's right to enact tobacco control measures led the TPP drafters to include a provision that allows States to preserve their full discretion in this area. TPP Article 29.5 allows a party to "*deny the benefits of [the dispute resolution section of TPP's investment chapter] with respect to claims challenging a tobacco control measure of the Party*".[35]

Sovereigns have chosen to respond to these concerns through the insertion of two types of provisions. The first, widely referred to as "right-to-regulate" clauses, includes language that delineates a government's right to regulate, either in general or specific terms. The second, known as "non-derogation" provisions, are clauses that declare the State's commitment to not deviate from its domestic laws in order to incentivize investment. The language of these provisions varies considerably – and accordingly, so does the degree to which they are binding.

Such language helps shape investors' legitimate expectations and clearly signals that host States will balance investment protection with other key objectives.[36] It also helps deter a "race to the bottom" in which, in an attempt to attract more investment, States waive or derogate from their domestic laws, lower their standards, or fail to enforce their laws altogether.[37] By providing for greater regulatory space than in previous treaties, this language allows host States to act on important government interests without excessive fear of liability.[38]

Right-to-regulate provisions emphasize a State's prerogative to develop its own domestic laws and measures in the public interest. Some clauses acknowledge the right, but do not emphasize it. For example, Article 13.2.1 of the EU-Singapore Free Trade Agreement, concluded in 2014, provides that: "*[t]he Parties recognise the right of each Party to establish its own levels of environmental and labour protection, and to adopt or modify accordingly its relevant laws and policies […]*"[39] Others treaties emphasize the right more strongly. Article 9.16 of the TPP, for example, includes one of the most progressive right-to-regulate provisions:

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.[40]

Article 9.16 reveals the TPP's emphasis on protecting regulatory space. First, it emphasizes that "[n]othing in this chapter" shall prejudice the State's right to regulate – essentially placing that right on par with its other treaty obligations. Second, rather than tying the requirement of a measure being "appropriate" to an objective standard, it imposes a self-judging one ("*any measure […] that it considers appropriate*") that allows the host State to determine the bounds of that

34 Jose E. Alvarez, *Why are we "Re-Calibrating" Our Investment Treaties?,* 4 World Arb. & Med. Rev. 143, 145 (2010); Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements,* 13 J. Int'l. Econ. L. 1037, 1045, 1048 (2010).

35 Trans-Pacific Partnership [TPP], art. 29.5.

36 Spears, *supra* note 34, at 1067.

37 Lise Johnson & Lisa Sachs, *International Investment Agreements, 2013: A Review of Trends and New Approaches*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2013-2014 39 (Andrea K. Bjorklund ed., 2015).

38 Gazzini, *supra* note 25, at 32.

39 Free Trade Agreement, EU-Singapore, art. 13.2.1 (2015).

40 TPP, art. 9.16 (2016).

appropriateness as broadly as it chooses. Where a clause is self-judging, a tribunal will review an alleged violation with less scrutiny than it would one tied to an objective standard.[41] Third, the provision's open-ended language leaves States free to pursue any "other regulatory objectives" under the protection of the clause.

A number of other treaties contain similarly strongly-worded and self-judging provisions asserting the primacy of the right to regulate over other treaty provisions.[42] The push for regulatory space is not simply led by States traditionally receiving more investment than exporting it – NAFTA, for example, also calls for regulatory discretion.[43] The U.S. was in fact at the forefront of this development, including provisions protective of its regulatory space even in its 2004 Model BIT.[44] Regulatory flexibility has also become a major priority for EU States, in the wake of increasing numbers of arbitrations brought against EU member States, as well as on-going discussions relating to TTIP.

Non-derogation provisions also emphasize preserving regulatory capacities, but they vary in the degree to which they are binding. On the less powerful end of the spectrum is treaty language that affirms the importance of upholding regulatory objectives, without attaching any legal obligation. Articles 12.1 and 13.1 of the Rwanda-U.S.BIT, concluded in 2008, provide that "each Party shall strive to ensure" that it does not waive, derogate, or offer to waive or derogate from its laws in a way that weakens the protection of those laws in order to incentivize investment.[45]

By contrast, many of Canada's newer treaties with African States prohibit derogation;[46] for example Article 15 of the Canada-Nigeria BIT, signed in 2014, provides that "a Party should not" waive or derogate from health, safety, and environmental measures.[47] Articles 12.2 and 13.2 of the 2012 U.S. Model BIT include even stronger language, obligating each party to "ensure"

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41 Gazzini, *supra* note 25, at 32.

42 *See, e.g.*, Southern African Development Community [SADC] Model Bilateral Investment Treaty Template, art. 20 (2012); Agreement Between the Belgium-Luxembourg Economic Union and the Republic of Colombia on the Reciprocal Promotion and Protection of Investments, art. VII.4 (2009); Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Promotion of Investment, art. 12.2 (2008).

43 North American Free Trade Agreement, art. 1114, Dec. 17, 1992, 32 I.L.M. 289 (1993) ("Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.").

44 *See* 2004 U.S. Model Bilateral Investment Treaty, Annex B, ¶ 4(b) (2004) ("Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."). *See also* 2012 U.S. Model Bilateral Investment Treaty, art. 12.3 (2012). ("The Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance […] where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.").

45 Rwanda-US BIT, arts. 12.1, 13.1; *See also* Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, arts. 12.1, 13.1 (2005).

46 Rainbow Willard & Sarah Morreau, *The Canadian Model BIT–A Step in the Right Direction for Canadian Investment in Africa?*, KLUWER ARB. BLOG (July 18, 2015), *available at* http://kluwerarbitrationblog.com/2015/07/18/the-canadian-model-bit-a-step-in-the-right-direction-for-canadian-investment-in-africa.

47 Agreement for the Promotion and Protection of Investments, Canada-Nigeria, art. 15 (2014).

that it does not waive, derogate, or offer to do either of those two, as well as that it does not "fail to effectively enforce" the applicable domestic laws.[48]

Such mandatory language, in both non-derogation and right-to-regulate clauses, conveys to investors that a State's regulatory objectives are of equal importance to the State as protecting those investors.

B. Refining the Scope of Investor Protections

At the onset of the investment treaty regime, States and investors alike assumed that the "treatification" of investment protections – that is, formalizing standards such as "fair and equitable treatment" ["**FET**"] in treaty provisions, rather than leaving them as amorphous, non-codified concepts – would result in a clearer understanding of their meaning.[49] This assumption has been called into question because tribunals have sometimes arrived at different interpretations of the same or similar provisions, partially undermining the predictability of arbitral outcomes.[50]According to some commentators, the open-ended wording of many treaty provisions, while providing tribunals the discretion to arrive at a suitable interpretation of a State's obligations, has also resulted in tribunals interpreting those provisions more broadly than States may have originally intended.[51] These trends are seen across a range of treaty provisions – for example in tribunals interpreting expropriation, FET, non-discrimination, and the definitions of investors or investment.[52]

In response to these concerns, States have included more detailed and precise language in their treaties. States have achieved this objective through two methods. First, States have expressly clarified that certain protections extend only to specific enumerated areas. Second, States have excluded certain areas from otherwise generally applicable protections. These approaches can overlap in some areas.

First, to avoid inconsistent or overly broad interpretations, States have provided guidance as to the scope of particular treaty provisions.[53] One realm in which this has occurred is in the definition of fair and equitable treatment ["**FET**"], the most ubiquitous investment treaty protection. FET has been interpreted to prohibit a vast range of State actions and inactions.

Some States provide guidance by expressly clarifying the extent of their treaty obligations. For example, some BITs now clearly take a position with respect to the long-standing debate on whether an FET clause provides protection equivalent to the minimum standard of treatment

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48 *See also* BLEU-Colombia BIT, art. VII.2.

49 Alvarez, *supra* note 34, at 151.

50 *Id.* at 147.

51 Spears, *supra* note 34, at 1040, 1057.

52 Michael E. Schneider, *The Role of the State in Investor-State Arbitration: Introductory Remarks, in* THE ROLE OF THE STATE IN INVESTOR-STATE ARBITRATION 6 (Shaheeza Lalani & Rodrigo Polanco Lazo eds., 2015); Spears, *supra* note 34, at 1048-49.

53 As part of its efforts to improve the ISDS system, the United Nations Conference on Trade and Development [UNCTAD] in 2012, raised the prospect of "qualifying or clarifying the FET clause, including by way of an exhaustive list of State obligations under FET. *See* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2012 139 (2012).

under customary international law or a greater level of protection.[54] Article 5.2 of the 2004 U.S. Model BIT (replicated in the 2012 U.S. Model BIT), explains that the treaty "*prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments […] [and does] not require treatment in addition to or beyond that which is required by that standard, and does not create additional substantive rights.*"[55] By definitively clarifying the extent of the FET obligation, these clauses narrow the interpretive field for the tribunal.

Other States clarify the extent of their international law obligations by enumerating the areas to which the provision extends. Article 8.10 of the Comprehensive Economic and Trade Agreement ["**CETA**"], concluded between Canada and the EU in 2016, provides that a party has breached its FET obligation only where its action or inaction results in one of a specified list of outcomes.[56] India's Model BIT, released in December 2015, does not include an FET clause but provides in Article 3.1 that States should not subject investors to measures that violate customary international law.[57] Article 3.1 specifically requires the State to ensure that there is no violation of customary international law through a (i) denial of justice in any judicial or administrative proceedings; or (ii) fundamental breach of due process; or (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or (iv) manifestly abusive treatment, such as coercion, duress and harassment.

The above model BITs demonstrate that States enjoy genuine flexibility in seeking to tailor their international law obligations vis-à-vis foreign investors. While CETA arguably provides for FET protections above the minimum standard for treatment, India's model BIT entirely removes this protection, while still offering a base level of protections to investors through the inclusion of the above-mentioned customary international law provision. Through these divergent approaches, States are ultimately seeking to provide clarity to future tribunals and further enhance the consistency of awards.

States have also circumscribed the scope of treaty provisions by providing criteria for what the relevant provision covers. Article 1.4 of India's Model BIT defines 'investment' as an "*enterprise […] [that] has the characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for development*" of the host State.[58] These features are reminiscent of the *Salini* v. *Morocco* test, generally considered restrictive

54 *See, e.g.,* Acuerdo Entre el Gobierno de los Estados Unidos Mexicanos y el Gobierno de la Republica de Singapur Para la Promoción y Protección Reciproca de las Inversiones (Mexico-Singapore BIT), art. 4.1 (2009); Investment Agreement for the COMESA Common Area, art. 14.3 (2007).

55 2004 U.S. Model BIT, art. 5.2; 2012 U.S. Model BIT, art. 5.2; *See also* U.S.-Rwanda BIT, art. 5.2; U.S.-Uruguay BIT, art. 5.2.

56 Comprehensive Economic and Trade Agreement [CETA], art. 8.10 (2016). ("A Party breaches the obligation of fair and equitable treatment […] where a measure or series of measures constitutes: (a) Denial of justice in criminal, civil or administrative proceedings; (b) Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings. (c) Manifest arbitrariness; (d) Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) Abusive treatment of investors, such as coercion, duress and harassment; or (f) A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties […]").

57 Model Text for the Indian Bilateral Investment Treaty, art. 3.1 (2016) [*hereinafter* "Indian Model BIT"].

58 Indian Model BIT, art. 1.4.

criteria for determining what constitutes an investment.[59] This detailed definition prevents tribunals from considering as investments other property or activities that India does not deem significant enough to warrant protection.

The second method States are employing to refine investor protections is "exception clauses". States include these clauses to exclude from their treaty obligations certain areas that are incompatible with other government objectives.[60] Exception clauses vary in their scope. Some shield particular areas from coverage; the Association of Southeast Asian Nations' ["**ASEAN**"] Comprehensive Investment Agreement ["**ASEAN Agreement**"], concluded in 2009, excludes "services supplied in the exercise of governmental authority" (i.e. non-commercial government services) as well as taxation measures, government procurement, and government-provided subsidies or grants.[61]

Other clauses simply carve out exceptions from a particular treaty provision. Article 1.4 of India's Model BIT, in addition to listing criteria for "investment[s]", also enumerates what India does *not* consider to meet its criteria. Among those things excluded are government-issued debt securities, loans to a government entity, and orders or judgments arising from judicial, administrative, or arbitral proceedings. Articles 5.4 and 5.5 also clarify that certain acts cannot constitute expropriation: actions taken by a host State in its commercial capacity, non-discriminatory regulatory provisions in the public interest, and awards by judicial bodies of a party that are in the public interest.[62]

C. Placing Responsibilities on Investors

Critics contend that investment treaties focus heavily on the obligations of States, leaving untouched the obligations of investors to abide by the laws of the host State.[63] However, a number of recent decisions have shown that improper conduct on the part of an investor – such as corruption, fraud, or other actions in violation of the local law of the host State – is impermissible and can undermine or even result in the dismissal of an investor's claim.[64] At the same time, little attention has been paid to the role of investors in *contributing* to the host State,

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59 Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco, ICSID Case No ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001). (The tribunal laid out four criteria for what constitutes an "investment" under the ICSID Convention, which does not define the term: certain duration, risk-taking, economic contribution by the investor, and a contribution to the development of the host state. Some tribunals have considered these criteria in subsequent cases to narrow the scope of the term "investment" as used and defined in BITs); *see*, *e.g.*, Romak S.A. v. The Republic of Uzbekistan, PCA Case No. AA280, Award, ¶¶ 198-207 (Nov. 26, 2009).

60 Spears, *supra* note 34, at 1059-1060.

61 ASEAN Comprehensive Investment Agreement, art. 3.4 (2009). Various other treaties contain similar exclusions. *See, e.g.*, India Model BIT, art. 2.4 (excluding from the treaty's coverage local government measures, tax measures, certain intellectual property rights, government procurement, government subsidies or grants, and services supplied in the exercise of governmental authority).

62 Both the COMESA Agreement and the ASEAN Agreement similarly exclude legitimate public regulatory measures from the ambit of their expropriation clauses. *See* Investment Agreement for the COMESA Common Area, art. 20 (2007); ASEAN Comprehensive Investment Agreement, Annex. 2, ¶ 4 (2009).

63 *See* Warren, *supra* note 2 ("If the tilt toward giant corporations wasn't clear enough, consider who would get to use this special court: only international investors, which are, by and large, big corporations. So, if a Vietnamese company with U.S. operations wanted to challenge an increase in the U.S. minimum wage, it could use ISDS. But if an American labour union believed Vietnam was allowing Vietnamese companies to pay slave wages in violation of trade commitments, the union would have to make its case in the Vietnamese courts.").

64 *See* Carolyn B. Lamm et al., *From World Duty Free to Metal-Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption*, 29(2) ICSID Rev. 328–349 (2014).

aside from their economic contributions. To change this, some States have placed affirmative responsibilities on investors with an aim towards putting investors on notice that they are expected to help achieve, or at a minimum not disrupt, the various developmental goals of the host State.

A number of new treaties, for example, include a singular provision on corporate social responsibility ["**CSR**"]. Since 2010, Canada has included voluntary CSR provisions in many of its BITs. Article 16 of the Canada-Nigeria BIT, for instance, provides:[65]

Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.

While still hinging on voluntary compliance by investors, this provision urges State parties to emphasize the importance of CSR standards to their nationals who invest overseas. Canada has placed similar provisions in its recent BITs with Benin, Cameroon, Senegal, Mali, Cote d'Ivoire, Burkina Faso, and Guinea.[66] While other States have formulated CSR obligations differently, with some less committal than Canada's[67] and others more demanding,[68] most CSR provisions cover similar topics relating to the domestic impact of foreign investments.

Other treaties entail a more comprehensive approach to investor responsibility. The Economic Community of West African States' ["**ECOWAS**"] 2008 Supplementary Act Adopting Community Rules on Investment ["**ECOWAS Act**"] includes a full chapter dedicated to investor obligations.[69] Article 11 imposes a number of general obligations on investors, including an obligation "*to strive […] to contribute to the development objectives of the host States and the local levels of government where the investment is located*".[70] The chapter also imposes various specific requirements: a pre-investment environmental and social impact assessment, anti-corruption rules, obligations to comply with domestic labour, human rights, and other rules, compliance with corporate governance standards, and corporate social responsibility rules.[71] Failure to comply with these requirements can bar investors from initiating dispute resolution, or have a mitigating effect on

65 Agreement for the Promotion and Protection of Investments, Can-Nigeria, art. 16 (2014).

66 Willard and Morreau, *supra* note 46.

67 TPP, art. 9.17 ("The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or supported by that Party."). Parties' compliance with this provision appears completely non-binding, and the provision limits its applicability to only those CSR standards a party agrees with.

68 India Model BIT, art. 12 ("[i]nvestors and their enterprises […] shall endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies […] These principles may address issues such as labour, the environment, human rights, community relations, and anti-corruption."). While worded somewhat confusingly as voluntary, the use of the word "shall" indicates India's desire for CSR standards to become a requirement in future treaties. The Indian Model BIT also places CSR obligations directly on investors, rather than merely requiring States to encourage investor compliance.

69 *See* Southern African Development Community Model Bilateral Investment Treaty Template, arts. 10-18 (2012) (similarly entailing a chapter on investor obligations).

70 *Id.* art. 11.2.

71 *Id.* arts. 12-16.

either the merits of a claim or the damages awarded.[72] A host State or home State can also bring claims against an investor for violating these provisions.[73] The Act also includes a chapter on the rights of the host State, including the right to impose performance requirements on investors to promote domestic development.[74]

D. Further Thoughts on States Reshaping Treaty Provisions

The above-described responses to the ISDS system reflect an on-going attempt by sovereigns to strike the right balance between ensuring that foreign investments are entitled to robust legal protections and meeting other domestic priorities. That States have these other domestic priorities objectives is nothing new; indeed, the entire purpose for States' consent to ISDS has always been to signal that protecting investors remains a priority notwithstanding other objectives. In this regard, States can continue to protect and attract investors while exempting a certain subject matter, economic sector, or area of government regulation from coverage.[75]

The discussion above demonstrates that, far from being victims of a restrictive investment treaty regime, States are playing an active role in responding to the development of ISDS by refining treaties to better suit their priorities. This runs counter to the misguided, yet oft-repeated criticisms described in the introduction. States are not victimized by an unfair set of treaties that were simply imposed on them; rather, they affirmatively choose to enter into those treaties and spend a great deal of time and effort crafting them. This active process of reimagining treaty protections is particularly significant for three reasons.

First, States of all regions and economic profiles are participating in the process of treaty re-balancing. The separation between capital-exporting home countries and capital-importing host countries, which dominated the 20th century investment scene, is no longer viable.[76] The contemporary era is one in which 40 per cent of new disputes brought in 2015 were against "developed" states.[77] The U.S. is regularly sued by investors under NAFTA,[78] and dozens of arbitrations have been initiated against European States in the past couple of years.[79] The contemporary era is also one in which investors from countries which previously had very little

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72 *Id.* art. 18.

73 *Id.*

74 *Id.* art. 24.

75 Elizabeth Boomer, *Rethinking Rights and Responsibilities in Investor-State Dispute Settlement: Some Model International Investment Agreement Provisions*, *in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 191-192 (Jean Kalicki & Anna Joubin-Bret eds., 2015).

76 Spears, *supra* note 34, at 1042.

77 UNCTAD Report, *supra* note 1, at xii.

78 *See, e.g.*, TransCanada Corporation & TransCanada Pipeline Limited v. The Government of the United States of America, Request for Arbitration (June 24, 2016) (Canadian investors seeking more than US$15 billion in claims under the NAFTA Treaty against the United States for alleged injuries arising out of the November 6, 2015 denial of the Presidential Permit for the Keystone XL Pipeline), *available at* https://www.state.gov/documents/organization/259329.pdf; *see also* Methanex, Final Award on Jurisdiction and Merits (Aug. 19, 2005) 12 I.I.C. 167 (2005) (UNCITRAL).

79 *See The ICSID Caseload – Statistics, supra* note 1, at 2424 (showing that "Western Europe" was subject to the most number of claims at ICSID in the first half of 2016, followed by "Eastern Europe and Central Asia").

outbound investment, benefit from the hundreds of "South-South" investment treaties in force.[80]

Second, it is especially significant that many agreements pioneering these changes are the product of multilateral negotiations among States with vastly different interests and priorities. Such agreements are considerably more difficult to conclude than bilateral treaties. The fact of multilateral agreement on these issues will have a significant norm-setting impact for agreements yet to be negotiated.

Third, as States or regional blocs add new or modified provision to some of their treaties, they will often aim to include similar provisions in their subsequent treaties to avoid inconsistent obligations and advance international norms. In October 2016, for example, in the midst of negotiating an India-US BIT, the U.S. indicated that the agreement should include standards similar to those contained in the TPP.[81]

IV. Procedural Responses: Arbitrators as Vanguards of the System

While States are the key players in drafting investment treaties, the proper functioning of the ISDS system depends substantially on the adjudicatory capabilities of arbitrators. As ISDS disputes become more numerous and complex, a variety of challenges have emerged that require arbitrators to be both vigilant and flexible. A recent article co-authored by Ms. Lamm discussed the imperative role that arbitrators play as guardians of the ISDS regime.[82] That article explained how arbitrators are addressing and can further address certain procedural issues to improve the robust procedural safeguards afforded by ISDS. In particular, that article explored: (1) the establishment of the procedural schedule; (2) the protection of the process from bad-faith tactics through mechanisms such as awarding costs, drawing adverse inferences, and excluding evidence; and (3) the tribunal's transparency with the parties in its assessment of the issues.[83] Through these actions and others, arbitrators exercise their power over the arbitral process to ensure efficiency and fairness.

Contrary to the allegation that ISDS is an opaque and inaccessible process, arbitrators have made substantial efforts to safeguard the system's fairness and to make it more accessible and transparent for non-party stakeholders. Openness has become a major priority of the ISDS regime in recent years; in the past two years alone, several multilateral initiatives have been advanced to improve arbitral transparency.[84] Since 2004, parties to arbitrations also have been

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80 *See* Mahnaz Malik, *South-South Bilateral Investment Treaties: The Same Old Story?*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT 1 (2010) ("Today, BITs between developing countries account for approximately 26 per cent of the total number of BITs.").

81 Subhayan Chakraborty, *BIT Breakthrough Unlikely at India-US Trade Meet*, BUSINESS STANDARD (Oct. 18, 2016), *available at* http://www.business-standard.com/article/economy-policy/bit-breakthrough-unlikely-at-india-us-trade-meet-116101800488_1.html.

82 *See* Carolyn B. Lamm et al., *An Arbitrator's Duties: Due Process and Trust in Investor-State Arbitration*, 2 BCDR Int'l. Arb. Rev. 357 (2015).

83 *Id.*

84 *See, e.g.*, United Nations Commission on International Trade Law [UNCITRAL], Convention on Transparency in Treaty-based Investor-State Arbitration (Dec. 10, 2014) *available at* https://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf.

opening up their proceedings to public observation.[85] The *Vattenfall* v. *Germany* arbitration, which arises from Germany's decision to phase out nuclear power, has been keenly followed amidst the discussion on ISDS' impact on governments' right to regulate. In October 2016, the oral hearing was made available to the public via an internet video stream.[86]

Arbitrators have been a major part of this push to make proceedings more open and ensure that they meet fundamental requirements of due process and fairness. This section highlights three types of actions they have taken in this regard: (1) allowing *amicus* submissions from non-party stakeholders; (2) taking measures to ensure that parties are able to fully present their cases at the oral hearing; and (3) ensuring that parties and witnesses are not prevented from participating in the proceedings. While this section expands upon the prior article referenced above, the conclusion reached remains the same – that arbitrators, as the gatekeepers of the ISDS system, are constantly adapting to the challenges faced by the ISDS regime by providing even more robust procedural protections.

A. Allowing for *Amicus* Submissions

With the growth of ISDS in recent decades, many actors beyond States and investors have asserted an interest in the outcome of proceedings. One outcome of this has been a significant focus on transparency. Measures such as broadcasting oral proceedings and making arbitration documents publicly available allow concerned citizens, community organizations, NGOs, and other stakeholders to closely follow proceedings and stay abreast of developments. Yet, as ISDS disputes can involve resolution of issues that involve public interest, some interested parties have sought a more active role as *amici curiae*.

Methanex v. *United States* was the first investor-State dispute to allow an *amicus* submission. The dispute involved a Canadian investor's challenge to a California government regulation banning certain chemical substances due to their health and environmental risks. After a number of Canadian non-governmental organizations ["**NGOs**"] petitioned the tribunal to allow submission of an *amicus* brief, in 2001 the tribunal determined that it had the implied authority to permit this request, despite no explicit authority or precedent.[87] The tribunal based its determination on Article 15(1) of the 1976 UNCITRAL Rules, which states that "*the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate […]*"[88] In reaching its decision, the *Methanex* tribunal stressed that "*[t]here is undoubtedly a public interest in this arbitration […] [n]ot merely because one of the Disputing Parties is a State*" but also because the subject matter of

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85 The first investor-State arbitration in which a hearing was opened to the public, via closed-circuit television, was Methanex, Final Award on Jurisdiction and Merits (Aug. 19, 2005) 12 I.I.C. 167 (2005) (UNCITRAL). *See Updated Methanex Corporation v. United States of America: Hearing Open to Public – New Room for Live Broadcast*, ICSID NEWS RELEASE (June 8, 2004), *available at* https://icsid.worldbank.org/apps/ICSIDWEB/Pages/News.aspx?CID=65&ListID=74f1e8b5-96d0-4f0a-8f0c-2f3a92d84773&variation=en_us.

86 *See Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12) – Public Hearing*, ICSID NEWS RELEASE (Sept. 29, 2016), *available at* https://icsid.worldbank.org/apps/ICSIDWEB/Pages/News.aspx?CID=211&ListID=74f1e8b5-96d0-4f0a-8f0c-2f3a92d84773&variation=en_us.

87 Methanex, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae," (Jan. 15, 2001), ¶ 53.

88 *Id.* ¶ 26.

the dispute concerned public services and human health.[89] The tribunal also considered that the "*arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular […]*"[90]

Since *Methanex*, other tribunals have allowed for *amicus* submissions, both from NGOs and other actors.[91] In *Glamis Gold* v. *United States*, a mining dispute under NAFTA, the tribunal permitted submissions from the Quechan Indian Nation whose sacred land the mines were located on.[92] More recently, as investor-State disputes involving EU member countries have highlighted the tension between EU States' investment treaty obligations and the role of European law, a number of tribunals have allowed the European Commission ["**EC**"] to make submissions outlining its position on the primacy of EU law.[93] Additionally, in the recent *Philip Morris* v. *Uruguay* arbitration, the tribunal allowed submissions from the World Health Organization ["**WHO**"] as well as the Secretariat for the WHO's Framework Convention on Tobacco Control.[94] The tribunal stated its belief that "*the Submission may be beneficial to [the tribunal's] decision-making process in this case considering the contribution of the particular knowledge and expertise of two qualified entities regarding the matters in dispute*".[95]

In deciding to permit *amicus* submissions, past tribunals generally relied either on open-ended provisions allowing a tribunal to take measures it sees fit, such as Article 15 of the 1976 UNCITRAL Rules referenced above, or on provisions in the relevant rules or treaties allowing for participation by a non-disputing party.[96] While those rules did not explicitly permit *amicus* involvement, some newer treaty provisions specifically envision and allow *amicus* submissions.[97] As the predecessors to these treaty developments, arbitrators have been at the cutting edge of responding to the policy and regulatory concerns at stake in disputes. Rather than shutting their doors to those concerns when not expressly required to consider them, arbitrators are allowing input from third parties in order to enhance their understanding of the various interests involved. This process furthers the "*procedural legitimacy of investment arbitration by [allowing for] greater participation*".[98]

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89 *Id.* ¶ 49.

90 *Id.*

91 Eugenia Levine, *Amicus Curiae in Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 Berkeley J. Int'l. L. 200, 210-214 (2011).

92 Glamis Gold, Ltd. v. United States of America, UNCITRAL, Decision on Application and Submission by Quechan Indian Nation (Sept. 16, 2005), ¶ 13.

93 *See, e.g.*, Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20, Award, ¶¶ 27 and 317 (Dec. 11, 2013); Eureko B.V. v. The Slovak Republic, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, ¶ 175 (Oct. 26, 2010); AES Summit Generation Limited and AES-Tisza EromuKft v. The Republic of Hungary, ICSID Case No. ARB/07/22, Award, ¶¶ 3.22 and 8.2 (Sept. 23, 2010).

94 Philip Morris, ICSID Case No. ARB/10/7, Procedural Order No. 3, ¶ 29 (Feb. 17, 2015).

95 *Id.* ¶ 28.

96 *See, e.g.,* ICSID Arbitration Rules, art. 37(2); NAFTA, art. 1128.

97 *See, e.g.,* TPP art. 9.23(3); 2012 U.S. Model BIT, art. 28(3); Free Trade Agreement, U.S.-Cent. Am- Dom. Rep., art. 10.20(3) (2004).

98 Levine, *supra* note 91, at 217.

B. Improving Parties' Ability to Present Witnesses

Sometimes it is not third parties, but parties to a dispute themselves, who seek a greater voice in the proceedings. Typically, during a hearing, a party may choose to call only certain witnesses for cross-examination and may limit the scope of such cross-examination to a select set of issues. By allowing a party to control the witnesses the tribunal sees live, this practice allows opposing parties to determine which issues are addressed at the hearing (and which important issues might not be raised). The result is a potential distortion of what the tribunal hears and of the record, especially where re-direct examination is limited to topics raised on cross-examination. By emphasizing certain, favourable topics during live testimony – where the tribunal has the opportunity to better evaluate witness credibility – other important topics are relegated to being assessed only through written submissions. This distortion may prejudice parties' right to be heard – a fundamental procedural guarantee of the arbitral process.

Recognizing this deficiency, a number of tribunals have directed parties to take oral testimony in accordance with their own needs. For example, in *Canadian Cattlemen* v. *United States*, the tribunal directed parties to submit in advance of the hearing "*notifications of the witnesses and experts presented by themselves or by the other [p]arty they wish to examine at the [h]earing*".[99] Similarly, in *Chevron* v. *Ecuador*, the tribunal allowed parties to call their own witnesses for oral testimony, irrespective of whether those witnesses had been called by the opposing party or by the tribunal.[100] The tribunal in *Renco* v. *Peru* took a different approach, deciding: "*Witnesses and experts who are not called for cross-examination shall not testify at the hearing, but if a Party calls fewer than two of the other Party's experts or fewer than two of the other Party's witnesses, then the other Party may designate, respectively, up to two (2) witnesses and/or up to two (2) experts to testify*."[101] In all of these cases, the tribunals have acted to safeguard parties' ability to present their full case to the tribunal.

C. Preventing Harassment of Witnesses, Parties, and Counsel

ISDS disputes may arise and be conducted under politically sensitive circumstances. Consequently, individuals – whether parties, their lawyers, or witnesses – may be strong-armed in order to prevent their appearance before a tribunal or otherwise deter their participation in the proceedings. Such harassment may take the form of threatened or actual domestic criminal proceedings. As recognized by the tribunal in *Caratube* v. *Kazakhstan*, the obligation to arbitrate fairly and in good faith "*includes the duty of parties not to intimidate, harass, retaliate against, or physically harm parties, witnesses and other participants in ICSID proceedings or prevent them from fulfilling their functions*".[102]

In response to such bad faith tactics, tribunals have used their power to order provisional measures. Article 47 of the ICSID Convention allows a tribunal to "*recommend any provisional measures [that it considers necessary] to preserve the respective rights of either party*". Article 39 of the ICSID

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99 The Canadian Cattlemen for Fair Trade v. United States of America, UNCITRAL, Procedural Order No. 1, ¶ 5.8 (Oct. 20, 2006).

100 Chevron Corp. (U.S.A.) and Texaco Petroleum Corp. (U.S.A.) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877, Interim Award, ¶ 20 (Dec. 1, 2008).

101 The Renco Group, Inc. v. The Republic of Peru, ICSID Case No. UNCT/13/1, Procedural Order No. 1, ¶ 16.2 (Aug. 22, 2013).

102 Caratube International Oil Company LLP v. Republic of Kazakhstan, ICSID Case No. ARB/08/12, Award, ¶ 62 (June 5, 2012).

Arbitration Rules also permits a tribunal to grant provisional measures of its own accord, in addition to allowing parties to request provisional measures to preserve their rights.[103] Other arbitration rules provide for similar powers.[104] In various cases, therefore, tribunals have considered granting provisional measures to stay criminal or other proceedings in order to ensure the proper conduct of the arbitration.

A recent example is *Hydro* v. *Albania*, in which the Albanian government sought to extradite two individual Italian claimants from the United Kingdom ["**UK**"]. Albania had issued arrest warrants for the individuals on the grounds they were involved in tax evasion and money laundering.[105] The tribunal granted the claimants' request for provisional measures after determining that the extradition and criminal proceedings, as well as the possible incarceration of the claimants, would prevent the claimants from properly participating in the arbitration.[106] The tribunal called for Albania to suspend the extradition and criminal proceedings until the end of the arbitration, in addition to negotiating with the claimants over the claimants' assets that the government had frozen.[107]

On the basis of that order, a UK court ordered that the extradition proceeding be stayed.[108] The judge in that court found that as the tribunal's provisional measures order was binding on the UK, allowing the claimants to be extradited would breach the UK's international law obligations and undermine the claimants' rights to participate in the arbitration against Albania.[109] While the tribunal issued a new decision soon afterward, finding that the UK court's decision made the tribunal's provisional measures unnecessary,[110] this chain of events demonstrates how the tribunal's decision to grant provisional measures protected the claimants' ability to participate in the proceedings.

Tribunals have similarly granted provisional measures in a number of other cases to ensure the ability of both parties and non-parties to participate.[111] In *Quiborax* v. *Bolivia,* the tribunal ordered Bolivia to stay a domestic criminal proceeding against witnesses after it found that the "*direct relationship between the criminal proceedings and this ICSID arbitration is preventing Claimants from accessing witnesses that could be essential to their case*".[112]

In making these determinations, tribunals must consider the specific facts of the case. They must also balance the tribunal's power to maintain the integrity and proper conduct of the arbitration

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103 ICSID Convention, Regulations and Rules, arts. 39(3), 39(1).

104 *See, e.g.*, the 2010 UNCITRAL Arbitration Rules (art. 26).

105 Hydro S.r.l. and others v. Republic of Albania, ICSID Case No. ARB/15/28, Order on Provisional Measures, ¶¶ 2.20-2.49 (March 3, 2016) [*hereinafter* "Hydro S.r.l."].

106 *Id.* ¶¶ 3.18-3.20.

107 *Id.* ¶¶ 3.21-3.22, 5.2.

108 Government of Albania v. Francesco Becchetti and Mauro de Renzis, Judgment of UK Magistrates' Court, ¶ 43 (May 20, 2016).

109 *Id.* ¶ 54.

110 Hydro S.r.l., ICSID Case No. ARB/15/28, Decision on Claimants' Request for a Partial Award and Respondent's Application for Revocation or Modification of the Order on Provisional Measures (Sept. 1, 2016), ¶¶ 4.14-4.16.

111 *See, e.g.*, Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia, ICSID Case No. ARB/06/02, Decision on Provisional Measures (Feb. 26, 2010), ¶¶ V.1-V.2 [*hereinafter* "Quiborax"]; City Oriente Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador, ICSID Case No. ARB/06/21, Decision on Provisional Measures (Nov. 19, 2007), ¶ IV.1.

112 Quiborax, ICSID Case No. ARB/06/02, Decision on Provisional Measures (Feb. 26, 2010), ¶¶ 163.

with the respondent State's sovereign right to enforce its domestic laws.[113] Tribunals have therefore rejected similar measures in other cases.[114] Yet the robust discussions that surround these determinations show that arbitrators – far from conducting opaque and biased proceedings – are actively involved in preserving the integrity of arbitral proceedings and their core values of due process and fairness.

V. Conclusion

While there are genuine debates about ISDS that arise from its development over the past half-century, its unforgiving treatment in contemporary headlines is undeserved. As a system built upon flexibility – the flexibility of States to define treaty provisions, the flexibility of parties to arbitrations to provide input to the tribunal in how the proceedings may be conducted, and the flexibility of arbitrators to adjudicate according to the demands of the specific case – ISDS reflects and implements the objectives of sovereigns in its functioning and is a system that responds dynamically to the changes proposed by sovereigns and other stake-holders. This capacity to absorb feedback and respond to it is not a panacea for the challenges facing the system. Nonetheless, rather than calling for the wholesale elimination of ISDS and the consequent return to a system of greater uncertainty for foreign investors, those critical of ISDS and calling for an entire dismantlement of the system, should instead focus on providing constructive criticism for the system to build upon.

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113 Hydro S.R.L., ICSID Case No. ARB/15/28, Order on Provisional Measures (March 3, 2016), ¶¶ 3.14-3.16, 3.20 ("[I]t is necessary to ascertain what test is appropriate in the circumstances of a case, such as this, where the relief sought would interfere with the exercise of a sovereign State's rights and duties to investigate and prosecute crime. […] any obstruction of the investigation or prosecution of conduct that is reasonably suspected to be criminal in nature should only be ordered where that is absolutely necessary."); Quiborax, ICSID Case No. ARB/06/02, Decision on Provisional Measures (Feb. 26, 2010), ¶ 164.

114 *See, e.g.*, Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 14 (Dec. 22, 2014), ¶¶ 72-77; Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Order No. 3 (Jan. 18, 2005), ¶¶ 12-13.