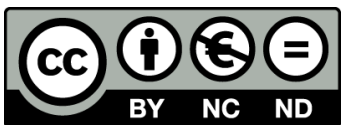
Universitat Internacional de Catalunya

Tesis doctoral

Multinational corporations as a new subject of international investment law: Rights conferred to investors under the ISDS provisions of intergovernmental and bilateral treaties and ways to balance this new reality.

María Chochorelou



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MULTINATIONAL CORPORATIONS AS A NEW SUBJECT OF INTERNATIONAL INVESTMENT LAW: RIGHTS CONFERRED TO INVESTORS UNDER THE ISDS PROVISIONS OF INTERGOVERNMENTAL AND BILATERAL TREATIES AND WAYS TO BALANCE THIS NEW REALITY.

International Mention

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Declaration

I certify that the thesis I have presented for examination for the PhD degree of the Universitat Internacional de Catalunya is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

I warrant that this authorisation does not, to the best of my belief, infringe the rights of
any third party.

Abstract

The international investment regime has faced several criticisms already since the mid-2000s. Scholars and civil society have called both for refinement of the content of the numerous bilateral investment treaties (BITs) and other international investment agreements (IIAs), as well as for reconsideration of the purpose of the investment regime.

Over the past few years, we face a phase of 're-orientation' of international investment law. The 1990s rush of conclusion of BITs is slowing down and gives way to the negotiations at the regional level. This era of transition from investment bilateralism to regionalism presents us with a paradox, which has revived the question of the legal status of multinational corporations. On the one hand, the mega-regional Free Trade Agreements (FTAs) concluded and being negotiated advance the protection of investors and facilitate their access to Investor-State dispute settlement (ISDS). On the other hand, States attempt to react to investors' growing power either by opting out from ISDS or by reforming investment standards to better reflect their interests.

One of the primary objectives of States during this phase of re-orientation of international investment law is safeguarding their right to regulate for public purpose interests. In order to meet this goal, the past few years States slightly shift towards sustainable development, a

concept that has been criticized as threatened by the old IIA regime. The adoption of a sustainable development-oriented approach in investment law also depends largely on the tribunals that are tasked with the interpretation of IIAs. Despite their current reluctance to engage in a sustainable development discussion, this situation may alter with the conclusion of the post-2015 FTAs. These treaties make more references to the principle, both in separate chapters and in their investment chapters. They also place at the arbitrators' disposal interpretative tools for the integration of sustainable development into their argumentation.

This thesis concludes that regionalism has not be suitable to resolve the 'battle' of predominance between investors and States. It argues that other options that may be more suitable to strike a delicate balance between the protection of foreign investment and the public interests of States, and reflects on changes that may render the investment regime more compatible with sustainable development. Special focus is given to the drafting of a multilateral investment treaty, which, although could serve as a 'golden mean' between States and investors, still raises concerns and seems as a farfetched idea.

Acknowledgments

Initially, I would like to express my appreciation and thanks to my supervisor Prof. Carlos Espaliu Berdud for his support and for everything that he taught me throughout these three years of our collaboration. I also sincerely thank the Academic Doctorate Committee of the UIC and the University in general for having opened up its doors, having funded my research and having given me the opportunity to present this thesis.

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I am likewise appreciative of the valuable assistance on the editing of my work given to me by my native-speaking friends, as well as of the support of my colleagues and family members.

TABLE OF CONTENTS

Abbreviations

ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
CETA	EU-Canada Comprehensive Economic and Trade Agreement
ChAFTA	China-Australia Free Trade Agreement
CIL	Customary International Law
COMESA	Common Market for Eastern and Southern Africa
ECtHR	European Court of Human Rights
EU	European Union
EPA	Economic Partnership Agreement
FDI	Foreign Direct Investment

FET	Fair and equitable treatment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID Disputes	International Centre for Settlement of Investment
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965
IIA	International Investment Agreement
IISD	International Institute for Sustainable Development
ILA	International Law Association
ILC	International Law Commission

ILO	International Labour Organization
IP	Intellectual Property
IPFSD	Investment Policy Framework for Sustainable Development
ISDS	Investor-State Dispute Settlement
MAI	Multilateral Agreement on Investment
MFN	Most-favoured Nation
NAFTA	North American Free Trade Association
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-Operation and Development
PCA	Permanent Court of Arbitration
SADC	Southern African Development Community
SCC	Stockholm Chamber of Commerce

SDG	Sustainable Development Goal
SOE	State-owned enterprise
SSDS	State-to-State Dispute Settlement
TPP	Trans-Pacific Partnership Agreement
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNGA	General Assembly of the United Nations
US	United States of America

VCLT	Vienna Convention on the Law of Treaties 1969
WTO	World Trade Organization

CHAPTER 1

Introduction

> '(N)ation states aside, TNCs are the most powerful actors in the world today and to not recognize that power would be unrealistic'.[1]

International investment law is one of the most dynamic and remarkably transformed fields of international law of the past decades. In response to globalization and due to a widespread belief among States that foreign direct investment (FDI) would promote their economic

[1] J I Charney, 'Transnational Corporations and Developing Public International Law', (1983) Duke Law Journal 748, at 768.

growth, FDI flows started increasing over time and, in 2016, they reached their highest ever level.[2] This boost, together with the expansion of the international activities of multinational corporations, made clear the need for an international normative framework. Today, international investment law has been enshrined mainly in bilateral investment treaties (BITs) and less in other International Investment Agreements (IIAs).

Despite the recognition of international investment law as a sub-branch of public international law, it is of a unique character, as it has a distinctive private element stemming exactly from the category of persons to which such international rules apply: private corporations. Investment treaties provide for substantive standards of protection of foreign investors, even though they are not parties to the IIAs. For the enforcement of these substantive standards, IIAs also confer procedural rights on these private entities. Arguably the most important clause of these treaties is the Investor-State Dispute Settlement mechanism (ISDS), which entitles investors to commence arbitration against the host-State. This hybrid nature of the investment regime, and especially the substantive and procedural rights granted to investors, have enhanced the idea of the 'international subjectivity' of the latter. Several authors started arguing that, through the investment system, corporations have acquired legal personality.[3]

[2] In 2016, they reached to an estimated US$1.81 trillion. See United Nations Conference on Trade and Development (UNCTAD, Global Investment Trend Monitor, no 28 (UNCTAD/DIAE/IA/2018/1)

[3] For a detailed analysis of the issue of 'international subjectivity' of investors see

Although the BIT system has been in place for around sixty years, it only attracted the attention of the international community in the early 2000s. Shortly afterwards, the dissatisfaction with the investment legal framework started growing. Critical voices have been raised both with regards to the treaties in place and investment arbitration. Some commentators have remarked that the plurality of investment instruments in place, in combination with the different – and most times – vague wording of substantive standards included in them, have led to expansive and inconsistent interpretations by arbitral tribunals, which calls the legitimacy of the system into question. The main concern, which is of particular relevance to the issue of 'international subjectivity' of corporations, has been that the BITs regime offers numerous legal rights for foreign investors, without establishing corresponding responsibilities for them. Academic and policy circles argue that the current system works only in favour of investors, while it does not take due account of the interests of States and largely neglects the sustainable development impact of investment. The growing number of investor claims challenging a wide array of States' regulatory measures on public interest matters, as well as the growing number of ISDS awards having far-reaching implications for sustainable development contributed to the spread of this criticism.

States seem to have recognized the shortcomings - both

Chapter 1.2.

substantive and procedural - of the current international investment regime and the impact of the latter on their regulatory powers. Having understood that the BIT regime becomes irrelevant, especially in terms of addressing emerging environmental and social challenges, States now reconsider their investment policies. Instead of pursuing investment regulation through bilateral treaties, they started shifting to regionalism. More specifically, the linkage between investment and trade has created a tendency of adopting a holistic approach to deal with them and States start integrating investment chapters in regional Free Trade Agreements (FTAs). Beyond protecting foreign investment, these FTAs contain language that aims at building a sustainable-development friendly investment framework. In order to ensure, however, that the investment regime does not pose obstacles to States' sustainable development paths, more need to be done. As most of these so-called 'new-generation' investment instruments still have in place the ISDS mechanism, the role of investment tribunals in interpreting investment standards in line with sustainable development objectives is crucial.

The remainder of this Introduction will first provide the PhD project description (Section 1.1). It will subsequently give a brief background of the evolution of the international investment law regime over time (Section 1.2), before discussing the 'international subjectivity' theories and their relation to international investment law (Section 1.3). With this background in mind, Section 1.4 will state the objectives of this work, research questions and significance of the thesis, while Section 1.5

will deal with methodological considerations. Finally, Section 1.6 will provide an outline of the Chapters that follow.

1.1 PhD project description

The PhD was conducted as part of the research project "The basis of international law: new European and Mediterranean actors in international society in the 21st century" of the Law School of the UIC, undertaken by the GRE - Study group on fundamental issues in international contemporary society and coordinated by Prof. Carlos Espaliu Berdud.

The research topic of this PhD is directly linked to the project of the above mentioned Research Group and, particularly, to the issue of 'international subjectivity' and the emergence of new actors on the international scene. This thesis can be seen as complementary to the research activities undertaken by the Group, as it focuses on international economic law and it presents a different angle of 'international subjectivity' examining the legal status of multinational corporations. More specifically, in a first stage, this research discusses the loss of prominence of the State on the international investment regime, while assesses the augmented role of multinational corporations and reflects on whether these actors could be considered as new subjects of international

investment law. In a second stage, this work provides thoughts on how to balance the negative effects of the multinational corporations' dominance in investment law.

As accepted by the Doctorate Academic Committee, this thesis is presented as a compendium of publications. More specifically, the PhD consists of two articles published in indexed journals included in the CARHUS Plus system. The first article is published in the Issue 2016/2 of the Revue Belge de Droit International, classified in the category 'B' of the CARHUS + 2014 list. This article corresponds to the first aspect of the research, meaning the rights that the recently concluded Free Trade Agreements (FTAs) - and especially the Investor-State Dispute Settlement (ISDS) mechanisms of their investment chapter - confer to the multinational organizations. The article reviews the investment protection clauses of these treaties and questions how these provisions change the position of the multinational corporations in the international legal system and whether they erode the state sovereignty. The second article is published in 2018, in the second Issue of the 27th Volume of the Review of European, Comparative & International Environmental Law, classified in the category 'A' of the CARHUS + 2014 list. This article summarizes the findings of the second aspect of the research; it covers the social provisions of the new-generation FTAs, namely the sustainable development, labour and environmental clauses, and attempts to answer the question of whether these provisions and their interpretation by investment tribunals are an effective tool in minimizing the power of

corporations and in striking the right balance between the interests of States and investors.

This PhD project was awarded the 2016 Pre-Doctoral Scholarship of the UIC and has been completed in the course of three years. The first year of the doctorate was devoted to the collection and analysis of the bibliography, reading of all the scientific material and drafting of the first article. During the second year, the first article was sent for publication and I proceeded in the drafting of the second article, which was subsequently also sent for publication. The first article was accepted for publication in this second year of the PhD. In the third year, the second article was also published. During this year, I also assisted with the preparation and attendance of conferences and seminars of the Charlemagne Institute for European Studies (ICEE). Moreover, as required for the International mention of the Doctoral Certificate, the last year of the PhD I performed a three-months research stay in the KFG Research Group - The International Rule of Law - Rise or Decline?, in the Humboldt University in Berlin. This research stay helped me acquire a high-level international profile and get a more complete and universal view of the phenomenon of public international law.

1.2 Evolution of the international investment law regime

Current debates on foreign investment regime may imply that the law in this field is a recent development. However, the will of States to protect foreign investors had already appeared during the pre-1945 colonial period. Back then, the rules governing foreign investment were mainly of customary international law nature and the disputes arising were resolved through the system of home-State diplomatic protection.[4] This regime faced a significant change after the World War II. Improvements in transportation and communication facilitated FDI flows around the world, and the expansion of the international activities of multinational corporations made clear the need for an international investment normative framework. Some early attempts of codification in the international level were made between 1948 and 1960, but they were not successful. First in 1948, the draft Havana Charter included a provision on investment, however, it never came into force.[5] Other international economic agreements signed the same year, such as the

[4] E Borchard, The Diplomatic Protection of Citizens Abroad (Banks Law Publishing, 1915).

[5] Havana Charter for an International Trade Organization (Havana Charter, ITO Charter 1948) (United Nations [UN]) UN Doc E/CONF.2/78. See also P Muchlinski, 'A Brief History of Business Regulation', in S. Picciotto and R.Mayne (eds), Regulating International Business: Beyond Liberalization (MacMillan Press Ltd., Basingstoke, Hampshire, 1999), at 53: "The inclusion of a right of capital importing states to control the conditions of foreign investment, and the absence of any unequivocal provision for compensation in the case of expropriation, caused widespread opposition to the Havana Charter among business interests and contributed to its demise".

Bogota Agreement and the General Agreement on Tariffs and Trade (GATT) did not regulate investment.[6] Finally, non-governmental initiatives designed to create a legal framework for investment, such as the 1948 ICC International Code of Fair Treatment of Foreign Investments and the 1960 ILA Draft Statutes of the Arbitral Tribunal for Foreign Investment And the Foreign Investment Court were never adopted.[7]

As the negotiations on a multilateral investment treaty failed, States followed a different path: the path of bilateralism. They started concluded Bilateral Investment Treaties (BITs), instruments that have been defined as "agreements between two countries for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either country".[8] The first BIT was

[6]American Treaty on Pacific Settlement ("Pact of Bogotá"), Organization of American States (OAS), Treaty Series, No. 17 and 6 (30 April 1948); General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

[7] International Chamber of Commerce, International Code of Fair Treatment of Foreign Investments, ICC Pub. 129 (Paris Lecraw Press, 1948) and International Law Association Draft Statutes of the Arbitral Tribunal for Foreign Investment And the Foreign Investment Court (ILA, 1948), reprinted in UNCTAD, International Investment Instruments: A Compendium, Volume XII, UNCTAD/DITE/4(Vol.XII) (UN, 2003), at 273 and 259 respectively.

[8] UNCTAD, 'Investment Instruments Online', available at http://www.unctadxi.org/templates/Page1006.aspx (last access 3 August 2018).

concluded in 1959 between Germany and Pakistan[9] and, soon, BITs became the principal instruments for the regulation of investment relationships. These agreements originated from the wish of capital-exporting countries to protect the assets of their investors in capital-importing countries, thus they were exclusively concluded between a developed and a developing State. Their main objective was to constrain the ability of developing host States to discriminate against foreign investors. Early BITs did not include any provision on dispute settlement. Foreign investors had two avenues if a host State interfered with their investment; either to seek relief in the national courts of the host State or, if these courts were ineffective, to persuade their home State to espouse their claim and exercise diplomatic protection. However, the emergence of several investment disputes at that time made obvious that both options had important limitations. With regards to the first option of national courts, foreign investors were often encountering difficulties caused by the partiality and lack of independence of the host-State judiciary. The second option of diplomatic protection was again problematic, as home governments would frequently prove reluctant to take up an investor's claim should higher political risks were at stake. This is why, in the 1970s we see the first BITs to introduce ISDS [10] and, until the late 1980s, this mechanism had become a standard provision of these agreements.

[9] Germany-Pakistan BIT (adopted 25 November 1959, entered into force 28 April 1962).

[10] Indonesia-Netherlands BIT (adopted 6 April 1994, entered into force 1 July 2015, terminated 30 June 2015).

In the 1990s, a second round of attempts for the establishment of multilateral investment rules took place; in 1995, negotiations on a proposed Multilateral Agreement on Investment (MAI) begun within the Organisation for Economic Co-Operation and Development (OECD), however they only lasted for three years, as States could not agree on core principles of investment protection.[11] Similarly, the 1996 Singapore Ministerial Conference of the World Trade Organization (WTO) started working on a program on the relationship between international trade and investment, which, however, was also discontinued due to the divergent interests of States. While codification in the multilateral level failed, during the 1990s bilateralism proceeded forward with giant strides; until the late 1980s only 381 BITs existed, but, by the end of 2000, their number reached 2,067.[12] The purpose of these so-called 'first generation' BITs was still limited to the protection of foreign investors, which was reflected in the content of these treaties; BIT standards were traditionally very broad and were not defined precisely. The same decade was also when foreign investors 'discovered' the ISDS mechanism. The first ISDS award was issued in 1990 under the Sri-Lanka-United Kingdom BIT[13]

[11] The Multilateral Agreement On Investment, Draft Consolidated Text, OECD Negotiating Group on the Multilateral Agreement on Investment (MAI), DAFFE/MAI(98)7/REV1 (22 April 1998).

[12] UNCTAD, World Investment Report 2015 - Reforming International Investment Governance, UNCTAD/WIR/2015, (UNCTAD 2015), at 123.

[13] Asian Agricultural Products Ltd. (AAPL) v Republic of Sri Lanka, ICSID Case No. ARB/87/3, (Award of 27 June 1990) under Sri Lanka-United Kingdom BIT (adopted 13

and was followed by a vast number of cases during the 1990s and especially the 2000s.

While quantitative data of the United Nations Conference on Trade and Development (UNCTAD) show that the total number of BITs number has risen up to 2952,[14] today this proliferation of bilateral instruments has gradually slowed down. On the other hand, the IIA making in the regional level has accelerated, with States starting integrating investment chapters in their FTAs. This practice is not new; investment provisions in regional FTAs are already present since 1992, when the North American Free Trade Association (NAFTA) was signed. [15] However, it is only since 2007 that a vast majority of such regional instruments with detailed chapters on investment started emerging. This shift to regionalism has coincided with a general phase of 're-orientation' of international investment law. Probably under the pressure of ISDS cases that still rapidly increase (with their current number to reach 855),[16] States started redrafting their old-generation IIAs, refining their content and expanding their scope to also include public interest matters. These ambitious and wide-ranging investment treaties that are generated during

February 1980, entered into force 18 December 1980).

[14] UNCTAD, International Investment Agreements Navigator, http://investmentpolicyhub.unctad.org/IIA, (last access 25 July 2018).

[15] North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, 32 ILM 289, 605 (1993).

[16] UNCTAD, International Dispute Settlement Navigator, http://investmentpolicyhub.unctad.org/ISDS, (last access 25 July 2018).

this 're-orientation era' of international investment law is what we call ‘new-generation’ IIAs.

1.3 'International subjectivity' and investment law

'International subjectivity', despite being a fundamental concept of international law, has been highly contested. It is mainly linked to the doctrine of legal personality,[17] which, as argued by the International Court of Justice (ICJ), "has sometimes given rise to controversy".[18] Indeed, several opinions on the question of which entities can qualify as subjects of international law have been expressed. The most withspread theory, at least throughout the 19th century, has been that States are the only subjects of international law. The emergence of new actors, especially after the World War II, brought about systematic changes to the classic international legal order. This had as a result the State sovereignty principle to start ebbing away and the departure from the idea that States are the only regulators of international law. A milestone towards the broadening of the circle of subjects of international law was the Reparation for Injuries Suffered in the Service of the United Nations

[17] J Klabbers, An Introduction to International Institutional Law, 2nd Edn (Cambridge University Press, 2009), at 38-44.

[18] Reparation for Injuries Suffered in the Service of the United Nations, 1949 ICJ Reports 174, Advisory Opinion (11 April 1949), at 178.

case of 1949. In its advisory opinion, he ICJ recognized the legal personality of international organizations, stating that subject of international law can be any entity which is "capable of possessing international rights and duties, and have capacity to maintain their rights by bringing international claims".[19] Building on the Reparation for Injuries case, several definitions of 'international subjectivity' emerged. Some of them directly echoe the definition of the ICJ, [20] while others add elements to it. Brownlie and Dixon, for instance, state that international legal personality further stems from the capacity of the entity to conclude international agreements and to enjoy immunities from national jurisdictions, and to be subject to international claims.[21] Although most definitions accept the legal personality of some non-State entities, different theories there have been formed on how this personality is acquired. The most popular are the the 'recognition theory' asserting that

[19] Ibid, at 179.

[20] M McDougal and H Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order' (1959) 53(1) American Journal of International Law 1, at 1; H Lauterpacht, 'General Rules of the Law of Peace', in H Lauterpacht (ed.) International Law: Volume 1, The General Works: Being the Collected Papers of Hersch Lauterpacht (Oxford University Press, 1970), at 193; A Cassese, International Law, (Oxford University Press, 2001), 46; V Chetail, 'The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward', in D Alland et al. (eds) Unity And Diversity Of International Law: Essays In Honour Of Professor Pierre-marie Dupuy (Martinus Nijhoff Publisher, 2015), at 108.

[21] The last point was only made by Brownlie. See I Brownlie, Principles of Public International Law (Oxford University Press, 1999), at 56-57; M Dixon, Textbook on International Law, 7th Edn (Oxford University Press, 2013), at 116.

States remain the primary subjects of international law and upgrade other entities to subjects of international law, endowing them with rights and obligations,[22] and the 'individualistic conception' supporting that the 'international subjectivity' of non-state actors - mainly individuals - exists a priori and does not derive from States.[23]

If today the legal personality of international organizations is undisputed, this is not the case for multinational corporations. The issue of 'international subjectivity' of corporations is of special relevance to international investment law. As discussed above, investors are direct recipients of both the substantive protection standards of investment treaties and of the procedural right to bring ISDS claims. States, on the other hand, have been characterized as "mostly passive participants in a

[22] P Daillier and A Pellet, Droit International, 5th Edn (L.G.D.J., 1994), at 395 and 551; C Tomuschat, "International law : ensuring the survival of mankind on the eve of a new century : general course on public international law (Vol. 281)", in The Hague Academy of International Law (ed.) Collected Courses of the Hague Academy of International Law (Brill and Nijhoff, 1999), at 160; P K Menon 'The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine' (1992) 1 Journal of Transnational Law and Policy 151; N Jägers, 'The Legal Status of the Multinational Corporation Under International Law', in M K Addo (ed.) Human Rights Standards and the Responsibility of Transnational Corporations 259 (Brill Nijhoff, 1999), at 262.

[23] A Cançado Trindade, 'International Law for Humankind: Towards a New Jus Gentium: General Course on Public International Law (Vol. 316)', in The Hague Academy of International Law (ed.) Collected Courses of the Hague Academy of International Law (Brill and Nijhoff, 2005), at 252–84.

game controlled by corporate plaintiffs".[24] Do these rights bestowed on investors elevate them to subjects of international law?

According to the literature, one way to answer this question could be by considering whether the aforementioned rights belong directly to investors, or rather to States. Several authors support the former position; among them Douglas, who writes that "the investor is bringing a cause of action based upon the vindication of its own rights rather than those of its national State.".[25] The same position was held by a number of investment tribunals. The most prominent examples are the CPI v Mexico case and the Occidental v. Ecuador cases, where tribunals asserted that "companies are to have a direct claim for their own benefit".[26] These individual rights, according to Braun, a firm proponent of the

[24] J E Alvarez, "Are Corporations "Subjects" of International Law?" (2011) 9 Santa Clara Journal of International Law 1, at 11.

[25] J Paulsson, 'Arbitration without Privity', (1995) 10 ICSID Review - Foreign Investment Law Journal 232, at 256; Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitrations' (2003) 74(1) British Yearbook of International Law 151, at 180. Similarly, Z Douglas, The International Law of Investment Claims (Cambridge University Press, 2009), at 6–10; T W Walde, 'Investment Arbitration under the Energy Charter Treaty: An Overview of Key Issues' (2004) Transnational Dispute Management 1.

[26] Corn Products International, Inc. v United Mexican States, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility (15 January 2008), paras 167 and 176; Occidental Exploration and Production Co. v Republic of Ecuador, LCIA Case No. UN3467, Non-justiciability of Challenge to Arbitral Award (Appeal Court) (9 September 2005), para 20.

'international subjectivity' of investors, upgrade investors "to the status of a partial subject of international law".[27] Similarly, Tully writes that "(c)orporations clearly have a degree of international legal personality which encompasses for example locus standi before (International Centre for Settlement of Investment Disputes) ICSID Tribunals".[28] Not everyone agrees with this view. Several authors have supported the so-called 'derivative rights' thesis, arguing that investors do not have individual rights and are only permitted to enforce their home States' rights.[29] According to Shaw, the participation of investors in itself is not sufficient to convey to corporations the status of a subject of international law.[30] Others have taken the intermediate position of 'contingent rights', claiming that IIAs only grant procedural rights to investors, while substantive rights are only granted to the treaty parties.[31] This latter position has been accepted by the tribunal of the ADM v Mexico case,

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[27]T R Braun, 'Globalization: The Driving Force in International Investment Law', in M Waiber et al. (eds.) The Backlash Against Investment Arbitration: Perceptions and Reality (Wolters Kluwer, 2010), at 491–506.

[28] S Tully, Corporations and International Lawmaking (Brill | Nijhoff, 2007), at 429.

[29] R Higgins, Problems and Process: International Law and How We Use It (Oxford University Press, 1995), at 50. Also, International Law Commission (ILC), 'First Report on Diplomatic Protection, by Mr. John R. Dugard, Special Rapporteur', U.N. Doc A/CN.4/506 and Add. 1 (7 March and 20 April 2000), at 213, para 24.

[30] M N Shaw, International Law, 5th Ed. (Cambridge University Press, 2003), at 176 et seq.;

[31] For the three approaches to the nature of IIA rights see A Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights' (2015) 56(2) Harvard International Law Journal 353, at 355

which alleged that "the (substantive) rights...only exist at the international plane between the NAFTA Parties", while "(i)nvestors are the objects or mere beneficiaries of those rights". [32]

Even if we accept that investors have individual rights, is this sufficient for their elevation to subjects of international law? As mentioned above, one of the criteria that has been seen as indicative of legal personality is whether an entity, besides rights, also has obligations under international law. In this vein, several authors have denied the legal personality of corporations. Both Cassese and Malanczuk, although recognize that corporations are beneficiaries of international rules, believe that they have not been granted rights or obligations under international law.[33] At the other end of the spectrum, Nowrot believes that there is a "presumption in favour of multinational corporations being subject to international legal obligations to contribute to, inter alia, the promotion and protection of human rights, core labour and social standards as well as the environment.".[34] Similarly, The Urbaser v.

[32] Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v The United Mexican States, ICSID Case No. ARB(AF)/04/05, Award (21 November 2007), paras 171 and 179

[33] A Cassese, International Law in a Divided World (Clarendon, 1986), at 103; P Malanczuk, Akehurst's modern introduction to international law, 7th Edn, (Routledge 1997), at 100; P Muchlinski, "Corporations in International Law", in R. Wolfrum (ed.), Max Planck Encyclopedia of Public International Law (Oxford University Press, 2010).

[34] Karsten Nowrot, 'Reconceptualising International Legal Personality of Influential Non-State Actors: towards a Rebuttable Presumption of Normative Responsibilities', (2005/6) 80 Philippine Law Journal 563, at 585.

Argentina tribunal claimed that investors have obligations deriving from the Corporate Social Responsibility (CSR) standard, stating:

> "international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation. In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law".[35]

Adopting a totally different approach, some scholars, such as Clapham, have left the question of international subjectivity of investors open,[36] while others, such as Higgins, seem to consider legal personality as a 'fabricated fiction', which serves "no functional purpose".[37]

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[35] Urbaser S.A., Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic, ICSID Case No. ARB/07/26, Award (8 December 2016), para 1995. Similarly, E Lauterpacht, 'International Law and Private Foreign Investment', (1997) 4 Indiana Journal of Global Legal Studies 259, at 274.

[36] A Clapham, Human Rights Obligations of Non-State Actors (Oxford University Press, 2006), at 76-77.

[37] Higgins (n 29), at 52; J Klabbers, '(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non−State Actors', in J Petman and J Klabbers (eds), Nordic Cosmopolitanism. Essays in International Law for Martti Koskenniemi (Brill 2003).

1. 4 Objectives, questions and significance of the research

The divergent views in the literature regarding the 'international subjectivity' of investors may indicate that the changing structure of the international system has rendered the traditional positivist thought of 'subjects' and 'objects' of international law outdated.[38] Therefore, unlike previous legal scholarship, this research does not aim to give a direct and absolute response to the question of whether investors have legal personality. Rather, the objective of this thesis is to peripherally touch upon the issue of 'international subjectivity', by addressing the broader question of what rights have been bestowed to investors by IIAs in place and what powers have been retained by States. The examination of States' rights under IIAs is imperative, as the legal standing of investors in the international investment legal sphere cannot be conceptualized in isolation from the respective standing of States, who are, ultimately, the ones drafting investment treaties.[39]

In order to answer the aforementioned question, this research will focus on the recently signed or being negotiated FTAs, whose reforms were meant to address the concerns related to the growing power of investors and to preserve the sovereignty of States. Therefore, another

[38] Nowrot (n 34) at 568.

[39] Roberts, (n 31), at 356.

objective of the thesis is to assess whether the public interest elements – and more specifically the sustainable development, environmental and human rights provisions – incorporated in these FTAs 'change the scenery' of international investment law, placing States back into a predominant position. Special weight is given to sustainable development, a concept that has been acknowledged as being able to help achieve the objectives of all stakeholders and to deliver a stable, clear and predictable IIA regime.[40]

Finally, we cannot grasp the full picture of the international investment framework without taking into consideration the role of arbitral tribunals, the third 'wheel' of investment arbitration. This is because, in international investment law, a field so fragmented and still vague, arbitrators are not only decision-makers, but, through their interpretations, also shapers of law. Their decisions are decisive for the future of investment law and, consequently, for the status of investors in the international legal sphere. Along this line, this thesis analyses the reasoning and awards of ISDS tribunals, especially when adjudicating cases with explicit public interest – environmental and human rights – components, with the purpose to determine whether their interpretations preserve the right of States to regulate, or rather support the business interests of investors. Furthermore, this research aims to detect whether new-generation FTAs could alter the practice of ISDS tribunals, by examining whether these treaties impose an obligation on arbitrators to

[40] UNCTAD World Investment Report 2015 (n 12), at xii.

interpret investment standards in a more sustainable-development friendly way.

On this understanding, the key questions to which this thesis seeks resolution are:

- What are the rights conferred on investors under the investment treaty regime? Have these rights been strengthened or reduced with the conclusion of FTAs?
- What are the reforms of new FTAs that enhance the status of States? Are the sustainable development provisions incorporated in these FTAs capable of preserving the regulatory freedom of States?
- To what extent investment tribunals affect the standing of investors and States under the investment legal regime, and how – if at all – the sustainable development components of new-generation FTAs could alter the way that ISDS tribunals resolve disputes?

With international investment law in turmoil, these questions seem more pertinent than ever. Naturally, existing literature has already attempted to articulate the concerns regarding the IIA regime, however most of the academic works were produced before the new era of modernization of investment treaties, thus study the 'old-generation IIAs' and mainly BITs. Moreover, they are usually limited to the question of

what rights, and of what nature, investment treaties grant to investors, without reflecting on the rights retained by States.[41]

The contribution of this research to the existing literature is that it extends the discussion to the new developments in international investment rule-making that took place after 2015. More particularly, it focuses on two significant shifts that characterize this era of reconceptualization of international investment law. The first is the shift from bilateralism to regionalism,[42] and especially the trend of regulating investment through so-called 'mega-regional' FTAs, meaning instruments signed and being negotiated by countries or regions with a major share of world trade and FDI. The second is the shift towards sustainable development. The need to align international investment law with the new development agenda and Sustainable Development Goals (SDGs) was underlined by UNCTAD in its World Investment Reports of 2015 and 2016.[43] Following UNCTAD's recommendations, all new-generation FTAs include sustainable development-oriented reform elements. The significance of this work lies in the fact that it examines both the status of investors and States in the light of these new developments. It, therefore, looks at the issue of 'international subjectivity' from a different angle, offering a new perspective which complements and fills the gaps of the current scholarly debates.

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[41] For this point see Roberts (n 31), at 356.

[42] UNCTAD World Investment Report 2015 (n 12), at 123

[43] Ibid and UNCTAD, World Investment Report 2016, Investor Nationality: Policy Challenges (UNCTAD 2016).

It has been suggested that "(i)nvestment policymaking is getting more complex", but also, "more uncertain".[44] This seems to be confirmed, as, already before regionalism takes effect, its future seems nebulous: the ratification of certain FTAs is doubtful and some States seek multilateral solutions for the regulation of investment.[45] The analysis of this work could not be more timely; as long as regional FTAs is still the prefered way to regulate investment, this thesis evaluate whether they can improve the investment treaty system, and whether other the alternatives proposed by States could be more efficient in striking a delicate balance between the rights and obligations of investors and States.

1. 5 Research methodology

The term 'legal scholarship' can cover several methods of research. An interesting classification was proposed by Jan Smits, on the basis of the questions that could be asked about the law. According to the author, these questions are: (1) 'how does the law read?' (2) 'how ought the law to read?', (3)'what are the consequences to society of applying a certain legal rule?' and (4) 'what is law and how does it develop?'. The first question is translated to the 'descriptive legal science', whose aim is

[44] UNCTAD, World Investment Report 2017: Investment and the Digital Economy (UNCTAD 2017), at 98.

[45] See Section 2.4 below.

to describe the positive law in a certain field. The second question is what Smits calls 'normative approach'; the objective of this method is not merely to describe law, but rather criticize it and suggest improvements. The third question is linked to the so-called 'empirical legal research', while the fourth question relates law with other systems and tries to explain it from an external perspective ('explanatory legal theory').[46]

Following the categorization of Smits, this work could be seen as a combination of the 'descriptive legal theory' and the 'normative approach'. A good legal research cannot be done without a careful description of its research object. Therefore, this thesis makes a selection of international investment instruments and performs a detailed textual analysis of their legal provisions. The treaties chosen are the post-2015 mega-regional FTAs that are considered as trendsetters, namely the Trans-Pacific Partnership Agreement (TPP), the EU-Canada Comprehensive Economic and Trade Agreement (CETA), the China-Australia FTA, the EU-Singapore FTA, the EU-Vietnam FTA and the Transatlantic Trade and Investment Partnership (TTIP).[47] Although

[46] J M Smits, The Mind and Method of the Legal Academic (Edward Elgar Publishing, 2012), at 8-9.

[47] Trans-Pacific Partnership Agreement (TPP) (adopted 4 February 2016, not yet in force); Comprehensive Economic and Trade Agreement (CETA) (adopted 30 October 2016, provisionally entered into force 21 September 2017); China Australia Free Trade Agreement (adopted 17 June 2015, entered into force 20 December 2015); EU-Singapore Free Trade Agreement (negotiations concluded 17 October 2014, not yet adopted); EU-Vietnam Free Trade Agreement (negotiations concluded 2 December

the EU-Singapore and the EU-Vietnam FTAs are not strictly-speaking mega-regionals, they are worthy of discussion, as they can be considered as 'pathfinder agreements' on the road to an eventual EU-ASEAN mega-regional FTA.[48] In order to identify what makes these agreements qualify as trendsetters, a comparative analysis is also performed between these agreements and older IIAs. Moving on from the description, this research examines these legal instruments with a more critical eye, concentrating on the question of how the law ought to read. This critical analysis is not imaginable without the review of the vast amount of academic literature and civil society reports. In addition, the relationship of the investment regime with other fields of international law is explored. Therefore, regulations and soft-law instruments of international organizations, such as the United Nations (UN), the World Trade Organization (WTO) and the International Labour Organization (ILO) are also made part of the research. Moreover, guidelines and model laws of other international bodies, such as the Organisation for Economic Co-Operation and Development (OECD), United Nations Commission on International Trade Law (UNCITRAL), and UNCTAD are considered. Finally, the thesis looks at the investment jurisprudence by both a 'descriptive' and 'normative' angle; it presents the arguments put forward

2015, not yet adopted); Transatlantic Trade and Investment Partnership (TTIP) (still in negotiations).

[48] L H Kiang, Minister of Trade & Industry of Singapore, 'Speech at the Singapore-Hungary Business Forum' (27 September 2017), available at https://www.sbf.org.sg/images/2017/Singapore-Hungary_Business_Forum_SBF_CEO_Speech.pdf (last access 5 August 2018), at 2.

by the disputing parties in ISDS cases, analyses the reasoning of tribunals, and detects which party usually prevails in different cases, why, and whether for good reasons.

For the better conceptualization of the context and the normative arguments made in the thesis, some theoretical and historical explanations of the creation and evolution of the foreign investment protection regime are also given. Last but not least, although this research is library based, empirical studies performed by other authors are presented throughout the thesis. Also, empirical insights can be drawn by the analysis of the case-law found both in Chapters 2 and 3.

1. 6 Outline

Chapter 1 is the introductory part of this thesis. It discussed the preface and the background of the research, it defined the objectives and importance of the work, and it described the research methodology. Including the Introduction, this thesis is structured into four chapters.

Chapter 2 corresponds to the first objective of the research: to 'situate' investors in the international legal sphere during this era of ‘re-orientation’ of international investment law. The provisions of the

recently concluded or negotiated FTAs are analysed and compared with clauses of earlier IIAs. Both the substantive and procedural rights conferred on investors are presented and special emphasis is placed on ISDS provisions. From this analysis we draw conclusions about the increased strength of multinational companies in the investment legal sphere. Afterwards, the 'reaction' of States to this growing power and their attempts to restrict it are examined. In this realm, the backlash against ISDS and the building of stronger State-to-State and domestic processes are discussed. Furthermore, the FTA provisions that aim to enhance transparency and consistency are evaluated. Finally, Chapter 2 contributes with reflections on the results of regionalism and on the future of international investment law, estimating whether the conclusion of a multilateral investment treaty would be the desirable and plausible.

Building on the discussion on regionalism, Chapter 3 assesses whether new-generation FTAs are able to address the concerns expressed about the inadequacy of the current investment regime to preserve the regulatory activities of States and of the ISDS mechanism to resolve public interest disputes.[49] It principally concentrates on sustainable development, a broad concept that encompasses social, environmental and human rights elements. The question of whether the investment provisions of these treaties could be interpreted in a way that furthers –

[49] F L Garcia et al, 'Reforming the International Investment Regime: Lessons from International Trade Law' (2015) 18(4) Journal of International Economic Law 861, at. 861-892.

rather than hinders – sustainable development is asked. The Chapter reviews the sustainable development language of the new-generation FTAs, studying both the separate environmental and labor chapters introduced in these treaties, as well as the sustainable-development references made in the investment chapters. Afterwards, the Chapter turns to arbitrators, investigating their current practice when facing environmental and human rights claims. It, afterwards, outlines the interpretative tools at the disposal of tribunals for the alignment of IIAs with the SDGs set out by the 2030 Agenda for Sustainable Development. More specifically, it explores whether tribunals could rely on other international agreements, customary law as well as soft-law instruments when adjudicating disputes with public interest components. Finally, the Chapter suggests further reforms, both of the profile of the decision-makers and of the investment agreements themselves, that would render the investment regime more compatible with sustainable development.

Chapter 4 is the concluding chapter of the thesis. It briefly summarizes the findings of this work, provides some final thoughts on regionalism, puts forward policy recommendations, and suggests areas in need of further research.

CHAPTER 2

Recent Regional Investment Treaties And Dispute Settlement: Investors And States On A Roller-coaster Of Predominance

2.1 Introduction

Over the past few years, we face a phase of ‘re-orientation’ of international investment law. The traditional bilateral regime is losing ground and States are starting to integrate investment chapters in regional Free Trade Agreements (FTAs), following older models such as the North American Free Trade Agreement (NAFTA). This shift has been accompanied by promises of governments that these agreements would achieve a better balance between the protection of investors and the

rights of States.[50] With several new-generation IIAs 'under construction', crucial questions arise. Have States kept this promise? Do the new agreements guarantee the regulatory power of States or do they strengthen the role of multinational corporations in the international forum? Does regionalism have the anticipated results? What will be the future of international investment law?

The present Chapter's purpose is to identify the 'standing' of multinational corporations in the international investment legal plane under the light of the provisions of the recently concluded or negotiated mega-regional FTAs.[51] Section 2 examines whether the reforms made in these treaties augment the role of investors in international investment law. Special attention is paid not only to the investment chapters of the agreements but also to other FTA chapters which could be proven relevant to ISDS. In Section 3, the 'reaction' of States to the growing power of investors and their attempts to minimize it will be analyzed. The third part will contribute with reflections on the results of regionalism and on the future of international investment law, assessing

[50] European Commission, 'Investment Protection and Investor-to-State Dispute Settlement in EU agreements', Fact Sheet (11 November 2013), http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf (last access 4 August 2018).

[51] The Trans-Pacific Partnership Agreement (TPP), the EU-Canada Comprehensive Economic and Trade Agreement (CETA), and Australia-China FTA (signed), the EU-Singapore FTA, EU-Vietnam FTA (negotiations concluded) and the Transatlantic Trade and Investment Partnership (TTIP) (in negotiation) will be analyzed.

whether the conclusion of a multilateral investment treaty would be the appropriate and most plausible way to balance the rights between investors and States.

2.2 New-generation FTAs as a Reaffirmation of Investors' Growing Power

This Section assesses whether the amendments of the mega-regional FTAs are substantial and suitable to address the flaws of the current investment treaty regime.

2.2.1 Broad Investment Provisions

2.2.1.1 Investment and investor definition

Wide investor protection can already be observed in the first article of the investment chapters of new FTAs, the definitions.

Rather than following NAFTA's exhaustive list of covered investments and explicit exclusion of certain types of assets,[52] the new treaties adopt a more investor-friendly, loose approach.[53] They define

[52] NAFTA art. 1139

[53] TPP art. 9.1, ChAFTA art. 9.1(d), EU-Singapore FTA art. 9.1(1), EU-Vietnam FTA art. 8.4(p), CETA art. 8.1, TTIP proposal Definitions.

investment as 'every kind of assets' and then provide an indicative list, which is long and vague, encompassing controversial portfolio investments[54] and intellectual property rights. In order to avoid expansive interpretations in ISDS, they set out certain characteristics that assets should have to qualify as investments. But the list is again indicative ('such as'), giving latitude to tribunals to stretch the scope of investment.

The definitions of investor are also quite broad and follow the NAFTA model,[55] covering the Party itself, natural and legal persons and granting them pre-establishment rights ('that seeks to make … an investment').[56] Some IIAs include a denial of benefit clause for enterprises that do not have 'substantial business activities' or are not 'directly or indirectly owned or controlled by a natural person' of the Party.[57] Although useful additions, the meaning of these concepts is not

[54] Previous IIAs have excluded portfolio investments from the definition of covered investments: UNCTAD, Scope and Definition (A sequel): Series on Issues in International Investment Agreements II, UNCTAD/DIAE/IA/2010/2 (UNCTAD 2011), at 5; D Gaukrodger, Investment Treaties and Shareholder Claims: Analysis of Treaty Practice, OECD Working Papers on International Investment, no 2014/03 (OECD Publishing, 2014), at 12-13.

[55] NAFTA art. 1139, TPP art. 9.1, ChAFTA art. 9.1(e), EU-Singapore FTA art. 9.1(2), EU-Vietnam FTA art. 8.4(q), CETA art. 8.1.

[56] TPP art. 9.1(ft12) limits the pre-establishment rights to investors that have taken 'concrete actions' to make an investment. Similarly EU-Vietnam FTA art. 8.4(q)(ft9). EU-Singapore FTA does not provide for pre-establishment rights.

[57] TPP art. 9.15, ChAFTA art. 8.17, EU-Singapore FTA art. 9.1(3)(4), EU-Vietnam FTA art. 8.4(a)(b)(c), CETA arts 8.1 and 8.16, TTIP proposal Article 9.

spelled out in the agreements. They, therefore, do not inspire confidence that they will prevent 'treaty-shopping' practices from investors with covered subsidiaries.[58]

2.2.1.2 Substantive standards

The new IIAs were meant to clearly define and circumscribe substantive standards. The Fair and Equitable Treatment (FET) poses to the host State the obligation to treat investments justly. Usually constructed as an open-ended, without precise meaning standard, it has been turned into an 'all-encompassing' provision, popular to investors.[59] Concerns about expansive interpretations by investment tribunals and lack of predictable results,[60] put it at the core of the investment regime reform. Interestingly, the drafting of the standard in mega-regional FTAs follows divergent approaches. Nevertheless, none of them seems to

[58] B A Melo Araujo, The EU Deep Trade Agenda: Law and Policy (Oxford Studies in European Law, 2016), at 117-119.

[59] C Schreuer, 'Fair and Equitable Treatment in Arbitral Practice', (2005) 6(3) The Journal of World Investment and Trade 357, at 364. Also see Mondev International Ltd v United States of America, ICSID Case No ARB(AF)/99/2, Award (11 October 2002), para 118; Waste Management, Inc v United Mexican States, ICSID Case No ARB(AF)/00/3, Award (30 April 2004), para 99.

[60] UNCTAD, Fair and Equitable Treatment: Series on Issues in International Investment Agreements II, UNCTAD/DIAE/IA/2011/5 (UNCTAD 2011), at 10-11.

sufficiently address the concerns. The new EU IIAs narrow FET's scope providing a closed, exhaustive list of States' obligations,[61] but they do not prohibit the protection of investors to go beyond the customary international law (CIL) on the treatment of aliens. They also protect 'specific representations' and 'legitimate expectations' of investors. Although all mega-regional FTAs omit umbrella clauses, these concepts re-introduce a disguised umbrella clause,[62] as contractual obligations between States and investors could be elevated to treaty obligations, which could promote corporate favoritism.[63] On the other hand, the US agreements have always linked FET with CIL.[64] TPP is no exception and Article 9.6 explicitly refers to CIL as the standard of treatment to be afforded to investments. In theory, this approach would better protect States' regulatory authority. ISDS panels, though, have not been always

[61] EU-Singapore FTA art. 9.4, EU-Vietnam FTA art. 8.14, CETA art. 8.10, TTIP proposal art. 3.

[62] K Nadakavukaren Schefer, International Investment Law, (Edward Elgar Publishing, 2013), at 425: 'An 'umbrella clause' is a BIT provision that extends investor protection to any obligation made by the state with respect to an investment'.

[63] S Sinclair, S Trew and H Mertins-Kirkwood, Making Sense of the CETA: An Analysis of the Final Text of the Canada-European Union Comprehensive Economic and Trade Agreement, Canadian Centre for Policy Alternatives (2014), at 17, available at https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2014/09/Making_Sense_of_the_CETA.pdf (last access 15 July 2016).

[64] NAFTA art. 1105(1) and NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001), http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp (last access 15 July 2016)

eager to apply CIL basing it in State practice and opinio juris; instead they usually cite decisions of previous tribunals, rendering the distinction between CIL-linked or non-CIL-linked FET standards relatively meaningless.[65] As none of the new FTAs expressly prohibit arbitrators to do so, these practices will probably not cease to exist. Finally, despite using softer language than EU IIAs, TPP also recognizes that 'legitimate expectations' of investors can be relevant when an infringement is determined.[66]

Indirect expropriation, namely the loss of investors' expected profits because of States' actions that are not necessarily directed to the investor, is the second most-alleged standard in ISDS. Because of its nebulous language in BITs and early regional IIAs,[67] tribunals have, over the decades, developed different tests to regulate it, resulting in

[65] Railroad Development Corporation (RDC) v Republic of Guatemala, ICSID case no ARB/07/23, Award (29 June 2012). See also UNCTAD Fair and Equitable Treatment (n 60), at 11-12 and 44-58; and M C Porterfield, 'A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals', (2013) 3(3) Investment Treaty News, available at http://www.iisd.org/pdf/2013/iisd_itn_march_2013_en.pdf (last access 15 July 2016).

[66] L Johnson and L Sach, 'The TPP's Investment Chapter: Entrenching, rather than reforming, a flawed system', CCSI Policy Paper (Columbia Center on Sustainable Development, 2015), at 4, availabe at http://ccsi.columbia.edu/files/2015/11/TPP-entrenching-flaws-21-Nov-FINAL.pdf. (last access 15 July 2015).

[67] NAFTA art. 1110.

contradictory awards.[68] Scholars have called for omission of the standard, [69] however, States have only moved to a modest reform. On a positive note, mega-regional FTAs add an explanatory annex in their investment chapters, which outlines criteria distinguishing indirect expropriation from non-compensable regulatory actions.[70] The wording of the texts, though, comes to undermine these changes; regulatory actions can still amount to expropriation 'in rare circumstances', which gives great leeway to the tribunals for interpretation. The provision of the 'case-by-case' determination of whether an expropriation has occurred has a similar effect. In some agreements, the 'reasonable expectations' of investors are inserted in the scope of indirect expropriation,[71] which, as discussed in the FET analysis above, could be a deterrent to States' right to regulate.

The Most-Favored-Nation (MFN) standard ensures that, in like circumstances, an investor will be accorded the same treatment as

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[68] Metalclad Corporation v The United Mexican States, ICSID Case no ARB (AF)/97/1, Award (30 August 2000) and different approach in Methanex Corporation v United States of America, UNCITRAL, IIC 167, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005).

[69] V Been and J C Beauvais, 'The Global Fifth Amendment? NAFTA's Investment International "Regulatory Takings" Doctrine', (2003) 78 New York University Law Review 1, at 37; P D Isakoff, 'Defining the Scope of Indirect Expropriation for International Investments', (2013) 3 Global Business Law Review 189, at 200.

[70] TPP Annex 9-B, EU-Singapore FTA Annex 9-A and 9-C, EU-Vietnam FTA Annex 9-A X, CETA Annex 8-A

[71] TPP Annex 9-B(3aii), CETA Annex 8-A(2c).

investors from any third country. Over the years, corporations have relied upon MFN clauses in order to import into ISDS more beneficial substantive or procedural provisions from third treaties that the host State is a member to. Investment tribunals, through their interpretation, have allowed this importation.[72] States have acknowledged the 'cherry-picking' nature of MFN[73] and have taken steps for the restriction of this practice. However, only EU-Singapore FTA totally omits the standard. TPP Article 9.5(3) excludes ISDS procedures from MFN, meaning that investors cannot use the standard to benefit from jurisdictional clauses of other IIAs. However, they will be still able to attract substantive guarantees, such as more favorable FET and expropriation treatment. CETA and EU-Vietnam, at first glance, exclude both the importation of procedural and substantive provisions. They create, nevertheless, a loophole; they still allow MFN treatment to be used for 'measures adopted by a Party pursuant to such (substantive) obligations',[74] leaving an open door for investors to invoke these measures, and consequently MFN, in ISDS. Be that as it may, critics have

[72] For the cases where MFN claims were accepted see A Tokeser and J Mo, 'Drafting MFN Clause in Investment Chapter of Trans-Pacific Partnership Agreement', Trade and Investment Law Clinic Papers, Geneva Centre for Trade and Economic Integration (2012), Annex G.3, at 40-44; Also Z Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails', (2011) 2(1) Journal of International Dispute Settlement 97, at 98 and 101.

[73] European Commission, 'Consultation on Modalities for Investment Protection and ISDS in TTIP' (March 2014), http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf, at 4.

[74] CETA art. 8.7(4), EU-Vietnam FTA art. 8.4.

argued that the maintenance of MFN in IIAs itself nullifies the attempts of clarification of the other substantive standards.[75]

2.2.2 Right to Regulate

National sovereignty is an important principle of international law and is translated to the right of States to regulate. However, the increase of ISDS claims against States' measures on issues of public interest, and the pro-investor tendency of tribunals in the adjudication of such cases[76] have created a 'chilling effect' on governments.[77] Mega-regional FTAs were supposed to better reflect the regulatory power of States, but the final texts leave doubts as to whether this goal was successfully met. Purported safeguards can be found spread throughout the agreements, but

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[75] G Van Harten, 'Reforming the System of International Investment Dispute Settlement', in C L Lim (ed.) Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah (Cambridge University Press, 2016), at 120-121.

[76] G Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Empirical Study of Investment Treaty Arbitration', (2016) 53(2) Osgoode Hall Law Journal 540.

[77] L Poulsen, 'Bounded Rationality and the Diffusion of Modern Investment Treaties, (2013) 58 International Studies Quarterly 1; P J Kuijper et al., Investor-State Dispute Settlement (ISDS) provisions in the EU's international investment agreements, Volume 2-Studies, European Parliament, Directorate-General for External Policies of the Union-Directorate B-Policy Department (2014), at 74.

none of them provide substantial protection. Some agreements just 'recognize' or 'reaffirm'[78] the right to regulate, while others transpose the NAFTA language, stating that 'nothing … shall be construed to prevent' adoption of measures of public interest, if, however these measures are 'otherwise consistent with this Chapter'.[79] This final condition seems to negate any intended protection, as it affirms that the right is fully subject to the agreements.

The creation of general exceptions clauses, similar to the General Agreement on Tariffs and Trade 1994 (GATT) XX or the General Agreement on Trade in Services (GATS) XIV, has been considered as the preferred way to secure the regulatory freedom of States.[80] Indeed such clauses are inserted in the new IIAs. However, the exceptions either do not apply at all to the investment chapter, as in TPP, or they only apply to certain sections.[81] Even where they are applicable to the whole investment chapter,[82] their welfare effects are ambiguous; as evidenced by the World Trade Organization (WTO) experience, the panels have been reluctant to rule in favor of these exceptions, setting highly-demanding levels of proof that a measure is 'necessary' or that it

[78] EU-Vietnam FTA art. 8.13bis, CETA art. 8.9(1).

[79] NAFTA art. 1114, TPP art. 9.16.

[80] R Sappideen and L He, 'Dispute Resolution in Investment Treaties: Balancing the Rights of Investors and Host States', (2015) 49 Journal of World Trade Law 85.

[81] TPP art. 29.1, CETA art. 28.3(1,2) not applicable to expropriation, EU-Singapore FTA art. 9.3(3) applicable only to National Treatment.

[82] ChAFTA art. 9.8, EU-Vietnam FTA Ch. VII art. 1.

does not amount to the chapeau 'arbitrary or unjustifiable discrimination'.[83] Given tribunals' pro-investor tendency, we should expect same results in ISDS.[84]

Recent trends in investment awards could also endanger the regulatory space of States. In Achmea II, for example, the tribunal accepted jurisdiction over a claim for a State's draft regulation, raising questions of when a dispute starts to exist and what is the exact scope of the consent to arbitrate.[85] These questions remain unresolved; the new IIAs neither explicitly state that a dispute cannot be extended to pre-emptive claims, nor provide that the consent to arbitrate only applies to existing breaches. Although IIAs do not prescribe past decisions as binding, the de facto precedent practices of tribunals may establish the

[83] Public Citizen, Only One of 44 Attempts to Use the GATT Article XX/GATS Article XIV "General Exception" Has Ever Succeeded: Replicating the WTO Exception, Construct Will Not Provide for an Effective TPP
General Exception (August 2015),
https://www.citizen.org/documents/general-exception.pdf (last access 16 July 2016).

[84] A Newcombe, 'General exceptions in international investment agreements', in M C Segger, M Gehring, and A Newcombe (eds.), Sustainable development in world investment law (Kluwer Law International, 2010), at 369–370.

[85] Achmea B.V. v The Slovak Republic, PCA Case no 2013-12 (Number 2), Award on Jurisdiction and Admissibility (20 May 2014). Also, L Franc-Menget, 'ACHMEA II – Seizing Arbitral Tribunals to Prevent Likely Future Expropriations: Is it an Option?', Kluwer Arbitration (28 March 2013), available at http://kluwerarbitrationblog.com/2013/03/28/achmea-ii-seizing-arbitral-tribunals-to-prevent-likely-future-expropriations-is-it-an-option/ (last access 16 July 2016).

future acceptance of such claims.[86]

2.2.3 Intellectual Property as Covered Investment

The inclusion of intellectual property (IP) rights in the investment definition, although only sporadically seen in BITs and earlier FTAs,[87] is now mainstreamed in all new-generation FTAs,[88] 'inviting' investors to invoke IP violations before arbitral tribunals. Such claims already appeared in the AHS v Niger, Eli Lilly v Canada and Philip Morris v Australia ISDS cases. In the absence of explicit qualification of IP rights as covered investments in the relevant BITs, tribunals denied jurisdiction to hear such claims.[89] Under the new FTAs this will no longer be

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[86] Kuijper (n 77), at 66-69.

[87] See for example the Belgium/Luxembourg-Barbados BIT (adopted 29 May 2009, not yet in force); Belgium/Luxembourg-Colombia BIT (adopted 04 February 2009, not yet in force) and Belgium/Luxembourg-Oman BIT (adopted 16 December 2008, not yet in force). Also the Colombia-US-FTA (adopted 22 November 2006, in force 15 May 2012); Peru-US FTA (adopted 12 April 2006, in force 01 February 2009); Korea-US FTA (adopted 30 June 2007, in force 15 March 2012); Panama-US FTA (adopted 28 June 2007, in force 31 October 2012).

[88] TPP art. 9.1(f), ChAFTA art. 9.1(d)(vi), EU-Singapore FTA art. 9.1(1)(g), EU-Vietnam FTA art. 8.4.p(vii), CETA art. 8.1(g), TTIP proposal Definitions x.2(g).

[89] AHS Niger and Menzies Middle East and Africa S.A. v Republic of Niger, ICSID Case no ARB/11/11, Award (15 July 2013); Eli Lilly and Company v The Government of Canada, UNCITRAL Case no UNCT/14/2, Award (16 March 2017); Philip Morris Asia

possible. The exposure of IP rights to ISDS has been characterized as a 'rupture in the fabric of IP law',[90] which have always been settled by State-to-State dispute settlement. Some new IIAs partly preserve this norm, removing the issuance of compulsory licenses and the 'revocation, limitation or creation of intellectual property rights' from ISDS.[91] However, these exemptions apply only to the extent that the measures are consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) or the IP chapter of the IIA, conditions that could be easy for investors to surpass. Furthermore, the carve-outs are only applicable to expropriation claims, meaning that investors can still start proceedings invoking other substantial standards, such as FET or National Treatment.

What is more, the new-generation IIAs make IP chapters more stringent, introducing 'TRIPS and NAFTA plus' provisions. Some treaties extend the copyright protection from 50 to 70 years,[92] reform that could impose losses on consumers and hinder future innovation. Others

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Limited (Hong Kong) v The Commonwealth of Australia, PCA Case no 2012-12, Award (17 December 2015).

[90] S Flynn, 'How the Leaked TPP ISDS Chapter Threatens Intellectual Property Limitations and Exceptions', Info Justice (26 March 2015), available at: http://infojustice.org/archives/34189 (last access 16 July 2016).

[91] TPP art. 9.8(5), EU-Singapore FTA art. 9.6(3), EU-Vietnam FTA art. 8.16(4), CETA art. 8.12(5)(6), TTIP proposal arts 5.6 and 5.7.

[92] TPP art. 18.63, EU-Singapore FTA art. 11.5(4). 50 years in TRIPS Part II, Section I, Article 12 and NAFTA art. 1705(4).

weaken the standards of patentability, facilitating the acquisition of initial patents. For example, TPP's Article 18.37 allows for the patenting not only of new products but also of 'new uses or new methods of using a known product'. Hence, pharmaceutical companies will be able to acquire unlimited patents, curtailing access to affordable medicine. Likewise, TPP and CETA, although maintaining the TRIPS standard that patents last for 20 years from the filing date, de facto lengthen their protection, providing for a patent term adjustment to compensate for delays occurring during their registration.[93] CETA further secures monopolies by extending the data protection for pharmaceuticals from five to eight years.[94] The same treaty gives a right to appeal to patent holders,[95] allowing them to maintain market exclusivity, as the market approval for generic equivalent medicines is postponed until the appeal procedure is over.[96]

The Member States of the IIAs will have to adapt their national legislations to reflect these tougher standards, which, in conjunction with the inclusion of IP rights in ISDS, could suggest an avalanche of IP

[93] TPP art. 18.48; CETA art. 20.27.

[94] CETA art. 20.29 ; 5 years in NAFTA art. 1711(5)(6).

[95] CETA art. 27.4.

[96] J Lexchinand and M A Gagnon, 'CETA and Intellectual Property: The debate over pharmaceutical patents', Canada-Europe Transatlantic Dialogue, CETA Policy Briefs Series (2013), at 4-5, available at http://labs.carlaeton.ca/canadaeurope/wp-content/uploads/sites/9/CETD-Policy-Brief_CETA-and-pharmaceutical-patents_MG_JL.pdf (last access 16 July 2016).

claims in the future.

2.2.4 Financial Services and Taxation in ISDS

The Financial Services chapters of IIAs have always been in interaction with their Investment chapters. NAFTA's Article 1401(2), for example, incorporates the investment articles regarding transfers, expropriation and denial of benefits into its Financial Services chapter. TPP and CETA move further, also incorporating the concept of the minimum standard of treatment of investors,[97] enabling financial institutions to bring ISDS claims for violations of their 'legitimate expectations'. A second interaction between the two chapters is the question of whether financial investments qualify as protected investments. The investment definitions of early BITs and regional IIAs vary, with some of them including bonds and others not.[98] This inclusion has been a powerful tool used by corporations to sue countries for measures adopted in response to their financial crises. It started with Argentina which, in 2005, had to perform a debt restructuring. Dozens of cases were initiated against it making it the world's most sued country under IIAs. A prime example is the Abaclat v Argentina case, where approximately 180,000 bondholders initiated an arbitral proceeding

[97] TPP art. 11.2(2)(a); CETA art. 13.2(3).

[98] NAFTA art. 1139 does not include them, while Energy Charter art. 1.6(b) does.

seeking US$3.6 billion from the country.[99] History repeated itself with the global economic crisis of 2008; the 2012 Greek 'haircut' on sovereign bonds resulted in two lawsuits against the country, Poštová v Greece and Laiki v Greece.[100] Despite Greece's win in Poštová, the tribunal decided to allocate the ISDS costs between the parties.[101] With arbitration costs for the respondent being US$300,000 (which were advanced) and its lawyers' fees exceeding €4,650,000,[102] it was a very expensive case to defend. The new-generation IIAs establish the inclusion of bonds in the definition of investment,[103] facilitating the emergence of similar cases in the future. To mitigate the risk, States add public-debt annexes, which, in principle, prohibit ISDS claims for cases of restructuring debts. But instead of extending this prohibition to the whole investment chapter, IIAs partly offset it, still allowing ISDS claims for restructurings that violate the National-Treatment or MFN Articles.[104]

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[99] Abaclat and Others v Argentine Republic, ICSID Case no ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011). See also UNCTAD, Sovereign Debt restructuring and International Investment Agreements, IIA Issues Note, no 2, UNCTAD/WEB/DIAE/PCB/2011/3 (UNCTAD 2011), at 3.

[100] Poštová banka, a.s. and ISTROKAPITAL SE v Hellenic Republic, ICSID Case no ARB/13/8, Award (9 April 2015); Cyprus Popular Bank Public Co. Ltd. v Hellenic Republic, ICSID Case no ARB/14/16 (Award pending).

[101] Poštová banka, para 378.

[102] Ibid, para 374.

[103] TPP art. 9.1(c); ChAFTA art. 9.1(d)(iii); EU-Singapore FTA art. 9.1(1)(c); EU-Vietnam FTA art. 8.4.p(iii); CETA art. 8.1(c); TTIP proposal Definitions x.2(c).

[104] TPP Annex 9-G(2); EU-Vietnam FTA Annex(2); CETA Annex 8-B(2); TTIP proposal Annex II(2).

International investment law and taxation are also linked. Earlier regional IIAs have been criticized for encouraging tax avoidance, by offering the opportunity to corporations to strategically place their investments in countries with optimal tax systems.[105] The conclusion, for example, of the US-Panama Trade Promotion Agreement has not only not prevented but incentivized money flows to Panama. The Panama Papers scandal that followed, as well as tax evasion practices by transnational corporations such as Starbucks, Amazon and Google exacerbated the concerns that existing investment instruments do not secure tax justice.[106] The new wave of IIAs has been expected to address the matter, but this does not seem to be the case. They do not limit inflows and outflows of capital,[107] therefore, making possible for corporations to transfer their money to tax heavens that are members to the agreements, such as Singapore, Netherlands, Switzerland or Cyprus.

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[105] C Provost, 'Taxes on trial: How trade deals threaten tax justice', Global Justice Now (February 2016), available at https://www.tni.org/en/publication/taxes-on-trial (last access 16 July 2016).

[106] For Panama papers see investigation by The International Consortium of Investigative Journalists, https://panamapapers.icij.org/. For tax avoidance of multinational corporations see report of UK Parliament's House of Commons Committee, http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/716/71605.htm (last access 16 July 2016).

[107] TPP art. 9.9; CETA art. 8.13; TTIP proposal art. 6. Same for EU-Singapore FTA art. 9.7, which, even though refers to 'taxation' in para 2(g), does not explicitly removes it from its scope.

When such tax avoidance practices take place, States should be able to change their tax systems or withdraw tax privileges previously granted to corporations. A growing number of taxation ISDS claims, mainly against developing countries, illustrates that this right is limited.[108] The new IIAs, aiming to shrink the number of such claims, introduce taxation carve-outs. However, their language is blurry, with exceptions within exceptions. For example, under TPP Article 29.4(6b)(8), a taxation measure can still, under conditions, be challenged as infringing National Treatment or as amounting to indirect expropriation. The text fails to mention the FET standard, which, at a first glance, seems not to be applicable to taxation. However, this could be still subject to expansive interpretations; tribunals could argue that what not explicitly prohibited is deemed permitted and, thus, still apply it. The EU IIAs also take the route of non-explicit-mention. Although they condemn the 'avoidance and evasion of taxes', their tax exception clauses are not applicable to investment, with the exception of CETA that just excludes MFN.[109] Finally, as discussed in sub-Section II.A.1, the narrowing of investor's definition only to enterprises with 'substantial business activities' cannot

[108] Cargill, Incorporated v United Mexican States, ICSID Case no ARB(AF)/05/2, Award (18 September 2009); 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 (11 December 2013); Perenco Ecuador Ltd. v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case no ARB/08/6; Tullow Uganda Operations PTY LTD v Republic of Uganda ICSID Case no ARB/12/34; Vodafone v India, UNCITRAL, Notice of Arbitration (17 April 2014).

[109] EU-Singapore FTA art. 17.6(4); EU-Vietnam FTA art. X.7(3); CETA Art. 28.7(2).

prevent covered subsidiaries from still bringing ISDS claims.

2.2.5 State-owned Enterprises in IIAs

Being a sensitive issue among countries, the concept of State-owned enterprises (SOEs) has not generally been touched in international trade and investment law. Only GATT Article XVII provides limited rules on the behavior of these entities. This situation is, though, changing in the era of regionalism.

TPP is the first treaty that dedicates a whole chapter to disciplines on SOEs. The rapid growth in number and size of SOEs and their often non-transparent operation and poor management pose, indeed, a need for regulation.[110] But one should not forget that SOEs have different orientations, as well as that they can play a positive role for countries, fostering economic development and employment opportunities.[111] TPP seems to do exactly that, depriving SOEs from all their benefits. Although Article 17.2.9 recognizes the right of establishment and

[110] P Kowalski et al., State-owned Enterprises: Trade effects and Policy Implications, OECD Trade Policy Paper no 147, TAD/TC/WP(2012)10/FINAL (OECD Publishing 2013), at 6 and 12.

[111] See A Capobianco and H Christiansen, Competitive Neutrality and State-owned Enterprises: Challenges and Policy Options, OECD Corporate Governance Working Papers, No. 1 (OECD Publishing, 2011), at 9.

maintenance of SOEs, the agreement removes the GATT safeguard that parties can grant to their SOEs exclusive or specific privileges. On the contrary, Article 17.6 prohibits States from providing non-commercial assistance to their SOEs, when this would have 'adverse effects to the interests of another Party' or could cause 'injury to a domestic industry. These terms are quite broad and go beyond WTO standards. The concept of 'adverse effects' is expanded to services, while for the measurement of 'injury to domestic industries' a long and exhaustive list of economic factors is set out.[112] These rules do not take into consideration the non-profitable SOEs that need government support to perform public functions. In the same sense, Article 17.4 obliges all SOEs and designated monopolies to 'act in accordance with commercial considerations' and not to discriminate against goods and services of another party, when engaging in commercial activities. Again these provisions disregard SOEs with hybrid role and social functions inextricably linked with their commercial ones, such as natural monopolies in sectors of public utilities, public transport etc. TPP includes carve-outs on the aforementioned norms, though they are quite limited. Article 17.13(2)(3) provides a general exception for SOEs that fulfill a 'government mandate', while country-specific exemptions of particular enterprises are found in annexes. However, apart from the annex for Vietnam, there are no carve-outs related to public good, as we would expect. Overall, the strict rules, in conjunction with the establishment of a committee in charge of reviewing the implementation

[112] TPP arts 17.7.1(d)(e) and 17.8.3 respectively.

of the chapter,[113] may result to a regulatory chill for States. On top of that, while the State-to-State Dispute Settlement is the norm, obligations related to 'covered investments' spread over the chapter, as well as the requirement for SOEs exercising delegated authority to comply with the whole Agreement,[114] open the way for investors to challenge SOEs' activities as investment breaches. TPP's twin brother, TTIP, also intends to insert a SOEs chapter with similar rules. This was made clear by the EU's textual proposal of January 2015 and confirmed by the leaked TTIP documents released by Greenpeace.[115]

The initiative for the inclusion of a SOEs chapter belonged to the US. The objectives put forward by the government were that the reform would help in the efficiency and accountability of the existing SOEs, the non-discrimination against private corporations and would provide a boost for international competition.[116] The inclusion of the chapter, however, could also imply political ramifications and more especially the attempt of the US to pass its capitalistic model to free market TPP

[113] TPP art. 17.12.

[114] TPP art. 17.3.

[115] European Union, 'Textual Proposal on Possible Provisions on State Enterprises and Enterprises Granted Special or Exclusive Rights Or Privileges' (January 2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153030.pdf. For Greenpeace leak see https://www.ttip-leaks.org/#docdoc14 (last access 17 July 2016).

[116] Office of the US Trade Representative, TPP Issue-by-Issue Information Center, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-negotiating-7 (accessed 17 July 2016).

Member States, such as Malaysia, Singapore and Vietnam, with an ultimate goal to stem the progress of the ever-growing Chinese SOEs.[117] After the US withdrawal from TPP,[118] it is unsure whether the remaining State Parties will maintain the SOE chapter in the agreement. If, however, they do, what we can expect is that such chapter could be particularly burdensome on developing countries such as Malaysia and Vietnam and small European economies, such as Hungary and Romania, whose economic infrastructure is based on SOEs.

2.3 The 'reaction' of States

On the other side of the coin, States are taking action to more actively participate in the investment treaty system, adopting modest or more radical approaches.

[117] J Kelsey, 'The risks of disciplines on State-owned Enterprises in the proposed Trans-Pacific Partnership Agreement', paper prepared for the stakeholder program at the 11th round of TPP Agreement negotiations in Melbourne (4 March 2012), available at https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp161-170/wp-168-willemyns-website.pdf (last access 24 May 2016), at 6-11.

[118] See infra (n 184).

2.3.1 Backlash against ISDS: Strengthening State-to-State Arbitration and Domestic Litigation

Evaluating the negative effects of the ever-increasing investor claims, States are trying to halt this phenomenon. The 'bravest' have renounced investment instruments altogether and are building stronger domestic processes. This is the example of the Latin American countries Ecuador, Venezuela and Bolivia, which withdrew from the ICSID Convention[119] and started terminating their existing BITs.[120] This termination policy was also followed by Indonesia, which in the years 2014 to 2016 denounced 19 out of its 71 IIAs in force. A different approach was taken by South Africa that determined to denounce its BITs on a case-by-case basis and conclude new IIAs only 'in cases of compelling economic and political circumstances'.[121] Other States, although still negotiating investment treaties, are opting out from ISDS.

[119] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention).

[120] Ecuador has led the way and since 2008 cancelled its BITs with Cuba, Dominican Republic, El Salvador, Finland, Germany, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay. Venezuela has taken Ecuador's lead, unilaterally denouncing its BIT with the Netherlands in 2008. Similarly, since 2012, Bolivia has terminated its BITs with the US, Argentina, Austria, France, Germany, Netherlands, Spain and Sweden.

[121] See Trade and Industry Minister, Robert Davies' speech at the session on UNCTAD's IPFSD, Geneva, (24 September 2012), extract, http://www.igd.org.za/index.php/about-us/about-igd/21-news/latest-stories/1597-south-african-minister-new-approach-needed-on-investment-treaties (last access 17 July 2016).

Philippines and Japan did so at their 2006 Economic Partnership Agreement (EPA). In 2011, Australia's government also announced its intention not to include ISDS in its future IIAs.[122] It has kept this commitment in the 2011 Australia–New Zealand EPA, the 2012 Australia–Malaysia FTA and the 2014 Australia–Japan EPA, where State-to-State Dispute Settlement (SSDS) was maintained as the sole dispute settlement mechanism. However, both Japan and Australia are signatories of the TPP Agreement that includes the ISDS mechanism. Brazil followed the same strategy and replaced ISDS with SSDS in the Cooperation and Investment Facilitation Agreements concluded with Mozambique and Angola, in March and April 2015 respectively.

Even when States insist on ISDS, both their practices and new IIAs demonstrate an attempt to promote SSDS. Hitherto, the two mechanisms have existed alongside each other in investment treaties, without clear indication which one prevails. The truth is that the availability of SSDS has not made much difference; having the disadvantages of the diplomatic protection and little benefit for investors, States have been hesitant in using it. The environment is slowly changing in the era of regionalism. Over the past decade, States have taken their first timid steps bringing such claims to seek diplomatic protection,

[122] Department of Foreign Affairs and Trade (DFAT), 'Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity' (April 2011), available at: http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf (last access 17 July 2016), at 14.

interpretation or declaratory relief.[123] The new-generation IIAs also draw particular attention to the SSDS chapter; it is made more elaborate and able to resolve a wide range of disputes, providing an attractive alternative even for investment disputes.[124] When it comes to sensitive issues, some IIAs break the silence and explicitly declare prevalence of SSDS. This is mainly the case of investment disputes in financial services, where the ISDS proceedings are suspended until the State-to-State tribunal/committee renders its –binding to the ISDS Tribunal- decision.[125] Similarly, after the much-discussed Philip Morris v Australia case, TPP Article 29.5 excludes tobacco-related challenges from ISDS.

Likewise, the new wave of IIAs advances the backstage role of domestic courts. States used to include 'fork-in-the-road' clauses in their BITs, giving to investors an irrevocable election between litigation at the courts of host States or investment arbitration. However, having the ISDS option, investors have rarely gone for domestic litigation. The

[123] Diplomatic protection: Italian Republic v Republic of Cuba, ad hoc State-State arbitration, Final Award (15 January 2008); Interpretation: The Republic of Peru v Chile to clarify a provision of Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v The Republic of Peru, ICSID Case no ARB/03/4, Award (7 February 2005); Ecuador v United States, UNCITRAL, PCA Case no 2012-5, Award (29 September 2012).

[124] See N Bernasconi-Osterwalder, 'IISD Best Practices Series: State–State Dispute Settlement in Investment Treaties', IISD, (October 2014), available at https://www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf (last access 17 July 2016), at 20.

[125] TPP art. 11.22(2c); CETA art. 13.21(2).

new-generation IIAs substitute 'fork-in-the-road' with waivers.[126] These clauses do not discourage national proceedings, as they permit investors to first commence a proceeding in domestic courts and, if they wish, to discontinue it in favor of ISDS. Knowing that their choice will not be final, the option of domestic courts could become more appealing to investors. Finally, some new IIAs bind arbitrators to follow the interpretation of national courts when examining domestic law. They further underline that the tribunals' interpretations will not be binding upon those national courts.[127]

2.3.2 Enhancing Transparency

Having its roots in the similar concept of commercial arbitration, investment arbitration has always been developed in secrecy. However, its hybrid nature differentiates it from the purely private, commercial model. Often involving matters of public interest or of particular political and financial risk, investment disputes require greater openness, stability and procedural legitimacy.[128] The re-orientation of international

[126] TPP Annex 9-L(A2); ChAFTA art. 9.14(2); EU-Singapore FTA art. 9.17(f)(i); EU-Vietnam FTA art. 8.8(1)(4b); CETA art. 8.22(1g); TTIP proposal art. 14(2b).

[127] CETA art. 8.31(2); EU-Vietnam FTA Ch. 8, section 3, art. 16(2); TPP art. 9.25(1) and fn 34; TTIP proposal art. 13(3)(4).

[128] D Euler et al., Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration

investment law is characterized by significant progress in the transparency levels. It started with the adoption of two instruments in 2014: the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the UN General Assembly's Convention on Transparency in Treaty-based Investor-State Arbitration. The new IIAs follow this transparency path, either directly referring to the UNCITRAL Rules[129] or adopting rules, where all pleadings, awards and decisions shall be publicly disclosed.[130] This could lead to scrutiny of investors' claims, who may think twice before starting a proceeding with little chance to succeed.

The amicus curia is a concept inextricably linked to transparency. It can improve accountability, assist the tribunals in being well-informed using the expertise of third-parties and promote public interest.[131] Despite

(Cambridge University Press, 2015), at 1-2.

[129] CETA art. 8.36; EU-Vietnam FTA art. 8.20(1); TTIP proposal art. 18.

[130] TPP art. 9.24; ChAFTA art. 9.17 and Side Letter on Transparency Rules; EU-Singapore FTA Annex 9-G

[131] A Newcombe and A Lemaire, 'Should Amici Curiae Participate in Investment Treaty Arbitrations?', (2001) 5 Vindobona Journal of International Law and Arbitration 22, at 30; J A VanDuzer, 'Enhancing the Procedural Legitimacy of Investor–State Arbitration through Transparency and Amicus Curiae Participation', (2005) 52 McGill Law Journal 681; T Ishikawa, 'Third party participation in investment treaty arbitration', (2010) 59(2) International and Comparative Law Quarterly 375, at 401-404; E Levine, 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation', (2011) 29 Berkeley Journal of International Law 200, at 217; K Fach Gomez, 'Rethinking the Role of the Amicus Curiae in International

being widely used in public international law, amici curiae have for a long time been disregarded in investment arbitration. BITs and older FTAs, even though permitting non-disputing parties to intervene in the proceedings,[132] make no mention of third-party submissions. This lack of explicit consent resulted in two unsuccessful early attempts of participation in Methanex and UPS cases.[133] In 2003, the NAFTA Free Trade Commission issued a statement setting out detailed – but not binding - criteria to be applied by tribunals when deciding whether submissions should be accepted.[134] This was followed by the ICSID amendment of Arbitration Rules and Additional Facility Rules in 2006 with the insertion of Rule 37(2) establishing similar criteria, and confirmed by the 2010 UNCITRAL Transparency Rules Article 4 and 17. Following these developments, amici curiae submissions have been increased, and since 2008, their number has doubled.[135] In addition,

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Investment Arbitration: How to Draw the Line Favorably for the Public Interest', (2012) 35 Fordham International Law Journal 510, at. 562-563; L Bastin, 'The Amicus Curiae in Investor–State Arbitration', (2010) 3(1) Cambridge Journal of International and Comparative Law 208, at 223-224.

[132] NAFTA arts 1128-1129.

[133] Methanex v US, (n 68); United Parcel Service of America Inc. v Canada, UNCITRAL, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (17 October 2001).

[134] Statement of the Free Trade Commission on non-disputing party participation, 2003, available at: http://www.state.gov/documents/organization/38791.pdf. (last access 17 July 2016).

[135] L Bastin, 'The Amicus Curiae in Investor–State Arbitration: Eight Recent Trends', (2014) 30(1) Arbitration International 125, at 128.

participation is no longer sought only by NGOs, as it used to be, but by diverse entities, such as international organizations, industry bodies, indigenous people and consultancy companies.[136] The system has become more permissive, with more and more tribunals granting leave to participation.[137] In fact, the tribunals themselves sometimes request submissions from non-party entities.[138] However, this trend of permissiveness is not absolute, as tribunals usually do not go beyond the acceptance of filing written submissions.[139] The innovation of new IIAs is that they explicitly incorporate third-party participation.[140] Although they still give significant latitude to tribunals ("the tribunal may accept"), this novelty will probably be in favor of States, as the experience of ISDS cases has shown that the majority of the amici curiae submissions

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[136] International organizations: AES Summit Generation Limited & Another v Republic of Hungary, ICSID Case no ARB/07/22, Award (23 September 2010), para 8.2; Electrabel SA v Republic of Hungary, ICSID Case no ARB/07/19, Award (25 November 2015), para 1.18; Industry bodies and indigenous people: Glamis Gold Ltd v United States of America, UNCITRAL, IIC 380, Award (8 June 2009), para 286; Merrill & Ring Forestry LP v Canada, UNCITRAL, Award (31 March 2010), paras 22-25; Consultancy companies: Apotex Inc v The Government of the United States of America, UNCITRAL, Procedural Order no 2 on the participation of a non-disputing party (11 October 2011), paras 23 and 28-29.

[137] Bastin (n 135), at 142-143. Appendix 1 shows that, until July 2012, 11 out of 18 petitions were granted permission.

[138] Eureko B.V. v. The Slovak Republic, UNCITRAL, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010).

[139] Bastin (n 135), at 140-141.

[140] TPP art. 9.23(3); CETA Annex 29-A for SSDS also applicable to ISDS; EU-Singapore FTA Annex 15-A; TTIP art. 23(5).

support the regulatory freedom of the respondent.[141]

2.3.3 Counterclaims and Arbitration Costs

Counterclaims in investment arbitration are a still rare phenomenon, which however have started picking up speed. The reluctance of host States to bring such claims lies in the long-standing perception that the sole objective of ISDS is protecting the rights of investors.[142] However, this does not seem to have been the rationale of the drafters of the ICSID Convention, who believed in the equal access between host States and foreign investors to arbitration.[143] ICSID Article

[141] In this line see Aguas del Tunari, SA v. Republic of Bolivia, ICSID Case No. ARB/02/3, Petition (29 August 2002), para 2; Biwater v. Tanzania (n 119), Petition for Amicus Curiae Status (27 November 2006), s. 4; Piero Foresti and Others v. Republic of South Africa, ICSID Case No. ARB(AF)/07/01, Petition for Limited Participation as Non-Disputing Parties (17 July 2009), s. 4; Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Application for Permission to Proceed as Amicus Curiae (2 March 2011), p. 1-2 and 13-16; Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador, UNCITRAL, PCA Case No 2007-02/AA277, Submission of Amici (5 November 2010), s. 1.

[142] H E Veenstra-Kjos, 'Counter-claims by Host States in Investment Dispute Arbitration ''without Privity'', in P Kahn and T Walde (eds) Les aspects nouveaux du droit des investissements internationaux , 600 (Martinus Nijhoff Publishers, 2007).

[143] Report of the Executive Directors on the Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States (ICSID Convention), Part III, para 13: 'While the broad objective of the Convention is to

46 explicitly allows counterclaims, stating that "the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute". After their 2010 modification, UNCITRAL Arbitration Rules confirmed the idea; Article 21(3) provides that "the respondent may make a counterclaim [...] provided that the arbitral tribunal has jurisdiction over it". Counterclaims are advantageous for States, as they would be enabled to seek affirmative relief from tribunals. The notion could lead to diminishment of the number of ISDS claims; investors, regularly expecting counterclaims, could be discouraged from starting proceedings.[144] States have recognized these benefits and counterclaims have flourished within the past five years.[145] Their success depends mainly on the precise wording of IIAs. The tendency of tribunals has been to

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encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States. Moreover, the Convention permits the institution of proceedings by host States…'.

[144] G Laborde, 'The Case for Host State Claims in Investment Arbitration', (2010) 1 Journal of International Dispute Settlement 97, at 99-100; T Kendra, 'State Counterclaims in Investment Arbitration - A New Lease of Life?', (2013) 29(4) Arbitration International 576, at 597-601; Kuijper et al. (n 77), at 95-96.

[145] Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability (28 April 2011); Metal-Tech Ltd. v Republic of Uzbekistan, ICSID Case no ARB/10/3, Award (4 October 2013); Hesham T.M.Al Warraq v Republic of Indonesia, UNCITRAL, Award (15 December 2014); Perenco v Ecuador supra note 64, Interim Decision on the Environmental Counterclaim (11 August 2015).

decline jurisdiction when there is no explicit consent for their use.[146] However, a recent approach first introduced in Pr. Reisman's dissenting opinion in Roussalis case, and then adopted by the tribunal in Goetz case, [147] creates a novel situation. It suggests that the investor's consent to counterclaims is implied by the consent to arbitration itself and, therefore, tribunals may broaden their jurisdiction ratione personae to encompass counterclaims even without specific treaty mention. The new-generation IIAs, with the exception of TPP,[148] still remain silent on the issue, but this new approach encourages counterclaims to be more widely braught and examined.

High arbitration costs have always been one of the main concerns of the investment arbitration system. The Organization for Economic Co-operation and Development (OECD) calculated them to reach US$8 million on average in 2012, with costs exceeding US$30 million in some cases.[149] Not only are the amounts excessive, but the tribunals have

[146] See Oxus Gold plc v. Republic of Uzbekistan, the State Committee of Uzbekistan for Geology & Mineral Resources, and Navoi Mining & Metallurgical Kombinat, UNCITRAL, Award (17 December 2015).

[147] Spyridon Roussalis v Romania, ICSID Case no ARB/06/1, Award (7 December 2011); Goetz v Burundi, ICSID Case no ARB/01/2, Award (21 June 2012), paras 278-279.

[148] TPP art. 9.19(2). Similarly in Common Market for Eastern and Southern Africa, 'Investment Agreement for the COMESA Common Investment Area' (adopted 23 May 2007, not yet in force), art. 28(9).

[149] OECD, Investor-State Dispute Settlement, Public Consultation: 16 May–23 July 2012, (OECD 2012), at 18.

adopted different approaches to their allocation, causing uncertainty, as States could predict neither the outcome nor the level of the fees they would have to pay.[150] The traditional approach has been the one generally used in public international law, 'pay your own pay', whereby each party bears its own costs.[151] By the end of 2011, half of the cases brought made use of this rule, which has been criticized as particularly burdensome for small economies and developing countries.[152] Because of the general dissatisfaction, States have sought ways to alleviate costs. The cycle of reforms started again with the modification of UNCITRAL Arbitration Rules in 2010; per Articles 42(1) and 40(2) all arbitration costs 'shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it

[150] See for example the approach taken in Señor Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6, Award (7 July 2011), para. 296 and Togo Electricité and GDF-Suez Energie Services v. Republic of Togo, ARB/06/07, Decision on annulment (6 September 2011), para. 257 and differently in Spyridon Roussalis v Romania (n 147), para. 882 and GEA Group Aktiengesellschaft v Ukraine, ICSID Case No. ARB/08/16, Award (31 March 2011), para. 365.

[151] I Uchekunova and O Temnikov TEMNIKOV, 'Allocation of Costs in ICSID Arbitration', Kluwer Arbitration, (3 December 2013), available at: http://kluwerarbitrationblog.com/2014/12/03/allocation-of-costs-in-icsid-arbitration/ (last access 5 August 2018). For examples of cases where the two different principles were applied see tables at https://works.bepress.com/inna_uchkunova/1/ and https://works.bepress.com/inna_uchkunova/2/ (last access 17 July 2016).

[152] D Smith, 'Shifting Sands: Cost-and-Fee Allocation in International Investment Arbitration', (2011) 51 Virginia Journal of International Law 749, at 753; UNCTAD, Reform of Investor-State Dispute Settlement: In Search of a Roadmap, IIA Issues Note, no 2, UNCTAD/WEB/DIAE/PCB/2013/4 (UNCTAD 2013), at 7.

determines that apportionment is reasonable'. The new-generation IIAs adopt this 'costs-follow-the-event' approach and further shrink arbitrators' latitude to apportion the costs between the parties, allowing them to do so only 'in exceptional circumstances'.[153] Seeking to rein in arbitration costs, the new IIAs give resort to mediation and also provide for prompt termination of frivolous and unfounded ISDS claims in an early stage of proceeding.[154]

2.3.4 Advancing Consistency: Authoritative Interpretations, Appellate Mechanism and Permanent Court

Tempering the abusive interpretation by tribunals and achieving uniformity of investment awards seems to be at the top of States priorities.

By delegating to arbitrators the ruling of ISDS claims, States are deliberately denouncing an element of their sovereignty, in return for new opportunities.[155] This does not change the fact that they still remain

[153] CETA art. 8.39; EU-Singapore FTA art. 9.26; EU-Vietnam FTA art. 8.27(4); TTIP art. 28(4).

[154] TPP arts 9.18(1) and 9.29(4); CETA arts 8.20, 8.32 and 8.33; EU-Singapore FTA arts 9.14, 9.20 and 9.21; EU-Vietnam FTA Annex I and arts 18-19; TTIP arts 3, 16(4) and 17.

[155] W Burke-White and A Von Staden, 'Investment Protection in Extraordinary Times:

'masters of the treaties',[156] sharing interpretive authority with tribunals. So far, apart from the 2001 NAFTA Free Trade Commission' Interpretation,[157] States have not made use of this authority. But feeling that their ties with the treaties are being cut off, they are now trying to strengthen their interpretative role. They are endowing their recent IIAs with specialized treaty committees consisted of all State-parties representatives and assign them tasks such as developing recommendations about substantive standards, adopting binding authoritative interpretations, amending the rules of the agreement and appointing the members of tribunals.[158] Some new IIAs also clearly set Vienna Convention on the Law of Treaties as applicable law,[159] preventing ISDS tribunals from sidestepping its rules of interpretation and deviating, that way, from the intention of the treaty-drafters.[160]

The ISDS institutional structure is characterized by brand-new reforms. So far the pool of arbitrators has been quite small, mainly

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The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties', (2008) 48 Virginia Journal of International Law 307, at 349.

[156] UNCTAD, Interpretation of IIAs: What States can do, IIA Issues Note, no 3, UNCTAD/WEB/DIAE/IA/2011/10 (UNCTAD 2011), at 3.

[157] NAFTA Free Trade Commission (n 64). For the reasons of the interpretation see ibid, at 13.

[158] TPP arts 9.25(3) and 27.2.2(f) ; CETA arts 8.10(3), 8.31(3), 8.44(3b), 8.27(2) and 8.28(3) ; EU-Singapore FTA arts 9.4(3), 9.19(3) and 9.30(2)(a)(c) ; EU-Vietnam FTA art. 8.34(2)(a)(b); TTIP proposal arts 3, 13(5), 27(2)(c) and 9(2).

[159] ChAFTA art. 9.18; CETA art. 8.31; EU-Singapore FTA art. 9.19(2).

[160] Kuijper et al. (n 77), at 40 and 66.

consisted of lawyers of big law firms, raising concerns that they have a 'business interest' in cases and, thus, are investor-biased.[161] Aiming to eliminate these vested interests, some IIAs assign to the treaty committees the task of compiling a roster of arbitrators and choosing from it in case of disagreement between the parties.[162] A binding code of conduct is also created, excluding conflicts of interest and safeguarding arbitrators' impartiality.[163]

After many years of discussions, CETA and the draft text of TTIP provide for a second instance facility.[164] It is not the first time that the words 'appellate body' appear in an IIA; older and recent agreements also mention such a mechanism but they only suggest a future, potential establishment.[165] The novelty of the two agreements lies in the fact that the Appellate Tribunal is created by the pact itself and is binding, similar to the WTO Appellate Body. The appeals procedure improves the annulment process of ICSID Article 52(1); besides the correction of procedural errors, it also provides for the review of the awards on the merits, which would reduce the risk of erroneous and poorly reasoned final decisions.

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[161] Ibid, at 103-104.

[162] ChAFTA art. 9.15; EU-Singapore FTA art. 9.18.

[163] TPP arts 9.22(6) and 28.10(1d) ; EU-Singapore FTA art. 9.18(6)(7) ; EU-Vietnam FTA Annex II ; CETA art. 8.44(2); TTIP proposal Annex II.

[164] CETA art. 8.28; TTIP proposal art. 10.

[165] ChAFTA art. 9.23; TPP art. 9.23(11); EU-Vietnam FTA art. 8.15.

The EU has again become a pioneer attempting to change the structure of the first instance. First seen in the November 2015 TTIP proposal and then included in EU-Vietnam FTA and CETA,[166] the new system aims to replace the ad hoc tribunals with a standing investment court. Some voices have been heard to suggest that it will pose several technical and political challenges.[167] But States have felt that its benefits would outweigh the drawbacks; the court, consisted by tenured and carefully selected judges, seeks to ensure greater legitimacy, fairness and independence. A major innovation is that the tribunal members will be appointed by the committee, depriving the investors of any influence on the selection.[168] The investors will also not be able to choose the respondent to the claim; it will be in the EU's sole determination whether the claim should be addressed by a Member State or the Union itself.[169] Whether such a Court will be established is still unclear, but, if it does, it could be valuable for small European States that in the past found themselves confronting corporations with greater economic and political power.

[166] TTIP proposal art. 9; EU-Vietnam FTA art. 12; CETA art. 8.27.

[167] E Zuleta, 'The Challenges of Creating a Standing Investment Court', (2014) 1 Transnational Dispute Management 403.

[168] TTIP proposal art. 9.2-9.3; EU-Vietnam FTA art. 8.12.2-8.12.3; CETA art. 8.27(2)-8.27(3).

[169] TTIP proposal art. 5; EU-Vietnam FTA art. 8.6(2); CETA art. 8.21. Also in EU-Singapore FTA art. 9.15(2).

2.4 Regionalism: Towards A Harmonization Of International Investment Law?

The surge of regionalism had been considered as a tool to abate the dissatisfaction over the bilateral investment system and to equalize the powers of investors and States, by obtaining a first consolidation of investment law.[170] Mega-regional FTAs had, hence, been seen as a 'stepping stone' for a future multilateralization,[171] which would be achieved with the gradual accession of additional States to existing regional instruments.[172] This Section will evaluate whether the goal of such harmonization has been accomplished through regionalism, and whether the drafting of a multilateral investment treaty would be either desirable or plausible.

It could be argued that mega-regional FTAs, governing a substantial share of the global investment, make some progress towards the convergence of the different investment standards found in BITs.

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[170] M Malli, 'Minilateral Treaty-Making in International Investment Law', in A K Bjorklund (ed.) Yearbook on International Investment Law and Policy, 2013-2014 507 (Oxford University Press, 2015), at 524.

[171] European Commission, 'Investment in TTIP and Beyond – the Path for Reform' (May 2015), http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF, at 11.

[172] TPP art. 30.4.

These treaties reflect a consensus between their participants on addressing the concerns of the current regime, providing more clarified substantive obligations, liberalization commitments and stronger regulatory transparency.[173] However, this fledging regionalism has added an extra layer to the already fragmented bilateral system; most IIAs affirm their co-existence with older bilateral or regional agreements and are silent on which one prevails, resulting in overlaps.[174] Investors are, thus, able to choose from these parallel treaties those that are the most preferential under which to bring their claims. To address this issue, the EU adopted a Regulation that provides for the replacement of Member-States' BITs with the new IIAs concluded by the Union.[175] Nonetheless, all BITs include 'transitional-period' provisions, which guarantee protection even upon termination, meaning that the overlap will still not be avoided. As such, we could only talk about a partial consolidation being reached through regionalism.

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[173] M Feldman, R Monardes and C Rodriguez Chiffelle, 'The Role of Pacific Rim FTAs in the Harmonization of International Investment Law: Towards a Free Trade Area of the Asia-Pacific', E15 Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum (March 2016), http://e15initiative.org/publications/the-role-of-pacific-rim-ftas-in-the-harmonisation-of-international-investment-law-towards-a-free-trade-area-of-the-asia-pacific/.

[174] TPP art. 1.2(1); ChAFTA art. 1.2(1,2). See also W Alschner, 'Regionalism and Overlap in Investment Treaty Law – Towards Consolidation or Contradiction?', (2014) 17(2) Journal of International Economic Law 271.

[175] Regulation (EU) no 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L351/40, art. 3.

At the other end of the spectrum, if the goal is the uniformity of international investment law, this could be facilitated through a multilateral investment system. A multilateral treaty could better balance economic with public purpose interests, so as to meet both the expectations of the investors and host States. With the creation of unified rules, it could create a regulatory framework that both provides safeguards for securing foreign investment while also addressing non-investment concerns, such as the right to regulate on health care and the environment.[176] This could further contribute to the elimination of contradictory interpretations of the various ad hoc tribunals, providing a more secure environment both for States and investors. Without a doubt, the negotiating power of developed countries, the source of most FDI flows, would be still stronger during the drafting of such treaty. Nevertheless, a coalition of all developing countries trying to protect their interests could bring about a more balanced regime. Thus, a multilateral treaty could end the perpetual battle between investors and States over who will prevail and thereby lead to a 'golden mean'. Of course, in order to have positive effects, a potential multilateral framework should be properly constructed. This would be only achieved through open negotiations between states and representatives of the business sector and civil society, clarification of standards preventing

[176] P Acconci, 'The integration of non-investment concerns as an opportunity for the modernization of international investment law: is a multilateral approach desirable?' at G Sacerdoti (ed.) General Interests of Host States in International Investment Law 165, (Cambridge University Press, 2014), at.186-7.

treaty-making by arbitrators and investors, as well as provision for corporate liability to ensure non-violation of human rights and environmental laws. Towards this direction, on 13 September 2017, the EU Commission released a Recommendation for a Council Decision which would initiate the negotiations for the setting up of a Multilateral Investment Court,[177] suggestion that is currently discussed during the consultations of the UNCITRAL Working Group III on the reform of ISDS.[178]

However, the multilateralization of investment law is still viewed with skepticism by both scholars and developing countries alike. Some commentators assert that a multilateral treaty is not necessary as BITs can already develop uniform standards, which would harmonize the investment regime.[179] However, as seen before, the substantive standards of BITs and FTAs are still far from uniform. The concerns of developing States mainly stem from the role foreign investors would acquire upon the drafting of such treaty. They claim that, under a multilateral system, it would be easier for corporations to move their investments from country to country causing unpredictability. A second argument put forward is that bilateral or regional negotiations are preferable, as they are less

[177] EU Commission, 'Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes', COM(2017) 493 final (13 September 2017).

[178] See infra (n 350).

[179] S W Schill, 'Multilateralizing investment Treaties through Most-Favored-Nation Clauses', (2009) 27 Berkeley Journal of International Law 496, at 500.

cumbersome for the economically weaker party, which can still channel and guide investment in support of its development.[180] The critics conclude that while individual consents of arbitration in bilateral treaties cannot elevate investors to subjects of international law, their unconditional recognition in a multilateral treaty would establish their legal personality. Especially as States would not be able to unilaterally modify or denounce such a treaty, thereby withdrawing the legal status accorded to corporations, as they could do with BITs.[181] But the situation is not much -if any- different under the current regime; the myriad bilateral and regional IIAs offer several alternatives to corporations on where to place their investments, forcing States to make concessions in order to attract and maintain FDI. Furthermore, almost all IIAs are negotiated based on the draft model of the more powerful State, and as States hold regular meetings with corporate lobbyists, investors have great influence on the negotiations.[182] Finally, regarding the legal

[180] E Chalamish, 'The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?', (2008) 34(3) Brook. Journal of International Law 304, at 340.

[181] K Nowrot, International Investment Law and the Republic of Ecuador: From Arbitral Bilateralism to Judicial Regionalism, (TELC Research Center, 2010), at 14-16; P Malanczuk, 'Multinational Enterprises and Treaty-Making—A Contribution to the Discussion on Non-State Actors and the "Subjects" of International Law', in V Gowlland-Debbas (ed.), Multilateral Treaty-Making -The Current Status of Challenges to and Reforms Needed in the International Legislative Process 45 (Springer, 2000), at 60-63.

[182] Corporate Europe Observatory, 'TTIP: a corporate lobbying paradise' (July 2014), available at:
http://corporateeurope.org/international-trade/2015/07/ttip-corporate-lobbying-paradise

personality of investors, we could argue that the ever-increasing number of BITs and regional IIAs and their contracting parties, as well as the binding consent to ISDS that they provide, already imply a de facto transformation of investors into subjects of international law. This becomes more obvious if we consider the role that investors can play in investment law-making; in the absence of a uniform or customary regime, arbitrators mainly rely on the parties' pleadings when identifying the meaning the substantive standards of IIAs. This gives investors a more pervasive role in influencing the shaping of investment law by proposing interpretations that are frequently adopted by tribunals and cited in subsequent awards.[183]

Be that as it may, the idea of a multilateral investment treaty seems even more farfetched, with developed countries trying to maintain fragmentation. The recent decision of the US government to withdraw from TTP in favor of pursuing bilateral agreements points in this direction.[184] The president's preference of bilateralism creates uncertainty

(last access 18 July 2016).

[183] A Reinisch, 'Investors', in M Noortmann, A Reinisch and C Ryngaert (eds), Non-State Actors in International Law 253 (Oxford Hart Publishing, 2015), at 264-267; M Paparinskis, 'Analogies and Other Regimes of International Law', in Z Douglas, J Pauwelyn and J E Viñuales (eds), The foundations of International Investment Law 73, (Oxford University Press, 2014), at 94-96.

[184] See Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement (23 January 2017), available at: www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific (last access 30 January 2017).

regarding the continuation of the TTIP negotiations, which is further enhanced by the government's intention to strengthen commerce and investment ties with Great Britain after Brexit.[185] Under these developments, not only does the drafting of a multilateral treaty seem utopian, but the future of regionalism also appears nebulous. Other developed countries do not seem to take the same view regarding mega-regionals; ASEAN members expressed the wish for the TPP to proceed, even without the US,[186] and will possibly explore the opportunity to commence negotiations with China for the conclusion of the Regional Comprehensive Economic Partnership.[187] The EU also seems to stand by the regional approach, although the ratification of some of its FTAs face problems. More specifically, the conclusion of the EU–Singapore FTA is pending after an opinion of the Court of Justice of the EU (CJEU)[188] and, in addition to this, on 6 September 2017, Belgium also requested a CJEU opinion on whether the Investment Court System

[185] See President Trump and Prime Minister May's Opening Remarks (27 January 2017) www.whitehouse.gov/the-press-office/2017/01/27/president-trump-and-prime-minister-mays-opening-remarks (last access 30 January 2017).

[186] The Daily Telegraph, Trans-Pacific Partnership: China could replace the US, says Malcolm Turnbull after Donald Trump signs executive order (24 January 2017), www.dailitelegraph.com.au/news/nsw/transpacific-partnership-china-could-replace-us-says-malcolm-turnbull-after-donald-trump-signs-executive-order/news-story/aaf25a1733c1cd7720f2b71cfb97f916 (last access 30 January 2017).

[187] For the progress of the negotiations of the Treaty see http://dfat.gov.au/trade/agreements/rcep/Pages/regional-comprehensive-economic-partnership.aspx (last access 30 January 2017).

[188] Opinion 2/15 of the Court [2017] ECLI:EU:C:2017:376.

of CETA conforms to the EU Treaties.[189] No matter what will happen with the EU FTAs, what is sure is that with the absence of the US, one of the major economic players, the regional model may have an 'expiration date'. Instead of increased harmonization, an atomization of international investment law is on the horizon, with a return to the old bilateral model.

2.5 Conclusion

The 'BITs' rush' of the 1990's is slowing down and is being replaced by intensified efforts at the regional level. In the aftermath of the 2008 global financial crisis, States felt that their economies would be revived through a strong, 'one shot' regulatory framework that would combine supplementary sectors such as trade, investment and services.[190] Thus, over the past decade, initiatives have been taken for the conclusion of mega-regional agreements that would not only 'protect' and 'promote'

[189] Koninkrijk Belgie, 'CETA - Belgian Request for an Opinion from the European Court of Justice' (September 2017) https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf (last access 10 August 2018).

[190] M F Houde, A Kolse-Patil and S Miroudot., 'The Interaction between Investment and Services Chapters in Selected Regional Trade Agreements', in International Investment Law: Understanding Concepts and Tracking Innovations: A Companion Volume to International Investment Perspectives, no 55 (OECD Publishing, 2008), at 242.

but also ‘liberalize’ investments. As the IIAs universe is expanding, concerns about the notable growth of investors’ power have been brought to the surface, not only by developing countries and civil society, but also by developed States that are now becoming targets of ISDS claims. This, in turn, revived the question of ‘international subjectivity’ of multinational corporations.

This Chapter has engaged to the discussion of ‘international subjectivity’ by examining both the rights of corporations and States in light of the new trend of governments to sign regional FTAs. It observes that this era of transition from investment bilateralism to regionalism presents us with a paradox. On the one hand, the mega-regional Free Trade Agreements signed and being negotiated advance the protection of investors and facilitate their access to the ISDS mechanism. On the other hand, States attempt to react to investors’ growing power either by opting out from investment arbitration or by reforming investment standards to better reflect their interests.

Reviewing this ‘battle’ of predominance, this Chapter argues that regionalism has not been suitable to resolve it. Although some steps were taken towards the consolidation of the investment regime, regionalism ultimately led to a further fragmentation. It can serve as a ‘sweet spot’ for investors, who not only maintain their powers, but are given even more means to proceed against States. What is sure is that, with the main purpose of international investment law still being the protection of

investors and with globalization making multinational corporations indispensable components of world economy, their role will not be easily diminished. Given the fact that regionalism does not seem to deliver the desired results, the alternative of a multilateral investment treaty could be the 'one-eyed man in the land of the blind', marking a new beginning in balancing States and investors conflicting interests. However, multilateralism still raises concerns among States and academics, which implies that the creation of such a treaty is utopian. At the same time, the future of regionalism itself seems also uncertain, with the US government leading the way back to bilateralism, pulling out of TPP and promoting the conclusion of BITs.

CHAPTER 3

Sustainable development in new generation FTAs: Could arbitrators further the principle through ISDS?

3.1 Introduction

Sustainable development has been defined in various ways, but no definition is yet universally accepted. The content of the principle was initially shaped by the 1987 Brundtland Report[191] and the 1992 Rio Declaration, which placed human beings at the centre of sustainable development and put weight on environmental protection.[192] Since then

[191] World Commission on Environment and Development, Our Common Future (Oxford University Press 1987).

[192] Rio Declaration on Environment and Development in 'Report of the United Nations Conference on Environment and Development, UN Doc A/CONF.151/26 (vol I) (12 August 1992), Annex (Rio Declaration).

its meaning has evolved; the Rio+10 and Rio+20 summits described sustainable development in terms of three pillars: economic, social and environmental.[193] The recent adoption of the 2030 Agenda[194] adds further elements to the concept. While still based on the three pillars, Agenda 2030 also directly mirrors the human right framework; it is grounded in international human rights treaties, and its Sustainable Development Goals (SDGs) and targets encompass issues related not only to economic and social rights but also cultural, civil and political rights.[195]

Agenda 2030 also creates a strong linkage between sustainable development and investment, explicitly linking its promotion with substantive SDGs and targets.[196] The adoption of investment promotion regimes is also mentioned as a means of implementation of the Agenda.[197] However, the current regulatory framework for international investment law has been criticized as threatening sustainable development. These concerns reinforce the need for the establishment of effective rules and processes to facilitate the realization of the SDGs.[198]

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[193] 'Report of the World Summit on Sustainable Development, Plan of Implementation of the World Summit on Sustainable Development' UN Doc A/CONF.199/20 (4 September 2002) I, para 2; UNGA, 'The Future We Want' UN Doc A/RES/66/288 (27 July 2012) I, para 3.

[194] UNGA, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (2030 Agenda) UN Doc A/ RES/70/1 (21 October 2015).

[195] Ibid para 10; see also Goals 5, 10, 16 and 17.

[196] Ibid Goals 1b, 2a, 7a, 10b.

[197] Ibid Goal 17.15.

[198] L Cotula, 'Foreign Investment, Law and Sustainable Development: A Handbook on

On a positive note, governments have embarked on a path of reforming international investment agreements (IIAs), shifting shyly towards sustainable development;[199] however, the steps taken thus far do not seem to be sufficient.

Although IIAs are inter-State agreements, States are not the only ones shaping the international investment regime. Through investor-State dispute settlement (ISDS), arbitrators are entrusted with the task of interpreting these agreements. Therefore, whether and how sustainable development will be put into practice also depends to a great extent on their decisions. Sustainable development should be considered as an 'interstitial' principle or a principle for the legal interpretation of international treaties.[200] How could arbitrators apply this principle in ISDS when resolving investment disputes, particularly those with explicit public interest components? Do the so-called new generation IIAs impose an obligation on them towards integrating the principle into their

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Agriculture and Extractive Industries' (International Institute for Environment and Development 2016), at 6.

[199] UNCTAD, World Investment Report 2015 (n 12), at 124.

[200] V Lowe, 'Sustainable Development and Unsustainable Arguments' in A Boyle and D Freestone (eds), International Law and Sustainable Development: Past Achievements and Future Challenges 19 (Oxford University Press, 1999); G Mayeda, 'Where Should Johannesburg Take Us? Ethical and Legal Approaches to Sustainable Development in the Context of International Environmental Law' (2004) 15 Colorado Journal of International Environmental Law and Policy 37.

interpretation? Does the arbitration system itself need to be reformed for the aims of sustainable development to be fulfilled?

Existing literature has already attempted to resolve tensions between existing IIAs and environmental or social issues.[201] This Chapter

[201] L J Dhooge, 'The North American Free Trade Agreement and the Environment: Lessons of Metalclad Corporation v. United Mexican States" (2010) 10 Minnesota Journal of Global Trade 209; R J Daniels, 'Defecting on Development: Bilateral Investment Treaties and the Subversion of the Rule of Law in the Developing World,' draft dated 23 March 2004, online: Università degli Studi di Siena http://www.unisi.it/lawandeconomics/stile2004/daniels.pdf; T Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) 25 International Review of Law & Economics 108; R Moloo and J Jacinto, 'Environmental and Health Regulation: Assessing Liability Under Investment Treaties', (2011) 29 Berkeley Journal of International Law 1; K Gallagher and D Chudnovsky, Rethinking Foreign Investment for Sustainable Development: Lessons from Latin America (Anthem Press, 2010); M W Gehring, M C Cordonnier-Segger and A Newcombe, Sustainable Development in World Investment Law (Kluwer Law International, 2011); F Rojid and M Vasquez, 'Investment Law and Poverty: Continuing the Debate through UNCTAD's Investment Policy Framework for Sustainable Development' (2011) 14 Journal of World Investment and Trade 889; L N Skovgaard Poulsen, 'Bounded Rationality and the Diffusion of Modern Investment Treaties' (2013) 58 International Studies Quarterly 1; C S Levy, 'Drafting and Interpreting International Investment Agreements from a Sustainable Development Perspective' (2015) 3 Groningen Journal of International Law 59; S W Schill, C J Tams and R Hofmann, International Investment Law and Development Bridging the Gap (Edward Elgar, 2015); J E Viñuales, 'Foreign Investment and the Environment in International Law: The Current State of Play' in K Miles (ed), Research Handbook on Environment and Investment Law 1 (Edward Elgar, 2016), at 2-3; S Hindelang and M Krajewski, Shifting

extends the discussion to 'new generation' mega-regional FTAs and assesses whether they have addressed these sustainable development-related concerns.[202] It principally concentrates on arbitral tribunals and the methods that they could employ in order to advance the principle of sustainable development. To do so, it first analyses the current practice of ISDS tribunals when confronted with investment disputes with explicit public interest components. In a second stage, the Chapter examines whether 'new generation' FTAs contain language aligning international investment law with SDGs and whether they provide tools that would enable arbitrators to interpret their provisions in light of the 2030 Agenda. Finally, it reflects on changes to ISDS and suggests alternative dispute resolution methods that would render the investment regime more compatible with sustainable development.

3.2 Current Practice of ISDS Tribunals

The gradual expansion of investors' activities in domains of public interest, such as water, energy or health care, has given rise to arbitration disputes involving a variety of investments with significant sustainable development impacts. The majority of these

Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified (Oxford University Press, 2016).

[202] The Chapter focuses on the Trans-Pacific Partnership Agreement (TPP), the EU-Canada Comprehensive Economic and Trade Agreement (CETA), the EU-Singapore FTA and the EU-Vietnam FTA.

sustainable-related issues, were brought either as environmental claims or as human rights assertions.

Environmental claims have been relatively slow to arise in the ISDS context. In early cases, the 'traditional approach' of arbitrators was to prioritize investment law, considering it as lex specialis.[203] Based on the 'sole effects doctrine',[204] some tribunals regarded the public purpose objective of a State measure as irrelevant to the decision as to whether the investment treaty was breached. For instance, both the Santa Elena and Water Management II tribunals, hearing indirect expropriation cases, stressed that "expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures", hence it was not a reason to exclude or limit investor compensation.[205] Taking a different approach, other tribunals engaged in the discussion of environmental issues, but still considered them as subordinate to investment protection. In the Metalclad award, arbitrators applied a strictly economic impact test to find that an indirect expropriation had occurred, as the owner was

[203] M Koskenniemi, 'Fragmentation of International Law – The Function and Scope of the Lex Specialis Rule and the Question of "Self-Contained Regimes": An Outline' (2009) 1 Transnational Dispute Management.

[204] C Henckels, 'Indirect Expropriation and the Right to Regulate' (2012) 15 Journal of International Economic Law 223, at 225 (fn 4).

[205] Compañia del Desarrollo de Santa Elena S.A. v Republic of Costa Rica, ICSID Case No ARB/96/1, Award (17 February 2000) paras 71-72; Waste Management v Mexico (n 59).

deprived "of the ... reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State".[206] In the Tecmed and Glamis cases, investment tribunals, although seemingly having weighed public purpose and investors' interests equally, set forth an expansive interpretation of the fair and equitable treatment (FET) standard, prioritizing the 'legitimate expectations' of investors.[207] The non-discrimination standards[208] have also been open to wide interpretation; the S.D. Myers tribunal adopted a competitive business approach in its assessment of 'like circumstances' and found the environmental decisions of the host State to be breaching its treaty obligations.[209]

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[206] Metalclad Corporation v Mexico (n 68), para 103. See also N Bernasconi-Osterwalder and L Johnson, 'International Investment Law and Sustainable Development: Key Cases from 2000–2010' (International Institute for Sustainable Development 2011), at 78-79.

[207] Tecnicas Medioambientales Tecmed S.A. v United Mexican States, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) paras 123, 139, 149; Glamis Gold Ltd. v United States (n 136), para 354.

[208] The non-discrimination standards prohibit discrimination on the basis of nationality. The most common non-discrimination standards of IIAs are the national treatment (NT) and the most-favoured nation treatment (MFN), which require treatment no less favourable than the one afforded to national or other foreign investors respectively.

[209] S.D. Myers, Inc v Canada (Partial Award) (12 November 2000) (UNCITRAL) IIC 249 (2000), para 243.

Since 2012, we can observe a steep increase in disputes with environmental relevance,[210] which serves as a confirmation of the growing importance of sustainable development in the field of international investment law. The gradually changing treatment of such disputes by ISDS tribunals points in the same direction. In the Chemtura, Al Tamimi and Charanne cases, the tribunals took into account the purpose of the host States' environmental measures, accepting the latter as a valid exercise of their regulatory powers.[211] Similarly, in the Marion Unglaube, Mamidoil, and Peter Allard cases, arbitrators considered the relevance of the host States' economic conditions, expecting 'due diligence' from investors.[212] However, these steps are modest, as arbitrators only assess environmental claims as part of the factual analysis rather than as questions of law.[213] Furthermore, the fact that

[210] Viñuales (n 201), at 12-13: 'A total of 60 such disputes have been filed […] which amounts to more than half of the entire 114-set.'.

[211] Chemtura Corporation v Canada (Award) (2 August 2010) PCA Case No 2008-01 (UNCITRAL) IIC 451 (2010), para 266; Adel A Hammadi Al Tamimi v Sultanate of Oman, ICSID Case No ARB/11/33, Award (3 November 2015), paras 388-444; Charanne and Construction Investments v Spain (Award) (21 January 2016) (Stockholm Chamber of Commerce, Case No 62/2012).

[212] Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v Republic of Albania, ICSID Case No ARB/11/24, Award (30 March 2015), paras 613-614; Marion Unglaube v Republic of Costa Rica, ICSID Case No ARB/08/1 and Reinhard Unglaube v Republic of Costa Rica, ICSID Case No. ARB/09/20, Award (16 May 2012), para 258; Peter A. Allard (Canada) v The Government of Barbados (Award) (27 June 2016) (PCA Case No 2012-06) IIC 864 (2016).

[213] C L Beharry and M E Kuritzky, 'Going Green: Managing the Environment through International Investment Arbitration' (2015) 30 American University International Law

several recent awards still insist on the 'traditional approach'[214] makes clear that investment and environmental law are still not on an equal footing.

Although still infrequent, human rights arguments also appear in ISDS. The acceptance of jurisdiction by tribunals ruling cases related to human rights does not seem to follow a firm pattern; the reference to international law as applicable law in the IIA was sometimes considered sufficient to establish jurisdiction for claims brought by the investor,[215] while in other cases it was not. But even in cases where arbitrators denied jurisdiction, they nevertheless took the human rights argumentation into consideration as 'part of the factual matrix of the claimants' complaints'.[216] This willingness to draw analogies with human rights seems, however,

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Review 396.

[214] Abengoa S.A. y COFIDES S.A. v United Mexican States, ICSID Case No ARB(AF)/09/2, Award (18 April 2013); Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v Romania, ICSID Case No ARB/10/13, Award (2 March 2015), para 312; Bilcon of Delaware et al. v Government of Canada (Award on Jurisdiction and Liability) (17 March 2015) (PCA Case No 2009-04) IIC 688 (2015), paras 691-692.

[215] Chevron & Texaco v Ecuador (n 141) (Interim Award) (1 December 2008) IIC 355 (2008), paras 2, 3 and 207; Desert Line Projects LLC v Republic of Yemen, ICSID Case No ARB/05/17, Award (6 February 2008); Toto Costruzioni Generali S.p.A. v Republic of Lebanon, ICSID Case No ARB/07/12, Decision on Jurisdiction (11 September 2009).

[216] Veteran Petroleum Limited (Cyprus) v Russian Federation (Award) (18 July 2014) (PCA Case No 2005-05/AA228) IIC 417 (2009) para 76.

one-sided.[217] Unlike investors' claims, when it comes to defences of States, arbitrators tend to dismiss human rights-related assertions without elaborating on their dismissal.[218] This is particularly true with regard to water arbitration cases, where tribunals either did not take cognisance of the right, as in Vivendi and Biwater,[219] or refused to enter into a discussion, noting that the respondent State had failed to sufficiently argue it, as in Azurix.[220] Differently, the Suez and SAUR tribunals acknowledged that human rights are to be taken into consideration but set a very high threshold for host States to prove the proportionality of their measure.[221] Only a few exceptions to this reluctance can be found in case law; the Continental Casualty and Philip Morris tribunals dismissed the

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[217] T Meshel, 'Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond' (2015) 6 Journal of International Dispute Settlement 277, at 282-283; V Kube and E U Petersmann, 'Human Rights Law in International Investment Arbitration' (2016) 11 Asian Journal of WTO and International Health Law and Policy 65, at 86.

[218] CMS Gas Transmission Company v Argentine Republic, ICSID Case No ARB/01/8, Award (12 May 2005); EDF International SA, SAUR International SA, and Leon Participaciones Argentinas SA v Argentine Republic, ICSID Case No ARB/03/23, Award (11 June 2012).

[219] Compania de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic, ICSID Case No ARB/97/3, Award (20 August 2007); Biwater Gauff Ltd v United Republic of Tanzania, ICSID Case No ARB/05/22, Award (24 July 2008).

[220] Azurix Corp. v Argentine Republic, ICSID Case No ARB/01/12, Award (14 July 2006).

[221] Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic, ICSID Case No ARB/03/19, Decision on Liability (30 July 2010); SAUR International SA v Argentine Republic, ICSID Case No ARB/04/4, Award (22 May 2014).

investor claims, holding that the governmental measures taken were proportionate to the intended objectives: the country's grave economic crisis and the need to protect public health respectively.[222]

Third parties have also participated in investment disputes with sustainable development components, and since 2008 the number of amicus curiae briefs has doubled.[223] The first time that Non-Governmental Organizations (NGOs) tried to intervene was in the Methanex case. Despite the outcome,[224] Methanex is considered to be a ground-breaking decision, as the tribunal recognized that it had the power to accept amicus curiae submissions, opening the door for more petitions in the future.[225] After some early unsuccessful attempts of participation,[226] we can observe an increased openness of tribunals towards amicus curiae

[222] Continental Casualty Company v Argentine Republic, ICSID Case No ARB/03/9, Award (5 September 2008); Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v Oriental Republic of Uruguay, ICSID Case No ARB/10/7, Award (8 July 2016).

[223] Bastin (n 135), at 128.

[224] Methanex Corporation v United States of America (Decision on Amici Curiae) (15 January 2001) (UNCITRAL) IIC 165 (2001).

[225] S Saha, 'Methanex Corporation and the USA: The Final NAFTA Tribunal Ruling' (2006) 15 Review of European Community and International Environmental Law 110; H Mann, 'Opening the Doors, at Least a Little: Comment on the Amicus Decision in Methanex v. United States' (2001) 10 Review of European Community and International Environmental Law 241.

[226] United Parcel Service of America Inc. v Canada, ICSID Case No, UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (17 October 2001).

submissions.[227] In addition, participation is no longer sought only by NGOs, but also by international organizations, business associations and indigenous peoples.[228] Nevertheless, their acceptance remains at the discretion of tribunals, which, as the case law shows, has so far not been consistent.

After the analysis of the jurisprudence, one could conclude that the responses of arbitrators to sustainable development lack consistency. Inconsistent awards have raised concerns about the legitimacy of the arbitral process; several commentators argue that ISDS exhibits investor bias and may limit or even discourage government measures that further sustainable development.[229]

[227] Bastin (n 135) Appendix 1 at 142-143.

[228] Ibid, at 128-130; K Tienhaara, 'Third Party Participation in Investment-Environment Disputes: Recent Developments' (2007) 16 Review of European Community and International Environmental Law 230, 238-239.

[229] S D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521; O Chung, 'The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration' (2007) 47 Virginia Journal of International Law 953.

3.3 The Role of Arbitrators in Promoting Sustainable Development under New-Generation Free Trade Agreements

Given the increasing number of ISDS cases involving some sustainable-development component,[230] it is very likely we will also see such issues being addressed by tribunals set up under the post-2015 FTAs. In this section, we will examine whether these treaties contain language that imposes the duty upon, or enables arbitrators to render decisions that would – borrowing the tripartite typology of States' obligations on human rights – 'protect, respect and fulfil' sustainable development.

3.3.1 Sustainable development clauses in new generation FTAs

3.3.1.1 Sustainable development, environmental and labour chapters

Unlike early IIAs, where explicit reference to sustainable development was either absent or only appeared in preambles,[231] new generation FTAs give greater weight to the principle. They all include preambles reaffirming the commitments of the parties to further

[230] UNCTAD, 'Investment Policy Framework for Sustainable Development' (UNCTAD 2015) 56 (UNCTAD IPFSD).

[231] A Newcombe, 'Sustainable Development and Investment Treaty Law' (2007) 8 Journal of World Investment and Trade 399.

sustainable development create new opportunities for workers, contribute to raising living standards and reduce poverty. Furthermore, they incorporate sustainable development chapters,[232] which recall international instruments such as the Rio Declaration, Agenda 21 and the ILO Declaration on Social Justice for a Fair Globalization, and acknowledge the aim of promoting investment in such a way so as to contribute to the objective of sustainable development. These chapters do not generate new obligations for the Parties, but rather embody a cooperative approach, focusing on dialogue between the Parties and relevant stakeholders with regard to trade-sustainable development issues.[233] A novel feature of the sustainable development chapters is that they aim to strengthen the corporate social responsibility (CSR), directly mentioning that the Parties shall take into account the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises and, in EU-Vietnam FTA, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.[234] Although the CSR article again lacks firm commitments, it demonstrates the acceptance of the Parties that, as Muchlinski claims, "some kind of accountability for the social

[232] TPP Chapter 23; CETA Chapter 22; EU-Singapore FTA Chapter 13; EU-Vietnam FTA Chapter 15.

[233] TPP art 23.6; CETA arts 22.3(1)(2a) and 22.1(2)(d); EU-Vietnam FTA arts 15.14(1)(b) and 15.9(d).

[234] CETA art 22.1(3)(d) and EU-Vietnam FTA art 15.9(e). Similarly in pre-2015 FTAs, such as the EU-Colombia/Peru/Ecuador FTA (adopted 26 June 2012, entered into force 1 June 2013), art 271(3).

consequences of their (investors') actions may be inevitable under international law".[235] The focus on the CSR standard can be proven very helpful for ISDS tribunals when adjudicating cases with environmental and human rights components.

Following the example of older IIAs, all post-2015 FTAs also incorporate environment and labour provisions, either as separate chapters,[236] or as part of the sustainable development chapter.[237] The environmental and labour chapters include positive and negative obligations for the parties. They all contain a 'right-to-regulate' provision, which acknowledges "the right of each Party to establish its levels of environmental and protection, and to adopt or modify accordingly its laws and policies".[238] In order to avoid potential distortion effects that may result from the liberalisation of trade and investment flows,[239] the FTA labour and environmental chapters also include"non-derogation" or "no-lowering of standards" provisions,

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[235] P Muchlinski, 'International Corporate Responsibility and International Law', in T Weiler and F Baetens (eds) New Directions in International Economic Law: In Memoriam Thomas Walde 223 (Nijhoff, 2011), at 229.

[236] CETA Chapters 23 and 24; TPP Chapters 19 and 20.

[237] EU-Singapore FTA Chapter 13; EU-Vietnam FTA Chapter 15.

[238] EU-Singapore FTA art 13.2(1). Similarly in TPP art 20.3(2); CETA arts 23.2 and 24.3; EU-Vietnam FTA art 15.2(1).

[239] V Prislan and R Zandvliet, "Labor Provisions in International Investment Agreements: Prospects for Sustainable Development" in A K Bjorklund (ed.) Yearbook of International Investment Law and Policy 2012/2013 357 (New York: Oxford University Press, 2013), at 378.

which prohibit the retrogression from the existing level of protection accorded by national laws as an incentive to attract foreign investment..[240] Derogations not only can occur by the positive action of weakening the labor standards, but also by omissions through their lack of enforcement. Therefore, all new generation FTAs combine the 'non-derogation' provisions with an 'enforcement of laws' clause, under which no Party "shall fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction".[241] Despite having the form of negative obligations, both the 'non-derogation' and the 'enforcement of laws' clauses could be seen as 'building a wall' against external pressures of multinational corporations, ensuring that the regulatory autonomy of States will not be affected by the actions of the former.

Neither the sustainable development nor the environmental and labour chapters of the treaties examined in this article gives recourse to dispute settlement mechanisms.[242] Disputes are to be resolved only by government consultations or referral to a Panel of Experts.[243] Despite not

[240] TPP arts 19.4 and 20.3(6); CETA arts 23.4(2) and 24.5(2); EU-Singapore FTA art 13.12(1); EU-Vietnam FTA art 15.10(2). Similarly in pre-2015 FTAs, such as the US-Colombia FTA (n 87) art 17.2(2); US-Korea FTA (n 87) art 19.2(2); US-Panama FTA (n 87) art 16.2(2).

[241] TPP arts 19.5(1) and 20.3(4); CETA arts 23.4(3) and 24.5(3); EU-Singapore FTA art 13.12(2); EU-Vietnam FTA art 15.10(3).

[242] With the exception of the TPP (n 45) art 19.15(12) and 20.23.

[243] CETA art 24.14-24.15, EU-Singapore FTA art 13.16-13.17; EU-Vietnam FTA art 15.16-15.17.

being directly applicable to ISDS, both the preambles and sustainable development-related provisions could be seen as a manifestation of parties' intention to strengthen the importance of sustainable development. They clarify the object and purpose of the agreements and, as provided by Article 31(2) of the Vienna Convention on the Law of the Treaties (VCLT),[244] they constitute relevant 'context', allowing investment tribunals to take into account the normative environment more widely, holistically interpreting investment agreements.[245]

3.3.1.2 Sustainable development references in investment chapters

Turning to provisions that can form the basis of an ISDS claim, sustainable development references are also present. The EU FTAs analysed 'reaffirm' the right of the parties to regulate in order to achieve legitimate policy objectives.[246] The wording of this provision, strongly reminiscent of preambular language, is quite vague and cannot be seen as providing clear guidance for ISDS tribunals. A similar right-to-regulate provision can be found in the TPP, which states that "nothing … shall be construed to prevent' the adoption of measures of environmental and

[244] Vienna Convention on the Law of the Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 31(2).

[245] International Law Commission (ILC), 'Report of the Study Group on the Fragmentation of International Law' UN Doc A/CN.4/L.682 (13 April 2006), at 209.

[246] CETA art 8.9(1); EU-Vietnam FTA Chapter 8-II, Section 2, art 13bis.

health objectives, unless these measures are 'otherwise consistent with this Chapter."[247] This provision complicates the intended protection and confers to the arbitrators the task to determine whether this compliance exists. All new generation FTAs also feature 'general exceptions'. The post-2015 EU FTAs, importing the language of Article XX of the 1994 General Agreement on Tariffs and Trade, assert that States can adopt measures aiming to protect the environment, human life or health, provided that they are 'necessary' and not amounting to 'arbitrary or unjustifiable discrimination'.[248] The vagueness of these terms has made WTO panels reluctant to rule in favour of the 'general-exceptions' provision, setting highly demanding levels of proof.[249] Although WTO case law does not set a precedent for investment arbitration, the absence of a definition of these terms in the EU FTAs make the 'general exceptions' open to broad interpretation. Moreover, their applicability to ISDS is quite limited, as they only cover specific sections of the Investment Chapter. The TPP general exception as applied to ISDS is even narrower, only addressing certain obligations under the performance requirement article.[250] Performance requirements are commitments imposed on investors to meet certain goals with respect to their

[247] TPP art 9.10(a).

[248] CETA art 28.3(1-2); EU-Singapore FTA art 9.3(3); EU-Vietnam FTA Chapter 8-VII, art 1.

[249] N Bernasconi-Osterwalder et al., Environment and Trade: A Guide to WTO Jurisprudence (Routledge, 2005), at 76-147.

[250] TPP art 9.10(3)(d).

operations in the host country.[251] The TPP generally does not make use of performance requirements, which are only accepted in the form of 'general exceptions'. Finally, all post-2015 FTAs include indirect expropriation annexes, which set forth factors indicating which types of State conduct constitute indirect expropriation.[252] The annexes provide that non-discriminatory regulatory actions designed to protect public health, safety and the environment do not constitute indirect expropriation, except in 'rare circumstances'.[253] While the TPP does not give guidance to arbitrators on how to apply this term, the EU FTAs elaborate on this aspect defining 'rare circumstances' as measures with such a severe impact in light of their purpose that they appear manifestly excessive. Despite the clarification, this wording still leaves great discretion to arbitrators to determine the threshold of indirect expropriation.

To summarize, the new generation FTAs do not provide a clear normative environment for sustainable development. The obscure wording of the relevant provisions – either outside or inside the scope of

[251] UNCTAD, World Investment Report 2003: FDI Policies for Development: National and International Perspectives (UNCTAD 2003), at 119.

[252] For a comprehensive analysis see L Cotula, 'Expropriation Clauses and Environmental Regulation: Diffusion of Law in the Era of Investment Treaties' (2015) 24 Review of European, Comparative and International Environmental Law 278.

[253] TPP Annex 9-B(3)(b); CETA Annex 8-A(3); EU-Singapore FTA Annex 9-A(2); EU-Vietnam FTA Chapter 8-II, Annexes, Annex on expropriation.

ISDS – creates ambiguities does not provide sufficient direction to arbitrators.

3.3.2 Interpretative tools

Could arbitrators overcome the ambiguities in these treaties, and integrate sustainable development into their decisions? As investment tribunals have competence to decide only within the legal framework of the agreement in question, we need to examine the provisions of the post-2015 FTAs establishing the competence of the tribunals: the 'covered investment' and 'governing law' clauses, and whether they leave room for the consideration of sustainable-development claims. Moreover, we need to analyse the existing jurisprudence on these clauses. Although no rule of strict precedent exists in investment arbitration, the vagueness of IIA language has made arbitrators shapers of investment law; through interpretation they create normative rules, which, while non-binding, exert influence on subsequent tribunals, forming de facto precedent.[254]

[254] B King and R Moloo, 'International Arbitrators As Lawmakers' (2014) 46 New York University Journal of International Law and Politics 875, at 882-883.

3.3.2.1 Covered investment

The 2030 Agenda "reaffirms that every State has … full permanent sovereignty over all its wealth, natural resources and economic activity".[255] According protection to investments violating national legislation would undermine the right of States to make decisions in their best interests. Older BITs addressed this issue of legality, explicitly subjecting the definition of 'covered investment' to conformity with the domestic laws of the host State. Based on this provision, several tribunals applied the so-called 'clean hands' doctrine to examine the legality of an investment, rejecting jurisdiction for investments contrary to the environmental or human rights laws of the host State.[256] The FTAs examined here omitted the domestic law criterion from the definition of 'covered investment'. Even so, it could be argued that tribunals could still apply the 'clean hands' doctrine, a view which can be derived from the jurisprudence; two recent awards upheld 'the widely-held opinion that investments are protected by international law

[255] 2030 Agenda (n 194), para 18.

[256] Inceysa Vallisoletana, SL v Republic of El Salvador, ICSID Case No ARB/03/26, Award (2 August 2006), para 335; Fraport AG Frankfurt Airport Services Worldwide v Republic of Philippines, ICSID Case No ARB/03/25, Award (16 August 2007), paras 397 and 401-402; Alasdair Ross Anderson et al v Republic of Costa Rica, ICSID Case No ARB(AF)/07/3, Award (19 May 2010), paras 57-59. For an analysis see P Dumberry, 'State of Confusion: The Doctrine of "Clean Hands" in Investment Arbitration after the Yukos Award' (2016) 17 Journal of World Investment and Trade 229, at 232-235.

only when they are made in accordance with the legislation of the host State', even without the inclusion of a relevant treaty provision.[257] However, assessing the legality of an investment may not be sufficient by itself. Cases may arise where national legislation itself falls short from furthering sustainable development, This is particularly true for developing countries-signatories of FTAs, such as Malaysia and Vietnam, whose laws for environmental democracy score low.[258]

This is why, besides legality, the quality of the investment should also be taken into account in the interpretation of 'covered investment'. The 2030 Agenda urges investment that stimulates 'productivity, inclusive economic growth and job creation'.[259] The question would be whether arbitrators could reject jurisdiction for investments that do not contribute to the host State's sustainable development. Under Article 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),[260] a dispute falls within the jurisdiction of the Centre if it directly arises out of an 'investment'. The absence of an 'investment' definition in the Convention gave rise to different interpretations by tribunals. One of the

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[257] Mamidoil v Albania (n 212), para. 359; Phoenix Action, Ltd. v The Czech Republic, ICSID Case No ARB/06/5, Award (15 April 2009), para 79.

[258] See Environmental Democracy Index, at http://www.wri.org/blog/2015/05/best-and-worst-countries-environmental-democracy (last access 10 August 2018).

[259] 2030 Agenda (n 194), para 67.

[260] ICSID Convention (n 119), art 25(1).

most sustainable development-friendly interpretations was given in the Salini case, where the following criteria were set as the typical characteristics of an investment: (i) commitment of capital; (ii) a certain duration; (iii) participation in risks; and (iv) contribution to the economic development of a host State.[261] The Salini test was accepted in several subsequent cases, but the majority of investment tribunals dismissed the criterion of economic development.[262] Departing from the model of older IIAs' wide investment definitions,[263] new generation treaties explicitly require investments to possess certain characteristics. Although some new BITs maintain all four Salini criteria,[264] the FTAs examined here do not mention the contribution to the economic development.[265] This could

[261] Salini Costruttori S.p.A and Italstrade S.p.A v Kingdom of Morocco, ICSID Case No ARB/00/4, Decision on Jurisdiction (23 July 2001), paras 50-52.

[262] Accepted in: Joy Mining Machinery Limited v Arab Republic of Egypt, ICSID Case No ARB/03/11, Decision on Jurisdiction (23 July 2001), para 53; Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt, ICSID Case No ARB/04/13, Decision on Jurisdiction (16 June 2006), para. 91; rejected in L.E.S.I. S.p.A. et ASTALDI S.p.A. v People's Democratic Republic of Algeria, ICSID Case No ARB/05/3, Award (12 July 2006), para 73(iv); Siemens, A.G. v Argentine Republic, ICSID Case No ARB/02/8, Decision on Jurisdiction (3 August 2004); Deutsche Bank AG v Democratic Socialist Republic de Sri Lanka, ICSID Case No ARB/09/02, Award (31 October 2012).

[263] NAFTA Article 1139.

[264] Government of the Republic of India, Annex Model Text for the Indian Bilateral Investment Treaty (adopted 18 December 2015) (Indian Model BIT), art 1.2(1); Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (adopted 19 January 2016, entered in force 30 August 2018), art 1.2(c).

[265] TPP art 9.1; CETA art 8.1; EU-Singapore FTA art 9.1(1); EU-Vietnam FTA Chapter

make it more difficult for future FTA tribunals ruling in relation to these agreements to rely upon the Salini test and reject jurisdiction for investments that do not promote sustainable development.

3.3.2.2 Governing law

All new generation FTAs set applicable rules of international law as the 'governing law' of ISDS.[266] Unlike the TPP, the EU FTAs also explicitly provide for the applicability of the VCLT. As the VCLT codifies customary international law, it should be accepted that TPP tribunals could also make use of its rules of interpretation. As confirmed in the Report of the Executive Directors on ICSID Article 42, "the term "international law" … should be understood in the sense given to it by Article 38(1) of the Statue of the International Court of Justice."[267] Under Article 38(1)(a) of the ICJ Statute, one of the primary sources of international law is international treaties. This could give arbitrators the green light to apply to ISDS the binding international human rights and environmental treaties ratified by the disputing parties, even ex officio, a

8-I, art 1(4)(p). In the TPP, the 'certain duration' phrasing was also removed.

[266] TPP art 9.25(1); CETA art 8.31; EU-Singapore FTA art 9.19(2); EU-Vietnam FTA Chapter 8-II, Section 3, Sub-Section 5, art 16(2).

[267] ICSID, 'Report of the Executive Directors on the Convention of the Settlement of Investment Disputes between States and Nationals of other States' (1965) 4 ILM 530.

practice that they have so far only sporadically used.[268] These treaties do not impose obligations on investors, but could be a useful interpretative tool, especially from a sustainable development perspective. For example, the 2015 Paris Agreement[269] could become pertinent in the discussion of some new generation cases springing from shifts in climate change policy.

In this context, the question arises as to whether tribunals could also rely on voluntary instruments to which parties have adhered. Article 38 of the ICJ Statute does not identify soft law as one of the sources of international law, a fact that led commentators to suggest it cannot be used by international courts and tribunals.[270] Others argue that the scope of Article 38 is narrow and acknowledge the role that soft law could play in international law.[271] Investment tribunals do not adopt a coherent approach; a study undertaken in 2011 shows that although some awards

[268] Azurix (n 220); Saipem S.p.A. v The People's Republic of Bangladesh, ICSID Case No ARB/05/07, Decision on Jurisdiction (21 March 2007), paras 130 and 132. See also Kube and Petersmann (n 217), at 92-93.

[269] Paris Agreement (adopted 15 December 2015, entered into force 4 November 2016) (2016) 55 ILM 740.

[270] J d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2009) 19 European Journal of International Law 1075; P Weil, 'Toward Relative Normativity in International Law' (1987) 77 American Journal of International Law 413, at 414, fn 7.

[271] C M Chinkin, 'The Challenge of Soft-Law: Development and Change in International Law' (1989) 38 International and Comparative Law Quarterly 850; G J H Hoof, Rethinking the Sources of International Law (Kluwer, 1983), at 188.

cite non-legally binding instruments, only three of them were cited more than once.[272] The use of soft law by arbitrators can be justified by Article 31(3)(c) of the VCLT, which requires decision makers to interpret disputes in the light of all relevant rules of international law applicable between the parties. This so-called 'systemic integration' approach could enable arbitrators to fill the gaps of the vague IIA standards and prevent conflicts between IIAs and international legal standards.[273] This could be of great practical significance for sustainable development, as future tribunals may integrate in their reasoning the SDGs adopted as part of the 2030 Agenda. Likewise, tribunals could take into consideration the OECD Guidelines for Multinational Enterprises, already invoked by the respondent in South American Silver case[274] and mentioned in post-2015 FTAs,[275] as well as the United Nations Guiding Principles on Business

[272] T Cole, 'Non-binding Instruments and Literature' in T Gazzini and E de Brabandere (eds), International Investment Law. The Sources of Rights and Obligations 289 (Nijhoff, 2012), at 304-305, fn 41.

[273] UNCTAD Interpretation of IIAs (n 156), at 9; K Berner, 'Reconciling Investment Protection and Sustainable Development: A Plea for an Interpretative U-Turn' in S Hindelang and M Krajewski, Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified 177 (Oxford University Press, 2016), at 186-187.

[274] South American Silver Limited (Bermuda) v The Plurinational State of Bolivia (Respondent Counter-Memorial) (31 March 2015) (PCA Case No 2013-15) 1291, https://www.pcacases.com/web/sendAttach/1291, para 220.

[275] CETA preamble and art 22.3(2)(b) and 25.4(2)(c); EU-Singapore FTA art 13.11; EU-Vietnam FTA art 15.9; and TPP art 9.17.

and Human Rights referenced by the tribunal in the Urbaser case.[276] These instruments reflect the importance of corporate social responsibility (CSR), which, according to the UNCTAD Investment Policy Framework for Sustainable Development (IPFSD), includes promoting low-carbon and environmentally sound investment.[277] Even without imposing direct obligations on investors, CSR could acquire greater importance in ISDS proceedings, by serving as a means for tribunals to evaluate whether investor protection overrides States' national development objectives. Besides assisting governments in the implementation of the 2030 Agenda, CSR could have positive effects for investors themselves. In an era that environmental and socio-economic consciousness increases, corporations' adoption of CSR measures could increase their competitiveness.[278]

However, what if there is no (relevant) international treaty signed by both disputing parties? Article 38(1)(b) and (c) of the ICJ Statute allow decision makers to also apply international custom and general principles of law. It is not easy to conclude which rules are recognized as customary international law or as general principles, or how investment

[276] Urbaser S.A., Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic, ICSID Case No. ARB/07/26, Award (8 December 2016), fn 434.

[277] UNCTAD IPFSD (n 230), at 46.

[278] M Petrović-Ranđelović, T Stevanović and M Ivanović-Đukić, 'Impact of Corporate Social Responsibility on the Competitiveness of Multinational Corporations', (2015) 19 Procedia Economics and Finance 332, at 332-341.

tribunals could apply them in promoting sustainable development. But some doctrines that are widely recognized in international law could have a role in the interpretation of IIA substantive standards in line with the sustainable development objectives.

For example, the 'police powers' doctrine, a norm of customary law operating autonomously from treaty law,[279] could be of help in determining the scope of indirect expropriation. Literature is divided on its applicability in international investment law,[280] and so is jurisprudence. In some ISDS proceedings, 'police powers' was sidestepped by the 'sole effects' doctrine, where solely the effect of the governmental measure on the property is crucial in the determination of expropriation.[281] Even in cases where tribunals applied 'police powers', they mostly did it as justification for non-payment of compensation, rather than to exclude liability.[282] The most radical pronouncement of the

[279] J E Viñuales, 'Sovereignty in Foreign Investment Law' in Z Douglas, J Pauwelyn and J Viñuales (eds), The Foundations of International Investment Law: Bringing Theory into Practice 317 (Oxford University Press 2014), at 326-328; OECD, Indirect Expropriation" and the "Right to Regulate" in International Investment Law (OECD Publishing 2004), at 5, fn 10.

[280] B Mostafa, 'The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law' (2008) 15 Australian International Law Journal 267.

[281] Henckels (n 204).

[282] P Ranjan and A Pushkar, 'Determination of Indirect Expropriation and Doctrine of Police Power in International Investment Law: A Critical Appraisal' in L Choukroune (ed), Judging the State in International Trade and Investment Law: Modern Sovereignty, the Law and the Economics 127 (Springer, 2016), at 131-132.

rule was made by the Methanex tribunal, which held that all non-discriminatory governmental measures, enacted in accordance with due process, do not constitute expropriation.[283] Although criticized as negating the very purpose of expropriation provisions,[284] this interpretation seems in line with the indirect expropriation annexes of the post-2015 FTAs examined here. Also, this interpretation is sustainable development-sensitive, as it does not restrain the ability of States to regulate in favour of health or the environment, thus preventing 'regulatory chill'.[285]

The 'margin of appreciation' doctrine, developed by the European Court of Human Rights (ECtHR) jurisprudence, gives a standard of deference for States to implement public interest measures. To evaluate whether national authorities have overstepped this margin, the ECtHR has developed a proportionality test, which is much less strict than the one usually applied in ISDS.[286] So far, the majority of investment tribunals have rejected the application of the ECtHR's 'margin of

[283]Methanex (n 68) Part IV, Chapter D, para 7.

[284] Ranjan and Pushkar (n 282), at 134-135.

[285] M Paparinskis, 'Regulatory Expropriation and Sustainable Development' in M W Gehring, M C Cordonnier-Segger and A Newcombe, Sustainable Development in World Investment Law 301(Kluwer Law International, 2011), at 321-322.

[286] J Krommendijk and J Morijn, '"Proportional" by What Measure(s)? Balancing Investor Interests andHuman Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration' in P M Dupuy, E U Petersmann and F Francioni (eds), Human Rights in International Investment Law and Arbitration 421 (Oxford University Press 2009), at 443.

appreciation', arguing that it is not recognized as customary law.[287] However, its growing acceptance by international courts shows that the doctrine is emerging as a general principle of international law.[288] In addition, Article 38(1)(d) of the ICJ Statute mentions judicial decisions as subsidiary means for the determination of the rule of law. Based on this provision, investment tribunals could take into consideration ECtHR jurisprudence and subsequently the principles developed by it, a practice that has rarely been followed in ISDS.[289] Scholars have questioned the suitability of 'margin of appreciation' within investment arbitration, arguing that it provides no guidance to tribunals regarding the appropriate standard of review, thus exacerbating fragmentation.[290] However, if arbitrators apply the ECtHR proportionality test as 'corrective and restrictive of the margin of appreciation',[291] the 'doctrine could be a

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[287] Siemens v Argentina (n 262), para 354; EDF v Argentina (n 218), paras 1003 and 1106; Biwater v Tanzania (n 119), para 515; Quasar de Valors SICAV S.A. et al. v Russian Federation (Award) (10 July 20012) (SCC Case No. 24/2007) IIC 557 (2012), para 22.

[288] Y Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2006) 16 European Journal of International Law 907.

[289] Mondev International Ltd v United States of America, ICSID Case No ARB/(AF)/99/2, Award (11 October 2002); Veteran Petroleum (n. 216), para 76.

[290] J Arato, 'The Margin of Appreciation in International Investment Law' (2013) 54 Virginia Journal of International Law 545.

[291] F Matscher, 'Methods of Interpretation of the Convention' in R S J Macdonald, F Matscher and H Petzold (eds), The European System for the Protection of Human Rights (Nijhoff, 1993), at 79.

promising tool for guaranteeing the right of governments to appreciate their development needs.

The precautionary or in dubio pro natura principle could also become relevant in ISDS. While no uniform definition exists, the principle is understood as a strategy to cope with possible risks where scientific understanding is incomplete.[292] First introduced in environmental law,[293] it is now enshrined in several international legal materials and domestic laws, and has been considered by international courts. Hence it is emerging as international custom,[294] an argument that has also been presented by the host State in the David R. Aven case.[295] With this case still pending, the principle may prove a useful device in the adjudication of environment-related investment disputes. It could allow arbitrators to deviate from the general rule of international arbitration and shift the burden of proof from the respondent to the claimant, who would have to prove that its actions are not hindering the host State's sustainable development.[296]

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[292] See www.precautionaryprinciple.eu.

[293] Rio Declaration (n 192).

[294] O Mclntyre and T Mosedale, 'The Precautionary Principle as a Norm of Customary International Law' (1997) 9 Journal of Environmental Law 221; A Sirinskiene, 'The Status of Precautionary Principle: Moving Towards a Rule of Customary Law' (2009) 118 Jurisprudencija 349.

[295] David R. Aven and Others v Republic of Costa Rica, ICSID Case No UNCT/15/3, Rejoinder Memorial (28 October 2016) paras 76-77, fns 36-37.

[296] Beharry and Kuritzky (n 213), at 418-420.

In summary, we conclude that investment tribunals could use the 'governing law' provisions to apply environmental and human rights provisions to their analysis of the merits.

3.4 Reform of the Current Investment Law Regime

The increasing number of ISDS cases explicitly touching on matters of public interest has raised doubts as to the suitability of the current arbitration system to pronounce on such disputes, with scholars and practitioners asking for reform.[297] The commitment of the international community to a sustainable future makes the questions of who arbitrates and under what rules crucial. Despite the positive steps taken by the new generation FTAs, further improvement of the agreements is recommended.

[297] J Paulsson, 'Moral Hazard in International Dispute Resolution', (2010) 25 ICSID Review - Foreign Investment Law Journal 339, at 339-355; G Van Harten, 'A Case for an International Investment Court', (2008) Society of International Economic Law (SIEL), Inaugural Conference Paper, SSRN:https://ssrn.com/abstract=1153424 or http://dx.doi.org/10.2139/ssrn.1153424.

3.4.1 Reform of the profile of arbitrators

It has been said that the investment tribunals so far come from a small pool of 'male, pale and stale' corporate lawyers.[298] Statistics show that although ISDS cases are mainly brought against developing countries or small economies, 68 percent of arbitrators come from North America and Western Europe.[299] This could be considered as problematic for two reasons. First, it does not guarantee diversity and pluralism, keys to sustainable development. Second, it does not guarantee sufficient 'participation of developing countries in all the institutions of global governance', as SDG 16.8 requires. Investment arbitration should comply with this goal, expanding the pool of arbitrators, with the entry of decision makers of more nationalities to help ensure that a broader variety of viewpoints be heard. Furthermore, sustainable development objectives could be better reflected by the inclusion of decision makers with different backgrounds in the international investment tribunals. Examining the new generation FTAs provisions regarding the qualification of arbitrators, we can see that they prioritize legal competences, providing that they shall have 'expertise or experience' in public international law or international investment law.[300] Legal

[298] Paulsson, (n 297).

[299] ICSID, 'ICSID Caseload Statistics no 2016-2' (2016), available at https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx (last access 7 August 2018).

[300] TPP art 9.22(5); CETA art 8.27(4); EU-Singapore FTA art 9.18(6); EU-Vietnam FTA Chapter 8-II, Section 3, Sub-Section 4, art 12(4).

knowledge is undoubtedly important. However, several ISDS cases, and especially those with environmental and human rights components, also include complex social, technical and scientific issues.[301] So far, investment tribunals have tried to resolve these issues by resorting to external experts.[302] Mega-regional FTAs seem to approve this solution.[303] However, party-appointed experts could entail bias, and if diverging expert opinions occur, arbitrators will be ultimately left to determine which experts they will follow.[304] Also, as far as the ex officio appointment of experts is concerned, arbitrators' practice shows that they are hesitant in taking this initiative.[305] An alternative solution could be the inclusion of non-legal arbitrators in ISDS, when appropriate, a change in line with SDG 16.7 calling for 'inclusive, participatory and representative decision-making'.

Other statistics suggest that investment arbitrators favour claimants at the expense of the respondent State's sustainable

[301] K Fach Gómez, 'The US-EU Transatlantic Trade and Investment Partnership: Should It Leave a Door Open for Non-Legal Arbitrators?' (2016) 34 Conflict Resolution Quarterly 199.

[302] Ibid , at 205.

[303] EU-Vietnam FTA art 8.26; TPP art 28.15; EU-Singapore FTA Chapter 8-II, Section 3, Sub-Section 5, art 8.26.

[304] Beharry and Kuritzky (n 213), at 404.

[305] R Jacur, 'Remarks on the Role of Ex Curia Scientific Experts in International Environmental Disputes' in N Boschiero et al (eds), International Courts and the Development of International Law 441, (TMC Asser Institute, 2013), at 444.

development.[306] Their pro-investor tendency could originate from their interest in attracting or maintaining high-paying corporate clients and their ability to act as counsels in other, pending cases.[307] During the Transatlantic Trade and Investment Partnership (TTIP) negotiations of November 2015, the EU proposed the replacement of the ISDS mechanism with an Investment Court System.[308] This system was adopted in the EU-Vietnam FTA and CETA.[309] One of its major innovations is that a joint Investment Committee of the contracted parties will appoint judges, who 'shall be available at all times and on short notice'.[310] To ensure this availability, a monthly retainer fee will be paid to them.[311] Likewise, the EU proposal attempts to prevent conflicts of interests by disallowing the parallel work of arbitrators as lawyers and by introducing a new 'challenge-of-arbitrators' system where the decision of disqualification will be made by a neutral authority.[312] The tenure and financial independence of arbitrators, as well as the neutrality of the system, could address the concerns of investor bias and enhance good governance, an important element for sustainable growth.[313] Much has

[306] Van Harten (n 76).

[307] Ibid, at 543 and 554.

[308] 'Investment in TTIP and Beyond' (n 171), at 4 and 11.

[309] EU-Vietnam FTA Chapter 8-II, Section 3, Sub-Section 4, art 12; CETA art 8.27.

[310] TTIP proposal art 9(11).

[311] Ibid art 9(12-13); CETA art 8.27(12-13); EU-Vietnam FTA Chapter 8-II, Section 3, Sub-Section 4, art 12.14-12.15.

[312] TTIP proposal art 9.11(1)(4); EU-Vietnam FTA Chapter 8-II, Section 3, Sub-Section 4, art 14(1)(4); CETA art 8.30(1)(3).

[313] ILA 'Resolution 3/2002, New Delhi Declaration on Principles of International Law

been said about the feasibility of this system, especially because of the limited enthusiasm of States to reform the current system. These concerns do not lack legitimacy; the EU proposal for the tenure of judges disregards one of the most popular features of investment arbitration: party selection.[314] Also, the establishment of an Investment court would require renegotiation of the existing investment instruments, which could not happen overnight. A good middle-ground solution could be the adoption of an opt-in Convention, similar to the recent Mauritius Convention on Transparency,[315] which would extend such a permanent mechanism to States' existing obligations. As a whole, the adoption of a standing Investment Court in subsequent FTAs could form the basis for the realization of SDG 16 on 'creating effective, accountable and inclusive institutions'.

3.4.2 Revision of investment instruments

If the text of the investment treaties remains vague, it cannot give the tribunals enough direction on interpretation. This is why the

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Relating to Sustainable Development;, ILA Resolution 3/2002, in International Law Association Report of the 70th Conference (New Delhi 2002) (ILA 2002) Principle 16; G Van Harten, (n 76).

[314] C Giorgetti, 'Who Decides Who Decides in International Investment Arbitration?', (2014) 35(2) University of Pennsylvania Journal of International Law 431, at 437.

[315] UN Convention on Transparency in Treaty-based Investor-State Arbitration (adopted 10 December 2014, entered into force 18 October 2017) I-54749 (UNCITRAL).

improvement of the profile of arbitrators alone seems insufficient. Rather, a revision of international instruments should be pursued.

As discussed in Section 2.2.1.2, new generation FTAs have shown attempts of clarification, such as the inclusion of expropriation annexes and the narrowing of the scope of FET[316] and MFN treatment.[317] However, as already remarked, their wording is still vague, making it difficult for arbitrators to strike the right balance between the interests of foreign investors and the public interest of States. IIA models released by NGOs, international organizations and governments, such as the 2005 International Agreement on Investment and Sustainable Development model, the 2012 Southern African Development Community (SADC) Model BIT, the 2015 Indian Model BIT, and the 2015 UN IPFSD, could be of help in aligning IIA substantive standards with the SDGs. States' model BITs are important, as they reflect a government's negotiating position for future IIAs and serve as a means to achieve coherence in State treaty practice. Despite the need to compromise some of their terms, States usually use their model BITs as the basis for their subsequent investment agreements negotiations.[318] Model BITs prepared

[316] CETA art 8.10; EU-Singapore FTA art 9.4; EU-Vietnam FTA Chapter 8-II, Section 2, art 14.

[317] For an explanation of the MFN standard see n 208. TPP art 9.5(3); CETA art 8.7(4); and EU-Vietnam FTA Chapter 8-II, Section I, art 4. The EU-Singapore FTA omits the standard.

[318] C Brown, Commentaries on Selected Model Investment Treaties (Oxford University Press, 2013), at 10-11.

by NGOs and international organizations are even more significant for sustainable development; as the result of the collective work of experts in international law, these templates identify the shortcomings of the current investment regime and provide a new direction consistent with the requirements of the global economy. Although it is quite difficult to evaluate the actual practical significance of these models, they seem to have influenced State treaty practice, with a number of treaties borrowing concepts identified in, for example, the IISD Model.[319] Clarifying the non-discrimination standards, model BITs set criteria for the interpretation of the identical treatment of foreign and local investors in 'like circumstances', a concept that remains undefined in new generation FTAs. One of the criteria provided by the IISD and SADC Models is the investment's 'effects upon the local, regional or national environment'; similarly, the Indian Model BIT refers to 'the actual and potential impact of the investment on … the local community, or the environment'.[320] The adoption of this criterion in future IIAs could prevent ISDS claims when, for example, a government refuses to issue an emission permit to a

[319] A De Mestral and C Lévesque, Improving International Investment Agreements (Routledge, 2013), at 20.

[320] International Institute for Sustainable Development (IISD), IISD Model International Agreement on Investment for Sustainable Development; (2005) <https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf> (IISD Model BIT), art 5(EB); Southern African Development Community, 'SADC Model Bilateral Investment Treaty Template with Commentary' (adopted July 2012) <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf > (SADC Model BIT), art 4.2; UNCTAD IPFSD (n 230) , at 92-93; Indian Model BIT (n 264), art 4.1 (fn2).

foreign corporation for a location where existing investors have exhausted the receptive capacity of the ecosystem.[321] Turning to FET, the most problematic issue from a sustainable development perspective is the protection of the 'legitimate expectations' of investors. Lacking definition, this broad concept indirectly restricts States' ability to change or introduce public interest policies that may have a negative impact on foreign investors. Interestingly, all IIA models omit investors' 'legitimate expectations' from the FET standard. Although advisable, it seems rather unlikely that the 'legitimate expectations' provision would disappear from future investment agreements. If the concept were to be maintained, the TPP approach could be followed, where 'legitimate expectations' cover only the binding written assurances provided to investors by governments.[322] Similarly, they have left out the 'rare circumstances' condition from the indirect expropriation clause, providing that regulatory measures applied to protect public health, safety and the environment never constitute an indirect expropriation.[323] Unlike new generation FTAs,[324] IIA models do not restrict the use of performance

[321] The term 'receptive' capacity refers to the size of the population that can be supported indefinitely upon the available resources and services of an ecosystem. See http://www.sustainablemeasures.com/node/33 (last access 7 August 2018).

[322] TPP fn 36. See also Total S.A. v Argentine Republic, ICSID Case No. ARB/04/01,, Decision on Liability (27 December 2010), para 117; Grand River Enterprises Six Nations Ltd, et al v United States of America (UNCITRAL), Award (12 January 2011), para 141.

[323] IISD Model (n 320) art 8(I); SADC Model BIT (n 320) art 6.7; Indian Model BIT (n 264) art 5.4.

[324] TPP art 9.10; CETA art 8.5; EU-Vietnam FTA Chapter 8-II, Section 1, art 6.

requirements, and Article 7.4 of the SADC Model BIT calls for foreign corporations to train and employ nationals of the host State. Article 26 of the IISD Model BIT also provides an indicative list of performance requirements that the host States may impose 'to promote domestic development benefits from investments'.[325] These performance requirements could help materialize expected spill-over effects from foreign investment, such as employment for skilled domestic and indigenous workers, protection of local sensitive industries, or productivity improvement.[326] Moreover, their imposition on investors could help achieve SDG 9.5, asking for the promotion of 'scientific research … technological capabilities of industrial sectors in all countries, in particular developing countries by 2030, encouraging innovation and substantially increasing the number of research and development workers'.[327] Finally, IIAs could provide for the mandatory conduct of sustainable development impact assessments. Envisioned by the IIA models,[328] impact assessments could ensure the establishment of investments that clearly contribute to the SDGs.

According to SDG 16.3, countries should 'promote the rule of law … and ensure equal access to justice for all'.[329] To meet this goal, ISDS

[325] Indian Model BIT (n 264) , at art 26.

[326] UNCTAD IPFSD (n 230) , at 98.

[327] 2030 Agenda (n 194) Goal 9.5.

[328] IISD Model (n 320) , art 12; SADC Model BIT (n 320), art 13; UNCTAD IPFSD (n 230), at 67; Cotula (n 198), at 75-78.

[329] 2030 Agenda (n 194), Goal 16.3.

should ensure the more active participation of interested parties, both disputing and third parties alike. Investment arbitration has been developed as a one-way street, allowing only investors to file claims. States rarely assert counterclaims, although both ICSID and UNCITRAL Arbitration Rules envision them.[330] The practice of tribunals has so far been to deny jurisdiction because of the lack of explicit consent in most IIAs.[331] As seen in Section 2.3.3, a recent approach, introduced in Reisman's dissenting opinion in the Roussalis case, and adopted by the tribunal in Goetz and Metal-Tech cases, suggests that the investor's consent to counterclaims is already implied by the consent to arbitration itself, without a need for explicit treaty reference.[332] However, it is not apparent that tribunals would be inclined to change their practice in this direction. The best solution would be the clarification of the term 'disputes' to encompass both claims and counterclaims,[333] or the explicit broadening of the consent to arbitrate on counterclaims. Turning to third

[330] ICSID Convention (n 119), art 46; United Nations Commission on International Trade Law , UNCITRAL Arbitration Rules as revised in 2010 (adopted by UNGA, 'UNCITRAL Arbitration Rules as Revised in 2010', UN Doc A/Res 65/22, (10 January 2011)), art 21(3).

[331] See, e.g., Oxus Gold plc v Republic of Uzbekistan (Final Award) (17 December 2015) (UNCITRAL) IIC 779 (2015).

[332] Spyridon Roussalis v Romania, ICSID Case No ARB/06/1, Award (7 December 2011); Antoine Goetz v Republic of Burundi, ICSID Case No ARB/01/2, Award (21 June 2012); Metal-Tech Ltd. v Republic of Uzbekistan, ICSID Case No ARB/10/3, Award (4 October 2013), para 409.

[333] Beharry and Kuritzky (n 213), at 408. So far, counterclaim provisions appear only in the COMESA Investment Agreement (n 148), art 28(9); and TPP art 9.19(2).

party participation, the concept of amicus curiae briefs is now incorporated in post-2015 FTAs.[334] The wording of the provisions shows, however, that tribunals still have significant latitude in the acceptance of these claims ('the tribunal may accept'). So far, arbitrators have not been willing to deliver participation rights beyond the filing of written submissions.[335] The only exception was in the Piero Foresti case, where the tribunal also allowed amici curiae to access case materials.[336] A reform of new generation IIAs to grant full participation rights, explicitly allowing third parties to attend and make oral submissions at the hearings, could be beneficial. Full participation should not be limited to amici curiae. Sustainable development requires fair representation of all affected stakeholders.[337] For this reason, individuals or local communities facing labour, human rights or environmental violations by investors, should be allowed to effectively join or even initiate ISDS proceedings.

Lastly, the sustainable development component could be strengthened through the selection of suitable arbitral rules under which IIA parties will settle their dispute. All new generation FTAs provide an

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[334] TPP art 9.23(3); CETA Annex 29-A(43-46); TTIP proposal art 23(5).

[335] Bastin (n 135), at 140-141.

[336] Piero Foresti and Others v Republic of South Africa, ICSID Case No ARB(AF)/07/01, Letter from ICSID regarding non-disputing parties (5 October 2009), at 2.

[337] J A Van Duzer, P Simons and G Mayeda, Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries (Commonwealth Secretariat, 2012), at 411.

indicative list, allowing investors to submit a claim under any other rules, if the disputing parties agree.[338] The choice of specialized arbitration rules could aid in ensuring that the process is properly adapted to the issues raised in these disputes, especially when it comes to disputes with environmental components, which involve complex technical matters. In 2001, the Permanent Court of Arbitration developed the Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources. These rules provide for the use of arbitrators with expertise on the subject matter.[339] They also allow tribunals to request a non-technical document explaining any scientific information, or appoint experts.[340] So far, no known ISDS case has been settled under the PCA Environmental Rules. Nevertheless, they could offer a sound alternative for the settlement of disputes with sustainable development implications.

Even reformed, ISDS may not be the most appropriate means to further sustainable development. Domestic litigation could secure broader access to justice, protecting the rights of stakeholders neglected by the ISDS regime. Despite the concerns of partiality, domestic courts

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[338] TPP art 9.19(4); CETA art 8.23(2); EU-Singapore FTA art 9.16(1); EU-Vietnam FTA Chapter 8-II, Section 3, Sub-Section 3, art 7(2)(d).

[339] Permanent Court of Arbitration (PCA), Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or The Environment (adopted 16 April 2002), available at https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf, art 8.3.

[340] Ibid art 24(4) and 27(1) respectively.

could enhance investors' accountability and prevent them from receiving benefits beyond those provided to domestic investors. IIA models enhance the role of domestic courts, requiring exhaustion of local remedies before accessing ISDS.[341] Conciliation and meditation, already provided by new generation FTAs,[342] may also be sound alternatives. Being less expensive than ISDS, they could be more accessible to stakeholders, especially in the developing world. Also, by involving a neutral third party, they could enhance procedural fairness.[343]

3.5 Conclusion

The interaction between international investment law and sustainable development should no longer be disputed. Whether this interaction poses a problem or an opportunity depends on from which side of the spectrum we are looking at it.

The current practice of investment tribunals shows that they are reluctant to engage in the discussion and consider the sensitivity of sustainable development-related claims. However, the policies emerging

[341] IISD Model (n 320), art 5.2; SADC Model Bit (n 320), art 28.4(a); Indian Model BIT (n 264), art 14.3(i-ii).

[342] TPP art 9.18(1); CETA art 8.20; EU-Singapore FTA art 9.14; EU-Vietnam FTA Chapter 8-II, Section 3, Sub-Section 2.

[343] UNCTAD 2013 (n 152), at 5.

with the negotiation and conclusion of new generation FTAs may alter the situation. These instruments include more explicit and implicit references to the principle in their preambles, sustainable development-related chapters and investment chapters. Arbitrators may fill the gaps of the investment treaties, using the interpretative tools they have at their disposal, and assist in the promotion of sustainable development.

However, it is not apparent that investment tribunals alone would change their practice in this regard. A reform of the current investment arbitration regime is necessary for the creation of a stable and sustainable development-friendly environment. This could be achieved by improving the profile of arbitrators, by incorporating people of more nationalities and different backgrounds in the investment tribunals, as well as by redrafting investment instruments to include substantive treaty provisions that better reflect the principle. These reforms seem both economically and politically plausible. They do not require an alteration of the investment regime altogether, which would be a difficult task. They rather suggest adjustments directed towards taking sustainable development into account, which would respond to the challenges posed by IIAs. Despite potential criticism against the feasibility of the measures, let us not forget that steps which in the past appeared utopian, such as introducing transparency in IIAs and the arbitration system, today are established facts. These reforms are aimed at governments, but could successfully materialize only with the effective support of NGOs and

international organizations, who, with their expertise, would be able to provide technical assistance, analytical support and assist in consensus building.[344] This has been already recognized by governments, who entrusted UNCTAD to play a lead role in the facilitation of the IIA reform by organizing multi-stakeholder meetings and consultations with member States.[345] UNCITRAL also mandated a working group to undertake related work.[346] However, even if reformed, the suitability of ISDS to further sustainable development is still in question and, thus, the promotion of alternative dispute resolution methods should be examined.

[344] UNCTAD, Reform of the IIA Regime: Four Paths of Action and a Way Forward, Issues Note, No 3, UNCTAD/WEB/DIAE/PCB/2014/6 (UNCTAD 2014), at 5 and 8.

[345] UNGA 'Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)' UN Doc A/RES/69/313 (17 August 2015), para 91.

[346] UNGA 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-fourth Session' (Vienna, 27 November – 1 December 2017)' UN Doc A/CN.9/930 (19 December 2017).

CHAPTER 4

Conclusion

International investment law is one of the fastest growing and most controversial spheres of international law. Despite being a branch of public international law, it exhibits a peculiar mixture of public-law and private-law features which makes it interesting among scholars and civil society. Especially the direct involvement of corporations in the process of ISDS has generated the question of whether investors could qualify as subjects of international law. The ISDS mechanism and the proliferation of investor claims the past few years has also led to concerns that the current system creates a favorable legal environment for corporations vis-à-vis States. Critics say that foreign investors receive great protection, while have few – if any- duties. On the other hand, the investment regime is believed not only to expose States to financial risks, but also to negatively impact the environment, labour and human rights and have implications for right of governments to regulate for these (or other) public purpose interests. In response to this so-called 'regulatory chill', States have embarked on a path of reforming their existing IIAs. BITs

have lost their dynamism and States started following a new approach to regulate investment: the conclusion of broader regional FTAs with investment rules contained therein. The wave of new FTAs, concluded and being negotiated after 2015, attempt to address the concerns by refining investment standards and including expansive chapters on issues traditionally not regulated by economic agreements, namely sustainable development, environment and labour.

Focusing on the new trend of regionalism, this thesis has attempted to detect the legal standing of investors, by asking what rights the new-generation FTAs confer and what obligations – if any – they impose to investors, as well as what rights States 're-gain' with the conclusion of these treaties. The following Section summarizes the answers of this work to the aforementioned questions.

4.1 Summary of the findings

The first Chapter is devoted to the Introduction of this thesis, which opened with a historical background and describes the evolution of the international investment regime, and then provided a theoretical understanding of the 'international subjectivity' theories and the way that the literature has addressed the question of whether investors qualify as subjects of international law.

Turning to the main text of this thesis, Chapter 2 attempted to draw the picture of how the acceleration of regional FTAs has turned out to be a 'battle' between corporations and States on who will take up the slack. It observed that regionalism presents us with a paradox; on the one hand, the IIAs concluded or negotiated reaffirm the strengthened role of investors in international investment law, by providing to them higher standards of protection and easier access to ISDS. The broad investment standards of FET, indirect expropriation and MFN have not been sufficiently tightened, but, on the contrary, definitions of investor and investment have been expanded to encompass elements so far not covered, such as intellectual property rights. Furthermore, these new treaties still do not safeguard the right of States to regulate; although some provisions have been inserted to their text in order to secure this right, such as for example the GATT-like general exception clauses, none of them seem able to provide substantial protection. The incorporation of investment in regional FTAs has also resulted to its interaction with other FTA chapters, such as the intellectual property and the financial services and taxation chapters, sliding intellectual property and financial violations into ISDS. More specifically, the intellectual property chapters of all post-2015 FTAs became more stringent, extending patent and copyright protections beyond the TRIPS limit. This fact, in conjunction with the inclusion of intellectual property to the definition of covered investment, make the respective chapter applicable to investment arbitration. This strengthens the status of investors and could indicate an

avalanche of ISDS claims with intellectual property components in the future. Turning to the financial services chapters, post-2015 FTAs incorporate investment provisions into the latter and include bonds in the definition of investment. Therefore, although some limited carve-outs are provided, investors could generally use these chapters as a basis of their ISDS claims. Finally, the new IIAs move further towards strictly regulating sensitive for States sectors such as SOEs.

On the other hand, Chapter 2 demonstrated that States are trying to 're-engage with the investment treaty system'.[347] A small group of countries has taken drastic measures by either terminating IIAs altogether giving competence to domestic courts or opting out from ISDS and promoting SSDS. Mainly, attempts to limit investors' influence have been made through reform of regional treaties; the new IIAs enhance transparency by explicitly referencing the UNCITRAL Rules on Transparency and incorporating clauses permitting third-party participation. They also embellish ISDS with safeguards such as counterclaims and allocation of costs to the losing party, which could prevent investors from bringing too many claims. In the search for a more predictable environment, some agreements are also introducing mechanisms such as the creation of specialized treaty committees entitled

[347] A Roberts, 'State-to-state investment treaty arbitration: A hybrid theory of interdependent rights and shared interpretive authority', (2014) 55(1) Harvard International Law Journal 1, at. 2.

to adopt binding authoritative interpretations, amending the rules of the agreement and appointing the members of tribunals, as well as the establishment of appellate facilities or a standing investment court, which restrict the arbitrators' latitude to adopt contradictory and investor-friendly interpretations. The Chapter has concluded that, although some steps were taken towards the balance between investors rights and States' interests, regionalism ultimately led to a further fragmentation, which serves as a 'sweet spot' for investors.

In Chapter 3, the discussion of the reforms of new-generation FTAs was extended. The Chapter focused on the question of whether these agreements are able to mitigate the concerns expressed that the investment regime neglects the sustainable development interests of States. In order to reply that question, the current practice of investment tribunals when faced with sustainable development-related – mainly environmental and human rights – claims was assessed. The analysis of the respective investment jurisprudence demonstrated that the responses of arbitrators to such issues lack consistency; despite some positive steps towards the consideration of sustainable development-related claims, most tribunals are still reluctant to engage in the discussion and, if they do, they only assess such claims as part of the factual analysis rather than as questions of law. Afterwards, the sustainable-development language of FTAs was examined. The Chapter observed that all treaties include more explicit and implicit references to the principle in their preambles and investment chapters and they also incorporate environmental, labor and

sustainable development chapters. However, they do not provide a clear normative environment for sustainable development, still leaving great leeway to arbitrators for their interpretation. Therefore, the examination of the interpretative tools at the disposal of investment tribunals which could be used for the promotion of sustainable development was essential. In this realm, the Chapter assessed under which circumstances arbitrators could apply the 'clean hands' doctrine to examine the legality of an investment, as well as whether they could reject jurisdiction for investments that do not contribute to the development of the host State. In a second stage, it reflected on whether arbitrators could rely on other international agreements, soft-law, and customary international law principles in their interpretation and concluded that this is permissible under the 'governing law' provisions of FTAs.

In the second Section of Chapter 3 it was argued that further improvement of the IIAs to reflect sustainable development objectives is needed and some recommendations that would render the international investment regime more sustainable development friendly were made. First, it was claimed that an expansion of the pool of arbitrators is essential, to encompass people of more nationalities, gender and ages and with broader qualifications. The proposal of replacing ISDS ad hoc arbitrators with tenured judges of an Investment Court System was also examined and the conclusion was that, although it could be beneficial to sustainable development, it may not be feasible. Then, it was suggested that new-generation IIAs could follow the example of the 2005

International Agreement on Investment and Sustainable Development model, the SADC Model BIT, the 2015 Indian Model BIT, and the 2015 UN IPFSD and adjust their substantive standards and provisions for amici curiae briefs accordingly. Finally, it was remarked that selecting specialized arbitral rules or turning to other dispute settlement methods, such as mediation or conciliation, could also be a sound alternative for the strengthening of sustainable development.

4.2 Concluding remarks and options for future research

The above analysis has demonstrated that, overall, regionalism fell short of the expectations, bestowing on investors even broader rights than the BIT treaty regime did. Whether these robust rights elevate them to traditional subjects of international law is rather ambivalent, but this is 'like a finger pointing at the moon and we are concentrating on the finger'. International subjectivity is a technical and and formally constructed concept which creates 'sterile' debates[348] and may not be in conformity with the changing realities of the international legal scene. What is sure is that there is a growing body of international norms dealing with corporations and their investors, which makes the latter active participants in the investment treaty regime; they are directly

[348] S Chesterman, 'Lawyers, Guns, and Money: The Governance of Business Activities in Conflict Zones' (2010/2011) 11 Chicago Journal of International Law 321, at 327

involved in investment dispute settlement but also indirectly contributing to investment law-making. This increasing important role of corporations further accentuates the need of reducing the discrepancy between their robust rights and potential to frustrate the protection of environment, human and social rights and and the inability to hold them liable of abuses of these public goods.[349] Noteworthy in this respect are the efforts of the post-2015 FTAs, especially with the references to corporate social responsibility (CSR) and their strive to bring sustainable development to the forefront of investment regulation. However, the duties imposed to investors under the CSR articles and the sustainable development chapters still have the form of 'soft law'. For the recalibration of the balance between the protection of investors and the interests of States, these norms should evolve into a developed system of hard-law liabilities. The timing for this shift is more than perfect; in late 2017, UNCITRAL received a broad mandate by governments to work on the possible reform of ISDS,[350] while UNCTAD continues its work on

[349] A Grear, 'Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights' (2007) 7 Human Rights Law Review 511, at 514; M Pentikäinen, 'Changing International "Subjectivity" and Rights and Obligations under International Law – Status of Corporations' (2012) 8 Utrecht Law Review 145, at 153.

[350] UNGA, 'Annotated provisional agenda' , United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) on its Thirty-fifth session New York (23–27 April 2018), UN Doc A/CN.9/WG.III/WP.144 (5 February 2018), at para 6 : "The Working Group would proceed to: (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any

modernizing old-generation IIAs.[351] Both forums, through consultations with governments and other interested stakeholders, should stress the significance of imposing binding obligations to investors and identify whether the reforms could be better materialized through bilateral, regional, or multilateral investment regime (as proposed by the EU)[352]. The contribution of scholars in this regard could be of paramount importance. Academic literature should critically assess the EU proposal for the set-up of a Multilateral Investment Court, provide enlightening insight on benefits and problems of regionalism vis-à-vis multilateralism, and suggest influential policies in the area of international investment regime.

relevant solutions to be recommended to the Commission.".

[351] UNCTAD, Phase 2 Of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties, IIA Issues Note, No 2, UNCTAD/DIAE/PCB/2017/3 (UNCTAD 2017).

[352] See Section 2.4, at 56

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ANNEX I

Maria Chochorelou and Carlos Espaliu Berdud, 'Recent Regional Investment Treaties and Dispute Settlement: Investors and States on a Roller-coaster of Predominance', 2016 (2) Belgian Revue of International Law, 487-512.

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RECENT REGIONAL INVESTMENT TREATIES AND DISPUTE SETTLEMENT: INVESTORS AND STATES ON A ROLLER-COASTER OF PREDOMINANCE

PAR

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AND

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Abstract

Over the past few years, we face a phase of 're-orientation' of international investment law. The 1990s rush of conclusion of bilateral investment treaties is slowing down and gives way to the negotiations at the regional level. This era of transition from investment bilateralism to regionalism presents us with a paradox, which has revived the question of the legal status of multinational corporations. On the one hand, the mega-regional Free Trade Agreements concluded and being negotiated advance the protection of investors and facilitate their access to Investor-State dispute settlement (ISDS). On the other hand, States attempt to react to investors' growing power either by opting out from ISDS or by reforming investment standards to better reflect their interests. This article reviews this 'battle' of predominance and argues that regionalism has not been suitable to resolve it. Nevertheless, the drafting of a multilateral investment treaty, although it could serve as a 'golden mean' between States and investors, still raises concerns and still seems as a farfetched idea.

Résumé

Au cours des dernières années, nous sommes confrontés à une phase de « réorientation » du droit international des investissements. La ruée vers la conclusion des traités bilatéraux d'investissement des années 1990 ralentit en ce moment, et cède la place aux négociations au niveau régional. Cette ère de passage du bilatéralisme au régionalisme constitue un paradoxe qui a relancé la question du statut juridique des sociétés multinationales. D'une part, les accords méga-régionaux de libre-échange conclus et négociés favorisent la protection des investisseurs et

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facilitent leur accès au Mécanisme de règlement des différends entre investisseurs et États (RDIE). D'autre part, les États tentent de réagir au pouvoir grandissant des investisseurs, soit en décidant de ne pas adhérer au RDIE, soit en réformant les normes d'investissement pour mieux refléter leurs intérêts. Le présent article examine cette « bataille » de prédominance et soutient que le régionalisme n'a pas pu résoudre. Néanmoins, la rédaction d'un traité d'investissement multilatéral, quoiqu'elle puisse constituer le juste milieu entre les États et les investisseurs, soulève encore des préoccupations et semble une idée farfelue.

I. — Introduction

International investment law is one of the most dynamic and remarkably transformed fields of international law of the past decades. In response to globalization and due to a widespread belief among States that foreign direct investment (FDI) would promote their economic growth, FDI flows started increasing over time and today are at their highest ever level. (1) This boost, together with the expansion of the international activities of multinational corporations, made clear the need for an international normative framework. Codification at the multilateral level has been attempted several times, without success. (2) Instead, international investment law has been enshrined mainly in bilateral investment treaties (BITs) between States and investors, (3) and less in other International Investment Agreements (IIAs).

The emergence of this system poses challenges to the classical international legal order, with the State sovereignty principle starting to ebb away and the gradual departure of the idea that States are the only participants of international law. Although the discussion about the legal status of the multinationals is not a novel one, the substantial and procedural rights conferred to investors through BITs have enhanced the idea of their 'international subjectivity'. (4) Especially the inclusion of the Investor-State Dispute

(1) 36% in 2015 to an estimated US$1.7 trillion. See UNCTAD, *Global Investment Trend Monitor*, No. 22 (UNCTAD/WEB/DIAE/IA/2016/1).

(2) In 1968 and 1998 by OECD members, see Organization for Economic Co-operation and Development (OECD), *Draft Convention on the Protection of Foreign Property*, Oct. 12, 1967, O.E.C.D. No. 23081, 7 I.L.M. 117 (1968); OECD, *Negotiating Group on the Multilateral Agreement on Investment (MAI), Multilateral Agreement on Investment: Draft Consolidated Text*, OECD Doc. DAFFE/MAI(98)7/REVI (22 Apr. 1998). In 2004 during the WTO Doha Development Round, see Doha Working Program, *Decision adopted by the Genera Council*, on 1 August 2004 ("July Package"), WTO doc. WT/L/579 para 1 lit. g, 2 August 2004.

(3) By April 2015, the IIA regime had grown close to 3,300 treaties. See UNCTAD, *World Investment Report 2015 — Reforming International Investment Governance* (UNCTAD/WIR/2015), p. 124

(4) A. Cassese, *International Law in a Divided World*, Clarendon, 1986, p. 123; P. Muchlinski, "Corporations in International Law", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, OUP, 2010; J. E. Alvarez, "Are Corporations "Subjects" of International Law?", *Santa Clara Journal of International Law*, Vol. 9, 2011, p. 31; M. Pentikäinen, "Changing International 'Subjectivity' and Rights and Obligations under International Law — Status of Corporations", *Utrecht Law Review*, Vol. 8, 2012, pp. 145-153; J. G. Ku, "The limits of Corporate Rights Under International Law", *Chicago Journal of International Law*, Vol. 12, Issue 1, 2012, pp. 741-745.

Settlement mechanism (ISDS), which allows investors to sue States before international tribunals, and the proliferation of such claims over the past few years (5) could serve as an argument for the recognition of corporations' legal personality by States. (6)

Today the interest in the discussion stands at its peak, as we face an era of 're-orientation' of international investment law with a shift towards regionalism. (7) The linkage between investment and trade has created a tendency of adopting a holistic approach to deal with them; the traditional bilateral regime is losing ground and States are starting to integrate investment chapters in regional Free Trade Agreements (FTAs), following older models such as the North American Free Trade Agreement (NAFTA). This shift has been accompanied by promises of governments that these agreements would achieve a better balance between the protection of investors and the rights of States. (8) With several new-generation IIAs 'under construction', crucial questions arise. Have States kept this promise? Do the new agreements guarantee the regulatory power of States or do they strengthen the role of multinational corporations in the international forum? Does regionalism have the anticipated results? What will be the future of international investment law?

The present article's purpose is to identify the 'standing' of multinational corporations in the international investment legal arena during this phase of evolution. In the first part, the growing power of investors will be discussed and a comparison between existing and recently concluded or negotiated IIAs will be drawn, (9) with special focus on their ISDS provisions. In the second part, the 'reaction' of States to this increased strength and their attempts to restrict it will be analyzed. The third part will contribute with reflections on the results of regionalism and on the future of international investment law, assessing whether the conclusion of a multilateral investment treaty would be the appropriate and most plausible way to balance the rights between investors and States.

(5) Total number of 696 ISDS claims, see http://investmentpolicyhub.unctad.org/isds (accessed 15 July 2016).

(6) For 'recognition theory', see R. PORTMANN, *Legal Personality in International Law*, Cambridge University Press, 2010, pp. 80-125.

(7) UNCTAD, *supra* note 3, pp. 107-108 and 124-125.

(8) European Commission, Investment Protection and Investor-to-State Dispute Settlement in EU agreements, Fact Sheet, 11 November 2013.

(9) The article intends to investigate the activities of a wide range of States and examine IIAs considered as trendsetters. For this purpose the Trans-Pacific Partnership Agreement (TPP), the EU-Canada Comprehensive Economic and Trade Agreement (CETA), and Australia-China FTA (signed), the EU-Singapore FTA, EU-Vietnam FTA (negotiations concluded) and the Transatlantic Trade and Investment Partnership (TTIP) (in negotiation) will be analyzed.

II. — New-generation IIAs as a reaffirmation of investors' growing power

In order to meet the concerns expressed about the inadequacy of the current investment regime to preserve the regulatory activities of States, (10) the mega-regional FTAs were revisited to address existing flaws. This Section will examine whether the amendments made were substantial and whether they augment the role of investors in international investment law.

A. — *Broad Investment Provisions*

1. — *Investment and investor definition*

Wide investor protection can already be observed in the first article of the investment chapters of new FTAs, the definitions.

Rather than following NAFTA's exhaustive list of covered investments and explicit exclusion of certain types of assets, (11) the new treaties adopt a more investor-friendly, loose approach. (12) They define investment as 'every kind of assets' and then provide an indicative list, which is long and vague, encompassing controversial portfolio investments (13) and intellectual property rights. In order to avoid expansive interpretations in ISDS, they set out certain characteristics that assets should have to qualify as investments. But the list is again indicative ('such as'), giving latitude to tribunals to stretch the scope of investment.

The definitions of investor are also quite broad and follow the NAFTA model, (14) covering the Party itself, natural and legal persons and granting them pre-establishment rights ('that seeks to make ... an investment'). (15) Some IIAs include a denial of benefit clause for enterprises that do not have 'substantial business activities' or are not 'directly or indirectly owned or controlled by a natural person' of the Party. (16) Although useful additions, the meaning of these concepts is not spelled out in the agreements. They,

(10) See F. L. GARCIA *et al.*, "Reforming the International Investment Regime: Lessons from International Trade Law", *Journal of International Economic Law*, Vol. 18, Issue 4, 2015, p. 861-892.

(11) NAFTA Art. 1139.

(12) TPP Art. 9.1, ChAFTA Art. 9.1(d), EU-Singapore FTA Art. 9.1(1), EU-Vietnam FTA Art. 8.4(p), CETA Art. 8.1, TTIP proposal Definitions.

(13) Previous IIAs have excluded portfolio investments from covered investments: D. Gaukrodger, *Investment Treaties and Shareholder Claims: Analysis of Treaty Practice*, OECD Working Papers on International Investment, No. 2014/03, OECD Publishing, 2014, pp. 12-13.

(14) NAFTA Art. 1139, TPP Art. 9.1, ChAFTA Art. 9.1(e), EU-Singapore FTA Art. 9.1(2), EU-Vietnam FTA Art. 8.4(q), CETA Art. 8.1.

(15) TPP Art. 9.1(ft12) limits the pre-establishment rights to investors that have taken 'concrete actions' to make an investment. Similarly EU-Vietnam FTA Art. 8.4(q)(ft9). EU-Singapore FTA does not provide for pre-establishment rights.

(16) TPP Art. 9.15, ChAFTA Art. 8.17, EU-Singapore FTA Art. 9.1(3)(4), EU-Vietnam FTA Art. 8.4(a)(b)(c), CETA Art. 8.1 and 8.16, TTIP proposal Art. 9.

therefore, do not inspire confidence that they will prevent 'treaty-shopping' practices from investors with covered subsidiaries. (17)

2. — *Substantive standards*

The new IIAs were meant to clearly define and circumscribe substantive standards. The Fair and Equitable Treatment (FET) poses to the host State the obligation to treat investments justly. Usually constructed as an open-ended, without precise meaning standard, it has been turned into an 'all-encompassing' provision, popular to investors. (18) Concerns about expansive interpretations by investment tribunals and lack of predictable results, (19) put it at the core of the investment regime reform. Interestingly, the drafting of the standard in mega-regional FTAs follows divergent approaches. Nevertheless, none of them seems to sufficiently address the concerns. The new EU IIAs narrow FET's scope providing a closed, exhaustive list of States' obligations, (20) but they do not prohibit the protection of investors to go beyond the customary international law (CIL) on the treatment of aliens. They also protect 'specific representations' and 'legitimate expectations' of investors. These concepts re-introduce a disguised umbrella clause, (21) as contractual obligations between States and investors could be elevated to treaty obligations, which could promote corporate favoritism. (22) On the other hand, the US agreements have always linked FET with CIL. (23) TPP is no exception and Article 9.6 explicitly refers to CIL as the standard of treatment to be afforded to investments. In theory, this approach could better protect States' regulatory authority. ISDS panels, though, have not been always eager to apply CIL basing it in State practice and *opinio juris*; instead they usually cite decisions of previous tribunals, rendering the dis-

(17) B. A. Melo Araujo, *The EU Deep Trade Agenda: Law and Policy*, Oxford Studies in European Law, 2016, pp. 117-119.

(18) Ch. Schreuer, "Fair and Equitable Treatment in Arbitral Practice", *The Journal of World Investment and Trade*, Vol. 6, Issue 3, 2005, p. 364. Also see *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award 11 October 2002, para 118; *Waste Management, Inc v United Mexican States*, ICSID Case No ARB(AF)/00/3, Award 30 April 2004, para 99.

(19) UNCTAD, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II (UNCTAD/DIAE/IA/2011/5), pp. 10-11.

(20) EU-Singapore FTA Art. 9.4, EU-Vietnam FTA Art. 8.14, CETA Art. 8.10, TTIP proposal Art. 3.

(21) K. Nadakavukaren Schefer, *International Investment Law*, Edward Elgar Publishing, 2013, p. 425: "An 'umbrella clause' is a BIT provision that extends investor protection to any obligation made by the state with respect to an investment". Umbrella clauses have been omitted in all new IIAs.

(22) S. Sinclair *et al.*, "Making Sense of the CETA: An Analysis of the Final Text of the Canada-European Union Comprehensive Economic and Trade Agreement", Canadian Centre for Policy Alternatives, 2014 p. 17, www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2014/09/Making_Sense_of_the_CETA.pdf (accessed 15 July 2016).

(23) NAFTA Art. 1105(1) and NAFTA Free Trade Commission, Notes of Interpretation of Certain Chap. 11 Provisions (31 July 2001), www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp (accessed 15 July 2016).

tinction between CIL-linked or non-CIL-linked FET standards relatively meaningless. (24) As none of the new FTAs expressly prohibit arbitrators to do so, these practices will probably not cease to exist. Finally, despite using softer language than EU IIAs, TPP also recognizes that 'legitimate expectations' of investors can be relevant when an infringement is determined. (25)

Indirect expropriation, namely the loss of investors' expected profits because of States' actions that are not necessarily directed to the investor, is the second most-alleged standard in ISDS. Because of its nebulous language in BITs and early regional IIAs, (26) tribunals have, over the decades, developed different tests to regulate it, resulting in contradictory awards. (27) Scholars have called for omission of the standard, (28) however, States have only moved to a modest reform. On a positive note, mega-regional FTAs add an explanatory annex in their investment chapters, which outlines criteria distinguishing indirect expropriation from non-compensable regulatory actions. (29) The wording of the texts, though, comes to undermine these changes; regulatory actions can still amount to expropriation 'in rare circumstances', which gives great leeway to the tribunals for interpretation. The provision of the 'case-by-case' determination of whether an expropriation has occurred has a similar effect. In some agreements, the 'reasonable expectations' of investors are inserted in the scope of indirect expropriation, (30) which, as discussed in the FET analysis above, could be a deterrent to States' right to regulate.

The Most-Favored-Nation (MFN) standard ensures that, in like circumstances, an investor will be accorded the same treatment as investors from any third country. Over the years, corporations have relied upon MFN clauses in order to import into ISDS more beneficial substantive or procedural provisions from third treaties that the host State is a member to. Investment

(24) *Railroad Development Corporation (RDC) v Republic of Guatemala*, ICSID case no ARB/07/23, Award 29 June 2012. See also UNCTAD *supra* note 18, pp. 11-12 and 44-58; and M. C. Porterfield, "A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals", *Investment Treaty News*, Vol. 3, Issue 3, 2013, www.iisd.org/pdf/2013/iisd_itn_march_2013_en.pdf (accessed 15 July 2016).

(25) L. Johnson and L. Sachs, "The TPP's Investment Chapter: Entrenching, rather than reforming, a flawed system", *Columbia Center on Sustainable Development*, 2015, p. 4, http://ccsi.columbia.edu/files/2015/11/TPP-entrenching-flaws-21-Nov-FINAL.pdf. (accessed 15 July 2015).

(26) NAFTA Art. 1110.

(27) *Metalclad Corporation v The United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award 30 August 2000 and different approach in *Methanex Corporation v United States of America*, UNCITRAL, Award 3 August 2005.

(28) V. Been and J. C. Beauvais, "The Global Fifth Amendment? NAFTA's Investment International 'Regulatory Takings' Doctrine", *New York University Law Review*, Vol. 78, 2003, p. 37; P. D. Isakoff, "Defining the Scope of Indirect Expropriation for International Investments", *Global Business Law Review*, Vol. 3, 2013, p. 200.

(29) TPP Annex 9-B, EU-Singapore FTA Annex 9-A and 9-C, EU-Vietnam FTA Annex 9-A X, CETA Annex 8-A

(30) TPP Annex 9-B(3aii), CETA Annex 8-A(2c).

tribunals, through their interpretation, have allowed this importation. (31) States have acknowledged the 'cherry-picking' nature of MFN (32) and have taken steps for the restriction of this practice. However, only EU-Singapore FTA totally omits the standard. TPP Article 9.5(3) excludes ISDS procedures from MFN, meaning that investors cannot use the standard to benefit from jurisdictional clauses of other IIAs. However, they will be still able to attract substantive guarantees, such as more favorable FET and expropriation treatment. CETA and EU-Vietnam, at first glance, exclude both the importation of procedural and substantive provisions. They create, nevertheless, a loophole; they still allow MFN treatment to be used for 'measures adopted by a Party pursuant to such (substantive) obligations', (33) leaving an open door for investors to invoke these measures, and consequently MFN, in ISDS. Be that as it may, critics have argued that the maintenance of MFN in IIAs itself nullifies the attempts of clarification of the other substantive standards. (34)

B. — *Right to Regulate*

National sovereignty is an important principle of international law and is translated to the right of States to regulate. However, the increase of ISDS claims against States' measures on issues of public interest, and the pro-investor tendency of tribunals in the adjudication of such cases (35) have created a 'chilling effect' on governments. (36) Mega-regional FTAs were supposed to better reflect the regulatory power of States, but the final texts leave doubts as to whether this goal was successfully met. Purported safeguards can be found spread throughout the agreements, but none of them provide substantial protection. Some agreements just 'recognize' or 'reaffirm' (37)

(31) For the cases where MFN claims were accepted see A. Tokeser & J. Mo, "Drafting MFN Clause in Investment Chapter of Trans-Pacific Partnership Agreement", Trade and Investment Law Clinic Papers, Geneva Centre for Trade and Economic Integration, 2012, Annex G.3, pp. 40-44; Also Z. Douglas, "The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails", *Journal of International Dispute Settlement*, Vol. 2, Issue 1, 2011, pp. 98, 101.

(32) European Commission, Consultation on Modalities for Investment Protection and ISDS in TTIP, Tradoc 152280, March 2014, p. 4,

(33) CETA Art. 8.7(4), EU-Vietnam FTA Art. 8.4

(34) G. Van Harten, "Reforming the System of International Investment Dispute Settlement", in Ch. Leng Lim (ed.), *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah*, Cambridge University Press, 2016, pp. 120-121.

(35) G. Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Empirical Study of Investment Treaty Arbitration", *Osgoode Hall Law Journal*, Vol. 53, Issue 2, 2016, p. 540.

(36) L. Poulsen, "Bounded Rationality and the Diffusion of Modern Investment Treaties", *International Studies Quarterly*, Vol. 58, 2013, pp. 1 ff; P. J. Kuijper *et al.*, *Investor-State Dispute Settlement (ISDS) provisions in the EU's international investment agreements*, Vol. 2, *Studies*, European Parliament, Directorate-General for External Policies of the Union-Directorate B-Policy Department, 2014, p. 74.

(37) EU-Vietnam FTA Art. 8.13*bis*, CETA Art. 8.9(1).

the right to regulate, while others transpose the NAFTA language, stating that 'nothing ... shall be construed to prevent' adoption of measures of public interest, if, however these measures are 'otherwise consistent with this Chapter'. (38) This final condition seems to negate any intended protection, as it affirms that the right is fully subject to the agreements.

The creation of general exceptions clauses, similar to the General Agreement on Tariffs and Trade 1994 (GATT) XX or the General Agreement on Trade in Services (GATS) XIV, has been considered as the preferred way to secure the regulatory freedom of States. (39) Indeed such clauses are inserted in the new IIAs. However, the exceptions either do not apply at all to the investment chapter, as in TPP, or they only apply to certain sections. (40) Even where they are applicable to the whole investment chapter, (41) their welfare effects are ambiguous; as evidenced by the World Trade Organization (WTO) experience, the panels have been reluctant to rule in favor of these exceptions, setting highly-demanding levels of proof that a measure is 'necessary' or that it does not amount to the *chapeau* 'arbitrary or unjustifiable discrimination'. (42) Given tribunals' pro-investor tendency, we should expect same results in ISDS. (43)

Recent trends in investment awards could also endanger the regulatory space of States. In *Achmea II*, for example, the tribunal accepted jurisdiction over a claim for a State's draft regulation, raising questions of when a dispute starts to exist and what is the exact scope of the consent to arbitrate. (44) These questions remain unresolved; the new IIAs neither explicitly state that a dispute cannot be extended to pre-emptive claims, nor provide that the consent to arbitrate only applies to existing breaches. Although IIAs do not prescribe past decisions as binding, the *de facto* precedent practices of tribunals may establish the future acceptance of such claims. (45)

(38) NAFTA Art. 1114, TPP Art. 9.16.

(39) R. Sappideen and L. He, "Dispute Resolution in Investment Treaties: Balancing the Rights of Investors and Host States", *Journal of World Trade Law*, Vol. 49, Issue 1, 2015.

(40) TPP Art. 29.1, CETA Art. 28.3(1, 2) not applicable to expropriation, EU-Singapore FTA Art. 9.3(3) applicable only to National-Treatment.

(41) ChAFTA Art. 9.8, EU-Vietnam FTA Ch. VII Art. 1.

(42) See Public Citizen, Only One of 44 Attempts to Use the GATT Article XX/GATS Article XIV "General Exception" Has Ever Succeeded: Replicating the WTO Exception, Construct Will Not Provide for an Effective TPP General Exception, August 2015, www.citizen.org/documents/general-exception.pdf (accessed 16 July 2016).

(43) A. Newcombe, "General exceptions in international investment agreements", in M.-Cl. Segger *et al.* (eds), *Sustainable development in world investment law*, Kluwer Law International, 2010, pp. 369-370.

(44) *Achmea B.V. v The Slovak Republic*, PCA Case No. 2013-12 (Number 2), Award on Jurisdiction and Admissibility 20 May 2014. Also, L. Franc-Menget, ACHMEA II — Seizing Arbitral Tribunals to Prevent Likely Future Expropriations: Is it an Option?, Kluwer Arbitration, 28 March 2013, http://kluwerarbitrationblog.com/2013/03/28/achmea-ii-seizing-arbitral-tribunals-to-prevent-likely-future-expropriations-is-it-an-option/ (accessed 16 July 2016).

(45) P. J. Kuijper, *supra* note 35, pp. 66-69

C. — *Intellectual Property as Covered Investment*

The inclusion of intellectual property (IP) rights in the investment definition, although only sporadically seen in BITs and earlier FTAs,(46) is now mainstreamed in all new-generation FTAs,(47) inviting investors to invoke IP violations before arbitral tribunals. Such claims already appeared in the *AHS v Niger, Eli Lilly v Canada* and *Philip Morris v Australia* ISDS cases. In the absence of explicit qualification of IP rights as covered investments in the relevant BITs, tribunals denied jurisdiction to hear such claims.(48) Under the new FTAs this will no longer be possible. The exposure of IP rights to ISDS has been characterized as a 'rupture in the fabric of IP law',(49) which have always been settled by State-to-State dispute settlement. Some new IIAs partly preserve this norm, removing the issuance of compulsory licenses and the 'revocation, limitation or creation of intellectual property rights' from ISDS.(50) However, these exemptions apply only to the extent that the measures are consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) or the IP chapter of the IIA, conditions that could be easy for investors to surpass. Furthermore, the carve-outs are only applicable to expropriation claims, meaning that investors can still start proceedings invoking other substantial standards, such as FET or National Treatment.

What is more, the new-generation IIAs make IP chapters more stringent, introducing 'TRIPS and NAFTA plus' provisions. Some treaties extend the copyright protection from 50 to 70 years,(51) reform that could impose losses on consumers and hinder future innovation. Others weaken the standards of patentability, facilitating the acquisition of initial patents. For example, TPP's Article 18.37 allows for the patenting not only of new products but also of 'new uses or new methods of using a known product'. Hence, pharmaceutical companies will be able to acquire unlimited patents, curtailing access to affordable medicine. Likewise, TPP and CETA, although maintaining the TRIPS standard that patents last for 20 years from the filing date, *de facto*

(46) See for example the Belgium/Luxembourg BITs with Barbados, Colombia and Oman. Also US-Colombia/Peru, Korea and Panama FTAs.

(47) TPP Art. 9.1(f), ChAFTA Art. 9.1(d)(vi), EU-Singapore FTA Art. 9.1(1)(g), EU-Vietnam FTA Art. 8.4.p(vii), CETA Art. 8.1(g), TTIP proposal Definitions x.2(g).

(48) *AHS Niger and Menzies Middle East and Africa S.A. v Republic of Niger*, ICSID Case No. ARB/11/11, Award 15 July 2013; *Eli Lilly and Company v The Government of Canada*, UNCITRAL Case No. UNCT/14/2; *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia*, PCA Case No. 2012-12, Award 17 December 2015.

(49) S. Flynn, *How the Leaked TPP ISDS Chapter Threatens Intellectual Property Limitations and Exceptions*, Info Justice, 26 March 2015, http://infojustice.org/archives/34189 (accessed 16 July 2016).

(50) TPP Art. 9.8(5), EU-Singapore FTA Art. 9.6(3), EU-Vietnam FTA Art. 8.16(4), CETA Art. 8.12(5)(6), TTIP proposal Arts 5.6 and 5.7.

(51) TPP Art. 18.63, EU-Singapore FTA Art. 11.5(4). 50 years in TRIPS Part II, Section I, Article 12 and NAFTA Art. 1705(4).

lengthen their protection, providing for a patent term adjustment to compensate for delays occurring during their registration. (52) CETA further secures monopolies by extending the data protection for pharmaceuticals from five to eight years. (53) The same treaty gives a right to appeal to patent holders, (54) allowing them to maintain market exclusivity, as the market approval for generic equivalent medicines is postponed until the appeal procedure is over. (55)

The Member States of the IIAs will have to adapt their national legislations to reflect these tougher standards, which, in conjunction with the inclusion of IP rights in ISDS, could suggest an avalanche of IP claims in the future.

D. — *Financial Services and Taxation in ISDS*

The Financial Services chapters of IIAs have always been in interaction with their Investment chapters. NAFTA's Article 1401(2), for example, incorporates the investment articles regarding transfers, expropriation and denial of benefits into its Financial Services chapter. TPP and CETA move further, also incorporating the concept of the minimum standard of treatment of investors, (56) enabling financial institutions to bring ISDS claims for violations of their 'legitimate expectations'. A second interaction between the two chapters is the question of whether financial investments qualify as protected investments. The investment definitions of early BITs and regional IIAs vary, with some of them including bonds and others not. (57) This inclusion has been a powerful tool used by corporations to sue countries for measures adopted in response to their financial crises. It started with Argentina which, in 2005, had to perform a debt restructuring. Dozens of cases were initiated against it making it the world's most sued country under IIAs. A prime example is the *Abaclat v Argentina* case, where approximately 180,000 bondholders initiated an arbitral proceeding seeking US$3.6 billion from the country. (58) History repeated itself with the global economic crisis of 2008; the 2012 Greek 'haircut' on sovereign bonds resulted in two lawsuits

(52) TPP Art. 18.48, CETA Art. 20.27.

(53) CETA Art. 20.29; 5 years in NAFTA Art. 1711(5)(6).

(54) CETA Art. 27.4.

(55) J. Lexchin and M.-A. Gagnon, *CETA and Intellectual Property: The debate over pharmaceutical patents*, Canada-Europe Transatlantic Dialogue, CETA Policy Briefs Series, 2013, pp. 4-5, http://labs.carleton.ca/canadaeurope/wp-content/uploads/sites/9/CETD-Policy-Brief_CETA-and-pharmaceutical-patents_MG_JL.pdf (accessed 16 July 2016).

(56) TPP Art. 11.2(2)(a), CETA Art. 13.2(3).

(57) NAFTA Art. 1139 does not include them, while Energy Charter Art. 1.6(b) does.

(58) *Abaclat and Others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility 4 August 2011. See also UNCTAD, *Sovereign Debt restructuring and International Investment Agreements*, IIA Issues Note, No. 2, UNCTAD/WEB/DIAE/PCB/2011/3, 2011, p. 3.

against the country, *Poštová v Greece* and *Laiki v Greece*. (59) Despite Greece's win in *Poštová*, the tribunal decided to allocate the ISDS costs between the parties. (60) With arbitration costs for the respondent being US$300,000 (which were advanced) and its lawyers' fees exceeding €4,650,000, (61) it was a very expensive case to defend. The new-generation IIAs establish the inclusion of bonds in the definition of investment, (62) facilitating the emergence of similar cases in the future. To mitigate the risk, States add public-debt annexes, which, in principle, prohibit ISDS claims for cases of restructuring debts. But instead of extending this prohibition to the whole investment chapter, IIAs partly offset it, still allowing ISDS claims for restructurings that violate the National-Treatment or MFN Articles. (63)

International investment law and taxation are also linked. Earlier regional IIAs have been criticized for encouraging tax avoidance, by offering the opportunity to corporations to strategically place their investments in countries with optimal tax systems. (64) The conclusion, for example, of the US-Panama Trade Promotion Agreement has not only *not* prevented but incentivized money flows to Panama. The Panama Papers scandal that followed, as well as tax evasion practices by transnational corporations such as Starbucks, Amazon and Google exacerbated the concerns that existing investment instruments do not secure tax justice. (65) The new wave of IIAs has been expected to address the matter, but this does not seem to be the case. They do not limit inflows and outflows of capital, (66) therefore, making possible for corporations to transfer their money to tax heavens that are members to the agreements, such as Singapore, Netherlands, Switzerland or Cyprus. When such tax avoidance practices take place, States should be able to change their tax systems or withdraw tax privileges previously granted to corporations. A growing number of taxation ISDS claims, mainly against developing countries, illustrates that this right is limited. (67) The new IIAs,

(59) *Poštová banka, a.s. and ISTROKAPITAL SE v Hellenic Republic*, ICSID Case No. ARB/13/8, Award 9 April 2015; *Cyprus Popular Bank Public Co. Ltd. v Hellenic Republic*, ICSID Case No. ARB/14/16.

(60) *Ibid.*, para 378.

(61) *Ibid.*, para 374.

(62) TPP Art. 9.1(c), ChAFTA Art. 9.1(d)(iii), EU-Singapore FTA Art. 9.1(1)(c), EU-Vietnam FTA Art. 8.4.p(iii), CETA Art. 8.1(c), TTIP proposal Definitions x.2(c).

(63) TPP Annex 9-G(2), EU-Vietnam Annex(2), CETA Annex 8-B(2), TTIP proposal Annex II(2).

(64) Cl. Provost, *Taxes on trial: How trade deals threaten tax justice*, Global Justice Now, February 2016, www.tni.org/en/publication/taxes-on-trial (accessed 16 July 2016).

(65) For Panama papers see investigation by The International Consortium of Investigative Journalists, https://panamapapers.icij.org/. For tax avoidance of multinational corporations see report of UK Parliament's House of Commons Committee, www.publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/716/71605.htm (both accessed 16 July 2016).

(66) TPP Art. 9.9, CETA Art. 8.13, TTIP proposal Art. 6. Same for EU-Singapore FTA Art. 9.7, which, even though refers to 'taxation' in para 2(g), does not explicitly removes it from its scope.

(67) *Cargill, Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award 18 September 2009; *Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and*

aiming to shrink the number of such claims, introduce taxation carve-outs. However, their language is blurry, with exceptions within exceptions. For example, under TPP Article 29.4(6b)(8), a taxation measure can still, under conditions, be challenged as infringing National Treatment or as amounting to indirect expropriation. The text fails to mention the FET standard, which, at a first glance, seems not to be applicable to taxation. However, this could be still subject to expansive interpretations; tribunals could argue that what not explicitly prohibited is deemed permitted and, thus, still apply it. The EU IIAs also take the route of non-explicit-mention. Although they condemn the 'avoidance and evasion of taxes', their tax exception clauses are not applicable to investment, with the exception of CETA that just excludes MFN. (68) Finally, as discussed in sub-Section II.A.1, the narrowing of investor's definition only to enterprises with 'substantial business activities' cannot prevent covered subsidiaries from still bringing ISDS claims.

E. — *State-owned Enterprises in IIAs*

Being a sensitive issue among countries, the concept of State-owned enterprises (SOEs) has not generally been touched in international trade and investment law. Only GATT Article XVII provides limited rules on the behavior of these entities. This situation is, though, changing in the era of regionalism.

TPP is the first treaty that dedicates a whole chapter to disciplines on SOEs. The rapid growth in number and size of SOEs and their often non-transparent operation and poor management pose, indeed, a need for regulation. (69) But one should not forget that SOEs have different orientations, as well as that they can play a positive role for countries, fostering economic development and employment opportunities. (70) TPP seems to do exactly that, depriving SOEs from all their benefits. Although Article 17.2.9 recognizes the right of establishment and maintenance of SOEs, the agreement removes the GATT safeguard that parties can grant to their SOEs exclusive or specific privileges. On the contrary, Article 17.6 prohibits States from providing non-commercial assistance to their SOEs, when this would have 'adverse effects to the interests of another Party' or could cause 'injury to a domestic industry. These terms are quite broad and go beyond WTO stand-

S.C. Multipack S.R.L. v Romania, ICSID Case No. ARB/05/20, Award 11 December 2013; *Perenco Ecuador Ltd. v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6; *Tullow Uganda Operations PTY LTD v Republic of Uganda*, ICSID Case No. ARB/12/34; *Vodafone v India*, UNCITRAL, Notice of Arbitration 17 April 2014.

(68) EU-Singapore FTA Art. 17.6(4), EU-Vietnam FTA Art. X.7(3), CETA Art. 28.7(2).

(69) Pr. Kowalski *et al.*, *State-owned Enterprises: Trade effects and Policy Implications*, OECD Trade Policy Paper No. 147, TAD/TC/WP(2012)10/FINAL, OECD Publishing 2013, pp. 6 and 12.

(70) See A. Capobianco and H. Christiansen, *Competitive Neutrality and State-owned Enterprises: Challenges and Policy Options*, OECD Corporate Governance Working Papers, No. 1, OECD Publishing, 2011, p. 9.

ards. The concept of 'adverse effects' is expanded to services, while for the measurement of 'injury to domestic industries' a long and exhaustive list of economic factors is set out. (71) These rules do not take into consideration the non-profitable SOEs that need government support to perform public functions. In the same sense, Article 17.4 obliges all SOEs and designated monopolies to 'act in accordance with commercial considerations' and not to discriminate against goods and services of another party, when engaging in commercial activities. Again these provisions disregard SOEs with hybrid role and social functions inextricably linked with their commercial ones, such as natural monopolies in sectors of public utilities, public transport etc. TPP includes carve-outs on the aforementioned norms, though they are quite limited. Article 17.13(2)(3) provides a general exception for SOEs that fulfill a 'government mandate', while country-specific exemptions of particular enterprises are found in annexes. However, apart from the annex for Vietnam, there are no carve-outs related to public good, as we would expect. Overall, the strict rules, in conjunction with the establishment of a committee in charge of reviewing the implementation of the chapter, (72) may result to a regulatory chill for States. On top of that, while the State-to-State Dispute Settlement is the norm, obligations related to 'covered investments' spread over the chapter, as well as the requirement for SOEs exercising delegated authority to comply with the whole Agreement, (73) open the way for investors to challenge SOEs' activities as investment breaches. TPP's twin brother, TTIP, also intends to insert a SOEs chapter with similar rules. This was made clear by the EU's textual proposal of January 2015 and confirmed by the leaked TTIP documents released by Greenpeace. (74)

The initiative for the inclusion of a SOEs chapter belonged to the US. The objectives put forward by the government were that the reform would help in the efficiency and accountability of the existing SOEs, the non-discrimination against private corporations and would provide a boost for international competition. (75) The inclusion of the chapter, however, could also imply political ramifications and more especially the attempt of the US to pass its capitalistic model to free market TPP Member States, such as Malaysia, Singapore and Vietnam, with an ultimate goal to stem the pro-

(71) TPP Arts 17.7.1(d)(e) and 17.8.3 respectively.

(72) TPP Art. 17.12.

(73) TPP Art. 17.3.

(74) EU Textual Proposal, *Possible Provisions on State Enterprises and Enterprises Granted Special or Exclusive Rights Or Privileges*, January 2015, http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153030.pdf. For Greenpeace leak see www.ttip-leaks.org/#docdoc14. (both accessed 17 July 2016).

(75) Office of the US Trade Representative, TPP Issue-by-Issue Information Center, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-negotiating-7 (accessed 17 July 2016).

gress of the ever-growing Chinese SOEs. (76) After the US withdrawal from TPP, (77) it is unsure whether the remaining State Parties will maintain the SOE chapter in the agreement. If, however, they do, what we can expect is that such chapter could be particularly burdensome on developing countries such as Malaysia and Vietnam and small European economies, such as Hungary and Romania, whose economic infrastructure is based on SOEs.

III. — The 'reaction' of states

On the other side of the coin, States are taking action to more actively participate in the investment treaty system, adopting the modest or more radical approaches analyzed below.

A. — *Backlash against ISDS: Strengthening State-to-State Arbitration and Domestic Litigation*

Evaluating the negative effects of the ever-increasing investor claims, States are trying to halt this phenomenon. The 'bravest' have renounced investment instruments altogether and are building stronger domestic processes. This is the example of the Latin American countries Ecuador, Venezuela and Bolivia, which withdrew from the ICSID Convention and started terminating their existing BITs. (78) This termination policy was also followed by Indonesia, which in the years 2014 to 2016 denounced 19 out of its 71 IIAs in force. A different approach was taken by South Africa that determined to denounce its BITs on a case-by-case basis and conclude new IIAs only 'in cases of compelling economic and political circumstances'. (79) Other States, although still negotiating investment treaties, are opting out from ISDS. Philippines and Japan did so at their 2006 Economic Partnership Agreement (EPA). In 2011, Australia's government also announced

(76) J. Kelsey, *The risks of disciplines on State-owned Enterprises in the proposed Trans-Pacific Partnership Agreement*, paper prepared for the stakeholder program at the 11th round of TPP Agreement negotiations in Melbourne, 4 March 2012, pp. 6-11, https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp161-170/wp-168-willemyns-website.pdf (accessed 24 May 2016).

(77) See *infra* note 136.

(78) Ecuador has led the way and since 2008 cancelled its BITs with Cuba, Dominican Republic, El Salvador, Finland, Germany, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay. Venezuela has taken Ecuador's lead, unilaterally denouncing its BIT with the Netherlands in 2008. Similarly, since 2012, Bolivia has terminated its BITs with the US, Argentina, Austria, France, Germany, Netherlands, Spain and Sweden.

(79) See Trade and Industry Minister, Robert Davies' speech at the session on UNCTAD's IPFSD, Geneva, 24 September 2012, extract, www.igd.org.za/index.php/about-us/about-igd/21-news/latest-stories/1597-south-african-minister-new-approach-needed-on-investment-treaties (accessed 17 July 2016).

its intention not to include ISDS in its future IIAs. (80) It has kept this commitment in the 2011 Australia-New Zealand EPA, the 2012 Australia-Malaysia FTA and the 2014 Australia-Japan EPA, where State-to-State Dispute Settlement (SSDS) was maintained as the sole dispute settlement mechanism. However, both Japan and Australia are signatories of the TPP Agreement that includes the ISDS mechanism. Brazil followed the same strategy and replaced ISDS with SSDS in the Cooperation and Investment Facilitation Agreements concluded with Mozambique and Angola, in March and April 2015 respectively.

Even when States insist on ISDS, both their practices and new IIAs demonstrate an attempt to promote SSDS. Hitherto, the two mechanisms have existed alongside each other in investment treaties, without clear indication which one prevails. The truth is that the availability of SSDS has not made much difference; having the disadvantages of the diplomatic protection and little benefit for investors, States have been hesitant in using it. The environment is slowly changing in the era of regionalism. Over the past decade, States have taken their first timid steps bringing such claims to seek diplomatic protection, interpretation or declaratory relief. (81) The new-generation IIAs also draw particular attention to the SSDS chapter; it is made more elaborate and able to resolve a wide range of disputes, providing an attractive alternative even for investment disputes. (82) When it comes to sensitive issues, some IIAs break the silence and explicitly declare prevalence of SSDS. This is mainly the case of investment disputes in financial services, where the ISDS proceedings are suspended until the State-to-State tribunal/committee renders its — binding to the ISDS Tribunal — decision. (83) Similarly, after the much-discussed *Philip Morris v Australia* case, TPP Article 29.5 excludes tobacco-related challenges from ISDS.

Likewise, the new wave of IIAs advances the backstage role of domestic courts. States used to include 'fork-in-the-road' clauses in their BITs, giving to investors an irrevocable election between litigation at the courts of host States or investment arbitration. However, having the ISDS option, investors have rarely gone for domestic litigation. The new-generation IIAs

(80) Department of Foreign Affairs and Trade (DFAT), *Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity*, April 2011, p. 14, http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf (accessed 17 July 2016).

(81) Diplomatic protection: *Italian Republic v Republic of Cuba*, *ad hoc* State-State arbitration, Final Award 15 January 2008; Interpretation: *The Republic of Peru v Chile* to clarify a provision of *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v The Republic of Peru*, ICSID Case No. ARB/03/4, Award 7 February 2005; *Ecuador v United States*, UNCITRAL, PCA Case No. 2012-5, Award 29 September 2012.

(82) See N. Bernasconi-Osterwalder, *IISD Best Practices Series: State–State Dispute Settlement in Investment Treaties*, October 2014, p. 20, www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf (accessed 17 July 2016).

(83) TPP Art. 11.22(2c), CETA Art. 13.21(2).

substitute 'fork-in-the-road' with waivers. (84) These clauses do not discourage national proceedings, as they permit investors to first commence a proceeding in domestic courts and, if they wish, to discontinue it in favor of ISDS. Knowing that their choice will not be final, the option of domestic courts could become more appealing to investors. Finally, some new IIAs bind arbitrators to follow the interpretation of national courts when examining domestic law. They further underline that the tribunals' interpretations will not be binding upon those national courts. (85)

B. — *Enhancing Transparency*

Having its roots in the similar concept of commercial arbitration, investment arbitration has always been developed in secrecy. However, its hybrid nature differentiates it from the purely private, commercial model. Often involving matters of public interest or of particular political and financial risk, investment disputes require greater openness, stability and procedural legitimacy. (86) The re-orientation of international investment law is characterized by significant progress in the transparency levels. It started with the adoption of two instruments in 2014: the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* and the UN General Assembly's *Convention on Transparency in Treaty-based Investor-State Arbitration*. The new IIAs follow this transparency path, either directly referring to the UNCITRAL Rules (87) or adopting rules, where all pleadings, awards and decisions shall be publicly disclosed. (88) This could lead to scrutiny of investors' claims, who may think twice before starting a proceeding with little chance to succeed.

The *amicus curia* is a concept inextricably linked to transparency. It can improve accountability, assist the tribunals in being well-informed using the expertise of third-parties and promote public interest. (89) Despite being widely used in public international law, *amici curiae* have for a long time been

(84) TPP Annex 9-L(A2), ChAFTA Art. 9.14(2), EU-Singapore FTA Art. 9.17(f)(i), EU-Vietnam FTA Art. 8.8(1)(4b), CETA Art. 8.22(1g), TTIP proposal Art. 14(2b).

(85) CETA Art. 8.31(2), EU-Vietnam FTA Ch. 8, section 3, Art. 16(2), TPP Art. 9.25(1) and footnote 34, TTIP proposal Art. 13(3)(4).

(86) D. Euler *et al.*, *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration*, Cambridge University Press, 2015, pp. 1-2.

(87) CETA Art. 8.36, EU-Vietnam FTA Art. 8.20(1), TTIP proposal Art. 18.

(88) TPP Art. 9.24, ChAFTA Art. 9.17 and Side Letter on Transparency Rules, EU-Singapore FTA Annex 9-G.

(89) T. Ishikawa, "Third party participation in investment treaty arbitration", *International and Comparative Law Quarterly*, Vol. 59, Issue 2, pp. 401-404; E. Levine, "Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation", *Berkeley Journal of International Law*, Vol. 29, 2011, p. 217; K. Fach Gómez, "Rethinking the Role of the Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest", *Fordham International Law Journal*, Vol. 35, 2012, pp. 562-563.

disregarded in investment arbitration. BITs and older FTAs, even though permitting non-disputing parties to intervene in the proceedings, (90) make no mention of third-party submissions. This lack of explicit consent resulted in two unsuccessful early attempts of participation in *Methanex* and *UPS* cases. (91) In 2003, the NAFTA Free Trade Commission issued a statement setting out detailed — but not binding — criteria to be applied by tribunals when deciding whether submissions should be accepted. (92) This was followed by the ICSID amendment of Arbitration Rules and Additional Facility Rules in 2006 with the insertion of Rule 37(2) establishing similar criteria, and confirmed by the 2010 UNCITRAL Transparency Rules Article 4 and 17. Following these developments, *amici curiae* submissions have been increased, and since 2008, their number has doubled. (93) In addition, participation is no longer sought only by NGOs, as it used to be, but by diverse entities, such as international organizations, industry bodies, indigenous people and consultancy companies. (94) The system has become more permissive, with more and more tribunals granting leave to participation. (95) In fact, the tribunals themselves sometimes request submissions from non-party entities. (96) However, this trend of permissiveness is not absolute, as tribunals usually do not go beyond the acceptance of filing written submissions. (97) The innovation of new IIAs is that they explicitly incorporate third-party participation. (98) Although they still give significant latitude to tribunals ("the tribunal may accept"), this novelty will probably be in favor of States, as the experience of ISDS cases has shown that the majority of the *amici curiae* submissions support the regulatory freedom of the respondent. (99)

(90) NAFTA Arts 1128-1129.

(91) *Methanex v US*, *supra* note 26; *United Parcel Service of America Inc. v Canada*, UNCITRAL, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae 17 October 2001.

(92) Statement of the Free Trade Commission on non-disputing party participation, 2003, www.state.gov/documents/organization/38791.pdf. (accessed 17 July 2016).

(93) L. Bastin, "The Amicus Curiae in Investor-State Arbitration: Eight Recent Trends", *Arbitration International*, Vol. 30, Issue 1, 2014, p. 128.

(94) International organizations: *AES Summit Generation Limited & Another v Republic of Hungary*, ICSID Case No. ARB/07/22, Award 23 September 2010, para 8.2; *Electrabel SA v Republic of Hungary*, ICSID Case No. ARB/07/19, para 1.18; Industry bodies and indigenous people: *Glamis Gold Ltd v United States of America*, UNCITRAL, Award 8 June 2009, para 286; *Merrill & Ring Forestry LP v Canada,* UNCITRAL, Award 31 March 2010, paras 22-25; Consultancy companies: *Apotex Inc v The Government of the United States of America*, UNCITRAL, Procedural Order No. 2 on the participation of a non-disputing party 11 October 2011, paras 23, 28-29.

(95) Bastin, *supra* note 90, pp. 142-143. Appendix 1 shows that, until July 2012, 11 out of 18 petitions were granted permission.

(96) *Eureko v Slovak Republic*, UNCITRAL, Award on Jurisdiction, Arbitrability and Suspension 26 October 2010.

(97) Bastin *supra* note 90, pp. 140-141.

(98) TPP Art. 9.23(3), CETA Annex 29-A for SSDS also applicable to ISDS, EU-Singapore FTA Annex 15-A, TTIP Art. 23(5).

(99) In this line see *Aguas del Tunari, SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Petition, 29 August 2002, para 2; *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID

C. — *Counterclaims and Arbitration Costs*

Counterclaims in investment arbitration are a still rare phenomenon, which however have started picking up speed. The reluctance of host States to bring such claims lies in the long-standing perception that the sole objective of ISDS is protecting the rights of investors. However, this does not seem to have been the rationale of the drafters of the ICSID Convention, who believed in the equal access between host States and foreign investors to arbitration. (100) ICSID Article 46 explicitly allows counterclaims and, after the 2010 modification, UNCITRAL Arbitration Rules' Article 21(3) does as well. Counterclaims are advantageous for States, as they would be enabled to seek affirmative relief from tribunals. The notion could lead to diminishment of the number of ISDS claims; investors, regularly expecting counterclaims, could be discouraged from starting proceedings. (101) States have recognized these benefits and counterclaims have flourished within the past five years. (102) Their success depends mainly on the precise wording of IIAs. The tendency of tribunals has been to decline jurisdiction when there is no explicit consent for their use. (103) However, a recent approach first introduced in Pr. Reisman's dissenting opinion in *Roussalis* case, and then adopted by the tribunal in *Goetz* case, (104) creates a novel situation. It suggests that the investor's consent to counterclaims is implied by the consent to arbitration itself and, therefore, tribunals may broaden their jurisdiction *ratione personae* to encompass counterclaims even without specific treaty

Case No. ARB/05/22, Petition for Amicus Curiae Status 27 November 2006, s. 4; *Piero Foresti and Others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Petition for Limited Participation as Non-Disputing Parties 17 July 2009, s. 4; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Application for Permission to Proceed as Amicus Curiae 2 March 2011, p. 1-2 and 13-16; *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador*, UNCITRAL, Submission of Amici 5 November 2010, s. 1.

(100) Report of the Executive Directors on the Convention on the settlement of investment disputes between States and nationals of other States, Part III, para 13: "While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States. Moreover, the Convention permits the institution of proceedings by host States…".

(101) G. Laborde, "The Case for Host State Claims in Investment Arbitration", *Journal of International Dispute Settlement*, Vol. 1, 2010, pp. 99-100; Th. Kendra, "State Counterclaims in Investment Arbitration — A New Lease of Life?", *Arbitration International*, Vol. 29, Issue 4, 2013, pp. 597-601; Kuijper *and al.*, *supra* note 35, pp. 95-96.

(102) *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability 28 April 2011; *Metal-Tech Ltd. v Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award 4 October 2013; *Hesham T.M. Al Warraq v Republic of Indonesia*, UNCITRAL, Award 15 December 2014; *Perenco v Ecuador supra* note 64, Interim Decision on the Environmental Counterclaim 11 August 2015.

(103) See *Oxus Gold plc v. Republic of Uzbekistan, the State Committee of Uzbekistan for Geology & Mineral Resources, and Navoi Mining & Metallurgical Kombinat*, UNCITRAL, Award 17 December 2015.

(104) *Spyridon Roussalis v Romania,* ICSID Case No. ARB/06/1, Award 7 December 2011; *Goetz v Burundi*, ICSID Case No. ARB/01/2, Award 21 June 2012, paras 278-279.

mention. The new-generation IIAs, with the exception of TPP,(105) still remain silent on the issue, but this new approach encourages counterclaims to be more widely brought and examined.

High arbitration costs have always been one of the main concerns of the investment arbitration system. The Organization for Economic Co-operation and Development (OECD) calculated them to reach US$8 million on average in 2012, with costs exceeding US$30 million in some cases.(106) Not only are the amounts excessive, but the tribunals have adopted different approaches to their allocation, causing uncertainty, as States could predict neither the outcome nor the level of the fees they would have to pay.(107) The traditional approach has been the one generally used in public international law, 'pay your own pay', whereby each party bears its own costs.(108) By the end of 2011, half of the cases brought made use of this rule, which has been criticized as particularly burdensome for small economies and developing countries.(109) Because of the general dissatisfaction, States have sought ways to alleviate costs. The cycle of reforms started again with the modification of UNCITRAL Arbitration Rules in 2010; per Articles 42(1) and 40(2) all arbitration costs 'shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable'. The new-generation IIAs adopt this 'costs-follow-the-event' approach and further shrink arbitrators' latitude to apportion the costs between the parties, allowing them to do so only 'in exceptional circumstances'.(110) Seeking to rein in arbitration costs, the new IIAs give resort to mediation and also

(105) TPP Art. 9.19(2). Similarly in Common Market for Eastern and Southern Africa, "Investment Agreement for the COMESA Common Investment Area" (2007), Art. 28(9).

(106) OECD, *Investor-State Dispute Settlement, Public Consultation: 16 May-23 July 2012*, p. 18, www.oecd.org/daf/inv/investment-policy/ISDSconsultationcomments_web.pdf (accessed 17 July 2016).

(107) See for example the approach taken in *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Award 7 July 2011, para. 296 and *Togo Electricité and GDF-Suez Energie Services v. Republic of Togo*, ARB/06/07, Decision on annulment 6 September 2011, para. 257 and differently in *Spyridon Roussalis v Romania, supra* note 101, para. 882 and *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award 31 March 2011, para. 365.

(108) I. Uchkunova and O. Temnikov, *Allocation of Costs in ICSID Arbitration*, Kluwer Arbitration, 3 December 2013, http://kluwerarbitrationblog.com/2014/12/03/allocation-of-costs-in-icsid-arbitration/. For examples of cases where the two different principles were applied see tables at https://works.bepress.com/inna_uchkunova/1/ and https://works.bepress.com/inna_uchkunova/2/ (both accessed 17 July 2016).

(109) D. Smith, "Shifting Sands: Cost-and-Fee Allocation in International Investment Arbitration", *Virginia Journal of International Law*, Vol. 51, 2011, p. 753; UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, IIA Issues Note, No. 2, UNCTAD/WEB/DIAE/PCB/2013/4, 2013, p. 7.

(110) CETA Art. 8.39, EU-Singapore FTA Art. 9.26, EU-Vietnam FTA Art. 8.27(4) and TTIP Art. 28(4).

provide for prompt termination of frivolous and unfounded ISDS claims in an early stage of proceeding. (111)

D. — *Advancing Consistency: Authoritative Interpretations, Appellate Mechanism and Permanent Court*

Tempering the abusive interpretation by tribunals and achieving uniformity of investment awards seems to be at the top of States priorities.

By delegating to arbitrators the ruling of ISDS claims, States are deliberately denouncing an element of their sovereignty, in return for new opportunities. (112) This does not change the fact that they still remain 'masters of the treaties', (113) sharing interpretive authority with tribunals. So far, apart from the 2001 NAFTA Free Trade Commission' Interpretation, (114) States have not made use of this authority. But feeling that their ties with the treaties are being cut off, they are now trying to strengthen their interpretative role. They are endowing their recent IIAs with specialized treaty committees consisted of all State-parties representatives and assign them tasks such as developing recommendations about substantive standards, adopting binding authoritative interpretations, amending the rules of the agreement and appointing the members of tribunals. (115) Some new IIAs also clearly set Vienna Convention on the Law of Treaties as applicable law, (116) preventing ISDS tribunals from sidestepping its rules of interpretation and deviating, that way, from the intention of the treaty-drafters. (117)

The ISDS institutional structure is characterized by brand-new reforms. So far the pool of arbitrators has been quite small, mainly consisted of lawyers of big law firms, raising concerns that they have a 'business interest' in cases and, thus, are investor-biased. (118) Aiming to eliminate these vested interests, some IIAs assign to the treaty committees the task of compiling a roster of arbitrators and choosing from it in case of disagreement between the

(111) TPP Arts 9.18(1), 9.29(4); CETA Arts 8.20, 8.32. 8.33; EU-Singapore FTA Arts 9.14, 9.20, 9.21; EU-Vietnam FTA Annex I and Arts 18-19, TTIP Arts 3, 16(4), 17.

(112) W. Burke-White and A. Von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", *Virginia Journal of International Law*, Vol. 48, 2008, p. 349.

(113) UNCTAD, *Interpretation of IIAs: What States can do*, IIA Issues Note, No. 3, UNCTAD/WEB/DIAE/IA/2011/10, 2011, p. 3.

(114) NAFTA Free Trade Commission *supra* note 22. For the reasons of the interpretation see *ibid.*, p. 13.

(115) TPP Arts 9.25(3), 27.2.2(f); CETA Arts 8.10(3), 8.31(3), 8.44(3b), 8.27(2), 8.28(3); EU-Singapore FTA Arts 9.4(3), 9.19(3), 9.30(2)(a)(c); EU-Vietnam FTA Art. 8.34(2)(a)(b), TTIP proposal Arts 3, 13(5), 27(2)(c), 9(2).

(116) ChAFTA Art. 9.18, CETA Art. 8.31, EU-Singapore Art. 9.19(2).

(117) Kuijper *and al.*, *supra* note 35, pp. 40, 66.

(118) *Ibid.*, pp. 103-104.

parties. (119) A binding code of conduct is also created, excluding conflicts of interest and safeguarding arbitrators' impartiality. (120)

After many years of discussions, CETA and the draft text of TTIP provide for a second instance facility. (121) It is not the first time that the words 'appellate body' appear in an IIA; older and recent agreements also mention such a mechanism but they only suggest a future, potential establishment. (122) The novelty of the two agreements lies in the fact that the Appellate Tribunal is created by the pact itself and is binding, similar to the WTO Appellate Body. The appeals procedure improves the annulment process of ICSID Article 52(1); besides the correction of procedural errors, it also provides for the review of the awards on the merits, which would reduce the risk of erroneous and poorly reasoned final decisions.

The EU has again become a pioneer attempting to change the structure of the first instance. First seen in the November 2015 TTIP proposal and then included in EU-Vietnam FTA and CETA, (123) the new system aims to replace the *ad hoc* tribunals with a standing investment court. Some voices have been heard to suggest that it will pose several technical and political challenges. (124) But States have felt that its benefits would outweigh the drawbacks; the court, consisted by tenured and carefully selected judges, seeks to ensure greater legitimacy, fairness and independence. A major innovation is that the tribunal members will be appointed by the committee, depriving the investors of any influence on the selection. (125) The investors will also not be able to choose the respondent to the claim; it will be in the EU's sole determination whether the claim should be addressed by a Member State or the Union itself. (126) Whether such a Court will be established is still unclear, but, if it does, it could be valuable for small European States that in the past found themselves confronting corporations with greater economic and political power.

(119) ChAFTA Art. 9.15, EU-Singapore FTA Art. 9.18.

(120) TPP Arts 9.22(6), 28.10(1d); EU-Singapore FTA Art. 9.18(6)(7); EU-Vietnam FTA Annex II; CETA Art. 8.44(2); TTIP proposal Annex II.

(121) CETA Art. 8.28, TTIP proposal Art. 10.

(122) ChAFTA Art. 9.23, TPP Art. 9.23(11), EU-Vietnam FTA Art. 8.15.

(123) TTIP proposal Art. 9, EU-Vietnam FTA Art. 12, CETA Art. 8.27.

(124) E. Zuleta, "The Challenges of Creating a Standing Investment Court", *Transnational Dispute Management*, Vol. 1, 2014.

(125) TTIP proposal Art. 9.2-9.3, EU-Vietnam FTA Art. 8.12.2-8.12.3, CETA Art. 8.27(2)-8.27(3).

(126) TTIP proposal Art. 5, EU-Vietnam FTA Art. 8.6(2), CETA Art. 8.21. Also in EU-Singapore FTA Art. 9.15(2).

IV. — Regionalism: towards a harmonization of international investment law?

The surge of regionalism had been considered as a tool to abate the dissatisfaction over the bilateral investment system and to equalize the powers of investors and States, by obtaining a first consolidation of investment law. (127) Mega-regional FTAs had, hence, been seen as a 'stepping stone' for a future multilateralization, (128) which would be achieved with the gradual accession of additional States to existing regional instruments. (129) This Section will evaluate whether the goal of such harmonization has been accomplished through regionalism, and whether the drafting of a multilateral investment treaty would be either desirable or plausible.

It could be argued that mega-regional FTAs, governing a substantial share of the global investment, make some progress towards the convergence of the different investment standards found in BITs. These treaties reflect a consensus between their participants on addressing the concerns of the current regime, providing more clarified substantive obligations, liberalization commitments and stronger regulatory transparency. (130) However, this fledging regionalism has added an extra layer to the already fragmented bilateral system; most IIAs affirm their co-existence with older bilateral or regional agreements and are silent on which one prevails, resulting in overlaps. (131) Investors are, thus, able to choose from these parallel treaties those that are the most preferential under which to bring their claims. To address this issue, the EU adopted a Regulation that provides for the replacement of Member-States' BITs with the new IIAs concluded by the Union. (132) Nonetheless, all BITs include 'transitional-period' provisions, which guarantee protection even upon termination, meaning that the overlap will still not be avoided. As such, we could only talk about a partial consolidation being reached through regionalism.

(127) M. Malli, "Minilateral Treaty-Making in International Investment Law", in A. K. Bjorklund (ed.) *Yearbook on International Investment Law and Policy, 2013-2014*, Oxford University Press, 2015, p. 524.

(128) European Commission, *Investment in TTIP and Beyond-The Path for Reform*, Concept Paper, Tradoc 153408, May 2015, p. 11.

(129) TPP Art. 30.4.

(130) M. Feldman *et al.*, "The Role of Pacific Rim FTAs in the Harmonization of International Investment Law: Towards a Free Trade Area of the Asia-Pacific", EU15 Task Force on Investment Policy, ICTSD, March 2016.

(131) TPP Art. 1.2(1), ChAFTA Art. 1.2(1,2). See also W. Alschner, "Regionalism and Overlap in Investment Treaty Law — Towards Consolidation or Contradiction?", *Journal of International Economic Law*, Vol. 17, Issue 2, 2014.

(132) Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] *OJ* L351/40, Art. 3.

At the other end of the spectrum, if the goal is the uniformity of international investment law, this could be facilitated through a multilateral investment system. A multilateral treaty could better balance economic with public purpose interests, so as to meet both the expectations of the investors and host States. With the creation of unified rules, it could create a regulatory framework that both provides safeguards for securing foreign investment while also addressing non-investment concerns, such as the right to regulate on health care and the environment. (133) This could further contribute to the elimination of contradictory interpretations of the various ad hoc tribunals, providing a more secure environment both for States and investors. Without a doubt, the negotiating power of developed countries, the source of most FDI flows, would be still stronger during the drafting of such treaty. Nevertheless, a coalition of all developing countries trying to protect their interests could bring about a more balanced regime. Thus, a multilateral treaty could end the perpetual battle between investors and States over who will prevail and thereby lead to a 'golden mean'.

However, the multilateralization of investment law is still viewed with skepticism by both scholars and developing countries alike. Some commentators assert that a multilateral treaty is not necessary as BITs can already develop uniform standards, which would harmonize the investment regime. (134) However, as seen before, the substantive standards of BITs and FTAs are still far from uniform. The concerns of developing States mainly stem from the role foreign investors would acquire upon the drafting of such treaty. They claim that, under a multilateral system, it would be easier for corporations to move their investments from country to country causing unpredictability. A second argument put forward is that bilateral or regional negotiations are preferable, as they are less cumbersome for the economically weaker party, which can still channel and guide investment in support of its development. (135) The critics conclude that while individual consents of arbitration in bilateral treaties cannot elevate investors to subjects of international law, their unconditional recognition in a multilateral treaty would establish their legal personality. Especially as States would not be able to unilaterally modify or denounce such a treaty, thereby withdrawing the legal status accorded to corporations, as they could do with BITs. (136) But

(133) P. Acconci, "The integration of non-investment concerns as an opportunity for the modernization of international investment law: is a multilateral approach desirable?", in G. Sacerdoti (ed.), *General Interests of Host States in International Investment Law*, Cambridge University Press, 2014, pp. 186-7.

(134) S. W. Schill, "Multilateralizing investment Treaties through Most-Favored-Nation Clauses", *Berkeley Journal of International Law*, Vol. 27, 2009, p. 500.

(135) E. Chalamish, "The Future of Bilateral Investment Treaties: A *De Facto* Multilateral Agreement?", *Brook. Journal of International Law*, Vol. 34, Issue 2, 2008, p. 340.

(136) K. Nowrot, *International Investment Law and the Republic of Ecuador: From Arbitral Bilateralism to Judicial Regionalism*, TELC Research Center, 2010, pp. 14-16; P. Malanczuk, "Multinational Enterprises and Treaty-Making — A Contribution to the Discussion on Non-State

the situation is not much — if any — different under the current regime; the myriad bilateral and regional IIAs offer several alternatives to corporations on where to place their investments, forcing States to make concessions in order to attract and maintain FDI. Furthermore, almost all IIAs are negotiated based on the draft model of the more powerful State, and as States hold regular meetings with corporate lobbyists, investors have great influence on the negotiations. (137) Finally, regarding the legal personality of investors, we could argue that the ever-increasing number of BITs and regional IIAs and their contracting parties, as well as the binding consent to ISDS that they provide, already imply a *de facto* transformation of investors into subjects of international law. This becomes more obvious if we consider the role that investors can play in investment law-making; in the absence of a uniform or customary regime, arbitrators mainly rely on the parties' pleadings when identifying the meaning the substantive standards of IIAs. This gives investors a more pervasive role in influencing the shaping of investment law by proposing interpretations that are frequently adopted by tribunals and cited in subsequent awards. (138)

Be that as it may, the idea of a multilateral investment treaty seems even more farfetched, with developed countries trying to maintain fragmentation. The recent decision of the US government to withdraw from TTP in favor of pursuing bilateral agreements points in this direction. (139) The president's preference of bilateralism creates uncertainty regarding the continuation of the TTIP negotiations, which is further enhanced by the government's intention to strengthen commerce and investment ties with Great Britain after Brexit. (140) Under these developments, not only does the drafting of a multilateral treaty seem utopian, but the future of regionalism also appears nebulous. Other developed countries do not seem to take the same view regarding mega-regionals; ASEAN members expressed the wish for the

Actors and the "Subjects" of International Law", in V. Gowlland-Debbas (ed.), *Multilateral Treaty-Making — The Current Status of Challenges to and Reforms Needed in the International Legislative Process*, Springer, 2000, pp. 60-63.

(137) Corporate Europe Observatory, *TTIP: a corporate lobbying paradise,* July 2014, http://corporateeurope.org/international-trade/2015/07/ttip-corporate-lobbying-paradise (accessed 18 July 2016).

(138) A. Reinisch, "Investors", in M. Noortmann *et al.* (eds), *Non-State Actors in International Law*, Oxford Hart Publishing, 2015, pp. 264-267; M. Paparinskis, "Analogies and Other Regimes of International Law", in Z. Douglas *et al.* (eds), *The foundations of International Investment Law*, Oxford University Press, 2014, pp. 94-96.

(139) See Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, 23 January 2017, www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific (accessed 30 January 2017).

(140) See President Trump and Prime Minister May's Opening Remarks, 27 January 2017 www.whitehouse.gov/the-press-office/2017/01/27/president-trump-and-prime-minister-mays-opening-remarks (accessed 30 January 2017).

TPP to proceed, even without the US,(141) and will possibly explore the opportunity to commence negotiations with China for the conclusion of the Regional Comprehensive Economic Partnership.(142) EU FTAs will also most probably not cease to exist. However, with the absence of the US, one of the major economic players, the regional model may have an 'expiration date'. Instead of increased harmonization, an atomization of international investment law is on the horizon, with a return to the old bilateral model.

V. — Conclusion

The 'BITs' rush' of the 1990's is slowing down and is being replaced by intensified efforts at the regional level. In the aftermath of the 2008 global financial crisis, States felt that their economies would be revived through a strong, 'one shot' regulatory framework that would combine supplementary sectors such as trade, investment and services.(143) Thus, over the past decade, initiatives have been taken for the conclusion of mega-regional agreements that would not only 'protect' and 'promote' but also 'liberalize' investments. As the IIAs universe is expanding, concerns about the notable growth of investors' power have been brought to the surface, not only by developing countries and civil society, but also by developed States that are now becoming targets of ISDS claims. This, in turn, revived the question of 'international subjectivity' of multinational corporations.

This article has attempted to draw the picture of how the acceleration of regional IIAs has turned out to be a 'battle' between corporations and States on who will take up the slack. It observes that regionalism presents us with a paradox; on the one hand, the IIAs concluded or negotiated reaffirm the strengthened role of investors in international investment law, by providing to them higher standards of protection and easier access to ISDS. The broad investment standards have not been sufficiently tightened, but, on the contrary, definitions of investor and investment have been expanded to encompass elements so far not covered, such as intellectual property rights. The incorporation of investment in FTAs has resulted to its interaction with the financial services and taxation chapters, sliding financial violations into

(141) *The Daily Telegraph*, "Trans-Pacific Partnership: China could replace the US, says Malcolm Turnbull after Donald Trump signs executive order", 24 January 2017, www.dailitelegraph.com.au/news/nsw/transpacific-partnership-china-could-replace-us-says-malcolm-turnbull-after-donald-trump-signs-executive-order/news-story/aaf25a1733c1cd7720f2b71cfb97f916 (accessed 30 January 2017).

(142) For the progress of the negotiations of the Treaty, see http://dfat.gov.au/trade/agreements/rcep/Pages/regional-comprehensive-economic-partnership.aspx (accessed 30 January 2017).

(143) M.-Fr. Houde *et al.*, "The Interaction between Investment and Services Chapters in Selected Regional Trade Agreements", in *International Investment Law: Understanding Concepts and Tracking Innovations: A Companion Volume to International Investment Perspectives*, OECD Publishing, 2008, p. 242.

ISDS. Finally, the new IIAs move further towards strictly regulating sensitive for States sectors such as SOEs. On the other hand, States are trying to 're-engage with the investment treaty system'. (144) A small group of countries has taken drastic measures by either terminating IIAs altogether giving competence to domestic courts or opting out from ISDS and promoting SSDS. Mainly, attempts to limit investors' influence have been made through reform of regional treaties; the new IIAs enhance transparency and embellish ISDS with safeguards such as counterclaims and allocation of costs to the losing party. In the search for a more predictable environment, some agreements are also introducing mechanisms such as authoritative interpretations, appellate facilities or a standing investment court, which restrict the arbitrators' latitude to adopt contradictory and investor-friendly interpretations.

The article has concluded that, although some steps were taken towards the consolidation of the investment regime, regionalism ultimately led to a further fragmentation. It can serve as a 'sweet spot' for investors, who not only maintain their powers, but are given even more means to proceed against States. What is sure is that, with the main purpose of international investment law still being the protection of investors and with globalization making multinational corporations indispensable components of world economy, their role will not be easily diminished. Given the fact that regionalism does not seem to deliver the desired results, the alternative of a multilateral investment treaty could be the 'one-eyed man in the land of the blind', marking a new beginning in balancing States and investors conflicting interests. However, multilateralism still raises concerns among States and academics, which implies that the creation of such a treaty is utopian. At the same time, the future of regionalism itself seems also uncertain, with the US government leading the way back to bilateralism, pulling out of TPP and promoting the conclusion of BITs.

(144) A. Roberts, "State-to-state investment treaty arbitration: A hybrid theory of interdependent rights and shared interpretive authority", *Harvard International Law Journal*, Vol. 55, Issue 1, 2014, p. 2.

ANNEX II

Maria Chochorelou and Carlos Espaliu Berdud, 'Sustainable development in new generation FTAs: Could arbitrators further the principle through ISDS?', 2018 (27) Review of European, Comparative & International Environmental Law, 176-186.

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ORIGINAL ARTICLE

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Sustainable development in new generation FTAs: Could arbitrators further the principle through ISDS?

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Despite the strong linkage between sustainable development and investment, older international investment agreements (IIAs) have been criticized as threatening the sustainable development of the host State. In recent IIAs, a slight shift towards taking the principle into account can be observed. However, the adoption of a sustainable-development-oriented approach in investment law depends largely on the tribunals that are tasked with the interpretation of IIAs. This article examines the role of arbitrators in promoting sustainable development. Despite their current reluctance to engage in a sustainable development discussion, the situation may alter with the conclusion of so-called new generation free trade agreements. These agreements make more references to the principle and place at the arbitrators' disposal interpretative tools for the integration of sustainable development into their argumentation. Finally, the article reflects on changes that would render the investment regime more compatible with sustainable development.

1 | INTRODUCTION

Sustainable development has been defined in various ways, but no definition is yet universally accepted. The content of the principle was initially shaped by the 1987 Brundtland Report[1] and the 1992 Rio Declaration, which placed human beings at the centre of sustainable development and put weight on environmental protection.[2] Since then its meaning has evolved; the Rio+10 and Rio+20 summits described sustainable development in terms of three pillars: economic, social and environmental.[3] The recent adoption of the 2030 Agenda[4] adds further elements to the concept. While still based on the three pillars, Agenda 2030 also directly mirrors the human rights framework; it is grounded in international human rights treaties, and its Sustainable Development Goals (SDGs) and targets encompass issues related not only to economic and social rights but also cultural, civil and political rights.[5]

Agenda 2030 also creates a strong linkage between sustainable development and investment, explicitly linking its promotion with substantive SDGs and targets.[6] The adoption of investment promotion regimes is also mentioned as a means of implementation of the Agenda.[7] However, the current regulatory framework for international investment law has been criticized as threatening sustainable development. These concerns reinforce the need for the establishment of effective rules and processes to facilitate the realization of the SDGs.[8] On a positive note, governments have embarked on a path of reforming international investment agreements (IIAs), shifting shyly towards sustainable development;[9] however, the steps taken thus far do not seem to be sufficient.

[1]World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987).

[2]Rio Declaration on Environment and Development in 'Report of the United Nations Conference on Environment and Development' UN Doc A/CONF.151/26 (vol I) (12 August 1992) Annex (Rio Declaration).

[3]'Report of the World Summit on Sustainable Development, Plan of Implementation of the World Summit on Sustainable Development' UN Doc A/CONF.199/20 (4 September 2002) I, para 2; UNGA 'The Future We Want' UN Doc A/RES/66/288 (27 July 2012) I, para 3.

[4]UNGA 'Transforming Our World: The 2030 Agenda for Sustainable Development' (2030 Agenda) UN Doc A/RES/70/1 (21 October 2015).

[5]ibid para 10; see also Goals 5, 10, 16 and 17.

[6]ibid Goals 1b, 2a, 7a and 10b.

[7]ibid Goal 17.15.

[8]L Cotula, 'Foreign Investment, Law and Sustainable Development: A Handbook on Agriculture and Extractive Industries' (International Institute for Environment and Development 2016) 6.

[9]United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2015: Reforming International Investment Governance* (UNCTAD 2015) 124.

Although IIAs are inter-State agreements, States are not the only ones shaping the international investment regime. Through investor–State dispute settlement (ISDS), arbitrators are entrusted with the task of interpreting these agreements. Therefore, whether and how sustainable development will be put into practice also depends to a great extent on their decisions. Sustainable development should be considered as an 'interstitial' principle or a principle for the legal interpretation of international treaties.[10] How could arbitrators apply this principle in ISDS when resolving investment disputes, particularly those with explicit public interest components? Do the so-called new generation IIAs impose an obligation on them towards integrating the principle into their interpretation? Does the arbitration system itself need to be reformed for the aims of sustainable development to be fulfilled?

Existing literature has already attempted to articulate and resolve tensions between existing IIAs and environmental or social issues.[11] This article extends the discussion to new generation free trade agreements (FTAs), referring to the ambitious and wide-ranging treaties signed or concluded after 2015, and assesses whether they have addressed these sustainable development-related concerns. It principally concentrates on whether arbitrators could interpret their provisions in light of the 2030 Agenda, in a way that furthers – rather than hinders – sustainable development. The article first analyses the current practice of ISDS tribunals when facing investment disputes with explicit public interest components. Second, it examines the sustainable development language found in post-2015, new generation FTAs,[12] discussing the interpretative tools at the disposal of arbitrators for the alignment of the agreements with SDGs. Particularly, it analyses the Trans-Pacific Partnership Agreement (TPP), the EU–Canada Comprehensive Economic and Trade Agreement (CETA), the EU–Singapore FTA and the EU–Vietnam FTA. These agreements are selected both due to their substantial trade value, and because they reflect a recent shift in trade and investment policy: the conclusion of 'mega-regional FTAs' or, in other words, of deep integration agreements between regions with a major share of world trade and foreign direct investment. The TPP and CETA are the first comprehensive outcomes of this new trend. The EU–Singapore and EU–Vietnam FTAs are also worthy of discussion, as they can be considered as 'pathfinder agreements' on the road to an eventual EU–ASEAN mega-regional FTA.[13] It is not certain whether all of these agreements will enter into force. The conclusion of the EU–Singapore FTA is pending after an opinion of the Court of Justice of the EU.[14] Similarly, the future of TPP is uncertain following the withdrawal of the US. Be that as it may, their negotiations are still important, constituting a clear example of the investment approach that States will most probably follow in the future. Finally, the article reflects on changes to ISDS and suggests alternative dispute resolution methods that would render the investment regime more compatible with sustainable development.

2 | CURRENT PRACTICE OF ISDS TRIBUNALS

Investment tribunals have already been confronted with disputes involving sustainable development-related issues, brought either as environmental claims or as human rights assertions.

Environmental claims have been relatively slow to arise in the ISDS context. In early cases, the 'traditional approach' of arbitrators was to prioritize investment law, considering it as *lex specialis*.[15] Based on the 'sole effects doctrine',[16] the *Santa Elena* and *Water Management II* tribunals regarded the public purpose objective of a State measure as irrelevant to the decision as to whether the investment treaty was breached; hence, it was not a reason to exclude or limit investor compensation.[17] Taking a different approach, other tribunals engaged in the discussion of environmental issues, but still considered them as subordinate to investment protection. In the *Metalclad* award, arbitrators applied a strictly economic impact test to find that an indirect expropriation had occurred, as the owner was deprived 'of the . . . reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State'.[18] In the *Tecmed* and *Glamis* cases, investment tribunals, although seemingly having weighed public purpose and investors' interests equally, set forth an expansive interpretation of the fair and equitable treatment (FET) standard, prioritizing the 'legitimate

[10]V Lowe, 'Sustainable Development and Unsustainable Arguments' in A Boyle and D Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 1999) 19; G Mayeda, 'Where Should Johannesburg Take Us? Ethical and Legal Approaches to Sustainable Development in the Context of International Environmental Law' (2004) 15 Colorado Journal of International Environmental Law and Policy 37.

[11]K Gallagher and D Chudnovsky, *Rethinking Foreign Investment for Sustainable Development: Lessons from Latin America* (Anthem Press 2010); MW Gehring, MC Cordonnier-Segger and A Newcombe, *Sustainable Development in World Investment Law* (Kluwer Law International 2011); F Rojid and M Vasquez, 'Investment Law and Poverty: Continuing the Debate through UNCTAD's Investment Policy Framework for Sustainable Development' (2011) 14 Journal of World Investment and Trade 889; LN Skovgaard Poulsen, 'Bounded Rationality and the Diffusion of Modern Investment Treaties' (2013) 58 International Studies Quarterly 1; CS Levy, 'Drafting and Interpreting International Investment Agreements from a Sustainable Development Perspective' (2015) 3 Groningen Journal of International Law 59; SW Schill, CJ Tams and R Hofmann (eds), *International Investment Law and Development: Bridging the Gap* (Edward Elgar 2015); JE Viñuales, 'Foreign Investment and the Environment in International Law: The Current State of Play' in K Miles (ed), *Research Handbook on Environment and Investment Law* (Edward Elgar 2016) 1, 2–3; S Hindelang and M Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press 2016).

[12]The article will examine FTAs considered as trendsetters. For this purpose, the Trans-Pacific Partnership Agreement (TPP), the EU–Canada Comprehensive Economic and Trade Agreement (CETA), the EU–Singapore FTA and the EU–Vietnam FTA will be analysed.

[13]LH Kiang, Minister of Trade & Industry of Singapore, 'Speech at the Singapore–Hungary Business Forum' (27 September 2017) <https://www.sbf.org.sg/images/2017/Singapore-Hungary_Business_Forum_SBF_CEO_Speech.pdf> 2.

[14]Opinion 2/15 of the Court [2017] ECLI:EU:C:2017:376.

[15]M Koskenniemi, 'Fragmentation of International Law – The Function and Scope of the Lex Specialis Rule and the Question of "Self-Contained Regimes": An Outline' (2009) 1 Transnational Dispute Management.

[16]C Henckels, 'Indirect Expropriation and the Right to Regulate' (2012) 15 Journal of International Economic Law 223, 225, fn 4.

[17]*Compañia del Desarrollo de Santa Elena S.A. v Republic of Costa Rica*, ICSID Case No ARB/96/1, Award (17 February 2000) paras 71–72; *Waste Management, Inc v United Mexican States*, ICSID Case No ARB(AF)/00/3, Award (30 April 2004).

[18]*Metalclad Corporation v United Mexican States*, ICSID Case No ARB(AF)/97/1, Award (30 August 2000) para 103. See also N Bernasconi-Osterwalder and L Johnson, 'International Investment Law and Sustainable Development: Key Cases from 2000–2010' (International Institute for Sustainable Development (2011) 78–79.

expectations' of investors.[19] The non-discrimination standards[20] have also been open to wide interpretation; the *S.D. Myers* tribunal adopted a competitive business approach in its assessment of 'like circumstances' and found the environmental decisions of the host State to be breaching its treaty obligations.[21]

Since 2012, we can observe a steep increase in disputes with environmental relevance,[22] which serves as a confirmation of the growing importance of sustainable development in the field of international investment law. The gradually changing treatment of such disputes by ISDS tribunals points in the same direction. In the *Chemtura*, *Al Tamimi* and *Charanne* cases, the tribunals took into account the purpose of the host States' environmental measures, accepting the latter as a valid exercise of their regulatory powers.[23] Similarly, in the *Marion Unglaube*, *Mamidoil* and *Peter Allard* cases, arbitrators considered the relevance of the host States' economic conditions, expecting 'due diligence' from investors.[24] However, these steps are modest, as arbitrators only assess environmental claims as part of the factual analysis rather than as questions of law.[25] Furthermore, the fact that several recent awards still insist on the 'traditional approach'[26] makes clear that investment and environmental law are still not on an equal footing.

Although still infrequent, human rights arguments also appear in ISDS. The acceptance of jurisdiction by tribunals ruling cases related to human rights does not seem to follow a firm pattern; the reference to international law as applicable law in the IIA was sometimes considered sufficient to establish jurisdiction for claims brought by the investor,[27] while in other cases it was not. But even in cases where arbitrators denied jurisdiction, they nevertheless took the human rights argumentation into consideration as 'part of the factual matrix of the claimants' complaints'.[28] This willingness to draw analogies with human rights seems, however, one-sided.[29] Unlike investors' claims, when it comes to defences of States, arbitrators tend to dismiss human-rights-related assertions without elaborating on their dismissal.[30] This is particularly true with regard to water arbitration cases, where tribunals either did not take cognisance of the right, as in *Vivendi* and *Biwater*,[31] or refused to enter into a discussion, noting that the respondent State had failed to sufficiently argue it, as in *Azurix*.[32] Differently, the *Suez* and *SAUR* tribunals acknowledged that human rights are to be taken into consideration but set a very high threshold for host States to prove the proportionality of their measure.[33] Only a few exceptions to this reluctance can be found in case law; the *Continental Casualty* and *Philip Morris* tribunals dismissed the investor claims, holding that the governmental measures taken were proportionate to the intended objectives: the country's grave economic crisis and the need to protect public health, respectively.[34]

Third parties have also participated in investment disputes with sustainable development components, and since 2008 the number of *amicus curiae* briefs has doubled.[35] The first time that nongovernmental organizations (NGOs) tried to intervene was in the *Methanex* case. Despite the outcome,[36] *Methanex* is considered to be a ground-breaking decision, as the tribunal recognized that it had the power to accept *amicus curiae* submissions, opening the door for more petitions in the future.[37] After some early unsuccessful attempts of participation,[38] we can observe an increased openness of tribunals towards *amicus curiae* submissions.[39] In addition, participation is no longer sought only by NGOs, but also by international

[19] *Tecnicas Medioambientales Tecmed S.A. v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) paras 123, 139, 149; *Glamis Gold Ltd v United States* (Award) (14 May 2009) (UNCITRAL) IIC 380 (2009) para 354.

[20] The non-discrimination standards prohibit discrimination on the basis of nationality. The most common non-discrimination standards of IIAs are the national treatment (NT) and the most-favoured nation treatment (MFN), which require treatment no less favourable than the one afforded to national or other foreign investors, respectively.

[21] *S.D. Myers, Inc v Canada* (Partial Award) (12 November 2000) (UNCITRAL) IIC 249 (2000) para 243.

[22] Viñuales (n 11) 12–13.

[23] *Chemtura Corporation v Canada* (Award) (2 August 2010) PCA Case No 2008-01 (UNCITRAL) IIC 451 (2010) para 266; *Adel A Hammadi Al Tamimi v Sultanate of Oman*, ICSID Case No ARB/11/33, Award (3 November 2015) paras 388–444; *Charanne and Construction Investments v Spain* (Award) (21 January 2016) (Stockholm Chamber of Commerce, Case No 62/2012).

[24] *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v Republic of Albania*, ICSID Case No ARB/11/24, Award (30 March 2015) paras 613–614; *Marion Unglaube v Republic of Costa Rica*, ICSID Case No ARB/08/1 and *Reinhard Unglaube v Republic of Costa Rica*, ICSID Case No ARB/09/20, Award (16 May 2012) para 258; *Peter A Allard (Canada) v The Government of Barbados* (Award) (27 June 2016) (PCA Case No 2012-06) IIC 864 (2016).

[25] CL Beharry and ME Kuritzky, 'Going Green: Managing the Environment through International Investment Arbitration' (2015) 30 American University International Law Review 396.

[26] *Abengoa S.A. y COFIDES S.A. v United Mexican States*, ICSID Case No ARB(AF)/09/2, Award (18 April 2013); *Hassan Awdi, Enterprise Business Consultants, Inc and Alfa El Corporation v Romania*, ICSID Case No ARB/10/13, Award (2 March 2015) para 312; *Bilcon of Delaware et al v Government of Canada* (Award on Jurisdiction and Liability) (17 March 2015) (PCA Case No 2009-04) IIC 688 (2015) paras 691–692.

[27] *Chevron Corporation & Texaco Petroleum Corporation v Republic of Ecuador* (Interim Award) (1 December 2008) (PCA Case No 2007-02/AA277) IIC 355 (2008) paras 2, 3, 207; *Desert Line Projects LLC v Republic of Yemen*, ICSID Case No ARB/05/17, Award (6 February 2008); *Toto Costruzioni Generali S.p.A. v Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction (11 September 2009).

[28] *Veteran Petroleum Limited (Cyprus) v Russian Federation* (Award) (18 July 2014) (PCA Case No 2005-05/AA228) IIC 417 (2009) para 76.

[29] T Meshel, 'Human Rights in Investor–State Arbitration: The Human Right to Water and Beyond' (2015) 6 Journal of International Dispute Settlement 277, 282–283; V Kube and EU Petersmann, 'Human Rights Law in International Investment Arbitration' (2016) 11 Asian Journal of WTO and International Health Law and Policy 65, 86.

[30] *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Award (12 May 2005); *EDF International SA, SAUR International SA, and Leon Participaciones Argentinas SA v Argentine Republic*, ICSID Case No ARB/03/23, Award (11 June 2012).

[31] *Compania de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Award (20 August 2007); *Biwater Gauff Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Award (24 July 2008).

[32] *Azurix Corp v Argentine Republic*, ICSID Case No ARB/01/12, Award (14 July 2006).

[33] *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability (30 July 2010); *SAUR International SA v Argentine Republic*, ICSID Case No ARB/04/4, Award (22 May 2014).

[34] *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/9, Award (5 September 2008); *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016).

[35] L Bastin, 'The Amicus Curiae in Investor–State Arbitration: Eight Recent Trends' (2014) 30 Arbitration International 125, 128.

[36] *Methanex Corporation v United States of America* (Decision on Amici Curiae) (15 January 2001) (UNCITRAL) IIC 165 (2001).

[37] S Saha, 'Methanex Corporation and the USA: The Final NAFTA Tribunal Ruling' (2006) 15 Review of European Community and International Environmental Law 110; H Mann, 'Opening the Doors, at Least a Little: Comment on the Amicus Decision in Methanex v. United States' (2001) 10 Review of European Community and International Environmental Law 241.

[38] *United Parcel Service of America Inc v Canada*, ICSID Case No, UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (17 October 2001).

[39] Bastin (n 35) 142–143 shows that, until July 2012, 11 out of 18 petitions were granted permission.

organizations, business associations and indigenous peoples.[40] Nevertheless, their acceptance remains at the discretion of tribunals, which, as the case law shows, has so far not been consistent.

After the analysis of the jurisprudence, one could conclude that the responses of arbitrators to sustainable development lack consistency. Inconsistent awards have raised concerns about the legitimacy of the arbitral process; several commentators argue that ISDS exhibits investor bias and may limit or even discourage government measures that further sustainable development.[41]

3 | THE ROLE OF ARBITRATORS IN PROMOTING SUSTAINABLE DEVELOPMENT UNDER NEW GENERATION FREE TRADE AGREEMENTS

Given the increasing number of ISDS cases involving some sustainable development component,[42] it is very likely we will also see such issues being addressed by tribunals set up under the post-2015 FTAs. In this section, we will examine whether these treaties contain language that imposes the duty upon, or enables arbitrators to render decisions that would – borrowing the tripartite typology of States' obligations on human rights – 'protect, respect and fulfil' sustainable development.

3.1 | Sustainable development references in new generation FTAs

Unlike early IIAs, where explicit reference to sustainable development was either absent or only appeared in preambles,[43] new generation FTAs give greater weight to the principle. They all include preambles reaffirming the commitments of the parties to further sustainable development and incorporate sustainable development chapters.[44] These chapters recall international instruments such as the Rio Declaration, Agenda 21 and the ILO Declaration on Social Justice for a Fair Globalization, and acknowledge the aim of promoting investment in such a way so as to contribute to the objective of sustainable development. Following the example of older bilateral investment treaties (BITs), all post-2015 FTAs also incorporate environment and labour chapters,[45] which include positive and negative obligations for the parties, such as the right to regulate and the non-derogation from their national laws in order to attract foreign investment. However, none of the chapters of the treaties examined in this article gives recourse to dispute settlement mechanisms.[46] Disputes are to be resolved only by government consultations or referral to a Panel of Experts.[47] Despite not being directly applicable to ISDS, both the preambles and sustainable development-related provisions could be seen as a manifestation of parties' intention to strengthen the importance of sustainable development. They clarify the object and purpose of the agreements and, as provided by Article 31(2) of the Vienna Convention on the Law of the Treaties (VCLT),[48] they constitute relevant 'context', allowing investment tribunals to take into account the normative environment more widely, holistically interpreting investment agreements.[49]

Turning to provisions that can form the basis of an ISDS claim, sustainable development references are also present. The EU FTAs analysed 'reaffirm' the right of the parties to regulate in order to achieve legitimate policy objectives.[50] The wording of this provision, strongly reminiscent of preambular language, is quite vague and cannot be seen as providing clear guidance for ISDS tribunals. A similar right-to-regulate provision can be found in the TPP, which states that 'nothing ... shall be construed to prevent' the adoption of measures of environmental and health objectives, unless these measures are 'otherwise consistent with this Chapter'.[51] This provision complicates the intended protection and confers to the arbitrators the task to determine whether this compliance exists. All new generation FTAs also feature 'general exceptions'. The post-2015 EU FTAs, importing the language of Article XX of the 1994 General Agreement on Tariffs and Trade, assert that States can adopt measures aiming to protect the environment, human life or health, provided that they are 'necessary' and not amounting to 'arbitrary or unjustifiable discrimination'.[52] The vagueness of these terms has made World Trade Organization (WTO) panels reluctant to rule in favour of the 'general-exceptions' provision, setting highly demanding levels of proof.[53] Although WTO case law does not set a precedent for investment arbitration, the absence of a definition of these terms in the EU FTAs make the 'general exceptions' open to broad interpretation. Moreover, their applicability to ISDS is quite limited, as they only cover specific sections of the investment chapter. The TPP general exception as applied to ISDS is even narrower, only addressing certain obligations under the performance requirement article.[54] Performance requirements are commitments imposed on investors to meet certain goals with respect to their

[40]ibid 128–130; K Tienhaara, 'Third Party Participation in Investment–Environment Disputes: Recent Developments' (2007) 16 Review of European Community and International Environmental Law 230, 238–239.

[41]SD Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521; O Chung, 'The Lopsided International Investment Law Regime and its Effect on the Future of Investor–State Arbitration' (2007) 47 Virginia Journal of International Law 953.

[42]UNCTAD, 'Investment Policy Framework for Sustainable Development' (UNCTAD 2015) 56 (UNCTAD IPFSD).

[43]A Newcombe, 'Sustainable Development and Investment Treaty Law' (2007) 8 Journal of World Investment and Trade 399.

[44]Trans-Pacific Partnership Agreement (TPP) (adopted 4 February 2016, not yet in force) Chapter 23; Comprehensive Economic and Trade Agreement (CETA) (adopted 30 October 2016, provisionally entered into force 21 September 2017) Chapter 22; EU–Singapore Free Trade Agreement (negotiations concluded 17 October 2014, not yet adopted) Chapter 13; EU–Vietnam Free Trade Agreement (negotiations concluded 2 December 2015, not yet adopted) Chapter 15.

[45]CETA (n 44) Chapters 23 and 24; TPP (n 44) Chapters 19 and 20.

[46]With the exception of the TPP (n 44) art 19.15(12) and 20.23.

[47]CETA (n 44) art 24.14–24.15; EU–Singapore FTA (n 44) art 13.16–13.17; EU–Vietnam FTA (n 44) art 15.16–15.17.

[48]Vienna Convention on the Law of the Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 31(2).

[49]International Law Commission, 'Report of the Study Group on the Fragmentation of International Law' UN Doc A/CN.4/L.682 (13 April 2006) 209.

[50]CETA (n 44) art 8.9(1); EU–Vietnam FTA (n 44) Chapter 8-II, Section 2, art 13bis.

[51]TPP (n 44) art 9.10(a).

[52]CETA (n 44) art 28.3(1–2); EU–Singapore FTA (n 44) art 9.3(3); EU–Vietnam FTA (n 44) Chapter 8-VII, art 1.

[53]N Bernasconi-Osterwalder et al, *Environment and Trade: A Guide to WTO Jurisprudence* (Routledge 2005) 76–147.

[54]TPP (n 44) art 9.10(3)(d).

operations in the host country.[55] The TPP generally does not make use of performance requirements, which are only accepted in the form of 'general exceptions'. Finally, all post-2015 FTAs include indirect expropriation annexes, which set forth factors indicating which types of State conduct constitute indirect expropriation.[56] The annexes provide that non-discriminatory regulatory actions designed to protect public health, safety and the environment do not constitute indirect expropriation, except in 'rare circumstances'.[57] While the TPP does not give guidance to arbitrators on how to apply this term, the EU FTAs elaborate on this aspect defining 'rare circumstances' as measures with such a severe impact in light of their purpose that they appear manifestly excessive. Despite the clarification, this wording still leaves great discretion to arbitrators to determine the threshold of indirect expropriation.

To summarize, the new generation FTAs do not provide a clear normative environment for sustainable development. The obscure wording of the relevant provisions does not provide sufficient direction to arbitrators.

3.2 | Interpretative tools

Could arbitrators overcome the ambiguities in these treaties, and integrate sustainable development into their decisions? As investment tribunals have competence to decide only within the legal framework of the agreement in question, we need to examine the provisions of the post-2015 FTAs establishing the competence of the tribunals: the 'covered investment' and 'governing law' clauses, and whether they leave room for the consideration of sustainable development claims. Moreover, we need to analyse the existing jurisprudence on these clauses. Although no rule of strict precedent exists in investment arbitration, the vagueness of IIA language has made arbitrators shapers of investment law; through interpretation they create normative rules, which, while non-binding, exert influence on subsequent tribunals, forming *de facto* precedent.[58]

3.2.1 | Covered investment

The 2030 Agenda 'reaffirms that every State has … full permanent sovereignty over all its wealth, natural resources and economic activity'.[59] According protection to investments violating national legislation would undermine the right of States to make decisions in their best interests. Older BITs addressed this issue of *legality*, explicitly subjecting the definition of 'covered investment' to conformity with the domestic laws of the host State. Based on this provision, several tribunals applied the so-called 'clean hands' doctrine to examine the legality of an investment, rejecting jurisdiction for investments contrary to the environmental or human rights laws of the host State.[60] The FTAs examined here omitted the domestic law criterion from the definition of 'covered investment'. Even so, it could be argued that tribunals could still apply the 'clean hands' doctrine, a view which can be derived from the jurisprudence; two recent awards upheld 'the widely-held opinion that investments are protected by international law only when they are made in accordance with the legislation of the host State', even without the inclusion of a relevant treaty provision.[61] However, assessing the legality of an investment may not be sufficient by itself, especially in the case of developing country signatories of FTAs, whose environmental and labour laws may fall short from furthering sustainable development.

This is why, besides *legality*, the *quality* of the investment should also be taken into account in the interpretation of 'covered investment'. The 2030 Agenda urges investment that stimulates 'productivity, inclusive economic growth and job creation'.[62] The question would be whether arbitrators could reject jurisdiction for investments that do not contribute to the host State's sustainable development. Under Article 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),[63] a dispute falls within the jurisdiction of the Centre if it directly arises out of an 'investment'. The absence of an 'investment' definition in the Convention gave rise to different interpretations by tribunals. One of the most sustainable development-friendly interpretations was given in the *Salini* case, where the following criteria were set as the typical characteristics of an investment: (i) commitment of capital; (ii) a certain duration; (iii) participation in risks; and (iv) contribution to the economic development of a host State.[64] The *Salini* test was accepted in several subsequent cases, but the majority of investment tribunals dismissed the criterion of economic development.[65] Some recently concluded BITs introduce all four *Salini* criteria in the 'covered

[55] UNCTAD, *World Investment Report 2003: FDI Policies for Development: National and International Perspectives* (UNCTAD 2003) 119.

[56] For a comprehensive analysis, see L Cotula, 'Expropriation Clauses and Environmental Regulation: Diffusion of Law in the Era of Investment Treaties' (2015) 24 Review of European, Comparative and International Environmental Law 278.

[57] TPP (n 44) Annex 9-B(3)(b); CETA (n 44) Annex 8-A(3); EU–Singapore FTA (n 44) Annex 9-A(2); EU–Vietnam FTA (n 44) Chapter 8-II, Annexes, Annex on expropriation.

[58] B King and R Moloo, 'International Arbitrators as Lawmakers' (2014) 46 New York University Journal of International Law and Politics 875, 882–883.

[59] 2030 Agenda (n 4) para 18.

[60] *Inceysa Vallisoletana, SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award (2 August 2006) para 335; *Fraport AG Frankfurt Airport Services Worldwide v Republic of Philippines*, ICSID Case No ARB/03/25, Award (16 August 2007) paras 397, 401–402; *Alasdair Ross Anderson et al v Republic of Costa Rica*, ICSID Case No ARB(AF)/07/3, Award (19 May 2010) paras 57–59. For an analysis, see P Dumberry, 'State of Confusion: The Doctrine of "Clean Hands" in Investment Arbitration after the *Yukos* Award' (2016) 17 Journal of World Investment and Trade 229, 232–235.

[61] *Mamidoil v Albania* (n 24), para 359; *Phoenix Action, Ltd v The Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) para 79.

[62] 2030 Agenda (n 4) para 67.

[63] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention) art 25(1).

[64] *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction (23 July 2001) paras 50–52.

[65] Accepted in: *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No ARB/03/11, Decision on Jurisdiction (23 July 2001) para 53; *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Decision on Jurisdiction (16 June 2006) para 91; rejected in *L.E.S.I. S.p.A. et ASTALDI S.p.A. v People's Democratic Republic of Algeria*, ICSID Case No ARB/05/3, Award (12 July 2006) para 73(iv); *Siemens, A.G. v Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction (3 August 2004); *Deutsche Bank AG v Democratic Socialist Republic de Sri Lanka*, ICSID Case No ARB/09/02, Award (31 October 2012).

investment' definition,[66] but the post-2015 FTAs examined here do not mention the contribution to the economic development.[67] This could make it more difficult for future FTA tribunals ruling in relation to these agreements to rely upon the *Salini* test and reject jurisdiction for investments that do not promote sustainable development.

3.2.2 | Governing law

All new generation FTAs set applicable rules of international law as the 'governing law' of ISDS.[68] Unlike the TPP, the EU FTAs also explicitly provide for the applicability of the VCLT. As the VCLT codifies customary international law, it should be accepted that TPP tribunals could also make use of its rules of interpretation. As confirmed in the Report of the Executive Directors on ICSID Article 42, 'the term "international law" … should be understood in the sense given to it by Article 38(1) of the Statue of the International Court of Justice (ICJ)'.[69] Under Article 38(1)(a) of the ICJ Statute, one of the primary sources of international law is international treaties. This could give arbitrators the green light to apply to ISDS the binding international human rights and environmental treaties ratified by the disputing parties, even *ex officio*, a practice that they have so far only sporadically used.[70] These treaties do not impose obligations on investors, but could be a useful interpretative tool, especially from a sustainable development perspective. For example, the 2015 Paris Agreement[71] could become pertinent in the discussion of some new generation cases springing from shifts in climate change policy.

In this context, the question arises as to whether tribunals could also rely on voluntary instruments to which parties have adhered. Article 38 of the ICJ Statute does not identify soft law as one of the sources of international law, a fact that led commentators to suggest it cannot be used by international courts and tribunals.[72] Others argue that the scope of Article 38 is narrow and acknowledge the role that soft law could play in international law.[73] Investment tribunals do not adopt a coherent approach; a study undertaken in 2011 shows that although some awards cite non-legally binding instruments, only three of them were cited more than once.[74] The use of soft law by arbitrators can be justified by Article 31(3)(c) of the VCLT, which requires decision makers to interpret disputes in the light of all relevant rules of international law applicable between the parties. This so-called 'systemic integration' approach could enable arbitrators to fill the gaps of the vague IIA standards and prevent conflicts between IIAs and international legal standards.[75] This could be of great practical significance for sustainable development, as future tribunals may integrate in their reasoning the SDGs adopted as part of the 2030 Agenda. Likewise, tribunals could take into consideration the OECD Guidelines for Multinational Enterprises, already invoked by the respondent in the *South American Silver* case[76] and mentioned in post-2015 FTAs,[77] as well as the United Nations Guiding Principles on Business and Human Rights referenced by the tribunal in the *Urbaser* case.[78] These instruments reflect the importance of corporate social responsibility, which, according to the UNCTAD Investment Policy Framework for Sustainable Development (IPFSD), includes promoting low-carbon and environmentally sound investment.[79] Even without imposing direct obligations on investors, corporate social responsibility could acquire greater importance in ISDS proceedings, by serving as a means for tribunals to evaluate whether investor protection overrides States' national development objectives.

However, what if there is no (relevant) international treaty signed by both disputing parties? Article 38(1)(b) and (c) of the ICJ Statute allow decision makers to also apply international custom and general principles of law. It is not easy to conclude which rules are recognized as customary international law or as general principles, or how investment tribunals could apply them in promoting sustainable development. But some doctrines that are widely recognized in international law could have a role in the interpretation of IIA substantive standards in line with the sustainable development objectives.

For example, the 'police powers' doctrine, a norm of customary law operating autonomously from treaty law,[80] could be of help in determining the scope of indirect expropriation. Literature

[66]Government of the Republic of India, Annex Model Text for the Indian Bilateral Investment Treaty (adopted 18 December 2015) (Indian Model BIT) art 1.2.1; Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (adopted 19 January 2016, not yet in force) art 1.2(c).

[67]TPP (n 44) art 9.1; CETA (n 44) art 8.1; EU–Singapore FTA (n 44) art 9.1(1); EU–Vietnam FTA (n 44) Chapter 8-I, art 1(4)(p). In the TPP, the 'certain duration' phrasing was also removed.

[68]TPP (n 44) art 9.25(1); CETA (n 44) art 8.31; EU–Singapore FTA (n 44) art 9.19(2); EU–Vietnam FTA (n 44) Chapter 8-II, Section 3, Sub-Section 5, art 16(2).

[69]'Report of the Executive Directors on the Convention of the Settlement of Investment Disputes between States and Nationals of other States' (1965) 4 ILM 530.

[70]*Azurix* (n 32); *Saipem S.p.A. v The People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction (21 March 2007) paras 130, 132. See also Kube and Petersmann (n 29) 92–93.

[71]Paris Agreement (adopted 15 December 2015, entered into force 4 November 2016) (2016) 55 ILM 740.

[72]J d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2009) 19 European Journal of International Law 1075; P Weil, 'Toward Relative Normativity in International Law' (1987) 77 American Journal of International Law 413, 414, fn 7.

[73]CM Chinkin, 'The Challenge of Soft-Law: Development and Change in International Law' (1989) 38 International and Comparative Law Quarterly 850; GJH Hoof, *Rethinking the Sources of International Law* (Kluwer 1983) 188.

[74]T Cole, 'Non-binding Instruments and Literature' in T Gazzini and E de Brabandere (eds), *International Investment Law. The Sources of Rights and Obligations* (Nijhoff 2012) 289, 304–305, fn 41.

[75]UNCTAD, 'Interpretation of IIAs: What States Can Do' (UNCTAD 2011) 9; K Berner, 'Reconciling Investment Protection and Sustainable Development: A Plea for an Interpretative U-Turn' in Hindelang and Krajewski (n 11) 177, 186–187.

[76]*South American Silver Limited (Bermuda) v The Plurinational State of Bolivia* (Respondent Counter-Memorial) (31 March 2015) (PCA Case No 2013-15) 1291 <https://www.pcacases.com/web/sendAttach/1291> para 220.

[77]CETA (n 44) preamble and art 22.3(2)(b) and 25.4(2)(c); EU–Singapore FTA (n 44) art 13.11; EU–Vietnam FTA (n 44) art 15.9; and TPP (n 44) art 9.17.

[78]*Urbaser S.A., Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016) fn 434.

[79]UNCTAD IPFSD (n 42) 46.

[80]J Viñuales, 'Sovereignty in Foreign Investment Law' in Z Douglas, J Pauwelyn and J Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (2014) 317, 326–328; Organisation for Economic Co-operation and Development (OECD), '"Indirect Expropriation" and the "Right to Regulate" in International Investment Law' (OECD 2004) 5, fn 10.

is divided on its applicability in international investment law,[81] and so is jurisprudence. In some ISDS proceedings, 'police powers' was sidestepped by the 'sole effects' doctrine, where solely the effect of the governmental measure on the property is crucial in the determination of expropriation.[82] Even in cases where tribunals applied 'police powers', they mostly did it as justification for non-payment of compensation, rather than to exclude liability.[83] The most radical pronouncement of the rule was made by the *Methanex* tribunal, which held that all non-discriminatory governmental measures, enacted in accordance with due process, do not constitute expropriation.[84] Although criticized as negating the very purpose of expropriation provisions,[85] this interpretation seems in line with the indirect expropriation annexes of the post-2015 FTAs examined here. Also, this interpretation is sustainable development-sensitive, as it does not restrain the ability of States to regulate in favour of health or the environment, thus preventing 'regulatory chill'.[86]

The 'margin of appreciation' doctrine, developed by the European Court of Human Rights (ECtHR) jurisprudence, gives a standard of deference for States to implement public interest measures. To evaluate whether national authorities have overstepped this margin, the ECtHR has developed a proportionality test, which is much less strict than the one usually applied in ISDS.[87] So far, the majority of investment tribunals have rejected the application of the ECtHR's 'margin of appreciation', arguing that it is not recognized as customary law.[88] However, its growing acceptance by international courts shows that the doctrine is emerging as a general principle of international law.[89] In addition, Article 38(1)(d) of the ICJ Statute mentions judicial decisions as subsidiary means for the determination of the rule of law. Based on this provision, investment tribunals could take into consideration ECtHR jurisprudence and subsequently the principles developed by it, a practice that has rarely been followed in ISDS.[90] Scholars have questioned the suitability of 'margin of appreciation' within investment arbitration, arguing that it provides no guidance to tribunals regarding the appropriate standard of review, thus exacerbating fragmentation.[91] However, if arbitrators apply the ECtHR proportionality test as 'corrective and restrictive of the margin of appreciation',[92] the 'doctrine could be a promising tool for guaranteeing the right of governments to appreciate their development needs'.

The precautionary or *in dubio pro natura* principle could also become relevant in ISDS. While no uniform definition exists, the principle is understood as a strategy to cope with possible risks where scientific understanding is incomplete.[93] First introduced in environmental law,[94] it is now enshrined in several international legal materials and domestic laws, and has been considered by international courts. Hence it is emerging as international custom,[95] an argument that has also been presented by the host State in the *David R. Aven* case.[96] With this case still pending, the principle may prove a useful device in the adjudication of environment-related investment disputes. It could allow arbitrators to deviate from the general rule of international arbitration and shift the burden of proof from the respondent to the claimant, who would have to prove that its actions are not hindering the host State's sustainable development.[97]

In summary, we conclude that investment tribunals could use the 'governing law' provisions to apply environmental and human rights provisions to their analysis of the merits.

4 | REFORM OF THE CURRENT INVESTMENT LAW REGIME

The commitment of the international community to a sustainable future makes the questions of *who* arbitrates and *under what rules* crucial. Despite the positive steps taken by the new generation FTAs, further improvement of the agreements is recommended.

4.1 | Reform of the profile of arbitrators

It has been said that the investment tribunals so far come from a small pool of 'male, pale and stale' corporate lawyers.[98] Statistics show that although ISDS cases are mainly brought against developing countries or small economies, 68 percent of arbitrators come from North America and Western Europe.[99] This could be

[81] B Mostafa, 'The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law' (2008) 15 Australian International Law Journal 267.

[82] Henckels (n 16).

[83] P Ranjan and A Pushkar, 'Determination of Indirect Expropriation and Doctrine of Police Power in International Investment Law: A Critical Appraisal' in L Choukroune (ed), *Judging the State in International Trade and Investment Law: Modern Sovereignty, the Law and the Economics* (Springer 2016) 127, 131–132.

[84] *Methanex* (n 36) Part IV, Chapter D, para 7.

[85] Ranjan and Pushkar (n 83) 134–135.

[86] M Paparinskis, 'Regulatory Expropriation and Sustainable Development' in Gehring et al (n 11) 301, 321–322.

[87] J Krommendijk and J Morijn, '"Proportional" by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor–State Arbitration' in PM Dupuy, EU Petersmann and F Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 421, 443.

[88] *Siemens v Argentina* (n 65) para 354; *EDF v Argentina* (n 30) paras 1003 and 1106; *Biwater v Tanzania* (n 31) para 515; *Quasar de Valors SICAV S.A. et al v Russian Federation* (Award) (10 July 2012) (SCC Case No 24/2007) IIC 557 (2012) para 22.

[89] Y Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2006) 16 European Journal of International Law 907.

[90] *Mondev International Ltd v United States of America*, ICSID Case No ARB/(AF)/99/2, Award (11 October 2002); *Veteran Petroleum* (n 28) para 76.

[91] J Arato, 'The Margin of Appreciation in International Investment Law' (2013) 54 Virginia Journal of International Law 545.

[92] F Matscher, 'Methods of Interpretation of the Convention' in RSJ Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Nijhoff 1993) 79.

[93] See <www.precautionaryprinciple.eu>.

[94] Rio Declaration (n 2).

[95] O McIntyre and T Mosedale, 'The Precautionary Principle as a Norm of Customary International Law' (1997) 9 Journal of Environmental Law 221; A Sirinskiene, 'The Status of Precautionary Principle: Moving Towards a Rule of Customary Law' (2009) 118 Jurisprudencija 349.

[96] *David R Aven and Others v Republic of Costa Rica*, ICSID Case No UNCT/15/3, Rejoinder Memorial (28 October 2016) paras 76–77, fn 36–37.

[97] Beharry and Kuritzky (n 25) 418–420.

[98] J Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25 ICSID Review – Foreign Investment Law Journal 458.

[99] International Centre for Settlement of Investment Dispute (ICSID), 'ICSID Caseload Statistics no 2016-2' (2016) <https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx>.

considered as problematic, as it does not guarantee sufficient 'participation of developing countries in all the institutions of global governance', as SDG 16.8 requires. Investment arbitration should comply with this goal, expanding the pool of arbitrators, with the entry of decision makers of more nationalities. Furthermore, sustainable development objectives could be better reflected by the inclusion of decision makers with different backgrounds in the international investment tribunals. Examining the new generation FTAs provisions regarding the qualification of arbitrators, we can see that they prioritize legal competences, providing that they shall have 'expertise or experience' in public international law or international investment law.[100] Legal knowledge is undoubtedly important. However, several ISDS cases, and especially those with environmental and human rights components, also include complex social, technical and scientific issues.[101] So far, investment tribunals have tried to resolve these issues by resorting to external experts[102] and new generation FTAs seem to approve this solution.[103] However, party-appointed experts could entail bias, and if diverging expert opinions occur, arbitrators will be ultimately left to determine which experts they will follow.[104] Also, as far as the *ex officio* appointment of experts is concerned, arbitrators' practice shows that they are hesitant in taking this initiative.[105] An alternative solution could be the inclusion of non-legal arbitrators in ISDS, when appropriate, a change in line with SDG 16.7 calling for 'inclusive, participatory and representative decision-making'.

Other statistics suggest that investment arbitrators favour claimants at the expense of the respondent State's sustainable development.[106] Their pro-investor tendency could originate from their interest in attracting or maintaining high-paying corporate clients and their ability to act as counsels in other, pending cases.[107] During the Transatlantic Trade and Investment Partnership (TTIP) negotiations of November 2015, the EU proposed the replacement of the ISDS mechanism with an Investment Court System.[108] This system was adopted in the EU–Vietnam FTA and CETA.[109] One of its major innovations is that a joint Investment Committee of the contracted parties will appoint judges, who 'shall be available at all times and on short notice'.[110] To ensure this availability, a monthly retainer fee will be paid to them.[111] Likewise, the EU proposal attempts to prevent conflicts of interests by disallowing the parallel work of arbitrators as lawyers and by introducing a new 'challenge-of-arbitrators' system where the decision of disqualification will be made by a neutral authority.[112] The tenure and financial independence of arbitrators, as well as the neutrality of the system, could address the concerns of investor bias and enhance good governance, an important element for sustainable growth.[113] Much has been said about the feasibility of this system, especially because of the limited enthusiasm of States to reform the current system. These concerns do not lack legitimacy; the establishment of an Investment court would require renegotiation of the existing investment instruments, which could not happen overnight. A good middle-ground solution could be the adoption of an opt-in Convention, similar to the recent Mauritius Convention on Transparency,[114] which would extend such a permanent mechanism to States' existing obligations. As a whole, the adoption of a standing Investment Court in subsequent FTAs could form the basis for the realization of SDG 16 on 'creating effective, accountable and inclusive institutions'.

4.2 | Revision of investment instruments

If the text of the investment treaties remains vague, it cannot give the tribunals enough direction on interpretation. This is why the improvement of the profile of arbitrators alone seems insufficient. Rather, a revision of international instruments should be pursued.

New generation FTAs have shown notable attempts of clarification, such as the inclusion of expropriation annexes and the narrowing of the scope of FET[115] and MFN treatment.[116] However, as seen in Section 3.1, their wording is still vague, making it difficult for arbitrators to strike the right balance between the interests of foreign investors and the public interest of States. IIA models released by NGOs, international organizations and governments, such as the 2005 International Agreement on Investment and Sustainable Development model, the 2012 Southern African Development Community (SADC) Model BIT, the 2015 Indian Model BIT and the 2015 UN IPFSD, could be of help in aligning IIA substantive standards with the SDGs. States' model BITs are important, as they reflect a government's negotiating position for future IIAs and serve as a means to achieve coherence in State treaty practice. Despite the need to compromise some of their

[100]TPP (n 44) art 9.22(5); CETA (n 44) art 8.27(4); EU–Singapore FTA (n 44) art 9.18(6); EU–Vietnam FTA (n 44) Chapter 8-II, Section 3, Sub-Section 4, art 12(4).

[101]K Fach Gómez, 'The US–EU Transatlantic Trade and Investment Partnership: Should it Leave a Door Open for Non-legal Arbitrators?' (2016) 34 Conflict Resolution Quarterly 199.

[102]ibid 205.

[103]EU–Vietnam FTA (n 44) art 8.26; TPP (n 44) art 28.15; EU–Singapore FTA (n 44) Chapter 8-II, Section 3, Sub-Section 5, art 8.26.

[104]Beharry and Kuritzky (n 25) 404.

[105]R Jacur, 'Remarks on the Role of Ex Curia Scientific Experts in International Environmental Disputes' in N Boschiero et al (eds), *International Courts and the Development of International Law* (TMC Asser Institute 2013) 444.

[106]G Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Empirical Study of Investment Treaty Arbitration' (2016) 53 Osgoode Hall Law Journal 540.

[107]ibid 543, 554.

[108]European Commission, 'Investment in TTIP and Beyond – The Path for Reform' (2015) <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> (TTIP proposal) 4, 11

[109]EU–Vietnam FTA (n 44) Chapter 8-II, Section 3, Sub-Section 4, art 12; CETA (n 44) art 8.27.

[110]TTIP proposal (n 108) art 9(11).

[111]ibid art 9(12–13); CETA (n 44) art 8.27(12–13); EU–Vietnam FTA (n 44) Chapter 8-II, Section 3, Sub-Section 4, art 12(14–15).

[112]TTIP proposal (n 108) art 9.11(1) and (4); EU–Vietnam FTA (n 44) Chapter 8-II, Section 3, Sub-Section 4, art 14(1)(4); CETA (n 44) art 8.30(1)(3).

[113]International Law Association (ILA), 'Resolution 3/2002, New Delhi Declaration on Principles of International Law Relating to Sustainable Development', ILA Resolution 3/2002, in International Law Association Report of the 70th Conference (New Delhi 2002) (ILA 2002) Principle 16; G Van Harten, 'A Case for an International Investment Court', Inaugural Conference of the Society for International Economic Law (2008).

[114]United Nations Convention on Transparency in Treaty-Based Investor–State Arbitration (adopted 10 December 2014, entered into force 18 October 2017) I-54749 (UNCITRAL).

[115]CETA (n 44) art 8.10; EU–Singapore FTA (n 44) art 9.4; EU–Vietnam FTA (n 44) Chapter 8-II, Section 2, art 14.

[116]For an explanation of the MFN standard, see n 20. TPP (n 44) art 9.5(3); CETA (n 44) art 8.7(4); and EU–Vietnam FTA (n 44) Chapter 8-II, Section I, art 4. The EU–Singapore FTA omits the standard.

terms, States usually use their model BITs as the basis for their subsequent negotiations of investment agreements.[117] Model BITs prepared by NGOs and international organizations are even more significant for sustainable development; as the result of the collective work of experts in international law, these templates identify the shortcomings of the current investment regime and provide a new direction consistent with the requirements of the global economy. Although it is quite difficult to evaluate the actual practical significance of these models, they seem to have influenced State treaty practice, with a number of treaties borrowing concepts identified in, for example, the IISD Model.[118] Clarifying the non-discrimination standards, model BITs set criteria for the interpretation of the identical treatment of foreign and local investors in 'like circumstances', a concept that remains undefined in new generation FTAs. One of the criteria provided by the IISD and SADC Models is the investment's 'effects upon the local, regional or national environment'; similarly, the Indian Model BIT refers to 'the actual and potential impact of the investment on . . . the local community, or the environment'.[119] The adoption of this criterion in future IIAs could prevent ISDS claims when, for example, a government refuses to issue an emission permit to a foreign corporation for a location where existing investors have exhausted the receptive capacity of the ecosystem.[120] Turning to FET, the most problematic issue from a sustainable development perspective is the protection of the 'legitimate expectations' of investors. Lacking definition, this broad concept indirectly restricts States' ability to change or introduce public interest policies that may have a negative impact on foreign investors. Interestingly, all IIA models omit investors' 'legitimate expectations' from the FET standard. Similarly, they have left out the 'rare circumstances' condition from the indirect expropriation clause, providing that regulatory measures applied to protect public health, safety and the environment never constitute an indirect expropriation.[121] Unlike new generation FTAs,[122] IIA models do not restrict the use of performance requirements, and Article 7.4 of the SADC Model BIT calls for foreign corporations to train and employ nationals of the host State. Article 26 of the IISD Model BIT also provides an indicative list of performance requirements that the host States may impose 'to promote domestic development benefits from investments'.[123] These performance requirements could help materialize expected spill-over effects from foreign investment, such as employment for skilled domestic and indigenous workers, protection of local sensitive industries or productivity improvement.[124] Moreover, their imposition on investors could help achieve SDG 9.5, asking for the promotion of 'scientific research . . . technological capabilities of industrial sectors in all countries, in particular developing countries by 2030, encouraging innovation and substantially increasing the number of research and development workers'.[125] Finally, IIAs could provide for the mandatory conduct of sustainable development impact assessments. Envisioned by the IIA models,[126] impact assessments could ensure the establishment of investments that clearly contribute to the SDGs.

According to SDG 16.3, countries should 'promote the rule of law . . . and ensure equal access to justice for all'.[127] To meet this goal, ISDS should ensure the more active participation of interested parties, both disputing and third parties alike. Investment arbitration has been developed as a one-way street, allowing only investors to file claims. States rarely assert counterclaims, although both ICSID and UNCITRAL Arbitration Rules envision them.[128] The practice of tribunals has so far been to deny jurisdiction because of the lack of explicit consent in most IIAs.[129] A recent approach, introduced in Reisman's dissenting opinion in the *Roussalis* case, and adopted by the tribunal in *Goetz* and *Metal-Tech* cases, suggests that the investor's consent to counterclaims is already implied by the consent to arbitration itself, without a need for explicit treaty reference.[130] However, it is not apparent that tribunals would be inclined to change their practice in this direction. The best solution would be the clarification of the term 'disputes' to encompass both claims and counterclaims,[131] or the explicit broadening of the consent to arbitrate on counterclaims. Turning to third party participation, the concept of *amicus curiae* briefs is now incorporated in post-2015 FTAs.[132] The wording of the provisions shows, however, that tribunals still have significant latitude in the acceptance of these claims ('the tribunal may accept'). So far, arbitrators have not been willing to deliver participation rights beyond the filing of written submissions.[133] The only exception was in the *Piero Foresti* case, where the tribunal also allowed *amici curiae* to access case materials.[134] A reform

[117] C Brown, *Commentaries on Selected Model Investment Treaties* (Oxford University Press 2013) 10–11.

[118] A De Mestral and C Lévesque, *Improving International Investment Agreements* (Routledge 2013) 20.

[119] International Institute for Sustainable Development (IISD), 'IISD Model International Agreement on Investment for Sustainable Development' (2005) <https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf> (IISD Model BIT) art 5(EB); Southern African Development Community, 'SADC Model Bilateral Investment Treaty Template with Commentary' (adopted July 2012) <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> (SADC Model BIT) art 4(2); UNCTAD IPFSD (n 42) 92–93; Indian Model BIT (n 66) art 4.1 (fn 2).

[120] The term 'receptive' capacity refers to the size of the population that can be supported indefinitely upon the available resources and services of an ecosystem <http://www.sustainablemeasures.com/node/33>.

[121] IISD Model BIT (n 119) art 8(I); SADC Model BIT (n 119) art 6.7; Indian Model BIT (n 66) art 5.4.

[122] TPP (n 44) art 9.10; CETA (n 44) art 8.5; EU–Vietnam FTA (n 44) Chapter 8-II, Section 1, art 6.

[123] Indian Model BIT (n 66) art 26.

[124] UNCTAD IPFSD (n 42) 98.

[125] 2030 Agenda (n 4) Goal 9.5.

[126] IISD Model BIT (n 119) art 12; SADC Model BIT (n 119) art 13; UNCTAD IPFSD (n 42) 67; Cotula (n 8) 75–78.

[127] 2030 Agenda (n 4) Goal 16.3.

[128] ICSID Convention (n 63) art 46; United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules as revised in 2010 (adopted by UNGA 'UNCITRAL Arbitration Rules as Revised in 2010' UN Doc A/RES/65/22 (10 January 2011)) art 21(3).

[129] See, e.g., *Oxus Gold plc v Republic of Uzbekistan* (Final Award) (17 December 2015) (UNCITRAL) IIC 779 (2015).

[130] *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1, Award (7 December 2011); *Antoine Goetz v Republic of Burundi*, ICSID Case No ARB/01/2, Award (21 June 2012); *Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013) para 409.

[131] Beharry and Kuritzky (n 25) 408. So far, counterclaim provisions appear only in the Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) (adopted 23 May 2007, not yet in force) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3092> art 28(9); and TPP (n 44) art 9.19(2).

[132] TPP (n 44) art 9.23(3); CETA (n 44) Annex 29-A(43–46); TTIP proposal (n 108) art 23(5).

[133] Bastin (n 35) 140–141.

[134] *Piero Foresti and Others v Republic of South Africa*, ICSID Case No ARB(AF)/07/01, Letter from ICSID regarding non-disputing parties (5 October 2009) 2.

of new generation IIAs to grant full participation rights, explicitly allowing third parties to attend and make oral submissions at the hearings, could be beneficial. Full participation should not be limited to *amici curiae*. Sustainable development requires fair representation of all affected stakeholders.[135] For this reason, individuals or local communities facing labour, human rights or environmental violations by investors, should be allowed to effectively join or even initiate ISDS proceedings.

Lastly, the sustainable development component could be strengthened through the selection of suitable arbitral rules under which IIA parties will settle their dispute. All new generation FTAs provide an indicative list, allowing investors to submit a claim under any other rules, if the disputing parties agree.[136] The choice of specialized arbitration rules could aid in ensuring that the process is properly adapted to the issues raised in these disputes, especially when it comes to disputes with environmental components, which involve complex technical matters. In 2001, the Permanent Court of Arbitration developed the Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources. These rules provide for the use of arbitrators with expertise on the subject matter.[137] They also allow tribunals to request a non-technical document explaining any scientific information, or appoint experts.[138] So far, no known ISDS case has been settled under the PCA Environmental Rules. Nevertheless, they could offer a sound alternative for the settlement of disputes with sustainable development implications.

Even reformed, ISDS may not be the most appropriate means to further sustainable development. Domestic litigation could secure broader access to justice, protecting the rights of stakeholders neglected by the ISDS regime. Despite the concerns of partiality, domestic courts could enhance investors' accountability and prevent them from receiving benefits beyond those provided to domestic investors. IIA models enhance the role of domestic courts, requiring exhaustion of local remedies before accessing ISDS.[139] Conciliation and meditation, already provided by new generation FTAs,[140] may also be sound alternatives. Being less expensive than ISDS, they could be more accessible to stakeholders, especially in the developing world. Also, by involving a neutral third party, they could enhance procedural fairness.[141]

5 | CONCLUSION

The interaction between international investment law and sustainable development should no longer be disputed. Whether this interaction poses a problem or an opportunity depends on from which side of the spectrum we are looking at it.

The current practice of investment tribunals shows that they are reluctant to engage in the discussion and consider the sensitivity of sustainable development-related claims. However, the policies emerging with the negotiation and conclusion of new generation FTAs may alter the situation. These instruments include more explicit and implicit references to the principle in their preambles, sustainable development-related chapters and investment chapters. Arbitrators may fill the gaps of the investment treaties, using the interpretative tools they have at their disposal, and assist in the promotion of sustainable development.

However, it is not apparent that investment tribunals alone would change their practice in this regard. A reform of the current investment arbitration regime is necessary for the creation of a stable and sustainable development-friendly environment. This could be achieved by improving the profile of arbitrators, by incorporating people of more nationalities and different backgrounds in the investment tribunals, as well as by redrafting investment instruments to include substantive treaty provisions that better reflect the principle. These reforms seem both economically and politically plausible. They do not require an alteration of the investment regime altogether, which would be a difficult task. They rather suggest adjustments directed towards taking sustainable development into account, which would respond to the challenges posed by IIAs. Despite potential criticism against the feasibility of the measures, let us not forget that steps which in the past appeared utopian, such as introducing transparency in IIAs and the arbitration system, today are established facts. These reforms are aimed at governments, but could successfully materialize only with the effective support of NGOs and international organizations, who, with their expertise, would be able to provide technical assistance, analytical support and assist in consensus building.[142] This has been already recognized by governments, who entrusted UNCTAD to play a lead role in the facilitation of the IIA reform by organizing multi-stakeholder meetings and consultations with member States.[143] UNCITRAL also mandated a working group to undertake related work.[144] However, even if reformed, the suitability of ISDS to further sustainable development is still in question and, thus, the promotion of alternative dispute resolution methods should be examined.

[135]JA Van Duzer, P Simons and G Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries* (Commonwealth Secretariat 2012) 411.

[136]TPP (n 44) art 9.19(4); CETA (n 44) art 8.23(2); EU–Singapore FTA (n 44) art 9.16(1); EU–Vietnam FTA (n 44) Chapter 8-II, Section 3, Sub-Section 3, art 7(2)(d).

[137]Permanent Court of Arbitration, Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (adopted 16 April 2002) <https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf> art 8(3).

[138]ibid art 24(4) and 27(1), respectively.

[139]IISD Model BIT (n 119) art 5.2; SADC Model BIT (n 119) art 28.4(a); Indian Model BIT (n 66) art 14.3(i–ii).

[140]TPP (n 44) art 9.18(1); CETA (n 44) art 8.20; EU–Singapore FTA (n 44) art 9.14; EU–Vietnam FTA (n 44) Chapter 8-II, Section 3, Sub-Section 2.

[141]UNCTAD, 'Reform of Investor–State Dispute Settlement: In Search of a Roadmap' (UNCTAD 2013) 5.

[142]UNCTAD, 'Reform of the IIA Regime: Four Paths of Action and a Way Forward', UNCTAD Issue Notes No 3 (UNCTAD 2014) 5, 8.

[143]UNGA 'Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)' UN Doc A/RES/69/313 (17 August 2015) para 91.

[144]UNGA 'Report of Working Group III (Investor–State Dispute Settlement Reform) on the Work of its Thirty-Fourth Session' (Vienna, 27 November–1 December 2017)' UN Doc A/CN.9/930 (19 December 2017).

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