Why Can't We Be Friends? Protecting Investors While Also Protecting Legitimate Public Interests and the Sustainable Development of Host Countries in Investor-State Arbitration

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Abstract

International investment law was born in a day and age when investors located in powerful and wealthy developed countries were looking for protection against expropriation and other arbitrary interference with their investments by undemocratic and unaccountable governments in developing countries.[1] Bilateral and multilateral investment protection treaties were drafted by the developed countries to give rights and remedies to their investors. The world of investment law was pretty simple: The Western investors were the good guys, and the interfering host country governments in the second and third world were the bad guys. The interests of the less developed host countries were taken into account only insofar as they were going to get the investment in exchange for the guarantees provided to the investors. The majority of the early treaties contain few, if any, obligations on the investors, along the lines of respecting the laws of the host country or not seeking to corrupt their public officials in exchange for special benefits. They certainly did not take account of legitimate interests such as protection of environmental or social interests which might motivate a host government to regulate or rein in an investment.

Over the last decade or so, the world of investment law has become considerably more complex and colorful. Not only have we seen a diversification with regard to investment flows, including investors from the South using the one-sided language of a treaty to fight against regulations and other interference with an investment in the North. More importantly, we have seen more and more host countries in the South, with more and more democratic and accountable governments, trying to exercise their sovereign rights by making policy decisions in favor of sustainable

[1] To be sure, there has always been a parallel universe of North-North investment flows, next to these North-South investment flows. However, investors from one developed country investing in another developed country, say German investment flowing into the US, were never really all that worried about expropriation or other interference and, in any case, could rely on relatively predictable and fair remedies in courts and other fora, if something did occasionally go wrong. A similar level of trust in the policy- and decision-makers in developing countries did not exist in the past and does not exist today.

development and other non-economic goals and running afoul of overly broad language in investment protection treaties.

As a result, calls for a re-balancing of the rights and obligations of investors and host countries have become louder and more frequent, to the point that they can no longer be ignored.

In this article, we examine in some detail the strengths and weaknesses of several generations of investment protection treaties, leading up to today's crisis of the international investment protection system. Then we discuss a number of options how investor and host country interests could be better balanced and their chances of implementation in practice. Our conclusion is that major reforms will take time and some global leadership – of which little is in sight right now – while some minor but important changes may be doable on a lower level and in the much nearer future.

I. The Strengths and Weaknesses of International Investment Protection

Foreign direct investment (FDI), which includes cross-border mergers and acquisitions (M&A), as well as greenfield investment by foreign natural and legal persons, amounted to about 1.43 trillion dollars in 2017![2] This is by no means an outlier. Every year, well over a trillion dollars are spent by foreigners to join existing or build new business opportunities around the world. As recently as 2015, overall foreign investment amounted to 1.76 trillion dollars,[3] almost matching the pre-crisis record level of 1.833 trillion dollars recorded in 2007.[4] These capital flows are not only impressive in their own right, they are of crucial importance for the economic well-being of many countries and their populations. Indeed, FDI is the single most important source of capital for developing countries, representing 39% of all capital inflows.[5] The significance of loans, development assistance, as well as remittances from nationals working abroad means that all exports of goods and services combined – i.e. the participation in world trade, including all exports of natural resources – is less important than FDI for developing countries with regard to income earned![6] Even for a large developed economy like the United States, FDI is of great importance, accounting for some 12 million jobs, or about 8.5% of the entire U.S. labor force.[7]

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[2] *See* UNCTAD (ed.), World Investment Report xi (2018).
[3] *See* UNCTAD (ed.), World Investment Report x (2016).
[4] *See* UNCTAD (ed.), World Investment Report xv (2008). A decline by 13% to around 1.3 trillion US$ in 2018 (*see* World Development Report x (2019)) is more likely a consequence of current uncertainties in light of US trade wars than a systemic shift.
[5] *See* UNCTAD (ed.), World Investment Report 2018, at p. xii.
[6] *See* World Trade Organization (ed.), World Trade Statistical Review (2017), https://www.wto.org/english/res_e/statis_e/wts2017_e/wts17_toc_e.htm.
[7] *See* International Trade Administration (ed.), New Study: How Important is FDI to the U.S. Economy? (2016), https://blog.trade.gov/2016/02/24/new-study-how-important-is-fdi-to-the-u-s-economy/.

Beyond capital inflows and employment, FDI is credited with other benefits such as transfer of know-how and technology,[8] expansion of productive capacity and competitiveness,[9] general wage growth,[10] human capital development,[11] infrastructure development,[12] and many others.[13]

This explains why many governments will roll-out the red carpet for potential investors and offer a variety of incentives, including tax breaks[14] and special exemptions from certain national rules and regulations.[15] Some go as far as guaranteeing the profitability of an investment

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[8] *See* Wolfgang Keller & Stephen R. Yeaple, *Multinational Enterprises, International Trade, and Productivity Growth: Firm-Level Evidence from the United States*, 91 REV. OF ECON. AND STATISTICS, 821-831 (2003); Arbia Chatmi & Karim Elasri, *Entrepreneurship and Knowledge Spillovers from FDI and Exports Concentration, Diversification*, 35 INT'L J. OF ENTREPRENEURSHIP AND SMALL BUS., 485-510 (2018); Huay Huay Lee & Hui Boon Tan, *Technology Transfer, FDI and Economic Growth in the ASEAN Region,* 11 J. OF THE ASIA PACIFIC ECON., 394-410 (2006).

[9] *See, e.g.* Philippe Gugler & Serge Brunner, *FDI Effects on National Competitiveness: A Cluster Approach*, 13 INT'L ADVANCES IN ECON.RESEARCH, 268-284 (2007); *Henrik Hansen & John Rand, On the Causal Links Between FDI and Growth in Developing Countries*, 29 THE WORLD ECONOMY, 21-41 (2006); Polpat Kotrajaras, Bangorn Tubtimtong & Paitoon Wiboonchutikula, *Does FDI enhance Economic Growth? New Evidence from East Asia*, 28 ASEAN ECON. BULLETIN, 183-202 (2011).

[10] *See* Özlem Onaran & Engelbert Stockhammer, *The Effect of FDI and Foreign Trade on Wages in the Central and Eastern European Countries in the Post-Transition Era: A Sectoral Analysis for the Manufacturing Industry*, 19 STRUCTURAL CHANGE & ECON. DYNAMICS, 66-80 (2008).

[11] For discussion of the underlying issues see Magnus Blomström & Ari Kokko, FDI and Human Capital: A Research Agenda, (OECD Development Centre, Working Paper No. 195, 2002).

[12] While some studies show that a minimal level of infrastructure is a pre-condition for FDI, other studies also show that FDI, once coming into a country, helps with the further development of road and rail networks, ports, telecom and power infrastructure, etc. *See* Farrokh Nourzad, David N. Greenwold & Rui Yang, *The Interaction Between FDI and Infrastructure Capital in The Development Process*, INT'L ADVANCES IN ECON. RESEARCH, 203–212 (2014); Mumtaz Hussain Shah, *The Significance of Infrastructure for FDI Inflow in Developing Countries*, J. OF LIFE ECON., 1-16 (2014); Julian Donaubauer, Birgit Meyer & Peter Nunnenkamp, Aid, *Infrastructure, and FDI: Assessing the Transmission Channel with a New Index of Infrastructure*, 78 WORLD DEVELOPMENT, 230-245 (2016); Kevin Lehnert, Mamoun Benmamoun, Hongxin Zhao, *FDI Inflow and Human Development: Analysis of FDI's Impact on Host Countries' Social Welfare and Infrastructure*, 55 THUNDERBIRD INT'L BUS. REV., 285-298 (2013).

[13] *See also,* ASHOKA MODY, FOREIGN DIRECT INVESTMENT AND THE WORLD ECONOMY (2014); HWY-CHANG MOON, FOREIGN DIRECT INVESTMENT: AGLOBAL PERSPECTIVE (2016); IMAD A. MOOSA, FOREIGN DIRECT INVESTMENT – THEORY, EVIDENCE AND PRACTICE(2002); MICHAEL J. ENRIGHT, DEVELOPING CHINA – THE REMARKABLE IMPACT OF FOREIGN DIRECT INVESTMENT (2017); RAJNEESH NARULA & SANJAYA LALL (EDS), UNDERSTANDING FDI-ASSISTED ECONOMIC DEVELOPMENT(2006); DEBASHIS CHAKRABORTY & JAYDEEP MUKHERJEE (EDS), TRADE, INVESTMENT AND ECONOMIC DEVELOPMENT IN ASIA, 2018; YINGQI ANNIE WEI & V.N. BALASUBRAMANYAM (EDS), FOREIGN DIRECT INVESTMENT – SIX COUNTRY CASE STUDIES(2005); MARKUS KRAJEWSKI & RHEA TAMARA HOFFMANN, RESEARCH HANDBOOK ON FOREIGN DIRECT INVESTMENT(2019).

[14] *See* ALEX EASSON, TAX INCENTIVES FOR FOREIGN DIRECT INVESTMENT (2004); Milan Sedmihradsky & Stanislav Klazar, Tax Competition for FDI in Central-European Countries, (CESifo. Working Paper No. 647, 2002); Emmanuel Cleeve, *How Effective Are Fiscal Incentives to Attract FDI to Sub-Saharan Africa?,* 24 J. DEV. AREAS 135 (2008).

[15] In many cases, special treatment under the law as an incentive for foreign investors is negotiated as part of an investment contract between the government and the investor, rather than written into general laws and regulations. Since special treatment of foreign investors is often seen critically by domestic competitors and not infrequently results in allegations that bribes may have been paid, many of the cases are not widely known or advertised. Examples where special treatment is made public and widely advertised are the creation of special economic zones

or promising minimum rates of return,[16] potentially compromising long-term benefits for short term gains. Some investors find other ways of extracting more value from a host country than was ever transferred to it.[17] This explains why not everybody is excited about the arrival of foreign investors, not every foreign investment project is seen as beneficial to the host country, and not every country is winning in the game of FDI.[18]

Like most things in life, whether FDI is good or bad for a country and whether a particular investment is successful and sustainable or not depends on appropriate regulation and management. Besides the corporate leadership and their commitment – or lack thereof – to corporate social responsibility, regulatory oversight can be provided by the home country of the investor and by the host country of the investment. Unfortunately, the home countries often show little interest in ensuring good conduct by their companies when doing business abroad, as long as some benefits, i.e. profits and tax revenue, are brought home.[19] The host countries, on the other

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where taxes are lower and certain rules and regulations do not apply or apply differently. *See* THOMAS FAROLE & GOKHAN AKINCI EDS.,SPECIAL ECONOMIC ZONES: PROGRESS, EMERGING CHALLENGES, AND FUTURE DIRECTIONS (2011); Magdalena Owczarczuk, *Government Incentives and FDI Inflow into R&D: The Case of the Visegrad Countries*, 1 ENTREPRENEURAL BUS. AND ECON. REV. 73 (2013). Special economic zones have become so numerous and so important – there are now more than 5000 of them – that UNCTAD dedicated its latest World Investment Report to the subject; *See* United Nations Conference on Trade and Development, *World Investment Report 2019* (2019), https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf.

[16] This was alleged, for example, by the claimants in Mobil Cerro Negro, Ltd. v. Petroleos de Venezuela SA, Award, ICC Arbitration Case No. 15416/JRF/CA (Dec. 2011) (holding that the 1996 investment contract between the oil company and the Venezuelan government did contain certain guarantees, but also a cap that assumed no damages to the investor if oil prices were to go beyond 27 US$ per barrell, which they did very soon).

[17] There are more and more critical studies of Chinese investment in Africa and other parts of the world with at least some suggesting that China was engaging in a new kind of colonial exploitation. *See* DEBORAH BRAUTIGAM, THE DRAGON'S GIFT – THE REAL STORY OF CHINA IN AFRICA (2011); Wenjie Chen, David Dollar & Heiwai Tang, *Why Is China Investing in Africa? Evidence from the Firm Level*, 32 WORLD BANK ECON. REV. 610 (2018); EVELYN WAMBOYE & ESUBALEW ALEHEGN TIRUNEH EDS., FOREIGN CAPITAL FLOWS AND ECONOMIC DEVELOPMENT IN AFRICA: THE IMPACT OF BRICS VERSUS OECD (2017); *see also* ZED BOOKS, AGRICULTURAL DEVELOPMENT AND FOOD SECURITY IN AFRICA, THE IMPACT OF CHINESE, INDIAN AND BRAZILIAN INVESTMENTS (FANTU CHERU & RENU MODI EDS.,2013).

[18] An example of a particularly large investment project that has been subject to praise and criticism in similar measure is China's Belt and Road Initiative. In a nutshell, China is developing the infrastructure for improved maritime and land-based trade across Asia and into Europe. It is building ports, railroads and roads, and related infrastructure, in dozens of countries from Central Asia to Eastern Europe. While some see the influx of money and the prospect of improved trading lanes as godsend, others point out that most of the work contracts go to Chinese firms which employ Chinese workers and that the loans given for the projects often have to be repaid by the countries with interest. *See, e.g.,* Michael Clarke, *Beijing's March West: Opportunities and Challenges for China's Eurasian Pivot*, 60 ORBIS 296 (2016); Peter Enderwick, *Attracting "Desirable" FDI: Theory and Evidence*, 14TRANSNAT' CORP. 93 (2005); John Hurley, et al., , *Examining the Debt Implications of the Belt and Road Initiative from a Policy Perspective*, 3 J. INFRASTRUCTURE, POL' & DEV. 139 (2019); Jeffrey Reeves, *China's Silk Road Economic Belt Initiative: Network and Influence Formation in Central Asia*, J. OF CONTEMP. CHINA 502 (2018). *See also* Robert Stehrer & Julia Woerz, '*Attract FDI!' — A Universal Golden Rule? Empirical Evidence for OECD and Selected Non-OECD Countries*, 21 EUR. J. OF DEV. RES. 95 (2009); Avi Nov, *The "Bidding War" to Attract Foreign Direct Investment: The Need for a Global Solution*, 25 VA. TAX REV. 835 (2006). *See* Vintila Denisia, *Foreign Direct Investment Theories: An Overview of the Main FDI Theories*, EUR. J. OF INTERDISC. STUD. 53 (2010); Dinkar Nayak & Rahul N. Choudhury, *A Selective Review of Foreign Direct Investment Theories*, (ARTNeT, Working Paper No. 143, 2014).

[19] For example, while the U.S. is quite strict about anti-competitive behavior by U.S. companies at home, and by foreigners doing business or otherwise affecting the American marketplace, U.S. antitrust law does not apply at all

hand, have a strong interest in ensuring good conduct by investors but they may have granted special rights and privileges to attract the investment in the first place. More importantly, the host countries and the investors do not always agree on what kind and what level of regulatory oversight is appropriate.

In particular, in developing nations, investors have always been concerned about changes in the political and regulatory environment that can have a detrimental effect on a particular business or an entire sector of the economy. For example, an investor who received certain concessions or promises from the government in a (developing) country, may see those concessions or promises revoked after a change of government in that same country. In particular, if the change of government came about by a revolution or military coup, the new leadership may have few incentives to honor the promises made by the old leadership they have just replaced. Expropriations or even the nationalization of an entire sector used to be quite frequent events in certain parts of the world. In such cases, the investors have typically found legal remedies in the courts of the host country of limited interest. Instead, international law recognizes the right of the home country of the investor to bring claims against the host country where an investment was taken away. This doctrine is based on the passive personality principle, i.e. the notion that a violation of the rights of its citizens (both natural persons and legal entities) is also a violation of the rights of the sovereign state itself.[20] On this basis, the home country can provide diplomatic protection and even demand physical protection of its citizens while abroad, as well as compensation in case of violation of international minimum standards for the treatment of aliens found in customary international law and/or specific friendship, commerce and navigation treaties.[21]

Investor protection on the basis of public international law has three distinct drawbacks, however. First, it is always a political question for the home country whether it wants to bring a claim on behalf of its citizens against a particular host country at a particular moment in time. Private parties usually cannot force the hand of their government in this regard. Second, even if a home country brings claims against a host country, it may not be able to enforce them. Powerful

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and neither the Commerce Department nor the Federal Trade Commission take any interest in the (anticompetitive) behavior of U.S. firms in foreign markets. *See* J.S. Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View From Abroad*, 11 CORNELL INT'L L.J. 195 (1978); Christopher Sprigman, *Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction Over International Cartels,* 72 U. CHI. L. REV. 265 (2005); Makan Delrahim, *Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct,* 61 N.Y.U. ANN. SURV. AM. L. 415 (2005-2006). The consistent position of U.S. antitrust authorities and U.S. courts has been that U.S. antitrust laws will only apply to foreign conduct, i.e. acts like price fixing or market division committed abroad, if that conduct was intended to affect U.S. commerce and did in fact have a significant effect on U.S. commerce. United States v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1945). This "effects doctrine" means that the Sherman Act does not reach injuries of foreign plaintiffs suffered in foreign markets when those injuries are independent of the anti-competitive conduct's effects in the United States. F. Hoffmann-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155, 159-60 (2004).

[20] *See* Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L L.J. 1 (1993).

[21] *See* David Collins, *An Introduction to International Investment Law*, CAMBRIDGE UNIVERSITY PRESS 1-32 (2017).

nations like the British Empire resorted to gunboat diplomacy at times to secure and enforce the rights or interests of their subjects,[22] but not every home country can and will always marshal the necessary economic or military forces to exert this kind of pressure. Third, even if a home country does bring a claim and successfully collects some form of compensation, it is yet another question whether it is willing to share the benefits with the injured parties themselves.

Modern international investment law addresses these questions by providing the investors themselves with rights to bring claims directly against host countries in international fora. In the absence of one or more international investment courts, thousands of bilateral investment treaties (BITs) between home countries and host countries, as well as hundreds of multilateral investment agreements (MIAs) and other treaties with investment provisions (TIPs) provide for investor-state arbitration in cases where an investment was expropriated or minimum standards of treatment, like full protection and security (FPS) or fair and equitable treatment (FET), were violated.[23]

Historically, arbitration has experienced ups and downs and was not always widely used and relied upon as a method of dispute resolution. Addressing the early history of arbitration, Várady notes that "[a]rbitration is an institution which preceded courts; yet shortly after the appearance of the latter, arbitration assumed the position of the younger (and weaker) brother."[24] However, since the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has become virtually universally accepted,[25] international commercial arbitration, and its more specific sibling international investment arbitration, have become the most popular dispute resolution mechanisms, making arbitration the 'stronger' brother.[26] Nowadays, many

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[22] *See, e.g.,* REBECCA BERENS MATZKE, DETERRENCE THROUGH STRENGTH: BRITISH NAVAL POWER AND FOREIGN POLICY UNDER PAX BRITANNICA (2011); the seminal study of gunboat diplomacy in the 20th century is JAMES CABLE, GUNBOAT DIPLOMACY 1919-1991 (3rd ed. 1994).

[23] According to a 2012 survey done for the OECD, 96% of all investment treaties contain provisions allowing investors to raise claims against states through international arbitration, *see* David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* 64 (OECD Working Paper No. 2012/03, 2012). Only in rare cases specific bilateral agreements provide for dispute settlement more akin to court procedures. An example is the Iran-United States Claims Tribunal created in 1981 and endowed with jurisdiction to hear claims by US nationals against Iran and by Iranian nationals against the US, as well as certain interstate claims. The Tribunal has finalized about 3900 cases and is still working on a number of large and complex claims. For more information, *see* Iran-United States Claims Tribunal, www.iusct.net (2019).

[24] Tibor Várady, *Arbitration Despite the Parties*?*in* LAW AND REALITY: ESSAYS ON NATIONAL AND INT'L PROCEDURAL LAW 351 (Mathilde Sumampouw et al. eds.,1992).

[25] *See* U.N. Comm'n on Int'l Trade Law, *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2. The 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been ratified by 160 countries, including virtually all major trading nations and host countries of large investment flows.

[26] *See generally* GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 119 (2008) ("…[I]nvestment treaty awards are more widely enforceable than the rulings of any court or tribunal, international or domestic, that has the authority to resolve individual claims in regulatory disputes" which gives investment arbitration tribunals "…a coercive force that is unrivalled in public law adjudication"); *Accord* Tibor Várady, *The Elusive Pro-Arbitration Priority in Contemporary Court Scrutiny of Arbitral Awards,in* COLLECTED COURSES OF THE XIAMEN ACADEMY OF INT'L L. 355; *See also* August Reinisch, *The Future of Investment Arbitration, in* THE

arbitral institutions provide a platform for hearing claims by foreign investors against host states, with the International Centre for Settlement of Investment Disputes (ICSID) being primus inter pares.[27] The success of international investment arbitration is not only explained by states' unwillingness to submit to the jurisdiction of foreign courts. Investors also have concerns related to neutrality and fairness of judges as part of litigation proceedings at the domestic level in the host country of the investment. Investors prefer arbitration not only because it is generally considered to offer an impartial forum for bringing claims against host states but also because the New York Convention provides for an effective enforcement mechanism without parallel in the realm of transnational litigation.[28] All of these characteristics of the arbitration process make it an essential element in the system of protection of investors' rights.

In spite of all the positive aspects of investment arbitration as a dispute resolution system, it is subject to growing criticism, including claims that investment arbitration is systemically biased against host countries.[29] In part, this criticism may be exaggerated and reflect primarily the

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INT'L INV. L. FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 897 (Christina Binder et al. eds., 2009) ("For investors, ready to go to arbitration and thus implicitly recognizing that their investment cannot be salvaged by negotiations or mediation with the host State, the ultimate value of any adversarial dispute settlement mechanism lies in its potential for enforcement"); MUTHUCUMARASWAMY SORNARAJAH, THE INT'L LAW ON FOREIGN INV. 216 (2012); Sergio Puig, *No Right Without a Remedy: Foundations of Investor-State Arbitration, in* THE FOUNDATIONS OF INT'L INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 235-56 (Zachary Douglas et al., eds., 2014).

For the overview of the stages of investment arbitration proceedings *see* Joachim Delaney, et al., *Procedural Transparency, in* THE OXFORD HANDBOOK OF INT'L INV. L. 728-29 (Christoph Schreuer et al., eds., 2008) (International investment arbitration cases subject to exceptions generally follow the following procedural steps: "…commencement of the arbitration, the constitution of the tribunal, the submission of pleadings and evidence, an oral hearing and further written submissions in some cases, possible settlement discussions, the issuance of an award, and, if necessary, challenge to or enforcement of the award").

[27] ICSID Cases, 2019 alone has served as an administering institution for more than 500 investment cases to date. *See* UNCTAD, ICSID CASES, 2019, http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution. Reinisch and Malintoppi state that the ICSID system "…has known tremendous success, particularly over the last ten years, and is likely to grow further due to the increase in the number of Bilateral Investment Treaties … all over the world". *See* August Reinisch & Loretta Malintoppi, *Methods of Dispute Resolution, in* THE OXFORD HANDBOOK OF INT'L INVESTMENT L. 692 (Christoph Schreuer et al., eds, 2008); *See also* August Reinisch, *The Future of Investment Arbitration, in* INT'L INV. L. FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 894 (Christina Binder et al. eds, 2009); Ibironke Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8 SAN DIEGO INT'L L. J. 345-385 (2007); Elizabeth Moul, *The International Centre for the Settlement of Investment Disputes and the Developing World: Creating a Mutual Confidence in the International Investment Regime*, 55 SANTA CLARA L. REV. 881-916 (2015).

[28] *See* Stephan Schill, *Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement, in* THE BACKLASH AGAINST INV. ARBITRATION: PERCEPTIONS AND REALITY 33 (Michael Waibel et al. eds., 2010); MUTHUCUMARASWAMY SORNARAJAH, THE INT'L LAW ON FOREIGN INV. 217 (2012); Herfried Wöss et al., *Valuation of Damages in International Arbitration*, *in* DAMAGES IN INT'L ARBITRATION UNDER COMPLEX LONG-TERM CONTRACTS 259 (Loukas Mistelis ed., 2014); Vladimir Pavić, *"Non-Signatories" and the Long Arm of Arbitral Jurisdiction, in* RESOLVING INT'L CONFLICTS : LIBER AMICORUM TIBOR VÁRADY 213 (Peter Hay at al. eds., 2009).

[29] *See* Stavros Brekoulakis, *Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making,* 4 J. OF INT'L DISPUTE SETTLEMENT 553 (2013); Robin Broad, *Corporate Bias in the World Bank Group's International Centre for Settlement of Investment Disputes: A Case Study of a Global Mining Corporation Suing El Salvador,* 36 U. PA. J. INT'L L. 851 (2014-2015); Catherine A. Rogers, *The Politics of*

fact that countries are increasingly held accountable for their actions, something they are not used to in (public) international law. In fact, at least statistically, the majority of Investor-State-Dispute-Settlement (ISDS) cases are decided in favor of host countries.[30] That being said, at least some criticism is well-founded and can only partly be explained by the de-centralized nature of ISDS with decisions generally taken by ad-hoc tribunals. Among such criticisms are a lack of transparency, inconsistency of arbitral awards, unpredictability of the system, and other problems.[31] For instance, Acconci notes that "…ICSID is criticized by some developed and developing countries that are no longer satisfied with the increasingly frequent recourse to its arbitration by private investors, resulting in increasingly complex amounts of inconsistent case-law.[32] A case on point are the two arbitration procedures initiated by Ron Lauder against the Czech

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International Investment Arbitrators, 12 SANTA CLARA J. INT'L L. 223 (2013); Gus Van Harten, *Perceived Bias in Investment Treaty Arbitration, in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 433 (Michael Waibel et al. eds., 2010).

[30] UNCTAD reports a total of 767 known treaty-based ISDS cases brought as of January 2017. 495 of them had been concluded, with 36% decided in favor of States, 27% in favor of investors, 2% in favor of neither party, 25% settled, and 10% discontinued. *See* UN General Assembly, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Note by the Secretariat on Possible Reform of Investor-State Dispute Settlement (ISDS),* ¶ 12-13, U.N. Doc. A/CN.9/WG.III/WP.142 (September 28, 2017).

[31] *See* Tibor Tajti, *The Dynamic Conception of Alternative Dispute Resolution*, *in* ALTERNATIVE MEANS OF CONFLICT RESOLUTION IN BUSINESS 195 (Ryšardas Burda et al. eds., 2015) (criticizing investment arbitration as "…a weapon in the hands of multinationals"). For issues related to the rising cost of investment arbitration *see* Susan Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 WA U. L. REV. 769-852 (2011). For arguments related to the lack of proper balancing of interests in the current system of investment arbitration *see generally* Aaron Cosbey, *The Road to Hell? Investor Protections in NAFTA's Chapter 11, in* INT'L INV. FOR SUSTAINABLE DEVELOPMENT: BALANCING RIGHTS AND REWARDS 168 (Lyuba Zarsky ed., 2005) ("…[I]t is inappropriate that the balancing of public policy priorities such as health and safety, the environment and economic growth be conducted outside of government and with few of the procedural safeguards that help ensure legitimacy, transparency and accountability"); Stephan Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA J. OF INT'L L. 57, 69 (2011) ("The system of international investment law…[is facing and will]… most likely continue to face demands for increased transparency, openness, predictability, and fair balance between investors' rights and public interests"); Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions,* 73 FORDHAM L. REV. 1521-1625 (2004-2005); Thomas Schultz and Cédric Dupont, *Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study*, 25 EUR. J. OF INT'L L. 1147–1168 (2014); Joachim Delaney et al., *Procedural Transparency, in* THE OXFORD HANDBOOK OF INT'L INV. L. (Christoph Schreuer et al. eds, 2008), at 724 (The international investment regime "…falls well short of openness").

[32] Pia Acconci, *Most-Favoured-Nation Treatment*, *in* THE OXFORD HANDBOOK OF INT'L INV. L. 367 (Christoph Schreuer et al. eds., 2008). It is also important to note the writings of Prof. Tibor Várady on this issue. While Várady affirms that it is not likely that the pro-arbitration stance will change to the negative towards international commercial arbitration, he is not as certain with respect to international investment arbitration due to „existing reservations (or „hostility") towards...investment arbitration...." *See* TIBOR VÁRADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 81 (2015). *See also* William McElhiney, *Responding to the Threat of Withdrawal: On the Importance of Emphasizing the Interests of States, Investors, and the Transnational Investment System in Bringing Resolution to Questions Surrounding the Future of Investments with States Denouncing the ICSID Convention,* 49 TEX. INT'L L. J. 601 (2014); August Reinisch & Loretta Malintoppi, *Methods of Dispute Resolution, in* THE OXFORD HANDBOOK OF INT'L INV. L. 719 (Christoph Schreuer et al. eds, 2008) ("…[W]ith a significant growth experienced by investment arbitration over the last two decades…a number of inconsistent and partially conflicting decisions have been produced"); Nassib Ziadé, *Challenges and Prospects*

Republic after a media broadcasting license had been revoked. One claim was brought by Mr. Lauder personally, under the US-Czech BIT. A parallel case was brought by CME Czech Republic BV, a Dutch company owned by Mr. Lauder, under the Netherlands-Czech BIT. Both proceedings concerned the same state measure, the same harm, and, at least from an economic perspective, the same claimant. Yet the outcome could not have been more different. While one claim was dismissed,[33] the other resulted in an award of 400 million US$ in damages.[34] Since both tribunals cannot be right, at least one of the decisions has to be wrong. Given the amounts at stake, this is an uncomfortable thought, to say the least. While the Lauder case may be extreme, it is not the only example of unexpected or hard to justify results. Consequently, August Reinisch comments that "…it is an open secret that there are awards and decisions of highly variable quality" with some of them not fulfilling "…expectations of the users of the system…."[35]

In response to growing criticism, UNCITRAL established a Working Group with a mandate to (i) identify and consider concerns regarding ISDS, (ii) consider whether reform is desirable in light of identified concerns, and (iii) develop any relevant solutions to be recommended to the UN Commission.[36] The Working Group identified "concerns pertaining to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals" with specific problems regarding "divergent interpretations of substantive standards, divergent interpretations regarding jurisdiction and admissibility, and procedural inconsistency,"[37] the "lack of a framework to address multiple proceedings" about the same issue,[38] well as "limitations in the current mechanisms to address inconsistency and incorrectness of arbitral decisions."[39] The Working Group also found "concerns pertaining to arbitrators and decision makers," namely a "lack or apparent lack of independence and impartiality,"[40] "limitations in existing challenge mechanisms" that can be used to remove an arbitrator,[41] a widespread "lack of diversity of decision makers," in particular with regard to gender and

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Facing the International Centre for Settlement of Investment Disputes, *in* THE EVOLVING INT'L INV. REGIME: EXPECTATIONS, REALITIES, OPTIONS 120 (José Alvarez et al. eds., 2011).

[33] *See* Final Award of 3 September 2001 in the Matter of an UNCITRAL Arbitration between Ronald S. Lauder and the Czech Republic, https://www.italaw.com/sites/default/files/case-documents/ita0451.pdf.

[34] *See* Final Award of 14 March 2003 in the Matter of an UNCITRAL Arbitration between CME Czech Republic B.V. (The Netherlands) vs. The Czech Republic, https://www.italaw.com/cases/281. *See, e.g.,* Wolfgang Kühn, *How to Avoid Conflicting Awards – The Lauder and CME Cases,* 5 J. WORLD INVESTMENT & TRADE 7 (2004).

[35] August Reinisch, *The Future of Investment Arbitration, in* THE INT'L INV. L. FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 904 (Christina Binder et al. eds, 2009); *See also* LOUKAS MISTELIS ED., PERVASIVE PROBLEMS IN INT'L ARBITRATION (2006).

[36] *See* U.N. General Assembly, *United Nations Commission on International Trade Law, Draft Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Sixth Session,* ¶ 2, U.N. Doc A/CN.9/964 (Nov. 6, 2018) [hereinafter *Working Group III Draft Report*].

[37] *Working Group III Draft Report*, *supra,* note 36, at ¶ ¶ 27-40.

[38] *Working Group III Draft Report*, *supra,* note 36, at ¶ 41-53.

[39] *Working Group III Draft Report, supra,* note 36, at ¶ 54-63.

[40] *Working Group III Draft Report*, *supra,* note 36, at ¶ 66-83.

[41] *Working Group III Draft Report*, *supra,* note 36, at ¶ 84-90.

geographical representation,[42] and occasional concerns about "qualifications of decision makers."[43] Finally, the Working Group identified "concerns pertaining to cost and duration of ISDS cases,"[44] with an emphasis on "lengthy and costly ISDS proceedings and the lack of a mechanism to address frivolous or unmeritorious cases,"[45] which is of particular concern to developing countries with limited resources, as well as concerns about the allocation of costs and the availability of security for costs.[46] Better mechanisms for the latter could discourage at least some of the frivolous or unmeritorious proceedings.

The UNCITRAL Working Group is certainly addressing important concerns and will most likely make at least some useful proposals regarding how they can be addressed. However, one concern is not even on the agenda, namely whether ISDS tribunals are willing and able to find an appropriate balance between investor rights and the rights of host countries to regulate businesses in the pursuit of public policy goals in general and sustainable development in particular. This will be the focus of our analysis.

In the first part, the article discusses the growing crisis in investment arbitration caused by the traditional focus on protection of foreign investors and the neglect of public interest goals in the host country. We outline the lack of balance of interests and provide multiple examples, where investors have prevailed although the host country was merely trying to regulate the investment or the industry for laudable purposes, such as environmental or social protection. As a result, there exists a growing "regulatory chill," i.e. host countries shying away from sensible and proportionate regulation for fear of international liability, and there is a growing movement of countries exiting the traditional investment protection agreements and the ICSID system. To save the important and otherwise successful investment protection system, the second part explores different options how sustainable development goals of the host country could become a more prominent factor in the examination of investor claims. Obviously, a more balanced approach would have to be introduced in a way that acknowledges legitimate interests on both sides, to be widely acceptable. In the short term, options are somewhat limited but no less important. They include the appointment of special counsel for the representation of public interest goals. This idea, in various formats, is discussed in some detail. In the longer term, bilateral and multilateral investment protection treaties have to be re-negotiated to provide for a more balanced approach. Finally, we examine some of the arguments for and against an institutionalized appellate review mechanism in front of some form

Working Group III Draft Report, *supra,* note 36, at ¶ 91-98. *See generally* Kabir A.N. Duggal, *Understanding Racial Representation in International Investment Arbitration*, 72 DISP. RESOL. J. 19 (2017).

[43] *Working Group III Draft Report*, *supra,* note 36, at ¶ 99-108.

[44] The study prepared by Gaukrodger & Gordon for the OECD in 2012 found that ISDS cases with publicly available information averaged about 8 million US$ in costs for both parties combined and could exceed 30 million US$ per case; *see also* U.N. General Assembly, *United Nations Commission on International Trade Law, Working Group III, Possible Reform of Investor-State Dispute Settlement (ISDS) – Cost and Duration*, ¶ 42 U.N. Doc. A/CN.9/WG.III/WP.153 (Aug. 2018) [hereinafter *Working Paper 153*]. Working Paper153 also reports an average duration of 1,325 days or 3.63 years, at ¶ 54, and a maximum duration in one case of 13 years and 9 months, at ¶ 55.

[45] *Working Group III Draft Report*, *supra,* note 36, at ¶ 110-123.

[46] *Working Group III Draft Report*, *supra,* note 36, at ¶ 124-133.

of permanent investment court. While none of the potential remedies will be achieved easily and quickly, at the very least, greater awareness will be the first step toward better solutions for all sides.

II. The Mounting Criticism Against International Investment Arbitration

Investment arbitration is being criticized for becoming an all-too powerful system which threatens the sovereignty of states. In the early decades of investment arbitration, cases were often about expropriation, and the question was less whether the state should pay compensation, but how much would be adequate. In a way, this period built a momentum in favor of investors, with almost a presumption that a state may have been within its rights to expropriate or nationalize an investment, but generally had to do so for a public purpose and with payment of prompt, adequate, and effective compensation.[47]

In more recent years, states are less in the business of taking away an entire investment; the focus has shifted in many cases to regulatory interventions by host states that are interfering with business plans or profit expectations of investors. Since many bilateral and multilateral investment protection agreements are quite broad when it comes to obligations of host states,[48] countries are increasingly concerned with the impact that investment arbitration provided in most of these international investment agreements may have on their right to regulate and undertake other measures in the public interest.[49] States have faced multi-million and multi-billion dollar arbitration claims by investors for the alleged violation of investment protection standards.[50] For

[47] The terms "prompt, adequate, and effective" were initially coined by US Secretary of State Cordell Hull in 1938, after Mexico had expropriated a number of American farmers. It is known as "the Hull Formula" and has become part of customary international law for the compensation owed by the host country to the home country of an investor after an expropriation. For more information see Oscar Schachter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121-30 (1984). *See also* Suzy H. Nikièma, *Compensation for Expropriation*, INT'L INSTITUTE FOR SUSTAINABLE DEVELOPMENT 1 (2013).

[48] Indeed, many investment treaties contain so-called "umbrella clauses" pursuant to which the host state has to observe any and all obligations it may have entered into with regard to foreign investments and may have to guarantee to investors the continuity of favorable treatment in the future. By contrast, general clauses according to which the investors have to abide by all laws and regulations of the host country and/or the home country and/or international norms such as the OECD Guidelines for Multinational Enterprises somehow never find their way into investment treaties.

[49] Karl Sauvant & José Alvarez, *International Investment Law in Transition, in* THE EVOLVING INT'L INV. REGIME: EXPECTATIONS, REALITIES, OPTIONS xxxviii (*José Alvarez* et al. eds., 2011). *See* Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime*, 50 HARV. INT'L L. J. 491-534 (2009).

[50] An example of a developed country facing investment arbitration is Germany. The Swedish investor filed arbitration claims against Germany with respect to its adoption of laws on phasing out of nuclear power plants by 2022. *See* Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany I, ICSID, Case No. ARB/09/6, Award ¶ 3 (Mar. 11, 2011) http://investmentpolicyhub.unctad.org/ISDS/Details/329 (the investor claimed 1400.00 mln. USD as compensation; the case was settled); Vattenfall AB and others v. Federal

instance, in *Micula v. Romania*, Romania was held liable for breaching the Sweden-Romania bilateral investment treaty (BIT) due to its revocation of economic incentives offered to investors under its national law.[51] The tribunal ruled in favor of the investor[52] even though Romania was required to repeal its law in order to comply with EU state aid obligations, and the investor was from Sweden, another Member State of the EU bound by EU state aid rules, just like Romania. It is interesting that the European Commission has adopted a decision ordering Romania *not* to pay the compensation awarded to investors by the ICSID tribunal.[53] The Commission has also submitted that the Micula award is "…illegal and unenforceable under E.U. law" and that "….as a matter of E.U. law, Romania is squarely prohibited from complying with the Award".[54] At present, enforcement proceedings are pending in the United States. It remains to be seen whether the award will be enforceable. Similarly, in *Eiser v. Spain*, the tribunal found Spain liable to pay compensation in the amount of 128 million Euro to the investor.[55] According to the tribunal, Spain violated the fair and equitable treatment standard under the Energy Charter Treaty[56] due to its adoption of measures that reduced the level of subsidies paid to investors in the Concentrated Solar Power sector and other renewable generators.[57] The European Commission has instructed Spain *not* to pay investor-state awards in this and several other solar energy cases, on EU state aid grounds.[58]

Investment arbitration is being criticized by states for being overly protective of investors' rights and not adequately considering state interests. One example is the recent case of *Bear Creek v. Peru*. Bear Creek Mining Corporation was successful in an arbitration against Peru under the Free Trade Agreement between Canada and Peru.[59] Bear Creek, a Canadian company, invested in the Santa Ana Mining Project in Peru.[60] The mining project turned out to be highly contentious. Local communities, in particular, were against it due to environmental and various other

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Republic of Germany II, ICSID, Case No. ARB/12/12, Award ¶ 3 (May 31, 2012) http://investment-policyhub.unctad.org/ISDS/Details/467 (the investor claimed 4.7 billion EUR as compensation; the case is currently pending).

[51] Ioan Micula, et. al., v. Romania, ICSID, Case No. ARB/05/20 (Dec. 11, 2013) https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf.

[52] Ioan Micula, et. al., v. Romania, *supra* note 51, at ¶¶ 9, 186.

[53] Commission Decision 2015/1470, Procedures Relating to the Implementation of the Competition Policy, 2014 O.J. (L939), 2.

[54] Brief for the Commision of the European Union as Amicus Curiae Supporting Micula, et al., v. Gov't of Romania,104 F.Supp.3d 42 (D.D.C 2015) (No. 15-3109). Also available at https://www.italaw.com/sites/default/files/case-documents/italaw9198.pdf.

[55] Eiser Infrastructure Ltd. v. Kingdom of Spain, ICSID, Case No. ARB/13/36, Award ¶ 167 (May 4, 2017) https://energycharter.org/fileadmin/DocumentsMedia/Disputes/ISDSC-043en.pdf.

[56] *See* Energy Charter Treaty (1994) https://energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/.

[57] Eiser v. Spain, *supra* note 55.

[58] Douglas Thomson, *EU Warns Spain not to Pay Solar Awards,* GLOBAL ARBITRATION REV. (Jan. 19, 2018) https://globalarbitrationreview.com/article/1152912/eu-warns-spain-not-to-pay-solar-awards.

[59] *See generally* Bear Creek Mining Corporation v. Republic of Perú, ICSID, Case No. ARB/14/21, Award ¶ 153 (Nov. 30, 2017) https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf.

[60] *Id.* at ¶ 150-51.

concerns.[61] The protests resulted in the burning of a mining camp in 2008[62] and continued with anti-mining marches, massive demonstrations, strikes, and other activities through 2011.[63] In May of 2011, the number of protesters grew to 13,000 people in Puno with protests becoming violent and resulting in the looting of governmental institutions and destruction of commercial establishments.[64] According to the *Amici* submissions, the Bear Creek Mining Corporation "… did not do what was necessary to understand the doubts, worries and anxieties of the Aymara culture and religiosity…."[65] Moreover, the expert report states that "…Bear Creek did not engage in sufficient efforts to inform all the communities within its area of influence of the effects and benefits the project could bring."[66] As a result of the intense protests against the mining project, the Peruvian government revoked Supreme Decree 083[67] which entitled the investor to "… acquire, own and operate the…mining concessions and to exercise any rights derived from the ownership."[68] At the time of the revocation, Claimant Bear Creek had not yet secured some 99 agreements for the use of land and still had to have its Environmental and Social Impact Assessment approved.[69] Apart from this, according to witness testimony, it would have been highly unlikely for the investor's mining project to continue amidst the strong anti-mining protests.[70] Despite Bear Creek's lack of permits and widespread resistance against its mining project, the Tribunal decided that Peru had indirectly expropriated Bear Creek's investment and ordered it to pay damages in the amount of US$ 18,237,592, as well as to reimburse 75% of Claimant's arbitration costs.[71] This case shows the problem investment arbitration proceedings have with the adequate consideration of state and local community interests.

Another criticism directed against investment arbitration is the problem of uncertainty and unpredictability.[72] For example, in *Yukos v. Russia*, the tribunal applied a 25% reduction in

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[61] *Id.* at ¶ 152-53.
[62] *Id.* at ¶ 155.
[63] *Id.* at ¶ 169-78, 182.
[64] *Id.* at ¶ 189-90.
[65] *Id.* at ¶ 218.
[66] Expert Report of Antonio Alfonso Peña Jumpa at ¶ 96, Bear Creek Mining Corporation v. Republic of Perú, Case No. ARB/14/21, Opinion of Expert on the rights of Anthropology and Sociology (Oct. 6, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw 4476.pdf.
[67] Bear Creek Mining Corporation v. Republic of Perú, ICSID, Case No. ARB/14/21, Award ¶ 202 (Nov. 30, 2017) https://www.italaw.com/sites/default/files/case-documents/italaw 3036.pdf.
[68] *Id.* at ¶ 149.
[69] *Id.* at ¶. 201.
[70] *Id.* at ¶. 265. *See also* Partial Dissenting Opinion of Philippe Sands QC at ¶ 38, Bear Creek Mining Corporation v. Republic of Perú, ICSD, Case No. ARB/05/20 (Sep. 12, 2007), https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf. ("[T]he nature and extent of the opposition made it clear that there was no real possibility of the Project soon obtaining the necessary "social license"").
[71] *Id.* at ¶ 416, 738.
[72] *See generally* August Reinisch, *The Future of Investment Arbitration, in* INT'L INV. L. FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 904 (Christina Binder et al. eds, 2009) ("It is an open secret that there are awards and decisions of highly variable quality" with some of them not fulfilling "…expectations of the users of the system…"). *See also* LOUKAS A. MISTELIS ED., PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION (2006).

damages for contributory fault, lowering the amount of damages from around 66 billion USD to approximately 50 billion USD.[73] It is not clear how the tribunal arrived at this percentage for contributory fault. The tribunal simply noted that it had a wide discretion in such cases.[74] The "discretion" in this particular case resulted in a difference of a staggering amount of around 16 billion USD. Similarly, in *Occidental v. Ecuador,* the tribunal applied a 25% reduction in damages for contributory fault,[75] but it did not explain how it arrived at this percentage. The tribunal stated that it had "...a wide margin of discretion in apportioning fault."[76] It is important to note that one of the arbitrators wrote a dissenting opinion in this case, arguing that the tribunal greatly underestimated Claimants' contribution to damages and should have applied a 50% reduction in damages for contributory fault.[77] The difference between a reduction by 25% and a reduction by 50% was about 589 million USD! One of the key problems, as illustrated by these cases, is predictability.

Similar uncertainty arises in cases regarding regulatory expropriation for public purposes. There have been various extreme and some more balanced positions taken so far. Some tribunals have adopted the sole effect doctrine, disregarding the purpose of the measure but looking only at its effect from the investor point of view.[78] For example, an ICSID tribunal ordered Costa Rica to pay 16 million USD as compensation for a regulatory expropriation which took place after Costa Rica passed a decree taking the property of investors.[79] Although the decree was enacted in order to expand the territory of a national park for the purpose of conserving endangered feline species, including pumas and jaguars, the investment arbitration tribunal did not take this public purpose into account.[80] According to the tribunal, "…[e]xpropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are…similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated,

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[73] YUKOS Universal Limited (Isle of Man) v. Russian Federation, Case No. AA 227, Final Award, ¶ 1637 Perm. Ct. of Arb. July 18, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf.
[74] *Id.*
[75] Occidental Petroleum Corporation, Occidental Exploration and Production Company v. Republic of Ecuador, ICSID, Case No. ARB/06/11, ¶ 687 (Oct. 5, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf ("Having considered and weighed all the arguments which the parties have presented to the Tribunal in respect of this issue, in particular the evidence and the authorities traversed in the present chapter, the Tribunal, in the exercise of its wide discretion, finds that, as a result of their material and significant wrongful act, the Claimants have contributed to the extent of 25% to the prejudice which they suffered when the Respondent issued the *Caducidad* Decree").
[76] *Id.* at ¶ 670.
[77] Dissenting Opinion of Brigitte Stern at ¶ 7-8, Occidental Petroleum Corporation, Occidental Exploration and Production Company v. Republic of Ecuador(Sep. 20, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1096.pdf.
[78] Supportive, for example, Ben Mostafa, *The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law*, 15 Austl. Int'l L.J. 267 (2008). A more nuanced approach with an endorsement of the kind of proportionality test applied by the European Court of Justice and the European Court of Human Rights is advocated by Ursula Kriebaum, *Regulatory Takings: Balancing the Interests of the Investor and the State*, 8 J. World Investment & Trade 717 (2007).
[79] Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica, ICSID, ARB/96/1, Final Award, ¶111 (Feb. 17, 2000), 39 I.L.M. 1317 (2000).
[80] *Id.* at ¶ 18.

even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains,"[81] Even if one accepts the premise that every act of expropriation must be followed by some form and level of compensation, the arbitral tribunal's insensitivity to the public purpose behind the measure illustrates the tension between broad investment protection standards and states' right to regulate in the public interest.

States are also becoming increasingly concerned with arbitral tribunals reaching diametrically opposed decisions in similar cases.[82] There have been a number of cases, where different tribunals have interpreted the same standard in the same treaty as having a different meaning. For instance, in *Glamis Gold v. USA*, the tribunal interpreted FET in the NAFTA Agreement as a standard *requiring* an "egregious," "shocking," and "gross" denial of justice,[83] whilst in *Bilcon v. Canada*, the tribunal interpreted the same standard in the same treaty as requiring that the conduct of the host state be merely "arbitrary" and "unjust,"[84] noting that "…there is *no requirement* in all cases that the challenged conduct reaches the level of shocking or outrageous behaviour."[85]

The above-mentioned cases of *CME v. Czech Republic* and *Lauder v. Czech Republic* are also interesting in this regard. These cases were decided by two different tribunals (one in Stockholm, the other in London) on the same facts, but came out with diametrically opposing outcomes.[86] In *Lauder v. Czech Republic,* Ronald Lauder, an American citizen, who ultimately

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[81] *Id.* at ¶ 72.

[82] Pia Acconci, *Most-Favoured-Nation Treatment*, THE OXFORD HANDBOOK OF INT'L INV. L. 367 (Christoph Schreuer et al. eds., 2008) ("ICSID is criticized by some developed and developing countries that are no longer satisfied with the increasingly frequent recourse to its arbitration by private investors, resulting in increasingly complex amounts of inconsistent case-law"). It is also important to note the writings of Prof. Tibor Várady on this issue. While Várady affirms that it is not likely that the pro-arbitration stance will change to the negative towards international commercial arbitration, he is not as certain with respect to international investment arbitration due to existing reservations (or hostility) towards ... investment arbitration.... *See* TIBOR VÁRADY ET AL., INT'L COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 81 (2015). For further analysis of these issues *see also* William McElhiney, *Responding to the Threat of Withdrawal: On the Importance of Emphasizing the Interests of States, Investors, and the Transnational Investment System in Bringing Resolution to Questions Surrounding the Future of Investments with States Denouncing the ICSID Convention,* 49 TEX. INT'L L. J. 601-19 (2014); August Reinisch and Loretta Malintoppi, *Methods of Dispute Resolution,* THE OXFORD HANDBOOK OF INT'L INV. L. 719 (Christoph Schreuer et al. eds, 2008) ("…[W]ith a significant growth experienced by investment arbitration over the last two decades…a number of inconsistent and partially conflicting decisions have been produced"); NASSIB ZIADÉ, THE EVOLVING INT'L INV. REGIME: EXPECTATIONS, REALITIES, OPTIONS 120-124 (José Alvarez et al. eds., 2011).

[83] Glamis Gold, Ltd. v. United States of America, ICSID, ¶ 612, 616, 828-29, (June 8, 2009) https://www.italaw.com/sites/default/files/case-documents/ita0378.pdf.

[84] William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and BILCON of Delaware, Inc v. Gov't of Canada, Case No. 2009-04, ¶ 442-44, 591-92, (Perm. Ct. of Arb, March 17, 2005).https://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf.

[85]. *Id.* at ¶ 444.

[86] Ronald Lauder v. Czech Republic, Ad Hoc Arbitration, ¶ ¶ 42, 289 (Sep. 3, 2001), http://www.italaw.com/sites/default/ files/case-documents/ita0451.pdf; CME Czech Republic B.V. (Netherlands) v. The Czech Republic, Ad Hoc Arbitration (Mar. 14, 2003), http://www.italaw.com/sites/default/files/case-documents/ita0180.pdf. For a comprehensive analysis of these two cases *see* MARIEL DIMSEY, THE RESOLUTION OF INT'L INV.DISPUTES: THE CHALLENGES AND SOLUTIONS93-96 (Ingeberg Schwenzer et al., eds., 2008).

controlled CNTS broadcasting company in the Czech Republic via his company CME Media Enterprises B.V., initiated arbitration proceedings against the Republic, claiming that the country violated a number of investment protection standards, including FET.[87] He noted that the Czech Republic's Media Council "demonstrated hostile conduct towards CNTS, by the totality of its…actions and inactions that undermined the rights which had been provided to CNTS."[88] However, the tribunal rejected this argument and denied all claims for damages brought by Lauder.[89]

In *CME v. Czech Republic* CME, a company established under the Dutch laws, that held a 99% equity interest in CNTS, brought a claim against the Czech Republic, alleging that the country violated investment standards, including the FET, under the 1991 BIT between the Netherlands and Czech and Slovak Federal Republic.[90] CME claimed that CNTS "…has been commercially destroyed by the actions and omissions attributed to the Media Council, an organ of the Czech Republic."[91] The tribunal upheld CME claims, ordering the Czech Republic to pay CME 269,814,000 USD.[92] The different outcomes in these two arbitration proceedings have fueled debate in the international investment academic literature, with Reinisch, a renowned investment law scholar, calling these cases "…[t]he ultimate fiasco in investment arbitration…".[93] Whether fiasco or not, they demonstrate the problem of inconsistent awards: Since every tribunal is constituted ad hoc and has no obligation of stare decisis, or even of explaining why it does not want to stay with the decision in an earlier case,[94] there is no uniformity in arbitral decisions, which can give the impression of arbitrariness. The same treaty language may be interpreted quite differently from one case to the other and persuasive reasons for the different approaches are rarely provided. In some cases, this has gone as far as tribunals issuing blatantly conflicting awards on similar issues. The above factors contribute to states' overall uncertainty as to the outcomes, if their regulatory decisions should face a challenge in an ISDS procedure.

Apart from traditional investment arbitration claims, countries are nowadays also facing situations where investors threaten to bring arbitration claims against almost any new law,

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Ronald Lauder v. Czech Republic, *supra* note 86, at ¶ 42. The claim was brought under the BIT between the United States of America and the Czech and Slovak Federal Republic.

[88] *Id.* at ¶ 289.

[89] *Id.* at ¶ 75.

[90] CME Czech Republic B.V. (Netherlands) v. The Czech Republic, Ad Hoc Arbitration (Mar. 14, 2003) http://www.italaw.com/sites/default/files/case-documents/ita0180.pdf. The claimant in this case – CME Czech Republic B.V., a Dutch company – was the wholly owned subsidiary of CME Media Enterprises B.V., a Dutch company controlled by Ronald Lauder.

[91] *Id.* at ¶ 19.

[92] *Id.* at ¶ 9.

[93] August Reinisch, *The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections from the Perspective of Investment Arbitration,* INT'L L. BETWEEN UNIVERSALISM AND FRAGMENTATION (IN HONOUR OF GERHARD HAFNER) 115-116 (James Crawford et al., eds., 2008).

[94] *See* Frank Emmert, *Stare Decisis: A Universally Misunderstood Idea*, 6 THEORY AND PRACTICE OF LEGISLATION (LEGISPRUDENCE) 207 (2012).

regulation or similar measure they perceive in any way burdensome. This results in a "regulatory chill,"[95] i.e. states deciding not to adopt new rules for fear of costly arbitration claims.[96] This effect is particularly important when it comes to legislation or regulation in the public interest or for the promotion of sustainable development.

The controversial nature of international investment arbitration largely stems from its dealings both with private and public law matters. It is the latter aspect that triggers a variety of legitimacy related arguments against investment arbitration.[97] In this respect, addressing the negative outcomes of international arbitration for host states, Gus Van Harten rightfully observes that "….flaws in the system [are] a consequence of the unhappy marriage of international arbitration and public law."[98] This "unhappy marriage" has already resulted in "divorce" for some states, as they have taken the decision to leave ICSID.[99] In particular, Bolivia denounced ICSID

[95] It is not easy to say who coined the term. For example, see Julia G. Brown, *International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?*, 3 W. J.OF LEGAL STUD.1 (2013); Stephan W. Schill, *Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?*, 24 J. OF INT'L ARB. 469 (2007); Kyla Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 606 (Chester Brown et al., eds., 2011).

[96] For further analysis of this problem *see* Howard Mann, *Reconceptualizing International Investment Law: Its Role in Sustainable Development*, 17 LEWIS & CLARK L. REV. 527 (2013).

[97] One of these arguments takes issue with tribunals frequently omitting any serious explanation of the calculation and valuation of damages. *See* Joshua Simmons, *Valuation in Investor-State Arbitration: Toward A More Exact Science*, 30 BERKELEY J. OF INT'L L. 196, 214 (2012) ("Although investor-state decisions are moving toward better explanations of valuation, deficient discussions of specific calculations remain a common exception to the trend. The failure to explain calculations in detail is perhaps justified in rare cases in which investors claim relatively small amounts. In most cases, however, the failure to explain valuation adequately hints at a failure to address the issue methodically, thus exposing an award to greater skepticism"). One concrete illustration of this problem is the case of *Maritime International v. Guinea*, where the ICSID ad hoc committee annulled the previously issued arbitral award for the failure to state reasons in the calculation of damages. *See* Maritime International Nominees Establishment v. Republic of Guinea, ICSID,Case No. ARB/84/4, Decision for Partial Annulment of the Arbitral Award, ¶ 8.01 (Jan. 6, 1988) https://www.italaw.com/sites/default/files/case-documents/italaw8608.pdf.
For criticism of arguments voiced against investment arbitration *see* Charles Brower & Stephan Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?* 9 CHICAGO J. OF INT'L L. 471 (2008-2009); Irene Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 COLUM. J. OF TRANSNAT'L L. 418 (2012-2013); Stanimir Alexandrov, *On the Perceived Inconsistency in Investor-State Jurisprudence*, *in* THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS, 60 (José Alvarez et al. eds., 2011); Susan Franck, *Considering Recalibration of International Investment Agreements: Empirical Insights, in* THE EVOLVING INT'L INV. REGIME: EXPECTATIONS, REALITIES, OPTIONS, 73 (José Alvarez et al. eds., 2011).

[98] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 153 (2008).

[99] L. Yves Fortier, *Canadian Approach to Investment Protection: How Far We Have Come!, in* INT'L INV. L. FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 543 (Christina Binder et al. eds, 2009) (discussing some States leaving ICSID); *See also* Ilija Mitrev Penusliski, *A Dispute Systems Design Diagnosis of ICSID, in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 507, 520-526 (Michael Waibel et al. ed., 2010); Anne van Aaken, *The International Investment Protection Regime though the Lens of Economic Theory, in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 550-551 (Michael Waibel et al. eds., 2010); Timothy Nelson, "*History Ain't Changed": Why Investor-State Arbitration Will Survive the "New Revolution", in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 573-575 (Michael Waibel et al. eds., 2010) (noting several of South American countries' actions or threats regarding leaving the ICSID and analyzing their consequences); Susan Franck*, Development and Outcomes of Investment Treaty Arbitration*, 50

in 2007,[100] Ecuador withdrew from ICSID in 2009,[101] and Venezuela did likewise in 2012.[102] Strong criticism of Investor-State Dispute Settlement (ISDS) is also being made by some developed states. For instance, after facing an investment arbitration claim by Philip Morris Company against its new tobacco packaging requirements,[103] Australia decided not to include investment arbitration as a means of dispute resolution in a number of its newer FTAs[104] and has even officially announced that it is against signing investment agreements that will limit its right to regulate in the public interest.[105]

It is also important to note the EU's criticism of ISDS. In *Achmea v. Slovakia,* the arbitral tribunal found Slovakia liable for violating the 1992 Agreement on Encouragement and Reciprocal Protection of Investments with the Kingdom of the Netherlands due to its reversal of the liberalization of the private sickness insurance market and ordered it to pay damages to the investor in the amount of approximately 22 million Euro.[106] Slovakia moved to set the award aside in Germany, and the Federal Court of Justice (Bundesgerichtshof) submitted a request to the European Court of Justice (CJEU) for a preliminary ruling under Article 267 TFEU regarding the compatibility of the arbitration clause in the BIT with EU law.[107] In response, the CJEU has ruled that EU law precludes "…a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member

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HARVARD INT'L L. J. 435 (2009) (noting States that argued against the legitimacy of the investment arbitration system and analyzing the link between the development status of countries and arbitration).

[100] Oscar Garibaldi, *On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy, in* INT'L INV. L. FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 252 (Christina Binder et al. eds, 2009).

[101] Nicolle E. Kownacki, *Prospects for ICSID Arbitration in Post-Denunciation Countries: An Updated Approach*, 15 UCLA J. OF INT'L L. & FOREIGN AFF. 529, 532 (2010).

[102] Federico Lavopa et al., *How to Kill a BIT and Not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties*, 16 J. OF INT'L ECON. L. 869, 871 (2013); For greater analysis of States' withdrawing from investment arbitration *see* Muthucumaraswamy Sornarajah, *The Retreat of Neo-Liberalism in Investment Treaty Arbitration, in* THE FUTURE OF INVESTMENT ARBITRATION 291-293 (Catherine Rogers and Roger Alford eds., 2009).

[103] Philip Morris Asia Limited v. The Commonwealth of Australia, Case No. 2012-12, Award on Jurisdiction and Admissibility, ¶ 178 (Perm. Ct. Arb. Dec. 17, 2015) http://www.pcacases.com/web/sendAttach/1711.

[104] AUSTRALIA – UNITED STATES OF AMERICA FREE TRADE AGREEMENT, May 18, 2004, http://investment-policyhub.unctad.org/Download/TreatyFile/2682; MALAYSIA – AUSTRALIA FREE TRADE AGREEMENT, May 22, 2012, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2634.

[105] *Australian Government, The Department of Foreign Affairs and Trade*, INVESTOR-STATE DISPUTE SETTLEMENT, http://dfat.gov.au/trade/topics/Pages/isds.aspx ("The Australian Government is opposed to signing up to international agreements that would restrict Australia's capacity to govern in the public interest — including in areas such as public health, the environment or any other area of the economy"). For further analysis see Jürgen Kurtz, *Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication*, 27 ICSID REV.–FOREIGN INV. L. J. 65 (2012).

[106] Achmea B.V. v. The Slovak Republic, Case No. 2008-13, ¶ 352 (Perm. Ct. Arb. Dec. 7, 2012) https://www.italaw.com/sites/default/files/case-documents/italaw3206.pdf.

[107] *See* the Judgment in Case C-284/16, Slovak Republic v. Achmea, 158 E.C.R. (2018)

State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept."[108] The implication of the *Achmea* decision is that courts in the EU will be able to set aside arbitral awards rendered under intra-EU BITs, thereby reinforcing the EU's critical stance against the existing investor-state arbitration model.[109]

As can be seen, there is a rising backlash against ISDS. This backlash is understandable considering that the outcome of investment disputes may affect not only the business operations of a particular company but also livelihoods of entire communities, the work of governments, and national budgets.[110] One cannot but agree with Gottwald that "…even a single successful investor claim could wreak havoc on [a state's] economy, weaken its capacity to regulate in the public interest, and damage its reputation as a desirable investment location."[111] How should this growing criticism of international investment arbitration as a system for settlement of disputes be addressed? If the international investment arbitration system is to remain successful, it needs to be aligned with sustainable development goals!

III. Reconciling Investor Protection with Sustainable Development in Investment Arbitration

As the world is approaching the end of the second decade of the 21st century, there is an increasing recognition of the need for a modern legal framework of investment that provides not only for the protection of investors' rights but also properly addresses the investments' wider social, economic, and environmental effects.[112] Historically the emphasis of investment law was placed primarily on investor protection.[113] However, such an asymmetrical treatment of foreign

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[108] *Id.* at ¶ 62.

[109] For a critical review of the Achmea decision *see* Csongor István Nagy, *Intra-EU Bilateral Investment Treaties and EU Law After Achmea: "Know Well What Leads You Forward and What Holds You Back"*, 19 GERMAN L. J. 981 (2018).

[110] As noted by Moss, "[t]he community may be affected by the outcome of the dispute, for example where considerable payments have to be made from the public budget, or where regulatory measures or administrative practices have to be changed or adapted to accommodate an award." *See* Giuditta Cordero Moss, *Commercial Arbitration and Investment Arbitration: Fertile Soil for False Friends?, in* INT'L INV. L. FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 793 (Christina Binder et al. eds, 2009).

[111] Eric Gottwald, *Leveling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?,* 22 AM. U. INT'L L. REV. 237, 239 (2007).

[112] *See generally* Marie-Claire Cordonier Segger & Avidan Kent, *Promoting Sustainable Investment through International Law, in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 774 (Marie-Claire Cordonier Segger et al. eds., 2011) ("Instead of regarding international investment law as an isolated regime, an integrated approach should be adopted, one that will require the promotion of sustainable development law and principles through the legal framework of international investment law. The only way in which the two may co-exist and support each other is through reconciliation, beginning with recognition of the stake that each regime has in the other").

[113] Most international investment agreements signed and ratified in the 20th century and early 2000s provide only for investors' rights, failing to specify their obligations and contain very broad investment protection standards, such as indirect expropriation, the fair and equitable treatment standard, full protection and security, and others. For analysis of the predominantly one-sided nature of these agreements *see generally* Muthucumaraswamy Sornarajah, *A Law for Need or a Law for Greed?: Restoring the Lost Law in the International Law of Foreign Investment*, 6 INT'L ENVTL. AGREEMENTS 329, 331 (2006) ("International investment law is "…the law of greed simply because of the fact that

direct investment (FDI) is slowly but steadily giving way to a new generation legal framework of FDI, the objective of which is not only to promote and protect investment but also to advance host states' sustainable economic, social and environmental development.[114] According to the 2015 UNCTAD Investment Law Policy Framework for Sustainable Development, "… 'new generation' investment policies place inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment."[115] Similarly, the Report on "Investment Promotion Agencies and Sustainable FDI: Moving toward the Fourth Generation of Investment Promotion" emphasizes the current move to the promotion of not simply any kind of FDI, but *sustainable* FDI.[116] The underlying idea is to ensure a proper balance between the protection of investors' rights and those of other relevant stakeholders. Efforts at reforming the legal framework of FDI in line with this paradigm shift in investment law are still fragmented. However, it is clear that sustainable

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it is built on accentuating only one side of the picture of foreign investment so as to benefit the interests of multinational corporations which exist to seek profits for their shareholders"); Mehmet Toral and Thomas Schultz, *The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations, in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 588 (Michael Waibel et al. eds., 2010) ("…IIAs seem to fail to impose clear obligations on investors that would allow dispute settlement bodies to adequately address the issues raised in areas such as human rights and sustainable development"); Tarcisio Gazzini, *Bilateral Investment Treaties, in* INTERNATIONAL INVESTMENT LAW: THE SOURCES OF RIGHTS AND OBLIGATIONS 107 (Eric De Brabandere et al. eds., 2012); Helene Bubrowski, *Balancing IIA Arbitration through the Use of Counterclaims*, *in* IMPROVING INT'L INV. AGREEMENTS 216 (Armand de Mestral et al. eds., 2013); Jan Wouters et al., *International Investment Law: The Perpetual Search for Consensus*, *in* FOREIGN DIRECT INVESTMENT AND HUMAN DEVELOPMENT: THE LAW AND ECONOMICS OF INTERNATIONAL INVESTMENT AGREEMENTS 48 (Olivier De Schutter, et al. eds., 2013); Genevieve Fox, *A Future for International Investment? Modifying BITs to Drive Economic Development*, 46 GEORGETOWN J. OF INT'L L. 229, 232-236 (2014).

[114] *See generally* U.N. Secretary-General*, World Investment Report: "Towards A New Generation of Investment Policies"* (2012), http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf; *Columbia Center on Sustainable Investment and the World Association of Investment Promotion Agencies,* REPORT OF THE FINDINGS OF THE SURVEY ON FOREIGN DIRECT INVESTMENT AND SUSTAINABLE DEVELOPMENT 4 (2010), http://ccsi.columbia.edu/files/2013/12/fdi.pdf. The most widely accepted definition of the term "sustainable development" is the one provided in the Brundtland Report: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs". *See* Report of the World Commission on Environment and Development on "Our Common Future," G.A. Rep., Annex U.N. Doc. A/43/427 (Aug. 4, 1987), www.un-documents.net/wced-ocf.htm.

[115] U.N. Conference on Trade and Development, *Investment Policy Framework for Sustainable Development,* ¶ 3, U.N. Doc. UNCTAD/DIAE/PCB/2015/5 (2015), http://investmentpolicyhub.unctad.org/Upload/Documents/INVESTMENT%20POLICY%20FRAMEWORK%202015%20WEB_VERSION.pdf; *See also* U.N. Secretary-General, Conference on Trade and Development, Investment Policy Framework for Sustainable Development, *World Investment Report: Towards A New Generation of Investment Policies* 14 (2012), http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf. The Organization for Economic Co-operation and Development (OECD) has also placed sustainable development at the forefront of its analysis of investment. In its key recent work on investment, the OECD states that "…[s]ustainability and responsible investment are integral parts of a good investment climate and should be factored in from the beginning and not as an after-thought". *See* OECD, POLICY FRAMEWORK FOR INVESTMENT 18 (OECD, 2015), http://www.oecdilibrary.org/docserver/download/2014041e.pdf?expires=1459242455&id=id&accname=guest&checksum=E28BFF7350ED92EB93C8124B79A8B987; *See also OECD*, GUIDELINES FOR MULTINATIONAL ENTERPRISES, (OECD, 2011) http://www.oecd.org/daf/inv/mne/48004323.pdf.

[116] Vale Columbia Ctr. on Sustainable Int'l Inv. and the World Ass'n of Inv. Promotion Agencies*,* Report of the Findings of the Survey on Foreign Direct Investment and Sustainable Development, *in Investment Promotion Agencies and Sustainable FDI: Moving Toward the Fourth Generation of Investment Promotion, COLUMBIA CENTER ON SUSTAINABLE INVESTMENT* ¶ 4, (June 25, 2010) http://ccsi.columbia.edu/files/2013/12/fdi.pdf accessed on Feb. 4, 2019.

development has emerged as the foundation of this new generation legal regime of FDI. Accordingly, investment law reforms must be aligned with goals broadly associated with sustainable development. Failure to achieve this paradigm shift may destroy ISDS as we know it. How is it possible to align international investment arbitration with sustainability objectives? The sections below advance both substantive and procedural solutions.

1. 21st Century International Investment Agreements

One way to address the balance between investor protection and sustainable development is the negotiation and implementation of new generation investment treaties and the re-negotiation of old generation treaties in line with sustainable development goals. This is important, as it is the language of these treaties that ultimately shapes the outcome of arbitral proceedings. In this regard, Brigitte Stern, currently one of the most frequently appointed arbitrators by respondents in investor-state arbitration proceedings,[117] is correct when noting that "…if states do not include provisions [advancing sustainable development]…in their investment treaties…, arbitration can only play a very marginal, or even non-existent role, in making investments foster sustainable development."[118] Indeed, arbitrators have to apply existing rules. If these rules provide for, or at least allow, a balance between the protection of investors' rights and those of other stakeholders, then such balanced considerations will be reflected in arbitral tribunal awards.

Older investment treaties are increasingly being criticized for being one-sided, since they provide investors with many protection standards but generally fail to stipulate investor obligations towards host states.[119] This concern is valid as most of the investment treaties in force today do

[117] *UNCTAD, Investment Dispute Settlement Navigator*, INV. POLICY HUB, (July 31, 2019) http://investmentpolicyhub.unctad.org/ISDS/FilterByArbitrators.

[118] Brigitte Stern, *The Future of International Investment Law: A Balance between the Protection of Investors and the States' Capacity to Regulate*, *in* THE EVOLVING INT'L INV. REGIME: EXPECTATIONS, REALITIES, OPTIONS 175 (José Alvarez et al. eds., 2011). In a contrarian view, the constraints of existing treaties are largely dismissed because the Vienna Convention on the Law of Treaties supposedly allows a new interpretation of the vague language often found in BITs and MIAs. *See* Katharina Berner, *Reconciling Investment Protection and Sustainable Development: A Plea for an Interpretative U-Turn*, in SHIFTING PARADIGMS IN INT'L INV. L. – MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED 177 (Steffen Hindelang & Markus Krajewski eds., 2016). Unfortunately, the present authors are not so optimistic about the interpretative potential of the old generation agreements.

[119] In particular, Taillant and Bonnitcha have voiced criticism with respect to the one-sided nature of BITs in the following way: "BITs do not place obligations on foreign investors nor do they set out the rights of Stakeholders. BITs focus exclusively on the protection of the interests of foreign investors. Again, third party stakeholders, particularly vulnerable groups whose human rights could be violated by circumstances deriving from upholding BITs, while they may have an important stake in the outcomes of the execution of activities covered by a BIT, are left to fend for themselves if their rights are violated as a consequence". *See* Jorge Daniel Taillant and Jonathan Bonnitcha, *International Investment Law and Human Rights, in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 65 (Marie-Claire Cordonier Segger et al. eds., 2011). For criticisms of existing investment agreements s*ee also* Louis Wells, *Preface, in* THE EVOLVING INT'L INV. REGIME: EXPECTATIONS, REALITIES, OPTIONS xix (*José Alvarez* et al. eds., 2011) ("To be completely accepted by developing countries…an investment regime should also impose behavioral rules on foreign investors"); Tarcisio Gazzini, *Bilateral Investment Treaties,*

not have provisions that would help protect the environment or stimulate sustainable social and economic development.[120] Apart from that, vague and unqualified investment protection standards, such as the fair and equitable treatment standard,[121] the indirect expropriation standard, and similar open-ended standards shaped in a different investment age, have been challenged for their ability to "…impede, discourage, or even prohibit government measures to ensure the sustainable development."[122] Indeed, while old generation investment treaties do accord protection to investors, they do not properly consider the interests of other relevant stakeholders. In this regard, one cannot but agree with Taillant and Bonnitcha that this problem "…is largely due to the fact that…international investment law evolved as a specialized regime (with specialized actors) primarily concerned with protecting foreign investment from unfair interference by host States in unstable economies," and therefore, "[t]he public interest in terms of the social, environmental, or economic negative externalities of large foreign investments, was simply not part of the objectives

in INT'L INV. L.: THE SOURCES OF RIGHTS AND OBLIGATIONS 107 (Eric De Brabandere et al. eds., 2012) ("[T]he manifestly asymmetrical nature of…[bilateral investment treaties]…with all obligations incumbent upon the host State and virtually all rights granted to the foreign investor, has often been criticized"); Helene Bubrowski, *Balancing IIA Arbitration through the Use of Counterclaims, in* IMPROVING INT'L INV. AGREEMENTS 216 (Armand de Mestral et al., eds., 2013) ("…IIAs are asymmetrical," as they "produce obligations for host states and corresponding rights for investors"); Andrew Newcombe and Marie-Claire Cordonier Segger, *An Integrated Agenda for Sustainable Development in International Investment Law, in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 113 (Marie-Claire Cordonier Segger et al. eds., 2011); Howard Mann, *Civil Society Perspectives: What Do Key Stakeholders Expect from the International Investment Regime? in* THE EVOLVING INT'L INV. REGIME: EXPECTATIONS, REALITIES, OPTIONS 27 (*José Alvarez* et al. eds., 2011).

[120] However, as Burke-White and von Staden are pointing out, quite many investment treaties do contain so-called NPM or "Non-Precluded Measures" clauses. Some of these are in the actual text, some can be found in additional protocols or in exchanges of notes between the parties negotiating a BIT. An example is the NPM in the Protocol attached to the Germany-Pakistan BIT of 1959, which provides that "[m]easures taken for reasons of public security and order, public health or morality shall not be deemed as discrimination within the meaning of Article 2 [of the BIT, which prohibits inter alia "restricting the purchase of raw or auxiliary materials, of power or fuel, or of means of production or operation of any kind, impeding the marketing of products within or outside the country, as well as any other measure not applied to the same extent either to persons residing within the country and to nationals of third states or to investments of such persons"; *see* FRANK EMMERT, WORLD TRADE AND INVESTMENT LAW – DOCUMENTS 93 (2018). In plain English, even restrictive measures specifically directed at protected investors and per se discriminatory are allowed, if they are being implemented, for example, in the interest of public security or public health. Arguably, such kind of NPM clauses should be equally broadly interpreted as FET and FPS clauses have traditionally been. For a very good discussion see William W. Burke-White & Andreas von Staden, Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties, 48 VA J. INT'L L. 307 (2008).

[121] *See* Roland Kläger, *Revising Treatment Standards – Fair and Equitable Treatment in Light of Sustainable Development*, in SHIFTING PARADIGMS IN INT'L INV. L. – MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED 65-80 (Steffen Hindelang & Markus Krajewski eds., 2016).

[122] Andrew Newcombe and Marie-Claire Cordonier Segger, *An Integrated Agenda for Sustainable Development in International Investment Law, in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 103 (Marie-Claire Cordonier Segger et al. eds., 2011). *See also* ANTHONY VANDUZER ET AL., INTEGRATING SUSTAINABLE DEVELOPMENT INTO INT'L INV. AGREEMENTS: A GUIDE FOR DEVELOPING COUNTRY NEGOTIATORS (2013); Markus Gehring and Avidan Kent, *Sustainable Development and IIAs: from Objective to Practice*, *in* IMPROVING INT'L INV. AGREEMENTS 302 (Armand de Mestral and Céline Lévesque eds., 2013); Graham Mayeda, *Sustainable International Investment Agreements: Challenges and Solutions for Developing Countries*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 542 (Marie-Claire Cordonier Segger et al. eds., 2011).

pursued in the evolution of…[the] investment legal framework."[123] This observation is accurate. Investment treaties were created to protect investors from nationalization and other risks in developing states. That was traditionally the main goal and, indeed, often the only goal.

It has been shown that the very structure of international investment law that seemed appealing in the 1980's and 90's is no longer fully answering the call of modern times in terms of advancement of sustainable development, with due regard being given to the rights of all relevant stakeholders. Indeed, many states have started reconsidering their investment agreements to ensure that they reflect their interests both as capital-exporting and capital-importing states.[124] A leading example in this regard is the case of the United States of America. The USA's Model BIT of 1984 was pro-investor.[125] Alvarez stated that it was "…the most investor-protective in the world," utilizing "every lawyerly device imaginable to achieve a single unitary object and purpose: to protect the foreign investor."[126] The obvious thinking was that the investor would most likely be an American entity, whilst the host state would most likely be a developing nation, rather than the other way around. Although the direction of the investment flows covered by U.S. BITs has not really changed in recent years,[127] the United States revised its Model BIT in 2004 and again in 2012.[128] The most recent iteration, in particular, provides clear mandates for the host state authorities to pursue environmental goals (Article 12),[129] as well as protection of labor rights

[123] Jorge Daniel Taillant and Jonathan Bonnitcha, *International Investment Law and Human Rights, in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 59 (Marie-Claire Cordonier Segger et al. eds., 2011). *See also* Mahnaz Malik, *The IISD Model International Agreement on Investment for Sustainable Development*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 565 (Marie-Claire Cordonier Segger et al. eds., 2011) ("The international investment law regime, with few exceptions, has been solely focused on the legal aspects of facilitating cross-border investment flows and protecting foreign investors").

[124] *José E. Alvarez & Karl Sauvant, International Investment Law in Transition, in* THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS 20 (José E. Alvarez et al eds., 2011); *See also* Rainer Geiger, *Multilateral Approaches to Investment: The Way Forward, in* THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS 155 (*José E. Alvarez* et al eds., 2011) (Geiger notes that when developed countries were capital-exporting, they "…were setting rules that were incorporated into bilateral investment treaties, and as a result strong and almost unqualified investment protection backed by investor-state arbitration was predominant". However, this has changed, as the "…same countries today follow a more cautious approach, as they have become hosts of foreign investment").

[125] Text of the U.S. Model Treaty Concerning the Reciprocal Encouragement and Protection of Investment (Feb. 24, 1984) http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1042&context=bjil.

[126] José E. Alvarez, *The Return of the State*, 20 MINN. J. OF INT'L L. 223, 231 (2011).

[127] U.S. BITs are in force mainly with developing nations, such as Azerbaijan, Cameroon, Congo, Ecuador, Egypt, Honduras, Kazakhstan, Kyrgyzstan, Moldova, Mongolia, Mozambique, Rwanda, Senegal, Sri Lanka, Tunisia, Turkey, and Ukraine. For a full list of countries see ENFORCEMENT AND COMPLIANCE https://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp.

[128] Treaty Between the Government of the United States of America and the Government of [County] Concerning the Encouragement and Reciprocal Protection of Investment (2004) http://www.state.gov/documents/organization/117601.pdf; Treaty Between the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (2012) https://2009-2017.state.gov/documents/organization/188371.pdf. The 2012 Model BIT is also available in FRANK EMMERT, WORLD TRADE AND INVESTMENT LAW – DOCUMENTS 113 (2018).

[129] Article 12(5) provides that "[n]othing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure

(Article 13).[130] By contrast, as recently as 2008, Germany published an updated Model BIT that is a classic old generation treaty and refers only to investor rights and not to any other stakeholders or public interest concerns.[131]

However, before calling the Germans backward and praising the U.S. for its more progressive approach, the application of the treaties in practice has to be examined as well. Indeed, out of 40 BITs currently in force for the U.S., 38 are based on the old generation model of 1984, and 2 have some modest mention of environmental and labor rights as per the 2004 revision, while not a single BIT has so far been concluded that follows the most progressive standards adopted in the 2012 Model BIT.[132] This nicely illustrates the problem – hundreds of BITs negotiated by dozens of countries over decades are largely in place for the relationships, where investment flows are significant and protection is potentially needed. They will not easily or quickly be replaced with more modern versions, since it always takes (at least) two to tango.[133]

A faster route to getting investments covered by more progressive treaties would seem to be the multilateral approach. Instead of having to negotiate or re-negotiate a multitude of bilateral treaties, a single multilateral treaty could potentially cover an entire phalanx of bilateral relations. An example of this approach would be the 2009 ASEAN Comprehensive Investment Agreement.[134] Unfortunately, the ASEAN Agreement does not contain such clear language as found in the 2012 U.S. Model BIT. However, it does contain an almost verbatim reproduction of Article XX of the GATT 1947. Thus, Article 17 of the ASEAN Agreement, entitled "General Exceptions", provides that

> *"[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Member States or their investors where like conditions prevail, or a disguised restriction on investors of any other Member State and their investments, nothing*

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that investment activity in its territory is undertaken in a manner sensitive to environmental concerns". *See* TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF [COUNTRY] CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT, 2012, https://2009-2017.state.gov/documents/organization/188371.pdf.

[130] A clear legacy of the Obama years, this article refers to obligations under ILO Conventions and the ILO Declaration on Fundamental Principles and Rights at Work. Unsurprisingly, the 2012 Model BIT has so far not been used with any of the U.S.'s trading partners. *See Id.*

[131] *See* Investment Policy Hub, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2865. *See also* FRANK EMMERT, WORLD TRADE AND INVESTMENT LAW – DOCUMENTS 94 (2018).

[132] U.S. DEPARTMENT OF STATE, UNITED STATES BILATERAL INVESTMENT TREATIES, https://www.state.gov/e/eb/ifd/bit/117402.htm.

[133] For discussion *see* Karsten Nowrot, *Termination and Renegotiation of International Investment Agreements, in* SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW – MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED 227 (Steffen Hindelang et al, 2016).

[134] *See* ASEAN Comprehensive Investment Agreement, http://www.asean.org/storage/images/2013/economic/aia/ACIA_Final_Text_26%20Feb%202009.pdf. *See also* FRANK EMMERT (ed.), WORLD TRADE AND INVESTMENT LAW – DOCUMENTS 495 (2018).

in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures: (a) necessary to protect public morals or to maintain public order; (b) necessary to protect human, animal or plant life or health; (c) necessary to secure compliance with laws or regulations which are not inconsistent with this Agreement, including those relating to: (i) the prevention of deceptive and fraudulent practices to deal with the effects of a default on a contract; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; (iii) safety; (d) aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of investments or investors of any Member State; (e) imposed for the protection of national treasures of artistic, historic or archaeological value; (f) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[135]

The present authors do not have insider information with respect to whether considerations of sustainable development and other public interest concerns were actively discussed in the negotiations that led to the ASEAN Agreement and the heavy reliance on the GATT provision was the ultimate acceptable compromise, or whether the inclusion of the GATT provision with minimal editing was the result of a lazy drafter looking for a suitable model at a time when the 2012 U.S. Model BIT was not yet available. Be that as it may, it will be exciting to watch whether and to what extent arbitration tribunals called to apply the ASEAN Agreement will look for inspiration in the case law of the GATT and WTO.

The ultimate horror scenario arguing against reliance on multilateralism in this regard, however, is the effort by the OECD to come up with a Multilateral Agreement on Investment, commonly referred to as "the MAI." After efforts extending over half a century, the 1998 Draft is potentially more comprehensive than any other and is also more ambitious with regard to scope and coverage. However, it is also riddled with disagreement and alternative proposals, making it virtually certain that a final and widely acceptable draft will never see the light of day.[136]

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[135] With regard to the "public order", the Article contains an official note to clarify that the provision "may be invoked by a Member State only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."

[136] *See* THE MULTILATERAL AGREEMENT ON INVESTMENTS, http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf. *See also* FRANK EMMERT,WORLD TRADE AND INVESTMENT LAW – DOCUMENTS 161 (2018).For commentary *see*, inter alia, Lance Compa, *The Multilateral Agreement on Investment and International Labor Rights: A Failed Connection*, 31 CORNELL INT'L L. J. 683 (1998); Riyaz Dattu, *A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 FORDHAM INT'L L. J. 275 (2000-2001); Peter T. Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, 34 INT'L L. J. 1033 (2000); Daniel Egan, *The Limits of Internationalization: a Neo-Gramscian Analysis of the Multilateral Agreement on Investment*, 27:3 Critical Sociology 74-97 (2001).; Katia Tieleman, *The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Public Policy Network*, UN Vision Project on Global Public Policy Networks, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.627.7992&rep=rep1&type=pdf. *See also*

If 34 of the most developed nations in the world, under the umbrella of the OECD, cannot agree upon a multilateral investment treaty, although they should have many interests in common, it is not surprising that the only multilateral treaty currently in force that is not a regional treaty, is anything but ambitious. The WTO Agreement on Trade-Related Investment Measures (TRIMs) can be neatly reproduced on four pages[137] and mostly refers back to the GATT, in particular with regard to exceptions. Indeed, Article 3 of the TRIMs Agreement states that "[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement." This is nothing but a circumlocutory reference to Article XX of the GATT 1947. It can only be speculated whether this was the only acceptable compromise for the states negotiating in the Uruguay Round, or whether the drafters of the TRIMs were even lazier than the drafters of the ASEAN Agreement. Nevertheless, the provision is there, and 164 countries around the world are bound by it!

In concluding our observations on the propagation of sustainable development goals and other public interest topics via the negotiation of new generation or re-negotiation of old generation investment treaties, we may say that any progress in this direction will be "…a strong and slow boring of hard boards" as Max Weber observed for politics more generally. However, this does not mean that (potential) host countries cannot or should not demand the conclusion of revised BITs before welcoming significant investments that could potentially conflict with sustainability goals. If agreements between the home country and the host country cannot be concluded in time, host countries can still insist on specific investment contracts with the investors and include provisions that require investors to abide by international standards of conduct provided by the International Labor Organization (ILO),[138] the OECD Guidelines for Multinational Enterprises,[139] the UN Guiding Principles on Business and Human Rights,[140] and the UN Convention Against Corruption.[141] In our view, all new generation investment treaties and all individual investment

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Stephen Young & Ana Teresa Tavares, *Multilateral Rules on FDI: Do We Need Them? Will We Get Them? A Developing Country Perspective*, 13 Transnational Corporations 1-29 (April 2004).

[137] *See* World Trade Organization, Agreement on Trade Related Investment Measures (2018) https://www.wto.org/english/docs_e/legal_e/18-trims_e.htm. *See also* FRANK EMMERT, WORLD TRADE AND INVESTMENT LAW – DOCUMENTS 607 (2018).

[138] In particular the 1998 ILO Declaration on Fundamental Principles and Rights at Work, the 2008 ILO Declaration on Social Justice for a Fair Globalization and the 1977 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, as last amended in 2017. All of these documents are available on the website of the ILO. Social Justice and Principles Related Documents, International Labour Organization, https://www.ilo.org/global/standards/lang--en/index.htm. Also available in FRANK EMMERT, WORLD TRADE AND INVESTMENT LAW – DOCUMENTS, COUNCIL ON INTERNATIONAL LAW AND POLITICS 201, 204, and 210 (2018).

[139] *See* OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing, http://dx.doi.org/10.1787/9789264115415-en (amended 2011).

[140] *Guiding Principles on Business Human Rights*, UNITED NATIONS (June 16, 2011) https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. *See also* FRANK EMMERT, World Trade and Investment Law – Documents, Council on International Law and Politics 431-450 (2018).

[141] *United Nations Convention Against Corruption*, UNITED NATIONS (Oct. 31, 2003). https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf. *See also* FRANK EMMERT, WORLD TRADE AND INVESTMENT LAW – DOCUMENTS, COUNCIL ON INTERNATIONAL LAW AND POLITICS 397-430 (2018).

contracts should specifically provide that investors are not entitled to compensation if a host state interferes with their business in the public interest in a proportionate way and that compensation shall be reduced if the investors were in violation of these standards and requirements. This may scare away some investors, but if an investor is unwilling to make the investment under these conditions, the host country is probably better off without the investment.

If new and better treaties and contracts remain *de lege ferenda* and will not be available any time soon, however, this makes it more urgent to be more creative in using the existing treaty provisions. To this end, some innovative proposals that may be achievable *de lege lata* will be discussed.

2. **Public Interest Attorneys**

One of the key problems, whilst seeking a better representation of sustainable development goals in ISDS, is the lack of a good advocate for the laudable cause. A good solution could be the involvement of a public interest attorney to represent sustainable development goals in general, even if the investor does not bring them up for lack of interest, and the host state does not bring them up because they do not know how to[142] or otherwise choose not to. The model to consider is the "Advocate General" who is an independent member of the European Court of Justice (CJEU), represents *the European interest* in cases before the CJEU, and makes recommendations for the judges how a case should be decided, has proven extremely successful.[143] The Advocate General is able to consider the impact of a particular case on a broader scale, removed from the self-interest of the parties and the more narrow considerations that may inform the judges. His or her recommendations address not only the arguments advanced by the parties but also other arguments that could or should be taken into account to get the best possible outcome from a broader perspective of European integration, all Member States, and all peoples of the EU. In many cases, the Opinions of the Advocate General make for more interesting reading than the judgments adopted later.

[142] A rather interesting example of a failure of a host state to secure a reasonable and manageable outcome in ISDS is provided by Nigeria in the case brought by P&ID. In 2010, the investor, based in the UK, had negotiated the rights to build and operate a gas processing plant in Nigeria and be provided with large quantities of gas by the Nigerian government over an expected factory life of 20 years. Nigeria defaulted on its obligations and P&ID initiated ISDS proceedings. Overconfident Nigerian negotiators rejected an 850 million USD settlement offer from P&ID. Eventually, the arbitral tribunal awarded 6.6 billion USD in damages. Since Nigeria did not pay, it was taken to court in the UK for enforcement purposes and Mr. Justice Butcher of the Commercial Court ruled on 16 August 2019 that P&ID, with costs and interest, was owed a total of 9.6 billion US$. Still overconfident, the Nigerians have announced that they will appeal and in any case not pay. Lawyers for P&ID are surely relishing the opportunity of locating and seizing Nigerian assets around the world for a long time to come. *See* Rod Austin, *Nigeria Misses Chance to Transform Lives – and Must Pay $9bn Damages,* THE GUARDIAN (Aug. 24, 2019) https://www.theguardian.com/global-development/2019/aug/24/nigeria-must-pay-9bn-damages.

[143] *See*, inter alia, NOREEN BURROWS & ROSA GREAVES, THE ADVOCATE GENERAL AND EC LAW (2007); *See also* Cyril Ritter, *A New Look at the Role and Impact of Advocates-General - Collectively and Individually*, 12 COLUM. J. EUR. L. 751 (2005-2006).

Indeed, the CJEU follows the recommendations of its Advocate Generals in more than 80% of its decisions.[144]

The problem is, of course, that investors are quite happy with the way things are in ISDS and have no reason to agree to the involvement of a public interest attorney unless such an involvement is mandated by a new generation investment treaty. Thus, it is highly unlikely that a systematic involvement of independent voices for the advancement of sustainable development in front of investment arbitration tribunals will be seen any time soon.

However, this does not have to be the death sentence to the idea. First, if an investment treaty provides any language in support of balancing investor rights with state and public interest considerations, arbitral tribunals could appoint experts to analyze the public interest dimension of a dispute.[145] Even if arbitrators should shy away from taking such an approach for fear of not being appointed in future cases, there is no reason why the respondent state could not bring in the expert as a party appointed expert or even as a member of the legal team. In particular, if the respondent is a developing country, often, the government does not have highly qualified lawyers to represent it in arbitration.[146] In many developing countries there is no concerted effort to prepare a new generation of lawyers that can represent their interests before international investment tribunals, as high-quality courses on investment law and arbitration are almost non-existent in university and law school curricula.[147] Some countries have, therefore, outsourced the work and brought in expensive representation from well-known international law firms. However, it is by no means clear that money spent on this kind of counsel is well spent because from the perspective of the law firm, there is little incentive to work beyond the call of duty. Old generation investment treaties seem to favor the investor, the law firm cashes in regardless of outcome, and the respondent state is unlikely to become a repeat customer. Creative arguments, for example that the exceptions based on Article XX of the GATT should be taken into consideration even if they are not mentioned in the BIT because both parties to it are also Contracting Parties of the WTO and bound by the TRIMs Agreement, are rarely seen in these kinds of cases. This does not have to be the case, and there are certainly experts available in academia and NGOs that would make more passionate and unconventional arguments to try to tip the scale toward a better representation of sustainable development goals.

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[144] *See* FRANK EMMERT, DER EUROPÄISCHE GERICHTSHOF ALS GARANT DER RECHTSGEMEINSCHAFT (1998), https://www.researchgate.net/publication/259848618_Der_Europaische_Gerichtshof_als_Garant_der_Rechtsgemeinschaft.

[145] U.S. Model BIT Article 32 (2012).

[146] The authors have seen this in their own practical experience, although other factors play an important role in the apparent bias of investor-state arbitration procedures against less developed host states. For comprehensive analysis see Daniel Behn, Tarald Laudal Berge & Malcolm Langford, *Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration*, 38 NW. J. INT'L L. & BUS. 333-389 (2018).

[147] One of the authors of the article has introduced a new semester long course on "Investment Law and Sustainable Development" into the curriculum of the International and Business Law Program of the American University of Central Asia, Kyrgyz Republic. However, to the best knowledge of the authors, overall, there is a lack of courses that focus on teaching investment law and arbitration in the context of sustainable development goals.

3. Amicus Curiae Submissions in Investor–State Arbitration

The 2012 U.S. Model BIT provides in Article 28(2) that "[a] non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty." Thus, in a dispute between an investor and a host country, the home country of the investor would be entitled to make submissions as well, if a BIT based on the 2012 Model were in force.[148] Unfortunately, it is not very likely that the home country of the investor would take "the other side" and advocate for a limitation of the investor's rights and an expansion of public interest considerations in the host country.

More interesting in this regard may be the provision in Article 28(3) of the same 2012 U.S. Model BIT pursuant to which "[t]he tribunal shall have the authority to accept and consider amicus curiae submissions *from a person or entity that is not a disputing party.*" (emphasis added). The U.S. did not invent this rule, however. It is taken almost verbatim from the ICSID Rules of Procedure for Arbitration Proceedings after their 2006 amendment. The big difference is that under the ICSID Rules, the tribunal has the authority only "[a]fter consulting both parties" and if certain conditions are met, including "a significant interest" of the non-disputing party in the proceeding.[149] An example, where the conditions were met is *AES Summit v. Hungary*.[150] The investor claimed that the introduction of certain price control measures in the Hungarian electricity market violated their rights protected by the Energy Charter. The EU Commission requested and, after consultation of the parties, was allowed to file limited observations regarding the application of EU competition or antitrust law. However, for lack of agreement by the parties, the EU Commission did not get access to the written submissions of the parties.[151] Happ observes that there is an inherent conflict in Rule 37 of the ICSID Rules. [152] On the one hand, Rule 37(2)(a) requires that "the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is *different* from that of the disputing parties." (emphasis added). On the other hand, unless the disputing parties give broad consent, the non-disputing party will have very limited

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[148] As we have outlined above, so far, the U.S. has not actually entered into BITs based on the 2012 Model. However, this may still happen in the future. Other countries could also craft BITs of their own and include similar language.

[149] *See* Rule 37(2) of the ICSID Rules of Procedure for Arbitration Proceedings. *See also* Filip Balcerzak, *Amicus Curiae Submissions in Investor - State Arbitrations*, 12 COMMON L. REV. 66 (2012); Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 BERKELEY J. INT'L L. 200 (2011); A. Saravanan & S.R. Subramanian, *The Participation of Amicus Curiae in Investment Treaty Arbitration*, 5 J. CIVIL LEGAL SCI. 21 (2016).

[150] AES Summit Generation Limited & AES-Tisza Erömü Kft. v. Republic of Hungary (II), ICSID, Case No. ARB/07/22 (Sep. 23, 2010) http://investmentpolicyhub.
unctad.org/ISDS/Details/279.

[151] AES Summit Generation Limited v. Hungary, ICSID, Case No. ARB/01/4, ¶ 3.22.

[152] *See* Richard Happ, *ICSID Rules, in* INSTITUTIONAL ARBITRATION ARTICLE-BY-ARTICLE COMMENTARY ON … ICSID923-1005 (Rolf A. Schütze (ed.) 2013).

rights and even more limited access. But how are the *amici* supposed to know what they might be able to add beyond what is already presented to the tribunal by the disputing parties, if they do not have access to the files?

An even more pertinent example may be *Bernhard von Pezold v. Zimbabwe*.[153] The investors were various owners of tobacco, tea, and coffee farms that were expropriated in the course of land reforms undertaken by the Zimbabwean government. The European Center for Constitution and Human Rights, as well as four indigenous communities of Zimbabweans applied for leave to participate as *amici curiae* on behalf of the host state. However, since the investors objected, the tribunal denied the request,[154] although it seems clear that the petitioners had a genuine interest in the matter, since they were the beneficiaries of the land reforms. The argument made by the tribunal is quite striking, namely that "the circumstances of the petition gave rise to legitimate doubts as to *the independence and neutrality* of the Petitioners." (emphasis added).[155] Therefore, supposedly, the applicants did not meet the criteria of the ICSID Rules for third party participants.[156] It is not clear, where in the Rules the tribunal would locate a requirement that *amici* need to be independent and neutral. In light of the fact that Rule 37(2)(c) requires, *expressis verbis*, that the non-disputing party must have "a significant interest in the proceeding," the opposite would seem to be the case.

What these examples show, unfortunately, is ambiguity inside the ICSID Rules which leads, once again, to unpredictable outcomes. The authors are not aware whether the drafters of the 2012 U.S. Model BIT dropped the conditions for participation of *amici* for these very reasons to ensure a better integration of sustainable development and other public policy considerations in the future, or whether it is just a fortuitous coincidence. One can only hope that the 2012 U.S. Model does not remain merely a model much longer and that its terms find their way into new investment treaties insisted upon by host countries and – until those can be obtained with the home countries of investors – into specific investment contracts concluded between a host country and an investor, as discussed above. For the time being, however, the parties to a dispute may have to bring their *amici* on the official ticket.

4. Establishment of an International Investment Court

[153] Bernhard von Pezold and others v. Republic of Zimbabwe, ICSID, Case No. ARB/10/15 (July 28, 2015) http://investmentpolicyhub.unctad.org/ISDS/Details/376.
[154] *Id.* at ¶ 36-38.
[155] *Id.* at ¶ 38.
[156] *Id.* at ¶ 38. Another interesting case is Gabriel Resources v. Romania, in which arbitrators allowed amicus submission of facts, but decided to exclude their "arguments on the law, as well as references to or reliance on testimonies". *See* Gabriel Resources Ltd. & Gabriel Resources (Jersey) Ltd. v. Romania, ICSID, Case No. ARB/15/31, Procedural Order #19 (December 7, 2018) https://www.italaw.com/sites/default/files/case-documents/italaw10152.pdf.

As traditional ISDS is facing mounting criticism, another procedural solution advanced by commentators is the call for the establishment of an international investment court.[157] For example, Asif Qureshi calls for a "Supreme Investment Court … [to be]…set up as such, or as part of a chamber in the ICJ"[158] in order to "contribute to greater transparency, accountability, and legitimacy in the adjudicative process; deal with the asymmetry in the manner in which different types of investment are currently dealt with; and provide certain safeguards."[159] Similarly, Gus Van Harten states that "the lack of an appellate body to review awards makes it difficult, if not impossible, to unify the jurisprudence into a stable system of state liability."[160] Therefore, he proposes "an international court with comprehensive jurisdiction over the adjudication of investor claims."[161] The most thorough analysis to date may be provided by Marc Bungenberg and August Reinisch in their book, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*.[162]

At first glance, it may seem inconsistent to call for a court to get involved in arbitration. After all, the ability of arbitral tribunals to deliver enforceable decisions in a short period of time, after confidential proceedings, and with no possibility of appeal, are among the prized benefits of (commercial) arbitration. None of these advantages would survive if (investment) arbitration awards were systematically reviewable in an investment court. However, as Antony Crockett has pointed out, while finality is generally preferred over consistency in commercial arbitration, consistency is more important in investor arbitration.[163] The reasons can be found in the elevated public interest; awards against host countries have to be satisfied from public coffers and may penalize and potentially even prevent host country regulation in the public interest. Furthermore, the awards in investment cases are already public and not confidential in most cases. Last but not least, the ability of parties to an arbitration to pick suitable neutrals would also recede into the

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[157] *See* Rob House, *Designing a Multilateral Investment Court: Issues and Options, in* 36 YEARBOOK OF EUROPEAN L. 209-236 (Albertina Albors-Llorens et al., eds, 2017). *See also* David Howard, *Creating Consistency through a World Investment Court*, 41 Fordham Int'l L. J. 3-52 (2017); Louis Wells, *Backlash to Investment Arbitration: Three Causes, in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 349 (Michael Waibel et al. ed., 2010); Ilija Mitrev Penusliski, *A Dispute Systems Design Diagnosis of ICSID, in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 529-531 (Michael Waibel et al. ed., 2010); Debra Steger, *Enhancing the Legitimacy of International Investment Law by Establishing an Appellate Mechanism, in* IMPROVING INT'L INV. AGREEMENTS 247-264 (Armand de Mestral et al. eds., 2013); For the criticism of the idea of a multilateral investment court *see* Charles Brower & Jawad Ahmad, *From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court*, 41 FORDHAM INT'L L. J. 791, 792-820 (2018).

[158] Asif Qureshi, *An Appellate System? in* THE OXFORD HANDBOOK OF INT'L INV. L. 1165 (Christoph Schreuer et al. eds., 2008).

[159] *Id*. at 1167.

[160] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 152 (2008).

[161] *Id*. *at* 180.

[162] *See* Marc Bungenberg & August Reinisch (eds), *Special Issue: From Bilateral Arbitral Tribunals and Investments Courts to a Multilateral Investment Court – Options Regarding the Institutionalization of Investor-State Dispute Settlement*, EUROPEAN YEARBOOK OF INT'L ECON. L. (2018).

[163] See the conference report by Rutger Metsch, *Hong Kong is Mapping the Way Forward in ISDS Reform*, Kluwer Arbitration Blog, (March 29, 2019).

background, since the judges on a world investment court would be no less qualified than any arbitrators the parties might select themselves.

The idea that an investment court should be available for ISDS, either as a substitute of ad hoc arbitration options or as an appellate review body in some or all cases may be good to advance greater consistency in the arbitral process. The problem is, as before, that the idea needs to be implemented via treaties and those have to be drafted, negotiated, supported and ratified by home states and host states, preferably many of them.

The most prominent proponent of the idea of an investment court has been the European Union (EU). Already in 2015, the EU Commission proposed providing for a permanent investment court in all of the EU's investment agreements.[164] The idea behind this has been the need to create an independent, predictable, comprehensive, cost-effective, and transparent dispute resolution system, with a permanent institution authorized to hear investment claims instead of having only arbitration tribunals set up on a case-by-case basis.[165] As a result, a number of the EU's investment agreements already provide for an investment court. For example, the EU-Singapore Investment Protection Agreement establishes a tribunal of first instance and an appeal tribunal.[166] The tribunal consists of two members nominated by the EU, two members nominated by Singapore, and two members jointly nominated by the EU and Singapore who are not to be nationals of any Member State of the EU or Singapore.[167] It is interesting to note that the parties have indicated knowledge or experience in public international law as one of the key criteria for appointment, along with having qualifications similar to those required to become a judge in the respective countries or having qualifications required to be jurists of recognized competence.[168] The appointment is made for an eight-year term.[169] Although the Agreement establishes the dispute resolution system on a bilateral basis, it also provides for the possibility of a multilateral dispute settlement mechanism.[170]

Similarly, the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada provides for a tribunal and an appellate tribunal.[171] The tribunal is to have fifteen

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[164] EU Commission, A Multilateral Investment Court, http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf.
[165] *Supra* note 64.
[166] EU-Singapore Investment Protection Agreement, Ch.3, Art. 3.9, 3.10 http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156731.pdf; *See* Leon Trakman, *Enhancing Standing Panels in Investor-State Arbitration: The Way Forward?,* 48 GEORGETOWN J. OF INT'L L. 1145, 1146-1195 (2017).
[167] EU-Singapore Investment Protection Agreement, Ch.3, Art. 3.9, Sec. 2.
[168] EU-Singapore Investment Protection Agreement, Ch.3, Art. 3.9, Sec. 4.
[169] EU-Singapore Investment Protection Agreement, Ch.3, Art. 3.9, Sec. 5.
[170] EU-Singapore Investment Protection Agreement, Ch.3, Art. 3.12 ("The Parties shall pursue with each other and other interested trading partners, the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of international investment disputes. Upon establishment of such a multilateral mechanism, the Committee shall consider adopting a decision to provide that investment disputes under this Section will be resolved pursuant to that multilateral mechanism, and to make appropriate transitional arrangements").
[171] Comprehensive Economic and Trade Agreement between the EU and Canada, Ch. 8, Art. 8.27, 8.28, http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/. For an analysis of the dispute settlement

members with five members being nationals of EU Member States, five members being nationals of Canada, and five members being nationals of third countries.[172] The appointment is made for a five-year term.[173] The Agreement also specifies "…demonstrated expertise in public international law" as one of the key criteria to be appointed as the member of the tribunal[174] which stands in stark contrast to the existing ISDS, where arbitrators do not necessarily have to possess any knowledge of public international law. The Agreement also notes that the "Parties shall pursue…the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes."[175]

Apart from including the provision on an investment court in these investment agreements, the EU has been actively promoting its proposal of a multilateral investment court as "…a logical next step in the approach to set up a more transparent, coherent and fair system to deal with investor complaints under investment protection agreements."[176] The EU Council of Ministers has issued "negotiating directives" for a convention establishing a multilateral court for the settlement of investment disputes.[177] The negotiations are to take place under the auspices of the United Nations Commission on International Trade Law (UNCITRAL).[178] The convention is to establish a multilateral investment court in the form of a tribunal of first instance and an appeals tribunal.[179] The directives stipulate that members of the multilateral court must be "…subject to stringent requirements regarding their qualifications and impartiality," "…appointed for a fixed, long and non-renewable period of time and enjoy security of tenure" and have to "…receive a permanent remuneration."[180]

Although having a multilateral court instead of the existing ISDS system would be a step forward, widespread implementation of this idea may be very difficult in practice due to opposition both to ISDS and to a multilateral investment court coming from various countries around the

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mechanism under CETA see David Schneiderman, *International Investment Law's Unending Legitimation Project*, 49 LOYOLA U. CHICAGO L. J.229, 249-254 (2017).

[172] Comprehensive Economic and Trade Agreement between the EU and Canada, Art. 8.27, Sec. 2.

[173] Comprehensive Economic and Trade Agreement between the EU and Canada, Art. 8.27, Sec. 5.

[174] Comprehensive Economic and Trade Agreement between the EU and Canada, Art. 8.27, Sec. 4.

[175] Comprehensive Economic and Trade Agreement between the EU and Canada, Art. 8.29.

[176] EU Commission, A Multilateral Investment Court, http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf.

[177] Council of the European Union, Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes (Mar. 1, 2018) http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf.

[178] Council of the European Union, Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes ¶ 4 (Mar. 1, 2018) http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf.

[179] Council of the European Union, Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes ¶ 10 (Mar. 1, 2018), http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf.

[180] Council of the European Union, Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes ¶ 11 (Mar. 1, 2018) http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf.

world. For example, Brazil does not allow investors to have direct recourse to investment arbitration in its investment agreements. Brazil's 2015 Cooperation and Facilitation Investment Agreement provides for a Joint Committee to "…resolve any issues or disputes concerning investments of investors of a party in an amicable manner."[181] It also establishes a National Focal Point or "Ombudsman" to support the investor and to "…seek to prevent differences in investment matters, in collaboration with government authorities and relevant private entities."[182] The Model Agreement only gives parties a right to state-to-state arbitration.[183] Another example of a state that opposes international investment arbitration is South Africa.[184] South Africa's domestic law provides investors with recourse to mediation instead of arbitration.[185]

The topic of reforming ISDS and the possible creation of a multilateral investment court is now being discussed as part of UNCITRAL Working Group III.[186] It remains to be seen whether this idea will be implemented. Given the strong support by the EU, it seems likely that some kind of court system will be created eventually. Even if it is implemented and widely supported beyond the EU and a handful of other countries, which is all but certain at the present time, the multilateral investment court per se may not be able to solve all problems related to the current imbalance between the protection of investors and advancement of sustainable development. Much will depend on the kind of law it gets to apply and to what extent it can persuasively argue that old rules should be re-interpreted in more balanced ways even before new BITs and IIAs come into force. Therefore, the negotiation and renegotiation of BITs and IIAs in line with sustainable development goals remains indispensable.

Conclusions

International investment arbitration is one of the most popular dispute resolution mechanisms. It provides an impartial forum for bringing claims against host states and allows for an effective enforcement of arbitral awards. Nevertheless, despite all the positive aspects of arbitration, there is now a rising backlash against investment arbitration due to problems related to lack of transparency, inconsistency of arbitral awards, unpredictability of the system, and other

[181] Model Cooperation and Facilitation Investment Agreement of the Federative Republic of Brazil, 2015, Art. 17, http://investmentpolicyhub.unctad.org/Download/TreatyFile/4786.
[182] Model Cooperation and Facilitation Investment Agreement of the Federative Republic of Brazil, 2015, Art. 18, http://investmentpolicyhub.unctad.org/Download/TreatyFile/4786.
[183] Model Cooperation and Facilitation Investment Agreement of the Federative Republic of Brazil, 2015, Art. 24, http://investmentpolicyhub.unctad.org/Download/TreatyFile/4786.
[184] *See* Sean Woolfrey, *The Emergence of a New Approach to Investment Protection in South Africa*, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW – MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED 266-90 (Steffen Hindelang & Markus Krajewski eds., 2016).
[185] Trishna Menon & Gladwin Issac, *Developing Country Opposition to an Investment Court: Could State-State Dispute Settlement Be an Alternative?* (Feb. 17, 2018) http://arbitrationblog.kluwerarbitration.com/2018/02/17/developing-country-opposition-investment-court-state-state-dispute-settlement-alternative/.
[186] *UNCITRAL*, WORKING GROUP III, http://www.uncitral.org/uncitral/en/commission/working_groups/3Online_Dispute_Resolution.html.

issues. If the international investment arbitration system is to remain viable, it needs to be balanced with advancement of sustainable development goals. The sustainability of ISDS itself depends on both substantive and procedural reforms analyzed in this article. Therefore, such reforms should be enacted to provide for better solutions for all sides.

Host countries, in particular developing and less developed countries, should no longer just lament a real or perceived bias of the system against them, but use the creative tools outlined in this article to get better terms in new generation investment treaties with investor home countries and – until those can be negotiated and ratified – these countries should insist on better terms to be included in direct investment contracts concluded with investors whenever larger projects can potentially clash with public policy objectives and sustainable development goals. If investors do not want to commit to respecting the most fundamental principles of good corporate governance and citizenship, the host countries would be better off without them and should certainly not have to pay compensation for proportionate regulation in the public interest.