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**INTERNATIONAL INVESTMENT DISPUTE SETTLEMENT IN THE 21ST CENTURY:
DOES THE PRESERVATION OF THE PUBLIC INTEREST REQUIRE AN
ALTERNATIVE TO THE ARBITRAL MODEL?**

**Nicolas Hachez
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ABSTRACT

This paper aims at taking stock of the criticism directed at the mechanism of international arbitration for settling disputes between international investors and host states. This paper also analyzes and describes the main attempts at reforming the arbitral model in response to those criticisms, notably in terms of transparency and participation. It finally briefly presents and evaluates proposals for plain alternatives to the arbitral model in investment dispute settlement, and assesses those proposals in legal and policy terms. The paper closes with a few remarks on the real potential of the arbitral model in investment disputes, and insists on the need to further reform it so that it can serenely and credibly play its role of impartial dispute settlement mechanism in cases often involving high doses of public interest. The paper notably makes a case for the fostering of a peaceful and practical co-existence between arbitral tribunals and domestic courts.

KEY WORDS

International Investment Law, Foreign Direct Investment, International Arbitration, Dispute Settlement, Local Remedies Rule, Transparency and Participation

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CONTENTS

1. Arbitration in the international investment legal regime	2
2. Criticism of the arbitral model.....	5
2.1. Commercial process v. the public interest: democracy and the rule of law	5
2.2. Which standard of justice in investment arbitration?	8
2.2.1. Independence of arbitrators	8
2.2.2. Impartiality of arbitrators	10
2.3. Interim conclusion	13
3. Current reforms of the arbitral model: Too little, too late?	14
4. Doing away with arbitration? A critical overview of possible alternatives to the commercial arbitral model.....	18
5. Conclusion.....	22

1. Arbitration in the international investment legal regime

While the international legal regime on foreign direct investment (FDI) is unique in many respects, its most peculiar characteristic is the arbitral model which has become an ‘institution’ for solving disputes between investors and host States.¹ Even though this model cannot (yet) be said to have become part of customary international law for regulating the relations between investors and host States², the presence of clauses allowing for investors to directly sue the host State before an *ad hoc* arbitral tribunal in case of dispute is a recurrent feature of international investment agreements (IIAs), be they investment contracts governing the relationship of an investor and the host State regarding one investment, or investment treaties governing the relationship of the investors of a State (the ‘home State’) with one or several other States in which the investor has an investment (the ‘host State’). There are however notable exceptions to this legal trend.³ The role of

¹ Jan Wouters and Nicolas Hachez, ‘The Institutionalization of Investment Arbitration and Sustainable Development’, in Marie-Claire Cordonier Segger, Markus Gehring and Andrew Newcombe (eds.), *Sustainable Development in World Investment Law*, Alphen, Kluwer Law International, 2011, p. 616. On the reasons for the increasing recourse to arbitration to solve investment disputes, see Jeswald Salacuse, ‘Explanations for the Increased Recourse to Treaty-Based Investment Dispute Settlement: Resolving the Struggle of Life against Form?’, in Karl P. Sauvant (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford, Oxford University Press, 2008, pp. 105-126.

² Bernard Kishoiyian, ‘The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law’, 14 *Northwestern Journal of International Law and Business* 327 (1994), p. 368.

³ The US-Australia free trade agreement’s investment chapter does not contain a dispute settlement clause, possibly because both developed countries are inclined to trust each other’s judicial system.

arbitral tribunals in shaping the international investment regime has been decisive⁴ and there is every reason to believe that investor disputes will continue to be a main driver in the emergence and evolution of international norms on FDI. Therefore, it seems fitting to evaluate how arbitration is faring in its role as promoter of the general interest.

Arguably, the reason for having such a peculiar dispute settlement mechanism has to do with the credence that, in order to attract FDI, a host State has to display a 'friendly investment climate' through the development of an effective rules-based regime governing its relations with investors.⁵ Next to a number of substantive protections in favour of investors (fair and equitable treatment, full protection and security, protection against (indirect) expropriation, etc.), the existence of a dispute settlement mechanism separate from domestic judicial and administrative procedures is thought to contribute to a friendly investment climate in the host State. *A contrario*, host States would also be induced into accepting the arbitral model so as not to be seen, among capital-importing countries, as having an 'unfriendly' investment climate for being one of the only countries not allowing such remedy.⁶ The perceived advantages of arbitration for investors are multiple. First, domestic judicial institutions are generally bypassed (at least after some time of trying them out – see *infra*), and with them their supposedly lengthy procedures and their possibly corrupt, biased, or incompetent judges. A distrust towards domestic judicial institutions is thus at the root of investor-State arbitration. Second, having recourse to arbitration directly between the foreign investor and the host State for the breach of an international obligation by the latter⁷ also allows to circumvent the disadvantages and uncertainties of the customary diplomatic protection process, in which a foreign investor is entirely dependent on the goodwill and power of its home State in order to get a wrong redressed.⁸ Third, international arbitration, despite its sometimes staggering cost (counsel, arbitrator and expert fees, travel and administrative costs, secretarial costs, etc.⁹), is thought to be more effective than

See Free trade Agreement between Australia and the United States, done at Washington D.C. on 18 May 2004, available at <http://203.6.168.65/fta/ausfta/final-text/>. Similarly, China was long very cautious regarding the inclusion of arbitration clauses into international investment instruments, notably by limiting the jurisdiction of tribunals to certain issues or requiring prior recourse to domestic remedies. However, it seems to have relaxed its practice in the last decade. See Monika Heymann, 'International Law and the Settlement of Investment Disputes Relating to China', 11 *Journal of International Economic Law* 507 (2008) and Dan Wei, 'Bilateral investment treaties: an empirical analysis of the practices of Brazil and China', *European Journal of Law and Economics* (2010), Online First, DOI: 10.1007/s10657-010-9157-z.

⁴ See UNCTAD, 'Investor-State Dispute Settlement and Impact on Investment Rulemaking', 2007, available at http://www.unctad.org/en/docs/iteiia20073_en.pdf.

⁵ As opposed to the 'gunboat diplomacy' which used to prevail, according to which a foreign investor had to rely on the diplomatic efforts and power of its home State if it had to have its investment protected against abuse by the host State. See Susan D. Franck, 'Challenges Facing Investment Disputes: Reconsidering Dispute Resolution in International Investment Agreements', in Sauvant, *supra* note 1, p. 149.

⁶ See Andrew Guzman, 'Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties', 38 *Virginia Journal of International Law* 639 (1998).

⁷ As we shall see *infra*, the host State is in 99% of the cases the respondent in investment arbitration.

⁸ Stephan Schill, 'Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement', in Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung and Claire Balchin (eds.), *The Backlash against Investment Arbitration – Perceptions and Reality*, Alphen, Kluwer Law International, 2010, pp. 36-45.

⁹ Even though transparent data are lacking to evaluate the true cost of arbitration in most of the cases. See Susan D. Franck, 'Empirically Evaluating Claims about Investment Treaty Arbitration', 86 *North Carolina Law Review* 1 (2006-2007), pp. 66-70.

domestic judicial processes, as its procedures are more flexible, and as the awards are final and not subject to appeal, save in a limited number of 'annulment' instances.

As one can see, the benefits of arbitration for investors are direct, whereas for host States, the advantages are indirect, as by giving up the jurisdiction of their own courts they hope to send a favourable message to potential investors, perhaps resulting in a growth in incoming capital.¹⁰ While the positive effect on investment flows is yet to be demonstrated¹¹, investors have not refrained from using arbitration to vindicate their rights under international investment instruments, especially over the last decade.¹² A number of phenomena, such as a race for capital by host States, the supposedly uncritical signing by host States of some 'model agreements' containing arbitration clauses and presented by capital-exporting States, the unequal bargaining positions inducing host States to sign BITs with arbitration clauses, or simply a phenomenon of imitation and replication operating throughout the investment legal regime, have made arbitration a '*fait accompli*' in international investment instruments. To be sure, the outcomes of a number of these proceedings have at times proven bitter for respondent host States, as the latter were condemned to pay steep damages to claimant investors.¹³ As the number of awards concerning investment disputes kept growing, scrutiny and criticism simultaneously intensified towards investment arbitration, leading to what some have called a 'backlash against investment arbitration'.¹⁴ A number of points in the design and operation of investment tribunals have polarized the debate.

In the following sections, we first give an overview of the main criticisms against investor-State arbitration. We then briefly present the steps that were recently taken to reform the arbitral institution in order to respond to the critique. We finally turn to more radical proposals for reform, some of which even suggest to do away with arbitration altogether, and we evaluate these proposals for alternatives to the arbitral model.

¹⁰ Olivia Chung, 'The Lopsided International Investment Law Regime and its Effect on the Future of Investor-State Arbitration', 47 *Virginia Journal of International Law* 953 (2007).

¹¹ See e.g. Mary Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit ... And They Could Bite', *World Bank Policy Research Working Paper No. 3121*, August 2003, available at

http://econ.worldbank.org/external/default/main?pagePK=64165259&piPK=64165421&theSitePK=469372&menuPK=64216926&entityID=000094946_03091104060047; and Jason Webb Yackee, 'Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?', 42 *Law and Society Review* 805 (2008); and Jeswald Salacuse and Nicholas Sullivan, 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain', 46 *Harvard International Law Journal* 67 (2005).

¹² At the end of 2010, the number of known arbitration cases was 390. The number of filed claims before investment tribunals has been growing exponentially since the mid-1990s; 2010, with 'only' 25 new cases has 'the lowest number of known treaty-based disputes filed annually since 2001.' See UNCTAD, 'Latest Developments in Investor-State Dispute Settlement', *IAs Issues Note No. 1*, March 2011, available at http://www.unctad.org/en/docs/webdiaeia20113_en.pdf, pp. 1-2.

¹³ For a review of some of the highest damages awarded as at 2005, see UNCTAD, 'Investor-State Disputes Arising from Investment Treaties: A Review', 2006, available at http://www.unctad.org/en/docs/iteit20054_en.pdf, pp. 9-12.

¹⁴ See Waibel *et al.*, *supra* note 8.

2. Criticism of the arbitral model

2.1. Commercial process v. the public interest: democracy and the rule of law

The main criticism addressed to the arbitral model is that it fails to live up to the basic precepts of democracy and the rule of law.¹⁵

First of all, since investment arbitrations are one-off proceedings, and since the various arbitral tribunals do not share an organic link in the form of a *stare decisis* rule, or an appeals mechanism, arbitration has produced a number of inconsistent decisions, reaching different outcomes in similar situations.¹⁶ A visible stream of inconsistencies resulted from the dozens of claims that have been filed against Argentina following the economic crisis that struck the country in 2000-2001, in which international investors were challenging Argentina's anti-crisis measures as breaching a number of investment protections. Whereas some arbitral panels accepted Argentina's defense of necessity and reliance on the 'non precluded measures' clause to justify these measures¹⁷, others rejected it, even though the factual context was the same in all cases.¹⁸ Other well-known instances of inconsistencies can be found in the *Lauder v. Czech Republic* and *CME v. Czech Republic* cases, in which two tribunals reached radically different verdicts while judging the same parties and the same facts in parallel proceedings, the former rejecting the claimant's case while the latter awarded it several hundred million dollars in damages and interests.¹⁹

¹⁵ See e.g. Barnali Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit', 41 *Vanderbilt Journal of Transnational Law* 775 (2008); and Gus Van Harten, *Investment Treaty Arbitration and Public Law*, Oxford, Oxford University Press, 2007.

¹⁶ August Reinisch, 'The Issues Raised by Parallel Proceedings and Possible Solutions', in Waibel *et al.*, *supra* note 8, pp. 115-117, classifies the cases of inconsistency in three categories : (i) divergent views on legal issues, (ii) divergent assessment of identical facts and (iii) conflicting results in the same dispute.

¹⁷ See *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007 ; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008.

¹⁸ See *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 ; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award 28 September 2007 ; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007. All three awards were subsequently annulled by ICSID *Ad Hoc* committees, e.g. for wrongful application of the customary rules on necessity and of the NPM Clause contained in the US/Argentina BIT, on which all three claims were based. On the application of the NPM Clauses in the Argentina awards, see generally William Burke-White and Andreas von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties', 48 *Virginia Journal of International Law* 307 (2008).

¹⁹ See *Lauder v. Czech Republic*, UNCITRAL, Award (Final), 3 September 2001; and *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001 and Final Award, 14 March 2003.

Even though according to UNCTAD the cases of blatant contradiction are scarce²⁰, the very possibility that inexplicable inconsistencies²¹ can arise cultivates an impression that arbitration might at times rhyme with arbitrariness and that States, in accepting to submit themselves to arbitration, would in a sense be ‘gambling’ with the general interest.²² Depending on whom the dispute is submitted to, the outcome of the case can be radically different, and there is no appeals mechanism to correct erratic awards. True, there are marginal review mechanisms attached to the arbitral institution, either before international bodies or before domestic courts. But these are reserved for a limited number of hypotheses.²³ The *CMS v. Argentina* award, for example, has recently been annulled by an ICSID *ad hoc* Committee, even though the latter insisted that grounds for reviewing the legal reasoning contained in an arbitral award had to amount to a ‘manifest’ error amounting to excess of powers.²⁴ The only ground for annulment in such a case is when a tribunal fails to apply the proper law, but not when it errs in applying it.²⁵ Annulment procedures are therefore no appeals mechanism, and are only aimed at removing manifest and grossly unfair anomalies from the body of arbitral case-law. They are not as such capable of preserving unity in this case-law.²⁶ In other words, legal certainty is not guaranteed in international investment law.²⁷

A second and more foundational line of criticism concerns the fact that international arbitration is traditionally a commercial instrument of dispute settlement, while investor-State disputes do not have that character. First, an investment tribunal has

²⁰ See UNCTAD, *supra* note 4, p. 91. See also Reinisch, *supra* note 8, p. 115, and Jan Paulsson, ‘Avoiding Unintended Consequences’, in Sauvant, *supra* note 1, pp. 241 ff., insisting that one should distinguish *obiter dicta* and *ratio decidendi* before concluding to a case of inconsistency.

²¹ Some apparent inconsistencies can arguably be explained by the nuances in the wording of treaties for the same kind of protection. See the example of the various versions of the ‘fair and equitable treatment’ standard in various BITs in Anna Joubin-Bret, ‘The Growing Diversity and Inconsistency in the IIA System’, in Sauvant, *supra* note 1, p. 138.

²² See Susan D. Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’, 73 *Fordham Law Review* 1521 (2005), p. 1523: ‘Tribunals have applied [investor protection] standards differently and made divergent findings on liability. Rather than creating certainty for foreign investors and Sovereigns, the process of resolving investment disputes through arbitration is crating uncertainty about the meaning of those rights and public international law.’

²³ See ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington D.C. on 18 March 1965 (entry into force 14 October 1966, amended on 10 April 2006), Article 52 (1), providing: ‘Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.’ For awards rendered by tribunals constituted under other rules than those of ICSID, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (into force 7 June 1959), the so-called ‘New York Convention’, provides in its article V that domestic courts can only refuse recognition and enforcement of an arbitral award for a limited number of reasons.

²⁴ *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Annulment Decision, 25 September 2007, paras. 51 and 136.

²⁵ *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 47. See also Christina Knahr, ‘Annulment and its Role in the Context of Conflicting Awards’, in Waibel *et al.*, p. 155.

²⁶ See Knahr, *supra* note 25, p. 160: ‘Although committees regularly harshly criticize the performance and the reasoning of arbitration tribunals, in the end they tend not to qualify the deficiencies as severe enough to lead to an annulment of the award.’

²⁷ See Reinisch, *supra* note 16, p. 115: ‘Where investment tribunals produce inconsistent or even conflicting awards, one of the central values of any rule-based system of law, that is, predictability, is lost.’

jurisdiction to review State acts and thus the exercise of sovereign authority by organs of the host State that allegedly go against obligations contained in an international agreement. Investor-State arbitration is therefore a public/administrative law mechanism, yet it is removed from the democratic constitutional realm.²⁸ Second, investment disputes typically oppose a State and its (supposedly) public interest-oriented policies to the commercial interests of a private corporation.²⁹ Third, the outcome of the review may have serious consequences on the citizens of the host State, be it because the latter is condemned to pay damages using taxpayers' money, or because the host State as a result of the award is forced to amend some of its policies which were judged contrary to the provisions of an investment instrument. The commercial and private nature of arbitration is said to be at odds with the public character of investor-State disputes, and this, it is said, amounts to a 'democratic deficit'.

From a procedural point of view, critics of arbitration fustigate the lack of transparency in investment arbitral proceedings, which copy the confidentiality which is consubstantial with commercial arbitration. Procedural rules applicable in arbitral disputes are often the same as those applicable to regular commercial arbitration between private parties: UNCITRAL, International Chamber of Commerce (ICC), Stockholm Chamber of Commerce, etc. The arbitration rules of the International Centre for the Settlement of Investment Disputes (ICSID)³⁰ offer the only set of arbitral rules designed specifically for investment arbitration.³¹ However, despite a reform in 2006 (see *infra*), they remain very much influenced by the commercial model, and confidentiality remains the rule rather than the exception. The influence of confidentiality in investment arbitration makes it difficult to have a clear view of the arbitral reality, as it is impossible to have a precise knowledge of how many investment disputes are ongoing, between which States and which investors. This may make it difficult for democratic accountability processes to play out with regard to the issues being arbitrated and with regard to the way host governments are defending the public interest in the framework of arbitral proceedings.

From a substantive point of view, critics emphasize that panels tend to view investment disputes as regular commercial litigation between equals, without taking into account the special position of the host State and of the public nature of the issues at stake or of the legal basis of their jurisdiction³², the investment agreement

²⁸ See generally Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', 17 *European Journal of International Law* 121 (2006).

²⁹ On the difficult question of the public/private divide in international investment law, see Alex Mills, 'Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration', 14 *Journal of International Economic Law* 469 (2011).

³⁰ See Rules of Procedure for Arbitration Proceedings (available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf, pp. 99 ff.) and ICSID Additional Facility Rules (available at http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf), governing certain disputes falling outside the scope of the ICSID Convention. The ICSID rules are the most commonly used set of rules in investment arbitration.

³¹ See however the 1993 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State, available at <http://www.pca-cpa.org/upload/files/1STATENG.pdf>.

³² See in this regard William Park, 'Arbitrator Integrity', in Waibel *et al.*, *supra* note 8, p. 246: 'One must be cautious about unselective attempts to transplant judicial standards into the world of arbitration. Given a judge's clear obligations to the citizenry as a whole, the calculus of judicial duties will differ from what might be expected of arbitrators who remain principally (albeit not exclusively) creatures of the litigants' contracts.'

(treaty or contract). This approach manifests itself in awards through an emphasis on the sanctity of contract³³ or through the application of strict, non-public, standards of review of State policies, according no deference whatsoever to the latter.³⁴ This contributes to reducing the 'policy space' of the State and to encroaching on the democratic choices of citizens and on the right to regulate in the public interest.³⁵

This is why critics call for taking into account the public character of investor-State relations and for reforming investment dispute settlement accordingly. In the words of Burke-White and von Staden, to remedy the rule of law and democracy deficits, 'it is time to recognize that contemporary investor-State arbitrations are not merely another form of private commercial arbitration, with one party now being a State, but that they are more fittingly understood as a form of dispute settlement that, like many domestic judicial proceedings, also operates in a public law context.'³⁶

2.2. Which standard of justice in investment arbitration?

The second line of criticism is also connected with the value of the rule of law and has to do with the functional suitability of arbitrators as judges in public law disputes. Arbitration is accused of structurally leaving the door open to arbitrators' conflicts of interest, lack of independence and partiality.³⁷ Arbitrators would be 'biased' in two ways, which we examine in turn below.

2.2.1. Independence of arbitrators

Independence for a judge means that he must not be personally interested in the outcome of the case before him, financially, emotionally, or otherwise. An independent judiciary is one of the fundamental features of the rule of law, and therefore in domestic judiciaries a number of mechanisms are typically put in place in order to guarantee such independence, notably the granting of tenure to judges and the setting of a list of functions or positions which are 'incompatible' with being a judge.

³³ See Louis Wells, 'Backlash to Investment Arbitration: Three Causes', in *Id.*, pp. 342-347.

³⁴ William Burke-White and Andreas von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitration', 35 *Yale Journal of International Law* 283 (2010). According to these authors' review, this not in line with the practice of other international institutions entitled to review acts of States, such as the European Court of Human Rights or the WTO Dispute Settlement Body. See recently for a more relaxed standard of review, according considerable deference to State decisions: *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para.283, stating e.g. 'A claim that a regulatory decision is materially wrong will not suffice [to find a violation of the BIT]. It must be proven that the State organ acted in an arbitrary or capricious way.'

³⁵ See, in relation with the case-law on regulatory takings, UNCTAD, 'FDI Policies for Development: National and International Perspectives', *World Investment Report 2003*, available at http://www.unctad.org/en/docs/wir2003light_en.pdf, p. 111.

³⁶ Burke-White and von Staden, *supra* note 34, p. 285.

³⁷ Choudhury, *supra* note 15, p. 820.

Arbitrators do not have tenure. They are typically appointed for a specific case³⁸, generally by the parties themselves, and are remunerated by the latter as well. Since the parties get to choose the arbitrators who are going to hear their case, they will likely be tempted to elect arbitrators whose past decision record seems to suit their position. Starting from there, arbitrators may be induced to adopt pro-investor or pro-host State stances in order to improve their chances to be appointed by one side or the other. This 'competition' within a profession whose members are appointed on a case by case basis seems difficult to reconcile with the aforementioned requirement of independence.³⁹

Moreover, there are no structural incompatibilities for arbitrators (except of course being a party to the dispute⁴⁰). Admittedly, arbitrators must disclose any information which might put their independence in doubt⁴¹ and certain indicative lists resembling incompatibilities have been developed,⁴² as well as a 'jurisprudence of ethical standards' applicable to arbitrators.⁴³ However, dubious relationships and uneasy situations may not be so uncommon, as it is a fact that the practice of investment arbitration sees many of the same faces, and that arbitrators are often business lawyers whose clients are very large corporations investing abroad, and therefore likely to have recourse, one day or the other, to investor-State arbitration. As a result, these lawyers-arbitrators have a direct interest in adopting extensive interpretations of investor protections so as to please their clients and defend their present or future interests. An author suggests that this state of facts is partly responsible for the ever greater scope of investor protection which one can find in the developing case-law.⁴⁴ Again, this sits rather uneasily with the principle of independence.⁴⁵

³⁸ An exception to the punctual appointment of arbitrators, connected to a specific stream of events, is the Iran-US Claims Tribunal, for which nine arbitrators are permanently appointed to rule on pending claims of US or Iranian nationals, as a means to resolve the crisis between the two countries, which arose as a result of the events of November 1979. See Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), 19 January 1981, available at <http://www.iusct.org/claims-settlement.pdf>.

³⁹ See Aaron Cosbey, Howard Mann, Luke Eric Peterson and Konrad von Moltke, *Investment and Sustainable Development – A Guide to the Use and Potential of International Investment Agreements*, Winnipeg, International Institute for Sustainable Development ('IISD'), 2004, available at http://www.iisd.org/pdf/2004/investment_invest_and_sd.pdf, p. 6.

⁴⁰ See also the conditions of nationality, ICSID Arbitration Rules, *supra* note 3023, Rules 1-3.

⁴¹ See *id.*, Rule 6; and UN General Assembly, UNCITRAL Arbitration Rules as Revised in 2010, Resolution 65/22, 6 December 2010, UN Doc. No. A/RES/65/22, article 11.

⁴² See International Bar Association, 'IBA Guidelines on Conflicts of Interest in International Arbitration', 22 May 2004, available at <http://www.int-bar.org/images/downloads/guidelines%20text.pdf>. The Guidelines non-exhaustively list situations which are relevant to evaluating the arbitrators' independence and impartiality, and classify them in three lists. The Red List contains situations which normally preclude a person from being an arbitrator in a dispute (save express consent of the parties for waivable conflicts arising from such situations). An Orange List contains situations which may rise doubts as to the arbitrator's independence and impartiality, and which must then be disclosed; the parties are deemed to accept the appointment of the arbitrator failing a timely objection after disclosure. The Green List contains a list of situations which should normally not pose problems for the independence or impartiality of arbitrators and which do not have to be disclosed, such as previously expressed legal opinions.

⁴³ Park, *supra* note 32, p. 231.

⁴⁴ Howard Mann, 'Transparency and Consistency in International Investment Law: Can the Problems Be Fixed by Tinkering?', in Sauvant, *supra* note 1, p. 216, noting that arbitrators are often 'lawyers who come from major law firms that generally represent large corporations who are themselves foreign investors. In this circumstance, it is readily arguable that the arbitrators have clients that have a specific interest in the expansion of the scope of investor protection.' On such expansionary trends, see

2.2.2. Impartiality of arbitrators

This aspect of the critique against investment arbitration has to do with impartiality, that is, with the assurance that arbitrators may not have made up their minds before they decide on the case.

2.2.2.1. Are arbitrators biased towards investor interests?

A frequent criticism against investment arbitration is that arbitral panels would suffer from a structural bias in favour of investors. It is a fact that investment instruments – and hence the dispute settlement mechanisms they contain – were originally intended to reassure and protect investors, their property and their profits so as to, possibly, foster investment flows into host States. The whole philosophy of the regime is meant to be favourable to investor interests.⁴⁶ While arbitrators are required to apply the law, some point to elements indicating that the scales may have better chances of getting tipped in the direction of investors' claims.

In practice, an overwhelming majority of claims are brought by investors; only five known claims out of several hundreds have reportedly been brought by host States.⁴⁷ In this connection, it is a commonly expressed fear that the corporation of arbitrators could favour investors' interests in order to induce the latter to file claims and thus increase the size of the arbitration business.⁴⁸ The legal culture from which most arbitrators come from may also be suspected to create a 'professional' bias, given that most arbitrators are practicing lawyers active in the field of business law, and rarely in areas of public law in which a host State could find defenses, such as human rights law or environmental law.⁴⁹ For instance, the ICSID Convention only provides that arbitrators 'shall be persons of [...] recognized competence in the fields of law, commerce, industry, or finance'.⁵⁰ Moreover, the fact that arbitrators are often practicing lawyers whose clients may possibly be involved in other arbitration cases can also have an (un)conscious influence on those arbitrators' impartiality. It is indeed not really conceivable that an arbitrator would decide in a certain way on an

Muthucumaraswamy Sornarajah 'A Coming Crisis: Expansionary Trends in Investment Arbitration, in Sauvant, *supra* note 1, pp. 39-80.

⁴⁵ See generally Gus Van Harten, 'Perceived Bias in Investment Treaty Arbitration?', in Waibel *et al.*, *supra* note 8, pp. 433-454.

⁴⁶ See Muthucumaraswamy Sornarajah, 'A Law for Need or a Law for Greed? Restoring the Lost Law in the International Law of Foreign Investment', 6 *International Environmental Agreements* 329 (2006), p. 342.

⁴⁷ Mehmet Toral and Thomas Schultz, 'The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations', in Waibel *et al.*, *supra* note 8, pp. 589-590. All these cases were introduced under investment contracts and not treaties. This can partly be explained by the fact that investors are not parties to investment treaties, and therefore their express consent is required before arbitration can be mounted against them. (*Id.*, p. 579). This may also be explained by the fact that BITs and other investment treaties usually confer very few litigable rights to host States. See Salacuse, *supra* note 1, p. 111. On host State claims, see generally Gustavo Laborde, 'The Case for Host State Claims in Investment Arbitration', 1 *Journal of International Dispute Settlement* 97 (2010), at 99 ff.

⁴⁸ See Van Harten, *supra* note 45, p. 445 and references cited: 'Where only one class of parties (here, investors) can bring the claims against the other class (States), and not vice-versa, arbitrators have an apparent interest to interpret the law in a way that encourages claims (albeit without undermining the political basis for the system's existence).'

⁴⁹ See Sornarajah, *supra* note 46, p. 357, and Burke-White and von Staden, *supra* note 34, pp. 330-332.

⁵⁰ See ICSID Convention, *supra* note 23, Article 14 (1).

issue if he or she has defended or is defending the opposite point of view as counsel in another case. His or her mind, on those issues, is already set.⁵¹

Of course, host States get to nominate arbitrators which they think will be sympathetic to their arguments. However, even when the arbitrator must, for some reason, be appointed by the default appointing authority in the place of the parties, a sort of ‘institutional bias’ favourable to investors is said to be at play.⁵² In ICSID arbitrations, arbitrators are, if need be, appointed by the Chairman of ICSID’s Administrative Council⁵³, who is also the President of the World Bank, by convention as of yet always a national of the United States, the largest capital-exporting country. The World Bank is also an organization who is strongly dominated by donor – i.e. developed – states, from where come most foreign investors. As a result of this supposed ‘institutional bias’⁵⁴ some have expressed the concern that this mechanism could result in the appointment of pro-investor arbitrators.⁵⁵ In ICC arbitrations, the default appointing authority is the ICC’s International Court of Arbitration⁵⁶ whose members are chosen by the ICC World Council.⁵⁷ The ICC brands itself as ‘the world business organization’.⁵⁸ This is not to say that arbitrators are all dishonest and biased in favour of investors and against host States. Actually, statistics are in favour of host States with 78 cases won against 59 lost as of March 2011.⁵⁹ However, the aforementioned structural elements of arbitration admittedly entertain a legitimate doubt as to whether the institution is perfectly independent and impartial. In other words, no matter how often justice is done, it is not seen to be done, and this produces understandable criticism.

2.2.2.2. Are arbitrators biased toward the application of IIL in isolation of other branches of international law (‘fragmentation’ critique)?

The ‘fragmentation’ critique comes from the observation that certain arbitral tribunals have tended to view and apply the body of international investment law in isolation of

⁵¹ See Mann, *supra* note 44, p. 216: ‘the average person cannot expect an arbitrator to rule against the very arguments he or she is making in a second case on the same issues, knowing that his or her participation in such a decision will undercut his or her client’s interest in the other arbitration.’

⁵² See generally Van Harten, *supra* note 45, p. 443-445.

⁵³ See ICSID Arbitration Rules, *supra* note 30, Rule 4.

⁵⁴ The notion that the World Bank generally, and ICSID in particular, would be vehicles of a neo-liberal ideology favourable to liberalizing and protecting investment, is at the basis of the ongoing distrust against ICSID in certain Latin-American countries. In 2007 Bolivia denounced the ICSID Convention. See Antonios Tzanakopoulos, ‘Denunciation of the ICSID Convention under the General International Law of Treaties’, in Rainer Hoffman and Christian Tams (eds.), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration*. Nomos, Baden Baden, 2011, pp. 75-93.

⁵⁵ Van Harten, *supra* note 45, p. 443.

⁵⁶ See International Chamber of Commerce, ‘Arbitration and ADR Rules’, effective 1 January 2012, available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf, Article 12.

⁵⁷ See *id.*, Appendix I (‘Statutes of the International Court of Arbitration’), Article 2. Moreover, see Article 11 (4) of the Rules (*id.*), which reads ‘The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final, and the reasons for such decisions shall not be communicated.’

⁵⁸ See <http://www.iccwbo.org/>

⁵⁹ See UNCTAD, *supra* note 12, p. 1.

other relevant fields of international law.⁶⁰ This has led to awards in which investment obligations somehow took precedence over other international obligations in other fields such as e.g. environmental protection, or awards in which the whole of the international legal environment was overlooked in favour of a strict application of international investment disciplines as if the latter were a sort of 'self-contained regime'.

The following well-known paragraph of the *Santa Elena v. Costa Rica* award epitomizes this perceived problem:

While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference.⁶¹

In such situations, host States find themselves caught between the hammer and the anvil, as they may have to choose between abiding by one or the other of their international obligations. As indicated above, this also reduces their policy space as they cannot implement international agendas to which they may be deeply committed. This topic has attracted much attention from researchers in the recent past. While some have openly doubted the reality of the fragmentation problem from the outset⁶², others have actively looked for solutions. One way to redress the imbalance could lie in an interpretative discipline⁶³ through which arbitrators would be encouraged to overcome their pro-investor bias and to interpret investment treaty obligations of host States in light of, for example, Article 31 (3) (c) of the Vienna Convention on the Law of Treaties, which commands that, in interpreting a particular treaty, '[t]here shall be taken into account, together with the context: [...] any relevant rules of international law applicable in the relations between the parties.'⁶⁴ Reference to general principles of law was also designated as helpful guidance for the

⁶⁰ A general definition of 'fragmentation' in the international legal order was given in 2006 by the International Law Commission. Fragmentation occurs where 'specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.' See UN General Assembly, International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission, 13 April 2006, UN Doc. No. A/CN.4/L.682, p. 11.

⁶¹ *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, para. 71.

⁶² See, with regard to the relationship between international investment law and human rights, James Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity', 18 *Duke Journal of Comparative and International Law* 77 (2007).

⁶³ See generally Anne Van Aaken, 'Defragmentation of Public International Law Through Interpretation: A Methodological Proposal', 16 *Indiana Journal of Global Legal Studies* 483 (2009).

⁶⁴ Anne Van Aaken, 'Fragmentation of International Law: The Case of International Investment Protection', 17 *Finnish Yearbook of International Law* 91 (2008); Moshe Hirsch, 'Interactions between Investment and Non-Investment Obligations', in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law*, Oxford, Oxford University Press, 2008, pp. 154-181; Jan Wouters and Nicolas Hachez, 'When Rules and Values Collide – How Can a Balanced Application of Investor Protection Provisions Be Ensured?', 3 *Human Rights and International Legal Discourse* 301 (2009).

interpretation of the relevant legal rules.⁶⁵ Other authors emphasize the need to reconsider the way investment agreements are drafted, in order to relocate the obligations they contain within the wider framework of the host State's policies and obligations.⁶⁶

Whether the fragmentation problem is real or not, recent years have witnessed an evolution in investment practice concerning the relationship of international investment law with the rest of international law.⁶⁷ First of all, some arbitral awards now tread more lightly when discussing investment obligations in regard of other international obligations, and explicitly make the balancing exercise.⁶⁸ Also, a new generation of international investment agreements is emerging which tend to balance the interests of investors against other agendas.⁶⁹ However, such a widespread change in drafting practices proves difficult to achieve and the traditional tenets of investor protection can prove resistant, as was shown by the failure of the new Norwegian Model BIT to gather the assent of the investor side.⁷⁰

2.3. Interim conclusion

As the current natural way to settle investor-state disputes, arbitration is under fire. This is even though cases are more often won by host States than not (see *supra*). However, a number of dubious awards evidence a lack of unity in the case-law, and host States' interests may be threatened by the philosophy of the system. There is a feeling that going to arbitration, for a host State, can be like playing Russian Roulette when public interests are involved. Regardless of how many awards are well-balanced, apply the law sensibly, and take the public interest into account, the arbitral system cannot hide that real chances also exist to get an award which contradicts other awards and which is supported by odd legal reasoning, with dire consequences for the host State's budget. In such case, hardly any recourse is open

⁶⁵ Campbell McLachlan, 'Investment Treaties and General International Law', 57 *International and Comparative Law Quarterly* 361 (2008).

⁶⁶ See Schill, *supra* note 1, p. 50; Wouters and Hachez, *supra* note 64, pp. 334 ff.

⁶⁷ See, with regard to the relationship between the international investment regime and the worldwide sustainable agenda, Marie-Claire Cordonier Segger and Avidan Kent, 'Promoting Sustainable Investment through International Law', in Cordonier Segger *et al.*, *supra* note 1, pp. 771-792.

⁶⁸ See *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, which considers the interaction with the human right to water at para. 262, even though it denies the *amici curiae's* opinion that 'Argentina's human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs and that the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its BIT obligations.' See also *S.D. Myers, Inc. v. Canada*, UNCITRAL, First Partial Award, 13 November 2000, which weighs the provisions of Chapter 11 of NAFTA (see *infra* note 74) with the obligations of Canada under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (see paras. 209 ff.). The Tribunal nonetheless found a breach of Nafta article 1102 (National Treatment), because there were other measures which could have complied with Canada's obligations under the Basel Convention while not being contrary to NAFTA (see para. 255).

⁶⁹ For an analysis of this 'new generation' of investment treaties, see Wouters and Hachez, *supra* note 64, pp. 336 ff.

⁷⁰ See Damon Vis-Dunbar, 'Norway shelves its draft model bilateral investment treaty', 8 June 2009, available at <http://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/>.

to the host State for getting a second examination of the case. This risk associated with investor-State arbitration is unfortunately the result of the way the institution was designed, and to the extent arbitration can be said to be at odds with democracy and the rule of law, it must be alleviated.

Arbitration works well most of the time because of the personal integrity of arbitrators, their legal skills and reasoning, and ventures into strange territory are scarce and random. The purpose of the above paragraphs was thus certainly not to tarnish the general reputation of honesty and competence which arbitrators enjoy. However, in view of the requirements of the rule of law and in light of the public interest, 'working well most of the time' is not enough. Any rule of law- and democracy-abiding dispute settlement system needs to comprise structural guarantees that it is going to effectively work well and that interests will be weighed against each other in a balanced manner according to legal rules. In the next sections, we analyze reforms that have been introduced in the recent past to address this critique, and what is being proposed on top of these reforms to go even further.

3. Current reforms of the arbitral model: Too little, too late?

In the face of the above critique, and in particular in response to the democracy and rule of law-based criticism, investor-State arbitration has attempted to reform itself in the last years. More precisely, procedural rules have been adapted and States have adopted new interpretations of investment agreements in order to bring more transparency into arbitral proceedings and to facilitate the participation of civil society in disputes engaging the public interest.

ICSID has reformed its rules of procedures in 2006, while UNCITRAL has been in the process of doing so for quite a while, yet still unsuccessfully on transparency and participation issues.⁷¹ Concerning transparency, the emphasis has been put on facilitating the publication of awards and other documents such as parties' submissions, and on rendering certain hearings public. If they were to be made a general rule in investment arbitration, these changes would shake the foundations of the whole system, which is still premised on the paradigm of commercial arbitration and on its seal of confidentiality. Confidentiality may not only be precious for businesses: for some governments seeking to escape public accountability in relation to investment claims, it may also be convenient. Therefore, the dose of publicity which these reforms have tried to instill, though welcome, is insufficient insofar as they remain very dependent upon the parties' consent.⁷²

⁷¹ See UN General Assembly, UNCITRAL, 'Settlement of Commercial Disputes: Preparation of a Legal Standard of Transparency in Treaty-Based Investor-State Arbitration – Note by the Secretariat', 29 July 2011, UN Doc No. A/CN.9/WG.2/WP.166.

⁷² J Anthony VanDuzer, 'Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation', 52 *McGill Law Journal/Revue de droit de McGill* 681 (2007), at 706.

Awards (or legally relevant parts of them) may be published by ICSID⁷³ but there is no practice of systematic publication for UNCITRAL awards or for awards rendered under the rules of other institutions such as Chambers of Commerce.⁷⁴ Regarding the other arbitration documents, such as submissions of the parties, they may only be released with the consent of the parties.⁷⁵ In the framework of NAFTA, however, a much higher standard of transparency applies.⁷⁶ In a 2001 Statement⁷⁷ the Free Trade Commission clarified that ‘nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.’ Therefore, the NAFTA parties agreed

to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:

1. confidential business information;
2. information which is privileged or otherwise protected from disclosure under the Party's domestic law; and
3. information which the Party must withhold pursuant to the relevant arbitral rules, as applied.

The above only applies to NAFTA but it appears to have affected treaty practice in a certain way, in that the ‘new generation of BITs’ seems to be commanding more transparency in arbitral proceedings along the lines described above.⁷⁸ Hearings under ICSID arbitration rules are normally only public if parties agree⁷⁹, as under the UNCITRAL rules.⁸⁰ However, the NAFTA parties have issued statements to the effect of systematically consenting to holding hearings in public, save to protect legitimate confidentiality interests.⁸¹ The practice of open hearings is not systematic outside NAFTA, though.

Concerning the participation of the public into arbitral proceedings, rules have been relaxed to give more leeway to arbitral tribunals for admitting what is called ‘amicus curiae briefs’, which are submissions presented to the tribunal by a third party to the dispute to inform the latter of a particular interest, or to present it with a particular legal position. This avenue is especially used by civil society organizations in defense of public interest positions, such as the protection of the environment. Prior

⁷³ ICSID Arbitration Rules, *supra* note 30, Rule 48 (4), reads as follows: ‘The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.’

⁷⁴ See North American Free Trade Agreement (NAFTA), done at San Antonio on 17 September 1992 (effective 1 January 1994), Article 1137 and Annex 1137.4, which allow parties to publish awards.

⁷⁵ See ICSID, ‘Administrative and Financial Regulations’, 10 April 2006, available at , Regulation 22 (2).

⁷⁶ For a comparison between the trade and investment provisions of NAFTA with regard to transparency, see Hugo Perezcano Díaz, ‘Transparency in International Dispute Settlement Proceedings on Trade and Investment, in Sauvart, *supra* note 1, pp. 193-200.

⁷⁷ See NAFTA Free Trade Commission, ‘Notes of Interpretation of Certain Chapter 11 Provisions’, 31 July 2001, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en&view=d>.

⁷⁸ See Wouters and Hachez, *supra* note 64, pp. 339-340.

⁷⁹ ICSID Arbitration Rules, *supra* note 30, Rule 32 (2).

⁸⁰ UNCITRAL Arbitration Rules, *supra* note 41, Article 28 (3).

⁸¹ See Nafta Free Trade Commission, Joint Statement – Decade of Achievement, San Antonio, 16 July 2004, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/js-sanantonio.aspx?lang=en&view=d>.

to the modification of arbitral rules, the door had already been opened by progressive tribunals⁸², which mirrored their practice on the example set by the WTO Dispute Settlement Body.⁸³ Certain States have now expressly admitted the principle of amicus curiae briefs⁸⁴, though under certain conditions inspired by the case-law on the matter. For example, under NAFTA, tribunals have the authority to accept amicus curiae briefs under the following conditions:

In determining whether to grant leave to file a non-disputing party submission, the Tribunal will consider, among other things, the extent to which:

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the non-disputing party submission would address matters within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the arbitration; and
- (d) there is a public interest in the subject-matter of the arbitration.

[...] The Tribunal will ensure that:

- (a) any non-disputing party submission avoids disrupting the proceedings; and
- (b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.⁸⁵

ICSID Rules were also modified to provide for the admission of amicus curiae briefs under similar conditions.⁸⁶ UNCITRAL rules are still silent on the subject even though there have been intense discussions on how to increase transparency in treaty-based investment arbitration.⁸⁷

These changes were made – by tribunals themselves or by arbitration institutions and States – explicitly in order to remedy the perceived legitimacy deficit of the

⁸² See *Methanex v. United States*, UNCITRAL, Decision on Amici Curiae, 15 January 2001; and *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Decision on Amici Curiae, 17 October 2001.

⁸³ World Trade Organization, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, 12 October 1998, WTO Doc. No. WT/DS58/AB/R, paras. 99-arbitratoin

⁸⁴ See United States Model BIT, 2004, available at <http://www.state.gov/documents/organization/117601.pdf>, Article 28 (3).

⁸⁵ See also NAFTA Free Trade Commission, 'Statement of the Free Trade Commission on non-disputing party participation 'Notes of Interpretation'', 7 October 2003, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf>.

⁸⁶ ICSID Arbitration Rules, *supra* note 30, Rule 37 (2): 'After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the 'nondisputing party') to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which: (a) 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; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.' It is not a requirement that issues of public interest be involved.

⁸⁷ The 2010 reform does indeed not address this. For relevant proposals now being discussed, see UN General Assembly, *supra* note 71, paras. 43-51.

arbitration institution⁸⁸ and to provide the public with more understanding of arbitral processes.⁸⁹ In the words of the *Methanex* tribunal, a pioneer in this regard:

[The investor-State arbitral] process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.⁹⁰

However, these reforms are unlikely to resolve the legitimacy crisis by themselves. As indicated above, the transparency reforms remain subject to the consent of the parties and therefore do not institutionalize transparency *per se*. Furthermore, the ability of NGOs and other third parties to submit *amicus curiae* briefs does not guarantee that the public interest will be taken into account. Several arguments to the contrary can actually be formulated. First of all, the tribunal remains free to rely on the arguments of the *amicus* or not. Second, *amici* are not themselves necessarily accountable to the public and they may not always be capable of representing the general interest.⁹¹ Third, authors have underlined that it is unlikely that they can make a meaningful input in their briefs if they cannot have access to the documents of the proceedings, which as a general rule remain confidential.⁹² Fourth, admitting non-disputing parties to participate clearly disrupts the natural timeline of arbitration and can severely slow down the proceedings, even though measures as to this (such as a maximum number of pages, or the submission of a joint brief by several NGOs) are taken by parties and tribunals and are foreseen in arbitration rules.⁹³ Yet, it will force parties to respond to such arguments⁹⁴ and inevitably disorganize their defense, on top of inevitably raising costs (which, for the host State, may not be in the general interest). Finally, one cannot fail to note that, for a significant number of judicial traditions, be they domestic, regional or international, the admission of *amicus curiae* briefs coming from civil society organizations is not necessarily a widespread practice, as the general interest is supposed to be protected by the guarantees of independence and impartiality of the judge, by his or her legal competence (*iura novit curia*), or by the adjunction to the court of a publicly appointed 'amicus' such as the Advocates General at the

⁸⁸ Amokura Kawharu, 'Participation of Non-governmental Organizations in Investment Arbitration as Amici Curiae', in Waibel *et al.*, *supra* note 8, p. 284.

⁸⁹ See *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005, para. 22.

⁹⁰ *Methanex v. United States*, *supra* note 82, para. 49.

⁹¹ Kawharu, *supra* note 88, p. 285-286 and generally Peter J. Spiro, 'New Global Potentates: Nongovernmental Organisations and the 'Unregulated' Marketplace', 18 *Cardozo Law Review* 957 (1996).

⁹² Nigel Blackaby and Caroline Richard, 'Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?', in Waibel *et al.*, *supra* note 8, p. 266.

⁹³ See NAFTA Free Trade Commission, *supra* note 85, Rule B (2).

⁹⁴ Even though, as submitted by an arbitral tribunal, 'the role of an *amicus curiae* is not to challenge arguments or evidence put forward by the Parties. This is the Parties' role. The role of the Petitioners in their capacity as *amicus curiae* is to provide their perspective, expertise, and arguments to help the court.' *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to Amicus Petition, 12 February 2007, para. 25.

European Court of Justice.⁹⁵ The International Court of Justice, for instance, is yet to admit a single civil society *amicus curiae* brief.

The above observations indicate that, whereas States seem to be aware of the legitimacy crisis, the recent reforms are hardly sufficient for redressing the flaws of the investor-State arbitral model. This is why some authors and critics have for some time been advocating more radical departures from the current dispute settlement institution in international investment law. We study these proposals below.

4. Doing away with arbitration? A critical overview of possible alternatives to the commercial arbitral model

Despite the criticism levied against the arbitral model, the awareness that it should be reformed in a way or another and the suspicion that the ongoing transparency and participation reform will fall short of the objective, many authors hesitate before taking the leap and suggesting a fundamental change in investment dispute settlement. Some argue that, given the structure of the international investment legal regime and the missing political will on the part of (home) States, any fundamental reform is an unrealistic prospect.⁹⁶ Others argue that the system is actually healthy and that its deficiencies will cure themselves naturally once it gets more mature.⁹⁷ What is certain is that, should there be a radical overturn, the new system should be carefully designed so as not to prove worse than its predecessor.⁹⁸

Other authors, while recognizing the difficulty of the task, do not shy away from making ambitious and creative suggestions to move toward a less uncertain dispute settlement system or even to do away with arbitration altogether. We discuss briefly these suggestions here.

The idea of reinstating the customary requirement of the exhaustion of local remedies is sometimes put forward.⁹⁹ Exhaustion of local remedies is most often required when international institutions are mandated to review acts of a State, as this gives the State whose exercise of regulatory power is challenged a chance to remedy the wrong without seeing its international responsibility engaged.¹⁰⁰ However, in IIAs, notwithstanding rare exceptions, this customary requirement is

⁹⁵ See Esther Kentin, 'Sustainable Development in International Dispute Settlement: The ICSID and NAFTA Experience', in Nico Schrijver and Friedl Weiss (eds.) *International Law and Sustainable Development – Principles and Practice*, Leiden/Boston, Martinus Nijhoff Publishers, 2004, p. 323, stating that NGOs may be gaining more rights to participate in investment dispute settlement proceedings than they do under most other domestic or international mechanisms.

⁹⁶ See Barton Legum, 'Options to Establish an Appellate Mechanism in Investment Disputes', in Sauvant, *supra* note 1, pp. 231-240.

⁹⁷ See Paulsson, *supra* note 20.

⁹⁸ Franck, *supra* note 5, p. 157.

⁹⁹ On the customary status of the exhaustion of local remedies rule, see International Court of Justice, *Interhandel Case (Switzerland v. USA – Preliminary Objections)*, Judgment of 21 March 1959, p. 27.

¹⁰⁰ See e.g. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950 (effective 3 September 1953), Article 35 (1).

waived.¹⁰¹ The suggestion to require local remedies again as a rule is very bold, because many IIAs do not provide for the exhaustion of local remedies for the very reason that they want to avoid confronting investors with local courts, where their competence, integrity and independence is subject to doubt and their bias against foreigners is feared.¹⁰² Also, resorting to arbitration without having to make the local detour would speed up the dispute settlement process. A departure from this situation could disrupt the economy of the system and shake investors' confidence.¹⁰³

However, critics have argued that bypassing at all times local remedies somehow showed prejudice¹⁰⁴ and in any case was likely to disempower local institutions, notably in developing countries where such institutions need to be strengthened and taken seriously.¹⁰⁵ This would undermine the local rule of law. A recent study shows that such suspicion is not necessarily without foundations:

[U]nder certain circumstances, the presence of international alternatives might undermine the quality of the local legal system. [...] If governments and foreign investors can turn to external sources of dispute resolution, they have little incentive to make marginal investments in improving local judicial quality. In some circumstances, this dynamic might allow domestic court structures to become captured by corrupt local coalitions. Unless domestic judiciaries internalize the benefits of institutional quality, they will not be concerned with the loss of "business" to international competitors such as arbitral bodies. The availability of international alternatives, then, may perpetuate poor domestic institutions by allowing powerful actors to exit.¹⁰⁶

In light of the above, recognizing to a certain extent the jurisdiction of local courts in investment disputes could have several advantages. First of all, it could equip the system with several degrees of jurisdiction, which on the one hand slows down the process and runs counter to the sought after 'finality' of arbitration, but on the other hand, could be favourable to investors themselves, who seem to lose their arbitral cases more often than not.¹⁰⁷ Also, it would allow to better take into account the local situation, to better appraise the motives (and good faith) of government measures, and to have a better understanding of the host State's international obligations. In any event, the embeddedness of local courts in the host State's socio-economic

¹⁰¹ Ralph Lorz, 'Local Remedies Rule in Public International Law and in Investment Protection Law', in ILA German Branch, Sub-Committee on Investment, *General Public International Law and International Investment Law – A Research Sketch on Selected Issues*, December 2009, available at <http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20105.pdf>, p. 45. Recently, see the analysis of the very clear waiver contained in the US-Ukraine BIT in *Joseph Charles Lemire v. Ukraine*, *supra* note 34, paras. 274 ff.

¹⁰² See Salacuse, *supra* note 1, p. 121. See in practice the Loewen case's analysis of the perceived anti-Canadian and pro-American bias of a Mississippi local court and its jury, at the end of which the tribunal concluded that 'By any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace. [...] By any standard of evaluation, the trial judge failed to afford Loewen the process that was due.' *Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award on Merits, 26 June 2003, para 119.

¹⁰³ See *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on the Application for Annulment, 14 June 2010, paras. 52-53.

¹⁰⁴ Sornarajah, *supra* note 46, pp. 349-350.

¹⁰⁵ The reverse argument is also made in that the availability of arbitration could emulate State courts to do better and get the 'business' of investment dispute settlement anyway. Susan D. Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law', 19 *McGeorge Global Business and Development Law Journal* 337 (2007), p. 367.

¹⁰⁶ Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance', 25 *International Review of Law and Economics* 109 (2005), p. 121.

¹⁰⁷ See *supra* note 59.

context would endow the latter with more legitimacy to review the acts of the host government.¹⁰⁸

Some States are therefore reconsidering their outright and absolute rejection of the local remedies rule. For some time, the requirement that local courts had to be resorted to for a minimal period of time before an arbitral complaint can be lodged has been included in investment agreements. Moreover, some States have included in their BITs certain features of fairness and certainty that the host State courts have to show, as an obligation toward foreign investors, pointing to the fact that this avenue should not be automatically overlooked by investors.¹⁰⁹ A recent line of arbitral case-law has also qualified the principle that investors were free of any obligation to have recourse to local courts.¹¹⁰ In *Chevron v. Ecuador*, the tribunal stated, in response to Ecuador's submission that resort to local remedies is necessary where mechanisms appear to be available:

While reiterating its view that strict exhaustion of local remedies is not necessary, the Tribunal agrees with the Respondent that a claimant is required to make use of all remedies that are available and might have rectified the wrong complained of [...]. Moreover, a high likelihood of success of these remedies is not required in order to expect a claimant to attempt them. In the case of undue delay, the delay itself usually evidences the general futility of all remedies except those that specifically target the delay. Resort to these remedies may also be excused if another traditional exemption applies, such as if these remedies were shown to be ineffective or futile in resolving delay.¹¹¹

¹⁰⁸ See Burke-White and von Staden, *supra* note 34, pp: 332-333: 'Generally, the greater embeddedness of a tribunal in a State's socio-political context justifies and supports the application of more strict scrutiny by the tribunal. In contrast, lack of embeddedness suggests the need for greater deference to decisions made by institutions that are more culturally, legally, and politically embedded. Such embeddedness and proximity to the issues at stake serves certain functions that cannot be easily replicated. [...] The application of strict scrutiny in effect authorizes a tribunal to fully evaluate all aspects of a case up to the point of substituting any assessments made by the governmental actors in the case with its own. At the international level, especially in the case of temporary, free-floating ad hoc tribunals, such an approach is generally inappropriate and will likely result in a reduction of perceived legitimacy, at least from the perspective of respondent states.'

¹⁰⁹ See US model BIT, *supra* note 84, Article 11 (4) and (5).

¹¹⁰ An author systematically reviewed the recent case-law dealing with local remedies and observed that the thrust of the local remedies rule was actually quite far reaching in arbitral case-law, in that '[s]everal distinct propositions of law are distillable from the Local Remedies Cases, including: 1. An investor cannot establish a treaty breach based on judicial conduct if there exists a reasonably available domestic legal mechanism for having such conduct reviewed and corrected, which the investor failed to invoke. 2. The same may also be true with regard to claims based on reviewable administrative conduct. 3. A treaty claim may be defective on the merits if it is predicated in part on a breach of contract by the host State but the investor has not sought a ruling on the contractual issues in a domestic forum. 4. If the investor does pursue a local remedy, the tribunal in a subsequent treaty-based arbitration should defer to the findings of the local court absent a "denial of justice." 5. The pursuit of local remedies may preclude the investor from asserting a treaty claim having the same "fundamental basis," if the relevant BIT contains a "fork-in-the-road" clause.' The author then goes on to argue that, while the relevance of the local remedies rule for certain claims, it should not be stretched to the point where investors have to go to unreasonable lengths to pursue them, or where absolute deference is given to domestic courts. See George K. Foster, 'Striking a Balance Between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration', 49 *Columbia Journal of Transnational Law* 201 (2010-2011), pp. 238-239.

¹¹¹ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, 30 March 2010, paras. 325-326. The US-Ecuador BIT contains the following article II(7): 'Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.' No exhaustion of local remedies was however required by the BIT. *In casu*, the claim had to do with delays that Chevron had to suffer before Ecuadorian courts.

Whether this kind of interpretation will provide for a re-birth of the local remedies rule – at least to the extent that the investor should try in good faith to have its wrong redressed by local courts – remains to be seen, as contrary case-law also exists. Recently, an award which decided that a Ministerial decision could not be seen as a breach of a BIT (not requiring exhaustion of local remedies) failing a challenge before the host State's administrative courts¹¹² was annulled by an *ad hoc* ICSID Committee.¹¹³

Other suggestions propose to avoid going to arbitration, but also to bypass local courts, notably by using 'alternative dispute resolution' mechanisms, that is, non-adversarial ways to resolve a difference between an investor and a host State. The variety of such mechanisms is considerable¹¹⁴ and analyzing all of them here would take us too far. However, such mechanisms have already proven their efficacy in some cases and have for some time expressly been mentioned in a number of investment agreements, sometimes as a prerequisite to arbitration. Art. 23 of the US Model bit for example provides the following:

In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.

The much publicized issue of the inconsistency of certain awards has also prompted students of the international investment regime to reflect upon possible solutions. Whereas a system of preliminary references *à la* European Union has been evoked¹¹⁵ as well as procedures for the consolidation of parallel claims¹¹⁶, the possibility of setting up a degree of appeal in investor-State dispute settlement has been the most popular subject of debate. The suggestions considered concern a proper appeals system and not the existing marginal annulment procedures which exist to cure the regime from gross errors and unfairness, but which by no means are a guarantee of cohesion in the case-law (see *supra*).¹¹⁷

ICSID itself contributed to the debate in a 2004 Discussion Paper containing a section entitled 'An ICSID Appeals Facility?' with a detailed discussion of what such facility would look like and how it would function.¹¹⁸ The Appeals Facility was seen as a means to overcome the potential for inconsistencies which was growing with the number of cases. This study by ICSID was inspired by the increasing number of BITs which were considering an appellate mechanism in their dispute settlement provisions, mostly at the behest of the US, whose Model BIT contains the following Annex D:

Within three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar

¹¹² See *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008, para. 148.

¹¹³ See *Helnan v. Egypt*, *supra* note 103, paras. 42 ff.

¹¹⁴ See generally Franck, *supra* note 5; and UNCTAD, 'Investor-State Disputes: Prevention and Alternatives to Arbitration II', *Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution*, Lexington, 29 March 2010 available at http://www.unctad.org/en/docs/webdiaeia20108_en.pdf.

¹¹⁵ See Christoph Schreuer, 'Preliminary Rulings in Investment Arbitration', in Sauvant, *supra* note 1, pp. 207-212.

¹¹⁶ See Reinisch, *supra* note 16, pp. 119-120.

¹¹⁷ For a well thought-out proposal to establish an 'Investment Arbitration Appellate Court', see Franck, *supra* note 22, pp. 1617-1625.

¹¹⁸ See ICSID Secretariat, 'Possible Improvements of the Framework for ICSID Arbitration', Discussion Paper, 22 October 2004, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncementPDF&announcementType=archive&announcementNo=14_1.pdf, p. 14 and Annex 1.

mechanism to review awards rendered under Article 34 in arbitrations commenced after they establish the appellate body or similar mechanism.

This would admittedly not solve inconsistency issues in the whole regime since it would be a bilateral mechanism. However, the US Model BIT also considers the possibility that a multilateral appeals facility might come about in its Article 28 (10):

If a separate, multilateral agreement enters into force between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered [...] in arbitrations commenced after the multilateral agreement enters into force between the Parties.

The possibility to adjoin an appeals mechanism to the currently disparate arbitral system has attracted an avalanche of critique, notably on feasibility grounds¹¹⁹, and because it would dismiss the existing arbitration paradigm based on the principles of finality and expediency. But the elephant in the room is the question of what sort of institution would be appropriate as the appeals mechanism. In this regard, proposals for a permanent arbitral institution were advanced, either as an appeals mechanism along the lines of the WTO Appellate Body¹²⁰ or even as a free-standing institution which could also have first instance jurisdiction on all cases.¹²¹ Without even trying to guess what such an institution would look like, and in full recognition of the far-fetched character of such a proposal (politically as well as legally), let us recount some of the advantages it may have. Whether an appeals chamber or a court of full jurisdiction, a permanent institution would on top of everything provide a solution to the independence and impartiality problems which are encountered with the system of scattered arbitration, as judges could be tenured and statutorily excluded from other functions. Moreover, balance in legal expertise could be ensured and the appointment authorities could see to it that the domination of business lawyers in the arbitration corporation is not replicated on the bench of an international investment court. Finally, nothing in the nature of such a court would prevent providing for the degree of openness, transparency and participation which is required from judicial institutions under the rule of law and which we see emerging in the arbitral system.

5. Conclusion

Whereas dispute settlement is a necessary feature of the international investment legal regime, its current design leaves much to be desired. It applies commercial

¹¹⁹ See generally Legum, *supra* 96.

¹²⁰ Even though it is underlined that this might be quite difficult since an investment appeals mechanism would be interpreting thousands of free standing agreement, and not a coherent legal ensemble. See Donald McRae, 'The WTO Appellate Body: A Model for an ICSID Appeals Facility?', 1 *Journal of International Dispute Settlement* 371 (2010).

¹²¹ Gus Van Harten, 'A Case for an International Investment Court', *Society of International Economic Law (SIEL) Inaugural Conference 2008 Paper*, 30 June 2008, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153424&rec=1&srcabs=916351.

procedural standards to issues which, given their public law nature, should benefit from the guarantees of administrative review mechanisms.

So far, reforms have been adopted or are underway to the effect of opening up arbitral proceedings and providing opportunities for participation of public interest groups. As indicated above, these changes are unlikely to soothe the worries caused by investor-State arbitration. More ambitious, practically and intellectually seductive proposals have been put forward, notably the idea of setting up a permanent institution which could hear cases in first instance or play the role of an appeals mechanism for arbitral proceedings.

Unfortunately, the current model seems to suit the interests of investors, and there is no reason to believe that capital-exporting countries, the main law-givers in international investment law, will soon experience a change of heart regarding arbitration.¹²² The European Union, which since 1 December 2009 has an exclusive competence regarding foreign direct investment as part of its common commercial policy¹²³, could however be a game changer in the near future. The introduction of a new powerful player in the investment legal regime could indeed be a good occasion to reconsider the rules of the game, especially given the fact that the system itself is not really prepared for the EU's joining it, as is shown by the fact that the ICSID Convention does not provide for accession by an international organization.

In its 2010 'Communication Concerning a Future European International Investment Policy'¹²⁴ the European Commission reflects on what type of dispute settlement mechanism it envisions for 'enforcing' the 'investment commitments' made under its forthcoming investment policy. As in the view of the Commission the Union should 'build on Member State practices to arrive at state-of-the art investor state dispute settlement mechanisms', it does not seem to question the suitability of arbitration as such (and even less as it announces that it will explore the possibility for the EU to seek to accede to the ICSID Convention). None the less, the Commission may have some ambition at reforming the arbitral model a bit further, as it insists on the necessary transparency which investment dispute settlement mechanism has to guarantee and on the fact that a solution must be found for the 'atomisation of disputes and interpretations', possibly by way of establishing an appellate mechanism.¹²⁵ No word, however, is to be found concerning the requirement to exhaust domestic remedies,¹²⁶ or the possibility viz. desirability of establishing a permanent body for adjudicating investor-State disputes.

¹²² See Katia Yannaca-Smal, 'Improving the System of Investor-State Dispute Settlement: The OECD Governments' Perspective', in Sauvant, *supra* note 1, pp. 223-229.

¹²³ See Article 207 of the Treaty on the Functioning of the European Union and generally Jan Asmus Bischoff, 'Just a Little *Bit* of "Mixity"? The EU's Role in the Field of International Investment Protection Law', 48 *Common Market Law Review* 1527 (2011).

¹²⁴ 7 July 2010, EU Doc. No. COM(2010) 343 final.

¹²⁵ *Id.*, pp. 9-10.

¹²⁶ Contrary to the European Parliament Report on the Matter, which expressly mentions that 'changes must be made to the present dispute settlement regime, in order to include greater transparency, the opportunity for parties to appeal, *the obligation to exhaust local judicial remedies where they are reliable enough to guarantee due process*, the possibility to use *amicus curiae* briefs and the obligation to select one single place of investor-state arbitration.' Emphasis added. See European Parliament, Committee on International Trade, Report on the Future European International Investment Policy, 22 March 2011, EU Doc. No. 2010/2203(INI), para. 31.

In conclusion, it seems that despite a pressing need for (r)evolution, conservatism firmly holds the international investment legal regime, especially on the part of capital-exporting countries, as their corporations value highly the possibility of resorting to arbitration.¹²⁷ One would hope that, in the absence of a sea change, small tides of reform will, in the course of the 21st century, progressively shape a fairer and more open dispute settlement system that is more concerned with the general interest.

¹²⁷ See Timothy Nelson, “History Ain’t Changed”: Why Investor-State Arbitration Will Survive the “New Revolution”, in Waibel *et al.*, *supra* note 8, pp. 555-576.



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