II

The Rise of and Backlash against Investor–State Arbitration

The rise of investor–state arbitration (ISA) is a process that started with the making of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),[1] an agreement that was slowly followed by consent to arbitrate investor–state disputes in bilateral investment treaties concluded in the late 1960s and 1970s.[2] Only by the end of the 1980s did the number of BITs containing investor–state dispute settlement provisions increased dramatically.[3] In the mid-1990s, investment chapters providing for ISA started to be included in certain free trade agreements (FTAs), following the example of the North American Free Trade Agreement (NAFTA).[4] Today, the vast majority of BITs and FTAs investment chapters include ISDS.[5]

However, it was not until the 1990s that this particular system of arbitration exploded, becoming one of the most fertile areas of international economic law. UNCTAD has reported that, in 2015, investors filed eighty known ISAs based on international investment agreements which constitutes the highest number of known treaty-based disputes ever filed

[1] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 18 March 1965, 575 U.N.T.S. 159 [hereinafter 'ICSID Convention'].

[2] A BIT has been defined as 'a reciprocal agreement concluded between two sovereign States for the promotion and protection of investments by investors of the one State ("home state") in the territory of the other State ("host state")': M. Jacob, 'Investments, Bilateral Treaties', May 2011: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1061 (accessed 13 January 2018).

[3] A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009), p. 47.

[4] North American Free Trade Agreement, 17 December 1992, 32 ILM 289, 605 (1993).

[5] D. Gaukrodger and K. Gordon, 'Investor–State Dispute Settlement: A Scoping Paper of the Investment Policy Community', *OECD Working Papers on International Investment*, No 2012/3 (2012), p. 10. The term 'international investment agreements' (IIAs) is used to refer to all investment treaties, whether FTAs or standalone BITs.

in one year – and has confirmed that foreign investors are increasingly resorting to ISA.[6]

In comparison with diplomatic protection, ISDS has several benefits for the claimant: the investor (and not the home state) has the procedural right to institute arbitration and has exclusive control of the claim, which may be initiated without the consent of the home state; and if damages are awarded they are calculated without considering inter-state concerns, and paid directly to the individual claimant.[7]

In the following sections we will briefly analyse the origins of ISA, focusing on the reasons for diplomatic protection being abandoned, and the main objectives that were taken into account in the creation of ISA. A final section explains the reasons behind the current backlash against ISA.

A Origins and Evolution of Investor–State Arbitration

1 Before the ICSID Convention

After World War II, there were attempts to create a multilateral agreement for the protection of foreign investments that included ISDS such as the Abs–Shawcross Draft Convention (1959) and the Draft Convention on the Protection of Foreign Property (1962) developed by the Organisation for Economic Co-operation and Development (OECD).

Article VII.2 of the Abs–Shawcross proposal provided that:[8]

> A national of one of the Parties claiming that he has been injured by measures in breach of this Convention may institute proceedings against the Party responsible for such measures before the Arbitral Tribunal [. . .], provided that the Party against which the claim is made has declared that it accepts the jurisdiction of the said Arbitral Tribunal in respect of claims by nationals of one or more Parties, including the Party concerned.

This draft still required consent by the state in a separate document, stipulating that 'parties willing to permit such claims to be brought directly against them by nationals of other parties would make a general declaration to that effect'.[9]

[6] UNCTAD, 'Special Update on Investor–State Dispute Settlement: Facts and Figures', *IIA Issues Note* 3 (2017), 1.

[7] K. Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press, 2011), pp. 103–7.

[8] G. Schwarzenberger, 'The Abs–Shawcross Draft Convention on Investments Abroad: A Critical Commentary', *Journal of Public Law*, 9 (1960), 147 at 162.

[9] A. R. Parra, *The History of ICSID* (Oxford University Press, 2012), p. 15.

The 1962 OECD Draft Convention also included controls on the use of ISA by nationals of a party.[10] Probably with the intention of protecting the sovereignty of the states, a state would have been allowed to preclude its nationals from instituting proceedings against another state if the claimant home state had instituted such proceedings over the same matter, or would do so within a certain time limit.[11] The tribunal could also order the claimant to give security for costs, or dismiss the claim if it appeared to be frivolous or vexatious.[12]

In the same year, the Permanent Court of Arbitration (PCA) elaborated a set of 'Rules of Arbitration and Conciliation for settlement of international disputes between two parties of which only one is a state', which seemingly inspired the subsequent adoption of the ICSID Convention.[13] However, although the PCA was established by a treaty, the rules of arbitration were not, and if countries did not comply with them that could not be characterized as a violation of an international law obligation.[14]

BITs that were starting to be signed at that time, did not include ISA. The first one – the 1959 Germany–Pakistan BIT – provided for a dispute settlement mechanism in the event of disputes as to the interpretation or application of the treaty, specifying consultation between the state parties for the purpose of finding a solution in a spirit of friendship. If no solution was possible, the dispute was to be submitted to the International Court of Justice (ICJ) if both parties so agreed, or to an ad hoc arbitration tribunal upon the request of either party.[15]

In that respect, BITs were similar to the second generation of friendship, commerce and navigation agreements that the United States (US) negotiated between 1946 and 1968 with more than forty countries, with the intention of protecting its investors and investments abroad. 'Modern' FCNAs provide that disputes arising

[10] Ibid., p. 17.
[11] OECD, 'Draft Convention on the Protection of Foreign Property', *International Legal Materials*, 2 (1963), 241–67, Art. 7(b)(ii).
[12] Ibid., Annex, para. 6(c).
[13] H. M. Holtzman and B. E. Shifm, *Permanent Court of Arbitration* (United Nations, 2003), vol. 1.3, p. 6.
[14] Parra, *The History of ICSID*, p. 17.
[15] Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, Bonn, 25 November 1959, Art. XI.

under the treaty may be submitted to the ICJ for resolution, by the state parties to the treaty.[16]

This model of dispute settlement was largely superseded after the rise of investment treaties with ISA provisions, as will be explained in the next section.

2 *After the ICSID Convention*

In the early 1960s, the World Bank began to work on an alternative approach to the settlement of investment disputes. The result of around four years of negotiations was the Convention establishing the International Centre for Settlement of Investment Disputes (ICSID) – a mechanism for the settlement of disputes not between states but between private parties on the one side and host states on the other.[17] The annual meeting of the World Bank's Board of Governors held in Tokyo in September 1964 approved a resolution asking the Executive Directors to formulate the final text of the Convention.[18] During that meeting, the Governor for Chile, Félix Ruiz, who was representing the Latin American countries, made a statement rejecting the proposal, known as 'the No of Tokyo'. For the first time in the Bank's history, a major resolution was met with substantial opposition to a final vote.[19]

The promotion of the ICSID Convention was central in the initial years of the Centre, which, between 1968 and 1969, published a set of model clauses to promote the insertion of provisions granting ICSID jurisdiction in contracts and BITs.[20] By the mid 1970s, the inclusion of ICSID arbitration clauses was a common feature in investment contracts, and a dozen domestic investment promotion laws were enacted with reference to the ICSID Convention.[21] That explains the fact that the first ICSID cases were all contract-based or based on domestic laws that provided consent to ICSID arbitration.

[16] J. Coyle, 'The Treaty of Friendship, Commerce, and Navigation in the Modern Era', *Columbia Journal of Transnational Law*, 51 (2013), 302 at 308, 310 and 315.
[17] A. F. Lowenfeld, *International Economic Law* (Oxford University Press, 2003), pp. 456–7.
[18] Parra, *The History of ICSID*, pp. 67–8.
[19] R. Polanco Lazo, 'The No of Tokyo Revisited: Or How Developed Countries Learned to Start Worrying and Love the Calvo Doctrine', *ICSID Review*, 30 (2015), 172 at 182.
[20] ICSID, 'Model Clauses Relating to the Convention on the Settlement of Investment Disputes Designed for Use in Bilateral Investment Agreements [September 1969]', *International Legal Materials*, 8 (1969), 1341–52.
[21] Parra, *The History of ICSID*, pp. 132–3.

The first BIT that expressly included recourse to ICSID was the 1968 Indonesia–Netherlands BIT, although, as Newcombe and Paradell point out, the drafting of the specific provision was unclear, and it could have been interpreted either as a binding offer to the investor to arbitrate or as a binding obligation on the state to agree to arbitrate if an investment dispute arose.[22] The first signed BIT clearly providing for ICSID jurisdiction with unqualified state consent seems to have been the 1969 Chad–Italy BIT.[23] Only in 1990 did an arbitral tribunal issue the first ICSID award in which jurisdiction was based on a BIT, following an arbitration clause provided in the Sri Lanka–UK BIT (1980).[24]

Belgium and the UK began including consent to ICSID in BITs in the first half of the 1970s, and France soon followed their example.[25] Notably, the US started to negotiate BITs only in the early 1980s, after abandoning its second wave of new FCNAs in 1968.[26] Other countries that originally did not include ISA in their BITs, such as Germany and Switzerland, joined the trend in the 1980s and, by the middle of that decade, BITs containing provisions with advance consent to ICSID arbitral jurisdiction were the standard.[27]

Besides ICSID and BITs, other IIAs included provisions on ISA. The 1974 Arab Investment Convention[28] created a Centre for the Settlement of Investment Disputes between host states of Arab Investments and Nationals of other Arab States (the 'Arab Centre'), an organization very similar to ICSID, but with some differences as it was circumscribed to a specific type of claimants, provided for limited annulment rules (a second award rendered was considered final) and gave jurisdiction to the same Arab Centre for disputes over the interpretation and application of the Arab Investment Convention – not to the ICJ, as in

[22] Newcombe and Paradell, *Law and Practice of Investment Treaties*, p. 44.
[23] Ibid., p. 45.
[24] *Asian Agricultural Products Ltd* v. *Sri Lanka*, ICSID Case No, ARB/87/3, Final award on merits and damages (1991) 6 ICSID Rev-FILJ 526.
[25] Parra, *The History of ICSID*, p. 134.
[26] Coyle, 'The Treaty of Friendship, Commerce, and Navigation in the Modern Era', 309.
[27] Parra, *The History of ICSID*, p. 134.
[28] Convention on the Settlement of Investment Disputes between Host States of Arab Investments and Nationals of Other Arab States, 10 June 1974 ('Arab Investment Convention') [1981] Rev. Arb. 348. The contracting states were Iraq, Jordan, Sudan, Syria, Kuwait, Egypt and Yemen; Libya and the United Arab Emirates (UAE) acceded later. See H. G. Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (Kluwer Law International, 2002), p. 182.

the case of ICSID.[29] This Arab multilateral treaty was superseded by the Unified Agreement for the Investment of Arab Capital in the Arab States (1980)[30] that provides for arbitration before the Arab Investment Court, which became operational only in 2003.[31]

Another example similar to the use of ISA is the Iran–US Claims Tribunal, created after the 1981 Algiers Accords, as an international arbitral, established in The Hague, to adjudicate claims between US nationals and companies, and the government of Iran and its state-owned entities, arising out of the 1979 Islamic Revolution.[32] The Accords followed a mixed approach, distinguishing between 'small claims' (US $250,000 or less), presented at the tribunal by the home state, and 'large claims' (above US$250,000), presented by individual claimants, although in both cases the tribunal held that it was adjudicating individual rights and not those from the home state.[33] Although not all the cases before the Iran–US Claims Tribunal related to foreign investment, a number of them concern expropriation of alien property, and comparable acts.[34]

However, the most important multilateral treaty providing for ISA is the Energy Charter Treaty (ECT).[35] The fundamental objective of the ECT's provisions on investment is to ensure the creation of a 'level playing field' for the energy sector, with the purpose of reducing to a minimum the non-commercial risks associated with energy-sector investments.[36] Today, the ECT has fifty-four members, including the European Union (EU), and fifty-two states have signed or acceded to it.[37] Therefore, the ECT is the world's largest multilateral investment treaty in substantive issues.[38] Like other investment treaties, the ECT includes

[29] Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award*, pp. 182–3.

[30] Unified Agreement for the Investment of Arab Capital in the Arab States, 26 November 1980 *ICSID Review*, 3 (1980), 191. The agreement has been ratified by all member states of the League of Arab States except Algeria and the Comoros.

[31] W. Ben Hamida, 'The First Arab Investment Court Decision', *Journal of World Investment & Trade*, 7 (2006), 699–721 at 700.

[32] Lowenfeld, *International Economic Law*, p. 461.

[33] Parlett, *The Individual in the International Legal System*, p. 99.

[34] Lowenfeld, *International Economic Law*, pp. 463–73.

[35] Energy Charter Treaty, 17 December 1994, 2080 U.N.T.S. 95; 34 I.L.M. 360 (1995).

[36] Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents* (Energy Charter Secretariat, 2004), pp. 13–14.

[37] Energy Charter Secretariat, 'About the Charter'.

[38] M. D. Slater, 'The Energy Charter Treaty : A Brief Introduction to Its Scope and Initial Arbitral Awards' in Association for International Arbitration (ed.), *Alternative Dispute Resolution in the Energy Sector* (Maklu, 2009), pp. 15–54 at p. 15.

ISDS provisions, allowing the arbitration of disputes before ICSID tribunals or those constituted under the United Nations Commission on International Trade Law (UNCITRAL) or the Stockholm Chamber of Commerce (SCC) Arbitration Rules.[39] Today, 119 ISA cases are known to have been brought under the ECT, which has become the most-invoked treaty in the ISDS system.[40]

During the 1980s and the early 1990s, a major policy reversal took place in Latin America, as most countries became members of ICSID and began to sign BITs that included ISDS, in order to stimulate economic growth through foreign direct investment (FDI),[41] with the intention of presenting themselves as attractive locations for potential foreign investors.[42] The only notable exception is Brazil, which is still not an ICSID member and has not ratified almost any of the BITs that it has negotiated.[43]

B Why Investor–State Arbitration Was Created

Several reasons led to the establishment of ISA, some of which related to the problems created by the use of diplomatic protection and others to the purported benefits of the new system. As we have seen, the traditional method for dealing with investment disputes until then – diplomatic protection – was fiercely opposed by host states, and particularly by those from the developing world. Overcoming problems arising from the use of diplomatic protection was one of the main objectives of developing a new method for the settlement of investment disputes. However, as we will see later, this development has created new resentment against the power of such international arbitral tribunals in relation to the sovereign powers of the host state.[44]

[39] Ibid., p. 15.

[40] UNCTAD, 'Investment Dispute Settlement Navigator': http://investmentpolicyhub.unctad.org/ISDS (accessed 26 February 2018).

[41] K. Fach Gómez, 'Latin America and ICSID: David versus Goliath?' (2010), p. 2.

[42] A. T. Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties', *Virginia Journal of International Law*, 38 (1998), 639–88 at 643–44.

[43] L. Barreiro Lemos and D. Campello, 'The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation', *Review of International Political Economy*, 22 (2015), 1055–86.

[44] M. E. Schneider, 'Investment Disputes – Moving Beyond Arbitration' in L. Boisson de Chazournes, M. G. Kohen and J. E. Viñuales (eds.), *Diplomatic and Judicial Means of Dispute Settlement* (Martinus Nijhoff Publishers, 2012), p. 119 at p. 125.

The main reasons for the creation of ISA can be summarized in three main aspects: to depoliticize or 'legalize' the dispute; the inherent limitations of diplomatic protection; and to overcome barriers to recovery from the host state.

1 To Depoliticize the Dispute

One of the most prominent goals that led to the creation of ISA was to 'depoliticize the dispute'. The aim was to remove the dispute from the realm of politics and diplomacy and shift it into the realm of law.[45] This was seen as being beneficial for the home state, the host state and the foreign investor.

In *Enron* v. *Argentina*, the tribunal explicitly mentioned as one of the merits of the ICSID Convention that 'it overcame the deficiencies of diplomatic protection where the investor was subject to whatever political or legal determination the state of nationality would make in respect of its claim'.[46]

For developed home countries, this new system had the 'healthy' effect of depoliticizing disputes, and freed governments from the pressure of affected investors who dragged them into costly diplomatic or military conflicts.[47] With respect to developing countries, depoliticizing disputes also minimized the chances that the investor's home state would be interested in exercising diplomatic protection. The hope was that developing countries would be more satisfied by dealing with a neutral arbitral tribunal rather than 'with officials from one of the world's larger economies, whose leverage over smaller states on a range of unrelated issues is likely to be considerable'.[48]

Regarding foreign investors, the creation of ISA was a turning point in international dispute settlement.[49] By its nature, diplomatic protection

[45] G. Kaufmann-Kohler, 'Non-Disputing State Submissions in Investment Arbitration' in L. Boisson de Chazournes, M. G. Kohen and J. E. Viñuales (eds.), *Diplomatic and Judicial Means of Dispute Settlement* (Martinus Nijhoff Publishers, 2012), pp. 307–26 at p. 308.

[46] *Enron Corp. and Ponderosa Assets, LP.*v. *Argentine Republic*, ICSID Case No ARB/01/3. Decision on Jurisdiction, 14 January 2004, para. 48.

[47] N. Maurer, *The Empire Trap: The Rise and Fall of US Intervention to Protect American Property Overseas, 1893–2013* (Princeton University Press, 2013), pp. 7–10.

[48] C. F. Dugan, D. Wallace Jr, N. D. Rubins and B. Sabahi, *Investor–State Arbitration* (Oxford University Press, 2008), p. 9.

[49] F. Orrego Vicuña, *International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization* (Cambridge University Press, 2004), pp. 64–5.

confers on the home state a wide latitude in determining what to do about an alleged breach of international law, if anything.[50] Espousal by the investor's home state depends also on political factors, and is not available, on an equal basis, to all nationals investing abroad.[51] Thus, investors may well find that their governments refuse to espouse a meritorious claim, to avoid that being considered an unfriendly act by the host state. In ISA, the investor is 'in the driving seat', while, in diplomatic protection, the home state had complete discretion in deciding whether and how to bring a claim, and whether and when to settle.[52]

It was also presumed that granting investors direct access to specialized international arbitration would decrease the inherent limitations of diplomatic protection, giving more certainty to investors through a process of 'legalization':[53]

> The dispute settlement procedures provided for in BITs and ICSID offer greater advantages to the foreign investor than the customary international law system of diplomatic protection, as they give the investor direct access to international arbitration, avoid the political uncertainty inherent in the discretionary nature of diplomatic protection and dispense with the conditions for the exercise of diplomatic protection.

However, is not clear whether the ISDS system has achieved this objective. Some commentators have pointed out that the idea of depoliticization is, at least, superfluous and, at worst, may distract law makers or interpreters from identifying relevant issues.[54] Others have stated that all investment arbitrations should be viewed as political.[55] As we will analyse later, today, it would be either naïve or misleading to conclude that the ISDS system has been completely depoliticized.

[50] J. J. Coe Jr, 'Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods', Vand. J. Transnat'l L., 36 (2003), 1381 at 1416.

[51] Dugan *et al., Investor–State Arbitration*, p. 89.

[52] A. Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States', *American Journal of International Law*, 104 (2010), 179–225 at 183.

[53] ILC, 'Draft Articles on Diplomatic Protection, with Commentaries. Report of the International Law Commission, 58th session (A/61/10)', *Yearbook of the International Law Commission*, II (2006), Art. 17(2).

[54] M. Paparinskis, 'The Limits of Depoliticisation in Contemporary Investor–State Arbitration', *Select Proceedings of the European Society of International Law*, 3 (2010), 271.

[55] C. H. Brower, II, 'Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes' in K. P. Sauvant (ed.), *Yearbook on International Investment Law & Policy* (Oxford University Press, 2009), pp. 347–78 at pp. 348–56.

2 *Limitations of Diplomatic Protection*

The diplomatic espousal of investment claims is not only politically costly; it is also cumbersome. Three main limitations make the use of this mechanism particularly burdensome: the rule on exhaustion of local remedies; the link with the nationality of the investor; and the available remedies due to the exercise of diplomatic protection.

(a) Exhaustion of Local Remedies

Under customary international law, diplomatic espousal is normally permissible only after previous exhaustion of all local remedies available within the judicial or administrative system of the country in which the investment is located.

This is seen as a way of respecting the sovereignty of the host state, giving it the possibility of doing justice to the injured party.[56] As the ICJ held in the *Interhandel* case:[57]

> The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a state has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the state where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.

However, the scope of application of this rule can be complex. How extensive must the resort to local remedies be in order for us to consider that the host state had a proper opportunity to settle the dispute? Is the exhaustion of local remedies applicable only to remedies of a judicial nature?[58]

Regarding the scope of the exhaustion, international case law displays different opinions. In the *Finnish Ships Arbitration* case, the arbitrator stated that:[59]

[56] Dugan *et al., Investor–State Arbitration*, p. 30.
[57] *Interhandel case*, Preliminary Objections, p. 25.
[58] C. F. Amerasinghe, *Diplomatic Protection* (Oxford University Press, 2008), p. 144.
[59] Claim of Finnish Shipowners against Great Britain in Respect of the Use of Certain Finnish Vessels during the War. (Finland v. Great Britain). Award, 9 May 1934, 3 UNRIAA 1481, p. 1502

> the raison d'être of the local remedies rule, in a case of an alleged initial breach of international law, can be solely that all the contentions of fact and propositions of law which are brought forward by the claimant Government in the international procedure as relevant to their contention that the respondent Government have committed a breach of international law by the act complained of, must have been investigated and adjudicated upon by the municipal Courts up to the last competent instance, thereby also giving the respondent Government a possibility of doing justice in their own, ordinary way.

A less strict test was articulated by the ICJ in the *ELSI* case,[60] which was preferred by the International Law Commission in its Draft Articles on Diplomatic Protection:[61]

> the local remedies rule does not, indeed cannot, require that a claim be presented to the municipal courts in a form, and with arguments, suited to an international tribunal, applying different law to different parties: for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.

The same ICJ has clarified that, in cases of diplomatic protection, the burden is on the applicant to prove that local remedies have been exhausted, or to establish that exceptional circumstances relieved the allegedly injured person, whom the applicant seeks to protect, of the obligation to exhaust available local remedies.[62] If the applicant shows that exceptional circumstances justified the non-exhaustion of local remedies, it is for the respondent state to prove that effective remedies were available in its domestic legal system, and that they were not exhausted.[63]

Although the rule of exhaustion of local remedies admits some exceptions, such as cases of undue delay or lack of availability,[64] the uncertainty of its scope has meant that, in the majority of existing investment

[60] *ELSI case,* Judgment, p. 59.
[61] ILC, 'Draft Articles', 73.
[62] *ELSI case*, Judgment, pp. 43–6.
[63] *Diallo*, Preliminary Objections, p. 600.
[64] Under ILC Draft Articles on Diplomatic Protection, Art. 15, local remedies do not need to be exhausted when: (a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress; (b) there is undue delay in the remedial process that is attributable to the state alleged to be responsible; (c) at the date of injury, there was no relevant connection between the injured person and the state alleged to be responsible; (d) the injured person is manifestly precluded from pursuing local remedies; or (e) the state alleged to be responsible has waived the requirement that local remedies be exhausted.

treaties, the investor often has immediate access to ISA, even in the absence of specific provisions.[65] Chapter 11 of NAFTA does not explicitly address whether investors are required to exhaust local remedies, and arbitral tribunals have implied that it is not needed, interpreting it such that no such customary requirement applies as a general rule, except in certain extreme cases such as denial of justice.[66]

This waiver does not derive directly from the ICSID Convention, as the host contracting state retains the power to require the exhaustion of local administrative or judicial remedies as a condition of giving its consent to arbitration under the Convention.[67] However, rarely, ICSID members have given notification that local remedies must be exhausted.[68]

(b) Nationality of the Investor

Under customary international law, a state is entitled to exercise diplomatic espousal in relation to the harm suffered by individuals and corporations, but only if the state can demonstrate a bond of nationality with the harmed person or entity.[69]

Several complex issues can arise regarding nationality. Two of the most relevant are the different rules for determining nationality of natural[70] or

[65] A. Van Aaken, 'The Interaction of Remedies between National Judicial Systems and ICSID : An Optimization Problem' in N. J. Calamita, D. Earnest and M. Burgstaller (eds.), *The Future of ICSID and the Place of Investment Treaties in International Law* (London: British Institute of International and Comparative Law, 2013), pp. 291–324 at p. 291.

[66] Coe Jr, 'Taking Stock of NAFTA Chapter 11 in Its Tenth Year', 1419–24.

[67] ICSID Convention, Art. 26.

[68] For example, in 1983 Israel gave such notification, but subsequently withdrew it in 1991. See C. Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration', *Law and Practice of International Courts and Tribunals*, 4 (2005), 1 at 2. Today, only Costa Rica (1993) and Guatemala (2003) have notified the Centre that they will require the exhaustion of local administrative remedies as a condition of their consent to arbitration under the ICSID Convention. See ICSID, 'Contracting States and Measures Taken by Them for the Purpose of the Convention. ICSID/8. Notifications Concerning Classes of Disputes Considered Suitable or Unsuitable for Submission to the Center': https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%208-Contracting%20States%20and%20Measures%20Taken%20by%20Them%20for%20the%20Purpose%20of%20the%20Convention.pdf (accessed 26 June 2017).

[69] Dugan *et al., Investor–State Arbitration*, p. 33.

[70] The general rule is that the nationality of natural persons is a question within the reserved domain of a state, whether by birth, descent, naturalization, succession of states, or in any other manner not inconsistent with international law. See *Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921*, Advisory Opinion, 7 February 1923, (1923) PCIJ Series B 5, p. 24, and ILC Draft Articles on Diplomatic Protection, Art. 4. As a general rule, fraudulently acquired nationality is not recognized: Amerasinghe, *Diplomatic Protection*, p. 93.

legal persons,[71] and the eventual changes of nationality during the course of the investment ('continuous nationality rule').[72] These problems are common to both the use of diplomatic protection and ISA, to the extent that, usually, there are no specific rules about this in investment treaties, and ISDS case law has generally relied on established principles that have been developed in the context of diplomatic protection.[73]

But investment treaties including ISA can provide more precision in issues related to nationality, particularly with respect of dual nationality of natural persons, the requirement of effective links, and the rights of foreign shareholders of corporations. Although early BITs generally failed to address the determination of rules applicable in cases in which a national of a contracting party also holds the nationality of the other contracting party,[74] today, several IIAs do have rules to deal with dual nationality,[75] and Article 25(2) of the ICSID Convention excludes dual nationals, if one of the nationalities is that of the host state.

In the *Nottebohm* case, the ICJ addressed the principle of 'effective link', by which it was considered that nationality was conferred by naturalization only if there is a genuine connection between the state

[71] Nationality of corporations is rarely dealt with in domestic laws and must be derived either from the fact of incorporation or creation of a legal person, from links to a particular state (such as the main seat of business) or from the nationality of the natural persons who control the company: J. Crawford, *Brownlie's Principles of Public International Law*, 8th edn (Oxford University Press, 2012), pp. 527–8. Investment treaties use several criteria to determine whether a juridical person is a national or an investor of a particular state, the incorporation and the main seat being the most commonly used: R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2012), p. 49.

[72] Several claims commissions and post-war arbitral tribunals dealt with the question of whether nationality was a prerequisite for diplomatic protection at the time of the filing of the claim, or at any later time. Some of them required continuity of the bond of nationality until the date at which the treaty came into force (e.g. the 1924 German–US Mixed Claim Commission), while others required continuity of nationality until the date of presentation of the claim (e.g. the 1929 British–Mexican Claims Commission), and some required continuity of the nationality link until the date of the award (e.g. the 1927 French–Mexican Commission). See Parlett, *The Individual in the International Legal System*, pp. 68–70. ICSID Convention Art. 25(1) requires claimants to establish that they had the nationality of a contracting state at the date on which the parties consented to ICSID's jurisdiction and the date of registration of the request for arbitration.

[73] Dolzer and Schreuer, *Principles of International Investment Law*, p. 47.

[74] R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers, 1995), p. 34.

[75] For example, the Canada–Lebanon BIT (1997) and the Uruguay–US BIT (2005), among others. UNCTAD, *Scope and Definition: UNCTAD Series on Issues in International Investment Agreements II* (United Nations, 2011), pp. 77–8.

and the individual concerned. An important factor to take into consideration for this link was the habitual residence of the individual concerned, and 'the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.'[76] Although it has been followed in some cases, the 'genuine link' requirement is not generally accepted or considered part of customary international law.[77] In contrast, several IIAs require a link beyond nationality to have access to the protection of the treaty and to ISDS, usually permanent residence and/or citizenship.[78]

Companies and shareholders can have a different nationality, and the diplomatic protection of foreign shareholders was not guaranteed under customary international law. In the *Barcelona Traction* case, the ICJ ruled that only the state of incorporation, rather than the state of its controlling shareholders, can invoke a claim for diplomatic protection.[79] IIAs generally recognize the protection of shareholders with a typical broad definition of 'investment', and under Article 25(2)(b) of the ICSID Convention a locally incorporated company might qualify as a foreign investor because of its foreign control. Similarly, NAFTA allows a foreign investor that owns or control a company to submit a claim of arbitration on behalf of that company.[80]

(c) Available Remedies

The remedies available in the exercise of diplomatic protection in investment disputes could take several forms that stem from the international law on state responsibility. Some do not directly impose the obligation to act by the responsible state (e.g. termination or suspension of a treaty; or countermeasures), and others require the host state to take remedial measures for the full reparation of the injury.[81]

[76] *Nottebohm case*, Judgment, p. 22.

[77] ILC Draft Articles on Diplomatic Protection, Art. 4 did not adopt the *Nottebohm* rule. The ILC pointed out to the fact that 'in today's world of economic globalization and migration a strict application of the genuine link requirement would exclude millions of persons from the benefit of diplomatic protection'. See Crawford, *Brownlie's Principles of Public International Law*, 8th edn (Oxford University Press, 2012), pp. 513–17.

[78] For example, Germany–Israel BIT (1976) and Canada–Argentina BIT (1991) require permanent residency, the ECT and NAFTA require citizenship and permanent residency. See OECD, *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD, 2008), pp. 13–14.

[79] *Barcelona Traction*, Judgment Second Phase, pp. 227–358.

[80] Dolzer and Schreuer, *Principles of International Investment Law*, p. 57.

[81] Amerasinghe, *Diplomatic Protection*, p. 282.

As recognized by the ILC Draft Articles on State Responsibility,[82] the reparation for the injury caused by the internationally wrongful act can take the form of restitution, compensation and satisfaction, either individually or in combination.

Because the international wrong that triggered diplomatic protection is considered to have been suffered by the home state of the foreign investor, in theory, reparation, and particularly compensation, should be to the benefit of the national state.[83] Although it is a fact that the damage to the alien constitutes the measure of reparation, the damage made to the home state is not identical with that suffered by its national.[84] The ILC Draft Articles on Diplomatic Protection include a 'recommended practice' that a state entitled to exercise diplomatic protection should 'transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions'.[85] In its first commentary to this article, the ILC clarified that this is a desirable practice for the progressive development of the law that adds strength to diplomatic protection.[86]

In ISA, remedies are sought directly by the foreign investor and nearly always consists of monetary compensation, as restitution in kind is rarely ordered, and satisfaction[87] does not play a practical role in investment law.[88]

3 *To Overcome Barriers at Host State Courts*

Diplomatic protection was not the only mechanism for the settlement of investment disputes. As we have seen in the first part of this work, historically, domestic courts have had an important role in this field,

[82] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No 10 (A/56/10), chp. IV. E.1, Art. 34.

[83] Amerasinghe, *Diplomatic Protection*, p. 319.

[84] 'The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a state; it can only afford a convenient scale for the calculation of the reparation due to the state': *Case Concerning the Factory at Chorzów*. Claim for Indemnity (Merits), p. 28.

[85] ILC Draft Articles on Diplomatic Protection, Art. 19.

[86] Ibid., Art. 19, Comm. (1).

[87] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 37 explains that satisfaction 'may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality' that does not take a form humiliating to the responsible state.

[88] Dolzer and Schreuer, *Principles of International Investment Law*, p. 271.

but they also presented some problems that ISA was supposed to overcome: inefficiency and local bias.

The efficiency – or lack of it – of domestic courts is a concern of many foreign investors, especially in developing countries that are often perceived as lacking 'responsive, robust legal systems capable of effectively and quickly adjudicating complex claims'.[89] One unusual case in this regard is *In re Union Carbide*,[90] in which the Indian government acknowledged the inefficiency of its own courts, in resisting the defendant's efforts to transfer the cases back to India – probably through fear of the extremely high amounts that US courts are prone to awarding in personal injury cases.[91]

Some commentators mention local bias as a serious barrier to obtaining redress in host country courts, conceding that, although judges are not necessarily more sympathetic to their nationals, the contrary perception is common – in some cases with good reason.[92] Regardless of whether the 'xenophobic bias' exists in fact, there should be no controversy about the reality of the *perception* that bias exists in domestic courts against foreign investors.

But the possibility of local bias against foreigners is not an exclusive phenomenon of developing countries. The US Supreme Court had already addressed the powers of federal courts exercising jurisdiction on the ground of diversity of citizenship, in the old case of *Erie R. Co.* v. *Tompkins,* in which it affirmed that 'Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state'.[93] Some authors have found that – consciously or not – jury decisions discriminate against foreign parties in intellectual property litigation before US courts.[94] Others have found evidence that the market reaction to the announcement of a US federal lawsuit is less negative for American corporate defendants than for foreign ones, even if the dismissal rates for US defendant firms are not reliably different from those for foreign ones.[95] In contrast, other researchers have not identify pro-domestic

[89] Dugan *et al., Investor–State Arbitration*, p. 15.
[90] *In Re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986)
[91] Dugan *et al., Investor–State Arbitration*, p. 15.
[92] Ibid., p. 13.
[93] *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938)
[94] K. A. Moore, 'Xenophobia in American Courts', *Northwestern University Law Review*, 97 (2003), 1497.
[95] U. Bhattacharya, N. Galpin and B. Haslem, 'The Home Court Advantage in International Corporate Litigation', *Journal of Law and Economics*, 50 (2007), 625–60 at 652–3.

party bias providing evidence that foreigners have in fact outperformed their American counterparts when they litigate in the United States.[96] This phenomenon could be explained by the foreigners' fear of US litigation – a presumption that makes them selective in choosing strong cases to pursue to judgment.[97]

Although the empirical evidence is mixed and a theoretical basis for bias is still underdeveloped, the perception that domestic judges may favour their fellow citizens is strong[98] and, if effective, could serve as a basis for ISA, if it is available. In the award in the famous *Loewen* v. *US* case, regarding the conduct of a Mississippi trial court that resulted in a -$500 million damages award against a Vancouver-based funeral home company (in which repeated allusions to Loewen's Canadian nationality were made by the plaintiff),[99] the arbitral tribunal found that:[100]

> [h]aving read the transcript and having considered the submissions of the parties with respect to the conduct of the trial, we have reached the firm conclusion that the conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law.

Wälde has pointed out that, in some countries in which there is not a clear internal separation of powers, if the state is simultaneously a disputing party, on one hand, and sovereign regulator, on the other, governments used to controlling internal adjudication, directly or indirectly, would be prone to undue interference before domestic courts. This would impair the principle of 'equality of arms' through misconduct such as corruption, pressure on judges or arbitrators, intimidation of counsel, experts and witnesses, or in general abuses of governmental powers, particularly if the investment dispute is seen as a domestic political risk.[101]

[96] K. M. Clermont and T. Eisenberg, 'Xenophilia in American courts', *Harvard Law Review*, 109 (1996), 1120–43.

[97] K. M. Clermont and T. Eisenberg, 'Xenophilia or Xenophobia in US Courts? Before and After 9/11', *Journal of Empirical Legal Studies*, 4 (2007), 441–64 at 444, 464.

[98] C. A. Whytock, *Domestic Courts and Global Governance: The Politics of Private International Law* (ProQuest, 2007), pp. 89–90.

[99] *O'Keefe* v. *Loewen Group, Inc.*, No 91-67-423 (Miss. Circ. Ct. 1st Jud. Dist., Hinds County 1995).

[100] *The Loewen Group, Inc. and Raymond L Loewen* v. *United States of America*, ICSID Case No ARB(AF)/98/3, Award, 26 June 2013, para. 54.

[101] T. W. Wälde, '"Equality of Arms" in Investment Arbitration: Procedural Challenges' in K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010), pp. 161–88 at pp. 161–79.

C Criticisms of Investor–State Arbitration

While the ability of foreign investors to choose ISA as a mechanism for settling investment disputes has gained relevance, it has also come under progressively more scrutiny.

The criticisms of ISA have been explained in great detail elsewhere[102] but, for the purposes of this book they can be classified into two main groups: those that question the necessity of the system as such and those focused on the functioning of the arbitral procedure.

1 Against the System of Investor–State Arbitration

Critics of the regime have pointed out that it allows foreign investors to bring a dispute against the host state before a body other than the state's own courts,[103] giving to private arbitrators the ability to decide the legality of sovereign acts, and in practice contracting out the judicial function that is embedded in public law.[104]

Some have taken even bolder positions, declaring that the last decades have witnessed 'the silent rise of a powerful international investment regime that has ensnared hundreds of countries and put corporate profit before human rights and the environment',[105] pointing out that international investment arbitration does not allow consideration of other legitimate public policies affecting a state's 'right to regulate', or 'policy space'. Certain characteristics of ISDS have led to concerns about the independence and impartiality of arbitrators, like that disputing parties appoint their own arbitrator, or the way in which the arbitrators are challenged, either by colleagues arbitrators or by organs composed of

[102] See, among many others, Michael Waibel *et al.* (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer Law & Business, 2010); O. Thomas Johnson and Catherine H. Gibson, 'The Objections of Developed and Developing States to Investor–State Dispute Settlement and What They Are Doing about Them' in Arthur W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2013* (2014) 253; UNCTAD, 'Reform of Investor–State Dispute Settlement'.

[103] Schneider, 'Investment Disputes – Moving Beyond Arbitration', p. 120.

[104] G. van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2008), p. 4.

[105] P. Eberhardt and C. Olivet, *Profiting from Injustice. How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom* (Corporate Europe Observatory (CEO) and the Transnational Institute (TNI), 2012), p. 6.

members appointed by business representatives.[106] Both types of criticisms have been rejected by other groups of scholars and practitioners.[107]

Others have stressed the imbalances of the system against developing host states, as they are subject to the most claims and at a higher level than their proportion of global investment.[108] But then others have underscored the procedural challenges that a private party has to face when litigating against a state.[109]

According to UNCTAD, there is a growing perception that the system lacks legitimacy[110] but, most importantly, that ISDS increases severance of the links between the host state and the investor, defeating the very purpose of investment promotion:[111]

> The nature of the relationship between the investor and the state involves a long-term engagement; hence a dispute resolved by international arbitration and resulting in an award of damages will generally lead to a severance of this link. Moreover, the financial amounts at stake in investor–State disputes are often very high. Time and money required conducting such investment arbitrations (large costs and increased time frame). Cases are increasingly difficult to manage, the fears about frivolous and vexatious claims, the general concerns about the legitimacy of the system of investment arbitration as it affects measures of a sovereign State, and the fact that arbitration is focused entirely on the payment of compensation and not on maintaining a working relationship between the parties.

Interestingly, this structural critique has gaining adhesion not only when disputes follow the 'classic' format of a foreign investor from a developed state in a developing host state. We are witnessing a similar debate against ISDS in the negotiations and ratification of 'mega-regional' agreements involving developed countries, such as the Trans-Pacific Partnership

[106] N. Bernasconi-Osterwalder and D. Rosert, *Investment Treaty Arbitration: Opportunities to Reform Arbitral Rules and Processes* (2014), p. 12.

[107] C. N. Brower and S. Blanchard, 'What's in a Meme? The Truth about Investor–State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States', Colum. J. Transnat'l L., 52 (2014), 689–896; S. M. Schwebel, 'In Defense of Bilateral Investment Treaties', *Arbitration International*, 31 (2015), 181–92.

[108] K. P. Gallagher and E. Shrestha, 'Investment Treaty Arbitration and Developing Countries: A Re-Appraisal', *Global Development and Environment Institute. Working Paper No 11-01* (2011), 1–12 at 8.

[109] Wälde, 'Equality of Arms'.

[110] UNCTAD, 'Reform of Investor–State Dispute Settlement', 2–4.

[111] UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration* (United Nations Publications, 2010), p. xxiii, 5, 9.

(TPP),[112] the Comprehensive Economic and Trade Agreement (CETA)[113] and the Transatlantic Trade and Investment Partnership (TTIP).[114] Some groups, including civil society, academia and certain government officials, view the proposed inclusion of ISDS in such treaties as dangerous, because it would give foreign investors access to ISA – a forum that is seen as inappropriate in legal systems with a strong tradition of rule of law and independent and impartial courts.[115]

2 *Against the Functioning of Investor–State Arbitration*

Next to the criticisms against the system, we can find other groups of concerns that are directed to the actual functioning of the ISA procedure.

[112] Trans-Pacific Partnership Agreement, signed on 4 February 2016, between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the US and Vietnam. After the withdrawal of the US on 30 January 2017, the remaining TPP-11 countries decided to continue with the agreement, with the exception of a small number of technical articles and the suspension of application of certain provisions. Renamed Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), negotiations concluded on 23 January 2018, and the new agreement was signed on 8 March 2018 in Santiago de Chile. New Zealand Ministry of Foreign Affairs and Trade, 'Comprehensive and Progressive Agreement for Trans-Pacific Partnership' (February 2018). The CPTPP incorporates, by reference, the provisions of the TPP, so I have kept all the citations to that treaty in this book. In the case of TPP, the main objections against investor–state arbitration came from Australia and at a certain extent from the United States. See Leon E. Trakman, 'Investor–State Dispute Settlement under the Trans-Pacific Partnership Agreement' in Tania Voon (ed.), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar Publishing, 2013), pp. 179–206.

[113] Comprehensive Economic and Trade Agreement between Canada and the European Union Trans-Pacific Partnership, signed on 30 October 2016. In this case, the debate has been taking place in both negotiating parties, Canada and the EU, and even its signature was at risk, after the opposition of the Walloon government in Belgium. See J. Adriaensen, 'The Future of EU Trade Negotiations: What Has Been Learned from CETA and TTIP?', November 2017: http://blogs.lse.ac.uk/europpblog/ (accessed 28 February 2018). CETA has been in partial provisional application since 21 September 2017.

[114] In the case of the TTIP, the European Commission held an online public consultation process, receiving a total of 149,399 contributions. European Commission, 'Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)' (2014). A group of 121 academic experts spoke against the inclusion of ISA in the TTIP. See P. Muchlinski *et al.*, 'Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)', July 2014: www.kent.ac.uk/law/isds_treaty_consultation.html (accessed 4 August 2017).

[115] Polanco Lazo, 'The No of Tokyo Revisited', 2.

UNCTAD has summarized different problems in this regard: i) transparency, as both disputing parties can keep proceedings fully confidential even in cases in which the dispute involves public interest matters; ii) 'nationality planning', as investors may gain access to ISDS using corporate structuring, without effective business in the 'home' state; iii) consistency of arbitral decisions, as arbitral tribunals have had divergent legal interpretations of identical or similar treaty provisions; iv) limited powers to correct erroneous decisions, as there is generally no appeal mechanism and ICSID annulment committees have very limited review powers; and v) arbitrators' independence and impartiality, as some disputing parties perceive them as biased or profiting from the system through repeated appointments.[116]

Reacting against this 'procedural' set of criticisms, innovative forms of rule-making have been taking place in recent years, both in IIAs and in arbitration rules. In order to discourage frivolous claims by investors, some IIAs have included a particular procedure for addressing preliminary objections by respondents.[117] After being amended in 2006, the ICSID Arbitration Rules now allow arbitral tribunals to dismiss proceedings summarily if they find that the underlying claims are 'manifestly without legal merit'.[118]

To minimize the possibilities of treaty and forum shopping, or overall 'nationality planning', several recent IIAs include a clause on 'denial of benefits', with the aim of excluding the protection provided by those treaties to investors or enterprises with no substantial business activity in the in the territory of the party under whose law it is constituted or organized.[119]

Several steps have been taken in order to increase transparency in the ISDS, aiming to improve the knowledge of the dispute, the access to the proceedings by non-disputing parties, and the publicity of awards and other arbitral documents. Efforts towards a more transparent investment arbitration system are reflected in most recent FTAs and BITs, particularly

[116] UNCTAD, 'Improving Investment Dispute Settlement: UNCTAD's Policy Tools', *IIA Issues Note,* 4 (2017), at 6.

[117] M. Potestà and M. Sobat, 'Frivolous Claims in International Adjudication: A Study of ICSID Rule 41 (5) and of Procedures of Other Courts and Tribunals to Dismiss Claims Summarily', *Journal of International Dispute Settlement*, 3 (2012), 131–62 at 22.

[118] A. Antonietti, 'The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules', *ICSID Review – Foreign Investment Law Journal*, 21 (2006), 427–48 at 438–47.

[119] For a detailed explanation on these clauses, see L. A. Mistelis and C. M. Baltag, 'Denial of Benefits and Article 17 of the Energy Charter Treaty', Penn St. L. Rev., 113 (2008), 1301.

those signed by the United States and Canada.[120] In 2006, ICSID amended its Rules of Arbitration, including provisions on the publication of awards and opening of hearings to the public, allowing the possibility of *amicus curiae* submissions, among others.[121] Further steps towards transparency were achieved on 1 April 2014, with the entry into force of the UNCITRAL Rules on Transparency in treaty-based investor–state arbitration,[122] and on 10 December 2014, with the adoption of the UN Convention on Transparency in Treaty-based Investor-State arbitration (also known as the 'Mauritius Convention'), which has been in force since 18 October 2017.[123]

However, what is more interesting for the purpose of this work is that some of these criticisms against the functioning of ISA have been addressed in the negotiation and renegotiation of new IIAs, increasingly conferring an important role on the home state of the foreign investor. This is particularly true in relation to problems of interpretations of treaty provisions, filtering of claims, regulation of the work of arbitrators, and enforcement of awards, as we will analyse in detail in the later chapters of this book.

There is no single approach to addressing the criticisms against the international investment regime. However, the treaty practice that has been observed in recent years can lead us to the conclusion that the majority of countries do not seem to be against IIAs or ISA per se, but against the consequences of having certain standards broadly defined or the way in which those standards are interpreted in practice by private arbitrators. Evidence of this is the continuously growing number of investment treaties and the steady state practice of negotiating and concluding IIAs with ISA or other methods of investor-state dispute settlement even in the legitimacy crisis of recent years.

Although some countries, such as Bolivia, Ecuador, Venezuela and South Africa, have totally or partially 'disengaged' from the system, in the face of criticisms against ISA, the large majority have taken an 'intra-system' and 'normative' strategy, actively participating in the negotiation

[120] OECD, *Transparency and Third Party Participation in Investor–State Dispute Settlement Procedures* (2005), p. 5.

[121] Antonietti, 'The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules', 432–7.

[122] UNCITRAL, Resolution adopted by the General Assembly 68/109, U.N. DOC. A/68/462 (16 December 2013).

[123] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, 17 March 2015, 54 ILM 747–57.

and renegotiation of new investment treaties to correct the system's numerous problems.[124]

If we analyse this new generation of treaties, we can see that they give more control and stronger involvement to the contracting parties, and notably we find a more active participation of the home state in investment disputes, in several roles such as the prevention or management of such disputes, the filtering of certain claims, in built-in treaty mechanisms for interpreting or clarifying provisions, in the regulation of the work and conduct of arbitrators, and in the enforcement of arbitral awards. These developments are not addressing the 'systemic' criticisms against the ISDS and the legitimacy of the system as such, but mostly those against the functioning of the arbitral procedure.

Several reasons explain the inclusion of stronger inter-governmental elements in IIAs. The first IIA that included detailed provisions in this regard was NAFTA, and Alschner believes that when it was negotiated, Canada and the United States felt potentially exposed to investment claims, and used tighter state control as a solution to moderating their risk in the face of bidirectional investment flows.[125] Van Aaken points out that contracting parties might retain authoritative interpretation for themselves or delegate it to other persons or institutions (such as joint commissions), if arbitrators are not trusted by states, either because they feel expertise is missing or because they are behaving in an unwanted manner.[126] According to Roberts, these institutional provisions have advantages over 'ad hoc' interpretations or clarifications, as they form part of the general regulatory framework of the agreement, which therefore 'substantially reduces concerns about detrimental reliance by investors'.[127] For Kulick, states have never lost their ability to make treaty interpretations, sharing this role with investor–state tribunals, only for the specific disputes between investors and home states.[128]

[124] R. Polanco Lazo, 'Is There a Life for Latin American Countries after Denouncing the ICSID Convention?', *Transnational Dispute Management*, 11 (2014).

[125] W. Alschner, 'The Return of the Home State and the Rise of "Embedded" Investor–State Arbitration' in S. Lalani and R. Polanco (eds.), *The Role of the State in Investor-State Arbitration* (Brill /Martinus Nijhoff, 2014), pp. 303–5.

[126] A. Van Aaken, 'Delegating Interpretative Authority in Investment Treaties: The Case of Joint Commissions', *Transnational Dispute Management*, 11 (2014) at 10.

[127] Roberts, 'Power and Persuasion', 208.

[128] Kulick, 'State–State Investment Arbitration as a Means of Reassertion of Control. From Antagonism to Dialogue' in A. Kulick (ed.), *Reassertion of Control Over the Investment Treaty Regime* (2017), pp. 128–52 at p. 146.

This phenomenon is simultaneously something 'new' and something 'old'. It is novel, in the sense that, with the rise of ISA, the home state had little to do with it, being virtually cast aside from the settlement of investment disputes. However, as we have seen in the first part of this work, this is also something 'old', as it implies the revisiting of a historical trend that saw home states involved in investment disputes, particularly through the use of peaceful means of diplomatic protection. Although most of these 'new' mechanisms are used jointly by the home state and the home state – a feature that has been described as the 'reassertion' of state control over the investment treaty regime[129] – a number of these mechanisms can also be triggered directly and solely by the home state. But is this new role of the home state in ISDS a 'return' to diplomatic protection, or we are witnessing a different type of home state participation?

In the chapters that follow, a detailed typology of the different kinds of participation of the home state is provided. This encompasses the whole range of investor–state disputes, from prevention and management of conflicts to participation at different stages of ISA, until the enforcement and implementation of arbitral awards. In each case we will examine whether this intervention constitutes diplomatic protection, based on the survey of IIAs negotiated, concluded and signed in the last fifteen years.

[129] Kulick (ed.), *Reassertion of Control Over the Investment Treaty Regime* (2017).