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Are Fear, Disinformation, Politics and the European Commission Becoming.The Four Horsemen of The Apocalypse For International Investment Dispute Arbitration? *

Judge Charles N. BROWER **

Sumario: I. Introduction. II. Statement of the International Bar Association (2015). 1. Investment Treaties and Arbitration are Not Harmful or Ineffective. 2. Arbitration Is Not One–Sided. 3. Proceedings Are Not "Secretive". 4. Arbitration Does Not Threaten Sovereignty or Result in "Regulatory Chill". III. Background. IV. Recent Developments. V. An Alternative to ISDS?. VI. Substantive Protections. VII. Avoiding the "Bunker" Mentality. VIII. Glimmers of Hope. IX. Conclusion.

Resumen: ¿Pueden el miedo, la desinformación, la política y la Comisión Europea, convertirse en los cuatro jinetes del Apocalipsis de Arbitraje de Disputas de Inversión Internacional?

Frente a lo que se considera como una "crisis de legitimidad", desatada por alarmismo organizaciones no gubernamentales y académicos de izquierda, grupos antiglobali-

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zación y políticos mal informados de otros Estados, los que conocen y entienden acerca de solución de controversias inversionista–Estado (ISDS) deben defender su territorio. Esto es particularmente cierto cuando los Estados exportadores de capital tradicionales "abandonan el barco", al encontrarse en la posición de demandado en este tipo de reclamaciones. Algunos Estados en esta situación se ven tentados a denunciar la totalidad el sistema de solución de controversias internacionales adoptando una mentalidad de "bunker" basada en la afectación de los tratados en el conjunto del "el espacio político nacional".

Palabras clave: ARREGLO DE CONTROVERSIAS INVERSOR–ESTADO – ALTERNATIVAS – TRATADOS DE INVERSIÓN Y ARBITRAJE.

Abstract: Are Fear, Disinformation, Politics and the European Commission Becoming The Four Horsemen Of The Apocalypse For International Investment Dispute Arbitration?

Against what is considered as a "crisis of legitimacy", sparked by scaremongering non–governmental organizations and left–wing academics, anti–globalization groups, and misinformed politicians of other States, those who know and understand about investor–State dispute settlement ("ISDS") must defend its ground. This is particularly so where traditional capital–exporting States have "jumped ship" after finding themselves on the receiving end of claims. Some States in this position are tempted to denounce the entire system of international dispute resolution and adopt a "bunker" mentality – blasting the notion of treaty restrictions on "national policy space" in its entirety.

Keywords: INVESTOR–STATE DISPUTE SETTLEMENT – ALTERNATIVES –INVESTMENT TREATIES AND ARBITRATION.

I. Introduction

Thank you for hosting me here today. I receive it as an immense honor to take part in this Hugo Grotius Lecture.

Many of you are familiar with the words of the thirty–second President of the United States, Franklin D. Roosevelt, spoken at his first inauguration held on 4 March 1933: "[T]he only thing we have to fear is fear itself." And so it is nowadays amongst the international arbitration community.

Faced with what I regard as a manufactured so–called "crisis of legitimacy," sparked by scaremongering non–governmental organizations ("NGOs") and left–wing academics, anti–globalization groups, and misinformed politicians of other States, those of us who know and understand investor–State dispute settlement ("ISDS") must defend our ground. This is particularly so where traditional capital–exporting States have "jumped ship" after finding themselves on the receiving end of claims. Spain, for example, is already facing 20 claims – and this

number is rising – filed by solar power investors before the International Centre for Settlement of Investment Disputes ("ICSID"), not to mention the additional cases filed before other arbitral institutions or under different arbitral rules[1]. Some States in this position are tempted to denounce the entire system of international dispute resolution and adopt a "bunker" mentality – blasting the notion of treaty restrictions on "national policy space" in its entirety. You may be aware that the European Commission itself has not helped matters. Just last month it unveiled a new draft "Investment Chapter" for the Transatlantic Trade and Investment Partnership ("TTIP") which proposes dismantling the entire existing system of arbitral appointments[2]. As I will explain today, such an approach is short–sighted and ultimately a mistake.

I have refuted the arguments advanced by skeptics in several written works recently, including "*We have met the enemy and he is us!" Is the industrialized north "going south" on investor–state arbitration?*[3] – an article in the March issue of *Arbitration International* – and in *What's in a meme? The truth about investor–state arbitration: Why it need not, and must not, be repossessed by states*[4], which was published in the Columbia Journal of Transnational Law[5].

Both of the aforementioned articles examine what I refer to as "NEO–NIEO," or the increasing embrace by developed, fully industrialized States of the 1970s New International Economic Order ("NIEO") that they fought so bitterly 40 years ago at the United Nations. The 1974 UN General Assembly Resolution No. 3201, entitled "Declaration on the Establishment of a New International Economic Order," represented the defining moment of NIEO in that it provided States with a blank check to nationalize property without any compensation, and it

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[1] L. Young, "Spain Faces 20th Renewable Energy Claim at ICSID", *Global Arbitration Rev.* (27 Aug. 2015).

[2] European Commission Press Release IP/15/5651, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (19 Sep. 2015); European Commission Draft Text TTIP – Investment (16 Sep. 2015), http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

[3] Ch.N. Brower & S. Melikian, "'We Have Met the Enemy and He Is Us!' Is the Industrialized North 'Going South' on Investor–State Arbitration?", *Arb. Int'l*, 31, Mar. 2015, p. 19.

[4] Ch.N. Brower & S. Blanchard, "What's in a Meme? The Truth About Investor–State Arbitration: Why it Need Not, and Must Not, Be Repossessed by States", *Columbia J. Trans'l L.*, 52, 2014.

[5] For related materials, *vid.* Ch.N. Brower & S. Blanchard, "From 'Dealing in Virtue' to 'Profiting from Injustice': The Case Against "Re–Statification" of Investment Dispute Settlement", *Hrvd. Int'l L.J.*, 55, 2014, p. 45; Ch.N. Brower & S.W. Schill, "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?, *Chi J. Int'l L.*, 9, 2009, p. 471.

contained not a single reference to international law or peaceful international dispute resolution[6]. It also forecast a "Charter of Economic Rights and Duties of States," adopted in a second resolution shortly thereafter[7]. Troubled "Northern countries" –among them, Belgium, Denmark, Germany, Luxembourg, the United Kingdom, and the United States– voted against the adoption of the Charter at the time. Others abstained, among them Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway, and Spain[8]. NIEO fortunately abated in the following decades as thousands of bilateral investment treaties ("BITs") and several multilateral investment treaties were concluded, and arbitral awards enforcing them flourished. ISDS has functioned and has done so fairly for at least 40 years. So what is there to fear?

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[6] Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S–VI), U.N. GAOR, 6th Special Sess., U.N. Doc. A/RES/3201 (S–VI) (1974); *see also* W.W. Park, *Arbitration of International Business Disputes,* 2d ed., 2012, Chapter 3 (providing historical perspective on the 1974 NIEO movement).

[7] Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (1974).

[8] *Vid.* W. Fikenscher & I. Lamb, "The Principles of Free and Fair Trading and of Intellectual Property Protection in the Legal Framework of a New International Economic Order", *in Reforming the International Economic Order* (Thomas Oppermann & Ernst–Ulrich Petersmann eds.), 1987, p 83, n.4.

[9] L. Young, "Spain Faces 20th …", *loc. cit.*.

to denounce the entire system of international dispute resolution and adopt a "bunker" mentality – blasting the notion of treaty restrictions on "national policy space" in its entirety. You may be aware that the European Commission itself has not helped matters. Just last month it unveiled a new draft "Investment Chapter" for the Transatlantic Trade and Investment Partnership ("TTIP") which proposes dismantling the entire existing system of arbitral appointments[10]. As I will explain today, such an approach is short–sighted and ultimately a mistake.

I have refuted the arguments advanced by skeptics in several written works recently, including "*We have met the enemy and he is us!" Is the industrialized north "going south" on investor–state arbitration?*[11] – an article in the March issue of *Arbitration International* – and in *What's in a meme? The truth about investor–state arbitration: Why it need not, and must not, be repossessed by states*[12], which was published in the Columbia Journal of Transnational Law[13].

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[10] European Commission Press Release IP/15/5651, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (19 Sep. 2015); European Commission Draft Text TTIP – Investment (16 Sep. 2015), http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

[11] Ch.N. Brower & S. Melikian, "'We Have Met the Enemy …", *loc. cit*., p. 19.

[12] Ch.N. Brower & S. Blanchard, "What's in a Meme?…", *loc. cit*.

[13] For related materials, *vid.* Ch.N. Brower & S. Blanchard, "From 'Dealing in Virtue' to 'Profiting from Injustice': The Case Against "Re–Statification" of Investment Dispute Settlement", *Hrvd. Int'l L.J*., 55, 2014, p. 45; Ch.N. Brower y S.W. Schill, "Is Arbitration a Threat…", *loc. cit*., p. 471.

[14] Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S–VI), U.N. GAOR, 6th Special Sess., U.N. Doc. A/RES/3201 (S–VI) (1974); *see also* William W. Park, *Arbitration of International Business Disputes* (2d ed. 2012), Chapter 3 (providing historical perspective on the 1974 NIEO movement).

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Denmark, Germany, Luxembourg, the United Kingdom, and the United States– voted against the adoption of the Charter at the time. Others abstained, among them Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway, and Spain[16]. NIEO fortunately abated in the following decades as thousands of bilateral investment treaties ("BITs") and several multilateral investment treaties were concluded, and arbitral awards enforcing them flourished. ISDS has functioned and has done so fairly for at least 40 years. So what is there to fear?

Allow me to share briefly some of the facts –the reality– showing why we should not buy into the "fears" about investor–State arbitration. The International Bar Association ("IBA") recently published a statement highlighting some of the same points[17].

II. Statement of the International Bar Association (2015)

Allow me to share briefly some of the facts –the reality– showing why we should not buy into the "fears" about investor–State arbitration. The International Bar Association ("IBA") recently published a statement highlighting some of the same points[18].

1. Investment Treaties and Arbitration are Not Harmful or Ineffective

● There are now more than 1,000 intra–South BITs[19]. Some developing countries are also entering into new treaties offering greater protection to foreign investors than in their first–generation treaties. For example, in 2012, China concluded a trilateral investment agreement with Korea and Japan that offers stronger protection of foreign investment than its previous 1988 and 1992 BITs with Japan and Korea, respectively[20].

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[16] *Vid*. W. Fikenscher & I. Lamb, "The Principles of Free and Fair Trading…", *loc. cit*., p 83, n.4.

[17] *Vid*. "Fact v. Fiction: The IBA Releases Statement on ISDS", *Global Arbitration Rev*. (22 Apr. 2015).

[18] *Ibíd*.

[19] Ch.N. Brower & S. Blanchard, "What's in a Meme?…"·, *loc. cit*., p. 701; *IIA Monitor No. 3*, *Recent Developments in International Investment Agreements*, UNCTAD 3 (2009), http://unctad.org/en/Docs/webdiaeia200 98_en.pdf.

[20] Ch.N. Brower & S. Blanchard, "What's in a Meme?…"·, *loc. cit*., p. 702; Agreement Among the Government of Japan, the Government of the Republic of Korea, and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment (2012).

● Empirical studies also show that BITs work. The majority of studies find a positive correlation between foreign direct investment ("FDI") and international investment agreements ("IIAs")[21]. In fact, companies such as Dow Chemical identify investment treaties as the foundation of their FDI strategy[22]. The Government political risk insurers of France and Germany refuse to underwrite investments that are not covered by BITs[23]. Other countries' public political risk insurers take the existence of a BIT into account as part of their risk assessments[24].

2. Arbitration Is Not One–Sided:

● As of the most recent 2015 statistics, tribunals have upheld investor claims under international investment agreements in part or in full with monetary compensation awarded in 27% of cases[25]. In 2% of cases, tribunals found a breach of the treaty occurred, but no monetary compensation was awarded to the investor[26]. Tribunals decided in favor of States 36% of the time and 26% of cases were settled before a decision was reached[27]. In the remaining 9% of cases, claims were discontinued for reasons other than settlement.[28]

While data shows that investors prevail in 60% of those cases that are decided on the merits[29], efforts to overstate investor success in ISDS ignore the jurisdictional hurdles faced by claimants at the outset, with tribunals declining jurisdiction in 17% of cases[30].

● Even when Claimants win, damages awards are usually not high. One study found that more than 80% of awards granted less than 40% of the damages sought[31]. Another study revealed that the average

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[21] Ch.N. Brower & S. Blanchard, "What's in a Meme?..."·, *loc. cit.*, p. 706 & n.66 (listing 21 sources).

[22] *Ibíd.*, p. 704.

[23] *Ibíd.*, p. 705.

[24] *Ibíd.*, p. 705.

[25] UNCTAD, *World Investment Report 2015 – Reforming International Investment Governance*, 116 (2015).

[26] *Ibíd.*

[27] *Ibíd.*

[28] *Ibíd.*

[29] *Ibíd.*

[30] *Id.*; *vid. also*, H. Mann, "ISDS: Who Wins More, Investors or States?, *Investment Treaty News* (24 June 2015).

[31] Ch.N. Brower & S. Blanchard, "What's in a Meme?...", *loc. cit.*, p. 711; D. Kapeliuk, "The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators", *Cornell L. Rev.*, 96, 2010, pp. 47 y 81.

amount awarded investors (approximately US$10 million) was a fraction of what they typically requested (approximately US$343 million)[32]. The same study also concluded that there was absolutely no basis to believe that tribunals with presiding arbitrators from Organization for Economic Co–operation and Development ("OECD") countries were more inclined to award high damages amounts in cases involving Respondent States from non–OECD countries[33]. In fact, just the opposite is true: Tribunals with presiding arbitrators from non–OECD countries awarded larger damage amounts than their OECD counterparts[34].

3. Proceedings Are Not "Secretive"

● Investor–State treaty arbitration ceased to be hidden from public view long ago. Most awards are public and readily found on the internet and, increasingly, so are transcripts of hearings, party submissions, and other data from proceedings. One need look no further than the many websites set up to provide information about ongoing proceedings directly to the public. They include International Arbitration Reporter, Global Arbitration Review, ITA Law, the ICSID site, Todd Weiler's North American Free Trade Agreement ("NAFTA") Claims page, and the Permanent Court of Arbitration ("PCA") website among others.

● In April 2014, the United Nations Commission on International Trade Law ("UNCITRAL") Rules on Transparency in Treaty–based Investor–State Arbitration went into effect and in March of this year Mauritius held a grand signing ceremony for the UN Transparency Convention. Anyone with experience in investor–State disputes recognizes that there is no turning back on the trend towards transparency.

4. Arbitration Does Not Threaten Sovereignty or Result in "Regulatory Chill":

● Putting aside for the moment that limiting political discretion is what treaties do, it is untrue that international investment law is somehow incompatible with the public interest. We hear this most often in relation to States' rights to enact environmental measures. To date, however, the critics cannot point to a single instance in which an

[32] S. Franck, "Development and Outcomes of Investment Treaty Arbitration", *Hrvd Int'l L. J.*, 50, 2009, pp. 435, 447.

[33] *Ibíd.*, pp 465–66.

[34] *Ibíd.*

investor–State tribunal has thwarted a legitimate environmental measure or struck down an environmental regulation[35]. One point of note in the Spanish context: many of the recent solar power claims against Spain do not challenge the measures that Spain took in the first half of the 2000s to embrace Photovoltaic ("PV") energy, but rather they challenge what they claim is the country's retreat from its commitment to support renewable energy starting in 2007[36].

● Nor is there any basis to believe that tribunals might use the doctrine of indirect expropriation to require States to compensate investors for generally applicable environmental regulations that cause a loss. This has never happened, and an analysis of existing arbitral decisions gives no reason to believe that it will[37].

● Even the recent award in *Bilcon v. Canada* that held Canada in breach of NAFTA Chapter 11 in relation to its treatment of a proposed quarry and marine terminal project notably did *not* strike down any environmental legislation but dealt with the fairness of procedures conducted by a regulatory review body and the legitimate expectations of the investor developed as a result of the State's assurances[38].

● To put things into perspective, a recent study of all concluded ICSID arbitrations found that investors have rarely even challenged legislative acts; over 90% of cases involved challenges to executive branch measures[39].

Well, NEIO nonetheless is enjoying a "second coming," this time thanks, in good part, to its former opponents. Some States have denounced the ICSID Convention and others are critically reviewing their bilateral investment treaties. Such actions are supported by a withering array of *pronunciamentos* by "Northern" academics, non–

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[35] *Vid.* Ch.N. Brower & S. Blanchard, "What's in a Meme?...", *loc. cit.*, p. 726–27.

[36] "Spain's Solar Nightmare: Changes in Energy Frameworks and ISDS", *iGlivanos* (World Press) (30 Apr. 2015).

[37] Ch.N. Brower & S. Blanchard, "What's in a Meme?...", *loc. cit.*, pp. 729–738.

[38] *Bilcon v. Canada*, UNCITRAL Award (17 Mar. 2015); S. Dudas, "Bilcon of Delaware et. al v. Canada: A Story About Legitimate Expectations and Broken Promises", Kluwer Arbitration Blog (11 Sept. 2015).

[39] J. Caddel & N.M. Jensen, "Columbia FDI Perspectives No. 120: Which Host Country Government Actors Are Most Involved in Disputes with Foreign Investors?", *Vale Colum Ctr. On Sustainable Int'l Investment* (28 Apr. 2014), http://www.vcc. columbia.edu/ content/which–host–country–government– actors–are–most–involved–disputes–foreign–investors.

governmental organizations, the media, and the like, blasting the entire notion of treaty restrictions on "national policy space" and especially ISDS[40]. The same people who resisted NIEO in the 1970s, once they became subjected to the very standards and dispute settlement procedures for which they had advocated –once the shoe was firmly laced onto "the other foot"–, suddenly began to retrench. The sauce urged on the goose became unpalatable to the gander.

But as former President of the International Court of Justice ("ICJ"), Judge Stephen Schwebel, recently stated, the arguments lodged by those fueling the flames of the current alleged crisis of legitimacy are "more colorful than they are cogent"[41]. My aim here today is not to deconstruct each aspect of the NEO–NEIO movement (although I would encourage you to read the aforementioned articles which serve that purpose). I will touch, instead, upon some key topics distinct to Europe and especially to countries like Spain, which now find themselves defending multiple ISDS claims.

III. Background

It is ironic that we should be having a debate about the merits of ISDS in Europe, its birthplace. Germany – now a hotbed of anti–ISDS criticism and perhaps its most vocal opponent – signed the very first BIT ever with Pakistan in 1959, and since then has entered into more BITs than any other nation[42]. The EU as a whole should be in the best position to appreciate investment arbitration, given its position as the world's largest trading bloc[43]. Its Member States have concluded in

[40] *Vid., e.g.*, P. Eberhardt & C. Olivet, "Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom" (2012), *available at* http://www.tni.org/sites/www.tni.org/files/download/profitingfrominjustice.pdf (setting forth the current assault against investment–treaty arbitration); "The Arbitration Game: Governments Are Souring on Treaties to Protect Foreign Investors", *The Economist* (11 Oct. 2014), *available at* http://www.economist.com/news/finance–and–economics/21623 756–governments–are–souring–treaties–protect–foreign–investors–arbitration; S. Donnan, "Trade Deals: Toxic Talks", *Financial Times* (6 Oct. 2014).

[41] S.M. Schwebel, "In Defense of Bilateral Investment Treaties", *Columbia FDI Perspectives* (24 Nov. 2014); Judge S.M. Schwebel, "Keynote at International Council for Commercial Arbitration Congress" (6 Apr. 2014) *available at* http://www.arbitration–icca.org/AV_Library/ICCA_MIAMI_2014_Keynote_Stephen_Schwebel.html.

[42] K. Karadelis, "Germany Shuns Arbitration in EU–US Treaty", *Global Arbitration Rev.* (19 Mar. 2014).

[43] A.T. Katselas, "Exit, Voice, and Loyalty in Investment Treaty Arbitration", *Neb. L. Rev.*, 93, 2014, pp. 313–365.

the aggregate almost half of the existing BITs[44], and they have played leading roles in creating and sustaining the major multilateral conventions relating to arbitration. Spain, for its own part, has 72 BITs in force and 53 other international investment agreements in force.[45] All EU countries are Member States to the ICSID Convention (excepting only for Poland), the New York Convention[46], and the Energy Charter Treaty (the "ECT")[47]. Investors from EU Member States are also the most prolific users of ISDS, accounting for 53% of total known disputes filed through 2014[48]. Notably, EU claimants have been particularly active in bringing cases against governments of other EU Member States under the ECT and intra–EU BITs[49]. Spain has been a particular target for these types of claims in recent months, and was in fact the most frequent respondent State for ISDS claims last year, with a total of five cases filed under the ICSID Convention in 2014[50].This record number in 2014, however, has already been surpassed, with another twelve ICSID cases having been registered against Spain already in 2015[51]. At the same time, Spain is also among the top eight home countries globally for investors filing claims under ISDS provisions, and is in the top six among only EU countries[52].

And the EU has taken major recent steps towards expanding global trade. Negotiations are underway for the TTIP, which would create a unified market of 800 million people between the United States and

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[44] G. Mazzini, "The European Union and Investor–State Arbitration: A Work in Progress", *Am. Rev. Int'l Arb.*, 24, 2013, pp. 611–626.

[45] *Vid.* UNCTAD International Investment Agreements by Economy, http:// investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu (last visited 5 May 2015).

[46] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (hereinafter "New York Convention").

[47] Energy Charter Treaty, *ILM*, 33, 1995, p. 367 (hereinafter "ECT"). For background on the sentence above, *vid.* G. Mazzini, "The European Union and Investor–State…", *loc. cit.*, pp. 611–626.

[48] *Investor–State Dispute Settlement: An Information Note on the United States and the European Union*, UNCTAD IIA Issues Note. No. 2, 8 (June 2014).

[49] *Id.* p. 10. In 2013, 42% of all new global ISDS claims were intra–EU claims. *Recent Trends in IIAS and ISDS*, UNCTAD IIA Issues Note. No. 1, 6 (Feb. 2015). In 2014, this proportion shrank to approximately 25%. *Id.* Of all known ISDS cases filed since 1987, intra–EU claims account for 16% of all cases. *Id.*

[50] UNCTAD, *World Investment Report 2015 supra* note 19, at 112.

[51] The International Convention on the Settlement of Investment Disputes (ICSCID) Case List, https://icsid.worldbank.org/apps/icsidweb/cases/Pages/AdvancedSearch.aspx?rntly=ST127 (last visited Sept. 17, 2015), p. 14.

[52] *Ibíd.*

the EU, estimated to add $100 billion a year to output on both sides of the Atlantic[53]. Last fall the EU signed the Comprehensive Economic Trade Agreement ("CETA") with Canada. Other major investment negotiations are ongoing with China, Japan, and several other North African and East Asian countries.

IV. Recent Developments

A brief recounting of the past months puts the current predicament into perspective. Formal TTIP negotiations began in mid–2013. Perhaps it was a bad omen that this happened amidst a "media tsunami" concerning American spying activities directed against EU Member State Governments, most notably Germany.

Nevertheless, things started off in the right direction when all EU Member State Governments formally mandated the EU Trade Delegation in June 2013 to include investment protections and ISDS in TTIP[54]. Just six months later, nonetheless, on 21 January 2014, the outgoing EU Trade Commissioner, Karel De Gucht, decided to "pause" the TTIP negotiations concerning ISDS in order to prepare a "Public Consultation on Modalities for Investment Protection and ISDS in TTIP"[55].

Barely a year thereafter, on 13 January 2015, the new EU Trade Commissioner, Cecilia Malmström, presented the results of the newly installed public consultation on TTIP, saying: "The consultation clearly shows that there is a huge skepticism against the ISDS instrument"[56]. That "consultation," however, was accurately described by Reuters as follows:

> [O]ver 95 percent [of the 150,000 responses] were from supporters of a small group of organisations hostile to a deal with Washington and who submitted identical or very similar responses . . . . [This was a] hijacking of the online consultation . . . .

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[53] R. Emmott & Ph. Blenkinsop, "Online Protest Delays EU Plan to Resolve U.S. Trade Row", Reuters (26 Nov. 2014).

[54] Council of the European Union, Directives for the Negotiation on the Transatlantic Trade and Investment Partnership Between the European Union and the United States of America (17 June 2013), ¶¶ 22–23 *available at* https://www.laquadrature.net/files/TAFTA%20_%20Mandate%20_%2020130617.pdf.

[55] European Commission STATEMENT/14/85, "Improving ISDS to prevent abuse" – Statement by EU Trade Commissioner Karel De Gucht on the Launch of a Public Consultation on Investment Protection in TTIP (27 Mar. 2014).

[56] European Commission Press Release IP/15/3201, Report Presented Today: Consultation on Investment Protections in EU–US Trade Talks (13 Jan. 2015).

> Many responses to the EU survey appeared to be automated or generated by forms filled in on campaign websites, encouraging EU citizens to reject arbitration policy in [TTIP][57].

Meanwhile however, EU and Canadian officials had completed nearly four months earlier five years of negotiations on CETA, signing it in Ottawa on 26 September 2014[58], whereupon the German Economic Affairs Ministry threw a spanner into the works, declaring that CETA is structurally a "mixed" agreement, meaning that the contracting Parties are not just Canada and the European Commission, but rather all 28 of the individual EU Member States. In other words, the constitutional processes of all 28 Member States would have to be involved and approve CETA for it to enter into force. Behind this move has been intense pressure from Germany, France, and NGOs to exclude traditional ISDS from CETA as a first step towards eliminating it from TTIP[59]. Both countries seem intent on replacing previous formulations of ISDS with reformed provisions that would elevate the State's right to regulate and impose increased State control on the dispute settlement process –including in the selection of arbitrators[60]. It is widely thought in international arbitration and political circles that the German attitude is a reaction to the country being sued under the ECT by Vattenfall, a Swedish State–owned producer and operator of nuclear power plants, over the change in Germany's nuclear legislation. That followed the 2011 Fukishima crisis in Japan, which triggered a huge populist response, galvanizing more than 200,000 Ger-

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[57] R. Emmott & Ph. Blenkinsop, "Online Protest Delays EU Plan to Resolve U.S. Trade Row", Reuters (26 Nov. 2014).

[58] G. Isfeld, "Canada, EU leaders sign CETA pact despite German concerns", *Financial Post* (26 Sept. 2014).

[59] *Négociations Commerciales – Déclaration Commune de Sigmar Gabriel, Matthias Machnig et Matthias Fekl [Joint Declaration by German Federal Minister for Economy and Energy Sigmar Gabriel, German State Secretary for Economic Affairs and Energy Matthias Machnig, and French Secretary of State for Trade Matthias Fekl,]*, (21 Jan. 2015), *available at* http://www.diplomatie.gouv.fr/fr/politique–etrangere–de–la–france/ diplomatie–economique–et–commerce–exterieur/actualites–liees–a–la–di-plomatie–econ omique–et–au–commerce–exterieur/2015/article/negociations–commerciales–117484.

[60] A. Fouchard Papaefstratiou, "TTIP: The French Proposal For A Permanent European Court for Investment Arbitration", Kluwer Arbitration Blog (22 Jul. 2015); *Project No. 83/15 of the German Federal Ministry for Economic Affairs and Energy: Model Bilateral Investment Treaty with Investor–State Dispute Settlement for Industrial Countries, Giving Consideration to the U.S. (Unofficial Translation)*, (5 May 2015), available at http://www.rph1.jura.uni–erlangen.de/material/150429–muster–bit–fr–industrie-staaten–krajewski–englische–bersetzung.pdf.

mans to participate in anti–nuclear protests on the eve of State elections[61].

The fate of CETA is still up in the air. Significantly, last fall the European Commission requested an opinion of the European Court of Justice ("ECJ") as to whether the yet–to–be ratified 2012 EU–Singapore Free Trade Agreement qualifies as a "mixed agreement" in the sense that Germany described CETA[62]. The ECJ's decision remains outstanding[63]. If it is determined that CETA should require individual Member State ratification as argued by Germany, the French Secretary of State for Trade has indicated that significant modification of the ISDS mechanism under CETA would be a prerequisite for French ratification of the agreement[64]. More recently, however, European Trade Commissioner Malmstrom has downplayed the possibility of renegotiating CETA, noting that "[t]he Canadian Agreement is closed, we are not reopening that"[65].

All the while, opposition to investor–State arbitration appears to be gaining ground. In May, the European Commission issued a concept paper outlining its vision for the future of ISDS –in TTIP and beyond– that would include substantial reforms to the ISDS mechanism[66]. Both Germany and France also issued similar proposals in May and June, respectively[67]. Most importantly, just last month, the European Commission released a new draft TTIP investment chapter text incorporating these proposals.

Among the most prominent of the reforms put forth by the Commission in its text were (1) the creation of a permanent Investment Court System, which would include a tribunal of first instance whose decisions would be subject to review by an appeals tribunal, (2) the creation of a roster of 15 arbitrators ("judges") appointed by the States

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[61] "Vattenfall Launches Second Claim Against Germany", *Global Arbitration Rev.* (25 June 2012).

[62] *EU Trade Policy: Pascal Lamy Hopes for Commission Firmness*, Borderlex (5 Feb. 2015).

[63] M. Sangsari, "CETA's Fate May Hinge on Outcome of EU–Singapore Trade Ratification", *The Globe and Mail* (1 Dec. 2014).

[64] *France May Block EU–Canada Trade Deal Over ISDS*. EurActiv (July 2, 2015).

[65] T. Fairless, "EU Proposes New Trans–Atlantic Court for Trade Disputes", *Wall Street J.* (16 Sept. 2015).

[66] *Concept Paper: Investment in TTIP and Beyond – The Path for Reform*, European Commission (5 May 2015), available at http://trade.ec.europa.eu/doclib/docs/ 2015/ may/tradoc_153408.PDF.

[67] *Project No. 83/15 supra*, note 47; *ISDS: Paris Proposals for a Permanent International Investment Arbitration Court*, Borderlex (5 June 2015), available at: http://www.borderlex.eu/paris–proposals–permanent–investor–arbitration–court/.

as parties to the investment agreement, from which three would be selected by the President of the Tribunal – not the litigants – to hear any given case before the tribunal of first instance, (3) increasingly strict requirements for those arbitrators selected to serve on the roster – including a requirements that candidates be eligible to hold judicial office in their home country, and (4) additional third–party rights, including the right to intervene through the submission of amicus curiae briefs[68]. If the Commission's plan becomes a reality, it will be a disaster for ISDS, with the result that investors and host States will revert to one–off contracts with arbitration clauses.

Procedurally, the European Parliament has endorsed –at least notionally– the Commission's proposals to reform the ISDS mechanism. It adopted a resolution to that effect in May, though the resolution specifically endorsed the Commission's May concept paper rather than its more recent draft text proposal[69]. While the Commission is expected to continue consultations with European stakeholders such as the Parliament regarding the draft text in particular, Parliament has already suggested that it favors the reform of the tribunal system through its statements supporting the hearing of cases by "publicly appointed, independent judges" subject to an appellate mechanism, and through its statements of support for a permanent International Investment Court[70].

In addition to these developments at the European Union level, there have also been troubling developments at the Member State level as well. Early this year, Italy notified the Energy Charter Treaty Secretariat that it intends to withdraw from the Energy Charter Treaty[71]. Like Spain, Italy potentially faces dozens of claims from solar power investors over retroactive cuts in government subsidies[72].

Its recent move appears to be an attempt to avoid such claims, although, as I will explain, withdrawing from a treaty accomplishes very

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[68] European Commission Press Release IP/15/5651, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (19 Sep. 2015); European Commission Draft Text TTIP – Investment (16 Sep. 2015), http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

[69] *Recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)*, Eur. Parl. Doc. A8–0175/2015 (8 July 2015).

[70] *Ibíd.*, p. 18.

[71] *Vid.* UNCTAD, *World Investment Report 2015* p. 107.

[72] *Vid.* T. Jones, "Italy and Spain Feel the Heat", *Global Arbitration Rev.* (17 Aug. 2015).

little aside from dramatic effect. Italy's strategy represents the type of narrow–minded "bunker" mentality that States should avoid.

Wisely, Spain has not (yet at least) taken the same type of knee jerk reaction as Italy. But some voices in the Spanish media have started to denounce the ISDS system, for example, by labeling it "a new system of institutionalized corruption that would permit the largest corporations to circumvent the democratic scrutiny of millions of citizens"[73]. And 92 Spanish civil society organizations signed an open letter to the European Parliament in March (along with other European organizations) demanding that TTIP not include ISDS provisions which would "grant[] privileged rights to foreign investors"[74]. The pertinent part of the letter read:

> The proposed investment protection chapter, particularly the inclusion of an Investor State Dispute Settlement (ISDS) Provision, would give investors exclusive rights to sue states when democratic decisions, made by public institutions in the public interest, are considered to have negative impacts on their anticipated profits. These mechanisms rely on rulings by tribunals that operate outside the national court systems and thereby undermine our national and EU legal systems and our democratic structures for formulating laws and policies in the public interest[75].

Across the Atlantic in the United States, negative sentiments have grown among pro–free–trade groups. In February, a trade policy analyst for the conservative Cato Institute published an article stating, "I'm not aware of any evidence that ISDS encourages development, rule of law, and good governance around the world"[76]. The same analyst continues to speak out against ISDS[77], including his participation on a panel at last April's Annual Meeting for the American Society of International Law, proposing that we scrap the entire investor–State

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[73] *Vid.* J.A. Pavón Losada, "Por qué los franceses no quieren ni oír hablar del TTIP" *[Why the French Do Not Want to Hear About TTIP]*, *El País* (21 Nov. 2014), *available at* http://blogs.elpais.com/alternativas/2014/11/por–qué–los–franceses–no–quieren–ni–oir–hablar–del–ttip.html (original text: "ISDS como un nuevo sistema de corrupción institucionalizada que permitiría a las grandes corporaciones eludir el escrutinio democrático de millones de ciudadanos").

[74] "For a TTIP Resolution that Puts People, the Environment and Democracy Before Short–Term Profit and Disproportionate Corporate Rights," *available at* http://ttip2015.eu/files/content/docs/Full%20documents/English–MEP–letter.pdf.

[75] *Ibíd.*

[76] S. Lester, "Responding to the White House Response on ISDS", *Cato at the Liberty* (27 Feb. 2015).

[77] *Vid., e.g.*, S. Lester, "Reforming the International Investment Law System", *Md. J. Int'l L. & Trade*, 30, 2015, p. 70.

system and revert back to State–to–State disputes[78] – a move that would take us backwards 40 years.

In addition, United States Senator Elizabeth Warren, touted by some as a potential eventual Democratic candidate for President, published a scathing op–ed in the *Washington Post* aimed at the parallel Trans–Pacific Partnership ("TPP") negotiations, claiming: "If a final TPP agreement includes Investor–State Dispute Settlement, the only winners will be multinational corporations"[79].

In fact, the anti–ISDS movement has extended even to the far reaches of Tasmania, where a Green Party Senator in the Federal Parliament proposed a "Trade and Investment (Protecting the Public Interest) Bill 2014," the sole operative section of which reads as follows: "The Commonwealth must not, on or after the commencement of this Act, enter into an agreement (however described) with one or more foreign countries that includes an investor–state dispute settlement provision"[80]. In touting his bill, the Senator declared, *inter alia*:

> The key concept which is enshrined in these clauses is the idea of 'indirect expropriation' under which any law or policy of [the] government that reduces the value of the investment is considered harmful[81].
>
> Luckily, a Senate committee has since recommended against the bill[82].

V. An Alternative to ISDS?

So what have the naysayers proposed as a viable alternative to ISDS? Putting aside for the moment the new EC draft investment text envisioning an "investment court," many people have suggested that investors should abandon international dispute resolution altogether and resort exclusively to national courts[83]. Without impugning the

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[78] E. Hellbeck, "Does TTIP Need Investor–State Dispute Settlement?", *Asil Cables* (13 Apr. 2015), *available at* http://www.asil.org/blogs/does–ttip–need–investor–state–dispute–settlement.

[79] E. Warren, "The Trans–Pacific Partnership Clause Everyone Should Oppose", *Washington Post* (25 Feb. 2015).

[80] L. Nottage, "The 'Anti–ISDS Bill' before the Australian Senate", Kluwer Arbitration Blog (27 Aug. 2014).

[81] Parlinfo – Bills: Trade and Foreign Investment (Protecting the Public Interest) Bill 2014: Second Reading (5 Mar. 2014).

[82] L. Nottage, "The 'Anti–ISDS Bill' before the Australian Senate", Kluwer Arbitration Blog (27 Aug. 2014).

[83] *Vid.*, *e.g.*, Group of the Progressive Alliance of Socialists & Democrats in the European Parliament, S&D Position Paper on Investor–State Dispute Settlement Mechanisms in

judicial system of any EU Member State, it is understandable that foreign investors would not expect equal treatment within all domestic courts. Nor would one anticipate that municipal judges be steeped in the types of treaty interpretation questions that arise in investor–State cases. Those of you who have heard of the 2014 "EU Justice Scoreboard" might foresee additional reasons why this proposal is highly unattractive to investors. The Commission's press release concerning the Scoreboard revealed that public perception of the independence of the judiciaries in many EU Member States has "deteriorated" in recent years. In fact, the worst offenders – Bulgaria, Croatia, Romania, and Slovakia – do not even rank within the top 100 out of 148 countries ranked *worldwide*[84]. Spain, for its own part, was ranked number 72 out of 148[85].

That press release also made it plain that "one of the main challenges for Member States remains reducing the time for first instance proceedings and reducing the large number of pending cases"[86]. While the pace of judicial proceedings in Croatia, Greece, Portugal, Slovakia, and Slovenia leave something to be desired, Italy's court system is apparently so sluggish that it has given rise to the term of art, "the Italian Torpedo." Those in the know use this phrase to describe a procedure in which an unscrupulous litigant files suit in an unsuitable but notoriously slow EU Member State (like Italy) as a means to force more appropriate Member State courts to stay parallel actions in order to comply with Brussels Regulation 44/2001[87] and the principle of *lis alibi pendens* ("dispute pending elsewhere")[88]. The Italian court system has become the subject of many such "torpedo" actions because proceedings typically take on average 32 to 41 years

Ongoing Trade Negotiations (4 Mar. 2015) ("In agreements with countries that have fully functioning legal systems and in which no risks of political interference in the judiciary or denial of justice have been identified, ISDS is not necessary").

[84] 2014 EU Justice Scorecard, at 26 (COM 2014) 155 final (17 Mar. 2014).

[85] *Ibíd.*, p. 28.

[86] European Commission SPEECH/14/225, The 2014 EU Justice Scoreboard (17 Mar. 2014) (remarks by Vivienne Reding, Vice–President of the European Commission and EU Commissioner for Justice) p. 2.

[87] Council Regulation 44/2001, of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (EC).

[88] L. Abell, "Disarming the Italian Torpedo: The 2006 Italian Arbitration Law Reforms as a Small Step Toward Resolving the *West Tankers* Dilemma", *Am. Rev. Int'l Arb.*, 24, 2013, p. 335 The term "Italian torpedo" first appeared in an article by Professor Mario Franzosi in 1997, entitled *World–Wide Patent Litigation and the Italian Torpedo*. *Vid.* M.R. Jones, "The Fall and Rise of the Italian Torpedo in European Patent Litigation", 6 *Landslide*, 6, 2014, pp. 35–36.

in courts of first instance, another 27 years in the courts of appeals, and 31 years at the *Corte di cassazione*[89]. In fact, Italy has come under constant criticism from the European Court of Human Rights for violations of Article 6 of the European Convention on Human Rights, which guarantees "a fair and public hearing within a reasonable time"[90].

As already noted, another key problem is the idea of creating a permanent international investment court as an alternative solution, which is among the key proposals put forth by the European Commission to reform ISDS. In particular, the EC approach envisions a system under which parties would chose from a closed list of fifteen arbitrators that would be appointed under the TTIP by the U.S. Government and European Union, and decisions by the appointed tribunal would be subject to an appeals mechanism. In describing the reform proposals, the Commission has noted that:

> [A]ll arbitrators are chosen from a roster pre–established by the Parties to the Agreement . . . This requirement could be accompanied by requiring certain qualifications of the arbitrators, in particular that they are qualified to hold judicial office in their home jurisdiction or a similar qualification. This would need to be complemented by the fact that they also need expert knowledge of how to apply international law as contained in the agreement – which would very precisely frame the exercise of their functions and reduce drastically the risk of unforeseen interpretation of the rules on investment protection . . . .[91].

The Commission noted its interpretation that many European stakeholders throughout its public consultation viewed such an institutional structure as a key component necessary "to ensure greater legitimacy" of the ISDS system in Europe[92].

All of this is reflected in the Commission's new proposed TTIP Investment Chapter, Section 3 of which lays out the blueprint for an "Investment Court System". Among the most striking aspects of the chapter are subparagraphs six and seven of Article 9, which provide:

> The Tribunal shall hear cases in divisions consisting of three Judges, of whom one shall be a national of a Member State of the European Union, one a national of the United States and one a national of a third country. The division shall be chaired by the Judge who is a national of a third country.

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[89] L. Abell, "Disarming the Italian Torpedo…", *loc. cit*., pp. 335–337.

[90] Convention for the Protection of Human Rights and Fundamental Freedoms art. 6.1, Nov. 4, 1950, 213 U.N.T.S. 221; L. Abell, "Disarming the Italian Torpedo…", *loc. cit*., pp. 335–337.

[91] *Concept Paper*, *supra* note 55 p. 8.

[92] *Ibíd.*

> Within 90 days of the submission of a claim pursuant to Article 6, the President of the Tribunal shall appoint the Judges composing the division of the Tribunal hearing the case on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Judges to serve[93].

I am totally against this idea. One of the foundational elements of the perceived legitimacy of investor–State dispute settlement is the timeless right of the parties to choose their arbitrators. This is reflected in nearly all of today's major international arbitration rules and many of the world's domestic arbitration laws, including the 2006 and 1985 versions of the UNCITRAL Model Law[94].

The approach proposed by the European Commission, however, would not only deprive the litigants to a dispute of the right to select their arbitrators, but it would place enormous and unquestioned authority into the hands of one individual, the President of the Tribunal. He or she alone would be permitted to select the three decision–makers for any given dispute based on no criteria whatsoever other than that the selection be "random and unpredictable".

Moving one step further backwards, I ask you to bear in mind that all of the 15 judges of an institution such as the one envisioned by European Commission would be chosen by States, a highly political process, rather than by the parties to a specific dispute. When their interests are at stake, there is evidence that States tend to select officials for international adjudicatory mechanisms who have demonstrated reliability and Government–friendly attitudes[95]. Where the dispute at issue is between two States, such as before the International Court of Justice, there is less of a concern because each party's appointee will balance the other one out. However, that dynamic does not carry over to investor–State dispute settlement where only one party to the dispute – the State – is given a gatekeeper role.

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93 European Commission Press Release IP/15/5651, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (19 Sep. 2015); European Commission Draft Text TTIP – Investment (16 Sep. 2015), http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

94 *Vid. generally* Ch.N. Brower & Ch.R. Rosenberg, "The Death of the Two–Headed Nightingale: Why the Paulsson–van den Berg Presumption that Party–Appointed Arbitrators Are Untrustworthy is Wrongheaded", *World Arbitration & Mediation Rev.*, 6, nº 3, 2012, pp. 619–628.

95 Ch.N. Brower & S. Blanchard, "What's in a Meme?...".·, *loc. cit*., p. 768; S. Rosenne, *The World Court: What it Is and How it Work*s, Dordrecht / Boston / Londres, Nijhoff, 1995, p. 44; S.M. Schwebel, "The Creation and Operation of an International Court of Arbitral Awards", *Justice in International Law: Further Selected Writings of Stephen M. Schwebel*, Cambridge University Press, 2011, p. 246.

In any event, States have been strikingly incapable of agreeing on actual appointments to such a list as demonstrated by past practice. Take, for example, the NAFTA, which provides that the State Parties shall establish and maintain a roster of 45 presiding arbitrators, something that has never happened[96]. Likewise, the Rules of Procedure of the Iran–United States Claims Tribunal provide that the Iranian and American Tribunal Members may create a list of substitute third–country Members to act in place of one or another of the third–country Members if required[97], yet such a list has never been created[98].

Compounding the fundamental problems concerning the European Commission's "Investment Court System" is the appeals mechanism contemplated in Article 10 of the draft Investment Chapter. It proposes establishing a "permanent Appeal Tribunal . . . to hear appeals from the awards issued by the Tribunal," which would include six "Members" to be appointed in the same manner as the Judges on the Tribunal of first instance and which would bestow upon the President of the Appeal Tribunal the same disproportionate discretion to select the composition of any particular panel on a "random and unpredictable" basis[99]. Note that the review procedure suggested by the European Commission is not referred to as "annulment" or "set aside" but rather as an "appeal procedure."

It seeks to discard the entire notion of finality behind arbitral awards and set up a *de novo* review system. In particular, Article 29 of the draft Investment Chapter includes as grounds for appeal not only all grounds provided for in Article 52 of the ICSID Convention, but also appeals where "the Tribunal has erred in the interpretation or application of the applicable law" or where "the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law"[100].

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[96] Ch.N. Brower & Ch.R. Rosenberg, "The Death…", *loc. cit.*, pp. 626–27.

[97] Iran–United States Claims Tribunal Rules of Procedure, 2 *Iran–U.S. Cl. Trib. Rep.* 403, art. 13 note (1983).

[98] Ch.N. Brower & Ch.R. Rosenberg, "The Death…", *loc. cit.*, p. 628.

[99] European Commission Press Release IP/15/5651, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (19 Sep. 2015); European Commission Draft Text TTIP – Investment (16 Sep. 2015) http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

[100] European Commission Press Release IP/15/5651, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (19 Sep. 2015); European Commission Draft Text TTIP – Investment (16 Sep. 2015), Art. 29(1) http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

I have been outspoken in the past in criticizing needless inventions and tinkering when it comes to the basic foundational elements of arbitration[101]. If there were ever a paradigm example for "throwing out the baby with the bathwater" when it comes to considering reforms to invest–State arbitration, the European Commission's new draft text is it!

VI. Substantive Protections

Now please allow me to draw your attention to one more critical – yet often overlooked – aspect of the ISDS debate, namely that the actual substantive protections offered to foreign investors in the new wave of treaties are materially less than in the great bulk of BITs we know, and – what is more – permit the State Parties to the treaties to deprive an already constituted tribunal of jurisdiction completely *ex post facto*. This constitutes another example of States adopting a short–sighted, defensive approach, intended as an impermissible usurpation of power by State Parties to control the arbitral process. My own country bears much of the blame as it has continued to claim control over the arbitral process. Consider the details of the "2012 U.S. Model Bilateral Investment Treaty"[102]. It includes an Annex A, entitled "Customary International Law," in which "The Parties confirm their shared understanding" of the term in a way which defines it differently as between that Article 5, which deals with the "Minimum Standard of Treatment," and Article 6, which addresses "Expropriation."

Article 5 deals with fair and equitable treatment and full protection and security. It notes "[f]or greater certainty" that both of those concepts "do not require treatment in addition to or beyond that which is required by [the customary international law minimum standard of treatment of aliens] and do not create additional substantive rights"[103]. Article 5(2) of the Model BIT appears also to exclude "legal security" as an aspect of "full protection and security" by prescribing in its Subparagraph (2)(b) that it "requires each Party to provide the level of police protection required under customary international law." Further, possibly prompted by the many cases in which Argentina has asserted the

[101] *Vid.* Ch.N. Brower, M. Pulos & Ch. Rosenberg, "So Is There Anything Really Wrong with International Arbitration as We Know It?", *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2012).

[102] 2012 United States Model Bilateral Investment Treaty.

[103] *Ibíd.*, art. 5.

defense of necessity, Article 18, labeled "Essential Security," in its Paragraph 2 inserts an apparently entirely self–judging necessity defense[104].

In relation to Article 6, while the U.S. Model BIT does include what on their face are the traditional American formulae regarding expropriation, including the requirement of "prompt, adequate and effective compensation," and also classic investor–State arbitration, the devil is in the details of two Annexes, the aforementioned Annex A, plus Annex B. Those Annexes, as well as the Model BIT's 22 separate footnotes, pursuant to Article 35 "shall form an integral part of this Treaty," i.e., just the same as if set forth as Articles of the Model BIT. Suffice it to say, for present purposes, that Annex B, entitled "Expropriation," covers an entire page and deals with what "cannot constitute an expropriation" as well as specifically with "direct expropriation" and "indirect expropriation".

Moreover, while Article 21(2) of the Model BIT provides that "Article 6 [Expropriation] shall apply to all taxation measures," a claimant alleging that a taxation measure constitutes an expropriation is barred from arbitrating its claim unless it first has submitted the dispute to the two State Parties' respective "competent authorities" (in the case of the United States the Assistant Secretary of the Treasury (Tax Policy)) and those two fail within 180 days to "agree that the taxation measure is not an expropriation." In other words, if the two States agree within 180 days that the claimant has not been expropriated, that is the end of its claim. It is wholly deprived of impartial and independent third–party arbitration of its claim.

Furthermore, –and this is perhaps the greatest step back to "NEO–NIEO"– Art.14 invites each State Party to list in one or another of three further Annexes, I, II and III, any existing measure in that State that does not conform to the BIT's requirements of most–favored–nation treatment and national treatment, its prohibition of certain performance requirements, and its prohibition of certain interferences with senior management and boards of directors, which listed measures then are exempted from application of the BIT in those respects.

Worse still, Article 31 of the Model BIT, labeled "Interpretation of Annexes," provides that a tribunal "shall" – that is "must" –, "on the request of the respondent" – note that there is no such right accorded a

[104] *Ibíd.*, art. 18(2) ("Nothing in this Treaty shall be construed . . . to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.").

claimant – "request the interpretation of the Parties on the issue" whenever "a respondent asserts as a defense that the measure alleged to be a breach is within the scope of an entry set out in Annex I, II or III." This Article further provides that the State Parties "shall submit in writing any joint decision declaring their interpretation to the tribunal within 90 days," and that any such joint decision "shall be binding on the tribunal," whose "decision or award must be consistent" with it. In other words, once more the State Parties can simply deprive the investor of any right to arbitration.

Now, the European Commission will not issue a Model Investment Treaty – it has expressly renounced the idea, despite the fact that OECD Members generally do have Model BITs, in order to avoid any limitation of its negotiating freedom[105]. But the CETA investment chapter and last month's draft TTIP investment chapter, which are very similar in most respects (sometimes verbatim), provide a good indication of the EU's position. As part of the German Government's assessment of CETA, Dr. Stephan Schill – a former law clerk of mine – was commissioned by the Government to author a report on it in which he concluded that there is little reason for alarm over CETA's investment–protection provisions[106]. In particular and very interestingly, he found that those provisions in any event do not offer robust protection to investors.

I agree. Although at least some of the EU officials apparently approached the CETA negotiations with the aim of avoiding what they called "NAFTA contamination"[107], it appears that they have concluded a treaty text with carve–outs and fine print similar to those in the United States Model BIT. CETA's provision on fair and equitable treatment, for example, is accompanied by a paragraph defining – that is, limiting – that obligation to a detailed list of measures[108], which

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[105] A. Reinisch, "Putting the Pieces Together… an EU Model BIT?", *J. World Investment & Tr*, 15, 2014, p. 679.

[106] Dr. Stephan Schill, 'Auswirkungen der Bestimmungen zum Investitionsschutz und zu den Investor Staat Schiedsverfahren im Entwurf des Freihandelsabkommens zwischen der EU und Kanada (CETA) auf den Handlungsspielraum des Gesetzgebers (Kurzgutachten)" [Translation: "Impact of Investment Protection Provisions and Investor State Arbitration in the Draft Free Trade Agreement between the EU and Canada (CETA) on Legislative Discretion (short report)"].

[107] L.E. Peterson, "EU Member States Approve Negotiating Guidelines for India, Singapore and Canada Investment Protection Talks; Some European Governments Fear 'NAFTA Contamination", *IA Reporter* (23 Sept. 2011).

[108] Comprehensive Economic & Trade Agreement (public text dated 26 September 2014), Article X.9 ("A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes: Denial of justice

also appears in the European Commission's draft TTIP text[109]. It further gives the State parties a mechanism to review and provide "recommendations" as to the meaning of fair and equitable treatment:

> "The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment may develop recommendations in this regard and submit them to the Trade Committee for decision"[110].

Likewise, the expropriation provision provides that "[f]or greater certainty," it "shall be interpreted in accordance with [an annex] on the clarification of expropriation," which contains more fine print and exceptions to the right to fair, prompt, and effective compensation for expropriation[111].

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in criminal, civil or administrative proceedings; Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; Manifest arbitrariness; Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; Abusive treatment of investors, such as coercion, duress and harassment; or A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.").

[109] European Commission Press Release IP/15/5651, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (19 Sep. 2015); European Commission Draft Text TTIP – Investment (16 Sep. 2015), Art. 3(2) http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf ("A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; or (b) fundamental breach of due process, including a fundamental breach of transparency and obstacles to effective access to justice, in judicial and administrative proceedings; or (c) manifest arbitrariness; or (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or (e) harassment, coercion, abuse of power or similar bad faith conduct; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.").

[110] *Ibíd.*, Art. X.9; *see also* European Commission Press Release IP/15/5651, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (19 Sep. 2015); European Commission Draft Text TTIP – Investment (16 Sep. 2015), Art. 3(3) http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807. pdf (same).

[111] *Ibíd.*, Art. X.11 & Annex X.11 ("For greater certainty, except in rare circumstances where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non–discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations."); European Commission Press Release IP/15/5651, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (19 Sep. 2015); European Commission Draft Text TTIP – Investment (16 Sep. 2015), Art. 5(2), Annex I(3) http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

In my humble opinion, the provisions I have described from the United States Model BIT, CETA, and the European Commission's draft TTIP chapter, should not serve as any kind of template for investment protections. Nonetheless, the trend of adopting such inadequate protections as a model seems to be spreading. In March, India released the latest draft of its Model BIT, which – among other notable features – removes the most–favored nation and fair and equitable treatment provisions from the agreement[112]. India's move was doubtless a reaction to the award rendered by the tribunal on which I sat in *White Industries v. India*[113].

Such agreements represent an overreaching attempt by States to control the arbitral process to the point of weakening or even destroying the jurisdiction of arbitral tribunals. They also ignore the pertinent fact that the very purpose of treaties is to constrain the freedom of State parties to them in order to ensure mutual benefit[114]. Investment promotion and protection provisions should be just that – *provisions that invite foreign investment by giving it effective legal protection*. Instead, due to the current climate of fear and misinformation, States are drafting defensive investment protection clauses solely with a view to narrowing their own potential liability as respondents. Approaching a treaty–negotiation process with such a one–sided vision does a disservice to investors.

VII. Avoiding the "Bunker" Mentality

So, you might ask, what is a country such as Spain, now faced with a growing number of investment cases against it, to do? It is not the first State forced to defend itself against a wave of international claims following an economic downturn, of course. Argentina exemplified the "recurrent Respondent" before investment tribunals during the early 2000s after its financial collapse. Others will follow in the future. Inevitably, States in this unfortunate predicament are always tempted to embrace the "bunker" mentality that focuses on protecting the national treasury over everything else. From a political standpoint, this may seem like the best way to placate a seething electorate that is unwilling to watch foreign investors recover their tax dollars. I understand that

[112] S. Jandhyala, "Bringing the State Back In: India's 2015 Model BIT", *Colum. FDI Perspectives* (17 Aug. 2015).

[113] *Vid. White Industries Australia Ltd v. India*, UNCITRAL Award (30 Nov. 2011).

[114] S.M. Schwebel, "In Defense of Bilateral Investment Treaties", *loc. cit.*

the Spanish General Election will be held in coming weeks[115], so these considerations may be especially pertinent to some members of public office here now. The truth, however, is that the "bunker" approach is hopelessly short–sighted and ineffective.

Spain should by all means avoid the course of action pursued by Italy, which recently signaled its intention to denounce the ECT. Withdrawing from a treaty may make for good political theatre, but it usually accomplishes nothing positive. Italy's action, for instance, will have no impact on the mass of looming claims against it because of the "sunset provisions" set forth in Article 47(3) of the ECT, which allow all ongoing claims to proceed and also allow any future claims for another 20 years with respect to past investments[116]. Italy's move may also further deter potential new businesses from investing in a country now known for regulatory instability.

In terms of negotiating future treaties, Spain should look beyond the current atmosphere of hysteria and continue to support the inclusion of strong ISDS provisions in TTIP and in the other new multilateral treaties. It appears that Spain is doing so. Just this year, in the course of consultations regarding TTIP, the Government of Spain made clear its strong support for the inclusion of ISDS provisions, particularly because of the substantial international presence of its investors overseas[117]. Spain recognizes that these investors rely upon ISDS provisions as a fundamental tool for the protection of their investments, particularly in countries where legal uncertainty abounds[118]. Spain has also noted the important precedent that inclusion of ISDS provisions sets, particularly in ensuring that a country will be success-

[115] The date of the election is not yet set although it must take place before 20 December 2015. While previously expected to take place in November 2015, the latest speculation puts the elections closer to the December 20 deadline.

[116] ECF, Art. 47(3) ("The provisions of this Treaty shall continue to apply to Investments made in the area of a Contracting Party by Investors of other Contracting Parties or in the area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date.").

[117] *Acuerdo de Asociación Transatlántica Sobre Comercio e Inversión (TTIP): Capítulo de Inversiones en el Acuerdo de la Unión Europea con Canadá (CETA) y Consulta de la Comisión en TTIP [Transatlantic Trade and Investment Partnership (TTIP): Investment Chapter in the EU–Canada Agreement (CETA) and Consultations with the Commission on TTIP]*, Ministério de Economía y Competitividad, 9 (February 2015), http://www.comercio.gob.es/es–ES/comercio–exterior/politica–comercial/relaciones–bilaterales–union–europea/america/PDF/TTIP/150220%20DG%20ISDS%20en%20 CETA–TTIP. pdf.

[118] *Ibíd.*

ful in including such provisions in future agreements[119]. Importantly, the Spanish Government also seems to have rightly recognized that adopting strong ISDS provisions will dramatically influence attracting new capital from U.S. investors[120]. Spain is especially well–placed to take advantage of these benefits, given the prominence of U.S. investors in the Spanish economy[121].

I also commend, for example, the country's Secretary of State for Trade for joining the ministers of 13 other EU Member States, including the Czech Republic, Portugal, Sweden, and UK, in sending a joint letter to EU Trade Commissioner last October pointing out that "many of the concerns about TTIP are based on misconceptions"[122]. Remembering that ISDS provisions were included in the negotiating mandate that all 28 Member States gave to the Commission in 2013, the letter urged the EU to "tackle those myths head on" and keep ISDS clauses in TTIP[123]. I understand that leaders from Spain have also been partnering with European business groups, such as the Confederation of British Industry, in support of TTIP[124]. Despite such positive indications that it has thus far refrained from adopting a "bunker" approach, however, Spain must remain vigilant. It must continue to support robust investor protections and resist attempts to backslide towards greater State control of the dispute process. Recent press reports indicating support from Spanish Government officials for the European Commission's proposal for a reformed ISDS system are a particular cause for concern, especially when this support is coming from the same officials who have fought so valiantly for vigorous investor protections in the past[125].

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[119] *Ibíd.*, at 9.

[120] *Ibíd.*

[121] *Vid.* A. Bolaños, "Récord Inversor de Firmas de Estados Unidos en Sociedades Española [Record Investment by U.S. Firms in Spanish Companies]", *El País*, (Mar. 20, 2015), http://economia.elpais.com/economia/2015/03/20/actualidad/1426859431_255576.html.

[122] Letter from 14 Ministers to Cecilia Malmström dated Oct. 21, 2014 (published in: Peter Spiegel, *Leaked Letter: 14 Ministers Take on Juncker over Trade*, Financial Times (Oct. 23, 2014)), *available at* http://blogs.ft.com/brusselsblog/files/2014/10/ ISDSLetter.pdf.

[123] *Ibíd.*

[124] *Amid Slow Talks, EU Leaders Ponder How to Pitch TTIP to Skeptical Europe*, Inside US Trade (3 Apr. 2015).

[125] "España celebra borrador para resolución de disputas Estado–inversor con EEUU [Spain celebrates blueprint for resolving Investor–State disputes with the United States]", *El Correo* (7 May 2015), *available at* http://www.elcorreo.com/ agencias/201505 /07/ espania–celebra–borrador–para–383551.html. (Original text: "El secretario de Estado español de Comercio, Jaime García–Legaz, manifestó hoy su buena acogida a la propuesta inicial presentada por la Comisión Europea (CE) para un siste-

These issues are not merely symbolic. Recall that economic patterns are cyclical, and Spanish investors will continue to need protections when they invest abroad, long after the solar claims come and go. Outbound Spanish investment has slowed in recent years, but over the two previous decades Spain amassed assets worth $200 billion in Latin America and the country's total investment in the region ranked second only to that of the United States[126]. Spanish firms like Telefónica and Santander became the giant companies they are today in large part because they established such a significant presence in Latin American – *i.e.*, *outside of Spain*[127]. Officials of another well–known Spanish firm, Repsol, which endured a long dispute with Argentina after the State expropriated its interest in a local oil and gas operator, have been outspoken proponents of increasing the current investment protection regime to meet the needs of the business world[128]. Spain would be acting directly against the interests of this segment of its population if it adopted investment–treaty policies aimed only at limiting exposure of respondent States and ignored the rights of their national investors abroad.

In terms of defending itself against the numerous claims now filed against it, the best thing a country like Spain can do is to engage excellent counsel that understand this field of work and can provide a broad range of advice. Some States faced with an array of investment claims against it require law firms to bid on representing it on a claim–by–claim basis. This is a mistake in my view. Retaining the same firm to take the lead on all of the cases enables you to save on costs and adopt a consistent approach in raising legal defenses, sharing evidence, combining witness interviews, managing Government resources, and so forth. A State may advance an interpretation as a disputing party that is in its short–term interest as a Respondent in that arbitration rather than in its long–term interest in the development of international law and in furthering the interests of its own nationals abroad. The lawyers who plead for a State in a dispute are frequently not the officials authorized to represent the State's international lawmaking position. I suggest that a State like Spain combine

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ma de resolución de disputas Estado–inversor en el acuerdo comercial que negocia con Estados Unidos (TTIP)").

[126] "Latin America and Spain: Shoe on the Other Foot", *The Economist* (25 Jan. 2014); W. Chislett, "Spanish Direct Investment in Latin America", *Foreign Affairs* (Jan/Feb. 2004).

[127] "Latin America and Spain: Shoe on the Other Foot", *The Economist* (25 Jan. 2014).

[128] "London: Repsol's Perspective on EU Investment", *Global Arbitration Rev.* (24 Mar. 2013).

its resources so that the same people crafting the country's defenses in ongoing disputes also advise on the country's position with respect to the ISDS provisions to be found in TTIP and in other new multilateral treaties.

VIII. Glimmers of Hope

I have left many questions unanswered and I have painted a rather grim picture of the current state of affairs. But despair not! There are at least some silver linings in these clouds. A few examples:

To begin with, those in the arbitration community are fighting back. For example, Judge Schwebel's keynote address at last year's ICCA Congress and his more recent statements have vigorously defended international investment law[129]. The Secretary–General of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") has been outspoken that the ISDS debate must be based "on a proper understanding of the functioning of the current system" and not be "dictated by strong opinions stemming from individual cases"[130]. The SCC has taken a number of initiatives, including an ISDS blog to combat misinformation. It recently posted a fact sheet, pointing out that "extremely large multinationals represent only 8% of the total number of [ISDS] claimants"[131]. August Reinisch of the University of Vienna has also voiced support in favor of ISDS, explaining:

> [ISDS] has long been considered a crucial ingredient of effective investment protection. The direct access of private parties to seek remedies for violations of substantive investment treatment standards has been regarded as an important contribution to enhance the effectiveness of investment protection by eliminating the need for an espousal of claims under the traditional diplomatic protection paradigm[132].

As I noted before, the IBA released a statement on ISDS in April to correct "misconceptions and inaccurate information"[133]. Among the

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[129] Judge S.M. Schwebel, "Keynote at International Council for Commercial Arbitration Congress (6 April 2014)" *available at* http://www.arbitration–icca.org/AV _Library/ICCA_MIAMI_2014_Keynote_Stephen_Schwebel.html.

[130] A. Magnusson, "Need for Reform – Substance or Procedure?, *World Investment Forum 2014* (16 Oct. 2014).

[131] Stockholm Chamber of Commerce, A Guide to ISDS: The Facts (13 Jan. 2015), *available at* http://sccinstitute.se/media/49781/isds_infographics_online.pdf.

[132] A. Reinisch, "Putting the Pieces Together… an EU Model BIT?", *J. World Investment & Tr.*, 15, 2014, pp. 679 y 700–701.

[133] *Fact v. Fiction: The IBA Releases Statement on ISDS*, Global Arbitration Review (22 Apr. 2015).

myths that the statement debunked were that investors always win, that ISDS forces States to change their policies and law, that ISDS prevents States from regulating in the public interest, and that ISDS uses "secret tribunals"[134].

In addition, nearly 50 North American international law academics, lead by Andrea Bjorklund of McGill University and Susan Franck of Washington and Lee, defended ISDS in an open letter to members of the United States Government[135]. It responded to a previous letter signed by other academics who oppose ISDS. A press release accompanying the second open letter rightly notes that the signatories of the first letter are not scholars of international law and may be unfamiliar with the subtleties of international dispute settlement[136].

Elsewhere in the United States, strong, reputable voices have refuted the populist message of the likes of Senator Elizabeth Warren, whose slashing anti–ISDS op–ed in the influential *Washington Post* I cited earlier. The White House Director of the National Economic Council, Jeffrey Zients, publishing a response to her on the White House's blog, explained how Senator Warren had mischaracterized a number of individual cases, and emphasized:

> The reality is that ISDS does not and cannot require countries to change any law or regulation. . . . It is an often repeated, but inaccurate, claim that ISDS gives companies the right to weaken labor or environmental standards . . . .[137].

In fact, the *Washington Post* itself published its own editorial on 11 March entitled *Don't Buy the Trade Deal Alarmism*, in which it confirmed that "[c]ritics trumpet ISDS horror stories, but upon closer inspection they generally turn out not to be so horrible"[138].

In April, President Obama also joined a conference call with reporters to refute arguments made by ISDS critics. The Washington Post reported his remarks:

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[134] *Fact v. Fiction: The IBA Releases Statement on ISDS*, Global Arbitration Review (22 Apr. 2015).

[135] An Open Letter About Investor–State Dispute Settlement (Apr. 2015).

[136] A. Ross, "North American Academics Defend ISDS", *Global Arbitration Rev.* (8 Apr. 2015).

[137] J. Zients, "Investor–State Dispute Settlement (ISDS) Questions and Answers", *White House Blog* (26 Feb. 2015), *available at* https://www.whitehouse.gov/blog/2015/02/26/investor–state–dispute–settlement–isds–questions–and–answers.

[138] "The Post's View: Don't Buy the Trade Deal Alarmism", *Washington Post* (11 Mar. 2015).

> This is the notion that corporate America will be able to use this provision to eliminate our financial regulations and our food safety regulations and our consumer regulations. That's just bunk. It's not true. ISDS is a form of dispute resolution. It's not new. There are over 3,000 different ISDS agreements among countries across the globe. And this neutral arbitration system has existed since the 1950s[139].

Our Canadian neighbors to the north also appear to have taken steps in the right direction. Despite other regressive action in the NAFTA context[140], Canada has continued to pursue and conclude new investment treaties, including its recent ratification of the ICSID Convention, and it has been a vocal critic of South Africa's plans to terminate some of its BITs[141].

Global business representatives are also increasingly stepping up in defense of strong investor protections, and they have gone so far as to label proposals to weaken ISDS protections and strengthen the role of the State a "complicated and misguided solution to a non–existent problem"[142]. Most recently, U.S. firms reacted critically to the European Commission's release of its draft text proposal in September, with the U.S. Chamber of Commerce releasing a statement indicating that "the U.S. business community cannot in any way endorse [the] EU proposal…"[143]. Given the importance of such investment protections to international firms, we can hope that countries – including those like Spain which have prioritized the promotion of inward investment – will soon realize the importance of adopting more robust protections in order to gain a competitive advantage over their neighbors.

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[139] *Vid.* G. Sargent, Is TPP trade deal a massive giveaway to major corporations? An exchange between Obama and Sherrod Brown, *Washington Post* (27 Apr. 2015).

[140] In July of 2001 Canada, and Mexico issued an alleged "interpretation" of the terms "fair and equitable treatment" and "full protection and security" found in NAFTA's Article 1105. It declared that those terms meant no more than the customary international law minimum standard. 'Notes of Interpretation of Certain Chapter 11 Provisions', NAFTA (31 July 2001), *available at* http://www.sice.oas.org/tpd/nafta/Commission/CH11 understanding_e.asp ("The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."). This was just after the NAFTA arbitral tribunal in *Pope & Talbot* had decided to the contrary, branding Canada's contention that became enshrined in the later "interpretation" as "a patently absurd result." *Pope & Talbot Inc. v. Canada*, Award on the Merits of Phase 2 dated 10 April 2001, ¶ 118.

[141] A.T. Katselas, "Exit, Voice, and Loyalty…", *loc. cit*., pp. 313 y 364–65.

[142] R. Brevetti, "Business Reps Criticize EC Proposal on Investment Court", *Bloomberg L. Int'l Trade Daily* (21 Sept. 2015).

[143] T. Fairless, "EU Proposes New Trans–Atlantic Court for Trade Disputes", *Wall Street J*. (16 Sept. 2015).

IX. Conclusion

My fellow arbitration colleagues, let's keep this discussion alive. As countries like Spain strive to keep a balanced perspective during these turbulent times, I would encourage all to adopt a long–term mindset so as to the avoid the "bunker mentality." Above all else, please keep in mind the words of Judge Schwebel: "International investment law is a profoundly progressive development of international law: it should be nurtured rather than restricted and denounced"[144]. It is no time for "NEO–NIEO" and it is no time to be deterred by fear of an oncoming apocalypse! I thank you for this opportunity to speak with you.

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