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Grotius Lecture: Navigating International Dispute Resolution: Innovations in Investor–State Arbitration *

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Sumario: I. Introduction. II. International Economic Law Roots of Investment Arbitration. III. Innovation of Individual Claims and Investor–State Dispute Settlement. IV. Capacity to Adapt and Innovate. V. Some Recent Innovations – Access to Documents, Access to Hearings, Third Party Submissions, and Dismissal for Lack of Legal Merit: 1. Access to Document. 2. Open Hearings. 3. Third Party Participation. 4. ICSID Rule 41(5). VI. Jurisprudence Constante. VII. ICSID Practice Innovations. VIII. Ideas for Future. IX. Conclusion.

I. Introduction

I am honoured to be here today and to have been asked to give this lecture. Many distinguished persons have delivered the Grotius lecture in past years, and as a result, these are large shoes to fill. My task is even more daunting when considered in light of the legacy of Hugo Grotius, who is the inspiration for these lectures.

In approaching these remarks, I researched the life of Grotius. You will not be surprised to learn that while very interesting, the life of

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Grotius yielded few clues on investor–State arbitration! Apparently Grotius was a child prodigy, having entered university at the age of 11 and receiving his law degree by age 15. He began his professional career by opening a legal practice in The Hague. He was soon commissioned to write an opinion defending the seizure by the Dutch East India Company of a Portuguese cargo ship in Singaporean waters. The Dutch captain who ordered the seizure did not have permission to use force from his employers or his government, and he acted without instructions and of his own volition. The cargo seized by this captain was sold for more than 3 million guilders, which was then equivalent to twice the annual revenue of the British government. Not surprisingly, the seizure of the cargo and the right to the proceeds from its sale became the subject of highly contentious legal proceedings. Ultimately the case was settled, but the work Grotius did in this case became an inspiration for his book called *Mare Librum*, or *The Free Sea*, and informed his theories concerning the right of all nations to conduct international commerce by sea.

Grotius moved to public service in 1607, apparently because he found that legal clients were difficult and the practice of law was tedious! His career in the public sector, first as Attorney General of Holland, and later as Governor of Rotterdam, was by all accounts very successful. However, Grotius' rapid rise in the Dutch government came to a halt in 1618 when a coup by the Calvinists led to his arrest and trial on charges of treason[1]. On June 6, 1619, Grotius was sentenced to spend life in prison at the Loevestein castle. Two years later, he staged a daring escape from the castle. Legend has it that Grotius arranged for his wife to send him a large trunk and, evidently using formidable advocacy skills, was able to convince prison authorities to ship home a number of books he had accumulated while in prison. In fact, it was Hugo Grotius in the trunk, and not his library, and he soon landed in Paris and rejoined his family[2].

Grotius remained in Paris for many years, and spent most of these as the Swedish Ambassador to France. While in Paris, he played a role in numerous important international law files, including the negotiations to end the Thirty Years War[3]. He was recalled from his ambas-

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[1] Oregon State University, "Hugo Grotius 1583–1645" <http://oregonstate.edu/ instruct/ phl302/philosophers/grotius.html> accessed 6 May 2013.

[2] J. Bacchus, "Groping Toward Grotius: The WTO and the International Rule of Law"(1 October 2012) Harvard Law School Address <http://www.worldtradelaw. net/ articles/bacchusgrotius.pdf> accessed 6 May 2013.

[3] *Encyclopedia Britannica*, "Hugo Grotius" <http://www.britannica.com/ EBchecked/ topic/246809/Hugo–Grotius> accessed 3 May 2013.

sadorial duties in 1644. This was to be his final chapter: Grotius was shipwrecked in the Baltic Sea as he returned to Stockholm. In the late summer of 1645, Grotius was washed up on the shores of Rostock, Germany, where he died due to exhaustion from the storms and the harsh sailing conditions he had endured. Legend has it that Grotius' last words were, "By attempting many things, I have accomplished nothing"[4]. This seems like a very harsh, or perhaps overly modest, self–assessment, considering the life Grotius had led and the significant body of work he left behind. In all, Grotius published more than 20 manuscripts, on a wide variety of legal, political, religious, and literary matters. Among the most famous of these, his texts "*On The Laws of War and Peace*" and "*The Free Sea*" are still considered as foundations of international law, and he rightfully earned the reputation as one of the fathers of international law[5].

II. International Economic Law Roots of Investment Arbitration

The story of Grotius and his times is not only colourful, but is also a good example of early scholarship developing international norms to regulate cross–border commerce. The increasing inter–connec–tedness of the world in the last century has accelerated the pace of international commerce and has made application of the rule of law in commercial matters ever more important. The broad challenge for this area has been to define a set of legal norms that States can endorse and will abide by, and to develop an effective enforcement mechanism to ensure compliance with the agreed upon norms. In response, the legal community has devised a series of economic agreements to enhance the welfare of all by lessening barriers to the free flow of goods, the provision of services, and the making of investments.

One of the fundamental characteristics of these agreements has been to create rules–based systems, which declare agreed–upon legal norms, and are supported by dispute resolution mechanisms to adjudicate alleged violations of the norms. Originally most of these models

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[4] *Stanford Encyclopedia of Philosophy*, "Hugo Grotius" <http://plato.stanford.edu/entries/grotius/> accessed 3 May 2013.

[5] On the life and writing of Hugo Grotius, *vid.* generally E. Dumbauld, *The Life and Legal Writings of Hugo Grotius* (University of Oklahoma Press 1969). *Vid.* also, R. Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford University Press 1999).

relied on State–to–State dispute settlement, where States were solely responsible for defining the legal norm, participating in litigation about that norm, and complying with the outcome of such litigation. As a result, an individual involved in foreign commerce who had a grievance against a State was obliged to persuade their home government to intervene on their behalf to obtain redress for the wrong done –the doctrine of diplomatic protection[6].

A number of claims commissions and arbitral panels have been established on this model in the last 200 years. Well–known examples include the Jay Treaty of 1794[7], mixed claim commissions by States such as Mexico[8], Venezuela[9], and France[10], and U.S. treaties of friendship, commerce and navigation (FCNs)[11]. In more recent years, we

[6] On diplomatic protection, *vid.* generally, J. Crawford, A. Pellet & S. Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010); C.F. Amerasinghe, *Diplomatic Protection* (Oxford University Press 2008); W. K. Geck, "Diplomatic Protection", in R. Bernhardt (ed), *Encyclopedia of Public International Law* (North–Holland 1993) vol. 1; F.V. García Amador, *The Changing Law of International Claims* (Oceana 1984) vols. 1 – 2; H. Lauterpacht, "Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens" (1947) 9 *Cambridge L. J.* 330; C. Eagleton, *The Responsibility of States in International Law* (New York University Press 1928); and E. Montefiore Borchard, *The Diplomatic Protection of Citizens Abroad* (Banks Law 1915). *Vid.* also, *The Mavrommatis Palestine Concessions (Greece* v. *Britain)* (Judgment) [1924] PCIJ Rep Series A No 2, 12.

[7] Treaty of Amity, Commerce and Navigation between Great Britain and United States (signed 19 November 1794, entered into force 29 February 1796) 52 Cons. TS 243. See also Barton Legum, "The Innovation of Investor–State Arbitration under NAFTA" (2002) 43 *Harv Int'l L.J.* 534.

[8] *Vid., v.gr.*, the General Claims Convention of September 8, 1923 between the United Mexican States and the United States of America (signed 8 September 1923, entered into force 1 March 1924) <http://untreaty.un.org/cod/riaa/cases/vol_IV/7–320.pdf> accessed 3 May 2013.

[9] *Vid., v.gr.*, the Mixed Claims Commission Mexico–Venezuela constituted under the Protocol of an Agreement between the Ambassador from Mexico to the United States of America and the Plenipotentiary of the Republic of Venezuela for Submission to Arbitration of all unsettled Claims of Mexican Citizens against the Republic of Venezuela (signed 26 February 1903) <http://untreaty.un.org/cod/riaa/cases/vol_X/693–705.pdf> accessed 3 May 2013.

[10] *Vid., v.gr.*, the Mixed Claims Commission France–Venezuela constituted under the Washington Protocol of 27 February 1903 (signed 27 February 1903) <http://untreaty.un.org/cod/riaa/cases/vol_X/9–355.pdf> accessed 3 May 2013.

[11] *Vid., v.gr.*, the Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic (signed 2 February 1948, entered into force 26 July 1949), and the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Korea (signed 28 November 1956, entered into force 7 November 1957). *Vid.* also, more generally, J. Coyle, "The Treaty of Friendship, Commerce, and Navigation in the Modern Era" 51 *Colum J. Transnatl L.* 302 (2013).

have seen the development of the GATT system[12], and its evolution into the WTO Agreements with the highly successful Dispute Settlement Body and Appellate Body[13].

III. Innovation of Individual Claims and Investor–State Dispute Settlement

In the 1900s, the international system began to experiment with dispute mechanisms that allowed the individual wronged to claim directly against the alleged offending State, rather than requiring espousal and prosecution of the claim by the State[14]. Investor–State dispute resolution is probably the best known of these models, and likely the best example of individual–State, or hybrid, claims (along with human rights)[15].

Investor–State dispute settlement (ISDS) has now become a significant instrument of States that wish to encourage private flows of investment and to protect the investments of their nationals abroad[16]. While such arbitration can arise from a contractual clause or under domestic investment legislation, roughly 75% of the cases arise out of investment treaties[17]. Investment treaty arbitration is based on the negotiated consensus of States concluding the treaty about norms governing the treatment of investors. These are encapsulated in the obligations, or promises, in the treaty between two or more States. The most usual of these inter–State promises are to treat foreigners in a fair and equitable manner, to allow the free transfer of funds be-

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[12] General Agreement on Tariffs and Trade (1 January 1948) TIAS 1700.

[13] Understanding on Rules and Procedures Governing the Settlement of Disputes (1 January 1995) 1869 UNTS 401. For more information on WTO dispute settlement, see World Trade Organization, 'Understanding the WTO: Settling Disputes' <http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> accessed 14 June 2013.

[14] *Vid.* generally, A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International 2009) 1–73; W. S. Dodge, "Investor–State Dispute Settlement Between Developed Countries: Reflections on the Australia–United States Free Trade Agreement" (2006) 39 *Vanderbilt J. Transnt'l L.* 1.

[15] M.W. Janis, "Individuals as Subjects of International Law" (1984) 17 *Cornell Int'l L. J.* 61; D.J. Bederman, "State–to–State Espousal of Human Rights Claims" (2011) 1 *Virginia J. Int'l L.* Online 3.

[16] I.F.I. Shihata, "Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA" (1986) 1 *ICSID Rev.* 1.

[17] International Centre for Settlement of Investment Disputes (ICSID), *The ICSID Caseload – Statistics* (Issue 2013–1) ('ICSID Caseload–Statistics') 23 <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics> accessed 14 June 2013.

tween States, not to discriminate on the basis of nationality, and not to expropriate without compensation. A number of these norms have been well–used in the context of other economic instruments. For example, national and most–favoured–nation treatment are staples of trade treaties and are found in the WTO Agreements on Trade–related Investment Measures[18], Sanitary and Phyto–sanitary Measures[19], and Technical Barriers to Trade[20]. Similarly, expropriation was a key obligation in the Algiers Accord[21], and its definition of expropriation without compensation has grounded ISDS case law applying that concept[22].

Almost all modern investment treaties offer ISDS. This mechanism allows individual investors to commence arbitration to address allegations of breach of the investment treaty by the State. The State which allegedly breached the treaty at issue is the respondent. This is a unique mechanism, with States undertaking responsibility for performance of the obligation, while individual investors may claim for violations of the obligation. For investors, the primary advantage of this mechanism is that it gives the investor control over the initiation and prosecution of its own claim and an opportunity to remedy its actual loss – usually through an award of damages, but sometimes through restitution of the investment. For States, the key advantages of this mechanism are that it helps to depoliticize disputes by removing them from the bilateral (or multilateral) diplomatic relations of the treaty partners and it provides an assurance to prospective foreign investors that there is an effective and impartial system in place to adjudicate allegations of breach.

The major innovation in this area was negotiation and signature of the ICSID Convention in 1966[23], and its creation of the ICSID Centre

[18] Agreement on Trade–Related Investment Measures (1 January 1995) 1868 *UNTS* 186, Art 2.

[19] Agreement on the Application of Sanitary and Phytosanitary Measures (1 January 1995) 1867 *UNTS* 493, Art 2.

[20] Agreement on Technical Barriers to Trade (1 January 1995) 1868 *UNTS* 120, Art 2.

[21] Declaration of the Government of the Democratic and Popular Republic of Algeria Relating to the Commitments Made by Iran and the United States ("General Declaration") and Declaration of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ("Claims Settlement Declaration") 20 *ILM* 223 (1981).

[22] G.H. Aldrich, *The Jurisprudence of the Iran–United States Claims Tribunal* (Oxford University Press 1996).

[23] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966)

as a facility for arbitration and conciliation of international investment disputes. At the time, States recognized that there was debate on the definition of the substantive obligations[24], but nonetheless, that it would be useful to have an impartial international mechanism for arbitration or conciliation of disputes arising under investment contracts and treaties. One popular misconception is that ICSID dispute resolution was intended only for contracts – this is not so. The ICSID drafters clearly envisioned dispute resolution arising from treaty commitments[25], although they likely did not anticipate the growth in investment treaty that has occurred in the last two decades.

The ICSID Convention sought to depoliticize investment disputes by creating a self–contained set of rules for investment dispute settlement, and establishing specialized facilities to implement this goal. Under the Convention, both parties arbitrated their disputes under the ICSID Rules, with resort to a single level of review known as annulment. The purpose of the ICSID mechanism is very much related to the overall economic development goals of members of the World Bank: to create a neutral forum for the settlement of investment disputes and thereby to create an atmosphere of mutual confidence and stimulate a larger flow of private international capital into those countries that wish to attract it[26]. This mission remains as relevant today as in 1966, as international economic organizations reaffirm the importance of private sector investment as an engine of economic

('ICSID Convention'). *Vid.* also ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID, World Bank 1970) ("History of the ICSID Convention") Vols. I – IV.

[24] *Vid., v.gr.*, H. Abs & H. Shawcross, "Draft Convention on Investments Abroad" (issued April 1959) (Abs–Shawcross Draft Convention) Arts. I – III <http://unctad.org/sections/dite/iia/docs/Compendium/en/137%20volume%205.pdf> accessed 6 May 2013; Declaration on the Establishment of a New International Economic Order (adopted 1 May 1974) ('NIEO Declaration') A/RES/S–6/3201 <http://www.un–documents.net/s6r3201.htm> accessed 6 May 2013; V. Essien, "Aron Broches , Selected Essays: World Bank, ICSID and Other Subjects of Public and Private International Law" (1995) 19 *Fordham Int'l L.J.* 224: "With respect to the procedural law, Broches takes the view that the Convention, being a treaty, constitutes the *lex fori* and as such excludes the applicability of any national *loi de l'arbitrage* except where the Convention specifically refers to it".

[25] *History of the ICSID Convention* (n 23) Vol. I, 14–15, 114, 435, and Vol. II, '*Memorandum of the Meeting of the Committee of the Whole (23 February, 1965)'* (25 February 1965) SID/65/5, 984–985.

[26] International Bank for Reconstruction and Development, "Report of the Executive Director on the Convention on the Settlement of Investment Disputes between States and Nationals of other States" (18 March 1965) sec 3, para 9 <https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> accessed 14 June 2013.

growth[27]. ICSID remains a unique organization, designed with the single focus of facilitating resolution of international investment disputes by offering an impartial, non–profit, expert, and self–contained international institution.

Two years after negotiation of the ICSID Convention, the Netherlands and Indonesia signed the first bilateral investment treaty (BIT) with ISDS, allowing nationals to commence arbitration at ICSID[28], The first ICSID case was filed in 1972[29], based on a contractual clause. The first case based on an investment treaty was not registered until 1987, and the first award based on a BIT was issued in 1990, in *AAPL* v*. Sri Lanka*[30]*.*

All of this has launched us into a brave new world of investment arbitration that has accelerated in the last 15 years. We have seen substantial increases in cross–border investment in this period, even accounting for the financial crises of the recent past.[31] These increases have been accompanied by growth in the number of concluded bilateral and multilateral investment treaties, from 385 in the late 1980s[32] to 2,833 in 2011[33], and estimated at 3,200 or more today. There is also increasing diversity in the partners involved in cross–border trade and treaty–making.

At the same time, we have seen a corresponding increase in the number of cases. UNCTAD estimates that there have been approxi-

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[27] World Bank President Jim Yong Kim has recently emphasized the importance of the private sector in development. *Vid., v.gr.*, World Bank Group, "World Bank Group President Jim Yong Kim's Q&A at Georgetown University" (2 April 2013) <http://www.worldbank.org/en/news/speech/2013/04/02/world–bank–group–president–jim–yong–kims –qa–georgetown–university> accessed 6 May 2013.

[28] Agreement between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia on Promotion and Protection of Investment (signed 7 July 1968, entered into force 17 July 1971) Art. 9.

[29] *Holiday Inns S A and others* v. *Morocco*, ICSID Case No ARB/72/1, Registration (13 January 1972).

[30] *Asian Agricultural Products Limited* v*. Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award (27 June 1990).

[31] *Vid., v.gr.*, United Nations Conference on Trade and Development (UNCTAD), 'South–South Trade Monitor' (June 2012) <http://unctad.org/ en/Publications Library/ webditctab2012d2_en.pdf> accessed 3 May 2013.

[32] UNCTAD, Bilateral Investment Treaties 1959–1999 (2000) Figure 1 <http://unctad.org/en/Docs/poiteiiad2.en.pdf> accessed 3 May 2013.

[33] UNCTAD, 'World Investment Report Overview: Towards a New Generation of Investment Policies' (June 2012) <http://unctad.org/en/PublicationsLibrary/wir2012 overview_en.pdf> accessed 14 June 2013.

mately 514 known ISDS cases to date[34]; 426 cases have taken place under the ICSID rules. In addition, ICSID has administered 34 UNCITRAL cases, including most of the NAFTA cases to date. This is a huge amount of accumulated experience and the development of international investment jurisprudence continues apace[35]. Equally interesting is the fact that 170 cases are currently pending at ICSID – an indication that there will be a number of awards and decisions in the near term.

IV. Capacity to Adapt and Innovate

In most endeavors, this kind of rapid growth would be seen as an unquestionable success story, and I believe this is true of investment arbitration. However, a reading of some recent literature on investment treaties and arbitration might give the opposite impression. This literature suggests that we should abandon international investment law and investor–State dispute settlement altogether, or at the least, commence very significant renovation of it. This is often termed "the backlash" against investment law and arbitration[36].

The backlash critiques focus on three main aspects of investment law. First, there are those who focus on the overall objective, and claim that there is no link between investment promotion or protection and the existence of investment treaties. If one looks at the economic literature, there is debate about how extensive the benefit is and more importantly, how States can position themselves and negotiate investment treaties which will maximize the benefit to their respective economies. That said, the vast majority of economists conclude there is certainly an economic benefit from investment treaties[37].

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[34] UNCTAD IIA Issues Note, 'Recent Developments in Investor–State Dispute Settlement (ISDS)' (May 2013) <http://unctad.org/en/PublicationsLibrary/ webdiaepcb 2013d3_en.pdf> accessed 11 June 2013.

[35] ICSID, Pending Cases <https://icsid.worldbank.org/ICSID/FrontServlet?request Type=GenCaseDtlsRH&actionVal=ListPending> accessed 3 May 2013; ICSID Caseload–Statistics (n 17) 7–8, 10.

[36] *Vid.*, *v.gr.*, M. Waibel *et al* (eds), *The Backlash Against Investment Arbitration* (Kluwer Arbitration International 2010).

[37] *Vid.*, *v.gr.*, T. Allee & C. Peinhardt, "Contingent Credibility: The Impact of Investment Treaty Violations on FDI" (July 2011); A. Berger, M. Busse, P. Nunnenkamp & M. Roy, "More Stringent BITs, Less Ambiguous Effects on FDI, Not a Bit!" (Kiel Working Paper 2010) No 1621; A. Kerner, "Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties" (2009) 53 *Int'l Studies Q.* 73; J.L. Tobin & S. Rose–

The majority of States appear to share this assessment, seeing the benefit of such agreements from both an investment and a good governance perspective. Recently, a number of States have updated their existing treaties or designed model treaties which address some of the substantive and procedural lessons learned to date[38]. Perhaps the most significant recent trend is the shift from negotiating bilateral treaties to negotiating treaties on a regional basis. This audience is very familiar with the efforts of the European Union (EU) to address investment among EU members, both intra–EU and with other States, potentially including Canada, India, Singapore, and the United States. Similarly, the Trans–Pacific Partnership (TPP) has now grown to 12 States[39], covering USD $500,038,213,763 in foreign direct investment (FDI)[40]. The EU and TPP partners combined represent almost half of global net inflows of FDI. In addition, last year China, Japan and Korea negotiated a trilateral investment treaty, representing investment flows of USD $224,883,266,635[41]. The obvious conclusion from these negotiations is that international investment treaties are very much alive and will continue to be part of economic growth in the next decades. As a result, States and investors should focus their efforts on negotiation, implementation of, and compliance with investment treaties

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Ackerman, "Bilateral Investment Treaties: Do They Stimulate FDI?" (Yale University, 2006 unpublished manuscript); J. Salacuse & N. Sullivan, "Do BITs really work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain" (2005) 46 *Harvard Int'l L.J.* 67. But *vid.* J. S. Yackee, "Bilateral Investment Treaties, Credible Commitment and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?" (2008) 42 *L and Society Rev.* 805; and E. Aisbett, "BITs and FDI: Correlation *vs* Causation" (2007) Munich Personal RePEc.

[38] *Vid., v.gr.*, 2004 Canada Model Foreign Investment Promotion and Protection Agreement <http://italaw.com/documents/*Canadian2004*–FIPA– model–en.pdf> accessed 6 May 2013; 2007 Colombia Model BIT <http://italaw.com/ documents/inv_model_bit_colombia.pdf> accessed 6 May 2013; 2008 German Model BIT <http://www.italaw.com/sites/default/files/archive/ita1025.pdf> accessed 6 May 2013; 2003 India Model BIPA <http://www.italaw.com/sites/default/files/ archive/ ita1026.pdf> accessed 6 May 2013; 2007 Norwegian Draft Model BIT <http:// www.pca–cpa.org/showpage.asp?pag_id=1391> accessed 6 May 2013; and 2012 US Model Bilateral Investment Treaty <http://www.state.gov/documents/ organization/ 188371.pdf> accessed 6 May 2013.

[39] Brunei Darussalam, Chile, New Zealand, Singapore, Australia, Canada, Japan, Malaysia, Mexico, Peru, United States and Vietnam.

[40] The World Bank, 'Foreign Direct Investment, Net inflows (BoP, Current US$)' <http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD/countries> accessed May 3 2013.

[41] *Ibid.*

to ensure they derive the maximum benefit possible from these instruments.

The second theme of the backlash literature critiques investment treaties and arbitral interpretation of the obligations in these treaties. The concern raised most often is that there is a lack of consistency and predictability in the jurisprudence that is so severe as to discredit the entire discipline. Certainly there is not perfect symmetry in every award. In particular, commentators note the difficulty in reconciling cases on umbrella clauses and the use of MFN[42]. But that is perhaps not surprising for a jurisprudence that is only 20 years old, based on some 3,200 different treaties, determined by ad hoc tribunals, and without appellate review for correctness. While there is some inconsistency in investment cases (as in all legal systems), there is also a very great amount of consistency[43].

At the same time, the next generation of investment treaties appears to be grappling with some of these issues, particularly with respect to the substantive definition of the applicable obligations. For example, a number of recent treaties have expressly addressed whether MFN treatment includes dispute settlement[44]. Similarly,

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[42] R. Doak Bishop & M. Stevens, "A Systemic Perspective of the Foreign Investment Dispute Settlement System: Feedback, Adaptation and Stability" in A. Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2011* (Martinus Nijhoff 2012); J.A. Maupin, "MFN–Based Jurisdiction in Investor–State Arbitration: Is There Any Hope for a Consistent Approach?" (2011) 14 *J. Int'l Econ. L.* 157; G. Kaufmann–Kohler, 'Is Consistency a Myth?' in E. Gaillard and Y. Banifatemi (eds) *Precedent in International Arbitration* (Juris 2008); Tai–Heng Cheng, "Precedent and Control in Investment Treaty Arbitration" (2006) 30 *Fordham Int'l L. J.* 1014.

[43] *Vid., v.gr.*, on Art. 22 of the Venezuelan Foreign Investment Law, the following cases: *Mobil Corporation, Venezuela Holdings, BV, Mobil Cerro Negro Holding, Ltd, Mobil Venezolana de Petróleos, Inc* v. *Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction (10 June 2010); *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela,* ICSID Case No ARB/08/3, Award (2 August 2011); and *Opic Karimun Corporation* v. *Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/14, Award (28 May 2013).

[44] *Vid., v.gr.*, on MFN: Art. 3(2) of the United Kingdom Model BIT provides that "[f]or avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) [MFN] above shall apply to the provisions of Articles 1 to 11 of this Agreement." [Articles 8 and 9 provide for dispute settlement]. Likewise, the Free Trade Area of the Americas (FTAA) draft of November 21, 2003 excluded dispute resolution from MFN as a "reaction by States to the expansive interpretation made in the Maffezini case." For a contrasting approach, *Vid., v.gr.*, the Agreement between Canada and the Republic of Peru for the Protection and Promotion of Investments (signed 14 November 2006, entered into force 20 June 2007) <http://www.treaty–accord.gc.ca/text–texte.aspx?id=105078&lang=eng> accessed 10 June 2013. Annex B.4 states that "[f]or greater clarity, treatment 'with respect to the establishment, acquisition, expansion, management, conduct, operation

some recent treaties have revised clauses on essential security defenses and expressly defined the conditions for their application[45]. A related critique is that investment treaties do not offer States sufficient regulatory space or appropriate deference to regulate in the public interest[46]. These commentators suggest that investment treaties do not accommodate governmental measures in important areas such as public health and the environment, and that they create a "regulatory chill," to the detriment of the citizenry at large. It is debated whether case law supports this assertion[47], but its' very assertion undermines ISDS and has resulted in revised treaty language expressly addressing regulatory space[48].

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and sale or other disposition of investments' referred to in paragraphs 1 and 2 of Article 4 [MFN] does not encompass dispute resolution mechanisms, such as those in Section C, that are provided for in international treaties or trade agreements".

[45] *Vid., v.gr.*, Art. 18 of the 2012 US Model BIT (n 39), which provides that "[n]othing in this Treaty shall be construed…(2) 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." *Vid.* also the Agreement between Canada and The Hashemite Kingdom of Jordan for the Promotion and Protection of Investments (signed 28 June 2009, entered into force 14 December 2009) <http://www.treaty–accord.gc.ca/text–texte.aspx? id=105176&lang=eng> accessed 10 June 2013. Art. 10(4) provides that "[n]othing in this Agreement shall be construed (a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; (b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests [under circumstances prescribed in subparagraphs (i) to (iii)]…" Likewise, see the Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments (signed 8 May 2009, entered into force 23 November 2011) <http:// www.treaty–accord.gc.ca/text–texte.aspx?id=105170&lang=eng> accessed 10 June 2013, which contains the same language at Art. XVII(6).

[46] K. Tienhaara, "Regulatory chill and the threat of arbitration: A view from political science" in C. Brown & K. Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 606–627.

[47] *Vid., v.gr.*, *Chemtura Corporation* v. *Government of Canada* (*formerly Crompton Corporation* v. *Government of Canada*) UNCITRAL, Award (2 August 2010); *Metalclad Corporation* v. *United Mexican States*, ICSID Case No ARB(AF)/97/1, Award (30 August 2000), especially at para 45; and *Methanex Corporation* v. *United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005).

[48] *Vid., v.gr.*, the Singapore–Jordan Bilateral Investment Treaty (signed 29 April 2004, entered into force 22 August 2005) <http://unctad.org/sections/dite/ iia/ docs/ bits/Singapore_Jordan.pdf> accessed 11 June 2013. Art. 18 states that "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination, between the Parties where like conditions prevail, or a disguised restriction on investments in the territory of a Party by investors of the other Party, nothing in this Treaty shall be construed to prevent the adoption or enforcement by a Party of measures … (b) necessary to protect human, animal or plant life

Third, the backlash literature has been critical of the investment arbitration process, including the nomination and role of arbitrators. Some claim the system is investor–biased or State–biased, although, one hears both views (with equal conviction). In fact, the evidence is to the contrary: empirical study after empirical study, including the ICSID statistics[49], have shown that States and investors have an equal record of wins and losses, and so bald statements of systemic bias are not credible.

More difficult are the collection of issues related to identification of arbitrators. Much discussion has been devoted to commentary about those who adjudicate and how they do so. These usually include arguments that arbitrators do not have the qualifications needed (both public international law, international investment law, and arbitration expertise), that they are biased toward their appointing party, that arbitrators inappropriately act in different capacities (the "double hat"), that the arbitral pool is not sufficiently diverse, and that arbitration has become too slow and expensive, with unnecessary dissents or unnecessarily long reasons. These issues incite strongly held views and no consensus has emerged. While these critiques are heard with respect to all types of arbitration, they are especially difficult in the investment context, where the issues at stake may have public policy ramifications, the respondent is always a government entity, and the public purse finances the defense of the case and payment of adverse awards.

The critical commentary we have heard is an important catalyst to further improving the system, and the place to start is first, by identifying what truly is a problem and second, by identifying what concrete and constructive changes should be made. We should not lose sight of the fact that the investment arbitration system offers many benefits to users – both State and investor – and these should be maintained. We should also be optimistic about the potential for change.

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or health". Likewise, Art. 15(l)(c) of the Japan–Vietnam BIT provides that "(1) Notwithstanding any other provisions in this Agreement other than the provisions of Article 10, each Contracting Party may ... (c) take any measure necessary to protect human, animal or plant life or health". Agreement between Japan and the Socialist Republic of Vietnam for the Liberalization, Promotion and Protection of Investment (signed 14 November 2003, entered into force 19 December 2004) <http://www.mofa.go.jp/region/asia–paci/vietnam/agree0311.pdf> accessed 14 June 2013.

[49] *Vid.* ICSID Caseload Statistics (n 17) 14. *Vid.* also S. D. Franck, 'The ICSID Effect? Considering Potential Variations in Arbitration Awards' (2011) 51 *Virginia J Int'l L.* 825.

V. Some Recent Innovations – Access to Documents, Access to Hearings, Third Party Submissions, and Dismissal for Lack of Legal Merit

One very good reason for optimism is the fact that the ISDS system has already shown great capacity to adapt and innovate, while maintaining what is best about the system. Arguably, the most remarkable adaptation to date has been to make ISDS more accessible to those who are not directly involved in the proceeding. As an aside, it is unclear why ISDS was traditionally a confidential process or whether it was deliberately designed to be confidential. Virtually all analysts have suggested that this was an adoption of the usual commercial arbitration model[50], but one might quaere whether this is correct. For example, the ICSID system was conceived very much as a public law system and it has always had elements of transparency. ICSID has always been required to announce the registration and the outcome of proceedings, including publication of awards and minutes with consent of the parties[51]. Similarly, ICSID has always been required to maintain and publish registers of information about proceedings, including each step in an arbitration or conciliation, and to make these publicly available[52]. In addition, ICSID adopted important rule changes in 2006 which further enhanced the transparency of proceedings at the Centre.

1. Access to Document

The first change of note relates to increased access to documents, in particular awards and decisions. The trend in the past 15 years has been toward offering increased public access to relevant documents. This became especially controversial with the first NAFTA cases in the late 1990s, where the NAFTA governments were criticized for having adopted a process that allegedly took place behind closed doors and by unaccountable arbitrators[53]. The NAFTA Parties addressed this by formulating a Note of Interpretation to their treaty concerning access

[50] UNCTAD, 'Transparency, UNCTAD Series on Issues in International Investment Agreements II' (2012) 37 <http://unctad.org/en/PublicationsLibrary/ unctaddiaeia 2011d6_en.pdf> accessed 4 June 2013.

[51] ICSID Regulations and Rules (1 January 1968), and ICSID Additional Facility Rules ('ICSID AF Rules') (10 April 2006) Rule 21.

[52] ICSID Administrative & Financial Regulations (10 April 2006) Rules 22, 23. For development of international investment law, see ICSID AF Rules, Rules 21–22.

[53] *Vid., v.gr.*, A. DePalma, "Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say'" *New York Times* (New York, 11 March 2001).

to documents, highlighting the principle that there is no presumption of confidentiality in NAFTA arbitration[54].

ICSID adopted several rules changes in 2006 that addressed transparency concerns and reflected the evolution of investment case law.[55] With respect to documents, revised Rule 48 confirmed that awards would be made public with consent of the parties, and that the Centre shall excerpt the legal reasoning of all awards where such consent was withheld. ICSID has also recently gone back to cases since 1966 and asked every party for consent to publish decisions and awards issued prior to 2006. These are put on the ICSID web as consent is received. To close the circle, this summer the UNCITRAL Commission will consider transparency rules negotiated by the State parties that provide for broad access to documents generated in a hearing, including pleadings and evidence.

2. Open Hearings

Another aspect of transparency is access to the process and open hearings. Rule 32 of the ICSID Rules was amended in 2006 to provide that unless either party objects, the Tribunal can allow open hearings[56]. ICSID has substantial experience with public attendance at hearings and more recently with webcasting hearings; both have been highly successful, and have not interfered with the process in any respect. ICSID makes web–casting available to all parties who request it. It is very cost–effective to webcast a hearing, and gives flexibility to pause the webcast for truly confidential material that otherwise would be *in camera*. We have received feedback from numerous persons that they found it very useful to watch a hearing, and that it helped them better understand the arbitration process.

3. Third Party Participation

Another recent adaptation is the availability of third party participation. This is usually *amicus* participation, where a party that is nei-

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[54] North American Free Trade Agreement between the United States, Canada and Mexico (signed 17 December 1992, entered into force 1 January 1994) ('NAFTA'), Notes on Interpretation of Certain Chapter 11 Provisions (31 July 2001) n A.

[55] *V.gr.*, *Methanex Corporation* v. *United States of America*, UNCITRAL; *Metalclad Corporation* v. *The United Mexican States*, ICSID Case No ARB(AF)/97/1; and *Aguas Cordobesas SA, Suez and Sociedad General de Aguas Barcelona SA* v. *Argentine Republic*, ICSID Case No ARB/03/18.

[56] ICSID Rules of Procedure for Arbitration Proceedings ('ICSID Arbitration Rules') (10 April 2006) Rule 32.

ther named in the particular case nor a signatory to the applicable treaty asks to make submissions on a disputed point that has arisen in the arbitration. The authority for amicus submissions has been based on various instruments, including by interpretation of arbitration rules[57], by express treaty provisions[58], and by express amendment of the ICSID rules[59]. To date there have been a number of applications for amicus standing[60] by parties as diverse as the Centre for Applied Legal Studies in *Piero Foresti* v. *South Africa*[61], to the European Commission in *AES* v. *Hungary*[62]. Further evolution is on–going, as tribunals and commentators consider the extent to which an amicus should have

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[57] *Methanex Corporation* v. *United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as *Amici Curiae* (15 January 2001) ("Methanex Amicus Curiae Decision"); *Metalclad* (n 55); and *Aguas Cordobesas* (n 55).

[58] The Dominican Republic–Central America–United States Free Trade Agreement (signed 5 August 2004, entered into force 1 January 2009) ("CAFTA–DR") Arts. 10.20 (3).

[59] ICSID Arbitration Rules (n 56) Rule 37.

[60] ICSID Convention (n 23) Under ICSID Arbitration Rules see: (1) *AES Summit Generation Limited* v. *Republic of Hungary*, ICSID Case No ARB/01/4; (2) *Electrabel SA* v. *Hungary*, ICSID Case No ARB/07/19; (3) *Ioan Micula, Viorel and others* v. *Romania*, ICSID Case No ARB/05/20; (4) *Aguas del Tunari SA* v. *Republic of Bolivia*, ICSID Case No ARB/02/3; (5) *Apotex Holdings Inc and Apotex Inc* v. *United States of America*, ICSID Case No ARB(AF)/12/1; (6) *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co (Private) Republic of Zimbabwe*, ICSID Case No ARB/10/25; (7) *Berhard von Pezold and others* v. *Republic of Zimbabwe*, ICSID Case No ARB/10/15; (8) *Caratube International Oil Company LLP* v. *Republic of Kazakhstan*, ICSID Case No ARB/08/12; (9) *Biwater Gauff (Tanzania) Limited* v. *United Republic of Tanzania*, ICSID Case No ARB/05/22; (10) *Piero Foresti, Laura de Carli and others* v. *Republic of South Africa*, ICSID Case No ARB(AF)07/1 (no decision issued); (11) *Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA* v. *Argentine Republi*c, ICSID Case No ARB/03/17; (12) *Apotex Holdings Inc and Apotex Inc.* v. *United States of America*, ICSID Case No ARB(AF)/12/1, Procedural Order on the Participation of Applicant Mr. Barry Appleton as a Non–Disputing Party and Procedural Order on the Participation of Applicant BNM as a Non–Disputing Party (4 March 2013); (13) *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA* v. *Argentine Republic*, ICSID Case No ARB/03/19. Under other rules/treaty mechanisms, v*id.*: (1) *Glamis Gold, Ltd* v. *The United States of America*, UNCITRAL, Decision on Application and Submission by Quechan Indian Nation (16 September 2005) (NAFTA); (2)*Methanex Amicus Curiae Decision* (n 57); (3) *Chevron Corporation and Texaco Petroleum Corporation* v. *The Republic of Ecuador*, PCA Case No 2009–23, Procedural Order No 8 (18 April 2011) (UNCITRAL); (4) *United Parcel Service of America Inc* v. *Government of Canada*, UNCITRAL, Decision of the Tribunal on Petitions for Intervention and Participation as *amici curiae* (17 October 2001) (NAFTA); and (5) *Pac Rim Cayman LLC* v. *Republic of El Salvador*, ICSID Case No ARB/09/12, Procedural Order No 8 (23 March 2011) (CAFTA–DR).

[61] *Piero Foresti, Laura de Carli and others* v. *Republic of South Africa*, ICSID Case No ARB(AF)/07/1.

[62] *AES Summit Generation Limited and AES–Tisza Erömü Kft* v. *Hungary*, ICSID Case No ARB/07/22.

access to particular documents or pleadings, whether they should be allowed to make oral submissions, and whether they ought to contribute to the costs of the proceedings in which they make submissions.

A related innovation is participation by the non–disputing State Party in a case, meaning the other State party to the treaty at issue whose measure is not in contention. A number of BITs specifically allow non–disputing States to advance their views on the proper interpretation of the applicable treaty[63]. Such submissions have been frequent in NAFTA cases[64]. Even where not formally provided for by the investment treaty, a number of States and tribunals[65] have noted the importance of the views of the non–disputing State[66], and have sought to advance these through exchanges of letters and other such declarations. It appears that ICSID Rule 37 is broad enough to accommodate such participation in an apt case, and that it is a significant tool to assist tribunals in correctly interpreting treaty provisions, and fostering a predictable and coherent jurisprudence.

4. ICSID Rule 41(5)

A good example of innovation from a strictly procedural perspective is the recent ICSID Rule 41(5)[67]. That rule allows a party to object to a claim on the basis that it manifestly lacks legal merit. The rule change reflected the broader concern that time and cost should not be devoted to cases without a chance of success, and that there should be a mechanism to fairly adjudicate an objection on this basis at an early point in the proceedings[68]. The objecting party is required to raise the objection

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[63] NAFTA (n 54) Art. 1128; CAFTA–DR (n 58) Art. 10.20.2; and the 2012 US Model BIT (n 38), which states in Art. 28(2) that "[t]he non–disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty".

[64] NAFTA (n 54) Art. 1128; Meg N. Kinnear et al, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer Law International 2006), 1128–1 – 1128–5.

[65] A. Newcombe, "Should Investment Treaty Tribunals Fly in Flocks? Predictability and Consistency in Arbitral Decision Making" Kluwerarbitration Blog (31 March 2013); V.V. Veeder, "The Argentine Cases: An Evaluation of 10 Years of Arbitration – Possible Lessons for ICSID" (2012) 6 *WAMR* 424.

[66] *SGS Société Générale de Surveillance SA* v. *Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on Objections to Jurisdiction (6 August 2003) (The Swiss Government issued a note on interpretation of the relevant article in the Pakistan/Switzerland BIT.)

[67] *Vid.* also ICSID AF Rules (n 51) Rule 45(6).

[68] ICSID, "Possible Improvements of the Framework for ICSID Arbitration" (22 October 2004) ICSID Secretariat Discussion Paper, 6–7; ICSID, "Suggested Changes to the ICSID

no sooner than the first procedural session. In turn, the Tribunal must consider relevant evidence and argument at its first session or promptly thereafter and must give its decision on an expedited basis. There have been nine cases applying this mechanism to date[69], and five have resulted in orders partially or fully dismissing the case. While patently unmeritorious claims are likely to be few, the availability of a procedural mechanism to address them early in the process benefits all parties and contributes to the overall goal of efficient dispute resolution[70].

VI. Jurisprudence Constante

An interesting innovation that is entirely "arbitrator–made" is the notion of "jurisprudence constante"[71]. Despite the express absence of

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Rules and Regulations" (12 May 2005) Working Paper of the ICSID Secretariat, 7–8; and A. Parra, *History of the ICSID Convention* (Oxford University Press 2012) 254 – 256.

[69] *Vid.* (1) *Pan American Energy LLC* v. *Plurinational State of Bolivia*, ICSID Case No ARB/10/8, Decision on the Respondent's preliminary objections pursuant to ICSID Arbitration Rule 41(5) (26 April 2013); (2) *Emmis International Holding BV, Emmis Radio Operating BV, MEM Magyar Electronic Media Kereskedelmi Szolúltató Kft* v. *Hungary*, ICSID Case No ARB/12/2, Decision on the Respondent's preliminary objections pursuant to ICSID Arbitration Rule 41(5) (11 March 2013); (3) *Accession Mezzanine Capital LP and Danubius Kereskedohaz Vagyonkezelo Zrt v. Hungary*, ICSID Case No ARB/12/3, Decision on the Respondent's preliminary objections pursuant to ICSID Arbitration Rule 41(5) (16 January 2013); (4) *Rafat Ali Rizvi* v. *Republic of Indonesia*, ICSID Case No ARB/11/13, Decision on the Respondent's preliminary objections pursuant to ICSID Arbitration Rule 41(5) (22 June 2012); (5) *RSM Production Corporation and others v Grenada*, ICSID Case No ARB/10/6, Award (10 December 2010); (6) *Global Trading Resource Corp and Globex International, Inc* v. *Ukraine*, ICSID Case No ARB/09/11, Award (1 December 2010); (7) *Brandes Investment Partners, LP* v. *Bolivarian Republic of Venezuela*, ICSID Case No ARB/08/3, Decision on the Respondent's preliminary objections pursuant to ICSID Arbitration Rule 41(5) (2 February 2009*);* (8) *Trans–Global Petroleum, Inc* v. *Hashemite Kingdom of Jordan*, ICSID Case No ARB/07/25, Decision on the Respondent's preliminary objections pursuant to ICSID Arbitration Rule 41(5) (12 May 2008); and (9) *Mobile TeleSystems OJSC* v. *Turkmenistan*, ICSID Case No ARB(AF) /11/4 (no decision issued, case was discontinued).

[70] On Rule 41(5), *vid.* M. Potesta & 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" (2012) 3 *JIDS* 131–162; Ch. Brown & S. Puig, "The Power of ICSID Tribunals to Dismiss Proceedings Summarily: An Analysis of Rule 41(5) of the ICSID Arbitration Rules" (2010) in *University of Sydney Law School, The Law & Practice of International Courts and Tribunals*, vol. 10, 227–259; A. Diop, "Objection under Rule 41(5) of the ICSID Arbitration Rules" (2010) 25 *ICSID Rev—FILJ* 312; and A. Antonietti, "The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules" (2006) 21 *ICSID Rev—FILJ* 439–442.

[71] *Vid., v.gr.*, G. Kaufmann–Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?" (2006) 23 A*rb .Int'l* 357; *Saipem SpA* v. *People's Republic of Bangladesh*, ICSID Case No ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures (21

a rule of precedent in investment treaties[72], arbitrators have adopted an approach whereby they take note of prior decisions on the same legal issue, and follow these if the reasoning is persuasive. There is obvious value in this approach, in particular by lending to the creation of a stable interpretation of investment obligations. This is most fascinating as an innovation, in particular because no treaty or procedural rule even suggests a soft rule of precedent, yet it is now very well accepted.

VII. ICSID Practice Innovations

Those who have practiced at ICSID in the last three years will be aware that the Centre has taken a pro–active approach to making the process less costly, shorter, and more responsive to user concerns. On the question of timeliness, we have established time limits for steps to be taken by the Centre, and have implemented these. To name a few: registration of cases has gone from several months to less than 24 days; appointment of tribunals by the Centre has gone from months to 6 weeks on average; tribunals hold first sessions within 60 days of constitution; and parties are given regular status updates when an award is outstanding.

ICSID has also taken a number of steps to enhance diversity of arbitrators and ensure a broad and capable group of available arbitrators is maintained. For example, ICSID has developed a "yes/no ballot" when it is asked to appoint, and we propose between 5–9 candidates to the disputing parties, including at least one female arbitrator. We have also made a conscious effort to propose arbitrators of various nationalities. If the parties do not agree on one of these proposals, a candidate is nominated from the ICSID Panel. At the same time, ICSID has asked every State to replenish the Panel lists, explaining the importance of the Panel of Arbitrators and Conciliators, and asking them to appoint candidates with international investment law, public international law, and arbitration expertise.

March 2007); and *Glamis Gold, Ltd* v. *The United States of America,* UNCITRAL, Award (8 June 2009) para 8.

[72] Indeed, some investment treaties expressly state that cases will not have precedential value. *Vid., v.gr.*, NAFTA (n 55) Art. 1136, providing that "[a]n award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case".

VIII. Ideas for Future

I have reviewed several recent examples of innovation in ISDS to highlight the capacity of the system (and its actors) to respond to concerns. There are a number of continuing challenges that call for creative thinking and an openness to innovation if we are to maintain what is good about ISDS while strengthening the discipline overall. In the name of brainstorming, here is some food for thought.

First, there has been much discussion about incorporating mediation and other ADR tools into the investment arbitration process. There can be no doubt that this is a good idea, and initiatives such as the IBA Rules on Mediation in ISDS are a tremendous contribution. At the same time, we need to go beyond formal dispute settlement processes and address problems earlier in the lifecycle of the dispute. We know that the window for resolving a dispute is greatest at an early stage, especially before the legal claim is issued and even before the treaty cooling off period has begun. The World Bank is currently developing a conflict management toolkit to help States try to avoid disputes, and to better address disputes that arise in the early phases. Some of the tools in this kit include recommendations that States develop effective early warning systems about pending disputes, ensure there is good information sharing with national and sub–national entities, and that they have units within government ready to deal with investment conflicts as they arise. At the same time, ICSID has developed a training course to assist parties in understanding and anticipating steps in an arbitration once commenced, and we continue to offer these sessions in locations around the world.

Second, we need more effective ways to deal with time and costs. Such adjustments are always challenging because of the need to protect due process while ensuring expeditious process. ICSID has also adopted a number of practice techniques to reduce or avoid delay. These include an arbitrator calendar created on the date of tribunal constitution and maintained throughout the case; internal service standards; templates for standard documents; regular reporting to parties on the use of funds in the case; and regular reporting to parties on the status of award–writing.

That said, can we think of creative techniques? For example, could a tribunal–appointed expert be charged with calculating damages based on a set of legal and factual assumptions provided by the tribunal, rather than adding complex damage phases to already long hear-

ings? Similarly, could a single expert be named to rule on document disclosure arguments? We have seen this in a few cases and it has been quite successful. Could a small or expedited claims process be offered to parties with pre–set time frames and perhaps even pre–determined persons as arbitrators, ready to commence the case from day one? While I see advantages and disadvantages to all of these ideas, the point is that there must be ways we can streamline the process.

Third, perhaps the most complex area concerns selection and qualifications of arbitrators. These are debated issues in all types of arbitration, but seem to be particularly exacerbated in ISDS due to the quasi–public nature of the conflicts. ISDS is also beset by the debates about party vs. institutional appointment, standing vs. ad hoc adjudicative bodies, defining apprehension of bias, and the like. The question of apprehension of bias is especially difficult in ISDS. Some parties suggest that arbitrators are either "pro–State" or "pro–Investor" and that these positions are solidified by the desire for repeat appointments. They question repeated appointment of the same arbitrator by the same State, and by the same law firm. They are also concerned that arbitrators who have expressed a legal interpretation of a treaty are predisposed to the same result in future cases and cannot address a matter with an open mind. We hear this, in particular, in connection with difficult issues like MFN or compliance with treaty pre–conditions. The practice of "double hats" has provoked immense debate within the ISDS user community. There are no easy answers to this, but there is an acute need for consensus and clarity; the absence of clear international norms in this respect does a great disservice to ISDS and to arbitrators in this field[73].

Fourth, for the sake of discussion, is it time to reconsider an appellate mechanism for ISDS? There has been little appetite for this to date, despite the fact that there is a marker for it in all treaties based on the U.S. Model BIT[74]. But it continues to be mentioned, for example at the recent OECD stock–taking[75] and in the process for improving investment arbitration launched by the government of Finland in April, 2013[76]. ICSID proposed the outlines of such a system in 2006[77],

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[73] Veeder (n 66) 425.

[74] US Model BIT (n 39).

[75] D. Gaukrodger & K. Gordon, "Investor–State Dispute Settlement: A Scoping Paper for the Investment Policy Community" (OECD Working Papers on International Investment No. 2012/03) <http://dx.doi.org/10.1787/5k46b1r85j6f–en> accessed 11 June 2013.

[76] K.P. Sauvant & F. Ortino, "Improving the international investment law and policy regime: Options for the future" (Seminar on Improving the International Investment

and is ready to update or revise such an idea if there is broader interest among States. However this is done, it must be accomplished in a way that reduces fragmentation. There are already numerous venues and rules for ISDS, and layering additional standards of review or appellate bodies on top of existing mechanisms invites confusion rather than clarity. Nonetheless, there is certainly potential to develop an appellate function that supplants existing review mechanisms and adopts a standard of review that enhances a consistent interpretation of treaty obligations.

IX. Conclusion

It seems appropriate to conclude on the last words of Grotius, and his concern that by attempting many things, he had accomplished none. I hope we will not be timid to attempt many things in investment arbitration. Such attempts, and an openness to innovation, is how we will accomplish the kind of improvement that will allow ISDS to reach its full potential in the coming years.

Regime, Helsinki, 10–11 April 2013) <http://formin.finland.fi/public/ download.aspx?ID=113259&GUID=%7B1202781B–0D9B–4E9C–9621–FCA4DA87881E%7D> accessed 11 June 2013.

[77] *Vid.* ICSID, "Possible Improvements of the Framework for ICSID Arbitration" Item VI: An ICSID Appeals Facility? (22 October 2004) ICSID Secretariat Discussion Paper <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf> accessed 5 June 2013.