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RISKS OF A SELECTIVE APPROACH TO INVESTOR-STATE ARBITRATION

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TABLE OF CONTENTS

iv	About the Investor-State Arbitration Project
iv	About the Author
v	Acronyms and Abbreviations
1	Executive Summary
2	Introduction
3	Are Domestic Courts an Adequate Substitute?
6	Governments Are Becoming Important Critics of the System in Its Current Form
10	The Current Trend toward Regional and Mega-regional Agreements
11	Fragmentation of International Investment Law
11	Conclusion: Retreating from ISA Is Unlikely to Solve Any Problems
14	About CIGI
14	CIGI Masthead

ABOUT THE INVESTOR-STATE ARBITRATION PROJECT

Launched in November 2014, this project is addressing a central policy issue of contemporary international investment protection law: is investor-state arbitration (ISA) suitable between developed liberal democratic countries?

The project will seek to establish how many agreements exist or are planned between economically developed liberal democracies. It will review legal and policy reactions to investor-state arbitrations taking place within these countries and summarize the substantive grounds upon which claims are being made and their impact on public policy making by governments.

The project will review, critically assess and critique arguments made in favour and against the growing use of ISA between developed democracies — paying particular attention to Canada, the European Union, Japan, Korea, the United States and Australia, where civil society groups and academic critics have come out against ISA. The project will examine the arguments that investor-state disputes are best left to the national courts in the subject jurisdiction. It will also examine whether domestic law in the countries examined gives the foreign investor rights of action before the domestic courts against the government equivalent to those provided by contemporary investment protection agreements.

CIGI Senior Fellow Armand de Mestral is the lead researcher on the ISA project. Contributors to the project are Marc Bungenberg, Charles-Emmanuel Côté, David Gantz, Shotaro Hamamoto, Younsik Kim, Céline Lévesque, Csongor István Nagy, Luke Nottage, Ucheora Onwuamaegbu, Carmen Otero, Hugo Perezcano, August Reinisch and David Schneiderman. A conference was held in Ottawa on September 25, 2015. The papers presented at that conference are in the process of being issued as CIGI Papers and will ultimately appear as a collective book.



ABOUT THE AUTHOR

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ACRONYMS AND ABBREVIATIONS

ALBA	Bolivarian Alliance for the Peoples of Our America
ASEAN	Association of Southeast Asian Nations
BITs	bilateral investment treaties
CETA	Comprehensive Economic and Trade Agreement
DSB	Dispute Settlement Body
EPA	economic partnership agreement
FCN	friendship, commerce and navigation
FDI	foreign direct investment
FIPAs	foreign investment promotion and protection agreements
FTAs	free trade agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
IAs	international investment agreements
ISA	investor-state arbitration
ISDS	investor-state dispute settlement
MFN	most-favoured nation
MST	minimum standard of treatment
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
RTAs	regional trade agreements
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
WEF	World Economic Forum
WTO	World Trade Organization

EXECUTIVE SUMMARY

Investor-state arbitration (ISA) has been a controversial topic and a source of criticism and debate for quite some time. Yet, it continues to be a standard feature of modern international investment agreements (IIAs). While opposition to ISA has traditionally come from certain sectors of civil society, there appears to be a growing discomfort now among states as well.

Some critics suggest that ISA is unnecessary and should be left out of IIAs altogether. Others argue that it may be needed in IIAs between developed nations that are mostly capital exporters, on the one hand, and developing countries that require foreign capital to promote development, on the other, but that it is unwarranted in IIAs that developed countries enter into among themselves. They reason that developed countries have robust legal frameworks and institutions, including responsive judiciaries, that adequately protect private investment and, therefore, ISA can safely be omitted from such IIAs without any detriment to foreign investors or their investments.

This paper addresses some of the flaws in the arguments that have been advanced in support of this position, as well as some of its implications, especially the reaction that might be expected from developing countries if developed countries were to back away from ISA in their dealings with other developed nations but continue to demand its inclusion in their agreements with developing countries.

The argument that the domestic legal framework and institutions of developed countries provide adequate protection to private investors and their investments ignores that ISA provides a forum to resolve disputes concerning alleged breaches of international law by the state where the investment in question is located. Moreover, many states expressly deny private rights of action in the domestic forum for alleged breaches of international agreements, including IIAs.

It could, nevertheless, be argued that developed countries generally afford the same type of protections as IIAs against illegal government action that affects private investments, and that they also generally have responsive judiciaries that are able to resolve disputes expeditiously, efficiently and fairly. However, if the countries involved trusted each other's legal frameworks and institutions, IIAs — not just ISA — should be altogether unnecessary. Yet, the fact that one country finds it necessary to enter into an IIA with another reveals that neither is prepared to rely on the other's internal protections.

The argument is also misdirected. One of the main points of criticism against ISA is that it discourages governments from regulating in the public interest for fear of being sued by foreign investors before international tribunals. However, if a government's legitimate ability to regulate is fettered, it is hardly due to the operation of the dispute-settlement mechanism. Whatever the case, withdrawing from ISA in future agreements — when the system already comprises well over 3,000 IIAs — does not resolve the problem. The same goes for perceived procedural defects in ISA. Excluding ISA from IIAs would leave any such defects unresolved.

Talking about developed and developing countries may appear straightforward, and even seem an appealing way of drawing distinctions in the context of ISA, but only at a very superficial level. The truth is that the line is blurred. Countries around the world have been quite active at negotiating regional and mega-regional trade agreements that involve countries at very different levels of economic development. This is so even within clearly defined regional blocks, such as the European Union. Thus, attempting to draw distinctions based on the degree of economic development for purposes of carving out ISA may not be as easy as it looks at first sight. Indeed, it may prove undesirable or altogether infeasible.

In sum, excluding ISA from some IIAs will not resolve any of the underlying problems, actual or perceived. It is likely to intensify others, such as fragmentation of international investment law, and to fuel adverse reactions and political rhetoric from those countries upon which the system continues to be imposed. A better approach would be to work toward improving the system.

INTRODUCTION

Developed Democracies?

A word of caution is warranted at the outset. This paper refers to developed and developing countries, rather than to “developed democracies,” “democratic nations” or other like expressions because, even though there are no universally accepted definitions of a developed or developing country, these terms are widely used by the United Nations and other international organizations, and they relate closely to objective economic indicators.¹ As well, a country’s level of economic development frequently reflects on governance and the existence of responsive and accountable institutions, and responsive regulation.² In contrast, it is unclear who or what would define a “developed democracy,” and whether a particular country qualifies as one or not is likely to produce ardent discussion. Attempting to distinguish between different levels of democracy — or, more appropriately, of democratic achievements — in the context of international investment flows and protections also blurs one of the main issues that lies at the heart of the current debate, because democracy itself is but one of the relevant institutions, and not even one that has a greater impact on international investment flows: the perceived need for foreign investment protection under international law revolves around the existence of a stable and predictable framework based on good governance, responsive and accountable institutions and responsive regulation. Greater compliance with these standards results in turn in greater trust in government. As stated by the Organisation for Economic Co-operation and Development (OECD): “Inclusive governments and an active civil society put forward more responsive, equitable policies; access to information and proactive transparency help build citizens’ trust in government; high integrity standards curb corruption and ensure the fair and efficient use of resources; and a free, dynamic, and diverse media keeps citizens informed and empowers them to hold government to account for decisions and results.”³ More developed countries are more likely to meet those standards and, therefore, their governments are in turn more likely to enjoy greater confidence, including from the investment community and foreign governments that seek to protect their investors abroad.⁴

The Debate

ISA has been at the centre of controversy for some time. Its inclusion in the Comprehensive Economic and Trade Agreement (CETA),⁵ between Canada and the European Union, and the Transatlantic Trade and Investment Partnership (TTIP) negotiations between the United States and the European Union has again triggered criticism and provoked a heated debate.

ISA is currently a standard feature of modern IIAs.⁶ However, some critics argue that it is not needed and should be excluded from free trade and investment agreements altogether.⁷ Others believe that it may be necessary in agreements with some countries (for example, between developed countries on one hand, and developing or transition countries on the other hand), but not with others (for example, in agreements that developed countries enter into among themselves), depending on the quality of

1 See, for instance, the country classification in the UN’s *World Economic Situation and Prospects 2015*, Statistical Annex (New York: UN, 2015) 175 and the *Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings* (New York: UN, 2013), online: <<http://unstats.un.org/unsd/methods/m49/m49regin.htm#developed>>.

2 John Braithwaite, “Responsive Regulation and Developing Economies” (2006) 34:5 *World Development* 884.

3 Organisation for Economic Co-operation and Development, “Building more effective, accountable, and inclusive institutions for all”, *OECD and Post-2015 Reflections*, element 6, no 1 (Paris: OECD, 2015) at 1.

4 In this paper, the comments regarding developing countries apply equally to transition and least-developed countries, unless otherwise indicated.

5 Canada and the European Union concluded the CETA negotiations in September 2014. The complete text of CETA has been made available for information purposes. As of March 2016, it is still being translated into all the EU official languages, and thereafter will be subject to completion of the internal approval processes in Canada and the European Union. Online: <http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf>.

6 For purposes of this paper, IIAs include bilateral foreign investment protection agreements, as well as regional trade agreements (RTAs) that contain specific provisions for the protection of foreign investments, however they are designated. Bilateral investment treaties (BITs), foreign investment promotion and protection agreements (FIPAs), and agreements for the reciprocal promotion and protection of investments are examples of the former category; free trade agreements (FTAs), trade or economic partnership agreements (referred to as TPAs or EPAs, respectively), regional economic integration agreements and framework agreements on economic cooperation are examples of the latter, to the extent that they contain provisions on investment protection. They do not include friendship, commerce and navigation (FCN) treaties.

7 Simon Lester, “Liberalization or Litigation? Time to Rethink the International Investment Regime” (2013) *Policy Analysis 730*, CATO Institute, online: <www.cato.org/publications/policy-analysis/liberalization-or-litigation-time-rethink-international-investment [Lester]>.

each country's legal system and the recourse that it offers to settle disputes with host governments.⁸ Yet, states have continued negotiating and entering into IIAs that habitually include both substantive standards of investment protection and ISA. Indeed, 27 new IIAs were concluded in 2014 between developed and developing (or least-developed) countries (for example, the Canada-Cameroon FIPA and the Japan-Mongolia EPA), between developed countries (for example, the Australia-Korea and the Canada-Korea FTAs) and between developing countries (for example, the Mexico-Panama FTA or the Additional Protocol to the Framework Agreement of the Pacific Alliance [Pacific Alliance FTA]), bringing the total number of such agreements to 3,268 at the beginning of 2015.⁹ Even though several countries and regional integration organizations are currently revising their model IIAs, or have done so recently, this trend suggests that states continue to regard ISA as an important element of investment protection. However, there appears to be growing discomfort among states with ISA in its current form. Some governments are now expressing criticisms of ISA that until somewhat recently had mostly come from certain sectors of civil society. In fact, a few states have begun to exclude ISA from certain IIAs (notably Australia in its trade agreements with the United States and Japan).

This paper addresses some of the implications of excluding ISA from certain IIAs. One implication is the reaction that might be expected from developing countries if it were to be excluded from IIAs between developed countries, but the latter were to require that it continue to be part of their IIAs with developing countries.

As already noted, some critics argue that developed countries have robust legal frameworks and court systems that adequately protect private investment. They suggest that, therefore, ISA is unnecessary in IIAs between them. Judging from past experience, it could readily be concluded that, to the extent that developing countries are not parties to such agreements, it would be of no concern to them. Indeed, there does not appear to have been any reaction from developing countries to the 2005 US-Australia FTA or to the more recent Australia-Japan EPA that entered into force in January 2015, both of which left out ISA. However, the analysis now is more complicated than what such limited past experience would suggest, for several reasons.

First, the argument about developed countries having robust domestic frameworks and institutions is flawed in many respects. Second, in light of the current debate surrounding ISA, it cannot simply be assumed that developing countries' governments will remain impassive, especially now that governments of both developed and developing countries have become — or are becoming — important critics of the system. Third, there appears to be a growing trend toward entering into regional and mega-regional agreements that involve both developed and developing countries, and it is unlikely that such differences could be sustained in that context. Fourth, selectively including ISA in IIAs may exacerbate other problems, such as their perceived fragmentation. Finally, to the extent that there are actual problems with the system in its current form, retreating will hamper improvement in a context where the system is likely to remain active for the foreseeable future.

ARE DOMESTIC COURTS AN ADEQUATE SUBSTITUTE?

The suggestion that developed countries' legal frameworks and courts are sufficient to adequately protect private investment — domestic as well as foreign — and, therefore, ISA is unnecessary and should be excluded from IIAs they enter into is flawed in several respects. To begin with, it overlooks one crucial aspect of investor-state dispute settlement (ISDS): that in general it is intended to address alleged breaches of international law, not matters of domestic law. CETA, for instance, contains a typical formulation of applicable law in ISA: "A Tribunal established under this [Investment] Chapter shall render its decision consistent with this Agreement [i.e., CETA] as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties."¹⁰ Thus, whether the countries concerned deem their respective domestic legal frameworks and judiciaries to be robust may turn out to be completely irrelevant, because domestic

8 Roderick Abbott, Fredrik Erixon & Martina Francesca Ferracane, "Demystifying Investor-State Dispute Settlement (ISDS)" (2014) European Centre for International Political Economy, Occasional Paper No. 5.

9 United Nations Conference on Trade and Development (UNCTAD), "Recent Trends in IIAs and ISDS", *International Investment Agreements* (2015) *IIA Issues Note* 1, online: <www.unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf>.

10 *Comprehensive Economic and Trade Agreement*, Canada and the European Union, February 2016, online: <http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf>.

courts may not be available to entertain international law claims or, if they are, they may not be the best suited to deal with them. Indeed, domestic courts may not be vested with jurisdiction over claims arising under IIAs, as is the case in the United States, Canada and Australia, to name a few countries that expressly deny private parties a right of action before local courts for claims of breach of international agreements, including IIAs. Thus, however robust the internal legal system and local courts are perceived to be, they may be unavailable to resolve disputes arising under IIAs. Even if local courts are vested with jurisdiction to directly interpret international agreements — in Mexico, for instance, leaving aside the country's degree of economic development for a moment — they may not be the most suitable to deal with questions of international investment law and state responsibility.

Certainly, a counter-argument may be that it really does not matter, because the domestic legal framework in such countries welcomes and adequately protects investors and their investments from illegal government actions (for example, arbitrary, capricious or discriminatory actions, or uncompensated expropriations). Nonetheless, there is a persistent risk of a state being partial where “national interests” are concerned that IIAs are meant to address. Even countries that pride themselves on having developed, impartial, democratic and responsive institutions are not beyond reproach in the international plane, as Canadians, for instance, well know from their experience before US authorities and courts in trade remedy cases, as well as in the Loewen arbitration under Chapter 11 of the North American Free Trade Agreement (NAFTA).¹¹

In any event, a more basic question is, if two countries trust each other's laws and institutions, why would they require international investment protection rules in the first place? In other words, why would those countries deem it necessary to enter into an IIA in whatever form (a BIT, for instance, or an investment chapter in an FTA)? This issue can be analyzed in two parts.

First, the countries in question may feel that the desired degree of investment liberalization between them has not been achieved and they may therefore seek to increase it by entering into an IIA. BITs do not usually provide for greater openness than what internal laws already grant. Rather, they deal with post-establishment rights: in terms of access and performance of investments, in essence they are intended to secure that, in those sectors where foreign investment is already allowed by the existing legal framework, investors of the other party and their investments will be treated no less favourably than national investors and their investments (i.e., they will be granted national treatment) or than investors from any other country and their investments (i.e., they will be granted most-favoured nation [MFN] treatment). In contrast, FTAs such as NAFTA also provide for pre-establishment rights, either by consolidating the level of openness in those sectors in which foreign investment is already allowed to participate or by providing for further liberalization, in both cases on the basis of national treatment, whether limited to covered sectors by way of so-called positive lists (lists of the sectors or activities that are subject to the agreement's provisions), or across all sectors except those specifically reserved by way of so-called negative lists (lists of each party's reservations to the national treatment or certain other provisions).

Second, in addition to protecting investors of another party and their investments relative to the treatment afforded to nationals of the host country or of third countries (i.e., from denial of national or MFN treatment), IIAs generally contain a set of absolute foreign investment protections by reference

11 When Canada negotiated its bilateral FTA with the United States in 1987, one of its main concerns was that the US authorities and courts were biased in favour of domestic producers when it came to the application of anti-dumping and countervailing duties. Thus, it proposed a dispute settlement mechanism whereby judicial review of final anti-dumping and countervailing duty orders would be replaced by review before binational panels. This mechanism was essentially carried over to NAFTA Chapter 19. The so-called Loewen dispute arose out of litigation brought against the Loewen Group, a Vancouver, British Columbia-based funeral home and insurance company and a subsidiary in the United States, by US competitors based in Mississippi. The litigation involved a commercial dispute in Mississippi. The claim before the Mississippi courts was for no more than US\$5 million. However, the jury awarded the US competitors damages of \$500 million, including \$75 million for emotional distress and \$400 million in punitive damages. According to the claimants in the international arbitration under NAFTA, the trial judge repeatedly allowed extensive irrelevant and highly prejudicial references to their foreign nationality (which was contrasted to their US competitors' Mississippi roots), race-based distinctions between the US and Canadian companies, and class-based distinctions between the Loewen companies (which were portrayed as large, wealthy corporations) as opposed to their US competitors (which were portrayed as family-owned businesses). The Loewen companies sought to appeal the \$500-million verdict and judgment but were confronted with the application of an appellate bond requirement amounting to 125 percent of the judgment, which the Mississippi Supreme Court refused to reduce, despite its authority to do so. Facing immediate execution in the absence of a bond, the Loewen companies settled for payment of \$175 million. *Loewen Group, Inc. and Raymond L. Loewen v United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, 1 (International Centre for Settlement of Investment Disputes) online: <www.italaw.com/sites/default/files/case-documents/ita0469.pdf>.

to internationally accepted minimum standards that are independent from the treatment that the host country grants to its nationals. Such protections include:

- the minimum standard of treatment (MST) in accordance with international law, which requires that foreign investments be treated fairly and equitably, that they be granted full protection and security, and granted access to independent and impartial courts, among other such protections;
- that expropriations be undertaken for a public purpose only, in accordance with due process of law, and subject to full, adequate and prompt compensation; and
- that investors of another party and their investments be allowed to make international transfers freely.

If the developed countries' intention in entering into an IIA were to merely secure greater access to each other's market through the national treatment and MFN clauses, it seems unlikely that the absence of ISA and other investment protections would be cause for concern to other countries, including developing countries. Indeed, the World Trade Organization (WTO) General Agreement on Trade in Services (GATS) is that type of agreement. In addition to cross-border trade in services, it applies to the so-called mode 3 of supply: "the supply of a service ... by a service supplier of one Member, through commercial presence [i.e. investment] in the territory of any other Member" (GATS article 1). National and MFN treatment, and market access in the sectors identified in each member's positive list of commitments are the main pillars on which the GATS is founded. Other than provisions concerning freedom of transfers, the GATS does not contain other investment protections typically included in IIAs (for example, MST or expropriation clauses).

Although the lack of ISDS does not necessarily imply that one country trusts the other's legal framework and institutions, national and MFN treatment are more basic types of protections. Thus, state-to-state dispute settlement may be deemed sufficient to ensure market openness in the long term, but it comes at a cost to private parties engaged in international trade and investment because it is not intended to compensate them in case government action is found to be inconsistent with international law. Of course, this is the case in matters concerning trade in goods and services, generally. For instance, in the recent WTO case involving US mandatory country-of-origin labelling requirements for agricultural products, (*United States — Certain Country of Origin Labelling (COOL) Requirements*, better known as US-COOL) a panel found that US regulations were in breach of the United States' WTO obligations because they accorded less favourable treatment to imported Canadian and Mexican livestock than to like domestic livestock. The WTO Appellate Body upheld the panel's findings (albeit for different reasons) and concluded that the US requirements have a detrimental impact on imported livestock because they create an incentive for processors to use exclusively domestic livestock, and a disincentive against using like imported livestock.¹² In June 2015, both Canada and Mexico requested authorization from the WTO Dispute Settlement Body (DSB) to suspend certain tariff concessions and related obligations to the United States given the latter's continued failure to comply with its WTO obligations and its adverse effects on Canadian and Mexican stakeholders. Canada requested that the DSB authorize it to suspend concessions in the amount of US\$2.5 billion a year, until such time as the United States brings its measures into conformity with its relevant international obligations.¹³ Mexico's request was for US\$713 million annually.¹⁴ (The matter was referred to arbitration and the quantum for each party was reduced.) However, even if the value of the concessions suspended serves to compensate overall trade flows between the parties, respectively (in addition to pressuring the United States to comply with its obligations), the fact is that Canadian and Mexican producers or exporters of livestock will not be compensated under the WTO dispute settlement mechanism for any negative impact in their exports to the United States.

12 WTO, *United States — Certain Country of Origin Labelling Requirements*, Reports of the Appellate Body, WTO Doc WT/DS384/AB/R and WTO Doc WT/DS386/AB/R (29 June 2012).

13 WTO, "Canada's request to suspend concessions in 'US—COOL' dispute goes to arbitration", *Dispute Settlement News Items* (17 June 2015), online: <www.wto.org/english/news_e/news15_e/dsb_17jun15_e.htm>.

14 WTO, *United States — Certain Country of Origin Labelling (COOL) Requirements: Recourse By Mexico to Article 22.2 of the DSU*, WTO Doc WT/DS386/35 (19 June 2015).

While this may be a standard feature of state-to-state dispute settlement, cross-border investment is qualitatively different from cross-border trade in goods and services, at least in one important respect: it involves the establishment of an investor's property or assets in another country's territory for purposes of performing an economic activity or, more generally, the investor's commitment of capital or other resources to such economic activity in that country's territory. Hence, the impact on the investor of government action that is inconsistent with international law may be greater, relative to the investor's business, property, assets, capital and other resources, than a similarly inconsistent action that obstructs cross-border flows of goods and services. Consequently, international law has historically sought to protect aliens and their property abroad since the advent of FCN treaties or, in modern parlance, to protect foreign investors and their investments abroad, by requiring compensation for losses or damage incurred by reason of a state's internationally wrongful acts.

In contrast to the more basic market opening provisions, the inclusion of absolute investment protections in an IIA does reflect a lack of confidence in a country's legal system and institutions, or in each other's, reciprocally. Thus, if developed countries deem including such absolute investment protections in an IIA necessary, but at the same time were to decide to selectively diminish the overall level of investment protection by leaving out ISA, it would be likely to provoke a reaction from other countries. Even if the states concerned are developed countries, it would be hard to explain why it is acceptable to reduce the level of investment protection if trust in each other's legal framework and institutions is lacking and local courts may be either unavailable or unsuitable. Likewise, it would be hard to explain why, in such circumstances, some countries should be subject to international law standards before international tribunals in damages proceedings, and others to domestic law standards before local courts, perhaps more often than not in proceedings involving questions of legality that are unlikely to result in payment of damages.

GOVERNMENTS ARE BECOMING IMPORTANT CRITICS OF THE SYSTEM IN ITS CURRENT FORM

The main criticisms surrounding ISA may be broadly grouped into three categories. First, critics have raised concerns about certain substantive provisions of IIAs. They essentially argue that ISA affects a country's right to regulate "in the public interest," effectively creating what has been termed a "regulatory chill," principally because of broad obligations on fair and equitable treatment and indirect expropriation. Second, critics argue that the ISA process has several flaws, especially when compared to domestic judicial systems. In fact, some have characterized ISA as "the world's worst judicial system."¹⁵ A third category groups concerns that are political in nature.

Governments are now increasingly expressing concerns about a country's right to regulate and perceived procedural flaws that were initially voiced by certain sectors of civil society. However, exclusion of ISA from IIAs does not address either problem and may only exacerbate political rhetoric against the system.

Right to Regulate and Regulatory Chill

Some critics have expressed concern that the mere possibility of investor-state claims leads to regulatory chill, where governments are discouraged from regulating due to the fear of being sued by foreign investors for monetary damages under IIAs.¹⁶ In truth, however, it is not the fear of being sued, but rather the consequences of breaching international obligations that should preclude governments from adopting certain measures or taking certain actions. In other words, ISA (or any other dispute-settlement mechanism, for that matter) is not the culprit.

To say that regulation is in the public interest does not make it consistent with the applicable international framework. Indeed, all government regulation should, as a matter of principle, serve the public interest. Yet, while certain matters, such as the protection of human life or health, are undoubtedly always in the public interest, whether others are or not is often a question of policy. (For instance, the Second Ministerial Conference of Latin American States Affected by Transnational Interests reaffirmed,

15 Martin Khor, "The World's Worst Judicial System?" *South Bulletin* 74 (Geneva: South Centre, 5 July 2013).

16 Lester, *supra* note 7.

in 2014, each member’s “sovereign right to look after their respective peoples’ well-being in the face of inequities caused by the system of protection of investments and dispute settlement,” and also declared that “the use and repossession of each state’s natural resources in accordance with its own plans and development policies for the benefit of its inhabitants, as well as ensuring the protection of human rights and preservation of the environment for present and future generations in the context of contracts, agreements and other legal acts entered into with foreign investors, is a sovereign right.”¹⁷ Moreover, even where the public interest genuinely motivates regulation, frequently its form or content is inconsistent with international law.

In any event, if a country’s ability to regulate is hampered in any way, it is not because of the dispute-settlement provisions, but rather because of the substantive obligations that it has undertaken. To illustrate the point, just as the obligation to grant national treatment should preclude a country from regulating in a manner that protects its nationals by discriminating against foreigners, if a country accepts a stabilizing clause in a state contract, it may be precluded from raising taxes or adopting certain other measures that affect the investments covered by that contract. Similarly, the MST clause in an IIA would preclude the host government from taking arbitrary actions against foreign investors, even if it takes such actions against its own nationals. In the US-COOL case cited above, it is not the “fear of being sued” or even the possibility of Canada and Mexico retaliating that should have precluded the United States from regulating in a discriminatory manner. But having done so, the United States could not have expected to be able to maintain, without consequence, measures that have been determined to be inconsistent with its international obligations. It is no different in the investment context.

Granted, even though experts explain that nothing in IIAs impedes a government’s capacity to regulate or precludes legitimate domestic policy making,¹⁸ and governments have equally stressed this point,¹⁹ there is genuine concern that certain provisions in IIAs, as they have been interpreted by some international tribunals, may indeed interfere with states’ legitimate right to regulate, and that such provisions may have been abused by investors and actually misinterpreted by international tribunals. But withdrawing from ISA hardly solves the problem, and may create others.

In principle, all countries should have an equal right to regulate, and if ISA hampers a developed country’s right, the obvious conclusion is that it affects every other country’s right at least in the same measure. In fact, it may be argued that it affects developing countries to a larger extent — and least-developed countries even more so — because, in general, their legal and institutional frameworks are less developed as well and they therefore have a greater need to regulate. Thus, if developed countries begin to exclude ISA under the argument that it affects their right to regulate, it is likely that developing countries will seek to protect their own rights in the same manner. From an international law perspective, it does not make any sense that some governments should have a right to regulate but others should not enjoy that right in the same measure.

Procedural Flaws

Critics also argue that the ISA procedure is defective in several respects. Flaws include: the lack of judicial review or an appeal mechanism; a lack of transparency; and concerns regarding arbitrators, including the method of appointment, their lack of tenure, the lack of a code of conduct and conflicts of interest. It is useful to look at the history of ISA in order to understand its structure and perceived

17 Segunda Conferencia Ministerial de Estados Afectados por Intereses Transnacionales, *Declaración de Caracas*, 10 September 2014, at 1–2, online: <www.cancilleria.gob.ec/wp-content/uploads/2015/06/Declaraci%C3%B3n-II-Conferencia-Ministerial-Caracas.pdf>.

18 Daniel J Ikenson, “A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement” (March 2014) *Free Trade Bulletin* 57, CATO Institute, online: <www.cato.org/publications/free-trade-bulletin/compromise-advance-trade-agenda-purge-negotiations-investor-state>.

19 Office of the United States Trade Representative, *Investor-State Dispute Settlement (ISDS)* (March 2015) online: <www.ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds> [Office of the US Trade Representative]; European Commission, *Investment in TTIP and beyond: The path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court*, Concept Paper (Brussels: European Commission, 5 March 2015) online: <www.trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF>; Canada, House of Commons, “Response to Question No. 958 on the Order Paper”, *House of Commons Debates*, 41st Parl, 2nd Sess, Vol 147, No 185 (12 March 2015) at 86 (Hon Andrew Scheer).

shortcomings in the modern context. William Dodge²⁰ and Kenneth Vandeveld²¹ offer a detailed history of IIAs. Many of the critics' concerns are justified. Others are not.

In general, ISA involves the responsibility of states for internationally wrongful acts. As such, and for the reasons explained above, full-fledged judicial review of arbitral awards by domestic courts would defeat the purpose of international arbitration. Limited judicial review may be available in order to resolve questions of excess of authority and basic procedural defects such as bias or denial of due process. It may result in an award being set aside or its enforcement refused. In general, grounds for setting aside an arbitral award are very similar to those for refusing to enforce it.²² The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (known as the ICSID Convention)²³ provides that an award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in the convention itself. While it does not allow any form of judicial review, it does provide for an annulment mechanism before international ad hoc annulment commissions. Grounds for annulment are similarly limited to matters of excess authority and basic procedural defects.

The question of appeal in international arbitration has been described by Michael Reisman as “a tension between two control system policies: justice and finality”²⁴ or, similarly by William Park, as “the rival goals of finality and fairness.”²⁵ It can be traced as far back as the peace conferences that led to the Hague Conventions for the Pacific Settlement of Disputes of 1899 and 1907. Arbitration was recognized as “the most effective and at the same time the most equitable means of settling disputes” concerning questions of a legal nature, and especially in the interpretation or application of international conventions.²⁶ Both conventions provided that an award was binding on the parties in dispute and, when “duly pronounced and notified ... [it] settles the dispute definitively and without appeal.”²⁷ The United Nations International Law Commission expressly discussed the possibility of an appeal mechanism when it worked on the Rules for Arbitral Procedure in the 1950s. It was rejected in favour of finality of the award, subject to the possibility of its revision or annulment on limited grounds.²⁸ It appears that such rejection may have been more the result of inertia than a conscious decision that finality should prevail over justice.²⁹ The question is being revisited. Not only has the WTO Dispute Settlement Understanding incorporated an appeals mechanism and established a standing Appellate Body, but IIAs are increasingly contemplating that possibility, and calling for an analysis and discussion to that effect (for example, recent IIAs entered into by the United States, Canada, the European Union and several Latin American countries). The discussion is taking place in multiple fora, but it is far from being concluded or even from being narrowed down. There are no decisions yet on whether an appeals mechanism should be ruled out or built into ISDS and, if the latter, what form it should take; what the nature and composition of the deciding body or bodies should be; what the scope of appeal should be; or what effects decisions on appeal should have beyond the disputing parties and the individual cases, among other issues.

Transparency of international dispute-settlement proceedings involving states is another issue that has been in continuous evolution for the past two decades. Indeed, the arbitral tribunal in the *Abaclat et al v Argentine Republic* case noted in 2010: “the ICSID Convention and Arbitration Rules

20 William S Dodge, “Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement” (2006) 39:1 *Vand J Transnat'l L* at 37.

21 Kenneth J Vandeveld, “A Brief History of International Investment Agreements” (2005) 12:1 *UC Davis J Int'l L & Policy* 157.

22 See article 34 of the United Nations Commission on International Trade Law [UNCITRAL] Model Law on International Commercial Arbitration and article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

23 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, International Centre for Settlement of Investment Disputes (ICSID), open for signature 18 March 1965, at 53 (entered into force 14 October 1966; current membership 159 countries) [ICSID Convention].

24 W Michael Reisman, “Control Mechanisms” in W Michael Reisman et al, eds, *International Commercial Arbitration. Cases, Materials and Notes on the Resolution of International Business Disputes* (New York: The Foundation Press, 1997) 965.

25 William W Park, “Why Courts Review Arbitral Awards” in Robert Briner et al, eds, *Recht der Internationalen Wirtschaft und Streiterledigung im 21. Jahrhundert: Liber Amicorum Karl-Heinz Böckstiegel* (Koln: Carl Heymanns, 2001) 596.

26 Hague Convention for the Pacific Settlement of Disputes 1899, art 16 [1899 Convention]; Hague Convention for the Pacific Settlement of Disputes 1907, art 38 [1907 Convention].

27 1899 Convention, art 54; 1907 Convention, art 81.

28 Hugo Perezcano, “Enhancing the Dispute Settlement System or Much Ado about Nothing” in Ian A Laird et al, eds, *Investment Treaty Arbitration and International Law* (Huntington, NY: Juris, 2013) 1–10.

29 *Ibid.*

do not comprehensively cover the question of the confidentiality/transparency of the proceedings.”³⁰ International tribunals have therefore dealt with the issue on a case-by-case basis. However, states have increasingly been providing for greater transparency of ISDS (and other international dispute-settlement proceedings, for example, at the WTO). The NAFTA Free Trade Commission was perhaps the first to have adopted transparency rules for ISA proceedings through a note of interpretation issued in 2001,³¹ but such rules have found their way into IIAs, such as the Dominican Republic-Central America-US FTA, the Canada-Korea FTA or the Pacific Alliance FTA, among others. More recently, UNCITRAL issued its Rules on Transparency in Treaty-based Investor-State Arbitration, and newer IIAs, such as CETA, are beginning to incorporate them. Nevertheless, it can hardly be said that transparency issues have been addressed comprehensively or in a dispositive manner.

Countries have also begun to address concerns about arbitrators. For instance, CETA includes a code of conduct for arbitrators in ISA proceedings. However, the more recently concluded Trans-Pacific Partnership (TPP)³² FTA so far only calls for the parties to provide guidance on the application of the code of conduct for state-to-state dispute-settlement proceedings to arbitrators in ISA, as well as of other relevant rules or guidelines on conflicts of interest in international arbitration.³³

Yet, however legitimate concerns about procedural deficiencies may be, withdrawing from ISA hardly seems the proper way to resolve them. Indeed, the system has evolved — and continues to evolve — because both developed and developing countries face cases and have shared concerns. In fact, both the United States and the European Union pride themselves on being at the forefront of updating, upgrading and clarifying investment protection and ISDS standards.³⁴

Feeding Present-day Political Rhetoric

As noted by one commentator, disillusionment with the IIAs and ISA has prompted a variety of actions by governments, such as suspending negotiations of new agreements, attempts to renegotiate or withdraw from existing IIAs, and withdrawal from the ICSID Convention.³⁵ Bolivia, Cuba, the Dominican Republic, Ecuador, Saint Vincent and the Grenadines, and Venezuela also instituted the Ministerial Conference of Latin American States Affected by Transnational Interests. Argentina, El Salvador, Guatemala, Honduras and even Mexico are observers; while Chile, Colombia, Costa Rica, Peru and Uruguay, among other Latin American countries, as well as Algeria, Angola, Namibia and Zimbabwe from Africa, and India, Indonesia, Laos, Malaysia, Palestine, Qatar and Russia from Asia are invitees.

The First Ministerial Conference, held in Guayaquil, Ecuador, on April 22, 2013, declared, “That the recent events in several countries in the Latin American region related to disputes between States and transnational enterprises have shown that there continue to be awards that are in breach of international law, State sovereignty and are contrary to legal institutions because of the economic power of certain enterprises and the failings of international systems for the settlement of investment disputes[.]”³⁶

It therefore called for the institution of regional mechanisms for the settlement of investment disputes, as well as promoting global agreements, such as within the United Nations, to monitor earnings and advantages gained by transnational enterprises in developing countries, their contribution to the host countries’ development and to detect possible abuses in their dealings with states. The conference met again in 2014. It applauded the progress to establish a regional ISDS alternative.³⁷ In June 2015, Portal Alba, an organization that describes itself as the main Internet source on the principles, progress,

30 *Abaclat et al v Argentine Republic* (2010) ICSID Case No. ARB/07/5, Procedural Order no 3, at 27 (International Centre for Settlement of Investment Disputes).

31 OAS, “Free Trade Commission of the North American Free Trade Agreement, Notes of Interpretation of Certain Chapter 11 Provisions” (31 July 2001), online: <www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp>.

32 The TPP was signed on 4 February 2016. It has not yet entered into force. The legally verified text was released on 26 January 2016. Online: <www.mfat.govt.nz/en/about-us/who-we-are/treaty-making-process/trans-pacific-partnership-tpp/text-of-the-trans-pacific-partnership/>.

33 See *Trans-Pacific Partnership Free Trade Agreement*, [Australia, Brunei Darussalam, Canada, Chile, Japan, Mexico, Malaysia, New Zealand, Peru, Singapore, United States, Vietnam], [4 February 2016] at chapter 9, art 9.21(6).

34 Office of the US Trade Representative, *supra* note 19; European Commission, *supra* note 19.

35 Khor, *supra* note 15.

36 Primera Conferencia Ministerial de Estados Latinoamericanos Afectados por Intereses Transnacionales, *Declaración de Guayaquil*, 22 April 2013, online: <www.cancilleria.gob.ec/wp-content/uploads/2013/04/22abr_declaracion_transnacionales_esp.pdf>.

37 Segunda Conferencia Ministerial, *supra* note 17.

structure and projects of the Bolivarian Alliance for the Peoples of Our America (better known by its shorter acronym, ALBA)³⁸ published an article on the TPP and TTIP that states:

The foundation of TTIP and TPP, that form [a] new world order suitable to transnational corporations, is evidenced by the controverted investor-state clause (ISDS, per its English acronym) in both documents, that provides for the establishment of private arbitral tribunals outside the fringes of national constitutions, something that *ipso facto* constitutes a breach of popular sovereignty, and through which transnationals [i.e., transnational or multinational corporations] may sue a state and collect multimillion [dollar] compensations, not only arising from the taking of a concession or an expropriation, but also from any change in legislation or from the implementation of any public policy, whether on education, health, social security, etc. that affects their interests.³⁹

Excluding ISA from IAS entered into between developed countries, rather than confronting its perceived difficulties, may only feed political rhetoric such as this.

THE CURRENT TREND TOWARD REGIONAL AND MEGA-REGIONAL AGREEMENTS

The General Agreement on Tariffs and Trade (GATT), since 1947, allows the WTO Members (then known as GATT Contracting Parties) to enter into RTAs for the purposes of forming customs unions or free trade areas,⁴⁰ notwithstanding the MFN clause. The GATS incorporated a similar provision that enables WTO Members to liberalize trade in services through RTAs, again notwithstanding the correlative MFN clause.

Countries have been quite active at negotiating RTAs. As of April 2015, almost 450 such agreements had been notified to the WTO, of which 262 were in force.⁴¹ Recent trends in economic integration reflect three types of dominant RTAs that are being negotiated or have recently been concluded, as noted by the World Economic Forum (WEF):

- FTAs of substantive current or potential trade and foreign direct investment (FDI) value, such as those between the United States and South Korea, Canada and South Korea, the European Union and Singapore, or China, Japan and South Korea.
- Consolidation RTAs, which expand existing RTAs through new membership or by merging with other RTAs, such as the Pacific Alliance FTA that fuses and further integrates six pre-existing FTAs among Mexico, Colombia, Peru and Chile, with possible extension to Costa Rica and Panama.
- Mega-regional RTAs, which are deeper integration partnerships in the form of RTAs involving countries or regions with a major share of world trade and FDI, and in which two or more of the parties are in a paramount driver position, or serve as hubs, in global value chains (i.e., the United States, the European Union, Japan or China). Examples include the TPP, CETA,⁴² the TTIP or the Regional Comprehensive Economic Partnership FTA between the 10 member states of the Association of Southeast Asian Nations (ASEAN) (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam) and the six states with which ASEAN has existing FTAs (Australia, China, India, Japan, South Korea and New Zealand).⁴³

38 Antigua and Barbuda, Bolivia, Cuba, Dominica, Ecuador, Grenada, Nicaragua, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Surinam and Venezuela integrate ALBA.

39 Paola Bianco, "TTIP y TTP: la constitución imperial" (2015) *Portal Alba*, online: <www.portalalba.org/index.php/2014-03-29-22-13-16/2014-04-01-19-17-31/comercio/4996-ttip-y-ttp-la-constitucion-imperial>.

40 *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187, art XXIV (entered into force 1 January 1949).

41 WTO, "Regional trade agreements" (2015), online: <www.wto.org/english/tratop_e/region_e/region_e.htm>.

42 The WEF report considers CETA an FTA under the first category (i.e., an FTA with substantive potential trade and FDI value).

43 WEF, *Mega-regional Trade Agreements. Game-Changers or Costly Distractions for the World Trading System?* Report, Global Agenda Council on Trade & Foreign Direct Investment (Geneva: World Economic Forum, 2014) at 50, online: <www3.weforum.org/docs/GAC/2014/WEF_GAC_TradeFDI_MegaRegionalTradeAgreements_Report_2014.pdf>.

These types of RTAs involve many partners from different regions that usually are at different levels of economic development. Mega-regional agreements in particular cover larger volumes of trade and aim at achieving deeper integration and including a wider scope of issues.⁴⁴

Attempting to carve out ISA between developed and developing countries may therefore not be as simple as in certain bilateral IIAs, such as the US-Australia FTA. Indeed, it may not be feasible at all. The TPP, for instance, involves 12 countries that are at different levels of economic development. The spectrum is quite broad: Australia, Canada, Japan, New Zealand and the United States, all of which are developed economies; and Brunei, Chile, Malaysia, Mexico, Peru, Singapore and Vietnam, which are developing countries. A divide between developed and developing countries in the application of ISA seemed — and indeed proved to be — untenable. Even the exclusion of certain countries from ISA — which appeared to be Australia’s position⁴⁵ — was not acceptable, as the outcome of the TPP negotiations showed.

The issue does not look any simpler even in seemingly bilateral negotiations, such as those involving the European Union. Indeed, while in a broad generalization the European Union may be regarded as a developed region, in reality it comprises a large number of countries that are at different levels of social, economic and institutional development. It would be infeasible to selectively exclude ISA from CETA, for instance. Also, absent appropriate safeguards, including ISA, Canadian investors — and the Canadian government — may be concerned about the risks of investing in Greece, the newer EU member states (for instance, Canada currently has FIPAs in force with the Czech Republic, Hungary, Latvia, Poland, Romania and Slovakia) or in certain other EU15 states,⁴⁶ such as Italy, given how their court systems operate.⁴⁷

FRAGMENTATION OF INTERNATIONAL INVESTMENT LAW

Commentators have raised concerns about fragmentation of international investment law resulting from the large number of IIAs and the proliferation of dispute-settlement mechanisms. Selective exclusion of ISA would only exacerbate fragmentation, even if a clean divide along developed/developing country lines could be achieved. However, given the unlikelihood of attaining such separation, a selective exclusion would only add layers of complexity to the problem, without really offering any solutions.

CONCLUSION: RETREATING FROM ISA IS UNLIKELY TO SOLVE ANY PROBLEMS

If, rather than seeking to improve the ISDS system, developed countries were to retreat from ISA, developing countries might find it easier to reject it as well. The proposition of excluding ISA from IIAs between developed countries either obfuscates the real problem (that there are ambiguities in certain substantive investment protections), or, more likely, it conceals an intention to shield developed countries from exposure to international damages claims (by excluding ISA in certain circumstances, coupled with a lesser likelihood that investors from developing countries would bring such claims⁴⁸) while preserving their investors’ ability to exploit the international investment protection system to their benefit when investing in developing countries. This is unlikely to be an acceptable solution from the developing countries’ perspective.

44 *Ibid.*

45 Kyla Tienhaara, “These TPP Safeguards Won’t Protect us from ISDS” in Chip Rolley (ed), *The Drum* (25 March 2015), online: <www.abc.net.au/news/2015-03-26/tienhaara-these-tpp-safeguards-wont-protect-us-from-isds/6350358>; Kyla Tienhaara, Sharon Friel & Deborah Gleeson, “Leaked TPP Investment Chapter Shows Risks to Australia’s Health” (Australian National University, 10 April 2015), online: <www.anu.edu.au/news/all-news/leaked-tpp-investment-chapter-shows-risks-to-australias-health>.

46 The EU15 countries (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom) were the members of the European Union prior to the accession of 10 additional countries in May 2004.

47 Craig Garbe, “Investment Arbitration and the Canada-EU Comprehensive Economic and Trade Agreement: Time for a Change?” *Investment Treaty News* (11 July 2011), online: <www.iisd.org/itn/2011/07/11/investment-arbitration-and-the-canada-eu-comprehensive-economic-and-trade-agreement-time-for-a-change/>.

48 On this latter point see, for instance, testimony of Gus van Harten: Canada, House of Commons, Standing Committee on International Trade, *Evidence: Standing Committee on International Trade*, 41st Parl, 1st Sess (27 March 2015), at 11 (Hon Rob Merrifield).

In any event, it is unlikely that developed countries will completely pull out of ISA in agreements with other developed countries. The US government, for instance, has made it clear that even though “countries with weak legal institutions are frequent respondents in ISDS cases, American investors have also faced cases of bias or insufficient legal remedies in countries with well-developed legal institutions”⁴⁹ and therefore considers ISA to continue to be an important element of overall investment protection.

Given the number of IIAs in force, it is quite certain that developed and developing countries will continue to face ISA claims in the time to come. ISA is not going to go away simply because some developed countries successfully rejected it in a few agreements with like countries. Hence, undoubtedly a better approach is to continue to work toward improving the system.

49 Office of the US Trade Representative, *supra* note 19.

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