

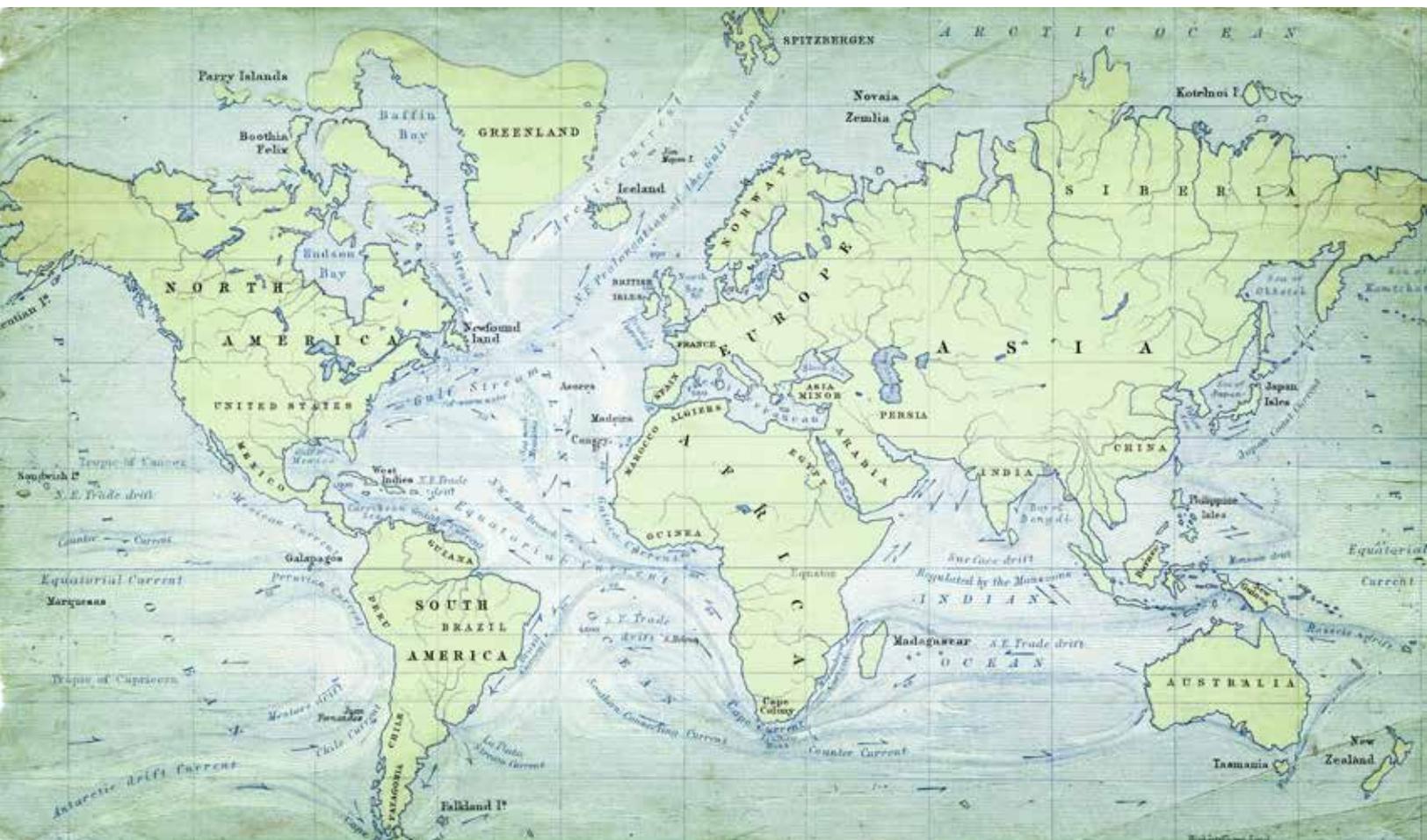


## INVESTOR-STATE ARBITRATION SERIES

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# LISTENING TO INVESTORS (AND OTHERS): *AUDI ALTERAM PARTEM* AND THE FUTURE OF INTERNATIONAL INVESTMENT LAW

DAVID SCHNEIDERMAN





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AND THE FUTURE OF INTERNATIONAL INVESTMENT LAW**

**David Schneiderman**



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## 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



David Schneiderman is a professor of Law and Political Science (courtesy) at the University of Toronto, where he teaches courses on Canadian and US constitutional law and on international investment law. He is the author or editor of 12 books, including *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (2008), *Resisting Economic Globalization: Critical Theory and International Investment Law* (2013) and, most recently, *Red, White and Kind of Blue? The Conservatives and the Americanization of Canadian Constitutional Culture* (2015).

**ACRONYMS AND ABBREVIATIONS**

BITs	bilateral investment treaties
EFILA	European Federation of Investment Law and Arbitration
FET	fair and equitable treatment
IIL	international investment law
INE	National Ecology Institute (Mexico)
ISA	investor-state arbitration
JRP	joint review panel
MIGA	Multilateral Investment Guarantee Agency
MTBE	methyl tert-butyl ether
NAFTA	North American Free Trade Agreement
PMRA	Pest Management Regulatory Agency
PROFEPA	Procuraduría Federal de Protección al Ambiente
SADC	South African Development Council



## EXECUTIVE SUMMARY

This paper enquires into an alternative foundation for investor rights linked to a theory of deliberative democracy and a procedural right to be heard. Theoretical accounts seeking to justify the rules-based system of international investment law typically rely on procedural defects in extant political systems. Investors, it is argued, are not well represented within host state political processes, thus the checking mechanism of investment arbitration provides “virtual representation” to the otherwise unrepresented. The problem with this story is that it is not well supported by the empirical literature. It turns out that investors have a variety of means available to them by which they can make their preferences known to political actors or that help to mitigate the diminution of investment value as a result of political risk.

This paper seeks to formulate a version of investor rights that corresponds better to concerns typically advanced to justify the investment law’s strictures, namely, that the interests of foreign investors fail to get taken into account within host states. Drawing upon historical and contemporary accounts within political theory, the paper advances a justification for investor protection that is limited principally to procedural protections associated with the Latin maxim *audi alteram partem* (“hearing the other side”). After outlining the foundations for this approach in English administrative law and political theory, the paper turns to selected arbitral awards in order to illustrate how a right to be heard would be advantageous to all the interests involved. The project proposes bringing together theory, history and practice in order to ground a theory of investor protection that better reconciles power, politics and democracy.

## INTRODUCTION

Much of international investment law (IIL) is premised on a distrust of public authority. Investments, once made, are subject to host state vicissitudes that are, it is feared, more likely to tilt in favour of local over foreign interests. This is attributed to “obsolescing bargains”<sup>1</sup> and the failure of states — even well-run democratic ones<sup>2</sup> — to take into account the interests of foreign nationals. Complaints about “instability”<sup>3</sup> and “arbitrariness” — that national states will “suddenly” change policy after investors enter into a host state’s economic space<sup>4</sup> — have led to insistence upon the availability of an exit from national legal orders. The rules-based system of IIL is offered up as a means for achieving this end. Its dispute settlement mechanism, investor-state arbitration (ISA), functions as a substitute for allegedly defective systems of dispute resolution found within national states. However extravagant the obsolescing bargain claim — as discussed below, it has not fared so well from an empirical point of view — distrust and suspicion continue to shape the regime’s rules and interpretive output.

There is much suspicion on the other side, too. IIL, it is said, is tainted by reason of its ever-expanding and continually evolving set of norms.<sup>5</sup> ISA grants to tribunals interpretive discretion that tilts, in a statistically significant way, in favour of foreign investors from capital-exporting states, revealing little deference to local administrative or legislative processes.<sup>6</sup> Moreover, outcomes in these disputes bear little relation to the domestic public law of even developed states.<sup>7</sup> Instead, they are intended to dampen

1 Raymond Vernon, *Sovereignty at Bay: The Multinational Spread of U.S. Enterprises* (New York: Basic Books, 1971) at 47.

2 If Vernon’s hypothesis was formulated in response to the behaviour of Latin American governments to US multinationals (see e.g. Theodore H Moran, *Multinational Corporations and the Politics of Dependence: Copper in Chile* (Princeton: Princeton University Press, 1974)) in the contemporary world, it has been generalized to apply to governments of all stripes, democratic or authoritarian.

3 For Alexis de Tocqueville, democratic “instability” — the constant variation of the laws — was one of the “evils inherent in democratic government.” Alexis de Tocqueville, *Democracy in America*, translated by Harvey C Mansfield & Delba Winthrop (Chicago: University of Chicago Press, 2000) at 238.

4 See e.g. World Bank, *World Development Report 1997: The State in a Changing World* (New York: Oxford University Press, 1997) at 41 [World Bank, *World Development Report 1997*].

5 Federico Ortino, “Substantive Provisions in IIAs and Future Treaty-Making: Addressing Three Challenges” in *E15 Initiative* (Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015), online: <<http://e15initiative.org/wp-content/uploads/2015/01/E15-Investment-Ortino-FINAL.pdf>>; David Schneiderman, “The Paranoid Style of Investment Lawyers and Arbitrators: Investment Law Norm Entrepreneurs and their Critics” in Chin Leng Lim, ed, *Alternative Visions of International on Foreign Investment: Essays in Honour of M. Sornarajah* (Cambridge: Cambridge University Press, 2016) 131 [Schneiderman, “The Paranoid Style”].

6 Gus Van Harten, *Sold Down the Yangtze: Canada’s Lopsided Investment Deal with China* (Toronto: International Investment and Arbitration and Public Policy, 2015); Gus Van Harten, *Sovereign Choices and Sovereign Restraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford: Oxford University Press, 2013) [Van Harten, *Sold Down the Yangtze*].

7 Lise Johnston & Oleksander Volkov, “Investor-State Contracts, Host-State ‘Commitments’ and the Myth of Stability in International Law” (2013) 24:3 *Am Rev Intl Arb* 361; Jan Kleinheisterkamp, “Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions” (2015) 78:5 *Mod L Rev* 793 at 813 [Kleinheisterkamp].

significantly state policy space.<sup>8</sup> The risk of regulatory chill, then, is real and non-trivial.<sup>9</sup> Though all this will be disputed by investment lawyers and arbitrators, these criticisms have given rise to doubts about the regime's utility not only among developing, but also developed, states.<sup>10</sup> Both sides to this debate view each other as imposing arbitrarily their own world views. "Dialogue is pointless," declares Jan Paulsson.<sup>11</sup> Dissensus seems likely to persist.

Drawing on principles of democratic theory, this paper proposes that we dampen dissensus and distrust by seeking out national processes that include all those affected.<sup>12</sup> What should be sought out are practices that best accommodate the inclusion of those that otherwise may be overlooked — whether they be foreign nationals or affected communities. It is not that such processes are likely to produce consensus — dissatisfaction and disagreement are as likely — but they can help to sway, even determine, policy outcomes.<sup>13</sup> Not only may deliberation generate better results, it may encourage adherence to, even confidence in, the ensuing outcomes.<sup>14</sup>

Of course, loyalty to an idea of procedural fairness will not make everyone happy either.<sup>15</sup> Conceptions of fairness are fraught with subjectivity — there will be dissensus here too. What is envisaged, instead, is a framework for "discourse, reasoning, and negotiation" by which opposing sides to controversial public policy questions get to air their points of view.<sup>16</sup> It ensures that, without easy exit, diverse viewpoints are given a public airing.<sup>17</sup> It means having recourse to politics, or voice, rather than to arbitration, or exit. "Voice is political action par excellence," declared Hirschman.<sup>18</sup> The idea is to take full advantage of a feature of well-functioning liberal democracies, namely, the opportunity to contest and debate rival political futures in the variety of settings where decisions are made about issues of public interest.<sup>19</sup> The hoped-for outcome is to disrupt understanding through reasoned argumentation, not to come to any final resolution.<sup>20</sup>

This paper offers up the rough outlines of a remedial process that both enhances domestic decision making and can act as either a complement to or a substitute for much of what goes on under the guise of investment arbitration, in particular, claims for fair and equitable treatment (FET).<sup>21</sup> What is proposed is a process premised on the Latin maxim *audi alteram partem* ("hearing the other side"). The object is to both enhance feelings of security for foreign investors and others by instituting consultative decision making (whether administrative or legislative), while generating processes that deliver a modicum of respect for decisions issuing out of democratically authorized decision-making institutions. This is a direction that some states appear to want to go, as seen in the establishment of an ombudsman to

8 *World Investment Report 2015: Reforming International Investment Governance*, UNCTAD (New York & Geneva: United Nations Conference on Trade and Development) at 125 [UNCTAD, *World Investment Report 2015*].

9 The validity of the claim about regulatory chill provides evidence that some states, often via non-transparent forms of argumentation, listen to investors. See David Schneiderman, "NAFTA's Takings Rule: American Constitutionalism Comes to Canada" (1996) 46:4 UTLJ 499; Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge: Cambridge University Press, 2009); Gus Van Harten & Dayna Nadine Scott, "Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada" (2016) 7:1 J Intl Dispute Settlement 92.

10 UNCTAD, *World Investment Report*, *supra* note 8. These criticisms are outlined in more detail in Schneiderman, "The Paranoid Style," *supra* note 5.

11 Jan Paulsson, *Denial of Justice in International Law* (Cambridge: Cambridge University Press 2005), at 236 [Paulsson, *Denial of Justice*].

12 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge, MA: MIT Press, 1996), at 104.

13 Jane Mansbridge et al., "The Place of Self-Interest and the Role of Power in Deliberative Democracy" (2010) 18:1 J Political Philosophy 64 at 68.

14 Richard B Stewart, "The Reformation of American Administrative Law" (1975) 88:8 Harv L Rev 1667 at 1761; Geneviève Cartier, "Administrative Discretion as Dialogue: A Response to John Willis (or, From Theology to Secularization)" (2005) 55:3 UTLJ 629; Carol Harlow & Richard Rawlings, *Law and Administration*, 3rd ed (Cambridge: Cambridge University Press, 2009) at 619-20.

15 It is unlikely to become what John Dewey hoped for: "the genuine instrumentality of an inclusive and fraternally associated public." John Dewey, *The Public and Its Problems* (New York: Henry Holt and Company, 1927) at 109.

16 Thomas M Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995) at 14. Again Dewey: "[n]o longer will views generated in view of special situations be frozen into absolute standards and masquerade as eternal truths" (Dewey, *supra* note 15 at 203).

17 Cass R Sunstein, *Going to Extremes: How Like Minds Unite and Divide* (Oxford: Oxford University Press, 2009).

18 Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge: Harvard University Press, 1970) at 16.

19 Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* (Cambridge: Harvard University Press, 1996). Chantal Mouffe, *Agonistics: Thinking the World Politically* (London: Verso, 2013) at 7.

20 There will be no expectation that foreign investors share with nationals a conception of political justice which they "freely come to live by and come to understand its virtues." John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), at xl. For this reason, Rawls's conception of "justice as fairness" implies too much prior agreement on substantive principles. See Joshua Cohen, "For a Democratic Society" in Joshua Cohen, *The Arc of the Moral Universe and Other Essays* (Cambridge: Harvard University Press 2010) 181 at 210.

21 It is this standard of protection, it is claimed, that lies at the "core" of today's debates over IIL. UNCTAD, *World Investment Report 2015*, *supra* note 8 at 137.

facilitate resolution of disputes in Brazil's new Cooperation and Investment Facilitation Agreements<sup>22</sup> or by encouraging the resolution of disputes within domestic bodies in South Africa's Promotion and Protection of Investment Bill.<sup>23</sup> In the overhaul of the investment treaty model proposed by the South African Development Council (SADC), it is envisaged that a right to "fair administrative treatment" replace FET.<sup>24</sup> Selected arbitral interpretation under FET also seems to endorse moving in this direction, with an avowed interest in procedural fairness and "natural justice."<sup>25</sup> Some academic commentary similarly proposes that FET be more narrowly confined to procedural, rather than substantive, review,<sup>26</sup> that binding domestic law, in regard to health, environment or social protections, be incorporated into arbitral decision making as "applicable law,"<sup>27</sup> and that treaty making draw upon administrative law practice internal to states.<sup>28</sup> A book written by this author concluded on this point, suggesting that IIL take up *audi alteram partem* as its organizing principle.<sup>29</sup> This paper is a first cut at developing this idea.

This proposal is intended to be a preliminary one, meant only to begin a discussion. No blueprint is on offer, only an imprecise sketch with which to move forward. As Jerry Mashaw cautions, "[p]romoting participation through structural design is a very tricky business."<sup>30</sup> The proposal is one drawn from a particular national legal experience, namely, English administrative law, whose rules have been absorbed by a number of common law legal systems. It is not dressed up as a "denationalized" solution to a global legal problem (although some political theorists and philosophers have made this claim — see discussion in the second section, "Antecedents").<sup>31</sup> Instead, this paper is intended to begin the conversation of harnessing existing institutions, or building new ones, that can accommodate more robust opportunities to be heard in public view so that all those affected by a decision have a voice in its formulation.<sup>32</sup> Nor is the paper intended as a contribution to the literature on global administrative law,<sup>33</sup> although it does endorse a modest role for international law in the concluding section that resembles "administrative law lite."<sup>34</sup> So although the paper has affinities with, and might be situated within, that project, it is not conceptualized as such since it is not intended to supplant or complement national administrative legal processes with a new global legal order. Instead, the proposal advanced here is intended to build upon, and improve where necessary, existing legal processes within host states.

Readers who wish to move directly to a discussion of the theoretical antecedents of the proposal should proceed to the second section, "Antecedents." The discussion in the third section, "Benefits," assesses how an emphasis on listening to investors may have made a difference in a number of select investment disputes. Finally, the fourth section, "Rejoinder," anticipates and critiques the response that investment arbitration already provides an adequate forum for the resolution of disputes that involves hearing from all sides. First, however, the paper looks at some of the rationales that have been offered to justify removal of investment disputes from the domestic to the supranational arena.

22 Martin Dietrich Brauch, "The Brazil-Mozambique and Brazil-Angola Cooperation and Investment Facilitation Agreements (CIFAs): A Descriptive Overview" (21 May 2015) Investment Treaty News (IISD), online: <[www.iisd.org/itn/2015/05/21/the-brazil-mozambique-and-brazil-angola-cooperation-and-investment-facilitation-agreements-cifas-a-descriptive-overview/](http://www.iisd.org/itn/2015/05/21/the-brazil-mozambique-and-brazil-angola-cooperation-and-investment-facilitation-agreements-cifas-a-descriptive-overview/)>.

23 B18-2015, *Promotion and Protection of Investment Bill* (S Afr), 22 July 2015, online: <[www.parliament.gov.za/live/commonrepository/Processed/20150908/609997\\_1.pdf](http://www.parliament.gov.za/live/commonrepository/Processed/20150908/609997_1.pdf)>.

24 *SADC Model Bilateral Investment Treaty Template with Commentary*, South African Development Community (SADC) (July 2012) at Option 2, Art 5.1, online: <[www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf](http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf)>. Some states are abandoning FET altogether (*Model Text for the Indian Bilateral Investment Treaty*, India (2015), online: <[https://mygov.in/sites/default/files/master\\_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf](https://mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf)>).

25 *Waste Management v Mexico*, Award, ICSID Case No ARB(AF)/00/3 (30 April 2004) at para 98 [*Waste Management*].

26 Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge: Cambridge University Press, 2014), at 334.

27 Francesco Francioni, "Access to Justice, Denial of Justice and International Investment Law" (2009) 20:3 Eur J Intl L 729 at 738-39.

28 Jason Webb Yackee, "Controlling the International Investment Law Agency" (2012) 53: Harv Intl LJ 391.

29 David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008) at 237 [*Constitutionalizing Economic Globalization*].

30 Jerry L Mashaw, *Due Process in the Administrative State* (New Haven: Yale University Press, 1985) at 261.

31 This is a recurring problem in the investment law literature. See David Schneiderman, "The Global Regime of Investor Rights: Return to the Standards of Civilized Justice?" (2014) 5:1 Transnat'l Legal Theory 60.

32 Stewart, *supra* note 14 at 1762.

33 Benedict Kingsbury, Nico Krisch & Richard B Stewart, "The Emergence of Global Administrative Law" (2005) 68:3&4 Law & Contemp Probs 1 at 15.

34 Richard B Stewart, "US Administrative Law: A Model for Global Administrative Law?" (2005) 68: Law & Contemp Probs 63 at 103.

## REMOVAL

The theory underlying the spread of investment treaty norms typically relies on some version of distrust associated with public (or “rational”) choice theory. According to this account, government action is premised, like economic activity, on the pursuit of self-interest and so, in the quest for electoral success, will prefer local to foreign investors. All acts of public authorities should, on this basis, be treated with suspicion.<sup>35</sup> Raymond Vernon’s idea of the obsolescing bargain operates on this presumption of distrust and so helps to explain why host state activity as regards foreign investors needs to be policed and curbed.<sup>36</sup> It is in the post-establishment phase, Vernon maintains, that investments are most vulnerable to political risk.<sup>37</sup> The obsolescing hypothesis offered to analysts “the most powerful framework for thinking about non-commercial risk,” declared Louis Wells Jr.<sup>38</sup> It turns out that the hypothesis may not be well supported by the evidence. Rodolphe Desbordes and Julien Vauday, for instance, in a study of 4,085 US and foreign firms operating in 48 developing countries, tested for the model and found otherwise: there is “more empirical ground” for a “foreign privilege” model than a “national preference” one.<sup>39</sup> Emma Aisbett, relying on World Bank data drawing on the experience of companies operating in 80 countries during the period 1999–2000, similarly finds that foreign firms are “no more or less influential” than domestic firms, and that “both foreign and domestic multinationals are significantly more influential” than other firms.<sup>40</sup> This is not to say that states do not behave badly, but rather that large data sets do not support the obsolescing hypothesis.<sup>41</sup>

If the obsolescing bargain does not offer a good descriptive account according to the empirical evidence, others have conscripted a version of democratic theory into IIL associated with the idea of “representation reinforcement review.”<sup>42</sup> It is claimed that because foreign investors do not have a vote and so are not “represented” in democratic processes operating within host states, they should be given a forum in which to contest adverse host state outcomes.<sup>43</sup> Business firms, of course, do not have a right to vote in any operative democracy. Even so, this democracy-promoting rationale does not sit well with the empirical findings of two sets of literature, the first having to do with “business and politics,” and the second with “political risk.”<sup>44</sup> Premised on the assumption that foreign investors seek to maximize profits, we learn from the first body of scholarship that there is a very high likelihood that foreign subsidiaries will participate, directly or indirectly, in host state deliberations that affect future profitability.<sup>45</sup> We also learn, from the political risk literature, that foreign firms adopt a variety of strategies, internal to the firm’s operations, that maximize the foreign firm’s bargaining power vis-à-vis the host state.<sup>46</sup> Even if risk mitigation tactics work better in some sectors than in others, new techniques for managing political risk, attentive to knowledge of local conditions, will emerge to fill in the gaps.<sup>47</sup> Taken together, the evidence generates less gloomy prospects for mitigating risk than posited by talk

35 James M Buchanan, “Politics Without Romance: A Sketch of Positive Public Theory and its Normative Implications” in James M Buchanan & Robert D Tollison, eds, *The Theory of Public Choice — II* (Ann Arbor, University of Michigan Press, 1984) 11. Amartya Sen appropriately asks what is rational about the pursuit of self-interest to the “exclusion of everything else”? See Amartya Sen, *On Ethics and Economics* (Oxford: Blackwell, 1987) at 15.

36 Vernon, *supra* note 1.

37 Once “the signatures have dried on the document,” Vernon wrote, “powerful forces go to work that quickly render the agreements obsolete in the eyes of the government” (*ibid* at 47).

38 Louis T Wells Jr, “God and Fair Competition: Does the Foreign Investor Face Still Other Risks in Emerging Markets?” in Theodore H Moran, ed, *Managing International Political Risk* (Oxford: Blackwell, 1998) 15 at 28.

39 R Desbordes & J Vauday, “The Political Influence of Foreign Firms in Developing Countries” (2007) 19:3 *Economics & Politics* 421 at 432.

40 Emma Aisbett, “Powerful Multinational or Persecuted Foreigners: ‘Foreignness’ and Influence Over Government,” Australian National University, Centre for Economic Policy Research Discussion Paper No 638 (April 2010) at 19.

41 Relying on World Bank data merged with an UNCTAD database on treaty-based ISA, the Multilateral Investment Guarantee Agency (MIGA) generates data that “appears to support the obsolescing bargain hypothesis.” See Multilateral Investment Guarantee Agency, *World Investment and Political Risk 2013* (Washington, DC: MIGA, World Bank Group) at 46, online: <[www.miga.org/documents/WIPR13.pdf](http://www.miga.org/documents/WIPR13.pdf)>. It is not clear, however, that investment-treaty disputes lodged between 1987 and 2010 have any relationship to “bargains” or to “obsolescence.”

42 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

43 José E Alvarez & Kathryn Khamsi, “The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime” (2009) 1 in Karl P Sauvant, ed, *Yearbook on International Investment Law and Policy* 379 at 446; *Loewen v United States*, Award, ICSID Case No ARB(AF)/98/3 (26 June) at Loewen 2003, para 223; *Técnicas Medioambientales Tecmed SA v Mexico*, Award, ICSID Case No ARB(AF)/00/2 (29 May 2003) at para 122, 10 ICSID Rep 130 [*Tecmed*].

44 David Schneiderman, “Investing in Democracy? Political Process Review and International Investment Law” (2010) 60:4 *UTLJ* 909 [“Investing in Democracy”].

45 See e.g. Wendy L Hansen & Neil J Mitchell, “Globalization or National Capitalism: Large Firms, National Strategies, and Political Activities” (2001) 3:1 *Business and Politics* 1, online: <[www.bepress.com/bap/vol3/iss1/art1](http://www.bepress.com/bap/vol3/iss1/art1)>.

46 See e.g. Chul W Moon & Augustine A Lado, “MNC-Host Government Bargaining Power Relationship: A Critique and Extension within the Resource-Based View” (2000) 26:1 *J of Management* 85-117.

47 Erik J Woodhouse, “The Obsolescing Bargain Redux? Foreign Investment in the Electric Power Sector in Developing Countries” (2005) 38:1 *NYUJ Intl L & Pol* 121 at 185.

about obsolescing bargains and defects in democratic processes within host states. What should be more worrisome is that politics already is disproportionately influenced by the wealthy — a worry that has long preoccupied political theory.<sup>48</sup> Instead of showing special solicitude for the already privileged, what should preoccupy institutional designers are processes that will mitigate the corrupting influence of wealth on public policy outcomes more generally.<sup>49</sup>

Given the shaky empirical grounds offered in support of ISA, especially as between developed states, the next section offers up grounds for alternative processes within national states that can serve to complement reforms of, and even substitute for, investment arbitration. A number of objections will be raised to replacing international processes with national ones. One of these objections (the “no substitute” argument) is addressed in this section, and a second (“IIL as fair process”) is addressed in the paper’s fourth section, “Rejoinder.” Turning to this first objection, it will be argued that national legal systems are no replacement for international law, which is premised on an entirely different set of normative premises than national legal ones. National courts, moreover, it is argued, have no expertise and, in some instances, are precluded from answering international legal questions.<sup>50</sup> This “no substitute” argument is premised on the idea that IIL is a system entirely distinct from national legal systems. With respect, this ignores the relationship of investment law to the particularistic norms of powerful capital-exporting states. It should be apparent that IIL draws upon national legal experiences and, indeed, mimics standards that will be familiar to the constitutional systems of many developed states.<sup>51</sup> Such a view also elides evidence suggesting that international arbitration acts as a “substitute” for local decision making.<sup>52</sup> Removal of disputes to distinct international processes reinforces the seeming lack of institutional competence, in particular within less developed national host states, to resolve investor-state disputes. Lastly, some tribunals are interpreting standards of protection, such as FET, in ways that duplicate, and so overtake, functions performed by national legal institutions. *Clayton v Canada* (2015) is an investment dispute that is emblematic of this tendency.

Bilcon of Delaware succeeded in its claim against Canada for having followed the advice of an independent environmental review panel. Under review was a proposal by Bilcon to build a rock quarry, together with a processing and ship-loading facility, on sensitive coastline in Nova Scotia for export to New Jersey. The joint review panel (JRP) recommended that the Canadian federal government and Nova Scotia provincial government reject Bilcon’s proposal because of its adverse environmental effects on the land, marine and human environments, advice which both levels of government followed. Rather than seeking a review of the decision in Canadian courts, the principal investors, the Clayton family, elected to pursue an award for damages before an investment tribunal — principally, one surmises, because the investor could not get an award for damages in Canadian courts for the government’s alleged misbehaviour.<sup>53</sup> Although purporting to apply principles associated with FET, the tribunal reasoned that the JRP failed to comply with Canadian law and so was “arbitrary”: “The Tribunal finds that the conduct of the joint review was arbitrary. The JRP effectively created, without legal authority or fair notice to Bilcon, a new standard of assessment rather than fully carrying out the mandate defined by the applicable law, including the requirement under the CEEA [Canadian Environmental Assessment Act] to carry out a thorough ‘likely significant adverse effects after mitigation’ analysis.”<sup>54</sup>

Arbitrator Donald McRae expressed concern, in his dissenting opinion, that his fellow arbitrators would be awarding damages for breach of Canadian law in a case where Canadian courts would not have done so. Canadian courts were fully competent to review the alleged procedural defects but were never given the opportunity to perform this role. Moreover, the tribunal had added a layer of control over

48 John P McCormick, *Machiavellian Democracy* (Chicago: Chicago University Press, 2011) at 2.

49 Larry M Bartels, *Unequal Democracy: The Political Economy of the Gilded Age* (Princeton: Princeton University Press, 2008) at 265; Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress — and a Plan to Stop It* (New York: Hachette Book Group, 2011) at 233.

50 Hugo Perezcano, “Risks of a Selective Approach to Investor-State Arbitration” (2016) CIGI Investor-State Arbitration Series Paper No 3, at 4.

51 Schneiderman, *Constitutionalizing Economic Globalization*, *supra* note 29; David Schneiderman, “Global Constitutionalism and International Economic Law: The Case of International Investment Law” (forthcoming 2016) European YB Intl Econ L.

52 Tom Ginsburg, “International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance” (2005) 25:1 Intl Rev L & Econ 107 [Ginsburg]; Kleinheisterkamp, *supra* note 7 at 811.

53 It is likely that, at best, the Claytons could get a court to order a “do over” of the approval process. Armand de Mestral and Robin Morgan suggest that the Claytons may have had a cause of action in negligent misrepresentation that could give rise to a claim for damages. On the facts, however, it is unlikely that such an argument would have had any legs. See Armand de Mestral & Robin Morgan, “Does Canadian Law Provide Remedies Equivalent to NAFTA Chapter 11 Arbitration?” (CIGI Investor-State Arbitration Series Paper No 4, 2016) at 13 [de Mestral & Morgan]; *Clayton v Canada*, Award on Jurisdiction and Liability, PCA Case No 2009-04 (17 March 2015) [*Clayton*, Award on Jurisdiction and Liability].

54 *Clayton*, Award on Jurisdiction and Liability, *supra* note 53 at para 591.

environmental review processes that would likely give rise to a “chill” on future environmental review panels. It amounts to a “remarkable step backwards in environmental protection,” McRae maintained. That the tribunal would take up this judicial review function for itself, under the guise of applying the standard of FET, underscores the degree to which claims about international law’s distinctiveness in relation to local law do not stand up to scrutiny.

Rather than relying on questionable assumptions regarding foreign investors’ lack of power and influence, this paper relies on a version of democratic theory that builds on deliberative processes already present within national states. It turns next to a deliberative democratic account tied to the insight that the authors of law may not necessarily be its addressees. In such cases it would be beneficial, in our highly integrated world, to improve democratic processes so that the interests of those affected by decision making within national borders are taken into account.<sup>55</sup> By suggesting a return to an emphasis on the deliberative and the procedural, a theme that was prominent in political theory in the 1990s,<sup>56</sup> this paper envisages investment law joining together with democratic processes. Rather than imposing substantive limits on the capacity of states to resolve social and economic problems, one imagines investors (and others) participating in deliberative processes, rather than having all yield to the preferences of “omnipotent” third-party arbitrators.<sup>57</sup>

## ANTECEDENTS

Might procedures that satisfy the Latin maxim *audi alteram partem* — with its emphasis on “voice” rather than “exit”<sup>58</sup> — generate an appropriate remedy for foreign investors negatively impacted by host state regulations? Though its origins are traceable back to the ancient Greeks, the maxim is associated with the principle of “natural justice” in English administrative law that “parties be given adequate notice and opportunity to be heard.”<sup>59</sup> As it developed in the nineteenth century, the rule applied to a variety of bodies having authority “to adjudicate upon matters involving civil consequences to individuals”<sup>60</sup> in cases where rights to property or the reasonable expectation of benefits, for example, were at issue.<sup>61</sup>

Though the precise procedures deployed will vary according to the mandate of the decision-making body, at a minimum, the presumption is that each side be given an opportunity to state its case with an opportunity to be heard.<sup>62</sup> Admittedly, such processes will be expected to mimic those of courts of law, but not entirely so.<sup>63</sup> There is no presumption, for instance, that reasons be issued,<sup>64</sup> although this often should be encouraged.<sup>65</sup> Much turns on the statutory terms upon which authority is delegated, the degree of significance to individual interests, and the nature of the decision-making function.<sup>66</sup> Openness, however, is to be presumed.<sup>67</sup>

Work in political theory underscores the merit of taking up deliberative mechanisms.<sup>68</sup> Cambridge historian Quentin Skinner, for instance, derives a similar “rhetorically minded” stance from his work on Renaissance England.<sup>69</sup> Skinner is drawn to this view after exhaustively studying Thomas Hobbes’s response to the troubling ambivalence of rhetoricians who could always be expected to construct

55 Nancy Fraser, “Transnationalizing the Public Sphere: On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World” (2007) 24:4 *Theory, Culture & Society* 7 at 21.

56 James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (Cambridge: MIT Press, 1996); James Bohman & William Rehg, eds, *Deliberative Democracy: Essays on Reason and Politics* (Cambridge: MIT Press, 1997); Jon Elster, ed, *Deliberative Democracy* (Cambridge: Cambridge University Press, 1998).

57 Jan Paulsson, *The Idea of Arbitration* (Oxford: Oxford University Press, 2013) at 16 [Paulsson, *Idea of Arbitration*].

58 David Miller, “Democracy’s Domain” (2009) 37:3 *Philosophy & Public Affairs* 201 at 224.

59 SA de Smith, *Judicial Review of Administrative Action*, 4th ed, JM Evans, ed (London: Stevens & Sons Limited, 1980) at 156-57 [de Smith].

60 Quoted in de Smith, *ibid* at 160.

61 de Smith, *supra* note 59 at 177.

62 Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Urbana: University of Illinois Press, 1971) at 118-19 [Davis, *Discretionary Justice*]; *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at para 22, 174 DLR (4th) 193 [Baker].

63 On administrative deliberation, see Martin Shapiro, *Who Guards the Guardians? Judicial Control of Administration* (Athens: The University of Georgia Press, 1988) ch 1.

64 de Smith, *supra* note 59 at 195; Ontario, *Inquiry into Civil Rights* (Toronto: Frank Fogg, Queen’s Printer, 1968) vol 1 (James McRuer) at 137.

65 This is not for the purpose of facilitating judicial review, rather, for the purpose of facilitating communication between decision maker and audience.

66 *Baker*, *supra* note 62 at para 43.

67 Davis, *Discretionary Justice*, *supra* note 62 at para 111.

68 The next three paragraphs draw upon David Schneiderman, “Compensating for Democracy’s ‘Defects’: The Case of International Investment Law.” In Christian Joerges & Carola Glinzki, eds, *The European Crisis and Transformation of European Governance: Authoritarian Managerialism Versus Democratic Governance* (Oxford: Hart, 2014) 47-70 at 68-69.

69 Quentin Skinner, *Reason and Rhetoric in the Philosophy of Hobbes* (Cambridge: Cambridge University Press, 1996) [Skinner].

probable arguments *in utramque partem* (“in the alternative”).<sup>70</sup> Hobbes was quite successful in expunging rhetoric from the dominant culture, a result that Skinner laments. He declares, “our watchword ought to be *audi alteram partem*, always listen to the other side. This commitment stems from the belief that, in moral and political debate, it will always be possible to speak in *utramque partem*, and will never be possible to couch our moral or political theories in deductive form. The appropriate model will always be that of a dialogue, the appropriate stance a willingness to negotiate over rival intuitions concerning the applicability of evaluative terms. We strive to reach understanding and resolve disputes in a conversational way.”<sup>71</sup> Disputes over justice and policy, Skinner reminds us, typically do not give rise to any final resolution.

This is a place that numerous other theorists also end up. The political philosopher Stuart Hampshire argues that “fairness in procedure” is a “constant in human nature.”<sup>72</sup> Just as the individual is a “divided soul” — “the scene of conflicting tendencies and of divided aims and ambivalences”<sup>73</sup> — so are political communities riven by disagreement. In order to settle the “inevitable recurring conflicts which must be resolved if communities are to survive,”<sup>74</sup> a fair process for “weighing and balancing of contrary arguments” must be devised. Such processes should “all [be] subject to the single prescription *audi alteram partem* (‘hear the other side’).”<sup>75</sup> There is no set formula by which this maxim can be satisfied, other than that contrary claims be heard in an open and public setting so that we can “raise continually our consciousness of political possibilities.”<sup>76</sup>

Seyla Benhabib, inspired by Hannah Arendt’s proposal for an “enlarged mentality,”<sup>77</sup> develops an account of a universal communicative ethics that has, at its centre, the capacity to change minds — to “reverse” perspectives as a consequence of a “willingness to reason from the other’s point of view.”<sup>78</sup> This also is what James Tully endorses in his version of “agonistic” constitutional democracy, in which agreement is less likely.<sup>79</sup> Inspired by Skinner, Tully points to *audi alteram partem* as “the first and perhaps the only universalisable principle of democratic deliberation.”<sup>80</sup> The agonistic dimension of his account suggests that the binary “agreement/disagreement” represents only contingent outcomes in ongoing political relations. It does not entail the end of politics — or the “depoliticization” of disputes — but the maintenance of political relations over time.

Removing politics from investment disputes — a dominant version of which mandates that states be made to behave as if they were private actors competing in the marketplace<sup>81</sup> — turns out to be both misleading and undesirable. We might instead work toward developing institutions and procedures within states that facilitate fairness and openness. This is, after all, what new inward investment purports to advance: to assist not only in economic development but also in the development of institutions that advance fairness. Because underlying investment rules are practices associated with “good governance,” Thomas Wälde argues, such practices should extend to cover all investors, national and not just foreign ones. Wälde, for this reason, applauds the tentative steps taken by investment tribunals to “reduce [...] the inequality with respect to international protection between domestic and foreign

70 *Ibid* at 299. Hobbes set about to expunge this mode of deliberation from political thought and yet, as Skinner shows, Hobbes had recourse to the skills of the Renaissance rhetorician in *Leviathan* (Thomas Hobbes, *Leviathan or the Matter, Forme, and Power of a Commonwealth Ecclesiasticall and Civil*, Michael Oakeshott, ed (Oxford: Basil Blackwell, 1957)).

71 Skinner, *supra* note 69 at 15-16.

72 Stuart Hampshire, *Innocence and Experience* (Cambridge: Harvard University Press, 1989) at 55; Stuart Hampshire, *Justice Is Conflict* (Princeton: Princeton University Press, 2000) at 4 [Hampshire, *Justice Is Conflict*].

73 Hampshire, *Justice Is Conflict*, *ibid* at 5, 7.

74 *Ibid* at 14.

75 *Ibid* at 8. Hampshire credits HLA Hart for having drawn to his attention “the centrality of this phrase” (*Ibid* at 8-9). Hart mentions it in passing in his *Concept of Law* (HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994) at 160 [Hart, *Concept of Law*). He associates “natural justice” as an idea of justice in its “simplest form” (Hart, *Concept of Law*, at 206).

76 Stuart Hampshire, “Justice is Strife” (2002) 28:6 *Philosophy and Social Criticism* at 644 [Hampshire, “Justice is Strife”].

77 Hannah Arendt, *Between Past and Future: Six Exercises in Political Thought* (Cleveland and New York: Meridian Books, 1961) at 220.

78 Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (New York: Routledge, 1992) at 8, 54; Jennifer Nedelsky, “Communities of Judgment and Human Rights” (2000) 1:2 *Theoretical Inquiries in Law* [Nedelsky]. According to de Tocqueville, this was one of the great advantages of democracy in America, having “the ability to make repairable mistakes” (Nedelsky, at 216).

79 James Tully, *Public Philosophy in a New Key, Volume II: Imperialism and Civic Freedom* (Cambridge: Cambridge University Press, 2008) at 85. Mouffe describes agonistic democracy as a contest between “adversaries” rather than “enemies,” in which conflicting hegemonic projects confront each other in open debate, and where no final reconciliation between them is possible (Mouffe, *supra* note 19, at 7, 15).

80 Tully, *ibid* at 110-11.

81 David Schneiderman, “Hayek’s Dream: International Investment Law and the Privatization of States” [unpublished, on file with the author].

companies.”<sup>82</sup> If international investment lawyers are serious about having states develop practices of “good governance,” building institutions within, rather than seeking replacements from without, would seem a worthwhile pathway forward. So as to underscore this point, this paper turns next to a sample of investment disputes where such processes may have made a difference, if not having the effect of forestalling them altogether.

## BENEFITS

Having addressed some of the legal and theoretical antecedents, this part of the paper canvasses some of the benefits of this approach flowing to host state political processes, even to investors themselves. It is likely that foreign investors (and their lawyers) will be dissatisfied with a proposal that confines remedies for host state malfeasance to a right to be heard. It bears no more than a cursory resemblance to the fulsome substantive protections available in contemporary IIL. But, as indicated above, there is a great deal of disagreement about the content of those standards of protection. Conceptions of substantive justice can be expected to be diverse and divisive, as they are, after all, steeped in politics.<sup>83</sup> A turn to process does not do away entirely with substantive questions — the relationship between process and substance is more complex than that<sup>84</sup> — nor does it guarantee substantively just outcomes — no process can do that.<sup>85</sup> A fair process aids, instead, in resolving the means by which substance gets worked out. To that end, this section takes up a number of disputes where the “right to be heard” within host state processes may have resulted in altered state conduct or may have entirely absolved states of responsibility. The selection of cases is not meant to be comprehensive but is, rather, illustrative. Nor are precise procedural roadmaps laid down; instead, the details vary according to the mandates of decision makers and repercussions for addressees. To reiterate, the discussion presumes that institutions and procedures within states that facilitate fairness and openness can replace or complement the regime of IIL or, at a minimum, FET strictures.<sup>86</sup>

One would not imagine a different result issuing in the *Methanex*<sup>87</sup> dispute if *audi alteram partem* had been the watchword. In coming to its decision that use of the gasoline additive MTBE (methyl tert-butyl ether) caused a “significant risk to the environment,” the State of California commissioned independent studies, a draft assessment report that would be the subject of public hearings, peer review and comments from the US Geological Survey and the Centers for Disease Control. At the public hearing, the tribunal reported, “government officials and members of the public (including MTBE and methanol producers) had an opportunity to ask questions and present oral testimony.”<sup>88</sup> It is hard to imagine a more meticulously thought out and open process.

The circumstances giving rise to the *Chemtura*<sup>89</sup> dispute also appear to satisfy the demands of listening to the other side. Pesticide producer Chemtura claimed that regulatory review by the Canadian federal Pest Management Regulatory Agency (PMRA), and its recommendation to phase out all agricultural uses of lindane-based seed treatment, was biased. It is undeniable that the review was instigated by a US Environmental Protection Agency decision to crack down on the importation of lindane-treated canola. The PMRA had come to its own determination, however. Unhappy with that decision, a review board was established at the request of the investor that recommended the PMRA “seek and consider input

82 Thomas Wälde, “Treaties and Regulatory Risk in Infrastructure Investment” (2000) 34:2 J World Trade at 119 [Wälde]. The evidence that IIL improves local decision making, however, is equivocal (Ginsburg, *supra* note 52 at 121). The available evidence suggests that many developing countries signed bilateral investment treaties (BITs) without knowing what they were signing up for, becoming aware of the stakes involved only when hit by an investment claim. See Lauge Poulson, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge: Cambridge University Press, 2015) at 160. In circumstances where the local citizenry is mobilized in opposition to an investment, IIL might even encourage the state to take measures that imperil their personal liberty and security. For instance, the 2000 “water wars” in Cochabamba, Bolivia, prompted military action by then President Hugo Banzer, in which hundreds were injured and one young bystander killed. I hypothesized that the investor, Bechtel, could argue that their investment was not provided with full protection and security, “providing warrant for even more brutal responses to local resistance.” See David Schneiderman, “Globalisation, Governance, and Investment Rules” in John N Clarke & Geoffrey R Edwards eds, *Global Governance in the Twenty-First Century* (Houndmills, Basingstoke: Palgrave, 2004) 67-91 at 79.

83 Hampshire, “Justice is Strife”, *supra* note 76 at 644.

84 David M Estlund, *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press, 2008) at 30.

85 Robert A Dahl, *Democracy and Its Critics* (Cambridge: Harvard University Press, 1989) at 164.

86 This effort is to be distinguished from that undertaken by de Mestral and Morgan (de Mestral & Morgan, *supra* note 53), who inquire into whether similar remedies are available to investors under Canadian law as under NAFTA Chapter 11. This paper does not seek out equivalent remedies but alternative ones that impose fewer constraints on state conduct.

87 *Methanex Corporation v United States*, Final Award on Jurisdiction and Merits, Ad hoc – UNICTRAL Arbitration Rules (3 August 2005) [*Methanex*].

88 *Ibid* at pt III, ch A-8, para 17.

89 *Chemtura Corporation v Canada*, Award, Ad hoc – UNICTRAL Arbitration Rules (2 August 2010) [*Chemtura*].

from the Claimant as well as from other interested parties” and “consult with the Claimant in order to take into account any available mitigation measures.”<sup>90</sup> A process of re-evaluation was undertaken by the PMRA, which included the required consultations with the investor. For this reason, the PMRA had good ground to reject claims that it was not in dialogue with the investor. The agency detailed the opportunities provided to the investor to submit information, even offering a further opportunity for consultation.<sup>91</sup> It is, once again, hard to imagine how the delegated authority failed to live up to the standards of a fair process.

In both *Methanex* and *Chemtura*, the investor’s claims were rejected. The *Methanex* tribunal, in convoluted fashion, even found that it was without jurisdiction. Even if the fairness of the processes employed by state actors in each instance may have made a good impression on tribunal members, such matters were not critical to their rulings. Instead, each was drawn down the rabbit holes of national treatment and expropriation. A focus on listening to investors, at least in these disputes, seems a more efficient and transparent means, within national state processes, of getting at complaints about investor mistreatment.

The circumstances giving rise to the adverse decision against Mexico in the *Tecmed* dispute would have turned out differently, in the author’s view, if Mexico had been more interested in processes associated with *audi alteram partem*.<sup>92</sup> The dispute arose because of a failure, on the part of a Mexican federal government agency (the National Ecology Institute [INE] of Mexico), to renew a permit to operate a Spanish-owned hazardous waste site (Cytrar), a mere 8 km from the city of Hermosillo. The decision not to renew was made after only two years of operation under Spanish ownership — the investor expecting that, once it lawfully acquired the site, it would be entitled to operate the facility for some time into the future. The tribunal was of the view that the failure to renew was not based on health or environmental concerns but because of political opposition originating out of nearby Hermosillo. Cytrar even had proposed relocation of the site, mostly at its own expense, but the Mexican federal authority would not yield. The tribunal concluded that there was a lack of transparency. The Mexican authority did not “report, in clear and express terms, to Cytrar or Tecmed, before issuing the Resolution” and so “prevented Cytrar from being able to express its position as to such issue and to agree with INE about the measures required to cure the defaults...considered significant.”<sup>93</sup> There was, in short, no “explicit, transparent and clear warning addressed to Cytrar from the Mexican authorities.”<sup>94</sup>

The tribunal was of the view that there were no legitimate environmental or public health concerns that could justify the government’s refusal to renew the operating permit. Yet the grounds for refusal precisely raised such concerns. Remarkably, the tribunal concluded that the resolution “does not specify any reasons of public interest” that could justify it.<sup>95</sup> The record reveals that Cytrar had exceeded landfill limits, temporarily stored hazardous waste outside the landfill, and received “liquid and biological-infectious waste” not authorized by its permit.<sup>96</sup> What is apparent is that the relevant Mexican authority (the Procuraduría Federal de Protección al Ambiente, or PROFEPA) was willing to tolerate these transgressions and so soft-pedalled them prior to issuing the decision not to renew. If the responsible Mexican authority (PROFEPA) had put its efforts into enforcing the law by properly documenting environmental wrongdoing, and if, together with the INE, it had provided an opportunity for Cytrar to either respond to or resolve these concerns, one could have foreseen a fair opportunity being provided to the investor to meet the case against it. It is interesting to learn that a “right to know campaign” was an element of the Hermosillo-based campaign, giving voice to the frustration citizens felt in being shut out of negotiations between Cytrar and the municipality.<sup>97</sup> A focus on process might have better facilitated the open exchange of information.

90 *Ibid* at para 40.

91 *Ibid* at para 45.

92 The *Tecmed* tribunal authoritatively laid down high standards of behaviour expected from states when they commit to FET (*Tecmed*, *supra* note 43 at para 154). It also expressly conscripted democratic theory into its ruling, maintaining that the interests of foreign investors ordinarily will not be represented within host state political processes (*Tecmed*, *supra* note 43 at para 122).

93 *Ibid* at para 162.

94 *Ibid* at para 160.

95 *Ibid* at para 125.

96 *Ibid* at para 99.

97 Ladan Mehranvar, *Constructing and Contesting Hegemony: Counter-Hegemonic Resistance to the International Investment Law Regime* (LLM Thesis, University of Toronto Graduate Department of the Faculty of Law, 2009) at 68 [unpublished].

Lastly, the Bilcon dispute. Among the many alleged procedural defects was the complaint that the provincial and federal governments had elected to jointly hold public hearings through the auspices of an independent review panel. This was in contrast to other similar projects that were granted approval through more expeditious processes, such as environmental screening or comprehensive study, rather than public hearings. There was no ground for this differential treatment, the investor claimed, other than vocal community opposition to the proposal. As such, the process of independent review was politically motivated and initiated to serve the purposes of local federal and provincial politicians.<sup>98</sup> Such an argument is entirely at odds with the perspective adopted in this paper. If we are to look out for practices that best accommodate the inclusion of all those who may be overlooked, then a public and open process would be advantageous to all those affected by a decision to proceed with a quarry project of this size and duration. Although a challenge to the decision to refer the assessment to the JRP was time-barred under the North American Free Trade Agreement (NAFTA),<sup>99</sup> the tribunal accepted the investor's version of events, laying the foundation for the tribunal's conclusion that there was a denial of national treatment. What the investor alleged, and the tribunal accepted, was the pernicious argument that, because government sought a process that would dig deeper into adverse environmental effects and that would also provide an opportunity for transparency and openness for all those affected, Canada had discriminated against the investor on the ground of nationality.<sup>100</sup>

Even though the JRP conducted public hearings over 13 days in order to assess the environmental impact of the proposed quarry, the investor complained that the hearing “did not afford Bilcon a reasonable opportunity to present its case” — the hearings, instead, becoming “a forum for the expression of anti-American venting.”<sup>101</sup> What was of concern ultimately to the tribunal was the invocation of the novel idea of “community core values” emerging as a theme in the JRP report. This was “unprecedented” and “inimical” to the proponent having “any real chance of success,” the majority opined.<sup>102</sup> Whatever the meaning to be accorded to “community core values,” the tribunal majority concluded that it was “at the very least” a “highly problematic” basis upon which to proceed and “a serious breach of the law on procedural fairness.” Not only was the investor “denied reasonable notice” that this was the approach the JRP would adopt, the investor was not given the “opportunity to seek clarification and respond to it.”<sup>103</sup> The tribunal concluded that, “Bilcon lacked reasonable notice of the ‘community core values’ approach. The opinions of two eminent experts support the objective reasonableness of its surprise in this respect, as does the reaction of several independent commentators at the time. On its own review of all of the evidence, the Tribunal concurs that Bilcon had been denied a fair opportunity to know the case it had to meet and to address it.”<sup>104</sup> On the majority's reading, this looks precisely like an instance where *audi alteram partem* did not guide the course of the proceedings.

Arbitrator Donald McRae, it will be recalled, issued a dissenting opinion that disagreed, in no uncertain terms, with his co-panellists' findings and, in particular, with their characterization of the use of community core values. When the JRP invoked community core values, declared McRae, it was referring specifically to “human environmental effects” — such things as “Aboriginal resource use, community history and heritage, community character and attitudes.”<sup>105</sup> What the majority opinion failed to do, McRae declared, was to look at the JRP report itself. If they had done so, they would have “seen that ‘core values’ and ‘community core values’ were simply names given to an important component of what the JRP in accordance with its terms of reference had to consider.”<sup>106</sup> This seems a more sensible reading of the record. “Community core values” appears to be a descriptor of a set of statutorily mandated considerations. It appears only after the section headed “Human Environment

98 *Clayton v Canada*, Expert Report of David Estrin, PCA Case No 2009-04 at para 101 (8 July 2011), online: <[www.italaw.com/sites/default/files/case-documents/italaw6286.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw6286.pdf)> [*Clayton*, Estrin Report].

99 *Clayton*, Award on Jurisdiction and Liability, *supra* note 53 at para 688; *Clayton v Canada*, Memorial of the Investors, PCA Case No 2009-04 (25 July 2011) online: <[www.italaw.com/sites/default/files/case-documents/italaw1158.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw1158.pdf)>.

100 *Clayton*, Award on Jurisdiction and Liability, *supra* note 53 at para 724.

101 *Ibid* at para 19. The anti-American statements of witnesses did not give rise to a violation of NAFTA, the tribunal concluded. This was a consequence of the “emotional environment at the JRP hearing” at which members of the public should be entitled to “express themselves in a manner that reveals strong feelings” (*Ibid* at paras 575-76).

102 *Ibid* at para 250.

103 *Ibid* at para 534.

104 *Ibid* at para 161.

105 *Ibid* at paras 23, 25.

106 *Ibid* at para 14. The investor's expert, David Estrin, acknowledged that “community core values” referred to socio-economic effects, which are precisely within the statutory mandate of the panel. He denied, however, that these effects were tied to any adverse environmental effects (*Clayton*, Estrin Report, *supra* note 98 at paras 230-31).

Effects Assessment,” which is 66 pages into a 107-page report. “Core values” receive a three-page discussion at the end of the report, immediately prior to the panel’s “conclusions and recommendations” (at page 96). Its placement in the report underlines how “core values” was used as a way to “sum up” a number of concerns rather than a “methodology” — or a central organizing theme — for coming to its conclusions.<sup>107</sup> The tribunal appears to have accepted without qualification the claimant’s arguments that community core values were the “essential basis of the Panel’s decision.”<sup>108</sup>

The investor’s environmental law experts were of the opinion that, had there been an application for judicial review, the JRP decision would have been overturned.<sup>109</sup> There is good reason to think that a court would have been interested in some of the issues raised, but no certainty that the JRP would have been required to redo its work. It appears to have addressed every statutory requirement expected of it. The majority members of the tribunal concluded otherwise, complaining that the JRP did not offer up mitigation measures in its final report, which it was required by statute to do. The JRP, however, was not of the view that such measures would mitigate the project’s harmful effects. In so doing, the panel operated entirely within its statutory mandate.<sup>110</sup>

Once the JRP report was issued, there were further alleged procedural discrepancies, including the absence of an opportunity to address both levels before a final decision was made. After repeated requests, the relevant ministers “refused to meet” with Bilcon in order to hear complaints about flaws in the JRP report. No explanation was offered.<sup>111</sup> This amounted to a “patent denial of natural justice,” opined one of the claimant’s experts.<sup>112</sup> Bilcon should have been given a “further opportunity to attempt to persuade” government not to accept the JRP recommendations.<sup>113</sup> This was characterized, by the Government of Canada, as a complaint about the investor being denied a further opportunity to “lobby government officials.”<sup>114</sup> There appears not to have been, in any event, any practice of granting *ex parte* meetings with either side after the issuance of a JRP report.<sup>115</sup> Decision makers reasonably could have concluded that the investor had received a full airing of its viewpoint in a lengthy public process.<sup>116</sup>

More subversive to an application for judicial review initiated by Bilcon would have been the company’s behaviour, which the JRP carefully recorded and about which the majority seemed curiously uninterested.<sup>117</sup> The investor’s documentation (its environmental impact statement) was “inadequate” and “suffered from ambiguity, a lack of transparency, incomplete or incorrect information, and limited consideration of community sustainability.”<sup>118</sup> “The Project description changed repeatedly through the review process,” the JRP complained.<sup>119</sup> It was a “moving work,” the investor offered by way of reply.<sup>120</sup> The investor, remarkably, was unresponsive to the JRP’s requests for information. These deficiencies are comprehensively documented in a table in the report entitled “Summary of Panel Concerns From the Terrestrial, Marine and Human Effects Assessment.”<sup>121</sup> Distrust among citizens in the project was compounded by the investor’s defamation suit against a local newspaper and an individual community

107 Meinhard Doelle, “Clayton Whites Point NAFTA Challenge Troubling” (25 March 2015), *Environmental Law News* (blog), online: <<https://blogs.dal.ca/melaw/2015/03/25/clayton-whites-point-nafta-challenge-troubling/>> [Doelle].

108 *Clayton*, Estrin Report, *supra* note 98 at 91, paras 254, 258; *Clayton*, Award on Jurisdiction and Liability, *supra* note 53 at para 452.

109 *Clayton*, Award on Jurisdiction and Liability, *supra* note 53, Dissenting Opinion at para 30.

110 Doelle, *supra* note 107.

111 *Clayton*, Estrin Report, *supra* note 98 at 87-88.

112 *Clayton v Canada*, Expert Report of T. Murray Rankin, Q.C., PCA Case No 2009-04 at para 161 (21 December 2012), online: <[www.italaw.com/sites/default/files/case-documents/italaw6287.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw6287.pdf)> [*Clayton*, Rankin Report].

113 *Ibid* at para 163.

114 *Clayton v Canada*, Counter-Memorial of Canada, PCA Case No 2009-04 (9 December 2011) at para 364, online: <[www.italaw.com/sites/default/files/case-documents/italaw1161.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw1161.pdf)>.

115 *Ibid*.

116 The tribunal agreed that there was no requirement to meet in person but that Bilcon rightly expected “an opportunity to voice its objection to the JRP’s report” in writing. This opportunity was afforded to the investor (*Clayton*, Award on Jurisdiction and Liability, *supra* note 53 at para 585). There remained a concern that the federal government did not “open its mind” to the investor’s claim that the JRP process was faulty (*Clayton*, Award on Jurisdiction and Liability, *supra* note 53 at para 586).

117 The investor’s expert, David Estrin, explained away these irregularities by describing environmental assessment as a process in which “uncertainty is inevitable” (*Clayton*, Estrin Report, *supra* note 98 at para 360).

118 Canada, Joint Review Panel for the Whites Point Quarry and Marine Terminal Project, *Joint Review Panel Report on the Proposed Whites Point Quarry and Marine Terminal Project* (Ottawa: Queen’s Printer, October 2007) at 84, 102, online: <[www.novascotia.ca/nse/ea/whitespointquarry/WhitesPointQuarryFinalReport.pdf](http://www.novascotia.ca/nse/ea/whitespointquarry/WhitesPointQuarryFinalReport.pdf)> [Canada, *Report on Proposed Whites Point Quarry*].

119 *Ibid* at 83.

120 *Clayton v Canada*, Memorial of the Investors, *supra* note 99 at 97, para 200.

121 Canada, *Report on Proposed Whites Point Quarry*, *supra* note 118 at 85.

member.<sup>122</sup> Given the measure of general deference courts are expected to grant to delegated authorities such as the JRP,<sup>123</sup> together with the tribunal's damaging findings of fact regarding the investor's evidence and conduct, there was no certainty that a court would have issued any remedy in this case.

In circumstances where the investor was given every opportunity to fairly state his case in an open and transparent process, the majority of the tribunal swallowed whole the investor's narrative of distrust.<sup>124</sup> This is a narrative common to those deployed in many other investment disputes: that ISA vindicates the interests of foreign investors in cases where politics, and not "rational" considerations, guide local decision making.<sup>125</sup> As suggested above (however unorthodox the suggestion may be), the JRP report can reasonably be read as a bona fide attempt at answering the questions asked of it and thereby fully in accordance with the panel's statutory mandate. Much turns, then, on who gets to control the narrative.<sup>126</sup> Investment lawyers and arbitrators, as argued in the next part, will not be quick to give up this control.

The narrative of corrupt, biased and politicized decision making plays well among this investment law set. It highlights the advantage, as the Clayton tribunal self-servingly put it, of resolving disputes before investment tribunals that offer "independence and detachment from domestic pressures."<sup>127</sup> Critics are, one could say, more "realistic" in their outlook.<sup>128</sup> Third-party adjudicators, they believe, bring their own set of values to bear on these disputes, ones that might not play as well in the communities within which these disputes are situated.<sup>129</sup> Realism is borne out by Gus Van Harten's content analysis of 162 arbitral awards that reveal the suspicion with which democratic processes are treated. Where "elections or democracy were mentioned by arbitrators," Van Harten finds, "it was often to suggest that politics had contributed to unsound decisions and that the arbitrator's role was to ensure that investors were compensated."<sup>130</sup> Arbitrators appear more comfortable with disparaging politics so that democracy is "managed without appearing to be suppressed."<sup>131</sup> This distrust of public authority in investment arbitral opinion underscores why it is unfortunate that no Canadian court was offered the opportunity to review the JRP's process.<sup>132</sup>

## REJOINDER

There remains only the matter of addressing the question of why one would seek out a substitute for ISA when the system is intended precisely to provide a forum for hearing both sides to an investment dispute. This is the rejoinder mentioned in the second section of this paper. ISA offers to both sides the opportunity to present evidence and to make legal argument in a judicial-type hearing (and to third parties, on rather constrained terms). This is the merit of the so-called "depoliticization" of investment disputes.<sup>133</sup> Arbitral tribunals, on this understanding, function as "instruments" of the rule of law.<sup>134</sup> Jan Paulsson describes arbitration as a "quest for civilized closure." Nothing "beyond that of a fair hearing" is to be expected.<sup>135</sup> There is no need, in other words, to have recourse to other processes when the extant international process works relatively well.

122 *Ibid* at 69.

123 Clayton, Rankin Report, *supra* note 112 at para 26; *New Brunswick (Board of Management) v Dunsmuir* 2008 SCC 9 at para 54, 1 SCR 190.

124 Replicated in the blog post by New York University's Rob Howse, published after release of the tribunal award, who both advised the investor and attended the hearing on the investor's behalf (Canada, *Report on Proposed Whites Point Quarry*, *supra* note 118 at 21; Rob Howse, "The Bilcon Decision: The Environment, Local Politics and the Rule of Law" (20 March 2015), *International Economic Law and Policy Blog* (blog), online: <<http://worldtradelaw.typepad.com/ielpblog/2015/03/the-bilcon-decision-the-environment-local-politics-and-the-rule-of-law.html>>.

125 The investor's Memorial makes reference to political considerations guiding decision making no less than 20 times (*Clayton v Canada*, Memorial of the Investors, *supra* note 99).

126 The "development of all argumentation is a function of the audience for which it is addressed and to which the speaker is obliged to adapt himself" (Chaim Perelman, *The Idea of Justice and the Problem of Argument* (London: Routledge & Kegan Paul, 1963) at 155).

127 Clayton, Award on Jurisdiction and Liability, *supra* note 53 at 439.

128 Karl N Llewellyn, "A Realistic Jurisprudence — The Next Step" (1930) 30:4 *Colum L Rev* 431 at 453 ("A realistic approach to any new problem would begin with skepticism as to the adequacy of the received categories").

129 M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2015) at 25-27.

130 Van Harten, *Sold Down the Yangtze*, *supra* note 6 at 73.

131 Sheldon S Wolin, *Democracy Incorporated: Managed Democracy and the Specter of Inverted Totalitarianism* (Princeton: Princeton University Press, 2008) at 47.

132 An application for judicial review of the tribunal's award is now pending before the Federal Court of Canada. This is, however, an application to set aside the investment tribunal's award and not an application for review of the conduct of the JRP or the governments involved.

133 This argument is canvassed in David Schneiderman, "Revisiting the Depoliticization of Investment Disputes," *Yearbook on International Investment Law and Policy*, 2010-11 (Oxford: Oxford University Press, 2011) 693-714.

134 Paulsson, *Denial of Justice*, *supra* note 11 at 265.

135 Paulsson, *Idea of Arbitration*, *supra* note 57 at 13.

This is persuasive only if one is convinced that investment arbitration is working well. For some of the reasons mentioned in the introduction, this is, at best, arguable. Legitimacy continues to be drained from the system<sup>136</sup> despite public relations campaigns, such as that launched by the new lobby group the European Federation of Investment Law and Arbitration (EFILA), together with overheated counter-arguments intended to halt this trend.<sup>137</sup>

There is, lastly, the question of whether the sort of institutional reform advocated here can be initiated without the threat of ISA to back it up.<sup>138</sup> Can states be expected to act to improve local decision making, enhancing opportunities for listening to the other side, without the regime of international investment<sup>139</sup> operating in the shadows? In other words, might the threat of ISA be necessary to prompt states to generate mechanisms that might forestall future investment disputes? Not that the threat of ISA is likely to disappear any time soon. Consider the counterfactual, then: if states were to abandon ISA in droves — prompted by, for instance, some European state's insistence that it be banished from the Comprehensive Economic and Trade Agreement<sup>140</sup> — can we reasonably expect states to implement fair processes for listening to investors? There are those who believe it naïve to think otherwise. But no similar threat, other than a continuing drought of new inward investment, prompted states to rapidly embrace investment law strictures beginning in the 1990s. Nor does it seem that states were induced to embrace purported practices of “good governance.” Rather, it appears that state actors were motivated to adopt investment treaties as a means of signalling their openness to foreign investment,<sup>141</sup> or at least they were so advised.<sup>142</sup> It is debatable whether bilateral investment treaties (BITs) have had their desired effect.<sup>143</sup> In a 2014 survey of 301 senior executives in companies with more than US\$1 billion in annual revenue, respondents indicated that the existence of BITs were of far less importance in making investment decisions than the character of host state laws.<sup>144</sup> Indeed, there remain other and better determinants of foreign investment.<sup>145</sup> The consequence is that developing and less developed states remain in desperate need of new inward investment for maintenance of infrastructure, economic development, and so on. Based on this experience — namely, the impressive ability of IIL norm entrepreneurs to promote the rapid adoption of new global rules — there is some basis for believing that, were a proposal for enhancing local decision making to become a focal point for legal reform, it would be taken up in many locales. Again, it should be emphasized that this is not meant to preclude a more robust discussion between states in the centre and those on the periphery about the propriety of *audi alteram partem* as an organizing principle for local law reform.

These circumstances are, admittedly, unlikely to arise any time soon.<sup>146</sup> The proposal signals, after all, a marked reduction in investor power. It means investors having to make their case not only in local

136 UNCTAD, *World Investment Report 2015*, *supra* note 8 at 128.

137 See, for example, the Honourable Charles N Brower & Sadie Blanchard, “What’s in a Meme? The Truth About Investor-State Arbitration: Why It Need Not, and Must Not, be Repossessed by States” (2014) *Colum J Transnat’l L* 52:3 689 [Brower & Blanchard] and Stephen M. Schwebel, “The Overwhelming Merits of Bilateral Investment Treaties” (2009) 32:2 *Suffolk Transnat’l L Rev* [Schwebel]. I describe this as a “paranoid style” in Schneiderman, “The Paranoid Style,” *supra* note 5. For a rejoinder to EFILA’s reply to critics, see David Schneiderman, Kyla Tienhaara & Gus Van Harten, “Reply to EFILA” (6 July 2015), *Investor-State Dispute Settlement: Comments and Observations: Gusvanharten* (blog), online: <<https://gusvanharten.wordpress.com/2015/07/06/reply-to-efila/>>.

138 This is the assumption of the Investment Climate Unit of the World Bank Group in proposing measures (what they label “conflict management mechanisms”) that forestall conflict rising to the level of an investor-state dispute. See World Bank Group, Investment Climate Unit, “Investor-State Conflict Management: A Preliminary Sketch” (November 2015) E15 Task Force on Investment Policy at 4, online: <<http://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-World-Bank-Group-FINAL.pdf>>.

139 World Bank Group, *ibid* at 8.

140 Stefan Wagstyl, “Germany to block investor protection rules: Free trade pacts”, *Financial Times* (26 September 2014) 6.

141 José E Alvarez, “The Once and Future Foreign Investment Regime” in MH Arsanjani et al, eds, *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Leiden: Martinus Nijhoff, 2010) 607 at 621; Wälde, *supra* note 82 at 12.

142 Lauge N Skovgaard Poulsen & Emma Aisbett, “When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning” (2013) 65:3 *World Politics* 273 at 282-3.

143 Jason Webb Yackee, “Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?” (2008) 42:4 *Law & Soc’y Review* 805; Christian Bellak, “Economic Impact of Investment Agreements” (2015) Department of Economics, Vienna University of Economics and Business Working Paper No. 200, online: <<https://epub.wu.ac.at/4625/1/wp200.pdf>>. As UNCTAD admits, “this is not a straightforward exercise” (UNCTAD, *World Investment Report 2015*, *supra* note 8 at 126).

144 Hogan Lovells et al, “Risk and Return: Foreign Direct Investment and the Rule of Law” at 41, online: <[http://fdasrvr.com/fr/1/415/10099/10071\\_D4\\_FDI\\_Main\\_Report\\_V4.pdf](http://fdasrvr.com/fr/1/415/10099/10071_D4_FDI_Main_Report_V4.pdf)> [Hogan Lovells]. The survey results also indicated that the existence of a BIT affected investment decisions. As the authors indicate, this result is hard to explain in light of the fact that “answers to other questions showed that they had indeed made investment in...regions... [where] no BITs were present” (Hogan Lovells at 47).

145 Bruce A Blonigan & Jeremy Piger, “Determinants of Foreign Direct Investment” (2014) 47:3 *Can J Economics* 775.

146 Indeed, this paper has, not unexpectedly, attracted hostility from investment lawyers. As one anonymous reviewer of this paper complained, it “reads like theoretical gibberish coupled with rampages against the Bilcon case and the writings of Jan Paulsson” (on file with the author).

venues but also, in states with an independent press, in the public sphere.<sup>147</sup> Despite having paid lip service to deliberative democracy, IIL has never been all that interested in it.<sup>148</sup> IIL promoters have instead been pursuing a politics of deliberative closure. “Omnipotent” arbitrators have served well the function of standing guard against democracy’s influence.<sup>149</sup> Critics are derided for being out of touch. Complaints about IIL’s defects are described as “noise” that ‘should be treated...for the nonsense that it so largely is’<sup>150</sup> and “ideologically driven polemics” that are “misguided,” “deeply flawed,” and “empty rhetoric.”<sup>151</sup> In cases where there has been significant diminution in the value of an investment, there is not much more to discuss other than the quantum of damages owed. This is made abundantly evident in a passage, again from arbitrator Paulsson, who derides “academics [who] have suggested that international arbitration should be jettisoned because its availability stifles the evolution of national courts in institutionally immature states.” This is a proposition, he continues, “that is hard to take seriously.”<sup>152</sup> The footnote appended to the “stifling” sentence reads as follows: “No references are given. If the reader doubts that such notions could seriously be put forward in scholarly writings, so much the better.”<sup>153</sup>

However contemptuous of the position advanced here, Paulsson’s statements are highly instructive. There is, first, the deliberate decision not to provide references to a claim made by some unmentionable academics.<sup>154</sup> This can only be interpreted as anti-intellectual. Second, it runs counter to proposals put forward by experts working in the field of law and development. Kevin Davis and Michael Trebilcock, for instance, argue that “the current wave of legal reforms must be situated in a broader agenda of public sector reform.” They tentatively conclude, after review of the extant empirical evidence, “that it is appropriate to emphasize reforms that enhance the quality of institutions charged with the responsibility for enacting laws and regulations, and institutions charged with the subsequent administration and/or enforcement of those laws or regulations” rather than being preoccupied solely with reform of property or contract law.<sup>155</sup> The myopia that Paulsson reveals, by willfully ignoring evidence that public institutions play a critical role in improving the economic prospects of developing states, is astonishing. That this is much less of a problem in self-described “rule of law” states in the developed world underscores how feeble Paulsson’s objections are.

## CONCLUSION

Lacking good empirical support for distrust of host state policy-making and adjudication, this paper has proceeded upon the assumption that it would be worthwhile for investors and others to be formally included within those processes. While allegations about a democratic deficit for investors within developed states is overwrought, the inclusion of all those affected by policy outcomes, investors and citizens alike, seems a worthwhile goal. It can have the tendency of rendering decisions more reasonable and legitimate. Scrutinizing the theoretical foundations for *audi alteram partem*, the objective has been to make a case for inclusion that can be considered a substitute for, or complement to, investment treaty arbitration. The proposal entails domesticating, one could say, concerns that have animated the spread of ISA. Further work, developing the details of this proposal, remains to be done.

147 Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* translated by Thomas Burger & Frederick Lawrence (Cambridge: The MIT Press, 1991).

148 Schneiderman, “Investing in Democracy,” *supra* note 44.

149 Paulsson, *Idea of Arbitration*, *supra* note 57, at 16. What Lionel Trilling said of Jewish American novelists in 1967 could also be said of the investment arbitration bar: “They believe they are great men, they insist on being at the center of their universe: all revolves around them. To impose, to impose: this is their single aim” (quoted in Adam Kirsch, *Why Trilling Matters* (New Haven: Yale University Press, 2011) at 34).

150 Schwebel, *supra* note 137.

151 Brower & Blanchard, *supra* note 137 at 699, 717.

152 Paulsson says he cannot take the proposition seriously for two reasons. First, it “would require a remarkable leap of faith to assume that those who deliver deficient justice will experience an ethical epiphany” and, second, that excluding “competent, neutral and independent international adjudication will have a real and enduring cost in terms of governance, credibility, and an environment conducive to investment and cooperation” (Paulsson, *Idea of Arbitration*, *supra* note 57 at 258). One cannot help but observe that this looks like special pleading.

153 *Ibid* at 258, note 4.

154 I will exhibit no such hesitation. See e.g. Ronald J Daniels, “Defecting on Development: Bilateral Investment Treaties and the Subversion of the Rule of Law in the Developing World” (Paper delivered at the Faculty Workshop, University of Toronto Faculty of Law, 29 November 2004, online: <[www.unisi.it/lawandeconomics/stile2004/daniels.pdf](http://www.unisi.it/lawandeconomics/stile2004/daniels.pdf)> at 4, 31 and Jennifer Tobin & Susan Rose Ackerman, “Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties,” online: <[www.iilj.org/courses/documents/HC2005.Ackerman.pdf](http://www.iilj.org/courses/documents/HC2005.Ackerman.pdf)> at 35.

155 Kevin E Davis & Michael J Trebilcock, “Legal Reforms and Development” (2001) 22:1 Third World Q 21 at 33.

This does necessarily mean that there should be no role for international law in policing state misbehaviour vis-à-vis foreign investors. Thinking about innovation in the field prompts one to contemplate a more modest monitoring function that could be performed by new international institutions, along the lines suggested by Eyal Benvenisti. Surveying international economic law through a public choice lens, Benvenisti develops a role for international law that resists capture by well-organized domestic groups in favour of transnational institutions that generate mechanisms for producing information, monitoring and publicity about state misbehaviour.<sup>156</sup> The advantage of Benvenisti's proposal is that it aspires to reduce interest-group capture while generating institutions that provide a "voice for all affected interest groups," holding "domestic officials accountable for their acts or omissions by drawing the domestic public's attention to ineffective domestic regulation of private activities."<sup>157</sup> This more modest role for international law enables international structures to mitigate some of the adverse consequences of the distribution and exercise of sovereign power.<sup>158</sup>

Admittedly, a marriage between investment law and democratic principle may be an awkward fit for IIL, despite the lip service that has been paid by lawyers and arbitrators, on occasion, to democratic principles. It nevertheless generates an enticing opportunity to move forward with an agenda of listening that promotes the interests of all, and not just the interests of foreign investors. It is hard to imagine that this is an agenda investment lawyers will be all that interested in taking up.<sup>159</sup> The question is whether democratically authorized agents of states will be more inclined — or, more precisely, whether states exercising influence over the future of IIL, namely, powerful capital-exporting states — will wish to push off in this direction. If the record to date is not all that encouraging, the instability generated by the regime's strictures will continue to produce new opportunities for reform and renovation.

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156 Eyal Benvenisti, "Exit and Voice in the Age of Globalization" (1999) 98:1 Mich L Rev 167 at 203.

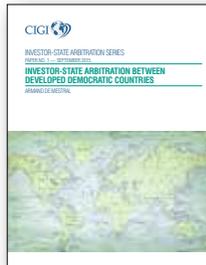
157 *Ibid* at 206.

158 Patrick Macklem, *The Sovereignty of Human Rights* (Oxford: Oxford University Press, 2015).

159 For an instructive account of how the lawyers stood in the way of the rise of administrative agencies in both England and the United States, see, respectively, HW Arthurs, *"Without the Law": Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto: University of Toronto Press, 1985) and Daniel R Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940* (New York: Oxford University Press, 2014).

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### **Investor-State Arbitration Policy and Practice in Australia**

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Luke Nottage

Investor-state dispute settlement (ISDS) first emerged in public and parliamentary debates in 2004, when Australia signed its free trade agreement with the United States; the official reason for excluding ISDS was mutual trust in each other's domestic legal systems. However, a few civil society groups raised broader sovereignty concerns in opposition to the Organisation for Economic Co-operation and Development's Multilateral Agreement on Investment. Debates over ISDS have intensified since 2010, when Australia joined with the United States to negotiate the expanded Trans-Pacific Partnership. There has been almost no analysis of how Australia's domestic law protections for (all) investors compare to substantive protections for foreign investors under international customary and treaty law.



### **An Experienced, Developed Democracy: Canada and Investor-State Arbitration**

*ISA Paper Series No. 7*

Charles-Emmanuel Côté

A "re-politicization" of the settlement of some investment disputes might be needed for the investor-state arbitration (ISA) system to keep its legitimacy and effectiveness. The looming question is that of the discriminatory nature of ISA. In the case of Canada, it seems clear that Canadian law sometimes offers no remedy equivalent to that provided to foreign investors under investment agreements. How long will the system tolerate less protection for national investors? This question will become more pressing with the rise of ISA between developed democracies.

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