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Reassertion of Control: An Introduction

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A. The Current State of International Investment Law: Rough Waters or Catharsis?

(1) The Legitimacy Crisis of International Investment Treaty Law and Arbitration and the Public Law Debate

International investment treaty arbitration is undoubtedly one of the most vibrant mechanisms of international dispute settlement to date. As of September 2016, the total number of investment treaty disputes has reached 739,[1] with the very first award having been issued only about twenty-five years ago, in 1990.[2] While having a relatively slow start, from the late 1990s onwards the number of awards increased, and so did the amounts claimed,[3] providing a constant flow of investment treaty arbitration disputes and awards, with about forty to fifty being issued annually over the course of the past five years,[4] including seventy in 2015.[5] Further, investors started to realise that the international investment agreement (IIA) provisions did not merely sanction expropriation without compensation but allowed, through clauses such as fair and equitable treatment and indirect expropriation, targeting more subtle ways of deprivation of investors' rights by the host State. Consequently, and arguably a success

[1] See United Nations Conference on Trade and Development (UNCTAD), Investment Policy Hub website: http://investmentpolicyhub.unctad.org/isds (accessed 22 September 2016).

[2] *Asian Agricultural Products Ltd.* v. *Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award of 27 June 1990.

[3] See United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2015, 114, fig. III.7, available at http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf (accessed 22 September 2016).

[4] United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2016, 104, fig. III.4, available at http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf (accessed 22 September 2016).

[5] See UNCTAD Investment Policy Hub website: http://investmentpolicyhub.unctad.org/ISDS/FilterByYear (accessed 22 September 2016).

attributable to the increasing web of IIAs,[6] nationalisations or other direct expropriations became rather rare. Instead, governmental measures of a more general nature, including legislation or other regulatory activity, came under scrutiny in investor-State disputes.[7]

As these disputes shifted in focus, from targeting nationalisations absent (adequate) compensation to frequently addressing general regulatory measures of the host State, it became increasingly apparent that the host of them were fundamentally different from both commercial disputes between private actors and classical public international law disputes between sovereign States but rather displayed a considerable resemblance with domestic public law litigation.[8] These disputes permit the control of the exercise of public authority, followed by a sanction (usually monetary damages or compensation), the enforcement of which is quite effective.[9] Indeed, if the claims target, for example, a statute or even far-reaching governmental responses to a financial crisis,[10] what

[6] See A. Lowenfeld, 'Investment Agreements and International Law', *Columbia Journal of Transnational Law*, 42 (2003–4), 123, 129–30.

[7] See M. Valenti, 'The Protection of General Interests of Host States in the Application of the Fair and Equitable Treatment Standard', in G. Sacerdoti, P. Acconi, M. Valenti and A. De Luca (eds.), *General Interests of Host States in International Investment Law* (Cambridge University Press, 2014), 26, 38–54; S. Hindelang and M. Krajewski, 'Towards a More Comprehensive Approach in International Investment Law', in S. Hindelang and M. Krajewski (eds.), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press, 2016), 1, 2–9.

[8] See G. Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007), 48–50; S. W. Schill, 'International Investment Law and Comparative Public Law: An Introduction', in S. W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010), 3, 10–17; A. Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press, 2012), 94–7; *ibid.*, 'Book Review: International Investment Law and Comparative Public Law', *European Journal of International Law*, 22 (2011), 917–24; see also, generally, D. Schneiderman, *Constitutionalizing Economic Globalization: International Investment Law and Democracy's Promise* (Cambridge University Press, 2008); S. Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Oxford, UK: Hart Publishing, 2009).

[9] Cf. Articles 53 and 54 of the ICISD Convention and Article V of the 1958 New York Convention.

[10] See e.g. *CMS Gas Transmission Company* v. *Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May 2005 and Decision of the Ad Hoc Annulment Committee of 25 September 2007; *G&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc.* v. *Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006; *El Paso Energy International Company* v. *Argentine Republic*, ICSID Case No. ARB/03/15, 31 October 2011; *Poštová banka, a.s. and Istrokapital SE* v. *Hellenic Republic*, ICSID Case No. ARB/13/8, Award of 9 April 2015; see also the pending case *Cyprus Popular Bank Public Co., Ltd.* v. *Hellenic Republic*, ICSID Case No. ARB/14/16.

makes the dispute functionally different from administrative or even constitutional judicial review?

However, while function and effect are similar to domestic public law disputes, adjudication in investor-State disputes is beyond the host State's sphere of influence: it is first and foremost an international dispute settlement mechanism. In addition, the treaty instruments on which the claims are based in the vast majority of cases focus on investor rights. Only to a limited extent do IIAs take into account the various interests at stake if issues of public interest are brought before an investor-State tribunal. Elsewhere I have called this the 'public interest challenge'.[11] Combined with the model of private adjudication, the ad hoc nature of the arbitral panel and the often still limited level of publicness of the proceedings,[12] these factors fuel what has been discussed for more than a decade now as the 'legitimacy crisis' of international investment law.[13]

Since the early 2000s, calls from the literature and public opinion to take issues of public interest and the specificities of democratic decision-making into account in investor-State dispute settlement have significantly grown in number. Indeed, there is evidence that these calls are increasingly being heard in arbitral practice. To name but two examples, decisions such as *Electrabel* v. *Hungary* and *Paushok* v. *Mongolia* of 2012 and 2011, respectively, emphasised that the inherent political and hence

[11] A. Kulick, *Global Public Interest in International Investment Law*, 50–2.

[12] However, transparency has improved significantly in investment arbitration with the amended ICSID Arbitration Rules of 2006, the recent UNCITRAL Rules on Transparency of 2014 and most notably with the conclusion of the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (so-called Mauritius Convention); see ICISD Arbitration Rules, as amended and in effect since 10 April 2006, available at https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp (accessed 22 September 2016); UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, in effect since 1 April 2014, available at www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency.html (accessed 22 September 2016); United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration, adopted on 10 December 2014, opened for signature on 17 March 2015, available at www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html (accessed 22 September 2016). See also on recent developments regarding transparency in international investment law and arbitration D. Euler, M. Gehring and M. Scherer (eds.), *Transparency in International Investment Arbitration* (Cambridge University Press, 2015).

[13] See S. D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions', *Fordham Law Review*, 73 (2004–5), 1521; D. Schneiderman, 'Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?', *Journal of International Dispute Settlement*, 2 (2011), 471; generally, G. Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007), 175–84.

more volatile nature of democratic decision-making in itself cannot serve as an indicator that the host States frustrated the investor's legitimate expectations.[14] Further, in the award of 9 April 2015 in *Poštová banka and Istrokapital* v. *Hellenic Republic*, pertaining to the Greek financial crisis, the tribunal adopted an interpretation of what constituted an investment under the respective bilateral investment treaties (BITs) that was much more restrictive[15] than interpretations of similar clauses by tribunals dealing with Argentina's sovereign default of 2001–2.[16] However, the case law, not least due to the ad hoc nature of proceedings, still lacks a consistent, generally accepted and practiced approach of how to include public interest considerations absent detailed treaty language to that effect.[17] Further, and particularly important for the purpose of this book, as the ensuing section will demonstrate, what drives a growing trend in international investment law is the *perception* among IIA Contracting Parties that investment law and arbitration are out of control rather than whether or not this is actually the case.

(2) A New Generation: Reassertion of Control

Hence, this book will depart from the premise that we are currently witnessing a paradigm shift,[18] a new generation of international investment law and arbitration. After three decades of proliferation of investor-friendly IIAs enfranchising the investors to bring themselves international claims against their host States and, accordingly, proliferation of investor-State

[14] *Electrabel S.A.* v. *Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para. 8.23; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company* v. *Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability of 28 April 2011, para. 299. See also, for further references, A. Kulick, 'Investment Arbitration, Investment Treaty Interpretation, and Democracy', *Cambridge Journal of International and Comparative Law* 4 (2015), 441.

[15] See *Poštová banka a.s. and Istrokapital SE* v. *Hellenic Republic*, ICSID Case No. ARB/13/8, Award of 9 April 2015, paras. 228 *et seq*. and 248 *et seq*.

[16] See e.g. *Abaclat and Others* v. *Argentine Republic*, ICSID Case No. ARB/07/5 (formerly *Giovanna a Beccara and Others* v. *Argentine Republic*), Decision on Jurisdiction and Admissibility of 4 August 2011, paras. 352, 354–7.

[17] Which, however, is not to mean that there is a shortage of conceptual and theoretical approaches offered in the literature. For maybe the most prominent one in the past years, see S. W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010).

[18] See also S. Hindelang and M. Krajewski (eds.), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press, 2016).

disputes, the public opinion is changing from indifference or ignorance towards international investment law and arbitration to predominantly scepticism or even fierce opposition.[19]

This is spurred by the fact that over the course of the past ten to fifteen years the old capital-exporting countries of the West are realising that BITs are no one-way street but indeed thus: bilateral. Originally intended to warrant investors from wealthy, predominantly Western countries a certain standard of protection, IIAs, so the old proponents of investment protection realise, can be targeted as much at their policies as they have been targeted at the policies of their treaty partners from the so-called developing world. Regulatory States with complex regimes for protection and conciliation of a myriad of different interests existing in a modern civil society, so it is submitted by many, are particularly prone to fall prey to a system of international investment law and arbitration that is not designed to make the careful balancing choices required of judicial decision-making in complex societal structures.[20] To name but a few examples from recent years, Germany has been seized to pay damages for its decision to phase out nuclear energy,[21] Australia faced a claim by Philip Morris for its plain packaging legislation[22] and Spain is subject to numerous claims for withdrawal of subsidies to the solar energy sector.[23] The pressure on decision-makers to recalibrate treaty

[19] Note that even an economically liberal publication such as *The Economist* has started to doubt the added value of investor-state dispute settlement and is promoting an exclusively inter-State dispute settlement system modelled on the World Trade Organisation (WTO) Dispute Settlement Understanding; *see* 'A Better Way to Arbitrate', *The Economist*, 11 October 2014; and also 'The Arbitration Game' from the same issue.

[20] I only refer to the numerous submissions by non-governmental organisations (NGOs) to the consultations by the European Commission on investor protection in TTIP, which in the vast majority expressed general concerns with regard to investor-state dispute settlement and investment law in general, see online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), EU Commission website: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179 (accessed 22 September 2016); on this complex, see also generally A. Kulick, *Global Public Interest in International Investment Law*, 77–167.

[21] *Vattenfall AB and Others* v. *Federal Republic of Germany*, ICSID Case No. ARB/12/12.

[22] *Philip Morris Asia Limited* v. *Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012–12. However, the claim has been rejected by Award of 17 December 2015.

[23] E.g. *AES Solar and Others* v. *Kingdom of Spain*, UNCITRAL; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l.* v. *Kingdom of Spain*, ICSID Case No. ARB/13/30 (a Decision on Jurisdiction has been issued on 6 June 2016; *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.* v. *Kingdom of Spain*, ICSID Case No. ARB/13/31; *NextEra Energy Global Holdings*

standards and dispute settlement is high – not only in democracies but, due to (social) media, in almost every society with widespread Internet access.

Moreover, the world economy is becoming more and more complex and intertwined. Not only is the classical dichotomy between capital-exporting (developed) States and capital-importing (developing) States severely blurred, but there is a growing tendency among developing or emerging economies to conclude BITs among each other.[24] These changes in economic realities and IIA parties bring about changes in IIA design and IIA policy, as well as in approaches to investor-State dispute settlement by the Contracting Parties to the respective agreements.

Examples for this paradigm shift are myriad. Contracting Parties are increasingly introducing inter-State arbitrations, such as the *Ecuador* v. *United States* arbitration[25]; they make use of, or are seriously considering making use of, joint interpretations of specific treaty provisions[26] and are increasingly including express provisions to that effect in the IIA text[27]; they terminate their IIAs and/or the Convention on the Settlement of Investment Disputes between States and Nationals of other States (so-called International Centre for Settlement of Investment Disputes (ICSID) Convention) or launch a general overhaul of their BIT regime[28]; they make

B.V. and NextEra Energy Spain Holdings B.V. v. *Kingdom of Spain*, ICSID Case No. ARB/14/11 (all pending).

[24] See United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2016, 101–04, http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf (accessed 22 September 2016).

[25] *Republic of Ecuador* v. *The United States of America*, PCA (award not public); further information is available on the PCA website: www.pca-cpa.org/showpage.asp?pag_id=1455 (accessed 22 September 2016).

[26] Joint interpretations will be the subject of Chapter 7 but are also touched upon in Chapters 2 and 6. See also on this issue generally J. R. Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford University Press, 2012), 2.39–2.51; and Article 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties: 'There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.'

[27] See e.g. Articles 9.24.3 and 27.2.2(f) of the Trans-Pacific Partnership Agreement (TPP), signed on 4 February 2015, available at https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text (accessed 22 September 2016).

[28] See on this issue Chapter 9. See also generally UNCTAD, World Investment Report 2015, 106, UNCTAD website: http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf (accessed 16 March 2016); see also UNCTAD, IIA Issues Note No. 2 (December 2010), 'Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims'.

increasing use of frivolous claims mechanisms such as Rule 41(5) of the ICSID Arbitration Rules or consider introducing similar mechanisms into IIAs[29]; they include definitions of standards such as fair and equitable treatment or indirect expropriation into their (model) IIAs[30]; they consider introducing appeals mechanisms or facilitations to challenging an investment treaty arbitration award[31]; and on the EU level, the European Commission has started to implement a regime for extra-EU BITs that foresees a number of control mechanisms for the Contracting Parties over investment disputes and the interpretation of the agreement, pushes for termination of all EU Member States' (intra- and extra-EU) BITs altogether and considers introduction of a so-called investment court system (ICS) into all its future IIAs, which shall replace investor-State arbitration.[32] All these observations are evidence

[29] See on this issue Chapter 4. See generally ICSID Arbitration Rule 41(5), introduced in April 2006; see also R. Dolzer and C. Schreuer, *Principles of International Investment Law*, 2nd edn. (Oxford University Press, 2012), 282–3. See also the EU Commission, 'Concept Paper: Investment in TTIP and Beyond – The Path for Reform', available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.pdf (accessed 22 September 2016).

[30] See on this issue Chapter 12. See also generally European Commission, DG Trade, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)', dated 26 September 2014, available at http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf (accessed 22 September 2016).

[31] See on this issue Chapter 5. See also generally European Commission, DG Trade, 'Factsheet on Investor-State Dispute Settlement', dated 3 October 2013, 4–5, available at http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151791.pdf (accessed 22 September 2016): '[T]he EU believes that on the basis of the agreements we have signed with our trading partners there should be a debate setting up an appeals mechanism for ISDS disputes. This would also lead to greater consistency in how the provisions of investment agreements are interpreted'; see already the discussion within the ICSID dating back until 2004: ICSID Secretariat, 'Possible Improvements of the Framework for ICSID Arbitration', Discussion Paper, 22 October 2004; see generally K. P. Sauvant (ed.), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008).

[32] See on this issue Chapter 13 and also Chapters 5 and 14. See also generally European Commission, DG Trade, 'Factsheet on Investor-State Dispute Settlement', dated 3 October 2013, available at http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151791.pdf (accessed 22 September 2016); European Commission, 'Towards a Comprehensive European International Investment Policy', Communication COM(2010)343 final, dated 7 July 2010, available at http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf (accessed 22 September 2016); European Commission. Press Release 'EU Finalises proposal for Investment Protection and Court System for TTIP', dated 12 November 2015, available at http://europa.eu/rapid/press-release_IP-15-6059_en.htm (accessed 22 September 2016). According to Ingo Venzke, the ICS 'make[s] good sense from the perspective of a public law theory of international adjudication'; see I. Venzke, 'Investor-State Dispute Settlement in TTIP

indicating that this approaching or already present new generation of international investment law and arbitration is characterised by the Contracting Parties' reassertion of control over IIAs and international investment treaty dispute settlement.[33] Moreover, developments such as the Brexit vote and the Trump election signal that we have by no means reached the peak of push-backs against trade and investment liberalization.

It appears that for the first time in the past five decades of modern IIA practice the interests of Contracting Parties to agreements regulating foreign investment are to a large part aligned or at least approximated.[34] This includes Contracting Parties with a traditionally very liberal IIA policy that used to be the frontrunners of investment protection. Germany, for instance, the world's BIT champion, with over 130 such treaties concluded,[35] has recently dispelled considerable scepticism with regard to the current prevalent investment treaty regime and called for reintroduction of the local remedies rule in new IIAs to which it or the European Union may become a party.[36] In addition, its government is opposed to including a chapter providing for investment protection and investor-State dispute settlement mechanisms in the Transatlantic Trade and Investment Partnership (TTIP).[37] This does not sound fundamentally

from the Perspective of a Public Law Theory of International Adjudication', *Journal of World Investment & Trade*, 17 (2016), 374, 399.

[33] For a similar assessment in this regard, see M. Waibel et al., *The Backlash against Investment Arbitration* (Alphen aan den Rijn, Netherlands: Wolters Kluwer, 2010); see also A. van Aaken, 'Control Mechanisms in International Investment Law' in Z. Douglas, J. Pauwelyn and J. E. Viñuales (eds.), *The Foundations of International Investment Law* (Oxford University Press, 2014), 409, 415 *et seq*.

[34] Cf. K. Miles, *The Origins of International Investment Law* (Cambridge University Press, 2013), Chaps. 1 and 2 and p. 386, where she describes the history of international investment law to date as 'a story of "assertion of power and responses to power"'. I contend that such swinging back and forth of the pendulum has come to a halt because of the increasing double role of most Contracting Parties that are simultaneously capital exporters and capital importers; only compare the likes of China, the United States and the European Union: see UNCTAD, World Investment Report 2015, 5, 8, figs. I.3 and I.8, UNCTAD website: http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf (accessed 22 September2016).

[35] According to UNCTAD, as of September 2016, Germany has concluded 135 BITs and 64 other IIAs that are still in force: see UNCTAD website: http://investmentpolicyhub.unctad.org/IIA/CountryBits/78#iiaInnerMenu (accessed 22 September 2016).

[36] See official position of the German government as stated on the website of the German Ministry for Economic Affairs and Energy: www.bmwi.de/EN/Topics/Foreign-trade/TTIP/faq.html (accessed 22 September 2016): 'It should only be possible to initiate investor-to-state dispute settlement as a last resort after exhausting the legal process before the national courts.'

[37] *Ibid*.: 'The German government would like to keep the arbitration procedures out of the TTIP negotiations. They are only needed where there is no functioning state based on the rule of law, and that does not pertain to the EU and the US.' Also note that Sigmar Gabriel,

different in policy approach to the likes of Ecuador or Argentina. Similarly, there is an ongoing discussion within the government of the Netherlands calling into question the established investment policy which led to a recent general impact study of investor-State dispute settlement.[38] I have already hinted at initiatives and considerations with regard to the EU investment policy – the most recent being the creation of a permanent investment court within a specific treaty regime, which has recently been included in the CETA and the EU–Vietnam Free Trade Agreement (FTA).[39]

The antagonism thus is not so much anymore one of 'developed' vs. 'developing' States, 'capital-exporting' vs. 'capital-importing' States or 'the West against the rest'[40] but rather Contracting Parties vs. investor and the investor-State tribunal. As has been foreshadowed in preceding paragraphs, this is most obvious – and will grow in trend in the near future – with regard to the conclusion of new IIAs. While it is true that there remain situations in which predominantly capital-importing States conclude IIAs with predominantly capital-exporting States that display the old power imbalance and thus one-sided pro-investment content of IIAs concluded between the 1960s and the early 2000s, these instances are becoming more the exception than the rule. This is not least due to the growing number of (mega-)regional

the German Minister for Trade and Energy, has recently declared that in his opinion the overall TTIP negotiations 'have failed'; see 'German minister says TTIP has failed', *Financial Times*, 28 August 2016, available at; www.ft.com/content/9603d94e-6d2f-11e6-a0c9-1365ce54b926 (accessed 22 September 2016).

[38] See C. Tietje and F. Baetens, 'The Impact of Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership', study prepared for the Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, dated 24 June 2014.

[39] See Chapter 8; and Chapter II, Section 3, Sub-sections 4 and 5 of the EU-Vietnam Free Trade Agreement as of January 2016, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 (accessed 22 September 2016); Chapter 8, Section F of the CETA as of 29 February 2016, available at http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf (accessed 22 September 2016); see also EU Commission, 'CETA: EU and Canada Agree on New Approach on Investment in Trade Agreement', press release of 29 February 2016, available at http://europa.eu/rapid/press-release_IP-16-399_en.htm (accessed 22 September 2016); and EU Commission, 'Concept Paper: Investment in TTIP and Beyond – The Path for Reform', 11–12, available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (accessed 22 September 2016).

[40] However, see Lauge Poulsen's interesting study on investment treaty negotiation dynamics between developed and developing countries: L. N. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge University Press, 2015).

FTAs[41] that display an amalgamation of various trade and investment interests of often several Contracting Parties and thereby considerably level any power imbalances. However, for the approximation of the Contracting Parties' interests, it should often suffice that the formerly capital exporters have become or are becoming also capital importers. Even with regard to an IIA where it is rather unlikely that capital flows in both directions, the capital-exporting Contracting Party will probably be unable or even reluctant to push for a liberal IIA of the old days. This is not only because of negotiation dynamics – if capital exporter A has concluded restrictive treaties with B, C, and D, in negotiation with capital importer E, it has little leverage to deviate considerably from the substance of those other treaties and maybe even its own rather restrictive Model IIA – but it is also because the pressure of public opinion to limit the reach of investor protection and investor-State dispute settlement is increasing.[42] Look again at Germany, which is still mainly a capital exporter and is unlikely to become a strong capital importer in the near future.[43] Nonetheless, the German government is considering abandoning its decades-old policy of strong investor protection and questions established standards of investment protection.[44]

Public opinion is also a factor in why all Contracting Parties, including the traditional capital exporters, will be more and more prone to push for a restrictive interpretation or overhaul of their old, liberal IIAs. Adding to this, of course, is the aforementioned increased likelihood that both Contracting Parties may find themselves in the respondent seat in an investor-State arbitration.[45] The quasi-precedential effect of investment

[41] See UNCTAD World Investment Report 2016, 101, UNCTAD website: http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf (accessed 22 September 2016).

[42] I only refer again to the about 150,000 submissions to the EU consultation on investor-state dispute settlement; see the online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), EU Commission website: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179 (accessed 22 September 2016).

[43] See UNCTAD, World Investment Report 2015, 5, 8, figs. I.3 and I.8, UNCTAD website: http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf (accessed 22 September 2016).

[44] See nn. 36 and 37.

[45] E.g. according to the UNCTAD World Investment Report 2014, of the fifty-six investment arbitrations introduced in 2013, twenty-six were directed against high-income countries, while nineteen were introduced against lower-income countries and eleven against emerging economies; see UNCTAD World Investment Report 2014, 124, available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf (accessed 8 September 2015); as for the year 2014, the UNCTAD World Investment Report 2015 (p. 112) claims