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Juan Miguel Alvarez Contreras

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INVESTOR-STATE DISPUTE SETTLEMENT BETWEEN DEVELOPED COUNTRIES

TABLE OF CONTENTS

INTRODUCTION

Investor-state dispute settlement (ISDS), understood here as the right of foreign investors to sue host states before an international adjudicatory body, has been one of the most debated and divisive issues in international economic law in the last years. This debate sparked more strongly than ever when developed countries found themselves as respondents in investment disputes, thus realizing that ISDS clauses could also be used against them depending on who the treaty partner is. Being now aware of the litigation risks posed by ISDS clauses in IIAs, developed countries, which once championed the spread of ISDS throughout the world, began questioning the legitimacy of this system for the settlement of investment disputes. This became particularly notorious in the midst of the negotiations of the so-called "mega-regionals," particularly the failed Transatlantic Trade and Investment Partnership (TTIP) between the European Union and the United States, the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada, and the Transpacific Partnership Agreement (TPP) among several countries from the Pacific region.

These agreements had a very particular feature: they were meant to link traditionally developed countries which had never concluded IIAs between each other. Historically, IIAs were firstly concluded between developed, capital-exporting countries and developing countries, following a traditional north-south paradigm. It was clear then what drove states to conclude IIAs. Developed countries sought to increase the protection of their nationals when investing in developing countries, while developing countries wanted to attract much-need foreign investments. ISDS steadily became a common feature of IIAs. Yet, when developed countries are involved, the rationale for entering into IIAs including ISDS could hardly be the same. Sometimes these countries already have a significative flow of investments between each other, which implies that they do not need to engage in any particular effort to "attract" investments. Moreover, these countries usually have strong and unbiased legal systems upon which foreign investors can rely for the settlement of their disputes. A new narrative was needed to justify IIAs and ISDS between developed countries.

Whereas IIAs between developed countries and developing countries (north-south IIAs) and even between developing countries alone (south-south IIAs) have been the subject of extensive analysis, the same has not occurred with regard to IIAs between developed countries (north-north IIAs). This thesis seeks to provide a comprehensive analysis of the issue of ISDS between developed countries, by assessing the reasons advanced in favor of the use of ISDS in this setting, examining the actual scope and the context of the IIAs concluded between developed countries, studying the claims and case law involving developed countries and reflecting on the content of the modern mega-regionals in light of the experience of these countries before ISDS tribunals. In our opinion, this analysis could be useful to understand the general attitude of developed countries regarding investment protection and dispute settlement, which, in turn, could provide a more realistic context to current discussions on the subject of IIAs and ISDS in general. Section 1 describes the problem of ISDS between developed countries and defines the methodology to establish who do we count as a developed country for the purposes of this work. Section 2 describes and critically assesses the arguments advanced in favor of ISDS between developed countries. Section 3 identifies the actual scope of north-north IIAs and ISDS between developed countries and highlights some patterns of the treaty practice among these countries. Section 4 assesses the ISDS case law involving developed countries, stressing the IIAs which have served as a basis for the claims, the type of disputes that developed countries are involved in, and the provisions that have served to hold developed countries liable for the breach of IIAs. Section 5 studies the content of modern IIAs between developed countries (so-called mega-regionals) with a particular eye on the case law identified in Section 5. Finally, Section 6 presents the conclusions of the work.

1. THE PROBLEM OF INVESTOR-STATE DISPUTE SETTLEMENT BETWEEN DEVELOPED COUNTRIES

Arguments against ISDS are manifold.[1] Critics claim that since it is based on the paradigm of international commercial arbitration, the system is no more than a private system of justice that lacks legitimacy to adjudicate disputes concerning public policies and actions, that it fails to assure consistency and predictability in the decision-making, that it creates a "regulatory chill," preventing states from enacting regulations in the public interest in matters such as the protection of the environment, human health, cultural diversity and so on, that it lacks transparency and prevents stakeholders from participating in the proceedings. Because developed countries began to conclude IIAs between each other and, as a result, they began to be called as respondents in investment disputes, another argument against ISDS took impulse: *ISDS is not actually needed between developed countries*.[2]

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[1] For a deeper description of the critics, and some responses to them, *see* European Federation for Investment Law and Arbitration (EFILA), *A response to the criticism against ISDS* (May 17, 2015), https://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf

[2] *See* Jason Yackee, New Trade Agreements Don't Need ISDS, CATO Unbound (May 19, 2015), https://www.cato-unbound.org/2015/05/19/jason-yackee/new-trade-agreements-dont-need-isds#_edn1; Back in 2014, Germany opposed the inclusion of ISDS in the FTA by then being negotiated with the U.S., arguing that "US investors in the European union have sufficient legal protection in the national courts." Jonathan Stoel, Markus Burgstaller & Michael Jacobson, *Germany Reverses its Support for Investor-State Dispute Settlement in the Transatlantic Trade and Investment Partnership (TTIP)*, Hogan Lovells (March 28, 2014), https://www.hoganlovells.com/en/blogs/focus-on-regulation/germany-reverses-its-support-for-investorstate-dispute-settlement-in-the-transatlantic-trade-and-investment-partnership-ttip; Soon thereafter, Germany called for the exclusion of ISDS from the EU-Canada FTA on similar grounds. Stephen Brown, *Germany wants investment clause scrapped in EU-Canada trade deal*, Reuters (Sept. 25, 2014), https://www.reuters.com/article/us-trade-eu-canada/germany-wants-investment-clause-scrapped-in-eu-canada-trade-deal-idUSKCN0HK1DM20140925; The argument was also advanced by different political sectors in Japan, *see* Shotaro Hamamoto, *Debates in Japan over Investor-State Arbitration with Developed States* 1, 9 Paper No. 5 CIGI Investor-State Arbitration (2016); After releasing an online public consultation on the inclusion of ISDS in the TTIP, the European Commission concluded that many NGOs and government organizations "considered [ISDS] as unnecessary between the EU and the US, in view of the perceived strength of the respective judicial systems." European Commission, Report, *Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, SWD(2015)3 final (January 13, 2015), at 14, http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf; Even after the Commission launched its proposal to replace traditional ad hoc arbitration with an investment court system, some sectors of the German society still opposed investor-state dispute settlement on the ground that it is not necessary between developed countries. *See* German Magistrates Association (DRB), *Opinion on the establishment of an investment tribunal in TTIP - the proposal from the European Commission on 16.09.2015 and 11.12.2015* (February 2016), https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/english_version_deutsche_richterbund_opinion_ics_feb2016.pdf (noting that "[t]he clearly implied assumption in the proposal for an International Investment Court that the courts of the EU Member States fail to grant foreign investors effective judicial protection, lacks factual basis.")

The argument goes to the historical roots of ISDS. ISDS was initially conceived to protect foreign investors, by then from developed, capital-exporting countries, against host countries with weak legal systems, labelled as developing countries. Therefore, since it is assumed that developed countries do have a strong rule of law and impartial and sophisticated judicial systems, then there is no need to include ISDS in IIAs involving developed countries. Foreign investors in these countries can rely on the local courts for the protection of their rights, and they thereby need no recourse to international adjudicatory bodies.

Alternatively, based on a similar idea regarding the reliability of the legal systems of the developed countries, some observers have proposed that ISDS should be granted only after investors have exhausted the local remedies before the domestic courts of the host state.[3] Under the assumption that developed countries have well-functioning legal systems, wrongdoings would be fixed in most cases by the domestic courts of the host state. Yet, in the exceptional cases in which domestic courts fail to grant relief, investors would have access to ISDS as a complementary alternative to enforce their rights under the treaty.[4]

Of course, before going any deeper on the subject it is necessary to identify who do we count as developed countries, a question whose answer is trickier than one may think at first. The notion of "developed country" is elusive. Although the notion is widely used in the international sphere,[5] there is not a formally established definition of it.[6] The WTO system, for example, contemplates

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[3] Charles-Emmanuel Côté, *An Experienced, Developed Democracy: Canada And Investor-State Arbitration*, 1, 3 Paper No. 7 CIGI Investor-State Arbitration Series (2016); William S. Dodge, *Investment Treaties between Developed States: The Dilemma of Dispute Resolution, in* THE FUTURE OF INVESTMENT ARBITRATION 165, 179 (Catherine A. Rogers & Roger P. Alford eds., 2009); Freya Baetens, *Transatlantic Investment Treaty Protection – A Response to Poulsen, Bonnitcha and Yackee*, Paper No. 4 in the CEPS-CTR project "TTIP in the Balance'' and CEPS Special Report No. 103 (March 2015), at 9 (noting, though, that this option higher costs and time for the parties); Gus Van Harten, *ISDS in the Revised CETA: Positive Steps, But Is It a "Gold Standard"?*, CIGI Investor-State Arbitration Commentary Series No. 6, https://www.cigionline.org/publications/isds-revised-ceta-positive-steps-it-gold-standard; Jan Kleinheisterkamp & Lauge Poulsen, *Investment Protection in TTIP: Three Feasible Proposals*, GEG & BSG Policy Brief (2014), at 4.

[4] Dodge, *supra* (noting that [i]n those few cases where a breach of the treaty remains and the investor resorts to arbitration, the tribunal will still benefit from the domestic courts' development of the facts and of those issues of domestic law that may bear upon the international claims.").

[5] See, e.g., the *United Nations World Economic Situation and Prospects (WESP) 2019*, Statistical Annex (New York: UN, 2019).

[6] United Nations Statistic Division (UNSD), *Standard Country or Area Codes for Statistical Use*, https://unstats.un.org/unsd/methodology/m49/ (noting that "there is no established convention for the designation of

some advantages in favor of developing countries,[7] but, instead of defining when a country is to be deemed "developed" or "developing," it leaves for the states to announce whether they are one or the other.[8] Most classifications are based on several economic indicators, such as gross national product (GNP), gross domestic income (GDP), per capita GDP, and level of industrialization. Other classifications focus not only on economic criteria, but also on other measures of social and human development, such as education and health standards.[9]

For purposes of assessing states' decisions concerning IIAs, the typical concept of developed country is not entirely useful. This is because in the field of international investment law the notion of developed country needs to be associated to that of "capital-exporting" country.[10] A particular country, although "developed" under some economic criteria, may have no significative outward foreign direct investments. Thus, not every developed country is a capital-exporting country, and not every capital exporting country is "developed." UNCTAD's classification of developed countries,[11] for example, includes as "developed" all Member States of the EU, regardless of the fact that many of them do not have a significant per capita GDP or outward investment flows. At the same time, the classification excludes countries that stand out in these respects, like South Korea and Singapore.[12] Therefore, in order to provide a more realistic and thus useful approach, for the purposes of this thesis we will use a classification of countries that considers not only the economic performance of a country, as measured by its GDP per capita, but also its relevance as a capital-exporting country in terms of FDI outward stock.[13]

'developed' and 'developing' countries or areas in the United Nations system."); United Nations Conference on Trade and Development (UNCTAD), *UNCTADstat*, https://unctadstat.unctad.org/EN/Classifications.html (noting that "[t]here is no established convention for the designation of 'developed' and 'developing' countries or areas in the United Nations system.")

[7] These advantages, usually referred to as "special and differential treatment provisions," include longer time periods for implementing WTO Agreements and commitments, measures to increase trading opportunities, among others.

[8] World Trade Organization (WTO), *Who are the developing countries in the WTO?,* https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm

[9] For instance, the Human Development Index (HDI), created by the United Nations Development Programme, is meant to emphasize "that people and their capabilities should be the ultimate criteria for assessing the development of a country, not economic growth alone." The HDI uses criteria such as life expectancy at birth, expected years of schooling for adults and children, and gross national income per capita. United Nations Development Programme, *Human Development Index (HDI)*, http://hdr.undp.org/en/content/human-development-index-hdi.

[10] Dodge, *supra* note 3, at 169.

[11] UNCTAD, *supra* note 6.

[12] Dodge, *supra* note 3, at 170.

[13] The methodology is taken from *Id.* at 170, 171, but the actual group of "developed countries" is updated with recent data.

Under this methodology, it is first necessary to identify the countries listed by the World Bank as "high-income" economies, namely, countries whose gross national income (GNI) per capita in 2018 was $12,376 or more.[14] Second, based on UNCTAD's World Investment Report 2019,[15] which consolidates data reported in 2018, from the list of "high-income" economies it is necessary to exclude those countries that are primarily capital-importing countries[16] and those with relatively low levels of outward investments.[17] As a result, we obtain a list of thirty-three "developed" countries for the purposes of this thesis.[18] Of course, this classification needs to be welcomed with caution. First, it includes (or excludes) countries in a "gray zone" under the adopted criteria.[19] Second, the classification reflects *today's* reality, which is not necessarily the same reality prevailing when a particular IIA was entered.[20] Hence, it is possible that certain IIAs, north-south in their origin, today may be better defined as north-north IIAs. Third, the classification does not consider other conditions that may speak of a country's development and that may be relevant when investment decisions are considered, like human rights record, political organization and so on.

[14] The list includes a total of 80 "high-income economies," 20 more than in 2006, when professor Dodge conducted his analysis. The World Bank, *World Bank Country and Lending Groups*, https://datahelpdesk.worldbank.org/knowledgebase/articles/906519

[15] See UNCTAD, *World Investment Report 2019: Special Economic Zones* (Geneva: United Nations, 2019).

[16] Defined by professor Dodge as those countries with "more than twice as much inward stock of foreign direct investment as outward stock." Dodge, *supra* note 3, at 171.

[17] Defined by professor Dodge as those countries with "less than 10 billion in outward stock." *Id.*

[18] The list includes all the 25 countries identified by Dodge in 2006 (Canada, United States of America, Israel, Japan, Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, Australia, Singapore, Hong-Kong SAR (China), Korea Republic and Cayman Islands) and also adds 8 new countries (Cyprus, Greece, British Virgin Islands, Kuwait, Saudi Arabia, Qatar, Taiwan (China) and United Arab Emirates).

[19] This is the case of countries like Greece, Portugal and Saudi Arabia (included) and countries like New Zealand and Chile (excluded).

[20] The same warning in Dodge, *supra* note 3, at 171.

2. ARGUMENTS ADVANCED IN FAVOR OF INCLUDING ISDS IN IIAs BETWEEN DEVELOPED COUNTRIES

Observers have claimed that, despite the fact that developed countries are assumed to have robust and reliable systems to protect foreign investors, there are some reasons justifying the inclusion of ISDS in IIAs between developed countries. In this chapter we critically assess such reasons, before examining the actual breadth of north-north IIAs and the case law against developed countries.

2.1. ISDS is necessary to depoliticize the settlement of investment disputes

In absence of ISDS, foreign investors are constrained to seek relief before domestic courts of the host state and, if such proceedings prove insufficient, their only option is trying to convince their home state to espouse their claim in state-to-state proceedings against the host state. If it were to act, the home state would have to embark in a political confrontation against the host state that may escalate from diplomatic protection to the use of economic sanctions[21] or even the deployment of some kind of military intervention.[22] Indeed, history witnessed many episodes of what was termed as "gunboat diplomacy," i.e., the deployment of military force to defend commercial interests.[23] Since ISDS grants investors a direct right of action against the host state, the need to resort to state-to-state mechanisms, although not excluded in theory,[24] is unnecessary in most cases. Thus, ISDS depoliticizes investment disputes by releasing home states from being involved in disputes with host states.[25]

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[21] For example, in 1962, prompted by an expropriation of American capital in Brazil, the U.S. Congress passed the so-called "Hickenlooper amendment" to the Foreign Assistance Act, whereby the government was required to cut foreign assistance to governments expropriating American capital. NOEL MAURER, THE EMPIRE TRAP: THE RISE AND FALL OF U.S. INTERVENTION TO PROTECT AMERICAN PROPERTY OVERSEAS, 1893-2013 467 (Princeton University Press, 2013).

[22] AHMAD GHOURI, INTERACTION AND CONFLICT OF TREATIES IN INVESTMENT ARBITRATION 15 (Kluwer Law International, 2015)

[23] *See* MAURER, *supra* note 21; JAMES CABLE, GUNBOAT DIPLOMACY (Macmillan, 3rd ed. 1994).

[24] Indeed, most IIAs with ISDS still contemplate forms of state-to-state dispute settlement.

[25] Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA* 1(1) ICSID Review – Foreign Investment Law Journal 1,25 (1985); Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. Davis Journal of International Law & Policy 157, 175 (2005) (noting that BITs "placed investment protection in the realm of law rather than politics."); David A. Gantz, *Investor-State Dispute Settlement In Us Law, Politics And Practice: The Debate Continues* 1, 2 Paper No. 9 CIGI Investor-State Arbitration Series (2015); William S. Dodge, *Investor-State Dispute Settlement between Developed Countries:*

Yet, some critics have been advanced against the depoliticization argument. Apart from the fact that it is not clear what "depoliticization" actually means,[26] some observers question the historic assumption whereby depoliticization drove states to enter into IIAs with ISDS in the first place.[27] Indeed, although in the U.S. the depoliticization argument has been praised as one of the key drivers of the BIT program, some observers claim that other factors, especially the need to consolidate the "Western" views regarding the content of customary international law on foreign investment, played a more decisive role.[28] Moreover, the de-politicization argument seems to have played no role at all in the development of European BIT programs.[29]

Others claim, regardless of states' original intent when entering into ISDS, that there is not empirical basis to assert that ISDS actually serves to depoliticize investment disputes.[30] In this regard, a recent study of U.S. diplomatic actions in several investment disputes reveals that the existence of ISDS does not seem to be influential of U.S. government decisions to bring investment disputes into the international sphere.[31] For example, in the famous *Continental* case, the dispute led the U.S. government to cancel ongoing trade negotiations with Ecuador, regardless of the fact the investor had access (and indeed accessed) ISDS.[32] Another example can be found in the *Phillip*

Reflections on the Australia-United States Free Trade Agreement, 39 VAND. J. TRANSNAT'L L. 1, 28 (2006); Martins Paparinskis, *The Limits of Depoliticisation in Contemporary Investor-State Arbitration*, 3 Select Proceedings of the European Society of International Law 1,3 (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1716833 (claiming that "[t]he contemporary State practice, case law and legal writings consider it almost axiomatic that depoliticisation is the purpose of investment protection regime (even if differing about its implications and the degree of successful achievement))."; Christian Tietje & Freya Baetens, *The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership*, Study prepared for: Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands (2014), at 70, file:///Users/mac/Downloads/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf; Ursula Kriebaum, *Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes*, 33 (1) ICSID Review 14-28 (2018).

[26] Paparinskis, *supra* (showing that the concept of depoliticization can be approached from the perspective of the host state, the home state and the investor, having several potential meanings from each one of them).

[27] JONATHAN BONNITCHA, LAUGE N. SKOVGAARD POULSEN & MICHAEL WAIBEL. THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME 196 (Oxford University Press, 2017).

[28] *Id.* at 199 (noting that such goal -of consolidating U.S. views on the content of customary international law- "explains why Washington only signed investment treaties with countries willing to accept the US-model BIT without any significant modifications.")

[29] *Id.* at 197 (referring to the cases of the U.K. and Germany).

[30] *See* Yackee, *supra* note 2.

[31] Geoffrey Gertz, Srividya Jandhyala and Lauge N. Skovgaard Poulsen, *Legalization, diplomacy, and development: Do investment treaties de-politicize investment disputes?* 107 World Development 239-252 (2018).

[32] *Id.* at 246.

Morris case. While the ISDS claims filed by Phillip Morris against Australia and Uruguay were pending, some countries, apparently driven by tobacco companies (among them Phillip Morris itself), brought proceedings before the WTO against the plain packaging legislation enacted by Australia, which was at the very heart of the ISDS claims.[33] Home states have also resorted to the suspension of trade benefits as an instrument for inducing host states to comply with ISDS awards.[34]

Moreover, it is said that absence of ISDS does not necessarily mean political entanglements between states, for IIAs can provide for *legalized* state-to-state mechanisms that resort to third-party adjudicators.[35] Observers also claim that the historical assumption whereby the settlement of investment disputes in the pre-investment treaty era was inefficient may be historically ill-supported or exaggerated and that, in fact, politicization of investment disputes may prove efficient to achieve reasonable and timely outcomes.[36] Commentators also stress that it is not always true that home states are isolated from ISDS, for investors may be prone to seek some sort of intervention from their home state before launching an ISDS claim with all the costs it entails.[37] Also, investors are sometimes state-owned companies and thereby the filling of an investment treaty claim may by itself involve a state-to-state dispute.[38] It is also mentioned that ISDS can still

[33] Catharine Titi, *Are Investment Tribunals Adjudicating Political Disputes?*, 32 (3) Journal of International Arbitration 261, 279 (2015).
[34] *Id.*
[35] Lise Johnson, Brooke Skartvedt Güven, and Jesse Coleman*, Investor-State Dispute Settlement: What Are We Trying to Achieve? Does ISDS Get us There?*, Columbia Center on Sustainable Development (Dec. 11, 2017), http://ccsi.columbia.edu/2017/12/11/investor-state-dispute-settlement-what-are-we-trying-to-achieve-does-isds-get-us-there/#_ednref9; But *see* Ingrid Persson, *Investor-State Dispute Settlement and the Rule of Law*, CATO Unbound (May 26, 2015), https://www.cato-unbound.org/2015/05/26/ingrid-persson/investor-state-dispute-rule-law (although conceding that the alternative to ISDS is not the return to gunboat diplomacy but resort to state-to-state settlement mechanisms, claiming that state-to-state mechanisms have proved to be highly politicized).
[36] Jason Webb Yackee, *Politicized Dispute Settlement in the Pre-Investment Treaty Era: A Micro-Historical Approach*, University of Wisconsin Law School Legal Studies Research Paper Series Paper No. 1412 3 (2017) (claiming that "the depoliticization thesis exaggerates the dysfunction and danger of the pre-investment treaty era. While the depoliticization thesis has some intuitive appeal, its underlying depiction of politicized dispute settlement and its alleged defects rests on an outdated or even ahistorical understanding of how home state governments used the tools of "diplomatic protection", broadly construed, to promote the interests of their investors. Politicized dispute settlement need not entail, or even risk, resort to force. Indeed, it can be apparently successful, especially where home and host state governments, and perhaps also the investor, perceive mutual gains from continued cooperation.")
[37] Tietje & Baetens, *supra* note 25, at 71 (noting that "[t]here have been investment disputes of Dutch companies against other States with which the Netherlands does have a BIT, in which the Dutch government has played a facilitating role, e.g., by exerting influence in meetings with policy makers.")
[38] Paparinskis, *supra* note 25, at 4; Lauge Poulsen, Jonathan Bonnitcha and Jason Yackee, *Costs and Benefits of an EU-China Investment Protection Treaty*, Report to the UK Department for Business, Innovation and Skills 1, 41

turn into a platform to discuss broader controversies between home and host states, like in the case of the implementation of countermeasures.[39]

In any case, even if depoliticization is taken for granted, it remains doubtful as a justification to ISDS between developed countries.[40] First, from a historical perspective, if developed countries actually saw ISDS as a tool to depoliticize the settlement of investment disputes, then the kind of disputes they wanted to depoliticize were disputes involving developing states, for the first IIAs providing for ISDS were concluded between developed, capital exporting countries and developing countries.[41] In fact, episodes of "gunboat diplomacy" usually involved the deployment of military force by a powerful state against a militarily weak counterpart, while there is little evidence showing that investment disputes between developed countries have turned into broader diplomatic crisis.[42]

Second, it has been noted that IIAs between developed countries would likely exclude access to ISDS in the very kind of investment disputes that "are most likely to raise political sensitivities," like those arising from governmental measures based on national security grounds.[43] Moreover,

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(2013), www.gov.uk/government/publications/costs-and-benefits-to-the-uk-of-an-eu-china-investment-protectiontreaty

[39] *Id.*

[40] Lauge Poulsen, Jonathan Bonnitcha and Jason Yackee, *Transatlantic Investment Treaty Protection,* Paper No. 3 in the CEPS-CTR Project on "TTIP in the Balance'' and CEPS Special Report No. 102 (March 2015), at 15 (assessing the depoliticization justification in the context of the negotiations of the TTIP); But *see* Côté, *supra* note 3, at 3 (claiming that the depoliticization argument remains valid between developed countries, but calling for the exhaustion of local remedies before resort to ISDS is granted.)

[41] UNCTAD, *Bilateral Investment Treaties 1959-1999* (Geneva: United Nations, 2000), at 1; K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, 4 Int'l Tax & Bus. Law. 105, 111 (1986) (noting that "[t]he primary purpose of the BIT program was to create an instrument of U.S. legal policy which was responsive to the unique issues facing private foreign investment in developing countries.") Gantz, *supra* note 25, at 4.

[42] Poulsen, Bonnitcha and Yackee, *supra* note 40, at 15 (noting that "we are aware of no evidence to suggest that investment disputes across the Atlantic have spilled over into broader diplomatic conflicts."); Jan Kleinheisterkamp & Poulsen, *supra* note 3, at 6; Tietje & Baetens, *supra* note 25, at 70 ("noting that "[b]ased on interviews with various persons in the Dutch Ministry of Foreign Affairs and the Dutch employer organisation VNONCW, it appears that there have not been any investment-related complaints either from US companies to the Dutch government or the other way around in the past years.")

[43] Poulsen, Bonnitcha and Yackee, *supra* (noting, in the context of the debate on ISDS in the TTIP, that "an EU-US investment chapter is almost certain to include a self-judging national security exception similar to Article 17 of the 2012 model US BIT. In that case, decisions by the US government to block acquisitions by European investors on national security grounds may be essentially unreviewable in arbitration, leaving diplomatic protection as the investor's only option to challenge the denial of permission to invest."); Similarly, Titi, *supra* note 33, at 267 (noting that "[i]n modern day investment arbitration, essential state security concerns are more likely to be invoked in the context of economic crises than other traditional national security interests.")

even if political encounters between developed countries need to be held, it would be improbable to find the same level of politicization witnessed in the past between developed and developing countries.[44] As some observers noted in the context of the debate on the inclusion of ISDS in the TTIP, history shows that "[t]ransatlantic investment flows have flourished for decades without significant politicisation of the dispute settlement process."[45]

Third, as will be shown, the actual number of IIAs between developed countries is lower than usually assumed, which suggests either that these countries do not seem likely to end up engaged in political confrontations with other developed countries over particular investment disputes or that they are no extremely concerned about it.

Yet, some observers suggest that the depoliticization argument may be relevant between developed countries in light of the fact that not of all them wield the same political power and influence, and thereby not all of them are capable of protecting their investors in state-to-state relationships with strong countries.[46] This might serve as an explanation to the fact, reckoned below, that IIAs exclusively linking developed countries usually involve countries that only recently emerged as economically developed, like South Korea, Saudi Arabia, Qatar and United Arab Emirates. These countries, although economically developed, may indeed lack sufficient political influence in the international context.[47]

2.2. Legal systems and courts of developed countries may fail in protecting foreign investors

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[44] Tietje & Baetens, *supra* note 25, at 70.
[45] *Id.*
[46] Younsik Kim, *Investor-State Arbitration in South Korean International Trade Policies: An Uncertain Future, Trapped by the Past* 1, 21 Paper No. 15 CIGI Investor-State Arbitration Series (2016).
[47] *Id.* (asserting that "[p]olitically weak investment-exporting states such as South Korea may be better off resorting to the investment treaty regime. Given South Korea's limited political powers in the international community, it seems unrealistic that it would take diplomatic measures against politically strong countries on behalf of aggrieved South Korean investors. Eventually, an international investment legal system will allow South Korea to protect its own investments from the arbitrary measures of foreign countries without apparent diplomatic conflicts — in particular with politically strong countries such as China or the United States. While individual South Korean investors are qualified to seek a legal remedy through ISA, the South Korean government can protect investments by simply telling the host state, 'Follow the global rule.'")

Some observers suggest that the assumption whereby the legal systems of developed countries are sophisticated and independent enough as to assure foreign investors proper protection may be flawed.[48] While it was negotiating the TTIP with the U.S. and before it came up with the proposal to create the so-called "investment court system" (ICS), the European Commission defended the inclusion of ISDS in the TTIP arguing that "[i]n the US there have been occasions where investors found reasons to complain."[49] The Commission, as well as some commentators, pointed to the famous *Loewen* case[50] as an example of how the legal system of a developed country, the U.S. in the case, may suffer from bias against foreign investors.

In short, Loewen, a Canadian company in the business of mortuary services, was ordered by a Mississippi jury to pay $100 million in compensatory damages and $400 million in punitive damages as a result of a sue filed by a local competitor based on allegations of fraud and violations of antitrust law. The trial was conducted in a blatantly biased manner against Loewen, who was the subject of prejudicial remarks based on its Canadian nationality, its wealth, and its alleged racial attitudes. According to Mississippi's law, prior to appeal Loewen had to post a bond worth 125% of the judgment to stay its execution. Since it was not able to secure the required bond, Loewen settled the case and then filed a suit under NAFTA Chapter 11 against the U.S., claiming the violation of the minimum standard of treatment. Even though Loewen eventually lost the case

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[48] Hugo Perezcano, *Risks of a Selective Approach to Investor-State Arbitration* 1, 4 Paper No. 3 CIGI Investor-State Arbitration Series (2016) (noting that "there is a persistent risk of a state being partial where 'national interests' are concerned that IIAs are meant to address. Even countries that pride themselves on having developed, impartial, democratic and responsive institutions are not beyond reproach in the international plane, as Canadians, for instance, well know from their experience before US authorities and courts in trade remedy cases, as well as in the Loewen arbitration under Chapter 11 of the North American Free Trade Agreement (NAFTA)."); Marc Bungenberg, *A History of Investment Arbitration and Investor-State Dispute Settlement in Germany* 1, 18 Paper No. 12 CIGI Investor-State Arbitration Series (2016) (noting that Foreign investors may be subject to discrimination, may not receive a fair trial in domestic courts, or may otherwise be deprived of fundamental rule of law guarantees even in highly developed OECD countries.); Roderick Abbott, Fredrik Erixon & Martina Francesca Ferracane, *Demystifying Investor-State Dispute Settlement (ISDS)*, European Centre for International Political Economy, ECIPE Ocassional Paper No. 5/2014 (2014), at 21 (claiming that "investment protection in several countries with high-standard legal systems is still not good enough to motivate a strategy of not having access to arbitration tribunals. The United States like many EU countries are in some sectors and areas acting in a way that undermines foreign investors. And they are more likely to do so if there is no investment-protection agreement that constrains potential government abuse."); Jurgen Kurtz & Luke Nottage, *Investment Treaty Arbitration 'Down Under': Policy and Politics in Australia*, Sydney Law School Legal Studies Research Paper No. 15/06 (2015), at 11; Tietje & Baetens, *supra* note 25, at 68.

[49] European Parliament, Answer given by Mr De Gucht on behalf of the Commission (Jan. 27, 2014), http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-013215&language=EN

[50] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003.

for not having exhausted all reasonable appellate remedies,[51] the arbitral tribunal asserted that "we have reached the firm conclusion that the conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law."[52]

While *Loewen* does reveal that a local court from a developed country may engage in egregious behavior and wrongdoing, ISDS, the praised alternative, did not prove much better in the case. The *Loewen* tribunal not only failed to grant any remedy to the investor[53] on a poorly reasoned decision,[54] but also, and perhaps more importantly, rendered its award under notorious pressure from the U.S. government, which could have affected its neutrality and the final outcome of the case. Indeed, as one of the arbitrators in the case later recalled, after his appointment he attended a meeting with officials from the Department of Justice, in which he was told: "You know, judge if we lose this case we could lose NAFTA." To what he replied: "Well, if you want to put pressure on me, then that does it."[55] ISDS then, when developed, powerful countries are involved as respondents, may exhibit the same biases that it is meant to prevent.[56]

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[51] *Id.* para. 217.
[52] *Id.* para. 54.
[53] Jan Kleinheisterkamp*, Is there a Need for Investor-State Arbitration in the Transatlantic Trade and Investment Partnership (TTIP)?* 1, 3 (Feb. 14, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410188
[54] Dirk Pulkowski, *The Final Award in Loewen v. United States*, *in* THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION CRITICAL CASE STUDIES (Guillermo Aguilar Alvarez, W. Michael Reisman eds., 2008).
[55] This episode was described by the arbitrator in an environmental law symposium held after the award was rendered. David Schneiderman, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*, 30 NW. J. INT'L L. & BUS. 383, 403 (2010) (claiming that the arbitrator's behavior reflects the "strategic model" of decision-making, whereby arbitral decisions are motivated by strategic reasonings within specific institutional environments. In the case, the arbitrator seems to have been driven by the need to avoid the backlash against NAFTA that would have ensued if a decision against U.S. was rendered.)
[56] JAN PAULSSON, THE IDEA OF ARBITRATION 161 (Oxford University Press, 2013) (claiming that "[t]he words 'that does it' evidently did not mean -as they should have- that this was the end of the matter for the prospective arbitrator. To the contrary, he accepted appointment, and did so with an apparent acknowledgment of great pressure to reach the result desired by his appointers. The Loewen corporation was thus deprived of an impartial and independent tribunal."); Kleinheisterkamp, *supra* note 53, at 3; Jason Webb Yackee, *Book Review The Reasons Requirement in International Investment Arbitration: Critical Case Studies. Edited by Guillermo Aguilar Alvarez and W. Michael Reisman. Leiden: Martinus Nijhoff Publishers, 2008. Pp. v, 373. Index. $221, E157* 103 AM. J. INT'L L. 629, 635 (2009) (noting that The Loewen award is "often criticized in the investment law community as a disgraceful example of the judicial craft, but its disgracefulness becomes much more understandable when we realize the tremendous pressure that the arbitrators were under to ensure that the United States did not lose."); But *see* V V Veeder, *The Historical Keystone to International Arbitration. The Party-Appointed Arbitrator—From Miami to Geneva*, *in* PRACTISING VIRTUE. INSIDE INTERNATIONAL ARBITRATION 127, 130 (Oxford University Press, David D Caron Stephan W. Schill Abby Cohen Smutny Epaminontas E. Triantafilou eds., 2015) (noting that, since the Loewen case was well in the media by the time, it may "be doubted that the American arbitrator was told anything that he could not already have learned as an informed member of the general public," and that, in any case,

Some observers contend that *Loewen*, although certainly disturbing, is an exceptional case and thereby does not support the opinion that the U.S. legal system is systemically biased against foreign investors.[57] Conversely, in light of the elevated amount of investment flows into the U.S., the fact that ISDS advocates can only point to *Loewen* as revealing broad mistreatment of foreign investors in the U.S. actually illustrates the opposite.[58]

The previous discussion allows us to frame the debate in these words. Neither local courts of host states nor ISDS are perfect. Where developing countries are involved, the assumption is that the local courts may be *generally unreliable*, which justifies recourse to ISDS despite its own deficiencies. But where developed countries are involved, justifications to consent to an unperfect system as ISDS are reduced, for the local courts of these countries are *generally reliable* to protect foreign investors. Following this logic, the scale can lean towards ISDS when the countries involved, although economically developed, do not have completely reliable legal systems, which may help explain why IIAs between developed countries usually involve countries that only recently became "developed," as in the case of Korea, Arabia Saudi, United Arab Emirates and Qatar.[59]

The discussion turns even more complex from the perspective of the treaties concluded by the EU. Not all the Member States are developed under the criteria set forth above and, correspondingly,[60] not all the legal systems of the Member States exhibit the same level of sophistication and impartiality. In fact, some of the central and eastern European that recently accessed the EU, such as the Czech Republic, Bulgaria and Romania, still perform poorly when the independence and efficiency of their legal systems are under exam.[61] In light of this reality, the fact that the developed

the quoted statement by the arbitrator "seems insufficient to impute a commitment by that arbitrator to make improper decisions in favour of the United States as his appointing party.")

[57] Yackee, *supra* note 24; Kleinheisterkamp, *supra* note 53, at 2.

[58] Poulsen, Bonnitcha and Yackee, *supra* note 40, at 12.

[59] Kim, *supra* note 46, at 20 (noting that South Korean insistence to include ISDS in its IIAs, even in those with other developed countries, implies that "South Korean policy makers seem to unintentionally insinuate that the South Korean legal system is so undeveloped that the government should guarantee the legal stability for global investors through international legal remedies rather than through domestic ones.")

[60] See discussion in Chapter 2.

[61] Armand de Mestral, *Investor-State Arbitration Between Developed Democratic Countries* 1, 22 Paper No. 1 CIGI Investor-State Arbitration Series (2016) (noting that "[p]ost-communist countries of the European Union continue to

countries that are Member States of the EU have reliable legal systems loses strength. Countries negotiating investment agreements with the EU may justifiably insist in the incorporation of ISDS under the assumption that not all domestic courts within the EU are suitable to protect their investors.[62] And since the EU would hardly allow ISDS only with respect to some of its members, it is forced to adopt a clear-cut position: either excluding ISDS for all[63] or including ISDS for all.

Something similar occurs in the context of multilateral agreements. As noted below, multilateral trade and investment agreements usually involve both developed and developing countries, this is, countries whose legal systems display different levels of independence and efficiency. While the developed countries may see no reason to include ISDS between each other in light of their sound legal systems, they may still pursue the incorporation of ISDS with respect to the less developed countries in the agreement. Nevertheless, the developed countries may find politically difficult or inconvenient to reach an agreement on a differentiated application of ISDS, so they may end up agreeing to ISDS with no distinction, thus obscuring the fact that their legal system does offer independent and efficient dispute settlement for investors.[64] This is what occurred in the case of NAFTA and the ECT, as note below.

2.3. International obligations demand for international enforcement

To some, as a matter of international law, since IIAs create international obligations for the states, the enforcement of such obligations should be dealt with at an international level.[65] Under this

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have problems, either with new laws such as those curtailing the interest rates on mortgages denominated in foreign currency, or administration of laws for domestic political purposes, as in the Czech Republic. The administration of justice is not thought to be of the highest standard in Bulgaria and Romania. To the extent that this can still happen, causing problems for foreign investors, recourse to ISA is arguably justified."); Bungenberg, *supra* note 48, at 18. (noting that the high number of cases filed against countries like the Czech Republic, Hungary, Poland and Romania "shows the mistrust of the judicial system of these countries, even though they are part of the European Union.")

[62] Marco Bronckers, *Is Investor–State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements*, 18 Journal of International Economic Law 655, 672 (2015).

[63] In this case, resource to ISDS is not necessarily ruled out, for Member States with inefficient legal systems can still consent to arbitration through domestic legislation or contracts. Kleinheisterkamp & Poulsen, *supra* note 3, at 5.

[64] Luke Nottage, *Investor-State Arbitration: Not in the Australia-Japan Free Trade Agreement, and Not Ever for Australia?,* Legal Studies Research Paper No. 15/45 (2015), at 41.

[65] European Federation for Investment Law and Arbitration (EFILA), *supra* note 1, at 34 (noting that "it is self-evident that when a state agrees to abide by a set of rules, their enforcement or compensation claims relating to the non-observance of those rules is also dealt with internationally, or, that those actors who rely on these agreements have the option to seek their enforcement internationally.")

argument, whether host states have strong and independent judiciaries or not is irrelevant, for they, in any case, are not meant to hear controversies regarding the breach of international obligations of the state.[66] The assumption of international commitments by the state demands the existence of international enforcement mechanisms, the absence of which threatens to transform such commitments into mere political statements.[67]

The argument, although persuasive, does not stand by itself. First, while IIAs do create international obligations for the states, in most cases the violation of such obligations is not to be judged in a vacuum, but with reference to the domestic law of the host state.[68] Consider this example. The host state, facing a tariff deficit crisis, decides to dismantle a system of subsidies granted to investors in the gas sector. The investor claims that the normative change violated its legitimate expectations and thereby the FET obligation. Now imagine that this measure occurs in two different countries. The domestic law of the first country states that the subsidies will never be replaced by subsequent laws. Conversely, the domestic law of the second country states that the subsidies shall be reviewed from time to time and shall be subject to modifications when the government deems it to be necessary to safeguard its economic stability. Even if the applicable FET "international obligation" is drafted in identical terms, the very same conduct can be judged differently based on the content of the domestic law.[69] Thus, even when international law reigns, it does not justify, as a matter of principle, the existence of international enforcement mechanisms.[70] International law may demand to consider the domestic law of the state,[71] and one may well argue that is for domestic, rather than for international courts, to fulfill this task.

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[66] Supra at 35.
[67] Supra (noting that "in the discussion on the architecture of international law, it should be clear that serious international law commitments come with serious international enforcement options. If the latter are absent, commitments risk becoming mere political statements and, in the case of IIAs, are not likely to promote foreign investment beyond existing levels.")
[68] Mestral, *supra* note 61, at 7 (noting that "it is not the treaty but domestic law that regulates the treatment of foreign investors. The national law is thus the essential comparator under the treaty and not the treaty itself.")
[69] For a deeper recount of instances in which domestic law may prove influential in determining whether the host state breached the FET clause, *see* JARROD HEPBURN, DOMESTIC LAW IN INTERNATIONAL INVESTMENT ARBITRATION 13-39 (Oxford University Press, 2017).
[70] ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS xxiii (Cambridge, Cambridge University Press, 2009) (noting that "[t]he important insight from the architecture of the investment treaty is that states do not purport to displace municipal laws and regulations on foreign investment in a wholesale fashion by the perfunctory signing of an investment treaty. Instead they envisage a relationship of coordination between international and municipal laws.")
[71] Dodge, *supra* note 3, at 176 (noting that "an investor's treaty claim may be deeply intertwined with issues of domestic law.")

Second, as a matter of international law, the enforcement of many international obligations, especially those that regulate states' behavior within their own jurisdiction (inward-looking obligations),[72] is primarily entrusted to domestic courts.[73] In many instances of international law recourse to international enforcement mechanisms is granted only after the individual has exhausted local remedies.[74] Thus, granting a direct right of action against the state for the violation of international obligations, rather than the rule, appears to be the exception under international law.[75]

2.4. Domestic courts, however sophisticated and efficient, may be precluded from enforcing treaty obligations set out by IIAs

Some observers claim that ISDS between developed countries is required because the domestic law of the state may preclude the enforcement of investors' treaty rights before domestic courts.

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[72] Instead of the behavior of the state vis-à-vis with other states (outward-looking obligations). Antonios Tzanakopoulos, *Domestic Courts in International Law: The International Judicial Function of National Courts*, 34 Loy. L.A. Int'l & Comp. L. Rev. 133, 138 (2011).

[73] Domestic courts are deemed to be the "natural judges of international law." *Supra* at 150, 152 (noting that "international law acknowledges the international judicial function of domestic courts as dispute-settlers and law-enforcers, and reserves a mere subsidiary monitoring function for the international instance. The domestic court is given the opportunity to successfully deal with the essence of the international claim, by correctly applying (but only in substance, not necessarily explicitly) international law.")

[74] Indeed, the exhaustion of local remedies is considered to be a principle of customary international law. In the context of diplomatic protection, see Interhandel Case (Switz. v. U.S.), Preliminary Objections, 1959 I.C.J. Rep. 6, at 27 (March 21), at https://www.icj-cij.org/files/case-related/34/034-19590321-JUD-01-00-EN.pdf (noting that "[t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law."); Elettronica Sicula S.p.A. (ELSI) (Italy v. U.S.), Judgment, 1989 I.C.J. Rep. 15, 28 I.L.M. 1109 (July 20) (noting that the exhaustion of local remedies, "an important principle of customary international law," cannot "be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so."); The rule of exhaustion of local remedies is also a rule in all major global and regional human right regimes. Martin Dietrich Brauch, *Exhaustion of Local Remedies in International Investment Law*, IISD Best Practices Series (January, 2017), at 5 (referring to the similar provisions in the International Covenant on Civil and Political Rights (ICCPR), the European Convention of Human Rights, the American Convention of Human Rights and the African Charter on Human and Peoples' Rights); The exhaustion of remedies is also a rule under the Rome Statute of the International Criminal Court (art. 14).

[75] Martin Dietrich Brauch, *supra* at 7 (noting that "[u]nlike in the context of the major human rights systems, in which ELR is the rule rather than the exception, very few agreements in the universe of over 3,000 bilateral investment treaties (BITs) and treaties with investment provisions (TIPs) expressly require ELR."); As a further corroboration that the exhaustion of local remedies is the rule under international law, some authors and case law have admitted that the ICSID Convention (art. 26) contains a waiver to the general rule of exhaustion of remedies. See, e.g. *Lanco International Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, (Dec. 8, 1998), para. 38-39.

The argument refers to whether and how, under the domestic law of the host state, treaty provisions are to be enforced before domestic courts. Well known in this regard is the distinction between monist and dualist countries. While in the former most treaties are to be deemed as domestic law since their ratification, in the latter most treaties are not part of domestic law, unless they are implemented through domestic legislation.[76] Since in countries said to follow a dualist approach, like Australia, Canada, Israel and the U.K., foreign investors have no venue to enforce their rights under IIAs, ISDS becomes the only alternative for the effectiveness of such rights.[77] This justification was advanced by the European Commission to defend the inclusion of ISDS in the failed TTIP with the U.S.[78]

To properly assess this argument, it would be required to examine the legal stance of every developed country on the status of IIAs in the domestic law. The distinction between dualist and monist countries is not completely useful because the line between one and the other tends to be blurred,[79] as it is revealed by the fact that domestic courts of traditional dualist states more frequently apply international law directly or indirectly, even if it has not been formally incorporated into the domestic legal system.[80] At the same time, domestic courts in monist states have identified some instances in which international treaties are not directly applicable within the internal legal system.[81] It is not advisable then to overgeneralize when dealing with the extent and means through which investment treaty provisions may be applied before domestic courts.

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[76] David Sloss, Domestic Application of Treaties (2011), Santa Clara Law Digital Commons, https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1620&context=facpubs, at 2 (noting that "[d]ualist states are states in which no treaties have the status of law in the domestic legal system; all treaties require implementing legislation to have domestic legal force. Monist states are states in which some treaties have the status of law in the domestic legal system, even in the absence of implementing legislation.")

[77] Perezcano, *supra* note 48, at 2; Stephan W. Schill*, In Defense of International Investment Law, in* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 309, 334 (Springer, Marc Bungenberg, Christoph Herrmann, Markus Krajewski, Jörg Philipp Terhechte eds. 2016); Freya Baetens, *supra* note 3, at 4.

[78] European Commission, Concept Paper, *Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court*, at 9, http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF

[79] David Sloss, *Treaty Enforcement in Domestic Courts: A Comparative Analysis* (Cambridge University Press, 2009), at 5, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1326711 (noting that "[a]lthough scholars use the terms 'monist' and 'dualist' to describe different types of domestic legal systems, the actual legal systems of many states do not fit neatly into either of these two categories.")

[80] Sloss, *supra* note 76, at 5 (noting that "courts in dualist states have developed a variety of strategies for judicial application of unincorporated treaties — even in the absence of any statutory directive for government officials to take account of treaty provisions.")

[81] Bronckers, *supra* note 62, at 665.

Japan, for example, does not have any legal provision defining whether treaties have direct applicability in the domestic legal order.[82] In general, courts afford direct applicability to treaty provisions that are clear and precise, with the effect that individuals can invoke such provisions before the Japanese domestic courts.[83] There are no precedents on the direct applicability of investment agreements entered by Japan, but observers assert that "the Japanese jurisprudence on the direct applicability of treaties suggests that most of the investment-related provisions in such treaties are directly applicable."[84]

In contrast, U.S. treaties require implementation through domestic law, unless they are "self-executing."[85] And even if a treaty is "self-executing," that does not necessarily entail that it confers individuals with a private right of action before U.S. courts to enforce its provisions.[86] After *Medellin*, in which the U.S. Supreme Court stated that "[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts,"[87] lower U.S. Courts have adopted a presumption whereby treaties do not give rise to private rights of action.[88] In reaction to Medellin, the Senate's Committee on Foreign Relations issued a declaration on the "[d]omestic implementation of the Rwanda BIT," stating "that Articles 3-10 of the Treaty are self-executing and do not confer private rights of action enforceable in United States courts. The remaining provisions of the Treaty are not self-executing and do not confer private rights of action enforceable in United States courts."[89] In the same line, U.S. legislation implementing free trade agreements, as in the case of the U.S.-Australia FTA and NAFTA, explicitly excludes private rights of action before U.S. domestic

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[82] Shotaro Hamamoto & Luke Nottage, *Foreign Investment In and Out of Japan: Economic Backdrop, Domestic Law, and International Treaty-Based Investor-State Dispute Resolution*, Legal Studies Research Paper No. 10/145 (2010), at 14.
[83] *Id.*
[84] *Id.*
[85] Oona A. Hathaway; Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 56 (2012) ("A *self-executing treaty* is a treaty that creates a domestic legal obligation in the absence of implementing legislation.")
[86] John F. Coyle & Jason Webb Yackee, *Reviving the Treaty of Friendship: Enforcing International Investment Law in U.S. Courts*, 49 ARIZ. ST. L.J. 61, 77 (2017).
[87] Medellin v. Texas, 552 U.S. 491, 506 n.3 (2008) (internal citations omitted); Sloss, *supra* note 79, at 30 (describing Medellin as "indicative of a disturbing trend in which U.S. courts increasingly regard international treaties with barely disguised contempt.")
[88] Hathaway et al., *supra* note 85, at 71.
[89] S. REP. No. 111-8, at 11 (2011).

courts for the enforcement of such treaties.[90] Both Canada and Australia, the developed countries which are part to these agreements, follow a similar position.[91]

The EU traditionally has had a different approach on the subject of the effect of international treaties within the internal legal systems of the Member States. Yet, the European Commission has recently embraced new treaty practices that tend to challenge such traditional approach. Indeed, the EU law system has been traditionally labelled as monist, which means that once concluded international treaties become part of the legal system of the EU, i.e., international treaties are directly *applicable*.[92] However, the fact that a treaty is directly applicable in the EU legal system does not necessarily mean that it has direct *effects*, i.e., that it can be invoked by individuals before the domestic courts of the Member States.[93] It is for the treaty parties or for the ECJ to establish whether a particular treaty is meant to produce direct effects.[94] In the absence of treaty provisions clarifying the effects of treaties in the domestic legal order, the ECJ has asserted that a treaty has direct effects only if that is consistent with the spirit, structure and nature of the treaty, and its

[90] In the case of U.S.-Australia FTA, *see* H.R. 4759, Public Law 108-286, 108 Stat. 919 (2004), 19 USC 3805 notes, Section 102(c). In the case of NAFTA, *see* H.R. 3450, Public Law 103-182, 107 Stat. 2062, Section 102(c). It is to be noted, though, that unlike NAFTA, the U.S.-Australia FTA does not provide for ISDS

[91] Luke Nottage, *Investor-State Arbitration Policy and Practice in Australia* 1, 10 Paper No. 6 CIGI Investor-State Arbitration Series (2016) (noting that "[i]nvestment treaty protections are not directly enforceable or judiciable through Australian courts."); Armand de Mestral & Robin Morgan, *Does Canadian Law Provide Remedies Equivalent to NAFTA Chapter 11 Arbitration?* 1, 5 Paper No. 4 CIGI Investor-State Arbitration Series (2016) (noting that "Canadian domestic courts have no jurisdiction to hear claims made on the basis of a treaty, unless the treaty remedy has been incorporated into Canadian law. The fact that a foreign investor is guaranteed certain standards of treatment by an investment treaty creates no right of action before Canadian courts.")

[92] *See, e.g*., European Court of Justice, Case C-224/16, Aetbri v. Burgas, 2017, ECLI:EU:C:2017:880, para. 50.

[93] Allan Rosas, *The European Court of Justice and Public International Law*, Meeting of the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI), Strasbourgn (March 2018), at 4; Laura Carola Beretta & Agnieszka Smiatacz, *Is the Supreme and Constitutional Courts' Rebellion Against EU Law a Threat for the Lack of Direct Effect of the New Generation EU Free Trade Agreements?*, 12 (11-12) Global Trade and Customs Journal 455, 458 (2017) (noting that doctrinairely there is a well-established difference between direct effect "sensu largo," which means that international treaties are binding within the EU legal order, and direct effect "stricto sensu," which refers to question of whether treaties confer individual rights of action upon individuals.).

[94] European Court of Justice, Case 104-81, Hauptzollamt Mainz v Kupferberg, 1982, ECR 3664, para 17 ("In conformity with the principles of public international law Community institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall for decision by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community.")

provisions are sufficiently precise and unconditional.[95] Under this approach, the ECJ has been prone to ascribe direct effects to bilateral agreements concluded by the EU with third countries.[96]

However, in what has been described as a major policy shift, most bilateral trade agreements concluded by the EU since 2008 incorporate a provision stating that they do not have a direct effect in the domestic courts of the contracting parties.[97] Relevantly for our discussion, this trend was extended to bilateral agreements concluded by the EU with developed countries comprising not only trade provisions but also investment provisions, as is the case of the EU-Canada FTA (CETA)[98] and the EU-Singapore FTA.[99] It is worth remarking that these treaties only are denied *direct* effects, which means that they still may bear some relevance *indirectly* by informing the interpretation of the secondary legislation of the EU.[100]

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[95] See, e.g., European Court of Justice, Case C-265/03, Simutenkov v. Ministerio de Educación y Cultura, EU:C:2005:213, para 21; Francesca Martines, *Direct Effect of International Agreements of the European Union*, 25(1) The European Journal of International Law 129, 138 (2014).

[96] *See, e.g.*, European Court of Justice, Case C-162/00, Nordrhein-Westfalen v. Beata Pokrzeptowicz-Meyer, [2002] ECR I–1049, paras. 19-30; Hauptzollamt Mainz v Kupferberg, *supra* note 94, at para. 26; Case C 416/96 Nour Eddline El-Yassini v. Secretary of State for the Home Department [1999] ECR I 1209, para 32; Case C 162/96 A. Racke GmbH & Co. v. Hauptzollamt Mainz [1998] ECR I 3655, para 51; Case 87/75 Bresciani v Amministrazione delle finanze dello Stato [1976] ECR 129, para 26; However, the ECJ has embraced a more restrictive view regarding the potential direct effects of multilateral trade agreements. For example, it denied direct effects to the GATT and then to some provisions of the WTO. *See* European Court of Justice, Joined Cases 21 to 24/72, International Fruit Company v. Produktschap voor Groenten en Fruit, 1972, ECR 1219, para. 27; European Court of Justice, Case C 268/94 Portuguese Republic v Council of the European Union [1999] ECR I 6177, para 34–46.

[97] This is the case of the Economic Partnership Agreement with the CARIFORUM States, the EU-Korea FTA, the EU-Peru and Colombia FTA, the Association Agreement with Central America, and the EU-Irak Partnership Cooperation Agreement. Aliki Semertzi, *The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements*, 51 Common Market Law Review 1125, 1126 (2014).

[98] Comprehensive Economic and Trade Agreement (hereinafter CETA), EU-Can., art. 30.6, Oct. 30, 2016, http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf ("1. Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties. 2. A Party shall not provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement."); CETA entered into force on 21 September 2017, with the exclusion of the provisions dealing with portfolio investments and investment dispute settlement, which are subject to the approval of each of the Member States of the EU.

[99] Investment Protection Agreement, EU-Sing., art. 17.5, Oct. 19, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download; The same rule is included in art. X.19 of the EU-Vietnam FTA.

[100] This has been referred to as the principle of consistent interpretation or the principle of uniform interpretation. Rosas, *supra* note 93, at 5; Bronckers, *supra* note 81, at 665; Beretta & Smiatacz, *supra* note 93, at 456; European Court of Justice, Case C-240/09, Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky, 2011, ECLI:EU:C:2011:125, para. 50; 157; See, generally, Jan-Peter Hix, *Indirect Effect of International Agreements: Consistent Interpretation and other Forms of Judicial Accommodation of WTO Law by the EU Courts and the US Courts*, Jean Monnet Working Paper 03/13 (2013).

Thus, when in the process of negotiating the failed TTIP the European Commission defended ISDS on the ground that domestic courts are precluded from adjudicating treaty claims,[101] the Commission was not actually pointing to a legal barrier within the EU to the direct applicability of trade and investment agreements before the domestic courts of the Member States, because, as seen, the ECJ has been inclined to grant bilateral trade agreements with direct effects. Rather, the Commission was pointing to a policy choice it had made in the direction of excluding such effects from its bilateral trade and investment agreements.[102]

At this point, a question emerges as to whether a treaty party should grant direct effects to a treaty when the legal system of the other party does not contemplate such effects. One may argue that there will be no reciprocity where one of the parties grants direct effects to a treaty, thereby exposing itself to treaty claims from foreign investors before its domestic courts, while the legal system of the other treaty party does not contemplate such direct effects within its own legal order. In this sense, given that Canada has been traditionally reluctant to admit treaty claims from individuals, the Commission's decision to deprive the EU-Canada FTA from direct effects may be justified on the need to safeguard the principle of reciprocity.[103] Yet, some observers argue that the fact that the treaty partner does not grant private rights of action for the enforcement of the treaty does not entail by itself a lack of reciprocity in the implementation of the agreement,[104] a conclusion that seems to be supported by the case law of the ECJ.[105] In any case, it is to be noted that the policy choice of excluding direct effects from trade and investment agreements has been

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101 *See* European Commission, *supra* note 78.

102 Bronckers, *supra* note 81, at 663 (noting that "if the EU wanted to optimize the chances that a treaty would not be given direct effect by the European Courts, the EU needed to insist on an explicit clause denying such effect in the treaty itself, in view of the case law of the European Court of Justice.")

103 In fact, when defending the inclusion of ISDS in the failed TTIP, the Commission pointed to the fact that international treaties are not directly incorporated into the U.S. legal system. *See*, European Commission, *supra* note 78.

104 Bronckers, *supra* note 81, at 669 (noting, though, that "in the event and for as long as the EU political institutions properly establish that there is a serious lack of reciprocity in the implementation of the economic or investment chapters of an agreement like TTIP, it could be acceptable for courts in the EU to suspend the possibility of private treaty-based claims of these chapters.")

105 Hauptzollamt Mainz v Kupferberg, *supra* note 94, at para 18 ("According to the general rules of international law there must be bona fide performance of every agreement. Although each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means. Subject to that reservation the fact that the courts of one of the parties consider that certain of the stipulations in the agreement are of direct application whereas the courts of the other party do not recognize such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement.")

embraced by the European Commission without distinction, i.e., irrespective of whether the domestic legal system of the other treaty party would have granted investors with a private right of action for the enforcement of the treaty.[106]

As it is revealed by the previous discussion, foreign investors, although "protected" under certain IIA, may have no right of action to pursue the enforcement of such protection before the domestic courts of the host state. This may be the result either of the stance of the legal system of the host state regarding the interplay between international and domestic law, or of a policy choice incorporated by the parties in the treaty. Yet, the finding that investors are barred from submitting treaty-based claims does not put an end to the inquire. First, the host state may have implemented the provisions of the treaty into domestic law, in which case investors are protected as a matter of domestic law.[107] As some commentators noted in the context of the TTIP negotiations, "if one believed that was a problem of domestic-court enforceability of TTIP rights in the US, the appropriate response by the EU would be to insist in its negotiations that the US pass implementing legislation securing a right to access US courts for certain TTIP violations, not to include ISDS in TTIP."[108] Second, even if a country has not *formally* incorporated the provisions of the treaty, it is entirely possible that its domestic law already assures similar protections to foreign investors.[109] Thus, what becomes relevant in the discussion is whether the domestic system of the home state substantially protects investors as IIAs do. For example, since the U.S. law on expropriation has been largely replicated in the U.S. BIT Model and IIAs,[110] foreign investors' right of action under domestic law allows domestic courts to apply IIAs, even if they are not particularly aware of it.

2.5. IIAs provide investors with greater rights than those enjoyed by domestic investors

[106] Bronckers, *supra* note 81, at 668 (noting that the EU has embraced a 'one size fits all" approach policy regarding the effects of treaties in the EU legal system).
[107] Kleinheisterkamp, *supra* note 53, at 4.
[108] Poulsen, Bonnitcha and Yackee, *supra* note 40, at 13. But *see* Baetens, *supra* note 3, at 5 (noting that, in light of U.S. negotiation policy and the actual practice of domestic courts, it is "highly unlikely that the US would ever agree to pass legislation that would make substantive treaty standards domestically enforceable.")
[109] Dodge, *supra* note 3, at 174 (noting that "[e]ven if breaches of an investment treaty cannot be raised in domestic court, as it is true with the NAFTA and other U.S. FTAs, the domestic law of the host state may provide relief to the foreign investor and avoid international liability for the state.")
[110] Gantz, *supra* note 25, at 14 (noting that, following the TPA's mandate in the sense of not to grant greater protection to foreign investors under IIAs, U.S. takings law was basically incorporated to the Singapore-U.S. FTA).

Very close to the previous discussion is the argument, used both in favor and against ISDS between developed countries, that IIAs and ISDS grant foreign investors with greater rights than those enjoyed by local investors. Historically, IIAs and ISDS were conceived for the very purpose of affording investors from developed countries with better protection in developing countries. Domestic standards for the definition of the compensation in case of expropriation, for example, were deemed to be insufficient or unpredictable, so IIAs became a tool to consolidate a different, more attractive standard of compensation.[111] The very existence of a minimum standard of treatment conveys the idea that foreigners may be afforded greater protection than the enjoyed by domestic investors. Indeed, if a host state assures that foreign investors shall not be treated below a minimum standard of treatment, it must do so regardless of whether domestic investors are subjected to a treatment that is below such standard.[112] There was also suspicious about the reliability of the local courts and their potential bias against foreign investors, so ISDS was created to grant foreign investors with a direct right of action against the host state before international adjudicatory bodies. One may concede then that the point of IIAs was precisely to afford foreign investors with greater rights than those enjoyed by domestic investors.

Yet, when developed countries began to be challenged under IIAs, they, who sought such greater protection in the first place, embraced the opposite view that IIAs should not afford foreign investors with greater rights than those enjoyed by domestic investors,[113] something that has been labelled as a "modified" version of the Calvo doctrine.[114] Prompted by the growing criticism against NAFTA Chapter 11, in 2002 the U.S. Congress passed the Bipartisan Trade Promotion Authority Act (TPA), which sets as one of the negotiating objectives of the U.S "ensuring that

[111] Lauge Poulsen, *Beyond Credible Commitments: (Investment) Treaties as Focal Points* (Sept. 6, 2019), International Studies Quarterly (forthcoming), at 5, https://ssrn.com/abstract=3450875

[112] *See Gami Investments v. Mexico*, UNCITRAL, Award (Nov. 15, 2004), para. 259 ("The minimum standard of treatment provision of the NAFTA is similar to clauses contained in BITs. The inclusion of a "minimum standard" provision is necessary to avoid what might otherwise be a gap. A government might treat an investor in a harsh, injurious and unjust manner, but do so in a way that is no different than the treatment inflicted on its own nationals. The "minimum standard" is a floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner.")

[113] *See, e.g.,* Kleinheisterkamp & Poulsen, *supra* note 3, at 3.

[114] BONNITCHA, POULSEN & WAIBEL, *supra* note 27, at 13, 152 (noting that this stance is in line with the economic reasoning whereby "[a]ll other things being equal, granting preferential rights to foreign investors of particular nationalities—'reverse discrimination'—reduces efficiency."); Rodrigo Polanco Lazo, *The No of Tokyo Revisited: Or How Developed Countries Learned to Start Worrying and Love the Calvo Doctrine*, 30 (1) ICSID Review 172, 184 (2014).

foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States."[115] From then on, the U.S. amended some of its IIAs and its Model BIT in order to reflect domestic standards on the content of the treaty standards of protection, particularly expropriation and fair and equitable treatment.[116] The U.S.-Colombia FTA states in its Preamble that "foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in this Agreement."[117] Similar provisions are included in the U.S. FTAs with Panama,[118] Peru[119] and Korea.[120]

In 2015, the U.S. Congress passed the Bipartisan Congressional Trade Priorities and Accountability Act, which reproduced the 2002 FPA negotiating objective.[121] Correspondingly, in the context of the ensuing negotiations of the TTIP and the TTP, the U.S. government once again asserted that "[t]hese investment rules mirror rights and protections in the United States and are designed to provide no greater substantive rights to foreign investors than are afforded under the Constitution and U.S. law."[122] After fierce debate over ISDS in the TTIP, the "no greater rights" principle was also embraced by the European Parliament in the context of the TTIP negotiations.[123] More recently, Canada and the EU issued a Joint Interpretative Declaration on the Comprehensive

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[115] H.R.3009 - Trade Act of 2002, 107th Cong., Sec. 2 (b)(3) (2001-2002).
[116] Gantz, *supra* note 25, at 15.
[117] Trade Promotion Agreement, Colom.-U.S., Preamble, Nov. 22, 2006, https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file708_10150.pdf
[118] Trade Promotion Agreement, U.S.-Pan., Preamble, June 28, 2007, https://ustr.gov/sites/default/files/uploads/agreements/fta/panama/asset_upload_file309_10358.pdf
[119] Trade Promotion Agreement, U.S.-Peru, Preamble, April 12, 2006, https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file971_9505.pdf
[120] Free Trade Agreement, U.S.-S.Kor., Preamble, June 30, 2007, https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file755_12697.pdf
[121] S.995 - Bipartisan Congressional Trade Priorities and Accountability Act of 2015, 114th Cong., Sec. 2 (b)(4) (2015).
[122] USTR, Fact Sheet: "Investor-State Dispute Settlement (ISDS)" (March 2015), https://ustr.gov/about-us/policy-offices/press-office/factsheets/2015/march/investor-state-dispute-settlement-isds
[123] European Parliament, Report containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)) (June 1, 2015) (stating, as one of the negotiating goals in the negotiation of the TTIP, to "ensure that foreign investors are treated in a non-discriminatory fashion and have a fair opportunity to seek and achieve redress of grievances while benefiting from no greater rights than domestic investors.")

Economic and Trade Agreement (CETA), stating that "CETA will not result in foreign investors being treated more favourably than domestic investors."[124]

Despite these statements, some observers contend that IIAs, even those that narrow down the scope of protection of investors aiming to reduce tribunals' discretion, do afford foreign investors with greater rights than those available to domestic investors. In this regard, it is said that, regardless of the substantial content of IIAs, the mere existence of ISDS entails that foreign investors are afforded with greater rights, for domestic investors have no similar right of action against the state before an international adjudicatory body.[125] In 2011, when the Australian Government embraced a policy against the inclusion of ISDS (policy that was moderated when the party government changed), it asserted that "foreign investors should not benefit from arbitration as a dispute resolution process that is not ordinarily available to domestic investors."[126]

Hence, while domestic investors need to engage in proceedings before domestic courts, subject to domestic procedural principles and rules that may prove influential to the final outcome of the case, foreigners under IIAs can bypass such procedural principles and rules by resorting to international arbitration and may thus succeed in circumstances under which they may have succumbed under domestic law.[127] The EU and Canada seem to have reacted to this argument by

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[124] Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, Oct. 27, 2016, at 4, http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf

[125] CONG. RESEARCH SERV., R43491, Trade Promotion Authority (TPA): Frequently Asked Questions 8 (2019) (noting that the "TPA-2015 states that no trade agreement is to lead to the granting of foreign investors in the United States greater substantive rights than are granted to U.S. investors in the United States. Some have argued, however, that the use of ISDS itself implies greater procedural rights."); Carmen Otero García-Castrillón, *Spain And Investment Arbitration: The Renewable Energy Explosion*, 1, 18 Paper No. 17 CIGI Investor-State Arbitration Series (2017) (noting that "[a]s to the effect of the renewable energies situation in the investment arbitration debate within Spanish civil society, three aspects are significant. The first is the differential treatment (discrimination) of national and foreign investors. Although Spanish investors have suffered the same consequences of the normative reforms as foreign investors, they do not have access to arbitration. Foreign investors, even those owned by Spanish nationals or companies, do have the arbitration option.")

[126] Leon Trakman, *Investor State Arbitration or Local Courts: Will Australia Set a New Trend?*, 46 (1) Journal of World Trade 83, 90 (2012) (pointing to a statement from the Australian Government in the sense that "[d]ispute settlement processes should not afford foreign investors in Australia with access to litigation options not normally afforded to local investors.")

[127] Lise Johnson, Lisa Sachs & Jeffrey Sachs, *Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law*, CCSI Policy Paper (May 2015), at 11 (noting that "[e]ven if it could be said that, in theory, these purely *substantive* standards of protection under investment treaties were the same as those under domestic law, the procedural avenues through which those standards are enforced can render the substantive standards different – and greater – in practice. This in turn exposes the government to litigation and liability to an extent not permitted under

claiming that their FTA "does not privilege recourse to the investment court system set up by the agreement. Investors may choose instead to pursue available recourse in domestic courts."[128] Of course, one may note that, regardless of whether the states somehow privilege ISDS over recourse to domestic courts, what remains true is that protected investors under the FTA enjoy the option to choose between either of the two, whereas domestic investors have not the same option.[129] They are restricted to seek relief before the domestic courts of their home state.

As to whether there is any reason to justify this preferential procedural right, some observers claim that a right of action before international adjudicators is acceptable when foreign investors are prone to suffer discrimination from the court system of the host state.[130] That being the case, since foreign investors have in practice lesser procedural rights than domestic investors as a result of such discrimination, ISDS fixes the situation and brings economic efficiency by providing the former with an unbiased forum for dispute settlement.[131] Thus, rather than creating greater rights for foreign investors, what ISDS does is giving them what domestic investors already have. Of course, this discussion is tied to the question, previously discussed, of whether developed countries have strong and unbiased legal systems.[132] If, as most developed countries would claim, they do generally assure that there will be no discrimination against foreign investors, then there is not inefficiency to fix and ISDS effectively affords foreign investors with greater rights.

Beyond dispute settlement, it is hotly debated whether IIAs create greater *substantial* rights than those under domestic law. This question, as the question of whether domestic courts are allowed

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domestic law and undermines the government's ability to take regulatory and other actions that are adverse to foreign investors without the risk of having to pay costly compensation.")

[128] Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, *supra* note 124, at 5.

[129] Gus Van Harten, *The EU-Canada Joint Interpretive Declaration/Instrument on the CETA Updated Comments*, 13(2) Osgoode Legal Studies Research Paper No. 6 (2017), at 4, file:///Users/mac/Downloads/SSRN-id2850281.pdf

[130] Government perspectives on investor-state dispute settlement: a progress report, Freedom of Investment Roundtable 14 December 2012, at 11, https://www.oecd.org/daf/inv/investment-policy/ISDSprogressreport.pdf (noting that, in the context of a Roundtable on ISDS conducted under the auspicious of the OCDE, some participant governments "suggested that the risk of bias against foreign investors in domestic courts in the host country is a basis for granting them at least some special substantive and procedural rights compared with domestic investors.")

[131] BONNITCHA, POULSEN & WAIBEL, *supra* note 27, at 154.

[132] *Id.* (pointing to a recent study finding that, unlike what is generally assumed, "foreign firms are more likely than comparable domestic investors to find that courts in the host state are fair, impartial, and uncorrupt, and that foreign firms are no more or less likely than comparable domestic firms to find that domestic courts are an obstacle to their operations.")

to hear treaty claims, needs to be answered in light of the content of the domestic law of each particular country. In Canada, for example, where there is not constitutional protection of private property, it is assumed that IIAs, which contain provisions on expropriation, do confer greater substantial protection to foreign investors.[133] In fact, the assessment of NAFTA case law reveals that most NAFTA claims against Canada would have found no remedy under Canadian law.[134] In the same vein, observers contend that the mere fact that IIAs mirror U.S. domestic law standards does not assure that foreign investors are not afforded with greater rights.[135] Domestic law standards are usually filled with different sets of rules and principles that govern the way in which those standards must be applied. So, even if the standards facially coincide, since international tribunals are not bound to abide by such rules and principles, the precise breadth of such standards may differ from domestic law and foreign investors may end up having greater protection.[136]

For example, some authors have argued that while establishing a violation of the equal protection clause of the U.S. Constitution requires a showing of an intent to discriminate on grounds of nationality, the TTP, which on its time was said to embody the gold standard in the field of investment treaties, does not require such showing.[137] Similarly, it has been noted that when assessing challenges against administrative agencies under the FET clause, ISDS tribunals are not obliged by the detailed substantive rules of the federal Administrative Procedures Act (APA) and case law interpreting it, and, as a result, international tribunals enjoy an unrestricted "power to conduct more searching reviews of agency action and order different remedies as compared to domestic courts."[138]

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[133] Gantz, *supra* note 25, at 15 (noting that "The assumption appears to have been that for many other countries, including Canada (which has no constitutionally mandated Fifth Amendment to protect private property), the protection offered by investment agreements does, in fact, provide broader substantive rights than local law and constitutions, in particular in nations where the rule of law is weak.")

[134] Mestral & Morgan, *supra* note 91, at 20 (noting, as a result, that "Canadian law does not generally provide foreign investors with remedies equivalent to those provided for under Chapter 11.")

[135] Johnson, Sachs & Sachs, *supra* note 127, at 7.

[136] *Id.* at 8. Similarly, *see* Lise Johnson & Oleksander Volkov, *Investor-State Contracts, Host-State "Commitments" and the Myth of Stability in International Law*, 24 (3) The American Review of International Arbitration 361, 414 (2013) (noting that "[a] review of the investment tribunals' decisions and approaches taken by U.S. domestic courts illustrates the chasm between the two in terms of their views of the scope of enforceable government 'commitments' and consequent state liability for interference with those undertakings. Stability – given overriding primacy in investment law cases – assumes a more subordinate position in U.S. doctrine.")

[137] Lise Johnson & Lisa Sachs, *The TPP's Investment Chapter: Entrenching, rather than reforming, a flawed system*, CCSI Policy Paper (November 2015), at 11.

[138] Johnson, Sachs & Sachs, *supra* note 127, at 8.

In the same line, observers have identified some areas in which the substantial protection afforded by IIAs differ from Australian domestic standards. For example, an indirect expropriation under an IIA may not amount to a compensable "acquisition" under Australian constitutional law, which requires not only a deprivation of investors' rights but also that the state somehow acquires a proprietary interest in such rights.[139] Furthermore, while the concept of "legitimate expectations" is constrained to matters of procedure under Australian domestic law, the same concept, deemed to be part of the FET standard, has been interpreted by ISDS tribunals in a broader way as to provide foreign investors with a substantial protection.[140]

The still ongoing saga of cases against Spain provides another example of how nominally similar standards can be afforded with different meanings, resulting in asymmetric levels of protection. In short, domestic and foreign investors alike were affected by Spain's decision to dismantle a subsidy program aimed at attracting investments in the renewable energy sector. Domestic investors, banned from accessing ISDS, challenged the regulatory changes before the domestic courts of Spain, particularly the Supreme Court and the Constitutional Court, claiming that such measures infringed the constitutional principles of legal certainty and legitimate expectations. While acknowledging that such principles do belong to the Spanish legal system, both the Supreme Court and the Constitutional Court concluded that the modifications did not infringe them.[141] In sharp contrast, several ISDS decisions, to which we refer below, have found Spain in breach of the FET clause in the Energy Charter Treaty, arguing that Spain violated investors' legitimate expectations that the regulatory regime would not be radically altered.[142] Therefore, under the very same facts, the very same concept ("legitimate expectations") has been filled with different content by domestic and international tribunals, with the result that foreign investors have received greater protection than the available to domestic investors.

[139] Nottage, *supra* note 91, at 13.
[140] *Id.* at 14.
[141] García-Castrillón, *supra* note 125, at 10 (noting that "both the Supreme and the Constitutional Courts, in their respective spheres of action, have considered that the cuts to the incentives do not entail any violation of the constitutional principles of legal certainty, legitimate expectations and the prohibition of retroactivity. They have ruled that the cuts respond to a public interest duly justified by the legislator and, in particular, that the cuts constituted the public authorities' reaction to the renewable energies technology evolution (rapid increase of competitiveness) and were required to fight the tariff deficit and guarantee sustainability of the electricity system. Therefore, the measures could not be considered an arbitrary use of public power.")
[142] *See* cases in *infra* note 286.

This is not to mean, though, that the same standards will always be interpreted in such a manner as to afford foreigners with greater protection. Competing interpretations can also work the other way.[143] The well-known *Vattenfall* case, which so much fueled criticism against ISDS,[144] has been dealt with by German domestic courts. The German Constitutional Court ruled that the government measures to phase out nuclear energy were valid. Yet, since investors' legitimate expectations must be respected under the German Constitution, the Court ordered the government to pay a compensation to investors affected by the phase out measures, including *Vattenfall*.[145] Although the ISDS case is still pending, it may well occur, especially in light of all the public attention it has received, that the tribunal will deny the investor's claim, in which case the domestic law would have proved more favorable than the IIA. What these examples reveal is that, regardless of the fact that international standards may on their face merely mirror domestic standards, the goal of achieving the exact level of protection for foreign and domestic investors is illusory.[146]

One also needs to bear in mind that IIAs involve at least two countries, so their content can be assessed with reference to the domestic law of at least those two countries. If the domestic law of the contracting states differs, as they will usually do, the "no greater rights" objective is almost impossible to achieve for at least one of the states. For instance, unlike the U.S., Canada does not constitutionally protect private property from expropriation. So, if an agreement between U.S. and Canada mirrors U.S. law on takings, such agreement automatically grants U.S. investors in Canada with greater rights than those available to domestic investors in Canada. Therefore, unless the domestic law of the parties in the IIA is substantially the same, the "no greater rights" objective is

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143 *See* Nottage, *supra* note 91, at 14 (noting that, given the content of Australian domestic law, in some respects foreign investors under IIAs may have fewer protection than the available under domestic law.)

144 Stephan W. Schill, *The German Debate on International Investment Law*, 16 J. World Investment & Trade 1 (2015).

145 Germany Federal Constitutional Court, Case BvR 2821/11, Judgement of December 6, 2016, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/12/rs20161206_1bvr282111en.html

146 *See* Poulsen, Bonnitcha and Yackee, *supra* note 40, at 22 (referring to the potential effects of the TTIP in the U.K., claiming that "continued uncertainty as to the content of international investment law means that investors may have an incentive to bring 'long-shot' claims against the UK, in particular where the investor has suffered large damages. In some cases, a long-shot claim may result in an arbitral interpretation and application of treaty text that goes beyond UK domestic law.")

hardly achievable. IIAs, *by design*, would almost inexorably confer greater rights on foreign investors of at least one of the contracting parties.[147]

This reality was not relevant in the context of the early IIAs. For IIAs were concluded between developed, capital exporting countries and developing countries, the way in which developed countries treated their domestic investors and whether such treatment differed from the treaty standards were questions that bore no relevance. In contrast, in the context of north-north IIAs, difficulties to achieve the "no greater rights" objective become relevant, for investment flows are supposed to move both from and to developed countries.

Moreover, if the goal is not to grant foreigners with greater substantial rights, but only the same level of protection that domestic investors already enjoy, then one needs to question what is the purpose of entering into investment agreements in the first place. If IIAs are meant to merely mirror the substantive protection already granted by domestic law, it would not be better to refrain from entering into investment agreements and thereby avoid the risk of committing mistakes in the process of transplanting the domestic law into such agreements or the risk of unintended interpretations by arbitral tribunals?[148]

2.6. Domestic courts lack expertise to adjudicate treaty claims

[147] Lauge N. Skovgaard Poulsen, Jonathan Bonnitcha & Jason Webb Yackee, *Costs and Benefits of an EU-USA Investment Protection Treaty*, LSE Enterprise (2013), at 29, https://www.italaw.com/sites/default/files/archive/costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf (while assessing potential costs and benefits of a EU-US FTA, the authors noted that "[d]espite the potential of expansive interpretations of uncertain treaty text, an EU-US investment chapter would still probably *by design* confer greater rights on US investors that they would be entitled to under UK law, at least in certain areas. As we observed in the EUChina report, the general rule in the UK is that legislation passed by Parliament cannot be challenged in the courts. This is relevant also when considering political costs, as noted below, as investment tribunals authorised to override acts of Parliament is politically sensitive. Moreover, while the actions of the executive can be challenged in UK courts, pecuniary remedies are only rarely awarded in such cases. In both respects, the position under an EU-US investment treaty would differ from the position under UK law.")

[148] *Id.* at 27 ("In general, our view is that an EU-US investment chapter is unlikely to grant US investors in the UK significantly greater rights than they would otherwise have under UK law. However, as we explain below, an EU-US investment treaty may provide opportunities or incentives for investors to bring claims that they would not bring under UK domestic law. The content of international investment law remains contested and uncertain, and it is possible that an ISDS tribunal formed under an EU-US investment chapter would grant a US investor significant damages for conduct that would not normally be actionable under UK domestic law.")

It is also argued that even if domestic courts of the host state are allowed to hear disputes grounded on IIAs, as a practical matter they may not be suitable to properly adjudicate such disputes, for they involve matters of international law and state international responsibility.[149] In short, domestic courts may lack sufficient expertise. On one hand, while it is true that domestic courts may have less expertise than international law experts, this is not to mean that domestic courts, especially those of countries said to be developed, are generally uncapable of properly interpreting and applying international law.[150] On the other hand, as mentioned, when deciding on the scope of the protection granted to investors under IIAs adjudicators are usually called to apply or consider the domestic law of the host state, and one can hardly argue that international arbitrators are better suited to do so than domestic courts.[151] The argument thus, although relevant in the overall, is not decisive.

2.7. ISDS is required because of the culturally specific nature of litigation in some developed countries

Some observers have argued that ISDS between developed countries may be justified in light of the cultural peculiarities of litigation that may exist in some countries. U.S. investors, for example, may be reluctant to litigate in different languages or in the context of civil law systems.[152] Although the culturally specific nature of litigation might be relevant, it is hard to imagine that it stands, by itself, as a reason to include ISDS in IIAs between developed countries. Such reasoning needs to be assessed along with the actual reliability of the legal system of the host country. In any case, the argument may be relevant to understand the actual trend of IIAs between developed countries,

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[149] Hugo Perezcano, *supra* note 77, at 2 (arguing that "[e]ven if local courts are vested with jurisdiction to directly interpret international agreements — in Mexico, for instance, leaving aside the country's degree of economic development for a moment — they may not be the most suitable to deal with questions of international investment law and state responsibility."); Baetens, *supra* note 3, at 5 (noting that "arbitrators who are specialised in the interpretation of 'vague and imprecise' standards should have less trouble deciding the factual and legal questions in an investment dispute than local judges would have who would be called upon to decide such cases."); Kurtz & Nottage, *supra* note 48, at 11; Tietje & Baetens, *supra* note 25, at 68.
[150] Leon E. Trakman, *Investor State Arbitration or Local Courts: Will Australia Set a New Trend?*, 46(1) Journal of World Trade 83, 115 (2012); Bronckers, *supra* note 81, at 660.
[151] Dodge, *supra* note 25, at 35.
[152] Mestral, *supra* note 68, at 7 (noting that "the culturally specific nature of litigation in different countries remains a fact between even the most closely allied countries. Litigation in the United States is a daunting prospect for Europeans or Asians — even for Canadians — and there can be little doubt that American investors do not relish the prospect of litigating in foreign languages and in civil law systems where concepts of procedure and evidence vary greatly. ISA provides a neutral forum both as to procedure and substantive law, and guarantees equality of arms.")

which, as seen below, usually involve countries that just recently became part of the group of "developed countries" and may still have legal systems that foreign investors may be particularly unfamiliar with.

2.8. Excluding ISDS from IIAs between developed countries may endanger IIAs between developed and developing countries

Another argument is that eliminating ISDS in IIAs between developed countries would create a "bad" precedent for developing countries, which may follow suit and thus also eliminate ISDS from their IIAs. [153] In this same line, it is said that a developed country that embraces the policy of excluding ISDS with other developed countries may put itself in a difficult position when negotiating ISDS with developing countries.[154] One author even suggests, in light of the evidence showing that the investment chapter in CETA was not to yield any significative economic benefit or increase investment flows,[155] that the final inclusion of such chapter may be explained by fears from both Canada and the EU of endangering future negotiations with other countries, particularly from the developing world.[156]

[153] Hamamoto, *supra* note 2, at 9; Perezcano, *supra* note 48, at 3; Ucheora Onwuamaegbu, *Limiting the Participation of Developed States: Impacts on Investor-State Arbitration*, Paper No. 11, CIGI Investor-State Arbitration Series (September, 2016), at 8 (noting that a "consequence that would likely flow from the system being abandoned by states such as the United States and Canada in their future treaties is that, eventually, developing countries would also follow the same route."); Mestral, *supra* note 68, at 31 (asking "[h]ow would they [developing countries] respond to being classified as unworthy of an exemption from ISA? The reaction is likely to be very negative and might well compromise the security placed in existing BITs by capital-exporting states, to the detriment of their foreign investors. For better or for worse, however uncomfortable the people and governments of developed democracies may be in the face of ISA action against them by foreign investors, and however tempted they may be to abolish ISA inter se, the reaction of the rest of the world to such a gesture cannot be ignored."); Tietje & Baetens, *supra* note 25, at 35.
[154] Baetens, *supra* note 3, at 9 (also noting that excluding ISDS with developed countries, while keeping it with developing countries, would send a "signal of distrust and inferiority towards developing states, forming a strong and, in this author's opinion, highly unfortunate reminiscent of certain colonial attitudes."); Mestral, *supra* note 68, at 30; Abbott, Erixon & Ferracane, *supra* note 48, at 20; Reinhard Quick, *Why TTIP Should Have an Investment Chapter Including ISDS*, 49 (2) Journal of World Trade, 199, 204 (2015).
[155] European Commission, *Final Report: A Trade SIA Relating to the Negotiation of a Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada*, Trade 10/B3/B06 (2011), at 327.
[156] Nathalie Bernasconi-Osterwalder & Howard Mann, *CETA and Investment: What Is It About and What Lies Beyond?*, *in* FOREIGN INVESTMENT UNDER THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA) 339, 342 (Makane Moïse Mbengue; Stefanie Schacherer eds., Springer, 2019).

In our opinion, the argument is not convincing.[157] It innocently suggests that developing countries enter into IIAs seeking for reciprocity, which is hardly the case. For many years, developing countries entered into IIAs with developed countries while witnessing that developed countries did not do the same between each other. Indeed, it is to be remembered that ISDS historically was created in IIAs between developed, capital exporting countries and developing countries. In fact, developed countries that have excluded ISDS from their north-north IIAs have had no problem to make it through their subsequent north-south IIAs. After excluding ISDS from the USMCA with the United States, Canada entered into IIAs with Moldavia and Mongolia, two developing countries.[158]Australia, which back in 2004 excluded ISDS from its FTA with U.S., has included it afterwards in its IIAs with developing countries, such as Uruguay.[159] Similarly, Japan has concluded IIAs with ISDS with developing countries after it excluded it from its FTA with Australia.[160]

2.9. Excluding ISDS from IIAs between developed countries may prevent ISDS from evolving

Some observers suggest that by eliminating IIAs between developed countries the evolution and improvement of ISDS can come to a halt. Since many of the improvements and refinements introduced to IIAs have been formulated and endorsed by developed countries after they began to be called as respondents in investment arbitrations (e.g. U.S. and Canada amendments to NAFTA and to their BIT Models),[161] the elimination of ISDS between developed states will halt the development of the system.[162] The evolution of the system would thus be left in the hands of

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[157] *See also* Kleinheisterkamp & Poulsen, *supra* note 3, at 5-6.

[158] *See* Agreement for the Protection and Promotion of Investments, Can.-Mold., art. 6, June 12, 2018 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5806/download; Agreement for the Protection and Promotion of Investments, Can.-Mong., art. 6, Sept. 8, 2016, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5373/download

[159] Agreement on the Protection and Promotion of Investments, Austl.-Uru., art. 14, Apr. 5, 2019, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5853/download

[160] Agreement for the Protection and Promotion of Investments*,* Jap.-Arg., Section 2, Jan. 1, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5799/download

[161] Poulsen, *supra* note 32, at 15 (noting that “like in the 1980s and 1990s investment treaties are still mostly negotiated around model agreements of developed states, which means that changes in treaty practise have primarily come from Western states.”)

[162] Onwuamaegbu, *supra* note 153, at 7 (noting that “[e]xperience has thus shown that a mere prospect is not enough to spur much action by a state in negotiating detailed ISDR provisions in its investment treaties. Since it appears that the main driving force for countries to include extensive ISDR provisions in their investment treaties is the prospect of being respondents in ISA, it follows that in the absence of such a prospect, there would be little or no incentive for those provisions to be included in future treaties.”). Similarly, Quick, *supra* note 154, at 206 (arguing, in the context

institutions[163] or other developed countries.[164] Putting aside the rather paternalistic idea that international investment law and dispute settlement can only evolve through the initiative and action of developed countries, the argument fails to explain *why* would developed countries seek to conclude IIAs with ISDS between each other. Certainly, developed countries do not include ISDS between each other because the prospect of being sued will prompt them to introduce improvements to the system.

2.10. Without ISDS, there is no reason to enter into IIAs whatsoever

Finally, some observers claim that without ISDS, namely, without an enforcement mechanism for the substantial protection granted by IIAs, there will be no reason to conclude IIAs in the first place.[165] What would be the purpose of agreeing on specific standards of treatment for foreign investors if such investors are deprived from the possibility to invoke and enforce these standards against the host state? An IIA without ISDS would opposite the maxim *ubi ius ibi remedium* (where there is a right, there is a remedy).

Of course, this argument needs to be assessed in light of some the previous discussions. First, absence of ISDS does not mean lack of a remedy when the treaty provisions are called to produce direct effects in the internal legal order of the contracting parties, in which case protected investors can file treaty-based claims before the domestic courts of the host state.[166] Although we did not intend to provide a throughout assessment of the status of treaties in the legal order of all the

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of the discussions regarding the failed EU-U.S. FTA, that ISDS should be included because it would serve as a "catalyst for further bilateral and multilateral reform" and would set an example of how the two biggest trading entities can show leadership and solve outstanding trade issues).

[163] *Supra* at 1 (noting that "[i]f these developments have occurred — and continue to occur — as reactions to developed countries facing the possibility of being respondents before the system, it follows that removing that prospect would ultimately have a chilling effect on the continued dynamic development of the system. In that scenario, the system's evolution would be left mostly in the hands of institutions, which are usually constrained by their delicate position of neutrality from acting nimbly enough (if at all) to meet the ever-changing demands of their users.")

[164] Abbott, Erixon & Ferracane, *supra* note 48, at 20 (noting that should the EU excludes ISDS from IIAs with developed countries, the drawback will be that "it limits the possibilities of the EU to lead a process of updating global investment-protection rules. Other countries that are willing to reform, and have the capacity to transmit reforms into their many BITs, tend to be countries with high-standard legal systems.")

[165] Perezcano, *supra* note 48, at 4 (asserting that "if two countries trust each other's laws and institutions, why would they require international investment protection rules in the first place?"); Baetens, *supra* note 3, at 10 (claiming, in the context of the TTIP, that "if TTIP is to include a right, there should also be a remedy for violations of that right; if one is to take away the remedy of ISDS, then it is better not to grant the right."); Dodge, *supra* note 3, at 179.

[166] See discussion in section 2.4.

developed countries identified above, in the corresponding section we did note that there is a trend, either imposed by domestic law (e.g. in the U.S., Canada, Australia) or voluntarily embraced as a policy choice (e.g. in the EU), of denying direct effects to IIAs between developed countries.

If, as a matter of domestic law or as a policy choice, covered investors do not have a treaty-based direct right of action before the domestic courts of the host state, then it emerges clear that the absence of ISDS entails that the covered investors are indeed deprived of any mean to directly enforce their treaty rights against the host state. Certainly, investors in this case would still have access to the domestic courts, but only for the enforcement of their *rights under the domestic law* of the host state, not their *rights under the investment treaty*. This is precisely the case of the Australia-U.S. FTA,[167] which, despite granting investors with substantial rights akin to most IIAs, neither contemplates ISDS nor serves as a basis for private rights of action before the domestic courts of Australia or the U.S.[168] In this scenario, one may well ask, as some commentators do, what is the purpose agreeing on a substantial protection to be afforded to foreign investors.

For sure, it remains the possibility for the home state of the investor to institute state-to-state proceedings against the host state based on the violation of the treaty,[169] in which case the dispute would be solved with basis on the substantial content of the agreement. In fact, as noted below, the treaties of Friendship, Commerce and Navigation (FCN), which were the first treaties with investment provisions involving developed countries, did not contemplate any form of investor-state dispute settlement, but only state-to-state mechanisms -it is debatable, though, whether these treaties confer private rights of action on individuals-.[170] Thus, even without ISDS, countries may claim that the substantial protection afforded by IIAs is not deprived of effect. Investors can obtain the enforcement of their treaty rights, but through the action of their home state (assuming, of course, that they manage to convince their home state of instituting state-to-state proceedings on their behalf).

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[167] Free Trade Agreement, U.S.-Aus. (hereinafter AUSFTA), May 18, 2004, https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta

[168] Kleinheisterkamp & Poulsen, *supra* note 3, at 3.

[169] AUSFTA, art. 11.16 (2), Chapter 29, Section B.

[170] *See infra* note 177.

More generally, it can be suggested that developed countries may have interest in concluding IIAs, even without ISDS, with eyes on the goal of shaping and cementing the content of these agreements for the future. While Australia and the U.S. may have no interest in allowing ISDS or any other mechanism of private enforcement in their FTA, they may still seek to include an investment chapter therein in order to influence the content of their future agreements with other countries.[171] Previous agreements, with or without ISDS, may serve as an example or a model for new agreements.

[171] Similarly, Bronckers, *supra* note 62, at 658 (noting, in the context of the negotiations of the failed TTIP, that "even if there may be more of a need for such rules in respect of other countries (China being mentioned regularly), investment protection in TTIP could at the very least operate like a fail-safe system also amongst developed and like-minded jurisdictions.")

3. REVIEW OF IIAs BETWEEN DEVELOPED COUNTRIES PROVIDING FOR ISDS

Having reviewed the arguments advanced in favor of including ISDS in IIAs concluded between developed countries, this section seeks to show the actual extent in which developed countries have entered into IIAs among themselves including ISDS as a system for the settlement of investment disputes. As this section will reveal, rather than bilateral investment treaties, IIAs between developed countries usually take the form of multilateral agreements linking both developed and developing countries, and dealing not only with investment protection but also with trade promotion.

3.1. Treaties of Friendship Commerce and Navigation (FCNs) and early BITs

Before the BIT era, developed countries had entered into treaties between each other containing certain provisions on the protection of investments. Particularly, starting in 1778 with the Treaty of Amity and Commerce with France, for long time the U.S. entered into Friendship, Commerce, and Navigation treaties (FCNs) with both developed and developing countries.[172] While early FCNs included provisions on many subjects, including custom duties, religious liberties, enforceability of arbitration agreements, protection against uncompensated expropriations, and consular relationships, the last "wave" of FCNs, entered after World War II, were mostly focused on investment promotion and protection and their content roughly resembles that of modern BITs.[173] Before the beginning of the U.S. BIT program in the late 1960s, the U.S. government had concluded FCNs with developed countries like Germany, the Netherlands, Italy, Benelux, Austria, France and Norway.[174]

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[172] Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 203-208 (1988); Gudgeon, *supra* note 40, at 108 (noting that the U.S. FCN program had more success with developed countries than with developing countries).
[173] Herman Jr. Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 806 (1958); Paulsen, *supra* note 111, at 7 (noting that FCNs "had several motivations and were more complex and multi-faceted than BITs, but their main aim was the protection of American investment.")
[174] Coyle & Yackee, *supra* note 86, at 67.

Importantly, unlike most modern IIAs, FCNs do not include any form of investor-state dispute settlement, i.e., covered investors have no direct right of action against the host state to enforce their rights under the treaty.[175] Instead, modern FCNs provide for state-to-state proceedings before the International Court of Justice (ICJ) over disputes regarding the interpretation and application of the agreement.[176] In addition, some commentators have recently argued that FCNs are self-executing treaties and confer covered investors with a private right of action, with the consequence that such investors would be able to directly enforce the treaty provisions before U.S. domestic courts.[177]

Unlike FCNs, when BITs emerged they primarily followed a north-south paradigm, i.e., they were concluded between a developed, capital exporting country and a developing country.[178] Indeed, as of 1987, most BITs had been concluded between developed and developing countries.[179] Although earliest BITs did not include ISDS,[180] in 1969 Italy and Chad concluded the first BIT providing for ISDS,[181] and from then on it became a common feature of IIAs.[182] While ISDS was drafted as to provide access to the system to investors from both states in the agreement, in practice ISDS

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[175] *Id.* at 69.

[176] The state-to-state dispute settlement contained in FCNs had at least three disadvantages from investors' perspective. First, as with diplomatic protection, it was subject to the discretion of the home state of the investor. Second, since it was governed by the rules of customary international law, state-to-state proceedings were admitted only after the exhaustion of local remedies before the domestic courts of the host state. Lastly, ICJ judgements were not enforceable before domestic courts. Vandevelde, *supra* note 172, at 257.

[177] Coyle & Yackee, *supra* note 86.

[178] ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 43 (Kluwer Law International, 2009).

[179] *Id.* at 47.

[180] Conversely, early BITs kept relying on state-to-state dispute settlement mechanisms, particularly arbitration or the submission of the dispute to the International Court of Justice. Poulsen, *supra* note 111, at 3 (noting that the lack of ISDS in early BITs shows that these treaties were not intended to function as "credible commitments", but as "focal points" aimed at facilitating the negotiated settlement of investment disputes.)

[181] NEWCOMBE & PARADELL, *supra* note 178, at 44.

[182] Joachim Pohl, Kekeletso Mashigo, Alexis Nohen, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey* 7, OECD Working Papers on International Investment, 2012/02, OECD Publishing, http://dx.doi.org/10.1787/5k8xb71nf628-en (noting that in a sample of 1,660 IIAs, 93% of the treaties contain language on ISDS.")

was conceived to be used only against the developing country, for it was to be the recipient of the investment flows.[183] ISDS was thus reciprocal in text, but not in reality.[184]

3.2. The beginning: ISDS between developed countries as an unintended effect of multilateral agreements involving both developed and developing countries: the first U.S.-Canada FTA, NAFTA and the ECT

For long time, BITs followed the same north-south paradigm. Yet, new trends began to emerge over the years. First, developing countries began to conclude IIAs between each other (south-south IIAs),[185] revealing that some developing countries increasingly became both capital importing and capital exporting countries, thereby facing not only the need to attract foreign investors but also the need to assure their own investors protection when investing abroad.[186] Because some countries have transited from developing to developed over the years, as occurs with South Korea, Singapore and Hong-Kong, many of the once "south-south" IIAs can be seen today either as "north-south" IIAs (when only one contracting party became a developed country)[187] or "north-north" IIAs (when both contracting parties became developed).[188]

Second, developed countries also began to enter into IIAs between each other. In 1987, Canada and the U.S. concluded an FTA containing provisions on investment protection.[189] The Canada-U.S. FTA, in fact, was the first investment agreement signed by Canada.[190] Nevertheless, unlike

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[183] M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 188 (3th ed. 2010) (noting that "[e]very bilateral investment treaty begins with a declaration as to the purpose of the treaty. This is usually stated to be the reciprocal encouragement and protection of investments. The statement disguises the important fact that the flow that is contemplated is in reality a one-way flow of investment from the developed state to the developing state.")
[184] Dodge, *supra* note 21, at 3 (noting that the obligations contained in IIAs "are reciprocal in theory but not in fact, for it is generally only the less developed country that bears the risk of being sued.")
[185] From 44 in 1990, the number of BITs between developing countries had increased to 653 by July 2004. UNCTAD, *South-South Investment Agreements Proliferating*, IIA Monitor No. 1 (Geneva: United Nations, 2006), at 1.
[186] *Id.* (noting, back in 2004, that the increase in south-south IIAs "is occurring as developing countries are increasingly becoming home countries of FDI flows and as their companies start to figure more prominently amongst the world's major transnational corporations.")
[187] *See*, e.g., Agreement for the Reciprocal Promotion and Protection of Investments, S. Kor.-Nigeria, Mar. 27, 1998, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1814/download
[188] *See*, e.g. Agreement for the Promotion and Reciprocal Protection of Investments, S. Kor.-Qatar, Apr. 16, 1999, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1824/download
[189] Free Trade Agreement, Can.-U.S., Chapter 16, Oct. 4, 1987, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/united_states-etats_unis/fta-ale/background-contexte.aspx?lang=eng
[190] Coté, *supra* note 40, at 2.

most IIAs and more in line with modern FCNs, the Canada-U.S. FTA only included state-to-state dispute settlement.[191] Thus, Canada and U.S. found no reason to grant their investors with access to ISDS.

The real breakthrough came in the context of multilateral, rather than bilateral relations. Developed countries seeking to assure ISDS against developing countries in multilateral agreements ended up exposing themselves to being the subject of ISDS proceedings. As it is commonly noted, the North American Free Trade Agreement (NAFTA), entered in 1992 between U.S., Mexico and Canada,[192] was the first IIA with ISDS involving developed countries.[193] The inclusion of ISDS in NAFTA, though, followed the same rationale that early IIAs providing for ISDS. Indeed, ISDS was contemplated because of U.S. concerns about Mexico's legal system and its suitability to protect foreign investors' rights under NAFTA.[194] Yet, regardless of this "original" intent, since NAFTA was drafted in a reciprocal manner, it soon became the basis for a substantial number of claims against both the U.S. and Canada,[195] something that came as a surprise to these two developed countries.[196]

Relevantly, NAFTA, as the old Canada-U.S. FTA, embodied a new trend of mixing both trade and investment provisions, which, in turn, revealed a new understanding of the economic correlation between trade and foreign investment. While foreign investment was traditionally seen as a substitute for trade,[197] it began to be seen as an instrument for promoting it.[198] Foreign firms

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[191] *Id.*

[192] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3104/nafta

[193] Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 The International Lawyer 727, 731 (1993).

[194] Jennifer A. Heindl, *Toward a History of NAFTA's Chapter Eleven*, 24 BERKELEY J. INT'L L. 672, 676 (2006); Kleinheisterkamp & Poulsen, *supra* note, at footnote 12.

[195] According to UNCTAD, as of 2018, NAFTA has been invoked in 63 disputes. UNCTAD, *supra* note 15, at 103.

[196] Meg Kinnear & Robin Hansen, *The Influence of NAFTA Chapter 11 in the BIT Landscape*, 12 U. C. DAVIS J. INT'L L. & POL'Y 101, 104 (2005).

[197] Foreign firms would firstly prefer exporting their products because trade is less risky than directly investing abroad. Yet, under some conditions foreign firms may opt to shift exports to FDI. This may occur when the host country imposes barriers on trade, firms perceive necessary to follow the path of competitors in establishing in foreign markets, firms need to reduce transportation and production costs or the proximity to customers is especially relevant. UNCTAD, *World Investment Report 1996: Investment, Trade and International Policy Arrangements* (New York & Geneva: United Nations, 1996), at 78; Lionel Fontagné, *Foreign Direct Investment and International Trade: Complements or Substitutes?* OECD Science, Technology and Industry Working Papers 1999/03, at 14.

[198] Vandevelde, *supra* note 25, at 181.

established abroad may become the source of new chains of production and trade, requiring imports from other subsidiaries and exporting products to other foreign markets.[199] In light of the perceived correlation between trade and foreign direct investments, countries negotiating free trade agreements also brought investment provisions to the negotiation table.[200] Consequently, in the context of broader negotiations between countries on different subjects, investment provisions can be used to leverage the negotiation process and induce concessions on different areas of the agreement.[201] For instance, Canada saw investment provisions in the old Canada-U.S. FTA as a negotiation chip to obtain greater access to the U.S. market, which was its main goal.[202] As it is noted below, NAFTA is meant to be replaced by the United States-Mexico-Canada Agreement (USMCA) signed in November 2018, which eliminates ISDS between U.S. and Canada and drastically curtails ISDS between U.S. and Mexico.

Two years after NAFTA, in 1994, some European and Asian countries with asymmetrical economic development signed the Energy Charter Treaty (ECT),[203] a multilateral treaty which provides for ISDS for the settlement of investment disputes in the energy sector. As NAFTA, the

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[199] UNCTAD, *supra* note 197, at 79 (noting that "[w]hile replacing exports, an affiliate usually generates demand for other products, such as capital goods or intermediate goods and services. These may be provided by other parts of the parent company, its suppliers or independent companies at home, or firms in third countries. This may lead to new trade for home and host countries -- associated trade; if it pulls domestic suppliers of goods and services abroad, it can also lead to new investment -- associated investment. Only when the configuration of these indirect effects is known can their full impact on trade and FDI be assessed. It may happen -- and, in fact, it does frequently -- that the shift from exports to FDI turns out to be both trade-replacing and trade-supporting and, on balance, often trade creating. In addition, FDI can also change the composition of trade."); Tomer Broude, *Investment and Trade: The "Lottie and Lisa" of International Economic Law?*, International Law Forum of the Hebrew University of Jerusalem Law Faculty, Research Paper No. 10-11 (2011), at 8, https://ssrn.com/abstract=1957686

[200] See Jean Raby, *The Investment Provisions of the Canada-United States Free Trade Agreement: A Canadian Perspective*, 84 Am. J. Int'l L. 394 (1990) (noting, in the context of the negotiations of the Canada-U.S. FTA, that the U.S. representative claimed that "[i]t would be incongruous to negotiate a trade regime intended to open the border and not do the same for investment. Businessmen do not separate trade from investment. They make trade and investment decisions together. How do you say to a businessman that the border will be open to your products, but not to your investment in the other country? In many respects they are two sides of the same coin.")

[201] Vandevelde, *supra* note 25, at 181 (noting that "[f]or example, a state might offer to open its economy to foreign investment in exchange for another party's offer of market access to goods."); Stephan W. Schill & Heather L. Bray, *The Brave New (American) World of International Investment Law: Substantive Investment Protection Standards in Mega-Regionals*, 5 Br. J. Am. Leg. Studies 419, 444 (2016).

[202] Raby, *supra* note 200, at 406. *See also*, Luke Nottage, *Why no investor–state arbitration in the Australia–Japan FTA?*, East Asia Forum (April 9, 2014), https://www.eastasiaforum.org/2014/04/09/why-no-investor-state-arbitration-in-the-australia-japan-fta/ (suggesting, as one possible reason of the exclusion of ISDS in the Australia-Japan FTA, that "the Japanese government may also have not wanted to press too hard to secure ISDS protections because this would probably have involved conceding even more access to Japan's politically sensitive sectors, such as agricultural markets.")

[203] The Energy Charter Treaty, Dec. 17, 1994, https://energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/

ECT was originally intended to protect investors from developed countries (chiefly Western European countries) in developing countries from Eastern Europe, the Caucasus and Central Asia.[204] Yet, because of the political hurdles the agreement would have faced had it been one-sidedly drafted, the ECT followed the example of previous IIAs and was drafted in a symmetric manner, providing the same level of protection to investors from all countries in the agreement.[205] The ECT then, although conceived under a "West-East" dimension, ended up having also a "West-West" dimension.[206] And as a result of such unintended dimension, the ECT, as NAFTA, became the source for ISDS claims not only against developing countries but also against developed countries.[207] It is to be noted that the ECT is currently undergoing a "modernization" process.[208]

3.3.The history after NAFTA and the ECT: ISDS in bilateral relations of developed countries

Although NAFTA and the ECT provide for ISDS between developed countries, it is by no means true that both IIAs set the example for future relations between developed countries. Indeed, contrary to south-south IIAs, which continued to increase over the years, IIAs exclusively involving developed countries (exclusive north-north IIAs) have not increased correspondingly. In this regard, it is possible to draw a distinction between two species of north-north IIAs: IIAs entered when both countries already had the status of developed countries according to the criteria

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[204] Armand de Mestral, *Introduction*, *in* SECOND THOUGHTS INVESTOR-STATE ARBITRATION BETWEEN DEVELOPED DEMOCRACIES 1, 3 (Armand de Mestral ed. 2017); Kleinheisterkamp & Poulsen, *supra* note, at footnote 12.

[205] Thomas Waelde, *International Investment under the 1994 Energy Charter Treaty*, in THE ENERGY CHARTER TREATY. AN EAST-WEST GATEWAY FOR INVESTMENT & TRADE 252 (Kluwer Law International, Thomas Waelde ed., 1996) (noting that the "[t]reaty was originally meant to protect Western investment in CIS and Eastern European countries. However, given that the CIS countries were unwilling to shoulder obligations which OECD countries were keen to have operating in the CIS (but not applicable to themselves), the only politically feasible deal was that obligations had to be of a universal scope.")

[206] *Id.*

[207] In fact, the ECT, along with NAFTA, has become the source for most ISDS claims in the world. According to UNCTAD, as of 2018, the ECT has been invoked in 121 cases, while NAFTA has been invoked in 63 disputes. Both ECT and NAFTA claims account for roughly 20 per cent of all ISDS cases known (942). UNCTAD, *supra* note 15, at 103.

[208] *See* Jarrod Hepburn, *Analysis: Energy Charter Treaty Secretariat Release Wide-Ranging Proposals by Governments for Treaty Amendments*, IA Reporter, (Oct. 11 2019), https://www-iareporter-com.uaccess.univie.ac.at/iar-search/?desktop-submit=Enviar&iarsearch=European+Union&iar_dt=5&cdfrom=&cdto=

set forth above (originally north-north IIAs)[209] and IIAs whose parties (or at least one of them) were not developed when the agreement was concluded but became developed over the years according to such criteria (supervened north-north IIAs).[210] While supervened IIAs are undoubtedly relevant today, for they involve today's developed countries, they are not useful to understand why, and to what extent, developed countries decide to conclude IIAs between each other, because, when entered, these IIAs still followed the north-south paradigm.

From the assessment of the north-north IIAs, it is possible to draw some general conclusions. First, most IIAs are supervened north-north IIAs, rather than originally north-north IIAs. This means that, when concluded, most of today's north-north IIAs were not necessarily agreements between "equals." Second, considering the number of potential north-north IIAs, the actual number of these

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[209] Foreign Investment Promotion and Protection Agreement, Can.-H.K. Section C, Feb. 2, 2016; Free Trade Agreement, Can.-S. Kor., Chapter 8, Section B, Sept. 22, 2014; Free Trade Agreement, U.S.-S. Kor., Chapter 11, Section B, June 30, 2007; Free Trade Agreement, U.S.-Sing., Chapter 15, Section C, May 5, 2003; Agreement for the Liberalization, Promotion and Protection of Investment, Isr.-Japan, art. 24, Feb. 1, 2017; Agreement for the Reciprocal Promotion and Protection of Investments, Isr.-S. Kor., art. 7, Feb. 2, 1999; Agreement for the Protection and Promotion of Investment, Japan-U.A.E., art. 17, Apr. 30, 2018; Agreement for the Promotion and Protection of Investment, Japan-Kuwait, art. 16, Mar. 22, 2012; Agreement for the Liberalization, Promotion and Protection of Investment, Japan-S. Kor., art. 15, Mar. 22, 2002; Agreement for the Promotion and Protection of Investment, Japan-H.K., art. 9, May 15, 1997; Agreement on Free Trade and Economic Partnership, Japan-Switz., art. 94, Feb. 19, 2009; Agreement for a New-Age Economic Partnership, Japan-Sing., art. 82, Jan. 13, 2002; Agreement for the Promotion and Protection of Investments, Austria-H.K., art. 9, Oct. 11, 1996; Accord concernant l'encouragement et la protection réciproques des investissements, BLEU (Belgium-Luxembourg Economic Union)-S. Kor., art. 8, Dec. 12, 2006; Agreement for the Promotion and Protection of Investments, BLEU (Belgium-Luxembourg Economic Union)-H.K., art. 9, Oct. 10, 1996; Agreement for the Promotion and Protection of Investments, H.K.-Fin., art. 8, July 2, 2009; Agreement for the Encouragement and Reciprocal Protection of Investments, H.K.-Ger., art. 10, Jan. 31, 1996; Agreement on Encouragement and Reciprocal Protection of Investments, Neth.-U.A.E., art. 9, Nov. 26, 2013; Agreement on the Promotion and Protection of Investments, Neth.-S. Kor., art. 8, July 12, 2003; Agreement on the Reciprocal Promotion and Protection of Investments, Port.-U.A.E., art. 11, Nov. 19, 2011; Agreement on the Reciprocal Promotion and Protection of Investments, Port.-Qatar, art. 11, Apr. 21, 2009; Agreement for the Promotion and Protection of Investments, H.K.-U.K., art. 8, July 30, 1998; Investment Agreement, Austl.-H.K., Section 6, Mar. 26, 2019; Free Trade Agreement, Austl.-S. Kor., Chapter 11, Section B, Apr. 8, 2014; Free Trade Agreement, Austl.-Sing., Chapter 8, art. 14, Feb. 17, 2003; Agreement on the Reciprocal Promotion and Protection of Investments, Qatar-Sing., art. 10, Oct. 17, 2017; Agreement for the Promotion and Reciprocal Protection of Investments, Sing.-U.A.E., art. 10, June 24, 2011; Agreement for the Encouragement and Reciprocal Protection of Investments, Kuwait-Sing., art 9, Nov. 5, 2009; Agreement on Economic Partnership, Sing.-Taiwan, Chapter 9, art. 9.16, Nov. 7, 2011; Agreement on the Promotion and Protection of Investments, Sing.-S. Kor., art. 11, Dec. 2, 2008; Free Trade Agreement, Sing.-S. Kor., Chapter 10, Section C, Aug. 4, 2005; Agreement for the Promotion and Reciprocal Protection of Investments, H.K.-U.A.E., art. 8, June 16, 2019; Agreement on the Promotion and Reciprocal Protection of Investments, U.A.E.-Greece, art. 11, May 6, 2014; Agreement for the Promotion and Protection of Investments, Can.-Kuwait, Section C, Sept. 26, 2011. All the aforementioned IIAs can be consulted on on UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/

[210] This group includes nearly 75 IIAs, most of them involving traditionally developed countries from Western Europe and countries like South Korea, United Arab Emirates, Singapore, Honk Kong, Kuwait, Qatar and Saudi Arabia.

IIAs seems to be small.[211] Thus, it is not possible to assert that developed countries are generally prone to conclude IIAs between each other.[212] It is to be noted here that we do not count as north-north IIAs most of the so-called "intra-EU BITs," i.e., BITs concluded between Western European Countries members of the EU and Central and Eastern European Countries that later accessed the EU.[213] Under the assumption that all the Member States of the EU are "developed," some observers deem these agreements to be north-north IIAs.[214] Yet, since in reality not all EU member states are economically developed in the sense referred above, most "intra-EU BITs" fall under the traditional north-south paradigm.[215]

Third, most north-north IIAs link traditionally developed countries with developing countries that became capital-exporting countries over the years, like Korea, United Arab Emirates, Singapore, Hong Kong and Qatar. For instance, while the Australia-Korea FTA signed on April 2014 includes ISDS, the Australia-Japan FTA, signed few months later, does not do so.[216] As noted above, there may be different reasons to explain this trend, although it is not possible to draw definitive answers. For example, it may reflect the existence of concerns regarding the reliability of the legal systems of these countries, which, in spite of being economically developed, may still be perceived as lacking strong and unbiased legal systems.[217] The trend may also reflect the assumption that these

[211] Since we identified 33 countries as developed, this means that the potential number of IIAs between them is 1056. However, we identified only nearly 100 north-north IIAs.
[212] Armand de Mestral, *supra* note 61, at 6 (noting that IIAs involving solely developed states have not increased notoriously over the years); UNCTAD, *World Investment Report 2014: Investing in the SDGs: an Action Plan* (Geneva and New York: United Nations, 2014), at 123 (noting, back in 2014, that "[t]o date, developed countries have been less active in concluding IIAs among themselves. The share of "North-North" BITs is only 9 per cent (259 of today's total of 2,902 BITs). Moreover, 200 of these BITs are intra-EU treaties – many of which were concluded by transition economies before they joined the EU.")
[213] Hanno Wehland, *Intra-EU Investment Agreements and Arbitration: Is European Community Law An Obstacle?*, 58 International & Comparative Law Quarterly 297, 298 (2009) (noting that as a result of the accession of 12 new Member States, most of them from Eastern Europe, the number of intra-EU BITs rose to 191).
[214] See, e.g., UNCTAD, *supra* note 212, at 123.
[215] Dodge, *supra* note 3, at 170.
[216] Kurtz & Nottage, *supra* note 48.
[217] See section 2.2 above. Some observers assert that the Australian government may have no insisted in the incorporation of ISDS in the Australia-Japan FTA based on the fact that Japan "has a high-quality court system and domestic law protections for all investors." Nottage, *supra* note 64, at 41; In contrast, consider, as a manner of example, the economic blockade against Qatar by several Arab countries, among them Saudi Arabia and U.A.E. The blockade has been considered illegal and arbitrary, and has become the basis for the filing of some investment claims against U.A.E. *Qatar: UN report proof Saudi-led blockade illegal*, Aljazeera (Jan. 8, 2018), https://www.aljazeera.com/news/2018/01/qatar-report-proof-saudi-led-blockade-illegal-180108152547009.html; Mayssa Khattar, *Recent Investor-State Arbitration Trends in the Middle East: #YoungITATalks in Dubai*, Kluwer Arbitration Blog (Jan. 20, 2019), http://arbitrationblog.kluwerarbitration.com/2019/01/20/recent-investor-state-arbitration-trends-in-the-middle-east-youngitatalks-in-dubai/

countries have particular legal cultures, which makes necessary to create a legal framework that investors are more familiar with.[218] It may also suggest that these countries still rely strongly on inward foreign investment and perceive ISDS as a mean to attract it.[219]

Conversely, with some exceptions, like the Japan – Switzerland EPA,[220] north-north IIAs between traditionally developed countries, like western European countries, Canada, U.S., Australia, Canada, Japan and so on are rather exceptional.[221] In the same vein, while some developed countries have entered into IIAs between each other, they have done so excluding recourse to ISDS and relying exclusively on state-to-state dispute settlement mechanisms.[222] For example, the Australia-U.S. Free Trade Agreement (AUSFTA) of 2004 did not include ISDS, a decision that

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218 See section 2.7 above.

219 Gordon Blanke, *Investment arbitration in the Middle East: basic trends and developments (Part 1),* Thomson Reuters Arbitration Blog (Aug. 14, 2018), http://arbitrationblog.practicallaw.com/investment-arbitration-in-the-middle-east-basic-trends-and-developments-part-1/ (noting that "[i]n the light of steadily diminishing oil reserves, the oil-rich nations in particular have become acutely aware of the need to attract foreign direct investment (FDI) for their sustained economic development in a post-oil era.")

220 *Agreement on Free Trade and Economic Partnership*, Japan-Switz., *supra* note 209.

221 Jan Kleinheisterkamp, *Who is Afraid of Investor-State Arbitration? Unpacking the Riddle of 'No Greater Rights' in the TTIP*, Investment Treaty News (Nov. 18, 2014), https://iisd.org/itn/fr/2014/11/18/who-is-afraid-of-investor-state-arbitration-unpacking-the-riddle-of-no-greater-rights-in-the-ttip/#_ftnref11 (noting, back in 2014, that "[t]he reality is that no BIT has been concluded between two traditional 'first world' countries. Historically, in other words, the assumption has been that these treaties would provide for protection to investors from traditional capital exporting countries doing business in countries with poor rule of law records—and poor altogether."); Gantz, *supra* note 25, at 2 (noting that "all US BITs have been with developing nations, mostly small ones, or the nations of Eastern Europe, which at the time were developing or emerging market nations."); Mark S. Manger & Clint Peinhardt, *Learning and the Precision of International Investment Agreements*, http://www.utdallas.edu/~clint.peinhardt/BITlegalization.pdf (noting, based on a sample of 1200 BITs, that "[t]here are very few BITs between developed countries, among them treaties with Singapore and a few countries that have only recently reached (or approached) developed-country status such as Chile, South Korea and Mexico."); Tietje & Baetens, *supra* note 25, at 36 (noting that before the Treaty of Lisbon, by which the EU Member States granted the EU competence over direct foreign investment, Netherlands had not concluded BITs with developed countries.)

222 Some observers even claim that there has been a "tradition of excluding ISDS in agreements among developed countries." Kleinheisterkamp & Poulsen, *supra* note 3, at 2.

was officially justified on grounds that both Australia and the U.S. have robust legal systems.[223] ISDS was also excluded from the Australia-Japan FTA entered in 2014.[224]

Lastly, although most north-north IIAs afford investors with direct access to ISDS, some of them, certainly the exception, do require the pursuit[225] or the exhaustion of local remedies as a precondition to ISDS.[226] These IIAs accommodate to the argument raised by some commentators whereby IIAs between developed countries should neither include traditional ISDS with a direct right of action against host states nor exclude ISDS altogether. Since developed countries are assumed to have reliable legal systems, they should have the first say when an investment disputes arises. Yet, because legal systems, even from developed countries, are not infallible, investors should have access to ISDS after pursuing or exhaustion legal actions before the domestic courts of the host state.[227]

3.4. Once again: ISDS between developed countries in recent multilateral agreements involving both developed and developing countries. TPP, CPTPP, CETA and the USMCA

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223 Australian Department of Foreign Affairs and Trade, Australia-United States Free Trade Agreement - Guide to the Agreement, at https://dfat.gov.au/about-us/publications/trade-investment/australia-united-states-free-trade-agreement-guide-to-the-agreement/Pages/11-investment.aspx (noting that "[i]n recognition of the Parties' open economic environments and shared legal traditions, and the confidence of investors in the fairness and integrity of their respective legal systems, the Investment Chapter does not establish an investor-state dispute settlement mechanism."); Office of the United States Trade Representative, Summary of the U.S.-Australia Free Trade Agreement, at https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/archives/2004/february/summary-us-australia-free-trade-agreement ("In recognition of the unique circumstances of this Agreement – including, for example, the long-standing economic ties between the United States and Australia, their shared legal traditions, and the confidence of their investors in operating in each others' markets – the two countries agreed not to adopt procedures in this FTA that would allow investors to arbitrate disputes with governments. This issue will be revisited if circumstances change. Government-to-government dispute settlement procedures remain available to resolve investment-related disputes.")

224 Nottage, *supra* note 91, at 4.

225 Agreement on the Reciprocal Promotion and Protection of Investments, BLEU (Belgium-Luxemburg Economic Union)-U.A.E., Article 12, Mar. 5, 2004, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/425/download (requiring to pursue legal remedies before domestic courts for 15 months); Agreement for the Promotion and Reciprocal Protection of Investments, Sing. - U.A.E. *supra* note 209 (requiring to pursue legal remedies before domestic courts for 6 months).

226 Agreement for the Promotion and Protection of Investments, H.K.-U.K., *supra* note 209. It is not self-evident that this IIA requires the exhaustion of local remedies. However, since it does not include a fork-in-the-road provision, it does not require investors to waive domestic remedies before proceeding to arbitration, and it does not refer to ICSID arbitration, it is assumed that the BIT does require the exhaustion of local remedies. Dodge, *supra* note 3, at 179. The same features are present in the Agreement for the Promotion and Protection of Investments, Austria-H.K., *supra* note 209.

227 *See supra* note 3.

As just noted, IIAs with ISDS involving exclusively developed countries (especially traditionally developed countries) are not common. Conversely, as in NAFTA and the ECT, the usual scenario in which IIAs link developed countries remains that of multilateral agreements involving both developed and developing countries, and dealing not only with investment protection but also with trade promotion.[228] It is in the context of the negotiation of these large new trade deals or "Mega-Regionals" that the backlash against ISDS gained momentum, especially in developed countries that had previously championed the spread of ISDS.[229]

Recent examples are the Trans-pacific Partnership Agreement (TTP),[230] involving twelve Pacific-Rim countries,[231] the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),[232] the trade and investment agreement that came to replace the TPP after the U.S. withdrew from it, the China-Japan-Korea Trilateral Investment Agreement,[233] and some of the EU's recent agreements that, although do not include traditional investor-state arbitration, do include a form of investor-state dispute settlement referred to as investment court system (ICS). This is the case of the EU-Canada Comprehensive Economic and Trade Agreement (CETA)[234] and the EU-Singapore Investment Protection Agreement.[235]

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[228] Schill & Bray, *supra* note 201, at 441 (noting that "[w]hile the integration of trade and investment rules has been common practice for Canada and the United States since the conclusion of the Canada-United States Free Trade Agreement in 1988,122 which later inspired NAFTA and many other U.S. trade and investment agreements, this is a newer development for the EU given that it was only granted competence for "foreign direct investment" in the Lisbon Treaty.")

[229] August Reinisch, *The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court*, CIGI Investor-State Arbitration Series 1, 8 Paper No. 2 (2016) (noting that criticism against ISDS was notorious in Germany and Austria, which seemed surprising given the fact that both Germany and Austria have for long entered into BITs).

[230] Trans-Pacific Partnership (hereinafter TPP), Chapter 9, Section B, Feb. 4, 2016, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3573/download

[231] Developed countries: Australia, Canada, Japan, United States and Singapore; Developing countries: Brunei Darussalam, Chile, Malaysia, Mexico, New Zealand, Peru and Vietnam.

[232] Involves all the TPP signatories, except for United States. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (hereinafter CPTPP), Chapter 9, Section B, Mar. 8, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5673/download

[233] Agreement for the Promotion, Facilitation and Protection of Investment, Japan-S. Kor.-China, art. 15, May. 13, 2012, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3302/china---japan---korea-republic-of-trilateral-investment-agreement-2012-

[234] CETA, *supra* note 98, Chapter 8,

[235] *See supra* note 99, Chapter 3.

Most of these multilateral IIAs involving developed countries, even those entered by the EU, follow some of the traditional patterns of IIAs with ISDS. As a general rule, IIAs grant investors with a direct right of action against the host state for the violation of their rights under the treaty, without requiring the exhaustion of local remedies before the domestic courts of the host state. Furthermore, as a rule these IIAs are drafted in a symmetric manner, providing such direct right of action to investors from all the parties in the treaty, and not only to investors from the developed countries.

Since these agreements were subject to great criticism and public attention, their content was carefully drafted to address all major areas of concern. Beyond dispute resolution, from a substantial perspective these IIAs are said to represent the highest standards of treaty drafting,[236] for they delimit the scope of investors' standards of treatment in order to reduce adjudicator's discretion and thus safeguard states' right to regulate in matters of public interest such as the protection of the environment, human health, cultural identity and so on.[237] Relevantly, as we will see below, these IIAs impose important restrictions on the standards of indirect expropriation and fair and equitable treatment, both of which constitute the bulk of ISDS claims against developed countries. In the same line, these IIAs generally diminish (or exclude altogether) the relevance of the concept of investor's legitimate expectations, which has been recurrently used as a key component of the fair and equitable treatment.[238]

Although developed countries have entered into some of these mega IIAs including ISDS, a new trend has begun to emerge in the multilateral context. Instead of keeping IIAs symmetric, i.e., instead of providing investors from all parties in the agreement with the same access to ISDS, some countries have opted to exclude ISDS vis-à-vis certain countries or include carve-outs or exceptions to ISDS.[239] For example, the CPTPP allows contracting parties to opt out ISDS in case

[236] José E. Alvarez, *Is the Trans-Pacific Partnership's Investment Chapter the New "Gold Standard"?*, IILJ Working Paper 2016/3 (MegaReg Series), at 18 (noting that "[i]f one expected the TPP negotiations to produce a 'state of the art' investment treaty, that goal was achieved. The TPP's is the latest thing in a traditional investment protection treaty.")
[237] See section 5 below.
[238] See below 5 below.
[239] This trend has been labelled as "selective judicialization," which is deemed to be a "mechanism to stress democratic control in the investment treaty regime." Stephan W. Schill & Geraldo Vidigal, *Cutting the Gordian Knot: Investment Dispute Settlement à la Carte*, RTA Exchange. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB), 2018, at 4.

of alleged violations of the national treatment and most favored nation in the pre-establishment stage, and Australia and Canada, along with other countries, exerted such option.[240] It also allows contracting parties to carve-out ISDS with respects to claims challenging tobacco control measures.[241] The CPTPP also includes some limitations to Mexico's[242] and Malaysia's[243] consent to ISDS, along with 5 side letters from New Zealand excluding ISDS altogether with 5 countries, including Australia (a developed country).[244]

Recently, the United States-Mexico-Canada Agreement (USMCA),[245] the treaty that is meant to replace NAFTA, completely eliminates ISDS for Canada, thereby abolishing ISDS between the two developed countries in the agreement.[246] The USCMA also eliminates ISDS between Mexico and Canada, but it would remain available between these countries under the CPTPP. Moreover, although the USCMA maintains ISDS between Mexico and the U.S., it does not grant the same procedural rights to all investors. For most investors, the USCMA provides for ISDS only after the claimant has pursued local remedies before the domestic courts of the host state for 30 months[247] and only when the claimant alleges the violation of the standards of national treatment and most favored nation in the post-establishment stage, and the violation of the standard of direct expropriation.[248] Nevertheless, if the claimant is a party to a "covered contract government"[249] in

[240] See CPTTP, Annex 9-H.
[241] CPTPP, Article 29.5.
[242] CPTPP, Annex 9-L (c).
[243] CPTPP, Annex 9-K.
[244] Institute for Sustainable Development, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) signed*, Investment Treaty News (April 24, 2018); Although New Zealand was not included among the developed countries listed above, it is in a "gray zone" between developed and developing countries according to the criteria set forth above.
[245] Agreement between the United States of America, the United Mexican States, and Canada (hereinafter USMCA), Chapter 14, Nov. 30, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5737/download.
[246] USMCA, Annex 14-C (3).
[247] Or until the claimant has obtained a final decision from a court of last resort of the host state. USMCA, Article 14.D.5 (a) and (b).
[248] USMCA, Article 14.D.3.1. Therefore, claims regarding the violation of national treatment and most favored nation with respect to the establishment and acquisition of investments, the violation of the standard of fair and equitable treatment and indirect expropriation are excluded from ISDS.
[249] USMCA, Annex 14.E(6)(a) (defining "covered government contract" as a "written agreement between a national authority of an Annex Party and a covered investment or investor of the other Annex Party, on which the covered investment or investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor in a covered sector.")

a "covered sector,"[250] it may directly submit a claim to arbitration[251] and may claim the violation of any of the obligations under the treaty.[252] Thus, when the claimant meets these particular conditions, USMCA preserves ISDS main traditional features.

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[250] According to Annex 14.E(6)(b), the "covered sectors" include oil and natural gas, power generation, telecommunication, transportation, ownership or management of roads, railways, bridges, or canals.

[251] USMCA, footnote 32 ("For greater certainty, Article 14.D.5.1(a)-(c) [which requires the pursue of local remedies] does not apply to claims under paragraph 2."); CONG. RESEARCH SERV., R44981, NAFTA RENEGOTIATION AND THE PROPOSED UNITED STATES-MEXICO-CANADA AGREEMENT (USMCA) 25 (2019) (noting that "[t]his use of ISDS is designed to protect investors in heavily regulated industries whose investments may be affected by the presence of state-owned enterprises in the sector.")

[252] USMCA, Annex 14-E(2)(a)(i) – (b)(i).

4. REVIEW OF CASE LAW AGAINST DEVELOPED COUNTRIES

Thus far, we have described the arguments advanced in favor of including ISDS in IIAs concluded between developed countries, and we have shown the actual breadth of such IIAs within the whole universe of investment treaties. In this section, we turn to the assessment of the existing case law against developed countries.[253] Such analysis may serve several purposes. It may provide general hints of how foreign investors are treated in developed countries. It may also show whether these countries do have reliable and unbiased legal systems, capable of properly protecting foreign investments.[254] Moreover, it allows to identify the kind of misbehavior developed countries are prone to display towards foreign investors and to establish whether foreign investors would have found remedies to readdress such misbehavior before domestic courts.[255] In addition, identifying the type of situations in which developed countries have been found liable is useful to understand the way these countries have shaped their subsequent IIAs.[256]

It would go beyond the scope of this work to provide a deep assessment of all the ISDS claims that have been filed against developed countries. Rather, this section seeks to identify some general patterns of the claims and awards rendered against developed countries. Then, in section 5, we will see how these patterns relate to recent trends in treaty practice between developed countries and to the general question of the relevance of ISDS in the context of north-north relations.

4.1. The general picture

Based on several online sources, which were contrasted and updated when necessary, Annex 1 contains a list of all the ISDS claims filed against the developed countries identified in Section 1,

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[253] It is admitted that the debate about ISDS between developed countries can be addressed from different perspectives, one of them being the assessment of the case law involving developed countries. *See* EFILA, *supra* note 1, at 34.
[254] See discussion in section 2.2 above.
[255] *See*, e.g., Mestral & Morgan, *supra* note 66.
[256] For example, it is admitted that the U.S. BITs incorporated certain changes in response to claims filed under NAFTA Chapter 11. Vandevelde, *supra* note 25, at 179 (noting that the "changes included the addition of language specifying that the fair and equitable treatment standard merely incorporates the international minimum standard, clarifying the extent to which the expropriation provision applies to regulatory actions by the host state and modifying the procedures employed in arbitrations under the investor-state dispute resolution provision.")

including the European Union as a separate entity.[257] Annex 1 includes information on the name of the case, the respondent state, the home state of the investor, the IIA under which the claim was filed, the outcome of the case,[258] the treaty breaches alleged by the investor, and the breaches found by the tribunal when the case was decided against the state.

As of November 1 2019, 153 ISDS claims have been brought against the developed countries identified in Section 1. Roughly one third of the cases have been filed against Spain (51), followed by Canada (28), the United States (17), Italy (11), South Korea (7), Saudi Arabia (6), Kuwait (6), Cyprus (5), Greece (5), United Arab Emirates (4), Germany (4), Belgium (2), Australia (2), Austria (1), France (1), United Kingdom (1) and Qatar (1). Annex 1 also includes a claim reportedly filed by a Russian investor against the EU under the ECT, which would constitute the first ISDS claim faced by the Union as an autonomous entity.[259]

Therefore, out of all the developed countries identified in Section 2, these countries have never been subject to ISDS proceedings: Japan, Israel, Denmark, Portugal, Finland, Taiwan (China), Hong Kong (China), Singapore, Sweden, Switzerland, Ireland, Luxembourg, British Virgin Islands,[260] and Cayman Islands.[261]

Claims against developed countries account for roughly 15% of all known ISDS claims.[262] Had we counted as "developed" all the European countries that accessed the EU after 2004, the number of cases would be higher. Yet, as noted, we do not deem these countries to be developed for

[257] The sources are: https://investmentpolicy.unctad.org/, https://www.italaw.com/, https://icsid.worldbank.org/en/Pages/cases/searchcases.aspx and https://www.iareporter.com/

[258] The "outcome" includes one of these options: decided in favor of the state, decided in favor of the investor, pending, settled, discontinued or "data not available."

[259] *See* Damien Charlotin, *Russian-Backed Project Investor, Nord Stream 2, Files Arbitration Against European Union Under the Energy Charter Treaty*, IA Reporter (Sept. 26, 2019), https://www-iareporter-com.uaccess.univie.ac.at/articles/russian-backed-project-investor-nord-stream-2-files-arbitration-against-european-union-under-the-energy-charter-treaty/

[260] This country has concluded no IIAs.

[261] This country has concluded no IIAs.

[262] According to UNCTAD, as of July 30, 2019, the total number of known treaty-based ISDS claims had reached 983. *See* https://investmentpolicy.unctad.org/news/hub/1625/20190930-isds-navigator-update-980-known-investment-treaty-cases-by-31-july-2019

purposes of this work because they are not high-income countries or they are not capital-exporting countries.[263]

4.1.1. Which IIAs are the basis for ISDS claims against developed countries?

As noted, Annex 1 includes information regarding the IIAs under which the claims against developed countries have been filed. The most invoked IIA is the ECT (61), which has been the basis for most ISDS claims against traditionally developed countries of Western Europe. Indeed, out of the 51 claims against Spain, 46 were filed under the ECT. All claims against Italy were filed under the ECT. And apart from one, all cases against Germany were also initiated with basis on the ECT. After the ECT, the most invoked IIA against developed countries is NAFTA (44), which has been the basis for almost all ISDS claims against the U.S. and Canada. In effect, with the exception of one claim against Canada in which the Canada-Egypt BIT was invoked, all the ISDS claims against Canada and the U.S. were filed with basis on NAFTA Chapter 11.

Thus, more than two thirds of the claims against developed countries have been filed under the ECT and NAFTA.[264] These claims account for almost all the cases against traditionally developed countries. As noted above, both the ECT and NAFTA are multilateral agreements involving both developed and developing countries, and containing not only investment provisions but also trade provisions. As we also noted, these multilateral agreements were concluded in the early 90's and followed treaty patterns of the times, namely, they include rather openly-worded standards of protection. Finally, it is worth noting that, when concluded, these agreements were not intended to serve as basis for ISDS claims against traditionally developed countries,[265] but to protect investors from these countries in the developing states that were parties in the agreements.[266] Thus, almost all the claims against traditionally developed countries can be deemed to be unintended consequences of the conclusion of multilateral agreements linking both developed and developing countries

[263] See discussion in section 1.
[264] In fact, both the ECT and NAFTA account for roughly 20 percent of all known ISDS cases. UNCTAD, *supra* note 15, at 103.
[265] Western European Countries in the case of the ECT; the U.S. and Canada in the case of NAFTA.
[266] Eastern and Central European countries in the case of the ECT; Mexico in the case of NAFTA.

The fact that almost all the claims against traditionally developed countries have had either the ECT or NAFTA as a basis is also consistent with the treaty trend identified above with respect to such countries. Indeed, as highlighted, traditionally developed countries do not usually conclude bilateral investment agreements between themselves, which explains why these countries have not faced a significative number of claims grounded on the violation of bilateral investment agreements. Curiously, the small number of bilateral agreements which have been invoked against traditionally developed countries actually involve developing countries and not developed countries. For example, in the cases against Spain which were not based on the ECT, investors invoked Spain's BITs with Venezuela, Panama, Argentine and Mexico. The only non-NAFTA case against Canada was instituted under the Canada-Egypt BIT. The only non-ECT case against Germany was filed under the Germany-India BIT. Oddly, one bilateral agreement between traditionally developed countries which has been recently invoked by investors is an agreement that does not actually provide for ISDS. Indeed, two American investors have filed claims against Australia under the Australia-U.S. FTA, which, as noted above, does not contain ISDS provisions.[267] Allegedly, the American investors seek to circumvent this circumstance by relying on the most favored nation clause and other provisions of the treaty.[268]

When non-traditionally developed countries are considered, i.e., countries that only recently became economically "developed" pursuant the criteria set forth above, the pattern is different. These countries are sued mostly with basis on bilateral investment agreements, most of them concluded when they were not economically developed yet (we identified these agreements as "supervened north-north IIAs").[269] As noted above, although "supervened north-north IIAs" are IIAs between countries that *currently* have the character of developed, they were concluded following a traditional north-south pattern. Thus, when non-traditionally developed countries concluded these agreements they were likely acting more as developing countries, seeking to attract foreign investments, than as developed countries. For example, Kuwait has been sued under

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[267] *See* Annex 1.
[268] See Jarrod Hepburn, *A second US investor tries to arbitrate under Australia-US FTA, despite absence of an investor-state arbitration mechanism*, IA Reporter (Apr. 24, 2017), https://www.iareporter.com/articles/a-second-us-investor-tries-to-arbitrate-under-australia-us-fta-despite-absence-of-an-investor-state-arbitration-mechanism/
[269] *See* section 3.3 above.

its BITs with Egypt, the Russian Federation, Spain, Switzerland and Italy. Korea has been sued under its bilateral agreements with Iran, BLEU, EFTA, Netherlands and the U.S. United Arab Emirates has faced claims under its BITs with Turkey, Italy and the U.K.

4.1.2. Where do the complaining investors come from?

Most ISDS claims against developed countries have been filed by investors from other developed countries. Indeed, in 129 out of the 153 cases against developed countries the investor's home state was a developed country. Having regard of the fact that one case may involve several investors with different nationalities, most claims engaged investors from the U.S. (31), followed by Luxembourg (22), Germany (19), Canada (16), Netherlands (14), the U.K (9), Denmark (5), Switzerland (5), France (5), Italy (4), Sweden (3), Japan (3), Cyprus (3), Belgium (3), Austria (2), Spain (2), Greece (2), Qatar (2), Hong Kong (1), Portugal (1), United Arab Emirates (1) and Ireland (1).

4.1.3. Why are the investors complaining for?

As can be seen in Annex 1, in some cases there is not information available regarding the breaches alleged by the complaining investors, so the ensuing conclusions are only of a partial value. The standard whose violation has been alleged the most by investors is the fair and equitable treatment. Out of 83 cases in which such information is available, the standard of fair and equitable treatment has been invoked in 77 cases, followed by indirect expropriation (49), national treatment (40), most favored nation (27), full protection and security (17), umbrella clause (15), arbitrary, unreasonable and/or discriminatory measures (15), and performance requirements (9). These figures, particularly the fact that the standards of fair and equitable treatment, and expropriation are the most invoked by investors, are consistent with general ISDS patterns.[270]

4.1.4. How successful have complaining investors been?

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[270] *See* UNCTAD, *IIA Issues Note International Investment Agreements*, Issue 3 Special Update on Investor–State Dispute Settlement: Facts and Figures (Nov. 2017), at 6.

Out of the 153 claims filed against developed countries, in 52 cases the tribunals have reached a decision, 75 cases are still pending, 12 were settled, 12 were discontinued and regarding one (1) case (the one filed against the U.K.) there is no available data. Out of the 52 cases that have been decided, in 31 of them the respondent state prevailed, while in 21 investors succeeded in at least one of the alleged breaches. Spain has faced more defeats than any other country (13), followed by Canada (5), Italy (2) and Korea (1). The state which has won the most is the U.S. (10), followed by Canada (8), Spain (3), Italy (2), Cyprus (2), Greece (1), United Arab Emirates (1), Belgium (1), Australia (1), and Austria (1).

Having in mind that a tribunal can find more than one violation in the same case, in 20 out of the 21 cases decided in favor of investors tribunals found a violation of the standard of fair and equitable treatment. In addition, respondent states were also held liable for violations to the national treatment (2), performance requirements (1), and the umbrella clause (1). Relevantly, no tribunal has found violations to the standard of indirect expropriation, which is one of the most invoked by investors as noted above.

4.2. Analysis of awards rendered against developed countries: the role of the concept of investors' legitimate expectations and the type of situations triggering developed countries' liability

As noted, most awards against developed countries have found them in breach of the fair and equitable treatment standard. This is not surprising and rather follows the general trend in ISDS case law.[271] Violations to the FET were found, for example, due to the failure of a provincial government in Canada to bring clarity to the regulatory uncertainty that emerged from the government's decision to impose a moratorium to the development of an off-shore wind project,[272] the harassment to which an investor was subjected in the course of a verification review process conducted by an administrative agency,[273] the enactment of certain regulations prohibiting the export of a toxic substance aimed at protecting the local industry,[274] the lack of transparency with

[271] UNCTAD, *supra* note 270, at 1 (noting, from the assessment of ISDS cases from 1987 to July 2017, that "[i]n the decisions holding the State liable, ISDS tribunals most frequently found breaches of the FET and indirect expropriation provisions.")
[272] *Windstream Energy LLC v. Canada*, PCA Case No. 2013-22, Award (Sept. 27, 2016), para. 380.
[273] *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award (Apr. 10, 2001), para 181.
[274] *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award (Nov. 13, 2000), para 266.

which a loan transaction with the investor was conducted by a government agency,[275] and the capricious termination of a sale purchase agreement followed by the illegitimate forfeit of a deposit paid in advance by the investor.[276]

Yet, the bulk of awards against developed countries (15 out of 21) have particularly relied on the concept of legitimate expectations as a basis to held developed countries liable for the breach of the FET. In very general terms, the concept usually comes to play when the host state adopts some regulatory changes that affect investors and their investments.[277] An investor's legitimate expectations are neglected when the host state performs acts that are inconsistent with expectations created by the state and upon which the investor reasonably relied when decided to invest.[278] While the concept of legitimate expectations has been defined as a key component of the FET,[279] its historical foundations and its application by ISDS tribunals have been criticized on several grounds.[280] Indeed, behind the concept of legitimate expectations lay important questions over which both case law and commentators still debate: are the legitimate expectations a stand-alone element of the FET, whose violation, by itself, leads to a treaty violation? What kind of acts must the host state display in order to conclude that "legitimate" expectations were created? How inconsistent must the acts of the state be in order to conclude that such expectations were violated?

[275] *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award (Nov. 13, 2000), para. 83.
[276] *Mohammad Reza Dayyani, et al. v. The Republic of Korea*, PCA Case No. 2015-38, Award (July 4, 2018). The text of the award is not publicly available, but an in-depth summary can be found at https://www-iareporter-com.uaccess.univie.ac.at/articles/details-of-iranians-arbitral-victory-over-korea-come-into-view-with-arbitrators-seeing-bit-breach-after-investment-deposit-not-returned-but-disagreeing-whether-any-compensation-was-warranted/
[277] PATRICK DUMBERRY, THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105 139 (Kluwer Law International, 2013).
[278] Kenneth J. Vandevelde, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U. J. Int'l L. & Pol. 43, 66 (2010) (noting that a violation of the consistency obligation "occurs, however, where the host state has promised to act in a certain way or has offered assurances to the investor (or investment) on which it has reasonably relied. That is, the consistency (or security) principle entitles the covered investment or investor to the protection of its legitimate expectations based on such promises or assurances.")
[279] UNCTAD, *Fair and Equitable Treatment - A Sequel: UNCTAD Series on Issues in International Investment Agreements II*, United Nations Conference on Trade and Development (UNCTAD) Series on Issues in International Investment Agreements II, UN, New York (2013), at 63; Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 SANTA CLARA J. INT'L L. 7, 17 (2013) (noting that the "protection of legitimate expectations by the FET standard will today properly be considered as the central pillar in the understanding and application of the FET standard.")
[280] Josef Ostřanský, *An Exercise in Equivocation: A Critique of Legitimate Expectations as a General Principle of Law Under the Fair and Equitable Treatment Standard, in* GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT ARBITRATION (Brill, A. Gattini; A. Tanzi, F. Fontanelli (eds.), Forthcoming), https://ssrn.com/abstract=3075791; SORNARAJAH, *supra* note 183, at 354.

It is our goal now to stress how the concept of legitimate expectations has been conceived and applied in the case law against developed countries. The concept has found its way in the ECT and NAFTA, both of which constitute the main source of ISDS litigation against developed countries, as noted above. Nevertheless, given the particular content of the FET clause in each of these agreements, it is worth analyzing separately the ECT case law and the NAFTA case law on the subject of legitimate expectations. As will be seen, while ECT tribunals have attached notorious relevance to the concept, NAFTA tribunals have embraced a more restrictive approach. These differences are reflected in the number in cases in which the violation of an investor's legitimate expectations has led to a treaty violation.

4.2.1. FET and legitimate expectations under the ECT: The Spain's and Italy's sagas on renewable energy generation

Without intending to provide a full assessment of the content of the FET under the Article 10(1) ECT, it is possible to remark some of its features. First, following treaty practices of the time, the definition of the FET standard contained in Article 10(1) of the ECT is a general, openly worded one.[281] Article 10(1), as most investment agreements of the time, merely imposes on the state the obligation to accord investors fair and equitable treatment, without defining the specific content of this obligation. Relevantly, it does not restrict the content of the FET to that of the minimum standard of treatment under customary international law,[282] neither does it contain a list of behaviors against the standard. The definition of the particular content of the standard is thus left to arbitral tribunals, which, in the absence of major constraints in the wording of Article 10(1) ECT, enjoy broad discretion in this task. With these general remarks in mind, we can now assess the ECT awards rendered against developed countries, particularly Spain and Italy.

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[281] ECT, Article 10 (1) ("Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. (…).")

[282] Christoph H. Schreuer, *Selected Standards of Treatment Available Under The Energy Charter Treaty*, in INVESTMENT PROTECTION AND THE ENERGY CHARTER TREATY 63, 86 (Graham Coop and Clarisse Ribeiro eds., JurisNet, LLC, 2008).

The general factual background of all the cases against Spain can be described as follows.[283] In order to attract investments in the renewable energy sector, in large part so that Spain could meet its renewable energy targets set by EU law, through Royal Decree 661/2007 Spain implemented a new regulatory regime for renewable energy generators. Among other economic incentives, the new regime established fixed Feed in Tariffs (FiTs) for qualifying solar photovoltaic ("PV") generators to be paid for the whole life of the respective facility and assured priority grid access. Relying on these incentives, numerous domestic and foreign investors invested in renewables in Spain. In the meantime, however, Spain was experiencing an alarming "tariff deficit," i.e., there was a notable gap between the rates paid by consumers and the costs of the system (including, of course, the cost of the subsidies for renewable resources). As a response to the "tariff deficit," in November 2010 Spain began to adopt a series of measures that gradually ended up dismantling the regimen created by Royal Decree 661/2007. Remarkably, through certain legislative and administrative measures Spain replaced the fixed FiTs with a new regime providing for a remuneration at a "reasonable rate of return" based on hypothetical "standard" investment and operation costs of hypothetical "efficient" plants."[284] The new regime significantly reduced, if not eliminated completely, the subsidies to be paid to renewable generators. In response, more than 40 claims have brought suit against Spain for the violation of the ECT.

Thus far, Spain has been found internationally liable in 12 cases as a result of its decision to dismantle the special economic regime enacted to attract investors in the sector of renewable energy generation.[285] Even though each decision has its one peculiarities which cannot be

[283] For a deep recount of the circumstances leading to the "renewable energy explosion" against Spain, *see* García-Castrillón, *supra* note 125.
[284] Royal Decree Law 9/2013, Law 24/2013, Royal Decree 413/2014, Ministerial Order IET/1045/2014.
[285] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Spain* (hereinafter Eiser), ICSID Case No. ARB/13/36, Award (May 4, 2017); *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Spain* (hereinafter Novenergia), SCC Case No. 2015/063, Award (Feb. 15, 2018); *Masdar Solar & Wind Cooperatief U.A. v. Spain* (hereinafter Masdar), ICSID Case No. ARB/14/1, Award (May 16, 2018); *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Spain* (hereinafter Antin), ICSID Case No. ARB/13/31, Award (June 15, 2018); *Foresight Luxembourg Solar 1 S. Á.R1., et al. v. Spain* (hereinafter Foresight), SCC Case No. 2015/150, Award (Nov.14, 2018); *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Spain* (hereinafter RREEF), ICSID Case No. ARB/13/30, Award (Nov. 30, 2018); *Cube Infrastructure Fund Sicav and Others v. Spain* (hereinafter Cube), ICSID Case No. ARB/15/20, Award (Feb. 19, 2019); *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Spain* (NextEra), ICSID Case No. ARB/14/11, Award (May 31, 2019) (hereinafter NextEra); *9REN Holding S.a.r.l v. Spain* (9REN), ICSID Case No. ARB/15/15, Award (May 31, 2019) (hereinafter 9REN); *SolEs Badajoz Gmbh v Spain*, ICSID Case No. ARB/15/38 (SolEs), Award (July 31, 2019) (hereinafter SolEs); *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Spain* (hereinafter OperaFund), ICSID Case No. ARB/15/36, Award (Sept. 6, 2019);

understated, it is fair to say that all of them were grounded, to a large extent, on the violation of investors' legitimate expectations, either because Spain had specifically assured that there will be no modifications to the regulatory regime or, in the absence of such assurance, because in any case investors had a legitimate expectation that the regulatory framework would not be drastically or fundamentally altered.[286]

Relevantly, most tribunals deemed the protection of investors' legitimate expectations to be a stand-alone element of the FET whose violation, without more, is enough to find a violation of the treaty.[287] Most of the decisions also engaged in an analysis of the kind of representations that are sufficient in order for the state to create "legitimate expectations." In particular, they addressed the question of whether the assurances of regulatory stability need to be contained in a specific communication or representation addressed to the particular investor, or whether representations made in laws or regulations, addressed to all investors, are sufficient.[288] While some tribunals asserted that specific representations vis-à-vis the investor were required,[289] most tribunals held that assurances contained in general regulations aimed at inducing investments in a certain sector were a sufficient source of legitimate expectations.[290] In the middle of these positions, one tribunal asserted that, although specific representations addressed directly to the investors are required, general provisions in the legislation and other surrounding circumstances are yet useful to provide

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InfraRed Environmental Infrastructure GP ltd. et al v. Spain, ICSID Case No. ABR/14/12, Award (Aug. 2, 2019) (the award has not been published, but it is known so far that the arbitrators unanimously found Spain in breach of the FET clause in the ECT, see https://www-iareporter-com.uaccess.univie.ac.at/articles/spain-round-up-an-update-on-new-rulings-imminent-ones-and-new-cases/)

[286] Eiser, paras. 382, 387; Novenergia, paras. 647 - 697; Masdar, paras. 482-522; Antin, paras. 532-573; Foresight, paras. 340 – 398; RREEF, paras. 260 - 263, 378 – 399; Cube, paras. 386 – 442; NextEra, paras. 582 – 601; 9REN, paras. 299, 307 – 311; SolEs, paras. 310 – 319, 462, 463; OperaFund, paras. 480 – 490.

[287] *See*, e.g., NextEra, para 582 ("The Tribunal accepts that the protection of legitimate expectations is an essential element of the provision of fair and equitable treatment and this applies under Article 10 of the ECT."); But *see* Cube, para. 387 ("(…) The fact that an investor's expectations have been defeated will not necessarily imply that there has been a breach of the FET standard.").

[288] Masdar, para 490 (noting that "[t]here are two schools of thought on this question. In essence, one school of thought considers that such commitments can result from general statements in general laws or regulations. The other considers that any such commitments have to be specific.")

[289] See, e.g., Foresight, para 366 (yet, the tribunal concluded that, in absence of a specific commitment, investors had a legitimate expectation that the regulatory regime would not be radically altered).

[290] OperaFund, para 485; 9REN, paras 294, 295 (noting that "[t]here is no doubt that an enforceable "legitimate expectation" requires a clear and specific commitment, but in the view of this Tribunal there is no reason in principle why such a commitment of the requisite clarity and specificity cannot be made in the regulation itself where (as here) such a commitment is made for the purpose of inducing investment, which succeeded in attracting the Claimant's investment and once made resulted in losses to the Claimant."); SolEz, para 313; Cube, para 388; RREF, paras 320, 321.

context to a legitimate expectations claim.[291] Some tribunals did not take side on the discussion, given that it was clear on the facts that specific representations to the concerned investors had been made by Spain.[292]

It is worth noting that some of the tribunals that have claimed that a specific representation is required, have nonetheless concluded that the absence of such representation is not necessarily fatal for an investor's claim based on the violation of its legitimate expectations. Indeed, some awards concluded that in the absence of a specific commitment investors cannot expect that there will be no modifications *whatsoever* to the regulatory regime. This means that states are free to introduce modifications to the regulatory regime. Yet, such freedom is not absolute, for investors, even in the absence of a specific commitment, have a legitimate expectation that the regulatory regime would not be "drastically" or "fundamentally" altered.[293]

Under a similar set of facts, Italy has been found liable in two ECT cases.[294] As Spain, Italy enacted an incentive regime aiming at increasing energy generation from renewable resources in order to comply with the EU's directives on the promotion of renewable generation. Afterwards, when investments had already been made, Italy decided to reduce the incentive tariffs previously granted to investors seeking to reduce costs for final consumers. Once again, specifics aside, the tribunals in both cases concluded that Italy, through its incentive regime and several representations made by public officials, created legitimate expectations upon which foreign investors could reasonable have relied on when they decided to invest.[295] By introducing modifications to its incentive regime, curtailing the incentive tariffs previously granted, Italy violated such legitimate expectations and, as a result, breached the FET under the ECT.[296]

[291] NextEra, paras 587, 596.
[292] Masdar, paras 511, 521.
[293] Eiser, para. 382; Novenergia, para. 654; Foresight, para 382 ("the FET standard in the ECT protects investors from a radical or fundamental change in the legal or regulatory framework under which the investments are made.")
[294] *Greentech Energy Systems A/S, et al v. Italian Republic* (hereinafter Greentech), SCC Case No. V 2015/095, Award (Dec. 23, 2018); *CEF Energia B.V. v Italian Republic* (hereinafter CEF), SCC Case No. V 2015/158, Award (Jan. 16, 2019).
[295] *Greentech*, at para. 447; *CEF*, at para. 234.
[296] *Greentech* para. 455; *CEF*, at para. 246.

4.2.2. The FET and legitimate expectations under NAFTA: the controversial *Bilcon* award against Canada

Once again, without intending to provide a full account on the subject, it is possible to remark some features of the FET standard under NAFTA. As the ECT, Article 1105 NAFTA does not define the content of the FET. Yet, unlike the ECT, Article 1105 NAFTA, entitled "Minimum Standard of Treatment," contains a reference to treatment "in accordance with international law," a qualification that has been interpreted in the sense of limiting the content of the FET to that of the minimum standard of treatment under customary international law.[297] This interpretation was confirmed in 2001 by the NAFTA parties through the "*Notes of Interpretation of Certain Chapter 11 Provisions*,"[298] which were issued in response to seemingly broad interpretations of the FET by some NAFTA tribunals.[299]

In the aftermath of the 2001 Notes of Interpretation, NAFTA tribunals began to embrace a stricter approach with regard to the content of the FET.[300] The *Methanex* award, which became highly influential, asserted that an FET violation requires the presence of a conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process."[301] Distinctively,

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[297] Patrick Dumberry, *The Protection of Investors' Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105*, 31(1) Journal of International Arbitration 47, 50 (2014).

[298] NAFTA Free Trade Commission*, Notes of Interpretation of Certain Chapter 11 Provisions*, North American Free Trade Agreement (July 31, 2001), http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp (noting that is the parties' understanding that "[a]rticle 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party" and that "[t]he concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."); Both the U.S. and Canada replicated these provisions in their subsequent BIT Models and IIAs. Gantz, *supra* note 25, at 15.

[299] Cristoph Schreuer, *Fair and equitable treatment in arbitral practice*, 6 (3) Journal of World Investment and Trade 357, 363 (2005).

[300] UNCTAD, *supra* note 279, at 61.

[301] *Methanex Corporation v. United States of America*, UNCITRAL, Award (Aug. 3, 2005), para 98.

NAFTA tribunals have generally set a high threshold in order for an FET violation to exist, requiring a conduct that is "egregious" and "shocking."[302]

As to the concept of investors' legitimate expectations, NAFTA tribunals, prompted perhaps by the qualified definition of the FET under Article 1105, have regularly held a restrictive approach in two regards. First, NAFTA tribunals have reasoned that the violation of an investor's legitimate expectations does not constitute, by itself, a breach of the FET standard, but merely a factor to be weighed when determining whether any of the well-settled elements of the FET has been infringed.[303] Second, NAFTA tribunals have embraced a restrictive approach with regard to the kind of state's representations that are needed to assert that a "legitimate" expectation was created, requiring a contractual or "quasi-contractual" relationship between the investor and the state.[304] Thus, assurances contained in general legislations usually cannot be the source of relevant expectations.[305]

Against this backdrop, the *Bilcon* case against Canada came to scene.[306] After encouraging the investor to invest in a coastal quarry and marine terminal project in Nova Scotia, the federal government rejected the project based on a report claiming that the quarry was against the "community core values," a new standard of review created by a joint review panel that overrode all other legal requirements defined by the applicable law.[307] The tribunal concluded that Canada's behavior reached the high threshold required to trigger state's liability, particularly "in light of: the Investors' *reasonable expectations* and major consequent investment of resources and reputation in a process that is the most rigorous, public and extensive kind provided under the laws of Canada;

[302] See, e.g., *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (June 8, 2009), para 616 ("It therefore appears that, although situations may be more varied and complicated today than in the 1920s, the level of scrutiny is the same. The fundamentals of the Neer standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105(1).") Patrick Dumberry, *Fair and Equitable Treatment, in* FOREIGN INVESTMENT UNDER THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA) 95, 118 (Makane Moïse Mbengue; Stefanie Schacherer eds., Springer, 2019) (noting that "the existence of this high threshold of severity is probably the predominant characteristic of NAFTA case law.")
[303] Dumberry, *supra* note 297, at 61.
[304] *See, e.g., Cargill, Incorporated v Mexico*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), para 290.
[305] Dumberry, *supra* note 297, at 67.
[306] *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award (Mar. 17, 2015).
[307] *Id.* at para. 590.

the fact that the JRP's distinctive approach in adopting the concept of community core values was not proceeded by reasonable notice; and the fact that the approach of the JRP departed in fundamental ways from the standard of evaluation required by the laws of Canada rather than merely being controversial in matters of detailed application."[308]

Bilcon represented the first (and thus far the only) NAFTA case in which a tribunal has found an FET breach as a result of the of violation of an investor's legitimate expectations[309] (although *not only* as a result of such violation). This decision has been the subject of notorious criticism, among other reasons, because it allegedly departed from previous NAFTA case law on the scope of the FET and the role of the concept of legitimate expectations. Indeed, more in line with the position sustained by the referred ECT tribunals, the *Bilcon* award applied the concept of investors' legitimate expectations as though it were a stand-alone element of the FET whose violation leads to a treaty breach.[310] Furthermore, although the *Bilcon* award does stress that "specific representations" are required in order to create legitimate expectations, it appears to have defended a broader understanding of what actually an "specific representation" means.[311] It remains to be seen whether the *Bilcon* approach will resonate in future NAFTA awards.

4.2.3. Regulatory modifications as the main trigger of ISDS litigation against developed countries

As a concluding note of this section, it is worth noting that most cases against developed countries refer to situations in which the state introduces modifications to the regulatory regime under which the investment was made, causing losses to foreign investors. These modifications are usually the result of policy decisions adopted by the state with the purpose of advancing the public interest in some way and usually affecting not only foreign investors, but also, in some cases, domestic investors. For instance, the last known claim filed against Germany, announced recently, is based on Germany's decision to modify its energy renewables incentive regime, which allegedly impacted three Austrian investors which had invested in the building of several offshore winding

[308] *Id.* at para. 594.
[309] Dumberry, *supra* note 302, at 106.
[310] Dumberry, *supra* note 309, at 108.
[311] *Id.* at 109.

projects in the German North Sea.[312] This case resembles several claims filed against other developed countries, particularly Spain and Italy.

ISDS tribunals have addressed these kinds of situations from the perspective of the FET standard, and more concretely from the concept of investors' legitimate expectations. The outcome in these cases seems to be treaty-dependent. Tribunals applying IIAs which contain a broad definition of the FET standard have been prone to find in the concept of legitimate expectations an autonomous element of the FET standard whose violation is sufficient to assert a treaty breach. Under this view, regulatory modifications are more likely to be seen as breaches of the FET standard, as it is revealed by the awards rendered against Spain and Italy as a result of their decisions to dismantle special regulatory regimes aimed at attracting investments in the energy sector.

Conversely, when the respective IIA contains a more restricted definition of the FET, as in the case of NAFTA, the violation of an investors' legitimate expectations does not appear to be self-sufficient to sustain a treaty breach. Under this view, regulatory modifications are less likely to support an FET violation, unless there is a specific assurance of a contractual or quasi-contractual nature that the state would not introduce any modifications to the legal regime. It is not surprising then that very few awards have been rendered against the NAFTA parties based on the violation of an investor's legitimate expectations.

Finally, knowing how the case law against developed countries looks like, it is possible to identify how *it does not* look like. Indeed, the case law reveals that developed countries are not usually accused of engaging in manifestly egregious behavior against foreign investors in the form, for example, of denial of justice, fundamental breach of due process, targeted discrimination, coercion or harassment. Treaty violations by developed countries tend to be less obvious.

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[312] Lisa Bohner, *As Vattenfall nuclear case sees new round of submissions, Germany faces another energy charter treaty arbitration following modification of renewables incentives regime*, IA Reporter (Sept. 22, 2019), https://www-iareporter-com.uaccess.univie.ac.at/articles/as-vattenfall-nuclear-case-sees-new-round-of-pleadings-germany-faces-another-energy-charter-treaty-arbitration-following-modification-of-renewables-incentives-regime/

5. Case law against developed countries seen through the content of recent IIAs involving developed countries

As noted in section 3.4, modernly the usual scenario in which developed countries enter into IIAs between each other is that of mega multilateral agreements involving both developed and developing countries, and comprising both investment and trade provisions. Thus, it is in the context of these IIAs that developed countries expose themselves to face ISDS litigation from foreign investors. Moreover, as noted in sections 4.2.2 and 4.2.3, the analysis of the case law reveals that the kind of situation in which developed countries face more risks of being subject to ISDS litigation is the introduction of modifications to the regulatory regime in place when the investments were made. In these situations, the notion of investors' legitimate expectation and their protection under the respective investment agreements become the crucial aspect to be addressed by ISDS tribunals.

This section seeks to assess these situations (regulatory modifications) in light of the content of modern IIAs involving developed countries. Particularly, we will focus on the content of CETA,[313] the CPTPP[314] and the USMCA.[315] The aim is to elucidate how these agreements deal with the kind of "wrongdoings" that developed states are more prone to display, and then try to draw more general conclusions regarding how the content of these agreements relate to the general attitude of developed countries towards ISDS between each other.

5.1. Preservation of states' right to regulate as a main goal of the agreements

All these agreements "recognize" or "reaffirm" in their preamble the need to preserve states' right to regulate in the public interest as one of their goals.[316] While it is admitted that the preamble of

[313] *See supra* note 232.
[314] *See supra* note 234.
[315] *See supra* note 245.
[316] CPTPP ("REAFFIRM … the importance of preserving their right to regulate in the public interest."); CETA ("RECOGNISING that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity; RECOGNISING that the provisions of this Agreement protect investments and investors with respect to their investments, and are intended to stimulate mutually-

an IIA does not by itself create rights or obligations, it is argued that "the references to the right to regulate in CETA's preamble are in categorical language and could entertain powerful arguments in favour of the right to regulate."[317] Reinforcing even more the role of the right to regulate, Article 8.9 CETA, entitled "Investment and regulatory measures," reproduces the same statement set out in the preamble stating that "[f]or the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity."[318]

Article 8.9 CETA also incorporates other provisions that may have more practical effects. Paragraph 2 indicates that "[f]or greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section." Hence, the violation of investors' expectations, whether legitimate or not, does not, *by itself* ("the mere fact,") entail the violation of any provision in the agreement, including, of course, the violation of the FET standard.[319] Therefore, CETA clarifies that the concept of legitimate expectations does not constitute a stand-alone element of the FET standard whose violation leads, without more, to an FET violation. Something else is required. As

beneficial business activity, without undermining the right of the Parties to regulate in the public interest within their territories."); USMCA ("RECOGNIZE their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, and protect legitimate public welfare objectives, such as health, safety, environmental protection, conservation of living or non-living exhaustible natural resources, integrity and stability of the financial system, and public morals, in accordance with the rights and obligations provided in this Agreement.")

[317] Catharine Titi, *The Right to Regulate*, *in* FOREIGN INVESTMENT UNDER THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA) 159, 169 (Makane Moïse Mbengue; Stefanie Schacherer eds., Springer, 2019); But *see* Christian Tietje & Kevin Crown, *The Reform of Investment Protection Rules in CETA, TTIP, and other Recent EU FTAs: Convincing?*, *in* MEGA-REGIONAL TRADE AGREEMENTS: CETA, TTIP, AND TISA: NEW ORIENTATIONS FOR EU EXTERNAL ECONOMIC RELATIONS 87, 96 (Oxford University Press, Stefan Griller, Walter Obwexer, Erich Vrane eds., 2017) (claiming that it is "questionable whether such reform provisions … really carry any legal significance.")

[318] CETA, art. 8.9 (1). Titi, *supra* at 1 (noting that paragraph 1 serves as an interpretive statement, reiterating declarations already made in the preamble, and functioning in a non-dissimilar way. Either way, even if inserted in the body of the treaty, it does not appear to provide a concrete actionable right."); Van Harten, *supra* note 3 (noting that "[t]his provision gives ISDS adjudicators — if so inclined — an interpretive source to weigh foreign investor rights against the good faith choices of legislatures, governments and courts. It is clearly an improvement over the complete omission of a clear affirmation of the right to regulate in ISDS, yet CETA still does not deliver a balanced agreement in the allocation of rights and responsibilities, due to its inaction on foreign investor responsibilities.")

[319] Titi, *supra* at 171.

noted above, this approach is consistent with NAFTA case law on Article 1105 NAFTA, which contains a qualified definition of the FET.[320] In contrast, several tribunals have conceived the concept of legitimate expectation as an autonomous element of the FET under the ECT, whose Article 10's definition of the FET is not subject to any qualification.[321]

Additionally, Paragraphs 3 and 4 of Article 8.9 of CETA set forth some rules regarding the granting of subsidies. The former clarifies, again "[f]or greater certainty," that a decision not to issue, renew or maintain a subsidy does not amount to a breach of the treaty, unless there has been a "specific commitment under law or contract to issue, renew, or maintain that subsidy." In turn, the latter, once again "[f]or greater certainty," states that nothing prevents states from discontinuing the granting of a subsidy nor requires them to compensate investors for doing so, where "such measure is necessary in order to comply with international obligations between the Parties or has been ordered by a competent court, administrative tribunal or other competent authority." As can be seen, these provisions directly deal with the very same situation that has given place to numerous claims under the ECT against Spain and Italy, namely, the withdrawal of subsidies granted to foreign investors.[322] Relevantly, paragraph 3 sets a high threshold to held states liable for the withdrawal of subsidies by requiring a "specific commitment" under law or contract to maintain them. Absent such commitment, there would be no violation of the treaty.

When these provisions were drafted, none of the cases against Spain and Italy had been already decided.[323] Yet, it is now possible to note that the final outcome of some of these cases, reached under a different law (particularly the ECT), appears to be opposite to the outcome that would have ensued under paragraph 3 of Article 8.9 CETA. As noted, some of the awards referred above have concluded that even in the absence of a specific commitment -and, as seen, there are different interpretations regarding what this exactly means-, investors have a legitimate expectation that the regulatory regime would not be *drastically* or *radically* altered.[324] Based on this idea, Spain and Italy have been held liable to investors for the breach of the FET clause in the ECT. Under

[320] *See* section 4.2.2 above.
[321] *See* section 4.2.3 above.
[322] Titi, *supra* at 171; Christian Tietje & Kevin Crown, *supra* note 317, at 97.
[323] Tietje & Kevin Crown, *supra.*
[324] Eiser, para. 382; Novenergia, para. 654; Foresight, para 382 ("the FET standard in the ECT protects investors from a radical or fundamental change in the legal or regulatory framework under which the investments are made.")

paragraph 3, the outcome would presumably be different, for the general rule is that a subsidy can be eliminated -and thus the regulatory regime drastically altered-, unless a specific commitment has been made in the opposite.

5.2. Restricting the scope of the standard of fair and equitable treatment

Turning to the specific content of investors' standards of treatment, it is necessary to assess first the FET standard, which, as shown above, is the standard whose violation has led to most of the existing awards rendered against developed countries. For the first time in an IIA, Article 8.10 (2) CETA includes a list, seemingly closed,[325] of the specific measures that violate the FET standard. These measures include "denial of justice in criminal, civil or administrative proceedings," "fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings," "manifest arbitrariness," "targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief," and "abusive treatment of investors, such as coercion, duress and harassment." By introducing a closed list of FET violations, the provision evidently aims to restrict tribunals' discretion in determining the content of the FET standard.[326] Except for the last behavior, which seems to have been taken from a 2012 UNCTAD Report, the list notably reflects general trends in NAFTA case law regarding the elements of the minimum standard of treatment under Article 1105 NAFTA.[327] Also borrowing from the NAFTA experience, the provision sets a high threshold for the finding of an FET violation, for it requires

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[325] Dumberry, *supra* note 309, at 109; Güneş Ünüvar, *Is CETA the Promised Breakthrough? Interpretation and Evolution of Fair and Equitable Treatment and (Indirect) Expropriation Provisions*, iCourts Working Paper Series No. 97 (2017), at 17. *But see* Van Harten, *supra* note 129, at 4 (noting that it is by no means clear that the list is intended to be "closed" because the provision does not include the word "only" before the measures are listed.); In support of the assumption that the list is exhaustive, it is to be noted that at some point during the negotiations the EU proposed the inclusion of express language stating that the list was not exhaustive. Such language was not included in the signed version of the treaty, which points to the direction of a "closed," rather than open list. Nathalie Bernasconi-Osterwalder, *Commentary to the Draft Investment Chapter of the Canada-EU Comprehensive Economic and Trade Agreement (CETA)*, IISD Report (2013), at 19, https://www.iisd.org/sites/default/files/publications/commentary_investment_chapter_CETA.pdf

[326] European Commission, Investment Provisions in the EU-Canada Free Trade Agreement (CETA) (Feb. 2016), http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf ("Unlike other agreements, the standard of "fair and equitable treatment" in CETA is a clear, closed text which defines precisely the standard of treatment, without leaving unwelcome discretion to the Members of the Tribunal.")

[327] Dumberry, *supra* note 325, at 105 – 117. See section 4.2.2 above.

a "fundamental" breach of due process, or "manifest" arbitrariness, or discrimination based on "manifestly" wrongful grounds.[328]

It is worth noting that Article 8.10 does not link the content of the FET standard to that of the minimum standard of treatment (MST) under customary international law, which, as noted above, was the strategy adopted by the U.S. and Canada in order to restrict tribunals' discretion in defining the content of the FET clause.[329] In fact, as will be shown in the next lines, both the CPTPP and the USMCA do tie the FET to the MST. At first glance, CETA's choice in this regard may be seen as a minor detail. Yet, since NAFTA tribunals have resorted to the evolutionary character of the MST under customary international law to find new elements into the FET standard,[330] the fact that CETA does not link the FET to the MST may restrict even more tribunals' discretion and reinforce the exhaustive character of the list in Article 8.10 (2).[331] As one commentator argued, under "the CETA FET clause, a tribunal would no longer have the freedom to simply 'move the goal post' by broadly interpreting how the MST has evolved in recent years. In CETA, the 'evolution' has effectively been stopped with the specific enumeration of elements contained in the FET clause."[332]

It is worth noting that the list sets forth in Article 8.10 (2) of CETA does not include, as an autonomous conduct leading to a breach of the FET standard, the violation of an investor' legitimate expectations.[333] At some point during the negotiations the EU proposed its insertion in

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[328] *Id.* at 117 – 120; Damien Nyer, *The Investment Chapter of the EU-Canada Comprehensive Economic and Trade Agreement*, 32 (6) Journal of International Arbitration 697, 702 (2015) (noting that "[t]he use of potent qualifiers (e.g., 'manifest' and 'fundamental') signals the intent of the drafters to constrain findings of breach to only the most exceptional situations, and reflects some of the strictest arbitral interpretations of the FET standard."); Schill & Bray, *supra* note 228, at 438.

[329] See section 4.2.2 above.

[330] However, it has been noted that this "evolutionary" interpretation of the minimum standard of treatment under customary international in practice has not led to an increase in the number of awards against the NAFTA parties. PATRICK DUMBERRY, FAIR AND EQUITABLE TREATMENT ITS INTERACTION WITH THE MINIMUM STANDARD AND ITS CUSTOMARY STATUS 46 (Brill, 2018).

[331] Nyer, *supra* note 328, at 702; YULIA LEVASHOVA, THE RIGHT OF STATES TO REGULATE IN INTERNATIONAL INVESTMENT LAW: THE SEARCH FOR BALANCE BETWEEN PUBLIC INTEREST AND FAIR AND EQUITABLE TREATMENT 260 (Wolters Kluwer, International Arbitration Law Library, 50th volume, 2019) (noting that "[b]y including a closed list of state obligations into IIAs, a step has been made towards better protecting the state's right to regulate and clarifying the extent to which investors can expect their investments to be protected under the FET standard.")

[332] Dumberry, *supra* note 325, at 121; *See also*, Ünüvar, *supra* note 325, at 21.

[333] Catharine Titi, *International Investment Law and the European Union: Towards a New Generation of International Investment Agreements*, 26(3) EJIL 639, 656 (2015).

the list,[334] but it was not included in the final text of Article 8.10 (2) CETA. This seems to be in accordance with Article 8.9 (2) CETA, referred above, which indicates that the "mere fact" that a regulatory measure affects or interferes with investors' expectation does not entail the violation of the treaty. Yet, the concept of investors' legitimate expectations was not eliminated altogether from CETA. Article 8.10 (4) CETA states that "[w]hen applying the above fair and equitable treatment obligation, a Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated." Thus, although the frustration of an investor's legitimate expectations does not by itself violate the treaty, it bears relevance as a factor to consider when determining whether one of the behaviors listed in Article 8.10 (2) CETA has occurred.[335] This rule follows the position of most NAFTA tribunals,[336] but departs from the approach embraced by most awards rendered against developed countries under the ECT. As noted above, these ECT awards have deemed the concept of legitimate expectations to be a stand-alone element of the FET.[337]

Furthermore, it is worth noting that Article 8.10 (4) CETA delimits which kind of representations are relevant in the assessment of investors' legitimate expectations. Notably, the provision requires a "specific representation" made by the host state "to an investor," which "implies that the representation should originate from the state's authority and be directed at the concrete investor."[338] General representations, addressed not only to a concrete investor but to the public in general or a potential poll of investors, do not seem enough to give raise to relevant expectations under Article 8.10 (4) CETA. In turn, the specific representation must have a particular content and purpose, namely, it needs to be made in order "to induce a covered investment." These limitations certainly restrict the potential relevance of the concept of investors' legitimate

[334] Bernasconi-Osterwalder, *supra* note 325, at 19.
[335] European Parliament, *The Investment Chapters of the EU's International Trade and Investment Agreements: In a Comparative Perspective*, Directorate-General for External Policies (2015), at 141, http://www.europarl.europa.eu/RegData/etudes/STUD/2015/534998/EXPO_STU(2015)534998_EN.pdf (noting that "a breach of legitimate expectations is not an independent category within the FET standard. Rather, it seems to be an additional factor to be taken into account when determining a breach of any such category in the closed list.")
[336] With the exception of the *Bilcon* award. *See* section 4.2.2 above.
[337] See section 4.2.1 above.
[338] YULIA LEVASHOVA, *supra* note 331, at 263.

expectations. They may be considered only to inform the adjudicator on whether one of the violations listed in Article 8.10 (2) of CETA has taken place, and only to the extent that they have arisen from representations particularly made by the host state to the investor. Once again, this restrictive approach is consistent with the position of most NAFTA tribunals, which have required a contractual or "quasi-contractual" relationship as a basis for an investor's expectations.[339] In contrast, as we noted above, most awards against developed countries under the ECT have supported a less restrictive view, asserting that general legislations and regulations, even if not addressed to a particular investors, can serve as a source of legitimate expectations.[340]

Finally, CETA also indicates, "[f]or greater certainty," that a breach of another provision of the treaty or of another treaty does not entail a violation of the FET obligation,[341] a provision that was developed by the U.S. and Canada from the NAFTA experience[342] and then consolidated into their BIT Models.[343] Moreover, CETA introduces a truly novel provision stating, once again "[f]or greater certainty," that "the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article."[344] Although the original motivation of this provision is not entirely clear, some authors suggest that it endorses a dissenting opinion in the *Bilcon* case, referred above,[345] in which the dissenting arbitrator claimed that the majority incorrectly derived an FET from the mere violation of Canada's domestic law.[346] Curiously, though, this provision did not find its way into Chapter 14 USMCA, the revisited version of NAFTA Chapter 11.

The CPTPP, as well as the recent USMCA, follow the same trend of narrowing down the scope of the FET standard, but with some subtle variations. First, they adopt the U.S. and Canada's traditional model, linking the FET to the minimum standard of treatment under customary

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[339] *See* section 4.2.2 above.
[340] See section 4.2.1 above.
[341] CETA, art. 8.10 (6).
[342] *See* NAFTA Free Trade Commission, *supra* note 298.
[343] Alvarez, *supra* note 194, at 26.
[344] CETA, art. 8.10 (7).
[345] *See* section 4.2.2 above.
[346] Dumberry, *supra* note 325, at 111; *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Dissenting Opinion of Donald McRae (Mar. 10, 2015), para. 42 ("But the NAFTA standard is not the domestic law standard and a NAFTA claim must meet the NAFTA standard. Showing that domestic law could have been violated does not mean that there has been a violation of Article 1105.")

international law.[347] In fact, both Article 9.6 CPTPP and 14.06 are entitled "Minimum Standard of Treatment." As mentioned, linking the FET to the minimum standard of treatment has prompted most NAFTA tribunals to embrace a restrictive approach towards the scope and content of the FET under Article 1105 NAFTA, which is reflected in the definition of behaviors that are deemed to be contrary to the standard, the high threshold of severity of the state's wrongdoing that must be sustained and the limited role of the concept of investors' legitimate expectations.[348] However, as just noted, some NAFTA tribunals have resorted to the "evolutionary" character of the customary international law in order to find new elements within the breadth of the standard, although this novel approach has not led in practice to a significate increase in the number of decisions against the NAFTA parties.[349]

Second, the CPTPP and the USMCA describe the content of the FET by stating that it comprises the "obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."[350] This description coincides with only one of the behaviors listed by Article 8.10 (2) CETA ("denial of justice in criminal, civil or administrative proceedings,") which may suggest that the scope of the FET is even more restricted under the CPTPP and the USMCA. However, unlike CETA, the CPTPP and the USMCA do not actually set out an "exhaustive" or "closed" list of behaviors against the FET, so they leave the door open not only to include the further elements identified by Article 8.10 (2) of CETA but also others not included therein. In this sense, the CPTPP and the USMCA may be seen to grant a broader breadth to the FET.[351]

Third, the CPTPP and the USMCA clarify, as CETA does, that "[a] determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article."[352] Nevertheless, unlike CETA, neither the CPTPP nor the USMCA indicate that the violation of the domestic law of the host state does not entail, by itself, the violation of the FET. Thus, some commentators claim that there is

[347] CPTPP, art. 9.6 (1) and (2); USMCA, 14.06 (1) and (2).
[348] See section 4.2.2 above.
[349] See *supra* note 330.
[350] CPTPP, art. 9.6 (3); USMCA, 14.06 (2)(a).
[351] Alvarez, *supra* note 194, at 26.
[352] CPTPP, art. 9.6 (2)(a); USMCA, 14.06 (2)(a).

nothing in the CPTPP (and the same can be said about the USMCA) that would prevent another *Bilcon* case,[353] in which the tribunal seemingly inferred an FET violation merely from the apparent breach of Canada's domestic law concerning environmental review, at least according to the opinion of the dissenting arbitrator.

The FET clause in the CPTPP and the USMCA includes some restrictions that are dealt with under CETA in the general provision set out in Article 8.9 "Investment and regulatory measures," to which we referred above. Thus, the CPTPP and the USMCA state that "[f]or greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result."[354] Just like CETA, the CPTPP and the USMCA clarify that the violation of investors' legitimate expectation does not automatically leads to a violation of the FET. Because the same provision in CETA is not part of the FET clause, but of a separate, general provision, in theory CETA's provision has a larger effect by excluding that the mere violation of an investor's legitimate expectations entails the infringement not only of the FET, but also of any other standard of treatment. In any case, this difference does not appear to be meaningful, for arbitral tribunals have mainly resorted to the concept of legitimate expectations when applying the FET standard, as noted above.

In the same line of CETA, the CPTPP contains a provision on the denial or elimination of subsidies. It states, "[f]or greater certainty," that the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result."[355] This provision, though, differs in some respects from CETA's provision on the subject. First, CPTPP's provision is included in the FET clause, whereas CETA's provision is included separately in a general provision. Second, unlike CETA, the CPTPP does not clarify under which circumstances the decision not to issue, renew or maintain a subsidy may entail the violation of the FET. Indeed, CETA indicates that such decision does not amount to a breach of the treaty, unless there has been

[353] Alvarez, *supra* note 194, at 34, footnote 138.
[354] CPTPP, art. 9.6 (4); USMCA, 14.06 (4).
[355] CPTPP, art. 9.6 (5).

a "specific commitment under law or contract to issue, renew, or maintain that subsidy." The CPTPP merely states that such decision, by itself, does not breach the FET, but does not specify what else is then required for that breach to exist. It is worth noting that the USMCA does not include, neither as a general provision nor in the FET clause, a provision dealing with the denial or elimination of subsidies.

Finally, neither the CPTPP nor the USMCA include a provision analogous to Article 8.10 (4) CETA, referred above, according to which investors' legitimate expectations are a factor to be taken into account when determining whether there has been a breach of the FET obligation. It is not straightforward, though, to elucidate the potential implications of this difference. One can certainly argue that the CPTPP's and the USMCA's approach appears to radically deprive the concept of investors' legitimate expectations from any relevance in the application of the FET clause.[356] However, considering that such concept has been taken into account by NAFTA tribunals even despite the absence of a provision like the one inserted in the CETA's text, the conclusion might not be so definitive. In fact, as noted before, Article 8.10 (4) CETA merely echoes the position embraced by such tribunals. In any case, as noted, Article 8.10 (4) CETA not only states that the concept of investors' legitimate expectations may be taken into account, but it also clarifies that such expectations must have emerged as a result of a "specific representation to an investor to induce a covered investment," which entails that general representations by the state are not enough to create a protected expectation. In the absence of a similar provision in the CPTPP and the USMCA, in theory tribunals under these treaties could still infer protected expectations from general representations by the state.

5.3. Differentiating between indirect expropriation and legitimate regulatory measures

Although, as noted above, the concept of indirect expropriation has had less practical importance in the case against developed countries as compared to the FET standard, CETA, the CPTPP and the recent USMCA, perhaps echoing the notable attention the subject has received by authors in the field, devote a notorious amount of effort trying to differentiate between indirect expropriation

[356] Dumberry, *supra* note 325, at 107.

and legitimate regulatory measures that does not lead to expropriation. In a nutshell, for long time case law and commentators have debated on how to differentiate between measures that are the result of the legitimate exercise of the state's right to regulate and measures amounting to indirect expropriation, focusing particularly on whether the inquiry should be focused exclusively on the economic effects of the measures (the so-called "sole effect" test),[357] or whether it is also necessary to consider and give appropriate weight to the purpose or character of the measure.[358]

In general, the expropriation clause in each of the agreements refer to an Annex on expropriation.[359] With some minor differences, the Annex in all the agreements provides a definition of indirect expropriation[360] and clarifies that in determining whether a measure or series of measures by the state amount to an indirect expropriation a case-by-case analysis is required, in which a number of factors need to be considered.[361] Among these factors, the Annex not only mentions the economic impact of the measure,[362] but also the extent of the interference with "distinct, reasonable investment-backed expectations,"[363] and the character of the government action, "including its object, context, and intent."[364] These factors strongly resemble U.S. case law

[357] *Compañía del Desarrollo de Santa Elena S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Award (June 8, 2000), at para. 72; *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award (October 31, 2000), at para. 111.
[358] *See* Tarcisio Gazzini, *Drawing the Line between Non-Compensable Regulatory Powers and Indirect Expropriation of Foreign Investment - An Economic Analysis of Law Perspective*, 7 Manchester J. Int'l Econ. L. 36 (2010); Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration*, J. Int'l Ec. L. 223 (2012); Stephen Olynyk, *A Balanced Approach to Distinguishing between Legitimate Regulation and Indirect Expropriation in Investor-State Arbitration*, 15 Int'l Trade & Bus. L. Rev. 254 (2012); UNCTAD, *Expropriation - A Sequel: UNCTAD Series on Issues in International Investment Agreements II*, United Nations Conference on Trade and Development (UNCTAD) Series on Issues in International Investment Agreements II, UN, New York (2013), at 57-104.
[359] CETA, art. 8.12 (1); CPTPP, art. 9.8, footnote 16; USMCA, art. 14.8, footnote 7.
[360] CETA, Annex 8-A (1)(b); CPTPP, Annex 9-B (3); USMCA, Annex 14-B (3). While both the CPTPP and the USMCA merely indicate that an indirect expropriation occurs when a measure has an effect "equivalent to direct expropriation," CETA clarifies that such equivalent effect is present when the measure "substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment."
[361] CETA, Annex 8-A (2); CPTPP, Annex 9-B (3)(a); USMCA, Annex 14-B (3)(a).
[362] CETA, Annex 8-A (2)(a); CPTPP, Annex 9-B (3)(a)(i); USMCA, Annex 14-B (3)(a)(i).
[363] CETA, Annex 8-A (2)(c); CPTPP, Annex 9-B (3)(a)(ii); USMCA, Annex 14-B (3)(a)(ii). While CETA remains silent on the issue of how to identify these "distinct, reasonable investment-backed expectations," both the CPTPP and the USMCA include a footnote stating that "[f]or greater certainty, whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector."
[364] CETA, Annex 8-A (2)(d); CPTPP, Annex 9-B (3)(a)(iii); USMCA, Annex 14-B (3)(a)(iii).

on expropriation.[365] Distinctively, CETA also calls to consider the duration of the measures or series of measures.[366]

Finally, the Annex on expropriation in all the agreements clarifies that, "except in rare circumstances," there is not indirect expropriation in the case of "[n]on-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment."[367] While neither the CPTPP nor the USMCA indicate when these "rare circumstances" are to be deemed to exist, CETA does so by stating that an indirect expropriation may emerge "in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive."[368]

5.4. Under modern IIAs involving developed countries, these countries would hardly be liable for the kind of wrongdoing that they are most likely to display against foreign investors

As a concluding remark of this chapter, it is possible to note what follows. Modern IIAs involving developed countries specifically address the very kind of situations in which developed countries are more likely to face challenges from foreign investors, namely, the introduction of modifications to regulatory regimes under which the investments were made. In dealing with this type of situations, these modern IIAs generally follow the restrictive approach embodied in NAFTA Article 1105 and, more relevantly, in NAFTA case law. As part of this approach, IIAs diminish the role of the concept of legitimate expectations, which, as noted, has been pivotal in the awards that have found developed countries liable for the introduction of changes to their regulatory regime. These awards, rendered under unqualified FET clauses, have adopted the view that the frustration of an investor's legitimate expectations through regulatory modifications is enough to

[365] Alvarez, *supra* note 236, at 28.

[366] CETA, Annex 8-A (2)(b). This provision is aimed at dealing with the debate as to whether a permanent measure is required in order for an indirect expropriation to exist. According to one author, the "reference to the duration factor in Annex 8-A must be interpreted as a requirement for a certain duration of the deprivation but it does not seem to necessarily require an irrevocable deprivation." Arnaud de Nanteuil, Expropriation, *in* FOREIGN INVESTMENT UNDER THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA) 127, 134 (Makane Moïse Mbengue; Stefanie Schacherer eds., Springer, 2019).

[367] CPTPP, Annex 9-B (3)(b); USMCA, Annex 14-B (3)(b).

[368] CETA, Annex 8-A (3). This addition has been considered "as the most innovative aspect of the CETA Investment Chapter in the field of expropriation," for it makes clear that "neither the 'sole effect' doctrine nor the 'radical' police power exception are applicable." Nanteuil, *supra* note 366, at 152-153.

sustain and FET violation, and that such legitimate expectations can have their source in representations contained in general regulations and legislations which are not addressed to a particular investor, but to all of investors. By contrast, modern IIAs between developed countries make clear that the frustration of an investor's legitimate expectation is not enough and that other type of egregious behavior by the state is required. At most, the concept of legitimate expectations can be considered when determining whether this egregious behavior has occurred, but it bears no relevance on its own.

Therefore, should the ECT claims against developed countries (particularly Italy and Spain) were to be judged under the content of modern IIAs, it is fair to suggest that these claims would be less likely to succeed than under the ECT. Relatedly, since the introduction of regulatory modifications is the usual scenario in which developed countries may affect foreign investors, as revealed by the case law studied above, by limiting the reach of the FET standard and of the concept of legitimate expectations modern IIAs involving developed countries in practice are limiting the exposure of these countries to adverse ISDS litigation. In the next section we will try to elaborate on the implications of this finding in the general attitude of developed countries towards ISDS among themselves.

6. CONCLUDING REMARKS. ISDS BETWEEN DEVELOPED COUNTRIES: AN UNINTENDED CONSEQUENCE THAT IS NOW BEING FIXED?

Developed countries do not like being sued. When a potential treaty partner is another developed country, the risks of being sued are higher, for in that case investment flows may move in both directions, not only from one country to the other. Not only the risks (costs) are higher, but also the benefits are lower.[369] Developed countries are likely to have robust and reliable legal systems, generally capable of protecting foreign investors from other developed countries. Accordingly, since developed countries do not like being sued, they usually seek to avoid being sued: they rarely enter into bilateral investment agreements between each other. This thesis shows indeed that developed countries are not generally prone to conclude bilateral agreements between themselves. And even when they do so, in no few times they opt to exclude ISDS altogether. This reality reveals that some of the arguments advanced in favor of ISDS between developed countries find no support in states' practice. If developed countries do not provide for ISDS between each other, this is because they do not perceive the current settlement of investment disputes to be highly politicized and thereby in need of de-politicization through ISDS.[370] Moreover, if developed countries do not provide for ISDS between each other, this is because they generally rely on the soundness of their legal systems for the protection of foreign investors.

This is not the rule for all developed countries, though. This thesis also showed that a higher number of bilateral investment treaties between developed countries involve countries that only recently became "developed" from an economic point of view (e.g. Korea, United Arab Emirates,

[369] Lauge N. Skovgaard Poulsen, Jonathan Bonnitcha & Jason Webb Yackee, *Costs and Benefits of an EU-USA Investment Protection Treaty*, LSE Enterprise (April 2013), at 9, https://www.italaw.com/sites/default/files/archive/costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf (noting that "an EU-US investment treaty that does contain ISDS is likely to have few or no benefits to the UK, while having meaningful economic and political costs. Removing ISDS from the treaty would be unlikely to have an appreciable impact on the (already negligible) benefits of a treaty with ISDS, while largely removing the costs of the treaty to the UK. While we have not conducted a full cost-benefit assessment of an EU-US investment treaty does not contain ISDS, such a treaty would likely be a less costly policy option from the perspective of the UK."); But see Tietje & Baetens, *supra* note 25, at 91 (claiming that "[o]n balance, as far as the inclusion of an ISDS mechanism in TTIP is concerned advantages may seem to outweigh disadvantages.")

[370] Poulsen, Bonnitcha & Yackee, supra at 44 (asserting that "there is little reason to think that an EU-US investment chapter will provide the UK with significant political benefits. The political relationship between Washington and Whitehall is exceptionally strong, and we are aware of no evidence that it is vulnerable to a meaningful risk of investor-state disputes that would become undesirably "politicized" in the absence of an investment treaty.")

Qatar, Kuwait and so on). Regarding these countries, some of the reasons advanced in favor of ISDS between developed countries may actually find support. On one hand, these countries may have become economically developed, but it does not necessarily entail that their legal systems are already strong and unbiased towards foreign investors. On the other hand, the specific legal culture of these countries may result particularly unknown and foreign to investors from traditionally developed countries, which may justify the inclusion of ISDS. It is also necessary to recall, as shown in this thesis, that many of today's IIAs between developed countries were concluded when their parties were still developing economies, so they were concluded under the traditional north-south paradigm.

Hence, traditionally developed countries generally avoid IIAs and ISDS between each other. Yet, there are some contexts in which excluding ISDS could prove politically unfeasible or impracticable. This is the case of multilateral agreements involving not only developed but also developing countries, and addressing not only investment protection but also trade liberalization. In this setting, whereas developed countries may seek to obtain ISDS against the developing countries in the agreement, they may find difficulties to do so without exposing themselves to adverse ISDS litigation. Indeed, in order to maintain a symmetric distribution of rights and obligations for all the countries in the agreement, in the multilateral setting developed countries may agree to ISDS vis-à-vis other developed countries in order to obtains ISDS against the developing countries which are parties to the agreement. This is precisely what occurred in the case of NAFTA and the ECT, both of which constitute the most important basis for claims against developed countries. Traditionally developed countries, seeking to assure ISDS for their investors against the developing countries, ended up exposing themselves to ISDS claims from investors from other developed countries which also happened to be parties to the multilateral agreement. ISDS litigation against developed countries became then an unintended consequence of the conclusion of multilateral agreements.

But, once again, developed countries do not like being sued. Modernly, developed countries have sought to limit their exposure to ISDS litigation and they have done so through different means. The first, easiest one, is what has been referred to as "selective judicialization."[371] Instead of

[371] See *supra* note 239.

keeping the multilateral treaties symmetric, thus granting on all states the same ISDS rights and obligations, some countries have begun to craft special carve-outs and exceptions to ISDS, which tend to exclude it between certain contracting parties or regarding certain policy areas. Perhaps the most notorious example of this trend is the recent USMCA, which is meant to replace NAFTA. As noted, this treaty eliminates ISDS between the U.S. and Canada, the two developed countries in the agreement. Yet, ISDS against Mexico would still be available for both U.S. (under the USCMA) and Canadian (under the CPTPP) investors.

This "selective judicialization" may prove impracticable in some settings, though. This is the case, for example, of treaties concluded by the EU, for the EU negotiates as a block on behalf of all the Member States and would hardly be able to cut a deal which creates different ISDS obligations for some Member States. Furthermore, one may not forget that current multilateral treaties deal not only with investment protection but also with trade promotion. If ISDS is already on the negotiation table, as it is usually the case, either its inclusion or exclusion may require granting concessions on other, more strategic areas of the agreements, and developed countries may not be willing to grant such concessions. In order words, in the context of broader negotiations between countries involving several subjects, investment provisions can be used to leverage the negotiation process and induce concessions on different areas of the agreement,[372] and this may mean keeping some sort of investor-state dispute settlement even between developed countries.[373]

Selective judicialization discarded, developed countries need to resort to other alternative for limiting their exposure to ISDS litigation: restrictive treaty drafting. This is not self-evident, though. Recent multilateral investments are presented as "gold standards" which embody the latest developments in treaty drafting. Under the slogan of safeguarding states' right to regulate, these treaties include restrictive definitions of the standard of fair and equitable treatment and, perhaps more importantly, diminish the role of the concept of legitimate expectations. This, by itself, says nothing. Yet, when assessed in light of the case law against developed countries, it reveals that by

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[372] Vandevelde, *supra* note 25, at 181 (noting that "[f]or example, a state might offer to open its economy to foreign investment in exchange for another party's offer of market access to goods.")
[373] For instance, Canada saw investment provisions in the old Canada-U.S. FTA as a negotiation chip to obtain greater access to the U.S. market, which was its main goal. Raby, *supra* note 200, at 406.

way of treaty drafting developed countries are limiting (if not eliminating altogether) their exposure to ISDS litigation.

Indeed, this thesis showed that the situation in which developed countries are more likely to face ISDS claims is the introduction of changes to the regulatory regime in place when the investments were made. In this very kind of situations, the case law reveals that the concept of legitimate expectations has served as the main basis to hold developed countries liable for breaching the standard of fair and equitable treatment. Modern IIAs, as also noted, tend to restrict the definition of the FET not only by requiring an egregious behavior performed by the state but also by defining a closed list of its elements or linking it to the minimum standard of treatment under customary international law. Furthermore, these IIAs explicitly state that the violation of an investor's legitimate expectations does not amount, by itself, to a treaty violation. The concept of legitimate expectations thereby does not constitute a self-standing element of the FET but merely a factor to consider when determining whether any of the actual elements of the FET has been violated. Therefore, by restricting the definition of the FET and, more importantly, by diminishing the relevance of investors' legitimate expectations, IIAs like CETA exclude from investors' scope of protection the type of situations in which an IIA would be useful against developed countries.[374] As noted by Schill and Bray, "Mega-Regionals reflect a changed environment in which investment flows are no longer unidirectional; instead they flow both ways. Treaties, in consequence, no longer solely accommodate the offensive interests of capital-exporting countries, but are

[374] Similarly, *see* Caroline Henckels, *Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP,* 19 Journal of International Economic Law 27, 37 (2016) (noting that "[s]hould the final versions of the CETA and TTIP provisions be drafted to provide a closed list of proscribed behaviours (or be interpreted as such by a tribunal), any claim relating to the substance of regulatory conduct would need to establish that the conduct was manifestly arbitrary, because no other element of the list would permit a tribunal to engage in substantive review. This suggests that non-discriminatory public welfare measures would be unlikely to breach fair and equitable treatment under these provisions, because it is difficult to imagine how such measures could amount to manifestly arbitrary conduct. Yet, because 'manifestly' and 'arbitrary' are both evaluative concepts that are open to a range of interpretations, it may be prudent for the drafters to consider spelling out the meaning of the concept in more detail so as to achieve greater clarity—such as acting in bad faith or irrationally, if this is what the parties intend."); YULIA LEVASHOVA, *supra* note 331, at 265 ("As had been demonstrated in the paragraphs above, the role of legitimate expectations as stated in the three IIAs appears to be diminished in comparison with the role of this concept in the examined case law. Accordingly, this development seems to shift the balance in the direction of the preservation of a state's policy space to regulate in the public interest. Particularly important for this conclusion are provisions such as the one included in the CETA that provides that a host state's change to a regulatory framework alone 'does not amount to a breach of an obligation under this Section'. This shift reduces, to some extent, the host state's risk of incurring liability under the FET standard when it decides to transform its regulatory framework."; *But see* Bernasconi-Osterwalder & Mann, *supra* note 156, at 357.

negotiated from the start based on an overall assessment of offensive and defensive interests by every negotiating party, whether developed or developing. With investments flowing in two ways, Mega-Regionals have altered the matrix underlying the negotiation of investment disciplines, and for this reason come along with recalibrated substantive standards of treatment that not only contain rules on investment protection, but also emphasize host state policy space."[375]

In practice, then, since it is uncommon to picture a developed country engaged in the kind of behavior expressly listed in the description of the FET (denial of justice, "*fundamental breach*" of due process, "*manifest*" arbitrariness, etc.),[376] investors in developed countries will find no relevant or attractive remedy against state behavior in the content of IIAs and will be confined to seek relief before domestic courts of the state, which, in any case, are presumed to be reliable in the case of developed countries. It is relevant to remember that prior to submitting a claim to ICS, investors are usually required to discontinue and waive their right to initiate proceedings before domestic courts,[377] and they would hardly do so if the domestic law provides protection, however restricted, to their legitimate expectations, while CETA expressly states that the violation of such expectations, by itself, does not violate the treaty.[378]

Of course, one may argue that by restricting the scope of the FET and diminishing the relevance of the concept of legitimate expectations, developed countries are also undermining the protection of their own investors in developing countries. This is certainly true, for the concept of legitimate expectations has also been used in case law against developing countries. However, restrictive definitions still protect against egregious behavior displayed by the state, and whereas developed countries do not usually engage in such behavior (as shown in this thesis), developing countries are more likely to do so. Examples can be found in awards rendered against Mexico under

[375] Schill & Bray, *supra* note 201, at 443.
[376] Tietje & Baetens, *supra* note 25, at 74 (noting that "Netherlands is not likely to be involved in ISDS cases in which foreign investors invoke gross violations of investment protections.); Poulsen, Bonnitcha & Yackee, *supra* note 369, at 25 (noting that "the UK government is unlikely to engage in the kinds of mistreatment of US investors that are likely to be viewed as clear or egregious violations of international law.")
[377] See, e.g. CETA, Chapter 8, Article 8.22 (g) - (f).
[378] Quick, *supra* note 154, at 207, footnote 40 (referring to Schill's opinion whereby "the CETA text on FET is weaker not only than the FET-standard of German BITs but also than the German constitutional requirements."); Similarly, Yackee, *supra* note 2 (noting that "the more that the scope of ISDS is "reformed" (narrowed) in response to criticisms of the system, the less likely it will be to provide effective redress (just as it will be less likely to actually promote investment).")

NAFTA,[379] Eastern European countries[380] and South American countries.[381] Hence, investors would still maintain some expectations of resorting to IIAs and ISDS when investing in developing countries who are party to the multilateral treaty, although there is no doubt that the exclusion of the concept of legitimate expectations would also diminish their protection in these countries. Therefore, through more "precise" and sophisticated treaty drafting, developed countries may, to a great extent, obtain what they had when they began entering into IIAs in the first place: an agreement that, although symmetric in text, is actually conceived to be used against developing countries.

It could be argued that nothing said here is actually true and that modern IIAs do genuinely purport to safeguard states' sacred right to regulate. Curiously, though, the aim of safeguarding the right to regulate becomes a major concern when the treaty partner is a developed country (and thus litigation risks are higher), but fades away when the treaty partner is a developing country and thus the litigation exposure for the developed country is reduced. Consider these examples. After entering into the TTP and CETA, both of which have almost the same restrictions on the definition of the FET and on the concept of legitimate expectations, Canada has signed BITs with Mongolia and Moldova. None of these IIAs contain a closed list of behaviors that violate the FET, neither do they diminish the role of the concept of legitimate expectations.[382] Of course, Canada does not need to include such limitations in these IIAs, for the investments from Mongolia and Moldova are not likely to be relevant and Canada's exposure to litigation is almost inexistent. Similarly, Japan, also a party to the TTP, has recently signed BITs with Jordan and Oman, none of which restricts the definition of the FET standard.[383] In fact, according to a Japanese author, Japan's IIAs

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[379] See, e.g. *Cargill, Incorporated v. United Mexican States*, *supra* note 304, paras. 284, 285, 296, 299, 301 (after asserting that the violation of the minimum standard of treatment requires "severity of the conduct" so that the lack or denial must be "gross," "manifest," "complete," the tribunal concluded that Mexico's behavior was "manifestly unjust" and "surpasses the standard of gross misconduct and is more akin to an action in bad faith.")

[380] See, e.g. *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Award (Aug. 24, 2012), para. 146 (finding that Hungary violated the FET in the form of a denial of justice).

[381] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award (Nov. 30, 2017), para. 415 (finding that Peru's Supreme Decree constituted an indirect expropriation, as the concept is restrictively defined in the Canada-Peru FTA).

[382] Agreement for the Protection and Promotion of Investments, Can.-Mold., art. 6, *supra* note 158; Agreement for the Protection and Promotion of Investments, Can.-Mong., art. 6, *supra* note 158.

[383] Agreement for the Protection and Promotion of Investments, Japan-Jordan, Nov. 27, 2018; Agreement for the Reciprocal Promotion and Protection of Investments, Japan-Oman, art. 5, June 19, 2015; Conversely, the Japan-U.A.E. BIT (linking another developed country) do expressly state that the FET "do not require treatment in addition to or beyond that which is required by customary international law minimum standard of treatment of aliens."

with developing countries tend to include more pro-investor provisions than those included in IIAs with developed countries.[384] Singapore, a party to the TPP and to a FTA with the EU, has recently concluded FTAs with Sri Lanka and Turkey, and while both IIAs state that the FET does not require treatment in addition to that which is required under customary international law, none of them expressly restrict the relevance of investors' legitimate expectations.[385] Korea and U.S., two developed countries, are trying to amend the investment chapter of their FTA to restrict the relevance of the concept of legitimate expectations in line with the TPP,[386] but they have not done the same with their other IIAs with developing countries. Notably, while the EU's IIAs with Canada (CETA) and Singapore, both of which are developed countries, include the same abovementioned limitations to the concept of legitimate expectations, the EU-Vietnam Investment Protection Agreement, entered with a developing country, includes a slight modification that tempers down such limitations.[387]

Agreement for the Protection and Promotion of Investments, Japan – U.A.E., art. 5, Apr. 30, 2018. These treaties can be consulted on UNCTAD Investment Policy Hub https://investmentpolicy.unctad.org/

384 Shotaro Hamamoto, *supra* note 2, at 8 (noting that "Japan tends to include pro-investor provisions in treaties concluded with states from which Japan receives a small amount of investment.")

385 Free Trade Agreement, Sing.-Sri Lanka, art. 10.3, Jan. 23, 2018; Free Trade Agreement, Sing. – Turk., art. 12.3, Nov. 14, 2015. These treaties can be consulted on UNCTAD Investment Policy Hub https://investmentpolicy.unctad.org/

386 The amendment inserts a new paragraph to art. 11.5, providing that "[f]or greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result." Protocol Between the Government of the Republic of Korea and the Government of United States of America Amending the Free Trade Agreement Between the Republic of Korea and the United States of America, https://ustr.gov/sites/default/files/files/Press/Releases/KORUS%20Texts%20Outcomes.pdf

387 While both CETA and the EU-Singapore Investment Protection Agreement provide that "[f]or greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Chapter" (respectively, Chapter 8, art. 8.9 (2) and art. 2.2 (2)), the EU-Vietnam Investment Protection Agreement states that "[f]or greater certainty, this Chapter shall not be interpreted as a commitment from a Party that it will not change its legal and regulatory framework, including in a manner that may negatively affect the operation of investments or the investor's expectations of profits" (art. 2.2 (2)).

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ANNEXES

Table 1. Case law against developed countries

No.	Year	Name	Respondent state	Home state	Outcome	IIA	Breach alleged	Breach found
1	1997	Maffezini v. Spain	Spain	Argentina	Investor	Arg.-Spain BIT	FET, TOF	FET
2	2013	Antin v. Spain	Spain	Luxe. / Netherlands	Investor	ECT	FET, AUDM, UC	FET
3	2013	Eiser and Energía Solar v. Spain	Spain	Luxe. / U.K.	Investor	ECT	FET, AUDM, UC, IE	FET
4	2015	Foresight and others v. Spain	Spain	Luxe. / Denmark / Italy	Investor	ECT	FET, UC, AUDM, IE	FET
5	2014	Masdar v. Spain	Spain	Netherlands	Investor	ECT	FET	FET
6	2015	Novenergia v. Spain	Spain	Luxe.	Investor	ECT	FET, AUDM, IE, UC, FPS	FET
7	2015	9REN Holding v. Spain	Spain	Luxe.	Investor	ECT	FET, AUDM, IE, UC	FET
8	2014	NextEra v. Spain	Spain	Netherlands	Investor	ECT	FET, MFN, AUDM, UC	FET
9	2013	RREEF v. Spain	Spain	Luxe. / U.K.	Investor	ECT	FET, UC	FET
10	2012	Charanne and Construction Investments v. Spain	Spain	Luxe. / Netherlands	State	ECT	FET, IE	N.A.
11	2012	IGB v. Spain	Spain	Venezuela	State	Spain-Ven. BIT	FET, IE, FPS, AUDM, NT, UC	N.A.
12	2013	Isolux v. Spain	Spain	Netherlands	State	ECT	FET, IE	N.A.
13	2015	Alten Renewable v. Spain	Spain	Netherlands	Pending	ECT	NO DATA	N.A.
14	2015	BayWa r.e. v. Spain	Spain	Germany	Pending	ECT	NO DATA	N.A.
15	2016	Biram and others v. Spain	Spain	Germany / U.K.	Pending	ECT	NO DATA	N.A.
16	2015	Cavalum SGPS v. Spain	Spain	Portugal	Pending	ECT	NO DATA	N.A.
17	2016	Corcoesto v. Spain	Spain	Panama	Pending	Pan.-Spain BIT	NO DATA	N.A.

18	2016	Cordoba Beheer and others v. Spain	Spain	Netherlands	Pending	ECT	NO DATA	N.A.
19	2013	CSP Equity Investment v. Spain	Spain	Luxe.	Pending	ECT	IE, FET	N.A.
20	2015	Cube Infrastructure v. Spain	Spain	France / Luxe.	Investor	ECT	FET, AUDM, IE, UC	FET
21	2017	DCM Energy and others v. Spain	Spain	Germany / Switzerland	Pending	ECT	NO DATA	N.A.
22	2015	E.ON SE and others v. Spain	Spain	Germany	Pending	ECT	NO DATA	N.A.
23	2018	EBL (Genossenschaft Elektra Baselland) and Tubo Sol PE2 S.L. v. Spain	Spain	Switzerland	Pending	ECT	NO DATA	N.A.
24	2016	EDF v. Spain	Spain	France	Pending	ECT	NO DATA	N.A.
25	2018	European Solar Farms v. Spain	Spain	Denmark	Pending	ECT	NO DATA	N.A.
26	2016	Eurus Energy v. Spain	Spain	Japan / Netherlands	Pending	ECT	NO DATA	N.A.
27	2017	FREIF Eurowind v. Spain	Spain	U.K.	Pending	ECT	NO DATA	N.A.
28	2018	GBM Global and others v. Spain	Spain	Mexico	Discontinued	Mex.-Spain BIT	FET, MFN, NT, DE, IE	N.A.
29	2016	Green Power and Obton v. Spain	Spain	Denmark	Pending	ECT	NO DATA	N.A.
30	2015	Hydro Energy 1 and Hydroxana v. Spain	Spain	Luxe. / Sweden	Pending	ECT	NO DATA	N.A.
31	2016	Infracapital v. Spain	Spain	Luxe. / Netherlands	Pending	ECT	NO DATA	N.A.
32	2014	InfraRed and others v. Spain	Spain	U.K.	Investor	ECT	FET	FET
33	2018	Itochu v. Spain	Spain	Japan	Pending	ECT	NO DATA	N.A.
34	2015	JGC v. Spain	Spain	Japan	Pending	ECT	NO DATA	N.A.
35	2015	Kruck and others v. Spain	Spain	Germany	Pending	ECT	NO DATA	N.A.
36	2015	KS and TLS Invest v. Spain	Spain	Germany	Pending	ECT	NO DATA	N.A.
37	2015	Landesbank Baden-Württemberg and others v. Spain	Spain	Germany	Pending	ECT	NO DATA	N.A.

38	2015	OperaFund v. Spain	Spain	Malta / Switzerland	Investor	ECT	FET, UC, FPS	FET
39	2017	Portigon v. Spain	Spain	Germany	Pending	ECT	NO DATA	N.A.
40	2014	RENERGY v. Spain	Spain	Luxe.	Pending	ECT	NO DATA	N.A.
41	2014	RWE Innogy v. Spain	Spain	Germany	Pending	ECT	NO DATA	N.A.
42	2015	SolEs Badajoz v. Spain	Spain	Germany	Investor	ECT	FET, IE, UC	FET
43	2015	Stadtwerke München and others v. Spain	Spain	Germany	Pending	ECT	NO DATA	N.A.
44	2015	STEAG v. Spain	Spain	Germany	Pending	ECT	NO DATA	N.A.
45	2011	The PV Investors v. Spain	Spain	Denmark / Ger. / Ire. / Luxe. /Neth/UK	Pending	ECT	FET	N.A.
46	2017	Triodos SICAV II v. Spain	Spain	Luxe.	Pending	ECT	NO DATA	N.A.
47	2018	Valle Ruiz and others v. Spain	Spain	Mexico	Pending	Mex.-Spain BIT	FET, FPS, NT, MFN, DE, IE	N.A.
48	2015	Watkins Holdings v. Spain	Spain	Luxe. / Netherlands	Pending	ECT	NO DATA	N.A.
49	2015	Solarpark v. Spain	Spain	Germany	Discontinued	ECT	NO DATA	N.A.
50	2019	Sapec S.A. v Spain	Spain	Belgium	Pending	ECT	NO DATA	N.A.
51	2019	Canepa Green Energy Opportunities and others v Spain	Spain	Luxe.	Pending	ECT	NO DATA	N.A.
52	2002	Chemtura v. Canada	Canada	U.S.	State	NAFTA	IE, FET, MFN	N.A.
53	2011	Detroit International v. Canada	Canada	U.S.	State	NAFTA	FET, NT, MFN	N.A.
54	2013	Eli Lilly v. Canada	Canada	U.S.	State	NAFTA	IE, FET	N.A.
55	2007	Gallo v. Canada	Canada	U.S.	State	NAFTA	IE, FET	N.A.
56	2012	Mercer v. Canada	Canada	U.S.	State	NAFTA	FET, NT, MFN	N.A.
57	2006	Merrill & Ring v. Canada	Canada	U.S.	State	NAFTA	IE, FET, NT, MFN, PR	N.A.
58	2011	Mesa Power v. Canada	Canada	U.S.	State	NAFTA	FET, NT, MFN, PR, FPS	N.A.
59	2000	UPS v Canada	Canada	U.S.	State	NAFTA	FET, NT	N-A.

60	2007	Mobil and Murphy v. Canada (I)	Canada	U.S.	Investor	NAFTA	FET, PR	Perf. Req.
61	1998	Myers v. Canada	Canada	U.S.	Investor	NAFTA	IE, FET, NT, PR	FET - NT
62	1999	Pope & Talbot v. Canada	Canada	U.S.	Investor	NAFTA	IE, FET, NT, PR	FET
63	2013	Windstream Energy v. Canada	Canada	U.S.	Investor	NAFTA	IE, FET, NT, MFN	FET
64	2010	AbitibiBowater v. Canada	Canada	U.S.	Settled	NAFTA	DE, FET, FPS, NT, MFN	N.A.
65	2009	Dow AgroSciences v. Canada	Canada	U.S.	Settled	NAFTA	IE, FET	N.A.
66	1997	Ethyl v. Canada	Canada	U.S.	Settled	NAFTA	IE, NT, PR	N.A.
67	2014	Longyear v. Canada	Canada	U.S.	Settled	NAFTA	FET, NT	N.A.
68	2011	St. Marys v. Canada	Canada	U.S.	Settled	NAFTA	IE, FET, NT, MFN, AUDM	N.A.
69	2008	Clayton/Bilcon v. Canada	Canada	U.S.	Investor	NAFTA	FET, FPS, NT, MFN	FET - NT
70	2016	Global Telecom Holding v. Canada	Canada	Egypt	Pending	Canada - Egypt BIT (1996)	FET, FPS, NT, MFN	N.A.
71	2013	Lone Pine v. Canada	Canada	U.S.	Pending	NAFTA	IE, FET, FPS	N.A.
72	2015	Mobil v. Canada (II)	Canada	U.S.	Pending	NAFTA	FET, PR	N.A.
73	2015	Resolute Forest v. Canada	Canada	U.S.	Pending	NAFTA	NT, FET, IE	N.A.
74	2017	Tennant Energy v. Canada	Canada	U.S.	Pending	NAFTA	FET	N.A.
75	2018	Westmoreland v. Canada	Canada	U.S.	Pending	NAFTA	FET. NT	N.A.
76	2009	Centurion v. Canada	Canada	U.S.	Discontinued	NAFTA	IE, FET, NT, MFN	N.A.
77	2004	COP v. Canada	Canada	U.S.	Discontinued	NAFTA	IE, FET, NT, PR	N.A.
78	2006	GL Farms v. Canada	Canada	U.S.	Discontinued	NAFTA	IE, FET, NT	N.A.
79	2010	Greiner v. Canada	Canada	U.S.	Discontinued	NAFTA	IE, FET, NT, MFN	N.A.
80	2014	Blusun v. Italy	Italy	Belgium /Fra. / Ger.	State	ECT	FET, IE	N.A.
81	2015	Greentech and NovEnergia v. Italy	Italy	Denmark / Luxe.	Investor	ECT	FET, AUDM, UC	FET, AUDM, UC

82	2015	Belenergia v. Italy	Italy	Luxembourg	State	ECT	NO DATA	N.A.
83	2015	CEF Energia v. Italy	Italy	Netherlands	Investor	ECT	FET, UC, AUDM	FET
84	2016	CIC Renewable and others v. Italy	Italy	Ger. / U.K. / Luxe.	Pending	ECT	NO DATA	N.A.
85	2015	Eskosol v. Italy	Italy	Italy	Pending	ECT	NO DATA	N.A.
86	2016	ESPF and others v. Italy	Italy	Austria / Ger.	Pending	ECT	No DATA	N.A.
87	2017	Rockhopper v. Italy	Italy	U.K.	Pending	ECT	NO DATA	N.A.
88	2015	Silver Ridge v. Italy	Italy	Netherlands	Pending	ECT	NO DATA	N.A.
89	2016	Sun Reserve v. Italy	Italy	Luxe.	Pending	ECT	NO DATA	N.A.
90	2018	Veolia Propreté v. Italy	Italy	France	Pending	ECT	NO DATA	N.A.
91	2015	Dayyani v. Korea	Korea	Iran	Investor	Iran - Korea BIT	FET	FET
92	2018	Elliott v. Korea	Korea	U.S.	Pending	US - Korea FTA	FET, NT	N.A.
93	2012	LSF-KEB v. Korea	Korea	Belgium / Luxe.	Pending	BLEU - Korea BIT	NO DATA	N.A.
94	2018	Mason v. Korea	Korea	U.S.	Pending	US - Korea FTA	NO DATA	N.A.
95	2018	Schindler v. Korea	Korea	Switzerland	Pending	EFTA-Korea Investment Agreement	FET	N.A.
96	2018	Seo v. Korea	Korea	U.S.	State	US - Korea FTA	NO DATA	N.A.
97	2015	Hanocal and IPIC International v. Korea	Korea	Netherlands	Discontinued	Korea - Netherlands BIT	NO DATA	N.A.
98	2000	ADF v. USA	United States	Canada	State	NAFTA	FET, NT, PR	N.A.
99	2009	Apotex v. USA (II)	United States	Canada	State	NAFTA	IE, FET, NT	N.A.
100	2012	Apotex v. USA (III)	United States	Canada	State	NAFTA	FET, NT, MFN	N.A.
101	2008	Apotex v.USA (I)	United States	Canada	State	NAFTA	IE, FET, NT	N.A.
102	2005	Canadian Cattlemen v. USA	United States	Canada	State	NAFTA	NT	N.A.
103	2003	Glamis Gold v. USA	United States	Canada	State	NAFTA	IE, FET	N.A.
104	2004	Grand River v. USA	United States	Canada	State	NAFTA	IE, FET, NT, MFN	N.A.
105	1998	Loewen v. USA	United States	Canada	State	NAFTA	FET, IE, FPS, NT	N.A.

106	1999	Methanex v. USA	United States	Canada	State	NAFTA	IE, FET, NT	N.A.
107	1999	Mondev v. USA	United States	Canada	State	NAFTA	IE, FET, NT	N.A.
108	2002	Canfor v. USA	United States	Canada	Settled	NAFTA	IE, FET, NT, MFN	N.A.
109	2004	Tembec v. USA	United States	Canada	Settled	NAFTA	IE, FET, NT, MFN	N.A.
110	2004	Terminal Forest v. USA	United States	Canada	Settled	NAFTA	IE, FET, NT, MFN	N.A.
111	2016	TransCanada v. USA	United States	Canada	Settled	NAFTA	NT, MFN, FET, IE	N.A.
112	2009	CANACAR v. USA	United States	Mexico	Discontinued	NAFTA	FET, NT, MFN	N.A.
113	2007	Domtar v. USA	United States	Canada	Discontinued	NAFTA	NT, MFN, FET, TF	N.A.
114	2002	Kenex v. USA	United States	Canada	Discontinued	NAFTA	FET, NT, MFN	N.A.
115	2018	beIN v. Saudi Arabia	Saudi Arabia	Qatar	Pending	OIC Investment Agreement (1981)	FPS, TF, DE	N.A.
116	2018	HOCHTIEF v. Saudi Arabia	Saudi Arabia	Germany	Discontinued	Germany - Saudi Arabia BIT	NO DATA	N.A.
117	2017	MAKAE v. Saudi Arabia	Saudi Arabia	France	Pending	France - Saudi Arabia BIT	NO DATA	N.A.
118	2017	Samsung v. Saudi Arabia	Saudi Arabia	Korea	Pending	Korea - Saudi Arabia BIT	NO DATA	N.A.
119	2019	Qatar Pharma and Al Sulaiti v. Saudi Arabia	Saudi Arabia	Qatar	Pending	OIC Investment Agreement (1981)	IE, FET, MFN	N.A.
120	2003	Ed. Züblin v. Saudi Arabia	Saudi Arabia	Germany	Settled	Germany - Saudi Arabia BIT	NO DATA	N.A.
121	2014	Aleksandrowicz and Częścik v. Cyprus	Cyprus	Poland	State	Cyprus - Poland BIT (1992)	IE	N.A.
122	2013	Marfin v. Cyprus	Cyprus	Greece	State	Cyprus - Greece BIT (1992)	IE, AUDM, FET, FPS	N.A.
123	2015	Adamakopoulos and others v. Cyprus	Cyprus	Greece / Luxem.	Pending	Cyprus - Greece BIT (1992)	No DATA	N.A.
124	2018	Nelin v. Cyprus	Cyprus	Belarus	Pending	Belarus - Cyprus BIT (1998)	No DATA	N.A.
125	2014	Saab v. Cyprus	Cyprus	Lebanon	Pending	Cyprus - Lebanon BIT (2001)	IE	N.A.
126	2018	Almasryia v. Kuwait	Kuwait	Egypt	Pending	Egypt - Kuwait BIT (2001)	NO DATA	N.A.

127	2018	Conseil Economique v. The State of Kuwait	Kuwait	Switzerland	Pending	Kuwait - Switzerland BIT (1998)	NO DATA	N.A.
128	2018	Lazareva v. Kuwait	Kuwait	Russian Federation	Pending	Kuwait - Russian Federation BIT (1994)	FET, FPS, AUDM, MFN, IE	N.A.
129	2017	OHL and others v. Kuwait	Kuwait	Spain / Italy	Pending	Italy - Kuwait BIT (1987) / Spain - Kuwait	NO DATA	N.A.
130	2019	Alcosa v. Kuwait	Kuwait	Spain	Pending	Kuwait - Spain BIT (2005)	NO DATA	N.A.
131	2019	Ayat Nizar Raja Sumrain v. Kuwait	Kuwait	Egypt	Pending	Egypt - Kuwait BIT (2001)	NO DATA	N.A.
132	2017	Bank of Cyprus v. Greece	Greece	Cyprus	Pending	Cyprus - Greece BIT (1992)	NO DATA	N.A.
133	2016	Safa v. Greece	Greece	Lebanon	Pending	Greece - Lebanon BIT (1997)	NO DATA	N.A.
134	2014	Cyprus Popular Bank v. Greece	Greece	Cyprus	Pending	Cyprus - Greece BIT (1992)	NO DATA	N.A.
135	2019	Jetion and T-Hertz v. Greece	Greece	China	Pending	China - Greece BIT (1992)	NO DATA	N.A.
136	2013	Poštová banka and Istrokapital v. Greece	Greece	Cyprus / Slovakia	State	Czech Republic - Greece BIT (1991) / Cyprus - Greece BIT (1992)	IE, FET, UC	N.A.
137	2019	Strabag, Erste Nordsee-Offshore Holding and Zweite Nordsee-Offshore Holding v. Germany	Germany	Austria	Pending	ECT	NO DATA	N.A.
138	2012	Vattenfall v. Germany (II)	Germany	Sweden	Pending	ECT	No DATA	N.A.
139	2009	Vattenfall v. Germany (I)	Germany	Sweden	Settled	ECT	IE, FET, FPS, AUDM	N.A.
140	2000	Sancheti v. Germany	Germany	India	Settled	Germany - India BIT (1995)	NO DATA	N.A.
141	2017	BM Mühendislik v. United Arab Emirates	United Arab Emirates	Turkey	Pending	Turkey - United Arab Emirates BIT (2005)	NO DATA	N.A.

142	2001	Impregilo v. UAE	United Arab Emirates	Italy	Discontinued	Italy - United Arab Emirates BIT (1995)	NO DATA	N.A.
143	2002	Soufraki v. UAE	United Arab Emirates	Italy	State	Italy - United Arab Emirates BIT (1995)	NO DATA	N.A.
144	2019	Shokat Mohammed Dalal v. United Arab Emirates	United Arab Emirates	U.K.	Pending	UK - United Arab Emirates BIT	NO DATA	N.A.
145	2012	Ping An v. Belgium	Belgium	China	State	BLEU (Belgium-Luxembourg Economic Union) - China BIT (2005)	FET, DE, MFN	N.A.
146	2017	DP World v. Belgium	Belgium	U.A.E.	Pending	BLEU (Belgium-Luxembourg Economic Union) - United Arab Emirates BIT (2004)	NO DATA	N.A.
147	2017	APR Energy and others v. Australia	Australia	U.S.	Pending	Australia-United States FTA (2004)	FET, FPS, DE	N.A.
148	2011	Philip Morris v. Australia	Australia	Hong Kong	State	Australia - Hong Kong BIT	IE, FET, FPS, UC, AUDM	N.A.
149	2015	Belegging-Maatschappij "Far East" v. Austria	Austria	Malta	State	Austria - Malta BIT (2002)	AUDM, FPS, DE, IE, FET	N.A.
150	2013	Serter v. France	France	Turkey	Discontinued	France - Turkey BIT (2006)	NO DATA	N.A.
151	2006	Sancheti v. UK	United Kingdom	India	Data no available	India - United Kingdom BIT (1994)	NO DATA	N.A.
152	2018	Al Awamleh and others v. Qatar	Qatar	Jordan	Discontinued	Jordan - Qatar BIT (2009)	NO DATA	N.A.
153	2019	Nord Stream 2 v EU	EU	Switz (incorp.) Russia (owner)	Pending	ECT	NO DATA	N.A.

Abstract:

This master thesis focuses on the issue of investor-state dispute settlement between developed countries. While “traditional” investment agreements, namely, those involving a capital exporting country and a developing country (north-south IIAs) have been the subject of extensive analysis, the assessment of investments agreements and ISDS between developed countries (north-north IIAs) has received less attention. By studying the arguments advanced in favor of ISDS in the context of north-north investment agreements, the historic and current treaty practices between developed countries, the case law involving these countries, and the specific content of recent north-north IIAs, this master thesis provides elements for understanding the actual role and significance of IIAs and ISDS between developed countries within the system of international investment protection. The thesis concludes that traditional developed countries usually refrain from concluding investment agreements between each other and as a result ISDS between developed countries is primarily an unintended consequence of the conclusion of multilateral agreements also involving developing countries. It also concludes that whereas north-north investment agreements are sometimes unavoidable, developed countries have resorted to treaty drafting as a tool to mitigate their exposure to adverse ISDS litigation in the context of such agreements.

Diese Masterarbeit befasst sich mit der Frage der Streitbeilegung zwischen Investoren und Staaten zwischen Industrieländern. Während „traditionelle“ Investitionsabkommen, an denen ein kapitalausführendes Land und ein Entwicklungsland beteiligt sind (Nord-Süd-Abkommen), ausführlich analysiert wurden, wurden Investitionsabkommen und ISDS zwischen Industrieländern (Nord-Nord-Abkommen) bewertet weniger Aufmerksamkeit erhalten. Diese Masterarbeit untersucht die Argumente, die im Zusammenhang mit Nord-Nord-Investitionsabkommen für ISDS vorgebracht wurden, die historischen und aktuellen Vertragspraktiken zwischen Industrieländern, die diese Länder betreffende Rechtsprechung und den spezifischen Inhalt der jüngsten Nord-Nord-IIAs. Diese Masterarbeit bietet Elemente zum Verständnis der tatsächlichen Rolle und Bedeutung von IIAs und ISDS zwischen Industrieländern im System des internationalen Investitionsschutzes. Die These kommt zu dem Schluss, dass traditionelle Industrieländer in der Regel keine Investitionsabkommen untereinander abschließen und ISDS zwischen Industrieländern daher in erster Linie eine unbeabsichtigte Folge des Abschlusses multilateraler Abkommen sind, an denen auch Entwicklungsländer beteiligt sind. Es wird auch der Schluss gezogen, dass Nord-Nord-Investitionsabkommen manchmal unvermeidlich sind, während die Industrieländer auf die Ausarbeitung von Verträgen zurückgegriffen haben, um ihre Gefährdung durch nachteilige ISDS-Rechtsstreitigkeiten im Rahmen solcher Abkommen zu verringern.