International Sustainable and Ethical Investment Rules Project

All Roads Lead Out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties

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FUNDACION ECOS

Nautilus Institute globalization & governance program

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The ***International Sustainable and Ethical Investment Rules Project*** is a global collaboration working to develop a framework for the governance of investment that promotes economic development, environmental sustainability, human rights, and global security,

Project funding was provided by the Wallace Global Fund, the Rockefeller Foundation, and the Ford Foundation (New York). For more information, please see www.nautilus.org/enviro/Investment .

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Abstract[*]

Despite the dramatic surge in global investment flows in recent years, there is no single international institution charged with creating the rules governing these flows or resolving disputes which arise between investors and host states. Instead, governments have had the most success negotiating treaties in a piecemeal, bilateral fashion. Similar in scope & content to the more well-known investment chapter of the North American Free Trade Agreement, although sometimes broader in their coverage, these BITs open up a number of dispute settlement mechanisms for aggrieved investors.

Unfortunately, in all but one instance, these mechanisms were simply grafted in from the secretive world of international commercial arbitration. As such, they fall well short of the standards for transparency, legitimacy and accountability expected of forums where sensitive government policies will be weighed against other private interests. As evidence emerges of a surge in BITs litigation - and particularly of cases which implicate sustainable development concerns - all of these dispute settlement avenues appear inadequate to the task of balancing private rights with public goods.

While it is too early in the litigation cycle to offer definitive comment on the interpretation of the substantive rights contained in these bilateral treaties, there are already ample grounds for criticizing the procedural rules under which so-called investor-state arbitration occurs. At some point, a single, balanced multilateral agreement might represent one solution to the current morass. However, prospective negotiations at the World Trade Organization in 2003, offer neither the appropriate time, nor place, for such an agreement.

[*] The author would like to thank Aaron Cosbey, Mark Halle, Konrad von Moltke, Howard Mann, Kenneth Van de Velde, Lyuba Zarsky and Sandy Buffett for their comments and guidance, as well as the rest of his colleagues in the IISD Trade & Investment team who have provided a superb intellectual working environment. Enormous gratitude is also due to Aljendro Escobar and Antonio Parra at ICSID, for handling countless queries from the author.

I. Introduction

When a series of investor rights and protections were inserted into the North American Free Trade Agreement (NAFTA), few anticipated that they would soon become the most controversial in the entire agreement. Since 1996, however, the rights contained in Chapter 11 of NAFTA have been invoked in a series of disputes brought by investors against one of the three NAFTA states (the United States, Canada and Mexico).

Most controversially, at least ten known disputes have been brought against government measures dealing with environmental and natural resource management, including those involving hazardous waste management, maintenance of clean drinking water, and gasoline additives (Mann, 2001).

The International Institute for Sustainable Development (IISD) has been in the vanguard of efforts to analyse this emerging pattern of strategic investor litigation against environmental, health and other public purpose regulations (Mann and Von Moltke, 1999; Mann, 2001; Mann and Von Moltke, 2002). Several cases have generated worrying interpretations of investor rights, in particular, guarantees against expropriation, or measures "tantamount to expropriation" without payment of compensation (Mann, 2001, p. 32). These cases have sent a chill through government regulators and the broader sustainable development community.

Despite all the attention lavished upon the NAFTA investment chapter, it was rarely noticed, until very recently, that these rights have an extensive family tree. So-called Bilateral Investment Treaties (or BITs) have been largely ignored for much of their 40 year history, in part due to the lack of an obvious organizational structure. Unlike the NAFTA or the World Trade Organization - which has been a lightning-rod on the shores of Lake Geneva - investment treaties have been concluded typically between two treaty partners, with little fanfare or publicity.

Even those on the frontlines of international investment decision-making seem to have ignored these treaties for much of their existence. A 1990s-era survey of foreign investors found that the treaties were dismissed as having been drafted by bureaucrats and trade negotiators, with an eye to "ambiguity, open-endedness and need for substantial (unpredictable) interpretation of the treaty" (Walde and Dow, 2000. p. 45). Thus, the study concluded that: investors "do not have much knowledge of the treaty, do not use it in any significant way and are not particularly interested (and thereby influenced) by the treaty" (Walde and Dow, 2000, p. 12).

Despite this low profile, there are now some 2000 international investment treaties worldwide – overwhelmingly bilateral, but also regional or plurilateral in nature. At least 173 countries, a number well exceeding the WTO's membership, are bound by at least one such investment treaty (UNCTAD, 2000). What's more, investor interest in these treaties has increased markedly in recent years.

As with the NAFTA, the vast majority of BITs have a opened a Pandora's box of dispute settlement options for investors, allowing them to launch so-called investor-state disputes against host governments before international arbitration tribunals (Parra, 2001). Rather than creating new institutions suited to this task, and restricting their purview to those instances where no domestic remedy could be had, the treaties simply grafted in various existing international commercial arbitration mechanisms which had been designed (with one notable exception) for the settlement of commercial disputes, primarily between two businesses.

The half-dozen different arbitral rules surveyed in this paper suffer from a number of the same shortcomings. They also display a handful of key differences which might be exploited by savvy investors eager to shop for rules deemed most amenable to their interests. This can be seen especially in the varying levels of transparency offered under the different arbitral rules and the extent to which subsequent review of arbitral rulings is permitted by some higher legal body. Other, more technical differences between the different arbitral rules – such as choice of applicable law – may also be of strategic importance. However, this complex substantive question is beyond the author's expertise, and hence the scope of this paper.

Further scrutiny of these treaties and their dispute settlement mechanisms is important. At this writing, the World Trade Organization's Working Group on Trade and Investment was still debating whether the WTO should launch talks in 2003 on a multilateral investment agreement. Even if such talks are launched, they seem unlikely to tackle sensitive issues like investor-state dispute settlement and expropriation – two hot-button issues at the regional and bilateral level (Bridges, 2002). Thus, the myriad dispute settlement mechanisms offered by modern BITs are likely to remain viable avenues for investors for some time.

Indeed, there is growing evidence that investors are waking up to the opportunities latent in these long-ignored bilateral treaties. The World Bank's International Center for the Settlement of Investment Disputes (ICSID), thought to be the busiest of the various arbitral forums, notes in its most recent Annual Report that "The largest number" of its cases in 2001 were brought not under the NAFTA, but under BITs (Tung, 2001). While the high-profile health and environmental NAFTA disputes have attracted the most scrutiny from the sustainable development community, only 9 of 49 cases pending at ICSID in 2001 were NAFTA cases.

Major law firms are awakening to the potential uses of these BITs; one firm, Freshfields Bruckhaus Deringer, hails them as “a most powerful weapon” for foreign investors in the context of the Argentine financial crisis, particularly in public services such as oil and gas, electricity, water, transport and telecommunications (Freshfields Bruckhaus Deringer, 2000).

Investors have been invoking the provisions of BITs in a trickle of litigation since the late 1980s. Over the past five years, however, the “floodgates” have opened (Parra, 2000). A full sixty of the one hundred cases which ICSID has seen over its entire forty year history have come in the last five years alone (Stevens, 2002).

Due to the very recent nature of this surge in litigation, most key investor rights have yet to be fully fleshed out by the Tribunals charged with interpreting the treaties (ibid). A number of investment law commentators continue to draw attention to the striking breadth and imprecision of the rights contained in these BITs. One leading arbitration lawyer has described these treaty provisions as “dazzlingly abstract”, and cautioned that “the BITs … are maddeningly imprecise as to the substantive legal standard to be applied by the tribunal, and that imprecision may well open the door to vexatious litigation” (Rogers, 2000, p. 4). Two senior ICSID officials further warn that the “breadth (of these rights) … is worth emphasizing”, while the effort to elucidate these rights, “has only just begun” (Shihata and Parra, 1999, pp. 319, 336).

While the substantive legal rights have yet to be fleshed out, it is already apparent that the procedural rules designed to guide this interpretive task are inadequate. As mechanisms designed for primarily private commercial disputes, they do not meet the basic standards of transparency, legitimacy and accountability expected of institutions entrusted with the task of balancing private economic rights with public goods. If, as legal scholar Jeswald Salacuse has argued, these investment treaties are contributing to “a new international law of foreign investment to respond to the demands of the new global economy,” then the institutional failings of these treaties render the fuller details of this body of law frustratingly elusive.

This paper examines and evaluates some of the key features of BITs, their dispute settlement rules and some emerging disputes.. Section II offers an overview of the treaties and their basic provisions, followed by an introduction to the various arbitral avenues available to investors for disputes settlement. The subsequent three sections highlight the major procedural shortcomings of these avenues, with respect to transparency, legitimacy and accountability. Section VI summarizes what we know about formal and informal treaty disputes and profiles three pending disputes.

II. Bilateral Investment Treaties: Origins and Features

Most of the BITs concluded during the late 1950s and the 1960s were between Western European and African nations. Even today, a majority of the treaties still bring together a Northern and Southern partner, although it is increasingly common in recent years for developing countries to sign BITs amongst themselves (UNCTAD, 1998). In the 1990s, BITs experienced an astonishing growth spurt. In only ten years, the numbers of BITs virtually quintupled, growing from 385 to 1,857 (UNCTAD, 2000). Recent commentaries typically put the number of BITs at some 2000 worldwide (Obadia, 2001, p. 4).

The family resemblance of BITs to their more famous relatives, such as the NAFTA or the OECD's proposed Multilateral Agreement on Investment (MAI), is quite striking. BITs typically contain a series of investor protections, both absolute standards, such as guarantees to "fair and equitable treatment" or "full protection and security", and relative standards, such as national and most-favored nation treatment, which require that investors be treated no less favorably than domestic and third-party investors respectively (UNCTAD, 1998, pp. 53-64).

As might be expected, there are considerable variations from country to country and certainly from era to era, given that these treaties have been negotiated over a four decade period. However, a number of features are quite standard. Most BITs contain brief preambles which set narrow objectives for the treaty: typically promotion and protection of investment, as well as encouragement of economic cooperation between the two signatories (UNCTAD, 1998, pg. 30). As well, most tend to offer broad definitions of investment, in part to ensure the future utility of the treaties as the nature of investment itself evolves over time (UNCTAD, 1999).

Indeed, the definitions of both investors and investments under most BITs are broader and less nuanced than they are under NAFTA's Chapter 11 (Grigera-Naon, 2000). This ensures that a wide range of economic actors and activities qualify for coverage under the agreement, (including for purposes of invoking the investor-state dispute settlement mechanism typically contained in these agreements). However, the reach of many of the substantive provisions is often restricted to the post-establishment phase of an investment (i.e. once the investment has been made), rather than extended to the pre-establishment stage (i.e. offering a right of entry) (UNCTAD, 1999).

Most BITs typically safeguard investors from direct expropriation and indirect (or "creeping") expropriation by dictating that government measures which expropriate an investment must be enacted for a public purpose, in a nondiscriminatory manner, in accordance with due process of law, and accompanied by payment of "prompt, adequate and effective compensation"

(Parra, 2001, pp. 21-22). This provision has been of particular concern in the NAFTA context, as government regulations have been challenged, with some success, as measures "tantamount to expropriation", and therefore entitling investors to compensation (Mann and Von Moltke, 2002). Many BITs also include provisions allowing for transfer of monies, movement of key employees, and some protection from war and civil disturbance.

A state-to-state dispute settlement mechanism has been a feature of most BITs since the earliest days. It gave home-states a legal option beyond the traditional avenue of diplomatic negotiations between home-state and host-state. However, formal state-to-state disputes under BITs are exceedingly rare. An investor-state dispute settlement mechanism first appeared in the late 1960s, becoming "a regular feature" in BITs signed during the 1970s, and emerging as virtually standard by the 1980s and 1990s.[1]

The investor-state mechanism allows investors themselves to challenge alleged violations of the treaty provisions by host states before an international arbitration tribunal, merely by following the simple steps marked out under the given arbitral rules. In most instances, modern BITs do not require the exhaustion of domestic legal remedies prior to the invocation of international arbitration. Indeed, in some instances the BITs discourage the use of local courts, by declaring that recourse to them will preclude international arbitration at a later date (Grigera-Naon, 2000; Parra, 1997).

Avenues for Arbitration

The World Bank's ICSID has become the most well-known and, based on available information, most commonly invoked *institutional* avenue for dispute settlement. However, treaties often allow recourse to a number of other arbitral options, both institutional and ad-hoc.[2] The ICSID is unique insofar as it was conceived specifically with investment arbitration in mind, rather than a broader range of commercial disputes. However, its jurisdiction extends only to cases where the legal instrument in question - a treaty, national investment law or contract - explicitly provides for ICSID arbitration. Moreover, both of the parties must be party (or in the case of an investor, hail from a state which is party) to the ICSID convention.

ICSID does offer a second set of arbitration rules, the so-called Additional Facility (AF) rules, in order to accommodate disputes which involve a state (or an investor hailing from a state) which has yet to come on board the ICSID Convention. For example, the Additional Facility rules are of use to countries such as Canada and Mexico (and their investors), which have not ratified the ICSID Convention to date. Indeed, as of July 2002, only 134 Countries have acceded to the ICSID Convention (by contrast recall that 173 countries have entered into BITs).

Neither set of ICSID rules are available in cases where *both* parties to a dispute do not hail from an ICSID signatory country (Parra, 1997). For this reason, the majority of investment treaties since the 1980s have incorporated references to other (non-ICSID) arbitral avenues (Parra, 2000). Arbitration under other *institutional* rules is increasingly mentioned in more recent bilateral investment treaties, for example the International Chamber of Commerce's International Court of Arbitration (ICC rules) or the Stockholm Chamber of Commerce's Arbitration Institute (SCC rules) (Parra 1997, 295-6, 363; Grigera-Naon, 2000, 67).

Many treaties also offer investors the ability to take disputes to an *ad-hoc* arbitration process, where only a tribunal (but no supervising institution) oversees the conduct of the arbitration. Examples of ad-hoc arbitrations include, those under the UN Commission on International Trade Law (UNCITRAL) rules or those arbitrated in a classical ad-hoc fashion (i.e. before a panel with no prescribed rules whatsoever, apart from what the treaty explicitly prescribes) (Parra, 1997).

This paper explores some of the features of these six arbitral options:

Institutional: International Chamber of Commerce, Stockholm Chamber of Commerce, ICSID, and the so-called ICSID Additional Facility rules;
Ad-hoc: UNCITRAL or classical ad-hoc.

Attention to the last of these is limited, however, because classical ad-hoc arbitration is less often mentioned in treaties. Nor, as shall be seen, does it have any rules which can be helpfully compared with the other sets; as the name implies, arbitrations on these rules are entirely ad-hoc, and totally off-the-record.

One important implication of the inclusion of a *menu* of arbitral options in most BITs, is that investors generally enjoy the ability to select their favored arbitral option from all those listed in the treaty's menu (Parra, 1997). In effect, they may "rule-shop" for the set of arbitral rules most favorable to their interests. Thus, effective monitoring of emerging investment disputes must not only countenance all of the arbitral options discussed here, but it must also come to appreciate certain important differences between these different rules.

The monitoring and analysis of investment disputes are hampered by deficiencies of legitimacy, transparency and accountability. This ought not be surprising, as, with the exception of the ICSID system, these arbitral rules were designed for what one sympathetic textbook characterizes as a system of "private justice in the service of merchants" (Dezalay and Garth, 1996, pg. 53). While the various arbitral options differ in some respects, all fall short of the standard expected of institutions which are increasingly charged – particularly after the high-profile NAFTA disputes - with resolving conflicts pitting private rights against public goods.

III. Transparency in BITs Arbitrations

Public Registration of Investor-State Disputes

Under NAFTA Chapter 11, disputes must be registered with the NAFTA Secretariat once a Notice of Arbitration has been filed against the host state. No bilateral investment treaties, however, contain a comparable requirement that investors publicly signal their intention to launch a dispute. Indeed, unlike the NAFTA, BITs do not have a secretariat, and even in cases of plurilateral investment treaties such as the Energy Charter Treaty (ECT), which does have a permanent secretariat, there is no requirement that investors or contracting states notify the ECT Secretariat when a dispute has been launched. One former Energy Charter official candidly chalked this anomaly up to, "a reluctance on the part of our contracting parties to be more transparent" (Vesely, 2001).

In some instances, publicly traded companies resorting to arbitration will have legal duties to disclose certain information to shareholders (Stevens, 2000). Occasionally, the perspicacious investigator may uncover recent arbitrations by monitoring public filings of companies. more often though, and in the absence of express *treaty* requirements to register disputes brought under the treaty, public disclosure will hinge upon the particular *arbitral rules* chosen by an investor. And in cases brought under either set of ICSID rules, ICSID requires that a register of all cases be kept by its Secretariat, including on a docket of pending cases kept on ICSID's website.[3] This docket lists the name of the parties involved in a dispute, the date the case was registered, and a very terse description of the dispute - for eg "Foreign Trade Enterprise", "Waste Disposal Enterprise", or "Mining, Banking and Service Enterprises."[4]

Whenever a new dispute is launched at ICSID the public can be easily apprised of the name of parties involved in a dispute, which can then guide further investigation and inquiry into the details of the investment dispute. Although the ICSID docket does not specify whether a dispute is being brought under a treaty, a law or contract, a large majority of ICSID cases now arise out of the general consents to arbitration lodged in investment laws or treaties, rather than contract disputes (Shihata and Parra, 1999; Parra, 2002). Nevertheless, it is important to remember that not all cases on ICSID's docket will be treaty arbitrations. Generally, ICSID staff can be relied upon to clarify under what type of legal instrument a given case is being contested.

Under the other *institutional* arbitral options (usually ICC or SCC) there is no comparable requirement that new BITs cases be publicly registered. Moreover, because these institutions handle a variety of other (non-investment treaty related) international commercial disputes, they do not compile precise figures on the *number* or *proportion* of their cases which arise out of a BIT (Parra, 1997; Jolivet, 2001, Magnusson, 2001).

However, in interviews, officials or former officials with both institutions concede that the number of BITs cases seen each year is currently thought to be only a small handful per institution (Grigera-Naon 2000, 98).[5] Nevertheless, this caseload marks an increase from five years ago, when neither institution was thought to see any investment treaty-based arbitration (Grigera-Naon, 2002; Franke, 2002). Moreover, this "handful" of cases each year seems far less insignificant when it is recalled that ICSID, which is widely thought to handle the bulk of such disputes, has yet to see more than a dozen treaty-based arbitrations in a given year (Obadia, 2001). Most worrying of all, regardless of the number of investor-state disputes filed at the ICC or the SCC, all will be filed, arbitrated and ultimately resolved under a cloak of confidentiality.

So-called *ad-hoc* (non-institutional) arbitration poses an even more formidable challenge to transparency. Such arbitrations may take place anywhere, without the supervision of an arbitral forum or any requirement for public registration.[6] As one major survey of international commercial arbitration warns: "… there are quite a number of ad hoc arbitrations – not affiliated with any arbitral institutions – that are not recorded anywhere" (Dezalay and Garth, 1996). Naturally, it is unclear how many of those which slip through the cracks would be treaty-based. However, it would be fair to assume that it is a growing proportion, as the long-ignored treaties are coming to the attention of a much wider group of investors.

The *ad-hoc* rules most commonly referenced in BITs are those of UNCITRAL, which does have a permanent Secretariat devoted to the creation and promotion of arbitration rules and model laws. However, this Secretariat has been given no mandate to chart the actual use of its arbitral rules by investors. Thus, when faced with an inquiry as to the prevalence of investor-state arbitrations using the UNCITRAL rules – and particularly those implicating sensitive environmental, health or other issues of public interest – a Secretariat official could only confess that "We're not monitoring this at all" (Sorieul, 2002).[7]

Senior officials with the ICC or SCC are at least able to make a rough guess as to the number of BITs cases occurring under their roof – even if details and the names of the parties remain frustratingly confidential. UNCITRAL's Secretariat is unable to do even this. Investigators are left to gather details of unpublicized BITs arbitrations through a variety of needle-in-a-haystack techniques, including, reading transcripts of government foreign relations committee hearings;[8] scrutinizing the publicity materials of law firms offering legal services;[9] or poring over the statutory filings of publicly traded companies.[10]

The lack of any requirement in most of these arbitral rules that disputes be publicly registered (apart from under the ICSID rules), has worrying implications when sensitive government regulations or investments in key public services are the subject of investor challenges. There are anecdotal suggestions that some investors already "rules-shop" for those arbitral rules which provide the greatest level of confidentiality (Ferrari, 2001; Walde, 2002).

Indeed, as increasing public scrutiny is brought to bear on the more visible ICSID process – which is an increasingly scrutinized arm of the World Bank - analysts will need to be on guard for any signs that investors are decamping for more obscure and opaque arbitral avenues (provided, of course, that such options are offered in the relevant BIT).[11] Anecdotal evidence suggests that, while non-ICSID avenues are seeing more investor-state disputes, for the moment, they may not be well known or understood by business interests (Walde, 2002).

Publication of Awards

Remarkably, when an arbitral tribunal hands down a ruling - known as an award - there is no requirement that these awards enter the public domain. Sometimes, awards will circulate in the international legal community, stripped of any identifying information. These sanitized awards are useful for the legal principles that they elucidate, but offer no information about the parties' identities and the key details of the dispute.[12]

Awards may be published in their entirety only under certain circumstances. According to the ICSID Convention, the Center may publish an award only where both parties give their consent. However, either party may choose unilaterally to allow the award to be published elsewhere, for instance on a law firm website. According to one ICSID lawyer, "In many cases, one of the parties has made the award public while in a few the award has remained confidential" (Stevens, 2000). Conversely, the UNCITRAL rules set a far more onerous standard, insofar as they provide that an award may be publicized "only with the consent of both parties" (Article 32(5)). Commentators point to this rule as safeguarding the secrecy of proceedings even once they are concluded (Dessemontet, 1996)

The same secrecy requirement constrains parties under other *institutional* rules such as those of the SCC (Franke, 2002). This means that even those disputes centering upon challenges to government health, safety, environmental or other sensitive regulations might see their awards shrouded in secrecy, unless both investor and host state give their consent to publication.

Recalling Jeswald Salacuse's comment that bilateral investment treaties are contributing to "a new international law of foreign investment to respond to the demands of the new global economy", this is, nevertheless, a body of law whose contours remain shrouded in some mystery even for its most assiduous devotees (Salacuse, 1990).

The shortcomings in these arbitral rules – including the provisions on confidentiality of awards - create further uncertainty for all levels of government which may be contemplating regulatory measures or policies which might impact upon foreign investments. It is wholly inadequate that awards circulate sporadically – or sometimes only informally within close-knit international arbitration circles – without being readily available to the government officials and elected representatives, whose policies must take heed of the developing international legal norms on investment.

IV. Legitimacy in BIT Arbitrations

Selection of Arbitrators

One standard feature of investor-state arbitration, no matter under which arbitral rules it occurs, is the fact that "In contrast to court litigation, arbitration … affords parties the opportunity to submit their disputes to judges of their own choosing" (Parra, 1997, p. 289). Under the most commonly invoked sets of arbitral rules, a panel will consist of three members; the investor customarily chooses one arbitrator, while the state chooses the second, and both parties select the third.

This feature has already been flagged in the NAFTA context as an important difference between arbitration and regular courts. As IISD's Howard Mann and Konrad von Moltke argue: "When matters of public welfare are at stake it … contravenes one of the most fundamental principles of jurisprudence, namely that parties to a dispute may not pick their own judges" (Mann and Von Moltke, 2002, p. 21). Indeed, there are signs that the freedom to choose one's own arbitrator can have a decisive influence on the outcome of some arbitrations. Yves Dezalay and Bryant Garth have pointed to studies which show that the selection of arbitrators in commercial arbitrations plays a key role in winning or losing:

> The attorneys to the parties well understand that the "authority" and "expertise" of arbitrators determine their clout within the tribunal. The operation of the market in the selection of arbitrators therefore provides a key to understanding the justice that emerges from the decisions of arbitrators (Dezalay and Garth, 1996, pp. 8-9).

Because the commercial arbitration community operates as a "club" or "mafia" in the words of some arbitrators, the same persons act as counsel in some cases and as arbitrators in others (ibid, p 10). One leading arbitrator conceded to Dezalay and Garth that to be "really independent" one ought to be over 75 years old and not dependent upon future arbitration income (ibid, p. 35). Another senior arbitrator interviewed by Dezalay and Garth admitted that the close-knit nature of this arbitration community leads to potential conflicts:

> "You're often appointed a party arbitrator by someone with whom you have worked before," and "You know you're going to work with him again. Does that unconsciously bias one? I think that's a difficult one." But "not everybody is 100 percent honest and you know it's a very great advantage to find someone whose character you really do know and can depend on" (ibid, p. 50).

As international commercial arbitration has come to be the process of choice for resolving conflicts between private investor rights and public goods (such as health or environmental protection), the inadequacies of this system become all the more worrying.

Although BITs may sometimes dictate that arbitrators in certain categories of disputes display certain training or expertise, this is the exception rather than the rule. One such exception is the requirement found in certain Canadian BITs, that arbitrators in "disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial service in dispute".[13] Otherwise, the treaties leave it to the parties – who will invariably have their own personal interests - to ensure that arbitrators have the breadth of experience necessary to resolve the dispute.

Just as the treaties themselves rarely offer guidance when it comes to the expertise required of arbitrators, nor do the major sets of arbitral rules fill this gap. Arbitrations under the ICSID Convention simply require that arbitrators be "of high moral character and recognized competence in the fields of law, commerce, industry or in finance who may be relied upon to exercise independent judgment" (ICSID Convention, Article 14(1)).[14]

Notably, the Convention offers no suggestion that special expertise might be valuable (or even essential) in cases where disputes touch upon sensitive regulations related to a state's exercise of its "police powers": non-discriminatory regulations of general application which were traditionally exempt from expropriation claims under international law (such as regulation of the environment, public safety, morals, culture, etc.) (Mann and Von Moltke, 2002). Presumably such disputes were never envisaged. The UNCITRAL, classical ad-hoc, SCC and ICC rules offer even fewer criteria for prospective arbitrators, providing only that arbitrators be independent and/or impartial.[15]

Access by Non-Parties to the Proceedings

Arbitral proceedings are not generally accessible to the public or concerned groups. Thus, in the absence of any express treaty language to the contrary, arbitrations under the ICSID rules would require the consent of both investor and state in order to open up the proceeding to the participation of outside actors, such as an amicus curiae (i.e. friend of the court) (Stevens, 2000).

Nor do the UNCITRAL rules offer greater openness. They stipulate that "Hearings shall be heard in camera unless the parties agree otherwise" (Article 25(4)). This places a significant obstacle in the way of those parties seeking greater transparency of the proceedings, insofar as they require the consent of the state and the investor – and investors, in particular, are rarely keen to see greater light shone on such proceedings. In turn, this has implications for non-party access to the proceedings.

In the arbitration between the Methanex Corporation and United States under NAFTA, Methanex opposed an application for amicus curiae status by the International Institute for Sustainable Development.[16] Although the Tribunal took the important step of signaling its willingness to accept a written amicus brief – acknowledging the "undoubtedly public interest" in the subject matter - the IISD's application was undercut somewhat by express provisions contained in the UNCITRAL arbitration rules. Thus, the recalcitrance on the part of one of the parties, Methanex, led the Tribunal to find that it had no authority under the UNCITRAL rules (which require in-camera hearings) to allow participation by other non-disputing parties in the *oral* portion of the proceedings (Mann, 2001).

In another NAFTA case, Pope & Talbot, the Canadian Government sought *not* to advocate the participation of other actors in the hearings, but rather to divulge transcripts of those hearings to interested third-parties. The Tribunal in that case also ruled against such disclosure, on the grounds that the UNCITRAL arbitral rules expressly require that hearings be held in-camera.[17] Subsequently, after further negotiation between Canada and the investor – and a threatened lawsuit by Canada pursuant to its own access to information legislation - agreement was reached between the parties to override this portion of the UNCITRAL rules. [18]

While heartening, the decision to override in this case does not obviate the need for future consensus between both parties under arbitrations governed by the UNCTIRAL rules, before the express provision requiring in-camera hearings will be overridden. In a similar vein, the ICC rules also expressly provide that proceedings shall take place in private, unless the parties and the arbitral Tribunal agree otherwise (Article 21 (3)).

Although the SCC rules do not expressly mandate that the proceedings be closed to the public, the Secretary General of the Stockholm Arbitration Institute indicates that it would require the *unanimity* of the two parties to agree to open the proceedings up to the participation of other actors (Franke, 2002). Thus, the rules designed to discourage transparency of the proceedings (particularly that hearings be held in-camera), have knock-on implications for interested parties seeking to intervene and participate in the resolution of investment disputes, which brings into question the very legitimacy of the process.

VI. Accountablity in BITs Arbitrations

Lack of *Stare Decisis* (doctrine of precedent)

Another alarming feature of investor-state arbitration is that it was conceived as a method of Alternative Dispute Resolution (ADR) between two parties (i.e. an alternative to domestic court proceedings). In the NAFTA context, Howard Mann has observed that the one-off nature of arbitrations gives rise to concerns that "the absence of a consistent interpretation of Chapter 11 may lead to the loss of government certainty and public understanding of the obligations governments face" (Mann, 2001, p. 42). Even the international commercial arbitration community recognizes that uncertainty plagues the process, as can be glimpsed in the suggestion that investors choose the same arbitrators for disputes which implicate similar facts, lest different arbitrators reach inconsistent decisions on the same (or virtually the same) facts (Obadia, 2001).

However, unlike the NAFTA, BITs do not require the consolidation of related cases into a single proceeding, as would often happen in a domestic court system (Parra, 1997). The alternative, as ICSID Deputy secretary General Antonio Parra concedes, is one where a state measure affecting a number of different foreign investors could give rise to multiple arbitrations and where "The scope for inconsistent decisions in regard to essentially the same issues is obvious" (Ibid, p. 352).

Other practitioners concede that the one-off nature of arbitration means that common issues may have to be re-litigated in each new proceeding, which can lead to increased costs, inconsistent results, or both.[19] While this represents a continual revenue stream for commercial arbitrators, it signals a potential stream of uncertainty for governments. From the perspective of sustainable development policy-making, the prospect of multiple arbitrations – running in parallel or consecutively - sets up the very real situation where sensitive government regulations or measures will be scrutinized by a number of tribunals (under one or many different bilateral investment treaties with the host state) which could reach different, and even contradictory, conclusions.

To take a hypothetical example, an environmental measure taken by Country X to restrict the uses of a particular substance might be challenged by two investors from Country A and another investor from Country B, under the terms of BITs signed by Countries A and B with Country X. Under these three separate treaty arbitrations, three separate Tribunals would be appointed. Depending upon the composition and orientation of the members of each Tribunal, it is possible that they would reach varying or even outright contradictory interpretations of basic treaty requirements (such as non-discrimination, expropriation or restrictions on performance requirements).

This prospect should be of grave concern to the sustainable development community. The potential for divergent or conflicting rulings seriously complicates the efforts of host-states and their regulators, to assess how they may remain in compliance with their own treaty commitments. In this instance - and in the face of a reluctance on the part of investors to use domestic legal systems - a single multilateral framework which required consolidation of disputes under a single panel might be preferable to the current morass of diverging avenues. This prospect is discussed more fully in the conclusion.

While the problem of parallel arbitrations is a real one, it is not the only one of concern. Host states face the further difficulty of not knowing how much credence to attach to earlier awards (assuming that these awards are even publicly available). While treaty arbitration is not bound by a strict rule of *stare decisis*, it is widely acknowledged that earlier arbitral decisions will, as ICSID Deputy Secretary General Antonio Parra observes, often be "highly persuasive" for future Tribunals (Parra, 2002).

In the NAFTA context, earlier awards have often colored subsequent interpretations (Mann, 2001). Not surprisingly, these NAFTA "precedents" are extrapolated from their context and used by private law firms seeking clients interested in arbitration under BITs. One major law firm, in its promotional materials touting these BITs, helpfully explains that what constitutes an expropriation of an investor's property has been expanded "in recent years, to the benefit of foreign investors" (Freshfields Bruckhaus Deringer, 2002). The cited test - a "covert or incidental interference with the use or enjoyment of property" – borrows directly from the award in the NAFTA Metalclad case.

Given that one distinguished arbitrator has counseled that "… the principal function of an arbitration agreement or mechanism, is *preventative* ….", it ought to be of especial concern that controversial interpretations under the NAFTA may come to influence government regulators to adapt their behavior so as to "avoid the initiation of legal proceedings" under other bilateral investment treaties (Lalive, 1986).

The absence of a binding rule of *stare decisis* renders future treaty arbitrations as something of a "crapshoot". Under-resourced developing countries seem unlikely candidates for rolling the dice in an effort to seek further new elaborations of these elusive treaty commitments. It is well known that litigious investors will pursue multi-pronged strategies designed to create "added cost, and uncertainty" for the host state.[20] ICSID has estimated that the average investor-state arbitration costs $220,000 US dollars (this figure does not include legal counsel fees, which may be much higher - In the NAFTA Metalclad case, the investor was said to have spent some $4 million in arbitrators and legal fees - nor any financial damages awarded by the tribunal (Shihata and Parra, 1999, p. 334).[21]

In 2002, ICSID issued a new schedule of fees which saw arbitrators' daily fees increase from US$1,100 per day per arbitrator, to US$2,000, which will increase significantly the average cost of ICSID proceedings noted above.[22] Costs for non-ICSID forms of arbitration tend to be even higher (as the World Bank defrays many of the administrative costs associated with ICSID arbitrations). These substantial costs make contestation of an arbitral claim an unattractive option for poorer developing countries. Moreover, uncertainty about the rules of precedence adhering from one case to the next - when coupled with the notorious secrecy which surrounds the legal argumentation deployed in some arbitrations - makes it difficult for host states to ascertain the nature of their substantive obligations under a BIT. The prospect for a chilling effect on domestic regulation or policy-making affecting foreign investors would seem likely.

Scope for Post-Award Review

The choice of arbitral rules will also dictate what recourse the parties have after a Tribunal hands down an award. Arbitrations under the ICSID Convention are unique insofar as they are "insulated by that Convention from the control of national legal systems" (Parra, 1997, p. 301). To the extent that they fall under the sphere of the ICSID Convention, panel decisions which have been arbitrated under the ICSID rules are not subject to review by domestic courts (Grigera-Naon, 2000).

Recourse can only be had internally - within the ICSID system - and will be limited to five specific grounds listed in the ICSID Convention (Parra, 1997).[23] These grounds for annulment do not amount to a full review of the decision on its merits, as might be typically available for court decisions in domestic legal systems. Moreover, the annulment proceeding, as with the original ICSID proceeding will take place out of public view. To date, only a handful of ICSID treaty arbitrations have been the subject of annulment proceedings[24]

By contrast, arbitrations under other rules – specifically, ICC, SCC, classical ad-hoc, UNCITRAL and ICSID AF - may be subject to one or more forms of review, (for example, under the law of the place where the arbitration was sited, and/or in the place where enforcement is sought) (Grigera-Naon, 2000, p. 81). If, for example, the arbitration appears to have violated some mandatory provision of the law of the place of arbitration, then a party might appeal to a local court to annul the award (Parra, 1997. p. 300). However, the breath of such review should not be over-emphasized, particularly as an increasing number of jurisdictions are adopting model laws which severely restrict the level of control which may be exercised over arbitral awards by domestic courts (Grigera-Naon, 2000).[25]

Where the victorious party seeks enforcement of an award pursuant to the New York Convention on the Enforcement of Foreign Arbitral Awards - which now has more than 100 state signatories - host states can resist enforcing the award on a handful of grounds set out in that Convention. According to Antonio Parra:

> These grounds include invalidity of the arbitration agreement; failure to give the losing party a fair hearing; excess of authority of the arbitrators; improper constitution of the arbitral tribunal or other irregularities in the conduct of the proceeding; invalidity of the arbitral award at the place of its rendition; non-arbitrability of the subject matter of the dispute in the country in which enforcement is sought; and failure of the award to conform with the public policy requirements of that country (Parra, 1997, p. 300-301)[26]

On their face, these amount to an intriguing range of grounds – although commentators caution that controls by domestic courts are tending to be circumscribed over time. A complex body of legal literature grapples with these issues as they arise in various national jurisdictions (Grigera-Naon, 2000; Schwartz, 1994). Those concerned about the impact of investment treaty arbitration upon sustainable development policy should explore these post-award avenues more thoroughly – particularly the "non-arbitrability of subject matter" and failure "to conform with the public policy requirements of that country" - as they might have critical legal implications for the legacy of an award.

Apart from the complex substantive issues raised in the review of awards by domestic courts, there is also at least one obvious procedural distinction to be highlighted between the different arbitral rules. This post-award review process can represent another way in which the details – and perhaps even the very existence - of specific investor-state arbitrations may come to public attention (Dessemontet, 1996). Several high-profile investor-state arbitrations under the NAFTA (which were *not* arbitrated under the ICSID Convention rules), have been reviewed in domestic courts in Canada. These judicial reviews opened the cases up to far greater public scrutiny than was previously seen.

One such case is the controversial Metalclad case under NAFTA, which had been arbitrated under the ICSID Additional Facility rules.[27] In the Metalclad case, the Mexican government's treatment of the Metalclad Corporation's waste treatment facility was found to have violated the NAFTA's provisions on expropriation and minimum international standards of treatment, and the government was ordered to pay Metalclad nearly 17 million US dollars (Mann, 2001, p.42).

However, as the arbitration was legally sited in Vancouver, British Columbia, this opened the possibility for the Mexican Government to challenge the Award before the Supreme Court of British Columbia. That Court partially overturned the substance of the award on the grounds that the Tribunal had decided matters "beyond the scope of the submission to arbitration."[28] From the procedural perspective, the Court's review was notable for having opened the dispute up to wider public scrutiny. Indeed, the entire court hearing was broadcast live over the Internet by the Vancouver Independent Media Center.[29]

Thus, the differing processes through which arbitral awards may be challenged under the ICSID Convention compared to under all other sets of known arbitral rules, might be of strategic importance to investors. Researchers should monitor these different channels to assess whether challenges to sensitive government regulations show any greater signs of success under one or the other avenues, given the very different levels of post-award review. Indeed, there is a literature developing following the controversial Metalclad case, which questions whether awards in some of the high-profile NAFTA arbitrations which implicate important public policy issues, should be viewed far less deferentially by revewing courts, than would awards in more straight-forwardedly "commercial" disputes (Brower, 2001; Thomas, 2002; Brower, 2002; Tollefson, 2002)

Having now surveyed some of the shortcomings of these arbitral rules, we can turn to an effort to assess the extent to which investors are using investment treaties to challenge sustainable development policy making or other sensitive government measures.

VI. Emerging Disputes Under BITs

Informal Disputes

Efforts to monitor the volume of investor disputes under BITs are complicated by the fact that not all uses of these treaties will occur in a *formal* arbitral capacity. Increasingly, the treaties are recognized to have great utility in informal contexts – often as a deterrent - whereby investors refer to the treaty, and the threat of arbitration thereunder, in the hope of diverting a new or proposed government measure (Mann, 2001, p. 42). Armed with these BITs, investors enjoy an expansive opportunity to lobby away from the public eye, as, apart from under the ICSID rules, there are typically no treaty requirements to divulge the existence of even *formalized* legal disputes to the general public.

Practicing lawyers do admit that they hear rumours of investors applying informal pressure upon host states – while brandishing an investment treaty as a potential legal stick. One more public instance of this saber-rattling was seen in Canada under the NAFTA, where the Philip Morris company had threatened on several occasions to challenge restrictions on packaging of cigarettes under the terms of Chapter 11 of NAFTA. Canadian officials backed away from plans to impose plain packaging after Philip Morris hired a former US Trade Representative to advocate on their behalf (Appleton, 1998).

More recently, documents have fallen into the public domain which detail Philip Morris' warning to the Canadian Government over its proposed ban on "mild" and "light" labels (Public Citizen, 2002). In general, however, such informal usage is impossible to monitor. When coupled with the dismal transparency offered by most arbitral rules, it is possible that many uses of these treaties - both formal and especially informal - will occur with minimal disclosure of the details and legal argumentation, or may go unnoticed altogether.

When related to investment treaties, such informal threats are more worrying than they might be in relation to other laws or legal norms, precisely because the substantive implications of these treaties are not yet fully fleshed out. Thus, litigious investors may point to "precedents" in arbitrations under the NAFTA, with some confidence – recognizing that under-resourced host-states may not prefer to be the ones saddled with anteing up the capital required to further flesh out these untested treaty commitments in a formal arbitration.

Formal Disputes

ICSID, which is the most transparent of the arbitral avenues canvassed here, is the best starting point to examine emerging disputes. More rigorous investigation of the other more opaque arbitral processes will be necessary in future, along with sweeping reforms to open those avenues to public scrutiny.

In its most recent Annual Report, ICSID reveals that its caseload has continued to grow at a "record pace" (Tung, 2001). In 2001, the Centre saw 14 new cases, 11 of which were brought pursuant to a BIT (Obadia, 2001). The available evidence reveals certain trends in disputes coming to ICSID. First, the ICSID arbitrations seem to be more than run-of-the-mill commercial disputes. As the Deputy Secretary General of ICSID has noted:

> The cases now more typically concern claims over events such as civil strife in the State, alleged expropriations or denials of justice by it, and actions of its political subdivisions. Reflecting the times, several of the cases concern privatizations and several others may be said to involve environmental disputes (Parra, 1999).

Interestingly, a number of known BITs cases deal with water privatization (several of which are described in further detail below): Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic;[30] Azurix Corp. v. Argentine Republic;[31] and Aguas del Tunari v. Bolivia. At the time of this writing, another multinational water services company has signaled its intention to launch a BITs case against Argentina at ICSID.[32] Other recent disputes at ICSID touch upon matters such as the "rehabilitation of a hydropower plant,"[33] "cobalt and copper mining concessions,"[34] and a "gold mining concession".[35]

Not all of these disputes will necessarily implicate sensitive health & safety, human rights or environmental concerns. However, the framework under which they will be arbitrated makes it difficult – and sometimes virtually impossible - to know when they do so. The three below have been singled out, in part, because some information is available to suggest that they may implicate questions of considerable public interest.

Azurix Corp. v. Argentine Republic[36]

In 1999, the Azurix Corporation, a spin-off of the Enron Corporation, successfully bid $438.6 million in order to obtain a 30-year concession to run the newly privatized water systems in the province of Buenos Aires (Perrin, 2000). The company courted trouble with the government when customers began to complain of poor water pressure.[37] A larger controversy erupted in the spring of 2000 when the government was forced to warn half a million customers to avoid drinking the local water and to minimize exposure to showers and baths, due to an outbreak of toxic bacteria in the local water supply.[38] A local public health chief was quoted in the news media as saying: "I've worked here for 25 years and this is the worst water crisis I've ever seen here" (Perrin, 2000).

According to filings with the US Securities and Exchange Commission, Azurix countered that problems with water quality, "for the most part are due to failures by the Province to deliver infrastructure that it committed to deliver under the concession contract."[39]

Azurix Buenos Aires terminated its own concession contract with the government of Buenos Aires on Oct. 5, 2001. Around the same time Azurix filed a claim under the US-Argentina BIT, alleging that the regulatory actions of Argentina and its political subdivisions had violated the guarantees against expropriation, and fair and equitable treatment and "security and protection."[40] The firm is seeking more than $550 million (US) in compensation (Peterson, 2002). An arbitration tribunal has been selected and the case is proceeding behind closed doors.

Técnicas Medioambientales Tecmed, S.A. v. United Mexican States[41]

This case was launched under ICSID Additional Facility rules using the Spain-Mexico BIT in the autumn of 2000. Tecmed is seeking undisclosed damages as a result of a decision by the Mexican Government's National Ecology Institute to refuse Tecmed a renewal of its annual permit to operate the Cytrar hazardous waste confinement facility in Hermosillo.

According to news reports, the Cytrar facility was plagued by "sit-ins by local residents protesting the site's technical viability and lack of public participation in decisions regarding the hazardous waste confinement, as well as legal questions regarding Cytrar's proximity to Hermosillo (Nauman, 2000). Tecmed counters that its Cytrar facility was the target of organized protests designed to achieve a protectionist end: protecting Mexico's only other hazardous waste storage facility in Mina, near Monterrey (ibid).

Whatever, the facts of the case, and the merits of the complaint, the dispute is being heard in-camera before an ICSID arbitration tribunal, rather than in a more public forum. What's more, the existence of the ICSID investor-state arbitration led the Mexican government to request that a separate inquiry launched by a citizen's submission for environmental enforcement with the NAFTA Commission for Environmental Cooperation (CEC) be terminated.[42] This raises difficult issues concerning the priority of NAFTA's so-called environmental side-agreements and the investment provisions of NAFTA.

Aguas del Tunari S.A. v. Republic of Bolivia[43]

A long-term water-supply contract between a consortium led by the US-based Bechtel Corporation and Cochabamba, Bolivia's third largest city, gave the consortium exclusive rights to all the water in the area, including in formerly community-held wells (Finegan, 2002). Subsequent increases in local water rates – some bills doubled and amounted to a quarter of monthly incomes - and the legal expropriation of all public water supplies, triggered widespread unrest in Cochabamba and across the country.[44] These protests led to serious violence and the eventual declaration of martial law. Authorities warned executives that their safety could not be guaranteed and they fled Cochabamba.

Currently, the government and the consortium disagree as to whether Aguas Del Tunari abandoned its concession or was forced out. One thing is certain: Aguas Del Tunari is seeking to recoup its losses via an arbitration under the terms of a bilateral investment treaty signed between Holland and Bolivia. Shortly after signing the Cochabamba concession, the consortium moved its legal headquarters from the Cayman Islands to Holland. This suspicious-looking gesture has been decried by various campaigners as a form of treaty shopping.[45]

A Civil Society campaign has been launched to open up the arbitration and to ensure that affected stakeholders may participate in the proceedings (Center for International Environmental Law, 2002). Given the considerable media attention already devoted to the Cochabamaba dispute, it seems fair to surmise that the formal arbitration will attract a considerable deal of notoriety for the ICSID. One unintended outcome could be to encourage investors to choose more obscure arbitral rules in future – such as those described herein - which do not divulge the existence of formal disputes to the public.

VII. Conclusion

Doubtless, many lawyers, investors and signatory countries – and, one hopes, the sustainable development policy community - will be watching closely (or to the extent possible, due to transparency shortcomings) as the "dazzingly abstract" investor rights contained in these BITs are finally "put to an extensive test" in arbitrations like the ones described above. Those countries which have yet to affix their signatures and ratification to these still poorly-understood agreements - and have been made to feel sometimes that developments are passing them by - might yet come to be saluted for their foresight in having kept their feet firmly planted on the sidelines while the international legal obligations of host states to investors are slowly worked out on a case-by-case basis in arbitration.

For the present, much more work needs to be done to monitor traffic on the arbitral avenues highlighted in this paper, and to assess the implications of emerging disputes upon sustainable development policy-making. Indeed, until the current raft of litigation works its way through the system, it will be too early to assess what sort of *substantive* reform might be needed of the existing BITs provisions and how that reform can be best carried out.

Nevertheless, we can already identify some of the *procedural* shortcomings of BITs' dispute settlement mechanisms. A number have been highlighted herein, and doubtless others will emerge during subsequent efforts to monitor disputes under these treaties. Already it is clear that a number of the most obvious procedural weaknesses could have been avoided if the governments which negotiated these treaties had used more precise treaty language to override those portions of the arbitral rules which detract from basic standards of legitimacy, transparency and accountability.[46]

For instance, the rules guiding the selection of arbitrators, could, as in cases touching upon financial matters, also require special expertise of arbitrators where sensitive health, environmental or human rights issues are implicated. Likewise, obstacles to the participation of other parties, such as *amicus curiae*, could be overridden by express treaty provisions.

Treaty parties could also have designed dispute settlement institutions with the legitimacy to handle the scrutiny of sensitive government regulations, and the balancing of competing public and private interests which this requires (Pastor, 2001). Notably, when the US Congress granted trade promotion authority (fast-track) to the Bush Administration in 2002, it imposed a number of conditions on future investment agreements negotiated by the US Administration. This has led the Administration to alter its future negotiating position, so that it requires new treaties to contain dispute settlement provisions which require the release of documents, allow for *amicus curiae* interventions and hold tribunal proceedings which are open to the public (International Trade Daily, 2002). Because the proposed negotiating texts were not available at this time of writing, it is impossible to assess the extent to which these reforms will be sufficient.

In any case, hundreds upon hundreds of existing bilateral treaties have not been designed (or reformed) with such attention to detail. One future opportunity for sweeping reform of the existing treaties could one day come in the form of negotiations on a multilateral agreement on investment (Peterson, 2001). The latter could represent a potential opportunity for improving upon the flaws which continue to emerge in these bilateral templates.

However, as the potential uses of these long-ignored BITs comes to the attention of industry, there has been a growing resistance, led by business groups, to any effort to over-write or over-ride these treaties (Inside US Trade, 2002).[47] This might explain why the United States recently signaled to the WTO "that it preferred to have existing regional trade deals grandfathered so as to shield them from any new rules or clarifications agreed upon under the new round of WTO negotiations" (Inside U.S. Trade, 2002).

Apart from this, there are good reasons to not favor the World Trade Organization as the home for any such multilateral treaty, regardless of whether a WTO agreement would over-write existing BITs or simply co-exist alongside them (International Institute for Sustainable Development, 2001).

Nor, is the moment for such a multilateral agreement a propitious one. As has been argued here, only further resolution of pending cases will reveal to what extent the substantive BITs provisions prove to be as worrying a threat to sensitive government policies as the NAFTA has been to date. Thus, if WTO negotiations on investment are launched at the next ministerial conference in the autumn of 2003 in Mexico, it is unlikely that negotiators will be well placed to identify those substantive portions of the BITs which should be replicated, and those which should be reformed or phased out.

Just as critically, it is doubtful whether sufficient understanding of the relationship between foreign investment and sustainable development currently exists, to permit negotiators to craft an agreement which not only guards against strategic litigation against sensitive government measures, but which goes further and encourages those types of investments which are urgently needed to promote genuinely sustainable development (Mann and Von Moltke, 2002). While a single, balanced multilateral agreement could represent the best future outcome, potential WTO negotiations in 2003 would come at the wrong time, and in the wrong place.

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Endnotes

[1] UNCTAD, BITs in the Mid-1990s, pg.94; Antonio Parra, "ICSID and Bilateral Investment Treaties", ICSID News, Spring 2000, Vol.17, no.1; It must be noted that individual country practices, and even individual treaties, will differ as to the exact nature and scope of the investor-state dispute settlement mechanism.

[2] While ICSID seems to be ICSID the most popular forum. the confidentiality under other arbitral rules makes it difficult to accurately gauge ICSID's market-share of investor-state arbitration.

[3] See www.worldbank.org/icsid/cases/pending.htm

[4] See www.worldbank.org/icsid/cases/pending.htm

[5] Griger-Naon (2002) estimates that "1%" of the ICC's some 500 cases per year are BITs cases. Franke (2002) estimates that there are "1, 2 or 3" cases a year at the SCC.

[6] See for example, the Asean Agreement for the Promotion and Protection of Investments, discussed in Parra (1997), p. 345.

[7] Of course, as noted above, NAFTA disputes using the UNCITRAL rules would presumably be caught thanks to another filter, contained in the treaty itself: the requirement that Notices of Arbitration be publicly registered with the NAFTA Secretariat.

[8] See for example the testimony of Ronald Lauder before the Subcommittee on European Affairs, Committee on Foreign Relations, U.S. Senate, (Lauder, 2000).

[9] See for example the "International Dispute Resolution" portion of the website of Patton Boggs LLP which details a BITs dispute launched on behalf of a US Oil investor in Kazakhstan.

[10] For example, PSEG Energy Holdings Inc (2002)., a US Energy company, reveals in its filings with the US Securities and Exchange Commission (SEC), dated March 11, 2002, that it is challenging an Argentine law affecting its electricity distribution investments in Argentina.

[11] Some have raised the possibility that the ICSID, as the most visible of the arbitral avenues, could experience the same sort of public opprobrium as the GATT did in the early 1990s when it handled sensitive trade and environment disputes. See Sands (2000).. Quoted with permission of the author.

[12] See for instance the newly launched Stockholm Arbitration Reports (www.chamber.se/arbitration/english/)

[13] Agreement Between The Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investments, Article XI, available online at: http://www.dfait-maeci.gc.ca/tna-nac/fipa_list-e.asp

[14] Article 14(1) ICSID Convention.

[15] Articles 9, 10, UNCITRAL Rules; Article 17, SCC Rules; Article 7, ICC Rules

[16] For a backgrounder and documents relating to this intervention see: www.iisd.org/pdf/trade_methanex_background.pdf

[17] The Tribunal also warned that such disclosure would also be in violation of an undertaking on the part of Canada in a Confidential Order, agreed at the outset of the arbitration. See "Decision and Order by the Arbitral Tribunal in NAFTA UNCITRAL Investor-State Claim Pope & Talbot, Inc. and Government of Canada", March 11, 2002, at 15, 18

[18] This agreement is reflected in the consequent Amended Procedural Order on Confidentiality No.5, Sept. 17, 2002, available on-line at: www.naftaclaims.com

[19] See the arbitration web site of the law firm Mayer, Brown, Rowe & Maw at: www.interarbitration.net/introduction/toarbitrate.asp

[20] Bishop, R. Doak; Dimitroff, Sashe D.; Miles, Craig S., "Strategic Options Available When Catastrophe Strikes the Major International energy Project", *Texas International Law Journal*, Vol. 36, No.4, Pg. 668

[21] For information about Metalclad's costs, see note 18 in J.C. Thomas, "A Reply to Professor Brower", *Columbia Journal of Transnational Law, Vol.40, No.3, 2002*

[22] ICSID Schedule of Fees, July 1, 2002, available online at: http://www.worldbank.org/icsid/schedule/main-eng.htm

[23] The grounds are “that the arbitral tribunal was improperly constituted; that it manifestly exceeded its powers; that one of its members was corrupt; that there was a serious departure from a fundamental rule of procedure; or that the award failed to state the reasons on which it was based.”

[24] Details can be found on ICSID’s website at : www.worldbank.org/icsid/cases/cases.htm

[25] Grigera-Naon (cites the UNCITRAL Model Law on Commercial Arbitration.

[26] See also Grigera-Naon (2000) regarding the increasing practice of treaties requiring that Awards be rendered in New York Convention states.

[27] Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1

[28] The United Mexican States vs. Metalclad Corporation, 2001 BCSC 664, at 79 For a legal analysis of this decision see Mann 2001

[29] http://vancouver.indymedia.org/

[30] ICSID Case No. ARB/97/3

[31] ICSID Case No. ARB/01/12

[32] See the June 28, 2002 press release of the Suez Services Group: http://www.suez.com/finance2/english/news/detail.php?id=885&pg=year

[33] Zhinvali Development Ltd. v. Republic of Georgia, ICSID Case No. ARB/00/1

[34] Ridgepointe Overseas Developments, Ltd. v. Democratic Republic of the Congo and General des Carrieres des Mines, ICSID Case No. ARB/00/8

[35] Société d'Exploitation des Mines d'Or de Sadiola S.A. (SEMOS) v. Republic of Mali, ICSID Case No. ARB/01/5

[36] ICSID Case No. ARB/01/12.

[37] Ibid.

[38] Ibid.

[39] SEC Quarterly Report, Nov. 19 2001 Available on-line at: www.sec.gov/Archives/edgar/data/1080205/000095012901504206/0000950129-01-504206.txt

[40] Ibid.

[41] ICSID Case No. ARB(AF)/00/2

[42] See Cytrar II Citizen Submission, at: www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=58

[43] ICSID Case No. ARB/02/3

[44] Ibid.

[45] See the views of campaigning groups expressed in a piece for Project Censored: http://www.projectcensored.org/stories/2001/1.html

[46] Although the NAFTA Chapter 11 does not go far enough, its Article 1120(2) provides a model insofar as it expressly provided that the rules of arbitration applied “except to the extent modified” by the treaty.

[47] A letter written to US officials by the Emergency Committee for American Trade, National Association of Manufacturers, National Foreign Trade Council, and the US Council for International Business urged the Bush Administration to oppose an effort by the European Commission to have potential new applicants to the European Union abrogate their existing BITs with the United States.