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## Investment arbitration and the international rule of law

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Investment arbitration can contribute to the promotion of the international rule of law through a wider use of legal norms in the international society and through the protection of private persons' rights. However, as shown by the European Union's approach in this field, investment arbitration can only be a useful complement to the rule of law within the State if it is reformed to incorporate some elements of permanent courts. Firstly, legal certainty requires clearer and more predictable case-law, which would be eased by an appeal system based on a permanent body. Secondly, procedural fairness needs to be increased, especially through new appointment methods. Thirdly, several mechanisms can foster transparency.

Although the concept of rule of law was first developed within the State, to a certain extent it can also apply to the international society.<sup>1</sup> Added to the rule of law within the State (also covered by the similar concepts of *Rechtsstaat* and *Etat de droit*), the international rule of law can complete it and correct the limits of domestic law. External review (especially, external judicial review) of State action is certainly one of the constitutive elements of the international rule of law.

International investment law is a field of international law where dispute settlement plays a crucial role: besides traditional diplomatic protection (State-State dispute settlement), investor-state dispute settlement (ISDS) has developed dramatically over the last few decades, especially since the 1990s. It allows the settlement of disputes between foreign investors and host States, generally on the basis of one of the around 3000 bilateral investment treaties (BITs) in force. The vast majority of these treaties include at least one dispute settlement clause allowing claims against the host State concerning investments in its territory by investors which are national of the other State party.<sup>2</sup> Given the growing importance of investment arbitration, an analysis from the point of view of the rule of law helps shade some light on its shortcomings and possible evolutions. Among its multiple functions,<sup>3</sup> the concept of rule of law is a model or a value with a strong normative function. As such, it does not only help describe, analyse and legitimise positive law, but also to criticise it and to assess debates about possible reforms.

In the 1990s and in the 2000s, the growing number of BITs and investment cases seemed to show an overall positive perception of investment arbitration in the international society. The aim of investment arbitration implies a twofold contribution to the international rule of law. Firstly, it aims at avoiding politicisation of investment disputes, and thus it contributes to a wider use of legal norms in the international society. Secondly, it promotes the protection of private persons' rights against

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All websites were last accessed on 2 May 2018.

<sup>1</sup> James Crawford, 'International Law and the Rule of Law', *Adelaide Law Review*, Vol. 24, No. 1, 2003, pp. 3-12; Tom Bingham, 'The Rule of Law in the International Legal Order', in Robert McCorquodale (Ed.), *The Rule of Law in International and Comparative Context*, London, British Institute of International and Comparative Law, 2010, pp. 1-19. See also the site of the Kolleg-Forschergruppe "The International Rule of Law - Rise or Decline?", <http://www.kfg-intlaw.de/index.php?ID=1>.

<sup>2</sup> According to data of the United Nation Conference on Trade and Development, 2441 out of 2572 mapped treaties (UNCTAD, 'International Investment Agreements Navigator', <http://investmentpolicyhub.unctad.org/IIA>).

<sup>3</sup> See the chapter by Michal Peno in this book.

State abuse.<sup>4</sup> From the historical point of view, investment arbitration must be compared to previous methods for settling investment-related disputes, in particular diplomatic protection in all its forms<sup>5</sup>. Even without dwelling on the use of force as a method to settle investment-related disputes, which was lawful until the beginning of the 20<sup>th</sup> century, diplomatic protection has some obvious flaws from the point of view of the rule of law. Dispute settlement through diplomatic protection is not necessarily based on judicial procedures, or even on law; the right to exercise diplomatic protection is not an individual right, but a State's right; the State is not obliged to transfer to the injured person any compensation obtained for the injury.<sup>6</sup>

However, in spite (or because) of a growing number of cases, in the last few years investment arbitration has faced backlash.<sup>7</sup> Criticism of investment arbitration has always existed, especially in investment-importing countries, but in the last few years criticism was mainstreamed for the first time in investment-exporting countries, especially in Europe. Some examples illustrate this trend. Provisions on investment protection are included in a new generation of free trade agreements concluded by the European Union. Strong criticism has been voiced in several EU Member States, especially Germany, on investment arbitration provisions in the Euro-Canadian Comprehensive Economic and Trade Agreement (CETA, signed in October 2016, provisionally applied in part, but not yet fully in force<sup>8</sup>). As a result, the current version of the agreement has operated a significant shift towards settlement of investment disputes through a permanent court instead of arbitration. In spite of this redrafting, intense political debate on ISDS continued. For example, Belgium does not intend to ratify CETA on the basis of ISDS as it stands on the day on which CETA is signed.<sup>9</sup> The European Commission “is committed to further review, without delay, of the dispute settlement mechanism (ICS), and allowing sufficient time so that Member States can consider it in their ratification processes”.<sup>10</sup> This debate is not only about the political expediency, but also on the constitutionality of ISDS. The German *Bundesverfassungsgericht* judged in 2016 that the signature and provisional application of CETA was constitutional under some conditions, but will render another judgement before the ratification of the agreement.<sup>11</sup> The French *Conseil constitutionnel* judged in July 2017 that the ratification of CETA is constitutional under French law.<sup>12</sup> The Court of Justice of the EU will review the compatibility of ISDS with EU law in *Opinion 1/17*.<sup>13</sup> The Court has already judged that (at least some) investor-State arbitration clauses in BITs between EU Member States are not compatible with EU law.<sup>14</sup>

In sum, it has become clear that unconditional acceptance of investment arbitration cannot be taken for granted. To what extent is investment arbitration compatible with the concept of rule of law?

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<sup>4</sup> For a reflection on investment law as a means to protect individual rights, Nicolas Klein, *Das Investitionsschutzrecht als völkerrechtliches Individualschutzrecht im Mehrebenensystem*, Baden-Baden, Nomos, 2018.

<sup>5</sup> For a retrospective view through the lens of the rule of law, Richard Happ, ‘Why Investment Arbitration Contributes to the Rule of Law: Without Knowing Where We Came from We Cannot Know Where We are Heading’, *European Investment Law and Arbitration Review*, vol. 1, 2016, pp. 278-287. The author underlines the achievements of investment arbitration and argues that current reforms continue an evolutionary process.

<sup>6</sup> See Articles 1, 2 and 19, c of the International Law Commission's Draft articles on Diplomatic Protection of 2006 (Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)).

<sup>7</sup> With specific reference to the contribution of this trend to the development of the international rule of law, Prabhash Ranjan, ‘National Contestation of International Investment Law and the International Rule of Law’, in Machiko Kanetake & André Nollkaemper (Eds), *The Rule of Law at the National and International Levels : Contestations and Deference*, Oxford, Hart, 2016, pp. 115-142.

<sup>8</sup> Most provisions concerning investment protection, including those covered by this chapter, are not yet in force.

<sup>9</sup> CETA, Statements to the EU Council minutes, doc. 13463/1/16, *Official Journal of the European Union*, L 11, 14 January 2017, p. 9, Statement 38, para B.

<sup>10</sup> *Ibid.*, Statement 37.

<sup>11</sup> *Bundesverfassungsgericht*, 13 October 2016, 2 BvR 1368/16, 2 BvE 3/16, 2 BvR 1823/16, 2 BvR 1482/16, 2 BvR 1444/16; 7 December 2016, 2 BvR 1444/16, 2 BvR 1482/16, 2 BvR 1823/16, 2 BvE 3/16.

<sup>12</sup> *Conseil constitutionnel*, 31 July 2017, Decision No 2017-749 DC.

<sup>13</sup> CJEU, *Opinion 1/17*, request by Belgium, 7 September 2017.

<sup>14</sup> CJEU, 6 March 2018, *Slovak Republic v Achmea*.

Some research projects try to answer this question within a broader framework, which also covers substantive standards of investment protection: international investment law as a whole is analysed in its relations with the rule of law.<sup>15</sup> This approach allows to tackle issues such as the influence of international investment law on the domestic rule of law.<sup>16</sup> Although linked to substantive issues,<sup>17</sup> procedural issues of international investment law raise specific questions. Legal doctrine has already started a separate analysis of the relation between investment arbitration and the rule of law,<sup>18</sup> which proved to be controversial.<sup>19</sup> Thus, this chapter will only focus on investment arbitration.

The debates of the last few years within the EU have shown that investment arbitration needs to be reformed to get closer to the model of the rule of law. Starting from 2015, the European Commission and the European Parliament have put forward an ambitious reform of investment arbitration, in fact a transformation into a permanent court system<sup>20</sup>. This evolution would strengthen the effective promotion of the international rule of law in ISDS in three areas where investment arbitration has proved not to be sufficiently equipped to achieve this goal: legal certainty (I), procedural fairness (II), and transparency (III).

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<sup>15</sup> Yves Fortier, 'Investment Protection and the Rule of Law: Change or Decline?', in Robert McCorquodale (Ed.), *The Rule of Law in International and Comparative Context*, London, British Institute of International and Comparative Law, 2010, pp. 119-135; Norah Gallagher, 'The Rule of Law and Investment Protection', in Robert McCorquodale (Ed.), *op. cit.*, pp. 137-148; Photini Pazartzis, 'Committee on the Rule of Law and International Investment Law : Working Session', *International Law Association Reports of Conferences*, vol. 77, 2016, pp. 331-339.

<sup>16</sup> Benjamin K. Guthrie, 'Beyond Investment Protection: an Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law', *New York University Journal of International Law and Politics*, vol. 45, No. 4, 2013, pp. 1151-1200; Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States. Enabling Good Governance?*, Oxford, Hart, 2018.

<sup>17</sup> Christoph Ohler, 'Democratic legitimacy and the rule of law in investor-State dispute settlement under CETA', *European yearbook of international economic law*, vol. 8, 2017, pp. 227-245. For the author, the most outstanding flaws of ISDS are not of procedural but of substantive nature.

<sup>18</sup> Gus Van Harten, 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law', in Stephan W. Schill (Ed.), *International investment law and comparative public law*, Oxford, Oxford University Press, 2010, pp. 627-657; John P. Gaffney, 'The Rule of Law and Alternatives to Investment Arbitration', *European Investment Law and Arbitration Review*, vol. 1, 2016, pp. 267-273; August Reinisch, 'The Rule of Law in International Investment Arbitration', in Photini Pazartzis & Maria Gavouneli (Eds), *Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade*, Oxford, Hart, 2016, pp. 291-307; Rule of Law Institute of Australia, 'International Investment Arbitration and the Rule of Law', 12 April 2017, <https://www.ruleoflaw.org.au/international-investment-arbitration/>.

<sup>19</sup> Compare Christian Tietje, 'Investor-State Arbitration as Part of the International Rule of Law', 4 July 2016, <https://voelkerrechtsblog.org/investor-state-arbitration-as-part-of-the-international-rule-of-law/> and John Doe, 'Investor-state arbitration: rationale and legitimacy. A reply to Christian Tietje', 6 July 2016, <https://voelkerrechtsblog.org/investor-state-arbitration-rationale-and-legitimacy/>.

<sup>20</sup> European Commission, 'Investment in TTIP and beyond – the path for reform', [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF); 'Trade for All – Towards a more responsible trade and investment policy', [http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf), pp. 21-22; European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)). Among the numerous commentaries, one has underlined the potential of this approach by referring to a possible "constitutional moment in international economic law" (Stephen W. Schill, 'Authority, Legitimacy, and Fragmentation in the (Envisaged) Dispute Settlement Disciplines in Mega-Regionals', in Stefan Griller, Walter Obwexer, Erich Vranes (Eds), *Mega-regional trade agreements : CETA, TTIP, and TiSA new orientations for EU external economic relations*, Oxford, Oxford University Press, 2017, pp. 111-150, pp. 131-150).

## I. Legal certainty

Legal certainty is without doubt a central element of the concept of the rule of law.<sup>21</sup> Clarity, accessibility and predictability of the law also have obvious implications on its equal application.<sup>22</sup> Arbitral tribunals must and do state reasons for the outcome provided in awards and other decisions. However, arbitral practice is often inconsistent, even on some crucial issues. Examples include the notion of investment, which is the criterion of jurisdiction *ratione materiae* of investment arbitration tribunals, the use of most-favoured nations clauses inserted in BITs, the effects of called umbrella clauses, the scope of fair and equitable treatment clauses and the notion of indirect expropriation. In extreme cases, two tribunals can reach opposite conclusions on the same set of facts presented in different cases, between formally different parties and on the basis of different treaties. A textbook case in this respect are the two parallel cases *CME v Czech Republic* and *Lauder v Czech Republic*.<sup>23</sup> The statistical importance of inconsistency should not be exaggerated: on several issues, solutions are well-established and recognised as such by most or all arbitral tribunals. In other words, the outcome of disputes is not totally unpredictable. Moreover, arbitrators are not totally responsible for inconsistencies: BITs, especially older ones, are often drafted in loose terms, by reference to broad or even vague concepts like “fair and equitable treatment”. To a certain extent, international investment law as a system has also proven its ability to self-regulate.<sup>24</sup> In particular, more recent treaties can build on a wider case-law, to codify it or to correct it, and anyway to clarify it through a sort of dialogue between arbitrators and law-makers. Strengthening this dialogue is not a panacea, but it is useful.<sup>25</sup>

However, the current situation is certainly at odds with a full-fledged protection of the rule of law. This outcome seems inevitable in a system made up of *ad hoc* tribunals: in principle, a different tribunal was constituted for each of the 855 known investment arbitration cases.<sup>26</sup> Besides, in most cases domestic courts cannot help provide consistency. In commercial arbitration, in certain circumstances national courts can review of arbitral awards within the framework of the 1958 New York convention on the recognition and the enforcement of foreign arbitral awards. This framework is applicable to some ISDS awards, but the majority of cases are subject to the 1965 Washington convention which established the International Centre for Settlement of Investment Disputes (ICSID) and set a self-contained system for the review of awards.<sup>27</sup> Awards are not only binding but also enforceable (which is exceptional for international adjudication), and domestic courts may not review them.<sup>28</sup> The ICSID system does include annulment proceedings. However, article 52 of the convention sets limited grounds for annulment: two of them – manifest excess of power and failure to state reasons – allow a review of the way an arbitral tribunal has applied the law, but the standard of review cannot amount to an appeal of the award and annulment committees are not permanent but *ad hoc*. In its current form, investment arbitration is incompatible both with a system of precedent and with a system of cassation. In other words, the only means to ensure the consistency of case-law

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<sup>21</sup> For example, Tom Bingham, *The rule of law*, London, Penguin Books, 2011, chapter 3.

<sup>22</sup> *Ibid.*, chapter 5.

<sup>23</sup> *CME Czech Republic B.V. v. Czech Republic*, partial award of 13 September 2001 and final award of 14 March 2003, based on the Czech Republic-Netherlands BIT and UNCITRAL arbitration rules; *Ronald S. Lauder v. Czech Republic*, final award of 3 September 2001, based on the Czech Republic-United States BIT and UNCITRAL arbitration rules.

<sup>24</sup> In favour of self-regulation, Giovanni Zarra, ‘The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?’, *Chinese Journal of International Law*, vol. 17, No. 1, 2018, pp. 137-185.

<sup>25</sup> For example, under 8.31 (3) CETA, the CETA Joint Committee can adopt binding interpretations of the agreement.

<sup>26</sup> UNCTAD, ‘Investment Dispute Settlement Navigator’, <http://investmentpolicyhub.unctad.org/ISDS>.

<sup>27</sup> 650 registered cases until the end of 2017 (ICSID, ‘The ICSID Caseload – Statistics’, 2018-1, [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(English).pdf)).

<sup>28</sup> Under article 54 of the Washington Convention, “[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State”.

is the persuasiveness of previous awards.<sup>29</sup> Under these circumstances, the binding character of adjudication and the growing case-law, which could be positive elements for the promotion of the rule of law, risk to increase legal uncertainty instead of legal certainty.

A system of appeals with a permanent higher court not only allows a review in each the case, but most importantly guarantees consistency, at least on issues of law. A permanent Appellate Tribunal has been introduced in CETA to ensure uniform application of chapter 8 on investment protection.<sup>30</sup> Two other draft agreements, the EU-Vietnam free trade agreement and the EU-Singapore investment protection agreement (neither of which has been signed yet) confirm this approach.<sup>31</sup> However, these pioneering treaties are far from replacing all BITs, so that it will take a long time before the structure of ISDS can ensure legal certainty. Another important discrepancy between investment arbitration and the rule of law model concerns procedural fairness.

## II. Procedural fairness

Procedural fairness is another core element of the rule of law, because is linked to a basic form of separation of powers between adjudicators and law-makers. In particular, adjudicators should be independent and impartial.<sup>32</sup> arguably, independence and impartiality are constitutive elements of adjudication by definition.

In investment arbitration, perceived arbitrators bias might to be greater than actual bias. The asymmetric character of investment arbitration, i.e. the fact that by design there can be only one kind of defendant (a State), can contribute to perceived bias. The development of investors' obligations and access to justice also against investors at the international level could contribute to the promotion of the international rule of law.<sup>33</sup> Specific adjustments on a practical level to ease the access to ISDS for small and medium enterprises (as opposed to powerful transnational corporations) are also useful to enhance access to justice at the international level.<sup>34</sup> Depending on one's preferences, the asymmetric character of investment arbitration can be seen as more or less expedient, but it does not prevent, as such, procedural fairness: domestic law provides the host State with several means to protect its interests against investors.

Moreover, the rates of success of claimants seem to show that investment arbitration is not intrinsically pro-investor. It is virtually impossible to determine what is the "appropriate" success rate,<sup>35</sup> but barely more than one third of cases (only 36,5%) are decided in favour of investors. More than one quarter was decided in favour of the State (27,9%), and the rest was settled or discontinued.<sup>36</sup>

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<sup>29</sup> For an overview, Marc Bungenberg & Catharine Titi, 'Precedents in International Investment Law', in Marc Bungenberg et al. (Eds), *International Investment Law*, Munich, Beck, 2015, pp. 1505-1516.

<sup>30</sup> Under Article 8.28 (2) CETA, "[t]he Appellate Tribunal may uphold, modify or reverse the Tribunal's award based on: (a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; (c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b)".

<sup>31</sup> For a detailed analysis, *ICSID Review*, Vol. 32, No. 3, 2017.

<sup>32</sup> Tom Bingham, *The rule of law*, *op. cit.*, chapter 9.

<sup>33</sup> For an overview of existing practice, Karsten Nowrot, 'Obligations of Investors', in Marc Bungenberg et al. (Eds), *op. cit.*, pp. 1154-1185. In favour of establishing symmetrical substantive obligations for host States and investors, Christian Tietje & Kevin Crow, 'The Reform of Investment Protection Rules in CETA, TTIP, and other Recent EU-FTAs: Convincing?', in Stefan Griller, Walter Obwexer, Erich Vranes (Eds), *op. cit.*, pp. 87-110, pp. 107-110 (with specific reference to the positive impact on the rule of law at 110).

<sup>34</sup> For example, CETA allows the CETA Joint Committee to adopt supplemental rules for small and medium enterprises (Article 8.39 (6)).

<sup>35</sup> For an empirical study, Thomas Schultz & Cédric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantative Empirical Study', *European Journal of International Law*, vol. 25, No. 4, 2014, pp. 1147-1168.

<sup>36</sup> UNCTAD, 'Investment Dispute Settlement Navigator', <http://investmentpolicyhub.unctad.org/ISDS>. These figures are calculated on known cases worldwide. Success rates can vary, in particular depending on the defendant. For example, investors' success rate is significantly lower in cases where EU Member States are defendants.

It is true that arbitrators might experience conflicts of interest, as it is arguably in their interest to broaden their jurisdiction. As a consequence, some investors (especially those with deep pockets) can be tempted to continue costly proceedings which a State may wish to end rapidly by transaction, irrespectively of how serious the claim is. Even if the risk of frivolous claims must be taken seriously,<sup>37</sup> the financial argument should not be given excessive weight, because starting long proceedings without serious claims is not necessarily a rational choice for an investor.

In terms of procedural fairness, the most sensitive aspect of investment arbitration is arbitrators' appointment. Current rules are based on the principle that at least one arbitrator is chosen by the parties to the dispute. The rule of law model leans towards of breaking the link between each party and "its" arbitrator. In particular, this seems useful to avoid that multiple appointment in several cases, a common practice in investment arbitration, becomes a reward for having protected a party's interests (those of a certain investor or State, or those of investors or States as a category) in previous cases. Norms on disqualification and other forms of prevention and reaction to threats to independence and impartiality already exist,<sup>38</sup> but they are soft-law provisions. Moreover, the flaws of investment arbitration from the point of view of the rule of law are linked, because these norms can be applied differently by different tribunals.

Tenured judges are probably the best solution to ensure high levels of expertise while limiting pressure from parties as powerful as transnational corporations or States. CETA and the following EU draft agreements adopted this approach by establishing one permanent (first-instance) Tribunal, complemented by the Appellate Tribunal described above. The fifteen members of the Tribunal will be appointed by the CETA Joint Committee. The President of the tribunal will appoint the members of the three-member division hearing a case, which means that parties to the dispute have no choice at all.<sup>39</sup> Procedural rule of law does not seem to be incompatible with all kind of arbitration. A total shift to tenured judges risks to increase the unavoidable tension between independence and accountability of adjudicators. It also reduces flexibility, whereas this appreciated feature of arbitration could be partially maintained without undermining procedural fairness. Another viable option would have been party choice from a roster, combined with a permanent Appellate body, following the inspiration of the WTO dispute settlement body. The practical functioning of the foreseen permanent courts will allow a more detailed assessment of their procedural fairness. Meanwhile, some partial achievements can be noted in the last area of tension between investment arbitration at the rule of law: procedural transparency.

### III. Procedural transparency

Whereas transparency as a general concept corresponds to openness and access to information and procedures, the scope and definition of transparency as a legal concept still needs to be clarified.<sup>40</sup> Nonetheless, the rule of law certainly includes publicity of the law. As the law must be publicly available and accessible (an aspect of legal certainty), this should arguably also apply to some aspects of adjudication proceedings.<sup>41</sup>

Confidentiality cannot be excluded in arbitration between private persons. However, international arbitration can be referred to as public in nature, at least in the sense that the legal basis for arbitration is generally a treaty (as opposed to a contract) and that the defendant is necessarily a State. This

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<sup>37</sup> For example, under 8.39 (5) CETA the costs of the proceedings are borne by the unsuccessful disputing party, which should deter unfounded claims.

<sup>38</sup> In particular, the 2014 *IBA Guidelines on Conflicts of Interest in International Arbitration*, [https://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx).

<sup>39</sup> Article 8.27 CETA.

<sup>40</sup> Anne Peters, 'Towards Transparency as a Global Norm', in Andrea Bianchi & Anne Peters (Eds), *Transparency in International Law*, Cambridge, Cambridge University Press, 2013, pp. 534-607.

<sup>41</sup> On investment arbitration, Mathias Wolkewitz, 'Transparency and Independence of Arbitrators in Investment Arbitration: Rule of Law Implications', *European Investment Law and Arbitration Review*, vol. 1, 2016, pp. 288-301.

implies that disputed measures can also include general norms and that the possible investor's compensation is a charge for public finance. As a consequence, international arbitration needs some procedural transparency. The 2013 United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State makes compulsory the publication of various information and several documents in the arbitration process (starting with the notice of arbitration), subject to certain safeguards, such as the protection of confidential information. Under certain conditions, both third parties (*amici curiae*) and non-disputing treaty parties (the State of origin of the investor) can make submissions.<sup>42</sup> In principle, these Rules apply only to proceedings based on investment treaties concluded after 1 April 2014, obviously a small minority. However, the 2015 Mauritius convention aims at broadening the applicability *ratione temporis* of the UNCITRAL Rules of Transparency to proceedings based on previous treaties. The Convention's ratification process is disappointingly slow<sup>43</sup>, but recent investment protection agreements also refer the UNCITRAL Rules of Transparency, if necessary with modifications.<sup>44</sup>

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In conclusion, the case of investment arbitration shows that positive law is not always the carbon copy of the rule of law model. In spite of recent developments, ISDS has a still a lot of room for improvement. Solutions in this field can only be effective if they are multilateral. In the hopes of the European Commission, the future network of EU investment protection agreements should lead the evolution from investment arbitration to a permanent multilateral investment court. In March 2018, the EU Council adopted the negotiating directives authorising the Commission to negotiate within the UNCITRAL to achieve this goal.<sup>45</sup> Given the current state of international economic relations, negotiations are not likely to succeed in the short term.<sup>46</sup> Nonetheless, the rule of law model will continue to inspire and encourage evolution.

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<sup>42</sup> For a detailed analysis, Dimitrij Euler (Ed.), *Transparency in international investment arbitration : a guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration*, Cambridge, Cambridge University Press, 2015.

<sup>43</sup> The Convention was only ratified by Canada, Mauritius and Switzerland. It is in force for these three States, but the ratification by the 20 other signatory States is still pending.

<sup>44</sup> Article 8.36 CETA.

<sup>45</sup> EU Council, Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, 12981/17, 1 March 2018.

<sup>46</sup> For example, see UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November-1 December 2017)*, 19 December 2017, A/CN.9/930.