White Paper 14

international investments

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1.

state of play

International investment is intrinsically linked to the question of international legal protection of aliens and foreign properties. Strictly speaking, international investment law came into being recently, in the 1960s, with the creation of the ICSID within the framework of the World Bank and the conclusion of hundreds and then thousands of bilateral treaties for the reciprocal promotion and protection of foreign investments[1]. This law however has its origins in ancient rules, that started develop during the 17-18th centuries, which imposed on sovereigns an obligation to protect foreigners and their property[2]. Thus, protection of foreign investments is shaped from various eras of international economic relations: the ancient trade treaties, and later the conventions of establishment, inspired the international legal regime devoted to foreign investments, which has continued to gain in importance with the global expansion of the world economy, the emergence of development problems in the countries that have emerged from decolonization, the question of the integration of countries in transition into the world economic order, and today's multiplication of free trade agreements[3]. In addition, the last decades have been marked by a powerful privatization phenomenon in many economic sectors, which has led to a significant increase in investment flows. In many countries, certain public service activities are managed or administered by foreign investors[4]. This development made it necessary to set up a framework for the protection of international investments, particularly during the 1980s and 1990s.

While the debate on international investment law issues was confined to a small club of specialists, it recently made a spectacular entry into the public sphere. International arbitration as a means of settling disputes between a State and a foreign

Note 1 On the history of investment law, see C. Leben, "La théorie du contrat d'Etat et l'évolution du droit international des investissements", 302 The Hague Academy of International law, Recueil des cours – Collected courses (2003) 197-386. For a more historiographical approach, S. Schill, C.Tams, R. Hofmann (eds), International investment law and history, Elgar (2018).

Note 2 For a synthetic approach, see M. Paparinskis, The international Minimum Standard and Fair and Equitable Treatment, Oxford University Press (2013) 20-30, as well as the references indicated. See also D. Anzilotti "La responsabilité internationale des Etats à raison des dommages soufferts par les étrangers", 13 R.G.D.I.P. (1906) 5-29.

Note 3 On the various "sources" of international investment law, see J. Viñuales (dir.), The Foundations of International Investment Law, Oxford University Press (2014).

Note 4 L. Disckinson, "Public law values in a privatized word", 31 The Yale journal of international law, (2006) 383-426.

investor (ISDS) has come under scrutiny[5]. However, beyond various initiatives aimed at reforming ISDS (aimed at increasing transparency of procedures and case law consistency), it appears that these criticisms reflect well-known divisions among stakeholders of economic relations: the North-South divide, never really settled, the North-North divide concerning the level of liberalization of international investments, and today a public-private interest divide which is apparent in the debate on safeguarding the State's power to regulate in the general interest[6]. Each of the actors in the field of investment law - States, multinational companies, NGOs – seems to be defending different approaches that appear challenging to reconcile.

It is no exaggeration to think that international foreign investment law is at a turning point in its history. The successive failed attempts to adopt a major multilateral agreement on investment during the 20th century have compromised the chances of multilateralization of the law[7]. It is therefore in the still bilateral or restricted plurilateral framework that developments are taking place, in particular, in the context of the negotiation of the so-called new generation trade and investment agreements[8]. Many of these instruments negotiated among developed countries alike developing countries promote a more balanced approach of investment protection.

International investment and international investment law are thus the focus of a reforming process requiring addressing many challenges. They are well known and well documented. There is no doubt that the future of investment and of invest-

Note 5 See for example Corporate European Observatory, Profiting from injustice. How law firms, arbitrators and financiers are fuelling an arbitration boom, Brussels, 2012.

Note 6 C. Titi, The right to regulate in international investment law, Nomos (2014), 240 p.

Note 7 See SFDI, L'accord multilatéral sur l'investissement: d'un forum de négociation à l'autre ? Paris, Pedone, 1999. Yet some kind of multilateralization through bilateral treaties, customary law and case law could be ongoing, see S. Schill, The Multilateralization of International Investment Law, Cambridge University Press (2009). One could also wonder whether the emergence of new generation treaties could enhance this multilateralization phenomenon, see J. Beechey, A. Crockett, "New generation of Bilateral investment treaties : consensus or divergence ?", in A. Rovine (ed.), Contemporary issues in international arbitration and mediation. The Fordham papers 2008, Nijhoff (2009) 5-26.

Note 8 See UNCTAD, Towards a New Generation of Investment Policy, UNCTAD IIA Issue Notes, 2013-5, 12 p.

ment law will (and has already started to) be deeply influenced by the necessity to take into account the following needs:

- Investment and the environment[9]:
    - Taking into account social and environmental stakes in promoting and protecting investment
    - Ensuring that investment can be a leverage for and not a threat to the transition towards a greener economy
- Investment and sustainable development[10]:
    - Ensuring that investments are made in the interest of sustainable development
    - Finding a balance between interests of developed and developing countries
- Investment and general interest[11]:
    - Guaranteeing a fair balance between the need to protect foreign investment and the need to protect States' rights
    - Taking into account the positive social impact of some investments while reducing the negative social and environmental impact of others
    - Taking into account the interests of local populations when the investment is made under the form of physical facilities or mining infrastructures in particular
    - Engaging a reflexion on the need to adjust protection according to the nature of the investment and its contribution to the host State's economic development (distinguishing portfolio or purely financial investment and investment that actually creates activity and wealth on the territory of the host State)

Note 9 See J. Viñuales, Foreign Investment and the Environment in International Law, Cambridge University press (2012) 474 p.

Note 10 Ibid.

Note 11 L. Diskinson, "Public law values in a privatized word", 31 The Yale journal of international law, (2006) 383-426.

- Investment incentives[12]:
  - Re-assessing the relationship between the existence of an investment protection system and the actual increase of investment flux
  - Identifying the precise and actual incentives of investment flux
  - Reconciling foreign investment and the current trend towards re-nationalization and re-localisation of economic activities
- Settlement of disputes[13]:
  - Improving the independence and impartiality of the dispute settlement system including the creation of a permanent court mechanism
  - Ensuring that decisions or awards issued by the dispute settlement mechanism are actually enforced

Although, international investment law has already started to take into account those different needs, many remain to be addressed. It can be said that the state of the law is the following on those different topics:

- Investment and the environment:
  - Introduction of environmental provisions in treaties[14]:
  - Provisions securing the regulatory powers of the State in favour of the environment
  - Provisions inviting investors to engage in a corporate social responsibility approach
  - Provisions inviting States not to lower their environmental standards as an investment encouragement

Note 12 On the relationship between investment treaties and investment flux, see Hallward-Driemeier, « Do bilateral investment treaties attract foreign direct investment ? Only a bit...and they could bite », World bank policy working paper n°3121, 2003; J. Salacuse, N. Sullivan, "Do BITs really work : an evaluation of Bilateral Investment Treaties and their grand bargain", 46 Harvard International Law Journal (2005) 67-130.

Note 13 For a strong criticism against the current system see S. D. Franck,"The Legitimacy Crisis in Investment Treaty Arbitration : Privatizing Public International Law through Inconsistent Decisions", 73 Fordham Law Review (2005) 1521.

Note 14 K. Gordon, J. Pohl, Environmental concerns in international investment agreements : a survey, OECD Working Papers n°2011/1, OECD Publishing.

- Evolution of case law in the sense of an inclusive approach[15]:
- Admission of a general requirement to respect domestic law (thus including domestic environmental law)
- Better taking into account of the environmental aim of some State measures in the interpretation of treaty standards

- Investment and development:
  - Discussions of international investment framework are taking place in universal fora (WTO, UNCITRAL)

- Investment and general interest[16]:
  - Recognition of a general right to regulate in favour of States, provided that their measures are neither arbitrary nor discriminatory, both in treaties and customary international law
  - Non-lowering standards clauses
  - Preambular provisions referring to to the promotion of general interests (health, environment, human rights)

- Investment incentives:
  - Everything remains within the hands of States: most treaties do not apply at the moment of the admission phase
  - Non distinction is made on the basis of the nature or of any qualitative aspect of the investment to

Note 15 Beharry, C.L. and Kuritzky, M.E., "Going Green: Managing the Environment Through International Investment Arbitration", 3 American University International Law Review (2015) 384-386 ; also M.M. Mbengue, D. Raju, "The Environment and Investment Arbitration", in T. Schultz, F. Ortino, F. (eds.), The Oxford Handbook of International Arbitration, Oxford University Press, 2020.

Note 16 K. Vandevelde, "A comparison of the 2004 and 1994 US Model BITs : rebalancing investor and host country interests", in K. Sauvant (ed.), Yearbook on International Investment Law and Policy, 2008-2009, OUP, 2009, 283-317

- trigger the protection: what matters is that there is an investment, on the sole basis of economic criteria.
- General trend in the sense of increasing the screening powers of States but mostly on the basis of economic and strategic motives, not that much on considerations in relation with social or environmental considerations

- Settlement of disputes:
  - Improvement of transparency and independence requirements through the adoption of new norms (in particular, a joint code of conduct adopted by ICSID and UNCITRAL in 2021).
  - Increasing scope for arbitrators' disclosure obligations in annulment phases *(*Eiser v. Spain*)*.
  - Arbitration remains limited to biggest investors, even if ICSID recently changed its arbitration rules in order to increase the accessibility of ICSID tribunals (in particular in the context of the expedited procedure).
  - Efficiency of enforcement depends on the arbitration rules (it is supposed to be easier in the context of ICSID) but lack of studies and statistics on this point.

Independently of all the changes this field of international law has been facing since the beginning, it cannot be denied that international investment arbitration has been constantly increasing in the last 50 years, and it has contributed to the peaceful settlement of disputes across the world.

2.

challenges

Interviews conducted with various stakeholders in international investments[17] have been a fruitful opportunity to identify various challenges in the field. It appears that ongoing developments and further discussion will be needed on : the concept of investment itself (1), on stakeholders (2), on the need for a universal framework (3), on substantive provisions (4) and on procedural rules (5).

1. On investment: general trends and the need for a protection

What are the major investment incentives today?

It has been brought to our attention that the main investment incentive was the possibility to bring money back. However, it has been observed that the fragmentation of international trade may become an obstacle to achieve this objective. In practice, investors have to take into account : many different aspects like sanctions, maritime routes, exchange control, taxation.

The legal protection afforded by international law is one among other incentives that motivate the decision to invest and its role might be overestimated It was observed that only few examples were found in which the investment operation was structured in a way as to benefit from the protection of a treaty it would not have enjoyed otherwise.

In fact, incentives may vary upon the type of industry involved. For long-term investment the legal framework may be of core importance as an investor would expect a a minimum of stability in the long term. Generally speaking, the easier it is to get the investment back, the less important will the legal framework be. Several persons have insisted on the criteria of withdrawal: if withdrawal of investment is to be complicated and costly, a particular attention will be paid to the applicable rules.

For this reason, it is likely that investors will increasingly resort to investment contract that may offer a better protection. It was argued for instance that litigation under BITs have proven more complicated and unpredictable for investors as States have increasingly raised jurisdictional objections that sometimes appear difficult obstacles to overcome. Designed to encourage

Note 17 See the list of interviewees at the end of the White Paper.

and protect foreign investments, BITs are now sometimes perceived as seeking to dissuade them to the point that some investors regret having initiated an arbitral procedure.

That being said, export credit agencies and moneylenders are increasingly sensitive and demanding about the quality of legal protection. They may require investors to invest only in places where a sufficient legal guarantee is ensured and where the applicable law is clear enough to avoid disputes.

Also, tax legislation has been a major concern and incentive for investors. However, in the future, tax burdens will play an increasing role to the point where it will be of paramount importance for an investor to decide whether or not to invest. It is believed, that sometimes investors would prefer having the protection of a double taxation treaty, rather than the protection of a BIT.

The extra-economic factors (in particular, environmental issues) appear to be secondary in the decision to invest or not. It seems that the need to take into account the environment is often imposed by shareholders or moneylenders so that companies have to adjust their investment policy accordingly. A real green transition can only happen if entities that finance international investment decide not to support any operation that is not environmentally friendly.

Evolution of forms of international investment

Even though the main pillars of international investment will remain unchanged (economic contribution, duration, risk), the definition of "investment" may change over the next years with the development of new economic markets such as digital markets that expand the space for investment (Internet platforms, innovative products, etc.). The evolution may include more creative methods for investment, particularly as indirect investments. For that reason, adjustments to the notion of investment might be made in future investment agreements and by arbitral tribunals. Having said that, the current forms of investing will also remain, but it cannot be denied that indirect investments may be more in demand due to the increasing use of high technology, platforms, data and the Internet. Investing through funds has been often used in the past decades, and chances are that this form of investment will be even more developed in the future.

It could also be expected that successful investments will require a true alliance between investors and States, including their public entities, as it happens for instance in Australia. Such model of public-private alliance in which investors and States share lost and profits and losses appears to be the less proble-

matic since both partners are on equal footing for the purposes of performing the investment activities and achieving their goals.

A point of vigilance on the form of foreign investment comes from the requirement of certain States that the investment takes form through a local structure, incorporated according to their own laws. This can be a source of risks for investors, notably of provoked liquidation.

In any case, the evolution of investment protection is highly indicative of the emerging change of investment itself. Starting with legal instruments, the concept of covered or protected investments is shifting towards making investments more accountable, sustainable, and aware of social and environmental factors. This is a holistic approach to investment that goes beyond mere economic due diligence.

Interviewees have also highlighted Geopolitics and interstate relations as another factor of evolution in the international investment field. The effect of the aggression of Ukraine since February 2022, which prompted the adoption of numerous sanctions and similar restrictive measures targeting Russia and Russian affiliated entities in connection with the invasion is an example. As a result, for Russia, investment activity has been and obviously will continue to be significantly affected by the political agenda. In particular, massive sanctions imposed on the Russian investors in numerous jurisdictions and massively unfriendly policies towards Russian companies and individuals not forming part of the sanctions list, will require investors to seek new markets, and also new forms of cooperation with the States, with the aim to guarantee the security of investments. However, the impact of this crisis is about to go beyond just the Russian market of investments as the policy of imposing sanctions on private companies and persons creates legal uncertainty. These events will presumably have the impact not only on the Russian investors, but, more importantly, on the general level of trust in investment policies.

Which industries or sectors are more likely to see influx of investment in the forthcoming years?

Since the system of international trade relations is undergoing significant changes, one should expect a modification and redistribution of investment flows. Regional associations of friendly countries or associations between States with common

objectives, such as BRICS, can become the main platform for investment. In general, investment activity can decrease due to political uncertainty and unpredictability.

Natural resources such as oil, gas, mining, water but also construction, telecoms, bank, finances, transportation, services, commerce and supply chains for goods, will not disappear from the investment field, although it is possible that the traditional energy sector, represented by oil and gas, starts decreasing. Actually, it is possible that reserves of oil and gas remain available for at least 20 more years. The energy sector represented by mining, on the contrary, may continue its expansion.

Still, there will be sustained investment growth in commodities, which is, of course, quite important. This sustained growth indeed demands prioritizing the prevention of potential investment disputes.

However, there will be an increase in few more investments in specific industries, such as renewable energy, health care, technology, crypto currencies, data analytics, cloud computing, biotech and virtual transactions which will certainly become part of the investment landscape, much of which are not fully regulated, and when they be, naturally, this regulatory process may turn into investment disputes.

Actually, when considering the evolution of investment, special attention should be given to current trends in transnational economic transactions. Many of them now involve emerging technologies like Blockchain, NFTs, etc. These technologies raise important questions regarding lack of domestic regulation, the likelihood of transnational norms addressing particular issues, and the problem of the absence of territoriality of digital assets and transactions.

Despite the growth of new industries, this increase is not likely to come at the expense of investment in traditional sectors.

Evolution can also come from other different tendencies: for example, the increase of States' control on the admission of foreign investments and the trend towards a certain politization of international economic relations, sometimes against rules.

In any case, which sectors are more attractive will vary from region to region and from country to country, depending on their own needs but also on the global economy. In fact, each country and region has specific needs of development and growth. Some of them need for goods, manufacture, infrastructure, while others may need more services.

Rise or decrease of investment flux?

Investments will continue to expand, despite some difficult circumstances we have been facing recently, such as the pandemic and the current armed conflicts.

In fact, contrary to what could be expected, war might not lead to a decrease in the flux of cross-border investments, but it may certainly change the landscape for players and investments: prices may increase, scarcity may appear, inflation also will play a role, but investments will not stop. For example, in Ukraine, despite Russian's violations of international law, some investors may not withdraw their investments, and even though they leave the country, they will probably go somewhere else or diversify their investments. Russia may cause expropriations that will lead to multiple new arbitration cases, but attention must be drawn to the enforcement of awards because it prove complicated to achieve. Other investors have already withdrawn their investments in Russia and exceedingly few Western investors will be injecting money into Russia. Also, it is sure that most of the European countries, gas-dependent from Russia, may face gas supply problems, but that also means new opportunities for new investments and investors. It is hard to predict, but times have also shown that wars are opportunities to grow.

The change in the forms of investor protection will largely depend on the outcome of litigation following the sanctions and restrictions imposed in the context of the Ukrainian conflict. New questions will arise related to the assessment of the spread of unilateral restrictive measures, the fulfillment of obligations assumed under the conditions of the sanction's regime.

As for the pandemic, it was stressed that States have shown a will to protect themselves, at least on the supply of basic goods such as food, water, medicines, and others. This may also result in increasing "nationalism" and "sovereign-guided practices" aimed at promoting and protecting local industries in these primary sectors rather than foreign investments, deterring inward investment flux or obstructing foreign investment already established in these fields including expropriation. However, and again, foreign investment may increase in goods and services that cannot be assured by local production either in terms of quality or the quantity.

This growth or decrease in investment is obviously highly dependent on the context of each country and region. Developing countries, for instance, are still in need of foreign investment and this explains that there is a significant increase in FDI. There is yet much to do when it comes to developing countries as exporters of investment abroad.

Another important factor is also the question of investors' obligations. It is indeed expected that future rules on investment protection will also include investors' obligations (and this has already started). Yet, it was observed that such obligations might divert investment from certain States where obligations are stricter. In this respect, it was argued that obligations shall be envisaged on a global basis rather than a State-by-State or bilateral approach. The more universal they are, the more acceptable they are for investors.

2. Stakeholders

Stakeholders may remain the same in the future, but it is possible that more attention will be drawn to society/labour/indigenous groups as they have raised over the last years, concerns about environmental, social and human rights issues.

Balance of interests between the Investor and the State

It is well known that international investment law has been always struggling with establishing a balance between public and private interests since it was originally aimed at protecting private actors and their properties against sovereign powers. Despite all the efforts to equilibrate those interests, it remains unclear whether a more balanced approach will be effective considering the original misbalanced nature of international investment law. In this respect, clarifications are needed regarding the nature of the expected balance of interests in international investment law.

States will always remain a prey for the investor because an investor has always options as to where to invest and how to claim its investment rights. States are mostly in the position of having to defend themselves in arbitral tribunals against investor claims. On the opposite, investors will always be a prey for States since the latest, as sovereign, always act as they think is the best, even though that leads to harm foreign investors.

Investors insist on the fact that States remain sovereign and that, whatever the economic or political weight of the State, negotiation is never easy. Or course, it depends on circumstances but some elements such as the experience of the State in welcoming and negotiating with foreign investors appear to be central. In particular, in the field of natural resources, while it is much harder for investors to negotiate with a State whose resources have been exploited for a long time, negotiations appear easier where resources were recently discovered. Negotiation

also depends on the way the domestic market is organized: a monopolistic situation proves to be more challenging than an open market in which there are a lot of investors and where States are prompted to create a competition between them to get the deal.

On the other hand, States may also appear to have "schizophrenic" priorities: they tend to defend their own companies abroad but want to be in a position of controlling foreign investors on their territory. There is a strong discrepancy between what States want for their companies abroad and what they are ready to grant to foreign companies on their territories. This phenomenon seems to have been strongly reinforced during the last ten years.

As for the benefit of States in foreign investment, there are diverging opinions. Some are of the view that it is important to consider that the investor is contributing to the economy of the host state, as a result of which he should be afforded all legal remedies. This, in turn, provides the basis for finding a balance between the interests of the investor and the state. What's more, investors must not only have rights, but also obligations to respect human rights, social and environmental responsibility. New BIT's should encourage recourse to state authorities before resorting to arbitration. On the other hand, some of the authorities take the view that the balance of interests must now be shifted and that no preference should be given to the investor.

The Salini test requiring evidence of a certain contribution to economic development of the host country in order to be considered as an investment might not be the best way to think about a notion of investment. The distinction between direct and indirect investments remains the best way to think about the issue: States mostly benefit from direct investments, while portfolio investment is sometimes based on speculative purposes and does not intend to support a long-term activity. A distinction between the two in the protection granted by international law could be a way of addressing the issue.

Transnational companies

The question of the balance between States and investors is particularly visible in the case of multinational companies. International investment law needs to oversee and probably regulate actively the projects embarked upon by transnational companies, since these powerful giants entities pose reasonable risks (i.e. uncontrollable behaviors) for many developing and least developed countries.

A lot of change and consolidation on how transnational companies conduct their business and investments due to Environmental, Social and Corporate Governance (ESG) has emerged. This is indicative of a certain return of States in the regulation, but also of a willingness of companies to change their behaviour.

ESG is an increasingly influential approach to cross-border investment. Including ESG provisions and obligation in BITs would be helpful. This would provide clear expectations but would also require careful drafting, specific obligations, and not merely aspirational statements. There is an emerging global concern on the need to invest in education and the environment, which is seen as a win for all.

In any event, transnational companies will have to accept the emergence of the due diligence standard, through domestic and European regulations. Many States have already adopted a due diligence obligation but it seems that companies would benefit from an international framework on this question. Legal stability would greatly benefit from a global framework on due diligence, beyond domestic legislation. Yet an international standard may also emerge from transnational companies practice that tend to adopt their own standards. The role of companies could be complementary to that of States if they are unwilling to adopt due diligence standards.

Another generalization process of the due diligence standard is happening through contracts. Parties tend to introduce obligations of this kind so that it may become some kind of a new *lex mercatoria* rule. This will take time but this evolution is necessary to complement the adoption of domestic rules on due diligence, and it supports the emergence of a common standard, beyond peculiarities of domestic regulations. An international standard of due diligence can only emerge though domestic regulations *and* transnational contracts.

Civil society

As for the concerns of ethnic groups, environmentalists, and labour, these are better addressed through the relationship of these groups to the domestic States, or through regulation. Special attention may be paid when damages caused by an investment project cannot be recoverable.

These matters involve considerations that are particular to each State. Some BITs and many contracts today include ESG clauses that impose compliance obligations on the investors. Some instruments also provide shared obligations and rights for indigenous and local communities as well.

For instance, Colombian indigenous consider that the Colombian BIT Model should have taken into account the point of view of the communities on environmental standards. More so, the conversation in the country ought to be about another type of profitability, "a profitability to enable life". At the same time, Colombians indigenous opine what ought to be done is to have high environmental standards that incorporate the cosmopolitan vision of the communities and provide clear rules. The State should consider the cosmopolitan vision of the communities when issuing environmental regulations.

This has become of increasing importance as local and indigenous communities gain bargaining power such that they must be taken into account when considering an investment. For example, in Canada, the use of natural resources requires buy-in from the surrounding community, both as a legal mandate and as a private initiative in order to ensure success over the investment time. This calls for developing a constructive relationship with community leaders.

In this regard, there is a rising trend to impose strong jurisdictional requirements (or tools open for States, like denial of benefits clauses). Measures to prevent treaty shopping or preclude shareholder's claims for reflective loss, as well as the establishment of adequate investor-state communications, are some of the actions taken with regards to the rising position of transnational companies.

Moreover, investment treaty arbitrations do not arise only from disputes between States and transnational companies, but also individuals. There have been some cases in the past where individuals claimed against States, but in the future this can be a trend. Besides, we do not yet know how this will articulate with investment treaty arbitration, but there is a new set of rules called The Hague Rules On Business and Human Rights Arbitration, based on the UNCITRAL arbitration rules, whose purpose is to settle business and human rights disputes. This set of rules may overlap, somehow, with investment treaty arbitrations, but it can certainly expand the stakeholders, and the parties to arbitration proceedings, as explained in its introductory note:

> *"As with the UNCITRAL Rules, the scope of the Hague Rules is not limited by the type of claimant(s) or respondent(s) or the subject-matter of the dispute and extends to any disputes that the parties to an arbitration agreement have agreed to resolve by arbitration under the Hague Rules. Parties could thus include business entities, individuals, labor unions and organizations, States, State entities, international organizations and civil society organizations, as well as any other parties of any kind. Equally, the Hague Rules purposefully do not define the terms "business," "human rights" or "business and human rights." For the purposes of the Hague Rules, such terms should be understood at least as broadly as the meaning such terms have under the UN Guiding Principles on Business and Human Rights. However, in the vast majority of cases, no definition of these terms should be necessary at all"*

(The Hague Rules On Business and Human Rights Arbitration, December 2019, https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf).

Also, the landscape for arbitrators, as stakeholders, may also change, since every day transparency and diversity are part of the debate, so that the traditional white/male/common law arbitral tribunal may turn into a more diverse tribunal in terms of gender, race, geography and legal background.

Finally, some political international organizations, such as the European Union, may have more and more involvement in investment international law.

Transparency

More transparency should be demanded from both investors and States, but both in some cases prefer confidentiality. Thus, too much transparency may be counter-productive and will not produce benefits for the people in the host states since it can increase the risk of investment and may decrease the number of investments in certain areas.

Transparency regarding stockholders is paramount. This point is particularly relevant nowadays.

Accountability and an adequate outcome properly executed under the relevant law and facts depends on transparency. Currently, for example, the drafters of codes of conduct are

discussing the creation of disclosure obligations. Recently, ICSID arbitration rules introduced changes aimed at fostering transparency. States and relevant stakeholders are beginning to take reasonable steps to make transparency a priority. IIA should strive for more transparency as investors want clarity and predictability. However, investors do not want to lose their corporate veil.

Third-party funding (TPF)

Third- party funding appears to be debated in the field. Many think that TPF is inevitable, and that there is nothing wrong with this practice and no reasons to ban it. Third Party Funders are often the only ones that make it possible for the investor to go have recourse to arbitration. Regulation is however needed, in particular to determine the source. TPF regulation should focus on disclosure covenants but it should not impose additional restrictions.

Others believe that TPF is nowadays a widespread practice and BITs should specifically address it. Access to international arbitration should be restricted to investors without TPF in order to guarantee less litigation of the cases, so that investors only go to arbitration when they have legitimate claims.

Funders relieve investors from legal costs and take a stake in the outcome of arbitration cases. Their behaviour is at times controversial as they often fund claims that have little or no merit.

State-owned companies as investors

Another development is the emergence of partially or fully State-owned enterprises as investors. Such is the case of a lot of state-owned Chinese companies. In Latin America, these public investors are also becoming important players, such as Codelco, a fully State-owned Chilean company which has been involved in at least in one dispute against Ecuador. Another example is Isagen – a hybrid public-private company partially owned by a Colombian local government.

Still, the stake of States in State-owned enterprises raises questions as to whether State-owned enterprises could pursue political or geo-strategic interests rather than economic interests. State-owned Chinese companies, for example, seem to prioritize China's access to natural resources. States could have a State-owned company pursue national security matters rather than purely commercial interests. Considering these possibilities, some have suggested including in BITs limits on the stakes that

States can take in companies, even though the BIT model of protecting investors is also applicable, at least for arbitration purposes, to public investors.

3. Legal framework

Is there a need for international rules?

We already have international rules voiced in treaties, customs and principles of law, so there is no need for more rules. According to some opinions, the system could keep working with the existing rules.

However, to address current concerns around ISDS, new rules are needed on most issues. It is worth discussing the nature of such rules. Rather than being indicative, these rules should be clear and binding and provide serious steps towards a transparent and efficient system.

In any case, it is necessary to create a methodology to adapt existing treaties to reform options. So, the idea is to guarantee a pacific transition between old clauses of the BIT and the new generation of them through a model treaty. In this order, States can choose if they want to take an international model of transition.

Another difficulty is still the relationship between international and municipal law and the approach distinguishing treaty claims and contract claims.

Is there any possible universality for international rules?

Most codifications and IIA focus on procedural rather than substantive issues. The greatest success was the creation of ICSID, to which 160 countries were signatories. Likewise, the UNCITRAL mandate to reform investment law is limited to procedural issues. As far as substantive regulation is concerned, it seems nearly impossible to provide uniform regulation. The Washington and New York Conventions are phenomena that seem difficult to replicate nowadays, partly because of the lack of necessity, partly due to the absence of a large common understanding of international law mechanisms and also because of major changes in negotiation and drafting techniques. As a result, there are strong doubts that universality of substantive investment rules can be achieved. Presumably, bilateral and multilateral investment treaties will remain the primary sources of law and we must admit that they are in fact sufficiently unified.

If failure to promote a multilateralism in the investment field may be deemed to contribute to fragmentation, it should be recalled that international law is inherently a slow process to create new norms because since it is very difficult to get States to think alike.

From this perspective, it can be argued that in international investments law universalism has never worked and may never do. Every treaty is different, specific to the peculiarities of each State. Still, general principles continue to be applicable. It seems utopic to think of a single treaty applicable to all States, more so considering that each treaty undergoes its own negotiation, which depends on the relationship between the States involved.

The experience of the Multilateral Agreement on Investment is a reminder of the obstacles to reach a consensus. Due to the remaining discrepancy between Europe and the United States the project was eventually abandoned by the United States when they understood that they had to make concessions. It is a good illustration of the schizophrenia of States that has been mentioned supra: some States were not ready to grant the protection that they required for their own companies abroad. However, the example of the reform of international taxation by OECD shows that initial disagreements can sometimes be overcome. What matters is also to find the proper framework (OECD is probably not universal enough).

Three factors lead to think that universality will be very hard to reach:

- First, the emergence of new actors both on the side of investors and on the side of States such as China or emerging countries who do not have the same capitalist culture as the EU and the US. Their approach cannot be the same as Western countries who have somehow a common history.
- Second, the emergence of new non-economic issues within international investment, which have fuelled the phenomenon of fragmentation of international law. The question of social rights and of the environment increases disagreements between States, in particular because some developing States are not ready to make as many efforts as required by developed countries.
- Third, the development of screening mechanisms shows that States tend to grant some priority to domestic considerations. States want to keep control on inward investment flux and there are some important differences between domestic investment screenings mechanisms, in particular

on the notion of national security or on the identification of strategic economic sectors. The general trend seems to be the return to unilateralism rather than the development of a multilateral framework.

However, in any case, the general rules of public international Law remain applicable to International Investment Law, which allows for an adequate and more general drafting of the treaties. Even though a universal statute may not be possible, general principle and broadly drafted standards on the environment, health, labour, and other matters, are necessary to strike a balance between providing certainty to investors and upholding the regulatory powers of sovereign States.

Many agree that there can be no single universal investment treaty and that it is preferable to agree on general rules to promote uniformity. According to E. Gaillard, one of the great accomplishments of the New York Convention was not standardization but rather its ability to enable each State to have their own regulation. The way forward could be to have a Model Law, relatively uniform, in the same terms than of the UNCITRAL Arbitration Law Model, but not universal.

Nevertheless, if a universal rule of law is to be promoted some States (Colombia, for instance) might propose the adoption of a Multilateral Convention, with opt-in/opt-out mechanisms, to which States can adhere with the aim of universalizing any potential reform.

Discussions on the opportunity to negotiate a conventional universal rule for investment law have not really explored the possible role played by customary law in the establishment of universal rules. This issue raise complex questions: how an arbitral tribunal could crystalize a custom? Does an arbitral tribunal have the same legitimacy and function than the ICJ to do so?

Finally, it is being said that universalism does not seem to a suitable solution to reform the system and that promoting uniformity of interpretation of existing rules by international tribunals seems preferable.

What about the relationship with international business law and general international law rules?

It is noted that international law has long permeated with various areas of regulation, including commercial law. Various areas of laws such as the protection of human rights and the environment, the fight against corruption and crime are increasingly being considered in the application of investment law. The

search for a balance between public and private interests – which needs to rely on the general international law concepts – will shape the future development of international investment law. On the other hand, some experts argue that neither the parties' submissions nor the arbitral awards rely on international trade law or WTO law. Rather, reliance on ECtHR jurisprudence happens, but remains isolated. Overall, it can be noted that the system seems to function in a vacuum and draws little from international trade or commercial law.

Scholars and judges have strived to fight the fragmentation of international law but in practice there are few means available to coordinate or harmonize these bodies of law. Still, International Law remains whole and investment is embedded within it.

Public law lawyers and private law lawyers may not address questions and challenges in the same way. Public law lawyers are not always business experts and private law lawyers are sometimes too focused on contractual issues alone.

There is an evident discomfort among ISDS users regarding the interaction between these two regimes. The current situation of the treaty regime is such that Public International Law is applicable and yet there are sources of authoritative interpretation that are deliberately disregarded. This inconsistency raises substantial concerns, which then, again, must be addressed in a reform that involves as many actors as possible.

As mentioned above, perhaps The Hague Rules On Business and Human Rights Arbitration will play an important role creating bridges between business law, general public international law, investment law, and other fields of international law that may interplay in the investment law field.

4. On substantive rules

The return to the contract or the improvement of treaties as a frame for international investments

There is a renaissance of the State contract depending on the needs of each investment. Investors might consider that a contract offers better protection to their rights, given the amount of jurisdictional and admission hurdles in BITs arbitrations. Even in countries like France, one can see a process vis-à-vis the internationalization of administrative contracts.

Some people think that treaties standards of protection are not

working because of jurisdictional defences of States. And this may explain why investors prefer resorting to contracts. However, not all investments are made by contracts means, and contractual investors have the right to claim before an arbitral tribunal for breaches of treaties, so the investment treaties may still be improved.

One proposed way is that States, rather than raising jurisdictional objections, make clearer treaties and honour their wording. Nothing obliges States to offer arbitration, but if they do, they should be consistent. For example, instead of making a general offer to arbitrate, States could condition the investor's access to arbitration (i.e. access by sectors which are critical to the country or by amounts of investment). Once arbitration is launched according to a specific set of rules, the States should not raise jurisdictional objections and only defend itself on the merits of the dispute.

Others propose to have treaties by sectors, which offer more clearness and transparency, rather than general BITs. There ought to be private agreements specific to each sector to define which tribunal or court will resolve a dispute, so that substantive standards may have more chances to be, at least, discussed. Those new agreements would give investors another option and allow them to decide whether or not to invest.

The classic protection in treaties

The evolution of the 'need' for investment protection in international law is rather difficult to assert. Most of all, both investors and States want to feel reassured regarding the conduct and decision of arbitrators and, perhaps, giving adjudicators clear rules is the best way to assure consistency in the decision-making process.

The problem with most of the standards of protection is that most of them are drafted like slogans (Douglas' position). This has been changing from the first generation of treaties to the most modern ones. However, still, protections are not very clear. That's not a problem for some, but other think otherwise. Thus, clarification of vague treaty provisions appears to be the major issue.

Most people think that in the future, the standards of protection will remain pretty much the same in terms of use, and that reliance on the FET, which remains unclear, will continue to be important. FET and expropriation are likely to be in high demand by investors when claiming against States because the latest always find ways to harm foreign investors, particularly by means of their control organs.

We have seen how States and tribunals have increasingly narrowed the scope of the FET. This is also obvious, when we notice

how contents of FET have been disaggregated into independent standards, such as transparency, proportionality, non-arbitrary treatment, and non-discrimination.

Beyond the content of the rules, a strong disagreement remains among States on the scope of the rules, in particular regarding the pre-establishment phase. The development of screening mechanisms shows that most States are not willing to take any commitment on the admission phase. It is quite unlikely that States may reach an agreement on this matter considering the high sensitivity of the matter and the strong differences of perception of the issue by different States.

The inclusion of provisions to protect States and public interests

The issues of ecology, sustainability, and human rights are closely connected to investments today and reflect general public interests. Their inclusion will guide the spirit and letter of a new generation of BITs as the current system of treaties don't draw sufficient attention to the issue of investors' accountability. Ideally, common solutions are needed to deal with these issues, as now the solutions sought are rather fragmentary and sought on a case-by-case basis.

The question is whether treaties should include more standards of protection for States by which investors oblige themselves and States may bring claims or counterclaims. For some, this could help the system to gain legitimacy and fairness. For others, this is not necessary because States retain the right to sue investors before their courts when they consider it necessary.

It seems fair for States to be able to defend themselves. There are certain things investors ought not to do and it is a good thing that States can defend themselves with equal arms. Yet, the asymmetric nature of investment treaties presents an obstacle to the admissibility of counterclaims.

For this reason, even though recent treaty practice has allowed the inclusion of obligations vis-à-vis investors, their wording remains aspirational rather than biding. Hence, the inclusion of new wordings including ESG obligations for investors, and others will be the next step ahead. Even assuming that future treaties will include binding investors' obligations, which remains uncertain, chances are that it will be limited to a practice among homogeneous countries: north-north countries, and south-south countries, not in the north-south countries.

It was also recalled that the protection of general interest is not necessarily a monopoly of the State: some companies may also

work for the public as some of them may have higher social and environmental standards than States, as for example the code of conduct of the French company Danone. Some States have prohibited the intervention of NGOs on some projects and have thus prevented any possibility for the civil society interests to be taken into account. It is thus important to keep in mind the fact that it is also a matter of balance and that a real protection of public interest will never be achieved only by relying on constraint. An association of the private sector is unavoidable.

Another point of vigilance is linked with discrimination based on nationality and sanctions. Restrictions on remittances, the inability to continue investment activity, as well as other obstacles to the preservation and growth of investments are consequences of unilateral restrictive measures. The basic question nowadays is whether the international community is ready to recognize common interests as justification of discrimination. In this case, reconsideration of fundamental principles of international investment law is needed. Currently, these are investment tribunals who are to decide the issue of sanctions and their grounds, reasonableness and proportionality, although the tribunals are not the best placed for that. In case where the sanctions policy becomes more widespread, new mechanisms should be implemented to provide the investors with necessary guarantees of fair trial and to secure them from unjustified sanctions.

5. On procedural rules

Is there a need for international arbitration? Is there a need for establishing an international investment court?

To the majority, there might be an active need for international arbitration. It remains a valuable tool and many partially rely on it to venture abroad and invest. It is a safeguard of sorts. An obvious reason is that in times of crisis there is more trust to independent tribunals than to State courts that may be more sensitive to political implications. However, this perception cannot be fed by the illusion that this regime creates a 'para-legality' in which investors enjoy preferential treatment, which is far from the deference that international law gives to sovereigns. An investment court, on the other hand, might be of use to tackle some of the issues in the current model of ad-hoc arbitration, but its efficiency to address substantive issues is yet to

be determined. According to one opinion, in current geopolitical situation the establishment of an international investment court may be feasible as a regional court and / or on the basis of a regional multilateral agreement. A 'global' investment court is seen rather as a Utopian project, account taken of the lack of investors' trust in the current situation.

International arbitration is needed and, for the majority, remains the best dispute settlement mechanism as it guarantees equality of parties. Some consider that public actors raise the legitimacy crisis without taking into account private investors' point of view.

For most people, even though in theoretical terms the idea of having a Court or a permanent body to adjudicate international investment disputes may be very interesting, in practical terms, this Court might not function is. Uncertainties remain as to the judges' appointment process. As an international court, it would seem logical that States appoint the judges and this might deter investor to resort to the Court. Secondly, there is no guarantee that coherence and consistency in jurisprudence will be achieved. Thirdly, there is no a general traditional system of investment law beyond the BIT's fragmented system, that goes along with a Court for investment law cases. This is difficult to reach. But it is going to happen, for any reason, this Court will most likely have a very similar functioning as the ICJ.

For these reasons, it was observed that improvement of the arbitration system is preferable to the creation of new dispute settlement mechanisms since a decentralized system offers more flexibility and resilience.

Investors are not always very comfortable with the idea of a dispute with a State. Arbitration is seen as a failure because it means that the agreement with the State, which is always the result of a difficult and sensitive negotiation, has failed. Furthermore, even when the award is in favour of the investor, it is common ground that enforcement is a hard, long and costly process. There is no need for "chimneys awards" (the one that you can frame and hang on your wall, but from which you cannot get anything else). Thus, the first aim of investors is to avoid arbitration. But when the dispute arises investor will always prefer to resort to arbitration rather than to the domestic courts.

On the investment court project, it seems that several actors have not yet a definite position. Since disputes do not happen in all investment operations, many investors never had to deal with arbitration proceedings against a State so they are not really aware of the debate on the question of an investment court. It was also mentioned that investors, in exchange of States' renunciation from their immunity on some of their properties, could accept the establishment of such a court that

may imply withdrawal of the right to appoint arbitrators. The bargain would thus be that, on the one hand, investors give up some advantages of arbitration and, on the other hand, States guarantee that the decisions will actually be enforced.

According to another opinion, the Iran-United States Claims Tribunal could serve as a model for a permanent jurisdiction. Such a tribunal, possessing a necessary degree of the trust on the part of the investors and States, may be able to resolve a conflict of investment nature.

How can we improve international investment arbitration? And is there a need for another procedure of review of international investment arbitration awards?

The most pressing preoccupation seems to ensure more impartiality of tribunals, which, in turn, depends on the absence of any political pressure on arbitrators, and exclusion of any other forms of inappropriate influence of the arbitrator's State of nationality. In-depth re-thinking of the coexistence of public and private elements in international investment law, so as to offer, on both doctrinal and practical level, optimal models for balancing them is crucial. Other possibilities for development include, for instance, the creation of the Code of Conduct for arbitrators or third party funding.

There is very little accountability in the way arbitrators are adjudicating the cases brought to them. Choosing good arbitrators remain the best way to resolve this problem, but still, parties and lawyers, mainly, are the ones who chose arbitrators and they must do this in a very diligent way. Legitimacy will be achieved through various improvements: transparency, efficiency and respect for the rule of law, and of evidence. Recent amendments to arbitration rules show a tendency to avoid double hatting situations that enhance transparency and efficiency.

Enhancement of the arbitrators' disclosure obligations is key to ensure selecting process improvement of the arbitration system. In this respect, higher standards of independence and impartiality are needed. Efficiency of proceedings has also been highlighted as a preoccupation (arbitrators have a role to play in asking question that contribute to streamline the debates among the parties). Lack of consistency in the application of Public International Law to ISDS has also been raised as a major concern that, in turn, unveils the importance of the arbitrator's selection process.

Having options among classic arbitration and expedited arbitration is always a plus. The Canadian Model BIT as well as recent arbitration rules offer expedited arbitration for certain disputes for instance.

Another factor connected with the discrimination issue is the lack of uniformity in the tribunals' case law. It may lead to violations of investors' rights; the absence of established common landmarks and principles creates uncertainty in their legal status and expectations.

An option that may work better than an investment court would be a court of appeal, as nowadays it is difficult to organize and ensure predictability and consistency of arbitration practice. But this is also controversial because it may raise the same problem than of a permanent court for investments. It is possible to devise a system with a court of appeal and a threshold on the amount in dispute. Access to the court would be available for disputes that satisfy the minimum threshold, and both investors and States could appeal before it. The WTO system may offer an example, even though its appellate Body bodies is somehow more diplomatic.

There is also a need for a commitment by law firms not to overcomplicate cases, not to create unnecessary delays and not to bring frivolous claims, as well to limit the page count of filings.

Also, an underestimated element is the issue of access to dispute settlement to third parties, not as *amici curiae* but as real litigant. There is no access to justice for people or communities that are affected by the investment activity because they are neither investors nor States. There is an important legal vacuum here, both because those communities cannot access arbitration and because arbitral tribunals are not empowered to rule on their rights since they are limited to the rights and obligations set in investment treaties. There is here a need to reform investment treaties as well as arbitration mechanisms.

3.

questions

Question 1

A new balance between States' and investments' interests must be found, without losing sight the object and purpose of international investment law, that is to encourage and protect foreign investments through norms and impartial dispute settlements procedures.

How to restore confidence in rules and procedures?

- By clarifying the content of protection rules:
    - By limiting the recourse to standards like fair and equitable treatment or indirect expropriation
    - By instituting a list of the elements that can be considered as forming part of the FET: denial of justice, arbitrariness, discrimination, legitimate expectations
    - By improving the level of precisions regarding legitimate expectations: what kind of behaviour can create a protected expectation? Shall the investor have relied on the State's behaviour for its expectations to be protected? How to distinguish between a normal shift in a State's polity and a breach of protected expectations?
- By instituting a permanent court, but there are many obstacles, in particular regarding the appointment process
- By enhancing the transparency and impartiality requirement of arbitration (limitation of double hatting, limitation of the number of cases per arbitrator, general disclosure obligations, establishment of a universal system of conflict-check)
- By keeping an arbitration system with a universal appellate organ

Should the international investment regime be more regional and/or sectoral?

- The negotiation of a universal agreement on investment seems quite unlikely considering the level of divergence of interests at hand
- The regional level seems more adapted and discussions have already started in Europe and in Africa
- Yet this supposes that regional organizations are sufficiently structured and financed to conduct such negotiations. The example of the ZLECAF in Africa is an interesting one.

- This also raises the question of possible investment agreements between regional economic integrations, such as the one between EU and Mercosur
- Yet the Energy Charter treaty has been conceived as a specific instrument for a given economic sector but is it still relevant and could this model be considered for other economic fields?

Should more public-private alliance be encouraged?

- This question depends on international law as much as on domestic law, so the possibilities in international law remain limited but such alliances could be encouraged and supported.
- International Institutions could adopt model agreements (in the same vein as model contracts in some economic fields, drafted by professional associations).

How can we enhance international investment acceptability?

- A system of consultation of local populations shall be established as soon as the investment is likely to have an impact on local people. The question is the criterion applicable to trigger such an obligation (which cannot be required for all investment operations).
- This could form part of a new legal framework applicable to investment (model law or model agreement)
- Could the generalization of prior impact studies be considered?

Question 2

Considering Investors' obligations.

The notion of protected investment must probably be thought of differently.

- A distinction could be made between direct and indirect investment, considering the fact that direct investment is more often likely to directly participate to the economic development of the host State.
- A specific regime could be adopted for purely financial investment.

What would be the best way to impose social and environmental obligations on investors?

- Treaty: there is a chance that a treaty is adopted but there is a risk that it corresponds to the less common denominator between States. The question of liability and chain of command is a very complicated one to be addressed in a treaty since it also depends a lot on domestic corporate laws. That is why other ways could be considered.
- Model law could be a good way of addressing the investors' obligations: a model law guarantees States' faculty of adaptation and could thus be more acceptable than a treaty.
- Municipal law is of course a solution but it is necessary to find incentives or ways of forcing States to adopt municipal law establishing investors obligations and actually enforcing them. However, the condition of respect of local law, which is now established for the benefit of any investment treaty, offers a good solution where domestic law is sufficiently developed.

Isn't it now necessary to admit States' counterclaims in arbitration?

- Counterclaims offer advantages but are also intrinsically limited
- Counterclaims suppose that investors have obligation under the applicable law, which might prove difficult to be established when this is international law

What about screening mechanisms?

- Screening mechanisms have recently been established or consolidated in many States and in the EU and this seems to be a general trend
- Yet they are still limited to strategic purposes but they could be used to prevent investments which do not comply with environmental and/or social regulations

Question 3

Investment disputes settlement procedures need to be improved.

How continuing the efforts undertaken to guarantee transparency, expertise, ethics, efficiency, without losing the recognized qualities of arbitration?

- This work has already started in the context of ICSID and UNCITRAL, lessons shall be learned from the enforcement of recent reforms
- Can we go beyond the debate arbitration vs permanent court by considering a new kind of arbitration with more regulation and an appellate organ, for example?

Is it desirable to encourage alternative disputes settlement procedures?

- A reflexion on mediation has started and shall be continued: it could be more efficient, less costly and more economically sustainable for investors because it offers a better guarantee that the investment operation could continue
- The development of joint committees in investment treaties could also be a way of preventing disputes and accompanying the disputing parties by avoiding recourse to a court or tribunal.

annex

persons interviewed

List of people interviewed

- *John Adam,* Attorney, Partner Squire Patton Boggs, United Kingdom
- Hadi Azari, Professor, University Kharazmi, Tehran, Iran
- *Nicola Bonucci,* Attorney, Partner, Paul Hastings, Former Head of the Legal Department, OECD, Italy
- *Ibrahim Fadlallah,* Professor Emeritus of University Paris 10, Arbitrator, France, Lebanon
- *Matthias Fekl,* Avocat, Partner, Audit Duprey Fekl, Former Minister for Foreign Trade, France
- *Mikhail Galperin,* Doctor of Laws, Professor of International Law School of the Higher School of Economics, Deputy Minister of Justice of the Russian Federation, Agent of the Russian Federation at the European Court of Human Rights, Russia
- *Aurélien Hamelle,* Head of the Legal Department, Totalenergy, France
- *Dyalá Jimenez,* Arbitrator, Costa Rica
- *Charles Kotuby,* Professor, Pittsburgh University, United States of America
- *Konstantin Ksenofontov,* Professor of International Law School of the Higher School of Economics, Russia
- *Fernando Mantilla Serano,* Attorney and Arbitrator, Partner, Latham & Watkins, Colombia
- *Ana María Ordoñez,* Director of the National Agency of Defense of the State in Colombia, Colombia
- *Carlos Ortega,* Financial Expert, Deloitte, Colombia
- *Priscila Pereira de Andreade,* Legal officer, UNIDROIT, Brasil
- *Hugo Perezcano Días,* Arbitrator, Mexico
- *Mónica Pinto,* Professor and Arbitrator, Argentina
- *Vanessa Rivas Plata,* President of the Special Commission representing Peru in investment-related disputes, Peru
- *Eduardo Silva Romero,* Attorney, Partner, Dechert, France
- *Vladislav Starzhenetskiy,* PhD, Associate Professor of International Law School of the Higher School of Economics,

Director of International Department of the Supreme Commercial Court of the Russian Federation, Russia

- *Georgio Sacerdoti,* Professor of International Law and European Law at Bocconi University, Milan, Italy, former member of the WTO's Appellate Body, Italy
- *Narghis Torres,* Finance Expert, Lex Finance, Peru
- *Olga Tsvetkova,* PhD, Co-Director of Arbitration Practice, Legal Firm «EPAM», Deputy Director of International Department of the Ministry of Justice of the Russian Federation, Russia
- *Danilo Villafaña Torres,* Representant of the Cuatro Pueblos de la Sierra Nevada de Santa Marta, Colombia
- *Todd Weiler,* Arbitrator, Canada
- *Alberto Zuleta,* Attorney, Cuatrecasas, Colombia

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