AMSTERDAM LAW FORUM
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Article

An Analysis of Geopolitical Considerations of Investor State Dispute Settlement and the Pursuit of Impartial Justice

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Abstract

The United States is pushing for the largest consolidation of economies in the history of the world. The main vehicle of this consolidation is the Trans Pacific Partnership (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP). These mega trade agreements are being negotiated in tandem with increases in military cooperation. But this system of consolidation has to contend with major considerations regarding national sovereignty, rule of law and effectiveness. Under the economic aspects, the investor state dispute settlement mechanism is under high scrutiny. Disagreements over the mechanics and function of the dispute mechanism is a dark cloud over the negotiation proceedings. The concerns are legitimate in regards to legal certainty, foreign intervention and accountability. But in the big picture, the pros outweigh the cons as it discourages diplomatic intervention in economic activities.

I. Introduction: General Overview of Trade & Politics

Political, legal and economic considerations are deeply imbedded in all trade agreements. The legal personality of these agreements varies vastly depending on the intended purpose of the agreement.[1] Although various trade agreements have existed since the beginning of civilization, the idea of 'free trade' is arguably a relatively new concept. The concept of global free trade is accredited to first making a break through by Adam Smith's book, Wealth of Nations in 1776 and David Ricardo's theory of comparative advantage in 1799. This is marked as the beginning of modern economic liberalism. These economic concepts among other things, argue for the abolition of protectionist and mercantilist practices, specifically the reduction of tariffs and quotas. By doing so, trading economies

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Thanks are given to Professors William Clark Murray, Jose Barra, Luisa Parraguez, and Bernardo M. Cremades who gave valuable insight into the issues through their many years of expert experience as academics and professionals.

[1] UNCTAD, 'Dispute Settlement: Investor-State', *UNCTAD Series on international investment agreements* 2003, at: http://unctad.org/en/Docs/iteiit30_en.pdf (last access 27 Apr. 2014).

would eventually capitalize on respective comparative advantages and the prices would equalize, benefiting the consumer. This economic concept lies at the heart of most contemporary free trade agreements. A broader vision of trade and economic liberalization is the fact that when economic integration/interdependence occurs, political ambitions are more likely to be complementary. Thus, it is postulated that world peace can be achieved through economic liberalization.[2]

After the Second World War, economic liberalism took truly a global personality with the formation of the Bretton Woods institutions known today as the International Monetary Fund (IMF), World Bank Group (WBG) and the United Nations (UN) affiliated institutions such as the World Trade Organization (WTO). These international institutions have since pushed trade liberalization all around the globe.

Although nations could negotiate agreements at their leisure, the concept of a Free Trade Area/Agreements (FTA) first made its major appearance with the European Coal and Steel Cooperation and its expansion made it clear that economic integration could clearly translate from economic cooperation to political cooperation. This has been an all-round success, as there has been peace between E.U. member states since.

Eventually the European success story prompted the Reagan administration to start negotiations for the North American Free Trade Agreement (NAFTA) under the auspice of counterbalancing European and Asian economic power by consolidating the economies of the North American continent.[3] Hence forth, a clear motive of large FTA agreements negotiated by the U.S. would be distinctly strategic in nature.[4] Coincidently, this marked the beginning of modern day regionalism and a unified anti-globalization sentiment in the United States.

Due to a rising popular anti-globalization sentiment and the controversial and disputed beneficial outcomes of NAFTA, FTA's were discreetly negotiated throughout the Clinton and Bush administration. Due to entanglements in the Middle East, there was not a strong institutional focus on trade liberalization.[5] It was not until the shock of the global financial crisis of 2008 put economic policy at the center of the world's political debate.

The financial crisis of 2008 made it crystal clear that the global power hierarchy of the world was going through some major changes. The BRIC nations (Brazil, Russia, India and China) began to fill the economic power vacuum left by the crippled U.S. economy. Generally speaking, the BRIC's (and other developing countries) have a political mandate from home to question U.S. policies since their people were suffering due to the financial crisis. Feeling this new power, the BRIC's began to collectively counterbalance U.S. global hegemony.[6] Thus, the geopolitical rivalries are back in full force.[7]

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[2] M. Mousseau, H. Hegre et al., 'How the Wealth of Nations Conditions the Liberal Peace', *European Journal of International Relations* 2003 vol.9, no.2.

[3] The White House, 'National Security Strategy of the United States' (January 1987), at: http://nssarchive.us/NSSR/1987.pdf (last access 20 Apr. 2014).
Note: Some scholars point to this change to regionalism started as early as 1982: Donald W. Boose, *Recalibrating the U.S.-Republic of Korea alliance*, Carlisle, Pa.: Strategic Studies Institute 2003.

[4] *Id*.

[5] J. Kurlantzick, 'How Obama Is Ignoring Asia', *Newsweek*, 7 June 2010, at: www.newsweek.com/how-obama-ignoring-asia-74615?piano_t=1(last access 27 Apr. 2014).

[6] Rasmussen et al 2013. Comment by Dr. J. Barrera, 'Rebalance to Asia: Underreported/Unexpected Variables', Tecnologico de Monterrey Campus Ciudad de Mexico

[7] Note: The author takes a slightly different approach to the 'hows' and the 'whys' but the sentiment is the same: W. R. Mead, 'The Return of Geopolitics: The Revenge of the Revisionist Powers', *Foreign Affairs,* Council on Foreign Relations, 1 May 2014, Print.

I.1 Shift in Strategy: Enter the Trade Blocs of the World

The world is being carved up into geopolitical/economic blocs. U.S./EU influence, Eurasian Market (Russia), Shanghai Cooperation (China) and Mercosur (Brazil) and South Africa's sphere of influence. The diagram below is highly generalized, but it gives a good overview of the former and following argument; It is generally seen that along the areas of crossover, are the areas of most political and economic instability.

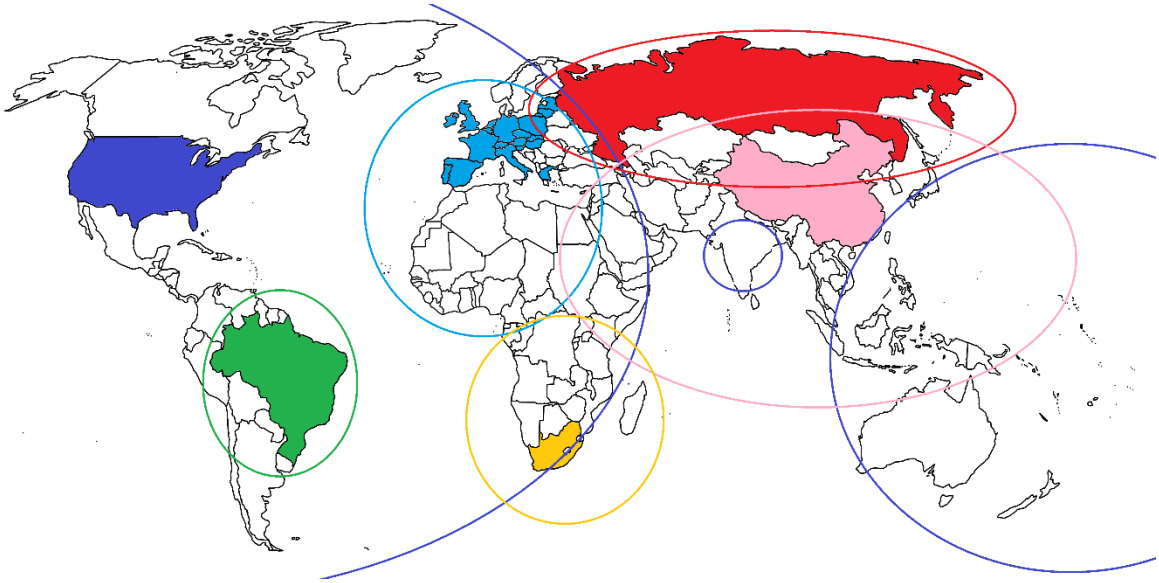

Table 1, generated by Leif Cocq Rasmussen (2014)

From a U.S. perspective, the economic crisis rejuvenated geopolitical and geoeconomic regionalism. Rhetoric aside, U.S. policy regards China as a direct threat to U.S. economic and military hegemony in the Pacific. Global concern over the growing influence of the BRIC nations to counterbalance 'western' influence eventually caused Washington to come up with a new aggressive trade strategy. The United States and European allies were unable to ram through policies via the WTO and IMF alone. The initiative would have to become far more strategic, in turn, isolating the BRIC nations with specific focus on China. The vehicle of this geoeconomic/political initiative takes the form of the contemporary FTAs.[8] This has led to what is being called 'Free Trade Blitzkrieg'.[9]

The Obama administration announced the U.S. 'Rebalance to Asia' in 2011'[10] directly looking to contain China and further to insure influence in Latin America. The rebalancing consists of a major force projection capability shift from 50/50 Europe/Pacific to 60/40 Europe/Pacific.[11] The economic center piece is the Trans Pacific Partnership (TPP) which aims to consolidate economic ties with both

[8] M. Otero-Iglesias, 'The Geopolitics of the TTIP seen from Beijing', *Fundación Real Instituto Elcano*, 1 Jan. 2013, at: www.realinstitutoelcano.org/wps/portal/web/rielcano_en/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_in/zonas_in/international+economy/commentary-otero-iglesias-geopolitics-ttip-seen-from-beijing#.U1eY_fmSxUU (last access 12 Apr. 2014).
[9] *Id.*
[10] M. Manyin et al., 'Pivot to the Pacific? The Obama Administration's "Rebalancing" Toward Asia', Congressional Research Center, 28 Mar. 2012, at: www.fas.org/sgp/crs/natsec/R42448.pdf (last access 16 Apr. 2014).
[11] P. Symonds, '"Pivot to Asia": US Military Build-up in Asia, Threatening China', *Global Research Center for Research on Globalization,* 7 June 2013, at: www.globalresearch.ca/pivot-to-asia-us-military-build-up-in-asia-threatening-china/5337361(last access 27 Apr. 2014).

traditional U.S. allies and new allies like Vietnam. China is countering with their own initiatives, for instance with the Shanghai Cooperation (SCO), similar trade agreements and other economic 'goodie bags' to entice allies.[12] In the long run, India will be a decisive player in this race for influence in Asia.[13]

At the same time the Trans-Atlantic Trade and Invest Partnership (TTIP) is initiated to further consolidate EU-US economic cooperation. With the new focus being in Asia, the TTIP was largely undetected by the public until late 2013 when the final negotiations were initiated. Furthermore, it is now evident that the Russian Federation has changed its mind about being on stand-by and has begun to push hard for its own Eurasian common market and ramping up measures to influence neighbors.[14] Many experts agree that the current Ukrainian crisis is a result of this.[15]

The TPP and TTIP could directly affect 39% and 46% of the global economy respectively, 85% of the combined global GDP. And as outlined by the counter actions from China and Russia, this 'FTA blitzkrieg' strategy is inherently competitive because the trade block with the largest collective economy can collect more political, economic and strategic clout. In its essence, with the larger nations in control, they can gain direct or indirect control/or influence of another nation by controlling key sectors of the economy. Private investors play a critical role in this process of consolidating power, by being in control of key investments in industry infrastructure and finance.[16]

This competition is resulting in issues affecting all levels of society, ranging from questions about how to deal with immigration, environmental protection, intellectual property, military cooperation, control of natural resources, national sovereignty, corporate power and the rights of the individual in a globalized world. These problems are extremely complex, interconnected and the distinctive national strategies differ broadly. In this global scenario, the Investor State Dispute Settlement (hence forth ISDS) clause plays an important role.

I.2 Why Focuses on ISDS

This paper will now focus on one of the most controversial aspects of the contemporary U.S. initiated Free Trade Agreement: ISDS. ***A typical ISDS clause found in FTAs is a legal recourse mechanism made available to a foreign investor from nation A to sue nation B if the investor believes that the government of nation B has taken action that unfairly disadvantages or harms the foreign investor A's investment***.

The concept that a private investor can sue a state outside of the jurisdiction of a national or international court is extremely controversial and polarizing. So polarizing in fact, that this issue has

[12] J. Hayward-Jones and P. Brant, 'China ups the aid stakes in the Pacific Islands', Lowy Interpreter, 18 Nov. 2013, at: www.lowyinterpreter.org/post/2013/11/18/China-ups-the-aid-stakes-in-the-Pacific-Islands.aspx?COLLCC=1671763788& (last access 2 May 2014).

[13] S. Denyer, 'Obama's Asia rebalancing turns into a big foreign policy heachache', *Guardian Weekly*, Guardian News and Media, 28 Jan. 2014, at: www.theguardian.com/world/2014/jan/28/obama-china-japan-relations-asia (14 Apr. 2014).

[14] K. Moldashev, 'Joining the Customs Union: The Dilemma of Kyrgyzstan', HORIZON SDU Research Center, 1 May 2011, at: http://horizonresearch.kz/index.php/en/analytics/regional-integrations/74-kyrgyzstan-cu (last access 10 Sept. 2014).

[15] A. Wilson, 'Belarus Wants Out: One of Russia's Closest European Allies Begins to Play the Field', *Council on Foreign Relations*, 20 Mar. 2014, at: Foreign Affairs 0

[16] The consolidation of economies and strategic interests of one major actor is by no means a new concept and has proven to be effective thought ancient and contemporary history. The most extreme examples of this economic control involving the privet/state actors are well documented in U.S. and Latin American relations, these the involvement of the CIA and the United Fruit Company in the 1954 Guatemalan coup d'etat.

become an Achilles heel in the negotiations of the TPP and TTIP.[17] The majority of the controversy lies in the circumstance that there is little consensus politically, economically and legally on the nature of ISDS franchises that decorate various International Trade and Investment Agreements (ITIA's).

Therefore, in the context of the above mentioned political, economic and legal problems, the ISDS franchise deserves due attention. The purpose of this paper is to make an in-depth analysis of ISDS cases in contemporary ITIA's and see if there is a connection between major disagreements and the factual nature of the contemporary ISDS systems, in particular, to see if the ISDS system is capable of proving impartial justice. For simplification, the International Center of Settlement of Investment Disputes (ICSID) will be the main arbitrational institution of focus since this institution sees by far the most cases.[18] The structure of this ISDS system under ICSID and related cases will be the main legal focus. The big question whether an ISDS clauses in a given agreement can attract foreign direct investment (FDI). Before this analysis can begin, the issues need to be properly identified and framed.

II. Separating Politics from Law on ISDS

The first order of business is to separate the legal from the political issues. Within the U.S., The United States Trade Representative (USTR - a part of the U.S. executive branch)[19], a large portion of the business community[20] and a respectable number of lawyers and academics[21] have full heartedly defended ISDS where public advocacy groups and other non-governmental organizations (NGO's) such as the Sierra Club have vehemently opposed the ISDS clauses in the FTA's.[22] Internationally, there has been equally significant disagreement, with long U.S. allies rejecting the clause completely, threatening the treaties.[23] Even the United Nations Conference on Trade and Development (UNCTAD) has released documents and statements that take a dubious account of the ISDS.[24] The support and opposition of ISDS varies. However, two major issues come up and it has been confirmed as major problems with very little credible information to say the counter:

a) ISDS is in general far too expensive, reserving arbitration for the biggest and richest

The average administrative cost for arbitration in the ICSID is 4 million per party[25] and the arbitration takes on average 3.6 years[26]. This would limit 'mom and pop' investors from

[17] Daniel J. Ikenson, 'A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement', *Cato Institute*, 4 Mar. 2014, at: www.cato.org/publications/free-trade-bulletin/compromise-advance-trade-agenda-purge-negotiations-investor-state (last access 27 Apr. 2014).
[18] J. Zhan, 'Reform of Investor-State Dispute Settlement: In Search of a Roadmap', Investment and Enterprise Division UNCTAD, 1 June 2013, at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf (last access 27 Apr. 2014).
[19] Office of the United States Trade Representative, 'The Facts on Investor-State Dispute Settlement: Safeguarding the Public Interest and Protecting Investors', 27 Mar. 2014, at: www.ustr.gov/about-us/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors (last access 27 Apr. 2014).
[20] S. Heather, 'Balderdash and ISDS', *U.S. Chamber of Commerce*, 16 Apr. 2014, at: www.uschamber.com/blog/balderdash-and-isds (last access 29 Apr. 2014).
[21] Rasmussen et al 2013. Comment by Dr. J. Barrera, 'Rebalance to Asia: Underreported/Unexpected', Variables, Tecnologico de Monterrey Campus Ciudad de Mexico, at: www.facebook.com/events/195361723982432/?ref_dashboard_filter=calendar (last access 11 Sept. 2014).
[22] Sierra Club, 'Responsible Trade Program: Trans-Pacific Partnership Agreement', at: www.sierraclub.org/trade/trans-pacific-partnership-agreement.aspx (last access 27 Apr. 2014).
[23] *Op. cit. supra* (CATO 2014).
[24] *Op. cit. supra* (UNCTAD 2013).
[25] House of Commons, 'Investor-state dispute settlement (ISDS) and the Transatlantic Trade and Investment Partnership (TTIP)', at: www.parliament.uk/briefing-papers/SN06777.pdf (last access 9 Apr. 2014).

effectively using ISDS.[27] Furthermore, the range and distribution of costs varies largely depending on the case, some costing significantly more. The combination of these facts, and in the context of geopolitical considerations, suggests that only the biggest investors in the economy are in control of critical industries (see fig. 2). It is obvious that this puts foreign investors on a political collision course with their host states.

b) ISDS provides a form of recourse to foreign investors that is not available to domestic investors

As mentioned in the start of this paper, the ISDS is only available to 'foreign' investors. That means that domestic investors are denied this right, causing outcry from domestic side politically. It can be politically difficult to justify that foreign investors should having an extra system of recourse. Yet this is not a matter of law.[28]

With the above-mentioned issues taken as given, the more complicated issues were brought up by civil society groups, lawyers and business advocacy and were now addressed. The following points come up as the most relevant and will be discussed in depth:[29]

1) **It is a breach of sovereignty to allow tribunals to override the decisions of states (2.1)**
   This claim is often the issue that receives the most attention and is most often misunderstood. Advocates against ISDS often attribute this breach of sovereignty to 'regulator chilling', where states are less likely/able to regulate in the public interest because they want to avoid retribution from industry. Basically, it is argued that ISDS is a way for big businesses to bully small countries away from regulation.

2) **Accepting ISDS as a means of attracting Foreign Direct Investment (2.2)**
   Investors will see ISDS as a type of insurance against mistreatment of their host nations.

3) **Arbitrators are not regulated enough to be insured as totally impartial (2.3)**
   There are weak controls on conflicts of interest and the ethical set up of the tribunals.

4) **There is not enough legal consistency (2.4)**
   Without legal consistency, there is no chance for predictability to take hold. This makes it harder for accountability to develop. If there was more legal consistency as an emphasized customary law, it would be easier to challenge rulings that are unjust.

5) **Forum shopping is an issue (2.5)**

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[26] A. Sinclair, 'ICSID Arbitration: how long does it take?', *GAR J.* 2009 4:5, at: http://www.goldreserveinc.com/ (last access 09 Apr. 2014).
[27] Gaukrodger, D. and K. Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03, OECD Publishing. http://dx.doi.org/10.1787/5k46b1r85j6f-en
[28] ISDS, tax benefits and other favorable policies encourages domestic investors to incorporate their companies in foreign nations, attributing to forum shopping upsets domestic policy makers. See Page 17, at:www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf (last access 9 Apr. 2014).
[29] Here, the author had to make a series of judgment calls on which issues to entertain or ignore. This is not easy because there is a significant amount of embellished or false literature on the subject of ISDS. The criteria used to identify the main issues was to look at which issues were the most incongruence within academic literature and public advocacy groups. See previously referenced OECD scoping papers.

Forum shopping in the context of ISDS is as follows: Nations A and B have an ITIA that entails ISDS. Investor from nation C incorporates under nation A to invest in nation B to take advantage of the protections offered under the mentioned ITIA between A and B. In short, some countries have a whole array of ITIA's which means that investors can have shell companies in whatever jurisdiction suits them best, without having any real links to the given ITIA jurisdiction other than a mailing address.

II.1 It is a breach of sovereignty to allow tribunals to override the decisions of states

Those for and those against ISDS waste a significant amount of time in their arguments because there are central misunderstandings on the purpose, legitimacy and functioning of ISDS. From the U.S. perspective, this confusion is because there has been a breakdown in communication from the USTR (the executive branch) and the public. Before the main sovereignty issues of the ISDS can be tackled, some more background on ISDS must be given.

The ISDS clause was put into place for two major reasons:

i. Curb diplomatic protection of private investors by providing an alternative system of redress for foreign investors that are mistreated by host states.
ii. Attract foreign direct investment (FDI).

The U.S. has a rich history using arbitrational tribunals as an alternative to diplomatic intervention as early the first Treaty of Washington in 1871 to mitigate the Alabama Claims with the British.[30] Fast forward to the cold war era, the U.S. had been experimenting for several years with economic and military exploitation and control of its neighbors in Latin America. The power of foreign investors over the national governments and economy was a key aspect of this. U.S. corporations colluding with the Central Intelligence Agency were directly responsible for overthrowing governments which resisted dominion.[31] However, it was not always possible or effective to have the U.S. Government get directly engage a sovereign nation every time a U.S. investor got into 'trouble' with a host country. Especially when these cases revolved around major infrastructure or natural resources:

[30] [30] Subedi , S.P.. *International economic law Section A: Evolution and principles of international economic law*. London: University of London Stewart House , 2006. Print.
[30]"The Blockade of Confederate Ports, 1861–1865 - 1861–1865 - Milestones - Office of the Historian." The Blockade of Confederate Ports, 1861–1865 - 1861–1865 - Milestones - Office of the Historian. N.p., n.d. Web. 30 June 2014. <https://history.state.gov/milestones/1861-1865/blockade>.
Lerner, Eugene M.. "Book Review:The Panic of 1819: Reactions and Policies Murray N. Rothbard." Journal of Political Economy: 603. Print.
[31] Congress, the CIA, and Guatemala, 1954. (2011, August 3). Retrieved September 14, 2014.

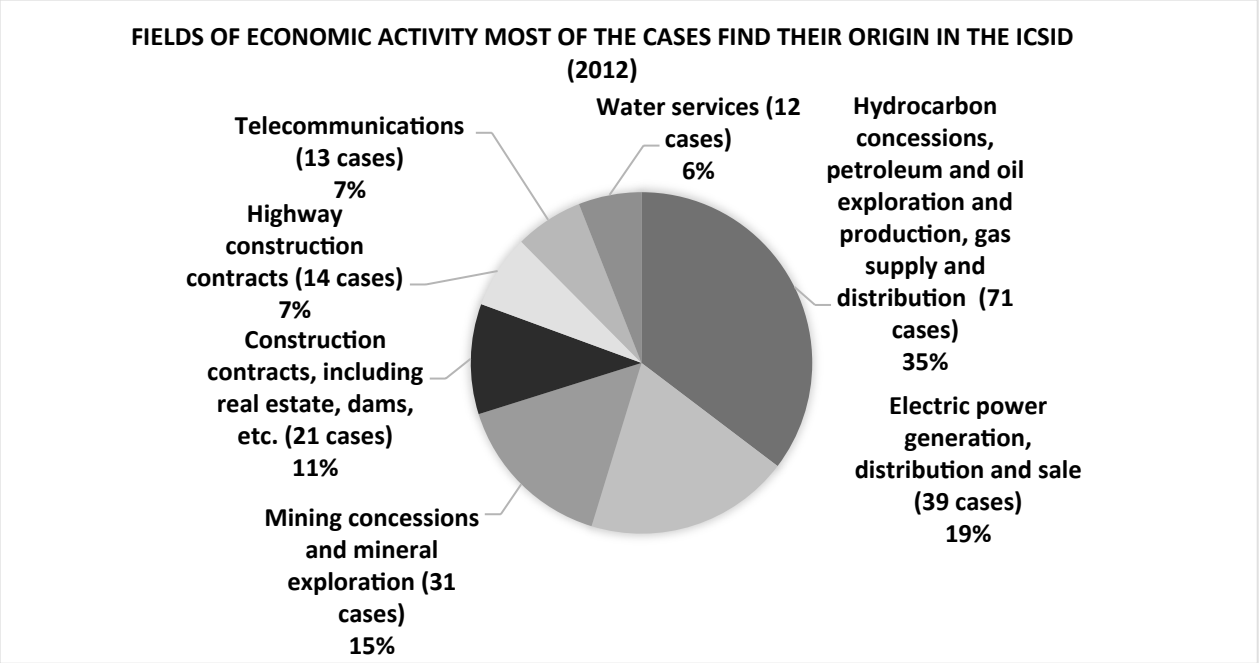

Fig. 2., Data collected from: 'ICSID: Curious Facts', Inna Uchkunova (2014).

To avoid sticky political situations when a given country employs diplomatic protection or other investor unfriendly tactics, the U.S. came up with a solution to this problem - The 1965 Washington Convention. Under the convention, an investor can take a signatory to a tribunal in the World Bank Group's International Center of Settlement of Investment Disputes (ICSID). The decisions found by the tribunal would be binding and to a great extent remove political/diplomatic entanglements. This concept is central to all ISDS tribunal franchises.

Those arguing against the ISDS clause, claiming that it is a breach of national sovereignty, make an understandable political point. But as a matter of law, is really depends on what country governing documents one owes allegiance to. As for example in the U.S., there are serious constitutional questions that should be addressed as to the way these treaties and their working parts are being negotiated.[32] On the other hand, many Latin American countries have incorporated the famous 'Calvo Doctrine' into their governing documents that among other things, effectively block foreign investors from seeking conflict resolution outside of the national courts to actually prohibit foreign investors from accumulating too much economic influence.[33] It is understandable that the notion of an international tribunal running as a parallel to a Supreme Court ruling does not sit well with constitutional conservatives. The reality is that engaging with international law and treaties, legal gray areas proliferate.

[32] I general interioanl treaties are held at the same level as the U.S. construction (See Supremacy clause: Article Six, Clause 2 of the United States Constitution). However, how those treaties are negotiated has classically been the prerogative of congress as stated in Article II, Section 2, Clause 2 of the United States Constitution. In the 1960's this right was farmed out to the executive with congressional oversight. The oversight the congress has gotten is a major point of contention.
See: We Need Sen. Wyden's Help to Fix the Broken, Anti-User Trade Negotiation Process. (n.d.). Retrieved September 14, 2014. https://www.eff.org/deeplinks/2014/08/we-need-sen-wydens-help-fix-broken-anti-user-trade-negotiation-process

[33] R. Wesley, 'The Procedural Malaise of Foreign Investment Disputes in Latin America: Local Tribunals to Fact Finding', *Law & Policy International Business* 1975 vol.7, pp. 813, 818.

Regardless what national inclinations may be, the international law perspective is that the ISDS clause in a given ITIA is legitimate. Nations agree to include the ISDS clause are sovereign entities and willingly agree to have this system in place as is customary under international law when accepting treaties. Should a nation feel that it has an issue with a treaty, they can motion to have it amended or the treaty nullified. Therefore, the ISDS system is legitimate under international law. The clashes with national laws (such as the Calvo clause) will not be addressed in detail. It is clear that the geopolitical considerations are clearly playing a role here, and therefore the concerns of those opposing ISDS are at times legitimate, just not as a matter of law.

II.2 Accepting ISDS as a means of attracting Foreign Direct Investment

The general problem is that some states have underdeveloped legal institutions, politically unstable and/or are for one reason or another deemed risky places to invest in. As a result, countries that match such a description have problems attracting Foreign Direct Investment (FDI). If at one point a foreign investor did decide to invest in such a country and felt that he would not be given fair address in the host states legal system, he would have to involve the potentially complicated diplomatic mission of his home state as stated above.[34] ISDS is considered to give investors extra confidence in investing in risky countries, therefore, they would be more likely to contribute to a countries' FDI[35] and the host state could benefit from the foreign capital injection and other benefits that come along with FDI such as new technology and know-how. How much ISDS actually increases FDI is heavily contested. For example, Brazil and India are considered as developing countries with tendencies for investor-unfriendly behavior, but still attract significant FDI.[36] Furthermore, it is greatly contested that developed countries with highly sophisticated legal systems should subjugate themselves to ISDS in any event.[37]

Nation:	FDI outflows in Billions of USD	Approximate % of Global FDI outflows
United States	351	25
Top EU counties (UK, Germany, France & Belgium)	286.2	20.4
Japan	122	8.7
China	62.4	4.4
Russia	31	2.2

Fig. 3, Data collected from OECD database on FDI (2013)

[34] *See* The Energy Charter Secretariat, 'Investor-State Dispute Settlement Public Consultation: 16 May – 23 July 2012', OECD, Print., at: www.oecd.org/daf/inv/investment-policy/ISDSconsultationcomments_web.pdf.
[35] *See* Article 27 of the ICSID Convention, Regulations and Rules, at: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (last access 11 Sept. 2014).
[36] K. Raja, 'The rise of BRICS in global investment: A new UN agency report charts the growing importance of the BRICS countries as both sources and recipients of investment flows', *Third World Economics*: pp. 10 - 12.
[37] A. Berger et al., 'More stringent BITs, less ambiguous effects on FDI? Not a bit!', *Economics Letters 2011* vol. 112 Issue 3, pp. 270 – 272.

The critical point is that ISDS attracts a specific kind of FDI. Namely, big ticket investors in the industries outlined in Table 2. This is a valuable pattern to recognize as it supports many of the points made about ISDS in the context of geopolitical considerations. The U.S. is one of the greatest providers of FDI. Therefore, it is not surprising that the U.S. Government would have an inherent interest in giving a recourse mechanism that investors could utilize to avoid diplomatic intervention.

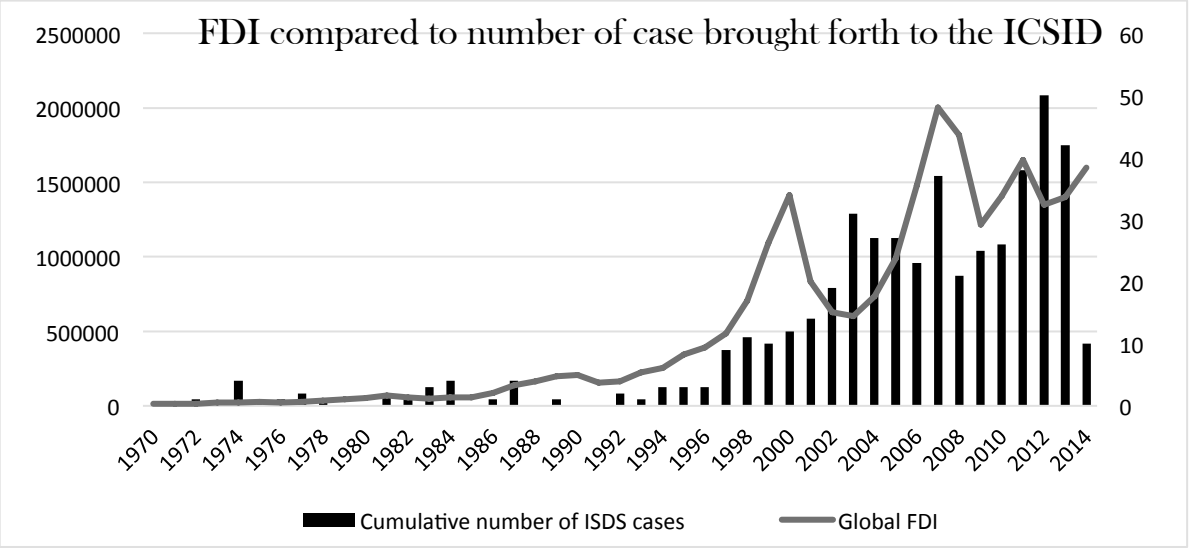

Fig. 4, Data collected from UNCTAD and ICSID[1]

Fig. 4 demonstrates a correlation with the increase of FDI and the number of ISDS cases that come forth to the ICID. The United Nations Committee on Trade and Development (UNCTAD) released an extensive overview on the legal framework of ISDS clauses found in various International Investment and Trade Agreements (ITIA's).[38] According to the UNCTAD, the most common form of ISDS are brought to the International Center of Settlement of Investment Disputes (ICSID). In 2012, 61% of ISDS cases where filed under ICSID[39] and the majority of non-ICSID tribunals share similar structures.[40] Therefore, the ICSID will be the focus instance regarding related tribunal-ISDS issues. The WBG is an international development bank that has the mandate to stop poverty[41] and has several arms used to achieve this goal: The International Bank for Reconstruction and Development (IBRD), The International Development Association (IDA), The International Finance Corporation (IFC), The Multilateral Investment Guarantee Agency (MIGA) and the focus of this writings attention, The International Centre for Settlement of Investment Disputes (ICSID). The ICSID was created by the World Bank Group (WBG) under the Washington Convention of 1965.[42] As the ICSID is directly connected, it has been postulated that the WBG could enforce ISDS rulings against borrowing countries, and this is sharply criticized by some.[43] This would be logical in

[38] *Op. cit. Supra (UNCTAD 2013).*
[39] *Op. cit. Supra (UNCTAD 2013).*
[40] *Op. cit. supra (UNCTAD 2013).*
[41] *See* 'About ICSID', World Bank Group, at: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home (last access 11 Sept. 2014).
[42] World Bank Group, 'Ending Extreme Poverty and Promoting Shared Prosperity', 19 Apr. 2013, at: www.worldbank.org/en/news/feature/2013/04/17/ending_extreme_poverty_and_promoting_shared_prosperity (last access 29 Apr. 2014).

regards for a means of enforcement of awards, however, there are no known cases of this happening to the author's knowledge where this has happed beyond reasonable doubt.[44]

II.3 Arbitrators are not regulated enough to be insured as totally impartial

The real legal question lies in what are the functional/structural issues with ISDS and how much sovereignty is being 'agreed' to be given to an ISDS tribunal contra how much is in fact being taken. This is an interpretation issue of the treaty that the arbitrators of a given tribunal have to deal with. Problems come up if it is not done properly. These concerns can be broken down into two main legal questions when looking at ISDS:

i) Is the tribunal able to deliver impartial justice?
ii) Is there arbitrational consistency?

In principle, the structure of the ICSID and its involvement in ISDS is relatively simple. But with a little digging, big ethical and legal problems become apparent, namely in due process of law, ultimately leading to endemic legal uncertainty.

The rules and procedure of the ICSID are quite straight forward and are available to the public.[45] This procedure of conduct is supported by the information given by Professor Bernardo Mr. Cremades who was kind enough to donate his time for an interview in conjunction with the research being done for this paper[46]. In short, a plaintiff will submit an official application to the Secretary General of the ICSID for a conciliation or an arbitration proceeding and then the other party will be contacted. If they accept going to arbitration, both parties may pick up to four arbitrators and the Chairman can pick an additional ten with constraints on nationality (Articles 12-13).[47] Next comes the ethics of arbitrator's provision. There are broad stipulations regarding the ethics of those representing on the tribunal:

Articles 14-16 of the ICSID Convention, Regulations and Rules. Article 14 states:

(1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

(2) The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.

Further along in Chapter II, Jurisdiction of the Centre, according to Article 25-27 it is stated that the diplomatic interest must refrain from interfering with the tribunal. In layman's terms, the arbitrators

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[43] G. Moody, 'How Much Does Gold-Plated Corporate Sovereignty Cost? $1 Billion Or About 2% Of A Developing Country's GDP', *Techdirt*, 30 Oct. 2013, at: www.techdirt.com/articles/20131028/10170325035/how-much-does-gold-plated-corporate-sovereignty-cost-about-2-developing-countrys-gdp.shtml (last access 4 May 2014).
[44] Antonio R. Parra, 'The Enforcement of ICSID Arbitrational Awards. Session on Specific Aspects of State-Party Arbitration, *24th Joint Colloquium on International Arbitration*, Paris, France, (see p.11) 16 Nov. 2007, at: www.arbitration-icca.org/media/0/12144885278400/enforcement_of_icsid_awards.pdf (last access 30 Apr. 2014).
[45] ICSID Convention, Regulations and Rules (2006), *International Centre for Settlement of Investment Disputes Washington*, at: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (last access 11 Sept. 2014).
[46] C. Rasmussen, phone interview with Prof. Bernardo M. Cremades on ISDS', 17 Apr. 2014, at: www.youtube.com/watch?v=_-kuACh3HoI (last access 11 Sept. 2014).
[47] *Id.*

must be competent and of high moral standing and the interest of the states (diplomatic protection) as mentioned above, would have no place in the tribunal. This may seem obvious at first, but there are huge differences between the nature of a tribunal and that of a national court[48] where in the end, there are as few as three arbitrators deciding on a majority win (2-1 / 3-0) case in a scenario where:

'The Tribunal shall be the judge of its own competence.'

ICSID CONVENTION, REGULATIONS AND RULES, Section 3
Powers and Functions of the Tribunal,
Article 41, (1)

That the tribunal should be the judge of its own competence is not in itself usual in international law. The problem is that the ability of the tribunal to do so is compromised if its members are not impartial. As there are no similar checks and balances in the ICSID like in developed domestic courts, there is a disproportional amount of power put in the hands of the arbitrators, whose decisions can have far-reaching consequences into the lives of totally uninvolved parties such as the local populous without being in any way directly accountable or having a realistic venue of appeal.[49] This issue is one of many that attributes to legal uncertainty which plagues ISDS as a principle in its usual understanding.[50]

'ICSID arbitration proceedings are decided by independent and impartial tribunals.'

Background Information on the International Centre For Settlement of Investment Disputes[51]

One of the most common moral hazards found to be pervasive in tribunals are that arbitrators have potential conflicts of interests, sometimes referred to as arbitrators having 'multiple-hats' (e.g. arbitrators serving as council, or having directly worked for the industries which they are judging on, or a revolving door situation). Examples of moral hazards are numerous, and that these moral hazards are coloring the outcomes of cases has been documented. There have been several cases where an arbitrator has been ejected from a tribunal due to a conflict of interest (*see Blue Bank International & Trust (Barbados) Ltd v. Bolivarian Republic of Venezuela)*.[52] However, there are several problematic reports where a moral hazard was clearly evident but not acted upon (see: *Republic of Ghana v. Telekom Malaysia* case).[53]

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[48] E.g. As found in the US using an adversarial court system where there is a clear plaintive, defendant judge, jury and appellate system etc. that are taken into account.

[49] *See* IISD Model International Agreement on Investment, International Institute for Sustainable Development at: http://www.iisd.org/investment/capacity/model.aspx.

[50] *See* responses to OECD scoping paper, at: http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf (last access 10 Sep. 2014).

[51] See document: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&icsidOverview=true&language=English (last access 11 Sept. 2014).

[52] Nwoye, Ikemefuna S, 'Arbitrator's Impartiality and Independence in ICSID: Blue Bank International & Trust (Barbados) Ltd v. Bolivarian Republic of Venezuela Revisited', *Transnational Notes RSS*, 31 Jan. 2014 at: http://blogs.law.nyu.edu/transnational/2014/01/arbitrators-impartiality-and-independence-in-icsid-blue-bank-international-trust-barbados-ltd-v-bolivarian-republic-of-venezuela-revisited/ (last access 1 May 2014).

[53] Nassib G. Ziadé, 'How Many Hats Can a Player Wear: Arbitrator, Counsel and Expert?', *Foreign Investment Law Journal* ICSID Review 2009, 24 (1), pp. 49 - 64. doi: 10.1093/icsidreview/24.1.49: n. pag. (last access 1 May 2014.).

The problem with the conflict of interest is by no means a new issue in the arena of international law, especially when talking about tribunals, and this debate come and go as a focus of discourse.[54] Over the years, this has led to several camps of thoughts on how to fix this problem. The overall consensus seems to be that something needs to change in this regard[55], nonetheless, there seems to be little real movement to change, which has many frustrated.[56]

One of the leading voices in this regard is Professor Jan Paulson, who eloquently laid out the massive moral hazard of a partial tribunal.[57] Paulson recalls the infamous *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*[58] case which is controversial for many reasons, including the strong indications of a moral hazard in regarding diplomatic intervention. In this particular case, a Canadian death care firm (Loewen Group) had been brought to trial by a Biloxi businessman named Jeremiah O'Keef in a Mississippi state court on grounds of breaching state anti-trust laws. An initial settlement proposed by O'Keef asked for 5 million U.S. Dollars from the defendant (Loewen Group).[59] The settlement was rejected, and the case went to trial and eventually the jury presiding in the Mississippi court delivered a verdict which included a 500 million U.S. Dollars penalty against the Loewen group. The Loewen group appealed to the Mississippi Supreme Court but was rejected and thus submitted for arbitration under NAFTA article 11 in 1998 on a damages claim of 725 million U.S. Dollars under grounds of unfair treatment.

This case is extremely complicated. But in regards to moral hazards of arbitrators was the fact that in 2009 that the arbitrator had been taped by U.S. Department of Justice (DOJ), arguably having a significant effect on the proceedings of the arbitration as Professor Paulson describes. It seems that this could have been avoided had there been more stringent stipulations on the ethics of arbitrators.

> *'The symposium happened to be recorded, and the tenor of his remarks notably made public in a law review in 2009, in a footnote that could easily be traced back to retrieve shocking verbatim remarks. This included the revelation that the arbitrator had met with officials of the U.S. Department of Justice prior to accepting the appointment, and that they had told him: "You know, judge, if we lose this case we could lose NAFTA." He remembered his answer as having been: "Well, if you want to put pressure on me, then that does it." The words "that does it" obviously did not mean that this was the end of the matter for the prospective arbitrator. To the contrary, he accepted appointment and did so with an apparent acknowledgement of great pressure to' reach the result desired by his appointers. The Loewen Corporation was thus deprived of an impartial and independent tribunal.'*
> *Professor Jan Paulson (29 April 2010)*

[54] *See* T. Nelson, 'Histoy Ain't Changed: Why Investor-State Arbitration Will Survive the "New Revolution"', in: M. Waibel et al. (eds.) *The Backlash against Investment Arbitration: Perceptions and Reality* (Alphem aan den Rijn: Kluwer Law 2010), pp. 555 - 76. Or at: www.skadden.com/sites/default/files/publications/Publications2085_0.pdf (last access 11 Sept. 2014).
[55] *Op. cit. supra (OECD)* and Gordon et al., 'Investor-State Dispute Settlement Public Consultation: 16 May - 9 July 2012', Organisation for Economic Co-operation and Development Investment Division, Directorate for Financial and Enterprise Affairs Paris, France, at: www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf (last access 30 Apr. 2014).
[56] *Op. cit. supra Timothy Nelson (2010)*.
[57] J. Paulsson, 'Moral Hazard in International Dispute Resolution' (Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair University of Miami School of Law), at: arbitration-icca.org, 29 Apr. 2010 (last access 30 Apr. 2014), www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf (last access 11 Sept 2014).
[58] *See*: U.S. Department of State, at: www.state.gov/s/l/c3755.htm (last access 11 Sept 2014).
[59] The Loewen group in 1996 would see another verdict of 30 million U.S. Dollars on comparable charges. Provident American Corporation v. The Loewen Group Inc (U.S.D.C. Ed. Pa. CA. No. CIV. A. 92-1964). (Mar. 10, 1995), at: www.nytimes.com/1996/02/14/business/company-news-loewen-settles-suit-for-30-million.html (last access 11 Sept. 2014).

Furthermore, this case clearly puts into question the DOJ and thus the U.S's ability to respect the founding principles of the Washington Consensuses of 1965, and in an ironic way, seriously undermines the prowess found on the United States Trade Representatives homepage 'The Facts on Investor-State Dispute Settlement: Safeguarding the Public Interest and Protecting Investors'stating:[60]

> *'As a country that plays by the rules and respects the rule of law, the United States has never lost an ISDS case'*
>
> *United State Trade Representative (27 March 2014)*

In this case the Loewen Group had broken anti-trust laws, but as indicated by Paulson, the Mississippi court had taken discriminatory measures. It seems that any misunderstandings could have been avoided had there been more stringent stipulations on the ethics of arbitrators and had there been clear punishment for bad actors. Consistent with the findings above, there are many contenders on how this issue could be fixed from all strata for the international legal community which all deserve serious consideration since the fact of the matter is, people's lives are affected by decisions and it is disrespectful to the taxpayers financing this tribunals via their representative (more or less) state without an effective due process[61].

II.4 There is not enough legal consistency

As stated before (ii), legal uncertainty can be a significant problem. It supplies parties against ISDS with limitless ammunition to lobby against those in favor on all fronts (political, economic and legal) as it undermines many of the foundations on which the ISDS franchise is based upon: delivering a form of impartial justice.

The issue at hand from a political perspective: In general terms, people do not like uncertainty, especially when it is involving the astronomical sums of money that find their way into the ICSID no matter which way you turn it. Therefore, in the eyes of advocates against ISDS under ICSID and like institutions, it is at best seen as an 'arbitrational casino' where it is extremely difficult to predict the outcome. In the more radical views, it is seen as a corporate wild card against a host state.[62] This makes lawyers, politicians and the constituencies to which they are accountable nervous. Hostility toward ISDS's legal uncertainty is especially highlighted by cases where the interpretation of the tribunal's jurisdiction changes from one case to another, in particularly cases brought forth under the same treaty.

So, are ISDS tribunals 'flip-floppers'? The question is loaded. For one, tribunals operate on an *ad hoc* basis, meaning they are specifically put together to deal with a specific case in a horizontal legal hierarchy. In typical national legal systems, there is a vertical judicial hierarchy, whereas found in international law, there is no real hierarchy. To criticize the reality that the tribunal is not bound by previous cases is fair, but it would be a legal fallacy to accuse the tribunals as flip-flopping since legally speaking, a *tabula rasa* (blank slate) principle is applied so that each case brought forth to a tribunal can be judged on this own merits alone. Therefore, the tribunals under the ICSID are clearly

[60] *Op. cit. supra (USTR 2014)*.
[61] L. Johnson and F. Marshall, 'Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel', *Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel*. IV Annual Forum for Developing Country Investment Negotiators, 29 Oct. 2010, at: www.iisd.org/publications/pub.aspx?id=1442 (last access 30 April 2014).
[62] See: http://www.citizen.org/investorcases (last access 11 Sept. 2014).

not bound by *stare decisis* (bound by precedent). But what about creeping customary law or case law?

According to the interview done in conjunction with this project with Prof. Cremades and significant legal literature,[63] the general impression is that not only precedent is a strong tool for arguing a case one way or another within ISDS in the ICSID, but there may in fact be case law developing. In regard the issue of precedent and jurisdiction, our interview with Prof. Cremedes resulted in some interesting comments on this note:

> *‘‘* [….] *The waste management case you are talking about (referring to Waste Management, Inc. v. United Mexican States (ICSID Case No. ARB (AF)/98/2)), was a case in which we, the tribunal, decided we had no jurisdiction due to the fact that there was pending arbitration on the domestic area. Normally they (critics) blame the arbitrators, because they say that they (the arbitrators) want to attract jurisdiction in any case in order to be competent and to allure the award afterword, but that was a case in which we honestly decided that we thought it would be the moment to say no to the jurisdiction on the issues of the case.’’*
>
> (14:56-15:36), Prof. Cremedes

The dissenting opinion of Prof. Keith Highet (appointed by the Claimants in the waste management case) had other thoughts[64] and used significant amount of cases to back up his claim. Nonetheless, Prof. Cremendes goes to say that over the past 15-20 years, a consistent customary case law has developed within international law, especially within the tribunal setting of ISDS.[65] This is indeed a very interesting proposal. In line with this thinking, Professor Thomas Johnson[66] commented on the issues surrounding the consistency of tribunals:

> *‘Over time, I think that the system produces consistent results. Outlier decisions are criticized and, ultimately, not followed. The real problem is not inconsistent decisions but wrong decisions. A permanent appellate body can make a wrong decision and the world is stuck with it. An ad hoc tribunal makes a wrong decision and, in time, it is recognized as such and not followed.’*[67]

Yet this notion is totally denied by others, in reference to the fact that it is incredibly difficult to predict the outcomes of a given tribunal, stating that "*The majority of investment protection agreements include this far-reaching fair and equitable treatment principle, which has been interpreted very differently by arbitration tribunals."*[68] This issue in particular was referring to the case under the arbitration of *Vattenfall v. The Federal Republic of Germany* (2012).

Indeed, there are several cases that show a tribunal deciding upon the interpretation of a treaty on cases that are similar on their merits but come to different conclusions, such as *Lauder v. Czech*

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[63] C. Schreuer and M. Weiniger, 'A Doctrine of Precedent?' *Diversity and Harmonization of Treaty Interpenetration in Investment Arbitration: Substantive Principles*, Oxford University Press 2006, p. 1189, at: www.univie.ac.at/intlaw/wordpress/pdf/89_conv_across_90.pdf (last access 10 Sept. 2014).

[64] Dissenting Opinion, Keith Highet Waste Management, Inc. v. United Mexican States (ICSID CaseNo.ARB(AF)/98/2), para 52.

[65] Op. cit. supra (Cocq Rasmussen 2014) 16:34 min.

[66] Member of Iran-United States Claims Tribunal, Adjunct Professor of International Investment Law, Columbia University School of Law, former partner at Covington & Burling LLP, Washington D.C.

[67] Op. cit. supra (OECD 2012), p. 7.

[68] N. Bernasconi-Osterwalder and R. T. Hoffmann, 'The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the new dispute Vattenfall v. Germany (II)', *International Institute for Sustainable Development*, 1 June 2012, at: www.iisd.org/pdf/2012/german_nuclear_phase_out.pdf (last access 8 May 2014).

Republic[69] *and CME v. Czech Republic*[70] and the controversy surrounding *CMS v. Argentina*[71] *and LG&E v. Argentina*[72].

Caution must be used in comparing cases arbitrated in the ICSID under the language of different treaties. The author notes that in reading the decisions of over 20 different cases, there seems to be a pattern that tribunals do take the findings of other tribunals into close consideration such as *PSEG Global Inc., The North American Coal Corporation, and Konya Ilgın Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey (ICSID Case No. ARB/02/5*) paragraphs 63-64, 68-69, 134, 139 and more. When looking to confirm this suspicion, a comprehensive study called the *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis* (2008) by Professor Ole Kristian Fauchald, corroborated this finding in a very comprehensive manner[73] and would suggest that there is some kind of a customary law developing naturally.

The evidence provided above is arguable anecdotal, but does show that there is something comparable to creeping case law developing, recognizing that there are some distinct outliers or cases perhaps competing for interpretational supremacy. What exactly constitute creeping case law or customary law is up to debate in itself[74], and by no means conclusive yet within the forum of ISDS. In this regard, it could be advisable for future treaties to strengthen language to include some kind of customary law to increase the legal certainty. But this is easier said than done to the massive number to treaties which invokes the next (but not totally unrelated) issue of forum shopping.

II.5 Forum shopping is an issue

There are over 3200 known ITIA's globally, and the United States alone is subject to 50 ITIA's that incorporate ISDS.[75] When a given investor wishes to make a claim, say against the U.S., there are unclear incorporation laws, nationally and internationally, that allow the investor to potentially change the legal structure or national origin of incorporation to become eligible for arbitration under a number of different ITIA's. In short, an investor has the ability to do forum shopping for a treaty under which to apply a complaint which the investor thinks will have the most favorable outcome, as is well outlined in Knottnerus & Roos study and publication: The Netherlands: A Gateway to 'Treaty Shopping' for Investment Protection [76]

Forum shopping and associated competitive federalism[77] seems to be a general problem with globalization as a need for more international regulation grows. In regard to creating problems for ISDS, the views are conflicting. Some advocates say that is it the right of the investor to choose the

[69] LG&E v. Argentina, ICSID Case No. ARB/02/1 (United States/Argentina BIT).
[70] CME Czech Republic BV v. Czech Republic, *Ad hoc* – UNCITRAL Arbitration Rules, Partial Award of 13 September 2001 and IIC 62 (2003), Final Award of 14 March 2003.
[71] Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/08.
[72] LG&E v. Argentina, (ICSID Case No. ARB/02/1).
[73] Ole K. Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis', *European Journal of International Law* 2008 vol. 19, pp. 301-364, at: http://ejil.oxfordjournals.org/content/19/2/301.full.pdf+htmlb (last access 8 May 2014).
[74] Brian D. Lepard, 'The Necessity Of Opinio Juris In The Formation Of Customary International Law'*, Discussion Paper for Panel on "Does Customary International Law Need Opinio Juris?"*, University of Nebraska College of Law, Print, at: http://law.duke.edu/cicl/pdf/opiniojuris/panel_2-lepard-the_necessity_of_opinio_juris_in_the_formation_of_customary_international_law.pdf (last access 10 Sept. 2014).
[75] *Op. cit. supra (USTR 2014)*.
[76] R. Knottnerus and R. Van Os, 'The Netherlands: A Gateway to "Treaty Shopping" for Investment Protection', *International Institute for Sustainable Development*, 12 Jan. 2012, at: www.iisd.org/itn/2012/01/12/the-netherlands-treaty-shopping/ (last access 1 May 2014), hereinafter (Roos et al 2012).
[77] W. Kasper, 'High on the reform agenda: Competitive federalism', Policy, Spring 1994, pp. 10 □ 14, at: www.cis.org.au/images/stories/policy-magazine/1994-spring/1994-10-3-wolfgang-kasper.pdf (last access 10 Sept. 2014).

most favorable forum for a given dispute to be heard and it is finally up to the tribunal to decide if it has jurisdiction, should the state object. As pointed out by Roos et al. 2012, this notion was upheld in the *Saluka Investments B.V. V. The Czech Republic* case of which the proceedings where indeed very interesting in this regard:

> *"In its Counter-Memorial, submitted on 7 March 2003, the Respondent both set out its response to the Claimant's claims and dealt with the question of counterclaims. As regards the former, the Respondent contended that Saluka's claims should be dismissed because Nomura had not acted in good faith and was not a bona fide investor, and because Saluka did not have any bona fide factual links to The Netherlands: the Respondent used the terms 'Nomura' and 'Saluka' interchangeably, considering Saluka to be nothing more than a shell used by Nomura for its own purposes. Respondent rejected the Claimant's version of relevant facts and the context in which they were to be viewed. In particular, the Respondent asserted that Nomura knew of IPB's financial weakness when it acquired its shareholding in IPB and could not therefore complain of losses arising because matters turned out worse than Nomura expected. The forced administration of IPB and consequent sale to CSOB was the result of Nomura's failure to comply with its obligations to ensure IPB's financial viability. In any event, Nomura's acquisition of control over IPB could not be considered in isolation but as a step towards acquiring – at great profit to Nomura –control of the Czech Republic's largest brewery, Pilsner Urquell, through acquiring IPB's stake in the brewery. Overall, it was the Czech Republic, not Nomura, which was the injured party. The Respondent accordingly asserted that it had at all times acted reasonably, and denied that it was in breach of its obligations under Articles 3 and 5 of the Treaty''"*[78]
>
> From the Decision on Jurisdiction over the
> Czech Republic's Counterclaim in
> *Saluka Investments B.V. V. The Czech Republic*

Similar logic was used in the *Mobil v. Venezuela* case[79] (Roos et al 2012) where the tribunal directly considers this behavior as legitimate. Something not directly mentioned, but perhaps implied, by Ross et al 2012 in regard to the *Mobil v. Venezuela* case is that the tribunal touches on an important distinction when it comes to abuse when forum shopping. Basically, the tribunal was of the opinion that it is acceptable for an investor to have a 'shell company' to take advantage of preferable protections of a given treaty. But it is unacceptable for a company to manipulate the structure of the company once a conflict has incurred.[80] This issue has come up in many cases, where the tribunal had to make a judgment call on the origin of the investor or under which jurisdiction the investor had be incorporated under, including the Leowen case mentioned in the sections above.

All this is very interesting; however, the author differs in his opinion from Roos et al 2012 on the principle of this being a bad thing as such. The issue of forum shopping is not one of the tribunal but a problem of the states themselves. As mentioned before, the individual states are sovereign in their negotiation and acceptance of ISDS in a given treaty. If given states want to limit this, they must do a better job of instituting regulations/rules in treaties that combat against forum shopping.

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[78] *Op. cit. supra* R. Knottnerus and R. Van Os (2012), *See* Proceeding of the tribunal found at the Permanent Court of Arbitration, at: www.pca-cpa.org/showpage.asp?pag_id=1149 (last access 10 Sept 2014).

[79] *Mobil Corporation, Venezuela Holdings B.V.; Mobil Cerro Negro Holdings, Ltd.; Mobil Venezolana de Petróleos Holdings, Inc.; Mobil Cerro Negro, Ltd.; and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela, Decision on Jurisdiction, 10 June 2010, ICSID Case No. ARB/07/27, para. 190. See https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=viewCase&reqFrom=Home&caseId=C74.*

[80] *Ibid, paras. 204 & 205.*

Secondly, it is unclear to the author what the real problem is with investors seeking out favorable treaties of which a state was a willing signatory. If there has been a case of mistreatment toward an investor, then as principle of justice and the fundamental arguments used to justify ISDS (i.e. treating investors fairly), there should not be an issue other that a nuisance to the state that more investors may bring up claims under a given treaty. If a state is worried about abuse of 'shell companies' (i.e. an investor making a claim but not having any capital to come after once a tribunal decided in unfavorable terms to the investor.), it is again the reasonability of the state to come up with capital requirements or something of that nature on investors to curb perceived abuses.

III. Discussion and Conclusion

The interconnections between special interests, national/international politics and various understandings of the law are elaborate and not always consistent. At times there is no clear line between law and the other considerations. However, a general analysis of ISDS in the ICSID in the context of geopolitical considerations, indicates that the system seems to do its intended job for now, i.e. serving the interests of big investors from discriminating or incompetent national law and securing geoeconomic interests. But it is coming at a price of legal uncertainty and at times a sense of injustice. The ISDS as an *ad hoc* process and therefor by its nature does not function by the traditional 'adversarial' method of resolving conflicts, which most of the citizenry is familiar with as a means to producing consistent justice. But the process can evolve to achieve consistent justice without compromising the geopolitical goals of multilateral trade and investment. But it will not be easy.

There are many ideas floating around in the professional spheres on how to adapt ISDS to be more accommodating to a greater sense of justice. The most obvious point being made is to homogenize treaties. The U.S. is going to do this to an extent with the TPP and TTIP as it will encompass 85% of the world's GDP. With homogenization an effective case law/customary law can develop naturally. A homogenization comes with limitations as each nation is at a different stage of development and culture. Nonetheless, basic definitions of what an investment is (see example of Salini test convention debate)[81], how a tribunal goes about deciding jurisdiction, appointing arbitrators, etc. should become basic in respected conventions with the advent of these mega agreements. If they are not concrete conventions/customs, it is much harder for civil society to orient itself and affectively demand adaptations if injustice occurs.

There is a growing concern that intellectual property could start becoming more of an issue in ISDS cases. For example, Take a U.S. pharmaceutical company charges $100 dollars for a given drug treatment of a disease that only costs $1.00 dollars to produce. A competitor (e.g. the national health care system of a state) starts selling the drug at cost price, and thus ignoring the patent to save lives, where does morality go in the tribunal? These issues will become the new legal, economic, political and potentially military battlegrounds, just as competition over ownership of natural resources continue today. In a system where an unjust rule of law exists, the power players could become the international patent holder, not the people or the governments that represent them. This is a serious issue that deserves real debate.[82]

[81] A. Garcia from Herbert Smith Freehills LLP, 'ICSID tribunal considers Salini criteria', *Practical Law*. Thomson Reuters, 27 Mar. 2013, at: http://uk.practicallaw.com/9-525-4681?q=&qp=&qo=&qe= (last access 8 May 2014).

[82] Joseph E. Stiglitz, a Nobel laureate in economics and University Professor at Columbia University, was Chairman of President Bill Clinton's Council of Economic Advisers and served as Senior Vice President and Chief Economist of the World Bank. His most recent book is *The Price of Inequality: How Today's Divided Society Endangers our Future*. Read more at: www.project-syndicate.org/columnist/joseph-e--stiglitz#O1tRtyLS8qxBtKSy.99 (last access 10 Sept 2014).

One of the main arguments for having ISDS and the liberal economic policies is to help developing countries. However, there is no strong evidence showing that this is the case.[83] As argued before, ISDS generally implemented in countries with weak legal institutions to impartially represent foreign investors in their own courts. This mantra is too is breaking down, as countries with highly sophisticated legal systems such as Germany, are faced with tribunal litigation. Is it acceptable that one of the most developed democracies is challenged in arbitration over a new political policy to phase out nuclear energy (Vattenfall v. The Federal Republic of Germany (2012))? The author refrains from too much criticism of this case as the litigation is kept private, and the facts of the case are not totally clear as of the writing of this paper.

On a final note, the world's biggest corporations are deeply involved in drafting the TPP and TTIP as they are the ones with most to gain.[84] They are obviously going to lobby for the writing of the treaty to serve corporate interests. It is up to civil society to counter this lobbying.

One must not lose sight of the big picture. The TPP and TTIP will consolidate the economics and foster strong political, economic and strategic relationships. With cooperation on these issues, market stability and collective security will be an aggregate benefit. Unpredictable political/diplomatic actions will be more likely to be via the law. This is a critical value to nurture in a more connected world. For sustainable progress to be made a respected dialog must be established between the stakeholder groups.

[83] A. Berger et al., 'More stringent BITs, less ambiguous effects on FDI? Not a bit!', *Economics Letters 2011* vol. 112 Issue 3, pp. 270 – 272.
[84] K. Hrafnsson, 'TPP - Sacrificing the Environment for Corporate Interests', Wikileaks, 15 Jan. 2014, https://wikileaks.org/tpp-sacrificing-the-environment.html (last access 6 May 2014).