ISSUE FOCUS

The Investment Protection Chapter of the EU-Singapore Free Trade Agreement: A Model for the Post-Brexit UK IIAs

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The impending British exit (Brexit) from the European Union has placed the UK's investment policy at a crossroads. A post-Brexit UK will now have to reorganise its investment relationships with its economic partners through bespoke UK IIAs. This exercise will have to accommodate the shifting zeitgeist concerning the balance of investors' rights and the right to regulate IIAs that is expected. This paper examines the continued relevance of the recently minted Investment Protection Chapter in the EU-Singapore Free Trade Agreement, acknowledged by Britain's power brokers, as a persuasive model for the UK to emulate for this purpose. This is notwithstanding the uncertainties that now surround the implementation and efficacy of the Agreement in light of Brexit and a pending decision from the Court of Justice of the European Union. Such emulation would ultimately make for a better Investor-State Dispute Settlement System in the UK IIAs by providing a much needed update to its old investment treaty architecture.

Keywords

EUSFTA, Investment Chapter, Brexit, ISDS, Right to Regulate, Code of Conduct, Roster of Arbitrator.

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I. Introduction

The European Union-Singapore Free Trade Agreement ("EUSFTA") is poised to be a landmark agreement in the Southeast Asian region. Negotiations for the EUSFTA begin in 2009 and the agreement was finalized in 2014. Initially, the EUSFTA was expected to enter into force by the end of 2015, but it is now postponed to 2018 or 2019, further subject to the domestic administrative procedures on both sides.[1] This is due to the European Commission's decision to request for a CJEU opinion on its competencies about the EUSFTA**.** This is further complicated by the impending departure of the UK, to which three quarters of Singaporean investment in the EU goes, from the EU following a referendum on June 23, 2016.[2] This has generated considerable uncertainty about the UK's future relationship with Singapore in relation to investment protection as the Investment Protection Chapter of the EUSFTA was meant to be a replacement of the existing bilateral investment treaty between the two countries, namely, the Agreement on Promotion and Protection of Investment on July 22, 1975 (hereinafter UK-Singapore BIT). Brexit has thus underscored the EUSFTA's role as both a possible model for an independent UK to emulate, and an event possibly impacting on the implementation and efficacy of the EUSFTA.[3]

Whatever the fate of the EUSFTA would be, three things are evident. First, Prime Minister Theresa May's government has indicated its post-Brexit direction of focusing on Commonwealth countries as an alternative to Britain losing access to the European Single Market after leaving the EU.[4] Secondly, there is a clear impetus for the UK to update its international economic law architecture with a new series of international investment agreements ("IIAs"). Those terms would better comport with the evolved expectations on an investment treaty regime by host States, home

1 Singapore Ministry of Trade and Industry, Press Release, Dec. 2014, *available at* https://www.mti.gov.sg/MTIInsights/SiteAssets/Pages/EUSFTA/5%20things%20you%20should%20know%20about%20the%20EUSFTA.pdf (last visited on Apr. 21, 2017).

2 At this referendum, 52 percent of the UK voters voted in favour of leaving the European Union. *See Britain votes 'Out' to exit the European Union*, Channel NewsAsia (Singapore), June 24, 2016, *available at* http://www.channelnewsasia.com/news/world/live-updates-britain/2899680.html (last visited on Apr. 21, 2017).

3 Tang See Kit, *Brexit and the EU-Singapore FTA: Further delays or a slow-death?*, Channel NewsAsia (Singapore), July 5, 2016, *available at* http://www.channelnewsasia.com/news/business/singapore/brexit-and-the-eu/2929208.html (last visited on Apr. 21, 2017).

4 P. Sunwalkar, *Spurred by Brexit, UK pushes for trade with India and the Commonwealth*, Hindustan Times, Mar. 8, 2017, *available at* http://www.hindustantimes.com/india-news/spurred-by-brexit-uk-pushes-for-trade-with-india-and-the-commonwealth/story-Stx8oMH0gwxSf55AElJUVN.html (last visited on Apr. 21, 2017).

States and investors on both ends. These expectations reflect a shift away from the traditional pro-investor model used in earlier generation UK BITs to a more nuanced balancing of investor and regulator rights. Thirdly, the Investment Protection Chapter of the EUSFTA, unique even in the context of the three new-generation EU treaties to date, is emblematic of a sophisticated and pragmatic accommodation of the new *zeitgeist* on clear terms.

The primary purpose of this research seeks to highlight that the language of the EUSFTA's Investment Protection Chapter should, in its embrace of the EU-style treaty drafting while reflecting indigenous attitude towards investor-state dispute settlement ("ISDS") and investment policy, serve as a model for emulation by a post-Brexit UK as it embarks upon creating its own new generation BITs with important investment partners such as Singapore. This potential has been acknowledged by the British High Commissioner to Singapore Scott Wightman who stated that this emulation could result in "such a high-quality agreement … that sets the benchmark" which, in turn, would help Britain negotiate good agreements with other countries.[5]

This paper is composed of four parts including a short Introduction and Conclusion. Part two will address the current uncertainties surrounding the implementation and efficacy of the EUSFTA. Part three will examine the impetus for a new generation of the UK IIAs and flesh out specific features of the EUSFTA that ought to be emulated in the new UK treaty template upon which these future IIAs would be negotiated.

II. Uncertainty over the Implementation of the EUSFTA

A. Pending CJEU Decision

On September 13-14, 2016, the full bench of the Court of Justice of the European Union ("CJEU") heard arguments on which of the EUSFTA's provisions fall within the EU's shared competence, within EU's exclusive competence; and within the

[5] *See UK looks to EU-S'pore FTA for ways to ensure trade continuity*, Bus. Times (Singapore), Apr. 13, 2017, *available at* http://www.businesstimes.com.sg/government-economy/uk-looks-to-eu-spore-fta-for-ways-to-ensure-trade-continuity (last visited on Apr. 21, 2017).

exclusive competence of the EU Member States.[6] The Opinion[7] of the Advocate-General of the CJEU, Eleanor Sharpston *QC*, which was released on December 21, 2016, suggests that the EU lacks the exclusive competence to conclude the EUSFTA with Singapore because of its 'mixed nature.'[8] The Advocate General is of the view the EU's competence is shared with Member States in matters concerning, *e.g.*, "provisions on trade in services, forms of investment other than direct foreign investment and dispute settlement procedures."[9] If this opinion is followed by the Court, it could stymie the implementation of the EUSFTA because, in this case, the agreement has to be approved by the EU Council, the European Parliament, as well as the 38 national and regional Parliaments of all Member States before it can take effect. One commentator notes that different Member States have different requirements for ratification, a process which could take several years.[10]

It is still unclear how the full court of 28 judges of the CJEU will rule on this matter. The Advocate General's Opinion is neither binding,[11] nor does the Court always follow it.[12] When asked in Parliament about the impact of the Opinion on the EUSFATA, Singapore's Minister of Trade and Industry replied that: "Singapore is actively working with the EU and Member States to ensure that the EUSFTA can proceed with ratification as soon as the CJEU delivers its final opinion so that

6 *See Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU*, C363/22 Official J. E.U. (2015), *available at* http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62015CU0002 (last visited on Apr. 21, 2017). The request reads: "Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically: - Which provisions of the agreement fall within the Union's exclusive competence? - Which provisions of the agreement fall within the Union's shared competence? Is there any provision of the agreement that falls within the exclusive competence of the Member States?"

7 *See* Advocate General Sharpston considers that the Singapore Free Trade Agreement can only be concluded by the European Union and the Member States Acting Jointly, 147/16 CJEU Press Release, Dec. 21, 2016, *available at* http://curia.europa.eu/jcms/jcms/p1_269089/fr (last visited on Apr. 21, 2017).

8 *Id.*

9 *Id*.

10 A. Casteleiro, *Opinion 2/15 on the scope of EU external trade policy: Some background information before next week's hearing*, EU Law Analysis, Sept. 6, 2016, *available at* http://eulawanalysis.blogspot.sg/2016/09/opinion-215-on-scope-of-eu-external.html (last visited on Apr. 21, 2017).

11 *See* Advocate General Sharpston Considers that the Court should annul the Measures Maintaining Hamas and LTTE on the EU List of Terrorist Organizations on Procedural Grounds, 'Note,' 108/16 CJEU Press Release, Sept. 22, 2016, *available at* http://curia.europa.eu/jcms/jcms/p1_228975/en. *See also* Advocate General Sharpston Considers that a Company Policy Requiring an Employee to Remove her Islamic Headscarf when in Contact with Clients Constitutes Unlawful Direct Discrimination, 'Note,' 74/16 CJEU Press Release, July 13, 2016, *available at* http://curia.europa.eu/jcms/jcms/p1_215558 (all last visited on Apr. 21, 2017).

12 C. Arrebola & A. Mauricio, *Measuring the Influence of the Advocate General on the Court of Justice of the European Union: Correlation or Causation?*, EU Law Analysis, Jan. 17, 2016, *available at* http://eulawanalysis.blogspot.sg/2016/01/measuring-influence-of-advocate-general.html (last visited on Apr. 21, 2017).

businesses can reap its benefits as soon as possible."[13] If the CJEU was to concur with the Advocate-General's opinion, the speed at which the EUSFTA can be implemented, if at all, will be left open. This is evidenced by the slow progress with the Comprehensive Economic and Trade Agreement ("CETA") with Canada and the Transatlantic Trade and Investment Partnership ("TTIP") with the US.

It is interesting to note that other recent investment agreements concluded by the EU have not faced the same level of scrutiny with respect to the European Commission's application to the CJEU. The European Commission has already proposed the CETA to the EU Council for signature and provisional application in July 2016.[14] However, this was clearly stated to be without prejudice to the CJEU's pending decision on the application regarding the EUSFTA. The Advocate General's comments on the compatibility of Investor-State Dispute Settlement ("ISDS") in the EUSFTA with other EU law provisions is also of note. She said that her analysis in her Opinion is "without prejudice to … the material compatibility of the EUSFTA, including the provisions regarding the ISDS mechanism," with other EU law provisions.[15] Indeed, the Commission did not ask the CJEU to resolve this question in addition to the competence question, despite the fact that it requested this Opinion after the Court delivered its Opinion 2/13 on the draft accession agreement to the European Court of Human Rights.[16] In his comments before the European Parliament, the Commission's chief CETA negotiator Mauro Pettriccione suggested that if the CJEU did not object to ISDS in Opinion 2/15, we could assume that the CJEU considers the mechanism compatible with the Treaties.[17]

B. Impact of Brexit on the EUSFTA

The fact that the UK may not eventually be party to the EUSFTA could dilute the significance of this FTA on Singapore's investment law and policy *apropos* Europe. The UK is the largest investor among the countries in the EU into Singapore. Total foreign direct investment into Singapore from the UK exceeded GBP 30 billion at

13 *See* Singapore Parliamentary Debates, 94:35 Written Answers to Questions, Feb. 28, 2017.

14 European Commission Press Release, July 5, 2016, *available at* http://europa.eu/rapid/press-release_IP-16-2371_en.htm (last visited on Apr. 21, 2017).

15 L. Ankersmit, The Power to Conclude the EU's New Generation of FTA's: AG Sharpston in Opinion 2/15, European Law Blog, Jan. 10 2017, *available at* http://europeanlawblog.eu/2017/01/10/the-power-to-conclude-the-eus-new-generation-of-ftas-ag-sharpston-in-opinion-215 (last visited on Apr. 21, 2017).

16 L. Ankersmit, Investment Court System in CETA to Be Judged by the ECJ, European Law Blog, Oct. 31, 2016, *available at* http://europeanlawblog.eu/2016/10/31/investment-court-system-in-ceta-to-be-judged-by-the-ecj (last visited on Apr. 21, 2017).

17 *Supra* note 15.

the end of 2014, making it the fifth-largest total source of foreign direct investment. Half of Singapore's foreign direct investment into the EU goes to the UK, including significant investments in infrastructure projects.[18]

Notwithstanding, the existing short-term impact of Brexit on investment has been observed to be minimal. According to the UNCTAD, inward FDI to the UK surged to USD 179 billion in 2016, the second highest in the world, behind the US, representing a six-fold increase over the 2015 total.[19] Moreover, many surveys show continued investor confidence in the UK after the Brexit referendum. This may stem from the fact that several advantages of the UK such as developed capital markets, strong rule of law and light touch regulation are unaffected by the EU membership.[20] It has been pondered whether Brexit could invite claims by foreign investors against the UK for breaches of its international legal obligations contained in its BITs. One example of such a claim could be for a breach of legitimate expectation that the UK would stay in the EU. Though possible in theory, it has been observed that such claims are unlikely to succeed due to the difficulties in attributing the act of leaving the EU to the UK government, the lack of any specific assurances and Brexit being an exercise of sovereignty pursuant to express wording in Article 50 of the Lisbon Treaty.[21] Brexit is also unlikely to affect British companies already operating in Singapore and may even encourage these companies to increase their investments in Singapore and Asia amid the uncertainties and risks in their home markets, assuming the British pound does not weaken.[22]

In any event, it is still too early to make a definitive pronouncement on the long-term impact of Brexit. Much could depend on the precise outcome of the difficult UK-EU exit negotiations, especially for FDI by the UK-based companies that focus on the European market.[23] According to Article 50 of the Lisbon Treaty, negotiations on the withdrawal of the UK from the EU can take up to two years with the

18 Suet-Fern Lee & T. Cooke, *Singapore and the Brexit Effect*, Morgan Lewis, June 29, 2016, *available at* https://www.morganlewis.com/pubs/singapore-and-the-brexit-effect (last visited on Apr. 21, 2017).

19 UNCTAD, 25 Global Investment Trends Monitor, Feb. 2, 2017, *available at* http://unctad.org/en/PublicationsLibrary/webdiaeia2017d1_en.pdf (last visited on Apr. 21, 2017).

20 L. Kekic, *FDI to the UK will remain robust post-Brexit*, 195 Colum. FDI Perspectives, Mar. 13, 2017, *available at* http://ccsi.columbia.edu/files/2016/10/No-195-Kekic-FINAL.pdf (last visited on Apr. 21, 2017). This cites the annual business survey conducted for the World Economic Forum and a survey by Colliers International among others.

21 M. Burgstallar & A. Zarowna, Why Brexit May Be Good for UK Investors Abroad, Kluwer Arbitration Blog, Oct. 24, 2016, *available at* http://kluwerarbitrationblog.com/2016/10/24/brexit-may-good-uk-investors-abroad (last visited on Apr. 21, 2017).

22 *See SG: Brexit impact limited for now*, DBS Group Research Report, June 28, 2016, *available at* http://www.dbs.com.sg/treasures/templatedata/article/generic/data/en/GR/062016/160627_economics_brexits_impact_will_be_mixed.xml (last visited on Apr. 21, 2017).

23 *Supra* note 20.

possibility of an extension. This timeframe will help mitigate some of the uncertainty surrounding Brexit as investment policy can be adapted accordingly.

III. EUSFTA as A Model for the Post-Brexit UK IIAs

The UK has concluded many investment treaties. Only on one occasion, however, it has been taken before an investor-state tribunal based on such a treaty.[24] This was largely attributable to the income asymmetry between the UK and other contracting States. This dynamic could change in future negotiations with high-income countries that have significant foreign investment stocks in the UK, such as the US and Singapore[25] and a growing desire among lower-income countries to assert regulatory rights exercised in the public interest. By sticking to its old investment treaties, the UK may miss an opportunity to harness evolving international economic law to meet the complex economic, social and environmental challenges facing it and its partners today.[26]

The EUSFTA represents the latest model of Singapore's next generation international investment agreements ("IIAs") with a more calculated approach towards investor-state arbitration. The provisions therein evince a conscientious effort to 'dispute-proof' the treaties as much as possible. They are innovating where necessary to achieve this purpose. Many of the next-generation EUSFTA's novel provisions and processes are not present in the IIAs currently in place between Singapore and several EU Member States. Even though the status of the EUSFTA itself remains tentative given the fore-mentioned developments, it is highly likely that its provisions will outlive its demise as a model for both British and European IIAs going forward.

A. Express Affirmation of the Right to Regulate

Singapore, the other State, and regional parties, all are wary of the rise ISDS cases in

[24] D. Webb, Standard Note on the TTIP (2015), *available at* http://www.parliament.uk/briefing-papers/SN06688/the-transatlantic-tradeand- investment-partnership-ttip (last visited on Apr. 21, 2017).

[25] L. Cotula & L. Johnson, *Beyond trade deals: charting a post-Brexit course for UK investment treaties*, Columbia Center on Sustainable Investment Briefing, Dec. 2016, *available at* http://ccsi.columbia.edu/files/2016/12/Beyond-trade-deals-charting-a-post-Brexit-course-for-UK-investment-treaties-Dec-2016.pdf (last visited on Apr. 21, 2017).

[26] *Id*.

the recent years.[27] Although statistics shows an even split in awards for and against States,[28] it appears to have affected the way Asian States negotiate and review their investment agreements. Indonesia, *e.g.*, has given written notice to the Netherlands that it was denouncing the Indonesia-Netherlands BIT.[29] It has also denounced its BITs with France, Slovakia, China, Italy, and Bulgaria. Indonesia is also terminating its BITs in such a manner that clauses which offer residual protection to investors will not apply, upon termination.[30]

The cognizance of treaty parties to this perception of a pro-investor bias in earlier-generation treaties is illustrated by the shift from the predominantly pro-investor stance characteristic of old US-style treaty drafting to a more balanced EU-style approach as typified in the EUSFTA. This means that IIAs with the EU-style drafting are now neither simply pro-investor, nor pro-host state. Instead, they seek to strike a balance between investors and host countries.[31]

This shift is clearly shown from the language of these next generation agreements. At the outset, the preamble of the EUSFTA departs from previous treaties, which traditionally "refer exclusively to the economic imperative of promoting and protecting investments."[32] Instead, the preamble of the EUSFTA makes explicit reference to the State's right to regulate, in particular when pursuing public policy objectives. This is an important innovation present in the EUSFTA, which made clear to be central to the objectives of both parties.[33] This express reference represents the agreement between the parties of the importance of carving

27 S. Menon, *The Impact of Public International Law in the Commercial Sphere and Its Significance to Asia*, 16 J. World Inv. & Trade 777 (2015).

28 UNCTAD, Recent Trends in IIAs and ISDS 1 (2015), *available at* http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf (last visited on Apr. 21, 2017).

29 Netherlands Embassy in Jakarta, Indonesia, Termination Bilateral Investment Treaty, *available at* http://indonesia.nlembassy.org/organization/departments/economic-affairs/termination-bilateral-investment-treaty.html (last visited on Apr. 21, 2017).

30 L. Peterson, *Indonesia Ramps up Termination of BITs - And Kills Survival Clause in One Such Treaty - But Faces New $600 Mil. Claim from Indian Mining Investor*, Int'l Arbitration Reporter, Nov. 20, 2015, *available at* http://www.iareporter.com/articles/indonesia-ramps-up-termination-of-bits-and-kills-survival-clause-in-one-such-treaty-but-faces-new-600-mil-claim-from-indian-mining-investor (last visited on Apr. 21, 2017).

31 L. Nottage, US vs EU vs Other Models for Investment Treaties in the Asian Region, Japanese Law and the Asia-Pacific (blog), University of Sydney, June 10, 2016, *available at* http://blogs.usyd.edu.au/japaneselaw/2016/06/us_vs_eu_vs_other_models.html (last visited on Apr. 21, 2017).

32 EU Commission, Concept Paper on investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court (2015) (EC Concept Paper), at 6, *available at* http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (last visited on Apr. 21, 2017).

33 EU-Singapore Trade & Investment 2015, at 27, *available at* http://eeas.europa.eu/archives/delegations/singapore/documents/eu_singapore/eu_singapore_trade_investment_2015_en.pdf (last visited on Apr. 21, 2017).

out space for the State's regulatory rights.[34] Further, it sets the tone for the EUSFTA and moves away from the traditionally pro-investor language by carving out greater space for the host state's regulatory rights. It would be prudent for the forthcoming UK concluded BITs to likewise expressly commit to ensuring a balance between state and investor rights in forthcoming IIAs particularly to obtain the buy-in of the Global South.

B. Extensive Use of Interpretative Footnotes and Language

The EUSFTA is punctuated with numerous footnotes which serve as explanatory statements. They would clarify the wording of the treaty to preclude disputes on interpretation. *E.g.*, these footnotes frequently begin with the wording "for greater certainty,"[35] reminiscent of commercial contracts. This departs from older investment agreements entered into by Singapore, which have little[36] or no footnotes.[37] This drafting language in fact already has a precedent in the 2010 Singapore-Costa Rica Free Trade Agreement.

In addition to footnotes, the definitions provided are lengthier both in terms of the number of words the parties chose to define and the definitions provided. *E.g.*, the terms 'treatment' and 'measure' are carefully defined under Article 9.1, paragraph 5 of the EUSFTA, delimiting the exact type of State action investors may dispute. Article 9.2 further limits the scope of state conduct the investor may raise during investor-state arbitration by stating, "[f]or greater certainty, a Party's decision not to issue, renew or maintain a subsidy or grant shall not constitute a breach of Article 9.4 (Standard of Treatment) or be considered an expropriation." It is noteworthy that the CETA does not have an equivalent provision, making it a unique feature of the EUSFTA.

These explanatory notes may be interpreted in two ways. First, it could be viewed as an attempt to curtail or, at the very least, limit the future tribunal from exercising control over the interpretation of the agreement's wording. Secondly, it could

34 *See generally* S. Menon, 'International Arbitration: The Coming of a New Age for Asia (and Elsewhere), ICCA Congress 2012 (Singapore), ¶ 22, *available at* http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf (last visited on Apr. 21, 2017). Menon noted that investment arbitrators increasingly "find themselves having an unexpectedly weighty hand in shaping economic and monetary policy, tax incentives, and perhaps even employment laws," and questions if this should be so.

35 EUSFTA arts. 9.2(2) (Scope of the Agreement) & 9.4(4) (Standard of Treatment). *See also* EUSFTA Investment Chapter, footnotes 1, 2, 6, 7, 14, 17, 19 & 23.

36 Singapore-Australia Free Trade Agreement 2003, Investment Chapter; European Free Trade Association-Singapore Free Trade Agreement 2002, Investment Chapter.

37 Singapore-Jordan Free Trade Agreement 2004.

be construed as a means to give greater guidance to ensure that the true bargain negotiated between the State parties is given effect to. This author prefers the second explanation. Also, some have indeed noted that arbitral tribunals have difficulties in agreeing on the interpretation of treaty provisions even though they may be largely similar.[38] In that way, states are thus taking a more proactive step in defining with certainty the scope and content of their obligations to the investor.

C. Joint Committee on Interpretation

Article 17.1 of the EUSFTA establishes a Trade Committee comprising of representatives from both parties. Essentially, the Trade Committee is assigned to oversee the smooth implementation of the FTA, consider amendments, and issue binding decisions on interpretation.[39] The decisions of the Trade Committee then become binding on the Parties as well as any subsequent ISA. Importantly, interpretations adopted by the Trade Committee are binding on the tribunal deciding a claim pursuant to Article 9.16.[40] While the usage of the word 'adopted' indicates the Trade Committee's decisions would not have a retroactive element, the extent of the Trade Committee's powers is yet to be fully explored.

Such a provision is not novel globally and to Singapore. An early and relatively well-known example of such a provision in investment treaty may be found in the North American Free Trade Agreement ("NAFTA"). The NAFTA established a Free Trade Commission ("FTC") made up of cabinet-level representatives of its member States or their designees. In particular, Article 1131(2) states that any "interpretation by the [Free Trade Commission] shall be binding" on investor-state tribunals. Under the Singapore-US FTA, an identical provision is made under Article 15.21. The adoption of such a provision in the EUSFTA continues this trend and comes on the heels of joint interpretation mechanisms being vogue in recent agreements entered into by many of the TPP negotiating States. Under the ASEAN-Australia-New Zealand Free Trade Agreement ("AANZFTA"), *e.g.*, Article 27(2) authorizes a tribunal to request a joint interpretation by the Parties of any provision of the agreement. Article 27(3) of AANZFTA establishes the binding nature of joint

38 S. Menon, *Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence*, Sing. J. Legal Stud. 235 (2013), *available at* http://law.nus.edu.sg/sjls/articles/SJLS-Dec-13-231.pdf (last visited on Apr. 21, 2017).

39 M. Daly, The EU-Vietnam FTA: What Does It All Mean? What Does It Mean for the Future?, Kluwer Arbitration Blog, Dec. 14, 2015, *available at* http://kluwerarbitrationblog.com/2015/12/14/the-eu-vietnam-fta-what-does-it-all-mean-what-does-it-mean-for-the-future (last visited on Apr. 21, 2017).

40 EUSFTA art. 9.19, ¶ 3.

interpretations. Under the Korea-US Free Trade Agreement ("KORUS FTA"), Article 22.2 authorizes the Parties, through a Joint Committee, to issue interpretations of any provision of the agreement. Article 11.22 of KORUS FTA, like Article 27(3) of AANZFTA set up the binding nature of joint interpretations.

This renewed enthusiasm for a Joint Committee for interpretation is perhaps a response to the concerns ISA cases initially caused. Without treaty-created interpretive boards, arbitral tribunals could decide on the bargain between the State parties without much restrictions. These arbitral tribunals have been criticized as having little or no accountability to the State parties.[41] Therefore, the arbitral jurisprudence was described as having "little consideration of the views and practices of states in general or the treaty parties in particular."[42] This resulted in a high likelihood of a gap between the expectation of the State parties and the eventual tribunals which interpreted the treaty.[43] The developments in introducing the concept of a Trade Committee in the EUSFTA with the ability to deliver binding decisions at least narrows this gap on issues of interpretation. It has been suggested that the ability of the Joint Committees to issue an interpretation of any obligation in the Agreement that is binding on an arbitral tribunal can be considered key procedural protection.[44] When a party believes that particular provisions in the EUSFTA have been interpreted in an overly broad way by the tribunal, which had not been anticipated by the party, a plain reading of Article 9.16 suggests that the Joint Committee may intervene, on request, to issue an interpretation that is binding on the tribunal. In this way, the parties' exposure to a relatively high degree of uncertainty that may flow from the tribunal's wide interpretation can be decreased considerably.

A Joint Committee may also provide a better guarantee of *appropriate* interpretation of the terms of the investment agreement between countries. [Emphasis added] This is not only because it can convey more accurately the present parties' intention to the tribunals and the fast-changing global investment environment, but also because it is able to better consider other similar situations pending between the two States and the policy dimension of the measure at issue in a comprehensive manner. While

41 S. Menon, *Public International Law - A Requirement for Every Private Lawyer*, Keynote Speech at the Pacific Rim Advisory Council Conference in Singapore, Oct. 17, 2011, at 6, *available at* https://www.agc.gov.sg/DATA/0/Docs/NewsFiles/Pacific_Rim_Advisory_Council_Conf_171011.pdf (last visited on Apr. 21, 2017).

42 A. Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 Am. J. Int'l L. 179 (2010).

43 *Supra* note 41.

44 The Parliament of the Commonwealth of Australia, Report 142: Treaty Tabled on 13 May 2014-Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea (Sept. 2014), at 27, *available at* http://www.iri.edu.ar/publicaciones_iri/anuario/cd_anuario_2014/Asia/Australia-Korea%20Trade%20Agreement.pdf (last visited on Apr. 21, 2017).

investment tribunals can undertake a legal enquiry, it will not be well-placed to consider the practical and policy paradigms to the matter at hand. [45]

While there is concern that this role and nature of the Joint Committee implicitly blurs the lines between ISDS and State-to-State Dispute Settlement, such cognizance may circumscribe unregulated use and expansion of the Joint Committee's function.[46] Also, a joint committee in the mold of the Trade Committee is, on balance, a welcome addition to the UK investment agreements notwithstanding its American origin.

D. Filtering Unmeritorious Claims

The EUSFTA contains provisions directed at preventing investors from bringing claims without reason so that it protects the States' legislative powers from inopportune intrusions. This outlook facilitates efficient ISDS.

1. Rejection of Frivolous Claims

Inspired by Rule 41(5) of the ICSID Rules of Procedure for Arbitration Proceedings,[47] Article 9.21 of the EUSFTA has established a fast track system for rejecting unfounded or frivolous claims. Frivolous claims can be thrown out in a matter of weeks. These are innovative provisions, broader in scope of application and functioning than any existing comparable systems. By comparison, none of the investment agreements currently in force between Singapore and the EU Member States contains similar provisions.

The NAFTA experience indicates the possibility of abusing ISDS through frivolous claims is not fanciful as a significant number of claims filed by the US investors against Canada were later withdrawn or became inactive.[48] Occasionally, such claims are brought in bad faith merely to harass a respondent as a strategic device, mostly with the intention of gaining a better bargaining position.[49] These

45 J. Chaisse & Tsai-yu Lin (eds.), International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita 147 (2016).

46 *Id.* at 150.

47 J. Crook, *Four Tribunals Apply ICSID Rule for Early Ouster of Unmeritorious Claims*, 15 ASIL Insights (2011), *available at* http://www.asil.org/insights/volume/15/issue/10/four-tribunals-apply-icsid-rule-early-ouster-unmeritoriousclaims#_edn20 (last visited on Apr. 21, 2017).

48 L. Poulsen et al., Costs and Benefits of an EU-USA Investment Protection Treaty (2013), *available at* http://www.italaw.com/sites/default/files/archive/costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf (last visited on Apr. 21, 2017).

49 UKTI Trade Services, Establishing a Business Presence in the USA 2013, *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/301343/Establishing_a_Business_Presence_in_the_USA.pdf

types of claims are to be prevented or eliminated at an early stage of the proceedings in order to control arbitration costs and to save other host State resources, otherwise bound by responding to investment claims.[50]

While the EUSFTA did not clarify the term "manifestly without legal merit," guidance can be sought from the awards rendered in pursuance of Rule 41 (5) of the ICSID Rules of Procedure for Arbitration Proceedings.[51] A tribunal held: "The ordinary meaning of the word 'manifest' requires the respondent to establish its objection clearly and obviously, with relative ease and despatch. The threshold is thus set high."[52] Another held that, despite the wording of Rule 41 (5), the objection is not limited to challenges on the merits. It can be extended to objections based on a lack of jurisdiction.[53] The rule has been used, *e.g.*, to bring those arbitrations to an early end either where there was obviously no investment within the meaning of Article 25 of the ICSID Convention,[54] or where the respondent wanted to re-open a case already decided elsewhere.[55]

2. Costs

Following Article 9.29 of the EUSFTA, both the costs of the arbitration and other reasonable costs which include those of legal representation are to be borne by the unsuccessful party. According to the European Commission, they are the first of their kind in ISDS agreements.[56] It supports this approach specifically with the view that it might lead to cost relief for governments.[57] This would be a particularly

(last visited on Apr. 21, 2017).

50 S. Hindelang, *Study on Investor-State Dispute Settlement ('ISDS') and Alternatives of Dispute Resolution in International Investment Law*, 1 Transnat'l Dispute Mgmt. 107 (2016), *available at* http://ssrn.com/abstract=2525063 (last visited on Apr. 21, 2017).

51 *Supra* note 47.

52 Trans-Global Petroleum, Inc. v. Jordan, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, ¶ 88 (Apr. 8), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0872.pdf (last visited on Apr. 21, 2017).

53 Brandes Inv. Partners, LP v. Venezuela, ICSID Case No. ARB/08/3, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, ¶¶ 52-55 (Feb. 2), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1170_En&caseId=C26 (last visited on Apr. 21, 2017).

54 Global Trading Resource Corp. v. Ukraine, ICSID Case No. ARB/09/11, Award, ¶ 56 (Dec. 1), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1771_En&caseId=C66 (last visited on Apr. 21, 2017).

55 RSM Prod. Corp. v. Grenada, ICSID Case No. ARB/10/6, Award, ¶ 7.3.6 (Dec. 10), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1792_En&caseId=C98 (last visited on Apr. 21, 2017).

56 European Commission, Investment Provisions in the EU-Canada Free Trade Agreement (CETA) 6 (2014), *available at* http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf (last visited on Apr. 21, 2017).

57 *Id.*

welcome development for developing countries given the high cost of resolving disputes in international arbitration[58] and the financial power asymmetry between large corporations and poorer host States.[59] Yet, it has been argued that this principle does not assure that financially robust claimants are deterred from resorting to arbitration if it serves their strategic interests.[60]

In any event, the same article of the EUSFTA grants the tribunals some discretion to allocate the costs differently if it determines to be appropriate considering the circumstances of the case. It is not further defined what such circumstances might be. If only parts of a claim were successful the costs shall be borne proportionately by the parties. The provisions differentiate between arbitration costs and other reasonable costs. In this way, the treaties allow tribunals to differentially apportion arbitration costs and other costs, because the circumstances relevant to each apportionment might not necessarily be the same.

E. Regulating Arbitrators

The EUSFTA has also addressed the regulation of arbitrators, namely, the provision of a binding code of conduct for arbitrators and a roster of pre-selected arbitrators. These provisions aim to reduce the propensity of arbitrator challenges in an investment arbitration particularly due to alleged misconduct and pro-investor bias. This in turn saves time, costs and ultimately removes a frequent obstacle to the enforcement of such awards.

1. Code of Conduct for Arbitrators

Article 9.21 (8) of the EUSFTA introduces an unprecedented binding code of conduct for arbitrators and mediators (hereinafter the Code). It is different from the initial draft of CETA or even the TPP which are comparatively less detailed and focus more on the qualifications of the arbitrator.[61] The Code, found at Annex 9-B of the EUSFTA, arguably imposes a higher standard of conflict and disclosure obligations on arbitrators than in any other rules or guidelines, including the UNCITRAL

58 *E.g.*, the legal costs to the claimant (related to both the jurisdiction and merits phases of the arbitration), amounted to USD 4.6 million, while the respondent's legal costs (for both phases) were USD 13.2 million. *See* Plama Consortium v. Bulgaria, ICSID Case No. ARB/03/24, Award, *available at* https://www.italaw.com/sites/default/files/case-documents/ita0671.pdf (last visited on Apr. 21, 2017).

59 K. Böckstiegel, *Enterprise v State: the New David and Goliath?*, 23 Arbitration Int'l 93-4 (2007).

60 Hindelang, *supra* note 50, at 110.

61 Trans-Pacific Partnership Agreement (signed on Feb. 4, 2016, not in force as of May 2017) ch. 28, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text (last visited on Apr. 21, 2017).

Model Law, the UNCITRAL Arbitration Rules and the 2004 IBA Guidelines.[62] Going beyond the requirements for independence and impartiality, as found in the IBA Guidelines, arbitrators must also "avoid impropriety and the appearance of impropriety" and "avoid direct and indirect conflicts of interest."[63] Further, they must, on an on-going basis, "avoid creating appearance of bias or impropriety" and "not be influenced by self-interest, outside pressure, political considerations, and public clamour, loyalty to a disputing party or a non-disputing Party or fear of criticism."[64] Prior to confirmation of his appointment, an arbitrator must disclose "any past or present interest, relationship or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of impropriety or bias in the proceeding."[65] Annex 9-B (15) of the EUSFTA clarifies that even former arbitrators are not free from obligations. Also, Annex 9-B (16) -(18) deals with the confidentiality of proceedings, according to which arbitrators shall not disclose or use any non-public information. There is no list of safe harbours, as in the IBA Rules' 'Green' List. If an arbitrator breaches the code, s/he will be replaced, as assessed by an independent body, the Secretary General of ICSID. It is notable that the Code of Conduct was, after its insertion in the EUSFTA, inserted into the CETA text during its legal scrubbing.[66] With this Code, the EUSFTA provides some measure of certainty as to the conduct of arbitrators regardless of their mode of appointment.

2. Roster of Arbitrators

Unlike the EU-Canada and EU-Vietnam FTAs, as the EUSFTA does not provide for a standing tribunal, parties get to choose their arbitrators. Instead, it provides for a pre-selected and agreed list of ten arbitrators from which an arbitrator will be appointed if a party fails to appoint an arbitrator or the parties are unable to agree on a chairperson, thereby ensuring that each party will always have agreed to at least two out of three tribunal members.

62 M. Weiniger & J. Greenaway, *Repaving the Southeast Asian Silk Road: EU-Singapore Free Trade Agreement negotiations concluded*, Arbitration Note, Nov. 12, 2014, *available at* http://hsfnotes.com/arbitration/2014/11/13/repaving-the-southeast-asian-silk-road-eu-singapore-free-trade-agreement-negotiations-concluded (last visited on Apr. 21, 2017).

63 EUSFTA Annex 9-B(2).

64 *Id*. Annex 9-B(10).

65 *Id*. Annex 9-B(3).

66 The original CETA text did not contain a Code of Conduct. *See* The Investment Chapters of the EU's International Trade and Investment Agreements in a Comparative Perspective, European Parliament Policy Department (2015), at 64, *available at* http://www.europarl.europa.eu/RegData/etudes/STUD/2015/534998/EXPO_STU(2015)534998_EN.pdf (last visited on Apr. 21, 2017).

There are well-founded reasons for supporting a cautious approach towards standing tribunals. There is a strong assumption[67] that standing panels are generally beneficial because they address many of the perceived concerns about investor-state arbitration.[68] However, this assumption may not be grounded in principle or in practice. While empirical data is lacking due to the confidential nature of arbitral appointments,[69] there have been studies analyzing the impact of standing tribunals.

In principle, there are some issues with the concept of standing panels for arbitration. It removes the core of arbitration - the concept of party autonomy. The autonomy of the investor, which the treaty purports to protect, is compromised in favor of the autonomy of the State parties to the treaty. This is because, in using a standing panel, the parties to the treaty decide on the arbitrators as opposed to the common practice of each party nominating one arbitrator. While it can be argued that individual autonomy can and should be compromised when member's interests enter the picture, this undoubtedly removes an important core to arbitration. It has been questioned whether this practice is desirable, despite the lack of empirical study on this subject due to the confidential nature of arbitral appointments.[70] A study done with 3000 investors shows that they had the perception that the arbitral panel would be biased towards the States.[71] This perception of bias was analyzed to have been generated by the very notion of a standing panel.[72] Moreover, the bilateral nature of such standing tribunals provides no greater certainty towards how issues would be adjudicated when compared with the current ISDS mechanisms.

The FTAs that the EU concluded with Canada and Vietnam have provisions for a standing tribunal whose members are to be appointed by the EU and Canada, and the EU and Vietnam, respectively. Given that these are still separate tribunals, it is entirely possible that each tribunal would interpret the same provision differently

67 L. Trakman & D. Musayelyan, *Arguments For and Against Standing Panels of Arbitrators in Investor-State Arbitration: Evidence and Reality*, Paper presented at the Conference titled, The Age of Mega-Regionals: TPP & Regulatory Autonomy in IEL (May 19-20, 2016), at 5, *available at* http://law.unimelb.edu.au/__data/assets/pdf_file/0004/1954156/Trakman,-ARGUMENTS-FOR-AND-AGAINST-STANDING-PANELS-OF-ARBITRATORS-IN-INVESTOR-STATE-ARBITRATION-EVIDENCE-AND-REALITY.pdf (last visited on Apr. 21, 2017).

68 These concern include the inconsistencies in the development of coherent jurisprudence, the private nature of the investor-state arbitral tribunals and the perceived unregulated nature of ISA. *See generally id.*; Menon, *supra* note 27, at 787-93.

69 *Supra* note 67.

70 *Id.* at 19.

71 J. Gross & B. Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2 J. Dispute Resolution 354 (2008).

72 *Id.*

if the same is adjudicated in both tribunals.[73] Standing tribunals would thus not provide States with any greater degree of certainty that their interests would be protected.

At first blush, the omission of a standing tribunal in favor of a roster of arbitrators may appear to avoid the fore-mentioned disadvantages associated with a standing tribunal.[74] However, it has been suggested that although rosters themselves may not cause bias, the institutional authority in charge of the roster may, unwittingly or otherwise, be perceived as favouring one disputant over another in the way it administers the roster.[75]

F. Appeal Mechanism

The dispute settlement mechanisms in the EUSFTA on the one hand and in CETA and the EU-Vietnam FTA on the other hand are remarkably different in relation to possible appeal mechanisms against an award. The EUSFTA, which was finalized in 2014, relies on classic investment arbitration, although with many partial innovations. A similar model was adopted in the original 2014 version of CETA, which was at that time declared to be a final text agreed between the parties. However, a court-like system was subsequently incorporated into the text when the European Commission reopened the CETA negotiations with Canada. The EU-Vietnam FTA followed suit with a similar mechanism which provides for a standing nine-member investment tribunal with an appeal mechanism. It is apparent that the EU will be aiming to push through the court-like system akin to other EU investment agreements. As such, the EUSFTA could remain an outlier instance of an EU investment agreement catering to the classic model of dispute settlement mechanisms in investment treaty arbitration. In place of an appeal mechanism, the EUSFTA contains two features. One is a commitment to consult within their respective treaty committees on the establishment of an appeals facility. The other is the subjection of decisions rendered based on the EUSFTA to an appeals facility pursuant to other institutional arrangements outside of these treaties. This is embodied in Article 9.30 which serves as a socket provision.

[73] S. Schill, *The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Mulilateralizing International Investment Law*, 20 ASIL Insights (2016), *available at* https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping (last visited on Apr. 21, 2017).

[74] *Supra* note 67.

[75] *Id. See also* C. Brower & C. Rosenberg, *The Death of the Two-headed Nightingale: Why the Paulsson van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, 29 Arbitration Int'l 25 (2013).

The merits of adopting an appeal mechanism are now up for debate. Introducing an appeals facility in ISDS may allow for correcting erroneous decisions. It would not only save time and money compared to the current situation in which the whole arbitration has to be retried, but also contribute to more consistency and predictability in investment law decision-making as a certain term in the treaty would have to be interpreted in the same fashion by each tribunal if it does not want to risk being overturned.[76] The European Commission would summarize the aforesaid words as follows. An appellate mechanism might "increase legitimacy both in substance and through institutional design by strengthening independence, impartiality and predictability."[77]

Conversely, it could be argued that the finality of arbitration proceedings - only very limited or no appeals mechanisms - was one of the advantages of investment arbitration over domestic court systems as it puts an end to a dispute. This might in turn contribute to a de-politicisation of an investment conflict as it is quickly taken off the public agenda, thereby alleviating the fear that every investment dispute would be a political battle. Moreover, an international investment court may not strike the right balance between the investors' interests and the State's right to regulate. Since it is currently proposed by the European Commission, the tribunal is composed of judges who are one-third European, one third American, and the remaining one-third those from a third country.[78] Professor Sornarajah is of the view that this does not provide a proper balance as minority judges from the third countries could be "strong-armed into complying with majority decisions."[79] He also argues that the existing domestic courts are better suited to resolving investment

76 W. Burke-White & A. von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 Yale J. Int'l L. 299 (2010). *See also* N. Blackaby, *Public Interest and Investment Treaty Arbitration*, *in* International Commercial Arbitration: Important Contemporary Questions (A. van den Berg ed., 2003). *Cf.* K. Sauvant (ed.), Appeals Mechanism in International Investment Disputes (2008). For a summary of a discussion among the OECD countries, *see Improving the System of Investor-State Dispute Settlement: An Overview*, OECD Working Papers on International Investment No. 2006/01, *available at* https://www.oecd.org/china/WP-2006_1.pdf. For an optimistic view, *see* UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, 2 IIA Issues Note 9 (2013), *available at* http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf (all last visited on Apr. 21, 2017).

77 European Commission, *'Investment in TTIP and beyond - the path for reform'*, Concept Paper, at 9, *available at* http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (last visited on Apr. 21, 2017).

78 European Commission, Transatlantic Trade and Investment Partnership 2015: Chapter II-Investment, art. 10, *available at* http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf (last visited on Apr. 21, 2017).

79 M Sornarajah, *An International Investment Court: panacea or purgatory?*, 180 Colum. FDI Perspective (2016), *available at* http://ccsi.columbia.edu/files/2013/10/No-180-Sornarajah-FINAL.pdf. *See also* D. Schneiderman, Why CETA Is Unlikely to Restore Legitimacy to ISDS, Investor-State Arbitration Commentary Series No. 7 (May 27, 2016), *available at* https://www.cigionline.org/publications/why-ceta-unlikely-restore-legitimacy-isds (all last visited on Apr. 21, 2017).

disputes as "they are more familiar with the circumstances in which a State interfered with foreign investments and can assess the fairness of the interference in its political and social context more effectively."[80]

It is difficult to interpret the silence of the EUSFTA about the appeal mechanism. On the one hand, Singapore is merely adopting a wait-and-see approach which would ensure a measured decision made in the face of global trends in this respect. On the other, a permanent investment court might too squarely overlap with the purpose of the recently established Singapore International Commercial Court ("SICC").[81] Alongside commercial judges from Singapore, the SICC's panel is composed of twelve eminent international judges hailing from various jurisdictions, each of whom is possessing deep commercial expertise, and representing a good mix of both the civil and common law traditions.[82] Regardless, it would be prudent to observe the developmental trend of global jurisprudence. It is dubious whether the investment court system would gain attraction among the global community, before definitively committing to an appeal mechanism, while taking stock of potential backlash.

IV. Conclusion

In summation, the above features of the EUSFTA belies a careful calibration of state-investor interests and judicious application of best practices from around the world with an eye to ensuring clarity, certainty and a deference to regulatory space. These also represent a concerted effort to mitigate adverse features of investor-state arbitration which undermine ISDS such as unmeritorious claims and arbitrator challenges. The EUSFTA's pragmatism is reflected in its willingness to depart from certain staple features of the investment chapters in the other new-generation EU FTAs such as standing tribunals and an investment court system where its merits remain ambivalent. This sophistication means the EUSFTA is well-placed to be

80 *Id.*

81 V. Rajah, Speech of the Attorney-General VK Rajah S.C. as Delivered at the Opening of the Legal Year 2015, at 13, *available at* https://www.agc.gov.sg/DATA/0/Docs/NewsFiles/OPENING%20OF%20LEGAL%20YEAR%202015_ATTORNEY-GENERAL%20V%20K%20RAJAH%27S%20SPEECH_5%20JAN_checked%20against%20delivery.pdf (last visited on Apr. 21, 2017).

82 S. Menon, Response by Chief Justice Sundaresh Menon Opening of the Legal Year 2015 at 7, *available at* http://www.supremecourt.gov.sg/docs/default-source/default-document-library/sjc/response-by-cj---opening-of-the-legal-year-2015-on-5-january-2015-(final)d9da2e33f22f6eceb9b0ff0000fcc945.pdf (last visited on Apr. 21, 2017).

a model for a post-Brexit UK on how it could navigate its investment policy and treaties in such new normal for international investment law.