

Profiting from injustice

How law firms, arbitrators and financiers are fuelling an investment arbitration boom



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investment arbitration boom



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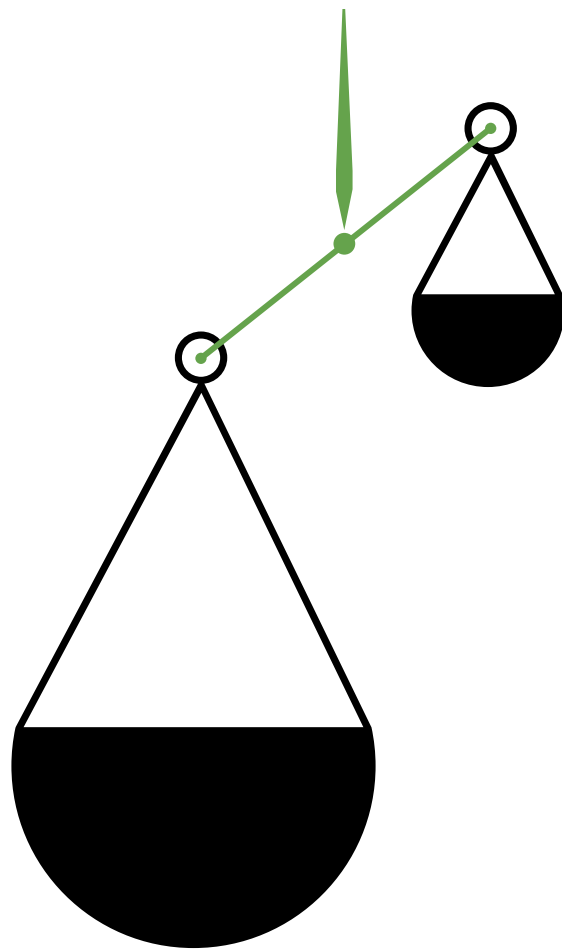
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Executive summary

The last two decades have witnessed the silent rise of a powerful international investment regime that has ensnared hundreds of countries and put corporate profit before human rights and the environment.

International investment treaties are agreements made between states that determine the rights of investors in each other's territories. They are used by powerful companies to sue governments if policy changes – even ones to protect public health or the environment – are deemed to affect their profits. By the end of 2011, over 3,000 international investment treaties had been signed, leading to a surge in legal claims at international arbitration tribunals. The costs of these legal actions weigh on governments in the form of large legal bills, weakening of social and environmental regulation and increased tax burdens for people, often in countries with critical social and economic needs.

Yet while these financial and social costs have started to become ever more visible, one sector has remained largely obscured from public view and that is the legal industry that has profited from this litigation boom. This report seeks to address that by examining the key players in the investment arbitration industry for the first time. It seeks to shine a light on law firms, arbitrators and litigation funders that have profited handsomely from lawsuits against governments.

The report shows that the arbitration industry is far from a passive beneficiary of international investment law. They are rather highly active players, many with strong personal and commercial ties to multinational companies and prominent roles in academia who vigorously defend the international investment regime. They not only seek every opportunity to sue governments, but also have campaigned forcefully and successfully against any reforms to the international investment regime.

The international investment arbitration system was justified and put in place by Western governments with the argument that a fair and neutral dispute settlement system was needed to protect their corporations' investments from perceived bias and corruption within national courts. Investment arbitrators were to be the guardians and guarantors of this regime.

Yet rather than acting as fair and neutral intermediaries, it has become clear that the arbitration industry has a vested interest in perpetuating an investment regime that prioritises the rights of investors at the expense of democratically elected national governments and sovereign states. They have built a multimillion-dollar, self-serving industry, dominated by a narrow exclusive elite of law firms and lawyers whose interconnectedness and multiple financial interests raise serious concerns about their commitment to deliver fair and independent judgements.

As a result, the arbitration industry shares responsibility for an international investment regime that is neither fair, nor independent, but deeply flawed and business-biased.

Key findings:

- 1. The number of investment arbitration cases, as well as the sum of money involved, has surged in the last two decades** from 38 cases in 1996 (registered at ICSID, the World Bank's body for administering such disputes) to 450 known investor-state cases in 2011. The amount of money involved has also expanded dramatically. In 2009/2010, 151 investment arbitration cases involved corporations demanding at least US\$100 million from states.
- 2. The boom in arbitration has created bonanza profits for investment lawyers paid for by taxpayers.** Legal and arbitration costs average over US\$8 million per investor-state dispute, exceeding US\$30 million in some cases. Elite law firms charge as much as US\$1,000 per hour, per lawyer – with whole teams handling cases. Arbitrators also earn hefty salaries, amounting up to almost US\$1 million in one reported case. These costs are paid by taxpayers, including in countries where people do not even have access to basic services. For example, the Philippine government spent US\$58 million defending two cases against German airport operator Fraport; money that could have paid the salaries of 12,500 teachers for one year or vaccinated 3.8 million children against diseases such as TB, diphtheria, tetanus and polio.

3. **The international investment arbitration industry is dominated by a small and tight-knit Northern hemisphere-based community of law firms and elite arbitrators.**
 - a) Three top law firms – Freshfields (UK), White & Case (US) and King & Spalding (US) – claim to have been involved in 130 investment treaty cases in 2011 alone.
 - b) Just 15 arbitrators, nearly all from Europe, the US or Canada, have decided 55% of all known investment-treaty disputes. This small group of lawyers, referred to by some as an ‘inner mafia’, sit on the same arbitration panels, act as both arbitrators and counsels and even call on each other as witnesses in arbitration cases. This has led to growing concerns, including within the broader legal community, over conflicts of interest.
4. **Arbitrators tend to defend private investor rights above public interest, revealing an inherent pro-corporate bias.** Several prominent arbitrators have been members of the board of major multinational corporations, including those which have filed cases against developing nations. Nearly all share businesses’ belief in the paramount importance of protecting private profits. In many cases concerning public interest decisions, such as measures taken by Argentina in the context of its economic crisis, arbitrators have failed to consider anything but corporations’ claims of lost profits in their rulings. Many arbitrators vocally rejected a proposal by International Court of Justice Judge Bruno Simma to give greater consideration to international environmental and human rights law in investment arbitration.
5. **Law firms with specialised arbitration departments seek out every opportunity to sue countries – encouraging lawsuits against governments in crisis,** most recently Greece and Libya, and promoting use of multiple investment treaties to secure the best advantages for corporations. They encourage corporations to use lawsuit threats as a political weapon in order to weaken or prevent laws on public health or environmental protection. Investment lawyers have become the new international ‘ambulance chasers’, in a similar way to lawyers who chase hospital wagons to the emergency room in search for legal clients.
6. **Investment lawyers, including elite arbitrators, have aggressively promoted investment arbitration as a necessary condition for the attraction of foreign investment, despite evidence to the contrary.** Risks to states of acceding to investor-state arbitration are downplayed or dismissed.
7. **Investment lawyers have encouraged governments to sign investment treaties using language that maximises possibilities for litigation. They have then used these vaguely worded treaty provisions to increase the number of cases.** Statistical study based on 140 investment-treaty cases shows that arbitrators consistently adopt an expansive (claimant-friendly) interpretation of various clauses, such as the concept of investment. Meanwhile arbitration lawyers have taken a restrictive approach in international law when it comes to human and social rights.
8. **Arbitration law firms as well as elite arbitrators have used positions of influence to actively lobby against any reforms to the international investment regime, notably in the US and the EU.** Their actions, backed by corporations, succeeded in preventing changes that would enhance government’s policy space to regulate in the US investment treaties that had been proposed by US President Barack Obama when he came to office. Several arbitrators have also loudly denounced nations that have questioned the international investment regime.
9. **There is a revolving door between investment lawyers and government policy-makers that bolsters an unjust investment regime.** Several prominent investment lawyers were chief negotiators of investment treaties (or free trade agreements with investment protection chapters) and defended their governments in investor-state disputes. Others are actively sought as advisers and opinion-makers by government and influence legislation.
10. **Investment lawyers have a firm grip on academic discourse on investment law and arbitration,** producing a large part of the academic writings on the subject, controlling on average 74% of editorial boards of the key journals on investment law, and frequently failing to disclose the way they personally benefit from the system. This raises concerns over academic balance and independence.

11. The investment arbitration system is becoming increasingly integrated with the speculative financial world, with investment funds helping fund investor-state disputes in exchange for a share in any granted award or settlement. This is likely to further fuel the boom in arbitrations, increase costs for cash-strapped governments, and raises concerns of potential conflicts of interest because of a dense web of personal relationships that link financiers to arbitrators, lawyers and investors. Firms such as Juridica (UK), Burford (US) and Omni Bridgeway (NL) have already become an established part of international investment arbitration, in the absence of any regulation of their activities. This financialisation of investment arbitration has even extended to proposals to sell on packages of lawsuits to third parties, in the vein of the disastrous credit default swaps behind the global financial crisis.

Some countries have started to realise the injustices and inconsistencies of international investment arbitration and have initiated a retreat from the system. In spring 2011, the Australian government announced that it would no longer include investor-state dispute settlement provisions in its trade agreements. Bolivia, Ecuador and Venezuela have terminated several investment treaties and have withdrawn from ICSID. Argentina, which has been swamped with investor-claims related to emergency legislation in the context of its 2001-2002 economic crisis, refuses to pay arbitration awards. South Africa is engaged in a thorough overhaul of its investment policy to better align it with development considerations and has just announced that it will neither enter into new investment agreements nor renew old ones due to expire.

The backlash has not gone unnoticed by members of the investment arbitration industry. Some insiders are ready to confront the challenges with proposals for moderate reform, such as greater transparency. But these proposals do not address the inherent flaws and corporate bias of the investment arbitration system. We believe only systemic reform, based around principles that consider human rights and the environment as more important than corporate profits, can deliver necessary change. This must start with the termination of existing investment agreements and a moratorium on signing new ones.

Nevertheless even within the existing system, there are some steps that can be taken to help to roll back the power of the arbitration industry. This report calls for a switch to independent, transparent adjudicative bodies, where arbitrators' independence and impartiality is secured; the introduction of tough regulations to guard against conflicts of interest; a cap on legal costs; and greater transparency regarding government lobbying by the industry.

These steps will not by themselves transform the investor-state arbitration system. Without governments turning away from investment arbitration, the system will remain skewed in favour of big business and the highly lucrative arbitration industry.

Chapter 1

Introduction

“ There is little use in going to law with the devil while the court is held in hell. ”

Humphrey O'Sullivan, *The Diary of an Irish Countryman*, 1831



Would you go to court with the devil if the court was held in hell? Of course not. But governments have done it hundreds of times. And continue to do so.

In international investment disputes multinational companies can sue governments if the government has done something that the multinational considered harmful to its profits. For example, tobacco giant Philip Morris is suing Uruguay and Australia because they introduced compulsory health warnings on cigarette packets. Energy company Vattenfall is suing Germany because the country decided to phaseout nuclear energy.

These cases take place before an international tribunal of arbitrators, three people who decide whether private profits or the public interest are the most important. Across the world these tribunals have granted big business millions of dollars from taxpayers' pockets – often in compensation for the alleged impact on company profits of democratically made laws that protect the environment, public health or social well-being.

The legal bases for these disputes are investment treaties between states. Historically, they were put in place by Western governments wanting to protect their companies when they invested abroad. They wanted to grant their investors access to a fair and independent dispute settlement system if they ran into problems with the host state. The host state's own courts were considered too biased, too slow and sometimes too corrupt to play that role. Hence the idea of a 'neutral' body of legal experts, the arbitrators, who should act as independent mediators.

The idea of investment arbitration as a fair and independent space to resolve disputes between multinationals and governments is one of the key justifications for a system which has cost taxpayers dearly and undermines the capacity of sovereign governments to act in the interests of their people.

This report argues that the alleged fairness and independence of investment arbitration is an illusion. The law and the consequential disputes are largely shaped by law firms, arbitrators and, more recently, a phalanx of speculators who make a lot of money from the disputes. Driven by their own profit interests, this 'arbitration industry' actively encourages an ever-growing number of corporate claims, while creating the necessary legal loopholes and funding mechanisms for its continued functioning. This industry is also responsible for growing its own business with pro-investor interpretations of the treaties. Meanwhile, investment lawyers actively fight for maintaining investment arbitration against its critics, in academic circles and through direct political lobbying against reforms in the public interest.

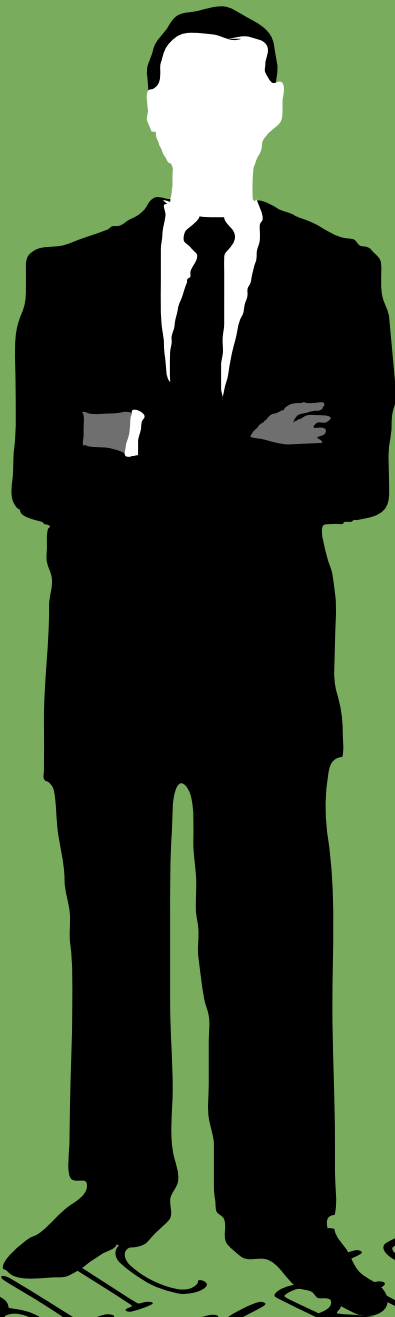
By signing investment treaties and agreeing to arbitration, states have indeed accepted to be sued by the devil in hell.

Investment arbitration lawyers, arbitrators and funders have largely escaped public attention. Many of their cases are unknown and some never become public. The vested interest behind their actions is well hidden by a thick layer of legal rhetoric about judicial independence, fairness and advancing the rule of law. It is therefore time to shine a spotlight on the key actors in the arbitration industry, who drive and profit from the injustices of global investment rules.

Chapter 2

Investment treaty disputes

Big business for the arbitration industry



“ Bilateral investment agreements can pose profound and serious risks to government policy. ”

South African government official¹

After the Fukushima nuclear disaster the German government decided to phaseout nuclear energy. To protect public health, the governments of Uruguay and Australia introduced compulsory health warnings on cigarette packets. To redress the inequalities created by the apartheid regime, the South African government grants black people certain economic privileges. What do these scenarios have in common? They have all been legally challenged by companies that considered them harmful to their profits. However, they did not challenge the legislation in their respective host countries' courts but sued the governments before an international tribunal of arbitrators in international investment disputes. In the past 20 years, many of these tribunals have granted big business dizzying sums in compensation – paid out of taxpayers' pockets often for democratically made laws to protect the environment, public health or social well-being.

Investment treaty boom creates a lucrative industry

The legal basis for these disputes is in the agreements between countries that determine the rights of investors in each other's territories. These international investment agreements give sweeping powers to foreign investors, including the peculiar privilege to directly file lawsuits at international tribunals, without necessarily even going through the local courts. Companies can claim compensation for actions by host governments that have damaged their investments, either directly through expropriation, for example, or indirectly through regulations of virtually any kind. 'Investment' is understood in such broad terms that corporations can claim not just for the money invested, but for future anticipated earnings as well.

Box 1

Some emblematic investor-state disputes

Corporations versus public health – Philip Morris v. Uruguay and Australia: On the basis of bilateral investment treaties (BITs), tobacco giant Philip Morris is suing both Uruguay and Australia over their anti-smoking laws. The company argues that compulsory large warning labels on cigarette packs prevent it from effectively displaying its trademarks, causing a substantial loss of market share².

Corporations versus environmental protection – Vattenfall v. Germany I & II: In 2009, Swedish energy multinational Vattenfall sued the German government, seeking €1.4 billion (US\$1.9 billion³) plus interest in compensation for environmental restrictions imposed on one of its coal-fired power plants. The case was settled out of court after Germany agreed to water down the environmental standards, exacerbating the effects that Vattenfall's power plant will have on the Elbe river and its wildlife⁴. In 2012, Vattenfall launched a second lawsuit seeking €3.7 billion (US\$4.6 billion⁵) for lost profits related to two of its nuclear power plants. The case followed the German government's decision to phaseout nuclear energy after the Fukushima nuclear disaster⁶. Both actions were taken under the Energy Charter Treaty, which includes BIT-like investment protection provisions. (see box 5 on page 27)

Corporations versus black empowerment – Piero Foresti and others v. South Africa: In 2007, Italian investors sued South Africa over its Black Economic Empowerment Act which aims to redress some of the injustices of the apartheid regime. It requires, for example, mining companies to transfer a portion of their shares into the hands of black investors. The dispute (under South Africa's BITs with Italy and Luxembourg) was closed in 2010, after the investors received new licenses, requiring a much lower divestment of shares⁷.

Corporations versus action against financial crises – CMS and 40 other companies v. Argentina: When Argentina froze utility rates (energy, water, etc.) and devalued its currency in response to its 2001-2002 financial crisis, it was hit by over 40 lawsuits from investors. Big Companies like CMS Energy (US), Suez and Vivendi (France), Anglian Water (UK) and Aguas de Barcelona (Spain) demanded multimillion compensation packages for revenue losses⁸.

There are currently more than 3,000 such agreements⁹. The vast majority are bilateral investment treaties (BITs) between two countries. Others include free trade deals with investment chapters such as the North American Free Trade Agreement (NAFTA) between Canada, Mexico and the United States, and multilateral agreements such as the Energy Charter Treaty which regulates investments in the energy sector.

Since the late 1990s, these agreements have triggered a wave of investor claims against states. In 1996, only 38 investor-state disputes had been registered at the then 30-year-old World Bank International Center for Settlement of Investment Disputes (ICSID), the main handler for these arbitrations¹⁰. Its staff worried that they “would soon be empty-handed”¹¹. They had no reason to worry. In 2011, there were 450 known investor-state cases, the majority of which were filed by

Bringing a billion-dollar claim is no longer enough to stand out in a survey of international arbitration. Nor is it enough to win a measly \$100 million... What it takes to distinguish yourself these days is a \$350 million award, minimum.

American Lawyer Magazine¹⁴

corporations from industrialised countries against countries from the Global South¹². With most arbitration forums subject to confidentiality, the actual number is likely to be much greater.

The stakes have also skyrocketed. In 2011, American Lawyer magazine reported on 151 investment arbitration cases that involved costs of at least US\$100 million and is confident that, at the time of its next survey, the stakes will have risen even further: “Bringing a billion-dollar claim is no longer enough to stand out in a survey of international arbitration. Nor is it enough to win a measly US\$100 million. Attention, arbitration lawyers: What it takes to distinguish yourself these days is a US\$350 million award, minimum”¹³.

Box 2

The chronology of an international investment dispute

The exact course of an investor-state arbitration case depends on the relevant rules and the institution administering the case. The majority of known cases are handled by the World Bank's International Center for Settlement of Investment Disputes (ICSID) in Washington. The second most used rules are those of the United Nations Commission on International Trade Law (UNCITRAL). The Permanent Court of Arbitration (PCA) in The Hague, the London Court of International Arbitration (LCIA) as well as the Paris-based International Chamber of Commerce (ICC) and the Stockholm Chamber of Commerce (SCC), both business organisations, also regularly handle disputes.

Despite procedural differences, an investment arbitration case looks roughly like this:

Phase 1 The arbitration process starts when a foreign investor sends a notice of arbitration to a state. Both, the investor and the state will be assisted by lawyers (counsel) during the proceedings.

Phase 2 The investor and the state jointly select the arbitration tribunal. Usually each party picks one arbitrator and both jointly appoint a third to serve as chairman.

Phase 3 Proceedings last years and mostly take place behind closed doors, with scant or no information at all released to the public, sometimes not even the fact that a case is on-going.

Phase 4 The arbitrators ultimately determine if an award is justified and the type and size of the remedy. They also allocate the legal costs of the proceedings (see box 3). Opportunities to challenge tribunal awards are very limited and awards are rarely challenged by governments.

Phase 5 States have to comply with arbitral awards. If they resist, the award can be enforced almost anywhere in the world, for example, by seizing the state's property elsewhere.

The growth of the investment arbitration industry

As the number of international investment disputes has grown, arbitration has become a money-making machine in its own right. Arbitration lawyer Nicolas Ulmer from Swiss law firm Budin & Partners explained: “Arbitration institutions vie for their market share of disputes, legislatures pass arbitration-friendly measures to attract this business, various conference and workshops are held year round, a class of essentially full-time arbitrators has developed and a highly specialised ‘international arbitration bar’ pursues large cases avidly. A veritable ‘arbitration industry’ has arisen”¹⁵.

In fact investment arbitration is considered “possibly the fastest-developing area of international law”¹⁶. “It’s become a sexy thing to do”, Yves Derains, counsel and arbitrator with Paris-based law firm Derains & Gharavi, told the media. “It offers the chance to contribute to jurisprudence”. And an opportunity for promoting your brand. “With investment arbitrations, you can boast”¹⁷.

Blogs are littered with anecdotes about “young, up-and-coming lawyers who want to break into the international arbitration arena or seasoned veterans seeking to make a transition into this [...] legal field”¹⁸. More and more legal boutiques announce the opening of an arbitration practice in hotspots such as Paris, London, Washington and New York. Arbitration events mushroom around the globe, with droves of lawyers “dragging laptops and Blackberries in tow to ensure meeting deadlines on the arbitrations”¹⁹. Journals and websites regularly rank the biggest cases, busiest arbitrators and most in demand arbitration firms²⁰.

Box 3

Expensive consequences

The costs of investment arbitration

Investment arbitration is expensive – long before the final settlement is made. Both the state and the investor have to pay for the administration of a case. They also have to pay arbitrators, witnesses and experts who are often scattered across the globe and require translation services, travel and living allowances. And they have to pay their lawyers.

According to the United Nations Conference on Trade and Development (UNCTAD) “costs involved in investor-state arbitration have skyrocketed in recent years”²¹. For the known cases with available data, the Organisation for Economic Co-operation and Development (OECD) recently found that legal and arbitration costs averaged over US\$8 million, exceeding US\$30 million in some cases²². Compare that to the average legal costs of US\$194,000 for one side in US domestic antitrust litigation²³. The Philippines government spent US\$58 million to defend two cases against German airport operator Fraport – the equivalent of the salaries of 12,500 teachers for 1 year, vaccination for 3.8 million children against diseases such as TB, diphtheria, tetanus, polio; or the building of 2 new airports²⁴.

The lion’s share ends up in the pockets of the parties’ lawyers. Industry insiders estimate that more than 80% of all legal costs in arbitration are spent on counsel²⁵. The tabs racked up by elite law firms can be US\$1,000 per hour, per lawyer – with whole teams handling cases²⁶. According to figures from ICSID, arbitrators also line their pockets, earning a US\$3,000 daily fee plus travel and living allowances²⁷.

Legal costs aren’t always awarded to the winning party. An empirical study of investment arbitration costs found that “tribunals most frequently required parties to share tribunal and administrative costs equally and absorb their own legal fees”²⁸. This means that even when corporations do not win, taxpayers still have to pay millions in legal fees. The real winners? Law firms who collect multimillion-dollar payments, regardless of the result.

In the case of *Plama Consortium v Bulgaria*, for example, Bulgaria’s legal fees totalled US\$13,243,357 for defending a claim that was ultimately found to be fraudulent. Although Bulgaria was awarded US\$7,000,000 of these legal fees, it was still forced to pay out the remaining US\$6,243,357²⁹. At that time Bulgaria was grappling with a healthcare crisis due to a shortage of nurses – the money could have paid the salaries of more than 1,796 Bulgarian nurses³⁰.

If you look at ICSID awards, and in particular at the legal costs of the parties, you’ll fall off your chair. 6 million, 8 million, 12 million – just for the law firms.

Lars Markert, Gleiss Lutz³¹

Investment arbitration in troubled waters

Originally, investor-state arbitration was envisioned for instances of straightforward expropriation – when the government took the factory. But the system has spun out of control, with multinationals using it to chase down lost profits. The last two decades have seen a number of multimillion-dollar claims against the alleged effects of public legislation. Developed and developing countries on every continent have been challenged for tax measures, fiscal policies, bans on harmful chemicals, bans on mining, requirements for environmental impact assessments, regulations relating to hazardous waste etc³². Sometimes, the threat of a dispute has been enough to freeze government action, making policymakers realise they would have to pay to regulate³³.

Investor-state dispute settlement... opens the door to narrow commercial interests on matters of vital national interest and... is a direct challenge to constitutional and democratic policy-making.

South African government official³⁵

the system. In spring 2011, the Australian government announced that it would no longer include investor-state dispute settlement provisions in its trade agreements. Bolivia, Ecuador and Venezuela have terminated several BITs and have withdrawn from ICSID, sending a clear political message that they refuse to co-operate in the future. Argentina, which has been swamped with investor claims related to emergency legislation in the context of its 2001–2002 economic crisis, refuses to pay arbitration awards. South Africa has announced that it will not renew old investment treaties due to expire. And India is reported to have decided not to include investor-state dispute provisions in future free trade agreements³⁶.

The so-called users of investment arbitration, multinational companies, have come out in force to prevent any radical reform of the system³⁷. And they have not been alone. The investment arbitration industry is by their side, propping up an unjust but lucrative system.

These legal challenges have raised a global storm of critical objection to investment treaties and arbitration. Public interest groups and academics have called on governments to oppose investor-state arbitration, claiming it fails basic standards of transparency, judicial independence and procedural fairness and threatens states' responsibility to act in the interest of their people, economic and social development and environmental sustainability. Concerns have also been raised about the glaring absence of investor obligations and the imprecise language of many investment treaties, opening the floodgates to expansive, pro-investor interpretations of corporate rights by arbitral tribunals³⁴.

Some countries have realised the injustices and inconsistencies of international investment arbitration and are trying to abandon

“ Investment treaty arbitration is an important legal and institutional piece of the neoliberal puzzle because it imposes exceptionally powerful legal and economic constraints on governments and, by extension, on democratic choice, in order to protect from regulation the assets of multinational firms. ”

Professor Gus van Harten, Osgoode Hall Law School, Toronto³⁸

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- 34 For examples of the academic critique of the investment arbitration system, see the following two statements: <http://tpplegal.wordpress.com/open-letter/>; http://www.osgoode.yorku.ca/public_statement. Many critical works by public interest groups can be found on the website of the Network for Justice in Global Investment: www.justinvestment.org.
- 35 Raman, Meena (2012), see endnote 1.
- 36 For an overview of the growing discontent with the investment arbitration system, see: UNCTAD (2012) World Investment Report 2012. Towards a new generation of investment policies, pp. 86ff.
- 37 For example, the Australian Chamber of Commerce and Industry (ACCI) is lobbying against Australia's move away from investor-state dispute settlement. See: <http://accii.asn.au/Research-and-Publications/Media-Centre/Media-Releases-and-Transcripts/Global-Engagement/Australian-Foreign-Investment-Requires-Right-to-Su.aspx>.
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Chapter 3

Legal vultures

Driving demand for investment arbitration

“ Why do law firms deal with investment law?
One reason is clear: because of the money. [...] Cases are incredibly long, incredibly complex and you make a lot of money. ”

Lars Markert, Gleiss Lutz¹



The debt crisis in Greece grabbed the attention of the world in 2011. With an enormous budget deficit, violent protests and public spending cuts that devastated the lives of ordinary people, the country appeared to be constantly on the brink of collapse. Without massive restructuring to reduce the debt, Greece's survival was under threat. And with it that of Europe's economy. Several international law firms were also watching Greece – but their concern was not to save the Greek people from social disaster or prevent economic collapse in Europe.

In the midst of the debt crisis, lawyers urged multinational corporations to use investment arbitration to defend their profits in Greece. The German law firm Luther, for example, told its clients that, where states were unwilling to pay up, it was possible to sue on the basis of international investment treaties. Luther suggested that "Greece's grubby financial behaviour" provided a solid basis for seeking compensation for disgruntled investors, paid for ultimately by Greek taxpayers².

The lawyers' enthusiasm was not based in fantasy. The UN has recognised that international investment agreements can severely curb states' abilities to fight financial and economic crises³. Argentina has been sued more than 40 times as a result of the economic reform programmes implemented after its economic crisis in 2001. By the end of 2008, awards against the country had reached a total of US\$1.15 billion⁴. That's the equivalent of the average annual salary for 150,000 Argentinian teachers or 95,800 public hospital doctors⁵.

Analysing one of the pending disputes against Argentina in an October 2011 client briefing paper, US-based law firm K&L Gates wrote that investment treaty arbitration could "recover damages for investment losses from nations defaulting on their sovereign debts." It continued: "Given the current financial crises worldwide, this should provide hope for investors who have suffered losses at the hands of sovereign restructuring of their debt instruments". The firm identified Greece as a country where investors should check which investment treaties "may protect their investment". The firm also suggested clients should use the threat of investment arbitration as a "bargaining tool" in debt restructuring negotiations with governments⁶.

The legal sharks have already started circling the fall-out from the Greek sovereign debt restructuring.

Patrick Heneghan & Markus Perkams, Skadden⁷

US law firm Milbank, the Dutch firm De Brauw and UK-based Linklaters all took a similar line⁸, preparing the ground for billion dollar claims against a cash-strapped country struggling to restore its economy. While their profits per partner climbed to up to US\$2.5 million in 2011 (at Milbank), Greece lowered the monthly minimum wage for workers under 25 to €510 (US\$ 660)⁹.

In March 2012, after long negotiations between the EU and the banks, funds and insurers owed money by Greece, most accepted to ease repayment terms. Soon after, several law firms announced that they would seek millions in damages on behalf of lenders refusing to accept the debt swap¹⁰.

The Greek debt crisis case stands out as just one example in a highly lucrative investment arbitration business. It suggests a new breed of international 'ambulance chasers' has emerged on the global stage. The term 'ambulance chasers' originated in the late 19th Century and referred to lawyers who sought to profit from someone's injury or accident, following hospital wagons to the emergency room in search for legal clients. Today's ambulance chasing has gone global, with international law firms encouraging multinationals to sue governments in international investment disputes – wreaking havoc on public finances, social, health and environmental policies.

TABLE 1

The 20 busiest investment arbitration law firms

These law firms claimed involvement in the most investment treaty disputes in 2011¹¹. Please note the numbers are those provided by the firms themselves, have not been externally verified, and some firms did not provide any data. The importance of law firms which are not on the list should not be underestimated as they may also handle disputes with huge implications for the public interest and be important actors in the world of investment arbitration¹².

Law firm	Number of treaty cases in 2011 ¹³	Gross revenue in 2011 (US\$) ¹⁴	Profits per partner in 2011 (US\$) ¹⁵	Does the firm work for investors or states? ¹⁶	Prominent investment treaty arbitrators	What you should know about the firm
Freshfields Bruckhaus Deringer (UK)	71	1.82 billion	2.07 million	Both – but represented the investor in majority of known cases	Jan Paulsson, Noah Rubins, Lucy Reed, Nigel Blackaby	By far <i>the</i> dominant investment arbitration firm in the past decade
White & Case (US)	32	1.33 billion	1.47 million	Both – probably with more work for states	Carolyn Lamm, Charles Brower (until 2005), Horacio Grigera Naón (until 2004)	Representing Italian bondholders in their multi-billion dollar arbitration against Argentina following the country's sovereign debt restructuring in the aftermath of its 2001 financial crisis (see page 19).
King & Spalding (US)	27	781 million	1.93 million	Works for investors – with very few exceptions	Doak Bishop, Guillermo Aguilar-Alvarez, Eric Schwartz, John Savage	Specialises in suing Argentina and in dirty energy claims as in Chevron vs. Ecuador (see page 25). Acting for US group Renco, seeking US\$800 million from Peru over a metal smelter deemed one of the world's most polluted industrial sites.
Curtis Mallet-Prevost, Colt & Mosle (US)	20	165 million	1.54 million	In investment disputes, the firm always represents the state, never the investor		The firm's revenue increased 50% between 2007 and 2012, thanks largely to its investment arbitration work for states such as Venezuela, Kazakhstan and Turkmenistan ¹⁷ .
Sidley Austin (US)	18	1.41 million	1.60 million	Both – but probably with more work for companies	Stanimir Alexandrow, Daniel Price (until 2011)	Together with Lalive, Sidley represents tobacco giant Philip Morris in its case against Uruguay, challenging the country's restrictions on cigarette marketing (see page 13).
Arnold & Porter (US)	17	639 million	1.40 million	Both – but probably with more work for states	Jean Kalicki, Whitney Debevoise	Together with Ogilvy Renault (now merged with Norton Rose) the firm sued Canada for paper maker Abitibi-Bowater because a provincial government had taken back its water and timber rights – after the company had closed its mills. Canada paid US\$130 million to settle the case, the largest known payment so far under NAFTA.
Crowell & Moring (US)	13	329 million	845 thousand	Works for investors – with very few exceptions		The firm represents Canadian mining company Pacific Rim in its legal battle with El Salvador, claiming around 1% of the country's GDP because it did not approve a license to mine for gold.
K&L Gates (US)	13	1.06 billion	890 thousand	Both	Sabine Konrad	Whenever energy giant Vattenfall sued Germany, the government picked Sabine Konrad as counsel – despite her promotion of investment arbitration against states (see pages 19 and 27).
Shearman & Sterling (US)	12	750 million	1.56 million	Both – but investor's counsel in large majority of known cases	Emmanuel Gaillard, Philippe Pinsolle, Fernando Mantilla-Serrano, Yas Banifatemi	Elite arbitrator Emmanuel Gaillard is the figurehead of the firm, attracting vast amounts of work as counsel. One of the industry's intellectual lions, he constantly intervenes in political and academic debates about investment law and arbitration (see pages 28, 41, 47).

DLA Piper (US)	11	2.24 billion	1.22 million	Both	Pedro Martinez-Fraga	The world's second-largest law firm represents investors in several ICSID cases against Venezuela, all filed days before the country's withdrawal from the centre took effect in summer 2012.
Chadbourne & Parke (US)	11	306 million	1.31 million	Investor		The firm is a prime example of the opacity of international investment arbitration. It claims to have acted in 11 disputes in 2011, but none are listed on its website.
Cleary Gottlieb Steen & Hamilton (US)	more than 10¹⁸	1.12 billion	2.69 million	Both		Cleary Gottlieb represented Telecom Italia in a claim against Bolivia. Reacting to Telecom Italia's faulty service and low investment, Bolivia re-nationalised the telecoms firm Entel. Bolivia paid US\$100 million to settle the case.
Appleton & Associates (CAN)	10 or more¹⁹	no data	no data	The firm always represents the investor, never the state		Barry Appleton brought some of the first NAFTA cases against Canada for the firm, including acting for Ethyl following the ban of a toxic gasoline additive. The case settled when Canada repealed the ban and paid US\$13 million in compensation. Appleton still sues Canada regularly.
Foley Hoag (US)	10	149 million	1 million	State	Mark Clodfelter	In investment arbitration, the firm works mainly for states; several of its lawyers have a background in government.
Latham & Watkins (US)	10	2.15 billion	2.27 million	Both	Robert Volterra (until 2011)	In one of the first investment arbitrations following the Arab Spring, the world's fourth largest law firm is representing multinational Indorama against Egypt. An Egyptian court ordered Indorama to return a textile factory, which it had acquired under the Mubarak regime, seemingly under corruption-riddled circumstances.
Hogan Lovells (US/UK)	10	1.66 billion	1.16 million	Both, probably with more work for states		Represents British company Churchill in its US\$2 billion claim over the revocation of coal mining permits on the Indonesian island of Borneo. Indonesian courts had ruled the permits were forged.
Clyde & Co (UK)	10	460 million	915 thousand	Both, probably with more work for investors		First foreign law firm to open an office in post-Gaddafi Libya, anticipating disputes as a result of regime change (also see page 23).
Norton Rose (UK)	10	1.32 billion	620 thousand	Tends to work for investor	Yves Fortier (until 2011), Michael Lee (until 2001)	In 2011, Norton Rose merged with Canadian Ogilvy Renault, which has represented investors in controversial cases against Canada, including challenging a pesticide-ban for US-based Dow. After more than 50 years with the firms, full-time arbitrator Yves Fortier left in 2011, citing potential conflicts of interest between his work as arbitrator and the client work in a global law firm (see page 39).
Salans (F)	9	260 million²⁰	725 thousand²¹	Both, probably with more work for investors	Bart Legum, Jeffrey Hertzfeld, Hamid Gharavi (until 2008)	The head of investment arbitration, Barton Legum, was a US government lawyer and defended the country in several NAFTA disputes. Today, he sells the insights he gained to Canadian pharmaceutical company Apotex, suing the US under NAFTA's investment chapter (see page 29).
Debevoise & Plimpton (US)	9	675 million	2.07 million	Represented the investor in nearly 100% of known cases	Donald Francis Donovan	Together with Covington & Burling, Debevoise won the largest known ICSID award, US\$1.76 billion plus millions in interest, for US-based Occidental Petroleum against Ecuador, for the termination of an oil production site in the Amazon. Oxy has been accused of human rights violations and environmental destruction.

Big Business for Big Law

Globally, three firms have emerged as market leaders in the investment arbitration business: Freshfields Bruckhaus Deringer (UK), White & Case (US) and King & Spalding (US) (see table 1 on pages 20-21). Freshfields alone claims to have acted in more than 165 investor-state disputes²². Such dominance creates a reputation for these firms, which in turn brings new cases and leads to a concentrated market that is difficult for newcomers to enter. One practitioner estimates that 25 out of 30 new cases at the World Bank's International Centre for Settlement of Investment Disputes (ICSID) go to the heavyweights in the field²³. Non-Western law firms from the countries most sued by investors scarcely get a look in.

In any arbitration, the primary cost is the cost of the lawyers.

Gabriele Crespi Reghizzi, Professor, arbitrator and of counsel Lombardi Molinari e Associati²⁴

Lawyers at elite arbitration law firms charge up to US\$1,000 per hour for their services, with cases often handled by teams of lawyers and taking years. The consequent legal bill for countries defending cases can be staggering. (see box 3 on page 15)

Arbitration lawyers also profit when cases settle before a final trial, as happens with many disputes. Contingency fee arrangements, where lawyers only get their full payment if they win the case or it is favourably settled, usually as a percentage of the client's net recovery, are becoming more commonplace, which means that the lawyers can receive a substantial fee even without lengthy litigation. In one reported case, the law firm King & Spalding allegedly claimed over 80% of a US\$133 million award from its client²⁵.

Law firms know the unwritten rules of the game

An anecdote in the Global Arbitration Review (GAR) 100, a yearly survey of specialised arbitration firms, indicates why arbitration lawyers have become such high-priced actors. The story is about a university lecture on international arbitration by Matthew Weiniger from the UK-based law firm Herbert Smith Freehills, who regularly appears before arbitration tribunals. He compared the UK's two volumes of court rules and procedure with a thin booklet produced by the International Chamber of Commerce. "The difference between those two thicknesses," Weiniger explained to his students, "is what international arbitration lawyers know. And it's not written down"²⁶.

It is this "lack of rules and regulations to consult" that leaves many young lawyers who enter the field of international arbitration "feeling almost queasy," according to GAR. "They're disoriented to be in a world where case procedure can be entirely ad hoc." International arbitration does not even look like a legal proceeding. An outsider would "see two small groups of lawyers wearing lounge suits, occupying a hotel room or training room. On the other side of the room: a trio of types with possibly a bit more grey hair. There's no audience, no usher and little hint of pomp or ceremony. It could perhaps be mistaken for a training course"²⁷. Or a business meeting.

Hiring some of the rare advocates with inside knowledge about this mysterious universe offers a significant advantage. A practitioner from Swiss firm Schellenberg Wittmer explained: "Who should we choose as arbitrators? How many witnesses should we have? How many written submissions? Should we allow written witness statements? You have to be aware of these issues to know what's good for your case and what is not"²⁸.

It is often observed that 'arbitration is only as good as the arbitrators you choose'. Arguably, the process starts one step earlier. Pick the right counsel, and you start a chain reaction that ought to end somewhere positive.

Global Arbitration Review²⁹

Countries which can't afford this kind of expertise often find their defence case suffers from scattered and incomplete sources of investment law and jurisdiction³⁰. The Czech Republic, for example, only managed to successfully defend its cases when it turned away from domestic lawyers and hired some of the costly international elite firms³¹. The secrecy of the investment arbitration regime secures the market of the leading firms.

Know your ‘judge’, be the ‘judge’

Specialised arbitration lawyers have another advantage. They know the ‘judges’. And the ‘judges’ know them. As one arbitration lawyer boasted: “I’ve got a case right now in front of [a leading international arbitrator]. Every time I go to a conference, he’s there. We read each other’s books. My opponent on the case... well, he hasn’t got a clue [...]. Between all the partners in our group [...] we’ve appeared before every single arbitrator worth knowing. Not just once, but multiple times in the past few years and we have the inside knowledge as a result of that”³².

The better you know an arbitrator, the better you know how to convince them. Familiarity also increases your chances of picking someone who will rule in your favour. As K&L Gates has claimed: “Our knowledge of arbitrators means we are also well placed to ensure that your case is presented in such manner [sic] as is most likely to appeal to the majority of the tribunal, bearing in mind their particular likes/dislikes and their overall approach”³³. No wonder, parties tend to rely on suggestions from counsel when appointing arbitrators. That way, specialised arbitration lawyers become the “gatekeepers” of the arbitration community, and keep it close-knit³⁴.

As many as two dozen senior lawyers in the top firms also act as arbitrators³⁶, opening a Pandora’s box of potential conflicts of interest because of their vested interest in growing their own business. An arbitrator might, for example, be tempted to make a decision that will favour a client whom they represent as counsel in another case. Some suggest that the dual role of arbitrator and counsel is “one of the most significant problems of the investment arbitration regime”³⁷. But according to one of the leaders in the arbitrator market, Swiss firm Lalive: “the lawyer who regularly sits as an arbitrator is the more astute advocate”³⁸. (see also chapter 4)

It all comes down to an old adage, ‘know your judge’ – and its even more important other half, ‘make sure your judge knows you’. The longer an advocate spends in the presence of adjudicators, the better his or her chances of being persuasive in front of them.

Global Arbitration Review³⁵

Multiplying arbitrations against countries

Turning international investment arbitration into a lucrative business has provided a great incentive for smart lawyers to sustain and expand the system in order to maximise profits. Keeping corporate clients constantly informed about the opportunities for litigation is the bread and butter of an international investment arbitration lawyer. Fuelling claims against countries fighting a major economic crisis is one way to expand your business, but lawyers have also tried to profit from human disasters.

Take the 2011 civil war in Libya. While the global public followed events fearing an imminent massacre, the arbitration industry was advising the multinational community how to defend its profits in the country. Freshfields suggested corporations could use investment treaties to sue the Libyan state with investors claiming financial compensation for the country’s failure to comply with promises “regarding physical security and safety of installations, personnel etc.”⁴⁰. The new government might now have to compensate the companies that supported the dictatorial regime as a result of the shift towards democracy.

King and Spalding similarly flagged up arbitration options available to oil and gas companies in Libya⁴¹, as did Clifford Chance, Cleary Gottlieb and Fulbright⁴². Renowned arbitrator Christoph Schreuer identified the “considerable” legal potential of investment treaties in situations such as the Libyan civil war, writing on the protection of investments in armed conflicts⁴³.

When Hungary introduced a tax on profitable companies to reduce its back-breaking public debt in 2011, law firm K&L Gates suggested some “attractive” arbitration options⁴⁴. When Swedish energy giant Vattenfall announced arbitration against Germany’s phaseout of nuclear power (see box 5 on page 27), UK firm Herbert Smith Freehills analysed how investors “might

Crisis in Libya: What Legal Options are Available to Oil and Gas Companies?

‘Client alert’ issued by King & Spalding in the midst of the 2011 Libyan civil war³⁹

seek redress in the UK should a similar decision be made here⁴⁵. When India allowed a generic drug producer to sell a cheaper version of a patented cancer drug in 2012, White & Case pointed out that patent-holding drug multinationals “may be able to seek relief under applicable bilateral investment treaties⁴⁶”.

Specialised arbitration firms run huge marketing departments identifying potential hooks for investment claims, targeting investors⁴⁸. Not every company follows their advice⁴⁹, but the ambulance chasing of some law firms is nevertheless a driving force in the boom in international investment arbitration. As one lawyer explained: “Lawyers live on disputes. They create monsters like the current investment arbitration regime and hype it to produce work for themselves – as lawyers and arbitrators. I truly believe that the investment arbitration system wouldn’t exist the way it does today if it wasn’t for the lawyers⁵⁰”.

Investment arbitration lawyers are not just ambulance chasing. They are also creating the accidents because, doubling as arbitrators, they often interpret the treaties very broadly. So it’s a bit like ambulance chasing after your friend has put banana peels on the road.

Professor Gus Van Harten, Osgoode Hall Law School, Toronto⁵¹

Reining in democracy

For law firms looking to maximise profits from arbitration, state regulations to protect the environment, public health and social security have become lucrative business opportunities. As two lawyers from the law firm Milbank put it: “Adverse government actions do not have to take place only with autocratic rule. The populism that democracy can bring often is the catalyst for such actions⁵²”.

In a brochure entitled “Help, I am being expropriated!”, German law firm Luther has promoted scenarios such as new taxes, newly-introduced environmental laws, and reduced state-controlled prices as opportunities for investment arbitration. The abolition of tax privileges and special economic zones in the aftermath of Ukraine’s 2005 Orange Revolution was put forward as another example⁵⁴.

I truly believe that the investment arbitration system wouldn’t exist the way it does today if it wasn’t for the lawyers.

Nathalie Bernasconi-Osterwalder, International Institute on Sustainable Development (IISD)⁴⁷

Extract from a role play to train practitioners⁵³

Investment lawyer: Well, I know you were looking for a tough litigator to help you in [imaginary country] Ruritania, but I’m here today to propose a completely different approach to this issue that you have in Ruritania, and we believe based on our experience that it is an approach which is much more likely to get you the kind of compensation that Toll-Stoy [an imaginary construction company] deserves.

Toll-Stoy counsel: And what approach is this?

Investment lawyer: Have you considered a claim under a BIT?

Toll-Stoy counsel: A BIT?

Investment lawyer: A Bilateral Investment Treaty.

Toll-Stoy counsel: A Bilateral Investment Treaty? What’s that?

[Lengthy exchange about the BIT system]

Investment lawyer: Well, the BIT gets you out of Ruritania courts and before a neutral independent body of arbitrators that has the power to render an award for millions of dollars for Toll-Stoy and you can take that award and have it treated as a judgement in a 142 countries around the world.

Toll-Stoy counsel: Oh, now I’m interested. Tell me more.

Box 4

King & Spalding profile

King & Spalding shot into the top ranks of international arbitration firms in the last decade – focusing almost exclusively on investor-state arbitration. According to Global Arbitration Review the firm's key to success was winning ICSID cases against Argentina⁵⁵. King & Spalding represented investors in at least 15 out of the 49 ICSID cases filed against Argentina by February 2012⁵⁶, more than any other firm. Doak Bishop, co-head of the firm's international arbitration group, is considered “the go-to lawyer for claims arising from Argentina's peso crisis”⁵⁷. He secured a staggering US\$185 million in compensation for US firm Azurix which had taken over the privatised water and sewage system in the Buenos Aires region and which sued Argentina when the province's water regulator blamed it for an algae outbreak in 2000.

King & Spalding's second speciality is working for “super-major and major international oil and gas companies”⁵⁸. In the mid '90s, the firm opened a Houston office following a request by Houston-based oil giant Texaco, which wanted King & Spalding to handle its litigation needs. Since then, the firm has alerted energy companies to arbitration as one of the “strategic options available when catastrophe strikes the major international energy project”. “Catastrophes” have included a newly-elected government terminating a project, civil unrest and company executives arrested on criminal charges⁵⁹. Energy-related disputes have become a large share of investor-state claims.

King & Spalding is currently representing Chevron in a controversial dispute with Ecuador. Chevron initiated arbitration to avoid paying US\$18 billion to clean up oil-drilling-related contamination in the Amazonian rainforest, as ordered by Ecuadorian courts. The case has been lambasted as “egregious misuse” of investment arbitration to evade justice⁶⁰. Doak Bishop, on the other side, dismissed the rainforest communities who were harmed by Chevron's ecological destruction as “irrelevant”⁶¹.

The investor-appointed arbitrator in the Chevron-Ecuador case, Horacio Grigera Noan, has come under fire from the rainforest communities for his close business relationship with King & Spalding⁶². In another case of a US oil company against Ecuador, the investor-appointed arbitrator, Guido Tawil, resigned following allegations of an “extremely close connection and relationship” with King & Spalding, the oil company's counsel⁶³.

King & Spalding has some 50 arbitration lawyers working from key arbitration hubs such as Washington, New York, Paris, London and Singapore⁶⁴. Several of the firm's lawyers sit as arbitrators and some hold positions in arbitral institutions such as the ICC's International Court of Arbitration⁶⁵. Margrete Stevens, “the most senior former ICSID official to go into private practice”⁶⁶, joined King & Spalding after 17 years at ICSID. Her colleagues also have excellent contacts with investment policy-makers: Guillermo Aguilar-Alvarez, for example, used to be a legal advisor for the Mexican government in the NAFTA talks (North American Free Trade Agreement between the US, Canada and Mexico)⁶⁷.

King & Spalding lawyers have rarely represented the state in an investment dispute, acting on behalf of the company in 35 of the 37 investor-state disputes listed on its website in March 2012⁶⁸.

Scaring governments into submission

Arbitration lawyers also encourage their clients to use the threat of investment disputes as a way to scare governments into submission. According to Luther: “A settlement, which you should always aim for, is easier to reach under the shadow of a looming investment treaty claim”⁶⁹. Luther was one of the firms involved in securing a settlement for Swedish energy giant Vattenfall against Germany, a typical case of a government lowering standards in the face of a large compensation claim (see box 5 on page 27).

I’ve seen the letters from the New York and DC law firms coming up to the Canadian government on virtually every new environmental regulation [...]. Virtually all of the new initiatives were targeted and most of them never saw the light of day.

Former Canadian government official⁷⁰

These “pre-emptive strikes” seem to be on the rise, with investment arbitration no longer a last resort, but a political weapon in a wider war of attrition against states⁷¹. There is evidence that proposed and even already adopted laws on public health and environmental protection have been abandoned or watered down because of the threat of huge damage claims. Canada, for example, did not pursue certain anti-smoking policies after Big Tobacco threatened to seek compensation⁷². Five years after NAFTA’s investor-to-state provisions came into force, a former Canadian government official told a journalist: “I’ve seen the letters from the New York and DC law firms coming up to the Canadian government on virtually every new environmental regulation and proposition in the last five years. They involved dry-cleaning chemicals, pharmaceuticals, pesticides, patent law. Virtually all of the new initiatives were targeted and most of them never saw the light of day”⁷³.

Making money with 3-D chess: BIT shopping and investment structuring

Lawyers also assist investors in picking the most investor-friendly treaties for their claims against states – what is known as ‘BIT shopping’(BIT = bilateral investment treaty). Thanks to their global reach, multinationals can sue the same country in several fora, on the basis of the same facts. In one of the most famous cases of this “multifront war” which has been compared to “3-D chess”⁷⁴, US cosmetics billionaire Ronald Lauder sued the Czech Republic under the US-Czech BIT, and then again under the Netherlands-Czech BIT (the investment was structured via a Dutch vehicle). In the latter case, the Czech Republic was ordered to pay US\$ 270 million plus interest, the equivalent of the country’s entire health budget. The first case was dismissed⁷⁵.

Lawyers also advise their clients on what they euphemistically call “corporate structuring for investor protection” to ensure access to the most investor-friendly arbitration routes. Self-acclaimed ‘foreign policy lawyer’ Robert Amsterdam explained: “In order to take advantage of the strongest BITs, the investor should consider structuring the company through a third party state for greater security – i.e., a Canadian company seeking to invest in Bolivia may choose to establish a shell corporation in Sweden to be afforded the protective measures of a stronger treaty”⁷⁷. Thanks to such an offshore construction, a ‘Lithuanian’ company could sue Ukraine under a BIT, even though it was 98% owned by Ukrainians⁷⁸.

It is no crime to get smart about BIT-shopping.

Elvira R. Gadelshina, Russian law firm Yukov, Khrenox & Partners⁷⁶

With one of the world’s largest investment treaty networks, the Netherlands is a particularly popular “gateway for treaty-shopping”⁷⁹. This is thanks to firms such as Amsterdam-based De Brauw Blackstone Westbroek touring the globe advertising investments in energy rich and developing countries ‘through’ the Netherlands⁸⁰. US firm Baker McKenzie advises its US clients to structure investments in China through intermediary companies in the Netherlands – because there is no US-China investment treaty, but there is a Dutch one⁸¹. When the Australian government turned its back on investor-state arbitration in April 2011, Clifford Chance suggested the Netherlands as a “very popular choice” to Australian corporations still wanting to sue foreign states⁸².

Box 5

Representing Vattenfall Scorning the environment and democracy

In 2009, Swedish energy giant Vattenfall brought the first known investment treaty claim against Germany. The company demanded €1.4 billion (US\$1.9 billion⁸³) in compensation for environmental measures restricting the use and discharge of cooling water for a coal-fired power plant on the banks of the Elbe river in Hamburg. After Germany agreed to dilute environmental standards, a settlement was reached, worsening the effects that the power plant will have on the river and its wildlife⁸⁴.

Having tasted blood, Vattenfall launched its second investor-state challenge against Germany in May 2012, seeking damages related to two of its nuclear power plants. Following the Fukushima disaster and the German public's hardened anti-nuclear stance, the German government had decided to phaseout nuclear energy. Vattenfall is claiming €3.7 billion (US\$4.6 billion⁸⁶) in compensation – even though its two plants were not operational when the phaseout decision was made⁸⁷.

In both cases, Vattenfall was represented by the German law firm Luther and the Swedish firm Mannheimer Swartling. These two boutiques are not among the world's biggest, but their arbitration practice is global.

Mannheimer Swartling's 60-lawyer-strong dispute resolution team is the firm's "dominant group"⁸⁸ with lawyers based in Sweden, Germany and Hong Kong, as well as regularly jetting out to the Moscow office⁸⁹. They specialise in energy and natural resource related disputes under BITs and the Energy Charter Treaty, often involving states of the former Soviet Union. Six of the firm's lawyers sit as arbitrators⁹⁰, including ex-White & Case lawyer Kaj Hobér who has appeared in more than 300 arbitrations⁹¹. As "one of the foremost current practitioner-academics"⁹², Hobér was appointed Professor at Uppsala University, Sweden, to lead Europe's first MA programme in investment treaty arbitration⁹³.

Luther, is one of only three German outlets among the global top 100 arbitration firms⁹⁴ and sees itself as a "business law firm" – "thinking and acting like businessmen"⁹⁵. It, too, appears to specialise in disputes under the Energy Charter Treaty, with partner Richard Happ having spent part of his legal training in the Secretariat of the Energy Charter Conference⁹⁶. Happ also sits as arbitrator and co-authored a brochure published by the German government, suggesting a number of public policies that are ripe for investment arbitration (see page 24).

A third actor in the Vattenfall cases is the US firm **K&L Gates**, representing the German government. The latter does not seem to mind that the firm's lawyers on the case, Sabine Konrad and Lisa Richman are some of the most pro-active investment lawyers in seeking to trigger investment treaty cases against states (see pages 19, 23). Konrad also sits as an arbitrator and mobilised against reform of the European investment policy (see page 28)⁹⁷. She leads K&L Gates' German arbitration practice together with Johann von Pachelbel, who was one of Mannheimer Swartling's counsels for Vattenfall in the first case against Germany⁹⁸.

Let him who desires
peace prepare for war.
Vegetius, 4th century

We are prepared.

Law firm Luther advertising its
arbitration work⁸⁵

Paving the way for future claims

Law firms also play a key role in ensuring that arbitration rulings are expansive and investor-friendly, increasing their future business. Should an aggrieved investor be allowed to bring parallel disputes on the basis of the same facts? Can a 98% Ukrainian-owned investor sue Ukraine through a Lithuanian holding company? Answers to such contested legal questions matter for the concrete case, but also for investors' future chances of success. Research reveals that tribunals tend to resolve such issues with expansive, investor-friendly interpretations, paving the way for even more challenges against states⁹⁹. But while the arbitrators ultimately decide on these questions, the parties' lawyers play a key role in bringing the underlying arguments forward¹⁰⁰. Another way for law firms to perpetuate and exacerbate the injustice of the investment arbitration system.

Teaching governments, growing new clients

Specialised arbitration law firms even seem to have negotiated some investment treaties for governments, and regularly instruct them about arbitrations and advise them on treaty drafting. Swiss law firm Lalive, for example, runs regular e-learning courses on investment arbitration for UNITAR, the UN organisation for capacity building in developing countries¹⁰¹. Officials from poor countries get extra scholarships – and Lalive benefits from a long list of potential new clients.

In November 2011, a dozen government lawyers from Ghana, Gambia, Liberia, South Africa, Uganda and Egypt attended a full-week training on investment law and arbitration, sponsored by a number of large arbitration firms including Salans, Hogan Lovells, Volterra Fietta, WilmerHale and Allen & Overy – which provided the trainers¹⁰².

Lobbying to kill investment treaty reform

As governments come to realise the threat that the international investment regime represents to responsible public policies, more and more are trying to reduce their legal exposure to investor-state disputes (see page 16). Industry associations and big law firms have mounted fierce lobbying campaigns to counter any reform process, propping up an unjust but highly lucrative system¹⁰⁴.

The current debate in the EU is a case in point¹⁰⁵. With the coming into force of the Lisbon Treaty in 2009, lawyers faced the risk of radical reform of investment treaties in the EU. Trade unions and civil society groups had long called for an overhaul of EU member states' BITs to guarantee a greater balance between public and private interests. They advocated a whole new generation of agreements: without investor-state dispute settlement, with investor obligations, with more precise and restrictive language regarding their rights, and with explicit references to countries' right to regulate. Some members of the European Parliament (MEPs) were also moving in that direction.

There are people within the system who are very supportive of the way it currently operates and do a lot to encourage governments to sign treaties. They work as lawyers, they advise governments, they tell governments that actually all these concerns about investment treaties are exaggerated and that they should keep signing them.

International investment law researcher¹⁰⁶

But the firms discretely forgot to mention that they make considerable profits from these so called intra-EU BITs, suing the same EU governments that they were now lobbying to keep the legal base for this business intact. De Brauw, for example, is representing the Dutch insurance company Eureko in a €100 million (US\$142 million¹⁰⁹) claim against the Slovak government on the basis of a BIT between the Netherlands and Slovakia. The Slovak government had reversed the health privatisation policies of the previous administration, requiring health insurers to operate on a not-for-profit basis¹¹⁰.

We also advise governments on drafting and negotiating BITs and managing the risk of investment claims in the implementation of government policy.

Hogan Lovells¹⁰³

But that was not what the arbitration industry had in mind. To influence the debate, firms such as Hogan Lovells, Herbert Smith Freehills and Baker McKenzie invited EU policy-makers to “informal but informed” debates with their multinational clients – including several which have sued states under investment treaties such as Deutsche Bank and Shell. Dutch law firm De Brauw sent an article to MEPs slamming the European Parliament's moderate reform proposals. The message from these firms was clear. Existing BITs and the high standard of investor protection and in particular investor-to-state arbitration had to be maintained; and investment protection should not be linked to labour or environmental standards.

Investment lawyers were also keen to retain the investment treaties that EU countries have signed amongst themselves. Elite arbitrator Emmanuel Gaillard of Shearman & Sterling warned of the “disastrous economic consequences” if they were abolished, as had been proposed¹⁰⁷. De Brauw and K&L Gates echoed the warning¹⁰⁸.

Investment lawyers walking in and out of government

In its fight against meaningful reform of international investment law, the arbitration industry can count on first-rate access to legislators and policy officials responsible for negotiating investment treaties and battling disputes. Many of these public servants roam the same conferences and socialise at the same gala dinners; while many in the arbitration circuit, and particularly in the US, have a background in government and international institutions (see box 6).

The revolving door grants the arbitration industry valuable insider access. In an interview, former US government insider Theodore Posner who now works for the law firm Weil, Gotshal & Manges explained that he and others like him “know how government officials negotiate treaties and how they analyze the issues”. He is now lobbying to tailor future US investment treaties to his corporate clients’ needs¹¹¹.

The revolving door also breeds conflicts of interests by inviting public officials to use their positions for private gain, including for the benefit of future employers. Several of the NAFTA investment chapter negotiators and advisors have become household names in the arbitration industry, including Daniel Price who negotiated on the US side (see his profile on page 44), Jan Paulsson (see his profile on page 40) and King & Spalding’s Guillermo Alvarez Aguilar, who have both advised the Mexican government. The moment NAFTA was signed, these lawyers pushed companies to sue the three signatory states. In an article from 1995, Paulsson enthused about “this new territory for international arbitration” which only allows companies to sue the state and not the other way round¹¹².

Box 6

Some emblematic revolving door cases

Barton Legum of Paris-based law firm Salans, formerly with Debevoise & Plimpton, was with the US Department of State from 2000 to 2004. He was lead counsel defending the US against investor disputes and helped develop new investment treaties. Today, he is selling the insights he gained in that period to firms such as Apotex, a Canadian pharmaceutical company suing the US for at least US\$520 million on the basis of NAFTA’s investment chapter¹¹³. Legum also sits as an arbitrator.

Regina Vargo of K-street law firm Greenberg Traurig, joined the firm after more than 30 years in US government, including as chief negotiator for free trade and investment agreements such as CAFTA-DR (U.S.-Central America Dominican Republic agreement)¹¹⁴. According to one colleague “no one has been more up close and personal with the CAFTA”¹¹⁵. In the first investor-state claim under the treaty, Vargo obtained an award of around US\$12 million from the Guatemalan government for a US railway investor. A trade unionist commented: “She was paid by the USTR [US Trade Representative] to strike a good deal on behalf of US investors in Central America. And now she is taking the first case to exemplify how treaties like CAFTA favor those investors”¹¹⁶.

Anna Joubin-Bret of US boutique Foley Hoag, spent 15 years with the United Nation Conference on Trade and Development (UNCTAD), advising developing countries on investment treaty issues. Joubin-Bret was the lead organiser of UNCTAD’s infamous mass signing parties where developing countries were lured into a room full of negotiators, leaving as signatories to dozens of investment treaties¹¹⁷. At Foley Hoag, Joubin-Bret now represents states in investor-state disputes and advises them in treaty drafting.

Members of our team have unmatched knowledge and experience, often drawing from prior service in governments around the world.

Sidley Austin about its arbitration practice¹¹⁸

Keepers of the corporate flame

In 2001, journalist and author William Greider described NAFTA's investment chapter as the result of industry's long-term strategy to force governments to compensate whenever they regulate. Corporate lawyers, he suggested, were the "main transmission belt" for putting this idea into practice. "Their role, often underappreciated, is to act as the keepers of the flame, nurturing long-term policy objectives over many years and beyond the transient influence of elected politicians or corporate CEOs. They move in and out of government themselves, helping to write the official texts and laws they later use as tools on behalf of corporate clients when they return to private practice"¹¹⁹.

“ Explorers have set out to discover a new territory for international arbitration. They have already landed on a few islands, and they have prepared maps showing a vast continent below. ”

Jan Paulsson of Freshfields, promoting investment arbitration in 1995¹²⁰



The investment lawyer's toolbox

Become part of the club. Take your Blackberry and jet out to arbitration conferences. Subscribe to expensive list-serves. Become friends with other investment lawyers, arbitrators, funders and academics.

Headhunt government officials. Their insider knowledge is invaluable and their contacts to ex-colleagues might come in handy.

Know the arbitrators. Learn what they read, write, think, like, dislike. The better you know an arbitrator, the easier you will convince him/her and make them rule in your favour.

Be the arbitrator. Even better! No one is as astute as the lawyer who regularly sits as an arbitrator.

Create your own business. Look out for wars, economic crises and political change. Do your marketing. Convince your multinational clients that investment arbitration is a way to make money from such upheavals.

Inflate your business. Get smart about treaty-shopping. Pursue parallel claims against states on the basis of the same facts. Put forward expansive, pro-investor interpretations of contested legal issues – to pave the way for even more disputes in the future.

Scaremonger states. The threat of a multi-million dollar investor claim will make governments behave. With a contingency fee deal, you can cash in on the settlement.

Be a mentor. Offer free capacity building to poor governments – all potential new clients. Maybe you can even advise them on treaty drafting.

Lobby against investment treaty reform. Investment treaties are your cash cow. Fight against reform proposals which might make them less profitable.

But protect the system! Investment treaty arbitration is in a crisis of legitimacy. You will have to swallow some minor reforms to keep it intact and lucrative.

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- 116 Wallach, Jason (2007) Ex-USTR Negotiator Vargo Key in CAFTA Case, 28 March, <http://upsidedownworld.org/main/news-briefs-archives-68/678-ex-ustr-negotiator-vargo-key-in-cafta-case> [17-05-2012].
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- 118 Sidley Austin (2012) Our Practice. International Arbitration (Commercial and Treaty), <http://www.sidley.com/internationalarbitration/> [22-08-2012].
- 119 Greider, William (2001), see endnote 70.
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Chapter 4

Who guards the guardians?

The conflicting interests of investment arbitrators

““ When I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all [...] Three private individuals are entrusted with the power to review, without any restriction or appeal procedure, all actions of the government, all decisions of the courts, and all laws and regulations emanating from parliament. ””

Juan Fernández-Armesto, arbitrator from Spain¹



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Investment arbitrators are hidden from public view, barely mentioned in international media. This is perhaps not surprising, given that most people's eyes glaze over at the mere mention of the words. Yet this small group of elite lawyers have been granted unprecedented power to judge cases that affect millions of people.

When companies sue governments in international arbitration tribunals, investment arbitrators have the power to divert taxpayers' money to corporations. They can decide to penalise governments for ensuring people's human rights to health, access to water or electricity as well as the right to a healthy environment. This field of law is certainly not short of technocratic detail and obtuse legalese, but it has a much broader relevance when we understand the role that this group of lawyers play in decisions that affect ordinary people's lives.

Arbitrators: neutral guardians of the investment arbitration system?

Advocates claim an international arbitration system is needed because national courts are not sufficiently neutral. They say that only international arbitration courts can provide the neutral ground to deal with investors' concerns. That means that investment arbitrators become the guardians of investment arbitration, and confidence in the system is based on their perceived independence.

Yet investment arbitrators are hardly neutral guardians, who stand above the law. In fact, they are crucial actors in the arbitration industry, with a financial interest in the existence of investment arbitration. Arbitrators, to a far greater degree than judges, have a financial and professional stake in the system². They earn handsome rewards for their services. Unlike judges, there is no flat salary, no cap on financial remuneration.

Arbitrators are people to whom others entrust their wealth and welfare.

William W. Park, investment arbitrator³

Arbitrators' fees can range from US\$375 to US\$700 per hour depending on where the arbitration takes place⁴. How much an arbitrator earns per case will depend on the case's length and complexity, but for a US\$100 million dispute, arbitrators could earn on average up to US\$350,000⁵. It can be far more. The presiding arbitrator in the case between Chevron and Texaco v. Ecuador, received US\$939,000⁶. In another case, the Tribunal president billed for 719 hours at an hourly rate of US\$660 plus VAT⁷.

Box 7

Who are the investment arbitrators and how are they chosen?

- Investment-treaty arbitrators are lawyers.
- They differ from private commercial arbitrators, who deal with disputes between companies based on contracts. Investment-treaty arbitrators deal with disputes between companies and the state, based on international investment treaties.
- They can come from law firms, academia or have held government positions.
- Most arbitration panels are composed of three people. One arbitrator is selected by each of the parties and a third, the president, is usually selected by the two party-appointed arbitrators. Sometimes a previously agreed appointing power, such as the World Bank or International Chamber of Commerce, selects the arbitrators.
- Arbitrators do not need to be registered anywhere in order to qualify. Both parties can appoint anyone they consider suitable.
- There are thousands of lawyers who want to become arbitrators, only very few who make it.

To put it simply, if a doctor is sponsored by a pharmaceutical company, we might question whether the medicine prescribed is the best for our health; if a public servant receives money from a lobbyist, we might question whether the policies they promote are in the public interest. In the same vein, if an arbitrator's main source of income and career opportunities depends on the decision of companies to sue, we should wonder how impartial their decisions are.

And concerns not only arise from the financial benefits arbitrators gain. Arbitrators frequently combine their role with several other hats: working as practitioners, academics, policy advisers or as media commentators. With these various roles, this small group of investment lawyers can influence the direction of the investment arbitration system in a way that they can continue benefiting from it.

A close examination of the arbitration world soon reveals why arbitrators, far from being neutral, have become powerful players who have shaped the pro-corporate investment arbitration system that we see today.

The arbitrators' club

Arbitrators may not be well known in the outside world, but members of the arbitration club certainly know each other. International arbitrators are the epitome of a close-knit community. Academics, journalists and insiders have described the circuit of investment arbitration as "small, secret, clubby"⁸, "an inner circle"⁹, "a closed homogenous group comprised of 'grand old men'... "or even an arbitration 'mafia'"¹⁰.

Keeping the club small and cohesive means arbitrators have a tight grip on the investment arbitration system and can exert immense influence over it.

An investment law academic, who prefers to remain anonymous, has questioned whether the investment arbitration system would even be viable if it was not maintained by a small community, bound by similar values, education and outlook. He argues that coherence among arbitrators in their view of how the system should work is essential for its survival. So the arbitrators "play this role of holding the system together"¹².

Pro-business, males and from the rich North

Most of the members of this club are men from a small group of developed countries:

- *Proportion of arbitrators from Western Europe and North America:* 69% for all cases held at the World Bank's International Centre for Settlement of Investment Disputes (ICSID)¹³ and 83% if taking into account arbitrators who have sat in more than 10 cases (see annex A¹⁴).
- *Proportion of arbitrators who are women:* 4%. Two women (Brigitte Stern and Gabrielle Kaufmann-Kohler) dominate this list, accounting for three quarters of the cases taken by women¹⁵.

Even more important for the cohesion of the arbitration industry is their shared outlook of the world. "Arbitrators have to make choices to resolve the disputes, which are of course informed by their political standpoint", Brigitte Stern has noted¹⁶. Evidence shows that many of the arbitrators enjoy close links with the corporate world and share businesses' viewpoint in relation to the importance of protecting investors' profits. Given the one-sided nature of the system, where only investors can sue and only states are sued, a pro-business outlook could be interpreted as a strategic choice for an ambitious investment lawyer keen to make a lucrative living¹⁷.

Everyone knows everyone in the arbitration world.

Guy Sebban, former Secretary General of the International Chamber of Commerce (ICC)¹¹

What gives the arbitral system order are the arbitrators, who share basic norms and outlooks and who, in the process of deciding disputes, are in many cases also "making law" that supports their shared vision of how the world should be.

Stephan Schill, researcher, Max-Planck Institute for Comparative Public Law and International Law¹⁸

The legal anthropologists Yves Dezalay and Bryant Garth, among the first to explore the emergence of a transnational elite of arbitrators in the 1990s, suggested: “this generation of arbitration is closer to business and therefore more likely to work business common sense into the legal norms applied to each case”. The authors also confirm the arbitrators’ “strong market orientation”¹⁹. Some of the arbitrators they mentioned in their study 20 years ago are the top investment arbitrators of today.

In fact, arbitrators themselves have stated that they “do not normally see themselves as guardians of the public interest”²⁰. A known professor in the field noted, “Most arbitrators are experts in “anything *but*” human rights law”²¹.

There is a dark irony in this situation. While public concerns do not seem to be the arbitrators’ forte, many documented legal claims brought by corporations, involve issues that arise out of governments’ implementation of policies to defend the public interest. Indeed, corporations can and have challenged environmental regulations, tax increases, monetary policies, and the re-nationalisation of public services and natural resources²². In many of these cases, it is within the arbitrators’ discretion to weigh broader public interest when interpreting the treaty rules. For example, when Argentina argued “state of necessity” to justify the measures that took during the 2001–2002 economic crisis which led to over 30 lawsuits by investors, arbitrators could accept this defence. Among the cases decided so far, most arbitrators chose not to²³.

The black sheep are shunned

Members of the arbitration community tend to recommend each other as counsel or arbitrator; they invite each other to conferences and to submit articles to journals. However, the black sheep, those investment lawyers who have systemic critiques of the arbitration system, are shunned.

To cite one example, there was a hostile reaction towards a public statement from 37 academics, including well-known investment lawyers, who in 2010 called on states to withdraw from or renegotiate current investment treaties²⁵.

They were shunned, with accusations that they did not know what they were talking about. Todd Weiler, an arbitration specialist, commented: “I’ve seen the list [of academics who signed the statement]. I see four professionals I recognise as having expertise in investment arbitration policy and only one who has substantive dispute settlement experience. I think that fact speaks for itself”²⁶. The implication was clear: you can only offer useful comment on the system if you are an insider, already beholden to it.

An investment arbitration researcher, who spoke anonymously, explained that while proponents of the investment arbitration system tend to be outspoken, you would never hear a member of the close-knit community openly arguing that countries should restrict corporations’ rights or should critically assess the investor-state disputes mechanism. The same specialist noted that going against the tide, and not reproducing the opinions of those respected in the investment arbitration world, could cost anyone dearly. Breaking with the tight-knit community could entail no further appointments as an arbitrator, no promotion in the law firm, isolation in the academic community, and a drop in invitations to investment treaty conferences²⁷.

This is not to say that arbitrators are a homogenous block. In fact, some leading arbitrators have put forward proposals on how to ‘improve’ some aspects of the system. Critiques, however, seem more likely to be tolerated as long as they do not undermine the legitimacy of the system as a whole.

Arbitrators do not normally see themselves as guardians of the public interest.

Guillermo Aguilar Alvarez and William W. Park, arbitrators

(T)he arbitrati becomes an omertà, a closed society that vows to keep all others out.

Audley Sheppard, partner at law firm Clifford Chance²⁴

Movers and shakers: an elite 15

Jan Paulsson, a top-ranking arbitrator, once assured an audience that the existence of an ‘elite’ group of arbitrators was an “illusion”²⁸. However, our research shows that within the close-knit community, there is indeed a group of 15 arbitrators that can be considered the movers and shakers of international investment arbitration (see table 2 below). This group fits the category recently described by arbitrator Toby Landau as “super arbitrators” who are “not just the mafia but a smaller, inner mafia”²⁹.

This elite 15 have the heaviest caseload as arbitrators in investment-treaty disputes, handle most of the biggest cases in terms of amounts demanded by the corporations and have been repeatedly ranked as top arbitrators by well-known surveys.

15 arbitrators have captured the decision making in 55% of the total investment treaty cases known today.

Together they have decided on:

55% (247 cases ³⁰)	64% (79 cases)	75% (12 cases)
out of 450 investment-treaty disputes known today ³¹	out of 123 treaty disputes of at least \$100 million	out of 16 treaty dispute of at least \$4 billion

Sources: see Annexes B and C³²

Contrary to Paulsson’s assessment, it seems that among the hundreds of lawyers who serve as investment arbitrators³³ an elite group does exist and Paulsson is a leading member.

The concentration of cases in so few hands suggests that this small group of frequently appointed arbitrators has a significant career interest in the system. This is problematic because it poses the danger of making arbitrators even more receptive to investor interests, the latter being the only ones who can initiate investment disputes.

TABLE 2

Movers and Shakers of investment-treaty arbitration: an elite 15

Arbitrator (country)	Total cases as arbitrator in known investment-treaty disputes	% of total known treaty-based cases (450)	Total known cases as counsel in investment-treaty disputes ³⁴
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A few biographic details you might not find in the industry’s own rankings

Brigitte Stern (France)

39

8.7%

N/A

- The states’ favoured choice. Governments have appointed her as arbitrator in 79% of her known investment-treaty cases.
- Professor of Université Paris I, Panthéon-Sorbonne; is not part of any law firm.
- Openly against lawyers playing the dual role of counsel and arbitrator³⁵.
- Although she has criticised conduct in the international arbitration system, she has also said there is no need for a change in its rules: “it appears to me there is no systemic problem with investment treaty arbitration. The biggest challenge is ensuring that all the stakeholders – both the investors and the host states – consider the system is trustworthy”³⁶.

Charles Brower (US) **33** **7.3%** **3**

- A favourite of investors. Companies have appointed him as arbitrator in 94% of the known investment-treaty cases with which he has been involved.
- Has spent the best part of 37 years with top law arbitration firm White & Case. In 2005, he joined 20 Essex Street Chambers in London.
- An ardent defender of international investment arbitration, he once said, “My proposition is that any proposal that alters any of the fundamental elements of international arbitration constitutes an unacceptable assault on the very institution”³⁷.
- During the case with Perenco, Ecuador challenged his impartiality as arbitrator after he referred to Ecuador and Bolivia as “recalcitrant host countries” because these countries refused to accept arbitration tribunal decisions that contradicted their own constitutions³⁸. Actions that Brower considered arbitrary acts, can also be interpreted as Ecuador’s and Bolivia’s sovereign right to uphold national law in defence of the interest of their people.

Francisco Orrego Vicuña (Chile) **30** **6.7%** N/A

- A prolific arbitrator, usually sitting as either president of the panel (57% of total known investment-treaty cases) or investor appointee (33% of known cases).
- Currently a member of 20 Essex Street Chambers in London. Has held several government positions during the 16 years long Pinochet dictatorship (73-89), the most prominent as Chile’s ambassador to the United Kingdom (1983-1985)³⁹ ⁴⁰.
- A salient defender of investment arbitration, he does not support national courts deciding on investors claims. Believes that “If countries don’t sign up to [Bilateral Investment Treaties] BITs they will have nothing to offer and will lose the investment”⁴¹.

Marc Lalonde (Canada) **30** **6.7%** N/A

- Politician for 13 years, holding high-ranking positions including Minister of Health, Minister of Justice, Minister of Energy and Minister of Finance in Canada.
- Prominent lawyer/arbitrator, he worked with Canadian firm Stikeman Elliott for over 22 years, before going solo in 2006.
- An active member of the corporate community, he joined the boards of Citibank Canada and Air France in the 1990s. Since 1998 he has held board roles in the energy and mining company Sherritt International⁴². Energy and mining cases account for half of his known investment treaty arbitration work.
- Strong links to the corporate world might explain why investors have appointed him 17 times and states only 3.

L. Yves Fortier (Canada) **28** **6.2%** N/A

- Like Lalonde, Fortier has combined government positions with private practice, arbitration and senior corporate positions⁴³.
As a career diplomat, he was Canada’s ambassador to the UN and in 1989 President of the UN Security Council.
For almost 50 years, he was part of top arbitration law firm Ogilvy Renault, until he resigned in 2011 citing that “being an international arbitrator as a member of a global legal practice can create inherent conflict risks”⁴⁴.
- Currently part of the arbitration panel in two of the biggest cases in terms of the amount requested by the investor: Yukos v. Russia (US\$103.6 billion) and ConocoPhillips v. Venezuela (US\$30 billion).
- A member of corporate boards, including NOVA Chemicals Corporation (1998-2009), aluminium producer Alcan Inc. (2002-2007) and giant mining company Rio Tinto (2007-2011), among others.
- Openly admits that being part of the corporate world has shaped his views: “Sitting on the board of a publicly traded company – and I have served on a number of such boards – has helped me in my practice as an international arbitrator. It has always provided me with a vista on the business world that I would not have known as a lawyer”⁴⁵.

Gabrielle Kaufmann-Kohler (Switzerland) **28** **6.2%** N/A

- Heads Lévy Kaufmann-Kohler, the law firm she founded in 2007. A professor and active arbitrator, she has also been on various corporate boards.
- As an arbitrator in investment-treaty cases, she has presided over at least 17 panels. In another nine known cases, she was appointed by the investor and in one by the state. In one, her role is unknown.
- In 2004, she was appointed as arbitrator by water company Vivendi and energy and gas supplier EDF in two different claims against Argentina. Two years later, in 2006, Kaufmann-Kohler was appointed to the Board of the Swiss bank UBS, which was the single largest shareholder in Vivendi and which has stakes in EDF. Kaufmann-Kohler claimed she was unaware of the connections. Argentina challenged her impartiality on the case. A committee deciding on the challenge denied Argentina's claim, but lambasted her for failing to disclose her role as a corporate board member⁴⁶.
- Even though she argued that "having an active participation in business through board memberships is undoubtedly an asset for an arbitrator", she resigned from the UBS board in 2009⁴⁷.

Albert Jan van den Berg (Netherlands) **27** **6.0%** N/A

- An active career both as practitioner and in academia. Passed through various law firms from 1980 until he opened his own arbitration law firm⁴⁸ together with Bernard Hanotiau in 2001.
- Has been appointed at least eight times by companies in investment-treaty cases, and five of those cases were against Argentina, following the state's response to the 2001-2002 economic crisis. In two of the cases, van den Berg supported contradictory outcomes even when the facts and reasoning of defence of both lawsuits were almost identical⁴⁹. Argentina later questioned the arbitrator's impartiality, though this challenge was rejected⁵⁰.

Karl-Heinz Böckstiegel (Germany) **21** **4.7%** N/A

- An academic-arbitrator, not known to have been appointed as arbitrator by a state. Based on known treaty-cases, has chaired 62% of the cases, and in 28% was appointed by the company.
- In a 2006 international arbitration lecture, Böckstiegel portrayed states as the biblical Goliath, the gigantic warrior who terrorises the kingdom, and companies with the underdog David⁵¹. The use of this metaphor reveals an apparent bias towards corporations in his outlook.

Bernard Hanotiau (Belgium) **17** **3.8%** **2**

- Hanotiau was a well-established arbitrator when he co-founded the firm Hanotiau & van den Berg, but has since been much in demand. In 2010, he was named arbitrator of the year by Global Arbitration magazine (GAR)⁵². In 2011, he was selected to arbitrate in at least seven investment-treaty cases.
- Seems to be riding a wave of new trends in international arbitration following the boom in Asia and he regularly sits as an arbitrator in Singapore⁵³. Maybe anticipating an increase of new lawsuits in the region, in 2011, his firm opened an office in Singapore⁵⁴.

Jan Paulsson (France) **17** **3.8%** **16**

- A well-known name in international arbitration, Paulsson is based in London, Miami and Bahrain. One of the few elite arbitrators to remain part of a global law firm, Freshfields, despite the increasing risk of conflicts of interest⁵⁵. His impartiality was challenged in 2008 during the case Lemire v. Ukraine because Freshfields was defending Ukraine in another case.
- Not only an active arbitrator but also an active counsel on investment-treaty panels. Currently, he represents the oil giant ConocoPhillips in its US\$30 billion demand against Venezuela.
- Despite being a fervent advocate of international arbitration, he recently contested one of the foundations of the current investment arbitration system, suggesting that all three arbitrators should be appointed by a neutral body⁵⁶.
- In 2009, he published a blistering critique of governments that are attempting to regain control of their natural resources from foreign investors, which have a redistribution policy and which are critical of international arbitration and the laws that grant foreign investors greater rights⁵⁷.

Stephen M. Schwebel (US) **15** **3.3%** **10**
 [9 with D. Price]

- Judge Schwebel held several posts at the U.S. Department of State under the Kennedy and Carter administrations and was a Judge at the International Court of Justice for 11 years⁵⁸.
- A frequent arbitrator in investment-treaty disputes, in 40% of his known cases he has been appointed by the investor. The other 60% of known cases are divided equally between state appointments and president of the tribunal.
- An active counsel, mainly defending companies (eight out of ten known cases).
- Argues that BITs are an immense advance in the field and should be nurtured and cherished rather than denounced and undermined⁵⁹. He avidly opposes any restriction on investor protection⁶⁰.

Henri Alvarez (Canada) **14** **3.1%** N/A

- Like Paulsson and Galliard, one of the three elite 15 arbitrators still part of a global law firm, Fasken Martineau.
- Specialised in Latin America. Nine out of 14 known cases where he arbitrated against a Latin America country. Mainly appointed by companies (64% of known cases).
- Advocated that Canada should sign investment treaties. When the Canada-EFTA (European Free Trade Association - including Norway, Switzerland, Iceland, and Liechtenstein) came into force in 2009, he expressed disappointment because it “does nothing to establish rules for investment protection”⁶¹.

Emmanuel Gaillard (France) **14** **3.1%** **21**

- Gaillard, a lawyer with international law firm Shearman & Sterling, has been more prolific as counsel than as arbitrator in investment-treaty cases. In 76% of known cases, he has represented the investor. He represented Yukos in the high stake case against Russia, claiming US\$103.6 billion.
- The double role of counsel-arbitrator caused him problems when Ghana challenged his impartiality after he arbitrated in the case Telekom Malaysia v. Ghana at the same time as acting as counsel in the related case of RFCC v Morocco⁶².
- Criticised Russia for withdrawing from the Energy Charter Treaty⁶³ and the European Commission for proposing to terminate investment treaties between EU member states (intra-EU BITs)⁶⁴.

William W. Park (US) **9** **2.0%** **1**

- Currently the President of the London Court of International Arbitration (LCIA), the oldest and one of the most well-known arbitration institutions. LCIA is also one of the most secretive. Until 2006, there was a ban on publication of any decision, but a summary of challenges has now been published.
- Suggests that investment agreements which grant foreign investors ample protection as well as the right to sue governments directly are positive for development⁶⁵. He has advocated this position while not always identifying himself as an active arbitrator who benefits financially from the existence of investment agreements.
- Defends investment protection provisions in treaties such as the North American Free Trade Agreement (NAFTA). He has criticised those in the United States who tried to water down NAFTA provisions⁶⁶.

Daniel Price (US) **9** **2%** **15**
 [9 with S. Schwebel]

See his biographic details in Box 8 (page 44).

Note: Information on the elite 15 is not comprehensive but is based on available information combining caseload, ranking in arbitrators scorecards (American Lawyer and Chambers and Partners) and/or the fact that they have other roles as counsel, academic or government official. There may be other arbitrators who qualify as elite based on the frequency of their appointment. The number of 15 has been chosen for convenience and other arbitrators may be considered main players in the industry. The count of cases is based on known investment-treaty cases including different rules (UNCITRAL, ICSID, etc). For the full list of cases see ANNEX B⁶⁷.

Keeping it in the family

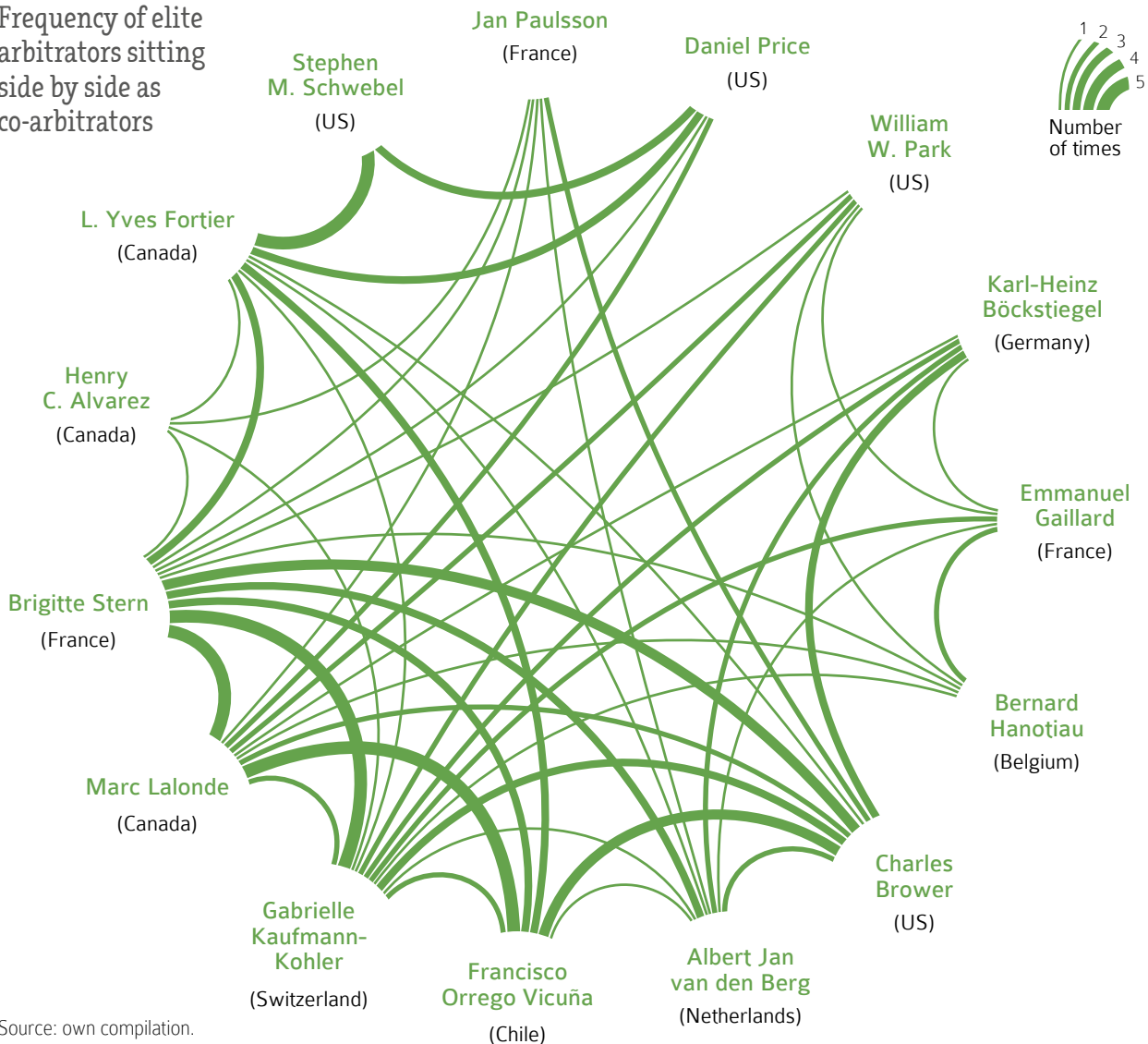
How would investment arbitration look if it did not operate as a closed-shop? What would happen if many more lawyers motivated by the public interest sat in panels; if the interpretation of investment clauses was more heterogeneous, or if arbitrators tended to allocate people and environmental welfare higher value than property rights when deciding on the merits of a case? Under such a scenario, it is likely that many lawsuits brought by investors would be dismissed. In fact the system may even collapse as investors would be more hesitant to pursue cases if the arbitration system became a level playing field.

The survival of international investment arbitration may well depend on keeping the arbitrators club small, heavily interconnected, and cohesive. And that is how in reality it is run.

Once we recognise that the outcome of investment arbitration is driven, in part, by non-legal factors such as the arbitrators' policy preferences, their social and personal background⁶⁸, the fact that elite arbitrators regularly sit side-by-side as co-arbitrators becomes especially relevant. All members of the elite 15 have sat at least once and many twice with another elite arbitrator. The extreme situation where all the arbitrators are from the elite 15 has occurred in at least 15 known treaty cases (see Annex D1⁶⁹). For example, when oil company Yukos sued Russia for US\$100 billion under the Energy Charter Treaty in 2005, the case was heard by a panel composed of Yves Fortier, Daniel Price⁷⁰ and Stephen Schwebel. Incidentally, another elite arbitrator, Emmanuel Gaillard, was representing the investor.

IMAGE 1

Frequency of elite arbitrators sitting side by side as co-arbitrators



Source: own compilation.
For a detailed table with all cases see Annex D.1⁷¹

Once arbitrators with a shared outlook and vested interest in the system form a majority of the tribunal panel, they are in a position to interpret the law in similar way and potentially control its decisions. Some studies have even referred to the role of “collegial politics” in the outcome of the case. Researchers Waibel and Wu have noted, “an arbitrator may vote differently depending on who the two co-arbitrators are”⁷².

But close ties among members of the club extend beyond their role as co-arbitrators. There are also a significant number of cases where one or more of the elite 15 is part of the arbitration panel, while another, this time in the role of counsel, represents one of the parties (see Annex D.2). In some cases up to four members of the elite 15 have been involved in the same case (see Annex D.3)⁷³. When acting as counsels, arbitrators can argue for a certain interpretation of the treaty clauses. In fact, it is the counsels who first bring forward key arguments. Arbitrators cannot, in principle, decide a case based on positions that have not been already introduced during the proceedings.

A close relationship between the arbitrator and the counsel could well be cause to question their impartiality in the process. While it is largely accepted that the integrity of the process would be compromised if lawyers from the same law firm acted as arbitrators and counsel in the same case, a more lenient approach seems to apply in cases when the relationship is close, but not as straightforward as working for the same firm.

This is the case when arbitrator and counsel are both members of the same Chamber. For example Stephen Schwebel from Essex Court Chambers acted as counsel for the company and Karl H Bockstiegel, also from Essex Court, was one of the arbitrators in 2003 during the US\$700 million dispute between Bayindir Insaat Turizm Ticaret Ve Sanayi v. Pakistan. Two other members of Essex Court Chambers were part of Pakistan’s defence team.

Chambers are not law firms, but they can be described as an “office community” of self-employed lawyers. Some arbitrators like Orrego Vicuña, a member of 20 Essex Street Chamber, have argued that this situation does not lead to conflicts of interest⁷⁴. However, Park, another prominent arbitrator, indicated that “practice in a collective format, sharing premises and clerks, as well as a common image for the public, can result in significant personal and professional bonds”⁷⁵.

The perception that arbitrators and counsel from the same chambers acting in the same case could lead to conflicts of interest, was reaffirmed in the case *Hrvatska Elektroprivreda, d.d. (HEP) v. Republic of Slovenia*. An ICSID tribunal decided that Slovenia could not hire David Milton as their counsel because Milton and the chair of the arbitration panel, David A.R. Williams, were both members of Essex Court Chambers⁷⁶.

The hidden agenda behind the multiple roles of arbitrators

It has become normal for investment arbitrators to constantly switch hats: one minute acting as counsel, the next framing the issue as an academic, or influencing policy as a government representative or expert witness.

Over the last few years these multiple roles have become the subject of some debate. This discussion has focused on the fact that some arbitrators also act as counsel which, in some situations, can raise doubts about the arbitrator’s independence and impartiality.

A common example is when an arbitrator has to decide without prejudice on an issue that the arbitrator has previously defended as an advocate. Park explained the conundrum: “On occasion, an arbitrator must address, in the context of an arbitration, the very same issue presented to him or his law firm as advocate in another case, or to himself as scholar in academic writings. It is not difficult to see why such situations might compromise the integrity of the arbitral process”⁷⁷.

Lawyers cannot always move comfortably between arguing a point of legal interpretation and sitting on a tribunal deciding the issue.

William W. Park, arbitrator⁷⁸

Box 8

Dan Price: a case of revolving doors

Dan Price has never been G&A magazine's arbitrator of the year but, if G&A had a category for the arbitrator with the most hats, he would be the undisputed winner. Government official negotiating investment treaties, check; corporate lobbyist advocating investor-state dispute settlement, check; counsel defending the interest of corporations, check, prolific media commentator promoting neoliberalism, check; and arbitrator; check.

It is common for lawyers to retire into the role of arbitrators, having held positions in government. However, Price has spun through the revolving doors between government and the arbitration circuit several times in the last 20 years. His advocacy for investment protection and investor-state arbitration has been consistent throughout.

Price has also benefited from the investment protection treaties he has promoted and helped negotiate. His roles as arbitrator and counsel (mainly for companies) were many times on cases that relied on the very treaties he helped to shape.

As Deputy General Counsel for the Office of the U.S. Trade Representative, he negotiated the US-Russia BIT for the US. When Russia was sued for US\$103.6 billion in the largest claim ever, the investors (Yukos/ Hulley/ Veteran Petroleum) appointed him as arbitrator. He also negotiated investment protection under NAFTA.

Between 2002 and 2006, he represented Fireman's Fund Insurance (Allianz) in a case against Mexico. While the trial was on-going, he lobbied the Department of Commerce, House of Representatives, Senate, Department of State, US Trade Representative and the White House on behalf of Allianz⁷⁹. He has also worked as lobbyist for Monsanto, for the Organization for International Investment, and for a group that represents the country's leading pharmaceutical research and biotechnology companies⁸⁰.

Price is not a typical investment arbitration champion. By the time he left his first government position in 1992 "he understood globalization from the inside out [...] Price saw a broader order — and a new practice area — emerging from the Uruguay Round of trade talks, the North American Free Trade Agreement, and bilateral investment treaties", according to the law firm Sidley Austin⁸¹. He foresaw the unlimited possibilities to profit from an investment arbitration industry and took on the task of helping develop it. He is known for designing the investor-state provisions and for being one of the first US lawyers to encourage corporations to sue governments by making use of investor-state clauses embedded in investment agreements⁸².

After four years as Chair of the International Trade and Dispute Resolution practice at Sidley Austin, he moved back to a government position in 2007, as senior economic advisor to U.S. President George W. Bush. He was Bush's personal representative to the G-8 (Tokyo) and spearheaded the first G-20 summit in Washington in 2008. In 2008, when the global economic crisis was at its peak and governments threatened controls on capital flows, Price seems to have perceived a possible threat to the neoliberal global governance structure he had helped create. Luckily, he was in a position where he could influence the debate. The official G20 communiqué stated "We recognize that these reforms will only be successful if grounded in a commitment to free market principles, including the rule of law, respect for private property, open trade and investment, competitive markets [...] we must avoid over-regulation that would hamper economic growth and exacerbate the contraction of capital flows, including to developing countries"⁸³. Exactly the measures Price was advocating⁸⁴.

He returned to Sidley Austin in 2009, but left again in 2011. Unlike other arbitrators who left global firms to limit their connections with investors⁸⁵ he plans to enhance his links with companies, opening both an independent law practice and a business advisory firm, Rock Creek Global Advisors. From one he offers his services as neutral arbitrator⁸⁶, in the other he promises to help prospective clients "resolve regulatory or other problems they may confront in their worldwide operations"⁸⁷. In other words, while he presents himself as impartial arbitrator, he offers advice to corporations on how to avoid or counteract government regulations.

Rather than question the potential conflicts of interest, colleagues such as van den Berg and Kaufmann-Kohler have praised the way he has combined the role of independent arbitrator with that of lobbying for transnational corporations⁸⁸.

Some of those who acknowledge this problem have put forward proposals on how to deal with the issue (such as a ban on the arbitrator-counsel role, or the proposition that arbitrators are appointed by the institutions and not the parties). However, these initiatives suggest that new rules and guidelines would be enough to solve all possible conflicts of interests.

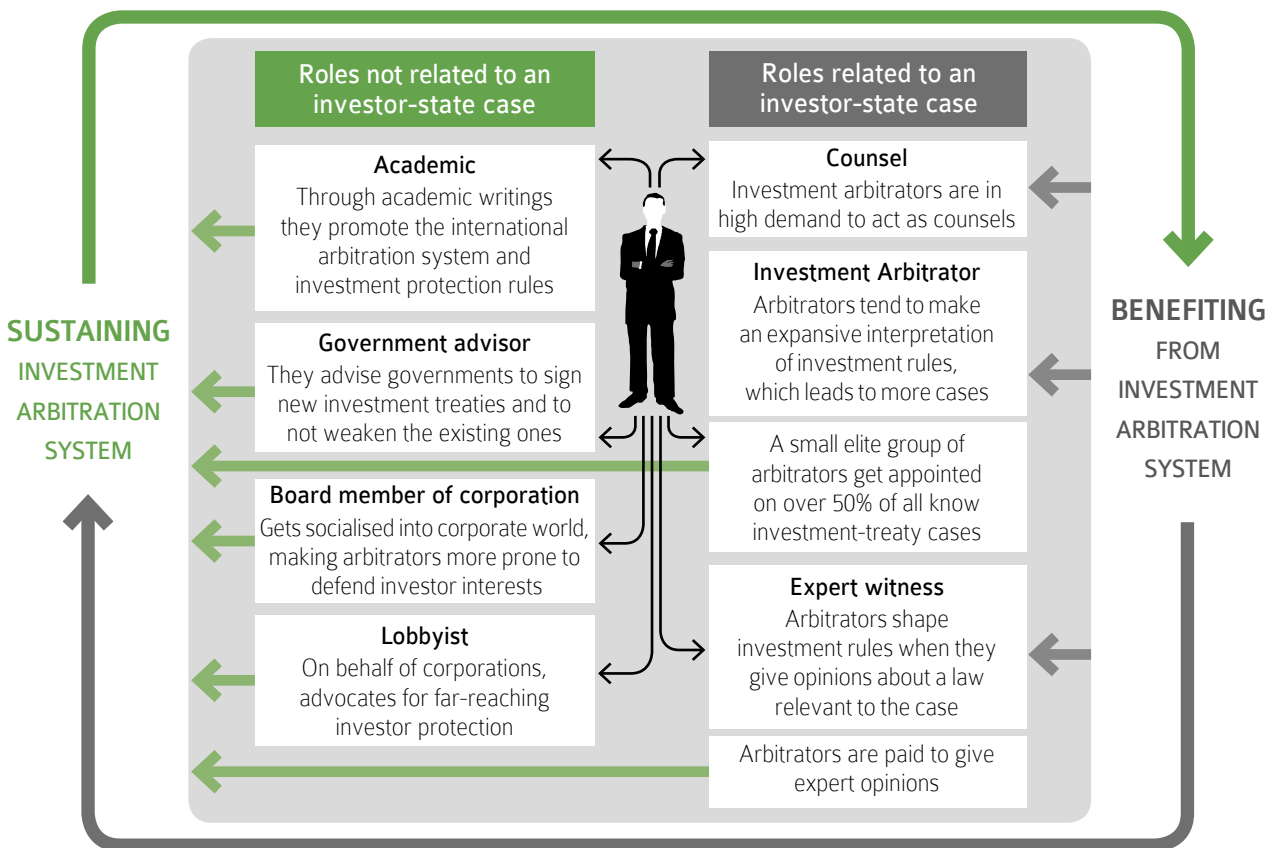
While the dual role of arbitrator-counsel has raised serious concerns and debate among the arbitration community⁸⁹, what some might see as an even more problematic aspect of arbitrators' multiple-hats has been largely ignored. Arbitrators are less willing to accept that their multiple roles provide them with the platform to set rules, influence the debate and prevent structural change. In essence, there is an inherent conflict of interest that could be classified as system-related, and which has been long overlooked.

The soccer World Cup is coming soon. Would it be acceptable that the player is also the referee?

Brigitte Stern, arbitrator⁹⁰

IMAGE 2

How investment arbitrators' multiple roles interact with the investment arbitration system



Promoting the 'benefits' of investment arbitration

Elite arbitrators have used different forums to encourage countries to sign investment treaties, to advance laissez-faire economic policy, and promote investor and arbitration-friendly positions. Arbitrators, who claim to be neutral, are employing political rhetoric to push governments into signing investment agreements. And in doing so, there is little evidence that they also warn of the potential risks for states.

BITs are an immense advance in the field and should be nurtured and cherished rather than denounced and undermined.

Well-known arbitrator William W. Park combines the defence of transnational corporations' economic rights with the assertion that he and his colleagues are not politically biased. "In today's heterogeneous world", he wrote,

Judge Stephen M. Schwebel

“cross-border investment will be chilled without a willingness of all countries to accept arbitration”. In the same paper he argued “arbitration responds to this apprehension [the bias of host country judges] by providing a forum that is more neutral than host country courts, both politically and procedurally”⁹¹.

Park’s claim that there is a direct correlation between signing investment agreements and attraction of Foreign Direct Investment (FDI) is not supported by the facts. Back in 2003, Mary Hallward-Driemeier, a Senior Economist in the World Bank’s Research Department, was already warning that: “analyzing twenty years of bilateral FDI flows from the OECD to developing countries finds little evidence that BITs have stimulated additional investment”⁹². And his argument that “investors’ economic rights need to be protected”⁹³ tends to overlook investors’ obligations.

Others have resorted to scare tactics. “If international arbitration goes, international economic exchanges will suffer immensely. Nothing will take its place”⁹⁴ warned Jan Paulsson. Judge Schwebel states that: “the demise of BITs would be regressive for investors, states and the international community”⁹⁵. And according to Chilean arbitrator Orrego-Vicuña: “if countries don’t sign up to BITs they will have nothing to offer and will lose the investment, as has been seen many times”⁹⁶. Yet these types of apocalyptic warnings are not based on reality. Brazil, for example, has never signed a BIT and yet receives the largest amount of foreign direct investment of any Latin American country.

Arbitrators have also tried to discredit critics such as journalists and civil society advocates who warn how investment agreements in general and investor-state disputes in particular threaten national sovereignty and democracy⁹⁷. They claim that they are driven by propaganda, have been misinformed, and do not possess real knowledge of investment arbitration law. Park, for example has argued that “some conspiracy theorists, often journalists or academics, gain traction by targeting arbitration as an inherently unfair process”⁹⁸. Paulsson has dismissed critics as “shrill voices ... who float propaganda” suggesting that those who question international investment law, have no respect for the rule of law⁹⁹. To associate all critiques with conspiracy theories or disrespect for the rule of law is a highly defensive reaction, and suggests a community that is unwilling to accept there may be a need for systemic reforms.

Challenging the status quo is not an option

In 2004, the US government, which had been sued several times by Canadian companies under NAFTA, introduced a new BIT template (usually called a Model BIT) which modified the 1994 version. The revised text included new language that would afford the US state some policy space to regulate, particularly in the areas of health and environment. Even though environmental and labour organisations deemed the changes inadequate, prominent US arbitrator Judge Schwebel vocally condemned the changes¹⁰⁰.

Price, who had helped to negotiate BITs on behalf of the US, also argued against weakening the provisions in the US Model BIT.¹⁰¹ Park said that “this policy shift is highly problematic, and ultimately will cause significant harm to American interests abroad”¹⁰².

In 2009, Barack Obama vowed as a Presidential candidate to review the 2004 model BIT to increase labour and environmental obligations. But when the new text came out in 2012 no substantive changes had been made¹⁰⁴. Judge Schwebel was part of the government’s advisory committee and, together with the business lobbies, advocated a return to stronger investment protection as contained in the 1994 Model BIT¹⁰⁵. He seems to have got his way.

At the same time, investment lawyers were confronted with the possibility of reform of investment treaties in the EU (see chapter 3). Civil society groups had long advocated a whole new generation of investment agreements which better

My proposition is that any proposal that alters any of the fundamental elements of international arbitration constitutes an unacceptable assault on the very institution [...] Conversely, any proposal that does not attack these fundamental elements, but instead is designed to enhance them, should be considered carefully and may be found to represent an improvement to the process.

Charles Brower, arbitrator¹⁰³

balanced private and public interests¹⁰⁶. The EU Commission and the European Parliament seemed to be moving in that direction¹⁰⁷. Arbitrators did not waste any time putting forward their “neutral” points of view. Lalonde, for example, expressed concern that the EU’s new investment policy would weaken investor protection. He noted that, for Canada it would be an advantage to negotiate a single European BIT rather than 27 BITs, but warned: “A proviso would be that, we don’t end up with a second rate product or a weaker product than what is available at the present time when we negotiate on a bilateral basis with individual countries”¹⁰⁸.

The French arbitrator Emmanuel Gaillard raised concerns about the European Commission’s proposal to phase out BITs between EU Member States (Intra-EU BITs)¹⁰⁹. Gaillard warned that the “effort to create a level playing field for investment in Europe will have the unintended consequence of driving companies that wish to invest in Europe away from the European Union”¹¹⁰. Like his colleagues, he seemed to believe that investment agreements are necessary to attract FDI, whereas the evidence is inconclusive¹¹¹. Perhaps the fact that Gaillard has himself arbitrated in at least three intra-EU BIT cases provides some explanation as to why he was so concerned to maintain these agreements¹¹².

More recently, the Union of South American Nations (UNASUR) have discussed setting up an arbitration centre that could replace ICSID¹¹³. This would address some perceived flaws in the current arbitration rules. Asked about his views on this idea, Chilean elite arbitrator Francisco Orrego-Vicuña stated: “The result would be a sort of anti-investment arbitration forum, providing an alternative to ICSID and other forums that are perceived as too investor-friendly. I don’t think it’s a good idea – since such an institution would almost certainly be perceived as too state friendly, and that wouldn’t be satisfactory to investors”¹¹⁴. It is remarkable that Orrego-Vicuña does not appear to realise the inherent double standard in his comment. While he defends a perceived investor-friendly system, a system that could be perceived state-friendly is unacceptable.

As a tight-knit community of arbitrators, who have influential positions in the legal and political field of state-investor relations, arbitrators have tried to ensure that no substantial reforms are implemented which could compromise their own financial position.

Sign here please

Companies can only sue governments when the latter have agreed to international arbitration in investment agreements. For investment lawyers this means: no investment agreement, no cases. No cases, no appointments as arbitrator or counsel.

There have been occasions where elite arbitrators’ role as government advisors have provided them with the opportunity to advocate signing investment treaties that include broad protection for investors.

For example, in the 1990s, Paulsson advised the Mexican government during the negotiation of investment protection rules (Chapter XI) in NAFTA¹¹⁵. This later provided a well-paying appointment when he presided on two arbitration panels where companies sued Mexico invoking that treaty.

Gaillard was not retained as government advisor, but used a public conference in Mauritius to encourage the Mauritius government to sign investment treaties. He went on to recommend the inclusion of broad investor-friendly protection clauses in new BITs^{117 118}.

Price, who has negotiated investment treaties on behalf of the United States, led negotiations on Chapter XI of NAFTA, where he evidently helped persuade the Mexican government to accept investor-state arbitration¹¹⁹. As a result, the Mexican government dropped the principle that only national courts should have the jurisdiction to hear a case brought by foreign investors (known as the Calvo doctrine) which was part of the Mexican constitution. Price later reaped the benefits when he was hired by two different American companies to sue Mexico due to breach of NAFTA rules¹²⁰.

**[Investment] rules
tend to be crafted
by the people who
inevitably go out
and then use them.**

Investment Arbitration
specialist¹¹⁶

Vague rules, more disputes

There is a whole range of investment protection clauses embedded in investment agreements. The alleged breach of one or more of these provisions by the host state gives companies the right to sue. When clauses lack precision, they open the door for companies to sue in a variety of situations that would otherwise not be allowed. The United Nation Conference on Trade and Development (UNCTAD) has noted that “many IIA [international investment agreements] provisions are loosely phrased”. As a consequence, the only thing that stands between the vague rules of investment treaties and a claim from an investor is how the clauses are interpreted by the arbitrators¹²¹. If the provision is not precise, it is open to wide interpretation. This shows how important their role is.

An expansive interpretation of minimalist treaty language can give rise to a lack of predictability in the application of the standard. This, in turn, may lead to the undermining of legitimate State intervention for economic, social, environmental and other developmental ends.

UNCTAD¹²²

The obligation for states to grant fair and equitable treatment (FET) to investors which appears in the great majority of international investment agreements is a good example. It is regarded as one of the most unqualified and imprecise of the clauses, and has emerged, according to UNCTAD, “as the most relied upon and successful basis for IIA claims by investors”¹²³. UNCTAD has also pointed out that arbitrators have “interpreted the FET concept rather broadly”, concluding that “the result may be an open-ended and unbalanced approach, which unduly favours investor interests and overrides legitimate regulation in the public interest”¹²⁴.

In a recent statistical study based on 140 investment-treaty cases, Professor Gus Van Harten found evidence that arbitrators tend to adopt an expansive (claimant-friendly) interpretation of various clauses, such as the concept of investment. He also found that arbitrators were more likely to have an expansive interpretation of the clauses when the investor in the dispute was from France, Germany, the UK or the US¹²⁵.

Arbitrators can also promote an expansive interpretation when they act as counsel. In the NAFTA case *Fireman's Fund v. Mexico*, the investor, an insurance company, claimed that Mexico expropriated its financial investment. This was a result of Mexico's emergency measures during the financial crisis in 1997. The interpretation of the expropriation clause was crucial in the decision. The investor's counsel, Price and Schwebel reportedly wrote an 82-page report making the case that expropriation should be interpreted in a broader way than the notion of confiscation of property¹²⁶.

Professor Van Harten opened up a heated debate when he pointed out that arbitrators appear to have financial and career interests in interpreting the law in an expansive way. He argued there was an incentive to secure future appointments as well as to please the party (the corporations) as they can initiate disputes, saying: “arbitrators may be influenced by a need to appease actors with power or influence over specific appointment decisions as well as the wider position of the relevant arbitration industry”¹²⁷.

This proposition has been recently backed by Singaporean attorney general Sundaresh Menon who noted that it is “in the interest of the entrepreneurial arbitrator to rule expansively on his own jurisdiction and then in favour of the investor on the merits because this increases the prospect of future claims and is thereby business-generating. This hints at a modern-day uber-sophisticated ambulance-chasing plaintiffs' lawyer”¹²⁸.

While arbitrators tend to apply an expansive interpretation of the clauses that favours the investor, they have taken a restrictive approach in a wider context of international law when it comes to human and social rights. In May 2012, the European Center for Constitutional and Human Rights tried to file a written statement (*amicus curiae*) to an arbitral tribunal hearing two cases against Zimbabwe¹²⁹. The cases related to timber plantations. The statement argued that the plantation land in dispute was located on ancestral territories belonging to indigenous peoples, and so the decision of the Tribunal would have an impact on the indigenous communities' rights to their lands. The Tribunal, chaired by Yves Fortier, refused even to hear these concerns¹³⁰.

International Court of Justice Judge Bruno Simma has noted that “giving adequate consideration to economic and social rights is the exception rather than the rule in investor-state arbitration” and has advocated greater contemplation of international environmental and human rights law¹³¹. Elite arbitrators, practitioners and companies reacted strongly against this proposal¹³². It exposes a certain hypocrisy when arbitrators encourage an expansive interpretation as long as

it favours the investor, but consider the idea of a more expansive approach that favours the interests of other actors, such as victims of human rights abuses, to be unacceptable.

Trust the expert

Expert witnesses in trials are usually associated with technical or scientific expertise. However, it has become common practice in investor-state cases to call in other investment lawyers as experts to argue the substantive legal question that is central to the case. The expert will discuss a specific clause in the agreement or will interpret that clause in light of the specific case, on behalf of one side. In essence, senior practitioners, who are likely to be arbitrators themselves, “come in and tell their peer arbitrators what the law is and how the law should apply”¹³⁴. Paulsson, one of the elite arbitrators, has provided such expert opinions¹³⁵. This practice would be unacceptable in any other judicial process¹³⁶.

This role enables them to shape the development of the system from another angle. It also happens to be quite lucrative.

Promoting reform to pre-empt structural changes

There is currently a backlash against the investment arbitration system¹³⁷. The perceived legitimacy of the system is eroding (see chapter 2). With this pressure on investor-state arbitration, it is not surprising that elite arbitrators are looking for ways to support it.

Some arbitrators have been more receptive than others to the critiques and actions by governments to regain some policy space to regulate. Park, for example, has noted that “If investment arbitration is to fulfil its promise [...] some mechanism must be found to promote greater sensitivity to vital host state interests. Otherwise, investor/government arbitration may fall prey to public pressure arising from a backlash against investor victories”¹³⁸.

Honatiau put it more bluntly, saying investment arbitration must confront the challenges. He has acknowledged the need to review the roles of all arbitration participants and accept some changes in the way the system works. He said: “It is only at this price that arbitration will remain in the decades to come the “natural judge” of international commerce”¹³⁹.

While some high profile arbitrators have acknowledged that there is a legitimacy problem, many of their proposed reforms - such as Paulsson and van den Berg’s suggestion that the institutions that administer investor-state disputes (such as ICSID, LCIA, ICC, etc.) should appoint the entire panel instead of the parties¹⁴⁰ or that there should be greater transparency - would not challenge the pro-investor bias in the system¹⁴¹.

Today, there are ideas floating about which constitute very significant threats to arbitration. I hope these threats can be averted because I favour arbitration as a matter of political policy. But if they cannot, let us at least make the challengers realise that whatever may be their objections to arbitration, international arbitration is something else.

Jan Paulsson, arbitrator and head of the international arbitration department, Freshfields¹⁴²

I have always found the submission of expert legal opinions on matters of international law to investment treaty tribunals rather odd.

Andrew Newcombe, University of Victoria Faculty of Law¹³³

Charles Brower rightly noted that the arbitration community is only prepared to accept reforms as long as “such strategies do not require a fundamental redesign of the entire system”¹⁴³. So while they may be a sincere attempt to improve a flawed system, they are at the same time fundamentally an exercise in self-preservation.

Arbitrators enjoy a privileged position of influence and power due to their different roles. As academics they are able to shape knowledge and understanding of the field, advance theory that promotes practice, and help to shape the investment lawyers of tomorrow. As government officials, they can negotiate investment treaties containing far-reaching investment protection clauses. As experts in the field, they can promote the investor-state arbitration system and advocate for flexible wording in investment rules. As arbitrators they can interpret vague language, creating the potential for more work by doing so.

If investment law firms can be characterised as ambulance-chasers encouraging “victims” to take advantage of the laws that protect them (see chapter 3), arbitrators could be seen as the ones creating the conditions for the accidents to happen.

Yet, few insiders seem disturbed by these facts. A plausible explanation as to why these types of conflicts may be less acceptable in the investment community lies in the fact that they cut to the core of how the system operates and sustains itself. It cannot be fixed by applying stricter procedural rules. It demands system-change.

“ This new age of arbitration is in fact its golden age [...] Never before have so many controversies been left to the disposal of arbitrators; and never before has so much autonomy been afforded them. ”

Sundaresh Menon SC, Chief Justice of Singapore¹⁴⁴



The investment arbitrator's toolbox

Get accepted into the close-knit community

It helps a lot to come from Western Europe or North America, and to be male. Most importantly, an aspiring arbitrator needs to have a business-friendly outlook. Remember, only investors can initiate a lawsuit. So, keeping investor's interests in mind is crucial to keep earning a three digits figure per hour.

Keep the arbitrators' club small and cohesive

Recommend fellow members as arbitrators or as counsel; invite them to conferences or to submit articles; and be careful not to expose them if they are challenged. It is likely that the favour will be returned.

Keep the black sheep out

Systemic critiques of the arbitration system should not be tolerated since coherence among arbitrators view of how the system should work is essential for its survival.

Sustain and fuel investor-state arbitration

Being an active arbitrator is good but not enough. Occupy as many roles as possible in law firms, academia, and government advisory positions. These roles will enable the elite arbitrator to influence the fate of investment arbitration:

- Promote international investment arbitration as the best policy choice for governments. The arbitrator does not need to explain his financial interests in the system.
- Advocate strong investment protection rules and resist any attempt by governments to weaken the current standards.
- Advise governments to sign new investment treaties – they could provide a useful source of future work.
- Make sure that the wording of investment protection rules is left vague so investors have more chances of pursuing a claim. The arbitrator will then be able to interpret the vague rules in investor-friendly way.
- Be invited by fellow arbitrators to act as an expert in a case. In this way, the arbitrator will be able to guide the interpretation of the clauses.
- Recognise there is a backlash against investment arbitration and promote some minor reforms, as long as they do not challenge the foundations of the system. These will help the arbitrator pre-empt any suggestions of structural changes.

Get the high-stake cases

Once a member of the elite, you will be very busy. The ultimate goal, however, is to arbitrate the high-stake cases, those between US\$100 million and several billion. At fees around US\$700 per hour, the arbitrators' financial gains are considerable.

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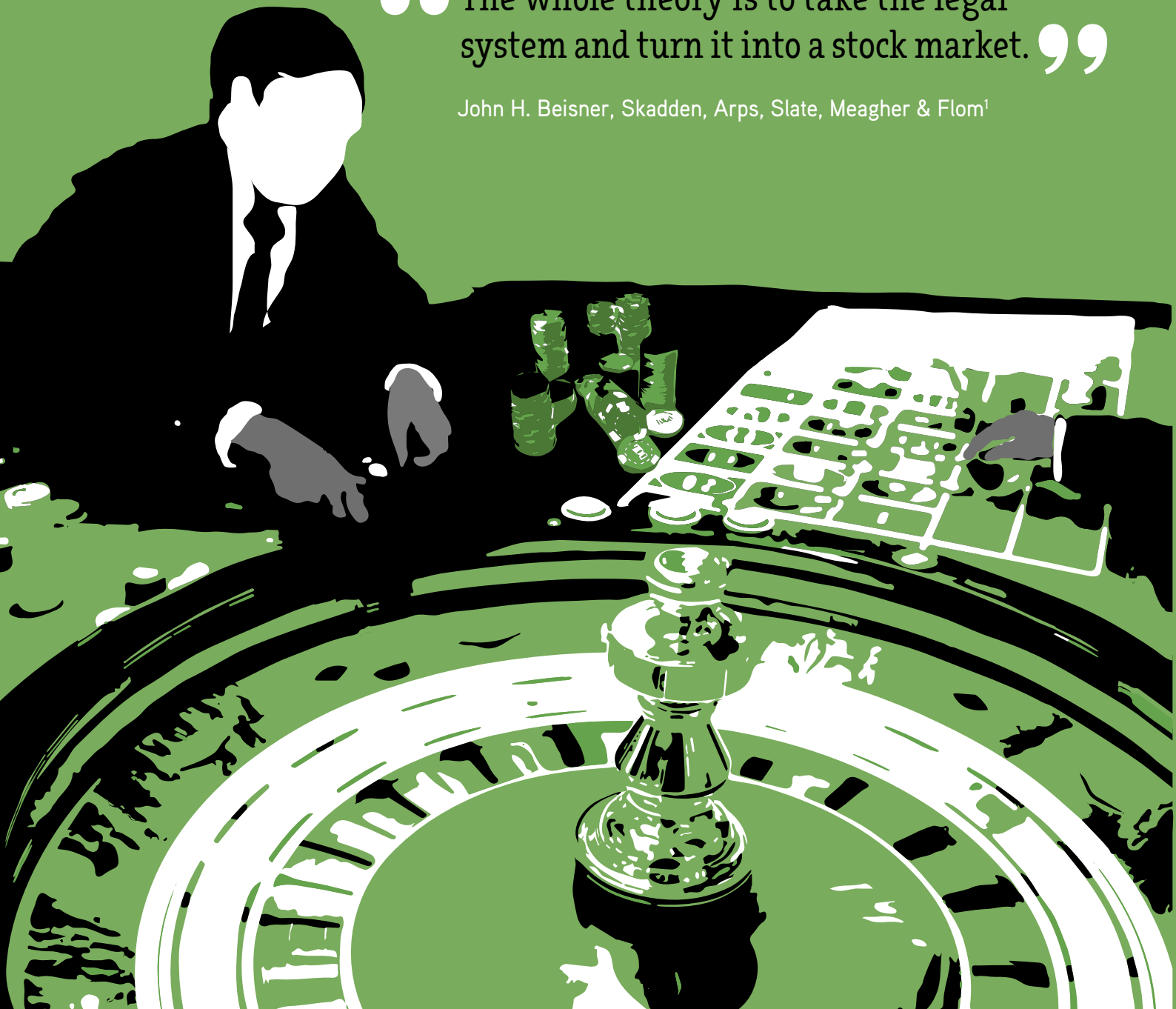
Chapter 5

Speculating on injustice

Third-party funding of investment disputes

“ The whole theory is to take the legal system and turn it into a stock market. ”

John H. Beisner, Skadden, Arps, Slate, Meagher & Flom¹



Imagine a multinational company eager to sue a government on the basis of an international investment treaty. It is about to hire a top arbitration law firm as counsel. But the lawyers charge astronomical fees – more than the company is willing to pay. Fortunately for the company, an investment firm offers to invest in the case. It pays parts of the lawyers' pay cheque in exchange for getting a share of the potential profits at the end. Welcome to the world of third-party funding.

Commercial third-party litigation funding is most readily described as buying into someone else's lawsuit in the hopes of sharing in the spoils if a payout is awarded. Typically, a funder will take between 20% and 50% of the final award².

Little is known about the industry, but occasional reports suggest that litigation finance shops such as Juridica (UK), Burford (US) and Omni Bridgeway (NL) are becoming an established part of international investment arbitration. Banks, hedge funds and insurance companies also invest in international disputes. Brokers and electronic marketplaces where claimants can shop for potential funders and funders can shop for claims are emerging³. One lawyer from the law firm Debevoise and Plimpton recently claimed: "There's no shortage of funders who want to step in [...] even when there is a rogue debtor on the other side"⁴.

Third party funding is a fast growing industry and will undoubtedly play a large role in investment arbitration in the future. Investors will need or want to outsource the financial risks involved with investment arbitration.

Dr. Eric De Brabandere & Julia Lepeltak, Leiden University⁵

TABLE 3

Buying into arbitration – some prominent third-party funders

Firm	Worth knowing
Burford Capital (US)	The largest litigation funder in the world claims "a particular specialty in investment treaty arbitration [...] often mak[ing] the difference between a meritorious case being heard and needing to be abandoned" ⁶ .
Juridica Investment LTD (UK)	Juridica gained unwanted fame over an ongoing feud with its ex-client S&T Oil. Juridica first sponsored the firm's claim against Romania with a US\$3 million injection, but wanted its money back when the case was abandoned. S&T accused the funder of having an "unethical" business model and of fraud ⁷ .
Omni Bridgeway (NL)	One of the oldest litigation funders specialises in distressed debt in emerging markets. Investors, who are waiting for their money from an arbitration award against Argentina, are invited to "contact [Omni] for advice" ⁸ .
Fulbrook Management (US)	Fulbrook was only founded in 2011, by the co-founder and ex-chair of Burford, Selvyn Seidel. Seidel is probably <i>the</i> frontrunner in the industry and advocates a more active role for financiers in arbitrations – to drive up their value.
Calunius Capital (UK)	Calunius made the headlines with two recent investment disputes in the mining sector. It is sponsoring Canadian company Rusoro in a claim against Venezuela and British firm Oxus Gold's US\$400 million arbitration against Uzbekistan.

Staggering returns

Just how much money can third-party funders make? Top tier financier Burford commits on average US\$8 million to a case, while Juridica averages US\$7.5 million⁹. Returns vary between 30 and 50%¹⁰. No wonder litigation funders' profits have been growing at staggering rates. Burford's profits grew ninefold on their 2010 levels in 2011¹¹. In the same period, Juridica saw a 578% growth in its profits¹².

A world flush with monumental settlements and glaring opacity, a place where public treasuries are treated like ATMs by arbitral bodies and awards can be enforced globally – this is a world that third-party funders are particularly interested in. Burford, for example, claims to have “a particular specialty in investment treaty arbitration”, a field where it expects significant returns in the form of “a multiple of the capital invested [...] together with a portion of the net proceeds”¹³. In other words, millions of dollars of taxpayers' money.

Gambling with legal claims

In the aftermath of Wall Street's subprime lending debacle in 2008, third-party funders got a fresh boost. James Tyrrell, a partner at law firm Patton Boggs and seemingly also counsel to Juridica and Burford, asserted that in a recession: “There's a lot of money out there that's looking to find a home”¹⁵.

So, while the rest of the world was reeling from the excesses of credit-default swaps and reckless financiering, third-party funders received a fresh influx of cash to gamble with. In 2007, Juridica raised US\$125 million (£80 million) at its initial public offering through the London Stock Exchange¹⁶. In late 2008 – when the global recession was getting into full swing – another US\$116 million (£74.4 million) flowed into its coffers¹⁷.

Maya Steinitz from the University of Iowa asserts that the expansion in funding is due to a “de facto absence of professional regulations that enables funders and attorneys to operate outside of the disciplinary reach of bar associations”¹⁸. Indeed third-party funding has been called “a legal no-mans land”¹⁹, essentially unencumbered by legislation to regulate its behaviour. In a case of Wall Street déjà vu, what legislation that does exist has sometimes been written by funders themselves²⁰.

There is even the possibility – heaven forbid – that we could fund a case and then resell it to third parties, a bit like credit default swaps.

Selvyn Seidel, Fulbrook Management²¹

There has even been talk of third-party financiers creating new ways to maximise profits, as outlined by Fulbrook Management's founder and chairman Selvyn Seidel: “There are other products we're considering [...] Anything from derivatives, where we fund a single motion rather than the entire case, to a basket of five or six cases put together as a mini-portfolio to give some security through diversification. There is even the possibility – heaven forbid – that we could fund a case and then resell it to third parties, a bit like credit default swaps”²².

If this all sounds a little bit too familiar, sometimes it is the same investors who enabled Wall Street's addiction to unrealistic profit margins who are now looking to gamble in litigation. Hedge funds “want to invest, and it is those [hedge funds] that were involved in the distress[ed] debt market, so they are used to it. This is just a new class of risk to them”²³. They are simply interested in the chance of winning, as John Jones of risk insuring company Aon explained: “In a typical case[,] a hedge fund, acting on behalf of already wealthy investors, will seek to accumulate yet more money – not by investing in business enterprise or wealth creation – but by gambling on the outcome of a legal action for damages. They have no interest in the justice or otherwise of the case – only in the chances of success – as they will demand a share of the damages awarded in return for putting up the stake money”²⁴.

The financial benefits and risks associated with [arbitration] claims mean that they are likely to provide attractive opportunities for third-party funders.

Susanna Khouri, Kate Hurford & Clive Bowman, litigation funder IMF¹⁴

Dredging up disputes

By funding lawsuits that might otherwise settle quickly or die altogether, third-party funding has the potential to multiply the number of investment disputes brought before arbitrators. Lessons from the past support the claim that financing stirs up litigation. Australia saw an estimated 16.5% rise in litigation after liberalising its attitude toward third-party funding in general²⁵.

A good funding agreement effectively removes the financial risk of an expensive claim. This means that a corporation can file a claim then pass the cash drain and the risk to a funder while waiting for a payout, making arbitration against states even more attractive for businesses. If the money doesn't come, the claimant has nothing to lose, but the defendant (a government) has still been forced to pay top-tier firms for their services.

One particular concern is an increase in frivolous disputes which would go uncontested without external funding²⁶. While there is usually little incentive for funders to fund weak cases, bubbles in the market for legal claims might incite exactly that²⁷. Mick Smith, co-founder of Calunius Capital, indicates that is the case: "The perception that you need strong merits is wrong – there's a price for everything"²⁸. A condition in the funding agreement can always make a weak case worthwhile for the financier. Eventually, frivolous, high-risk claims might inflate the value of funders' portfolios. As the Burford Group notes: "If we shy away from risk for fear of loss, as some litigation investors do, we will not maximise the potential performance of this portfolio"²⁹.

It's basically venture law these days. So you have private investors coming in and trying to say 'Hey, who can we sue next? I'm gonna put up five million dollars and let's do some discovery and see where we go from there and really try to reap a windfall'.

Peter Snyder, CEO New Media Strategies³⁰

Driving up legal bills, investing in rule change

Third-party funding can also drive up legal tabs, burdening cash-strapped sovereign budgets with even heftier arbitration costs. One example is the investment dispute of S&T Oil Equipment and Machinery Ltd. against Romania. The case was eventually discontinued when the oil company stopped paying its legal bills, but only after having been kept alive for an extra two years thanks to a cash injection from Juridica. Romania is stuck with its legal costs, including for the two extra years³¹. An investor boosted by third-party funding is also likely to bring more experts and witnesses to the dispute, driving up the legal costs of the respondent state.

There is a "push" by funders to get more control of cases and sell more services.

Global Arbitration Review³⁵

In their quest for selling more services, some litigation funders are also exploring "less passive business-models", providing for more influence on the management and strategies of arbitrations³². Dutch litigation funder Omni Bridgeway, for example, offers "custom-made advice" on arbitrations, including on selecting expert witnesses and on fact-finding missions³³. Scholar Steinitz expects that in a few important cases, financiers are likely to "invest in rule change," that's to say selecting a claim not so much for its end result, but for certain potential arguments in an award or procedural changes, leaving a lasting mark on the whole system and maximising the future value of their portfolios³⁴.

Gatekeepers

Like law firms and elite arbitrators (see chapters 3 and 4), third-party funders act as gatekeepers of a close-knit arbitration circuit. They tend to accept cases with leading law firms as counsel and will suggest alternatives if they are not happy with the choice³⁶. They may also influence who is appointed as an arbitrator. As Mick Smith of Calunius Capital puts it: "If somebody says to us that they're thinking of so-and-so and the other side has proposed so-and-so and asks if we have experience of them, we'd certainly give our view"³⁷.

The financing industry is highly-concentrated, and also symbiotically joined to the cadre of law firms with which many arbitrators in high demand are affiliated.

Marc J. Goldstein, arbitrator³⁸

Smith is an example of the web of interpersonal relationships that link financiers to arbitrators, lawyers and investors in countless ways. He is head of Calunius, one of the largest funders, but previously worked at the law firm Freshfields, maintaining close links with his former colleagues: “The relationships I made there are still important and they’re my first port of call,” he said³⁹. So when the Canadian gold mining company Rusoro was looking for a funder of its investment dispute against Venezuela in early 2012, Calunius got the deal. Rusoro is represented by Freshfields and Smith was delighted to work with his old friends again⁴⁰.

Smith and Calunius are no exception. According to Selvyn Seidel, now chairman of Fulbrook Management and a former partner at Latham & Watkins, his strong links with arbitration lawyers, firms and institutes “have been a big help to us and we hope to make our contribution to them through helping international arbitration”⁴¹. Burford boasts “more than 300 years of collective [...] experience at major law firms and corporations”⁴².

These close networks raise a long list of potential conflicts of interest⁴³. For example, where arbitrators are also lawyers at firms that funders work closely with, or when arbitrators also sit as counsel in another case financed by the same funder. More likely still, arbitrators may have former partners that are now executives of third-party funders. In fact, some funders and law firms are owned (in part or full) by the same parties. These potential conflicts of interest seriously call into question the ability of arbitrators to evaluate a case impartially, fearing the consequences for their professional futures if they do not rule in favour of a financier.

A two-way street?

But could third-party funding not be a double-edged sword? Apparently, for-profit funders are currently developing products for defendants, including states in investment treaty disputes. Even though states can never really ‘win’ anything in these cases, but only rebut million dollar claims, Fulbrook’s Seidel claims: “We’ve often been blamed for stirring up litigation, but now we can say that we work on both sides of a dispute”⁴⁴.

In a marathon case brought against Chevron on behalf of Ecuadorian indigenous groups, Burford Capital agreed to finance the claim resulting from dirty oil exploration activities, which had permanently destroyed the land and ecosystems of the rainforest inhabitants. But the seemingly responsible financing came with a catch. According to the contract, if a settlement of \$1 billion had been reached, Burford would have received US\$55 million for taking over the full US\$15 million in legal costs. If the plaintiffs had recovered US\$2 billion, Burford would have received US\$111 million. But if the Ecuadorians were awarded less than US\$1 billion (as low as US\$69.5 million) Burford’s payout would have remained at the US\$1 billion settlement level. In the case of a US\$69.5 million judgement, Burford would have taken US\$55 million, almost 80% of the judgement. Large chunks of the remaining 20% would have gone to other investors, only “the balance (if any) shall be paid to the claimants”⁴⁵. Burford recently sold its interest in the case to another funder⁴⁶.

“There’s something about all this secret meddling in other people’s bitterest disputes and profiting from them that doesn’t sit well.”

Roger Parloff, editor *Fortune* magazine⁴⁷



Three easy steps to becoming a successful investment arbitration funder

Step 1: Raise huge sums of money in the middle of a global recession to gamble with investment arbitration proceedings.

Step 2: Cultivate a network of connections in the arbitration industry. Your friends from your former law firm could be very helpful in introducing you to their clientele, and you should probably call that old co-worker who's been doing a lot of arbitrator work lately.

Step 3: Provide several million dollars for your friend's firm to litigate the claim, for years if necessary. In the meantime, invest in a swath of new cases and find new ways to profit from disputes, like offering sovereign funding options and case derivatives.

Once you cash your first big cheque from the Sovereign Bank of Taxpayer Funds, you're well on your way to a lucrative future in third-party funding!

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Chapter 6

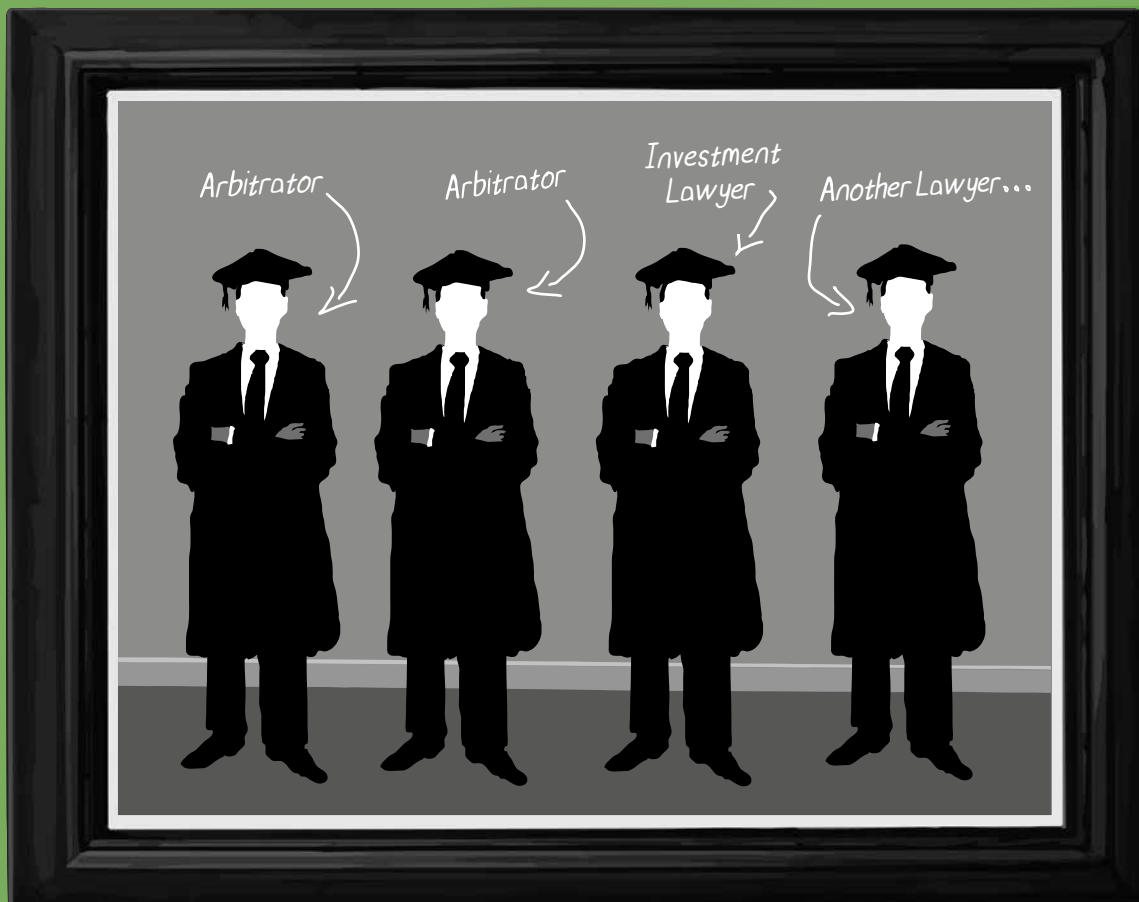
Academia's trojan horse

Is the arbitration industry undermining independent research?

“ Through academic teaching, conferences, research and publications, Lévy Kaufmann-Kohler's lawyers are constantly at the forefront of the developments in international arbitration law.

”

Website of law firm Lévy Kaufmann-Kohler¹



*Editorial Board
Journal of International Arbitration*

Imagine that half of all scientific writing on public health was written by pharmaceutical companies. Or imagine that oil companies took over the editorial boards of environmental law journals, directing their tone and position. When it comes to academic research on international investment law, these scenarios are not so far-fetched. The arbitration industry appears to have a firm grip on what is written and taught about its own activities and decisions – with academics apparently for hire, and journals captured by industry.

Arbitration boom triggers a scholarly boom

The explosion in high-stake investment treaty disputes from the mid-1990s onwards paved a new career path for lawyers in private practice. It did not take long for this to trigger a derivative boom in academia. Today, international investment law is a distinct legal field, with dedicated courses and institutes and a growing body of publications and PhDs. There are newsletters, mailing lists, summer schools, conferences, and simulated legal proceedings (moot courts). In the words of investment law researcher Stephan Schill, “investment law is sexy”².

Part of the attraction is that this field is constantly evolving through new awards and treaties. It is international law put into practice, touching on many of the key legal, political and economic questions of our time. It is practised by a globe-spanning and inter-mingled community. It is a field where boundaries between theory and practice are blurred. And it is very lucrative, delivering handsome fees for lawyers but also for the academics who serve as counsel, arbitrators or as experts-for-hire in the system (see box 3 on page 15)³.

Investment arbitration is an academic goldmine.

George Bermann, arbitrator and professor, Colombia Law School⁴

Penning the literature

This blending of the study and the business of investment law is obvious in the literature. Much of the writing is done by lawyers and arbitrators who make money when companies sue states under investment treaties. One canon of recent essential writings in the field comprises 51 books and articles⁵, more than half of which (30) were (co-)written or edited by investment lawyers and arbitrators. The three existing volumes of the Yearbook on International Investment Law and Policy contain 50 texts⁶, of which nearly half (23) were (co-) written by lawyers, arbitrators and assistants in arbitrations.

The editorial direction, as well as the content of important journals in the field is also dominated by the arbitration industry. In some cases all of the major journals’ editorial board members are people who have earned income as arbitrators, experts, counsel or from institutions that administer arbitrations. On average, 74% of the editorial board members of these journals have a background in the arbitration industry. Elite arbitrators (see chapter 4) appear to have a particularly strong influence over editorial policies at the leading journals (see table 4 on page 66).

The career background of these ‘academic’ writers on investment law is not always revealed to their readers. Only two of the six leading journals provide basic information on the professional affiliation of their editorial board members⁷. But as many also hold academic posts, they often appear only as academics, with no mention of their financial interests in arbitration. Texts written by arbitrators are sometimes also published without that crucial information. But shouldn’t students who read, for example, William W. Park’s defence of the integrity of the arbitration system learn that ‘Professor’ Park himself makes money as an arbitrator⁸?

In other academic fields, disclosing authors’ conflicts of interests appears to be more common. According to the conflicts of interest guidelines used by the International Committee of Medical Journal Editors, for example, authors have to disclose “all financial and personal relationships that might bias their work”. The guidelines also state that journal editors “must have no personal, professional, or financial involvement in any of the issues they might judge”⁹.

TABLE 4

Practitioners on the editorial boards of the key journals¹⁰

Journal	Total number of board members	Number of practitioners on board	Some prominent law firms and chambers linked to board members	Some prominent arbitrators among board members
Arbitration International	11 (1 general editor, 8 editors, 2 articles editors)	8 (73%)	Freshfields, Shearman & Sterling, Skadden	Nigel Blackaby, William W. Park
ICSID Review	35 (2 editors-in-chief, 5 associate editors, 8 board members and an editorial advisory board of 20 people, which assists the editors-in-chief in selecting articles and themes and provides editing assistance)	31 (89%) , including 25 arbitrators, 3 ICSID staff and its former Deputy Secretary General	Convington & Burling, Dechert, Essex Court Chambers, Freshfields, Matrix Chambers, Shearman & Sterling, Sidley, 20 Essex Street	James Crawford, Zachary Douglas, Ahmed El-Koshery, Yves Fortier, Emmanuel Gaillard, Gabrielle Kaufmann-Kohler, Toby Landau, Vaughan Lowe, Francisco Orrego-Vicuña, Jan Paulsson, Lucy Reed, Christoph Schreuer, Brigitte Stern, V.V. Veeder
Journal of International Arbitration	17 (1 general editor, 1 news and development editor, 1 assistant editor, an advisory board with 14 members)	17 (100%) , all of them arbitrators!	Clifford Chance, Freshfields, Essex Court Chambers, White & Case, 20 Essex Street	Bernard Hanotiau, Michael Hwang, Gabrielle Kaufmann-Kohler, Toby Landau, Horacio Grigera Naón, Lucy Reed, V.V. Veeder
Journal of International Dispute Settlement	46 (1 editor-in-chief, 2 general editors, 2 associate editors, 12 on the editorial board, 1 assistant editor, 28 on the editorial advisory board)	23 (50%)	Dechert, Essex Court Chambers, King & Spalding, Matrix Chambers, 20 Essex Street	Karl-Heinz Böckstiegel, James Crawford, Zachary Douglas, Bernard Hanotiau, Gabrielle Kaufmann-Kohler, Julian Lew, Vaughan Lowe, Campbell McLachlan, Francisco Orrego-Vicuña, Michael Reisman, Jeswald Salacuse, V.V. Veeder
Journal of World Trade and Investment	3 (1 publisher and editor, 2 associate editors)	2 (67%)		
Transnational Dispute Management	66 (1 editor-in-chief, 3 on the editorial board, 1 articles editor and 61 associate editors)	44 (67%)	Arnold & Porter, Cleary Gottlieb, Clifford Chance, Covington & Burling, Crowell & Moring, Curtis Mallet, DLA Piper, Essex Court Chambers, Eversheds, Freshfields, Herbert Smith Freehills, Lalive, Mannheimer Swartling, King & Spalding, Salans, Shearman & Sterling, Steptoe & Johnson, 20 Essex Street	Doak Bishop, Charles Brower, Emmanuel Gaillard, Kaj Hobér, Michael Hwang, Mark Kantor, Richard Kreindler, William Park, Noah Rubins, Stephen Schwebel, Todd Weiler

The scientific field is strongly influenced by lawyers and arbitrators publishing in the relevant journals.

PhD student in international investment law¹¹

Information correct as of 23 September 2012.

Multiple hats compromise academic independence

According to Schill, the career and financial background of many of those who write on investment treaty law and arbitration “constitutes a potential obstacle for independent and clear positioning as conflicts between academic analysis, political appraisal, professional interests, and arbitral independence are undoubtedly numerous”¹².

Imagine for example, a law professor who is also an arbitrator and occasionally sits as an expert witness as well. Individuals who wear different hats must balance their need to be impartial in their academic analysis with the need to continue their work as an arbitrator when they are not teaching. Arbitrating is very likely the more lucrative of the two roles, but working as a professor has its perks as well. “Well”, our professor might think, “Why can't I have my cake and eat it too?”.

So, the hypothetical professor decides to research and publish in a way that elevates his or her standing in the community. Lawyers and other insiders take notice, boosting the professor's career in arbitration. The professor is more likely to get appointments, calls to be an expert, and other favours from the arbitration community, such as a coveted scholar-in-residence position at a leading law firm¹⁴. But the professor's contribution to critical, open-minded and honest reflection about investment law and arbitration may be limited. The search for the truth gets lost in a hunt for contracts and appointments.

Legitimising the arbitration business

The plethora of practitioner publications helps to perpetuate a position that sustains and promotes investment treaties and arbitration. One researcher thinks that “strongly critical views of the system” might not be published “because people who peer review you are people who are within the system”¹⁵. A PhD student of investment law argues that the industry's dominance in the literature is a key factor “manipulating scientific analyses into a certain direction”¹⁶. Thanks to these tacit censorship mechanisms, ‘academic’ writing becomes a tool for the arbitration industry to legitimise its business.

In their 1996 study of the international arbitration community (‘Dealing in virtue’), sociologist Yves Dezalay and lawyer Bryant Garth documented the legitimising function that academia plays for the business of international arbitration. They reported that the “academic pedigree” of some arbitrators helped “promote the acceptance and recognition of arbitration throughout much of the world.” As a result, “law firms and businesses invest increasingly in the production of rules, cultivating links to outside academics and moving into learned circles themselves”¹⁷.

Infiltrating universities, shaping young minds

Investment lawyers are in high demand as guest lecturers at universities. Some even preside over academic institutes and design study programmes, helping to guide the mindsets of the next generation of investment lawyers. No doubt, students will benefit from these insights into the legal practice of international investment law. But given the arbitration industry's vested interest in growing its own business, the industry's capture of programmes and study centres raises serious questions about balance and independence.

You may end up wearing a lot of different hats in this business: teacher, scholar, arbitrator, expert and assistant counsel.

George Bermann, arbitrator and professor, Columbia Law School¹³

If you have strongly critical views of the system, you might not get publicised in investment treaty journals because people who peer review you are people who are within the system.

International investment law researcher¹⁸

Academic lawyers [...] create a jurisprudence of arbitration that legitimates it more generally.

Yves Dezalay & Bryant Garth,
Dealing in Virtue¹⁹

Take the one-year MA programme in International Dispute Settlement at the University of Geneva. Its website promises a “broad range of perspectives” for students looking for a career in a top law firm, international organisations, governments or academia. But the programme’s director, elite arbitrator Gabrielle Kaufmann-Kohler (see her profile on page 40), seems to think that, for a broad perspective, the views of other arbitrators will suffice. She sits with two of them on the five-member programme committee. Twenty of the 24 members of the advisory board are active arbitrators. Their names are familiar: Jan Paulsson, Brigitte Stern, Albert Jan van den Berg, Emmanuel Gaillard, Doak Bishop, William W. Park, Christoph Schreuer – among others²⁰. These arbitrators also teach courses on the MA, many of them related to investment arbitration. None of the teachers have a critical perspective on the system.

Most of the elite-15 arbitrators who reap the lion’s share of the business of investor-state disputes are or were at some point professors at universities that are considered intellectual hotspots in the field of investment law. These professorships helped build their stature as lawyers, shape young minds and promote the system.

The debate that is yet to happen

When Dezalay and Garth published their expose on the international arbitration circuit in 1996, they noted that, unlike the practitioners they had interviewed for their study, “legal academics, tend to resist thinking in terms of the internal politics of the field of law (or, similarly, seeing their role in that politics)”²¹.

This remark seems to hold true today. There does not appear to have been any debate as yet about the influence of the arbitration industry on what is taught and published about international investment law and arbitration²². But doesn’t a legal field with such far-reaching ramifications for governments and companies deserve this debate?

“ It should raise concerns if, at universities, lawyers teach investment protection law and their bias cannot be balanced by other viewpoints. ”

PhD student in international investment law²³



The practitioner-academic's toolbox

Publish, publish, publish. If you want to become a known investment arbitration specialist you must regularly slap out 'academic' texts.

Grow the business. Academic writing can help promote certain interpretations of the law, which will mean more business for you in the future.

Infiltrate universities. Become a regular lecturer at law schools. Call yourself an adjunct professor. Nothing will enshrine your business more than an army of young lawyers, eager to profit from it.

Get on editorial boards. This will allow you to keep critics out of the discourse and the community of acknowledged experts closely-knit. It will allow you to show what side you are on and how well you can represent it.

Become a professor on the side. It's the icing on the cake. You can tailor entire study and research programmes to the needs of your arbitration business and the industry.

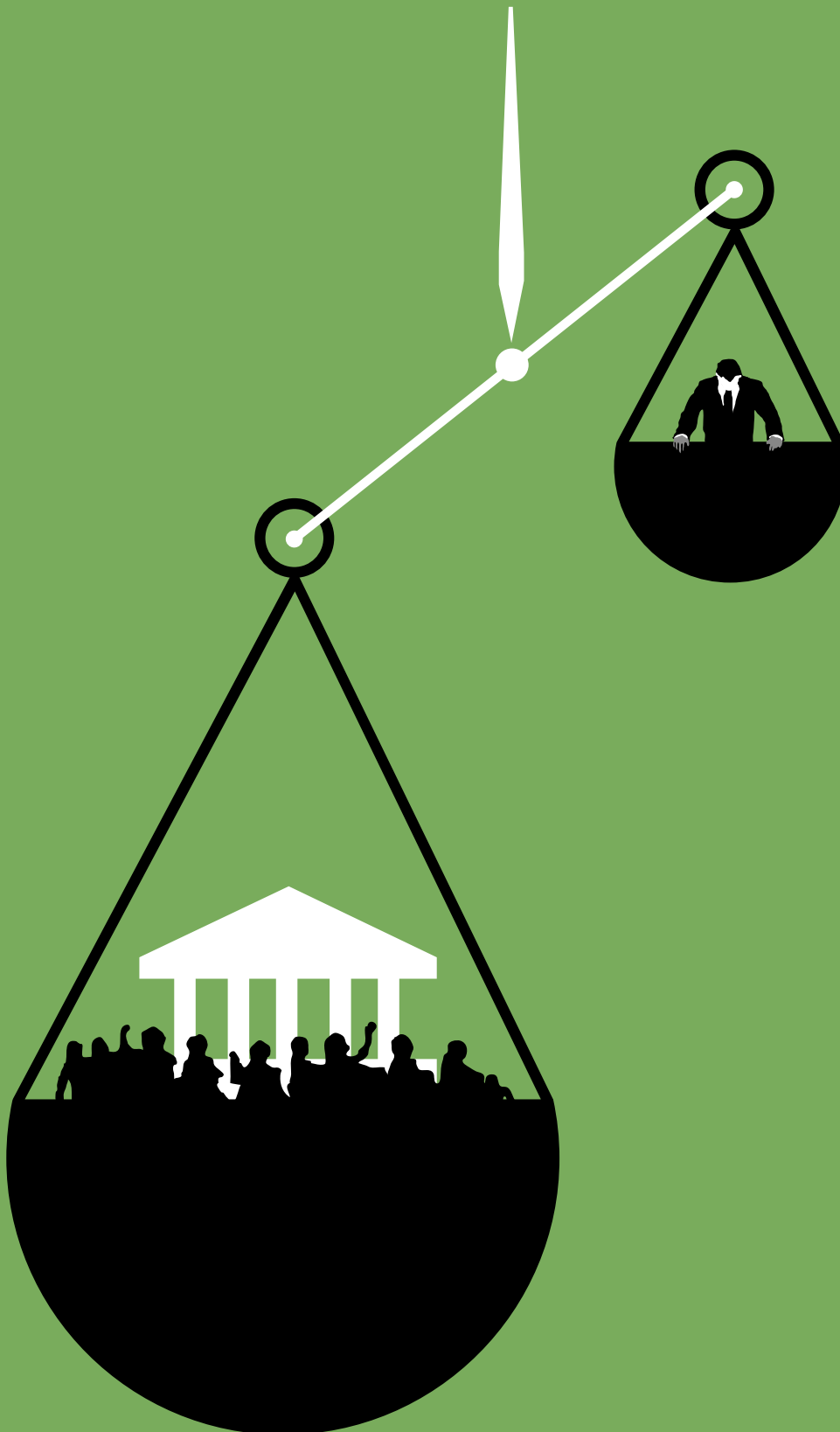
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- 14 The law firm Wilmer Hale runs such a scholar-in-residence programme. Positions are offered to "talented professors, lecturers and other academics" and come with "an office, use of library and other research facilities, and secretarial and other support services, as well as an honorarium in appropriate cases." See, Alford, Roger (2011) WilmerHale Seeks Arbitration Scholar-in-Residence in London, *Kluwer Arbitration Blog*, 13 January, <http://kluwerarbitrationblog.com/blog/2011/01/13/wilmer-hale-seeks-arbitration-scholar-in-residence-in-london/> [10-09-2012].
- 15 Interview with investment law researcher who asked to remain anonymous, 1 June 2012.
- 16 Interview with PhD scholar in international investment law, see endnote 3.
- 17 Dezaly, Yves/ Garth, Bryant G. (1996) Dealing in Virtue. *International Commercial Arbitration and the Construction of a Transnational Legal Order*, pp. 42, 179.
- 18 Interview with investment law researcher, see endnote 15.
- 19 Dezalay, Yves/ Garth, Bryant G. (1996), see endnote 17, p. 195.
- 20 University of Geneva/ The Graduate Institute (2011) MIDS – Geneva LL.M. In *International Dispute Settlement. 2012-2013 program*, pp. 5, 6, 8-11. The links of the members of the programme committee and the advisory board to the arbitration industry were collected through internet research and can be provided. The information is correct as of 24 September 2012.
- 21 Dezaly, Yves/ Garth, Bryant G. (1996), see endnote 17, p. 4.
- 22 Interview with Stephan Schill, see endnote 2; interview with PhD scholar in international investment law, see endnote 3.
- 23 Interview with PhD scholar in international investment law, see endnote 3.

Chapter 7

Conclusion & recommendations

Investment arbitration: a lucrative industry built on illusions of neutrality



The existence of international investment arbitration is based to a large extent on the argument that it provides a depoliticised, neutral space to resolve disputes between multinational companies and governments. This premise was always flawed given that investment treaties only enable companies to sue states at international tribunals, yet affected communities and governments cannot make use of the same mechanism.

The lure of corporate investment persuaded governments to sign numerous international investment agreements, which have in turn fuelled a boom of investment treaty cases. As this report shows, this led to a powerful and highly lucrative arbitration industry.

The role of the arbitration industry

The alleged neutrality of arbitration is however a myth. A small group of elite arbitrators emerged promising to be neutral 'judges' in whom, as arbitrator William Park said, "people could entrust their wealth and welfare". But, instead, they have used their power and influence to secure government-hostile rules and a steady flow of multimilliondollar lawsuits. A number of global law firms are also involved, multiplying arbitrations against countries. Investment funds are increasingly consolidating the investment arbitration market, bringing speculative claims.

As a result, states have to defend the rights of their citizens in a system that is shaped by vested interests. Societies in many developing nations have seen their taxes diverted as a result of financial penalties and costs imposed by arbitration. The only beneficiaries seem to have been corporations and investment lawyers.

Investment lawyers have become aggressive promoters of a skewed and unjust system on which their six- or seven-digit salaries depend. As this report shows, investment lawyers have:

- actively encouraged cases and sometimes even pushed corporations to pursue arbitration, exploiting loopholes in investment treaties to create an explosion in the number and the costs of dispute settlement cases
- acted behind the scenes to push countries to adopt investment treaties
- promoted the use of vague language in treaty clauses which increases the scope for investor-friendly interpretation by arbitrators and the chances of disputes
- tended to approach investment law from an almost exclusively commercial angle rather than public interest, ignoring or even denouncing arguments based on human rights and sustainable development
- aggressively and successfully fought to maintain and expand the current system of investment treaties and arbitration, both through academic circles and by lobbying against reforms that would serve the public interest
- worked alongside speculative investment funds to provide the finance for corporations to bring more cases, at the expense of states and taxpayers

These actions have not only confirmed the pro-corporate bias of current investment agreements, they have tilted the regime even further in the favour of large multinational corporations. The result is a system driven by commercial interests rather than the delivery of justice.

Scope for change

At a time when the world has seen the enormous social costs of excessive corporate control over the financial system and of short-sighted deregulation of capital, calls for reregulation and corporate accountability are increasing. Not only have investment agreements been one of the root causes of the crisis, they prevent governments from solving it². We need a root-and-branch review of the investment regime.

If there are investors who stay away because they feel that we don't have old-style, dated, antiquated bilateral investment treaties in place, I can assure you there are plenty of other investors from other parts of the world who are happy to come and don't insist on this.

Rob Davies, Trade and Industry
Minister of South Africa¹

Just as governments have agreed to a system that currently benefits corporations at the expense of the public interest, governments have the power to change it. The aim of attracting productive investment to fulfil people's needs cannot be realised in the context of the current flawed framework of investment treaties.

It is for governments to follow the example of countries such as Brazil, South Africa, Bolivia and Ecuador which have either never concluded international investment treaties or have started to terminate existing agreements and have pledged to not sign new ones. Or governments could follow Australia's example and exclude the investor-state dispute settlement process from their investment agreements, so preventing companies from suing states in international tribunals.

Even within the current international investment regime, there are a number of options that could help prevent investment lawyers and law firms from exploiting the current investor-state dispute system:

- Investment disputes could be solved by independent and transparent adjudicative bodies, where sitting 'judges' enjoy objective guarantees of independence and impartiality. The roster of 'judges' would represent every country in the world³.
- Tougher conflicts of interest regulations, including a binding code of conduct for investment arbitrators requiring that they can neither work as counsel nor as experts in investment cases during but also for at least 3 years before and after service on the roster (cooling-off period).
- A cap should be imposed on the costs of lawyers and arbitrators⁴.
- Clarification of the broad and vaguely formulated terms used in investment treaties, in order to prevent arbitrators from making investor-friendly (expansive) interpretations of certain obligations and to give countries policy-space to regulate.
- Inclusion of binding investor obligations in investment treaties on issues such as environmental and human rights impact assessments, compliance with all local and national laws on health, environmental, labour and taxation issues. In this way, arbitrators will be forced to take these issues into account when deciding on cases.
- Governments should provide pro-active lobby transparency about meetings with and advice received from members of the arbitration industry regarding their investment policies, including from law firms, chambers and individual arbitrators.

These proposals aim at increasing the neutrality and impartiality of investment arbitration and tackling conflicts of interest. They are legally viable. And yet they face resistance from the corporate world and most of the arbitration industry, which opposes any attempts to see their profits curbed. Investment lawyers have profound influence on arbitration panels, governments, academia, policymaking, and the media. They have benefited financially from the current system and are unlikely to argue for changes that challenge the status quo.

But these reform proposals will not suffice to address the most egregious injustice of the international investment regime: the exclusive right of foreign investors to threaten and initiate claims against legislative, executive or judicial decisions outside of national courts and the lack of mechanisms for communities to address corporate impunity when violations of human and environmental rights occur.

Without turning away from investor-state arbitration, the balance will remain skewed in favour of big business and a powerful and highly lucrative arbitration industry.

“ The states that created the investor-state arbitration system and that signed treaties granting jurisdiction are not getting what they bargained for, so they need to step in to try to tame the monster that the investor-state arbitration system has become. ”

Investment arbitration lawyer⁵

References chapter 7

- 1 Marais, Jana (2012) South Africa, European Union lock horns, Business Times, 23 September, <http://www.bdlive.co.za/business-times/2012/09/23/south-africa-european-union-lock-horns> [17-10-2012].
- 2 Gallagher, Kevin (2010) Policy Space to Prevent and Mitigate Financial Crises in Trade and Investment Agreements, UNCTAD G-24 Discussion Paper Series, No. 58, May.
- 3 Concrete proposals for this have already emerged. A working group of the Latin American regional block UNASUR has proposed a Permanent Arbitration Tribunal to solve investment disputes, where the selected arbitrators would not be allowed to hold other positions. Professor Gus Van Harten of Osgoode Hall Law School has advanced the idea of an international investment court that could replace the existing system. See, Fiezzoni, Silvia Karina (2012) UNASUR Arbitration Centre. The Present Situation and the Principal Characteristics of Ecuador's Proposal, Investment Treaty News, January 12, <http://www.iisd.org/itn/2012/01/12/unasur/> [17-10-2012]; Van Harten, Gus (2008) A Case for an International Investment Court, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153424 [17-10-2012].
- 4 Within UNASUR, countries have proposed a Centre for Legal Advice that could represent the interests of the states being sued and would follow the model of the Legal Centre for Dispute Settlement in the WTO, whose services are ten times cheaper than the costs of international law firms. Another proposed solution is the creation of an international standard that sets maximums on legal expenses.
- 5 Quoted in: van Harten, Gus (2010) Academic Experts Call for Reform of Investment Treaties, <http://triplecrisis.com/reform-of-investment-treaties/> [15-10-2012].



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