ALVAREZ, G.M., BLASIKIEWICZ, B., VAN HOOLWERFF, T., KOUTOUI, K., LAVRANOS, N., MITSI, M., SPITERI–GONZI, E., VERDEGAY MENA, A. y WILLINSKI, P.: “A Response to the Criticism against ISDS by EFILA”, *Journal of International Arbitration*, vol. 33, nº 1, 2016, pp. 1–36. This article analyzes the validity of some of the most often–heard criticism against ISDS. It concludes that most of that criticism is neither supported by statistical evidence nor by the practice of international arbitration law. Consequently, this article cautions against the current hyper–activism to reform or even to dismantle some of the salient features of investor–state dispute settlement (ISDS), and instead, calls for a rational and balanced debate based on facts with a view to improving the ISDS system where necessary in an orderly fashion.

BEHARRY, C.L.: “Prejudgment Interest Rates in International Investment Arbitration”, *Journal of International Dispute Settlement*, vol. 8, nº 1, 2017, pp. 56–78. Prejudgment interest can significantly increase the overall amount of damages awarded in international investment cases. Yet, the reason for selecting a given interest rate is usually not well explained in awards. Tribunals use a range of interest rates, resulting in inconsistent treatment and disparate outcomes. This article explains the economic and legal rationale for the main types of interest rates applied by tribunals and argues that the risk–free rate would adequately compensate investors in most cases.

BERNARDINI, P.: “Reforming Investor–State Dispute Settlement: The Need to Balance Both Parties’ Interests”, *ICSID Review*, vol. 32, nº 1, 2017, pp. 38–57. The investor–to–State dispute settlement (ISDS) system is undergoing a reform process under the new competence conferred to the European Union (EU) by the Lisbon Treaty. The process pursues the abandonment of the traditional system and its replacement by an International Court System (ICS) with an appellate mechanism to increase consistency of decisions. The European Commission (EC) proposal regarding this reform was first adopted by the EU–Canada Comprehensive Economic and Trade Agreement (CETA) and the EU–Vietnam Free Trade Agreement, to be then proposed to the United States in the context of the negotiation of the Transatlantic Trade and Investment Partnership (TTIP). ICS is composed of a Tribunal of 15 independent members competent to adjudicate disputes between investors and the State under the relevant treaty by an award that may be enforced only if no appeal is filed within the following 90 days with the Appellate Tribunal appointed under the treaty. The analysis of the EC’s proposed ICS points to the political nature of the reform rather than to a serious review of the functioning for over 40 years of the traditional ISDS. The latter has proven to be able to achieve a fair balance between the conflicting interests of the two parties, the investor and the State, and to be able to satisfy by appropriate amendments the key elements on which the EC’s proposal is based. Among such key elements are the States’ regulatory powers, the consistency and predictability of decisions, the transparency of the arbitration process and the prevention of practices such as “forum shopping”.

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CARRETEIRO, M.A.: “Appellate Arbitral Rules in International Commercial Arbitration”, Journal of International Arbitration, vol. 33, nº 2, 2016, pp. 185–216. Arbitral proceedings are praised for the finality of their arbitral awards. One cannot ignore, however, that parties to complex and high-stakes disputes may be concerned about potential errors. In certain disputes, therefore, an internal appellate tribunal may be an interesting option for effective review of awards. After reviewing the role of appeals in litigation, this article analyzes the reasons in favor of appeals in international commercial arbitration and reviews how arbitral institutions have structured appellate arbitral rules and other potential issues that may arise. In conclusion, this article suggests that appeals, in the context of certain international commercial arbitrations, may improve the arbitration system and be crucial instruments to protect parties against erroneous decisions and to safeguard the integrity of the arbitration process.

DARWAZEH, N. y LELEU, A.: “Disclosure and Security for Costs or How to Address Imbalances Created by Third–Party Funding”, Journal of International Arbitration, vol. 33, nº 2, 2016, pp. 125–149. The growth of third–party funding (TPF) in international arbitrations seems to have intensified recently, as suggested by the rise in the number of publicly–known cases involving funders. TPF is here to stay and it can play an important and commendable role in the arbitral process when it provides an impecunious party with access to justice. However, the flipside is that the addition of funders to the arbitral equation also creates imbalances where there were none before. This article provides an innovative perspective into the issue of TPF, by analysing how funders have impacted the arbitral process. The arbitral community should be aware of these imbalances and seriously consider effective remedies to redress them, thereby safeguarding the integrity and efficiency of the arbitral process. Currently, there is virtually no regulation of TPF conduct in international arbitration, and funders have been left to define their own rules of conduct. In the absence of appropriate and consistent regulation, two remedies can already be implemented to address the imbalances created by TPF. First, a funded party should communicate upfront and transparently about TPF. Second, arbitral tribunals should be more amenable to granting security for costs, especially when an impecunious claimant is being funded and the respondent is faced with a serious risk of a hit–and–run arbitration.

DOLGOFF, A. y DUARTE–SILVA, T.: “Prejudgment Interest: An Economic Review of Alternative Approaches”, Journal of International Arbitration, vol. 33, nº 1, 2016, pp. 99–114. There is no consensus in the economic literature as to the appropriate measure of prejudgment interest to apply to damages. In this article, we review various proposed alternative methods for determining prejudgment interest rates: the claimant’s ex post or hindsight cost of capital; the claimant’s ex ante or opportunity cost of capital; the respondent’s borrowing rate; and the risk–free interest rate. Upon examining each method’s economic rationale and merits we conclude that where the objective is full compensation to the claimant the risk–free interest rate is the appropriate measure of prejudgment interest. Our examination of awards in international arbitration shows a prevalence of rates that are not associated with the claimant or the respondent, but rather are consistent with a risk–free rate approach or estimates of what arbitrators deem to be reasonable commercial rates.

DUMBERRY, P.: “A Few Observations on the Remaining Fundamental Importance of Customary Rules in the Age of Treatification of International Investment Law”, ASA Bulletin, vol. 34, nº 1, 2016, pp. 41–61. This article examines the contemporary role of custom in the present context of the proliferation of BITs which have become in the last decades the most important source of international law in the area of foreign investment. The article will provide a survey of the changing importance of the different sources of international investment law overtime. I will argue that customary rules remain of fundamental importance even in this age of ‘treatification’. First, custom is the applicable legal regime of protection in the absence of any BIT. Second, custom is important in the many instances where BITs make explicit reference to the concept.
Third, custom plays a gap–filling role whenever a treaty, a contract or domestic legislation is silent on a given issue. Finally, I will explain the reasons why arbitral tribunals should always take into account relevant rules of customary international law.

DUMBERRY, P.: “Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?”, Journal of International Dispute Settlement, vol. 8, nº 1, 2017, pp. 155–178. This article examines whether or not the FET standard has become a rule of customary international law. The article contains the first empirical analysis of this question based on the two conditions under which a treaty–based norm can transform into a customary rule. The article will argue that the standard has not become a rule of custom. While the practice of States to include FET clauses in their BITs can be considered as general, widespread and representative, it is not uniform and consistent. There are in fact many different types of FET clauses and these variations matter a great deal. Also, the practice of States outside treaties shows that they rarely offer FET protection to foreign investors under their foreign investment laws. There is no indication that States parties to BITs believe that they have an obligation (opinio juris) under international law to provide FET protection to each other’s investors.

DUMBERRY, P.: “Shopping for a better deal: the use of MFN clauses to get ‘better’ fair and equitable treatment protection”, Arbitration International, vol. 33, nº 1, 2017, pp. 1–16. The present article analyses the following question: can a most favoured nation (MFN) clause contained in an investment treaty that includes a fair and equitable treatment (FET) standard clause be used by an investor to claim the benefit of a better FET protection found in other treaties entered into by the host state? Tribunals have so far all accepted the importation of better FET protection through MFN clauses. The question is important in light of the fact that new treaties are increasingly containing FET clauses with a restrictive scope.

DUMBERRY, P.: “The Importation of the FET Standard through MFN Clauses: An Empirical Study of BITs”, ICSID Review, vol. 32, nº 1, 2017, pp. 116–137. The fair and equitable treatment (FET) standard is now found in the vast majority of investment treaties. This article examines the following question. In the event that a BIT does not include an FET clause, can the investor be allowed to invoke the most–favoured nation (MFN) clause contained in such treaties, to claim the benefit of an FET clause found in another treaty entered into by the host State? My review of all investment arbitration cases dealing with this issue will show that all tribunals have so far accepted the importation of FET protection through MFN clauses. This article contains the first comprehensive empirical analysis of all those MFN clauses contained in BITs that do not include an FET clause to determine whether or not their scope allows for the importation of FET protection. Finally, one question addressed in this article is whether such an importation should be allowed in all situations or whether there should be circumstances where it should not be permitted.

DUMBERRY, P.: “The Role and Relevance of Awards in the Formation, Identification and Evolution of Customary Rules in International Investment Law”, Journal of International Arbitration, vol. 33, nº 3, 2016, pp. 269–287. This article examines the question of the role and relevance of arbitral awards in the formation, development and evolution of customary rules in international investment law. Judicial decisions and arbitral awards are not formal sources of international law. They cannot be considered as evidence of state practice for the formation of customary rules. Yet, while international judges or arbitrators have no formal role in the creation of these rules, they nevertheless play an essential role in “revealing” their existence as well as in their development and evolution. Thus, any decision/award containing a comprehensive and persuasive analysis (based on a detailed examination of both state practice and opinio juris) on whether or not a given rule should be considered as custom will greatly influence other future
tribunals as well as the subsequent practice of states. I will observe in this article, however, that arbitral tribunals have so far generally failed in their task of properly revealing the existence of customary rules. Thus, instead of conducting their own analysis of practice and opinio juris, they generally simply rely on the findings of other tribunals.

EULER, D.: “Transparency Rules and the Mauritius Convention: A Favourable Haircut of the State’s Sovereignty in Investment Arbitration?”, ASA Bulletin, vol. 34, nº 2, 2016, pp. 355–374. This paper investigates whether the United Nations Commission on International Trade Law (UNCITRAL) Transparency Rules on treaty–based investor–state arbitration (Transparency Rules) increases transparency in investment arbitration fairly for all the participants. The hypothesis is that the Transparency Rules and the United Nations Convention on Transparency in Treaty–based Investor–State Arbitration (Mauritius Convention), work together as a mechanism that is more favourable for the host states than for the investor, and thereby anticipate the different roles of all participants in treaty–based arbitration. Transparency brings pressure for a level playing field among disputing parties. In Detroit International Bridge Company v Government of Canada, UNCITRAL, PCA Case 2012–25, the tribunal accepted the prevalence of the in camera obligation in the procedural rules upon a general treaty obligation, and against the state’s arguments. In Philip Morris Asia Limited v The Commonwealth of Australia, UNCITRAL, PCA Case 2012–12, the tribunal accepted Australia’s need to disclose certain information under their national laws, but to exclude confidential business information as determined by the arbitral tribunal. Other decisions exist in which tribunals decide similarly. This paper explores the actual principle of equality as applied by arbitral tribunals. Thereafter, it considers the legal nature of transparency under the Transparency Rules, standing alone and in combination with the Mauritius Convention. It concludes by determining how this discretion affects the level playing field of all the participants.

FERNÁNDEZ ROZAS, J.C.: “El orden público del árbitro en el arbitraje comercial internacional”, Indret, Revista para el Análisis del Derecho, abril, 2017. La autonomía de las partes en el arbitraje comercial internacional es una razón convincente para que adopten un convenio de arbitraje, en vez de optar por un litigio jurisdiccional. Sin embargo, la labor de los árbitros pueden verse obstaculizada por varios factores, en concreto, la arbitrabilidad y el orden público. La noción de orden público existe en casi todos los sistemas jurídicos, sin embargo, es uno de los conceptos jurídicos de mayor dificultad de precisión debido a la diversidad de la práctica y de la doctrina en la materia. El alcance del orden público es algo más que un mero utensilio del control judicial, una vez finalizado el proceso ante los árbitros. Se exterioriza a lo largo del proceso arbitral repercutiendo en la determinación de la competencia de los árbitros, en la sustanciación de las actuaciones arbitrales y en la determinación del Derecho aplicable al convenio arbitral, dando lugar a una suerte de “orden público del árbitro”. Por consiguiente, la apreciación del orden público no atañe exclusivamente a los jueces. Los árbitros son tan competentes como éstos últimos para indagar en torno al contenido del orden público subyacente de una determinada ley, en un reglamento o en una práctica arbitral.

por la precisión de las cuestiones en disputa, lo que aumenta la eficacia de la audiencia posterior y, en un número significativo de casos, por demostrar que las posiciones jurídicas de las partes no son tan diferentes, creando así las condiciones para una posible transacción.

FREMUTH–WOLF, A.: “Mediation and Arbitration in Vienna – One–Stop–Shop Solution for Parties under the Vienna Rules and the new Vienna Mediation Rules”, ASA Bulletin, vol. 34, nº 2, 2016, pp. 301–321. The Vienna International Arbitral Centre (VIAC) possesses more than 40 years of experience in international arbitration and conciliation. Due to the new Vienna Mediation Rules it may now administer not only arbitrations but also mediations and other ADR–proceedings where a neutral third person supports the parties in finding a solution for their dispute as well as combinations like Arb–Med(–Arb). The new rules entered into force on 1 January 2016 and are applicable to all proceedings initiated after 31 December 2015. The rules have been drafted by national and international mediation experts thus ensuring an exceptional high standard and state of the art solutions. The overriding principle when drafting the rules was party autonomy. The aim was to provide a functioning framework for parties and mediators alike, but all provisions may be altered by agreement provided their compatibility with the overall idea of the Vienna Mediation Rules is still retained. As a further incentive for parties to use the new rules, VIAC administrative costs may be off–set in the later proceedings in case of subsequent mediation and arbitration proceedings between the same parties and concerning the same subject–matter in dispute. With its new Mediation Rules, VIAC is convinced to foster its position as the leading international arbitration institution in Central and Eastern Europe.

GAFFNEY, J.: “Should the European Union regulate commercial arbitration?”, Arbitration International, vol. 33, nº 1, 2017, pp. 81–98. The European Union (EU or ‘Union’) does not regulate commercial arbitration. This article reflects on whether regulation of commercial arbitration by the Union is appropriate, necessary, and warranted. It reviews the background to, and the context in which, this issue has arisen, discusses the historical reasons why arbitration has not been separately regulated by the EU, and examines the scope of existing regulation of arbitration in Europe, both internationally and at Member State level. Additionally, this article considers whether the EU is competent to regulate this area and whether such regulation is warranted with reference to core principles of EU constitutional law. In particular, it considers whether the introduction of EU regulation of arbitration would be a proportionate response to perceived gaps. The article also reviews the potential scope of EU regulation. It concludes that such regulation would only be justified to the extent that conflicts issues could be meaningfully addressed by EU action, in furthering the creation of an area of freedom, security, and justice, in a number of discrete areas. The article suggests that legislators ought to avoid harmonizing unnecessarily the law of arbitration in the EU, in light of the comprehensive coverage already provided by the New York Convention and the United Nations Commission on International Trade Law (UNCITRAL) Model Law, and recommends that the EU should encourage its Member States to adopt the Model Law to the fullest extent possible, which, together with the New York Convention, should serve to further the harmonization of arbitral regulation within the EU.

GAILLARD, E.: “Abuse of Process in International Arbitration”, ICSID Review, vol. 32, nº 1, 2017, pp. 17–37. Speaking at a conference held at McGill University in 1988, the late Professor Philippe Fouchard observed that the field of international arbitration had become plagued by misconduct and riddled with procedural disputes.2 He had not seen anything yet. Over the past decades, parties to arbitrations and their lawyers have developed an unprecedented array of procedural tactics designed to undermine and prejudice their opponents and to increase the chances that their claims prevail. The past five years in particular have witnessed the emergence of litigation strategies of the very worst kind, which threaten to undermine the reputation of international arbitration as an effective and reliable means of resolving international disputes.
GIANNAKOPOULOS, C.: “Reconceptualizing ‘Failure to State Reasons’ as a Ground for Annulment under Article 52(1)(e) of the ICSID Convention”, Journal of International Dispute Settlement, vol. 8, nº 1, 2017, pp. 125–154. According to the majority view on Article 52(1)(e) of the ICSID Convention, an inquiry by an annulment committee into the adequacy of the reasons offered by a tribunal is not an appropriate standard of review, as this would mean that the committee is acting as an appellate court. This article challenges that view. By examining what it means to say that an award has to be motivated by reasons, this article argues that there is no necessary correlation between a less restrictive scope of review and a review of the merits of a case. Rather, ICSID committees ought to examine the adequacy of a tribunal’s reasoning. Additionally, committees enjoy (limited) discretion to require more or less justification regarding particular interpretative problems, depending on the hardness or easiness of each case. A contrary view would deprive annulment of its function as the guarantor of legitimacy in the ICSID dispute settlement system.

GOLDSMITH, A.: “‘Arbitration and EU Antitrust Follow–on Damages Actions”, ASA Bulletin, vol. 34, nº 1, 2016, pp. 10–40. This article addresses the subject of whether, when and how EU antitrust follow–on damages actions, which seek civil remedies for harm alleged to have been suffered from the infringement of European antitrust law rules, may be submitted to international arbitration. The article begins by tracing the development of follow–on damages litigation in Europe, and then addresses the anticipated growth of such actions as a result of the EU Damages Directive. Next, the article considers certain procedural obstacles that may be encountered when parties seek to arbitrate follow–on claims. The relevant challenges relate to case law in certain European jurisdictions that has interpreted agreements to arbitrate narrowly in relation to followon claims, and to the complex nature of follow–on actions. Despite such challenges, the article argues that there are reasons why corporate users may prefer to avail themselves of international arbitration in relation to follow–on disputes. The article therefore explores mechanisms for maximizing arbitral options in the follow–on setting, including through drafting techniques, ex post submissions and undertakings before regulators.

HAPP, R. y WUSCHKA, S.: “Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories”, Journal of International Arbitration, vol. 33, nº 3, 2016, pp. 245–268. The 2014 Crimea crisis, in addition to issues of general international law, triggered questions relating to international investment law and arbitration. One of these is to what extent a state’s investment treaties bind that state on another state’s territory which it has put under its control by means of annexation. Starting from the assumption that annexation must not be recognized as legal, it seems necessary to adjust the application of this principle of non–recognition in the case that it ultimately benefits an aggressor. Such a situation might arise with respect to investment claims. Having impaired investments in an annexed territory, investors might want to hold the annexing state liable. However, as a jurisdictional hurdle, they need to satisfy a common criterion of investment treaties, which require investments in the territory of the contracting parties. A strict application of this territorial nexus by a tribunal would deprive investors of protection under international investment law. The interest of the international community to sanction illegal acquisition of territory thus clashes with the individual’s interest to have the investment protected under international law. The result might leave the investors in a legal vacuum. Addressing the issue on an abstract level, this article argues that an extension of a state’s investment treaties to annexed territories can well be founded in the law of treaties and is supported by custom and general principles.

increasingly governed by successive treaties. This raises the question of priority among successive treaties, which enables the provisions of the prioritised treaty to prevail. The phenomenon of investment protection under successive treaties gains prominence with the recent turn to mega–regional free trade agreements containing chapters on investment protection. These newer agreements may present the updated obligations of negotiating or signatory States on investment protection, but they do not necessarily prevail over older IPAs concluded with fellow negotiators or signatories. This article analyses the ordering of successive treaties, using the Trans–Pacific Partnership cosmos as a case study. The TPP is the first concluded mega–regional whose investment chapter promises an optimal balance between protecting investments and preserving the right of States to regulate. However, this investment chapter happens to be only one of 40 IPAs in the treaty network connecting the 12 TPP signatories. Understanding how investment protection under successive treaties pans out in the TPP cosmos is not only important for the committed signatories of the TPP, but is also an invaluable point of reference for future signatories of mega–regionals, FTAs and IPAs.

KUNZ, C.A.: “Enforcement of Arbitral Awards under the New York Convention in Switzerland – An overview of the current practice and case law of the Swiss Supreme Court”, ASA Bulletin, vol. 34, nº 4, 2016, pp. 836–865. This article presents an overview of the current practice and case law of the Swiss Supreme Court in relation to the implementation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. More specifically, this article examines the decisions rendered by the Swiss Supreme Court over the period 2000–2016. Decisions are discussed in relation to the relevant provision of the Convention on an article–by–article basis. For each provision of the Convention, a short commentary is included highlighting the relevant requirements and thresholds that need to be met in light of the recent case law of the Swiss Supreme Court in order for a party to obtain or to successfully resist the recognition and enforcement of a foreign award in Switzerland. The decisions of the Swiss Supreme Court rendered during the period under review are of particular interest as the Supreme Court has examined several Convention provisions for the first time, whilst confirming, clarifying and even overturning its earlier case law. These decisions confirm that Swiss courts continue to take a liberal, pragmatic and pro–enforcement approach to the New York Convention in practice.

KURLEKAR, A.: “Space – The Final Frontier: Analysing Challenges of Dispute Resolution Relating to Outer Space”, Journal of International Arbitration, vol. 33, nº 4, 2016, pp. 379–415. The development of outer space law at an international level has arguably stagnated after the Moon Agreement in 1979. With the rise in private space activities from the end of the twentieth century, a robust framework for dispute resolution has become an increasingly vital necessity in the space law regime. Scholars have theorized several schemes for settlement of disputes such as consultative alternative dispute resolution, a tribunal for the settlement of space law disputes, a multi–door courthouse and so on, but very few concepts have transformed into operable mechanisms. In space law at the international level, diplomatic consultation, claims commission under the Liability Convention, the International Court of Justice and, in support of arbitration, the rules of the Permanent Court of Arbitration for the Settlement of Disputes relating to Outer Space 2012 remain the only existing viable mechanisms. The article evaluates all these forums for dispute settlement to demonstrate their inadequacies. Thereafter, having identified its long–term limitations, the article seeks to justify a multi–tiered arbitration clause as an effective means of settlement of disputes relating to outer space.

KYRIAKOU, P.A.: “Lis Pendens in International Commercial Arbitration”, The Vindobona Journal of International Commercial Law and Arbitration, vol. 20, nº 1, 2016, pp. 61–70. The present paper offers a synopsis of the different scenarios that may give rise to the application of the lis pendens
principle in international commercial arbitration, focusing first on parallel proceedings before a domestic court and an arbitral tribunal, and second on parallel proceedings before different arbitral tribunals; it thereby avoids a discussion on parallel actions before arbitral tribunals and supranational bodies, which would step into the turfs of public international law. The first scenario being rather concisely addressed by the New York Convention and national arbitration statutes, this paper devotes a considerable part of the discussion to identifying solutions to the second scenario, and assessing the practicalities (or lack thereof) they might entail.

LEE, J.P.: “Lessons from Cuba: Case Commentary on Exemption from Damages and the Right to Interest under the CISG”, Journal of International Arbitration, vol. 33, nº 3, 2016, pp. 289–310. This commentary analyzes a recent 2014 decision from the Cuban Court of International Arbitration, Empresa Italiana X v. Empresa Mixta Y. It addresses two issues raised by the case: (1) whether the Cuban buyer should have been exempt from liability for damages under Article 79 of the 1980 Vienna Convention on the International Sales of Goods, (CISG), because, after the conclusion of the parties’ contract, the Cuban government, through the Central Bank of Cuba, established a new regulation that required the buyer to obtain a letter of liquidity from the Central Bank, which it failed to do; and (2) whether the parties derogated from the right to charge interest under Article 78 of the CISG because they agreed in their contract that no penalty would be applied for late delivery of the goods or for late payment. The commentary concludes that the arbitral panel erred by failing to exempt the Cuban buyer from liability under Article 79 and by failing to award the Italian seller interest under Article 78. It hopes to aid international arbitration practitioners dealing with cases subject to Cuban law or who may have such matters in the future.

MARGHITOLA, R.: “Document Production: New Findings on an Old Issue”, ASA Bulletin, vol. 34, nº 1, 2016, pp. 78–94. The current framework for evidentiary proceedings in international arbitration is marked by one set of rules, the IBA Rules, and conflicting interpretations of these rules. Contrary to the views of many commentaries, there is no abstract rule of what is sufficient to identify a document or a category of documents. Similarly, no technical rules exist for drawing adverse inferences. A successful document production strategy requires an early analysis which allows parties accurately to select its party–appointed arbitrator and to influence the establishment of the procedural rules. For this purpose, the suggested model clause for arbitration proceedings between parties expecting civil law proceedings may be used.

MEIER, A. y SETZ, A.L.: “Arbitration Clauses in Third Party Beneficiary Contracts – Who May and Who Must Arbitrate?”, ASA Bulletin, vol. 34, nº 1, 216, pp. 62–77. In a third party beneficiary contract, two parties stipulate that performance is to be rendered to a third party. If a third party beneficiary contract contains an arbitration clause, a number of questions arise, e.g. who has the right to invoke the arbitration clause and who is under an obligation to do so. After a brief introduction to third party beneficiary contracts, this article discusses the pertinent issues on the basis of different scenarios before addressing the concern that third party beneficiary concepts could be abused as a means for unduly extending the arbitration agreement to third parties. According to the Swiss Federal Supreme Court and the prevailing view among legal scholars, the third party beneficiary to a genuine third party beneficiary contract has a right to invoke the contract’s arbitration clause, as it is annexed to the right to demand performance as an ancillary right. In the authors’ view, one should rather examine whether it was the intention of the parties to the contract to enter into an arbitration agreement with the third party beneficiary, an intention which generally has to be affirmed. A different question is whether the third party is also under an obligation to invoke the arbitration clause. The Swiss Federal Supreme Court has not yet decided this issue. In the authors’ view, such an obligation exists as a rule. Promisor and promise are free to subject the right they stipulate in favor of a third party to

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conditions, including the condition that the third party submit to the arbitration clause for disputes in connection with the third party beneficiary right. As a consequence, the third party can only make use of the right if it also accepts the arbitration clause.

MEIRA MOSER, L.G.: “Arbitration and Choice of Law in Cross–Border Transactions: A Potential Interplay?”, ASA Bulletin, vol. 34, nº 1, 2016, pp. 95–111. How choice of forum and choice of law interact in cross–border transactions? Is there any connection between them that we should be aware of? How much weight is attributed to these choices and why? This article aims to provide real–world answers to these questions by presenting and analyzing the results of a Global Survey on the choice of law in international sales contracts (“the Survey”). The Survey reveals signals of interplay between arbitration and choice of law. It is suggested that, in some instances, once arbitration is chosen, the choice of law would play a rather ancillary role. The reasons for this assumption are further explored in this article.

MONEBHURRUN, N.: “Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model”, Journal of International Dispute Settlement, vol. 8, nº 1, 2017, pp. 79–100. In 2015, Brazil signed a new type of international investment agreement called Agreement on Cooperation and Facilitation of Investments (ACFI) with some African and Latin–American states. This article argues that the Brazilian ACFIs constitute a new investment agreement model. The latter is original in various aspects when compared to the majority of existing investment agreements. First, these agreements provide for governance institutions—a Joint Committee and an Ombudsperson—with the aim of permanently coordinating and facilitating the dialogue between states and investors. Accordingly, these institutions will strive to mitigate investment risks and to prevent the advent of disputes. In so doing, they are expected to soothe the investment climate and to provide a transparent legal regime for foreign investors during the whole life of their investments. As revealed by the recent investment reports of the United Nations Conference on Trade and Development, an efficient dispute prevention mechanism increases the confidence of concerned actors in the international investment legal regime. This was taken into consideration by Brazil while drafting the ACFIs. In a similar vein, the agreements make provision for civil society participation in specific cases. Secondly, the ACFIs innovate with an article on corporate social responsibility (CSR). Recommendations on CSR are addressed directly to the investors and even if non–binding, they can be used to construe the other provisions of the agreements by delimitating, for instance, the protection due to private companies as per their corporate social behaviour. In this sense, the ACFI can be described as a more balanced investment agreement. Interestingly, the ACFIs do not contain any provision on the fair and equitable treatment, indirect expropriation or on investor–state dispute settlement mechanism: this contributes to their originality which is, to some extent, also criticized in this article.

MULLEN, E. y WHITSITT, E. “ICSID and Legislative Consent to Arbitrate: Questions of Applicable Law”, ICSID Review, vol. 32, nº 1, 2017, pp. 92–115. No particular form of consent is required for a contracting State to agree to investor–State arbitration under the terms of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Consent under Article 25 of the ICSID Convention may be indicated through a consent clause in an investment contract, domestic legislation or any other form of unilateral statement by the State to investors at large—not to mention the most common form for the manifestation of such consent, by way of a bilateral or multilateral investment treaty. This article in particular considers State consent to International Centre for Settlement of Investment Disputes (ICSID) arbitration in the context of domestic legislation. To that end, the question might fairly be asked as to why domestic legislation, a seemingly defunct method of manifesting consent to ICSID arbitration apparently long swept away by the great wave of bilat-
eral investment treaty (BIT) claims that followed the decision in Asian Agricultural Products Ltd v Republic of Sri Lanka, warrants consideration. Two answers might be given. The first concerns the fact that, due to its relatively limited caseload and confined suite of principles, legislative consent represents a suitably restricted case study capable of thorough analysis within the confines of a journal article. The second is of greater immediate relevance in light of the points earlier made. Given the current ‘backlash’ against investor–State arbitration, driven in large part by States’ fears that they have lost control of their regulatory processes through an overuse of treaties, legislation may represent a mechanism by which such processes may be retained in the hands of the State—and continually amended—even as the benefits of investor protection (namely, the availability of investor–State arbitration) are maintained. Consequently, although presently characterized by obsolescence, States may in the near future seek to revive investment protection legislation and rely on it as a primary means of consent, especially if some interpretative questions can be answered.

**NIGMATULLINA, D.**: ‘The Combined Use of Mediation and Arbitration in Commercial Dispute Resolution: Results from an International Study’, *Journal of International Arbitration*, vol. 33, nº 1, 2016, pp. 37–82. In a changing international commercial dispute resolution landscape, the combined use of mediation and arbitration has emerged as a dispute resolution approach offering parties a number of benefits. These include resolving parties’ disputes cost–effectively and quickly and obtaining a binding and internationally enforceable decision. However, to date there has been little agreement on several aspects of the combined use of processes. The academic debate is ongoing about acceptable ways of combining mediation and arbitration. At the same time, there is little evidence to suggest that practitioners actually use a combination of mediation and arbitration. This article analyses the results of a recent empirical study of the current use of mediation in combination with arbitration in international commercial dispute resolution. The results reveal that the combined approach is used to a relatively low extent, which contrasts with widespread recognition of the benefits that it seems to offer. In vast majority of cases, the mediation and arbitration stages are conducted by different neutrals, while the mediation stage usually involves the use of caucuses. Surprisingly, as appears from the study, the absence of a unified enforcement mechanism for international mediated settlement agreements does not present any obstacle to recording the outcome of the combined use of processes in a mediated settlement agreement rather than in an arbitral award.

**ÖZDEL, M.**: “Enforcement of Arbitration Clauses in Bills of Lading: Where Are We Now?”, *Journal of International Arbitration*, vol. 33, nº 2, 2016, pp. 151–169. Arbitration is consensual, and this brings with it the questions of what should be understood by ‘consent’ and how it should present itself to justify enforcement of an arbitration agreement to a third party. In the context of bills of lading, the issue of consent has various dimensions, all of which can be best understood with reference to the enforcement of arbitration clauses in bills of lading. This article discusses how effectively arbitration clauses in bills of lading can be enforced against the bill of lading holders in light of English case law, the decisions of the European Court of Justice (ECJ) and the Rotterdam Rules.

**PADLEY, M. y CLUTTERHAM, C.**: “Common Pitfalls of Arbitration in the United Arab Emirates: Interference and Enforcement”, *Journal of International Arbitration*, vol. 33, nº 1, 2016, pp. 83–98. Since the United Arab Emirates (UAE) ratified the NewYork Convention in July 2006, the popularity of arbitration has soared in the UAE. The local UAE courts have enforced a number of arbitral awards under the Convention and the Dubai International Financial Centre (DIFC) Court now offers an alternative seat and route for the recognition and enforcement of arbitral awards pursuant to an UNCITRAL Model Law–based arbitration law. Yet there remain a number of recurrent pitfalls commonly encountered by parties attempting to enforce arbitration agreements, conduct effective arbitrations and enforce foreign and domestic arbitral awards in the UAE. Parties may be caught out by
issues such as capacity, the breadth of disputes considered non-arbitrable by the local courts, and alleged deficiencies in the conduct of the arbitration and the award itself. These pitfalls result from quirks of UAE law and the fact that there is still no dedicated arbitration law applicable to all of the UAE.

PAEZ–SALGADO, D.: "Settlements in Investor–State Arbitration: Are Minority Shareholders Precluded from Having its Treaty Claims Adjudicated?", *Journal of International Dispute Settlement*, vol. 8, nº 1, 2017, pp. 101–124. One of the most problematic issues in investor–state arbitration arises from the possibility of multiple proceedings initiated against the host state, in one instance, by foreign shareholders in their capacity as investors; and in another instance, by the local subsidiary. The issue becomes more difficult when the local company decides to settle its claim but the investors—usually minority shareholders—decide to continue the arbitration proceedings against the state. This article will address the effects of a settlement agreement, between a subsidiary and a host state, on a foreign shareholder's pending treaty claim considering the object and purpose of investment protection treaties as well as the risk of double recovery.

REPOUSIS, O.G.: "The Application of Investment Treaties to Overseas Territories and the Uncertain Provisional Application of the Energy Charter Treaty to Gibraltar", *ICSID Review*, vol. 32, nº 1, 2017, pp. 170–192. In the past decade, five investor–State tribunals constituted under the Energy Charter Treaty (ECT), examined its territorial application to Gibraltar, an overseas territory of the United Kingdom (UK). This article shows that the application of the ECT to Gibraltar and—to a limited degree to other overseas territories—is still fraught with uncertainty. Setting out from this premise, this article first examines the territorial application of investment treaties to overseas territories in general and the application of the ECT to such territories in particular. Special attention is paid to Articles 40 and 45 of the ECT that provide for its territorial and provisional application, respectively. The article then turns to the findings of ECT tribunals and specifically criticizes the approach adopted in *Statī v Kazahkstan*. In this case, the Tribunal failed to adequately explain why the ECT applies to Gibraltar even after the termination of the ECT’s provisional application with respect to the UK. In defence of this criticism, this article shows that ECT’s plain wording and customary international law do not provide for the provisional application of a treaty to part of a signatory’s territory even after the entry into force of this treaty for such signatory.

SATTLER, M.: "Abandon Ship? West Tankers, Gazprom, and Anti–Suit Injunctions under ‘Brussels Ia’", *ASA Bulletin*, vol. 34, nº 2, 2016, pp. 342–354. Anti–suit injunctions have long been a contentious issue under EU law. With its West Tankers decision, the European Court of Justice (ECJ) had held that anti–suit injunctions must not be issued by courts of EU member states if the injunctions would curtail the jurisdiction of the courts of other member states. This decision was problematic because it gave free rein to parties who sought to delay arbitration proceedings through “torpedo actions” at state courts. The goal of the present article is to assess whether the ECJ’s conclusion from West Tankers still stands. Two developments give reason to doubt this: first, the ECJ’s decision in the matter Gazprom OAO v. Republic of Lithuania; second, the recast EU regulation on jurisdiction ("Brussels Ia"). The author assesses each in turn and concludes that EU law no longer prohibits anti–suit injunctions that aim at protecting arbitration agreements. Neither does EU law prohibit the recognition and enforcement of anti–suit awards issued by arbitral tribunals.

SEPÚLVEDA–AMOR, B. Y LAWRY–WHITE: "State responsibility and the enforcement of arbitral awards", *Arbitration International*, vol. 33, nº 1, 2017, pp. 35–61. The place of arbitration as a dispute resolution mechanism for disputes involving states and investors depends upon the value accorded to a valid award. Many states voluntarily comply with awards rendered
against them. However, the occasions of non–compliance may result in the incurrence of international responsibility by states pursuant to both customary and treaty norms. This article considers some of these norms, as well as the bases on which states dispute responsibility for non–enforcement of arbitral awards or avoid execution. To this end, the various sections of this article examine: (i) the relevance of customary norms of state responsibility to investment arbitration; (ii) scenarios in which the refusal of national courts to enforce arbitral awards have been found to incur state responsibility by breaching an investment treaty; (iii) scenarios in which a state’s refusal to respect an award rendered against it by an investment tribunal might incur international responsibility and relevant issues such as immunity; and (iv) the role of the International Court of Justice and, its predecessor, the Permanent Court of International Justice in upholding the integrity of arbitral proceedings, including by adjudicating the validity of arbitral awards rendered against states.

SHARMA, A.K.: “Arbitrators Appointed In The ICSID Cases Commencing Since 2011: Data Compilation And Analysis”, Asian International Arbitration Journal, vol. 12, nº 2, 2016, pp. 107–135. This article conducts an exciting empirical study compiling and sorting ICSID data to prepare useful data sets identifying all the arbitrators, and amongst them the ‘leading arbitrators’, appointed in the recent Investor–State Arbitrations (ISAs) conducted under the ICSID Convention – Arbitration Rules, in all the relevant cases registered from the year 2011 onwards till 16 September 2016. The first data set, inter alia, identifies and lists rank–wise 188 such arbitrators in total. The author then prepares another derivative data set, culling the ‘leading arbitrators’ from the previous data set, on basis of their total number of appointments in the aforementioned representative period chosen for this study, and highlights interesting patterns showing most of them being appointed in the majority of cases for either of the parties or as the president of a tribunal. Certain interesting inferences are drawn from the above ‘leading arbitrators’ data set. By further correlation analysis, it confirms perceived positive correlation between previous and subsequent years appointments for the claimants and respondents throughout the representative period, highlighting exciting trends but, raising larger questions in the current ICSID arbitral practice, in this regard.

SHAW, G.J.: “Third–party funding in investment arbitration: how non–disclosure can cause harm for the sake of profit”, Arbitration International, vol. 33, nº 1, 2017, pp. 109–120. This article highlights the need for a mandatory disclosure requirement with regards to a third–party funder in all cases where a funder is present. As it currently stands, the funder is not a formal party to the proceeding and has no blanket obligation to disclose its involvement. While the 2014 Guidelines on Conflicts of Interest in International Arbitration require the disclosure of a funder’s involvement, this requirement is limited to instances where a previous relationship between an arbitrator and a funder exists. In all other arbitrations, there is no disclosure requirement. In such cases, a funder is free to exercise a controlling interest over the proceedings while operating in the shadows unbeknownst to the tribunal or the opposing party. This article introduces a number of scenarios where a funder’s undisclosed involvement may harm the parties to the proceedings, including the funded party. In particular, undisclosed funders have the ability to use information against a formerly–funded party in a subsequent proceeding and even to fund both sides of the dispute in an effort to maximize profits.

SHERIDAN, I.: “Qualitative Analytical Models for Arbitration2, Journal of International Arbitration, vol. 33, nº 2, 2016, pp. 171–183. The author identifies three analytical models that may contribute to improving the processes and outcomes of international arbitration. The three analytical models selected are: (1) mind map diagrams that enable the accurate, condensed summarizing of complex, voluminous cases; (2) simplified evidence charts that set out the arguments and supporting evidence relied on by the applicant, the respondent or both; and (3)
cause and effect diagrams that facilitate the retrospective dissection of a case as a means of identifying areas for improvement.

TRIANTAFILOU, E.E.: “Contemporaneity and Evolutive Interpretation under the Vienna Convention on the Law of Treaties”, ICSID Review, vol. 32, nº 1, 2017, pp. 138–169. A line of recent cases in investor–State arbitration have purported to rely on the so–called ‘principle of contemporaneity’ to interpret bilateral investment treaties (BITs). In this context, contemporaneity may be understood as the interpretation of treaty terms in accordance with the meaning they bore as a matter of formal definition or common linguistic usage at the time the treaty was concluded. The purpose of this article is twofold: first, to dispel the confusion created by the conflation of contemporaneity with other temporal issues of treaty interpretation and so–called ‘inter–temporal law’ and, second, to explore the manner in which contemporaneity, as defined above, fits within the well–established principles of treaty interpretation, as reflected in the Vienna Convention on the Law of Treaties (VCLT). The article proceeds in five sections. The first section begins with a brief overview of the modern origins of contemporaneity, which can be traced to the work of prominent international lawyer and legal scholar Sir Gerald Fitzmaurice in the late 1950s. The second and third sections separate the different concepts that have been conflated with contemporaneity and explore contemporaneity’s polar opposite, treaty interpretation based on the evolving meaning of treaty terms. The fourth section discusses the recent adoption of contemporaneity and the evolving meaning approach by investment treaty tribunals. The final section considers, in light of the preceding discussion, the proper position of contemporaneity within the framework of the VCLT.

VAN ZELST, B.: “Unilateral Option Arbitration Clauses in the EU: A Comparative Assessment of the Operation of Unilateral Option Arbitration Clauses in the European Context”, Journal of International Arbitration, vol. 33, nº 4, 2016, pp. 365–378. This article analyses the operation of unilateral option arbitration clauses (UAC) in the European context. The approach to UACs varies between the Member States of the European Union (EU). This has led to significant uncertainty. This uncertainty is attributable partly to the recent amendments in the recast Brussels I Regulation (hereinafter ‘Recast Regulation’) which came into force on 10 January 2015. Under the Recast Regulation, the substantive validity of jurisdiction clauses is governed by the law of the chosen forum. After an introduction (section 1) and a discussion of the typical wording and use of UACs (section 2), section 3 sets out the framework applicable to the assessment of jurisdiction clauses in the EU. Section 4 submits that the framework relevant to the assessment of the law applicable to UACs is provided by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and discusses the operation of this Convention in the context of UACs. Section 5 provides a comparative assessment of the approach to the validity of UACs in the United Kingdom, Germany and France.

WILSKE, S. y EDWORTHY, C.: “The Future of Intra–European Union BITs: A Recent Development in International Investment Treaty Arbitration against Romania and Its Potential Collateral Damage”, Journal of International Arbitration, vol. 33, nº 4, 2016, pp. 331–351. The article explores the debate surrounding intra–European Union (EU) investment treaty arbitration and the intervention of the European Commission in an investment treaty arbitration against Romania. The European Commission has demonstrated great appetite to pursue its own agenda in multiple proceedings generating an outcome which, it is argued, is likely to lead to an uncertain future for foreign direct investment in Romania and several other Member States. The article warns that if the Commission is not prepared to countenance that international law obligations can prevail over EU law (at least in so far as it is interpreted by the Commission) a dangerous precedent may be set and there could be adverse consequences for the rule of law.
YEOH, D.: “Third Party Funding in International Arbitration: A Slippery Slope or Levelling the Playing Field?”, Journal of International Arbitration, vol. 33, nº 1, 2016, pp. 115–122. Common law jurisdictions have traditionally been averse to the notion of third party funding (‘TPF’) due to the ancient doctrines of champerty and maintenance. Founded on considerations of public policy, the laws of champerty and maintenance were targeted at frivolous and vexatious claims ‘fomented and sustained by unscrupulous men of power’. While common law jurisdictions such as the United Kingdom and Australia have removed prohibitions on TPF in arbitration, other common law jurisdictions are less eager to follow suit. In this article, the author argues that TPF in international arbitration should not be prohibited, but regulated, as it levels the playing field for claimants who are either impecunious or unable to bear the associated financial risks due to their limited financial resources. It examines the various arguments presented against TPF, such as the encouragement of frivolous claims, the control of the claim and conflict of interests, while also proposing various measures to curtail the risks of a slippery slope from TPF.

YOUNG, M.: “Silent Talk: Identifying the Language of an Arbitration When the Arbitration Clause Is Silent”, Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators (J.C. Betancourt, ed.), Oxford, Oxford University Press, 2016, pp. 105–112. Language is a fundamental part of legal practice: without it, lawyers cannot function. But despite its importance, the applicable language is addressed rarely in a dispute resolution clause. Given its potent impact, the parties often disagree over which language (or languages) should apply where the clause is silent. This chapter considers the tools available to an arbitral tribunal to identify the language of the arbitration and to maintain the applicable language of the proceedings, while affording the parties flexibility in how they present their cases and ensuring that the matter proceeds efficiently. As with all discretions, this exercise must be carried out properly and fairly. In reaching their decisions, tribunals should not be confined by strict presumptions or priorities; they must assess all of the available indicia, weighing each element in the balance.