

Frivolous Claims in the International Investment Regime: How CETA Expands the Range of Frivolous Claims that May be Curtailed in an Expedient Fashion

K S E N I A P O L O N S K A Y A *

INTRODUCTION

A frivolous lawsuit is a claim “that is not legally tenable and as such is worthless”.¹ Such lawsuits have “no serious purpose or value or merit”.² Frivolous claims clog the judicial system, exhaust the resources of the

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¹ *Black’s Law Dictionary*, 2nd ed, *sub verbo* “frivolous action”, online: <<http://thelawdictionary.org/frivolous-action/>>.

² *The Oxford English Dictionary*, online ed, *sub verbo* “frivolous”, online: <<https://en.oxforddictionaries.com/definition/frivolous>>. The court in *Currie v Halton (Region) Police Services Board* has a similar understanding of the word “frivolous” as “lacking a legal basis or legal merit; not serious; not reasonably purposeful”. See *Currie v Halton Regional Police Services Board*, 2003 233 DLR (4th) 657, 179 OAC 67 at para 14. In another case, the court contends that a “frivolous” action lacks legal merit in *Noddle v The Deputy Attorney General of Canada*, 2016 ONSC 4866 at para 8.

other party to the dispute and, thus, bring the administration of justice into disrepute.³ Domestic legal systems empower courts to limit and deter frivolous lawsuits in a variety of ways. For example, Ontario's *Rules of Civil Procedure* allow courts to dismiss an action "on the ground that the action is frivolous, vexatious, or is otherwise an abuse of process".⁴ Among other options, a court could dismiss the proceedings, strike down the claim entirely or in part, or order costs to the party that brought a frivolous submission.⁵ The domestic courts can also impose sanctions on lawyers for bringing a frivolous submission.⁶

However, not only domestic legal systems are vulnerable to such claims. In the system of investor-state arbitration (ISA), a mechanism whereby foreign investors may sue sovereign states before a tribunal of three arbitrators for property takings and other unfair treatment, the number of frivolous claims has also increased considerably.⁷ According to a report issued by the United Nations Conference on Trade and Development (UNCTAD), in several investment arbitrations foreign investors filed claims that were "without merit", meaning that they had no real chance to succeed on the merits.⁸ Nonetheless, foreign investors are able to file and litigate such claims using

³ See *Thompson Bey v Iyer*, 2016 FC 990 at paras 8-9, which states that frivolous and vexatious litigation "clogs the courts and uses up the judicial resources [...] the court has a duty to control access to the judicial system by these types of litigants".

⁴ Ontario, *Ontario Rules of Civil Procedure*, RRO 1990, Reg 194, RS at r 2.1.01(1), 2.1.01(1)(d), 2.1.02(1).

⁵ Paul M Perell & John W Morden, *The Law of Civil Procedure in Ontario* (Markham: Lexis Nexis, 2010) at 354. The authors explain that "the court may strike out a pleading [...] that is frivolous, vexatious or abuse of process".

⁶ Sanford Levinson, "Frivolous Cases: Do Lawyers Really Know Anything at All" (1986) 24 *Osgoode Hall LJ* 353 at 359, 361-62. Levinson points out that the "Ontario Barrister's oath which requires the vow that the barrister will not, among other things, promote suits upon frivolous pretences". The article pinpoints that the courts can order costs against the solicitor in cases where one advanced a "frivolous position". Levinson refers to M. Gold who apparently argued "that it may be part of a solicitor's duty to the court that he only raise points which are fairly arguable. To take a thoroughly bad and unmeritorious point which results in extra costs to the parties may justify a costs order against a solicitor". See M Gold, "The Court's Authority to Award Costs Against Lawyers", cited in E Gertner, ed, *Studies in Civil Procedure* (Toronto: Butterworths, 1979) at 79.

⁷ UNCTAD, Trade and Development Board, *Issues Related to International Arrangements: Investor-State Disputes and Policy Implications*, 9th session, TD/B/COM.2/62, 14 January 2005 [UNCTAD Trade & Development].

⁸ *Ibid* at para 7. The Report stated that "there have been fears about frivolous or vexatious claims that could inhibit legitimate regulatory action by Government".

ISA with the result that states often find themselves dragged into the lengthy and costly process of arbitration.⁹

The problem of frivolous claims in the international investment regime first entered the spotlight during the negotiations of the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, also known as the ICSID Convention.¹⁰ During negotiations, a number of diplomatic delegates pointed out that the Convention needed a mechanism that would prevent foreign investors from drawing states into vexatious proceedings.¹¹ At the time, Aron Broches, a former President of the World Bank, reassured those delegates that the ICSID Secretary General could perform the function of dissuading claimants from bringing such claims.¹² As history shows, the Secretary General of the ICSID Arbitration Centre has never performed such a function and has only succeeded in preventing the filing of claims manifestly outside of the jurisdiction of the ICSID Arbitration Centre.¹³

Currently, some international treaties for protecting foreign investment,¹⁴ in addition to the ICSID Arbitration Rules,¹⁵ do provide mechanisms for

⁹ See Tania Voon, Andrew Mitchell & James Munro, "Parting Ways: The Impact of Investor Rights on Mutual Termination of Investment Treaties" (2014) 29:2 ICSID Rev 451 at 452. In that work, the authors recognize the impact of particular disputes on states and on the regime [Voon].

¹⁰ *International Convention on Settlement of Investment Disputes* 14 October 1966, 17 UST 1270, TIAS 6090, 575 UNTS 159; *UNCITRAL Arbitration Rules* 1976, UN Doc A/RES/31/98, 15 ILM 701.

¹¹ Statement of Mr. Agoro during Summary Proceedings of the Legal Committee Meeting, SID/LC/SR/11 (December 29, 1964) at 771, cited in *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Vol II-2 (Washington: ICSID, 1968), online: <<http://bit.ly/2wu74KL>>.

¹² Note by the General Counsel transmitted to the Executive Directors M 62-17 (19 January 1962) at paras 24-25 in *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Vol II-1, online: <<http://bit.ly/2vn8FID>>. See also Antonio R Parra, *The History of ICSID* (Oxford: Oxford University Press, 2012) at 250 [Parra].

¹³ *Ibid.*

¹⁴ See *The Dominican Republic, Central America, United States Free Trade Agreement*, art 10.20, online: <<http://bit.ly/2vOufSi>> [DR-CAFTA].

¹⁵ The ICSID Convention is in focus because the ICSID Arbitration Centre is the most frequently used venue for resolving disputes between investors and states. In addition, the ICSID Centre was the first centre to introduce a mechanism for the early dismissal of frivolous claims. Finally, the ICSID Tribunals developed a consistent body of case-law on meritless claims. See Parra, *supra* note 12 at 9, 16, 250. Note: it is an interesting issue whether the early

curtailing frivolous claims on an expedited basis. The recently concluded *European Union-Canada Free Trade Agreement (CETA)*¹⁶ also borrows from national rules of civil procedure in commitment to limiting frivolous claims. As this article will show, CETA uniquely builds on the existing experience of dismissing frivolous claims *in limine*.

This article submits that the existing mechanisms for early curtailment are insufficient and examines CETA's approach to dismissing frivolous claims. In particular, this article argues that CETA provides for important institutional changes in the model of investment arbitration such as an appeals mechanism as well as procedures concerning remuneration and appointment of arbitrators that are likely to make a big difference in the rate of frivolous claim dismissals early in investment proceedings. So far, the topic of frivolous claims in investment arbitration has received only limited coverage.¹⁷ In particular, this work focused on frivolous claims in the context of indirect expropriation. Michele Potestà and Marija Sobat have also examined the application of the ICSID Rules on frivolous claims by ISA tribunals for

dismissal of frivolous claims constitutes a part of the inherent powers of the ISA tribunals or, alternatively, must be specified in the treaties or arbitration rules. See also Chester Brown, *A Common Law of International Adjudication* (Oxford: Oxford University Press, 2007) at 242-44.

¹⁶ *Comprehensive Economic and Trade Agreement between the European Union and the Government of Canada* (2016), online:

http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [CETA].

¹⁷ Gus Van Harten briefly noticed that the European Commission is planning to introduce a mechanism for the early dismissal of frivolous claims in CETA. See Gus Van Harten, "Reforming the System of International Investment" in CL Lim, ed, *Alternative Visions of the International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2016) 103 at 113. Won-Mog Choi mentioned that some treaties carve out "specific public policy fields" from ISA jurisdiction and it might be a solution for the problem of frivolous claims. Won-Mog Choi, "The Investor-State Dispute Settlement Paradigm" in William J. Davey & John Howard Jackson, *The Future of International Economic Law* (Oxford: Oxford University Press, 2008) at 302. Jeffrey Sullivan and David Ingle mentioned that more and more treaties attempt to deal with the issue to curtail such claims quickly; they also posit that bringing frivolous claims have "no downside" for foreign investors because even "the hopeless claim may put inexperienced government under acute pressure to accede to the investor's demands". Jeffrey Sullivan & David Ingle, "Interim Costs Orders: The Tribunal's Tool to Encourage Procedural Economy" in Jean E. Kalicki & Anna Joubin-Bret, eds, *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Hague: Hotei Publishing, 2015) at 731. Tsai-fang Chen considered expedited review and dismissal of frivolous claims by tribunals as well as the shifting of attorney fees. However, Tsai-fang Chen's study did not critically address the mechanism in CETA. Tsai Fang Chen, "Deterring Frivolous Challenges in Investor-State Dispute Settlement" (2015) 8:1 *Contemporary Asia Arbitration J* 61.

curtailing frivolous claims.¹⁸ Eric De Brabandere has focused on reviewing the early dismissal mechanism in the ICSID Rules as well.¹⁹ This article builds on the existing literature on frivolous claims in ISA by specifically addressing the current standard for early dismissal of frivolous claims and contributes to the existing “dialogue of authors”²⁰ by making the case that CETA’s approach is superior to existing mechanisms.

The International Investment Regime: A Brief Overview

What is the International Investment Regime?

The international regime for the protection of foreign investment is embodied in more than 3000 International Investment Agreements (IIAs) which are primarily enforced through a mechanism known as Investor-State Arbitration (ISA). IIAs are of two types: (1) Free Trade Agreements (FTAs) and (2) Bilateral Investment Treaties (BITs).²¹ While BITs contain only investment rules,²² FTAs are “a full package deal” that include multiple chapters, among which only one deals solely with investment.²³ IIAs are instruments subject to international law, and as such, the obligations created by them are to be interpreted and applied in light of public international law.

IIAs incorporate a variety of more-or-less standardized substantive investment rules, such as Fair and Equitable Treatment (FET),²⁴ Full Security

¹⁸ Michele Potestà & Marija Sobat, “Frivolous Claims in International Adjudication: A Study of ICSID Rule 41(5) and of Procedures of Other Courts and Tribunals to Dismiss Claims Summarily” (2012) 3:1 J Intl Dispute Settlement 137.

¹⁹ Eric De Brabandere, “The ICSID Rule on Early Dismissal of Unmeritorious Investment Treaty Claims: Preserving the Integrity of ICSID Arbitration” (2012) 1:9 Manchester J Intl Economic L 23.

²⁰ The “dialogue of authors” is a term of art that I borrow from Abraham Drassinower. See Abraham Drassinower, *What's Wrong with Copying* (Cambridge: Harvard University Press, 2015). In that book on copyright, Drassinower suggests that each and every author is a participant in such dialogue, providing a voice that contributes to the scholarly discussion.

²¹ Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (Leiden: Martinus Nijhoff Publishers, 1995) [Dolzer & Stevens].

²² *Ibid.*

²³ See *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) [NAFTA].

²⁴ FET is a standard of treatment with a highly contested meaning in international law. In broad terms, the standard requires a host state to treat a foreign investor “fairly” and “equitably”; however, most treaties often do not define the meaning of these terms. IIAs

and Protection (FSP),²⁵ Expropriation,²⁶ Most-Favoured Nation Treatment (MFN),²⁷ and umbrella clauses.²⁸ The substantive investment standards (such as expropriation or FET) aim to protect foreign investors and their investments against various non-business risks while in the host state.

contain different textual formulations of the standard. For example, see the *Agreement between The Government of Hong Kong and The Government of Australia for the Promotion and Protection of Investments*, signed 15 September 1993, 1748 UNTS 385 (entered into force 15 October 1993). In some treaties, the FET standard is linked to the minimum standard of treatment (MST), see NAFTA and Joint Commission, Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission, July 31, 2001), online: <<http://bit.ly/2w6yoRW>>. For an overview of the FET standard and related controversies surrounding its scope, see Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford: Oxford University Press, 2013) at 83-105; Roland Kläger, 'Fair and Equitable Treatment' in *International Investment Law* (Cambridge: Cambridge University Press, 2011) at 60-85; Rudolf Dolzer, "Fair and Equitable Treatment: Today's Contours" (2014) 12:7 Santa Clara J Intl L 7.

²⁵ The FSP standard, like FET, is broad and often undefined. It is typically interpreted to include two elements: legal protection and physical protection. Some tribunals require FSP to be guaranteed only to foreign investments, while others require FSP to be applied both to foreign investors and foreign investments. For example, CETA requires a host state only to guarantee physical protection to foreign investors and foreign investment. For more, see Matthias Herdegen, *Principles of International Economic Law* (Oxford: Oxford University Press, 2016) at 469.

²⁶ Expropriation is another international standard that IIAs accord to foreign investors. In short, under this standard, a state may not expropriate (i.e. "take" or "seize") property of a foreign investor except under due process of law and with prompt and adequate compensation. Expropriation may be direct or indirect. Direct expropriation involves the actual taking or destruction of property by a state or its regulatory bodies. Indirect expropriation is a far broader and more controversial concept, it can encompass any governmental action or series of actions that impairs the value of an investor's investment. See Dolzer & Stevens, *supra* note 21; Andrew Newcombe, *Regulatory Expropriation, Investment Protection and International Law: When is Government Regulation Expropriatory and When Should the Compensation be Paid?* (University of Toronto, 1999), online: <<http://www.italaw.com/documents/RegulatoryExpropriation.pdf>>.

²⁷ Andrea K Bjorklund, Ian A Laird & Sergey Ripinsky, *Investment Treaty Law: Current Issues. Remedies in International Investment Law Emerging Jurisprudence of International Investment Law* (London: BIICL, 2009) at 242.

²⁸ Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008) at 153-162 [Dolzer & Schreuer]. On umbrella clauses, see Christoph Schreuer, "Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in the Road" (2004) 5:2 J World Investment & Trade 249 at 250. Schreuer explains that "umbrella clauses have been added to some BITs to provide additional protection to investors beyond the traditional international standards. They are often referred to as 'umbrella clauses' because they put contractual commitments under the BIT's protective umbrella. They add the compliance with investment contracts, or other undertakings of the host State, to the BIT's substantive standards. In this way, a violation of such a contract becomes a violation of the BIT".

However, such protections would be insufficient without a mechanism to enforce the standards under IIAs in case of non-compliance by the host state. ISA has become such an enforcement mechanism. ISA emerged to protect the property rights of foreign investors against the unilateral conduct of sovereign states (*ius imperium*).

Before further discussing the institutional design of ISA and exploring why frivolous claims are particularly problematic for it, it is essential to address the arguments in favour of why the international investment regime is valuable for foreign investors, individual states, and the international community as a whole.

Historical context helps to understand the significance of IIAs and ISA for its stakeholders. In the post-World War II environment, the international flow of foreign investment was crucial to the revival of the world economy. In capital-importing (i.e. developing) states, foreign investors often encountered various non-business risks, such as takings of property, discrimination, or lack of due process in local courts and administrative agencies.²⁹ After being subjected to this mistreatment, foreign investors often asked their home states to interfere in order to protect their assets abroad.³⁰ In some instances, the investors' home states (primarily capital-exporting, developed states) engaged in diplomatic negotiations,³¹ lump sum agreements³² or inter-state dispute

²⁹ Kate Miles, *The Origins of International Investment Law. Empire, Environment and the Safeguard of Capital* (Cambridge: Cambridge University Press, 2013) at 76. See also Asha Kaushal, "Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime" (2009) 50 *Harvard Intl LJ* 491 at 499 [Kaushal]. Particularly, Kaushal suggests that foreign investment protection "finds its roots in the post-World War II era [...] In the 1950s, newly independent states asserted control over their natural resources, using their national law to regulate foreign investments and investors. Nationalizations and expropriations of foreign concessions proliferated in Iran, Libya, Egypt, Cuba, Chile, and Venezuela, to name a few".

³⁰ Kaushal, *ibid* at 498 (suggesting that foreign investors often had to rely on the means of diplomatic protection); see also Stephan Wilske & Martin Raibe, "The Arbitrator as Guardian of International Public Policy? Should Arbitrators Go Beyond Solving Legal Issues?" in Catherine A Rogers & Roger P Alford, eds, *The Future of Investment Arbitration* (Oxford: Oxford University Press, 2009) 249 at 251 (arguing that diplomatic protection and military force akin to gunboat diplomacy were the most common ways to settle investment disputes).

³¹ Diplomatic negotiations, however, were not always successful. For instance, the British Government negotiated with the Soviet Government a sum to be compensated to Lena Goldfields Inc., a British company whose concession rights were expropriated. The diplomatic pressure continued for more than a decade, but without any success. See Arthur Nussbaum, "Arbitration Between the Lena Goldfields Ltd. and the Soviet Government" (1950) 36 *Cornell L Rev* 31 at 34.

settlement.³³ In other instances, some home states did not shy away from even bringing disputes over foreign property into the battlefield.³⁴ For example, during the Suez and Abadan crises, Britain and France sent their military forces to bring about favourable resolutions after the governments of Egypt and Iran respectively nationalized assets of British and French nationals.³⁵ Both incidents resulted in the escalation of international tension and resulted in serious political crises.³⁶

Of course, such conflicts over foreign property threatened to interrupt the international flow of foreign capital needed to rebuild the post-war economy.³⁷ In addition, such conflicts undermined the two foundational principles of the United Nations (UN), namely friendly cooperation among nations and peaceful resolution of disputes.³⁸ To safeguard foreign nationals and depoliticize disputes over foreign property,³⁹ some states and

³² For example, see Richard B Lillich & Burns H Weston, “Lump Sum Agreements: Their Continuing Contribution to the Law of International Claims” (1988) 82:1 AJIL 69 at 74. Lump-sum agreements guaranteed a certain sum to be compensated to the foreign investor independently of their actual losses. In some instances, the sums under such agreements were significantly less than the losses of foreign investors and of course did not meet the “prompt, adequate and effective compensation” standard. Quite often, states agreed to the conditions of the lump-sum agreements for political or economic reasons. As a result, foreign investors were strategically disadvantaged.

³³ For example, in the *Barcelona Traction* case, Canada did not step in to represent its Canadian investor. The International Court of Justice concluded that a state has a right but not an obligation to exercise diplomatic protection. See *Case concerning Barcelona Traction, Light and Power Company Limited (Belgium v Spain) (New Application, 1962)*, [1970] ICJ Rep 3 [*Barcelona Traction*].

³⁴ James Cable, *Intervention at Abadan: Plan Buccaneer* (Hague: Springer, 1991) at 9.

³⁵ Robert Delson, “Nationalization of the Suez Canal Company: Issues of Public and Private International Law” (1957) 57:6 Colum L Rev 755 at 756 [Delson]; see also Taylor St John, *The Power of Modest Multilateralism: The International Centre for Settlement of Investment Disputes (ICSID), 1964-1980* (D Phil. University of Oxford, 2015).

³⁶ Simon C Smith, *Reassessing Suez 1956: New Perspectives on the Crisis and its Aftermath* (London: Ashgate Publishing, 2013) at 65.

³⁷ Delson, *supra* note 35. UN, Economic and Social Council, The Promotion of the International Flow of Private Capital: Further Report by the Secretary General 1961, Doc E/3492 at paras 22, 278.

³⁸ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res 2625, UNGAOR, 25th Sess, UN Doc A/RES/25/2625 (1970).

³⁹ José E Alvarez, *The Public International Law Regime Governing International Investment* (Martinus Nijhoff Publishers, 2011) at 59 [Alvarez]. Note: it is necessary to account for David Schneiderman’s work, which persuasively argued that the depoliticization of investment disputes has failed. See David Schneiderman, *Resisting Economic Globalization: Critical Theory and*

international organizations⁴⁰ began enacting IIAs that included ISA mechanisms.

Institutional Design of Investment Arbitration

This section briefly discusses the conventional model of investment arbitration and its critiques. The next subsection addresses the structural changes of CETA with regards to the mechanism of investment arbitration. These subsections are important for the overall examination of why the current mechanisms for curtailing frivolous claims *in limine* are not sufficient.

i. The Conventional Model of Investor-State Arbitration

ISA tribunals are convened *ad hoc* for each dispute. ISA tribunals are typically composed of three arbitrators.⁴¹ One is appointed by the state, another by the investor, and the president of the Tribunal is appointed on the agreement of both parties. The arbitrators do not hold any form of tenure; they are separately appointed for each arbitration and receive remuneration directly from the parties to the dispute.⁴² This structure of arbitral tribunals and the procedure of arbitral appointments can be explained—and is typically justified—by the need to guarantee the neutrality of adjudicators and to secure the tribunals from any biases either in favour of the investor or the state.

International Investment Law (London: Palgrave Macmillan, 2013) [Schneiderman]. Later in this article, I highlight that the creation of the international investment regime and direct access of foreign investors to ISA was *motivated* by the idea of depoliticization of disputes over foreign property. It is not within the scope of this article to investigate if the international investment regime actually achieved this objective.

⁴⁰ For example, the World Bank played a prominent role in negotiating the ICSID Convention. In his interviews, Aron Broches acknowledged that the Suez and Abadan crises seriously influenced his commitment to introduce and negotiate the multilateral treaty on the international conciliation and arbitration mechanisms between states and foreign investors. Robert Asher, “The World Bank Group Archives Oral History Program: Transcript of Interview with Aron Broches” (18 April, 23 May 1984) at 29, 35, online: <<http://documents.worldbank.org/curated/en/603371468151508966/pdf/789460v30TRNOB0sson020May023001984.pdf>>.

⁴¹ Dolzer & Schreuer, *supra* note 28 at 258.

⁴² Stavros Brekoulakis, “Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making” (2013) 4:3 *J International Dispute Settlement* 553 at 566 (on remuneration), 578 (on lack of tenure) [Brekoulakis].

Before submitting a claim, a foreign investor must satisfy the requirements set out in the IIA that pertains to the scope of its application: the definition of investor (i.e. jurisdiction *ratione personae* of the ISA tribunal) and the definition of investment (i.e. jurisdiction *ratione materiae*).⁴³ Most often, IIAs include broad formulations of these definitions. Under the definition of investment, IIAs typically include any kind of asset (e.g. tangible and intangible property).⁴⁴ The definition of investor requires the investor to possess a particular nationality in order to gain access to the protections guaranteed under the specific IIA—normally, the investor must be a national of a state that has ratified the IIA other than the host state where it made the investment.⁴⁵

ii. *Critiques of the Conventional ISA Model*

Recently, the conventional ISA model has been subjected to a wide range of criticisms, wide enough that a survey of all the critiques of international investment regime⁴⁶ is well beyond the scope of this article. Accordingly, this article only focuses on the three critiques that specifically relate to the discussion on why frivolous claims in investment arbitration are particularly problematic.

First, there is an ongoing debate regarding the extent to which ISA arbitration limits the ability of states to regulate domestically.⁴⁷ It is clear that states fear that ISA could become pervasive in their regulatory space.⁴⁸ Particularly, there is a persisting concern that foreign investors will threaten to bring a claim against a state in order to deter that state's proposed welfare

⁴³ Zachary Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009) at 233-34 (on *ratione materiae*), 284-86 (on *ratione personae*) [Douglas].

⁴⁴ Dolzer & Schreuer, *supra* note 28 at 62-65.

⁴⁵ Douglas, *supra* note 43 at 286.

⁴⁶ Alvarez, *supra* note 39 at 75-94. Alvarez provides perhaps one of the most elaborative classifications of criticisms of the investment regime.

⁴⁷ Stephan Shill, "Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?" (2007) 24:5 J Intl Arb 469 at 475; Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge: Cambridge University Press, 2009) at 115.

⁴⁸ The newly negotiated IIAs illustrate this fear. For instance, CETA reaffirms the right of states to regulate. See CETA, *supra* note 16, Chapter 8 at Preamble, arts 8.9, 8.10. We can see similar pro-regulatory statements in the TPP and the TTIP.

policy.⁴⁹ It is necessary to mention that such a claim does not have to be viable in order to proceed to a full hearing on the merits, which will, of course, mean high costs for both parties. To avoid such costs, some states may therefore shy away from pursuing a particular policy—resulting in a so-called “chilling effect”.⁵⁰

Second, the investment rules of IIAs, as interpreted by ISA tribunals, have taken on meanings broader than many say they were originally intended to have. In particular, ISA tribunals have developed interpretations of the FET standard that are broader than states intended. Some tribunals include the element of legitimate expectations of the investor when applying FET, while other tribunals contend that this element is outside of the scope of FET.⁵¹

⁴⁹ Kate Miles examines an attempt by the Indonesian Government to enact a forestry law that “affected more than 150 mining companies”. Miles submits that “the companies threatened the state with international investment arbitration to ensure inapplicability of the new legislation [...] the Government subsequently enacted regulation that effectively exempted from the new forestry law the mining companies”. Reportedly, the Indonesian Government refused to enact the forestry law soon after the Government received advice that it may face ISA claims “in the realm of US\$31 billion if the forestry laws remained effective”. Accordingly, for Miles, the regulatory chill “has the potential to frustrate initiatives designed to implement national and global environmental objectives”. See Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguard of Capital* (Cambridge: Cambridge University Press, 2013) at 183.

⁵⁰ Recently, the international investment regime has already been subject to such pressures, particularly from national stakeholders in developed states. For instance, in Germany, the UK and Australia, there were serious parliamentary debates regarding whether these states should at all participate in ISA. For example, see Luke Nottage, *Investor-State Arbitration Policy and Practice in Australia* (CIGI Paper No. 6 June 2016); Leon E Trakman, “Investor-State Arbitration: Evaluating Australia’s Evolving Position” (2014) 15:1 *J World Investment & Trade* 152; Marc Burgenberg, *A History of Investment Arbitration and Investor-State Dispute Settlement in Germany*, (CIGI Paper No.12 October 2016), online:

<<https://www.cigionline.org/publications/history-investment-arbitration-and-investor-state-dispute-settlement-germany>>. In Canada, some prominent academics signed a petition that condemns the international investment regime for its pro-investor orientation. See Gus Van Harten et al, *Public Statement on the International Investment Regimes - 31 August 2010*, online: <<http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/>> [Public Statement on ISA].

⁵¹ Antony Crockett, “The integration principle in ICSID awards” in Marie-Claire Cordonier Segger & Judge CG Weeramantry, eds, *Sustainable Development Principles in the Decisions of International Courts and Tribunals: 1992-2012* (London: Taylor & Francis, 2017) 539 at 550.

Third, ISA tribunals have produced inconsistent decisions when applying investment rules, even in analogous factual circumstances.⁵² This inconsistency threatens to undermine the credibility of investment arbitration as a mechanism for resolving disputes. In particular, the inconsistency is problematic in the context of frivolous claims because an adjudicator has no clear understanding of how to consistently interpret and apply legal norms which results in an inability to measure whether a claim can succeed on the merits.⁵³

This generation of variable outcomes contributes to a perception among states that ISA could impact their freedom of regulatory action. However, inconsistent decisions and variable outcomes do not mean that the ISA tribunals are random or unprincipled in their decision-making.⁵⁴ At a minimum, ISA tribunals tend to follow previous decisions to crystalize the scope and meaning of investment rules, and it appears that the gradual accretion of precedents has made outcomes more consistent over time. However, ISA tribunals' decisions are not binding on any other tribunals or

⁵² The *CMS v Argentina* and *LG&E v Argentina* cases are illustrative. The tribunal in *LG&E v Argentina* (with nearly "identical" facts to *CMS v Argentina*) came to an opposite finding [or outcome] than the *CMS* conclusion in interpreting "state of necessity". The state of necessity is a doctrine in international law that a state can invoke as defence to justify a regulatory measure; if the defence is successful, a state is not required to pay a compensation. While the tribunals came to the opposite conclusion, they did so applying the same investment rules to nearly identical facts. ISA tribunals can thus be inconsistent in their application and interpretation of international law. Such inconsistency obviously makes it difficult to define trends, and it defeats any expectations on what claims are viable. In addition, it makes it far more difficult to evaluate the risks for states associated with litigating these claims. See *LG&E Energy Corp, LG&E Capital Corp, and LG&E International Inc v Argentina* (2006), 46 ILM 36 (International Centre for Settlement of Investment Disputes) at para 139; *CMS Gas Transmission Company v The Republic of Argentina* (2005), 42 ILM 788, 44 ILM 1205 (International Centre for Settlement of Investment Disputes). See also Todd Weiler, *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, 2005); Michael Waibel, "Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E" (2007) 20 *Leiden J Intl L* 637.

⁵³ There is fairly modest empirical scholarship on predicting outcomes in investment disputes, and authors tend to arrive at different conclusions. See Susan Franck & Lindsey Wylie, "Predicting Outcomes in Investment Treaty Arbitration" (2015) 65 *Duke LJ* 459; Cédric Dupont, Thomas Schultz & Merih Angin, "Political Risk and Investment Arbitration: An Empirical Study" (2016) 7:1 *J Intl Dispute Settlement* 136.

⁵⁴ Gabrielle Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?" (2007) 23:3 *Arb Intl* 357 at 357. Kaufmann-Kohler argues that "international arbitration lacks a doctrine of precedent, at least as it is formulated in the common-law system. Regardless, arbitrators increasingly appear to refer to, discuss and rely on earlier cases".

on national courts, which means that the ISA tribunals could step away from a particular pattern in interpreting IIAs at any time.⁵⁵

iii. *CETA's Model of a Quasi-Investment Court*

In response to these critiques, CETA departs in ways both subtle and dramatic from the conventional ISA mechanism. Under CETA, a claimant must still satisfy the traditional jurisdictional requirements to bring a claim. CETA, however, changes the procedure of the appointment of arbitrators, their method of remuneration, and the ethical requirements incumbent upon them.⁵⁶

More drastically, CETA replaces *ad hoc* arbitral tribunals with a permanent “standing tribunal”.⁵⁷ According to article 8.27 paragraph 2, the CETA Joint Committee, which is composed of the representatives of the EU and Canada, will appoint 15 arbitrators for renewable 5-year terms.⁵⁸ Among these 15 adjudicators, there will be 5 nationals of the EU, 5 nationals of Canada and 5 nationals of third countries. Individual cases are to be resolved by a panel of three arbitrators.⁵⁹ In contrast to the conventional approach (where the parties to the arbitration pick the arbitrators), the president of the CETA tribunal (who must be a national of a third country) selects the arbitrators for the particular dispute.⁶⁰ The most peculiar feature of the CETA's model is that the arbitrators will be paid a retainer to keep themselves available for adjudicating disputes.

⁵⁵ Andrea K Bjorklund, “Investment Treaty Arbitral Decisions as Jurisprudence Constante” in Colin Picker, Isabella D Bunn & Douglas Arner, eds, *International Economic Law: The State and Future of the Discipline* (Oxford: Bloomsbury Publishing, 2008) 265 at 268 [Bjorklund]. Bjorklund explains that the “tribunals can and do refer to decisions of other tribunals [...] they do not do so, however, in the guise of looking to previous decisions as binding precedent, and indeed jealously guard their autonomy. Thus, tribunals frequently disavow any formal obligation to review prior case law”.

⁵⁶ CETA, *supra* note 16, art 8.27.

⁵⁷ Armand De Mestral & Lukas Vanhonnaeker, *The Impact of the NAFTA Experience on Canadian Policy Concerning Investor-State Arbitration*, (CIGI Paper No. 13 November 2016) at 5, online: <<https://www.cigionline.org/publications/impact-nafta-experience-canadian-policy-concerning-investor-state-arbitration>>.

⁵⁸ CETA, *supra* note 16, art 8.27 at para 2.

⁵⁹ *Ibid*, art 8.27 at para 5.

⁶⁰ *Ibid*.

Perhaps the most significant change CETA makes is that it authorizes parties to bring an appeal to a so-called appellate tribunal.⁶¹ The appellate tribunal has the power to review awards, including to address errors “in the application or interpretation of applicable law”.⁶² This power means that the CETA appellate tribunal will supervise the application and interpretation of investment rules, which may result in greater consistency in arbitral practice under the treaty.⁶³

Why Frivolous Claims Are Particularly Problematic in the International Investment Regime

In the domestic context, frivolous claims are problematic because such claims clog the judicial system, disrupt the proper administration of justice and impose unnecessary costs on innocent defendants. The current international investment regime, however, has no unified judicial system. Instead, conventional ISA tribunals function on an *ad hoc* basis where the parties of the arbitration bear the costs of the proceedings. So, why are frivolous claims a problem that requires a mechanism for early dismissal in the arbitral context? Although the institutional organization of any domestic judicial system is different from the international investment regime, frivolous claims are still problematic in investment arbitration because they (a) impose unreasonable costs upon states and (b) threaten to undermine the credibility of the international investment regime itself.

i. Costs

Frivolous claims can impose high costs. In the domestic context, Judge Easterbrook perfectly summarizes why frivolous claims are problematic: “suits are easy to file and hard to defend. Litigation gives lawyers opportunities to impose on their adversaries’ costs much greater than they impose on their

⁶¹ *Ibid*, art 8.28.

⁶² *Ibid*, art 8.28 at para 2(a).

⁶³ In the international economic law context, the WTO Appeal Body gained scholarly praise for ensuring consistent case-practice in trade disputes. The constituency of arbitral practice of course serves for reinforcing the rule of law as the results become more predictable. In the context of frivolous claims, predictability in law’s application plays an important role because it gives the tribunal grounds to assert that this particular claim has no chance to succeed on the merits due to the pattern in how legal standards have been interpreted and applied. For more, see Peter Van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2013) at 205.

own clients [...] litigation becomes a predatory instrument rather than a method of resolving honest disputes”.⁶⁴

Judge Easterbrook’s criticism of frivolous lawsuits applies to the ISA context. The arbitral process is claimed to be prompt and cost-efficient, but it does not always deliver on that promise. In fact, ISA arbitration can last four years or longer,⁶⁵ and the costs of defending a claim can exceed 10 million dollars, which accounts only for arbitrators’ and lawyers’ fees and not the additional costs for experts, witnesses, investigations, and other requirements.⁶⁶ For example, Poland and the Czech Republic respectively spent US\$6 million and US\$10 million to cover their costs in defending a single arbitration.⁶⁷ Moreover, as the case of the Philippines shows, the costs of participating in investment arbitration can be burdensome for societies. The Transnational Institute reports, “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 airports”.⁶⁸

Arbitration also requires specialist legal expertise to strategically evaluate a claim.⁶⁹ Most states (including some developed states) lack such expertise in-

⁶⁴ *Re Central Ice Cream Co.*, 841 F.2d 732, 735 (7th Cir. 1988), cited in Mark R Kravitz, “Unpleasant Duties: Imposing Sanctions for Frivolous Appeals” (2002) 4 J App Pr & Pro 335.

⁶⁵ Daniel Behn, “Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-Art” (2015) 46 Geo J Intl L 364 at 376. Daniel Behn analysed a data-set of 77 investment arbitration cases. Behn explains that “cases in the data set take an average of four years to resolve [...] the longest case [...] took 129 months to resolve”.

⁶⁶ UNCTAD Trade & Development, *supra* note 7 at para 14.

⁶⁷ *Ibid.*

⁶⁸ Pia Eberhardt & Cecilia Olivet, *Profiting From Injustice* (Brussels: Corporate Europe Observatory and the Transnational Institute, 2012) at 15, online: <<https://www.tni.org/files/download/profitfrominjustice.pdf>> [Eberhardt].

⁶⁹ The importance of legal expertise is crucial, as the contrasting cases of *Phillip Morris v Australia* and *Shell v Nicaragua* demonstrate. In *Phillip Morris*, Australia approached the arbitration strategically and filed for bifurcation of the proceedings, a strategy that proved successful in helping Australia win the case on jurisdictional grounds while minimizing costs. In *Shell*, Nicaraguan officials admitted that they lacked expertise on matters relating to ISA. The case was settled. See *Shell Brands International AG and Shell Nicaragua SA v Republic of Nicaragua* (2006), (International Centre for Settlement of Investment Disputes Case No. ARB/06/14), online: <<http://investmentpolicyhub.unctad.org/ISDS/Details/231>>; *Phillip Morris v Australia*, Award on Jurisdiction and Admissibility, (2015) PCA Case No. 2012-12, online: <http://www.italaw.com/sites/default/files/case-documents/italaw7303_0.pdf>; Jorun

house, but many states also lack the resources to hire expert outside counsel. The arbitration of *Phillip Morris v Australia* is illustrative for such a strategic approach to conducting arbitral proceedings. Australia's success in having Philip Morris' claim struck out as abuse of process rested on the fact it was able to bifurcate the investment proceedings. For the purposes of our inquiry, it is important to note that in addition to the Australian government solicitors, the respondents' team included at least three law firms as counsel.⁷⁰ Such legal advice is, of course, costly. According to the Sydney Morning Herald, the overall cost to Australia in that arbitration amounted to \$50 million.⁷¹

Of course, under international law all states are considered equal sovereigns. However, the broader social and economic reality shows that states are functionally not equal in their capacity to resist the pressure of costly arbitral claims and proceedings.⁷² Developing states may not possess "the technical expertise and even institutional capacity" to respond to the pressure of an ISA action (so-called "challenges of capacity").⁷³ A lack of capacity to uphold defences or actively engage in arbitration could result in an unfavourable settlement or cancellation of national regulatory actions even if the state would ultimately be vindicated had the arbitral process proceeded to its conclusion. The costs may become particularly burdensome when a single developing state has to face multiple arbitrations in the context of a national emergency.⁷⁴

Baumgartner, *Treaty Shopping in International Investment Law* (Oxford: Oxford University Press, 2016) at 63.

⁷⁰ The Essex Court Chambers, Eleven Wentworth Chambers, Selborne Wentworth Chambers all participated in the proceedings as legal counsel for Australia. See *Philip Morris*, *ibid.*

⁷¹ Peter Martin, "Australia faces \$50m legal bill in cigarette plain packaging fight with Philip Morris", *The Sydney Morning Herald* (18 July 2015), online: <<http://bit.ly/1MwfANC>>.

⁷² Some states have to use third-party funding and expertise to carry on a defence. For example, Uruguay was able to survive a legal battle against tobacco companies only with the financial and expert support of Michael Bloomberg and other anti-tobacco advocates. See Heather Wipfli, *The Global War on Tobacco: Mapping the World's First Public Health Treaty* (Baltimore: JHU Press, 2015) at 132.

⁷³ UNCTAD, UNCTAD Secretariat, *International Investment Rulemaking*, UN doc TD/B/COM.2/EM.21/2, May 2007 at paras 17-19. Similar work has been done in the context of World Trade Organization (WTO), see e.g. Joan Apecu Laker, *African Participation at the World Trade Organization: Legal and Institutional Aspects 1995-2010* (London: Martinus Nijhoff Publishers, 2013) at 20.

⁷⁴ For example, Argentina is facing, or has faced, 37 claims arising out of actions taken to respond to its financial crises. See UNCTAD Trade & Development, *supra* note 7 at para 9; Schneiderman, *supra* note 39 at 43-44.

For states with smaller economies, the threats of investment claims (even if such claims potentially lack merit) could be challenging to withstand. Gus Van Harten and Dayna Nadine Scott conducted an empirical study regarding the influence of ISA claims on governmental decision-making.⁷⁵ They found that claims or even threats of claims led to changes in government policies, at least in Ontario. Their study provides support to the underlying concern of this article that the threat of meritless claims may have chilling effects.⁷⁶ The threat to file an ISA claim may add pressure upon a state and provide an investor with leverage.

Developed states with larger economies may also suffer from the costs that frivolous claims impose. When a government has to uphold a defence against an apparently frivolous submission, national stakeholders could demand an explanation as to why tax dollars are spent for engaging in frivolous proceedings.⁷⁷ The issue of costs thus results in another problem, which is that frivolous claims may ultimately undermine the credibility of ISA as a mechanism for resolving disputes between investors and states.

ii. *Credibility of Investor-State Arbitration*

Under the international investment regime, only foreign investors have a right to bring a claim against states, not *vice versa*. Hence, such a structure potentially empowers foreign investors to drag states into the process of arbitration. Notably, foreign investors, who are often multinational corporations, may submit their claims not to vindicate their property rights but instead to achieve other strategic purposes.⁷⁸ In domestic settings, corporate actors sometimes launch so-called “sham litigation” by bringing lawsuits without merit to drive their competitors from the marketplace.⁷⁹ This

⁷⁵ Gus Van Harten & Dayna Nadine Scott, “Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada” (2016) 7:1 J Intl Dispute Settlement 92.

⁷⁶ *Ibid.*

⁷⁷ See Gus Van Harten et al, *An Open Letter to the Parliament of Wallonia and Belgian Voters on the Proposed CETA and Its Foreign Investor Protection System* (17 October 2016), online: <<http://bit.ly/2wuJgq8>>.

⁷⁸ Litigation can be a predatory practice. It is particularly popular behaviour in the context of patents and antitrust litigation. See Michael J Meurer, “Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation” (2002-2003) 44 Boston College L Rev 509 at 511; Frederick D Lipman, *Whistleblowers: Incentives, Disincentives, and Protection Strategies* (New York: John Wiley & Sons, 2011).

⁷⁹ In the US Congress, one of the witnesses called sham litigation “an anticompetitive practice”, “a deadly weapon” that “results in extorting the tax payer’s money by using the threat

conduct may result in significant social costs because such litigation has anticompetitive effects. For example, when other companies cannot access the marketplace because they fear litigation, consumers suffer from the lack of competition, which allows monopolists to charge higher prices. Of course, sham litigation (like other kinds of frivolous litigation) is also problematic because it clogs the legal system and prevents the proper administration of justice.⁸⁰

In addition, it is entirely plausible that a board of directors may want to demonstrate to their shareholders that they will pursue all possible avenues of litigation, including ISA.⁸¹ Under this scenario, a foreign investor may submit a non-viable claim and nonetheless continue to arbitration on the jurisdiction and merit stages. If there is no procedure available to curtail such claims early in the process, states may be ‘dragged’ into continuous proceedings that involve serious costs.⁸²

The cost of frivolous claims is hardly the only reason why states may ultimately withdraw from the international investment regime. The cost of such claims, however, may be one of the contributive factors why states may consider a shift to state-to-state dispute settlement or to carving out particular industries from investment treaties. Tanya Voon, Andrew Mitchell and James Munro argue that even a single claim may be sufficient to generate backlash against the international investment regime.⁸³ The precedents are well known; when Philip Morris launched its claim challenging Australia’s tobacco plain packaging regulations, Julia Gillard, the Prime Minister of Australia, made a public declaration that her government would reconsider its approach to investment arbitration in favour of a state-to-state dispute settlement system for resolving disputes that concern Australia.⁸⁴ During the negotiations of the

of legal action”. Given that the same corporate actors participate in ISA, it is plausible to suggest that they could show similar behavioural patterns, particularly when they have something to gain. See also US, *Litigation as a Predatory Practice: Hearing before the Subcommittee on Intellectual Property, Competition and the Internet of the Committee on the Judiciary House of Representatives*, 112th Cong (2012), online: <www.gpo.gov/fdsys/pkg/CHRG-112hhrg72906/pdf/CHRG-112hhrg72906.pdf>.

⁸⁰ See Daryl Lim, *Patent Misuse and Antitrust Law: Empirical, Doctrinal and Policy Perspectives* (Northampton: Edward Elgar Publishing, 2013).

⁸¹ Stephen Martin Kohn, *Concepts and Procedures in Whistleblower Law* (Greenwood Publishing Group, 2001) at 7.

⁸² See above discussion on costs in this article.

⁸³ Voon, *supra* note 9.

⁸⁴ Austl, Department of Foreign Affairs and Trade, “Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity” (April 2011), online:

Trans-Pacific Partnership (TPP), it was no coincidence that Australia insisted tobacco be carved out from the subject-matter scope of the treaty.⁸⁵

Addressing Frivolous Claims in the International Investment Regime

This section surveys arbitral practice of the ISA tribunals on dismissing frivolous claims and introduces the reader to the standards the investment tribunals apply to curtail frivolous submissions early in the proceedings. Accordingly, this section proceeds in two parts.

Firstly, this section discusses the standard “manifestly without legal merit” that the ISA Tribunals applied before CETA. Here, the analysis is focused on the practice of the ICSID Arbitration Centre, which remains one of the most frequently used venues for resolving disputes between foreign investors and states.

Secondly, this section discusses the novel standard that CETA introduces for limiting frivolous claims that is “claims in which the award in favour of claimant cannot be made”. There is no arbitral practice under CETA yet. Accordingly, CETA’s provisions on frivolous claims will be discussed in the context of the *Pac Rim v El Salvador* decision rendered under DR-CAFTA,⁸⁶ a treaty that incorporates similar wording on frivolous claims to the standard found in CETA.

Claims Must Satisfy the High Threshold of “Manifestly Without Legal Merit”

Antonio Parra (the former ICSID Deputy Secretary-General) explained that “recurring complaints from some respondent governments” generated considerable pressure to add a mechanism for the expedient dismissal of unmeritorious claims.⁸⁷ In response to states’ grievances, in 2005 the ICSID

<<http://bit.ly/TEghet>>. Australia later changed its approach and did not denounce its treaties. Ongoing elections in the country possibly affected its policy trajectory, but it is known that the Parliament will schedule a second vote on the Anti-ISA Bill. The Labour Party and the Green Party also support an anti-ISA agenda for related future Australian treaties. See also Luke Nottage, *Investor-State Arbitration Policy and Practice in Australia* (CIGI Paper No. 6 June 2016); Trakman, *supra* note 50 at 152; Andrew Mitchell & Tania Voon, *The Global Tobacco Epidemic and the Law* (Northampton: Edward Elgar Publishing, 2014) at 3.

⁸⁵ Cathleen Cimino-Isaacs, *Trans-Pacific Partnership: An Assessment* (London: Jeffrey J Schott Peterson Institute for International Economics, 2016) at 115.

⁸⁶ DR-CAFTA, *supra* note 14 at 10.20(4).

⁸⁷ Antonio Parra, “The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes” (2007) 41 *Intl Lawyer* 47 at 65 [Parra].

Secretariat published a working paper, “Suggested Changes to the ICSID Rules and Regulations”, that proposed an expedited screening procedure for rejecting non-meritorious claims. In the paper, the Secretariat stated that:

It is suggested to make it clear, by the introduction of a new paragraph (5), that *the tribunal may at an early stage of the proceeding be asked on an expedited basis to dismiss all or part of a claim on the merits*. The change would be helpful in addressing any concerns about the limited screening power of the Secretary-General.⁸⁸ [emphasis added]

Accordingly, the ICSID Secretariat introduced an amendment to the ICSID Arbitration Rules in 2006 by adding Article 41(5), which established an expedited procedure “for the early dismissal by arbitral tribunals of patently unmeritorious claims”.⁸⁹ Rule 41(5) of the ICSID Arbitration Rules provides that:

Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, *file an objection that a claim is manifestly without legal merit*. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection

⁸⁸ ICSID Secretariat, “Suggested Changes to the ICSID Rules and Regulations” (2005) at 7, online:<<https://icsid.worldbank.org/en/Documents/resources/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf>>. Frivolous claims were in the spotlight during ICSID negotiations back to the 1960s. A number of negotiating parties raised questions about potential vexatious and frivolous litigation that could result in significant losses of both time and money. Accordingly, one of the representatives submitted that a “provision was required to discourage groundless or vexatious claims”. The World Bank admitted that the comments of the delegates on frivolous claims required attention, and it offered the following solution: “However, as a practical matter it would appear to be proper in such an extreme case [of frivolous claim] for the Secretary-General of the Centre to seek to dissuade the claimant from proceeding with his claim”. Yet, under the final text of the ICSID Convention, neither the ICSID Centre nor the Secretary General of the Centre performs a role of dissuading claimants from submitting frivolous claims. Article 36(3) of the final version of the ICSID Convention specifies that the Secretary General can refuse to register the request for arbitration. See Memorandum of Meeting of Executive Directors on the Subject of Settlement of Investment Disputes, (13 March 1962) SecM 62-68 at para 2(d), (19 January 1962) SecM 62-17. However, Schreuer notes in his Commentaries to the ICSID Convention that the Secretary General simply rejects the request for arbitration “only if the lack of jurisdiction is so obvious that the request does not deserve consideration by a tribunal.” Christoph H Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2001). The mechanism for early dismissal was eventually introduced not in the ICSID Convention, but in the ICSID Arbitration Rules, and only after 2005.

⁸⁹ Parra, *supra* note 87 at 65.

pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.⁹⁰ [emphasis added]

Accordingly, the ICSID Arbitration Rules require a claim to satisfy the standard “manifestly without legal merit” to curtail it expediently. Of course, an analysis of relevant arbitral awards is needed to understand what sort of claims are frivolous according to an ISA tribunal.

While there is no *stare decisis* in investment law, ISA tribunals “can and do refer to decisions of other tribunals” in order to clarify the meaning and the scope of investment rules.⁹¹ Admittedly, investment tribunals may change their interpretation of Rule 41(5). Accordingly, this subsection examines the currently existing standard “manifestly without legal merit”. Firstly, this section considers the standard “manifestly”. Secondly, it reviews the standard “without legal merit”.

i. “Manifestly”

This subsection shows that in interpreting the standard “manifestly”, tribunals require a respondent to demonstrate that the claim lacks merit ‘on its face’.⁹² The claim should not involve any novel issues of law or allegations of bad faith.⁹³ Tribunals refuse to apply the Rule 41(5) if a claim fails to meet these requirements.

In *Trans-Global Petroleum, Inc v Jordan*, a US investor concluded a concession agreement to explore a designated area of the Dead Sea.⁹⁴ The Jordanian government then made several attempts to remove Trans-Global Petroleum from the concession in favour of a local investor.⁹⁵ In *Trans-Global*, the government invoked Rule 41(5)—the first time the rule was cited in

⁹⁰ ICSID Convention, Regulations and Rules, “Rules of Procedure for Arbitration Proceedings (Arbitration Rules)”, April 2006 ICSID/15, art 41(5), online: <https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf>.

⁹¹ For example, see Bjorklund, *supra* note 55 at 268.

⁹² *Trans-Global v Jordan Trans-Global Petroleum, Inc v Hashemite Kingdom of Jordan* (2008), ICSID Case No. ARB/07/25 (International Centre for Settlement of Investment Disputes) at para 84 [*Trans-Global*].

⁹³ *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia: Decision on Respondent’s Application under ICSID Arbitration Rule 41(5)* (2014), ICSID Case No. ARB/13/32 (International Centre for Settlement of Investment Disputes) at para 53 [*MOL Hungarian Oil*].

⁹⁴ *Trans-Global*, *supra* note 92 at para 48.

⁹⁵ *Ibid* at para 52.

arbitration. The tribunal concluded that the word “manifestly” should mean “self-evident”, “clear”, “plain on its face” or “certain”.⁹⁶

In subsequent arbitral awards, tribunals held that the “manifestly” standard could not be satisfied in cases where the parties “have locked horns over the possible differences” as to the interpretation of legal rules. For example, in *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia*, the foreign investor sued Croatia for systemic obstacles, such as a refusal to issue licenses and permits that prevented the claimant from successfully exercising its concession rights.⁹⁷ In applying Rule 41(5), the tribunal emphasized that both the claimant and the respondent:

have between them cited some half a dozen ICSID cases on the relationship between treaty claims and contract claims [...] [it] would seem to show that, whatever the merits of the Respondent’s objection, it cannot be deemed ‘manifest’ so as to meet the standard set by Rule 41(5).⁹⁸

Hence, the summary review procedure under Rule 41(5) applies only to undisputed rules of law. *PNG Sustainable Development Program Ltd v Papua New Guinea*⁹⁹ further illustrated this point. The proceedings concerned the claimant’s investment in a gold mine and a pit copper mine in Papua New Guinea.¹⁰⁰ The government filed a preliminary objection, alleging that the claim did not satisfy the jurisdictional requirements of the applicable IIA and lacked legal merit.¹⁰¹ The tribunal emphasized that review in a summary fashion involves the application of “undisputed or genuinely indisputable rules of law to uncontested facts”.¹⁰² As a result, the tribunal dismissed the preliminary objection of Papua New Guinea under Rule 41(5). The tribunal justified its decision as follows:

[I]t would in principle be inappropriate to consider and resolve novel issues of law in a summary fashion, which would inevitably limit the Parties’ opportunity to be heard and the Tribunal’s opportunity to reflect.¹⁰³

⁹⁶ *Ibid* at paras 83-84, 105.

⁹⁷ *MOL Hungarian Oil*, *supra* note 93 at para 19.

⁹⁸ *Ibid* at para 49.

⁹⁹ *PNG Sustainable Development Program Ltd. v Independent State of Papua New Guinea: The Tribunal’s Decision On The Respondent’s Objection Under Rule 41(5) of The ICSID Arbitration Rules (2014)*, ICSID Case No. ARB/13/33 (International Centre for Settlement of Investment Disputes) [*PNG Sustainable Development*].

¹⁰⁰ *Ibid* at para 17.

¹⁰¹ *Ibid* at para 30.

¹⁰² *Ibid* at para 89.

¹⁰³ *Ibid* at 94.

In cases of uncertainty, the existence of a legitimate dispute over the meaning of the law means that a claim cannot be “manifestly” without legal merit. In *RSM Production Corporation and Others v Grenada*,¹⁰⁴ the tribunal added that “in cases of doubt or uncertainty as to the scope of a claimant’s allegation(s), any such doubt or uncertainty should be resolved in favour of the claimant”.¹⁰⁵

Allegations of bad faith also cannot be reviewed in summary fashion. According to the tribunal in *Mol Hungarian Oil*, serious “imputations of bad faith” and the allegations of the respondent that a claimant is “pursuing claims that it knows are baseless in order to obtain relief to which it knows it is not entitled” cannot not be adjudicated *in limine* and require full hearings.¹⁰⁶

ii. “Without Legal Merit”

In interpreting the phrase “without legal merit”, tribunals have concluded that “the adjective legal” in Rule 41(5) is clearly used in contradistinction to “factual”.¹⁰⁷ Accordingly, tribunals have held that “the tribunal is in no position to decide disputed facts alleged by the parties” early in the proceedings.¹⁰⁸ Accordingly, the tribunal has to address legal merits as if the facts alleged by the claimant were true.¹⁰⁹ The tribunals in *Trans-Global* and in *Brandes Investment Partners LLP v Venezuela* reached the same interpretation of the adjective “legal” in the context of ICSID Rule 41(5).¹¹⁰

The tribunals also concluded that a respondent could take advantage of Rule 41(5) both at the stages of jurisdiction and merits. Accordingly, respondent states could raise their preliminary objections under Rule 41(5) alleging both lack of jurisdiction and lack of merit on the substance of the dispute. The tribunal in *Brandes Investment Partners v Venezuela* noted:

¹⁰⁴ *RSM Production Corporation and others v Grenada: Award* (2010), ICSID Case No. ARB/10/6 (International Centre for Settlement of Investment Disputes) [*RSM Production*].

¹⁰⁵ *Ibid* at para 6.1.3.

¹⁰⁶ *MOL Hungarian Oil*, *supra* note 93 at para 53.

¹⁰⁷ *Trans-Global*, *supra* note 92 at para 97.

¹⁰⁸ *Ibid*.

¹⁰⁹ *Ibid* at para 93.

¹¹⁰ *Trans Global*, *supra* note 92 at para 93; *Brandes Investment Partners LP v Venezuela: Decision on the Respondent’s Objection under Rule 41 (5) of the ICSID Arbitration Rules* (2009), ICSID Case No. ARB/08/3 (International Centre for Settlement of Investment Disputes) at paras 58-59 [*Brandes Investment*].

Rule 41(5) does not mention “*jurisdiction*”. The terms employed are “*legal merit*”. This wording, by itself, does not provide a reason why the question whether or not a tribunal has jurisdiction and is competent to hear and decide a claim could not be included in the very general notion that the claim filed is “*without legal merit*”.¹¹¹

After analyzing the case-law, it becomes apparent that arbitration tribunals set a high threshold to dismiss claims as meritless. To be dismissed as frivolous, claims must deal only with the application of “undisputed or genuinely indisputable rules of law to uncontested facts”.¹¹² Accordingly, a claim must meet a high threshold of manifestly without legal merit to be dismissed under the ICSID Arbitration Rules.¹¹³

iii. *Claims in Which the Award in Favour of Claimant Cannot be Made*

The *Dominican Republic-Central American FTA* (DR-CAFTA)¹¹⁴ entails a mechanism for curtailment of frivolous claims that is distinctive from the ICSID Arbitration Rules and allows a broader range of claims to be curtailed *in limine*. According to art. 10.20 paragraph 4 of DR-CAFTA,

[A] tribunal shall address and decide as a preliminary question any objection by the respondent that, *as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made.*¹¹⁵ [emphasis added]

Art. 10.20 paragraph 4 appears to construe early dismissal of an investor’s claim in terms of viability or, more precisely “likelihood of success”. Arthur Rovine explains that “it is based on what American practitioners will understand as a motion to dismiss for failure to state a claim”.¹¹⁶ The tribunal must address and decide at the stage of preliminary objection whether a claim may succeed as a matter of law assuming that the facts alleged by the claimant are true. The burden to persuade the tribunal that a claimant has no case rests with the respondent.¹¹⁷

¹¹¹ *Brandes Investment*, *ibid* at para 50.

¹¹² *PNG Sustainable Development*, *supra* note 99 at para 89.

¹¹³ *MOL Hungarian Oil*, *supra* note 93 at para 44.

¹¹⁴ DR-CAFTA, *supra* note 14 at 10.20.4.

¹¹⁵ *Ibid*.

¹¹⁶ Arthur Rovine, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2015* (Hague: BRILL, 2016) at 90.

¹¹⁷ *Pac Rim Cayman LLC v The Republic of El Salvador: Decision on Preliminary Objection 10.20.4 and 10.20.5* (2010), ICSID Case No. ARB/09/12 (International Centre for Settlement of Investment Disputes) at para 111 [*Pac Rim*].

The provisions of art. 10.20 paragraph 4 fell under the scrutiny of an ISA tribunal in *Pac Rim v El Salvador*, which provides a unique opportunity to examine how the ISA tribunal evaluates this “likelihood of success” standard and discusses exactly what threshold the claim must meet. *Pac Rim Cayman*, a US based company, brought a number of DR-CAFTA and non-DR-CAFTA based claims against El Salvador. According to *Pac Rim’s* submission, El Salvador violated its investment obligations under DR-CAFTA when it denied approval of an environmental permit and refused to prolong an exploration licence relating to operations in the country.¹¹⁸

El Salvador brought a preliminary objection under DR-CAFTA and alleged that the *Pac Rim’s* claim was frivolous, in particular that an award in favour of the claimant could not be made. The preliminary objection by El Salvador in the *Pac Rim* case invited the ISA tribunal to discuss the standard of review under the art. 10.20 paragraph 4. The tribunal in *Pac Rim* stated that:

[t]he Tribunal does not consider that the standard of review under Article 10.20.4 is limited to “frivolous” claims or “legally impossible” claims, contrary to the submissions of the Claimant. These words could have been used by the Contracting Parties in agreeing CAFTA; but all are significantly absent. Moreover, the implied addition of these or similar words would significantly restrict the arbitral remedy under Article 10.20.4, when the structure of this provision permits a more natural and effective interpretation consistent with its object and purpose.¹¹⁹ [Emphasis added]

Under such interpretation, art. 10.20 paragraph 4 appears not to require the claims to meet the standard “manifestly without legal merit”. The tribunal noted that for an early dismissal of a claim under art. 10.20 paragraph 4, “a tribunal must have reached a position, both as to all relevant questions of law and all relevant alleged or undisputed facts, that an award should be made finally dismissing the claimant’s claim at the very outset of the arbitration proceedings, without more”.¹²⁰ The tribunal emphasized that it may refuse to dismiss a claim “depending on a particular circumstances of each case” even where “such a claim appeared likely (but not certain) to fail if assessed only at the time of the preliminary objection”.¹²¹

Concerning any possible comparisons between the ICSID Arbitration Rule 41(5) and DR-CAFTA art. 10.20 paragraph 4, the Tribunal in *Pac Rim*

¹¹⁸ *Ibid* at paras 60-64.

¹¹⁹ *Ibid* at para 108.

¹²⁰ *Ibid* at para 110.

¹²¹ *Ibid* at para 110.

noted as follows, “the Tribunal was also not materially assisted by comparisons [...] with the New ICSID Arbitration Rule 41.5, which ha[s] different wording and do[es] not share exactly the same object and purpose”.¹²² Clearly, the tribunal distinguishes between the scope of the ICSID Rule 41(5) and the DR-CAFTA provision and acknowledges that DR-CAFTA should be interpreted differently.

The DR-CAFTA rule on frivolous claims and its interpretation in the *Pac Rim* case are important for this article for two reasons. Firstly, DR-CAFTA provisions on frivolous claims resemble the wording in CETA, in which art. 8.10 also suggests that to curtail claims, “in which as a matter of law, an award in favour of claimant cannot be made”; thus the interpretation by the *Pac Rim* tribunal may chart the approach that future CETA tribunals can undertake with regards to preliminary objections of a similar sort. Secondly, DR-CAFTA integrates a conventional model of investment arbitration which embeds a number of institutional qualities that may influence the arbitral decision-making in assessing the likelihood for success of a particular claim.¹²³

Of course, both of these identified features require further analysis, which this article intends to provide. Accordingly, in the following sections, this article will show what impact the flaws of the conventional ISA model may have on early dismissal of frivolous claims. This article will then discuss the CETA’s mechanisms for the dismissal of frivolous claims together with the institutional changes that treaties offer and will address the potential impact of these provisions upon early dismissal of frivolous claims.

Why the Institutional Design of the Conventional ISA Model Fails to Equip Arbitrators to Dismiss Frivolous Claims in limine

As has been discussed, under the international investment regime, arbitrators are in charge of early dismissal of frivolous claims. This section submits that the conventional model of ISA poorly equips arbitrators to perform this function. Accordingly, this section does not aim to persuade a reader that the arbitrators are “villains”¹²⁴ but rather highlights the systemic features of the conventional ISA model that appear to decrease the ability for the arbitrators to exercise their function in the early curtailment of frivolous

¹²² *Ibid* at para 118.

¹²³ See sections that follow.

¹²⁴ Martti Koskeniemi, “It’s not the Cases, It’s the System” (2017) 18 *J World Investment & Trade* 343 at 347.

claims. These specific features will be discussed in the shadow of the various criticisms of the international investment regime. This section will approach the discussion from two angles. Firstly, that the institutional design does not equip arbitrators well to dismiss frivolous claims *in limine*. Secondly, this article discusses perceived arbitral bias as one of the reasons why the conventional model of ISA may offer insufficient mechanisms to effectively curtail frivolous claims.

ISA Tribunals May Be Inconsistent in Their Decision-Making and ISA Tribunals May Apply and Interpret the Investment Rules More Broadly Than Intended

The mechanisms for early dismissal of claims require arbitrators to evaluate the merits of the claim, in particular by examining whether an award in favour of the claimant may be made. This evaluation of course is impossible without knowing the scope of the applicable investment standard. To put it differently, in order to evaluate the possibility of success of a claim as a matter of law, the arbitrators must first know what the content of the applicable legal rule is.

According to Michael Reisman, investment standards (e.g. FET, expropriation etc.) are “evaluation rules”, meaning that “those who apply it [have] to take account of a range of variables and to exercise judgment as to their contribution, in varying, idiosyncratic contexts, to realizing the goal or goals that have been specified”.¹²⁵ In practice, it means that states formulate investment standards in a fashion that leaves room for arbitral discretion in their interpretation and application. Presumably, arbitral practice may result in “incremental development of substantive law”¹²⁶ and crystalization of the scope of applicable investment standards. This way, the arbitrators may easily evaluate the merits of a claim early in the proceedings.

Yet ISA tribunals are famous for generating inconsistent decisions.¹²⁷ Sometimes, the tribunals even ignore the interpretations of legal rules previously given by their colleagues even when the claim arose from the same

¹²⁵ Michael Reisman, “Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law” (2015) 30:3 ICSID Rev 616 at 617.

¹²⁶ Irene Ten Cate, “The Costs of Consistency: Precedent in Investment Treaty Arbitration” (2013) 51 Colum J Transnat’l L 418 at 420.

¹²⁷ Susan D Franck, “The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions” (2005) 73 Fordham L Rev 1521 at 1558-80 (examining inconsistent arbitral awards).

facts and under the same BIT. Under the conventional ISA model, there is no hierarchical structure among the tribunals that may (at least in theory) compel arbitrators to follow each other's interpretations. Notably, the international investment regime rejects *stare decisis*, which in national legal systems promotes certainty of legal norms and helps to crystalize the content of those norms. As such, the argument is not that *stare decisis* shapes 'good' law (it might not)¹²⁸ but that it renders considerable social benefits¹²⁹ by ensuring a consistency of application that upholds the credibility of the adjudicatory system.¹³⁰ Of course, the benefits of consistency cannot be confined to credibility alone but also extend to the proper functioning of the mechanisms of early curtailment of frivolous claims. In particular, a settled matter of law provides guidance to claimants on the pattern of permissible behaviour within the legal system and to the adjudicators concerning which claims can survive legal scrutiny when the facts alleged by a claimant are presumed to be true. Admittedly, *jurisprudence constante* can provide guidance for tribunals as to which claims are legally viable.¹³¹

Yet the value of *jurisprudence constante* is limited as arbitrators are free to ignore the findings of their colleagues without any sanction.¹³² Accordingly, tribunals may evaluate the merits of the claims distinctively depending on how the arbitrators themselves understand, interpret and apply the investment rules. The ICSID standard "manifestly without legal merit" is set so high that it may even be immune to such an issue because the ICSID Arbitration Rules require a claim to be *prima facie* without legal merit.

The DR-CAFTA standard is different and requires the ISA tribunal to engage in evaluating the probability of success of a claim. The likelihood of success depends on the application and interpretation of substantial legal standards. In the conventional model of ISA, where tribunals interpret and apply investment rules differently (often broader or narrower meanings), it is

¹²⁸ Christopher Peters suggests that *stare decisis* is also not perfect because it has a "cumulative effect" and often reinforces injustice by requiring courts to follow precedent. See Christopher J Peters, "Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis" (1996) 105:8 Yale LJ 2031. Jeremy Waldron also submits that *stare decisis* could have serious social costs in terms of injustice and the inefficiency of bad decisions. See Jeremy Waldron, "Stare Decisis and the Rule of Law: A Layered Approach" (2012) 111 Mich L Rev 1 [Waldron].

¹²⁹ William M Landes & Richard A Posner, "Adjudication as a Private Good" (1979) 8:2 J Leg Stud 235 at 239.

¹³⁰ Waldron, *supra* note 128 at 3.

¹³¹ Bjorklund, *supra* note 55 at 273.

¹³² *Ibid* at 277.

difficult to identify a single consistent pattern of interpretation and application of investment rules. In absence of such a single mode of application, it is impossible to anticipate the outcome of a tribunal's evaluation of success of a claim at the early stages.

In other words, probability of success is a category without clearly defined metrics, at least in investment arbitration where the principle of *stare decisis* does not govern the development of jurisprudence. Domestic legal systems embed mechanisms for the early curtailment of frivolous claims such as the summary of judgment rule and national courts may evaluate a claim on the merits because the governing principle of *stare decisis* determines the boundaries for permissible conduct by the claimant. In addition, the domestic system usually has an appeal mechanism that oversees the consistency of legal application and interpretation. These institutional features provide an infrastructure of support that permits the adjudicators (or in the domestic context, judges) to evaluate the merits of a claim early on. In such a setting, when the law is silent or the claimant introduces a novel issue, national courts most likely will proceed with a full trial on the merits. However, in the context of arbitration (where there is no *stare decisis* or hierarchy of courts that ensures consistent and coherent interpretation of legal rules), this is often not the case.

Investment Arbitration Does Not Embed Any Incentives for Arbitrators to Curtail Frivolous Claims Early

This subsection suggests that the conventional model of investment arbitration does not embed incentives for the arbitrators to curtail frivolous claims claims expediently. Particularly, the link between the arbitrators and the structure of their compensation and the process of their selection cannot be overlooked.¹³³

¹³³ Paul Greenberg and James Hayley suggest that the structure of compensation is directly linked to independence of the judiciary. For example, if the compensation is low, it signals that the candidates in judges could potentially seek nonmonetary gains from the judicial position and the court's system will become more prone to abuse. This is the case for judges because they are banned from undertaking other types of employment. For the arbitrators in the conventional arbitration model, this is not the case. The structure of compensation thus could be utilized to attract "properly motivated individuals" to access the bench. See Paul E Greenberg & James A Hayley, "The Role of the Compensation Structure in Enhancing Judicial Quality" (1986) 15 J Leg Stud 417 at 418, 425.

Before delving into this discussion, it is necessary to mention that this dissertation embraces the “*homo economicus paradigm*”¹³⁴ in adjudication and as such views arbitrators as rational actors who act in self-interest in order to maximize utility and as such are not immune to incentives that promise economic and personal gain.¹³⁵ Investment arbitration, as this section will show, lacks structures that would divorce arbitral action from such incentives.

Under the current investment arbitration model, arbitrators receive remuneration while participating in the dispute and as such their remuneration depends on the continuity of that dispute. Of course, the arbitrators may never admit that arbitral appointment attracts them by virtue of its monetary or non-pecuniary gains such as considerations of prestige or compensation.¹³⁶ However, the structure of arbitral compensation shows that the arbitrators ultimately have a financial interest in the continuity of investment proceedings.¹³⁷ Again, according to Schneiderman and Van Harten, the cost of arbitration is high.¹³⁸ Lee M. Caplan underscores how arbitrators earn on average US\$3,000 a day in addition to travel and accommodation allowances.¹³⁹ For example, the arbitrator in *Chevron and*

¹³⁴ Russell Smyth, “Do Judges Behave As Homo Economicus, and If So, Can We Measure Their Performance? An Antipodean Perspective on Tournament of Judges” (2004-2005) 32 Fla St UL Rev 1299 at 1301. Smyth explains that *homo economicus* is “sparked mainly by Posner’s seminal work on judicial decision making [...] that argued that judges, like the rest of us, are self-interested and respond to incentives”. See also Richard A Posner, “What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)” (1993) 3 Sup Ct Econ Rev 1 at 2-3.

¹³⁵ Sergio Puig, “Social Capital in the Arbitration Market” (2014) 25:4 Eur J Intl L 387 at 398. Puig indicates that “in addition to the visibility and reputational value of an appointment to an investor-state case, the financial incentives are considerable. At US\$3,000.00 an eight-hour day (plus expenses), arbitrators make on average \$200,000 per case”.

¹³⁶ Mark Cohen, “The Motives of Judges: Empirical Evidence From Antitrust Sentencing” (1992) 12:1 Intl Rev L & Econ 13 at 13 [Cohen]. Cohen notes that judges will never admit to such incentives, and I believe this very well applies to any private rational individual.

¹³⁷ Eberhardt, *supra* note 68.

¹³⁸ David Schneiderman & Gus Van Harten, “Self-interested lawyers and the Canada-China FIPA” (26 November 2012), *David Schneiderman* (blog), online: <<http://www.law.utoronto.ca/news/prof-david-schneiderman-self-interested-lawyers-and-canada-china-fipa>>.

¹³⁹ Lee M Caplan, “A Proposed Set of Arbitration Rules for Weaker Players” in Karl Sauvant, ed, *Yearbook on International Investment Law & Policy 2009-2010* (New York: Oxford University Press, 2010) at 345. Particularly, Caplan submits that “As a rule, ICSID arbitrators are paid US \$3000 per day [...] to the contrary, in ad hoc arbitration, arbitrators are free to charge their normal, private sector hourly fees, which may range from as much as US 700 to over US 1000 per hour”.

Texaco v Ecuador received a total remuneration of US\$939,000.¹⁴⁰ As such, the persisting concern of arbitral bias is not a matter of the conduct of individual arbitrators¹⁴¹ but arises from “the broader institutional context within which decisions are taken”.¹⁴²

The institutional structure of investment arbitration pertaining to the adjudicators does not provide for the administrative and economic safeguards typical of judicial independence in domestic legal systems, such as security of tenure, rotation of case assignments and prohibition of outside employment. The lack of these structures, particularly security of tenure, makes arbitrator remuneration dependent on proceedings continuing and on “whoever has the ability to make the claims and trigger the arbitrators’ appointments”.¹⁴³ As Gus Van Harten has noticed, the current design of investment arbitration provides only the foreign investors with this ability.¹⁴⁴ These features of the international investment regime make arbitrators vulnerable to financial incentives as motivation not to curtail a claim early. Accordingly, these features highlight why the existing mechanisms for early curtailment of frivolous claims in the international investment regime are not particularly useful given institutional features such as the structure of arbitral compensation and general uncertainty over the content of legal norms.

¹⁴⁰ Eberhardt, *supra* note 68 at 35.

¹⁴¹ It is not to say that particular cultural background features of individual arbitrators (such as, age, gender, previous affiliation, current primary occupation) do not matter; they do. For a more general discussion on the importance of individual factors for judges, see Cohen, *supra* note 136 at 16; Jonathan Kastellec, “Racial Diversity and Judicial Influence on Appellate Courts” (2013) 57:1 *American J Political Science* 167. For more specific information on the investment arbitration context, see Joost Pauwelyn, “The Rule of Law without the Rule of Lawyers! Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus” (2015) 109:4 *AJIL* 761; David Schneiderman, “Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes” (2010) 30:2 *Nw J Intl L & Bus* 383 at 385.

¹⁴² Brekoulakis, *supra* note 42 at 557. See also Gus Van Harten, *Comments on the European Commission’s Approach to Investor-State Arbitration in TTIP and CETA* (July 3, 2014), Osgoode Legal Studies Research Paper No. 59/2014 at 40.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

Examining CETA's Quasi-Investment Court in Light of Early Curtailment of Frivolous Claims

CETA contains two articles that aim to combat frivolous claims early in arbitral proceedings. CETA's art. 8.32 focuses on claims that are manifestly without legal merit, and art. 8.33 focuses on claims that are unfounded as a matter of law.¹⁴⁵ Art. 8.32 copies the wording of ICSID Arbitration Rule 41(5). Hence, it is plausible to assume that the tribunals will follow an interpretation similar to the ICSID standard. On the other hand, art. 8.33 is distinct in its formulation from both art. 8.32 and ICSID rule 41(5). Art. 8.33(1) appears to follow DR-CAFTA in expanding the range of claims that can be dismissed in a summary fashion. These claims are not limited only to submissions that "manifestly" lack "legal merit" but also include claims that *cannot potentially succeed*. As such, CETA provides state-respondents with two fast-track procedures for early dismissal of a frivolous claim.

However, since there is obviously no arbitral practice under CETA yet, it is difficult to foresee exactly how CETA tribunals will examine the viability of claims and measure the potential of a claim's success early in such proceedings. Nonetheless, it is still possible to explore the features of CETA's ISA dispute resolution model in light of its provisions on the early curtailment of frivolous claims.

As discussed above, the CETA parties have changed the conventional model of ISA in two important ways where frivolous claims are concerned. The first feature is the appeal body, may play a significant role in ensuring the consistency of arbitral practice when applying and interpreting investment rules. As a result, CETA tribunals will have a clearer understanding of which claims may succeed on the merits given how the investment rules have been interpreted and applied. Of course, this will impact the early curtailment of frivolous claims, particularly under art. 8.33, which requires that CETA

¹⁴⁵ Since CETA introduces two standards for the early dismissal of frivolous claims, it appears worthwhile to consider (at least briefly) the issue of the interaction of CETA's articles 8.32 and 8.33. Particularly, whether or not it is useful to have both standards in CETA. CETA imposes restrictions on using both mechanisms simultaneously by the state-respondents. Accordingly, CETA specifies that a respondent cannot submit an objection under article 8.32(1) "if the respondent has filed an objection pursuant to Article 8.33". In turn, Article 8.33(3) stipulates that "[i]f an objection has been submitted pursuant to Article 8.32, the Tribunal may, taking into account the circumstances of that objection, decline to address" an objection under article 8.33(1). Presumably, CETA introduces such restrictions to ensure that the state respondents will not unnecessarily prolong proceedings by submitting multiple preliminary objections.

tribunals examine whether a claim has any potential of success. In particular, when clear and consistent standards are in place, CETA tribunals will have an opportunity to see at an early stage whether a claim is viable. This effect has long-term benefits for both states and investors. For example, foreign investors will know and understand the parameters of viable claims, which will help guide decisions and actions in investment proceedings. The availability of such fast-track procedures may take some pressure off of states when foreign investors bring claims or threaten to do so.

Second, CETA changes the procedure for the appointment of arbitrators. CETA creates a standing arbitration tribunal with 15 arbitrators of particular qualification and vests the state-parties with the power to appoint. Such architecture creates a 'scarcity' of arbitral resources and may result in greater incentive for the arbitrators to curtail frivolous submissions. In addition, arbitrators will be kept on retainer under the CETA model. It is plausible to suggest that such retainers may disincentivize arbitrators from prolonging proceedings for financial gain. However, David Schneiderman argues that this outcome is improbable because arbitrators will still remain dependent upon investors to launch arbitrations. According to Schneiderman:

[a]rbitrators will continue to remain dependent upon investors – and only those with sufficiently deep pockets – to finance litigation against states. These reforms do little, then, to remove the financial incentives tribunal members already have to read treaty standards expansively so as to ensure future employment.¹⁴⁶

Accordingly, while the arbitrators are on retainer, they will still be paid by the hour and may still have a financial incentive not to dismiss the claims early.

CONCLUDING REMARKS

Frivolous claims in the international investment regime are particularly problematic because they undermine its credibility and threaten to impose serious costs on state-respondents. Prior to CETA, the ICSID Arbitration Rules offered the primary mechanism for dismissing claims that manifestly lack legal merit, which was a high threshold to satisfy. Later on, DR-CAFTA introduced another standard where an award in favour of the claimant cannot be made. Both mechanisms appear to be useful only to a limited extent given that the mechanisms are linked to the conventional ISA model.

¹⁴⁶ David Schneiderman, *Why CETA Is Unlikely to Restore Legitimacy to ISA Investor-State Arbitration Commentary Series* (CIGI Paper No. 7, 27 May 2016), online:

<<https://www.cigionline.org/publications/why-ceta-unlikely-restore-legitimacy-isd>>.

CETA not only incorporates both mechanisms but also links them to profound institutional changes. CETA alters the conventional model by changing the procedure for the appointment of arbitrators, the rules of remuneration of arbitrators and introduces an appeal body. There is good reason to be optimistic in light of these changes where early dismissal of frivolous claims is concerned, particularly the introduction of a supervising appellate body, which could ensure consistency in applying and interpreting investment rules. This will provide guidance as to which investors' claims may have a chance to succeed on the merits, something the current system sorely lacks. It is plausible to assume that when arbitrators possess greater certainty regarding the pattern in applying legal rules, there is a greater chance that unfounded claims will be curtailed at the early stages without causing negative effects either on the credibility of the international investment regime or through imposing high costs upon states. However, CETA does have potential for improvement in many areas, especially concerning the structure of arbitral compensation. By continuing to fail to address the underlying financial incentives arbitrators have to avoid dismissing claims early, the structural problems of the past may persist and will likely require further consideration if the international investment regime as a whole is to maintain its credibility and efficacy going forward.