The Natural Resources Industry Depends on Foreign Direct Investment: A Plea for Robust Investment Protection

Mathias Wolkewitz*

Introduction

The system of promoting and protecting foreign direct investment (FDI), which has developed in its modern form over the past seventy years through bilateral investment treaties (BIT) and certain multilateral instruments, has become a focal point of harsh criticism. The controversy seems to have mainly unfolded in the context of the political initiative to negotiate an agreement between the EU and the United States on free trade and investment, better known as the Transatlantic Trade and Investment Partnership (TTIP). Although TTIP as such shall not be the focus of the present analysis, this essay strives to discuss some key aspects currently at the core of the political and public debate. Before doing that, it seems appropriate to shed some light on the relevance of FDI – both for foreign investors and host States in which such investment takes place – focusing in particular on the international operations of the oil and gas industry.

Relevance of FDI for the oil and gas industry

The experience of the European natural resources industry, particularly in its oil and gas producing sector, shows that FDI are increasingly imperative. Three main reasons can be identified for this development. Firstly and most prominently, oil and gas resources in Germany – but also in other European countries – are in decline. Statistics demonstrate that in Germany, for example, indigenous resources of both oil and gas are constantly decreasing.[1] The United Kingdom, as a net exporter of oil and gas, has turned into a net importer with respect to oil since 2005 and to gas since 2004.[2] Secondly, the regulatory environment in a number of European States bans or may significantly restrict technologies like fracking, even in conventional reservoirs[3] where such technology has been applied for four decades; and it could increase the resource base of hydrocarbons in Europe substantially.[4] Thirdly, the costs in Europe of exploration for and the production of hydrocarbons out of the remaining resources have increased substantially because such resources bear growing geographical (e.g. remote areas), geological (e.g. small size of reservoirs) and technical (e.g. water depth) challenges. As a result, exploration and production of hydrocarbons increasingly has to be carried out in resource-rich host States.

In practice, both the foreign oil and gas producing companies and the host State benefit from such FDI. German and other European companies do create revenue streams into their home States and support

* The author is General Counsel Legal, Tax, Insurances of Wintershall Holding GmbH, Kassel/Germany, and Honorary Professor for International Law of Natural Resources, Energy and Environment at the Clausthal University of Technology. This essay is based on the presentation 'The importance of FDI for Enterprises, Challenges and Expectations towards Politics', held at the Ifo Institute's conference on *Foreign Direct Investment: Recent Challenges*, Munich, on 14 April 2015, but includes recent developments since that date. The views expressed in the essay are those of the author and shall not necessarily be attributed to the organizations the author is working for.

[1] Cf. Bundesanstalt für Geowissenschaften und Rohstoffe (ed.), *Energiestudie 2014 – Reserven, Ressourcen und Verfügbarkeit von Energierohstoffe,* Hannover 2014, pp. 21 (oil), 23 (gas), http://www.bgr.bund.de/DE/Themen/Energie/Downloads/ Energiestudie_2014.html; see also for production International Energy Agency (ed.), Energy Policies of IEA Countries – Germany Review 2013, Paris 2013, http://www.iea.org/publications/freepublications/publication/energy-policies-of-iea-countries---germany-2013-review.html, pp. 19 et seq.

[2] US Energy Information Administration (ed.), *UK became a net importer of petroleum products in 2013,* 3 July 2014, http://www.eia.gov/todayinenergy/detail.cfm?id=16971.

[3] See the moratorium in France by LOI n° 2011-835 du 13 juillet 2011 visant à interdire l'exploration et l'exploitation des mines d'hydrocarbures liquides ou gazeux par fracturation hydraulique et à abroger les permis exclusifs de recherches comportant des projets ayant recours à cette technique of 14 July 2011, JORF no 0162, p. 12217, http://www.legifrance.gouv.fr/ affichTexte.do?cidTexte=JORFTEXT000024361355&dateTexte=&categorieLien=id; see also for other EU Member States a report to the EU Commission by Milieu law & policy consulting (ed.), *Regulatory Provisions Governing Key Aspects of Unconventional Gas Extraction in Selected Member States – Final Report,* 1 July 2013, http://ec.europa.eu/ environment/integration/energy/pdf/Final%20Report%2024072013.pdf.

[4] Bundesanstalt für Geowissenschaften und Rohstoffe (ed.), *Abschätzung des Erdgaspotenzials aus dichten Tongesteinen (Schiefergas) in Deutschland*, Hannover 2012, https://www.bgr.bund.de/DE/Themen/Energie/Downloads/BGR_ Schiefergaspotenzial_ in_Deutschland_2012.pdf? __blob=publicationFile&v=7, p. 29.

employment.[5] With access to advanced technological know-how for sustainable resource extraction, host States, in turn, get the opportunity to monetize their natural resources at least through their share in production, or alternatively through royalties and taxes, but often through local content requirements too. The benefit of FDI for host States has been questioned in the recent debate by South Africa, for example, which argues that such benefits do not exist at all.[6] However, analyses by the Organization for Economic Cooperation and Development and by UNCTAD clearly show that host States – not automatically and to some extent depending on their national policies – may very well benefit from FDI.[7]

It is worth mentioning that other industry sectors are also increasingly using FDI to competitively obtain access to growth markets outside Europe, in particular Asia. One important driver for German and other companies in this respect is the use and optimization of global value chains.[8] These FDI also support employment in the home State on the one hand, and contribute to domestic demand for goods and services, as well as access to know how in the host State on the other.

In summary, it can well be said that FDI enables the host State to create value in economic areas where it otherwise could not do so by its own means, or at least not to the same extent or within the same time frame.

Established legal framework in flux

Despite the increasing relevance of FDI, particularly for the oil and gas industry, the legal framework that developed into a system of promotion and protection of FDI over the past seven decades seems in a process of flux, if not disintegration. Over 3,000 BITs are in force worldwide (1,200 between EU member States and third States)[9] and the Energy Charter Treaty of 1994[10] has proven to be one of the most prominent examples of a multilateral instrument, not only for the promotion and protection of investments, but also to strengthen the application of the rule of law after the fall of the iron curtain. These bi- and multilateral instruments have created a reliable system for the promotion and protection of FDI.

One significant reason for moving the system into flux notably seems the transfer of competence for foreign direct investment from EU member States to the EU institutions by the 2009 Lisbon Treaty.[11] Despite early analysis that these transfers of competence raise significant EU intra-institutional issues,[12] the EU on purpose decided not to develop a model BIT as many States like Germany[13] and the United States[14] have done. The argument not to do so was that a one-fits-all approach towards third States would neither be feasible nor desirable, and that the negotiation context has to be taken into account.[15] In the meantime the EU has finally negotiated a free trade agreement, including an investment protection chapter, with Singapore and with Canada respectively (Comprehensive Economic and Trade Agreement – CETA).[16] Despite the ongoing negotiations on TTIP, further stand-alone agreements and those with investment chapters are envisaged by a number of States like China and Myanmar as well as India, Vietnam and others.[17] It might be argued that the absence of a model BIT, which could have been previously discussed and agreed upon in the European legislative process, creates a disadvantage in the ongo-

[5] Deutsche Bundesbank (ed.), *Bestandserhebung über Direktinvestitionen* – Statistische Sonderveröffentlichung 10, April 2015, Frankfurt 2015, http://www.bundesbank.de/Redaktion/DE/Downloads/Veroeffentlichungen/Statistische_Sonderveroeffentlichungen/Statso_10/2015.pdf?__blob=publicationFile, p. 6.

[6] Cf. Carim, X., *Lessons from South Africa's BIT Review,* in: Columbia FDI Perspectives – Perspectives on topical foreign direct investment issues edited by the Vale Columbia Center on Sustainable International Investment, No. 109, 25 November 2013, http://ccsi.columbia.edu/files/2013/10/No_109_-_Carim_-_FINAL.pdf.

[7] OECD (ed.), *Foreign Direct Investments for Development – Maximising Benefits, Minimizing Costs,* Paris 2002, http://www.oecd.org/ investment/investmentfordevelopment/1959815.pdf.; UNCTAD (ed.), World Investment Report 2015, http://unctad. org/en/PublicationsLibrary/wir2015_en.pdf, pp. 5 et seq.; cf. also Hallward-Driemeier, M., *Do Bilateral Investment Treaties Attract Foreign Investment? Only a Bit … and They Could Bite,* Washington 2003, http://www-wds.worldbank.org/ servlet/WDSContentServer/WDSP/IB/2003/09/23/000094946_03091104060047/Rendered/PDF/multi0page.pdf.

[8] Drysdale, D., "Global Value Chains and ECA Policies", in: *CESifo Forum* 3/2014 (September), pp 5 et seq.; UNCTAD, ibid, pp. 8 et seq.

[9] UNCTAD (ed.), ibid, p.106; EU Commission (ed.), *Investment*, http://ec.europa.eu/trade/policy/ accessing-markets/investment/index_en.htm.

[10] http://www.encharter.org/fileadmin/user_upload/document/EN.pdf.

[11] Art. 207 of the Treaty on the Functioning of the European Union.

[12] Tietje, C. (2009), "Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon", in: Tietje, C., G. Kraft and M. Lehmann (eds.): *Beiträge zum Transnationalen Wirtschaftsrecht* 83, http://tietje.jura.uni-halle.de/sites/default/files/ altbestand/Heft83.pdf; Johannsen, S.L.E. (2009), "Die Kompetenz der Europäischen Union für ausländische Direktinvestitionen nach dem Vertrag von Lissabon", in: Tietje, C., G. Kraft and M. Lehmann (eds.): Beiträge zum Transnationalen Wirtschaftsrecht 90, http://tietje.jura.uni-halle.de/sites/default/files/altbestand/Heft_90.pdf.

[13] For text the German Model Treaty 2009 (German/English), see http://www.iilcc.uni-koeln.de/fileadmin/institute/iilcc/Dokumente/matrechtinvest/VIS_Mustervertrag.pdf.

[14] For text of the 2012 U.S. Model Bilateral Investment Treaty, see https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP %20Meeting.pdf.

[15] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Towards a Comprehensive European International Investment Policy, COM(2010)343 final, http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147884.pdf, p. 6.

[16] Cf. EU Commission (ed.), *Comprehensive Economic and Trade Agreement (CETA)*, http://ec.europa.eu/trade/policy/in-focus/ceta/.

[17] EU Commission (ed.), *Investment*, http://ec.europa.eu/trade/policy/accessing-markets/investment/index_en.htm.

ing negotiations with the United States, but also in the future as this obliges the EU Commission to align internally within the EU with the competent bodies in the middle of the negotiation process, as well as increasingly with the public, as shown by the consultation process launched by the EU Commission with respect to TTIP.

During the recent negotiations on TTIP in particular, fundamental criticism on investment protection as such has been raised by politicians, non-governmental organizations and the public. The critics focus especially on the substantial standards of protection for foreign investors on the one hand[18] and on legal protection through investor-state-dispute settlement (ISDS) on the other, whereby issues of the competence of national courts, transparency, the independence of arbitrators and public interest are raised.[19] While debate on individual aspects of this criticism is a natural requirement of political discourse in democratic societies, to fundamentally question the existence of a well-established legal framework in international investment law seems too far-reaching. In particular, as BITs for the promoting and protection of investments do provide benefits for all sides involved from the host State – by monetizing its natural resources contributing to the State's budget, getting knowhow etc. – to the home State – by supporting employment and investors getting appropriate protection for their investments, which are often significant compared to the size of the company ranging from global players to small and medium sized enterprises.[20] This would be even more inappropriate if such development were to be caused purely by changes in the competence for FDI within the EU.

Standards of protection at stake

Turning to the first area of criticism, namely protection standards for foreign investors, key arguments seem to be that the standards are drafted too vaguely in the bi- and multilateral instruments, providing too wide a scope for interpretation by arbitral tribunals, who decide on investment disputes and therefore favour foreign investors in an inappropriate way.[21]

There are a number of points to be raised in this context. Generally looking at the criticism of the existing standards, it seems worthwhile to look – although painted with a broad brush – into the development of international investment law from its roots in customary international law combining economic activities with the rights of aliens, to its codification through bi- and multilateral instruments and the definitions contained therein, which mark an important step forward in the development of a more specific legal fundament in this area of law. From its very early stages in merchant concessions trough Treaties of Friendship, Commerce and Navigation to the codified system of bi- and multilateral investment treaties, standards for the protection of foreigners, including foreign investors, towards the host State have become increasingly specified.[22] The current debate on standards, however, is more reminiscent of the contradicting position to this development first published by the Argentine lawyer Carlos Calvo in 1868, which in essence allows the host State to reduce its protection of alien property when also reducing guarantees for property held by nationals.[23] It is worthwhile to point out that enterprises as legal entities (unlike natural persons) cannot always rely on other international legal instruments for the protection of their investments.[24] Furthermore, analysis shows that the interpretation of arbitral tribunals of fair and equitable treatment standards, for example, are quite narrow, contrary to frequently raised criticism.[25]

Furthermore, from a practical perspective, experience shows that overly narrow definitions of fair and equitable treatment, for example, do not only reduce the level

[18] For reference see European Federation for Investment Law and Arbitration (ed.), *A Response to the Criticism against ISDS,* Brussels 2015, p. 6, footnote 9.

[19] Eberhardt, P., C. Olivet, T. Amos, and N. Buxton, ibid *Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fueling an Investment Arbitration Boom,* Brussels/Amsterdam 2012, edited by Corporate Europe Observatory and the Transnational Institute http://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf.

[20] For Germany, see the significantly increased applications for investment guarantees of small and medium-sized enterprises in PricewaterhouseCoopers (ed.), *Investitionsgarantien der Bundesrepublik Deutschland – Direktinvstitionen Ausland, Jahresbericht 2014,* Hamburg 2015, pp. 26 et seq.

[21] For reference, see European Federation for Investment Law and Arbitration (ed.), ibid.

[22] Instructive the recent study Tietje, C. and F. Baetens, *The Impact of Investor-State-Dispute Settlement (ISDS) the Transatlantic Trade and Investment Partnership prepared for the Minister for Foreign Trade and Development Cooperation,* Ministry of Foreign Affairs, The Netherlands, 24 June 2014, http://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCEQFjAA&url=http%3A%2F%2Fwww.rijksoverheid.nl%2Fbestanden%2Fdocumenten-en-publicaties%2Frapporten%2F2014%2F06%2F24%2Fthe-impact-of-investor-state-dispute-settlement-isds-in-the-ttip%2Fthe-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf&ei=8AaQVdD6MemsygOh86fYAg&usg=AFQjCNHifS73ozoVZqoGjG8cirkrk-XK2A, p. 15 et seq.; Dolzer, R. and C. Schreuer, *Principles of International Investment Law,* Oxford 2008, p. 11 et seq.

[23] Cf. Dolzer, R. and C. Schreuer, *Principles of International Investment Law,* Oxford 2008, p. 12; cf. also Schill, S., *From Calvo to CMS: Burying an International Law Legacy – Argentina's Currency Reform in the Face of Investment Protection: The ICSID Case CMS v. Argentina*, in: SchiedsVZ 2005, pp. 285 et seq.

[24] Cf. BDI (ed.), *Investitionsschutzabkommen und Investor-Staat-Schiedsverfahren: Mythen, Fakten, Argumente,* Berlin 2015, http://www. bdi.eu/download_content/GlobalisierungMaerkteUndHandel/Investitionsschutzabkommen_und_ISDS.pdf, p. 8.

[25] Tietje, C, and F. Baetens, ibid, pp. 57 et seq.

of protection; but also open up loopholes for host States to circumvent the rules established by international treaties. In the oil and gas industries in particular, the examples demonstrate that host States either modify their legal framework, so that only foreign investors are affected like in Venezuela in 2006 und 2007;[26] or they use quite some pressure to force foreign investors into renegotiating their investment agreements as the Libyan government did in 2008.[27] This is not surprising, however, as the analysis of trends in the debate over permanent sovereignty over natural resources clearly indicates that producer States are more inclined to assume rights, a phenomenon also described as resource nationalism.[28] Interestingly, a recent example from a different area, namely from the current debate on the critical financial situation of Greece, also shows that States develop quite some creativity in resolving home-made problems. Perhaps inspired by an Ecuadorian practice from 2007, a Committee of the Greek Parliament is reported to have declared that measures by the EU, the International Monetary Fund and the European Central Bank violate the Greek Constitution and are contrary to human rights and therefore illegal.[29]

Recent approaches like the draft document for a model investment protection treaty with investor-state-dispute-settlement for industrial States taking into account the United States *(Modell-Investitionsschutzvertrag mit Investor-Staat-Schiedsverfahren für Industriestaaten unter Berücksichtigung der USA)* initiated by the German Federal Ministry of Economy seem quite astonishing.[30] The preamble of the model treaty explicitly States that "this agreement does not provide a higher level of protection to foreign investors than provided by each Contracting Party to its own domestic investors and investments".[31] The impression – although maybe not the intention – is reminiscent of 'From Calvo with Love'. A closer look at the specific provisions of this draft document (which – as revealed by the comments it features – are inspired by the draft of CETA[32]) indicates how narrowly definitions are drawn. For example, to establish 'manifest arbitrariness' as a criterion for fair and equitable treatment[33] may very well be taking the standard *ad absurdum.* To qualify the measure of a State as arbitrary by most national laws requires a very high degree of State interference in the rights of an individual. So interpretation would probably be very challenging. Would an argument *e contrario* even lead to the conclusion that arbitrariness, as long as it is not manifest, is legal?

Such approaches do not seem to be in line with the relevance of FDI for enterprises, nor do they reflect the approach towards a common international investment policy taken by the EU Commission that: "A comprehensive common international investment policy needs to better address investor needs from the planning to the profit stage or from the pre- to the post-admission stage".[34] It should be acknowledged that the standards of protection do not only protect foreign investors, but by the same token, promote investment in the host State. Enterprises do contribute to value creation in the host State with significant investments, which that State otherwise may not have been able to achieve in the same form in the respective economic area. It cannot be denied that the level of protection is one factor considered by enterprises when taking investment decisions, although it is not the only criterion.

The various reasons mentioned above justify that standards of protection have to be at a high level and flexible to cater for the variety of measures taken by host States in practice. Furthermore, while open discussion of reasonable improvements to the wording of certain standards is positive, criticism should not be lead to rotten compromises in this respect. Enterprises need predictability with respect to the international legal framework relating to their investments as part of their investment decisions.

Investor-state-dispute-settlement blackmailed

The right of foreign investors to initiate arbitral proceedings against a host State in their own name under

[26] See in particular Organic Law, Official Gazette No. 38.493, 4 August 2006, text at www.ogel.org, L&R by Country, Decree 5.200 with Rank and Force of Law Concerning the Migration of the Association Agreements of the Orinoco Belt and of the Exploration Risk and Profit Sharing Agreements into Mixed Companies, Official Gazette No. 38.632, 26 February 2007, text at www.ogel.org, L&R by Country.

[27] Cf. Financial Times 13 June 2008, p. 18, "Oil Price Helps Libya Extract Better Terms from Eni".

[28] Dolzer, R., *International Co-operation in Energy Affairs*, in: Hague Academy of International Law (ed.), Recueil de cours, volume 372, Leiden/Boston 2015, pp. 399, 421 et seq. with further references.

[29] Schoepp, S., *Varoufakis' Kreuzzug,* in: http://www.sueddeutsche.de/politik/griechenland-varoufakis-kreuzzug-1.2530549, 21 June 2015.

[30] http://www.bmwi.de/BMWi/Redaktion/PDF/M-O/modell-investitionsschutzvertrag-mit-investor-staat-schiedsverfahren-gutachten,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf.

[31] Ibid, p. 4.

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

[33] http://www.bmwi.de/BMWi/Redaktion/PDF/M-O/modell-investitionsschutzvertrag-mit-investor-staat-schiedsverfahren-gutachten,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf, pp. 11 et seq.

[34] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Towards a Comprehensive European International Investment Policy, ibid, p. 5.

BITs, which is referred to as ISDS in the current debate, is another controversial issue. Critical voices claim that access of foreign investors to ISDS is too easy, lacks legitimization, is non-transparent, raises independency concerns and inappropriately favors foreign investors towards unwelcomed measures by the host State.[35]

Initiating an arbitral proceeding against a host State from a practical point of view is far from easy. Often foreign investors, particularly in the oil and gas industries, invest on the basis of concessions or other investment agreements lasting for 30 to 50 years; and are almost tied to the host State. To sue that State can, in such a situation, be equivalent to exiting a country. Furthermore, there is no guarantee of success in the first place, especially given the uncertainties of any award being executed, despite all of the international obligations of host States, e.g. those parties to the New York Convention.[36]

Furthermore, we should remind ourselves that BITs or similar international instruments on a multilateral level containing ISDS have been negotiated by sovereign States and ratified in accordance with national law also involving national parliaments. There is a lot to be said about bargaining power in negotiations between States at different stages of development and respective interdependency; and potentially even more about the State of the respective national laws.[37] However, what cannot be said, unless one believes in truly direct democratic concepts, is that the current system is not legitimized.

With respect to transparency, it is important to mention that the International Center for the Settlement of Investment Disputes (ICSID) belonging to the World Bank, as well as the secretariat of the Energy Charter Treaty, publish on their websites the matter in dispute, the parties to the dispute and the members of the arbitral tribunal. In many cases the decisions are also published. To make such publication an obligation could well constitute an improvement. In going far beyond such elements, like the UNCITRAL Rules 2014[38] do, those advocating this level of transparency should consider that the respective provisions incorporate ISDS instruments originate far more in Anglo-American concepts of procedural law than in European jurisdictions. From the perspective of rationally settling highly complex matters with certain links to political aims, the instruments introduced by the UNCITRAL Rules may even be detrimental to the independence of the arbitral tribunal and place witnesses at risk. Certainly, emotions will be a serious obstacle to reaching amicable settlement, which is frequently important for all parties involved. In the light of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration adopted by the UN General Assembly on 10 December 2014[39] making explicit reference to the UNCITRAL Rules, however, it seems that utmost transparency is on its way. It remains to be seen whether the advantages claimed by the advocates of such broad transparency will outweigh the disadvantages mentioned above.

Just as access to independent courts for aliens, a rightfully praised achievement of the first half of the 20th century, is a fundamental principle of the rule of law, in essence the maintenance of ISDS as an effective instrument of legal protection is important. Experience has proven that even in the 21st century, claimants of a foreign nation cannot be expected to be treated in an unbiased manner in front of national courts under all circumstances, and sometimes they are even denied access to national courts altogether. Additionally, in States with less developed legal and court systems, a differentiation may be considered by such States as improper and from the political perspective impractical, a systemic bias may add to the problem. Even in industrialized States the legal framework may contain deficiencies in the legal protection of aliens, e.g. to invoke violations of international legal obligations such as non-discrimination.[40]

However, the requests raised[41] and the proposals recently tabled, particularly by the EU Commission[42], leave doubt as to whether this topic is addressed in a rational manner. The main issues seem to be the independence of arbitrators on the one hand and the alleged lack of a review mechanism for arbitral awards. The first issue concerns potential conflicts of interest e.g. if arbitrators being lawyers serve in other cases as counsel for parties to the dispute. In this respect a number of facts should be considered. Lawyers, which

[35] Eberhardt, P. C. Olivet, T. Amos and N. Buxton, ibid.
[36] Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated 10 June 1958, http://www.newyorkconvention.org/ texts.
[37] Illustrative on this point the differentiate picture at Dolzer, R. and C. Schreuer, ibid, pp. 8 et seq.
[38] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, January 2014, http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf.
[39] http://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf.
[40] Cf. BDI (ed.), ibid, p. 8.
[41] Eberhardt, P., C. Olivet, T. Amos and N. Buxton, ibid.
[42] EU Commission, *Concept Paper Investment in TTIP and beyond – the Path for Reform Enhancing the Right to Regulate and Moving from Current ad hoc Arbitration towards an Investment Court,* http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF, pp. 7 et seq.

in their national jurisdiction are often considered to be part of the national juridical system, are typically subject to regulatory obligations of impartiality and are prevented by law or respective law society rules to enter into conflicts of interest. As a legal consequence they may even risk their license to carry out their profession for non-compliance. Consequently, the International Bar Association has enacted Guidelines on Conflicts of Interest, which are continuously updated and give clear guidance on situations of conflict.[43] In practice the independence of an arbitrator is one of the most important criteria for choosing a party appointed arbitrator by a party to a dispute.[44]

Proposals made to establish lists of arbitrators and/or to have only judges or previous judges to be admitted would neither solve the alleged issue, nor would they provide a sensible solution. Experiences with lists of arbitrators do exist in the context of ICSID. However, the notion of lists of arbitrators ensuring independence seems curious for at least one obvious reason. How should independence be established *ex ante* in any future given case? Judges as only viable candidates will most probably be difficult to identify. Foremost the expertise of an arbitrator in ISDS requires knowledge of international investment law as a specialized area of public international law. National judges, however, are trained and do practice in their national laws. Typically, if a dispute in front of national court involves public international law matters, the court has to refer to external experts, which are often law firms or respective academics. Therefore, national judges are neither trained in this legal area, nor do they have experience.

In view of the alleged lack of a review mechanism, it should be noted that at least the ICSID Convention contains an annulment procedure whereby arbitral awards can be challenged for an enumerated number of reasons.[45] However, the criticism also targets the inconsistency it finds in the landscape of international arbitral awards.[46] Of course, it has to be mentioned that inconsistencies regularly result either from differences in facts between the cases, or differences in the underlying BITs. A standing appellate mechanism as proposed by the EU Commission[47] seems to be a viable solution, but certainly remains a mid to long-term approach.

Summary

In short, from an industry perspective, and particularly in terms of the oil and gas industry, a robust system of protection for FDI is imperative. Invoking that robust investment protection only 'makes the rich richer' falls short of acknowledging the benefits that a host State can derive from FDI, be it through benefits for its economy, for its State budget or even for the improvement in the status of the rule of law. Therefore, FDI creates value and is mutually beneficial for the investor and the host State, so its protection should be in the interest of both.

Enterprises, in the interest of their stakeholders, have to strive to mitigate risk. Although, entrepreneurial risk remains residual, enterprises rely on a well-established legal framework for the protection of their foreign investments as one element of their investment decisions. The flux in the established legal framework, combined with fundamental criticism of existing standards, should neither lead to the abandonment of the entire system nor to a decrease in the level of protection. This does not mean that standards may not be reworded to prevent abuse or to correct demonstrated deficiencies. However, in the light of the above quote from the EU Commission with respect to a common international investment policy, they should require high compliance and flexibility, particularly in areas where knowhow or other immaterial assets are involved to serve as an efficient and effective protection of European investors.

Access to independent arbitral tribunals is a fundamental principle of the rule of law granting effective legal protection. Evolutionary modifications to the legal framework seem appropriate. While on transparency the framework already seems to have been modified substantially and foreign investors may have to adapt to it, the discussion on independence is still unfolding. The current proposals raise concerns that modifying the composition of arbitral tribunals may even sacrifice existing expertise and independence. It would be more appropriate for a system that it ultimately should be efficient and effective for the entities confronted with it in practice.

[43] IBA Guidelines on Conflict of Interest in International Arbitration dated 23 October 2014 http://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCEQFjAA&url=http%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3De2fe5e72-eb14-4bba-b10d-d33dafee8918&ei=IziQVZ7aLMvLygOv_Ki4Dg&usg=AFQjCNFevNZgKiVw0CZPEmhTtW0tnS2QLA&bvm=bv.96783405,d.bGQ.

[44] See also European Federation for Investment Law and Arbitration (ed.), ibid, pp. 18 et seq.

[45] Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 14 October 1966, https://icsid. worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf, Article 52.

[46] Tietje, C. and F. Baetens, ibid, pp. 112 et seq.

[47] EU Commission, *Concept Paper Investment in TTIP and beyond – the Path for Reform Enhancing the Right to Regulate and Moving from Current ad hoc Arbitration towards an Investment Court,* ibid, pp. 8 et seq.