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## EDITORIAL

### Ten Years of Transnational Dispute Management

*Mark Kantor*  
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#### Ten years of TDM

Ten years of TDM. A satisfying journey for those who started along the path with our founder Prof. Thomas Wälde in 2003 and for those who have joined along the way.

We have grown during that time into the preeminent forum for articles and papers aimed at practitioners, academics and policymakers worldwide with a special interest in transnational dispute management. TDM has indeed grown robustly, paralleling the robust growth of international investment law and investment treaty arbitration. Faithful to the vision of Prof. Wälde, though, the TDM community has not limited itself to investment treaty disputes. Instead, we have promoted discussion of international commercial arbitration, litigation over international issues in national courts, mediation of cross-border disputes, administrative law in national and international tribunals, labor and environmental disputes, the overlap between human rights law and tribunals and investments, the overlap between WTO dispute resolution and investments, administrative law and international matters, treaty making and treaty unmaking, and so many other methods for transnational dispute management. Moreover, we have discussed a wide array of tools for dispute resolution, including such means as the behavioural sciences, advocacy techniques, empirical studies, survey research and the like.

No other publishing platform covers this vital and constantly changing international legal, business and public environment so well.

TDM could not have been successful without dedicated support from MARIS, our publisher and their staff. And it simply would not have been worth the effort but for the presence of Prof. Charlotte Wälde. On behalf of the TDM community, we thank you.

There would be no TDM - no TDM community - without our sister enterprises. Most obviously, our twin sister OGEMID - ***the*** uniquely valuable forum. Our cousins at OGEL and OGELFORUM are a never-ending source of ideas in the world of energy. And our younger siblings at YOUNG-OGEMID create our future at the same time as they energetically create their own futures.

Further, there would surely be no TDM without our authors. The efforts of our authors, whether short or long, practical or conceptual, case-driven or empirical, make us the first place to visit for cutting edge reports and analyses with respect to international dispute resolution.

Collectively, you are the TDM community, and you are a particularly interesting set of people. We are glad to be able to spend our time with you.



OGEL is supported by  
the IBA and CEPMLP

The articles that comprise the 10<sup>th</sup> Anniversary Issue illustrate very well the value of TDM to the TDM community. In just this issue alone, we explore expansion of rights in the Americas, damages and State liability, procedural innovations to address corruption claims before investment tribunals, regionalization of investment disputes, expertise in international disputes, the scope of expropriation protections, cutting edge commentary on the amicus brief of the U.S. Department of Justice before the U.S. Supreme Court in *BG Gas v. Republic of Argentina*, energy transit under the GATT, Chinese arbitral institutions, third-party funding in investment treaty arbitration, and so much more. That wide range of expert commentary demonstrates our commitment to a diversity of viewpoints and subjects within transnational dispute management. The value of that commentary demonstrates our commitment to quality.

We have dedicated the past ten years to Prof. Wälde's vision. And so, we dedicate this 10<sup>th</sup> Anniversary Issue to his memory.

We will continue on this journey, secure in the knowledge that this ever-changing world of transnational dispute management will keep us interested and interesting. And so, we dedicate the next ten years to you, the TDM community.

Thank you.

Mark Kantor  
Editor-in-Chief  
Transnational Dispute Management

## TEN YEARS OF TRANSNATIONAL DISPUTE MANAGEMENT (TDM)

### Looking to the Future: Three "Hot Topics" for Investment Treaty Arbitration in the Next Ten Years

Matthew Weiniger  
Mike McClure

Herbert Smith Freehills LLP

#### Introduction

As TDM marks its tenth anniversary, the landscape of investment treaty arbitration in 2013 is very different from 2003. In 2003, the practice was in its infancy with only 34 reported awards. Now there have been over 168. As a result of those awards, a number of issues that were the subject of scholarly debate in 2003, such as the meaning of "investment" or "national", are now settled within comprehensible parameters. However, in 2013, scholars and practitioners are being presented with a host of new issues to debate. Are mass claims permissible within the ICSID framework? How should consent to such mass claims be interpreted? How are national courts performing their role of supervising investment treaty tribunals? There are many more

issues. In addition, some issues that were debated in 2003 remain on the table, notably the scope and application of most favoured nation (MFN) provisions.

This article will consider three areas that have prompted debate in recent years that are likely to be "hot topics" for scholars and practitioners for the next ten years. These issues are: (i) mass claims; (ii) competence and judicial supervision (particularly post *BG v Argentina*); and (iii) precedent (with a focus on the MFN debate). A common theme for each "hot topic" is that they concern (to a certain extent at least) two of the fundamental issues for investment treaty practitioners, namely jurisdiction and consistency.

[Full article here](#)

### Investor State Arbitration in Central Asia

Dr. Borzu Sabahi  
Diora M. Ziyaeva

Curtis, Mallet-Prevost, Colt & Mosle LLP

#### Introduction

This report was prepared based on a country-by-country survey of investment treaties and arbitral decisions of the five Central Asian states. The report has five sections, including a number of analytical charts and six appendices which include various tables about disputes in which each Central Asian state has been involved.

In Section III, we examine the following information for each of the Central Asian states: the number of disputes, the economic sectors in which the disputes arise, the nationality of the investor-claimants, and other statistical information. In Section IV, we analyze, on a topic-by-topic basis, the key issues discussed in all publicly available investment treaty cases involving Central Asian states including: the interpretation of treaties; the jurisdictional issues such as those relating to the law applicable to jurisdiction, mandatory recourse to local courts, consent, jurisdiction *ratione personae*, and jurisdiction *ratione materiae*; the merits issues including the arbitral tribunals' application of expropriation, fair and equitable treatment ("FET") and other protections in investment treaties and international law; the issues relating to remedies including compensation and restitution; and the enforcement and annulment of the awards. Section V provides some preliminary conclusions concerning the possible trends in disputes in Central Asia based on the review of the aforementioned data.

This report has six appendices in which we have included information including various analytical charts and tables about disputes in which each Central Asian state has been involved.

[Full article here](#)

## International Dispute Resolution Trends in Asia

*Professor Kun Fan  
Faculty of Law, The Chinese University of Hong Kong*

### Abstract

The development of trade and investment in Asia has resulted in the increase of international commercial transactions. In many parts of the region, rapid development has meant increased caseloads for already overburdened courts, further leading to slow adjudication of commercial disputes. As a result, alternative dispute resolution (ADR) mechanisms, including arbitration, have become more crucial for businesses operating in Asia. Most Asian countries have now ratified the New York Convention and the ICSID Convention. A growing numbers of Asian jurisdictions have amended outdated laws and have adopted the principles established by the Model Law. At the same time, there is a burgeoning number of Bilateral Investment Treaties (BITs) and investment chapters incorporated into bilateral and regional Free Trade Agreements (FTAs) in Asia. This article shed lights on the recent legal developments of foreign direct investment (FDI) in Asia and gives a contemporary overview of international dispute resolution trends in the Asian region.

[Full article here](#)

## The Role of Arbitration Institutions in China

*Pietro Ortolani  
University of Pisa*

### Summary

One of the most significant peculiarities of Chinese arbitration is that proceedings are necessarily administered by an arbitration commission: the Chinese Arbitration Law does not allow ad hoc proceedings seated in Mainland China. Arbitration commissions play a unique role in the Chinese system: they can act as a catalyst for future reform and for the general modernization of the arbitration system. The 2012 CIETAC Rules are, from this point of view, fundamental: the amendments introduce innovative provisions, which could beneficially influence the Chinese arbitration world on issues such as interim relief, the language of the proceedings and the taking of evidence. Conversely, the prohibition against ad hoc arbitration can have pathological consequences, when parties select an institution that might not be qualified as an 'arbitration commission' pursuant to the Arbitration Law. The article addresses the recent problems concerning the status of CIETAC's sub-commissions and argues that a judicial interpretation on the matters is urgently needed.

[Full article here](#)

## Economic, Social and Cultural Rights in the Americas: A Potential for Expansion

*Anibal Martin Sabater  
Norton Rose Fulbright*

### Introduction

In November 2012, during its 146<sup>th</sup> Period of Sessions, the Inter-American Commission on Human Rights created a thematic Unit on Economic, Social and Cultural Rights. The Unit's mandate is, among other things, "to cooperate with the analysis and evaluation of the situation of these rights in the Americas, provide advice to the IACHR in the proceedings of individual petitions, cases and requests of precautionary and provisional measures which address these rights." The creation of this Unit highlights the importance that economic, social and cultural rights have gained in recent years in the hemisphere. This article provides a brief summary of some of the economic rights recognized by the Inter-American Court of Human Rights and Inter-American Commission on Human Rights, and provides some considerations regarding how these rights might evolve and expand in the coming years.

*Footnotes omitted from this introduction.*

[Full article here](#)

## English Law Clause in Agreement Not Determinative of Approach to Corporate Veil in 'rule B' Attachment to Enforce a Pending Foreign Award Against Assets Traced in US

*Michael Redman  
Focus Ltd.*

### Abstract

In an admiralty action to secure a pending foreign arbitral award, the US Second Circuit Court of Appeals ruled that a veil piercing claim will be subject to a conflict of laws analysis and will take into account assets traced within the jurisdiction. A piercing claim based on an alter ego analysis will not be defeated by automatically having to apply the English law provisions of the underlying contract.

[Full article here](#)

## How to Deal With Zeus - Advocacy of Parallel Proceedings From an Investor's Perspective

Haig Oghigian  
Mami Ohara

Baker & McKenzie

### Abstract

Since foreign investment is a long term financial engagement in another nation, the investor is vulnerable to the interference by the sovereign - Zeus of Mount Olympus. When a sovereign state fails to comply with applicable contractual or treaty obligations, investor protection becomes an important issue. The authors focus on how the investor can exert pressure on the sovereign state to enforce treaty or contractual obligations by making use of different fora in arbitration. Besides arbitration, there are also other theoretically possible means to achieve the same end, such as the use of diplomatic protection and obtaining judgment from the International Court of Justice. However, the authors do not recommend the investor to engage in a long drawn-out battle with the sovereign state, and indicates that the use of "parallel proceedings" is the more preferable approach to secure protection of foreign investment against the sovereign state.

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↳ [Full article here](#)

## Principles of State Liability and their Applicability in Investment Arbitration

Dr. Irmgard Marboe  
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### Introduction

At the core of international investment arbitration is the idea of holding a state accountable for its wrongdoing. This is similar to the situation under national law, when an individual has suffered damage by unlawful actions of a state and tries to get monetary compensation. While in the context of investment arbitration, the dispute about the compensability of such damage is regarded as an issue of public international law, in particular the law of state responsibility, it might also be of interest to evaluate the liability of public authorities on the basis of state liability under national law. Is not every state liable for its wrongdoings and damage caused by its organs? Respective rules and procedures appear to exist in most jurisdictions. The argument can be made that a state who violates right of investors can also be held accountable on the basis of general principles of state liability.

The idea to view international investment law from the perspective of national administrative or public law and to apply the corresponding principles has been the subject of a number of comparative legal studies. The underlying rationale is that public international law appears not in all aspects appropriate for solving disputes between a state and a foreign investor. It has been pointed out that the legal rules governing investment protection have also certain similarities with administrative law. The author of the present article has participated in comparative studies on this subject and tried to analyse a number of jurisdictions with a view to identify some common principles in the law of liability of states for administrative wrongdoing. The present article will now go further into a qualitative analysis of some specific aspects of the concept of state liability as it exists in various legal systems. This shall then allow to draw a conclusion, if and to what extent there exist common or general principles of state liability which could be applied in investor-state arbitration.

The basis of the present analysis is a comparative study of the laws of Austria, France, Germany, Italy, Spain, Switzerland, United Kingdom, and United States, as well as on the jurisprudence of the Court of the European Union and of the European Court of Human Rights.

Footnotes omitted from this introduction.

↳ [Full article here](#)

## Damages Assessment in Cross Border Sales Between Related Parties

Sebastian Zuccon  
Compass Lexecon

### Abstract

Discriminatory government tax and regulatory measures may damage an international party's cross-border sales. Those measures may violate commitments in investment treaties to most-favored-nation treatment, national treatment or fair & equitable treatment, as the NAFTA claims brought by Archer Daniels Midland (ADM)-Tate & Lyle, Cargill and Corn Products International on account of a discriminatory Mexican tax regime demonstrate. Similarly, commercial breach of contract claims regularly involve damages due to loss of sales and profits.

Many international companies, however, sell their goods and services to their own affiliates in the host country. Non-market sales between related parties raise challenging transfer price issues and therefore novel questions when calculating damages for the breach of treaty obligation or contract. The impediments to execute such type of intercompany transactions generally imply an economic loss for investors' assets held in different jurisdictions. The proper assessment of such losses should be based on the premise that cross border sales between related parties are conducted at market prices (based on the arm's-length principle). This allows that the value

created by the investor abroad and in the host country is assessed on fair market value basis. If the pricing of cross border sales departs from market prices, there is necessarily a shift in investor's value between jurisdictions, distorting the intrinsic value of the assets that are protected by the relevant investment treaty or commercial contract. I address those issues in this paper.

[↪ Full article here](#)

## Expropriatory and Non-Expropriatory Takings Under International Investment Law

*Professor Jan H. Dalhuisen  
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*Professor Andrew T. Guzman  
University of California, Berkeley*

### Abstract

The question of expropriation is at the heart of modern foreign investment law, yet remains an area of great uncertainty and ambiguity. Neither treaty law nor existing jurisprudence provides clarity on the questions of when government action amounts to an expropriation or what to do if does.

This Article provides a framework for approaching questions of expropriation that helps understand the key questions that must be addressed by investment tribunals or, for that matter, host countries and investors. We begin with the neutral category of takings, meaning any government action that negatively affects that value of an investment. We argue that a taking that is more than de minimis is an expropriation unless it promotes public welfare (which we also term "super public purpose") or is incidental to normal government activity. These we call non-expropriatory takings. Whether the taking is an expropriation or not, we must next ask if it is lawful. As is well known, an expropriation is lawful if it is made for a public purpose, is non-discriminatory, satisfies due process, and if the required compensation is paid. Whether lawful or not, the taking must not violate the fair and equitable obligation. We also investigate when non-expropriatory taking are lawful. Finally, the Article considers the compensation owed (if any) under each of the four categories constructed above: a lawful expropriation, an unlawful expropriation, an unlawful non-expropriatory taking, and even a lawful non-expropriatory taking.

[↪ Full article here](#)

## An International Investment Policy Landscape in Transition: Challenges and Opportunities

*Hamed El-Kady  
UNCTAD*

### Introduction

A fundamental paradox underlies international investment relations: while governments recognize the importance of foreign direct investment (FDI) in their national development strategies and acknowledge the need to regulate FDI; negotiations on a cross-sectoral multilateral investment treaty have universally failed. This has created a regulatory vacuum in the area of investment, which has prompted countries to map investment regulations through a bilateral approach, weaving a complex web of bilateral investment treaties (BITs). The global BIT network today comprises over 3000 treaties, involving 182 countries. What is more, during the past decade there has been a gradual shift in international investment policymaking from the bilateral to the regional level. In 2012 alone, more than 110 countries were engaged in more than 22 regional negotiations. While this regionalization trend provides an opportunity to consolidate the IIA regime, it has in fact in its current conceptualization, added to the complexity of the investment policy landscape. This article sheds light on some of the major developments at the regional level and the opportunities and challenges which have arisen from the rapid swell in regional investment policymaking.

[↪ Full article here](#)

## Public Interest in a Private Procedure - What Burden of Proof for Allegations of Corruption in International Arbitration?

*Sophie Nappert  
3 Verulam Buildings*

### Introduction

Address on the occasion of the Tenth Anniversary ICAL Conference, Panel on Corruption, 29 August 2013, Stockholm - How is it that allegations of corruption so effectively manage to put a spanner in the works of international arbitration? The least that can be said is that this is not our finest hour. We are in the 21st century, with a history of international arbitration spanning several decades. We have a number of international treaties condemning corruption. Yet we keep being foiled by this nemesis which is as old as mankind itself.

I would like to explore with you some of the areas of tension highlighting how international arbitration is still struggling with the proof of allegations of corruption, and open up discussion about potential avenues for solutions.

[↪ Full article here](#)

## "International" Arbitration in an Increasingly Regional World

*Claudia Ludwig  
Joanne Greenaway*

*Herbert Smith Freehills LLP*

### Executive Summary

The article examines the recent proliferation of institutions worldwide, looking first at the global expansion of the international institutions and then at the growth of independent regional institutions, whilst recognising that there is no clear dichotomy between the two models. Many of the major international institutions have recently expanded, or are seriously considering expansion, into new jurisdictions by setting up subsidiaries or entering into joint ventures/partnerships with regional centres. These global expansion plans seem to be driven, on one hand, by the international institutions themselves in order to address increased competition and, on the other hand, by new or existing regional institutions seeking to draw upon the experience and reputation of the international institutions and entering into partnership or similar arrangements with them. The growth in independent regional institutions is arguably driven largely by convenience factors such as location, contacts with local lawyers, language and culture as well as familiarity of the institution with the local process, court system and legal framework. The trend to regionalism can also be seen as a response to the legitimacy problems which international arbitration suffers in some parts of the developing world. Parties from emerging jurisdictions often want to be able to influence the arbitration process with their own tailored rules which are sensitive to local issues and appoint local arbitrators who understand them. At the same time, many such jurisdictions are promoting arbitration as a safe dispute resolution mechanism in order to attract investments. In parallel to the move to regionalism there has also been a move to specialisation as parties are increasingly interested in institutions that can deliver expertise in certain types of cases. This is evidenced by the continued growth of ICSID notwithstanding a recent backlash from certain South American states in particular.

The authors conclude that, while the growth of regionalism, in whichever form, is undeniable, this should not be seen as a threat to international arbitration. On the contrary, it should increase the trust users put in arbitration as a dispute resolution mechanism, help to resolve the credibility and legitimacy issues international arbitration faces and increase the efficiency and quality of the arbitral process. Nor should the growth of regionalism be seen as the only solution to the challenges international arbitration faces as a result of its increased global popularity. An increased sensitivity of arbitrators and those involved in the arbitration process is also crucial to take account of the background of the parties and the cultural context of the dispute from which it arises.

[↪ Full article here](#)

## Reflections on the Origins and Evolution of the International Minimum Standard of Treatment

*Gabriel Bottini*

*Arbitrator and Advisor on Issues of Int'l Law and Int'l Litigation*

### Summary

Part I of this article discusses the early developments of the international minimum standard after Root's famous speech. I argue that in this period legal theory on this standard tends to follow the path indicated by Root, although at the same time the ground was being laid for more "objective" contents of the standard to develop.

Part II briefly analyzes more recent developments and arbitral decisions on the international minimum standard. These decisions appear to depart from the original conception of the standard propounded by Root, *inter alia* because they do not rely (or at least not expressly) on a distinction between different categories of states. However, I caution that, at a deeper level, the tendency of some tribunals-not of States-to equate the minimum standard to the fair equitable treatment standard or other more demanding standards may have the effect of putting developing States to legal tests belonging to the legal systems of developed States.

Part III concludes by arguing that the original sin that affected the creation of the international minimum standard may still be present today in certain conceptions of the standards of protection of international investment law. I suggest that such conceptions are probably incompatible with modern international law, and that the fundamental idea of equality between nationals and foreigners-against which the minimum standard is in part a reaction-deserves a better place in the modern international law of foreign investment.

[↪ Full article here](#)

### Expertise in International Arbitration

*Bernardo Cremades  
David J.A. Cairns*

*B. Cremades y Asociados*

### Summary

This article provides a critical review of the role of expertise in international arbitration today. It considers the different options of the parties to incorporate expertise in the dispute resolution process, and the lengthy debate in international civil procedure regarding the special issues raised by expert evidence. The solutions proposed to date in international arbitration have included flexible proceedings, the recognition of express duties of impartiality on experts, mandatory communication, prescribed disclosure, and an active role for the

tribunal in managing expert evidence both in its preparation and in the questioning of experts at the hearing.

On the basis of this analysis the article discusses six key characteristics of the expert witness in international arbitrations namely that: (i) the expert is a witness; (ii) the expert enjoys certain privileges as a witness; (iii) the expert witness has special duties; (iv) the expert must be qualified as an expert; (v) a party-appointed expert is not required to be independent of the parties; and (vi) the role of the expert is to testify and to assist when required (and not to presume too much).

The article concludes by considering the implications of the emergence of the figure of the 'star' expert, who combines impressive qualifications in their field of expertise with qualities that are normally associated with legal counsel, particularly persuasiveness, communication skills and a strategic role in the management of the arbitration.

[Full article here](#)

### **From "Dealing in Virtue" to "Profiting from Injustice": The Case Against Re-Statification of Investment Dispute Settlement**

*Judge Charles N. Brower  
20 Essex Street Chambers*

*Sadie Blanchard  
Private International Arbitration Law Clerk*

#### **Introduction**

[2013 Harvard International Law Journal Symposium Keynote Address] - In 1998, the book *Dealing in Virtue* discussed the growth of international arbitration and a cadre of elite arbitrators who, through intense competition, established themselves as trustworthy to resolve high-stakes global disputes. The book observed mild opposition to arbitration from certain corners. Over the next decade and a half, that opposition grew more intense, predominantly from leftist academics and anti-globalization groups and from States that found themselves as respondents in investment treaty arbitrations. These opponents of investor-State arbitration argue that investment arbitration is biased in favor of multinationals, either harms or fails to benefit poor States, and interferes with the ability of democratic governments to pursue policies in the public interest.

A report published last year, entitled *Profiting from Injustice*, captures the spirit of arbitration opposition. It opens with the epigraph, "There is little use going to law with the devil while the court is held in hell." Ostensibly adopting that attitude, several States have withdrawn from the investment arbitration regime to differing degrees: Venezuela, Bolivia, and Ecuador have withdrawn from ICSID or reduced the scope of their consent to ICSID arbitration. South Africa is terminating its "first wave" bilateral investment treaties (BITs). Australia

has announced that it will no longer enter into treaties providing for international arbitration.

But criticisms of investment treaties and arbitration are based on emotion rather than on facts. Time permits me to share only a few of the many examples of how the claims of opponents of investment arbitration are either directly contradicted by data or are nothing more than bald assertions.

[Full article here](#)

### **Commentary on the US Solicitor General's Office (CVSG) brief in *BG Group PLC v. Republic of Argentina* (May 2013)**

*Laurence Shore  
Amal Bouchenaki*

*Herbert Smith Freehills LLP*

#### **Introduction**

The legal acumen of the United States Solicitor General ("SG") cannot be doubted. Invited by the United States Supreme Court to file a brief expressing the position of the United States on the Petition for a Writ of Certiorari in *BG Group PLC v. Republic of Argentina, No. 12-138*, the SG might have been expected to provide thoughtful support for the Petition.

The decision for which the Petition sought review, an opinion by Judge Rogers of the United States Court of Appeals for the District of Columbia Circuit, determined that it was for the U.S. District Court, and not for the investment treaty arbitral tribunal, to decide whether the investor-claimant had satisfied a precondition to arbitration. As a result, the D.C. Circuit made its own independent assessment of Article 8 of the Argentina-United Kingdom Bilateral Investment Treaty ("BIT"). In doing so, the D.C. Circuit set aside the *BG Group v. Argentina* final arbitral award rendered on December 24, 2007, and held that the Article 8 eighteen-month litigation requirement prior to commencing arbitration constituted a "temporal limitation" on Argentina's consent to arbitrate under the Treaty. Not only was this D.C. Circuit decision contrary to the well-reasoned opinions of the majority of other Circuit Courts, but it also revealed ignorance of, or at least lack of interest in, international law, the law applicable to the arbitral dispute.

[Full article here](#)

## Arbitrator and Counsel: the Double-Hat Dilemma

*Dr. Günther J. Horvath  
Freshfields Bruckhaus Deringer LLP*

*Roberta Berzero, Esq.  
The World Bank Group*

### Introduction

A topic really hotly debated in recent time is the so called "double-hat syndrome", the question of the propriety of lawyers acting as counsel and arbitrator in cases that raise largely the same or similar legal issues. The relevance of this topic can be felt even more if one considers that no ethical code of conduct exists for lawyers and arbitrators acting in arbitral proceedings. In this article, the authors will point out the main areas of debate, present the state of the art and propose some possible approaches to deal with the dilemma in exam. Particularly, Section 1 provides an overview on the status of ethics in international arbitration, Section 2 identifies the main issues of the topic at hand; Section 3 addresses the various standards used by the main arbitral institutions/rules; Section 4 touches upon why a distinction in this context should be made between investment treaty arbitration and international commercial arbitration; Section 5 gives a glimpse on some of the relevant case law; Sections 6 and 7 present a series of arguments in favor and against acting both as counsel and arbitrator; and Section 8 finally explores some ways forward.

↪ [Full article here](#)

## Whose money is it and should it matter? An essay on the Cost of Capital in International Arbitration

*Mick Smith  
Calunius Capital LLP*

### Introduction

[September/October 2013] This article is in the final stages of completion and will be added shortly. If you would like to be notified keep an eye on the Advance Publication page and the RSS Feed <http://www.transnational-dispute-management.com/journal-advance-publication.asp>

↪ [Full article here](#)

## Comment on Third-Party Funding and Nationality Issues in Investment Arbitration

*Philippe Pinsolle  
Quinn Emanuel Urquhart & Sullivan LLP*

### Introduction

If the use of third-party funding is relatively frequent in State court litigation, at least in certain jurisdictions, the same is, or perhaps was, not true in international arbitration, not to mention investment arbitration. Recently, however, third-party funding has attracted a lot of interest in the arbitration community. Various cases are reportedly funded by third parties, including investment arbitration cases. Third-party funding comes in various forms and shapes, and each of them potentially creates legal and practical issues. One of these issues is the potential impact of third-party funding on the nationality of the claimant in a given investment arbitration. Because in most cases the funding third party is entitled to a significant portion of the award, should it be favorable to the claimant, there is an argument that the funder becomes an interested party, and, in effect, a claimant for the portion that it is entitled to receive. The issue then becomes at what point, and under what conditions, does this entitlement affect the nationality of the claimant—a prerequisite question of jurisdiction in most, if not all, investment cases. After describing third-party funding (A), and nationality issues in investment arbitration (B), in general, we will analyze the circumstances in which, if any, the nationality of the claimant can change as a result of third-party funding (C).

© OUP 2012 - previously published in *International Investment Law & Policy 2010/2011* (Chapter 16, "Comment on third-party funding and nationality issues in investment arbitration" by Philippe Pinsolle). Republished with kind permission. More info at [www.vcc.columbia.edu/yearbook](http://www.vcc.columbia.edu/yearbook)

↪ [Full article here](#)

## Transit of Energy Resources Under GATT Article V

*Baurzhan Kurmanov  
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### Abstract

This study discusses the applicability of the World Trade Organization ('WTO') legal framework for the resolution of energy transit disputes. It has become an important topic due to the broadening scope of the WTO membership. For example, Russia has recently acceded to the WTO. One of the implications of this accession is that Russia may invoke Article V of the General Agreement on Tariffs and Trade which establishes a regime of free transit in international trade of goods and at the same time is bound by it. It is important due to the fact that Russia is exporting hydrocarbons itself and its pipelines are still vital in transportation of energy resources from

Central Asia to Europe. There is also a trend that some countries are becoming more skeptical to arbitration under investment treaties (e.g. Energy Charter Treaty). The WTO also benefits of its relatively consistent dispute settlement system which deserves more trust from developing countries. This underlines the possible importance of GATT Article V to provide a right to freedom of transit of energy resources.

[↪ Full article here](#)

## WTO Enforcement Procedures - Featuring Arbitration - A Technical Perfection

*Dr. Katarína Chovancová  
Faculty of Law; Pan European University*

### Introduction

The purpose of the present article is to discuss the current usefulness of ADR under the existing WTO legislative frame, focusing on arbitration. The emphasis will be on unusual arbitration under Article 21 and 22 of the DSU, which forms a part of the mainstream and is cyclically relied on in the enforcement WTO proceedings. In particular, availability of the arbitration under Article 25 of the DSU, which may be described as almost fully autonomous within the borders of the WTO, will be accentuated. In addition, future prospects of the use of subtly ignored Article 25 are going to be laid down as well.

[↪ Full article here](#)

## Applicable Law in Investor-State Arbitration: The Interplay between National and International Law (Hege Elisabeth Kjos) - Book review

*Professor Ilias Bantekas  
Brunel University*

### Introduction

The problem of applicable law in international arbitration has always been far more persistent in the investment rather than its commercial dimension. Indeed, the tumultuous oil arbitrations of the 1950s not only highlighted the naivety by which choice of law clauses were drafted in investment contracts but also the political, ethical and legal conundrums faced by arbitrators called upon to settle disputes involving choice of law clauses encompassing a maze of national laws, international law, religious norms and obscure trade usages. These times are long gone but they left a lasting imprint on the psyche of Arab and African politicians, such that led them to distrust arbitration altogether for a long time. The ICSID Convention has provided some degree of certainty but as Kjos aptly demonstrates in her analysis the interplay between national and international law still strains investment arbitrators in their choice of applicable law in particular situations. Hence, the book is not only

timely but also an excellent addition to the international investment literature on a topic for which much has been written but in respect of which a systematic and methodological framework was badly needed. In my opinion, this book succeeds in both of these endeavours.

*Hege Elisabeth Kjos, Applicable Law in Investor-State Arbitration: The Interplay between National and International Law, Oxford: Oxford University Press, 2013, pp 314*

[↪ Full article here](#)

## Basic Documents on the Settlement of International Disputes (eds. C.J. Tams and A. Tzanakopoulos) - Book review

*Timothy L. Foden  
Allen & Overy*

### Introduction

In this text, Professors Tams and Tzanakopoulos have gathered a collection of international agreements, treaties and other documents that bring together a large number of primary sources relating to the peaceful settlement of disputes in a usable and affordable format suitable mainly for students pursuing generalist classes in international law.

*Basic Documents on the Settlement of International Disputes compiled by Christian J Tams and Antonios Tzanakopoulos, Hart Publishing, September 2012. £45.00, 858 pages, Paperback. ISBN 9781849463034*

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## Integrating Sustainable Development Into International Investment Agreements, A Guide for Developing Country Negotiators (J.A. VanDuzer, P. Simons, G. Mayeda) - Book Review

*Dr. Heba Hazzaa*

### Overview

INTEGRATING SUSTAINABLE DEVELOPMENT INTO INTERNATIONAL INVESTMENT AGREEMENTS, A GUIDE FOR DEVELOPING COUNTRY NEGOTIATORS (The Guide), is a book by J. Anthony VanDuzer, Professor of Common Law, Penelope Simons Associate Professor of Common Law and Graham Mayeda Associate Professor of Common Law at the University of Ottawa, Canada. The Guide has been researched over five years and is reviewed by some of the field's most prominent practitioners.

The authors undertake the issue of integrating sustainable development in International Investment Agreements (IIAs) with a practical, solution-oriented approach. In the Guide, the authors compare current

IAs provisions and their interpretation by arbitral tribunals to sample provisions suggested in the Guide with the purpose of integrating notions of "Sustainable Development" into IIAs.

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