



Procedural Innovation

in Investor-State Dispute Settlement

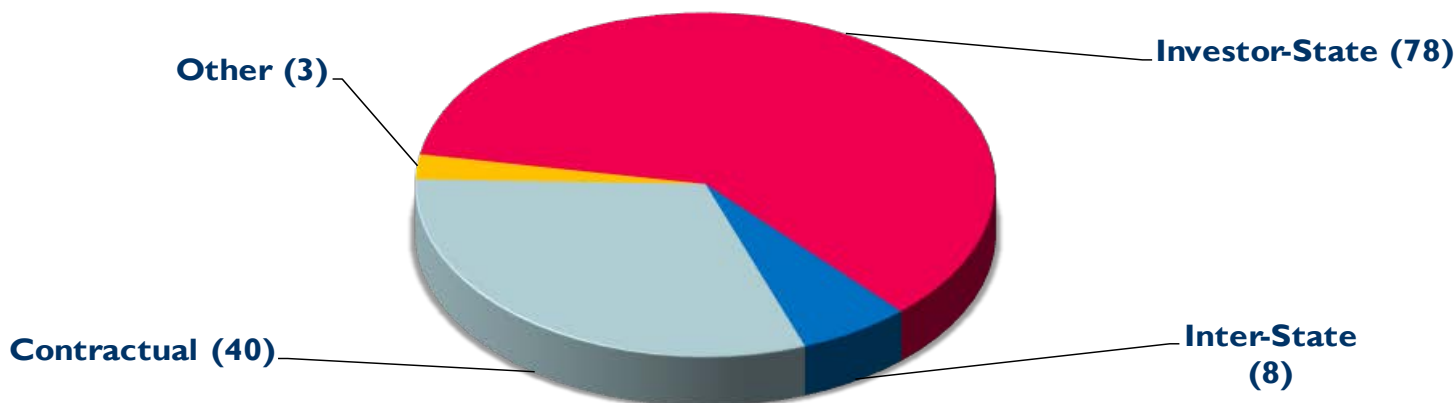
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Brussels International Energy Charter Forum
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Permanent Court of Arbitration

- Intergovernmental organization with 121 Contracting Parties (including all Member States of the EU)
- Secretariat for inter-State tribunals, investment treaty tribunals, and contractual cases, including various standing tribunals established under international treaties and conciliation/compliance proceedings.
- Has acted as, or designated an, “appointing authority” in 600+ cases



Genesis of Investment Arbitration

Period	Method
Middle Ages	Private Warfare
Middle Ages – 17 th Century	Private Reprisal
18 th Century – 19 th Century	Public Reprisal
19 th Century – 20 th Century	Diplomatic Protection / Inter-State Adjudication
20 th Century	Mixed Arbitration between Private Parties and States



Criticism of ISDS

1. ISDS proceedings lack transparency.
2. Arbitrators lack independence and impartiality.
3. Investors can easily abuse the system, bring frivolous claims, and escape wrongdoing.
4. ISDS leads to lower environmental, public health, and labour standards.



I. Transparency

“Remember that referendum about whether we should create a single market with the United States? [...] the government wouldn't cede our sovereignty to some shadowy, undemocratic body without consulting us. Would it?

[...]

It would allow a secretive panel of corporate lawyers to overrule the will of parliament and destroy our legal protections. Yet the defenders of our sovereignty say nothing.

The mechanism through which this is achieved is known as investor-state dispute settlement. It's already being used in many parts of the world to kill regulations protecting people and the living planet.”

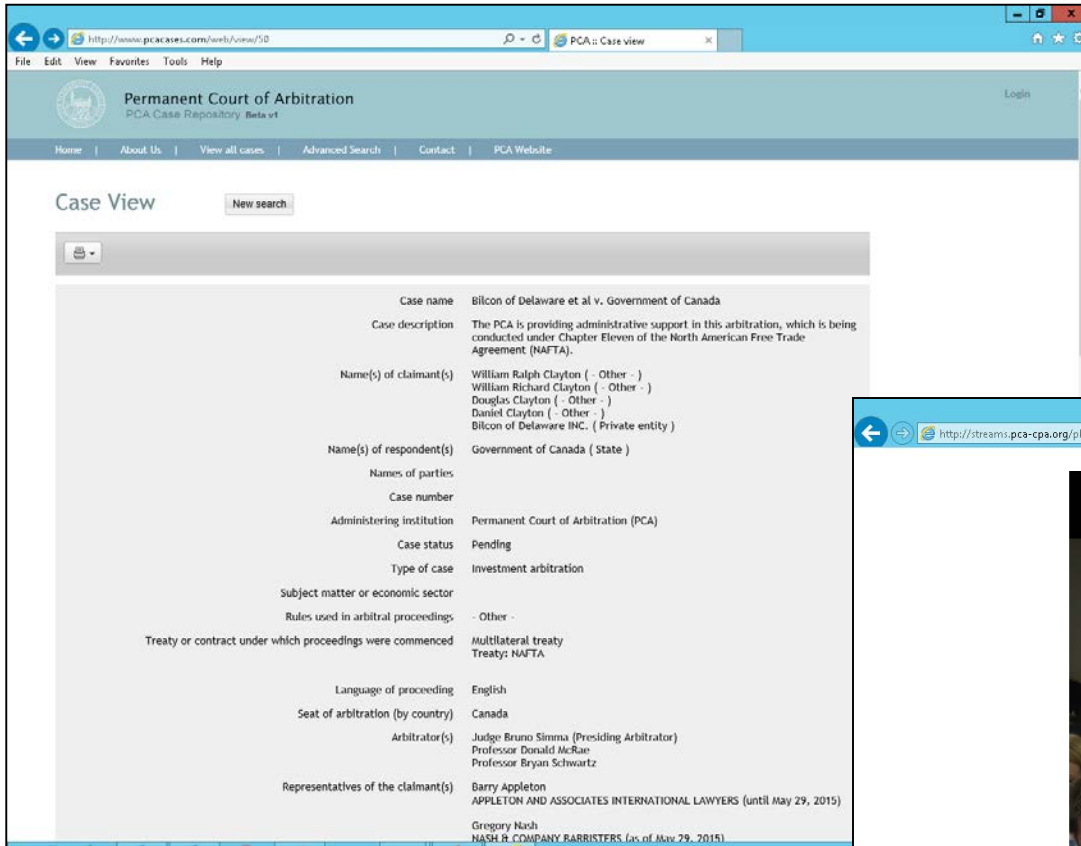
theguardian

“This transatlantic trade deal is a full-frontal assault on democracy”, George Monbiot, Opinion, The Guardian, 4 November 2013

I. Transparency


- **Methanex v. USA (2001)**
- **NAFTA FTC Notes (2001/2004)**
- **ICSID Rules (2006)**
- **UNCITRAL Transparency Rules (2013)**
- **Mauritius Convention (2014)**
- **SCC Rules (2017)?**

I. Transparency



The screenshot shows the 'Case View' page on the Permanent Court of Arbitration (PCA) Case Repository website. The page displays detailed information about the case 'Bilcon of Delaware et al v. Government of Canada'. The information is organized into a table-like structure with labels on the left and details on the right.

Case name	Bilcon of Delaware et al v. Government of Canada
Case description	The PCA is providing administrative support in this arbitration, which is being conducted under Chapter Eleven of the North American Free Trade Agreement (NAFTA).
Name(s) of claimant(s)	William Ralph Clayton (- Other -) William Richard Clayton (- Other -) Douglas Clayton (- Other -) Daniel Clayton (- Other -) Bilcon of Delaware INC. (Private entity)
Name(s) of respondent(s)	Government of Canada (State)
Names of parties	
Case number	
Administering institution	Permanent Court of Arbitration (PCA)
Case status	Pending
Type of case	Investment arbitration
Subject matter or economic sector	
Rules used in arbitral proceedings	- Other -
Treaty or contract under which proceedings were commenced	Multilateral treaty Treaty: NAFTA
Language of proceeding	English
Seat of arbitration (by country)	Canada
Arbitrator(s)	Judge Bruno Sinma (Presiding Arbitrator) Professor Donald McRae Professor Bryan Schwartz
Representatives of the claimant(s)	Barry Appleton APPLETON AND ASSOCIATES INTERNATIONAL LAWYERS (until May 29, 2015) Gregory Nash NASH R. COMPANY BARRISTERS (as of May 29, 2015)



The screenshot shows a live video stream from the PCA Multimedia Stream. The video depicts a man in a dark suit and red tie speaking at a podium. He is looking down at some papers on the podium. In the background, several other men in suits are seated at a long table, some looking towards the speaker. The setting appears to be a formal hearing room or conference room. The video player interface shows the URL 'http://stream.pca-cpa.org/play.php?width=800&height=600&file=http://stream.pca-cpa...' and the title 'PCA Multimedia Stream'.

2. Independence and Impartiality

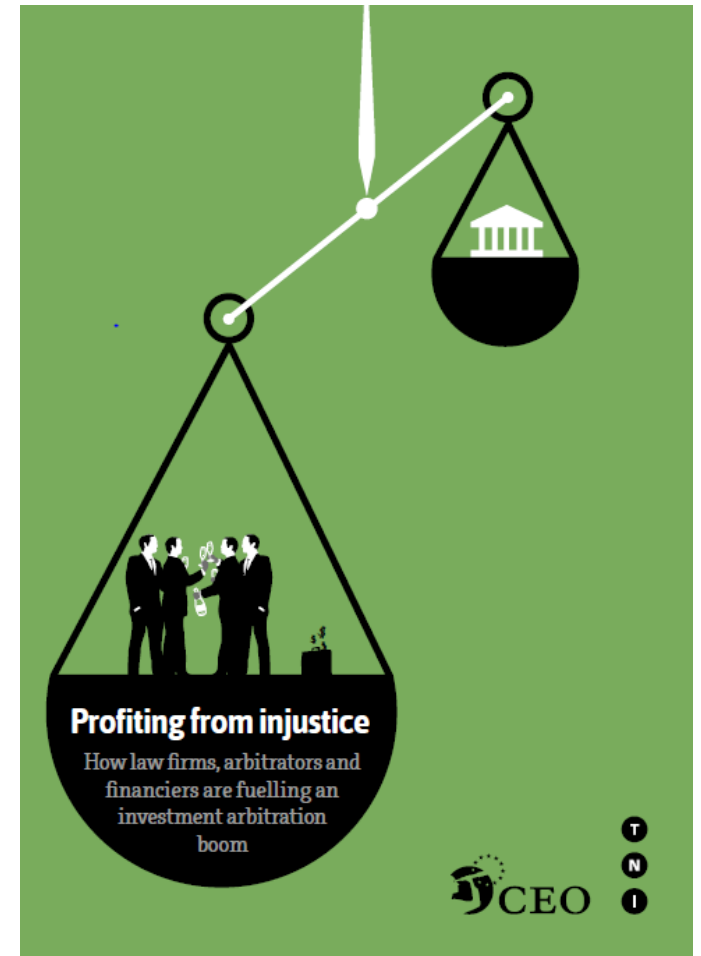


“Would you go to court with the devil if the court was held in hell? Of course not. But governments have done it hundreds of times. And continue to do so.

[...]

This report argues that the alleged fairness and independence of investment arbitration is an illusion. [...] Driven by their own profit interests, this ‘arbitration industry’ actively encourages an ever-growing number of corporate claims, while creating the necessary legal loopholes and funding mechanisms for its continued functioning. This industry is also responsible for growing its own business with pro-investor interpretations of the treaties.”

*“Profiting from Injustice”, Corporate Europe Observatory,
2012*



2. Independence and impartiality

ICSID	UNCITRAL
“on account of any fact indicating a <u>manifest lack</u> ”	“if circumstances exist that give rise to <u>justifiable doubts</u> ”

Contrasting decisions (Nov-Dec 2009):

1. Participaciones Inversiones Portuarias v. Gabon, ICSID (rejected)
2. Perenco v. Ecuador, PCA/IBA (upheld)
3. ICS v. Argentina, PCA/UNCITRAL (upheld)

Recasting ICSID standard: “relates not to the seriousness of the allegation, but to the ease with which the lack [...] may be perceived.”

1. Blue Bank v. Venezuela (2013) (upheld/rejected)
2. Burlington v. Ecuador (2013) (upheld)

3. Forum shopping

1. **Romak v. Uzbekistan:** simple cross-border sale contract does not meet inherent definition of investment
2. **Philip Morris Asia Ltd (Hong Kong) v. Australia:** dismissed case on grounds of “abuse of process” due to last-minute restructuring
3. **Guaracachi (US) & Rurelec (UK) v. Bolivia:** Tribunal dismissed first Claimant’s claim under denial of benefits clause

4. Investor wrongdoing/windfall

1. **Yukos v. Russia:** accepts claim for contributory fault
2. **Chevron v. Ecuador I:** accepts quasi-tax set off on the basis of “but for” causation
3. **Urbaser v. Argentina:** accepts jurisdiction over counter-claim based on UN Guiding Principles

Public concern	CETA	TTIP (EU informal proposal)	TPP
<p>I. Lack of transparency</p>	<p>Full transparency:</p> <ul style="list-style-type: none"> • UNCITRAL Transparency Rules • Documents available to public (website) • Hearings open to public • Submissions from interested third parties • Non-disputing party submissions <p>(Investment Chapter, Art. X.33 and X.35; Annexed Rules of Procedure and Code of Conduct, consolidated CETA text)</p>	<p>Full transparency:</p> <ul style="list-style-type: none"> • UNCITRAL Transparency Rules + additional obligations • Documents available to public (website) • Hearings open to public • Submissions from interested third parties • Non-disputing party submissions <p>(Section 3, Arts. 18 and 23, EU proposal)</p>	<p>Full transparency:</p> <ul style="list-style-type: none"> • Rules and obligations on transparency of proceedings • Documents available to public • Hearings open to public • Submissions from interested third parties • Non-disputing party submissions <p>(Art. 9.22.2, 9.22.3, 9.23, TPP text released)</p>

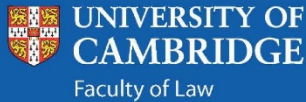
Public concern	CETA	TTIP (EU informal proposal)	TPP
<p>2. Lack of independence and impartiality of arbitrators</p>	<ul style="list-style-type: none"> • Compliance with International Bar Association Guidelines on Conflict of Interest in International Arbitration • Supplemental rules adopted by the Committee on Service and Investment • Mandatory Code of Conduct <p>(Investment Chapter, Art. X.25.6 and X.42(2)(b), Annexed Rules of Procedure and Code of Conduct, consolidated CETA text)</p>	<ul style="list-style-type: none"> • Permanent judges • Appointed jointly by EU and US • Judges assigned randomly to each case • High technical and legal qualification • Prohibited from working as counsel in investment cases • Mandatory Code of Conduct <p>(Section 3, Art. 9 and 10, 11(1) + Annex II (Code of Conduct), EU proposal)</p>	<ul style="list-style-type: none"> • Code of conduct • Other relevant rules and guidelines on conflicts of interest in international arbitration on which the Contracting Parties may agree <p>(Art. 9.21.6, TPP text released)</p>

Perceived shortcoming	CETA	TTIP (EU informal proposal)	TPP
<p>3. Frivolous or abusive claims</p>	<ul style="list-style-type: none"> • Cooling-off period of 180 days • 3 years statute of limitations to bring a claim (or 2 years after end of proceedings before national tribunal) • Expedited review of manifestly unfounded claims • Loser pays principle • Manipulative and fraudulent claims are excluded <p>(Investment Chapter, Arts. X.17, X.18, X.21, X.29, X.30, X.36, para. 5, CETA text)</p>	<ul style="list-style-type: none"> • Cooling-off period of 6 months • 3 years statute of limitations to bring a claim (or 2 years after end of proceedings before national tribunal) • Expedited review of manifestly unfounded claims • Loser pays principle • No jurisdiction when claimant acquired ownership/control of investment for purpose of bringing claim <p>(Section 3, Arts. 4.5, 6, 15, 16, 17 and 28(4) , EU proposal)</p>	<ul style="list-style-type: none"> • Cooling-off period of 6 months • 3 ½ years statute of limitations to bring a claim • Expedited review of manifestly unfounded claims • Possible award of attorneys’ fees • Denial of benefits clause to “shell companies” • Express provision for States’ counterclaims <p>(Arts. 9.17 , 9.18, 9.20.1, 9.22.4, 9.22.5, 9.22.6, TPP text released)</p>

Public concern	CETA	TTIP (EU informal proposal)	TPP
<p>4. Investors can obtain compensation twice and re-litigate cases</p>	<ul style="list-style-type: none"> Prevention of parallel claims: investors cannot seek remedies in domestic courts or other international tribunals and through ISDS at the same time <p>(Investment Chapter, Art. X.21, X.23, consolidated CETA text)</p>	<ul style="list-style-type: none"> Prevention of parallel claims: investors wanting to submit a claim to the Investment Tribunal must withdraw from any domestic proceedings they started <p>(Section 3, Art. 14(1), EU proposal)</p>	<ul style="list-style-type: none"> Prevention of parallel claims: investors pursuing a claim under ISDS provisions must waive the right to initiate or continue proceedings in other fora challenging the same measures <p>(Art. 9.20.2 and 9.20.3, released TPP text)</p>

Beyond Counter-claims: recourse by host State nationals

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PAPER NO. 8/2014
JANUARY 2014

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Jose Daniel Amado

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“Recent events demonstrate that an adjudication mechanism capable of producing reliable and enforceable results for all stakeholders, including affected populations, may tilt the balance...”

Thank you



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