

Reconsidering the Role of Private Persons in International Trade and Investment Disputes

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Abstract

Granting foreign investors the right of standing is usually regarded as particularly efficient means in order to reduce the risk premium required by foreign investors, which reduces the cost of capital for capital-importing states. For the realm of international trade, it has been suggested in the political economy literature, that governments reserve themselves the right to act as political filters in order to being able to exclude certain cases that private actors might otherwise bring. In this paper, we argue that the fact that governments act as a political filter when deciding what cases to bring to the WTO is a mere *effect* of the absence of private standing in international trade law, but *not its underlying reason*. Instead we identify capacity constraints at both the national and international level as central reason why private exporters are refused standing in international trade agreements. We argue that a situation with governments acting as political filters is suboptimal with respect to global welfare due to the increased amount of protectionism that it brings with it. We suggest that international trade dispute settlement remain intergovernmental, but that private exporters be given the right to have scenarios of alleged treaty violations examined by their governments who should be firmly obliged to bring all cases that appear to be sufficiently likely to succeed. This would create a situation where governments exercise their filter position in a way that would be beneficial for the entire system and serve objectives of long-term global welfare instead of short-term political utility. Obvious capacity constraints arising for WTO member states should be overcome by concerted efforts of the community of member states.

Résumé

En droit des investissements, la plupart des accords internationaux accorde aux investisseurs étrangers le droit de porter plainte directement contre leur état hôte. Cela est habituellement considéré comme une façon particulièrement efficace de réduire le risque d'expropriation perçu par un investisseur étranger ce qui devrait rendre les importations de capital moins chères pour l'état hôte. Dans le domaine du règlement des différends de commerce international, habituellement de nature intergouvernementale, la littérature de politique économique a suggéré que les gouvernements se réservent un rôle de filtre politique afin d'exclure d'avoir à poursuivre des procédures qui ne leur procureraient pas de gain net d'utilité politique. Dans ce papier, nous argumentons que le fait que les gouvernements peuvent en effet s'interposer en tant que filtre politique devrait être analysé comme *effet* et *non pas comme cause* de l'absence d'un droit pour les personnes privées de porter plainte contre un état. Nous identifions des contraintes de capacité, au niveau national ainsi

qu'international, comme la véritable raison pourquoi les personnes privées restent plus ou moins exclues du règlement des différends en droit international du commerce. Nous trouvons qu'une situation dans laquelle les gouvernements peuvent s'interposer en tant que filtre politique est sous-optimale en termes de bien-être global dû au degré élevé de protectionnisme qui se voit ainsi réintroduit. Nous proposons qu'au moins pour l'instant le règlement des différends en droit international du commerce devrait continuer à rester de nature intergouvernementale, mais que l'on devrait accorder aux exportateurs privés le droit d'officiallement demander à leur gouvernements d'examiner toute scénario sérieux de violation du droit. En obligeant les gouvernements d'effectivement poursuivre toute demande bien fondée créerait une situation où les gouvernements exerceraient leur rôle de filtre d'une façon qui servirait non pas des objectifs d'utilité politique à court terme, mais des objectifs de bien-être global à long terme. Les contraintes de capacité dont pâtissent les pays en voie de développement devraient être surmontées par des efforts concertés de la communauté des états membres.

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1. Introduction

Once the states that are party to an international treaty chose to create some sort of dispute settlement mechanism in order to deal with alleged treaty violations, the choice between public and private enforcement of law becomes relevant. States may opt to follow the traditional public international law approach and design the dispute settlement mechanism as a purely intergovernmental system with no right for private persons to bring claims (public enforcement). Even for treaties that indirectly create rights and duties for private persons this means that private persons can merely try to influence their government to bring itself a claim to the dispute settlement body for the alleged treaty violation brought to its attention. Basically, states either endorse claims by their citizens via traditional diplomatic protection or bring claims in their own name for treaties like the WTO agreements that do not directly create any rights and duties for private persons. Alternatively, states may of course chose to grant private persons certain rights with respect to the settlement of disputes. Private persons may be given the right to bring claims and to be an official party to the dispute (private enforcement). More limited ways for participation of private persons would be the right to appear as third party in addition to two state parties, or to at least act as *amicus curiae*.¹

The current state of international law in the realm of international trade and foreign investment is distinctly different when it comes to the role reserved for private persons. Whereas it has become common practice in international investment agreements to grant foreign investors ‘standing’, i.e. the right to bring claims against the investment host state without having to rely on traditional mechanisms of diplomatic protection, the state parties to international trade agreements have proven to be much more reluctant to grant similar rights to private persons. The WTO dispute settlement mechanism and, on a regional level, NAFTA,² are purely intergovernmental mechanisms with only limited possibilities for private persons to intervene via *amicus curiae* briefs.³

¹ *Amicus curiae*: literally translated from Latin as ‘friend of the court’. This term designates the possibility existing in several legal systems (in particular Common Law countries) that a person that is not party to the dispute, may submit statements regarding matters of fact as well as of law in order to help the court to formulate its decision. For a detailed presentation, see ASCENSIO, H (2001), ‘L’amicus curiae devant les juridictions internationales’, *Revue générale de droit international public*, 2001, n° 4, p 897

² It is true, though, that the picture is slightly different with respect to the trade provisions contained in the US constitution and the EC Treaty. Due to the direct impact on citizens of the legislative and administrative acts based on these provisions, both systems provide for at least limited possibilities for citizens to have the legality of such measures examined by the courts.

³ For detail on the issue of *amicus curiae* briefs at the WTO see section 5 of this paper.

In a political economy perspective, these differences are usually explained as follows. It is commonly accepted, that one of the major goals of international investment agreements is to reduce the so-called country-risk for foreign investors, i.e. the risk of expropriation and unfair discrimination in order to attract capital in the form of foreign investment. Granting foreign investors the right of standing in potentially arising disputes⁴ is usually regarded as particularly efficient means in order to reduce the risk premium required by foreign investors, which reduces the cost of capital for capital-importing states.⁵ For the realm of international trade, it has been suggested,⁶ that governments reserve themselves the right to act as political filters to exclude certain cases that private actors might otherwise bring. In other words, governments, out of interest to maximize their political welfare, would renounce on having the legality of certain scenarios of alleged treaty violation scrutinized if the political cost of bringing such a claim exceeds the potential gains.

We agree that these traditional explanations of the different roles granted to third persons provide valuable insight into the economic incentives of governmental action, but we find the existing analysis of why private persons are refused standing in the realm of international trade incomplete and partly flawed. In this paper, we argue that political welfare arguments do validly explain how governments exercise their role as political filters, but not why they opted to reserve to themselves that role. We suggest instead that capacity restraints, both within the individual states and within the international dispute settlement mechanism, are the true reason why dispute settlement in most trade agreements remains of entirely intergovernmental nature. We argue that under the existing capacity restraints states are entirely right not to admit private persons to international trade disputes, but that some measures of reform are necessary in order to improve the degree of compliance with international trade agreements which is reduced by the fact that governments as political filters renounce on bringing politically unprofitable claims. Better compliance means less protectionism and therewith more global trade and increased global welfare. These are the true objectives and economic long-term goals of international trade agreements, which should not be confounded with governmental pursuit of short-term political welfare.

⁴ The nowadays usual guaranty in BITs that investors do not have to rely on the local court system in order to resolve a dispute, but may submit it to an independent international arbitral tribunal may be regarded as even more important for reducing the risk premium required by foreign investors.

⁵ For a detailed analysis of this point see SYKES, A (2005), 'Public vs. Private Enforcement of International Economic Law: Of Standing and Remedy', *John M. Olin Law & Economics Working Papers No. 235*, Chicago Law School, pp 13-17. We will look into the relevant issues in section 2 below.

⁶ SYKES, A (2005), *ibid*, p 3, pp 17-29

In the following, we proceed as follows. Section 2 briefly summarizes the traditional economic analysis of private standing in international investment disputes, which we find to be very convincing. Section 3 presents the traditional analysis of private standing in international trade disputes and focuses on its limits. Section 4 elaborates why capacity constraints should be regarded as true reason for the intergovernmental character of trade agreements. Section 5 provides a detailed illustration in support of the capacity constraints argument by looking at the WTO and its reluctant approach of amicus curiae briefs. Section 6 contains our proposals for reform of international trade dispute settlement. Section 7 concludes.

2. Private standing in international investment disputes

The common picture in the huge number⁷ of bilateral international investment agreements is that investors are given the choice between having recourse to the tribunals of their host state and submitting the dispute to international arbitration after having attempted in vain to settle the dispute amicably.⁸ Originally, most BITs made the right of invoking international arbitration procedures conditional on the prior attempt of the investor to resolve the dispute in local courts, i.e. they required an exhaustion of local remedies. Over the last 10 years, however, BITs have increasingly adopted the approach whereby international arbitration is regarded as an alternative rather than as a subsidiary means of adjudication.⁹ Most investor-state disputes are either resolved by arbitration panels established by the International Centre for the Settlement of Investment Disputes (ICSID),¹⁰ or by ad-hoc panels using the arbitration

⁷ From 1990 to 2004, there was a surge from less than 500 BITs to almost 2,500 BITs; see UNCTAD (2006), *World Investment Report* (New York/Geneva, United Nations), pp 26 and 29. If investment chapters of regional trade agreements, such as NAFTA, are included, there is even more treaty-making activity in the investment protection area (p 28).

⁸ The 2000 BIT between Egypt and Thailand, for example, provides:

Article 10: Settlement of Disputes Between an Investor and A Contracting Party

1. Any dispute which may arise between a Contracting Party and an investor of the other Contracting Party shall, if possible, be settled amicably.

2. If the dispute cannot thus be settled within six months following the date on which the dispute has been raised by either Party it may be submitted upon request of the investor (his choice will be final) either to:

(a) The competent courts of the Contracting Party in whose territory the investment was made.

(b) The International Centre for the Settlement of Investment Disputes (ICSID) (...).

⁹ UNCTAD (2007), *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (New York/Geneva, United Nations), p 122

¹⁰ The ICSID belongs to the World Bank Group and has been established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention or Washington Convention). As of November 2008, 155 states had signed and 143 ratified the convention.

rules elaborated by the United Nations Commission for International Trade Law (UNCITRAL). Many BITs also mention the Court of Arbitration of the International Chamber of Commerce (ICC) in Paris or the Arbitration Institute of the Chamber of Commerce of Stockholm as possible venues. However, unless an international convention provides for the recognition and enforcement of an arbitral award made outside its national jurisdiction, a country is under no obligation to recognize and enforce it.¹¹ Among the international conventions, which oblige their members to recognize and effectively enforce arbitral awards in their domestic jurisdictions, the ‘United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards’, signed in New York in 1958, and often referred to as the ‘New York Convention’, is particularly important.¹²

As briefly mentioned in the introduction, the fact that international investments agreements usually grant private investors standing is commonly regarded as an efficient means in order to reduce the risk premium required by foreign investors therewith diminishing the cost of capital imports for the host state. Domestic users of imported capital will in turn offer political support for any policy that reduces the perceived risk of expropriation for foreign investors. This explanation of why countries in need of capital imports grant private persons standing appears to be generally accepted in the literature.¹³ The fact that rich countries, usually less reliant upon foreign direct investment, subscribe to the same strict rules should not surprise. To the extent that a country does not engage in any discriminatory behavior or uncompensated expropriation, a standard of treatment to which

¹¹ For detailed information see UNCTAD (2007), *ibid*, p 116

¹² One of the main provisions of the New York Convention is its Article III:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Accordingly, as has been pointed out elsewhere (UNCTAD (2007), *ibid*, p 117), countries parties to the New York Convention are obliged to recognize and enforce foreign arbitral awards rendered in another country. However, there are two significant caveats. First, a party may refuse to recognize and enforce a foreign arbitral award in any of the specific situations envisaged in article V of the New York Convention. Second, a party is not obliged to recognize and enforce an arbitral award issued in the territory of another country that has not subscribed to the New York Convention or an award adjudicating a dispute that does not arise out of a legal commercial relationship.

¹³ See for example GUZMAN, A (1998), ‘Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties’, *38 Virginia Journal of International Law*, pp 639–688; ELKINS, Z, GUZMAN, A and SIMMONS, B (2006), ‘Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000’, *60 International Organization*, pp 811–846; SYKES, A (2005), *ibid*.

developed countries appear to have less difficulties to conform to, the cost of giving private investors standing can be regarded as very little. In addition, although even BITs between a very rich and a very poor country officially establish equal rights and duties for both state parties involved, it appears obvious that in practice investment and capital flows are likely to flow in mainly one direction. Seen the relatively small amount of foreign investments flowing from poor countries into rich countries, the cost of granting private investors standing appears to be almost insignificant for rich countries.

As pointed out rightly elsewhere,¹⁴ granting standing to private investors is a low-cost commitment (or signal that investors' property rights will be respected) only to the extent that expropriation is defined as 'to include acts that the national government is unlikely to want to undertake.' In recent years, however, arbitral tribunals have become increasingly protective of investors when deciding what type of national regulation amounts to 'indirect expropriation'. This has considerably augmented the risk for governments to see legislative measures judicially challenged to which they attach a high importance. As a consequence, governments might not longer perceive granting standing to private investors as a low-cost commitment.

In order to fully understand this point it appears useful to recall that, as a general matter, customary international law and international investment agreements, do not preclude host states from expropriating foreign investors as long as certain conditions are met: the taking must be made for a public purpose, as provided by law, in a non-discriminatory manner and, above all, with compensation. As it has been summarized by the OECD,¹⁵

[e]xpropriation or 'wealth deprivation' could take different forms: it could be *direct* where and investment is nationalized or otherwise directly expropriated through formal transfer of title or outright physical seizure. In addition to the term expropriation, terms such as 'dispossession', 'taking', 'deprivation' or 'privation' are also used, international law is clear that a seizure of legal title of property constitutes a compensable expropriation. Expropriation or deprivation of property could also occur through interference by a state in the use of that property or with the enjoyment of the benefits even where the property is not seized and the legal title to the property is not affected. The measures taken by the State have a similar effect to expropriation or nationalization and are generally termed 'indirect', 'creeping', or 'de facto' expropriation, or measures 'tantamount' to expropriation.

¹⁴ SYKES, A (2005), *ibid*, p 16

¹⁵ OECD (2004), 'Indirect Expropriation' and the "Right to Regulate" in International Investment Law', Working Papers on International Investment, Number 2004/4, p 3

Under international law, not every state measure that interferes with property qualifies as expropriation. As Ian Brownlie puts it,

state measures, prima facie a lawful exercise of powers of government, may affect foreign investments considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation.¹⁶

In particular under NAFTA's Chapter Eleven on investment protection, arbitral tribunals have taken an approach that has been criticized as 'expansive regulatory takings doctrine', (...) [that] can sweep in many acts of "expropriation" that arguably result from the resolution of regulatory uncertainty or the emergence of new information about the subject of regulation.¹⁷ The argument goes that if governments find themselves increasingly obliged to pay compensation for regulatory measures that are not at all aimed at indirect expropriation, but which are taken in pursuance of laudable policy objectives, they will become increasingly reluctant in future BITs to grant private investors standing. Exaggerated protection of investors' interests could therefore ultimately lead to a weaker level of protection.¹⁸

In the light of these developments, some countries, in particular the United States and Canada, decided to redraft their model BITs in 2004. These countries now clearly limit the extent to which the host state's regulatory activities can be found to be unlawful indirect expropriation. They do so through including explicit, and very detailed, criteria in order to determine on a case-by-case basis whether a particular governmental measure amounts to an indirect expropriation.¹⁹ As stated rightly elsewhere, these reformulated BITs clearly 'show

¹⁶ BROWNLIE, I, *Public International Law* (OUP 6th edn 2003), p 509

¹⁷ SYKES, A (2005), *ibid*, 16. See also BEEN, V and BEAUVAIS, J (2003), 'The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International Regulatory Takings Doctrine', *78 New York University Law Review*, pp 30–143.

¹⁸ AAKEN, A, van, 'Perils of Success? The Case of International Investment Protection' (2008) *9 European Business Organization Law Review*, pp 1-27

¹⁹ Annex B of the BIT between the United States and Uruguay (2005) exemplifies this approach:

Annex B: Expropriation

The Parties confirm their shared understanding that:

1. Article 6(1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
3. Article 6(1) addresses two situations. The first is known as direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

the intention of the contracting parties to increase the clarity of BIT provisions to prevent an arbitral tribunal from having broad discretion in interpreting the expropriation clause in the context of a potential dispute.²⁰ These recent changes therewith clearly pursue the aim of assuring that the granting of private standing remains a low-cost commitment, which is perfectly in line with the above-described explanation of why states grant private investors standing.

Contrary to the just presented analysis in the realm of foreign investments, the traditional political economy analysis of the role of private persons in international trade disputes appears limited and partly flawed, but it nevertheless contributes to a better understand governmental action in this domain.

3. Private standing in international trade disputes: the traditional political economy analysis and its limits

The creation of an efficient dispute settlement mechanism has been one of the most important changes that came with the foundation of the WTO in 1995.²¹ The WTO dispute settlement mechanism constitutes a significant improvement of the rules governing the settlement of disputes under the former General Agreement on Tariffs and Trade (GATT) It consists of a quite original mixture of diplomatic negotiations, since at every stage of the procedure the Dispute Settlement Body (DSB) constituted by representatives of all member states intervenes, and a veritable jurisdictional settlement thanks to the creation of a permanent Appellate Body and the establishment of an award enforcement mechanism. Formally, the

4. The second situation addressed by Article 6(1) is known as indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure. The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

- (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
- (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
- (iii) the character of the government action.

²⁰ UNCTAD (2007), *ibid*, p 47

²¹ The entire bundle of WTO treaties was signed at the end of the Uruguay Round at the conference of Marrakech (14-15 April 1994) and entered into force on 1 January 1995. An excellent overview of the functioning of the WTO dispute settlement mechanism can be found in CANAL-FORGUES, E (2004), *Le règlement des différends à l'OMC* (Bruylant, 2nd edn, Brussels), 196 p.

system is based on the so-called Dispute Settlement Understanding (DSU),²² which provides the rules governing the different stages of the settlement of a dispute.²³ As noted previously, the WTO dispute settlement mechanism has a fundamentally intergovernmental nature, which implies that, in principle, only WTO member states have access to the system,²⁴ either as parties or, under certain circumstances, as Third Parties.²⁵ Non-governmental actors, in contrast, and independent of their potentially high interest and potential stake in a scenario of an alleged violation of the WTO agreements, do not have direct access to the system and are refused standing.²⁶

As briefly noted in the introduction, it has been suggested in the literature,²⁷ that governments have deliberately chosen not to grant foreign exporters standing in order to put themselves into a position of political filter, renouncing on bringing cases for which the political cost exceeds the potential gains. In the following we review this traditional explanation and show to what extent it provides valuable insights and where it should be regarded as limited.

It is an uncontested standard proposition in the modern economics literature that states conclude trade agreements in order to facilitate government-to-government market access commitments.²⁸ As noted rightly by Sykes, unlike in the investment scenario, where states aim to lower the price of capital imports, states do not usually enter trade agreements out of

²² For the provisions of the DSU, see World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (hereinafter 'The Legal Texts') (CUP, New York 1999). The Legal Texts are accessible online: <http://www.wto.org/english/docs_e/legal_e/legal_e.htm>

²³ These stages are: bilateral consultations; if these fail, the establishment of a panel; in case of appeal against the decision adopted by the DSB, the procedure before the Appellate Body; finally, the enforcement stage. For a succinct presentation, please refer to FLORY, T (1999), *L'Organisation mondiale du commerce – Droit institutionnel et substantiel*, (Bruylant, Brussels), pp 22-25

²⁴ Every state or customs territory that enjoys complete autonomy regarding its commercial policy may become member of the WTO. This explains, for example, why the European Union, in addition to the several EU-member states, has been granted full member status. (It appears natural that this, in a way, overrepresentation of a particular region has not been accepted without critical voices from other member states.)

²⁵ Concerning the rights of Third Party participants, please refer to DSU articles 10.2 (for the panel phase) and 17.4 (before the Appellate Body).

²⁶ As noted in the introduction, *amicus curiae* briefs are the only, albeit very limited, possibility for private persons, notably NGOs to get involved in a WTO case. We will analyze this issue in detail in section 6 below where we will also explain why the WTO dispute settlement body should take a particularly restrictive stand with respect to *amicus curiae* briefs.

²⁷ SYKES, A (2005), *ibid*, p 3, pp 17-29

²⁸ See for example BAGWELL, K and STAIGER, R (2002), *The Economics of the World Trading System* (MIT Press), 224 p

desire to reduce the price of imported goods and services. ‘They view any reduction in their own trade barriers, and the attendant price of their imports, as a “concession” that is only tolerable in return for concessions by trading partners.’²⁹ The interests of governments, who find themselves influenced by well-organized, powerful, lobbying from industries claiming increased levels of protectionism, have obviously a tendency of being diametrically opposed to those of the anonymous group of individual consumers, who would directly benefit from free trade via cheap imports.³⁰ Reality here clearly reflects a central element of public choice theory saying that some interest groups are better organized than others, and thus better able to influence the political process.

After rightly pointing out that not all import-competing industries are equally well organized, Sykes suggests that ‘an exchange of reciprocal promises [among governments] to forego enforcement on behalf of poorly-organized industries can leave both sides at a considerably higher level of utility,’³¹ which means that there would be no enforcement of international trade rules for industries ‘for which the political utility gain to officials in the violator state “outweighs” the political utility loss to officials in the state harmed by the violation.’³² This strongly recalls what the law & economics literature in private law has termed the theory of ‘efficient breach’.

However, whereas such reasoning on the basis of political utilities and political welfare appears to validly explain *how* governments exercise their role as political filters, we strongly disagree with the traditional explanation that governments concluding an international trade agreement refuse standing to foreign exporters *in order to* maximize their own political welfare by not bringing certain claims as suggested above.

Our claim is based on the fact that the above-described mutual maximization, among governments, of short-term political welfare requires that a certain percentage of treaty

²⁹ SYKES, A (2005), *ibid*, p 18

³⁰ It seems, however, that based on the widespread belief that protectionist measures can save jobs at home, general public opinion has also a considerable tendency to be against increased levels of trade liberalization. This would only further explain why individual consumers have major problems to influence the political process: most consumers apparently value increased safety of their jobs more than cheap imports. In a short-term perspective, most people do obviously not take into account that protectionist measures can at best save jobs for a short period of time.

³¹ SYKES, A (2005), p 24

³² *Ibid*

violations be not rectified. A weaker level of compliance is equivalent to a higher level of protectionism with the result that there will be less global trade and therewith, pursuant to the basic findings of international trade theory, diminished global welfare. Put shortly, short-term maximization of political welfare in the trade realm leads to a suboptimal level of general welfare. Governments exercising their role as political filter in the way suggested by the traditional analysis above might maximize their political utility with regards to the next election, but when considering costs and benefits beyond the short-term objectives of governments, any country, their own included, can be expected to suffer from a diminished amount of global trade. In a situation with less global trade, local consumers are likely to have to pay higher prices due to weakened competition from abroad and local producers facing protectionism abroad will see their markets reduced. It is a well-accepted proposition, that protectionism on a global scale does not only change the distribution of the cake, but above all diminishes the cake's total size. Governments supported by powerful industries might be able to win the next election, but their behavior as political filters will have clearly diminished global welfare.

It seems plausible to us to assume that when negotiating an international treaty, governments are guided more by achieving long-term general welfare for their country than in everyday politics where maximizing short-term political welfare is arguably the driving force behind their actions. This seems particularly true for the negotiation of a highly complex bundle of several multilateral and plurilateral treaties like the WTO agreements, negotiated over many years and by changing governments from the entire political spectrum, to a large extent behind closed doors and therewith less likely to be impacted by interest groups. Full compliance with the WTO agreements is what member states have eventually subscribed to in pursuance of the overarching goal of achieving greater global welfare through liberalizing trade. The Marrakesh Declaration, concluding the negotiations of the Uruguay round leading to the creation of the WTO, leaves no doubt on this point.

(...) Ministers affirm that the establishment of the [WTO] ushers in a new era of global economic cooperation, reflecting the widespread desire to operate in a fairer and more open multilateral trading system for the benefit and welfare of their peoples. *Ministers express their determination to resist protectionist pressures of all kind* (emphasis added).³³

³³ For the complete text of the Marrakesh Declaration of 15 April 1994, World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (hereinafter 'The Legal Texts') (CUP, New York 1999). The Legal Texts are accessible online: <http://www.wto.org/english/docs_e/legal_e/legal_e.htm>

All this supports our claim that the fact that governments act as a political filter when deciding what cases to bring to the WTO might be a mere *effect* of the absence of private standing in international trade law, but *not its underlying reason*. The traditional analysis convincingly explains how governments can benefit from the absence of private standing and can maximize their political short-term welfare by being able to interpose themselves as political filters. We have seen, however, that a situation with governments acting as political filters is clearly suboptimal with respect to global welfare due to the increased amount of protectionism that it brings with it. It seems therefore plausible to assume that the drafters of international trade agreements, when refusing standing to private persons, do not do this in order to enable governments to act as political filters, to therewith abuse of their power, and to compromise the overarching goals of their agreement.

Granting private exporters the right to bring claims would obviously have been the safest way to ensure that governments do not abuse of their factual possibility to filter scenarios of alleged treaty violations according to the level of political utility they procure. The fact that the drafters of international trade agreements generally opt not to follow this seemingly ‘safe’ path, but trust that governments will not abuse of the intergovernmental nature of the dispute settlement mechanism must therefore have a different, powerful reason. In the following section, we argue that capacity constraints, both on the national and international level, are the true reason why private persons are refused standing in international trade agreements.

4. Capacity constraints as reason for the intergovernmental character of international trade litigation

It appears straightforward to assume that if private persons had the right to initiate cases for alleged breaches of an international trade agreement, let’s say the WTO agreements,³⁴ the number of cases that the WTO dispute settlement mechanism would have to deal with would be significantly higher. It can be expected that many member states, in particular developing countries, but also the WTO dispute settlement mechanism under its current form would encounter severe capacity constraints and would be unable to reasonably deal with such an

³⁴ Obviously, the validity of our arguments is not limited to the WTO agreements, but extends to regional or merely bilateral agreements. Seen its outstanding importance as only, multilateral, international trade agreement and its dominant position in the realm of international trade law, we found it appropriate, to argue mainly within the WTO context.

increased case load. At the same time, taking more time and accepting an increasing case backlog is not an option for the WTO, since the DSU imposes very strict time limits in order to ensure an expedient resolution of potential disputes. Seen that a contested governmental measure may be upheld until found to breach a specific WTO provision, taking years prior to deciding a case would quickly amount to a factual denial of justice.

The issue of capacity constraints has already been looked into in a different context, namely by Guzman and Simmons in an attempt to analyze whether developing countries are disadvantaged in the WTO's dispute settlement mechanism. The findings of this research strongly support our argument. Guzman and Simmons have examined to what extent capacity constraints limit the number of WTO cases that poor countries can pursue.³⁵ By the term 'capacity' they refer to all available resources in order to identify, analyze and pursue a WTO dispute. Under the impact of capacity constraints, a country would pursue a smaller number of cases, lacking financial, human and institutional resources. As a consequence, and all other things being equal, disposing of only limited resources, a poor country faces higher opportunity costs when deciding whether or not to bring a case. With their empirical tests Guzman and Simmons demonstrate that developing countries focus their capacities on pursuing cases against countries with large markets, like the US and the EU, but that they have to renounce on bringing cases against smaller countries whose market size promises only smaller gains.

In the absence of any major financial, personal and technical assistance for poor countries, these will face increasing capacity constraints as the number of cases that have to be dealt with rises. Not allowing private persons to initiate cases may therefore be regarded as suboptimal, but at least partly efficient, way of how to deal with the capacity constraints faced by developing countries. Granting them with the possibility to filter cases ensures that they do not find themselves in a situation where they are entirely overwhelmed by an unmanageable caseload. Of course this does not resolve the major problem linked to the previously discussed loss of global welfare stemming from lower levels of compliance. It still remains, however, that capacity constraints appear to be the single-most important reason why private persons are not granted standing in WTO disputes. The fierce resistance of developing countries to

³⁵ GUZMAN, A and SIMMONS, B (2005), *Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes*, UC Berkeley Public Law Research Paper No. 660501, 44 p

allow for *amicus curiae* briefs in WTO dispute settlement proceedings underpins this proposition.³⁶

When it comes to the WTO dispute settlement mechanism itself, the fact that the system already struggles under its current intergovernmental form with the number of cases, illustrates that there are significant capacity constraints here as well. Reducing them would require huge additional resources. It is interesting at this point to draw a little comparison with the situation in the European Union (EU), where private persons are given significant possibilities to participate in claims brought to the European Court of Justice (ECJ) and the Court of First Instance attached to the ECJ.³⁷ The main reason why the ECJ is not overwhelmed by an unmanageable caseload is that national courts, not governments, act as filters, and only cases that cannot be decided at a lower level make it up to the Court of First Instance and to the ECJ. Unfortunately, such a filtering by national courts can currently not be regarded as an option for the WTO seen the huge differences in legal standards among its member states. It follows that unless the member states to an international trade agreement are willing and able to create a dispute settlement mechanism of a tremendous size, refusing private standing currently appears as the only available option.

As previously noted, the WTO's reluctant approach of *amicus curiae* briefs appears to be a very good illustration of the role played by capacity constraints in refusing private persons the right to participate in international trade disputes. We have therefore opted to dedicate the following section to an analysis this issue.

5. Illustration: the WTO and its reluctant approach of *amicus curiae* briefs

Despite its formally purely intergovernmental nature, the impact of private persons on the WTO dispute settlement mechanism has been steadily increasing, to the same degree as private entities have gained more and more economic and political clout. Just think, for example, of the dispute opposing Japan and the United States in the dispute *Japan – Film*³⁸. The driving forces behind this interstate dispute were in reality the interests of private

³⁶ For a detailed presentation of this issue, see section 5 below.

³⁷ We realize, of course, that the EU is more than a simple regional trade agreement. For the purpose of this argument, however, this fact may be considered irrelevant.

³⁸ *WTO, Japan – Measures Affecting Consumer Photographic Film and Paper* (short title: *Japan – Film*), Panel Report WT/DS44/R, 31 March 1998

economic actors: Kodak (USA) and Fuji (Japan). This case constitutes a particularly clear example of the important role played by private industries in the WTO dispute settlement mechanism.

Article 13 of the DSU (establishing the right of a panel to ask for information and opinions, including the right to obtain this information from private parties) leaves room to believe that non-governmental entities do have at least a partial right to participate in the settlement of WTO disputes. However, the DSU remains entirely silent on the question whether private parties may submit information to a panel spontaneously and on their own initiative. It is in this context that the issue of *amicus curiae* briefs arises. Before entering into the details of our analysis, it is important to underline that the possibility to make submissions as ‘friend of the court’³⁹ during a WTO dispute is more or less exclusively based upon a very generous interpretation of the DSU.⁴⁰ This stands in contrast to many national jurisdictions that provide explicitly for the possibility to submit *amicus curiae* briefs. For cases before the US Supreme Court, for example, Supreme Court Rule 37 contains explicit guidelines regarding *amicus curiae* participation on the merits of a case. In practice, however, and again in harsh contrast with the situation at the WTO, the US Supreme Court allows for essentially unlimited participation.⁴¹

According to Article 13.1 of the DSU, each panel shall have the right to seek information and technical advice from any individual or body that it deems appropriate. In addition, according to Article 13.2, panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the subject matter. This poses two questions. The first one asks whether a panel is obliged or not to take into consideration the *amicus curiae* briefs submitted upon its own request. In the dispute *EC – Hormones*⁴², the

³⁹ It should be obvious, that the term ‘*amicus curiae*’ should not be understood in the sense of a neutral assistant providing valuable information in order to enhance a judgment as objective as possible. In reality, although they might nevertheless provide valuable information, these ‘friends’ are mostly not neutral at all, but are clearly interested in favoring a particular outcome of the case at issue. No rule without exception, of course, since in the case, where for example a university scholar is solicited by the WTO judges to submit an amicus brief, the degree of neutrality of the latter could probably be expected to be considerably higher.

⁴⁰ In this sense see STERN, B (2003), ‘L’intervention des tiers dans le contentieux de l’OMC’, 2 *Revue générale de droit international public*, p 259

⁴¹ For a detailed presentation of interesting aspects drawn from the American experience with *amicus curiae* briefs, refer to COLLINS Jr, P (2004), ‘Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation’, 38 (4) *Law & Society Review*, pp 807-832

⁴² WTO, *EC – Measures concerning Meat and Meat Products* (short title *EC – Hormones*), Appellate Body Report WT/DS26/AB/R and WT/DS48/AB/R, 16 January 1998, paras 146-148

Appellate Body confirmed that the WTO panelists had a discretionary right in this respect. The question whether and to what extent these same persons have the right to submit information to a panel on their own initiative is different and much more delicate. Since the first disputes before the WTO dispute settlement mechanism, several non-governmental organizations (NGOs) and private corporations had asked to be authorized to submit *amicus curiae* briefs, however, without success.⁴³ In the dispute *US – Shrimps*⁴⁴, however, the United States supported the initiative of several NGOs that wanted to make submissions during the panel phase. The panel refused this request arguing that unless the information that those NGOs wanted to provide was included in one of the submissions by the two main parties themselves it could not admit those non-solicited submissions. The Appellate Body, however, reversed this interpretation of Article 13 of the DSU as too restrictive.⁴⁵ According to the Appellate Body, panels have large rights with respect to private sources, no matter whether this information had been solicited or not.

This possibility to submit *amicus curiae* briefs is equally open during WTO appellate review. The Appellate Body has been clear on this issue in the dispute *US – Lead and Bismuth II*.⁴⁶ In this dispute, the Appellate Body confirmed that it possesses a right comparable to that of a panel (based on DSU Article 13). The Appellate Body particularly stressed the discretionary character of its right to decide whether or not it is opportune to accept and to examine the information that has been submitted and that it regards as pertinent and useful for the appellate procedure.⁴⁷ The rights that enjoy the judges in both stages are therefore the same, although the legal bases are not identical. In order to justify its own right to accept or to refuse *amicus curiae* briefs, the Appellate Body argued with Article 17.9 of the DSU⁴⁸ and with Article 16.1 of its Working Procedures⁴⁹.

⁴³ In this respect, the WTO followed the traditional GATT-policy, which did not provide for the possibility to submit *amicus curiae* briefs.

⁴⁴ WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (short title: *US – Shrimp*) Panel report WT/DS58/R, adopted on 15 May 1998, Appellate Body Report WT/DS58/AB/R, 12 October 1998

⁴⁵ *Ibid*, Appellate Body Report, paras 107-108

⁴⁶ WTO, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (short title: *US – Lead and Bismuth II*), Appellate Body Report WT/DS138/AB/R, 10 May 2000, para 42

⁴⁷ *Ibid*, para 39

⁴⁸ ‘Working Procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.’

⁴⁹ ‘In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that

It is important to distinguish the situation presented above from the one where the memos prepared by non-state actors have been integrated in and have been presented as part of the official documents submitted by a state party to the dispute. In this hypothesis, the information provided by the private parties acquires the same status as the official party documents.⁵⁰ This means, of course, that WTO panelists are obliged to accept this type of information.

The relevance of *amicus curiae* briefs in the context of WTO procedure should be measured with respect to two criteria. First, what use is made of this means in practice, and second, what is the effect that the consideration of *amicus curiae* briefs might have on the final formulation of Panel and Appellate Body reports? Concerning the first point, it is important to keep in mind that, although the legitimacy of *amicus curiae* briefs in WTO proceedings has been admitted in principle, authorized submissions are very limited in practice, and might even be called almost non-existing. This is due to the fact, that despite the theoretical option to use *amicus curiae* briefs, both panels and the Appellate Body remain very reluctant to do so.⁵¹ In fact, up to the present day, the DSB of the WTO hasn't been very eager to actively 'making friends': in only one dispute, so far, an *amicus curiae* brief has actually been solicited.⁵² The second point concerns the effect that an *amicus curiae* brief might have, if accepted, on the actual panel decision. What is observable here, is a quite scarce reference to the submissions presented by private persons. The current tendency even seems to go in the opposite direction: often WTO panels appear to treat the information submitted (or at least parts of it) as their own finding. This makes it quite difficult to retrace the influence of the information provided by the 'friend of the court'.

Creating the possibility for *amicus curiae* briefs at the WTO was welcomed, but also met with criticism. This is not really surprising, since accepting *amicus curiae* briefs at the WTO might be seen as a highly symbolic act. It meant increased transparency and allowed for the participation of non-state actors, in particular of the Civil Society, in a domain that had

appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules. Where such a procedure is adopted, the division shall immediately notify the parties to the dispute, participants, third parties and third participants as well as the other Members of the Appellate Body.'

⁵⁰ In this sense, see STERN, B, *ibid*, p 263

⁵¹ For more detail see also ASCENSIO, H, *ibid*, p 910 as well as CANAL-FORGUES, E, *ibid*, pp 23-24

⁵² WTO, *Australia – Measures Affecting Importation of Salmon* (short title: *Australia – Salmon*), Article 21.5 Panel Report, WT/DS18/RW, 18 February 2000, paras 7.8 and 7.9

traditionally been purely intergovernmental.⁵³ A majority of member states has therefore always been against allowing *amicus* briefs.⁵⁴ This marked opposition of most of the States has clearly manifested itself at the extraordinary meeting of the WTO General Assembly on 22 November 2000.⁵⁵ This meeting had been held upon a request made by Egypt in the name of the informal group of developing countries.

Many states expressed their concerns about the fact that the WTO dispute settlement mechanism might be open to a certain extent for private persons. Capacity constraints have always been the main argument in this debate. Many states fear that there could be an abundant amount of *amicus curiae* briefs, which could constitute a too serious burden for the panels and the Appellate Body and be a waste of resources. In addition to these traditional types of capacity constraints, the admission of *amicus curiae* briefs has been criticized as bringing about a new disequilibrium within the WTO dispute settlement mechanism.⁵⁶ NGOs from rich countries undoubtedly dispose of a much stronger capacity, in terms of resources, than those from developing countries, to lobby efficiently for being admitted as *amicus curiae* and to submit substantially powerful briefs to the competent panel. This additional type of capacity constraints seems to be the major reason why most countries are very skeptical about indirect private participation via *amicus curiae* briefs at the WTO.

Finally, besides these major concerns with respect to capacity constraints, *amicus curiae* briefs raise an additional fundamental question.⁵⁷ It is very difficult to identify in whose final interest it is if a private person wishes to submit information and to determine the legitimacy of such an interest. The essential problem here is that every member state is already seen as representing the interests of the private entities within its territory under the form of the national interest, which every state incarnates. Therefore, admitting a specific interest of a private entity in addition to the interest represented by the member state to which that private entity belongs, is not free from conceptual contradiction.

⁵³ See also STERN, B, *ibid*, p 293 and ASCENSIO, H, *ibid*, p 900

⁵⁴ In the above-mentioned dispute *US – Lead and Bismuth II*, for example, whereas the United States defended the admission of *amicus curiae* briefs before the Appellate Body, the EU, Brazil as well as Mexico opposed this change.

⁵⁵ For the protocol of this session, consult the following document: WT/GC/M/60 of 23 January 2001

⁵⁶ For detail on this point refer to STERN, B, *ibid*, pp 294-295

⁵⁷ In this sense, see also CANAL-FORGUES, E, *ibid*, p 23

6. Proposals for reform

As we have seen in the previous sections of this paper, the major capacity constraints at both the national and international level cannot be easily remedied. As a consequence, states appear to be well advised to maintain the current refusal of private standing in international trade agreements. We have also seen, however, that political economy incentives lead governments to abuse of their role as political filters in the pursuit of short-term political welfare. The current intergovernmental dispute settlement leads to the maintenance of a certain amount of protectionism therewith diminishing the amount of international trade and global welfare. In the light of this distinctly suboptimal situation compared to a situation with optimal treaty enforcement and compliance, the following steps of reform might be undertaken whilst maintaining the intergovernmental nature of international dispute settlement.

Without being granted standing, private exporters should at least be given the right to officially demand that their states of origin thoroughly examine all scenarios of alleged treaty violation. States should be obliged to bring forward claims that appear to have a significant potential to succeed independent of any political utility considerations. Private exporters should be given the possibility to complain to the WTO if their request has not been thoroughly examined by their government with the possibility for the WTO to oblige the member state concerned to bring that case. Such an obligation would push governments to exercise their role as filters not dependent upon political utility concerns but based on the potential merits of a claim therewith preventing that the dispute settlement system be overwhelmed by numerous ill-founded private claims.

In order to overcome the capacity constraints on the side of developed countries that would obviously hinder any reform in this direction, the WTO should consider providing its member states with increased technical and financial resources in order to enable them to pursue any case in which it appears obvious that the WTO agreements are being breached. Such a reform would obviously require a stronger financial commitment on the part of the richer member states, which can therefore be expected to maintain the suboptimal *status quo*. However, in the light of the considerable gains in terms of global welfare that enhanced treaty enforcement and compliance seem likely to bring, major efforts on all side appear entirely justified.

7. Conclusion

As we have seen in this paper, the role of private persons in the enforcement of international investment and trade agreements varies significantly. We have seen that by giving foreign investors the right to bring claims directly against their host states for alleged scenarios of expropriation and other treaty violations, capital-importing states can reduce the risk premium required by foreign investors. In addition, whereas it procures immediate benefits by decreasing the price of capital imports, granting standing to foreign investors creates costs only to governments that intend to engage in discriminatory behavior. We have also seen that an excessive regulatory takings doctrine could prove to be counterproductive since it leads to a situation where granting private standing might no longer be perceived by states as a low-cost commitment. Overall, we found the traditional analysis in the investment realm to be very convincing.

Our findings in the trade area were much more critical of the traditional analysis advanced by the literature. We found that the fact that governments act as a political filter when deciding what cases to bring to the WTO is a mere *effect* of the absence of private standing in international trade law, but *not its underlying reason*. The traditional analysis provides valuable insight by convincingly explaining how governments can benefit from the absence of private standing and can maximize their political short-term welfare through interposing themselves as political filters.

We also had to point out, however, that a situation with governments acting as political filters is clearly suboptimal with respect to global welfare due to the increased amount of protectionism that it brings with it. We found it plausible to assume that the drafters of international trade agreements, when refusing standing to private persons, do not do this in order to enable governments to act as political filters, to therewith abuse of their power and to ultimately compromise the overarching goals of their agreement.

We identified capacity constraints at both the national and international level as central reason why private exporters are refused standing in international trade agreements. We found that these capacity constraints continue to speak in favor of maintaining the intergovernmental nature of WTO dispute settlement.

We therefore proposed to reform WTO dispute settlement in a way that would allow the entire system to benefit from the permanent and close scrutiny of treaty compliance by foreign exporters. We suggested that they be given the right to have scenarios of alleged treaty violations examined by their governments who should be obliged to bring all cases that appear to be sufficiently likely to succeed. This would create a situation where governments exercise their filter position in a way that would be beneficial for the entire system.

Obvious capacity constraints on behalf of the developing member states should be overcome by concerted efforts of the rich world. Such efforts do not only appear to be warranted by solidarity, which traditionally has proven to be a very weak incentive in international economic relations. Seen their greater share of international trade, rich countries are also the ones likely to benefit most from diminished levels of protectionism.

Bibliography

a) Treaties

World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (hereinafter 'The Legal Texts') (CUP, New York 1999). The Legal Texts are accessible online: <http://www.wto.org/english/docs_e/legal_e/legal_e.htm>

b) WTO Decisions

All of the following WTO dispute settlement decisions are available online at:
<<http://docsonline.wto.org>>

WTO, *Australia – Measures Affecting Importation of Salmon* (short title: *Australia – Salmon*), Panel Report WT/DS18/R, 12 June 1998, Appellate Body Report WT/DS18/AB/R, 20 October 1998, Article 21.5 Panel Report WT/DS18/RW, 18 February 2000

WTO, *EC – Measures concerning Meat and Meat Products* (short title: *EC – Hormones*), Appellate Body Report WT/DS26/AB/R and WT/DS48/AB/R, 16 January 1998

WTO, *Japan – Measures Affecting Consumer Photographic Film and Paper* (short title: *Japan – Film*), Panel Report WT/DS44/R, 31 March 1998

WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (short title: *US – Shrimp*) Panel report WT/DS58/R, 15 May 1998, Appellate Body Report WT/DS58/AB/R, 12 October 1998

WTO, *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (short title: *US – Lead and Bismuth II*), Panel Report WT/DS138/R, 23 December 1999, Appellate Body Report WT/DS138/AB/R, 10 May 2000

c) Publications by International Organizations

UNCTAD (2006), *World Investment Report* (New York/Geneva, United Nations), 372 p

UNCTAD (2007), *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (New York/Geneva, United Nations) 172 p

d) Monographs and Books

BAGWELL, K and STAIGER, R (2002), *The Economics of the World Trading System* (MIT Press), 224 p

CANAL-FORGUES, E (2004), *Le règlement des différends à l'OMC*, (2nd ed Bruylant, Brussels), 196 p

EHLERMANN, C-D (2004), 'Reflections on the Process of Clarification and Improvement of the DSU', *The WTO Dispute Settlement System 1995-2003*, (The Hague/London/New York), 640 p

FLORY, T (1999), *L'Organisation mondiale du commerce – Droit institutionnel et substantial* (Bruylant, Brussels), 248 p

e) Articles, Working Papers and Contributions to Compilations

AAKEN, A, van, 'Perils of Success? The Case of International Investment Protection' (2008) *9 European Business Organization Law Review*, pp 1-27

ASCENSIO, H (2001), 'L'amicus curiae devant les juridictions internationales', *4 Revue générale de droit international public*, pp 897-930

BECKER, G (1983), 'A theory of competition among pressure groups for political influence', *98 Quarterly Journal of Economics*, pp 371–400

BECKER, G (1985), 'Public policies, pressure groups and dead weight costs', *28 Journal of Public Economics*, pp 329–347

BEEN, V and BEAUVAIS, J (2003), 'The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International Regulatory Takings Doctrine', *78 New York University Law Review*, pp 30–143

BUSCH, M and REINHARDT, E (2003), 'Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement', *37 Journal of World Trade*, pp 719–735

COLLINS Jr. P (2004), 'Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation', *38 (4) Law & Society Review*, pp 807-832

ELKINS, Z, GUZMAN, A and SIMMONS, B (2006), 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000', *60 International Organization*, pp 811-846

GOLDSTEIN, J and MARTIN L (2000), 'Legalization, Trade Liberalization and Domestic Politics: A Cautionary Note', *54 International Organization*, pp 603–32

GROSSMAN, G and HELPMAN, E (1995), 'Trade Wars and Trade Talks', *103 Journal of Political Economy*, pp 675-708

GUZMAN, A (1998), 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties', *38 Virginia Journal of International Law*, pp 639–688

GUZMAN, A (2002), 'The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms', *31 Journal of Legal Studies*, pp 303–326

GUZMAN, A (2005), 'The Design of International Agreements', *16 (4) European Journal of International Law*, pp 579-661

GUZMAN, A and SIMMONS, B (2005), *Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes*, UC Berkeley Public Law Research Paper No. 660501, 44 p

HUDEC, R (1987), 'Transcending the Ostensible: Some Reflections on the Nature of Litigation between Governments', *72 Minnesota Law Review*, pp 211-226

LANDES, W and POSNER, R (1975), 'The Private Enforcement of Law', *4 Journal of Legal Studies*, pp 1–46

LEVY, P and SRINIVASAN, T (1996), 'Regionalism and the (Dis)advantage of Dispute Settlement Access', *86 American Economic Review (Papers and Proceedings)*, pp 93–98

MAGGI, G and RODRIGUEZ-CLARE, A (1998), 'The Value of Trade Agreements in the Presence of Political Pressures', *106 Journal of Political Economy*, pp 574–601

MAVROIDIS, P, *Amicus Curiae Briefs Before The WTO: Much Ado About Nothing*, Jean Monnet Working Paper 2/01, 18 p

SHELL, G. Richard (1995), 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization', *44 Duke Law Journal*, pp 829-927

SCHWARTZ, W and SYKES, A (2002), 'The Economic Structure of Renegotiation and Dispute Settlement in the World Trade Organization', *31 Journal of Legal Studies*, pp 179–204

STERN, B (2003), 'L'intervention des tiers dans le contentieux de l'OMC', *2 Revue générale de droit international public*, pp 257-303

SYKES, A (2005), 'Public vs. Private Enforcement of International Economic Law: Of Standing and Remedy', *John M. Olin Law & Economics Working Papers No. 235*, Chicago Law School, 42 p

TRACHTMAN, J and MOREMEN, P (2003), 'Costs and Benefits of Private Participation in WTO Dispute Settlement, Whose Right is it Anyway?', *44 Harvard International Law Journal*, pp 221–250

VANDEVELDE, K (1993), 'U.S. Bilateral Investment Treaties, The Second Wave', *14 Michigan Journal of International Law*, pp 621–704