Online Public Consultation on Investment Protection and ISDS Dispute Settlement in the TTIP

By Ana Koprivica, research fellow at the Max Planck Institute Luxembourg

The negotiations between the EU and the US, the two largest single trading blocs in the world, concerning a free trade agreement – the Transatlantic Trade and Investment Partnership (TTIP) – started in July 2013. With an ambition of making these negotiations the most open and transparent trade talks until now, the European Commission has just launched a public consultation on it. The questionnaire to be filled in, as well as additional relevant documents, can be found at http://ec.europa.eu/yourvoice/ipm/forms/dispatch?form=ISDS. The intention of the Commission is to consult the public in the EU on a possible approach to investment protection and ISDS in the TTIP and publish the contributions received by 21st June 2014 in a report, provided the contributors had previously agreed to this.

From the procedural point of view, some relevant novelties (compared to most existing investment treaties) are included in the consultation document and referred to in the Questionnaire: transparency of the investor-state dispute settlement (ISDS); the relationship with domestic courts; the rules on arbitrators' conduct and qualifications; the mechanism for a quick dismissal of frivolous or unfounded claims; the use of "filter mechanisms" and, the creation of an appellate body. For the sake of brevity, only the inclusion of the ISDS mechanism and transparency of the proceedings shall be addressed here.

ISDS and Transparency

At the outset it should be noted that there has been a strong opposition to inclusion of the ISDS in the TTIP. Interestingly enough, the Commission does not seem to question the adequacy of this ISDS in the Questionnaire, unless perhaps in the General Assessment Section, but instead goes on to include the reference to the UNCITRAL Transparency Rules which entered into force on 1st April. This is indeed a result of the ongoing public criticism regarding ISDS, displayed by the

NGOs, environmental groups and globalism activists who raised doubts on its legitimacy.

The Commission, however, did react to this criticism also by defending the necessity of keeping ISDS rather than referring the disputes to national courts, stating that the latter could in some circumstances be unattractive to investors due to the risk of home team bias (e.g., some States may deny foreign nationals access to courts). This is, of course, in line with the main purpose of having international investment agreements and that is to encourage foreign investors from one state party to invest in the territory of the other, although some reports by the World Bank cast doubts on the actual effects of this stimulation.

Even though the arguments set out by the Commission seem sensible and difficult to argue against, it is hard to believe that the US and EU are truly fearing that their investors could be treated unfairly, since the European and American legal systems do not have an investor-unfriendly reputation. In fact, both the US and the EU are currently negotiating investment agreements with China, which should provide the investors with greater legal certainty and market access. Consequently, should the EU and the US fail to include ISDS provisions in the TTIP, there is a concern that China might understand this as a signal to resist the pressure to undertake further liberalisation measures. It is, therefore, the necessity of including such a chapter in TTIP, from the economic point of view, that is still a debatable matter.

The EU's goal is to ensure transparency in the ISDS mechanism under TTIP in order to foster accountability, consistency and predictability and to that end the Questionnaire includes the reference to the UNCITRAL Transparency Rules. To remind, these rules provide for open hearings as well as disclosure of most of the documents, with an exception when it concerns confidential information, allowed by the tribunal. The additional documents whose disclosure is mandatory pursuant to Article xx-33 of EU-Canada Agreement, which is used as a reference for the consultations on transparency under TTIP, are: the request for consultations, the request for a determination, the notice of determination, the agreement to mediate, the notice of intent to challenge, the decision on an arbitrator challenge and the request for consolidation. In addition, a modification of the Rules has been made with regard to exceptions to disclosure. Article xx-33(6) stipulates an obligation for the respondent to disclose information to public if its laws so require and instructs the respondent to apply such laws in a

manner sensitive to protecting from disclosure of confidential or protected information.

Once more, due to numerous attacks on the account of lack of transparency, the Commission does not even question whether rules on transparency should be included in the TTIP but asks for views on whether the approach proposed contributes to the EU objective to increase transparency in the ISDS under TTIP. It should be added that, if the US and the EU agree on the applicability of UNCITRAL Transparency Rules, this would not be a precedent since the EU has already reached a political agreement with Canada to introduce these rules in the upcoming free trade agreement between them.

Finally, looking at a broad picture and a long-term impact, one may conclude that if the rules on transparency are included in the TTIP as well as the agreement with Canada (and both are highly likely to happen), it is to be expected that this would certainly put actors in investor-State arbitration under the pressure to allow for greater transparency. It will be interesting to see in which direction the contributions with regard to this and other issues would go until 21st June; however, it seems that the landscape of investor-State arbitration is certainly undergoing significant changes and that this will be yet another step in that direction.

"Intellectual Whiplash": One Day, Two International Cases, And Two Different Results At The U.S. Supreme Court

On December 2, 2013, the case of *BG Group v. Argentina* was argued at the Supreme Court. As the argument neared its end, Justice Anthony M. Kennedy quipped to Argentina's counsel: "Your – your whole argument gives me

intellectual whiplash." Last Wednesday, when the Court released its decisions in *BG Group* and *Lozano v. Montoya Alvarez*, the same might be said back to the Court. I'm not the first commentator to feel this way.

Lozano concerned the Hague Convention on Civil Aspects of Child Abduction, which in essence says that if one parent unilaterally takes their child to another country, and the child is found within a year, the child must be automatically returned home. Otherwise, a court must consider the best interests of the child, who may have developed ties in the new country. But what to make of the clandestine parent and a child whose location could not be discovered for 16 months? Is there a principle of "equitable tolling" under the Convention, according to which the one-year period should only begin after the child's location can be ascertained? This is certainly a familiar doctrine under U.S. law—equity tolls statutory limitations periods all the time. So as not to reward a clandestine parent, the father in the Lozano case wanted the same principle applied to his case.

The Supreme Court refused this request. The Convention, they said, was not a federal statute—it was a "contract between . . . nations"—so it would be "particularly inappropriate to deploy this background principle of American law" when interpreting it. Interpreting the Convention to preclude equitable tolling is more consistent with its text; if the drafters of the Convention had wanted the one-year period to start when the left-behind parent actually discovered where the child was, they could have easily said so. Because they didn't, the uniquely common law notion of equitable tolling could not justify the father's suit for automatic return.

The notion of a treaty as a contract pervaded the *BG Group* decision, too. On their face, the two cases had some similarities. Both involved UK parties with rights under an international treaty. The similarities, however, ended there. Lonzano was a father seeking the return of his foreign-domiciled daughter. BG Group was a British multinational oil and gas company who had invested in an Argentine gas distribution company, and whose investment was harmed by Argentine emergency legislation. BG Group filed a Notice of Arbitration against Argentina under the UK-Argentina Bilateral Investment Treaty ("BIT"), and sited the arbitration in the United States under the UNCITRAL Rules.

But Article 8(2) of the BIT provides that disputes under the Treaty between an

investor and Argentina must first be submitted to a competent court in the sovereign state where the investment was made. Subsequently, the dispute can go to international arbitration at one party's request only if (1) a period of eighteen months has elapsed since the dispute was presented to the court and no decision has been made; or (2) a final decision was made by the court, but the parties still disagree. Argentina opposed jurisdiction of the arbitral tribunal because the dispute had not been submitted to Argentine courts at all. BG Group argued that waiting to meet the requirements of Article 8(2) of the BIT would have been futile. The arbitral tribunal determined that they had jurisdiction because Argentina had enacted laws hindering judicial recourse for foreign investors, and ultimately issued an award on the merits in favor of BG Group.

Both parties filed petitions for review in the United States District Court for the District of Columbia, which deferred to the arbitrators and upheld the arbitration award. The United States Court of Appeals for the District of Columbia Circuit, however, overturned that decision. It found that the arbitral tribunal did not have jurisdiction because BG Group had not complied with the local litigation requirements of Article 8(2) of the BIT. As a result, it set aside the award. The Supreme Court was asked to decide the question that had split the inferior U.S. Courts, namely: "whether a court of the United States, in reviewing an arbitration award made under the Treaty, should interpret and apply the local litigation requirement de novo, or with the deference that courts ordinarily owe arbitration decisions."

Now here comes the "intellectual whiplash." A majority of the Supreme Court "treat[ed] the [treaty] before us as if it were an ordinary contract between private parties." In doing so, Justice Breyer—citing the Court's domestic, commercial arbitration jurisprudence—found that the local litigation requirement was a procedural condition precedent to arbitration, which determined "when the contractual duty to arbitrate arises, not whether there is a contractual duty to arbitration at all." Thus, as a procedural precondition rather than a substantive bar to arbitrability, Breyer found that, "courts presume that the parties intend arbitrators, not courts, to decide disputes about [the local litigation requirement's] meaning and application." The Court found nothing in Article 8 of the BIT to overcome this presumption, and thus saw "no reason to abandon or increase the complexity of [its] ordinary intent-determining framework" for contractual arbitration clauses. (Of course, it remains an open question of what

the Court would do if the Treaty were more express on the obligatory nature of the local litigation provision). Under a deferential review of the arbitrators' decision, the award was allowed to stand.

The dissent, authored by Chief Justice Roberts and joined by Justice Kennedy, harkened back to *Lozano* and took issue with the majority's decision to consider the BIT as an ordinary contract between private parties. In their view, when looking at the BIT as an act of state between co-equal sovereigns, with all deference that comes with that conclusion, the local litigation requirement can only be viewed as a textual precondition to the formation of an agreement to arbitrate against the state. "By focusing first on private contracts, the majority "start[s] down the wrong road" and "ends up at the wrong place," the dissent noted. "It is no trifling matter for a sovereign nation to subject itself to suit by private parties," the Chief Justice said; "we do not presume that any country-including our own-takes that step lightly." Thus, without having submitted to the local courts before it initiated arbitration, the dissent would have held that BG Group had no agreement to arbitrate against Argentina.

In some contexts, sovereign consent to convene an arbitration deserves a special place in the law. At least one federal judge has said that the federal policy in favor of arbitration carries special force when the agreement to arbitrate is contained in a treaty as opposed to a private contract. And take, for example, the recurring situation where parties use the U.S. courts to seek evidence by way of 28 U.S.C. § 1782 for use in international arbitration proceedings. Where that arbitration is convened by treaty and not by contract, U.S. courts will more readily lend their assistance. On its face, the *BG Group* decision runs counter to the idea that U.S. courts will treat investment treaty arbitration with greater deference than commercial arbitration. On the other hand, however, upholding the award furthers the above jurisprudence, the Supreme Court's recent string of pro-arbitration rulings, as well as the "basic objective of . . . investment treat[ies]." But "intellectual whiplash" still occurs when we consider that, in *Lonzano*, the Court was unwilling to "rewrite the treaty" in order to "advance its objectives."

Volume 366 of Courses of the Hague Academy

Volume 366 of the Collected Courses of the Hague Academy of International Law was just published. It includes the two following courses:

"Trusts" in Private International Law by **David Hayton**.

> *The course first deals with « What is a 'trust' in the global arena ? » because the concept has developed from English trusts that create proprietary rights binding third parties to complex offshore trusts with additional flexible features and to trusts in civil law and mixed jurisdictions that confer on beneficiaries a specially preferred obligation in respect of particular property. Once this range affecting the family and the commercial sphere is understood, it is possible properly to go on to deal with « Trusts Jurisdiction and Recognition and Enforcement of Judgments under Brussels 1 and the Recast Regulation » and then with « Trusts within the Hague Trusts Convention, the Applicable Law and Recognition of Trusts»*
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> - *Chapter I. What is a "trust" in the global arena;*
> - *Chapter II. Trusts jurisdiction and recognition and enforcement of judgments under Brussels 1 and the Recast Regulation;*
> - *Chapter III. "Trusts" within the Hague Trusts Convention: the applicable law and recognition of trusts.*

Res Judicata and *Lis Pendens* in International Arbitration by **Kaj Hobér**

> *The increase in the number of international courts and tribunals combined with the significant growth of international arbitrations has led to a corresponding increase in overlapping and competing jurisdictions, and in the risks thereof. One method of resolving such jurisdictional conflicts is to apply the principles of res judicata and lis pendens. These lectures discuss and analyze these two principles in so far as international arbitrations are concerned, including international commercial arbitration, interstate arbitration and investment treaty arbitration.*
>
> - *Chapter I. Introduction*

- *Chapter II. Res judicata and lis pendens in national law*
- *Chapter III. International arbitration, res judicata and lis pendens*
- *Chapter IV. Final comments.*

Privatizing Delaware Courts

I was not aware of this development in Delaware, which was introduced by a statute of 2009.

For USD 6,000 a day and USD 12,000 filing fees, the prestigious Delaware court and judges can be rented for settling disputes above USD 1 million. One of the parties at least must be a Delaware business entity. The Delaware law maker called it "arbitration", but the resulting decision is an "order of the Chancery Court", not an arbitral award. The scheme is closer to litigation behind closed doors than to arbitration.

One of the goals is to compete to attract business disputes to Delaware by offering a *cheaper* mode of dispute resolution. As a US judge has recently emphasized:

> *The State of Delaware has become interested in sponsoring arbitration as a part of its efforts to preserve its position as the leading state for incorporations in the U.S. One of the reasons that Delaware has maintained this position is the Delaware Court of Chancery, where the judges are experienced in corporate and business law and readily available to resolve this type of dispute. Nevertheless, judicial proceedings in the Court of Chancery are more formal, time consuming and expensive than arbitration proceedings. For that reason, the Court of Chancery, as a formal adjudicator of disputes, may not be able to compete with the new arbitration systems being set up in other states and countries.*

The constitutionality of this law, however, has been challenged, and the Supreme Court may decide to hear the case. In Delaware Coalition for Open Government,

Inc. v. Strine, the U.S. Court of Appeals for the Third Circuit found the Delaware law unconstitutional as the proceedings would not be open to the public:

> *Because there has been a tradition of accessibility to proceedings like Delaware's government-sponsored arbitration, and because access plays an important role in such proceedings, we find that there is a First Amendment right of access to Delaware's government-sponsored arbitrations*

See also this Op Ed of Judith Resnik in the *New York Times*.

I have tremendous respect for Judith Resnik, who is a professor at Yale Law School and one of the leading US scholars on civil procedure. Readers unfamiliar with the US legal academy should know, however, that Resnik belongs to a school of thought which is highly critical of alternative dispute resolution. This is probably the result of the development of arbitration for consumer and labour disputes in the US. I am not sure, however, that this peculiarity of US law should impact our perception and analysis of commercial dispute resolution.

Weidemaier on Sovereign Immunity and Sovereign Debt

Mark Weidemaier (University of North Carolina) has published Sovereign Immunity and Sovereign Debt in the latest issue of the *University of Illinois Law Review*.

> *The law of foreign sovereign immunity changed dramatically over the course of the 20th century. The United States abandoned the doctrine of absolute immunity and opened its courts to lawsuits by private claimants against foreign governments. It also pursued a range of other policies designed to shift such disputes into litigation or arbitration (and thus relieve political actors of pressure to intervene on behalf of disappointed creditors). This Article uses a unique data set of sovereign bonds to explore how international financial*

contracts responded to these legal and policy initiatives.

The Article makes three novel empirical and analytical contributions. The first two relate to the law of sovereign immunity and to the role of legal enforcement in the sovereign debt markets. First, although the decision to abandon the absolute immunity rule was a major legal and policy shift, this article demonstrates that investors dismissed their new enforcement rights as irrelevant to the prospect of repayment. Second, the ongoing Eurozone debt crisis has prompted fears that private investors will use litigation to prevent debt restructurings necessary to revive European economies. This Article shows that such fears may be overblown and, in the process, informs the broader empirical and theoretical debate about the role of legal enforcement in the sovereign debt markets.

Finally, the Article exposes a gap in contract theory as it pertains to boilerplate contracts such as sovereign bonds. Boilerplate presents a puzzle of intense interest to contracts scholars. It is drafted to serve the interests of sophisticated, well-resourced players, yet it often remains static in the face of new risks. To explain this inertia, contract theory posits that major shifts in boilerplate financial contracts require a financial crisis or other exogenous shock that substantially alters investors' risk perceptions. This Article, however, demonstrates that the Foreign Sovereign Immunities Act of 1976 prompted a major shift in contracting practices despite investors' continued indifference to legal enforcement and argues that contract theory must recognize that a wider range of forces may prompt boilerplate to change.

Liber Amicorum Bernard Audit

A Liber Amicorum to French leading PIL scholar Bernard Audit (Mélanges en l'honneur du Professeur Bernard Audit) will be published in the coming months. It will include the following contributions:

Bertrand ANCEL (Université Paris II)
Exequatur et prescription

Louis d'AVOUT (Université Paris II)
La lex personalis *entre nationalité, domicile et résidence habituelle*

Tristan AZZI (Université Paris Descartes)
La Cour de justice et le droit international privé ou l'art de dire parfois tout et son contraire

Jean-Sylvestre BERGé (Université Lyon 3)
Droit international privé et approche contextualisée des cas de pluralisme juridique mondial

George A. BERMANN (Columbia Law School)
The European Law Institute : a Transatlantic Perspective

Nicolas BINCTIN (Université de Poitiers)
Les apports de la propriété intellectuelle à l'analyse d'un ordre public « transnational » ou « réellement international »

Sylvain BOLLÉE (Université Paris I)
La responsabilité extracontractuelle du cocontractant en droit international privé

Béatrice BOURDELOIS (Université du Havre)
Relations familiales internationales et professio juris

Dominique BUREAU (Université Paris II)
Le mariage international pour tous à l'aune de la diversité

Olivier CACHARD (Université de Nancy)
Regards transatlantiques sur le forum non conveniens : *la jurisprudence en matière aérienne et nautique*

Muriel CHAGNY (Université de Versailles St-Quentin en Yvelines) et Valérie PIRONON (Université de Nantes)
Les recours collectifs en droit du marché

Daniel COHEN (Université Paris II)
Sur l'émanation d'État

Gilles CUNIBERTI (Université du Luxembourg)
La faible attractivité internationale du droit français des contrats

Bénédicte FAUVARQUE-COSSON (Université Paris II)
Le droit international privé des contrats en marche vers l'universalité ?

Diego P. FERNANDEZ-ARROYO (Sciences Po)
La tendance à la limitation de la compétence judiciaire à l'épreuve du droit d'accès à la justice

Estelle FOHRER-DEDEURWARDER (Université Paris II)
Le principe prior tempore dans la résolution des conflits de procédures en droit commun (après l'abandon de l'exclusivisme des privilèges de juridiction)

Jacques FOYER (Université Paris II)
Lois de police et principe de souveraineté

Hugues FULCHIRON (Université Lyon 3)
La reconnaissance au service de la libre circulation des personnes et de leur statut familial dans l'espace européen

Hélène GAUDEMET-TALLON (Université Paris II)
De l'abus de droit en droit international privé

Pierre-Yves GAUTIER (Université Paris II)
Convaincre l'arbitre

Bernard HAFTEL (Université d'Orleans)
Pour en finir avec le cercle vicieux du principe d'autonomie (ou presque)

Jeremy HEYMANN (Université Paris I)
De la mobilité des sociétés dans l'Union. Réflexions sur le droit d'établissement

Laurence IDOT (Université Paris II)
Réflexions sur les limites du modèle américain en droit de la concurrence… L'exemple du private enforcement

Charles JARROSSON (Université Paris II)
Le compromis, convention d'arbitrage d'avenir ?

Catherine KESSEDJIAN (Université Paris II)
Quel juge est compétent pour décider de la validité et de l'applicabilité d'une convention d'arbitrage ?

Georges KHAIRALLAH (Université Paris II)
Le statut personnel à la recherche de son rattachement. Propos autour de la loi du 17 mai 2013 sur le mariage de couples de même sexe

Malik LAAZOUZI (Université Lyon 3)
La limitation internationale indirecte de for. Réflexions à propos du contrat d'assurance

Paul LAGARDE (Université Paris I)
La fraude en matière de nationalité

Pierre MAYER (Université Paris I)
Le poids des témoignages dans l'arbitrage international

Horatia MUIR WATT (Sciences Po)
L'émergence du réseau et le droit international privé

Marie-Laure NIBOYET (Université Paris Ouest Nanterre la Défense)
Les remèdes à la fragmentation des instruments européens de droit international privé (à la lumière de la porosité des catégories « alimony » et « matrimonial property » en droit anglais)

Cyril NOURISSAT (Université Lyon 3)
L'avenir des clauses attributives de juridiction d'après le règlement « Bruxelles I bis »

William W. PARK (Boston University)
The Deontology of Arbitration's Discontents : Between the Pernicious and the Precarious

Louis PERREAU-SAUSSINE (Université Paris-Dauphine)
Le conflit entre clause compromissoire et clause attributive de juridiction

Gérard PLUYETTE (Cour de cassation)
Actualités du droit de l'arbitrage : l'obligation de révélation des arbitres et le contrôle de l'ordre public de fond par la Cour de cassation

Anne SINAY-CYTERMANN (Université Paris Descartes)
Les tendances actuelles de l'ordre public international

Édouard TREPPOZ (Université Lyon 3)
L'extraterritorialité des injonctions portant sur internet

Laurence USUNIER (Université Paris 13)
Droit d'agir en justice et actions de groupe transnationales

Thierry VIGNAL, (Université de Cergy-Pontoise)
Sur quelques paradoxes contemporains de la territorialité

The book can be ordered in advance by filling this form. Early buyers will be mentionned as such in the book.

Conflict of Laws Bibliography 2013

I am pleased to pass on that Professor Symeon Symeonides has once again compiled a bibliography that covers private international law, or conflict of laws, in a broad sense. In particular, it covers judicial or adjudicatory jurisdiction, prescriptive jurisdiction, choice of forum, choice of law, federal-state conflicts, recognition and enforcement of sister-state and foreign-country judgments, extraterritoriality, arbitration and related topics. You can find it here.

Thanks to Professor Symeonides for continuing to publish this incredibly helpful resource.

Cuniberti on the International Attractiveness of Contract Laws

I (University of Luxembourg) have posted The International Market for Contracts – the Most Attractive Contract Laws on SSRN.

The aim of this Article is to contribute to a better understanding of the international contracting process by unveiling the factors which influence international commercial actors when choosing the law governing their transactions.

Based on the empirical study of more than 4,400 international contracts concluded by close to 12,000 parties participating in arbitrations under the aegis of the International Chamber of Commerce, the Article offers a method of measuring the international attractiveness of contract laws. It shows that parties' preferences are quite homogenous and that the laws of five jurisdictions dominate the international market for contracts. Among them, two are chosen three times more often than their closest competitors: English and Swiss laws.

International Attractiveness, 2007-2012

- ***English Law: 11.20***
- ***Swiss Law: 9.91***
- ***U.S. State Laws: 3.56***
- ***French Law: 3.14***
- ***German Law: 2.03***

The Article then inquires which features made these laws more attractive than others and seeks to verify whether the postulate that international commercial parties are rational actors is true. It concludes that while some parties might have the resources to study the content of available laws before deciding which one to choose, others have no intention of investing such resources and are happy to rely on cheaper means to assess the content of foreign laws, including proxies. Furthermore, some parties suffer from cognitive limitations, the most important of which being the fear of the unknown and the correlative need for selecting a law resembling their own. Finally, unsophisticated parties might not fully appreciate the extent of their freedom to choose the law governing their transaction and might wrongly believe that it is constrained by largely irrelevant factors such as the venue of the arbitration.

The article is forthcoming in the *Northwestern Journal of International Law and Business.*

Strong on Procedural Choice of Law

Stacie Strong (University of Missouri School of Law) has posted Limits of Procedural Choice of Law on SSRN.

Commercial parties have long enjoyed significant autonomy in questions of substantive law. However, litigants do not have anywhere near the same amount of freedom to decide procedural matters. Instead, parties in litigation are generally considered to be subject to the procedural law of the forum court.

Although this particular conflict of laws rule has been in place for many years, a number of recent developments have challenged courts and commentators to consider whether and to what extent procedural rules should be considered mandatory in nature. If procedural rules are not mandatory but are instead merely "sticky" defaults, then it may be possible for commercial actors to create private procedural contracts that identify the procedural rules to be used in any litigation that may arise between the parties.

This Article considers the limits of procedural choice of law as both a structural and substantive matter. Structural concerns involve questions of institutional design and the long-term understanding of a sovereign state prerogative over judicial affairs. Structural issues are considered from both a theoretical perspective (including a comparison of consequentialist and deontological models) and a practical perspective (including a discussion of relevant decisions from the Third and Seventh Circuit Courts of Appeals). Substantive concerns focus on matters of individual liberty and the content of fundamental due process rights. These issues are analyzed through analogies to certain non-derogable procedural rights that exist in international commercial arbitration.

This Article addresses a number of challenging questions, including those relating to the proper characterization of different procedural rules (i.e., whether certain procedures are public or private in nature), the core duties of judges and state interests in procedural uniformity and efficiency. Although the discussion focuses primarily on procedural autonomy in international commercial litigation, many of the observations and conclusions are equally applicable in the domestic realm.

The paper is forthcoming in the *Brooklyn Journal of International Law.*

December 2013 Issue of the Revista Electrónica de Estudios Internacionales (REEI, Spain)

The latest issue of the REEI has been recently released. These are the contents related to Private International Law (free access, in Spanish):

M.D. Ortiz Vidal: *Distribución y venta en España de productos fabricados en el extranjero. Cuestiones de Derecho Internacional Privado*

Abstract: The distribution and sale, of a product manufactured in a third country, in the European single market, requires the adjustment of the product to the rules of public law and private law. From the point of view of public law, the Conformité Européenne operates as a necessary element in order to market for certain products in the EU single market. From an international private law perspective, European standards applicable to the legal position of the purchaser of a product – manufactured in a Member State of the EU or in a third country – which is distributed and commercialized in the EU single market, will provide a different legal treatment depending on whether the consumer is "active" or "passive".

E. Fernández Massiá: *Arbitraje inversor-estado: De "bella durmiente" a "león en la jungla"*

Abstract: The growing number of cases highlights benefits and deficiencies of international investment arbitration. Most countries consider the investor-state dispute settlement system a key element of international investment protection, but are reforming selected aspects of the same. In this sense, the new international Agreements introduce procedural innovations and changes in the wording of the substantive provisions looking forward a balanced approach that recognizes the legitimate interests of both host countries and foreign investors. But other governments have taken more radical steps. For example, Latin American countries have proposed the creation of a new investment arbitration center alternatively to ICSID. Australia intends no longer to include dispute resolution clauses allowing investor-state arbitration in future treaties, while South Africa and India are reviewing their external policy about foreign direct investment.

L. Dávalos León: *El contrato internacional en la nueva Ley cubana de Contratación Económica*

Abstract: The enactment of the new regulation on economic contracts in Cuba at the end of 2012 has brought about significant changes to contract law in this country. Although this regulation encompasses principles and international contracting rules based on the UNIDROIT Principles, it also gives rise to problems in relation to the "commercial" and "international" nature of contracts. The difference between commercial contracts and economic contracts is confusing because the provisions governing the former in the Commercial Code have been derogated and there are no other regulations substantively regulating these types of contracts. The new regulation also states that international contracts fall outside its scope of application but, at the same time, includes within its scope contracts executed with foreign natural or legal persons. Therefore, the presence of foreign elements does not suffice for a contract to be considered "international", but other objective links of greater significance are required. All this raises a question: Which rules currently apply to international commercial contracts when the parties, by virtue of the principle of autonomy, choose Cuban law as the governing law? This work analyses certain aspects of the new regulation and its contradictions

in order to expose them and to open discussion to find solutions or alternatives.

Chronicles on events and facts concerning Private International Law, International Civil Procedural Law and Public International Law are also provided.