

EVALUATING A PERMANENT COURT SOLUTION FOR INTERNATIONAL INVESTMENT DISPUTES

ABSTRACT

Despite the original objective of investor state dispute settlement (“ISDS”)—to create an unbiased arbitration mechanism to resolve conflicts between states and foreign investors—ISDS tribunals have gained the reputation of being one-sided, nontransparent, and inconsistent in decisions rendered. A major reform proposed to address the criticism of ISDS is the creation of one permanent tribunal, rather than numerous ad hoc tribunals constituted separately for each investment dispute. Discussion of ISDS reform in light of its historical context poses the question: is ISDS really a broken system, or have our global priorities and concerns changed over time? While improvements can be made, the current ISDS system is still faithfully serving its original purpose as a neutral tribunal where disputes can be arbitrated. In contrast, the creation of a permanent investment tribunal may thwart the principles envisioned for ISDS at its inception, most importantly, the balance between the protection of state sovereignty and the recognition of the investor as an autonomous private entity. This comment discusses a permanent court solution to international investment disputes in light of the European Council’s 2018 directive authorizing the European Commission to negotiate, on behalf of the European Union, a convention to establish a permanent body to settle investment disputes called the multilateral investment court (“MIC”). It compares the proposed MIC with the structure of the permanent investment tribunal, known as the Investment Court System, contemplated by the Comprehensive Economic and Trade Agreement. Ultimately, this comment concludes that ISDS tribunals can address many concerns through reform to the existing ad hoc system without requiring permanency, thus continuing to respect the original aims of the ISDS system and to foster international investment.

INTRODUCTION

As the number of investor-state dispute settlement (“ISDS”) cases have increased over the years, so has criticism regarding ISDS tribunals and their impermanent, ad hoc nature.¹ Despite the original objective of ISDS—to create an unbiased arbitration mechanism to resolve conflicts between states and foreign investors—ISDS tribunals have gained a reputation for being one-sided, nontransparent, and inconsistent in their rulings.² Critics of ISDS can be found throughout the legal and policy world—including academics, lawyers who have participated in ISDS either through representation or as arbitrators, nongovernmental organizations, and interest groups.³ Currently, different forms of ISDS are included in over 3000 international agreements, and the number of cases referred to international investment tribunals has increased.⁴ The growing prevalence of ISDS in treaties, coupled with the importance of foreign investing to the global economy, have led to public debate regarding appropriate solutions to the problems raised by critics of ISDS.⁵

1. See Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT’L L. 471 (2009) (discussing the growth of international investment law). In contrast to domestic courts, international courts and tribunals face constant attacks regarding their “legitimacy,” including debates about their methods and limits for dispute resolution. *Id.* While “[t]his holds true for any of the many international dispute-settlement bodies” created in the past two decades, it is especially true in international investment disputes. *Id.* at 471–72; see also DAVID COLLINS, AN INTRODUCTION TO INTERNATIONAL INVESTMENT LAW 227 (2017) (defining “ad hoc” as a tribunal “constituted for that particular dispute at hand outside an institutional framework”).

2. See Chris Evans, *ISDS: Important Questions and Answers*, WHITE HOUSE (Mar. 26, 2015, 4:49 PM), <https://obamawhitehouse.archives.gov/blog/2015/03/26/isds-important-questions-and-answers> [<https://perma.cc/6YNV-T7QA>]; *Fact Sheet: Investor-State Dispute Settlement (ISDS)*, OFF. U.S. TRADE REPRESENTATIVE (Mar. 2015), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds> [<https://perma.cc/L7PN-DRCK>] (last visited Dec. 1, 2018) [hereinafter *Fact Sheet*]. For a full discussion of the original ISDS objectives versus the Tribunal’s current reputation, see *infra* Part II.

3. ADVISORY COUNCIL ON INT’L AFFAIRS, INTERNATIONAL INVESTMENT DISPUTE SETTLEMENT: FROM AD HOC ARBITRATION TO A PERMANENT COURT 8 (2015) [hereinafter INTERNATIONAL INVESTMENT DISPUTE SETTLEMENT], <https://aiv-advies.nl/download/9a2c1343-80f8-4c2f-a16d-ab992d31f7b7.pdf> [<https://perma.cc/Z6S2-RU3M>].

4. *Fact Sheet*, *supra* note 2; see Press Release, United Nations Conference on Trade & Dev. Number of International Investment Disputes Mushroomed in 2012, UNCTAD Reports (Apr. 10, 2013), <https://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=120> [<https://perma.cc/L9X8-GN9U>].

5. See SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 283 (3d ed. 2016); Brower & Schill, *supra* note 1, at 472; Florian Grisel & Thomas Schultz, *From Ad Hoc Arbitral Tribunals to Permanent Courts: Three Examples*, OUPBLOG (Sept. 14, 2015), <https://blog.oup.com/2015/09/arbitral-tribunals-permanent-courts/> [<https://perma.cc/8Q8K-9R3L>].

The United Nations Commission on International Trade Law (“UNCITRAL”) formed Working Group III in response to the global desire for an evaluation of the current system and tasked them with crafting potential reforms.⁶ The mandate given to the Working Group III contained three stages: “(i) first identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.”⁷ Examining the product of Working Group III deliberations is a valuable tool for assessing states’ attitudes towards ISDS because it was designed to be government-led and consensus-based.⁸ A recent Working Group III session met in New York from April 23 to 27, 2018, and discussed procedural aspects of the arbitral process, outcomes, and transparency.⁹ They focused on issues like lack of accountability, consistency, the possibility of a review mechanism, and ways to address frivolous claims.¹⁰ Additionally, they discussed ways to fix the existing system, considering codes of conduct for arbitrators, decreasing third-party funding, and improving public perception, while entertaining concerns from non-governmental organizations about the potential for a regulatory chill on important legislation.¹¹ The Working Group will meet again to continue their discussion; to date, no firm reforms have been implemented and deliberations are ongoing.¹² However, this recent Working Group III Session shows that the issue of ISDS reform is on the international agenda.

A major reform discussed in the past in reaction to many ISDS criticisms was the creation of one permanent tribunal, rather than

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6. See Comm’n on Int’l Trade Law, Rep. of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session (pt. I), U.N. Doc. A/CN.9/930/Rev. 1, at 2–3 (2017) [hereinafter Rep. on Thirty-Fourth Session], <https://undocs.org/en/A/CN.9/930/Rev.1> [<https://perma.cc/2HQS-UP4A>]; Comm’n on Int’l Trade Law, Rep. of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fifth Session, U.N. Doc. A/CN.9/935, at 2 (2018) [hereinafter Rep. on Thirty-Fifth Session], <https://undocs.org/en/A/CN.9/935> [<https://perma.cc/Q88Z-NDA6>].

7. Rep. on Thirty-Fifth Session, *supra* note 6, at 2.

8. Rep. on Thirty-Fourth Session, *supra* note 6, at 3.

9. Rep. on Thirty-Fifth Session, *supra* note 6, at 1, 5, 8.

10. See *id.* at 4.

11. See *id.* at 10, 14–15.

12. See Comm’n on Int’l Trade Law, Rep. on the Work of Its Fifty-First Session, U.N. Doc. A/73/17, at 23 (2018), <https://undocs.org/en/A/73/17> [<https://perma.cc/W59D-T5XL>]; Rep. on Thirty-Fifth Session, *supra* note 16.

numerous ad hoc tribunals that are constituted separately for each investment dispute.¹³ This idea has surfaced periodically during negotiations of important mega-regional investment treaties, such as the European Union (“EU”)-Canada Comprehensive Economic and Trade Agreement (“CETA”), the EU-United States Transatlantic Trade and Investment Partnership (“TTIP”), and the Trans-Pacific Partnership (“TPP”).¹⁴ CETA went so far as to create a permanent investment tribunal, known as the Investment Court System (“ICS”).¹⁵ However, the CETA provision which purported to create the ICS is not included in the part of the agreement now provisionally in force.¹⁶ As a result, its effectiveness has not yet been evaluated.

Despite the non-implementation of CETA’s ICS, the creation of a permanent body for dispute resolution is a solution embraced by many internationally. On March 20, 2018, the European Council issued a directive authorizing the European Commission to negotiate, on behalf of the EU, a convention to establish a permanent body to settle investment disputes.¹⁷ This multilateral investment

13. See Grisel & Schultz, *supra* note 5 (comparing the debate for a permanent tribunal for investment disputes to the fifteen or more years it took to create the Permanent Court of Justice, which is now the International Court of Justice).

14. See STEPHAN W. SCHILL, THE E 15 INITIATIVE, REFORMING INVESTOR-STATE DISPUTE SETTLEMENT (ISDS): CONCEPTUAL FRAMEWORK AND OPTIONS FOR THE WAY FORWARD (2015), <http://e15initiative.org/wp-content/uploads/2015/07/E15-Investment-Schill-FINAL.pdf> [perma.cc/FDK4-HAJT].

15. See *CETA Explained*, EUROPEAN COMM’N (Sept. 21, 2018), http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/index_en.htm [https://perma.cc/A6CE-A9BT].

16. ERNEST & YOUNG, CANADA: PROVISIONAL IMPLEMENTATION OF TRADE AGREEMENT WITH EU IS DELAYED TO FALL 2017 DUE TO DAIRY, PHARMACEUTICALS, AND ISDS DISPUTES 2 (2017), [https://www.ey.com/Publication/vwLUAssets/Alert_Canada_provisional_implementation_of_trade_agreement_with_EU_is_delayed_to_Fall_2017_due_to_dairy_pharmaceuticals_and_ISDS_disputes/\\$FILE/2017G_04435-171Gbl_Indirect_Canada%20disputes%20delay%20CETA%20implementation.pdf](https://www.ey.com/Publication/vwLUAssets/Alert_Canada_provisional_implementation_of_trade_agreement_with_EU_is_delayed_to_Fall_2017_due_to_dairy_pharmaceuticals_and_ISDS_disputes/$FILE/2017G_04435-171Gbl_Indirect_Canada%20disputes%20delay%20CETA%20implementation.pdf) [https://perma.cc/4R8Q-G5YY].

17. Council of the European Union Press Release 144/18, Multilateral Investment Court: Council Gives Mandate to the Commission to Open Negotiations (Mar. 20, 2018), <https://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/pdf> [https://perma.cc/KJR9-6TEV] EU Trade Commissioner Cecilia Malmström said of the negotiations:

This is a very welcome decision. In the EU’s bilateral trade talks, we have already moved away from the old ISDS model towards the modern and transparent investment court system. Looking ahead to the long term, the multilateral level will be highly important for managing the growing number of bilateral investment agreements We can now continue working with like-minded partners around the globe, towards launching negotiations to create a multilateral investment court—knowing that EU citizens are fully informed of our negotiating instructions.

Commission Welcomes Adoption of Negotiating Directives for a Multilateral Investment Court, EUROPEAN COMM’N (Mar. 20, 2018), <http://trade.ec.europa.eu/doclib/press/index>.

court (“MIC”) would replace existing bilateral investment court systems included in EU trade and investment agreements.¹⁸ The European Commission has been working internationally to promote acceptance of the MIC multilaterally through dialogue with third-party countries and the promotion of discussion in multilateral bodies.¹⁹ Originally proposed in 2015, this directive shows that the European Commission is serious about trying to implement reform within the realm of international investment.²⁰

In evaluating a permanent ISDS tribunal solution, it is important to keep in mind the original purpose and vision of ISDS. Foreign investment has been an economic reality throughout human history, dating back as early as 1500 B.C.²¹ International investment tribunals were created as an independent forum for settling disputes, as a way to maintain and adapt this tradition to the contours of the modern-day global economy.²² This established a sort of middle ground between protecting the investor and respecting state sovereignty by choosing neither the investor state nor the host state as the site of the arbitration.²³ It also helped set the minds of investors at ease, who would otherwise be forced to bring a claim in domestic court, thereby risking possible bias.²⁴ Private investors were also assured that they had additional rights when investing in countries that had legal standards lower than their

cfm?id=1819 [https://perma.cc/KB7E-263S] [hereinafter *Commission Welcomes Investment Court*].

18. Rep. on Thirty-Fifth Session, *supra* note 6, at 4–5.

19. EUROPEAN COMM’N, A MULTILATERAL INVESTMENT COURT: A NEW SYSTEM FOR RESOLVING DISPUTES BETWEEN FOREIGN INVESTORS AND STATES IN A FAIR AND EFFICIENT WAY 2 (2017) [hereinafter NEW SYSTEM FOR RESOLVING DISPUTES], http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf [https://perma.cc/Y6VH-8BP2]. These discussions have been cosponsored by Canada. *Id.* UNCITRAL has also begun discussion of possible multilateral approaches to ISDS. *Id.*

20. *See id.*

21. *See generally* COLLINS, *supra* note 1, at 6 (discussing the history of international investment law). One of the earliest known examples of international investment is the Phoenicians, a civilization extant in 1500 B.C. that established commercial outposts around the Eastern Mediterranean to facilitate trade. *Id.*

22. *Id.* at 217.

23. *See id.* (“From the host state’s point of view, the courts of the investor’s home state, which will also have a reasonably close connection to the dispute through the nationality of the claimant, will be unsuitable fora. As respondent, the host state will often mistrust the courts of the home state for similar reasons It could fear that the home state will be biased in favour of the investor, or lack an understanding . . . of the particular legal environment in which the challenged laws have been enacted.”)

24. *See* Brower & Schill, *supra* note 1, at 491 (explaining how the rise in trans-border investment is a consequence of the end of the Cold War).

own.²⁵ In theory, this created a fair and reciprocal business relationship, as the existence of the tribunal facilitated international investment, which was both good for the investor and for strengthening the host state's economy.

Discussion of ISDS reforms in light of their historical context poses the question: is ISDS really a broken system, or have our global priorities and concerns changed over time? While changes could be made to improve the ISDS system, it is still faithfully serving its original purpose overall.²⁶ It is still a neutral tribunal where disputes can be arbitrated, thereby facilitating foreign investment in host states. In contrast, the creation of a permanent investment tribunal may thwart the principles envisioned for ISDS at its inception—most importantly, the balance between the protection of state sovereignty and the recognition of the investor as an autonomous private entity.

This comment will explore the potential benefits and drawbacks of reforming ISDS, ultimately concluding that permanent investment tribunals may not be the best method of preserving the delicate and critical function facilitated by ISDS. First, this comment will provide a brief background on the ICS and the MIC, the two major proposed permanent courts for ISDS cases, and explain how these bodies are meant to function compared to traditional ISDS tribunals. Next, it will focus on three major concerns that permanent investment tribunals are meant to solve—legitimacy, consistency and transparency—and explain why critics believe these are problem areas.²⁷ It will evaluate whether permanent investment tribunals can solve these issues while still adhering to the original aims of ISDS. Finally, this comment will propose methods of reforming the extant ad hoc ISDS tribunals in response to the international community's legitimate concerns in a way that does not require a permanent tribunal.

25. Wolfgang Koeth, *Can the Investment Court System (ICS) Save TTIP and CETA? 2* (European Inst. of Pub. Admin., Working Paper No. 2016/W/01), https://www.eipa.eu/wp-content/uploads/2017/11/20161019072755_Workingpaper2016_W_01.pdf [<https://perma.cc/7CPG-QYPJ>].

26. See *Fact Sheet*, *supra* note 2; Alison Ross, *A 15-Headed Hydra?*, 13 GLOBAL ARB. REV. 12, 13 (2018) (“Why do these acknowledged leaders of investment dispute arbitration as we know it bring termites into our wooden house of investor state dispute settlement?”).

27. See Rep. on Thirty-Fourth Session, *supra* note 6, at 7–8, 10, 12. “Legitimacy, consistency and transparency” seem to nicely sum up three of the major arguments against ISDS as it currently stands. See *id.* This article will focus on these three critiques. See *id.*

I. UNDERSTANDING PROPOSED PERMANENT ISDS MECHANISMS

A. *The International Court System*

On September 21, 2017, CETA provisionally went into effect, but it must be ratified by national parliaments in the Member States before taking full effect.²⁸ This may take some time, as member states with regional parliaments, like Belgium, have to wait for each of their provincial legislatures to formally ratify CETA.²⁹ CETA is the first significant free trade agreement that aims to implement the ICS in place of the old ISDS system.³⁰ The ICS was not included as one of the parts of CETA now provisionally in force; however, it has served as an impetus for discussion about whether the future of investment dispute resolution lies in permanent courts.³¹ The objective of CETA is to:

meet[] the high expectations of citizens and industry for a fairer, more transparent and institutionalised system of settling investment disputes [and] . . . ensur[e] a high level of protection for investors while

28. See *CETA Explained*, *supra* note 15.

29. Alison Ross, “Fake News”—*Brower Blasts Investment Court Proposal*, GLOBAL ARB. REV. (Mar. 1, 2018), <https://globalarbitrationreview.com/article/1166223/-fake-news-brower-blasts-investment-court-proposal> [<https://perma.cc/8394-EVRJ>]. In 2017, Belgium requested that the EU’s Court of Justice (“CJEU”) issue an opinion regarding whether the ICS would be compatible with EU law. Fatma Sassi, *The Investment Court System (ICS) and the EU Legal Order: An Impossible Love Story?*, BERKELEY J. INT’L L. BLOG (Oct. 8, 2017), <http://berkeleytravaux.com/investment-court-system-ics-eu-legal-order-impossible-love-story-2/> [<https://perma.cc/4GX8-37M4>]. This presents an interesting issue about the potential threat of the ICS to the legitimacy of the CJEU, another international court where legitimacy is imperative. Article 8.31 of CETA attempts to address the situation by stating that:

The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of the disputing Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.

Comprehensive Economic and Trade Agreement, Can.-European Union, art. 8.31, Oct. 30, 2016, EU 006/2018: CM9622 [hereinafter CETA].

30. Bernard O’Connor & Isabella Aquilini, *The Multilateral Investment Court*, 18 LEXOLOGY 18, 19 (Feb. 3, 2017), <https://s3.amazonaws.com/documents.lexology.com/05365b05-8bd5-4f3b-b358-e971f0c70672.pdf> [<https://perma.cc/5ZSX-SE59>].

31. See *id.*; *CETA Explained*, *supra* note 15 (clarifying that the three parts not yet in force include: investment protection, investment market access for portfolio investment, and the ICS).

fully preserving the right of governments to regulate and pursue legitimate public policy objectives such as the protection of health, safety, or the environment.³²

The ICS contemplates publicly appointed professional judges, with exclusive jurisdiction to work transparently and would function much like other permanent international courts.³³ This differs from the present ISDS system, which operates as an arbitral body in the traditional sense.³⁴ The ICS will consist of fifteen judges: five from Canada, five from the EU, and five from countries agreed on by both states.³⁵ The qualifications to be a judge are similar to those required by the International Court of Justice (“ICJ”), and judges will be assigned to cases randomly to help ensure impartiality.³⁶ The ICS consists of two levels, as there would also be an Appellate Tribunal to review decisions rendered.³⁷ The Appellate Tribunal will consist of fifteen members nominated by the EU and Canada, rather than arbitrators chosen by the investor and host state.³⁸ Three randomly appointed members will hear each appeal.³⁹ In addition, the ICS will focus on transparency; all hearings will be open to the public, and all court documents and tribunal decisions will be available on the United Nations (“UN”) website.⁴⁰

B. *The Permanent Multilateral Investment Court*

As outlined by the Treaty of Lisbon, foreign direct investment now falls within the purview of the EU, and is no longer the responsibility of the Member States, meaning that international protection agreements between the EU and third-party countries will

32. EUROPEAN COMM’N, INVESTMENT PROVISIONS IN THE EU-CANADA FREE TRADE AGREEMENT (CETA) 1 (2016) [hereinafter INVESTMENT PROVISIONS IN CETA], http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf [<https://perma.cc/FQ57-HZQ5>].

33. *See id.* at 1–2, 4.

34. DECHERT, LLP, THE EU SUCCEEDS IN ESTABLISHING A PERMANENT INVESTMENT COURT IN ITS TRADE TREATIES WITH CANADA AND VIETNAM 2 (2016) [hereinafter THE EU SUCCEEDS], https://www.dechert.com/content/dam/dechert/uploads/documents/The_EU_succeeds_in_establishing_a_permanent_investment_court_in_its_trade_treaties_with_Canada_and_Vietnam_-_Dechert_-_03242016.pdf [<https://perma.cc/DVW3-5PV5>].

35. *Id.*; *see* Ross, *supra* note 26, at 13.

36. *See* INVESTMENT PROVISIONS IN CETA, *supra* note 32, at 4.

37. THE EU SUCCEEDS, *supra* note 34, at 3.

38. INVESTMENT PROVISIONS IN CETA, *supra* note 32, at 4.

39. *See* CETA, *supra* note 29, at art. 8.28.

40. INVESTMENT PROVISIONS IN CETA, *supra* note 32, at 5. The parties will not be able to waive this transparency, except in the case of business secrets and information considered confidential under national law. *Id.*

eventually replace similar bilateral agreements between Member States and third-party countries.⁴¹ Because these new agreements will eventually represent a significant portion of international investment agreements signed, the EU was inspired to create an effective updated dispute resolution model.⁴² When the European Commission first attempted ISDS reform in 2015 (through discussions about including the ICS in the EU's bilateral agreements), it was simultaneously working on the MIC project.⁴³ The objective for the MIC is to create a permanent body to decide investment disputes that would bring together certain features of domestic and international courts.⁴⁴ This new multilateral investment court can also be seen as a reaction to commonly voiced concerns regarding the classic ad hoc ISDS mechanism, including "its lack of legitimacy, consistency and transparency."⁴⁵ Some view the MIC model as a continuation of the ICS, "used to address the setbacks that arose in relation to the ICS."⁴⁶ For example, the ICS was not well-received by certain European producers and business associations as a desired forum compared to ISDS, but because the MIC lacks the stigma associated with the ICS, it may be perceived more favorably.⁴⁷ The European Commission created the *Factsheet on the Multilateral Investment Court* to highlight the differences between the current ISDS system and the proposed MIC.⁴⁸

The European Commission describes the MIC as a court that will be permanent, independent, predictable, comprehensive, cost-effective, and transparent.⁴⁹ The tribunal would hear cases at both a trial court and an appellate level, and would be empowered to

41. See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, O.J. (C306) 92; Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, art. 207, Oct. 26, 2012, 2012 O.J. (C326) 140.

42. See INTERNATIONAL INVESTMENT DISPUTE SETTLEMENT, *supra* note 3, at 10.

43. *Commission Welcomes Investment Court*, *supra* note 17.

44. See O'Connor & Aguilini, *supra* note 30, at 21–22.

45. *Commission Welcomes Investment Court*, *supra* note 17.

46. O'Connor & Aguilini, *supra* note 30, at 22.

47. See *id.* The European Consumer Organization argues that consumers are also unconvinced that the ICS is the appropriate way forward because it does not adequately address core flaws with ISDS. Monique Goyens, *From ISDS to ICS: Still a Long Way to Go*, BEUC BLOG (Oct. 22, 2015), <https://www.beuc.eu/blog/from-isds-to-ics-still-a-long-way-to-go/> [<https://perma.cc/4Z26-QVRH>].

48. NEW SYSTEM FOR RESOLVING DISPUTES, *supra* note 19, at 3.

49. *Id.* In comparison to the adjectives listed above, the comparison chart notes that ISDS is ad hoc, there are risks of partiality, it is unpredictable, inefficient, and opaque. *Id.*

effectively enforce its decisions.⁵⁰ The MIC would employ tenured judges, all of whom would be required to abide by a set of ethical standards and would not be chosen by the parties.⁵¹ The MIC would also function transparently.⁵² Overall, it would share many features of the ICS created by CETA; however, because the ICS functions bilaterally, it is unable to resolve disputes under many existing investment treaties.⁵³ In contrast, the MIC could replace existing bilateral ISDS mechanisms that are currently included in EU investment and trade agreements.⁵⁴ Of the more than 3000 investment agreements which currently exist (including the over 1400 agreements entered into by EU Member States), most do not contain any of the updated improvements that the European Commission is now trying to integrate into present investment agreements.⁵⁵ The MIC could replace what many see as outdated ISDS provisions in a significant number of these older investment agreements.⁵⁶

II. WHY ISDS TRIBUNALS SHOULD REMAIN AD HOC RATHER THAN BECOME PERMANENT

Three main categories of concern have been voiced by critics regarding the current ISDS system—legitimacy, consistency, and transparency. This part will examine the bounds and contours of each concern, concluding with an evaluation of whether a permanent court system would be able to respond to that concern. This analysis exposes permanent investment courts as a short-term solution that diverges from the original aims of the ISDS regime that are fundamental to its success.⁵⁷ At best, their creation is a distraction from true reform efforts; at worst, it has the potential to create additional problems that could harm global investment overall.

50. *Id.*; INVESTMENT PROVISIONS IN CETA, *supra* note 32, at 4.

51. *See* NEW SYSTEM FOR RESOLVING DISPUTES, *supra* note 19, at 3.

52. *Id.*

53. *Id.* at 2–3.

54. *Id.*; *Commission Welcomes Investment Court*, *supra* note 17.

55. NEW SYSTEM FOR RESOLVING DISPUTES, *supra* note 19, at 1.

56. *Id.*

57. “The Investment Court System would lessen certain attractive features of arbitration such as confidentiality (already somewhat diminished for UNCITRAL arbitrations) and party autonomy in appointing adjudicators, while raising questions about costs, the duration of procedures and financing a new institution.” *From International Investment Arbitration to an Investment Court System*, ACERIS L. (July 1, 2017) [hereinafter *International Investment Arbitration*], <https://www.acerislaw.com/international-investment-arbitration-investment-court-system/> [https://perma.cc/CD5Z-3DMZ].

A. *The “Legitimacy” Concern: Arbitration Is Proinvestor at the Expense of the State*

One major critique of the current ISDS system is its lack of legitimacy, namely that: (1) the system is a bypass to domestic courts; (2) tribunals are proinvestor; (3) arbitrators themselves are biased; and (4) it chills national regulation because states fear future liability. This part discusses these legitimacy problems in depth, analyzes whether a permanent court would somehow provide greater legitimacy, and considers whether reforms could be implemented into the current system without the need to implement a permanent court structure.

1. The Current System Allows Parties to Bypass Domestic Courts for International Tribunals

International investment disputes differ from the traditional paradigm of international law, in which states are the only subjects of international law with the capacity to raise claims.⁵⁸ Private companies, unlike sovereign states, do not require the approval of their home state to challenge another host state in an ISDS proceeding.⁵⁹ Because of this reality, many opponents view ISDS as a way to bypass domestic law and national courts.⁶⁰ While some host

58. VALENTINA VADI, ANALOGIES IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 56 (2016); *see also* Koeth, *supra* note 25, at 3, describing why the ISDS formed the way it did:

These [ISDS] cases would be heard not before a local court, since one basic idea behind ISDS was to assure investors' rights in countries with poorly performing institutions, weak rule of law and high levels of corruption. Nor would these cases be heard before an international jurisdiction (since private investors do not have access to such jurisdictions). They would go before an arbitration panel composed of international business lawyers, chosen by common accord between the conflicting parties, and under rules that were stipulated in the agreement.

59. *See* VADI, *supra* note 58, at 56.

60. EUROPEAN FED'N FOR INV. LAW & ARBITRATION (EFILA), A RESPONSE TO THE CRITICISM AGAINST ISDS 1, 4 (2015) [hereinafter EUROPEAN FED'N], https://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf [<https://perma.cc/4UCD-LWPY>]. At one time, the state would have to petition domestically for its sovereign to take on its investor's case. *See* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1537 (2005). If the ICJ did find a violation of international law, an aggrieved investor would not necessarily receive the compensation for the sovereign's illegal conduct. *Id.* Additionally, the only enforcement method available is a Security Council Resolution "which is not commercially useful where an investor seeks financial compensation." *Id.*

states require that claimants exhaust all local remedies before that state will accept jurisdiction in an international tribunal, other states do not make local remedies mandatory in investment agreements.⁶¹ Generally, it is the state's responsibility to include such a provision, and these provisions are not common in modern international investment agreements.⁶² In addition, this bypass allows foreign investors to have greater procedural rights than domestic investors, who do not necessarily have access to an international forum when national regulations negatively affect them.⁶³

The bypass is important to many investors who fear bias in national courts. As a way to address this concern, individual states could require a case to begin at the domestic level before ISDS proceedings are initiated.⁶⁴ "Special chambers in appeals courts or even supreme courts that are staffed with regular judges" may be a viable forum for domestic recourse before pursuing an ISDS resolution.⁶⁵ As a result, rather than viewing the ISDS system as one that bypasses domestic courts, ISDS tribunals can work in tandem with national courts.⁶⁶ Alternatively, investors could be required to gain the approval of their home state by submitting the dispute to a preliminary governmental examination first.⁶⁷ Having the investor state government act as a gatekeeper may be a way to ensure legitimate claims, and therefore legitimacy as a whole.⁶⁸

61. COLLINS, *supra* note 1, at 224.

62. *Id.* at 225.

63. EUROPEAN FED'N, *supra* note 60, at 30. For example, when Argentina suffered an economic crisis in the early 2000s and passed emergency laws that resulted in breach of contract claims against the country, ICSID awarded damages to many foreign investors. Charity L. Goodman, Comment, *Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 U. PENN. J. INT'L L. 449, 478 (2014). As a result, Argentina argues "that ICSID has placed foreign investors that are covered by the ICSID agreement above the domestic investors that must rely on the domestic Argentine system." *Id.*

64. Schill, *supra* note 14, at 7.

65. *Id.*

66. See THE EU SUCCEEDS, *supra* note 34, at 5–6.

67. See Franck, *supra* note 60, at 1590.

68. See *id.*

2. Tribunals Are Proinvestor

Those who see ISDS as a bypass of national courts allege that these tribunals have a proinvestor bias that hinders their legitimacy.⁶⁹ However, proponents of the current system point to numbers. ISDS forums are not only currently used by many States, but their use has increased over time.⁷⁰ Thus the continued, and increasing, use of ISDS tribunals reflects its perceived legitimacy in the international sphere. The perception that tribunals are proinvestor has no evidentiary basis in ISDS data.⁷¹ Statistical evidence shows that States in arbitral proceedings consistently win more cases than the investors. Of the 495 ISDS cases that were brought to investor tribunals between 1987 and 2016, thirty-six percent were decided in favor of the State, twenty-seven percent in favor of the investor, with the remaining cases being dismissed.⁷² Also, international agreements are intended to foster a *mutually* beneficial relationship:

[B]oth the protection and promotion of foreign investment are primarily afforded, not for the private benefit of those foreign investors that profit from the protections in question, but are put into place in response to the public interest of States in increasing foreign investment flows and in taking advantage of the benefits foreign investment can bring, such as the transfer of technology, the creation of employment and tax income, and the increase in economic competitiveness. For the collectivity of all host States, this interest constitutes a community interest that is shared by *all states* participating in the IIL system.⁷³

69. See SUBEDI, *supra* note 5, at 273.

70. See INT'L CTR. SETTLEMENT OF INV. DISPUTES, THE ICSID CASELOAD-STATISTICS (ISSUE 2018-1) 7 (2018), [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(English).pdf) [<https://perma.cc/9UTD-6ZRE>] (displaying a bar graph showing how the ICSID case load has increased from 1972 where there was only one case, to 2017 where there were fifty-three cases).

71. See *generally* SUBEDI, *supra* note 5, at 273 (stating the possibility that this idea is a reflection of older international investment agreements, which were drafted quite broadly, leaving a lot of room for interpretation). As a result of this ambiguity, agreements were often interpreted in light of their purpose, which was to protect the foreign investor. *Id.*

72. Ross, *supra* note 26, at 13–14.

73. Stephan W. Schill & Vladislav Djanic, *International Investment Law and Community Interests* 6 (Soc'y of Int'l Econ. Law, Working Paper No. 1, 2016) (emphasis added), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2799500 [<https://perma.cc/7FQQ-CA2V>].

3. ISDS Arbitrators Are Biased

Currently, there is not one accepted way for arbitrator selection in ISDS; instead, it depends on the applicable treaty and the rules governing the dispute.⁷⁴ As a result, critics argue that arbitrators lack diversity, may not be qualified, and are biased.⁷⁵ The main concern is that arbitrators in ad hoc proceedings are neither elected nor accountable to anyone, but are instead party appointed.⁷⁶ Though accountability is often seen as a counter to independence, it is argued that accountability is needed in this context to ensure impartiality.⁷⁷ Critics believe that because arbitrators make their living based on what they are paid for arbitration appointments, self-interest leads the arbitrator to decide in a way that is favorable to a specific party.⁷⁸ This alleged bias is further evidenced by the fact that arbitrators are allowed to act as counsel in proceedings that take place in between their arbitrator appointments.⁷⁹ Often called “double hatting,” an arbitrator can decide an issue in one case, and later argue the same point in separate case as counsel.⁸⁰

The ICS contains certain features to ensure that arbitrators are not proinvestor. For example, the ICS will include a code of conduct rather than just a requirement that arbitrators be impartial through the treaty and rules of the arbitral body.⁸¹ Additionally, the permanency of judges in the ICS exists to minimize bias.

74. Brower & Schill, *supra* note 1, at 490.

75. See Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, 35 U. PA. J. INT'L L. 431, 436, 490 (2013).

76. *See id.*

77. This would occur by implementing a transparent and uniform method for selection, incorporating arbitrators into a permanent institution, and creating disciplinary power and sanctions for accountability. GABRIELLE KAUFMANN-KOHLER & MICHELE POTESTÀ, GENEVA CTR. FOR INT'L DISPUTE SETTLEMENT, THE COMPOSITION OF A MULTILATERAL INVESTMENT COURT AND OF AN APPEAL MECHANISM FOR INVESTMENT AWARDS 60 (2017), http://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf [<https://perma.cc/Y7LC-63HG>].

78. *See id.* at 45–46.

79. *The Multilateral Investment Court: A Plausible Attempt at Reform, or Cosmetic Changes Only?*, UK LAW SOC'Y'S JOINT BRUSSELS OFF. (Sept. 21, 2017, 4:31 PM), <http://www.lawsocieties.eu/news/the-multilateral-investment-court-a-plausible-attempt-at-reform-or-cosmetic-changes-only/5062902.fullarticle> [<https://perma.cc/N3T2-G8NW>].

80. Shreya Aren, *Has the Time Come for the Establishment of a Permanent Investment Court? The 'Ayes' Have It*, PRAC. L.: ARB. BLOG, (Feb. 2, 2016), <http://arbitrationblog.practicallaw.com/has-the-time-come-for-the-establishment-of-a-permanent-investment-court-the-ayes-have-it/> [<https://perma.cc/4L4M-2LZM>].

81. *See* KAUFMAN-KOHLER & POTESTÀ, *supra* note 77, at 53–54.

Judges are prohibited from acting as counsel or as a party-appointed expert or witness in any pending or new dispute under any agreement.⁸² However, these solutions may not completely fix legitimacy issues. Though ICS judges will not be allowed to act as counsel in any other ISDS case, they may continue acting as private lawyers outside of international investment treaties.⁸³ This will lessen possible conflicts of interest, but may not completely eliminate them.⁸⁴

The ICS judges will receive a retainer fee for the simple act of being available, which can become a salary if the workload increases.⁸⁵ The CETA Joint Committee has the discretion to transform the retainer fee (estimated to be around 2.000€ per month) and other fees paid by the parties per day into a regular salary, and to decide applicable modalities and conditions.⁸⁶ The reason for a retainer fee instead of a salary is based on the low amount of cases anticipated.⁸⁷ Yet the retainer system method may actually sustain the financial incentive for judges to accept as many cases as possible, and to cause them to last as long as possible.⁸⁸ On the other hand, if a fixed salary system is eventually implemented, the salary may not be enough to entice high-quality judges to want to serve permanently.

“If the concern was that private business lawyers serving as arbitrators have a natural bias towards the enterprise, could government-appointed judges not also be suspected of having a natural bias towards the state, in particular their own?”⁸⁹ Having permanent appointees to the ICS or the MIC does not extinguish the possibility of an unbiased selection process. A permanent court would

82. CETA, *supra* note 29, at art. 8.30.

83. *See id.* (prohibiting ICS judges from acting as counsel under CETA and other international agreements, but not mentioning any other prohibitions on their work as lawyers).

84. *See id.*

85. LAURA PUCCIO & RODERICK HARTE, EUROPEAN PARLIAMENTARY RESEARCH SERV., FROM ARBITRATION TO THE INVESTMENT COURT SYSTEM (ICS): THE EVOLUTION OF CETA RULES 1 (2017), [http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/607251/EPRS_IDA\(2017\)607251_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/607251/EPRS_IDA(2017)607251_EN.pdf) [<https://perma.cc/4QA8-7YMY>].

86. *Inside CETA, Episode 1: Are Arbitration Tribunals a Threat to Democracy?*, LE MONDE (July 11, 2016), http://www.lemonde.fr/les-decodeurs/article/2016/11/02/inside-cet-a-episode-1-are-arbitration-tribunals-a-threat-to-democracy_5024320_4355770.html [<https://perma.cc/3FWQ-WFX6>] [hereinafter *Inside CETA*]; *International Investment Arbitration*, *supra* note 57.

87. *See* PUCCIO & HARTE, *supra* note 85, at 1.

88. *See Inside CETA*, *supra* note 86.

89. *See* Koeth, *supra* note 25, at 12.

probably fare less well than the current arbitral system regarding independence from political powers, but this may be what the States want.⁹⁰ For example, the appointment of the fifteen judge panel for the ICS (five judges from Canada, five judges from the EU, and five judges from other nationalities) has the serious potential to be politically influenced.⁹¹ Ensuring that the diverse Canadian provinces and all EU member states feel represented in the ICS will prove challenging.⁹² The CETA Joint Committee is the body that will appoint the roster of Tribunal Members for the ICS.⁹³ However, when the final selection of a tribunal is made by an organ of state parties that is political by definition (like the CETA Joint Committee) politics are bound to come into play.⁹⁴ Unfortunately, it is virtually impossible to completely remove bias from any system. This quote sums up the irony nicely:

[T]he supporters of the ISDS doubted the conceptualisation of the new system, arguing that it would be based on states' inclination to control the system, meaning that all judges would be appointed by the state. This would remove any control from the investors and diminish the same legitimacy that the proponents of the court system were keen to preserve.⁹⁵

For the most part, arbitrators care about maintaining an impartial reputation.⁹⁶ In addition, public observation also keeps arbitrators in check.⁹⁷ Arbitrators who do not live up to the expectation of being objective will be viewed negatively by the relevant community, which is likely to have a detrimental impact on an arbitrator's career.⁹⁸ Further, stronger safeguards than the potential ruin of professional reputation are currently in place for many ISDS tribunals. Rules exist to challenge and remove arbitrators if they act in a biased manner.⁹⁹ Statistics from various arbitral institutions show an increase in arbitrator challenges over time.¹⁰⁰ Arbitrator

90. See Grisel & Schultz, *supra* note 5.

91. See Ross, *supra* note 26, at 13.

92. *Id.*

93. BEUC ET AL., JOINT ANALYSIS OF CETA'S INVESTMENT COURT SYSTEM (ICS): PRIORITISING PRIVATE INVESTMENT OVER PUBLIC INTEREST 5 (2016), <http://epha.org/wp-content/uploads/2016/07/Joint-Analysis-CETA-ICS-1.pdf> [<https://perma.cc/53WB-4P5Z>].

94. KAUFMANN-KOHLER & POTESÀ, *supra* note 77, at 62.

95. Aren, *supra* note 80.

96. See Brower & Schill, *supra* note 1, at 491.

97. *Id.* at 493.

98. *Id.*

99. Franck, *supra* note 60, at 1596.

100. Winnie Jo-Mei Ma, *Procedures for Challenging Arbitrators: Lessons for and from Taiwan*, 5 CONTEMP. ASIA ARB. J. 293, 295 (2012).

misconduct includes lack of impartiality, independence, fitness, or qualifications.¹⁰¹ Arbitrator challenges may also be valid grounds for challenging the arbitral award itself.¹⁰²

The International Centre for the Settlement of Investment Disputes (“ICSID”), an institution that provides ad hoc arbitration services, helps to prevent bias by allowing the disqualification of an arbitrator if that arbitrator is a national of the host state or has the nationality of the investor.¹⁰³ To prevent frivolous disqualification claims, the applicable legal standard is objective, “based on how a reasonable third party would evaluate the evidence,” rather than the subjective belief of the party.¹⁰⁴ However, one issue with the ICSID removal process is the fact that other members of the Tribunal make the ultimate removal decision.¹⁰⁵ “The unchallenged arbitrators’ voting on the challenge may be affected by their relationships with the challenged arbitrators, as well as by their personal experiences with challenges—hence the risk of undue lenience towards the challenged arbitrators.”¹⁰⁶

CETA contains a removal provision for biased arbitrators in the ICS that could help to solve this concern.¹⁰⁷ Based on paragraph 4, when a disputing party detects a conflict of interest, the party sends a notice challenging the appointment of the Tribunal Member to the President of the ICJ within fifteen days of the date on which the composition of the division of the Tribunal has been communicated, or within fifteen days of the date when relevant facts were made known.¹⁰⁸ If the Member has not voluntarily resigned within fifteen days from the date of the notice, the President of the ICJ hears the disputing parties, allows the challenged Member an

101. See Christopher Koch, *Standards and Procedures for Disqualifying Arbitrators*, 20 J. INT’L ARB. 325, 232, 336 (2003).

102. Franck, *supra* note 60, at 1596.

103. INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, ICSID CONVENTION, REGULATIONS AND RULES 15, 22–23, 28, 103, 107 (2006) [hereinafter ICSID REGULATIONS AND RULES], <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf> [<https://perma.cc/5TZQ-V8EN>].

104. *Disqualification of Arbitrators—Additional Facility Arbitration*, INT’L CTR. SETTLEMENT INV. DISPS., <https://icsid.worldbank.org/en/Pages/process/Disqualification-of-Arbitrators---AF-Arbitration.aspx> [<https://perma.cc/4JQJ-BLA4>] (last visited Dec. 1, 2018).

105. ICSID REGULATIONS AND RULES, *supra* note 103, at 29, 107–08. However, the decision will be made by the Chairman of the ICSID Administrative Council when the other members are equally divided or where the proposal refers to a sole arbitrator or to a majority of the Tribunal. *Id.*

106. Ma, *supra* note 100, at 299.

107. CETA, *supra* note 29, at art. 8.30.

108. *Id.*

opportunity to submit any observations, and then issues a decision within forty-five days.¹⁰⁹ Upon this recommendation from the President, or on their own joint initiative, the parties, “by decision of the CETA Joint Committee, may remove a Member from the Tribunal where his or her behaviour is inconsistent with the obligations set out in paragraph 1 and incompatible with his or her continued membership of the Tribunal.”¹¹⁰ Article 8.30 of CETA discusses the requirement for arbitrators to be independent, not affiliated with any government and to avoid participation in disputes that would create a conflict of interest.¹¹¹ ICSID could make similar changes to its framework to tighten arbitrator removal procedures by, for example, having a third party authority in charge of an arbitrator challenge. This would eliminate the issue of arbitrators making judgments as to the fitness of other challenged arbitrators, instead leaving that to someone in a more permanent and removed position.

While the ISDS system may be enhanced by removal procedure updates, one of the most important aspects of the ad hoc system is the parties’ selection of arbitrators.¹¹² Allowing parties to choose their own arbitrators reinforces the voluntariness of the proceeding and reflects the nature of ISDS, which stems from the intentional choice of both parties to enter into an investment relationship.¹¹³ Giving both parties control over arbitrator selection makes the parties more likely to utilize ISDS bodies and to comply with decisions rendered. Appointments also protect state sovereignty by

109. *Id.*

110. *Id.*

111. *Id.* Article 8.30 (1) states in full:

The Members of the Tribunal shall be independent. They shall not be affiliated with any government. They shall not take instructions from any organisation, or government with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. They shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted pursuant to Article 8.44.2. In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement.

Id. (footnote omitted).

112. See Brower & Schill, *supra* note 1, at 475, 489.

113. See INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, BACKGROUND INFORMATION ON THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID) 1, <https://icsid.worldbank.org/en/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf> [<https://perma.cc/3MCY-7ALQ>] (last visited Dec. 1, 2018).

allowing states to choose candidates who support their understanding of treaty interpretation.¹¹⁴ Even when submitting cases to the ICJ, states are able to appoint an ad hoc judge if there is not already a judge of that states' nationality sitting on the court.¹¹⁵ This reflects the general desire to respect the diversity of states in international proceedings. It is better for tribunals to strengthen the selection and removal methods for an arbitrator than to rob investors and states of the opportunity to choose.

4. The Threat of Litigation Causes a Regulatory Chill on National Legislation

The most common ISDS critique made by states concerns legitimacy—states fear that investment treaties favor the interests of investors over the states' competing interests.¹¹⁶ Under investment treaties, states waive sovereign immunity and submit to international tribunal jurisdiction over national regulatory issues.¹¹⁷ Thus, states are not only claiming that international investment tribunals are impartial, but are more seriously contending that a proinvestor bias interferes with its own state sovereignty by hindering a state's ability to pass legislation for the good of its citizens.¹¹⁸ Drafters of national legislation attempt to strike a balance between respecting the expectations of foreign investors and the host countries' desire to regulate without liability.¹¹⁹ This resulting regulatory chill could impact the lives of the host state's citizens,

114. Brower & Schill, *supra* note 1, at 494.

115. *Id.*

116. *Id.* at 471–72, 475. In contrast to domestic courts, international courts and tribunals face constant attacks regarding their “legitimacy,” including debates about their methods and limits for dispute resolution. *Id.* at 471. While this holds true for many dispute settlements created in the past two decades, it is especially true of international investment disputes. *Id.* at 471–72.

117. Julie A. Maupin, *Transparency in International Investment Law: The Good, the Bad and the Murky*, in *TRANSPARENCY IN INTERNATIONAL LAW* 142, 144, 148, 151 (Andrea Bianchi & Anne Peters eds., 2013).

118. See EUROPEAN FED'N, *supra* note 60, at 26 (discussing the “regulatory chill” of a government in three instances: “a) not drafting particular legislation in anticipation of arbitration, b) chilling legislation upon awareness of arbitration risks, and c) chilling legislation after the outcome of a specific dispute”). In Stephan Schill's post, *The Constitutional Frontiers of International Economic Law*, *BLOG EUR. J. INT'L L.* (Mar. 9, 2017), <https://www.ejiltalk.org/author/sschill/> [<https://perma.cc/WL35-DPAF>], he discusses the increasing intersection between international and constitutional law, as international tribunals are called on to review whether constitutional law is in line with a state's obligations under international law, and other times to apply domestic constitutional law directly.

119. Alison Giest, Comment, *Interpreting Public Interest Provisions in International Investment Treaties*, 18 *CHI. J. INT'L L.* 321, 323 (2017).

making ISDS unpopular in the public sphere. ISDS has even been called “a massive Trojan horse” by Yannick Jadot, a spokesperson for the Green Party of the European Parliament, who went on to explain that ISDS could be “used by multinational corporations to whittle away EU standards and regulations across a range of policies from the environment to food safety to social protection.”¹²⁰ The British publication, *The Economist*, similarly stated,

If you wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. Yet that is precisely what thousands of trade and investment treaties over the past half century have done, through a process known as “investor-state dispute settlement”, or ISDS.¹²¹

However, it is important to acknowledge that limitations do exist. Investors cannot challenge regulatory changes *carte blanche*, but rather may only initiate proceedings if the host state has promised to refrain from those specific changes.¹²²

Additionally, ISDS tribunals consistently respect state regulation when it is related to public policy, such as when citizen health is at stake. The recent *Philip Morris v. Uruguay* case provides an example of an ISDS tribunal, ICSID, respecting legitimate state regulation despite investor claims.¹²³ In February 2010, investor Philip Morris International sought damages against Uruguay for its plain packaging legislation, which prohibited different packaging for different cigarettes (for example, it prohibited Marlboro Red and Marlboro Gold from having distinct packaging).¹²⁴ The legislation was geared to protect public health, and it required certain pictures displaying the adverse effects of smoking to be displayed

120. See Press Release, The Greens: European Free All. in the European Parliament, EU-US Trade Negotiations (TTIP) (Jan. 21, 2014), <https://www.greens-efa.eu/en/article/eu-us-trade-negotiations-ttip/> [<https://perma.cc/AYQ6-NUQD>].

121. *The Arbitration Game*, *ECONOMIST* (Oct. 11, 2014), <https://www.economist.com/finance-and-economics/2014/10/11/the-arbitration-game> [<https://perma.cc/3BVJ-9UQE>].

122. Brower & Schill, *supra* note 1, at 488; see also Schill, *supra* note 118 (discussing how the relationship between the EU Member States and the CJEU can serve as inspiration for a cooperative approach).

123. See *Philip Morris Brands Sarl v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, ¶ 300 (July 8, 2016).

124. *Id.* ¶ 10.

on up to eighty percent of the packaging for all cigarettes.¹²⁵ Philip Morris challenged the national legislation, claiming that it devalued its investment in the country.¹²⁶ The company demanded that either the smoking regulations be repealed or not applied to them; or, alternatively, compensation for damages.¹²⁷ On July 8, 2016, ICSID dismissed Philip Morris's claim.¹²⁸ Philip Morris was ordered to pay Uruguay seven million dollars as a refund for legal fees.¹²⁹ ICSID recognized the adoption of health protection measures aimed at protecting the health of the people of Uruguay as an "exercise of the legitimate power of a sovereign country."¹³⁰

Similarly, in November of 2011, Philip Morris Asia brought the first investor-state dispute claim against Australia.¹³¹ Philip Morris Asia challenged the Australian Tobacco Plain Packaging Act, which restricted cigarette companies from displaying any individualized logo or branding on their packaging.¹³² The tribunal did not reach the merits of the issue.¹³³ However, it did find that Philip Morris Asia's claim was an abuse of process because Philip Morris Asia acquired an Australian subsidiary for the sole purpose of acquiring standing to challenge Australia's tobacco plain packaging laws.¹³⁴ This supports the notion that ISDS is meant to be a fair forum, rather than a way for an investor to take advantage of the State and control its regulatory power by abusing the process.

125. *Id.* ¶¶ 11, ¶ 13.

126. *Id.* ¶ 12.

127. *Id.*

128. Graciela Rodriguez-Ferrand, *Uruguay: Arbitration Panel Affirms Enforcement of Anti-Tobacco Legislation*, LIBR. CONGRESS (Aug. 26, 2016), <http://www.loc.gov/law/foreign-news/article/uruguay-arbitration-panel-affirms-enforcement-of-anti-tobacco-legislation/> [<https://perma.cc/49D3-U939>].

129. *Id.*

130. *Id.*

131. See Philip Morris Asia Ltd. v. Commonwealth of Australia, PCA Case No. 2012-12, Notice of Arbitration, ¶ 1.1 (Nov. 21, 2011); *Tobacco Plain Packaging—Investor-State Arbitration*, AUSTL. GOV'T ATT'Y GEN. DEP'T, <https://www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/Tobaccoplainpackaging.aspx> [<https://perma.cc/LGM8-RCWW>] (last visited Dec. 1, 2018).

132. Ankita Ritwik, *Tobacco Packaging Arbitration and the State's Ability to Legislate*, 54 HARV. INT'L L.J. 523, 523 (2013).

133. *Tobacco Plain Packaging—Investor-State Arbitration*, *supra* note 131.

134. *Id.*

B. *The “Consistency” Concern: Various Ad Hoc Tribunals Lead to Inconsistent Results*

The second issue with ISDS is the need for consistency, specifically the idea that: (1) consistency in decisions rendered is lacking; and (2) an appellate body could ameliorate this problem. This part addresses the consistency issue and analyzes the potential effects of a permanent court, including an exploration of whether sufficient reforms could instead be incorporated into the current ISDS system.

1. Decisions Rendered in ISDS Cases Lack Consistency

Unlike the World Trade Organization (“WTO”) or the UN, “international investment law has no hierarchy, no central organizing body, and no historical genesis or originating document acknowledged by all.”¹³⁵ Instead, it consists of “around 3,000 overlapping bilateral and regional treaties, tens of thousands of transnational contracts, and an unknown number of domestic statutes whose purported aim is to stimulate economic development by attracting and protecting foreign investments within the sovereign territories of individual host States.”¹³⁶ Providing a consistent body of investment law has proven to be difficult, in part because ISDS contains aspects of both public international law and private commercial arbitration.

Significant inconsistencies are not the norm in international investment arbitration, but they do exist. Argentina has experienced inconsistent ISDS decisions firsthand while participating in ICSID arbitration.¹³⁷ In 2001, Argentina suffered one of its worst financial crises.¹³⁸ As a result, Argentina introduced a package of emergency laws, which implied a considerable change in the conditions

135. See Maupin, *supra* note 117, at 143–44.

136. *Id.* at 144.

137. Oscar Lopez, *Smart Move: Argentina to Leave the ICSID*, 1 CORNELL INT’L L.J. ONLINE 121, 123 (2014) (footnotes omitted), <http://cornellilj.org/wp-content/uploads/2014/01/Lopez-Smart-Move-Argentina-to-Leave-the-ICSID-final.pdf> [<https://perma.cc/85B6-DZTM>]. Ironically, “for much of the twentieth century, Argentina required [foreign] investors to submit contractual disputes . . . to local courts for remedy.” Goodman, *supra* note 63, at 451. However, to facilitate capital, Argentina eventually abandoned this policy and signed the ICSID Convention. *Id.* Argentina entered into bilateral agreements with the United States and over thirty other countries which did not require claims to be brought to domestic courts before international arbitration. *Id.*

138. Lopez, *supra* note 137, at 122.

under which foreign investors had to operate.¹³⁹ This led to dozens of ISDS cases against the country.¹⁴⁰ “Although the devaluation operated across the board and affected all creditors, companies such as BP, France Telecom, Siemens, and Suez . . . pursued claims against Argentina for breach of contract and international treaty law”¹⁴¹ Many bilateral investment treaties (“BITs”) contain nonprecluded measures (“NPM”) clauses that limit investor protections in certain situations, “allow[ing] a country to take actions inconsistent with treaty obligations when necessary for the maintenance of public order, national security, or other essential security interests.”¹⁴² Though many of these cases addressed exactly the same postcrisis emergency laws, the investors brought forth very similar arguments, and Argentina used a practically identical series of defenses, ICSID results were strikingly different based on varying interpretations of these NPM clauses.¹⁴³

For example, in *LG&E Energy Corp. v. Argentine Republic*, ICSID found that Argentina’s actions during the Argentine Crisis of 2001 fell under Article XI of the BIT with the United States, which exempts a state from payment if the actions taken were necessary to preserve public order.¹⁴⁴ By contrast in *Sempra Energy International v. Argentine Republic* and *Enron Corp. v. Argentine Republic*, ICSID found that actions Argentina took during the same 2001 financial crisis were *not* covered by the necessity exception, making it unclear to the Argentine government what actions it may take during times of financial crisis.¹⁴⁵

Critics argue that creating a permanent court system would promote consistency in a way that has not been created through ad

139. See Ley de Emergencia Publica y de Reforma del Regimen Cambiario, Law No. 25.561, Jan. 1, 2002, [29810] B.O. 1-2 (Arg.); Goodman, *supra* note 63, at 478.

140. Federico Lavopa, Opinion, *Crisis, Emergency Measures and Failure of the ISDS System: The Case of Argentina*, INTER PRESS SERV. (Aug. 12, 2015), <http://www.ipsnews.net/2015/08/opinion-crisis-emergency-measures-and-failure-of-the-isds-system-the-case-of-argentina/> [<https://perma.cc/DT2M-AX9U>]; Goodman, *supra* note 63, at 451–52.

141. Goodman, *supra* note 63, at 452.

142. *Id.* at 475–76.

143. Lavopa, *supra* note 140.

144. *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, ¶ 2 (July 25, 2007); see also *Cont’l Cas. Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, ¶ 173 (Sept. 5, 2008).

145. See *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 346 (Sept. 28, 2007); *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶ 339 (May 22, 2007).

hoc tribunals.¹⁴⁶ “Dispute settlement has a central function in stabilizing the expectations of foreign investors and enables them to counter opportunistic behavior by the host state, such as unreasonable interferences with the investor’s economic rights.”¹⁴⁷ Though, technically speaking, there is no *stare decisis* in international investment law disputes, a permanent tribunal may have a higher likelihood of rendering decisions that are more consistent with one another.¹⁴⁸ Not only could a permanent court be seen as more legitimate, but it could also help to create predictability in investment law, a benefit for both states and investors.¹⁴⁹

However, fixing the problem of consistency comes with its own set of challenges and concerns. Establishing a permanent court to solve the issue of inconsistency may have a detrimental impact on state sovereignty protection. The ad hoc nature of the ISDS system is important to many investors. “Apart from the question of who sits as [arbitrators], and who appoints or elects them, permanent institutions may display stronger dynamics in enlarging their jurisprudential powers than a system of one-off arbitral tribunals.”¹⁵⁰ While a permanent investment body may begin to create consistent investment law, certain principles that might develop are likely to affect states in different ways. In this scenario, certain states will emerge as “decision makers,” while other states may not agree with the shifts they see taking place, moving the process further away from a democratic influence.¹⁵¹ While a permanent court may create consistency, it may not necessarily lead to the development of widely accepted and just principles. “[C]onsistency alone, which theoretically could be achieved with the current system, wouldn’t fix the soundness of the law produced. Consistency isn’t a silver bullet. It is only good if the contents of the law are sound.”¹⁵² State sovereignty is likely to be more harmed than helped by the creation of a permanent court that utilizes permanent judges and creates a consistent body of law.

146. See Brower & Schill, *supra* note 1, at 474.

147. *Id.* at 477.

148. Schill, *supra* note 14, at 8 (“[T]he extent to which permanent institutions can increase consistency in decision making will also depend on the applicable law. If the law remains essentially enshrined in bilateral treaties, consistency will be more difficult to achieve, and perhaps be contrary to the intentions of state parties than in a multilateral setting.”).

149. See *id.*

150. *Id.*

151. *Id.*

152. Grisel & Schultz, *supra* note 5.

One of the major issues that causes inconsistency is a tribunal's treatment of substantive rights granted to investors.¹⁵³ Public international law rights such as the right to "fair and equitable treatment" and the State's obligation to "observe its commitments," which are included in investor-state treaties, have been interpreted and applied differently.¹⁵⁴ This application has important consequences on liability.¹⁵⁵ Textual ambiguity arising from compromise language is common, especially because treaties are not only concerned with legal implications, but are also negotiated with economic, political, and social concerns in mind.¹⁵⁶

The shift towards BITs in international investments, which are uniquely negotiated between two entities, suggests that parties may be less interested in having all legal standards consistent across the board.¹⁵⁷ However, there are methods of creating consistency that are treaty based, rather than tribunal based. One solution that has been implemented in trade and commercial law is to use "Model Treaties" of investment protection that "aim[] to promote uniformity in treaty practice."¹⁵⁸ Using Model Treaties encourages the formation of norms in customary law by spreading

153. A typical investment treaty generally provides investors with a combination of up to seven different substantive rights. First, investors are often guaranteed the payment of adequate compensation in the event an investment is expropriated. Second, Sovereigns are prohibited from enacting currency controls so as to promote the free flow of capital. Third, Sovereigns are required not to discriminate on the basis of nationality; this typically means investors cannot be treated worse than the Sovereign's own citizens or other foreigners. Fourth, Sovereigns promise to treat investments fairly and equitably. Fifth, Sovereigns promise to provide full protection and security to an investment. Sixth, sovereigns guarantee that investments will not be treated less favorably than the minimum standard required by customary international law. Finally, Sovereigns sometimes agree to honor commitments they have made regarding an investment.

Franck, *supra* note 60, at 1530–32 (footnotes omitted). In United States agreements, American investors in foreign countries have protections such as freedom from discrimination, protection against uncompensated expropriation of property, protection against denial of justice, and the right to transfer capital. *See Fact Sheet, supra* note 2.

154. Franck, *supra* note 60, at 1523.

155. *Id.*

156. Locknie Hsu, *Examining the Formative Aspect of Investment Treaty Commitments: Lessons from Commercial Law and Trade Law*, in *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM* 221, 224 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

157. *Id.* at 225; Todd Allee & Clint Peinhardt, *Delegating Differences: Bilateral Investment Treaties and Bargaining over Dispute Resolution Provisions*, 54 *INT'L STUD. Q.* 1, 6 (2010).

158. Hsu, *supra* note 156, at 226.

State practice,¹⁵⁹ while still allowing states to depart from the format for special circumstances.¹⁶⁰ Interpreting the same model provision in various treaties would likely lead to consistent outcomes, which could solve the interpretation issue without a permanent body.

Other than model provisions, current ISDS ad hoc tribunals can clarify certain standards to make interpretation simpler and more predictable. For example, “Fair and Equitable Treatment” is both a substantive right of investors and a catch-all phrase that is the subject of many investment claims, often utilized to challenge public policy measures in ISDS proceedings.¹⁶¹ Article 8.10 of CETA lists the types of conduct that constitute a breach of the “Fair and Equitable Treatment” standard.¹⁶² The North American Free Trade Agreement (“NAFTA”) has done something similar.¹⁶³ After early arbitral tribunals gave different interpretations of the “Fair and Equitable” provision of the NAFTA text, NAFTA Free Trade Commission issued a binding interpretation on July 21, 2001 to clarify.¹⁶⁴ Similarly, in their own treaties, parties can explicitly define what behavior falls under substantive rights granted to investors. Making the standard clearer within each specific investment treaty would necessitate less interpretation in the first place. This option promotes consistency while respecting the uniqueness of the negotiating history and the intent of the parties.

159. *Id.*

160. *Id.*

161. Franck, *supra* note 60, at 1530–31; BEUC, *supra* note 93, at 3.

162. BEUC, *supra* note 93, at 3 (citing CETA, *supra* note 29, at art. 8.10).

163. Catherine Yannaca-Small, *Fair and Equitable Treatment Standard in International Investment Law* 10–11 (OECD Directorate for Financial and Enterprise Affairs, Working Paper No. 3, 2004), https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf [<https://perma.cc/D8VY-HGB4>].

164. *Id.* According to the interpretation:

Article 1105 (1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105 (1).

Id. at 11.

2. Adding an Appellate Body as a Possible Solution

Another major change that has been proposed to solve the consistency problem is the creation of an appellate tribunal to ensure errors in fact or law can be corrected, thereby promoting consistency.¹⁶⁵ Currently, without a higher court, there is no designated entity to control judicial errors, and there is no legislative body to control a tribunal's law-making activities.¹⁶⁶ ISDS tribunals are not legislative bodies, but by adding an appellate body, there exists the potential to become "self-correcting mechanisms in terms of the interpretation and development of the rules of international law."¹⁶⁷ An appellate tribunal would be able to modify a lower tribunal's decision, reverse it, or remand the matter for further consideration.¹⁶⁸

While it is too early to determine exactly what the MIC would look like, the idea is to model it based on both domestic and international courts and tribunals like the WTO, which is composed of a first instance panel and an appellate body.¹⁶⁹ Therefore, it is worth looking at the WTO's Appellate Body to discover issues that could appear in the potential MIC. The WTO Appellate Body—"established in 1995 under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) is a standing body of seven persons" who serve four-year terms and hear appeals.¹⁷⁰ The Appellate Body issues an Appellate Body Report, which is circulated to WTO Members within ninety days of the notice of appeal filing, and becomes public immediately upon circulation to Members.¹⁷¹ In its report, "[t]he Appellate Body may uphold, modify or reverse the legal findings and conclusions of the [WTO] Panel" that issued the original decision.¹⁷² The report is

165. SUBEDI, *supra* note 5, at 251. This idea gained more momentum in 2007, after an ICSID annulment committee found an error in the application of law by a prior tribunal but noted that there was not much it could do about it. *Id.*

166. *See* Schill, *supra* note 14, at 3.

167. SUBEDI, *supra* note 5, at 248.

168. THE EU SUCCEEDS, *supra* note 34, at 3.

169. O'Connor & Aquilini, *supra* note 30, at 22.

170. *Appellate Body*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm [<https://perma.cc/5S9D-TFYF>] (last visited Dec. 1, 2018).

171. *Appellate Body Members*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm [<https://perma.cc/K4TB-98V9>] (last visited Dec. 1, 2018).

172. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm [<https://perma.cc/G9H8-GM4X>] (last visited Dec. 1, 2018).

then adopted by the Dispute Settlement Body (“DSB”), which must then be accepted by the parties to the dispute.¹⁷³ Out of the seven Members, three are selected to each case.¹⁷⁴ These Members are chosen by the parties to the dispute.¹⁷⁵ Before finalizing the Appellate Body Reports, a three-Member division assigned to a case will exchange views with other Appellate Body Members to help maintain consistency and coherence in decisions.¹⁷⁶

However, the WTO demonstrates that the addition of an appellate mechanism to promote consistency has the potential to lengthen procedures, which can drive up costs and keep important issues from being solved in an efficient manner. In respect to the WTO Appellate Body:

[T]he number of issues raised on appeal, the number of participants and third participants, the total length of submissions, as well as an accumulation of jurisprudence [has increased]. As a result, Appellate Body proceedings now as a rule exceed, in some cases significantly, the 90-day timeframe prescribed by the Dispute Settlement Understanding.¹⁷⁷

While a large caseload suggests confidence in the Appellate Body, deadlines are being extended and efficiency is being compromised.¹⁷⁸ Additionally, WTO cases have become more labor intensive.¹⁷⁹ Parties are more often asking the WTO Appellate Body to reopen the factual record in a case, versus merely ruling on the first instance panel’s legal interpretation.¹⁸⁰ Further, choosing who will staff the MIC Appellate Body revives old issues of politicization surrounding the selection process. While instituting an appellate body is a better alternative to a permanent system, it could potentially make the process more complicated and costly in a detrimental way.

173. *Id.*

174. *Id.*

175. Claus-Dieter Ehlermann, *Experiences from the WTO Appellate Body*, 38 *TEX. INT’L L.J.* 469, 471 (2003).

176. *Appellate Body Members*, *supra* note 171.

177. Claus-Dieter Ehlermann, *The Workload of the WTO Appellate Body: Problems and Remedies*, 20 *J. INT’L ECON. L.* 705 (2017).

178. Alex Lawson, *The WTO’s Appellate Body Crisis Is Getting Worse*, *LAW360* (Aug. 25, 2017, 7:35 PM), <https://www.law360.com/articles/957758/the-wto-s-appellate-body-crisis-is-getting-worse> [<https://perma.cc/QS8P-A5NP>].

179. *Id.*

180. *Id.*

C. *The “Transparency” Concern: Secretive Nature of Proceedings Increases Anti-ISDS Bias*

The third concern of the current ISDS system is the lack of transparency, namely: (1) lack of transparency in proceedings; and (2) the need for third-party participation. While the transparency issue is still a major criticism of the ISDS system, it has largely already been addressed. This section addresses these two facets of the transparency problem to analyze whether a permanent court could be a solution, and considers reforms to the current system that would not require a permanent court structure.

1. ISDS Proceedings Lack Transparency

While transparency is an important issue in ISDS proceedings, the public is not completely in the dark about all aspects of international investments. Major multilateral conventions, like ICSID, as well as many bilateral and regional treaties are matters of public record.¹⁸¹ Yet, accessibility to the treaty text is far different from privity to the inner workings of the tribunal in a particular case. In investment dispute proceedings, published information can be limited about the existence of a particular dispute, the dispute procedure, substantive aspects of the case, and the results.¹⁸² Hearings may be “held *in camera* and the documents submitted by the parties remain confidential in principle.”¹⁸³ Further, the award granted is only published if the parties desire it to be.¹⁸⁴ However, it is important to note that significant progress has been made overall in the transparency area, and many issues have already been addressed. “Transparency within international investment law has come a long way in a short time. In the pre-NAFTA era of only 18 years ago, it seems fair to say that opacity was the norm and transparency the exception. Today the situation is mixed.”¹⁸⁵

Although there is no general obligation of confidentiality in ISDS currently, a presumption of respect exists for the principles

181. See Maupin, *supra* note 117, at 151.

182. NEW SYSTEM FOR RESOLVING DISPUTES, *supra* note 19, at 3.

183. VADI, *supra* note 58, at 58.

184. *Id.*

185. Maupin, *supra* note 117, at 170.

of confidentiality and privacy.¹⁸⁶ Introducing mandatory transparency into investment cases would defeat the principle of confidentiality that is important to investors.¹⁸⁷ ISDS through “neutral and *confidential* arbitration is one of the pillars of international investment law . . . recognized by every major capital importing and exporting nation in the world.”¹⁸⁸ Mandatory confidentiality could greatly tip the balance envisioned for ISDS by not respecting the investor as an autonomous private entity. Investment disputes are unlike many other disputes recognized in the international sphere between states. While it is ideal that investors feel a sense of obligation to the citizens of the host state, an investor’s duty to the public differs from a host state’s obligation of openness to its people.

Therefore, encouraging, rather than requiring, transparency is likely the best solution and there are multiple reasons why the international community should encourage transparency in disputes. Transparent proceedings have the potential to enhance the quality of democratic deliberation about risk and its control, especially in key areas like health and the environment, by fostering more access to information and participation by the public.¹⁸⁹ Tailoring the ISDS rules to allow for as much transparency as possible is a solution that maintains the balance between a state’s responsibility to its people and a private investor’s right to business confidentiality.

Currently in ICSID, parties are able to tailor the level of transparency in proceedings. Parties can agree on what information and documents that they want to keep confidential, and may agree that document publication is to be considered on a case-by-case basis.¹⁹⁰ Once the parties agree on a level of confidentiality for a particular proceeding, the agreement is typically signed and adopted by the Tribunal in a formal order.¹⁹¹ “The agreement may allow either party to designate documents as confidential, in part or whole,” or

186. EUROPEAN FED’N, *supra* note 60, at 16.

187. COLLINS, *supra* note 1, at 227.

188. *Id.* at 248 (emphasis added).

189. William Magnuson, *WTO Jurisprudence & Its Critiques: The Appellate Body’s Anti-Constitutional Resistance*, 51 HARV. INT’L L.J. ONLINE 121, 129–30 (2010).

190. *Confidentiality and Transparency—ICSID Convention Arbitration*, INT’L CTR. SETTLEMENT INV. DISPS., <https://icsid.worldbank.org/en/Pages/process/Confidentiality-and-Transparency.aspx> [<https://perma.cc/9TUF-D22X>] (last visited Dec. 1, 2018).

191. *Id.*

to allow specific portions of the document to be redacted before being made public.¹⁹² Parties may also allow public access to hearings in person or through web or video broadcasting.¹⁹³ If parties utilize this option, additional measures can be taken to protect privileged information by suspending portions of the hearing from broadcast.¹⁹⁴

Another solution recently adopted by UNCITRAL is the creation of the UNCITRAL Transparency Rules (“Rules”) which are automatically applied to current investment agreements.¹⁹⁵ In 2014, UNCITRAL reviewed its transparency requirements for investor-state arbitration, and created these updated Rules.¹⁹⁶ The Rules reverse the historic confidentiality presumption, but aim to create a balance by being open, while also protecting confidential business information and national interests.¹⁹⁷ The Rules only apply in investor-state claims arising out of treaties adopted after the enactment of the revised Rules on April 1, 2014 (unless the parties opt out), but the Rules can be adopted by treaties negotiated before their creation if the parties agree, or by a proactive amendment to the agreement.¹⁹⁸ The new Rules change proceedings in important ways, for example, by requiring publication of decisions and certain documents and opening proceedings to the public unless the tribunal decides otherwise.¹⁹⁹ Further indicating the shift toward confi-

192. *Id.*

193. INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, ICSID CONVENTION ARBITRATION RULES r.32 (2006) [hereinafter ICSID ARBITRATION RULES], <http://icsidfiles.worldbank.org/icsid/icsid/StaticFiles/basicdoc/partF.htm> [https://perma.cc/LM2K-MBVS].

194. *Confidentiality and Transparency—ICSID Convention Arbitration*, *supra* note 190.

195. UNITED NATIONS COMM’N ON INT’L TRADE LAW, RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 5 (2014) [hereinafter UNCITRAL RULES], <https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> [https://perma.cc/4X8P-M9DE].

196. *Id.* at 1–2.

197. *See* EUROPEAN FED’N, *supra* note 60, at 16.

198. UNCITRAL RULES, *supra* note 195, at 5. Article 1 of the UNCITRAL Rules on Transparency states that:

In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1 April 2014, these Rules shall apply only when:

(a) The parties to an arbitration (the “disputing parties”) agree to their application in respect of that arbitration; or

(b) The Parties to the treaty or, in the case of a multilateral treaty, the State of the claimant and the respondent State, have agreed after 1 April 2014 to their application.

Id.

199. *See* UNCITRAL RULES, *supra* note 195, at 10; Giest, *supra* note 119, at 332.

dentality, the UN adopted the Rules at the Convention on Transparency in Treaty-Based Investor-State Arbitration.²⁰⁰ Overall, strides have been made to increase and encourage transparency in ISDS proceedings, making this issue less significant than it has been in the past.

2. The Importance of Third-Party Participation

International investment tribunal decisions may determine the legality of national legislation in relation to an international investment agreement.²⁰¹ In light of the potential consequences these decisions could have on stakeholders and citizens of the host state, critics are surprised at the high level of confidentiality surrounding some of these proceedings.²⁰² Proponents of transparency believe that third parties who are impacted by decisions rendered in ISDS are more likely to accept these decisions if they are produced in a transparent manner.²⁰³ Thus, incorporating third parties into the process may be a way to alleviate the transparency problem. For example, many ISDS tribunals have allowed amicus curiae submissions by public interest groups.²⁰⁴ “In [United States] cases, amicus briefs have [long] been submitted by a variety of [non-governmental organizations], including the Sierra Club, Friends of the Earth, and Center for International Environmental Law.”²⁰⁵ Additionally, if key international governmental and non-governmental organizations in active fields, like the protection of human rights, public health, or the environment, are consulted before decisions are rendered, these decisions may be viewed as more legitimate.²⁰⁶ Allowing amicus briefs to be included more frequently in international investment agreements could help to ensure that parties who are affected by ISDS decisions have the opportunity to be heard. Encouraging participation from outside sources would likely serve to boost public faith in ISDS overall.

200. EUROPEAN FED’N, *supra* note 60, at 16; UNITED NATIONS, UNITED NATIONS CONVENTION ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 1, 5 (2015), <https://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf> [<https://perma.cc/2QQF-73GE>].

201. COLLINS, *supra* note 1, at 229–30.

202. *Id.* at 227.

203. *See id.*

204. *See* VADI, *supra* note 58, at 59.

205. *Fact Sheet*, *supra* note 2.

206. KAUFMANN-KOHLER & POTESÀ, *supra* note 77, at 73.

CONCLUSION

Since the 1980's, investor-state arbitration has become a standard feature in international investment agreements, and evaluating the ad hoc nature of current ISDS tribunals is a relevant issue in today's global community.²⁰⁷ Proposed solutions range from a return to state-to-state arbitration on one end of the spectrum, to a permanent investment court on the other.²⁰⁸ However, creating a permanent investment court has the potential to drastically alter a system that was put in place for particular reasons. Though a permanent investment court may address some of the criticisms of the ISDS mechanism as it currently exists, it will likely disrupt key objectives of ISDS, including the balance between the protection of state sovereignty and the recognition of an investor as an autonomous private entity. Though parties are not forced to use permanent courts over traditional ISDS methods, it is important for states who may only see the solutions created by the ICS or MIC to consider the long term effects. Some of these short term solutions may end up causing the very same issues they were meant to fix.

A permanent investment court, like the ICS or MIC, may be a premature way to solve state concerns. Though notable states have withdrawn (or discussed withdrawing from) treaties with ISDS mechanisms recently, there does not seem to be unified reason for doing so that would warrant a "one size fits all" solution. Stephan Schill, a well-respected author who writes on the ISDS topic, notes that:

[r]ather than speaking the language of nationalism and protectionism [as the United States has done, especially President Donald Trump], opposition in the EU invokes constitutional values and rights—namely democracy, the rule of law, and fundamental rights—which are leveraged against mega-regionals and the institutions they come with, notably investor-state dispute settlement (ISDS) and regulatory cooperation.²⁰⁹

NAFTA, which has been a hot topic in the news lately, serves as an example. The Trump administration has sharply criticized

207. *Id.* at 11–12.

208. Brower & Schill, *supra* note 1, at 475.

209. Schill, *supra* note 118; see Gideon Rachman, *Donald Trump Leads a Global Revival of Nationalism*, FIN. TIMES (June 25, 2018), <https://www.ft.com/content/59a37a38-7857-11e8-8e67-1e1a0846c475> [<https://perma.cc/ZC26-R92M>].

NAFTA's ISDS mechanism, which allows investors to bring claims against NAFTA countries.²¹⁰ In comparison, the Canadian government has been pushing to keep the ISDS system with "watered-down procedural changes," and Mexico still sees ISDS as a positive means to attract more foreign investors.²¹¹

Differences in perspective even exist from one administration to the next. President Trump's outlook stands in stark contrast to President Obama's, which was less concerned with the United States' vulnerability to suits in ISDS tribunals.²¹² Instead, President Obama focused on the fact that the United States had never lost an investment case.²¹³ This shift in the United States may be, therefore, a reflection of a renewed sense of nationalism and isolationism, rather than a belief that ad hoc ISDS tribunals are illegitimate without permanency.

In addition, the ICS or the MIC would likely negatively impact host states. "With no option but to turn to the investment court [ICS] to resolve disputes, other companies will 'either not invest at all, or . . . include the higher political risk in the prices of the investment.'"²¹⁴ This would be especially detrimental to states who need investments to aid their economies, and therefore possess less bargaining power. Big companies with leverage could end up making their own favorable deals, reminiscent of the pre-ISDS era.²¹⁵

The ISDS mechanism has finally reached a point where it has been in operation long enough, and has been utilized enough, to have its advantages and disadvantages analyzed by the global community.²¹⁶ Earlier in the comment, the question was posed regarding whether solutions are being created simply because the

210. Jeff Spross, *President Trump Doesn't Actually Have the Power to Repeal NAFTA*, WEEK (Mar. 26, 2018) <http://theweek.com/articles/762714/> [<https://perma.cc/WVC6-HM2T>] ("[The administration] wants to roll back NAFTA's Investor-State Dispute Settlement (ISDS) rules, which basically allow businesses to sue NAFTA countries over regulations and such. Both the Tea Party right and the Sanders left hate this setup for a variety of reasons.")

211. *Id.*

212. Rob Howse, *If Trump Doesn't Withdraw U.S. Consent to Be Sued in International Investment Tribunals, Expect the New Protectionism to Generate Claims for Billions from Foreign Interests*, INT'L ECON. L. & POL'Y BLOG (Mar. 30, 2017), <https://worldtradelaw.typepad.com/ielpblog/2017/03/if-trump-doesnt-withdraw-us-consent-to-be-sued-in-international-investment-tribunalsexpect-the-new-p.html> [<https://perma.cc/U542-FGDG>].

213. *Id.*

214. *See* Ross, *supra* note 29.

215. *Id.*

216. SUBEDI, *supra* note 5, at 255 ("[E]xisting investment dispute settlement institutions 'were not designed to address complex issues of public policy that now routinely come into

ISDS mechanism is broken, or whether these solutions are a result of a shift that has taken place in global community priorities that warrants such a drastic reform.²¹⁷ Because the ICS and the MIC are likely to result in an overall move away from the original aims of ISDS, it is important for the international community to seriously reevaluate its goals in regard to solving investment disputes. This should certainly take place before implementation of the MIC. Though times have changed, the original purpose of ISDS is still honored today. It may be unwise to trade a longstanding ISDS system that was built to respect foundational elements of international investing, with a reformed permanent investment court based on the ever-changing preferences of today.

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play in investor-State disputes.” (footnote omitted)).

217. See *supra* note 26 and accompanying text. For example, could the desire for transparency be related to the modern availability of information based on technology? If so, would this shift in attitude warrant overthrowing an accepted regime, rather than simply fixing it in more modest ways? As put by commentator Julie Maupin:

We must ask ourselves not only whether transparency is desirable within international investment law, but also transparency in respect of what and vis-à-vis whom? Only in light of the answers to these questions can we begin to fulfill the . . . mandate of querying the degree to which the international investment regime may manifest an existing or evolving international law norm of transparency.

See Maupin, *supra* note 117, at 143.

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