

Modeling an International Investment Court After the World Trade Organization Dispute Settlement Body

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This paper posits that an international investment court supported by an international investment treaty will achieve the reform needed for Investor-State Dispute Settlement (ISDS). The Dispute Settlement Understanding (DSU), the main agreement of the World Trade Organization (WTO) on resolving disputes, will help provide a blueprint for the investment treaty and court. This article proposes an international treaty that will provide a framework for establishing an international investment court, comprised of a standing appellate body (AB) and ad hoc panels, and replacing the existing universe of international investment agreements (IIAs) with a single, international investment treaty. Specifically, this paper will seek to achieve the following: (i) provide context on the current ISDS regime; (ii) argue that some of the historic justifications for ISDS in its current form are no longer valid; (iii) evaluate the critiques and public concerns of the ISDS regime; (iv) analyze recent decisions by ICSID Members that demonstrate need and support for ISDS reform; (v) propose an international investment court; and (vi) propose an international investment treaty.

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I. INTRODUCTION

Increasing public ire against Investor-State Dispute Settlement (ISDS) suggests a robust, public examination of the current ISDS regime may be due.¹ Currently, many critics oppose ISDS mechanisms in International Investment Agreements (IIAs) that allow investors to bring forth claims to private arbitration tribunals rather than through public judicial proceedings that would ordinarily adjudicate these matters based on legal standards or public policies.² Some of these claims involve sensitive public issues and regulations concerning climate change, environmental protection, and labor rights.³ The ISDS debate has become so contentious that it has stalled negotiations on trade agreements, such as the Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP), and the EU-Canada Comprehensive Economic and Trade Agreement (CETA).⁴ However, the most current roadblock to the U.S. supporting the TPP and TTIP may be President Trump's vocal opposition to ratifying either treaty, despite years of efforts by Democrat and Republican leadership alike to craft both trade agreements as the gold standard in international trade agreements.⁵

1. See Graham Vangergen, *Mass European Protest Against TTIP Corporate Takeover: EU Commission Sanctions 'Revolution Against Laws'*, GLOBAL RESEARCH (Nov. 5, 2015), <http://www.globalresearch.ca/mass-european-protest-against-ttip-corporate-takeover-eu-commission-sanctions-revolution-against-law/5486736>.

2. See Sylvia Constain, *ISDS Growing Pains and Responsible Adulthood*, 11 TRANSNAT'L DISP. MGMT. 1, 1 (2014).

3. *Id.*

4. Vangergen, *supra* note 1; Chris Bramwell, *TPP protests show confusion over deal*, RADIO N.Z. (Feb. 5, 2016), <http://www.radionz.co.nz/news/political/295793/tpp-protests-show-confusion-over-deal>; *Mass Protest Against TTIP and CETA to Take Place in Berlin*, EURACTIV, (Erika Korner, trans.) (Aug. 26, 2015), <http://www.euractiv.com/section/trade-society/news/mass-protest-against-ttip-and-ceta-to-take-place-in-berlin/>.

5. Tim Worstall, *With Trump's Election The TPP Probably Is Dead, Yes - As Is The TTIP*, FORBES (Nov. 11, 2016), <http://www.forbes.com/sites/timworstall/2016/11/11/with-trumps-election-the-tpp-probably-is-dead-yes-as-is-the-ttip/#4b91cf485b80>.

An international investment treaty that creates an international investment court will achieve the reform needed for ISDS by addressing some of its most pressing criticisms. The Dispute Settlement Understanding (DSU), the main agreement of the World Trade Organization (WTO) on settling disputes, will help provide a blueprint for the investment treaty and court. The treaty will involve two main projects: first, it will establish an international investment court, comprised of a standing appellate body (AB), and ad hoc panels; and second, it will replace the universe of IIAs with a single, international investment treaty. This paper focuses on the first part of the investment treaty that concerns the establishment of an investment court. This paper will seek to achieve the following: (i) provide background on the current ISDS regime; (ii) argue that some of the historic justifications for ISDS in its current form are no longer valid; (iii) evaluate the critiques of the ISDS regime; (iv) analyze recent decisions by ICSID Members that demonstrate need and support for ISDS reform; (v) propose an international investment court; and (vi) propose an international investment treaty.

II. BACKGROUND ON THE CURRENT ISDS REGIME

The International Centre for Settlement of Investment Disputes (ICSID) is the leading institution for ISDS and provides guidelines for the arbitration of IIAs.⁶ ICSID was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), a treaty between 153 signed and ratified contracting states that first entered into force on October 14, 1966.⁷ Since then, ICSID has administered 597 cases.⁸ Its caseload has rapidly grown in the last decade.⁹ In 2015, ICSID had 52 ICSID-based and non-ICSID cases, up from 12 ICSID-based cases in 2000, whereby non-ICSID cases involve those matters between states that are not signatories to the ICSID Convention but

6. 2016 Annual Report, International Centre for Settlement of Investment Disputes, WORLD BANK GROUP, 3 <https://icsid.worldbank.org/en/Documents/resources/ICSID-AR16-English-CRA-bl2-spreads.pdf>.

7. *Id.* at 8.

8. *The ICSID Caseload – Statistics*, 7 (2017), [https://icsid.worldbank.org/en/Documents/ICSID%20Web%20Stats%202017-1%20\(English\)%20Final.pdf](https://icsid.worldbank.org/en/Documents/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf) [hereinafter ICSID Caseload].

9. Background Information on the International Centre for Settlement of Investment Disputes, WORLD BANK GROUP 4 (Sept. 9, 2015), <http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/CaseLoadStatistics/ICSIDOverview-English.pdf>.

have chosen to use the ICSID administration to assist with the arbitral proceedings.¹⁰ The cases involve disagreements between governments and foreign investors, typically where the state is a party to the ICSID Convention and the investor brings a claim that the government has allegedly breached an investment contract. 25% involve the oil, gas and mining sector, and 17% involve the electric power and energy industries.¹¹

This paper will discuss the original policy justifications for ISDS, including the argument that ISDS is necessary so that investors from developed countries might break into foreign markets in developing countries, with the guarantee of ISDS to protect their investments when doing business in areas susceptible to weak rule of law and nationalization of certain industries. As a preliminary step, it is important to present the latest data on ICSID arbitration that reveals that the parties involved in ISDS have changed, and that the justifications for it may therefore need to be reconsidered. Over the lifetime of ICSID, out of state parties involved in ICSID cases have been 25% Eastern European or Central Asian, 24% South American, 15% Sub-Saharan African, 10% Middle Eastern and North African, and 7% Western European.¹² ISDS was created in part to protect investors from developed countries who wanted to invest in developing countries, yet recent trends in the data indicate that investors are increasingly arbitrating against developed countries.¹³ Whereas ISDS originally protected investors from doing business in developing nations, allaying fears of nationalization or judicial corruption by guaranteeing arbitral channels outside of the host country's opaque judiciary, ISDS now includes investors doing business in Western Europe, where proceedings in public national courts would presumably respect the rights of both foreign investors and the host government and thereby dilute the need for a private arbitration. In 2015, the newly registered cases that year involved 37% from Western European, 23% Eastern Europe and Central Asian, 15% Sub-Saharan Africa, and 11% Middle Eastern and North African countries.¹⁴ In

10. ICSID Caseload, *supra* note 8 at 1. Non-ICSID cases refer to those where the ICSID Secretariat offers various levels of administrative and organizational support for non-ICSID dispute settlement in state-state or investor-state proceedings.

11. *Id.* at 12.

12. *Id.* at 11.

13. CHRISTOPH H. SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY* 416 (Cambridge University Press 2nd ed. 2009).

14. The ICSID Caseload-Statistics (Issue 2016-1), International Centre for Settlement of Investment Disputes, 24 [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202016-1%20\(English\)%20final.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202016-1%20(English)%20final.pdf).

2016, newly registered cases included 31% from Eastern European and Central Asian, 17% South America, 15% Western European, 11% Middle Eastern and North African countries.¹⁵ While 2015 may present as an outlier with a plurality of cases registered by investors against Western European countries, it is important to consider the implications of the increasing use of ISDS by investors against Western European and other developed countries. Thus, ISDS does not only protect investors from having to file claims in corrupt local courts, but instead privileges them with the power of private arbitral proceedings to seek judgments against host governments.

A. *Some of the Original Justifications for ISDS in its Current Form are No Longer Valid*

Several historic justifications for ISDS are no longer valid under the current regime. First, ISDS sought to provide a neutral, depoliticized venue for international conflicts. Second, ISDS sought to promote good governance and democracy in host countries which were, originally, developing rather than developed nations and typified by weak rule of law. Third, ISDS sought to create a more efficient and equitable alternative to domestic national court systems found in developing countries. Fourth, ISDS sought to attract foreign direct investment by guaranteeing investors' rights in developing countries with traditionally weak rule of law.¹⁶ Ultimately, investors financing projects in a developing country did not want to pursue claims against the host government in local courts, marked by perceptions of weak rule of law and corruption. If investors wanted to enter a foreign market in mining or electricity in a developing country and, should the host government try to nationalize that industry or breach a contractual agreement, the investor would be able to bring a claim against the host government in a neutral venue, specifically a closed, private arbitration.

First, ISDS mechanisms in IIAs were initially designed to depoliticize investment disputes by carving out a neutral arena, thereby

15. The ICSID Caseload-Statistics (Issue 2017-1), International Centre for Settlement of Investment Disputes, 25 [https://icsid.worldbank.org/en/Documents/resource/ICSID%20Web%20Stats%202017-1%20\(English\)%20Final.pdf](https://icsid.worldbank.org/en/Documents/resource/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf).

16. Anna Joubin-Bret & Jean E. Kalicki, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, 11 *TRANSNAT'L DISP. MGMT.* 1, 1 (2014). See Catherine A. Rogers, *The Politics of International Investment Arbitrators*, 12 *SANTA CLARA J. INT'L L.* 223 (2013); Anthea Roberts, *State-To-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 *HARV. INT'L L. J.* 1 (2014).

deracinating the disputes from national courts or conflicts warranting diplomatic intervention.¹⁷ Renowned international arbitration law Professor W. Michael Reisman at Yale originally provided the following justification which served as the fundamental argument for ISDS: The “central achievement of the modern BIT [Bilateral Investment Treaty] regime is to provide meaningful and effective procedural rights place of the customary law and politicized arrangement that characterized the pre-BIT era of diplomatic protection. This achievement is primarily expressed in the design of a two-track jurisdictional system, which separates, legalizes, and insulates the investors’ procedural rights from what seemed before to be the caprice of sovereign-to-sovereign politics.”¹⁸ Reisman propounds that the separation of state-state and investor-state disputes into distinct tracks must be maintained.¹⁹ Under this system, the investor’s home government is relieved from representing the investor in a foreign proceeding. Rather than allowing the dispute to become internationally politicized due to a public, diplomatic state-state dispute, the arbitration mechanism can “quietly resolve the conflict.”²⁰ While Reisman argues that creating separate investor-state and state-states will temper state involvement, governments increasingly defend the inclusion of ISDS in IIAs in public, diplomatic capacities and, in so doing, significantly participate in the investor-state track.²¹

17. Joubin-Bret & Kalicki, *supra* note 16 at 1. See also Andrea K. Bjorklund, *Sovereign Immunity as a Barrier to the Enforcement of Investor-state Arbitral Awards: The Re-politicization of International Investment Disputes*, 21 AM. REV. INT’L ARB. 211 (2010) (objective of ISDS is to depoliticize investment disputes); Ibrahim Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, in THE WORLD BANK IN A CHANGING WORLD, 102–03 (Franziska Tschofen & Antonio R. Parra eds., 1st ed. 1991).

18. *Ecuador v. United States*, Expert Opinion with Respect to Jurisdiction of Professor W. Michael Reisman, 20–21 (Perm. Ct. Arb. Apr. 24, 2012) [hereinafter Reisman Opinion].

19. See *id.* Reisman provided expert testimony against Ecuador’s proposed interpretation of the Ecuador-US BIT. According to Reisman, Ecuador sought to interfere with what Reisman viewed as the “independent system of investor-initiated ISDS, which is the essential foundation of contemporary international investment law,” *Id.* at 21. Reisman warned against a losing state requesting that a state court interpret the tribunal’s interpretation of the BIT. Recall that only investors can bring complaints under IIAs; since only states broker and are a party to IIAs, only states can be in breach of them.

20. Christoph H. Schreuer, *Do We Need Investment Arbitration?*, 11 TRANSNAT’L DISP. MGMT. 1 (2014).

21. OFFICE OF THE U.S. TRADE REPRESENTATIVE, FACT SHEET: INVESTOR-STATE DISPUTE SETTLEMENT (2015), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>.

For example, the Office of the Assistant Legal Adviser for International Claims and Investment Disputes (L/CID) is the largest office in the U.S. Department of State's Office of the Legal Adviser. It "represents the United States and coordinates activities within and outside the Department with respect to all aspects of international claims and investment disputes."²² Further, the State Department works closely with U.S. investors and foreign companies to ensure that ISDS protects their business interests abroad.²³ Thus, while the two tracks may have originally intended to limit governments' participation in investor-state disputes, the U.S. not only participates in the ISDS regime by negotiating the treaty agreements that include ISDS provisions, but also actively justifies the ISDS regime, crafts foreign policy involving ISDS, and cooperates with U.S. investors and companies.

Another argument used to support ISDS is that it may promote good governance in host countries.²⁴ Christoph Schreuer, a leading scholar in international investment law, opined:

A positive side effect of investment protection that may not have been on the minds of the drafters of the relevant treaties is the introduction and promotion of principles of good governance in domestic legal systems. Investment protection treaties provide for the rule of law and its effective implementation with respect to foreign investors. The relevant standards have begun to show spill-over effects on the internal systems of the countries concerned.²⁵

This claim is unsubstantiated because no data or analysis has proven that ISDS provisions have promoted good governance, transparency, or other "spill-over" effects. Ironically, one recent critique is that ISDS actually lacks transparency because arbitration tribunals attach transparency to the consent of the parties.²⁶ For example, IC-SID may not publish the awards or other materials from tribunals

22. OFFICE OF THE LEGAL ADVISER AT THE U.S. DEP'T OF STATE, INT'L CLAIMS AND INV. DISPUTES (L/CID), <http://www.state.gov/s/l/c3433.htm> (last visited Sept. 22, 2016).

23. Lisa J. Kubiske, Deputy Assistant Secretary for Int'l Fin. and Dev., Bureau of Economic and Business Affairs, Remarks at the OECD Conference Center, <https://2009-2017.state.gov/e/eb/rls/rm/2015/239372.htm> (last visited Mar. 16, 2015).

24. *Id.*

25. Christoph H. Schreuer, *Do We Need Investment Arbitration?*, 11 TRANSNAT'L DISP. MGMT. 1, 4 (2014).

26. Investor-State Dispute Settlement (ISDS) Attacks: Empowering Multinational Corporations to Attack our Domestic Laws, Demand Taxpayer Compensation, PUBLIC CITIZEN, <http://www.citizen.org/investorcases> (last visited Apr. 20, 2016).

without the consent of the parties, or have hearings open to the public should a party object.²⁷ Consequently, third parties may struggle to file *amicus curiae* briefs due to the lack of access to documents filed in a proceeding.²⁸

Third, ISDS is supposed to allow for a more equitable and efficient process than a domestic national court system.²⁹ Schreuer contends that the ability of foreign investors to bypass domestic courts serves as a bulwark against discrimination, delay, and uncertainty for foreign investors.³⁰ This distinctive feature of investor arbitration is meant “to get away from the vagaries of proceeding through domestic courts. A requirement to exhaust local remedies in investment arbitration would add considerable cost, long delays and an additional element of uncertainty to the process. The primary victims of such a step would be small and medium sized investors.”³¹ In practice, the current ISDS does involve “vagaries,” in that different tribunals reach opposing decisions on the same set of facts.³² There is “uncertainty to the process” because tribunals have not agreed to uniform

27. See *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, ICSID, 17 U.S.T. 1270, art. 48(5); *Administrative and Financial Regulations*, ICSID, reg. 22; *Arbitration Rules*, ICSID, rules 32, 48 [hereinafter ICSID Convention].

28. Nathalie Bernasconi-Osterwalder, *Transparency and Amicus Curiae in ICSID Arbitrations*, in *SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW* 189 (Marie-Claire Cordonier Segger et al. eds., 2011).

29. Christoph H. Schreuer, *Do We Need Investment Arbitration?*, 11 *TRANSNAT'L DISP. MGMT.* 1, 10 (2014).

30. *Id.* (“In many countries there is no independent judiciary. Even where courts are independent, in principle, their decisions are often influenced by national loyalties. When measures adverse to foreign investors are taken by way of domestic legislation, the courts are usually unable to be of assistance to foreign investors even if they were disposed to do so.”)

31. *Id.* at 10. See also Chris Campbell, Sophie Nappert & Luke Nottage, *Assessing Treaty-based Investor-State Dispute Settlement: Abandon, Retain or Reform?* (Sydney L. School Legal Studies Res. Paper No. 13/40, 2013); Muthucumaraswamy Sornarajah, *Starting Anew in International Investment Law*, 74 *Columbia FDI Persp.* (2012).

32. Compare *Cont'l Cas. Co. v. Arg. Republic*, ICSID Case No. ARB/03/9, Award, ¶¶ 189–230 (Sept. 5, 2008), with *Enron Corp. & Ponderosa Assets, L.P. v. Arg. Republic*, ICSID Case No. ARB/01/3, Award, ¶¶ 322–45 (May 22, 2007) [hereinafter *Enron v. Argentina*, Award]. See also *CMS Gas Transmission Co. v. Arg. Republic*, ICSID Case No. ARB/01/8, Award, ¶¶ 304–94 (May 12, 2005) [hereinafter *CMS v. Argentina*, Award]; *Sempra Energy Int'l v. Arg. Republic*, ICSID, Case No. ARB/02/16, Award, ¶¶ 325–97 (Sept. 28, 2007) [hereinafter *Sempra Energy v. Argentina*]; *Enron Corp. & Ponderosa Assets, L.P. v. Arg. Republic*, ICSID Case No. ARB/01/3, Decision on Application for Annulment of Argentine Republic, ¶¶ 347–405 (July 30, 2010) [hereinafter *Enron v. Argentina*, Annulment].

standards for legal concepts, such as most favored nation (MFN).³³ Lawyers and clients agree that international arbitration is viewed as increasingly costly and time-consuming, as cases languish for years.³⁴ ICSID arbitration takes an average of 3.6 years for a proceeding to conclude.³⁵

Fourth, ISDS is allegedly necessary to attract foreign investment by guaranteeing investors' rights in developing countries with weak rule of law.³⁶ Alan Broches, World Bank General Counsel and the first Secretary General of ICSID,³⁷ argued that ISDS was necessary to entice foreign investment in countries with political instability: "It is beyond doubt that fear of political risks operates as a deterrent to the flow of private foreign capital to developing countries."³⁸ Today, the data does not prove that ISDS has attracted additional investment flow.³⁹ Increasingly, many ISDS respondents are from Western Europe, which means that investors are operating in Western European markets, not only developing countries, and then bringing forth

33. Schruerer, at 10. MFN is a principle of the WTO agreements, whereby no country may discriminate between their trading partners; if you grant a special trading term to one country, you must extend it to all WTO members. It is the first article of the General Agreement on Tariffs and Trade (GATT), a priority in the General Agreement on Trade in Services (GATS) (Article 2) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Article 4). The agreements all treat MFN slightly differently as a legal concept.

34. Adam Raviv, *Achieving a Faster ICSID*, 11 *TRANSNAT'L DISP. MGMT.* 1, 1 (2014). See, e.g., Margrete Stevens & Ben Love, *Investor-State Mediation: Observations on the Role of Institutions*, in *Contemporary Issues in International Arbitration and Mediation-The Fordham Papers 2009*, 13 (Arthur Rovine ed., 2009) ("Investors complain about the cost and slow pace of the process"); Nancy A. Welsh & Andrea K. Schneider, *Becoming "Investor-State Mediation"*, 1 *PENN ST. J. L. & INT'L AFF.* 86, 86 (2012) ("The parties decry the expense, delays, and political challenges associated with relying exclusively on a rights-based arbitral process."); Matthew T. Parish, et al., *Awarding Moral Damages to Respondent States in Investment Arbitration*, 29 *BERKELEY J. INT'L L.* 225, 243 (2011) ("[T]he already expensive and slow process of investment arbitration").

35. Inna Uchnokova, *ICSID: Curious Facts*, *KLUWER ARBITRATION BLOG* (Oct. 25, 2012), <http://kluwerarbitrationblog.com/2012/10/25/icsid-curious-facts/>.

36. David Gaukrodger & Kathryn Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community," *OECD Working Papers on International Investment*, 2012/03, 13 http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf ("ISDS . . . allows host States to attract investment even though their domestic governance standards may have weaknesses.")

37. Memorandum of Meeting of Executive Directors on the Subject of "Settlement of Investment Disputes" (Mar. 13, 1962), in 2 *HISTORY OF THE CONVENTION OF THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES* 59 (1968).

38. Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 *RECUEIL DES COURS* 331, 343 (1972).

39. See *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT* (Karl P. Sauvant & Lisa E. Sachs, eds, 2009).

ISDS claims against Western European governments when contracts are allegedly breached.⁴⁰ Nevertheless, Schreuer insisted on characterizing ISDS as a system where the investor requires special protection:

An investor typically must commit considerable resources before it can hope to reap the expected profits. In doing so, it makes itself dependent on the benevolence of the host state. This situation of dependence calls for strong legal protection. After having made the investment, the investor is exposed to a number of noncommercial risks at the hands of the host state. These include regime change, a change of general or sectorial economic policy, economic or political emergencies in the host state including public violence, to name just a few.⁴¹

The cases publicly filed are no longer based on public violence or regime change, but often stem from objections to state's reforms on environmental and other non-traditional trade matters as well as fiscal policy changes post the global recession.⁴² Thus, the modern incarnation of ISDS has evolved beyond some of its original policy rationale.

40. ICSID Caseload, *supra* note 8, at 25.

41. Christoph H. Schreuer, *Do We Need Investment Arbitration?*, 11 *TRANSNAT'L DISP. MGMT.* 1, 1 (2014).

42. See *Metalclad Corp. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1 (Aug. 30, 2000) (awarding Metalclad damages for Mexico's refusal to grant a construction permit for the expansion of a toxic waste facility amid concerns of water contamination and other environmental and health hazard; case pending); *The Renco Group, Inc. v. The Republic of Peru*, ICSID Case No. UNCT/13/1 (awarding the firm \$16 million for Peru's violation of fair and equitable treatment refusal to grant a third extension on its unfulfilled 1997 environmental commitments to install pollution abatement equipment in response to children suffering from toxic emissions); *S.D. Myers, Inc. v. Gov't of Canada*, Partial Award (NAFTA-UNCITRAL) (Nov. 13, 2000) (awarding investors \$5.6 million for Canada's ban on a hazardous waste); *Saluka Investments v. Czech Republic*, (Partial Award) (Perm. Ct. Arb. 2006) (holding that the Czech Republic had violated the BIT's "fair and equitable" treatment obligation and acted discriminatorily by giving greater government aid to banks in which the government was a major stakeholder, and awarded investor \$236 million); *CMS Gas Transmission Co. v. The Republic of Argentina*, ICSID Case No. ARB/01/8 (filing a claim against Argentina for financial rebalancing policies enacted in response to a 2001 economic crisis, receiving \$133 million award plus interest); *Eureko B.V. v. The Slovak Republic*, PCA Case No. 2008-13, (resulting in \$1.6 billion settlement for Eureko, a Netherlands-based company that filed a claim against Poland for prohibiting it from taking a controlling stake in PZU, Poland's first and largest insurance company).

B. *Review of the Current Critiques of the ISDS Regime*

There are many contemporary criticisms of ISDS, including impugning the host state's right to regulate on behalf of the public interest. Another critique attacks the inconsistency of arbitral awards, as tribunals may lead to divergent conclusions based on the same set of facts. Next, some critics argue that since foreign investors may use private arbitration, but domestic investors may only access their local courts, that foreign investors maintain a privilege against local competitors. Further, arbitrators are grossly homogenous and lack gender or ethnic diversity. Finally, enforcing ISDS awards can be a challenging process.⁴³

Critics contend that ISDS encroaches on state sovereignty by constraining governments from regulating on behalf of public welfare.⁴⁴ Recognizing that they might pay damages if a tribunal finds that their regulations violate the interests of the investors, host states may, in the future, consider passing legislation or issuing regulations based on the potential interests and responses by foreign investors rather than strictly the welfare of the public.⁴⁵ Arbitral decisions such as *Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States* may worry foreign governments that find themselves similarly situated to the Mexican government. This arbitral decision has been criticized for its finding that the Mexican government's refusal to renew the foreign claimant's license to operate a hazardous waste landfill was a breach of its obligation of fair and equitable treatment.⁴⁶ Critics argue that the government had a legitimate

43. See Public Statement from Gus Van Harten et al., Public Statement on the International Investment Regime (Aug. 31, 2010), <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/> (stating concern that ISDS hurts the public welfare, particularly by "hampering . . . the ability of governments to act for their people in response to the concerns of human development and environmental sustainability").

44. Christopher Ryan, *Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law*, 29 U. PA. J. INT'L L. 725, 729 (2008).

45. *Id.* at 738.

46. *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, IC-SID Case No. ARB(AF)/00/2, Award, ¶ 154 (May 29, 2003). See also Ryan, *supra* note 44 at 738–40; 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, 474 (2009) [hereinafter "Brower & Schill"] (noting the "hegemonic critique of international investment law . . . as an attempt by developed countries to impose their power on weaker, developing countries;" and the "more nuanced critique of the perceived unevenness created by a regime that protects property, investment, and foreign investors without sufficient regard to other non-investment-related interests of host states" share "a common core: the criticism that investment treaties unilaterally favor the

right to deny a license to protect public health, and that this type of public law matter should not be addressed in private arbitration.⁴⁷

A second complaint about ISDS involves the inconsistent decisions of ISDS tribunals.⁴⁸ Consistent decisions provide several important benefits: first, they engender predictability for investors and host states, which helps guide states' future decisions on investments and policies; second, they strengthen the public perception of fairness and legitimacy of the system; third, they increase the cost-effectiveness of the process, as parties can anticipate the procedures and make appropriate decisions to settle the dispute.⁴⁹ An example of inconsistency lies in the myriad of ISDS cases that were born out of the 2001 Argentinian financial crisis. When faced with foreign currency flight, the Argentinian government announced the Corralito measure, which restricted bank withdrawals, and passed the Emergency Act, which redenominated the U.S. dollar-based tariff regime to the Argentine pesos.⁵⁰ International arbitration lawyer Eun Young Park has analyzed these opposing responses and found that tribunals in the *CMS v. Argentina*, *Sempra v. Argentina*, and *Enron v. Argentina* arbitrations dismissed Argentina's necessity defense

interests of investors over the host state's competing interests, thus establishing an asymmetric legal regime that is detrimental to state sovereignty").

47. Ryan, *supra* note 44 at 740.

48. See Gaukrodger & Gordon, *supra* note 36; see also Roberts, *supra* note 16 at 3 ("To understand what is at stake, consider the potential for state-to-state claims with respect to Argentina's 2001 economic crisis. In response to dire economic circumstances, Argentina enacted wide-ranging regulatory reforms, resulting in more than forty ISDSs being filed, many of which were brought by U.S. companies. These claims involved certain common issues, such as whether Argentina's actions were justified under the U.S.-Argentina BIT's essential security clause or customary international law's necessity defense. In spite of these similarities, each case was litigated separately at great cost, imposing considerable time and financial burdens on the already troubled Argentine government. The results were wildly inconsistent, with some tribunals interpreting these exceptions widely and permitting the defense, and others interpreting them narrowly and rejecting the defense."); William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 3 *ASIAN J. WTO & INT'L HEALTH L. & POL'Y* 199, 200 (2008).

49. See Gaukrodger & Gordon, *supra* note 36; see also Brower & Schill, *supra* note 46 at 477; David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, 44 (OECD, Working Papers on International Investment, 2012), <http://www.oecd.org/daf/inv/investment-policy/WP-2012-3.pdf>.

50. Eun Young Park, *Appellate Review in Investor State Arbitration*, in *RE-SHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM*, 443, 445 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015)

based on a finding that the measure was not the only means available to resolve the crisis and that the government's responses contributed to the crisis.⁵¹ Other tribunals in the *LG&E v. Argentina* and *Continental Casualty v. Argentina* arbitrations disagreed, and held that Argentina's measures were necessary to protect its essential interests.⁵² Inconsistent outcomes such as these foment the perception of a lack of equity and fairness in the ISDS process.

A third criticism of ISDS is that foreign investors receive more financial advantages and must deal with fewer procedural requirements from ISDS than their domestic investor counterparts in domestic courts.⁵³ While ISDS may attempt to promote foreign investment, there is disparate legal treatment for local domestic investors. For example, ISDS frequently does not apply the requirement that foreign investors exhaust local remedies before requesting arbitration.⁵⁴ Foreign investors may bypass domestic courts and go directly to private arbitration tribunals.⁵⁵ Another example of how ISDS benefits foreign investors involves the allocation of cost.⁵⁶ After ruling that it lacks jurisdictional authority, the ISDS tribunal will force the parties to split the cost of proceedings. The practice fails to punish a party that brings forth non-meritorious claims. Since only foreign investors can bring ISDS claims, governments will always split the bill for frivolous suits brought by foreign investors, which is not the practice in local courts.

A fourth criticism levied against ISDS is that the lack of diversity among arbitrators may lead to inconsistent or even biased outcomes.⁵⁷ While judges may arguably also suffer from a lack of

51. *Id.* at 446.

52. *Id.*

53. Matthew C. Porterfield, *Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?*, 41 YALE J. INT'L L. 1, 2 (2015) ("Critics object to both the substantive and procedural rights afforded to foreign investors and question the need for ISDS given the generally high functioning judicial systems and strong protections for property rights in the United States and Europe.")

54. *Id.* at 3 ("The exhaustion requirement, however, is rarely applied in current ISDS practice").

55. ICSID Convention, *supra* note 27, art. 26.

56. Won Kidane, *The China-Africa Factor in the Contemporary ICSID Legitimacy Debate*, 35 U. PA. J. INT'L L. 559, 621 ("in all cases where the host state won, it was required to cover its own expenses and share the cost of the tribunal equally").

57. See Rogers, *supra* note 16, at 232; see also Muthucumaraswamy Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 SING. Y.B. INT'L L. 19, 30–31 n.42 (2006) (referring to an "arbitration fraternity" that promotes its interests at the expense of state interests); PIA EBERHARDT & CECILIA OLIVET, PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELING AN INVESTMENT ARBITRATION BOOM (2012), available at <http://corporateurope.org/sites/>

diversity, judges oversee public proceedings where the public may hold judges accountable for displaying any preference for a party, whereas arbitrators may not only espouse a bias but may never have to explain their private decisions which may hinge on such bias. Arbitrators are typically seasoned lawyers, professors, or former judges, from Europe or North America, and 75% come from OECD countries.⁵⁸ Historically, 95% of ICSID arbitrators have been male.⁵⁹ This data comes from ICSID, since non-ICSID arbitration panels do not typically share the demographics of the arbitrators.⁶⁰ Since only investors may file suit, arbitrators may possess a bias for investors.⁶¹ The OECD-hosted “Freedom of Investment” (FOI) Roundtable has raised concerns that arbitrators are biased to find jurisdiction and hear disputes so that they may be paid.⁶² Others blame the limitations of the IIAs for forcing tribunals to assume a significant amount of interpretive power.⁶³ The seminal 2010 van den Berg study on arbitrators presented the “astonishing fact” that almost all dissents written by party appointed arbitrators were written in favor of the party who appointed them.⁶⁴ Based on this conclusion, scholars have argued that the practice of parties appointing arbitrators must end.⁶⁵ More quantitative data is needed to understand the impact of the homogeneity of arbitrators on their decision-making, but the extreme lack of diversity suggests the possibility for bias.

A fifth concern is that enforcement of ICSID and non-ICSID awards has become increasingly difficult.⁶⁶ Arbitral creditors seeking

default/files/publications/profitting-from-injustice.pdf. Cf. Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 877 (2008) (reviewing FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURT OF APPEALS* (2007)).

58. David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, 44 (OECD, Working Papers on International Investment, 2012), http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf.

59. *Id.* at 92.

60. *Id.* at 43.

61. *Id.* at 46.

62. See Freedom of Investment Roundtable, *Government Perspectives on Investor-State Dispute Settlement: A Progress Report*, 14 (2012).

63. Gus Van Harten, *A Case for an International Investment Court* 29 (Society of International Economic Law (SIEL) Inaugural Conference, Working Paper No. 22, 2008).

64. Albert van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in *LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN* 821, 824 (Mahmounh Arsanjani et al., eds., 2010).

65. Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 FOREIGN INV. L. J. 339 (2010).

66. See Gaukrodger & Gordon, *supra* note 36.

enforcement face two challenges; first, commercial assets may be held by a state-owned enterprise so creditors are typically unable to satisfy a judgment; second, even if a state has assets in a jurisdiction, it may be immune because it holds sovereign assets, such as diplomatic bank accounts.⁶⁷ The recent challenge by Venezuela to delay payment in an enforcement proceeding in New York has attracted significant speculation in the ISDS community about the future of award enforcement.⁶⁸

C. *Decisions by ICSID Members Demonstrate the Need and Support for ISDS Reform*

Recently, several countries have announced their opposition to ISDS, demonstrating that the time for substantive overhaul of the ISDS regime has arrived.⁶⁹ Despite the earlier, failed attempt by the OECD to establish the Multilateral Agreement on Investment (MAI), the very recent announcements of ICSID Members to leave the ICSID Convention speak to public anxiety with ISDS. For example, Bolivia was the first state to notify ICSID of its exit on May 2, 2007.⁷⁰ Ecuador informed the World Bank that it was leaving the ICSID Convention on July 6, 2009.⁷¹ Venezuela announced its withdrawal from the ICSID Convention on January 24, 2012.⁷² In 2008, Ecuador terminated BITs with Cuba, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay because of their ISDS provisions.⁷³ Recall that BITs provide the framework for ISDS proceedings. At the request of the President, the Ecuadorian Constitutional Tribunal issued several decisions between

67. *Id.* at 5 (“For example, in *AIG v. Kazakhstan*, an English court registered an ICSID award as an English judgment, but rejected execution. It found that the assets in question were immune for two reasons; they were covered by absolute immunity (because they were “property” of the Kazakhstan central bank) and they were sovereign rather than commercial assets”); see also David Gaukrodger, *Foreign State Immunity and Foreign Government Controlled Investors*, 21–22, 25 (OECD, Working Papers on International Investment 2010), http://www.oecd.org/daf/inv/investment-policy/WP-2010_2.pdf (discussing state immunity aspects of case).

68. *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venez.*, 87 F. Supp. 3d 573, 574 (S.D.N.Y. 2015).

69. R. Polanco Lazo, *Is There a Life for Latin American Countries After Denouncing the ICSID Convention?*, 11 *TRANSNAT’L DISP. MGMT.* 1, 11 (2014).

70. *Id.* at 2. (“Latin America is leading the backlash against investment arbitration.”)

71. *Id.* at 16.

72. *Id.* at 20.

73. *Id.* at 17.

2010 and 2013 declaring BITs unconstitutional.⁷⁴ South Africa announced the termination of several BITs as well.⁷⁵

Other countries have not withdrawn from ICSID, but rather called for ISDS reform. For example, in February 2016, the EU declared that its two new trade agreements, the CETA and the November 2015 proposed TTIP, tackled ISDS reform by creating a permanent, institutionalized tribunal where Members will be appointed in advance.⁷⁶ The India 2015 model BIT allows parties to agree to an appellate body to review arbitral awards.⁷⁷ The US 2012 model BIT refers to the possibility of an appellate mechanism in the future.⁷⁸

The United Nations Conference on Trade and Development (UNCTAD) has called for ISDS reform since 2010.⁷⁹ Strikingly, UNCTAD's 2015 Note calls for general reform whereas its May 2013 Note specifically recommended an appeals facility and a standing investment court.⁸⁰ The 2013 Note observed, "Those arbitral decisions that have entered into the public domain have exposed recurring episodes of inconsistent findings . . . [including] divergent legal interpretations of identical or similar treaty provisions as well as differences in the assessment of the merits of cases involving the same facts."⁸¹ The lack of a review mechanism means that inconsistent or erroneous decisions cannot be corrected, resulting in "uncertainty about the

74. *Id.*

75. *Id.* at 56.

76. Daniela Vincenti, *EU, Canada change ISDS clause, get closer to gold-plated trade deal*, EURACTIV, Feb. 29, 2016, <https://www.euractiv.com/section/trade-society/news/eu-canada-change-isds-clause-get-closer-to-gold-plated-trade-deal/>.

77. Gordon Blanke, "India's revised Model BIT: Every bit worth it!" KLUWER ARBITRATION BLOG, March 20, 2016 <http://kluwerarbitrationblog.com/2016/03/20/indias-revised-model-bit-every-bit-worth-it/>.

78. U.S. 2012 Model Bilateral Investment Treaty, Article 28.10 ("In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 34 should be subject to that appellate mechanism.") <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

79. *IIA Issues Note – Taking Stock of IIA Reform*, UNCTAD, 2–3 (Mar. 2016), http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d3_en.pdf (providing an overview of areas for reform but no longer mentions the aggressive recommendation to create a court: "(i) safeguarding the right to regulate while providing protection; (ii) improving investment dispute settlement; (iii) adding a component of investment promotion and facilitation to the regime; (iv) ensuring responsible investment; and (v) enhancing the systemic consistency of the IIA regime").

80. *IIA Issues Note – Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, UNCTAD (May. 2013), <http://unctad.org/en/PublicationsLibrary/webdiae-en.pdf>.

81. *Id.* at 3.

meaning of key treaty obligations and lack of predictability of how they will be applied in future cases.”⁸² UNCTAD did not appear to include an explanation for the less aggressive recommendation in 2015 than in 2013.

III. PROPOSAL FOR AN INTERNATIONAL INVESTMENT COURT TO REFORM ISDS

An investment court that could adjudicate claims based on an investment treaty would help rectify the deficiencies in ISDS.⁸³ Public courts, not closed or secret, private arbitration panels, promote rule of law.⁸⁴ Matters affecting the environment, labor rights, or fiscal reform represent public policy concerns that involve public welfare, and should be adjudicated in a court where the citizens may be aware of these decisions and the impact they have on their lives. ISDS claims do not simply drum up private matters, such as breaches of contract in commercial exchanges, but have implications for entire nations, particularly when governments must pay multi-million dollar awards from arbitral proceedings which, should the parties

82. *Id.*

83. Omar E. Garcia-Bolivar, *Permanent Investment Tribunals: The Momentum is Building Up*, in *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM*, 394, 398 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015) (“The permanent investment tribunals could function under the umbrella of an international ad-hoc center or entity. The center under which the tribunals are hosted could be administered by a permanent secretariat. . . . The parties to a dispute would have the option whether to agree to settle the dispute before such permanent investment tribunals. State consent would be granted, as now, via treaties, laws, notifications or submission of disputes”). For scholars’ calls for some type of AB, although not an investment court: *see e.g.*, KENNETH S. CARLSTON, *THE PROCESS OF INTERNATIONAL ARBITRATION* 245–46 (1946); ELIHU LAUTERPACHT, *ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE* 112 (1991); William H. Knull, III & Noah. D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?*, 11 *AM. REV. INT’L ARB.* 531 (2000); Mauro. R. Sammartano, *The Fall of a Taboo: Review of the Merits of an Award by an Appellate Arbitration Panel and a Proposal for an International Appellate Court*, 20 *J. INT’L ARB.* 387 (2003); Susan. D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521 (2005).

84. *See* Rogers, *supra* note 16; *see also* Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 *N.Y.U. J. INT’L L. & POL.* 709, 709 (1999) (“When future international legal scholars look back at international law and organizations at the end of the twentieth century, they probably will refer to the enormous expansion and transformation of the international judiciary as the single most important development of the post-Cold War age”); Bruno Simma, *International Adjudication and U.S. Policy – Past, Present, and Future*, in *DEMOCRACY AND THE RULE OF LAW* 39, 39 (Norman Dorsen & Prosser Gifford eds., 2001) (“International courts and tribunals are proliferating, and the caseload of some of these institutions appears to explode”).

choose, are kept completely secret and confidential. Alternatively, international courts are “the lynchpin of a new, rule-based international order, which increasingly displaces or purports to displace the previous power-based international order.”⁸⁵ As a tool of rule of law, an international investment court surfaces as the most appropriate option to correct the deficiencies in ISDS.

The most contested ISDS claims hinge on public international law matters and should be considered by a public international court rather than private tribunals, so that the decisions are met with public scrutiny. As Supreme Court Justice Louis D. Brandeis stated, “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” A resolution that would protect the interests of both the investor and the state would be to “give the states more of what they want: a greater sense of control and predictability in the system. The system should not be ‘pro-investor’ or ‘pro-investment’ any more than it should be ‘pro-state.’”⁸⁶ Reform should enable states to have a level footing with investors. Many of the issues involved in ISDS cases pertain to public policy, and states should therefore have more power to govern. Otherwise, states will continue to exit the ISDS regime and investors will be without recourse. An international court with transparent public proceedings would allow for states to consistently participate and expose awards to public scrutiny. With arbitrations involving public policy matters, public judges can analyze government regulations that may have affected investors’ interests in a public court, rather than privately paid arbitrators.

The existing Secretariat of the ICSID could transform into the administrative body supporting the investment court. The Secretariat currently carries out the activities of ICSID, which provides facilities and resources for the conciliation and arbitration of investment disputes between states and investors under the terms of the ICSID

85. Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT’L L. 225, 226 (2012) (citing Karen Alter, *Private Litigants and the New International Courts*, 39 COMP. POL. STUD. 22 (2006)); see also Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005).

86. T.J. Feighery, *In Search of a Roadmap - Lessons for the ISDS Regime in the U.S. Experience of Lump-Sum Claims Settlement Processes*, 11 TRANSNAT’L DISP. MGMT. 1, 7 (2014).

Convention.⁸⁷ The Convention is buttressed by ICSID's Administrative and Financial Regulations, Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), Rules of Procedure for Conciliation Proceedings (Conciliation Rules) and Rules of Procedure for Arbitration Proceedings (Arbitration Rules), collectively referred to as the ICSID Regulations and Rules.⁸⁸ Each ICSID Member provides one representative to the Administrative Council, to ensure that it is a representative body.⁸⁹ Each Member of the Administrative Council has one vote and amendments require a two-thirds majority, while a simple majority is sufficient to decide on other matters.⁹⁰ Art. 2 of the DSU defines Administration and Art. 27 articulates the responsibilities of the Secretariat.⁹¹ The investment treaty will contain similar language on the administrative body's role as custodian of the investment court. Transforming the current ICSID Secretariat into the investment court's Secretariat will leverage the ICSID's expertise in international investment law and administration.

IV. PROPOSAL FOR AN INTERNATIONAL INVESTMENT TREATY TO REFORM ISDS

An international investment court will reform ISDS, and will require an international investment treaty to bring it into effect.⁹² The treaty will address two important goals. First, it will outline the function, authority, rules, and procedures of the international investment court, consisting of a standing AB and establishment of ad hoc panels. Second, it will contain an international investment agreement wherein states may choose to keep schedules that allow for their individual exceptions to this internationalized version of a model BIT. If the investment court were to be created without a single investment treaty, then the court would have to adjudicate over

87. *Report of the Executive Directors on the Convention, Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, ICSID Convention, 14–15 (2006).

88. *Id.* at 51–99.

89. *Id.* at 41.

90. *Id.* at 31.

91. DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226, art. 2, 27 (1994) [hereinafter DSU].

92. Eduardo Zuleta, *The Challenges of Creating a Standing International Investment Court*, in *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM*, 403 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

three thousand BITs. This paper will tackle the first part of the treaty that defines the investment court.

The Dispute Settlement Body (DSB) of the WTO, which oversees dispute settlement between WTO members, lays out several guiding principles as part of its framework. The DSB calls for Members to exercise “self-restraint,” implying a ban on frivolous or non-meritorious claims.⁹³ Members must seek “mutually agreed solutions consistent with covered agreements and, before bringing a case, a Member shall exercise its judgment as to whether the dispute can be settled under these procedures.”⁹⁴ Lacking a mutually agreed solution, the Member must withdraw its inconsistent measure.⁹⁵ The DSU also explains the meaning of settling disputes in good faith. DSU Art. 3.10 states: “procedural rules of WTO dispute settlement are designed to promote, not the litigation strategies often seen in confrontational and adversarial judicial systems, but the fair, prompt, and effective resolution of international trade disputes.”⁹⁶ The purpose is “effective resolution” rather than “litigation strategies,” reinforcing comity instead of conflict between Members. Limiting the authority of the AB, the DSU explains that the AB will clarify Members’ rights and obligations but not change them: “[T]he dispute settlement mechanism serves to preserve the rights and obligations of Members and to clarify the existing provisions of those [covered] agreements but must do so without adding to or diminishing the rights and obligations provided in the covered agreements.”⁹⁷ The DSB cannot contract or expand the rights of Members, and neither should the investment court. This provision is imperative to induce states to become parties to the investment treaty and the court.

The DSB establishes a multilateral system where no single Member may take unilateral action. The DSB has the authority to determine that a violation has occurred, that benefits have been nullified or impaired, or that the covered agreements’ objectives have been thwarted.⁹⁸ The Members of the DSB are committed to protecting the dispute settlement process so that Members do not operate beyond the bounds of the organization’s constraints by seeking out

93. YANG GUOHUA, BRYAN MERCURIO, & LI YONGJIE, *WTO DISPUTE SETTLEMENT UNDERSTANDING: A DETAILED INTERPRETATION* 25 (Kluwer Law International, 2007) [hereinafter *GUOHUA*].

94. *Id.*

95. *Id.*

96. DSU, *supra* note 91, art. 3.10.

97. *GUOHUA*, *supra* note 93, at 17.

98. DSU, *supra* note 91, art. 23.

unilateral action. The impulse for consensus at the root of the DSB's multilateralism is key for the survival of the investment court.

The DSB provides for various deadlines in its proceedings that the investment court should mirror. For example, the DSB requires that awards be issued within six months after the composition and terms of reference of the panel.⁹⁹ If the panel cannot complete its report within six months, it must notify the DSB.¹⁰⁰ The process includes a consultation, hearing, interim report by the panel, circulation of the report to the DSB, and then final adoption by the DSB; it cannot take longer than nine months from the establishment of the panel through the circulation of the panel's report.¹⁰¹ Art. 12 concerns panel procedures and Art. 16 addresses the AB's adoption of panel reports, with both giving instructions on specific time limits for certain procedures.¹⁰² The international investment court should include the clear time limits that the DSU sets out of panel proceedings, the AB, and the adoption of reports, and require strict adherence to ensure the expediency the ISDS process.

The DSU defines coverage and application in Art. 1, concepts which the proposed investment court should consider.¹⁰³ The DSU prevents possible conflict between its rules and procedures and covered agreements by offering clear instructions on how these documents should be interpreted. The investment treaty should similarly spell out its relationship with any other treaties or agreements. Although precedence is not a codified principle of the DSU, the DSB considers previous decisions by the AB when interpreting cases.¹⁰⁴ Though the DSB does not codify the practice of relying on Art. 31 and 32 of the Vienna Convention on the Law of Treaties, it does use the Vienna Convention in practice.¹⁰⁵ Interpretation of a treaty begins with the plain words of the text; should the meaning prove inconclusive, the objective and purpose of the treaty is considered, with supplementary materials reviewed in exceptional cases.¹⁰⁶ The investment treaty should codify the practices and standards for treaty interpretation demonstrated by the DSB.

The investment court will be comprised of a standing AB and ad hoc panels. It will borrow from the DSB's following requirements on

99. DSU, *supra* note 91, art. 12.8.

100. DSU, *supra* note 91, art. 12.9.

101. DSU, *supra* note 91, art. 16.

102. DSU, *supra* note 91, art. 12, 16.

103. DSU, *supra* note 91, art. 1.

104. GUOHUA, *supra* note 93, at xii.

105. GUOHUA, *supra* note 93, at 17–18.

106. GUOHUA, *supra* note 93, at 19.

the selection process of judges. The DSB contemplates potential delays and complications in judge selection by requiring the Secretariat to maintain a roster of individuals with the requisite qualifications from which panelists may be selected under Art. 8.4.¹⁰⁷ The DSB provides that the Secretariat propose nominations for the panel that parties cannot oppose “except for compelling reasons.”¹⁰⁸ Art. 8.7 outlines a stopgap measure should parties fail to agree on panelists after 20 days, so that the Director-General of the Secretariat selects the panelists.¹⁰⁹ Art. 8.10 provides special consideration for developing country Members, so that they may request that at least one panelist be a national of a developing country.¹¹⁰ Art. 17 describes the AB and details how the appellate judges will be selected.¹¹¹ These provisions govern the selection of judges, and should be adopted by the international investment court, specifically the time requirements for selection and the special consideration granted to developing countries. Previous concerns regarding the time-consuming process of selection will be neutralized once the international investment court adopts these requirements.

The DSB requires certain professional qualifications for panel and AB candidates that the international investment court must adopt. Art. 8 provides that panelists should be “well-qualified governmental or non-governmental individuals,” “drawn from a range of sources,” and not “citizens of the parties to the dispute or the third parties.”¹¹² By barring a panelist from being a national of one of the parties to the dispute, the DSB mitigates the potential or perception of bias. This requirement might foster greater diversity, as the nationality of judges will be different from that of the parties. In addition, the roster requires that potential panelists possess a specific area of expertise. Such a specification should be included in an investment treaty, especially as the issues arbitrated are increasingly non-traditional trade-related matters.

The DSB also clarifies the burden of proof and the standard of review that the investment court must embrace. In addition, Art. 9 allows parties to bundle their complaints.¹¹³ This provision would be

107. DSU, *supra* note 91, art. 8.4.

108. DSU, *supra* note 91, art. 8.6.

109. DSU, *supra* note 91, art. 8.7.

110. DSU, *supra* note 91, art. 8.10.

111. DSU, *supra* note 91, art. 17.

112. DSU, *supra* note 91, art. 8.

113. DSU, *supra* note 91, art. 9.

helpful in instances such as the Argentinian 2008 cases, where several investors brought suits based on similar claims. Once a complainant comes forward, the burden of proof is a prima facie case under Art. 11.¹¹⁴ The complainant must make a prima facie case establishing the inconsistency between the respondent's measures and WTO obligations.¹¹⁵ If legal uncertainty should arise as to whether a prima facie case was made, then the respondent receives the benefit of the doubt.¹¹⁶ From the prima facie argument, the panels must render an objective assessment on the facts of the case.¹¹⁷ Panels have the discretion to determine what evidence is relevant, but deliberate dismissal of evidence violates the duty of the panel to make an objective assessment.¹¹⁸ The AB shall strive to make all decisions by consensus and limit decisions to issues of law from the panel report, and not engage in fact finding.¹¹⁹ The AB shall avoid making determinations on matters of law not raised in the appeal.¹²⁰ Unlike the DSU, the ICSID is silent on the burden of proof or standard of review, and simply states in Art. 41.1, "the Tribunal shall be the judge of its own competence."¹²¹ The international investment treaty must consider all of these aforementioned DSB standards to focus and narrow the scope of its proceedings. The European Community has proposed a procedure for the AB to have the power to remand an issue to the panel within 10 days of adoption of the AB report to "the uncertain status of 'completing the legal analysis.'"¹²² The investment treaty may embed some of the proposed reforms to the DSB.

The investment treaty will have to turn to the ICSID rather than the DSB to design the process for the award of monetary damages. Whereas the DSB typically rules that a losing party must bring its measure into conformity, the investment court will award monetary damages and not trade remedies.¹²³ Art. 3 contains a limitation on arbitral awards that should be included in the investment treaty.¹²⁴ It states that arbitral awards "shall be consistent with those [covered] agreements and shall not nullify or impair benefits accruing to

114. DSU, *supra* note 91, art. 11.

115. GUOHUA, *supra* note 93, at 120.

116. GUOHUA, *supra* note 93, at 120.

117. DSU, *supra* note 91, art. 11, 13, 19.

118. GUOHUA, *supra* note 93, at 125.

119. GUOHUA, *supra* note 93, at 205.

120. GUOHUA, *supra* note 93, at 208.

121. ICSID Convention, *supra* note 27, art. 41.1.

122. GUOHUA, *supra* note 93, at 212.

123. DSU, *supra* note 91, art. 21, 22.

124. DSU, *supra* note 91, art. 3.

any Member under those agreements, nor impede the attainment of any objective of those agreements.”¹²⁵ A similar limitation imposed in the investment treaty will ensure that awards do not do violence to the goals of the investment treaty.

Art. 48–55 of the ICSID address the recognition, enforcement, and annulment of awards and also provide a starting point for the investment treaty.¹²⁶ Under the current ISDS regime, states often try to stymie the ICSID enforcement proceedings as a way to delay payment.¹²⁷ For example, the Supreme Court of Argentina ruled that its local courts could review an arbitral award because public policy is the exclusive concern of the national government.¹²⁸ To address this problem, the investment treaty must devise provisions specifying the type of proceeding necessary to enforce and attach awards. Once a panel has rendered a judgment, a winning party should have the right to approach a court in any country where the losing party has attachable assets, and request that the court enforce the award. While Art. 18 of the DSU forbids *ex parte* communication with the panel or AB, the investment treaty must allow it for the enforcement and attachment of arbitral awards in domestic courts.¹²⁹ One challenge in specifying the type of proceedings required for enforcement and attachment is that Members include common and civil law countries, and maintain different legal processes for enforcing judgments in their domestic courts. Nevertheless, Members will have to reach consensus on the necessary process for enforcement and attachment for the efficacy of the new regime.

125. DSU, *supra* note 91, art. 3.5.

126. ICSID Convention, *supra* note 27, art. 37(2)(b), 48–55.

127. See *Mobil Cerro Negro*, 87 F. Supp. 3d at 600. The latest development in the ICSID morass involves the *Mobil Negro* case which will revolutionize international arbitration, should the US federal appellate court rule in favor of Venezuela that *ex parte* proceedings are insufficient to enforce an arbitral award, despite current practice.

128. Stephen Clarkson & Steffen Hindelang, *How Parallel Lines Intersect: Investor-State Dispute Settlement and Regional Social Policies*, in REGIONAL ORGANIZATIONS AND SOCIAL POLICY IN EUROPE AND LATIN AMERICA 37 (Andrea C. Bianculli & Andrea Ribeiro Hoffman, eds., 2016).

129. DSU, *supra* note 91, art. 18.

The investment treaty will consider mechanisms to limit monetary awards.¹³⁰ The proportionality test could be codified in the investment treaty as one way to help limit awards.¹³¹ Capping damages and maximum penalties as a dollar amount or percentage could be devised.¹³² The investment treaty should specify caps on compensatory damages, and determine if punitive damages will be available.¹³³ Some type of constraints on the total damages available may help induce states to join the investment treaty. Another way to limit awards may be to consider the DSB's special consideration for developing countries. The investment treaty might contemplate tempering awards against developing countries, such as requiring the court to consider the impact on the developing country's economy when calculating the total.¹³⁴

The investment treaty should include the DSB proposals on managing the cost of proceedings. The Chairman's Draft, recommendations from the Chairman of the DSB, includes a proposal that would require a developed country Member to pay litigation costs if a developing country defends a measure or 'wins' a case.¹³⁵ The ICSID in Art. 61.1 leaves the parties with the freedom to contract on the issue, and if they fail to, then the tribunals assess the expenses involved with the proceedings and decide who covers them.¹³⁶ In the investment court, states will pay the expenses of administration and staffing for the investment court and Secretariat. The losing party will cover the winning party's proceeding costs.

130. Liang-Ying Tan & Amal Bouchenaki, *Limiting Investor Access to Investment Arbitration - A Solution without a Problem?*, 11 *TRANSNAT'L DISP. MGMT.* 1, 1 (2014). One of the largest ICSID awards was *Occidental v Ecuador*, where over \$1.7 billion was granted after a 25% deduction for the investor's own breach. *Occidental Petroleum Corporation v. The Republic of Ecuador*, ICSID Case No. ARB/06/11 Award, (Oct. 5 2012); see also 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*, 244, n.70 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

131. Liang-Ying Tan & Amal Bouchenaki, *Limiting Investor Access to Investment Arbitration - A Solution without a Problem?*, 11 *TRANSNAT'L DISP. MGMT.* 1, 51 (2014).

132. 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*, 244, n.70 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

133. See Jarrod Wong, *The Compensatory Nature of Moral Damages in Investor-State Arbitration*, 88 *Columbia FDI Persp.* (2013).

134. DSU, *supra* note 91, art. 24, 4.10.

135. GUOHUA, *supra* note 93, at 507.

136. ICSID Convention, *supra* note 27, art. 61.1.

The investment treaty should contain significant provisions on transparency, based on proposed reforms of the DSU.¹³⁷ The treaty must require that documents be made publicly available, hearings be public, and amicus curiae briefs be accepted.¹³⁸ The U.S. has proposed these reforms to bolster public confidence in the fairness of the WTO, but has met opposition from many developing country Members, such as Malaysia, Cuba, Honduras, India, Pakistan, Sri Lanka, Tanzania, Zimbabwe, Jamaica.¹³⁹ Transparency lies at the heart of the call for ISDS change, and cannot be abandoned in any future reform project. Mechanisms for transparency must be engineered throughout the investment treaty if the court is to stand for fairness and equity.

V. CONCLUSION

The success of the WTO DSB helps establish an aspirational standard for the investment court. The current ISDS regime is laden with deficiencies and, perhaps just as important, the public perception of this regime is an indication that the time for reform has come. Fortunately, we can turn to the best practices from the DSB and lessons learned from ICSID to quiet the cacophony of more than 3,000 IIAs into one single treaty. An institutionalized investment court will usher in a new era of transparency, fairness, and stability that promotes the rule of law and benefits governments, investors, and the public.

137. See GUOHUA, *supra* note 93.

138. See Nigel Blackaby & Caroline Richard, *Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?*, in MICHAEL WAIDEL ET AL., *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* 253–74 (Kluwer Law International, 2010).

139. GUOHUA, *supra* note 93, at 529–31.