TTIP and the Investment Court System: A New (and Improved?) Paradigm for Investor-State Adjudication

In response to the recent outcry against the investor-state dispute settlement ("ISDS") system, the negotiators to the proposed EU-U.S. Transatlantic Trade and Investment Partnership ("TTIP") have developed an alternative means of investment dispute resolution: the so-called Investment Court System ("ICS"). News agencies, political leaders, and legal scholars have published myriad reactions to the proposal, many of them mixed. This Note evaluates the ICS in light of the most cogent critiques lodged against ISDS, before considering three alternative modes of investment dispute resolution: a return to the pre-ISDS era, the adoption of a rule-of-law ratings mechanism, and a reformed and updated version of ISDS. Due to the problems inherent in the design of the ICS—including most notably the possibility that its judges would be beholden to state interests—this Note argues that it presents an imperfect solution to ISDS's critiques. Instead, a revised version of ISDS, updated to incorporate certain cost-reduction strategies, regulatory safeguards, and a multilateral ISDS appellate mechanism, theoretically offers the most promising long-term avenue for dealing with the unique circumstances inherent in investor-state disputes. However, because of the practical and political realities of TTIP, namely the souring of public sentiment towards anything ISDS, the most viable solution open to negotiators is a return to the pre-ISDS era.

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INTRODUCTION

In July 2013, representatives from the United States and European Union met in Washington, D.C. to begin negotiations on the Transatlantic Trade and Investment Partnership ("TTIP"), a proposed bilateral agreement intended to promote trade and economic growth between the two regions.[1] The delegates' stated goal was to come to terms on an "ambitious, comprehensive, [and] balanced" bilateral trade and investment agreement that "shall provide for the reciprocal liberalisation of trade in goods and services as well as rules on trade-related issues."[2] At the time of this writing, TTIP negotiators have participated in fifteen rounds of week-long negotiations, and have addressed issues relating to regulatory coherence, technical barriers to trade, customs and trade facilitation, and intellectual property rights.[3] But arguably the most contentious question faced by TTIP's representatives is whether to include a provision for investor-state dispute settlement ("ISDS") within the agreement's regulatory framework.[4] ISDS has been the subject of fierce opposition amongst EU Member States, interest groups, and citizens, who argue that it (among other things) unduly protects corporate interests at the expense of environmental standards and taxpayer protections.[5]

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1. European Commission Press Release IP/13/691, EU and US Conclude First Round of TTIP Negotiations in Washington (July 12, 2013), http://trade.ec.europa.eu/doclib/press/index.cfm?id=941.

2. Council Directive 11103/13, Directive for the Negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America 2 (June 17, 2013), data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf.

3. *Commission Report of the 15th Round of Negotiations for the Transatlantic Trade and Investment Partnership: October 2016*, at 1–2 (Oct. 21, 2016), http://trade.ec.europa.eu/doclib/docs/2016/october/tradoc_155027.pdf.

4. *See, e.g.*, Andrew Grice, *TTIP: Activists Triumph as Contentious US Free Trade Deal Clause Suspended*, INDEP. (London) (Jan. 13, 2015), http://www.independent.co.uk/news/uk/politics/ttip-activists-triumph-as-contentious-us-free-trade-deal-clause-suspended-9976090.html.

5. *See, e.g.*, EUROPEAN ENVTL. BUREAU, REGULATORY ROLLBACK: HOW TTIP PUTS

Just over two years after those negotiations began, on September 16, 2015, the European Commission ("the Commission") published a press release proposing a novel alternative to ISDS: a TTIP-centric[6] Investment Court System ("ICS").[7] If ratified as part of the larger TTIP agreement, the Commission believes that its proposal, which was minimally updated and "finalized" on November 12, 2015,[8] would usher in several important changes to the international investment dispute settlement system. First, it claims that the ICS would codify a shift away from the ad hoc ISDS method in favor of a formalized tribunal system. It insists that such a system would provide more stability and predictability than ISDS by implementing a structure comparable to more established domestic and international courts,[9] similar to the International Criminal Court ("ICC") and the International Tribunal for the Law of the Sea ("ITLOS"). In addition, the Commission believes that a TTIP investment tribunal could provide the impetus for the establishment of a permanent, multilateral International Investment Court. It envisions such a court eventually replacing "all investment dispute resolution mechanisms provided in EU agreements, EU Member States' agreements with third countries and in trade and investment treaties concluded between non-EU countries."[10]

Over the last fourteen months, the Commission's ICS proposal has sent waves through the international law community.

THE ENVIRONMENT AT RISK (Jan. 21, 2014), http://www.eeb.org/EEB/?LinkServID=4AFDDA9F-5056-B741-DB18FBAC26DE3743&showMeta=0; Patrick Gleeson, *TTIP: Chemical Corporations Against Safety Protections*, ECOLOGIST (Dec. 24, 2014), http://www.theecologist.org/News/news_analysis/2682031/ttip_chemical_corporations_against_safety_protections.html; Colin Todhunter, *TTIP: An Agenda for Corporate Plunder*, COUNTERPUNCH (June 5, 2015), http://www.counterpunch.org/2015/06/05/ttip-an-agenda-for-corporate-plunder.

6. The proposed Investment Court System is "TTIP-centric" in the sense that the court would only have jurisdiction to adjudicate disputes arising within the TTIP framework (i.e. those between an American or European investor and an EU Member State or the United States, respectively).

7. European Commission Press Release IP/15/5651, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (Sept. 16, 2015) [hereinafter IP/15/5651], http://europa.eu/rapid/press-release_IP-15-5651_en.htm.

8. European Commission Press Release IP/15/6059, EU Finalises Proposal for Investment Protection and Court System for TTIP (Nov. 12, 2015) [hereinafter IP/15/6059], http://europa.eu/rapid/press-release_IP-15-6059_en.htm.

9. *Commission Concept Paper on Investment in TTIP and Beyond—The Path for Reform* 1 (May 5, 2015), http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

10. IP/15/5651, *supra* note 7.

Meanwhile, divergent opinions on the plan have been bandied about by political and judicial leaders,[11] news outlets,[12] think tanks,[13] and myriad governmental[14] and non-governmental organizations.[15] But surprisingly few commentators have considered whether and to what

11. *See, e.g.*, *TTIP Trade Talks: German Judges Oppose New Investor Courts*, BBC (Feb. 5, 2016) [hereinafter *TTIP Trade Talks*], http://www.bbc.com/news/world-europe-35503885, (reporting that the German Association of Judges announced its opinion that there was "neither a legal basis nor an actual need" for the ICS).

12. *See, e.g.*, Natacha Cingotti, Opinion, *TTIP's Proposed Investment Court System Should Fool No One*, EURACTIV (Feb. 22, 2016), http://www.euractiv.com/section/trade-society/opinion/ttips-proposed-investment-court-system-should-fool-no-one (arguing that the ICS should be "scrapped completely" because "there is no need for special investors' privileges and tribunals in TTIP"); Douglas Singleterry, *Op-Ed: International Investment Court's Time Has Come: European Commission Has Proposed a System to Promote Fairness. Obama Should Get Onboard*, NAT'L L.J. (Dec. 14, 2015), http://www.nationallawjournal.com/id=1202744684325/OpEd-International-Investment-Courts-Time-Has-Come?slreturn=20160108125020 (encouraging the Obama administration to support the Commission's proposal "both to strengthen the investor dispute resolution mechanism and mitigate a prime source of controversy over trade agreements").

13. *See, e.g.*, MIRIAM SAPIRO, TRANSATLANTIC TRADE AND INVESTMENT NEGOTIATIONS: REACHING A CONSENSUS ON INVESTOR-STATE DISPUTE SETTLEMENT 1 (2015), https://www.brookings.edu/wp-content/uploads/2016/07/GlobalViews5Oct2015_FINAL.pdf (citing the modern investor-state dispute resolution debate and recent reforms to ISDS in arguing that "the reasons for maintaining [ISDS] in future agreements are more persuasive than those supporting elimination"); Ted Bromund et al., *The U.S. Should Reject the European Commission's Proposed Investment Court*, HERITAGE FOUND.: ISSUE BRIEF 1 (Nov. 13, 2015), http://www.heritage.org/research/reports/2015/11/the-us-should-reject-the-european-commissions-proposed-investment-court (calling on American negotiators to "firmly resist" the Commission's ICS proposal, "which departs radically from the well-functioning ISDS system").

14. *See, e.g.*, IP/15/6059, *supra* note 8 (praising the finalized proposal's "additional improvements on access" to the ICS for small and medium sized companies); IP/15/5651, *supra* note 7 (characterizing the Commission's proposal as a major improvement over the existing ISDS system in terms of transparency, state sovereignty, and the proper adjudication of investor-state disputes).

15. *See, e.g.*, Peter Chase & Sean Heather, *Investment Protection: If It Ain't Broke, Why "Fix" It?*, U.S. CHAMBER COM. (Oct. 1, 2015, 12:00 PM), https://www.uschamber.com/issue-brief/investment-protection-if-it-ain-t-broke-why-fix-it ("While the Chamber [of Commerce] understands the political difficulties the European Commission is facing when it comes to investment protection in TTIP and other trade agreements, [the ICS] proposal must be viewed only as a starting point for negotiations . . . . It must be dramatically improved before we can support it."); *'New' Investment Court System Still Privileges Foreign Investors under EU-US Trade Deal*, TRANSPORT & ENV'T (Sept. 16, 2015, 12:54 PM), https://www.transportenvironment.org/press/%E2%80%98new%E2%80%99-investment-court-system-still-privileges-foreign-investors-under-eu-us-trade-deal (arguing that the Commission's proposal "is a mere rebranding exercise of Investor-State Dispute Settlement" that "will resolve none of the fundamental concerns about granting special privileges for foreign investors, undermining national laws and bypassing domestic courts").

extent the Commission's proposal would systematically address the critiques that have been lodged against the ISDS regime. Even fewer have asked whether TTIP's negotiators should consider any alternative solutions to ISDS's problems, or whether any such alternatives even exist. This Note addresses each of these important considerations, using them as a springboard to show that the ICS represents a strategically imperfect solution to the modern challenges faced by the international investment dispute settlement regime.

Part I of this Note offers a brief introduction to the ISDS system and the most cogent critiques that have been lodged against it, in order to provide some context for the Commission's model system, the ICS. It then lays out the basic contours of the TTIP-centric ICS, as envisioned in the Commission's November 2015 proposal. Part II assesses the extent to which the ICS responds to the supposed problems inherent in the ISDS model, in an effort to both determine its viability as a standalone juridical mechanism and highlight possible reasons for concern. Part III analyzes possible non-ICS solutions to ISDS's current problems, including a return to the pre-ISDS era—when investor-state arbitrations were handled almost exclusively by the host country's domestic court system—and the adoption of an international rule-of-law ratings mechanism. Part III concludes by arguing that ISDS, if revised and updated to reflect modern-day realities, theoretically offers the most promising means for addressing the unique challenges inherent in investor-state disputes. However, due to the practical and political realities of TTIP, the only viable solution available to negotiators is a return to the pre-ISDS era.

I. THE HISTORY OF ISDS AND THE ICS

Over the course of the last century, the increasingly globalized nature of the international marketplace has incited unprecedented levels of cross-border investment and, as a direct result, disputes between investors and foreign countries.[16] The proper adjudication of these disputes, which often involve complex, cross-jurisdictional questions of law and commerce, arguably lies outside the competency of domestic courts, which some believe have a high potential for bias when deciding cases lodged against their own government.[17] In

16. *See generally* U.N. Conference on Trade & Development, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap* (June 2013) [hereinafter *Reform of ISDS*], http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf.

17. Fact Sheet, Office of the U.S. Trade Representative, Investor-State Dispute Settlement (ISDS) (Mar. 11, 2015), https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds. *See also* Marco Bronckers, *Is*

response to these concerns, national governments have adapted their legal structures to be more "investor friendly," often by entering into bilateral and multilateral International Investment Agreements ("IIAs")[18]—treaties that set forth the terms of investment that will prevail between two or more countries and provide the legal basis for the ISDS model of investment arbitration.[19] Given that the Commission devised the new ICS to operate as a direct successor to ISDS, their decision cannot be fully understood without consideration of both ISDS's contours and its most notable critiques.

A. The ISDS Model

The generic term "investor-state dispute settlement" broadly refers to the heterogeneous category of adjudication regimes that all share one basic feature: they empower private individuals and corporations wronged under an investment agreement to bring claims against foreign signatory states. More specifically, ISDS can be thought of as the set of legal instruments within IIAs that allow investors to bypass domestic courts in favor of a "neutral, international arbitration procedure" for resolving conflicts with host country governments.[20] By affording impartial, independent arbitral bodies full control over investor-state dispute settlement, ISDS's "swifter, cheaper, and more flexible" design was expected to lower the overall cost of investments and make IIA commitments more enforceable.[21]

Investor-State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts?: An EU View on Bilateral Trade Agreements, 18 J. INT'L ECON. L. 655, 671 (2015) (arguing that, in order to provide a viable forum for investor-state adjudication, domestic courts must assure foreign investors that they can adequately "deal with their claims with sufficient independence and efficiency," and finding further that "on both parameters courts in more than a third of the EU Member States are perceived to perform badly").

18. MARGARET L. MOSES, THE PRINCIPLES AND PRACTICES OF INTERNATIONAL COMMERCIAL ARBITRATION 231 (2d ed. 2012).

19. *See generally* U.N. Conference on Trade & Development, *Investor-State Dispute Settlement: UNCTAD Series on Issues in International Investment Agreements II: A Sequel* 18, 30–31 (May 2014) [hereinafter *Issues in International Investment Agreements*], http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf.

20. Fact Sheet, Office of the U.S. Trade Representative, *supra* note 17.

21. *Issues in International Investment Agreements*, *supra* note 19, at 13. These lower costs and decreased investment risk are partly the byproduct, supporters argue, of ISDS's ability to cut down substantially on the transaction costs associated with investor-state dispute resolution. Every national court employs a unique set of procedural and substantive rules, and they all inevitably boast a distinct body of relevant statutory provisions and case law. In order to resolve their legal claims, then, foreign investors must often spend substantial amounts of time and resources learning to navigate these novel and often unique

Because the legal basis for ISDS resides within a decentralized network of more than 3000 IIAs,[22] there are several different iterations of these general themes. However, virtually all ISDS provisions center on four broad-based guarantees: (1) "protection against discrimination" (a.k.a. "national treatment" and "most favored nation" status); (2) protection against government actions that expropriate without compensating the value of an investment; (3) "protection against 'unfair and inequitable treatment'"; and (4) protection against government actions restricting capital flows.[23]

Although the first ISDS provision appeared in the 1959 bilateral Treaty for the Promotion and Protection of Investments between Germany and Pakistan,[24] only a handful of ISDS cases were brought before 1996.[25] Indeed, ISDS only entered into widespread use after the upsurge in bilateral investment treaties ("BITs") that occurred in the 1990s and early 2000s.[26] Since 2001, the cumulative number of ISDS cases has increased by more than 500%, with a total of fifty-nine cases brought in 2013 alone.[27] Nonetheless, public awareness of

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legal systems. In addition, differences amongst national courts in regard to judicial congestion, logistics, and delays in the administration of justice mean that aggrieved parties in some jurisdictions will have to work harder, wait longer, and spend more to secure a remedy than in others. *See generally* Maria Dakolias, *Court Performance Around the World: A Comparative Perspective*, 2 YALE HUM. RTS. & DEV. L.J. 87 (1999). Without the protections afforded by ISDS (or a comparably harmonized multilateral system), potential investors would have to account for each of these contingencies prior to investing—a process that would increase the overall cost of the investment and which could, as a result, lead to deadweight losses.

22. U.N. Conference on Trade & Dev., *Recent Trends in IIAs and ISDS* 2 (Feb. 2015) [hereinafter *Recent Trends in IIAs*], http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf.

23. MARTA LATEK, INVESTOR-STATE DISPUTE SETTLEMENT (ISDS): STATE OF PLAY AND PROSPECTS FOR REFORM 2–3 (Jan. 21, 2014), http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/130710/LDM_BRI(2014)130710_REV2_EN.pdf.

24. Treaty for the Promotion & Protection of Investments, Pak.-Federal Republic of Ger., Nov. 25, 1959, 25 U.N.T.S. 1963.

25. *Recent Trends in IIAs*, *supra* note 22, at 5.

26. That upsurge was largely the result of two compounding developments: (1) the 1998 failure of the Organisation for Economic Co-operation and Development's ("OECD") negotiations towards a Multilateral Agreement on Investment ("MAI"), and (2) the 2001 failure of the Doha Round of trade negotiations. *See generally* Efraim Chalamish, *The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?*, 34 BROOK. J. INT'L L. 303 (2009); Philip De Man & Jan Wouters, *Improving the Framework of Negotiations on International Investment Agreements*, *in* FOREIGN DIRECT INVESTMENT AND HUMAN DEVELOPMENT: THE LAW AND ECONOMICS OF INTERNATIONAL INVESTMENT AGREEMENTS 233 (Olivier de Schutter et al. eds., 2013).

27. *Recent Trends in IIAs*, *supra* note 22, at 5.

ISDS and the controversy that now surrounds it are far more recent phenomena, prompted by the inclusion of ISDS provisions in the 2014 EU-Canada Comprehensive Economic and Trade Agreement ("CETA"),[28] the Trans-Pacific Partnership ("TPP"),[29] and TTIP.[30] The high stakes involved in these "super-regional agreements," combined with the EU's general anti-American sentiment and aversion to globalization and capitalism,[31] have turned ISDS into an extremely contentious subject, and have prompted several commentators to critique its procedural and substantive foundations.

B. Critiques of ISDS

1. Procedural Critiques

On a procedural level, commentators point to three primary critiques. First, they accuse ISDS of lacking transparency, since many arbitrations are predicated on strict non-disclosure agreements.[32] Second, some critics take issue with the comparative lack of independence and impartiality amongst arbitrators as opposed to judges.[33] Arbitrators are appointed by a disputing party (or other

28. Although the original text of CETA, which was released by the EU and Canada in August 2014, included an ISDS provision, the agreement was revised in February 2016 to incorporate elements of its own Investment Court System. Like TTIP, the CETA adjudication system is to be modeled off the EC's November 2015 revised proposal, but has yet to be formally ratified and implemented. European Commission Press Release IP/16/399, CETA: EU and Canada Agree on New Approach on Investment in Trade Agreement (Feb. 29, 2016) [hereinafter IP/16/399], http://europa.eu/rapid/press-release_IP-16-399_en.htm.

29. Trans-Pacific Partnership ch. 28, Feb. 4, 2016, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/sites/default/files/TPP-Final-Text-Dispute-Settlement.pdf (signed by all parties but not yet in force).

30. CHRISTIAN TIETJE ET AL., THE IMPACT OF INVESTOR-STATE-DISPUTE SETTLEMENT (ISDS) IN THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP 47 (2014) (study prepared for the Minister for Foreign Trade & Development Cooperation, Ministry of Foreign Affairs, the Netherlands).

31. Ralph Alexander Lorz, *Germany, The Transatlantic Trade and Investment Partnership and Investment-Dispute Settlement: Observations on a Paradox*, COLUM. FDI PERSPECTIVES, Oct. 13, 2014, at 1, http://ccsi.columbia.edu/files/2013/10/No-132-Lorz-FINAL.pdf.

32. *See, e.g.*, Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 786 (2008); Dora Marta Gruner, Note, *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform*, 41 COLUM. J. TRANSNAT'L L. 923, 932 (2003).

33. *See, e.g.*, NATHALIE BERNASCONI-OSTERWALDER ET AL., ARBITRATOR

"appointing authority") on a case-by-case basis, and are not subject to safeguards regarding personal and professional conflicts of interest. As a result, commentators have maintained that "arbitrator bias arising from diverse fact patterns and relationships pepper [investor-state] disputes, prolonging proceedings and opening ultimate awards up to strong critique."[34] Finally, the non-continuity of personnel from arbitration to arbitration implies to some critics the possibility of inconsistent, arbitrary, and/or unpredictable decision-making, as different arbitrators apply diverging interpretations of the same IIA provisions.[35]

2. Functional Critiques

More substantively, critics also object to ISDS on functional grounds. For example, some have argued that ISDS, by combining elements of both arbitrative and judicial review systems, forces states to "consent to arbitration with an unknown number of investors who may have invested or may invest in the future in their countries."[36] In so doing, ISDS arguably engenders an "elite arbitration industry,"[37] often characterized by extremely high legal and arbitrator fees and ethically perilous third-party investment-oriented funding.[38] In addition, some scholars have accused investor-state adjudication of codifying a "new colonialism," whereby large investors and states can exploit and subjugate their weaker compatriots.[39] But most egregiously, critics contend, ISDS operates like a "Trojan Horse" that enables foreign corporations to illicitly and non-transparently challenge

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INDEPENDENCE AND IMPARTIALITY: EXAMINING THE DUAL ROLE OF ARBITRATOR AND COUNSEL (Oct. 2010), http://www.iisd.org/pdf/2011/dci_2010_arbitrator_independence.pdf (prepared for the IV Annual Forum for Developing Country Investment Negotiators).

34. *Id.* at 2; *see also* Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 78–79 (2003).

35. Anna Joubin-Bret, *Why We Need a Global Appellate Mechanism for International Investment Law*, COLUM. FDI PERSPECTIVES, Apr. 27, 2015, at 1–2, http://ccsi.columbia.edu/files/2013/10/No-146-Joubin-Bret-FINAL.pdf.

36. MARKUS KRAJEWSKI, MODALITIES FOR INVESTMENT PROTECTION AND INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) IN TTIP FROM A TRADE UNION PERSPECTIVE 7 (2014), http://library.fes.de/pdf-files/bueros/bruessel/11044.pdf.

37. LATEK, *supra* note 23, at 1.

38. *See* EUROPEAN COMM'N, INVESTOR-TO-STATE DISPUTE SETTLEMENT (ISDS): SOME FACTS AND FIGURES 9 (March 12, 2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf.

39. Howard Mann, *International Investment Agreements: Building the New Colonialism?*, 97 ASIL PROC. 247, 247 (2003).

public health, environmental, and social protections that threaten their profit margins.[40] Succinctly put, ISDS "give[s] 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."[41] As a result, critics argue that ISDS empowers corporations at the expense of sovereign states' courts and legislatures, both creating a "chilling effect" on state regulatory powers[42] and subjecting sovereign states to the "caprice" of multinational enterprises ("MNEs").[43]

Although the majority of ISDS's critics are European,[44] several prominent Americans have recently come out against ISDS provisions as well. Most notably, in December 2014 the Democratic members of the Ways and Means Committee of the U.S. House of Representatives published a letter to President Barack Obama formally critiquing ISDS. In it they argue that the ISDS provisions in TTIP and other BITs "advantage[] foreign investors over domestic ones and threaten[] US laws, regulations, and judicial decisions protecting health and public safety . . . [by] provid[ing] foreign investors the right to either bypass our own courts entirely or to undermine them by challenging their results before panels of private arbitrators."[45]

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40. *See, e.g.*, Yannick Radi, *The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the 'Trojan Horse'*, 18 EUR. J. INT'L LAW 757 (2007).

41. *The Arbitration Game*, ECONOMIST (Oct. 11, 2014), http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration.

42. TIETJE ET AL., *supra* note 30. Regulatory chill theorists believe that government actors, faced with the possibility of substantial ISDS-related penalties, will elect not to adopt legitimate regulatory initiatives (for example, those aimed at protecting the environment, public health, consumer welfare, natural resources, etc.) for fear of investor-initiated adjudicative proceedings. For an in-depth evaluation of the "regulatory chill" effect, *see Id.* at 9, 39–48.

43. Lorz, *supra* note 31, at 1.

44. Indeed, opposition to ISDS within Europe has grown so fierce that Cecilia Malmström, the European Commissioner for Trade, has declared ISDS "the most toxic acronym in Europe." Paul Ames, *ISDS: The Most Toxic Acronym in Europe*, POLITICO (Sept. 17, 2015, 4:28 PM), http://www.politico.eu/article/isds-the-most-toxic-acronym-in-europe.

45. Letter from Bill Pascrell, Representative of N.J., U.S. House of Representatives, Lloyd Doggett, Representative of Tex., U.S. House of Representatives, Linda T. Sanchez, Representative of Cal., U.S. House of Representatives, John Lewis, Representative of Ga., U.S. House of Representatives, and Jim McDermott, Representative of Wash., U.S. House of Representatives, to Barack Obama, President of the U.S. (Dec. 17, 2014), https://pascrell.house.gov/media-center/press-releases/pascrell-ways-and-means-democrats-

That said, American critics (the Ways and Means Committee Members notwithstanding) tend to focus on ISDS's lack of a formal, effective appeals process,[46] while maintaining that the ISDS process generally strikes a careful balance "between investor protections and regulatory prerogatives."[47]

Each of the foregoing critiques has likely impacted the Commission's decision to reject ISDS and design a new Investment Court System within the TTIP agreement. Indeed, in the September 2015 press release introducing its new model for investor-state dispute resolution, the Commission noted that its proposal "builds on the substantial input received from the European Parliament, Member States, national parliaments and stakeholders through the public consultation held on ISDS."[48] The Investment Court System's design, then, can be understood as a direct response to ISDS's perceived failures, and its potential effectiveness should be assessed in part by the degree to which it responds to those same concerns.

C. The Investment Court System's Dispute Settlement Procedure

The Commission's proposed ICS intends to provide a process of investor-state dispute resolution that "ensure[s] that [TTIP-related] investment disputes will be adjudicated in full accordance with the rule of law."[49] Much like the World Trade Organization's ("WTO") dispute settlement procedure,[50] the proposal establishes a process of

urge-president-obama-to-exclude.

46. *See, e.g.*, David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 VAND. J. TRANSNAT'L L. 39 (2006); Barton Legum, *Appellate Mechanisms for Investment Arbitration: Worth a Second Look for the Trans-Pacific Partnership and the Proposed EU-US FTA?*, *in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY 437, 437–39 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015). The genesis of this focus could, in part, be the result of the United States' commitment in many of its more recent bilateral free trade agreements, *see, e.g.*, United States-Korea Free Trade Agreement, June 30, 2007, 46 I.L.M. 642, to eventually negotiate a formal appellate mechanism in the investor dispute realm.

47. Theodore R. Posner, Partner, Weil, Gotshal & Manges LLP, Trading Views: Real Debates on Key Issues in TPP—The Investment Chapter, Address Before the House Ways and Means Committee 6 (Dec. 2, 2015), http://democrats.waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/POSNER%20Remarks%20for%20TPP%20Investment%20Forum--12022015.pdf.

48. IP/15/5651, *supra* note 7.

49. *Id.*

50. *See* Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Apr. 15, 1994, 108 Stat. 4809, 1869 U.N.T.S. 401 [hereinafter DSU].

resolution whereby parties progress through a series of increasingly formalized adjudicative proceedings. To begin, parties must "as far as possible" seek out an "amicable resolution" through negotiations or mediation.[51] If an amicable resolution cannot be reached, claimants can then "submit a request for consultations" to the respondent.[52] Such a request must include certain relevant information regarding the dispute, must be presented within a two- to three-year statute of limitations (depending on the circumstances of the claim), and the requested consultations must occur within sixty days of the request.[53] If after six months the dispute remains unresolved, the claimant may then formally submit their claim to one of the most notable innovations of the Commission's ICS: the Tribunal of First Instance ("Tribunal").[54]

The Tribunal is designed to operate as a permanent TTIP-centric investment court, and will be imbued with the power to hear all claims submitted pursuant to TTIP's dispute settlement provisions.[55] It will be comprised of fifteen judges, appointed by an as-yet-unnamed "Committee" for a maximum of two six-year terms and paid a monthly retainer fee plus a set wage for each day worked.[56] Five of the Tribunal judges must be Americans, five must be Europeans, and five must be from third countries, and all must "possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence."[57] The Tribunal will hear cases "in divisions consisting of three Judges" to be randomly appointed by the President of the Tribunal, one each from the United States, the EU, and a third country.[58]

Perhaps surprisingly, the proposed ICS would allow disputing parties to continue utilizing some of the procedures established by its predecessor, ISDS. Most notably, the text of the proposal allows claimants to submit claims to the Tribunal under one of several sets of existing dispute settlement rules, including the Convention on the

51. *Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce: Chapter II—Investment*, EUROPEAN COMM'N 12 (Nov. 12, 2015) [hereinafter Proposal], http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf.

52. *Id.* at 13.

53. *Id.* at 13–14.

54. *Id.* at 15, 17–19.

55. *Id.* at 17.

56. *Id.* at 17–18.

57. *Id.* at 17.

58. *Id.* at 17–18.

Settlement of Investment Disputes (the governing rules of the International Centre for Settlement of Investment Disputes ("ICSID")), the arbitration rules of the United Nations Commission on International Trade Law ("UNCITRAL"), or "any other rules agreed [to] by the disputing parties."[59] Should the Tribunal determine in accordance with those rules that a State has breached its obligations under TTIP, it will then have the power to issue "provisional awards" to claimants in the form of restitution of property, monetary damages (not to be "greater than the loss suffered by the claimant") or a combination of the two.[60] The Tribunal may not, however, issue punitive damages nor "order the repeal, cessation or modification of the treatment concerned."[61]

Within ninety days of the issuance of a provisional award, either of the two disputing parties may appeal the Tribunal's decision to another of the Investment Court System's most important innovations: the Appeal Tribunal.[62] The Appeal Tribunal will consist of only six judges, but much like those in the Tribunal of First Instance, appellate-level judges will be appointed for a maximum of two six-year terms, will hear cases in similarly devised three-judge divisions, and will be paid a retainer in addition to a set wage for days worked.[63] Decisions of the Tribunal may only be modified or reversed by the Appeal Tribunal (i.e. there is no remand system), and modification or reversal will occur only if the Tribunal (1) "erred in the interpretation or application of the applicable law"; (2) "manifestly erred in the appreciation of facts" and/or relevant domestic legal standards; or (3) violated one of the many procedural grounds for appeal mentioned in Article 52 of the ICSID Convention.[64]

Article 30 of the Commission's proposal stipulates that any awards issued by either the Tribunal or the Appeal Tribunal "shall be

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59. *Id.* at 15.

60. *Id.* at 29–30.

61. *Id.* at 30.

62. *Id.* at 31.

63. *Id.* at 19–20.

64. *Id.* at 31. Article 52 states, in relevant part, that either party to a dispute:

> may request annulment of the award . . . on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 52, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

binding between the disputing parties and shall not be subject to appeal, review, set aside, annulment or any other remedy."[65] In other words, any decisions handed down by either tribunal are considered final—the draft text provides no provision for further adjudication or appeal. Paragraph 2 of Article 30 indicates that Investment Court decisions must be treated by the EU and United States as if they "were a final judgement of a [domestic] court" within their territories.[66] By requiring American and European courts to formally recognize ICS's judgments, the language of the proposal could even suggest that failure to comply with an Investment Court decision would open up disputing parties to sanctions similar to those already provided for in EU and U.S. domestic law.

D. The ICS's Other Notable Innovations

Outside the tribunals themselves, the Commission's Investment Court System proposes several other innovations worth noting. First, Article 3 of the draft proposal provides for a voluntary mediation process, which seems modeled after Article 5 of the WTO's Dispute Settlement Understanding ("DSU").[67] It would allow disputing parties "at any time . . . to have recourse to mediation" so long as (1) they mutually agree to do so and (2) the mediation would not "prejudice the legal position of either party."[68]

Second, the most recent draft of the Commission's proposal includes a few important exemptions and special considerations for small and medium enterprises ("SMEs").[69] For example, the proposal includes a provision "particularly" geared towards SMEs that allows for formal consultations with a respondent state to take place by "videoconference or other means."[70] In addition, the proposed language would place limits on the "costs of legal representation and assistance [that may] be borne by an unsuccessful [SME] party," in an apparent attempt at ensuring that SMEs can access the dispute set-

65. Proposal, *supra* note 51, at 31.

66. *Id.* at 32.

67. *Compare id.* at 12–13, *with* DSU, *supra* note 50, at 413–15.

68. Proposal, *supra* note 51, at 12.

69. European Commission Fact Sheet MEMO/15/6060, Why the New EU Proposal for an Investment Court System in TTIP is Beneficial to Both States and Investors (Nov. 12, 2015) [hereinafter European Commission Fact Sheet], http://europa.eu/rapid/press-release_MEMO-15-6060_en.htm.

70. Proposal, *supra* note 51, at 13.

tlement system despite a relative lack of financial clout.[71]

Third, Article 2 of the proposal's second section, which deals with investment protection, notes that nothing within the agreement shall "affect the right of the [EU or United States] to regulate within their territories through measures necessary to achieve legitimate policy objectives."[72] Therefore, consenting to the Commission's proposal will not prevent either the EU or U.S. governments from enacting policies related to "the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity."[73] The proposal, as a result, effectively enshrines the EU and United States' "right . . . to regulate" within their own territories.[74]

Finally, the Commission's proposal adopts the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, which would require that all Investment Court hearings be made public and that all information, documentation, and exhibits relevant to an Investment Court proceeding be published within a publicly-accessible repository.[75] Although in certain circumstances parties can avoid publication,[76] the Tribunal would have full discretion to determine whether such an exception should apply.[77]

II. THE ICS—A NEW (AND IMPROVED?) PARADIGM FOR INVESTOR-STATE ADJUDICATION

Evaluating the ICS as a successor to ISDS requires a two-pronged analysis. First, one must assess the extent to which the ICS responds to each of the critiques lodged against ISDS, discussed above in Part I.B. These can be categorized as concerns over: (1) the inconsistency and unpredictability of arbitrator decision-making; (2) ISDS's lack of transparency; (3) a lack of independence and impar-

71. *Id.* at 30.

72. *Id.* at 3.

73. *Id.*

74. European Commission Fact Sheet, *supra* note 69.

75. *See* Proposal, *supra* note 51, at 25; U.N. Comm'n on Int'l Trade Law, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (Jan. 2014) [hereinafter UNCITRAL Rules on Transparency], http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf, *as adopted by* G.A. Res. 68/109 (Dec. 16, 2013).

76. For example, when the proceedings involve confidential, proprietary, or protected information.

77. Proposal, *supra* note 51, at 29.

tiality amongst ISDS arbitrators; (4) the high costs associated with an elite arbitration industry; (5) the improper allocation of power and restraints on state sovereignty that result from ISDS (including its chilling effect on state regulatory powers); (6) the "Trojan Horse" complaint—that ISDS enables foreign MNEs to challenge any public health, environmental, and social protections that cut into their profit margins; and (7) ISDS's lack of a formal appeals process. Second, one must, to the extent possible, anticipate other complications the Investment Court might yield, and weigh those risks against the benefits it could confer.

A. The ICS as a Response to ISDS's Critiques

1. Consistency and Predictability

The proposed Investment Court System would likely prove more consistent and predictable than ISDS's ad hoc system of arbitrator decision-making. Indeed, the Commission seems to have had consistency in mind when designing the ICS model, which introduces two permanent tribunals comprised of a set list of semi-permanent adjudicators of "recognised competence."[78] By requiring that the same basic group of jurists decide every TTIP-related investor-state dispute, the Commission's proposal lays the stage for the ICS tribunals to become "authoritative bod[ies] capable of delivering consistent—and balanced—opinions."[79]

That said, commentators concerned about consistency may take issue with the proposal's lack of either an explicit or implicit commitment to a precedent doctrine. Much like the WTO's DSU, the Commission's proposal does not stipulate that either the Tribunal or Appeal Tribunal should or must follow prior precedent. Therefore, the judges assigned to a given case would not be required to defer to past decisions in any way—even if they themselves took part in the prior adjudication. And if one of the ICS's main goals is to increase the predictability of investor-state adjudications, why not modify the Commission's proposal to adopt a rule of precedent?

Notably, such criticism would run counter to what has been the prevailing practice in international law since the 1922 adoption of the Statute of the Permanent Court of International Justice, which originally excluded *stare decisis*.[80] In fact, though international tri-

78. *Id.* at 12.

79. *Reform of ISDS*, *supra* note 16, at 8.

80. Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*,

bunals routinely base their decisions on prior precedent, "all the international jurisdictions distance themselves in principle from the rule of *stare decisis*" in order to remain flexible both legally and politically.[81] In the TTIP context, for example, the EU and United States would likely balk at ratifying any agreement that would effectively place the approximately €1.99 trillion of EU outward foreign direct investment ("FDI") stocks in the United States and the approximately €1.81 trillion of U.S. outward FDI stocks in the EU at the mercy of a single (possibly under-qualified)[82] group of jurists.[83]

Nonetheless, the challenges associated with the use of precedent in international law—namely navigating between the risks of "jurisprudential incoherence," on the one hand, and "government by judges," on the other[84]—may mean that the ICS introduces less consistency than the Commission hopes. They may even explain the impetus for ISDS's ad hoc approach—diversifying the responsibility of finding acceptable arbitrators allows the parties to the dispute (i.e. those with the greatest stake in the settlement proceedings) to determine the adjudicatory circumstances that best suit their particular needs. But even taking those difficulties into consideration, there is good reason to believe that, by keeping the judges adjudicating disputes relatively static through time, the ICS would introduce a greater degree of consistency and predictability than ISDS currently affords.

2. Transparency

If implemented, the ICS would also heighten the level of transparency within investor-state dispute resolution. By incorporating the UNCITRAL Rules on Transparency into its proposal, rules that the General Assembly of the UN formally adopted through a December 2014 Resolution,[85] the Commission has ensured that the

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2 J. INT'L DISP. SETTLEMENT 5, 8 (2011).

81. *Id.* at 14.

82. *See infra* Part II.B.1.

83. *Foreign Direct Investment Statistics*, EUROSTAT: STATISTICS EXPLAINED, tbl.2 (Sept. 16, 2016, 8:37 AM), http://ec.europa.eu/eurostat/statistics-explained/index.php/Foreign_direct_investment_statistics. It should be noted that all macro-level financial statistics cited both here and throughout the remainder of this Note reflect data compiled prior to the United Kingdom's June 23, 2016 vote in favor of exiting the European Union. Considering the U.K. makes up approximately 10% of the EU's GDP, "Brexit" could substantially alter these estimates. However, because the impact of Brexit on TTIP had not been determined as of this writing, the old, U.K.-inclusive figures have been retained.

84. Guillaume, *supra* note 80, at 5.

85. G.A. Res. 69/116, art. 2 (Dec. 10, 2014).

ICS's transparency provisions would include the most state-of-the-art regulatory model available. The UNCITRAL Rules were negotiated over the course of three years by expert delegations representing more than fifty UN Member States, and are specifically designed for use in connection with investor-state arbitrations.[86] Therefore, assuming all parties agree as to the benefits of transparency in investor-state disputes,[87] the UNCITRAL Rules represent the most practicable system available.

3. Impartiality and Independence

As to impartiality and independence, the ICS intends to shore up ISDS's weaknesses through the operation of its permanent dual-tribunal structure. By utilizing an objective rotation system for assigning judges to cases, providing for increased transparency in ICS proceedings, and establishing an appellate body to review and ratify tribunal decision-making, the ICS takes several positive steps towards achieving adjudicative independence and impartiality.[88] Additionally, ICS judges cannot hear cases involving parties with whom they have a prior relationship, cannot act as counsel in any "pending or new investment protection dispute," and cannot adjudicate any disputes "that would create a direct or indirect conflict of interest."[89]

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86. LISE JOHNSON & NATHALIE BERNASCONI-OSTERWALDER, NEW UNCITRAL ARBITRATION RULES ON TRANSPARENCY: APPLICATION, CONTENT AND NEXT STEPS 11 (Aug. 2013), http://www.ciel.org/wp-content/uploads/2015/06/UNCITRAL_Transparency_Aug2013.pdf.

87. Of course, some investors might not be pleased with increases in transparency, preferring to settle their affairs in private in order to avoid public backlash or the unwanted dissemination of confidential or sensitive business information. However, their concerns could be partly assuaged by Article 7 of the UNCITRAL Rules, which wisely exempts from disclosure four broadly defined categories of confidential and/or protected data (including proprietary business information). In applying Article 7, the ICS Tribunals could also look for inspiration to the WTO regime, which has been applying confidentiality provisions in similar dispute settlement proceedings for well over two decades. *See, e.g.*, Appellate Body Report, *United States—Measures Affecting Trade in Large Civil Aircraft—Second Complaint*, WTO Doc. WT/DS353/AB/R (adopted Mar. 23, 2012); Appellate Body Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS316/AB/R (adopted June 1, 2011); Appellate Body Report, *Brazil—Export Financing Programme for Aircraft*, WTO Doc. WT/DS46/AB/R (adopted Aug. 20, 1999).

88. For a compelling discussion of the importance of independence and impartiality within the adjudication process, as well as the dangers associated with dual arbitrator-counsel relationships, see BERNASCONI-OSTERWALDER ET AL., *supra* note 33.

89. Proposal, *supra* note 51, at 20.

Arguably the most important of the above innovations is the appellate review system, which some commentators believe will singlehandedly "make the international investment regime more democratic," thereby ensuring "more independence and impartiality compared to the present arbitral system."[90]

On the other hand, critics have argued that ISDS's appointment mechanism already provides adequate safeguards against partisan decision-making,[91] even implying that implementing the ICS could actually *increase* the risk of biased adjudications.[92] Moreover, because ISDS arbitrators typically must be approved by both parties to a dispute,[93] one could argue that any blame for a faulty arbitrator lies with the parties themselves. However, such arguments do nothing to question the ICS's structure and potential for impartiality—they instead focus on defending the existing ISDS system. Therefore, this Note will accept as given that, by imposing the measures noted above, ICS judges would be at least as independent and impartial as ISDS's adjudicators, and possibly more so.

4. Costs of Adjudication

One of the most contentious issues surrounding the proposed Investment Court System—and arguably that for which the least empirical evidence exists—is whether it will reduce the costs of adjudicating investor-state disputes. In a memo released November 11, 2015, the Commission claims that the ICS would provide a "more cost effective and faster investment dispute resolution system" than the existing ISDS network.[94] According to that document, the ICS's "clear procedural deadlines" and "substantive rules," which would ostensibly limit the duration of all proceedings (including appellate reviews) to two years, will "help to keep the claims—and thus the ex-

90. STEPHAN W. SCHILL, REFORMING INVESTOR-STATE DISPUTE SETTLEMENT (ISDS): CONCEPTUAL FRAMEWORK AND OPTIONS FOR THE WAY FORWARD 8 (July 2015), http://e15initiative.org/wp-content/uploads/2015/07/E15-Investment-Schill-FINAL.pdf.

91. EUROPEAN FED'N FOR INV. LAW & ARBITRATION, A RESPONSE TO THE CRITICISM AGAINST ISDS 8–9 (May 17, 2015), http://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf.

92. *See infra* Part II.B.2.

93. Or, at the very least, the appointment of an arbitrator by one party must be offset by allowing the opposing party an appointment of their own. Most ICSID arbitration panels, for example, consist of one arbitrator appointed by the state, one appointed by the investor, and a third appointed by agreement of both parties. ICSID Convention, *supra* note 64, art. 37.

94. European Commission Fact Sheet, *supra* note 69.

tent of litigation—in check."[95] By way of comparison, the Commission estimates that ISDS arbitrations "often" last from five to six years, and that "many" take even longer.[96] Moreover, the Commission also asserts that, by apportioning exclusive control over ICS adjudicators' salaries to the EU and United States, the ICS would set "a cap on daily fees for judges."[97] Such a cap would keep the level of administrative costs low while preventing corrupt arbitrators from requesting incommensurate fees in exchange for preferential services or treatment. Although such caps already exist within certain ISDS regulatory frameworks,[98] other rules' structures allow arbitrators and outside counsel to be paid according to ad hoc fee structures agreed upon privately by the parties to the dispute.[99]

Nonetheless, some commentators have challenged the Commission's claims.[100] Professor Jörg Risse argues that, unlike the ICS, the ISDS system's "ad hoc arbitrations [entail] virtually no or very little overhead costs."[101] He analogizes the proposed ICS to ITLOS, which handles fewer than 1.5 cases per year despite its €18.8 million annual operating budget.[102] Absent certain protective measures,

95. *Id.*

96. *Id.*

97. *Id.*

98. The ICSID framework for dispute settlement proceedings, for example, caps arbitrators' fee schedules at $3000 per day plus expenses. Matthew Hodgson, *Counting the Costs of Investment Treaty Arbitration*, GLOBAL ARB. REV. (Mar. 24, 2014), http://globalarbitrationreview.com/news/article/32513. This cap was instituted in 2006 amid widespread reports of corrupt arbitrators requesting remuneration beyond that which was stipulated in initial settlement discussions. Gary Born et al., *Investment Treaty Arbitration: ICSID Amends Investor-State Arbitration Rules*, WILMERHALE (April 2006), https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=90393.

99. The UNCITRAL Arbitration Rules, along with a few other, less heavily utilized frameworks, set "no institutional limits akin to those at ICSID," instead allowing parties to determine appropriate levels of arbitrator compensation. David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* 20 n.27 (OECD Working Papers on Int'l Inv., Paper No. 2012/03, 2012), http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf.

100. Granted, it is worth noting that the majority of the Commission's critics on this point are practicing attorneys with specialties in international arbitration—individuals whose professional welfare could very well suffer should the Commission's approach prove successful. Both Risse and Hel-Koedoot, for example, are practicing attorneys in the international arbitration practices of Baker & McKenzie and NautaDutilh, respectively.

101. Joerg Risse, *A New "Investment Court System"—Reasonable Proposal or Nonstarter?*, GLOBAL ARB. NEWS (Sept. 25, 2015), http://globalarbitrationnews.com/investment-court-system-20150925.

102. *Id.*

Risse believes that a bilateral ICS between the EU and United States risks becoming as inefficient a body as ITLOS, especially given "how few investment arbitrations are actually pending where all parties involved stem from developed, industrialized countries with a sound democratic tradition."[103] Still others claim that the existence of an appellate tribunal will "lead to more delays and costs, as it is to be expected that the majority of the losing parties will use the opportunity to appeal."[104]

Of course, there is no way to know *ex ante* whether the ICS will *actually* act as inefficiently as ITLOS, or whether the Appeal Tribunal will *actually* lead to delays despite the Commission's strict procedural deadlines. However, the data available on ISDS[105] indicate that the single largest cost component of the arbitration process (at an estimated 82% of all costs) is comprised of "the fees and expenses incurred by each party for its legal counsel and experts."[106] And these fees are often nontrivial—between 2004 and 2014, the Philippines shelled out $58 million in order to successfully defend itself against Fraport, a German airport operator.[107] While there is no reason to believe that either states or investors mired in an ICS dispute will compromise on the quality or expense of their legal counsel, standardizing and circumscribing the adjudicatory process could plausibly lead to fewer man-hours worked and, as a result, an overall reduction in legal fees.[108] Assuming, then, that the ICS will make the

103. *Id.*

104. Mirjam van de Hel-Koedoot, *The Proposed New Investment Court System for TTIP: The Right Way Forward?*, EUR. FED'N FOR INV. L. & ARB. BLOG (Oct. 14, 2015), http://efilablog.org/2015/10/14/the-proposed-new-investment-court-system-for-ttip-the-right-way-forward.

105. Note that the privatized nature of the ISDS system implies that no public registry of claims exists, and that all data is therefore approximated. For a more detailed explanation of the data, see Roderick Abbott et al., *Demystifying Investor-State Dispute Settlement (ISDS)* 9 (European Ctr. for Int'l Political Econ., Occasional Paper No. 5/2014, 2014), http://www.ecipe.org/app/uploads/2014/12/OCC52014__1.pdf.

106. Gaukrodger & Gordon, *supra* note 99, at 19.

107. PIA EBERHARDT & CECILIA OLIVET, PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELLING AN INVESTMENT ARBITRATION BOOM 7 (Nov. 2012), https://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf.

108. Although the use of non-hourly fee arrangements (e.g. contingency fees) by ISDS practitioners seems to be on the rise, MAHNAZ MALIK, RECENT DEVELOPMENTS IN INTERNATIONAL INVESTMENT AGREEMENTS: NEGOTIATIONS AND DISPUTES 8 (Oct. 2010), https://www.iisd.org/sites/default/files/meterial/dci_2010_recent_developments_iias.pdf (prepared for the IV Annual Forum for Developing Country Investment Negotiators), that practice remains the exception, not the rule. As defendants, state-parties to investor-state disputes will never have access to contingency fee arrangements. And those private firms

investor-state dispute resolution process more efficient and less tedious, states (and especially their taxpayers) could realize enormous benefits.

5. Allocation of Power and State Sovereignty: The Trojan Horse Complaint

By limiting investors' capacity to challenge state regulatory initiatives, the ICS would shift power from MNEs to the EU and United States, thereby protecting state sovereignty and eliminating the possibility of Trojan Horse lawsuits. According to some commentators, the "open and broad wording of the substantive provisions" of IIAs, together with the ad hoc nature of the ISDS system, currently allows tribunals to adopt overly broad interpretations of their subject matter jurisdiction in investment disputes.[109] As a result, investors are able to bring claims concerning not only "direct expropriation and open discrimination, but also [state] regulatory measures," thereby discouraging states from adopting even legitimate policy regulations.[110] By contrast, the proposed ICS framework clearly delineates the jurisdictional reach of its tribunals, and explicitly states that the sovereign nations subject to its purview will retain their ability to regulate in order to achieve "legitimate policy objectives."[111] According to the Commission, this strategy represents a major improvement whereby "governments' right to regulate would be enshrined and guaranteed."[112] Therefore, even if the regulatory chill theory fails to conjure any reliable empirical support,[113] supporters of the ICS can still claim that the system's explicit regulatory protections lend more security to state regulatory powers than currently offered by the loose network of IIAs that buttress ISDS.

The ICS's regulatory safeguards also provide a neat answer to

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offering investor-plaintiffs an "alternative" fee schedule often still charge a reduced hourly rate. CATHERINE A. ROGERS & ROGER P. ALFORD, THE FUTURE OF INVESTMENT ARBITRATION 310 (2009).

109. KRAJEWSKI, *supra* note 36, at 7.

110. *Id.*

111. Proposal, *supra* note 51, at 3.

112. IP/15/5651, *supra* note 7.

113. It is worth noting that the empirical evidence compiled to date is, at best, mixed. While anecdotal support for the regulatory chill theory abounds, a formal study of NAFTA and the Dominican Republic-Central America Free Trade Agreement, prepared by Christian Tietje and Freya Baetens for the Dutch Ministry of Foreign Affairs, found "no evidence that any government has changed a policy position or refrained from acting in a policy area for fear of potential ISDS claims." TIETJE ET AL., *supra* note 30, at 93.

the "Trojan Horse" argument, which maintains that ISDS enables foreign corporations to illicitly challenge public health, environmental, and social regulatory protections.[114] By adopting the Uruguay Round's "legitimate policy objectives" language,[115] the Commission's proposal formally recognizes the authority of states to regulate in order to protect "public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity," regardless of the repercussions those regulations might have on private investors.[116] This oft-cited list of "legitimate" regulatory objectives is non-exhaustive, which could prove confusing if countries "formulate their own policy objectives and . . . tailor [their own] technical regulations accordingly."[117] However, because these policy exceptions have been (and continue to be) relatively well defined by international jurisprudence,[118] the list's non-exhaustive nature should not prevent investors from understanding the scope of valid sovereign regulatory power and ordering their behavior accordingly. As a result, the Commission seems justified in claiming that the ICS would provide an answer to the power allocation, state sov-

114. *See supra* Part I.B.2.

115. Proposal, *supra* note 51, at 3. The Uruguay Round of multilateral trade negotiations, which took place from 1986 to 1994, led to the formal establishment of the WTO. The phrase "legitimate policy objectives" appears in both the General Agreement on Tariffs and Trade and the Agreement on Technical Barriers to Trade, which were renegotiated by the Uruguay Round. The phrase has since become a well-recognized term of art. *See* Thomas Friedheim, *Domestic Taxes and Administrative and Technical Barriers to Trade on Goods and Services*, *in* IMPLICATIONS OF THE URUGUAY ROUND AGREEMENT FOR SOUTH ASIA: THE CASE OF AGRICULTURE 87 (Benoit Blarel et al. eds., 1999).

116. Proposal, *supra* note 51, at 3.

117. Friedheim, *supra* note 115, at 96.

118. In the trade realm, for example, both the General Agreement on Tariffs and Trade and the Agreement on Technical Barriers to Trade incorporate exceptions for legitimate policy objectives, and the WTO dispute settlement body has litigated several cases concerning the scope and definition of that language. *See, e.g.*, Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶¶ 213–34, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007) Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 41–44, 182–85, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 183–186, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998); Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, at 17–19, 25–29, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996). Similar language has also been incorporated into several other bilateral trade and investment agreements, including CETA. Comprehensive Economic and Trade Agreement, Can.-European Union, art. 8.9, Feb. 29, 2016, EUR. COMMISSION, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf (signed by all parties but not yet in force).

ereignty, and Trojan Horse critiques lodged against ISDS.

6. A Formal Appellate Mechanism

The ICS's Appeal Tribunal has been discussed at some length in the preceding sections,[119] and its inclusion within the Commission's proposal provides a clear answer to one of the longest-standing critiques of ISDS. Namely, that without a formal appellate body within the investor-state context there exists no independent mechanism to "allow errors of law to be corrected"[120] or to act "as a check on the ISDS process."[121] Indeed, calls for an ISDS-centric appellate mechanism have riddled scholarly and political commentaries for over a decade; the United States even allowed for the possibility of establishing such an entity in its 2004 Model BIT.[122] However, most such commentaries envisioned an independent appellate mechanism of international scope, possibly modeled after the WTO's Appellate Body.[123] By contrast, the ICS would, by definition, apply only to TTIP-centric disputes. Instead of providing a solution to ISDS's tendency to beget "diametrically opposed interpretations of the same or very similar investment agreements,"[124] then, the TTIP-specific ICS might actually contribute to the same alleged inconsistences.[125] This problem would only be compounded if the Commission chooses to

119. *See supra* Parts II.A.1, II.A.4.

120. Glyn Moody, *EU Puts Fresh Coat of Paint on ISDS, Now Re-Branded as "Investment Court System"*, ARS TECHNICA UK, (Sept. 16, 2015, 9:30 AM), http://arstechnica.co.uk/tech-policy/2015/09/eu-puts-fresh-coat-of-paint-on-isds-now-re-branded-as-investment-court-system.

121. SAPIRO, *supra* note 13, at 13.

122. Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, U.S. DEPT. OF STATE (2004), http://www.state.gov/documents/organization/117601.pdf (model bilateral investment treaty). In 2012, the U.S. State Department released an updated and reformed Model BIT, but retained those provisions relating to a multilateral ISDS appellate mechanism. Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, U.S. DEPT. OF STATE (2012) [hereinafter 2012 Model BIT], https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (model bilateral investment treaty).

123. KRAJEWSKI, *supra* note 36, at 20.

124. *Id.*

125. Of course, the Commission's press releases indicate that the ICS is intended only to fulfill a sort of stopgap role—providing an example of what a full-fledged international investment court might look like until one can be established. Should such a global entity eventually emerge, it would assuage these inconsistency concerns. *See infra* Part II.B.3.

ratify multiple ICS-incorporating IIAs, as seems more than likely given its current approach to the CETA and TTIP Agreements.[126]

B. Other Complications Inherent in the ICS Model

1. Attracting Qualified Jurists

From a purely logistical standpoint, it remains to be seen whether the ICS will be able to attract a suitable number of qualified candidates to fill all its posts. American negotiators, for example, may have a difficult time identifying and securing commitments from eight jurists that have an in-depth understanding of international investment law, possess the qualifications for appointment to, in the case of Appeal Tribunal judges, the highest of the United States' judicial offices (presumably a Federal District Court, Federal Circuit Court of Appeals, or the Supreme Court), and prove willing to forego the heightened prestige (and remuneration) of such a position in favor of an appointment to the ICS.[127] Appointing underqualified judges would not affect the predictability or impartiality problems discussed in Part II.A, above, but it could undermine the court's effectiveness and legitimacy. Should investors come to feel their claims will get a better hearing in better-staffed domestic courts, they might even abandon the ICS entirely.

2. The Risk of Capture

By calling for ICS's judges to be appointed and reappointed by a single, as-yet-undefined "Committee,"[128] the Commission's proposal would arguably motivate ICS's jurists to base their judicial findings on factors other than strict issues of law or fact. After all, judges that are up for reappointment will have an incentive to act in accordance with that Committee's expectations in order to secure their employment position. And because states are ultimately responsible for negotiating the contours of the ICS, there is a danger

126. *See* IP/16/399, *supra* note 28.

127. Although the Proposal does not specifically prohibit U.S. federal court judges from sitting on the Appeal Tribunal, Section 3, Article 10(11) stipulates that "[a]ll persons serving on the Appeal Tribunal shall be available at all times and on short notice and shall stay abreast of other dispute settlement activities under this agreement." Proposal, *supra* note 51, at 20. Given the time constraints faced by U.S. federal judges in the performance of their domestic duties, it therefore seems unlikely that a single individual could effectively juggle both appointments.

128. Proposal, *supra* note 51, at 17.

that the Committee and, as a result, the tribunals themselves would be "captured" by state interests, to the detriment of investor-complainants. It is of course possible that the Committee will be organized in a way to safeguard its appointment decisions against the risk of capture.[129] However, the high stakes faced by sovereign nations mired in investor-state disputes[130] imply that there would be, at the very least, some motivation for states to attempt to unduly influence the Committee's work.

Of course, critics could analogize to the EU and U.S. domestic court systems, whose judges are appointed through a variety of different mechanisms and who are routinely tasked with resolving state-interested disputes, to argue that the ICS's judges would likewise be capable of adjudicating similar cases without succumbing to the risks of capture. In the United States, for example, of the 281,608 civil cases filed in U.S. district courts in 2015, 37,349 (approximately thirteen percent) named the United States as a defendant.[131] And while some critics have raised concerns about the independence of American judges,[132] their decisions, including in cases against their own government, have been touted as some of the most reliable in the world.[133]

However, the domestic and ICS contexts can be distinguished on several important grounds. First, approximately two-thirds of investor-state disputes arise as a result of a host country's decision not to honor the terms of an explicit contractual agreement between it and the complaining investor.[134] States can therefore anticipate most

129. For example, the Committee would ideally be comprised of knowledgeable, yet unbiased and disinterested, representatives from both the EU and the United States and could include a safeguard mechanism whereby its appointment decisions must be ratified by both parties to TTIP. The ratification process could also solicit input from private investors, for instance, by initiating a notice-and-comment period (not unlike that which exists in American administrative law).

130. *See supra* notes 82–83 and accompanying text.

131. U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2015 (2015).

132. *See, e.g.*, Mira Gur-Arie & Russell Wheeler, *Judicial Independence in the United States: Current Issues and Relevant Background Information*, *in* GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY 133 (2002), http://pdf.usaid.gov/pdf_docs/pnacm007.pdf.

133. For example, the 2016 World Justice Project Rule of Law Index, a global rule-of-law ratings mechanism that assesses judicial systems on a variety of factors—including regulatory enforcement, absence of corruption, and civil and criminal justice—ranked the United States courts eighteenth in the world. WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2016 5 (2016), http://worldjusticeproject.org/sites/default/files/media/wjp_rule_of_law_index_2016.pdf.

134. *See* GUS VAN HARTEN, SOVEREIGN CHOICES AND SOVEREIGN CONSTRAINTS:

suits well in advance of their ultimate adjudication, and, if given power over the judicial process, would be in a unique position to improperly direct their own legal liabilities. More worrisome, domestic court judges are responsible for resolving an enormous variety of cases, only a fraction of which involve civil suits against the government,[135] while the ICS's judges would only resolve investor-state disputes. Therefore, there is substantially less danger in the domestic context than the ICS context that judges would be selected solely based on their tendency to decide such disputes in favor of government interests. Finally, and most importantly, U.S. federal court judges enjoy lifetime tenure, presumably shielding them from governmental influence. First-term ICS judges, on the other hand, might be more susceptible to undue pressure from host countries if focused on securing a second term.

In order to counter the potential risk of capture arising from the ICS's judicial appointment committee, TTIP's negotiators could instead adopt an appointment process similar to that of the ICC, which allows member-countries to democratically elect candidates that meet certain base-level criteria.[136] However, there are three primary issues with modeling an appointment process after the ICC. First, holding a "popular vote" between the two parties to a bilateral agreement hardly feels democratic. Both the EU and U.S. would likely propose candidates that they could compel to represent their own interests, and the lack of a consensus-capable voting body would raise the danger of a deadlocked selection process. Second, countries in the ICC context have less of a vested interest in the outcome of disputes—member states' interests in fair and effective adjudication typically stem only from the desire that "the most serious crimes of concern to the international community . . . not go unpunished."[137] In investor-state disputes, on the other hand, state-defendants inherently have a fundamental economic interest in the adjudicative process, and therefore have more of an incentive to inject bias into the proceedings. Third, in the ICC context states are the wronged party, whereas in the investor-state context it is just the opposite. In most cases, investor-state disputes arise after states have reneged on contracts with MNEs. It seems more likely, then, that states would resort to capture as a means for protecting their interests. For those reasons, affording states total control over any aspect of the investor-state dis-

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JUDICIAL RESTRAINT IN INVESTMENT TREATY ARBITRATION 122–24 (2013).

135. U.S. COURTS, *supra* note 131.

136. Rome Statute of the International Criminal Court art. 36, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

137. *Id.* at pmbl.

pute settlement process (for example, by authorizing them to make judicial appointment decisions) might encourage them to organize the adjudicative proceedings in such a way as to benefit their own interests, presumably at the expense of investors.

In fact, if one accepts the proposition that states have an incentive to act self-interestedly in establishing the judge-selection Committee, many of the ICS's ostensible solutions to ISDS's problems can be called into question. For example, calling a "captured" tribunal system "impartial" or "independent" would be disingenuous at best, as would claiming that its rulings are "consistent." True, one might expect all of the ICS's decisions to come out in favor of the states, but that hardly bespeaks an intellectually honest interpretation of the consistency called for by ISDS's critics.

The issues of state sovereignty and power allocation also take on a sinister tone when accounting for the risk of capture. If the judicial selection committee is beholden to TTIP's member countries, the EU and United States will have the power to pick and choose adjudicators based on their ideological outlook, and ICS's judges will have a personal incentive to rule against investors. Such a massive shift in adjudicative power would undoubtedly throw the investor-state dispute resolution regime off-balance, and could undo whatever gains the states would realize from increased sovereignty protections. Surely the Commission cannot be faulted for attempting to protect EU and U.S. sovereign authority, but one should be wary of any measures which provide them—parties with foreseeable interests in prospective investor-state disputes—with an illicit advantage in future proceedings.

Finally, one could also challenge the assertion that including an appellate review structure necessarily leads to a more "democratic" adjudicative process. After all, even if it is true that an appellate-level judicial review of the Tribunal's decisions would provide a "check[] on the propriety of the [ICS's] proceedings,"[138] that "check" can only function if the appeal tribunal itself remains free from capture.

Allowing countries to control judicial appointments would arguably be like formally enlisting the executive staff of Enron or Stratton Oakmont to draft applicable white-collar criminal statutes. In both cases, the offending party (i.e. the one accused of wrongdoing) is provided the opportunity to determine the circumstances under which their alleged misdeeds will be evaluated. Such a system not only smacks of impropriety, it is simply nonsensical. Worse, if in-

138. BERNASCONI-OSTERWALDER ET AL., *supra* note 33, at 2.

vestors begin to realize a negative financial impact as a result of such a system, the increased costs of researching and executing potential FDI opportunities could prohibit otherwise beneficial international investments from taking place, resulting in deadweight loss.

3. Extrapolation to an International Investment Court

Finally, one cannot fully evaluate the ICS without first considering the broader significance contemplated by the Commission's proposal: namely, a strategic pivot away from the existing ad hoc dispute settlement system in favor of a permanent international investment court. In both its September and November 2015 press releases introducing its plans for the ICS, the Commission explicitly stated that it ultimately envisioned establishing an international investment court to replace all other investor-state dispute resolution mechanisms, including the ICS.[139] The specific contours of this international court system are as yet unknown—the November press release indicates only that the Commission is "currently exchanging views with several international organisations" and "other countries" regarding it.[140] But while the Commission anticipates that brainstorming process to operate "in parallel to the TTIP negotiations," it would be difficult to imagine an eventual worldwide investment court system that did not incorporate most (if not all) of the major tenets of the ICS.[141]

Therefore, evaluating the ICS solely in terms of its potential impact on EU-U.S. investment relations yields an incomplete picture of the proposal's scope. To understand the full potential of the Commission's plan, one would need to examine the effect that an international investment court's multilateral status and amplified jurisdictional purview might have on impartiality, costs of adjudication, and the other elements of the analytical framework applied above in Part II.A. A permanent international investment court would mitigate some of the concerns noted above (for example, the present inconsistencies in the interpretation and application of similarly-worded IIAs), while potentially exacerbating others (for example, the independence and impartiality of investment dispute adjudicators). However, such an analysis lies outside the scope of this Note, both because it would require an unwholesome degree of conjecture (given that no framework for an international investment court has as yet

139. IP/15/6059, *supra* note 8; IP/15/5651, *supra* note 7.

140. IP/15/6059, *supra* note 8.

141. IP/15/5651, *supra* note 7.

been put forward) and because this Note's focus remains on analyzing TTIP, ISDS, and the ICS.

C. An Imperfect Solution

Based on the foregoing analysis, the Commission's proposed Investment Court System seems to be a bit of a mixed bag. On the one hand, the ICS will improve upon the existing investor-state dispute resolution system by ushering in: (1) increased transparency and consistency in the adjudication of disputes; (2) possible reductions in legal fees/overall costs; (3) additional protections for state regulatory powers; and (4) an established appellate mechanism. But on the other, the ICS would introduce significant logistical problems (for example, in hiring and retaining adequately qualified judges, determining whether and how precedential case law should apply to the adjudication of future disputes, etc.) and, most importantly, would seem poised to reallocate the power to appoint adjudicators, a power which investors and sovereigns share under the current ISDS system, solely to states.

III. ALTERNATIVE SOLUTIONS TO ISDS'S CRITIQUES

The ICS's mixed report card raises the question—are there any alternative solutions more capable than the proposed Investment Court of addressing the critiques lodged against ISDS? This Note will consider three such alternatives: (1) the so-called "Osgoode Plan,"[142] which advocates returning to the pre-ISDS system and replacing investor-state arbitrations with domestic court adjudication and private ordering opportunities;[143] (2) an international ratings mechanism that would require investors to file disputes based on a third-party evaluation of the host country's regulatory standards and rule-of-law;[144] and (3) a reformed and updated version of the existing ISDS framework. These alternatives were chosen because, first, they are representative of the few solutions that have been offered to-date

142. *Public Statement on the International Investment Regime*, OSGOODE HALL L. SCH. (Aug. 31, 2010), http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010.

143. For example, investment risk insurance, contract-based arbitration, etc.

144. John P. Gaffney, *When Is Investor-State Dispute Settlement Appropriate to Resolve Investment Disputes? An Idea for a Rule-of-Law Ratings Mechanism*, COLUMBIA FDI PERSPECTIVES, June 8, 2015, http://ccsi.columbia.edu/files/2013/10/No-149-Gaffney-FINAL.pdf.

in response to ISDS, implying that they present the most politically and logistically viable options available, and second, their basic contours can be mapped and properly evaluated.[145]

A. The Osgoode Plan

In a now somewhat outdated public statement, a group of more than fifty professors and academics ("the Osgoode Group") led by Gus Van Harten, an outspoken professor and scholar of investment treaty arbitration at Osgoode Hall Law School, decried the then-current international investment regime for "hampering . . . the ability of governments to act for their people in response to the concerns of human development and environmental sustainability."[146] Their 2010 statement echoes many of the concerns inherent in the Trojan Horse complaint,[147] including that "investment arbitration poses a serious threat to democratic choice and the capacity of governments to act in the public interest by way of innovative policy-making in response to changing social, economic, and environmental conditions."[148] As a result, the group recommends that sovereign nations review their existing IIAs with a view to renouncing or renegotiating their terms, while "strengthen[ing] their domestic justice system[s]" and in general "replac[ing] or curtail[ing] the use of investment treaty arbitration."[149] Additionally, it calls on international organizations to research and recommend alternatives to ISDS, "including private risk insurance and contract-based arbitration."[150]

Effectively, the Osgoode Group's proposal is the converse of the ICS. Where the European Commission's recommendation calls for increased global coordination in adjudicating investor-state disputes, Osgoode proposes a greater emphasis on both private ordering and the settlement of disputes by domestic tribunals. Indeed, the Osgoode Group essentially advocates for a return to the international investment structures that predated ISDS. Within the context of the TTIP agreement, then, they would argue that domestic courts in the EU and United States should hold sole authority to adjudicate the es-

145. Hence the non-consideration of a multilateral investment court system. *See supra* Part II.B.3.

146. *Public Statement on the International Investment Regime*, *supra* note 142.

147. *See supra* Part II.A.5.

148. *Public Statement on the International Investment Regime*, *supra* note 142.

149. *Id.*

150. *Id.*

timated two-thirds[151] of disputes between states and investors that involve a contractual breach, with the remainder to be resolved through private risk-insurers and other forms of private ordering (for example, social norms).

1. The Osgoode Plan as a Response to ISDS's Critiques

Because the Osgoode Plan pivots towards domestic courts, assessing it as a TTIP-centric response to ISDS will depend primarily on the circumstances present in the EU and U.S. legal systems. Dispensing with the easiest factors first, the Osgoode Plan provides a solution of sorts to the question of appellate proceedings. Eliminating ISDS would necessarily obviate the need for an ISDS-related appellate tribunal—investors mired in TTIP-related domestic court proceedings could instead access the appellate procedures available under EU and/or U.S. law. Also, the Osgoode Plan entails a substantial shift in power from investors to states. Returning to the pre-ISDS era would leave wronged investors to resort to either domestic courts, over which host countries have exclusive control, or private recompensatory schemes, in which host countries would have no vested interest. Finally, the Osgoode Plan provides a succinct answer to the Trojan Horse complaint. If investors only had recourse to host country courts, any disputes arising out of social or environmental policies would have to follow the procedures established within the country for challenging domestic regulatory policy, presumably without the possibility of corporate subterfuge.

Determining whether adjudication of investor-state disputes under the Osgoode Plan would be more consistent, predictable, and transparent, and whether domestic adjudicators would be more independent and impartial, requires a more nuanced analysis. The answers turn on whether the EU and U.S. legal systems can achieve more coherence, greater uniformity, and lower levels of corruption than ISDS offers. Given that both regions boast markedly sophisticated court systems,[152] an affirmative conclusion seems all but ordained. But consider that, under the ISDS regime, investors alleging government wrongdoing have the option to settle their disputes through either arbitration or domestic court proceedings, assuming the alleged misconduct gives rise to a cognizable claim within the host country's legal system. Put differently, the Osgoode Plan does

151. VAN HARTEN, *supra* note 134.

152. *See generally* Dakolias, *supra* note 21; ELVIRE FABRY & GIORGIO GARBASSO, "ISDS" IN THE TTIP: THE DEVIL IS IN THE DETAILS (2015), http://www.institutdelors.eu/media/ttipisds-fabrygarbasso-nejdi-jan15.pdf.

not offer investors any *additional* form of adjudication; it would simply force them down one of the two adjudicatory paths previously open to them. Assuming investors in the EU and United States prefer coherent and independent adjudicatory options, then, one would expect that they already choose domestic court proceedings over ISDS arbitrations.[153] One could therefore infer that, at least within the TTIP context, the Osgoode Plan will result in nothing more than a continuation of the status quo. Of course, without empirical data there is no way to be certain of the impact the Osgoode Plan would have on the factors identified. But, if nothing else, the foregoing analysis should cast doubt on the Osgoode Group's logic in proposing a return to the pre-ISDS era.

Similarly, the Osgoode Plan's net effect on TTIP-related adjudication costs could depend on the idiosyncrasies of the EU and U.S. domestic legal systems. Although anecdotal evidence abounds of the high costs associated with ISDS arbitrations, choosing to litigate in the TTIP countries' domestic courts might not, from a cost-savings perspective, prove a particularly welcome alternative. In the United States especially, commentators note that litigation costs have reached a "disproportionate" level compared to the rest of the world,[154] so much so that "[m]any foreign investors view the U.S. le-

153. Of course, one could plausibly counter that investors might actually *prefer* less coherent forums for dispute resolution, should they perceive that such a venue would provide them a better chance to obtain relief. However, what data is available on ISDS indicates the contrary. In the United States, for example, "foreign investors rarely pursue arbitration . . . and have never been successful when they have done so." Fact Sheet, Office of the U.S. Trade Representative, *supra* note 17. Despite annually accounting for between fourteen to twenty-one percent of the world's GDP PPP throughout the last few decades, *United States Share of World GDP based on PPP, %*, QUANDL (Oct. 6, 2016), https://www.quandl.com/data/ODA/USA_PPPSH, the United States has only been the named respondent in sixteen of the more than 500 total reported ISDS cases. *ISDS Fact Sheet*, TRANS ATL. BUS. COUNCIL (Jan. 2015), http://www.transatlanticbusiness.org/wp-content/uploads/2014/05/ISDS-Fact-Sheet.pdf. The total number of ISDS cases brought against EU Member States is significantly higher, but only twenty-four percent of those have led to an award upholding claims. *Id.* More than half of the cases brought against EU Member States in 2013 were against either Spain or the Czech Republic. U.N. Conference on Trade & Development, *World Investment Report 2014: Investing in the SDGs: An Action Plan* 125 (2014), http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf. Based on the evidence, one must conclude either that the TTIP Member States are generally less violative of investor interests than other countries or that aggrieved investors choose to pursue such disputes through alternative avenues.

154. *See, e.g.*, LAWYERS FOR CIVIL JUSTICE ET AL., LITIGATION COST SURVEY OF MAJOR COMPANIES 3 (2010), www.uscourts.gov/file/document/litigation-cost-survey-major-companies (presented to the Committee on Rules of Practice and Procedure, Judicial Conference of the United States, 2010 Conference on Civil Litigation at Duke Law School, May 10–11, 2010).

gal environment as a liability when investing in the United States."[155] That said, the Osgoode Group could argue that eliminating ISDS arbitrations in favor of domestic court proceedings would standardize the judicial process, and might thereby lead to an overall reduction in legal fees. Such an argument again assumes that investors in the EU and United States currently utilize ISDS to the exclusion of domestic courts, an assumption about which one can only speculate in the absence of any hard data. But even assuming for the sake of argument that the Osgoode Group's proposal would achieve a net decrease in the fees associated with adjudicating investor-state disputes, other problems inherent in the plan make it an unwelcome alternative to ISDS.

2. Other Complications Inherent in the Osgoode Plan

To understand the full scope of the Osgoode Plan's potential impact on TTIP, one must also consider the initial impetus for the ISDS regime and the role it currently plays in international investment. After all, a full repudiation of the ISDS system would by definition eliminate all of its benefits. As stated above,[156] the purposes of ISDS are to lower the transaction costs associated with investments, reduce investment risk, and make IIA commitments more enforceable. Theoretically, these propositions seem reasonable, given the myriad legal contingencies foreign investors would otherwise have to consider before investing in a host country.[157] Granted, these contingencies are likely to be trivial in the TTIP context, given the extensive investment history shared by the EU and United States. But there remains the possibility that the Osgoode Plan, by eliminating these beneficial aspects of ISDS, would impose additional structural costs on investors and/or discourage beneficial investments that otherwise would have occurred.

More worryingly, eliminating ISDS in favor of domestic courts and private ordering opportunities would undermine arguably the most important modern basis for international property rights. By offering a secure, sophisticated alternative to domestic courts, ISDS provides investors—even those that never institute an arbitral proceeding—with the peace of mind that their property rights will be re-

155. INT'L TRADE ADMIN., ASSESSING TRENDS AND POLICIES OF FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 7 (July 2008), http://trade.gov/media/publications/pdf/fdi2008.pdf.

156. *See supra* Part I.A.

157. For example, its unique procedural rules and statutory requirements or delays in the administration of justice.

spected, even in a foreign country. These rights form the foundation of our globalized economy, so much so that empirical studies have drawn links between the introduction of property rights in individual countries and "economic prosperity and freedom."[158] Removing ISDS, then, would reduce the likelihood that international property rights will be protected, and thereby destabilize that central tenet of the modern, integrated global economic system.

3. An Inward-Looking Approach to Outward-Facing Challenges

Much like the ICS, implementing the Osgoode Plan within the TTIP framework would require some trade-offs. Probable gains in the state sovereignty and Trojan Horse contexts, together with possible slight improvements in terms of consistency, transparency, and adjudication costs, must be balanced against foreseeable increases in investment transaction costs and reductions in both international private property protections and investor security. Viewed as a plain balancing test, the choice between these countervailing factors seems a relatively straightforward value judgment. But that perspective overlooks important contextual factors central to the entire TTIP enterprise.

By proposing a fundamentally inward-looking approach to the adjudication of investor-state disputes, the Osgoode Plan offers a solution that is countervailing to the objectives of globalization and international investment. Perhaps blinded by their "vitriolic opposition" to ISDS,[159] the Osgoode Group would have TTIP's negotiators chip away at international property rights protections, one of the central tenets of international economic law. Such a result should be abhorrent to any supporter of global economic integration. For that reason, the Osgoode Plan should only be considered as a possible substitute for ISDS under TTIP if no other system proves desirable and/or politically feasible.

B. A Rule-of-Law Ratings Mechanism

Just prior to the Commission's September 2015 release of its ICS proposal, John Gaffney wrote an article recommending an alter-

158. *See, e.g.*, Hernando De Soto, *Introduction by Hernando De Soto*, INT'L PROP. RTS. INDEX 2016, http://internationalpropertyrightsindex.org/introduction (last visited Nov. 29, 2016).

159. JOSÉ E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 345 (2011).

native solution to ISDS's troubles: the establishment of a "rule-of-law ratings mechanism" ("the Rule-of-Law Proposal").[160] Much like modern sovereign rating systems, which call upon third-party agencies to assess a country's creditworthiness based on its "capacity and willingness . . . to repay commercial debt obligations in full and on time,"[161] rule-of-law ratings would indicate whether "there is a substantial risk that the rule of law would not be upheld . . . by the domestic courts of the host country" were it to become implicated in an investment dispute.[162] Similar ratings systems are already published by a variety of sources,[163] and their proper application has been the subject of several commissions and reports, including a 2011 implementation guide published by the U.N. Department of Peacekeeping Operations and the High Commissioner for Human Rights.[164] But the Rule-of-Law Proposal would go a step further—it offers countries the opportunity to incorporate such a ranking mechanism into future IIAs and to require that investors bring future disputes through the best-ranked venue available.[165] In other words, as the quality of rule-of-law in a host country's domestic courts fluctuates relative to ISDS, investors and states would have a built-in method for determining whether investor-state disputes "should be resolved by national courts or [ISDS]."[166]

Gaffney's idea for a ratings mechanism seems to flow from a similar theoretical impression of ISDS as the Osgoode Plan—namely, that the ISDS system "suffers from flaws" that render it unworkable in its current form and that a drastic remodeling of the investor-state legal relationship is required to ensure "that investment

160. Gaffney, *supra* note 144.

161. Ashok Vir Bhatia, *Sovereign Credit Ratings Methodology: An Evaluation* 4 (Int'l Monetary Fund, Working Paper No. WP/02/170, 2002), https://www.imf.org/external/pubs/ft/wp/2002/wp02170.pdf.

162. Gaffney, *supra* note 144, at 1.

163. *See, e.g.*, WORLD JUSTICE PROJECT, *supra* note 133; *The 2015 EU Justice Scoreboard*, COM (2015) 116 final (2015).

164. U.N. DEP'T OF PEACEKEEPING OPERATIONS & OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, THE UNITED NATIONS RULE OF LAW INDICATORS: IMPLEMENTATION GUIDE AND PROJECT TOOLS (2011), http://www.un.org/en/peacekeeping/publications/un_rule_of_law_indicators.pdf.

165. In his piece, Gaffney does not define exactly how a rule-of-law ratings mechanism would be incorporated into future IIAs, or how such a mechanism would guide the forum choice for investor-state disputes. The interpretation presented above—that investors would be forced to bring disputes before the highest-ranking tribunal available—is therefore but one possibility of how an effective Rule-of-Law Proposal could theoretically be structured.

166. Gaffney, *supra* note 144, at 1.

disputes [are] resolved in accordance with the rule of law."[167] However, whereas the Osgoode Plan responds by forcing investors to always adjudicate future claims in the host country's domestic courts, the ratings mechanism would provide a creative method for determining whether, in certain circumstances, the admittedly flawed ISDS system might still be the best vehicle for settling investor-state disputes.[168] This solution also stems in part from Gaffney's prediction that developing countries' domestic court systems are more likely than their developed-country counterparts to not "satisfy" the rule-of-law ratings criteria, meaning investors in those regions will require increased protections.[169]

1. Rule-of-Law Ratings and the TTIP Agreement

Practically speaking, the Rule-of-Law Proposal would be unlikely to have much of an impact on the adjudication of TTIP-related investor-state disputes. Given the relative sophistication of the EU and U.S. courts, we would expect that most TTIP Member State's domestic court systems are already more credible, independent, and transparent options than ISDS proceedings. Therefore, assuming investors value those qualities in a legal setting,[170] these domestic courts are likely already the primary venue for investor-state dispute settlement under the current ISDS regime. Integrating the Rule-of-Law Proposal into TTIP, then, would simply codify a switch that investors have already made of their own accord, and would have no net impact on the consistency, predictability, transparency, or adjudication costs associated with investor-state dispute settlement.

That said, including a rule-of-law ratings mechanism in TTIP would likely reduce investment transaction costs by providing investors with reliable, no-cost information about potential host countries' legal systems. Such information-sharing would reduce the unknowns involved in making speculative investment decisions, and could provide investors peace of mind should they choose to invest in a TTIP

167. *Id.* at 2.

168. Critics may respond that classifying the Rule-of-Law Proposal as an "alternative" to ISDS is disingenuous or, possibly, a mischaracterization of the plan's intentions. After all, the ratings system would not do away with the ISDS regime, and in some ways might lead to its further entrenchment. However, the Rule-of-Law Proposal still represents an alternative to the current ISDS-dominated regime insofar as it would formally codify investors' forum choice calculus, requiring that they bring suit in the venue most likely to provide both parties with a fair, consistent, and transparent adjudicative process.

169. Gaffney, *supra* note 144, at 3.

170. *See supra* note 153 and accompanying text.

Member State that, for one reason or another, fails to satisfy the rule-of-law criteria.[171] Alternatively, for investors in countries with more stable court systems, the Rule-of-Law Proposal would both make clear that ISDS is a sub-optimal venue for resolving disputes and compel investors to seek out adjudication in domestic courts. Thus, the Rule-of-Law Proposal could provide a net improvement over the status quo if it can reliably indicate to investors when ISDS proceedings will prove more reliable, consistent, and independent than domestic courts.

On the other hand, the Rule-of-Law Proposal offers only partial answers to other of ISDS's critics. For example, by leaving open the possibility that claims against Hungary, Albania, and Poland (among others)[172] will remain in the currently appeal-less ISDS system, the Proposal would continue to allow the resolution of disputes without any appellate review. Similarly, incorporating rule-of-law ratings into TTIP could unequally perpetuate the state sovereignty and Trojan Horse problems, by allowing investors in worse-ranked countries to continue using ISDS to challenge public health, environmental, and social regulations. To his credit, Gaffney fully understands the ISDS-related consequences of his proposal, and writes, "[T]he development of a rule-of-law rating would have to proceed hand-in-hand with ongoing reforms of the ISDS."[173] Within the TTIP context, then, the Rule-of-Law Proposal can perhaps be best understood as an individual component of a broader reform package aimed at the entire ISDS system.[174]

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171. Though such a possibility may seem far-fetched, a recent study placed Hungary and Albania, both EU Member States and potential TTIP signatories, forty-ninth and seventy-second, respectively, in its global rule-of-law rankings, putting them behind South Africa, Ghana, and the United Arab Emirates. WORLD JUSTICE PROJECT, *supra* note 133, at 5. Additionally, at the time of this writing, the European Commission was in the early stages of an "unprecedented" investigation into the rule-of-law in Poland, after a controversial piece of Polish legislation "overhaul[ed] the constitutional tribunal" (Poland's highest court), undermining its ability to restrain executive powers. Jennifer Rankin, *Brussels Launches Unprecedented EU Inquiry into Rule of Law in Poland*, GUARDIAN (London) (Jan. 13, 2016), http://www.theguardian.com/world/2016/jan/13/ec-to-investigate-polish-governments-controversial-new-laws. A few months later, the EU granted Poland more time to solve the "constitutional crisis," stating that "it was not about to escalate its unprecedented investigation into whether government policies were threatening the rule of law." Gabriela Baczynska & Jakub Iglewski, *EU Gives Poland More Time in Rule of Law Investigation*, REUTERS, May 24, 2016, http://uk.reuters.com/article/uk-poland-constitution-eu-schinas-idUKKCN0YF17Y. Given the Commission's recent shift in focus to the Brexit, a resolution could still be several months off.

172. *See supra* note 171 and accompanying text.

173. Gaffney, *supra* note 144, at 2.

174. *See infra* Part III.C.3.

2. Other Complications Inherent in the Rule-of-Law Proposal

Adopting the Rule-of-Law Proposal within TTIP could involve significant logistical complications. The effectiveness of an international ratings system relies primarily upon its reputation, which is in turn a function of its "simplicity and comparability" as well as its "perceived analytical strength and independence."[175] A newly manufactured system, even one based on well-vetted and widely accepted criteria, will inevitably be viewed with more suspicion than, say, the centuries-old Moody's or Standard & Poor's indices. This is especially true in light of the fact that the Rule-of-Law Proposal would require, in order to be most effective, a means of weighting its overall rankings in favor of those rule-of-law-related indicators that most impact investment protection.[176]

Incorporating the Rule-of-Law Proposal into TTIP would also require that lawmakers either establish a "threshold level . . . beyond which ISDS would no longer be appropriate to resolve investment disputes,"[177] or develop a means by which a ratings agency could classify the ISDS system along the same rule-of-law parameters. Without such a benchmark, there would be no way to determine the point at which a host country's domestic courts no longer provide a more consistent, independent, and transparent venue for investor-state dispute resolution than ISDS. Either of the determinations listed above would inevitably involve a high degree of ambiguity, making it very likely that political and other non-rational concerns would come into play. Although some of these concerns might be worth considering, the current political firestorm against all things ISDS could skew the benchmarking process. If nothing else, finding acceptable solutions to each of the foregoing logistical concerns will likely take a substantial amount of compromise and trial-and-error—both of which could require more time than TTIP's negotiators are willing to spend.

Logistical problems notwithstanding, the Rule-of-Law Proposal would likely give rise to several beneficial side-effects. For example, adopting a formalized model for objectively evaluating rule-of-law in individual host countries, then tying those countries' investment futures to that same evaluation, could provide an enor-

175. Bhatia, *supra* note 161, at 3.

176. For example, in the Polish case, such a mechanism would need to determine first, whether the controversial new legislation would affect the country's overall rule-of-law, and next, whether and to what extent that legislation will specifically impact current and potential investors. *See supra* note 171.

177. Gaffney, *supra* note 144, at 2.

mous incentive for countries to improve and liberalize their domestic legal structures. Simultaneously, the "threat" of being forced to resort to the old ISDS system if their domestic courts fail to satisfy a rule-of-law rating might encourage host countries to continue working to improve and reform ISDS. In that way, one could argue that the Rule-of-Law Proposal introduces a creative solution to the current ISDS controversy. It occupies a clever middle-ground between the countervailing needs of protecting state sovereignty and ensuring investor security, all while maintaining a distinctly globalized outlook regarding the cross-border investment agenda.

3. A Finite Improvement

On its own, the Rule-of-Law Proposal would not do much to alter the scope of investor-state dispute resolution under TTIP. Although it would help reduce investment unknowns while compelling investors to utilize the optimal forum for dispute resolution, without simultaneous reforms of ISDS, the Proposal risks perpetuating the sovereignty, Trojan Horse, and appellate mechanism problems inherent in the current system. However, assuming such reforms are plausible and that the logistical problems with establishing an effective rule-of-law ratings mechanism can be overcome, a ratings mechanism could prove a hitherto untapped source of legitimacy and creative problem solving in the realm of investor-state disputes.

C. Reforming the Existing ISDS Framework

Arguably the most obvious "alternative" framework for investor-state dispute resolution would be a reformed and updated version of the existing ISDS regime. However, in order for such an option to prove viable under TTIP, especially given ISDS's recent run of unpopularity amongst EU and U.S. lawmakers and citizens, it must provide practicable reforms addressing each of its seven critiques, namely that ISDS is: (1) nontransparent; (2) costly; (3) neither independent nor impartial; (4) detrimental to state sovereignty and regulatory authority; (5) an enabler of Trojan Horse-type challenges; (6) inconsistent and unpredictable; and (7) lacking an appellate mechanism. By introducing into the ISDS system a few straightforward reforms, each falling under one of four broad categories, lawmakers could fully address all of these concerns while simultaneously revitalizing the public's perception of investor-state dispute resolution.

1. Transparency

If EU and U.S. lawmakers choose to keep ISDS in TTIP, they should follow the European Commission's example and mandate that any future arbitrations follow the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.[178] As noted above,[179] the UNCITRAL Rules provide the most state-of-the-art regulatory model available, representing the work of the world's foremost diplomats and scholars of international law. Additionally, negotiators should incorporate into TTIP and other future BITs specific language "[g]uaranteeing the transparency of the [dispute-resolution] process, including access by the public, the posting of documents, and the ability of arbitration panels to summon outside experts and parties of interest to make submissions."[180] Not only would doing so establish consistent and ambitious standards of accountability and openness in future investor-state arbitrations—thereby increasing the possibility that future arbitrators' decisions would be more impartial and independent—it would also represent to EU and U.S. citizens a new commitment to transparency in ISDS.

2. Cost-Reduction Strategies

Arguably, the ICS's most appealing innovation is its streamlined, standardized approach, which incorporates "clear procedural deadlines to ensure fast dispute settlement and to keep costs low."[181] However, standardizing the settlement process will, by definition, destroy the benefits conferred by ISDS's ad hoc structure, including, most notably, the right of both parties to a dispute to compromise on a non-partisan arbitral panel. But if TTIP's negotiators adopted three straightforward structural reforms, they could reduce the costs associated with the existing ISDS regime while preserving the benefits derived from the regime's essential nature. Those reforms are: (1) imposing a cap on ISDS's administrative fees; (2) establishing minimum-business requirements; and (3) introducing procedural safeguards against frivolous claims.

First, TTIP's negotiators could impose caps on ISDS's ad-

178. Such a mandate, in order to seem legitimate, could automatically invalidate any awards handed down by an arbitral tribunal that fails to comply with UNCITRAL's transparency requirements. UNCITRAL Rules on Transparency, *supra* note 75.

179. *See supra* Part II.A.2.

180. SAPIRO, *supra* note 13, at 17.

181. European Commission Fact Sheet, *supra* note 69.

ministrative fees. Taking the ICSID rules as a guide, negotiators might mandate a maximum daily fee payable to arbitrators. These daily fee caps have proven extremely successful in the ICSID context, and are credited with reducing ICSID's median tribunal costs by nearly twenty-four percent compared to UNCITRAL.[182] Adopting similar constraints in TTIP would ensure against out-of-control administrative costs while reducing the possibility of arbitrator corruption in the decision-making process, thus increasing the likelihood that arbitrators will render their decisions in an independent and impartial manner.

Second, the TTIP agreement could be drafted to require that investors, as a prerequisite to filing an ISDS suit against a particular host country, have a significant business presence within that country. Defining what constitutes "significant" might get contentious, but should center on objective measurements of either the investor's market share within the host country or the percentage of the investor's overall business conducted within the host country. This dual-operative definition will allow both MNEs and SMEs alike to have potential access to ISDS, while ensuring that investors with only a very minor stake in the host country are not able to bring Trojan Horse suits aimed at derailing the state's regulatory processes.

Finally, certain procedural safeguards could be included in TTIP to ensure the speedy resolution of frivolous or otherwise non-meritorious claims. For example, TTIP's negotiators could embrace CETA's approach, which includes a "fast track system" for non-meritorious claims to be thrown out "at [the Tribunal's] first session or promptly thereafter", ideally within a matter of weeks.[183] Additionally, they might consider adopting mandatory fee-shifting provisions aimed at discouraging investors from bringing claims with no reasonable chance of success on the merits. These provisions should be modeled after the "British" rule, "which requires the losing party to pay the winning party's costs in addition to his own."[184] In addition to safeguarding against frivolous and non-meritorious claims,

182. Hodgson, *supra* note 98.

183. Comprehensive Economic and Trade Agreement, *supra* note 118, at arts. 8.32–8.33; *see also* EUR. COMM'N, INVESTMENT PROVISIONS IN THE EU-CANADA FREE TRADE AGREEMENT (CETA) (Sept. 26, 2014), http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf.

184. Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 VAND. L. REV. 1069, 1071 (1993). Although most commentators agree that a pro-plaintiff fee-shifting rule (i.e. one in which only prevailing plaintiffs recover fees) best aligns the interests of both plaintiffs and defendants and "generates the greatest incentive to comply with the law," *id.*, the specific circumstances of ISDS (and the rampant claims that the system unduly inhibits state sovereignty) make the British rule a better option within this context.

such a fee-shifting regime would also protect state sovereignty and deter Trojan Horse suits. Under the British rule, states that feel as though an ISDS claim infringes upon their legitimate regulatory rights need not worry about the costs associated with defending their position, given that they can recoup those costs upon their successful resolution of the dispute.

3. Regulatory Safeguards

If TTIP's negotiators want to retain the ISDS regime, they will need to find a credible, persuasive way to convince the agreement's member States that investor-state disputes will not inhibit their regulatory powers. The most obvious way to do so would be to reaffirm in the text of the agreement the right of the EU and United States to adopt regulatory measures dealing with specific social, environmental, and health concerns. Although deciding how to formulate such a reaffirmation could get contentious, the "legitimate policy objectives" language employed by General Agreement on Tariffs and Trade ("GATT") and the Agreement on Technical Barriers to Trade ("TBT Agreement"), not to mention the Commission's ICS proposal, provides a well-known, heavily litigated, and relatively permissive jumping-off point.[185] EU and U.S. diplomats will likely wrangle over whether to include concepts like "social protection" and "protection of cultural diversity" under the legitimacy umbrella,[186] but those discussions hardly seem divisive enough to derail the negotiations. Importantly, the agreement should also stipulate that investor claims which disregard the "legitimate policy objectives" language will be placed on the "fast track" to dismissal. Establishing a zero-tolerance policy would both reassure states of their sovereignty and prevent any attempt by investors to initiate a Trojan Horse suit.

4. A Multilateral ISDS Appellate Mechanism

Most of the reforms proposed so far have already been incorporated, in full or in part, into existing BITs.[187] But if ISDS is to re-

185. *See supra* note 118 and accompanying text.

186. SAPIRO, *supra* note 13, at 12.

187. The 2012 U.S. Model BIT, for example, introduced ISDS provisions related to transparency, third-party participation, and dispute prevention. 2012 Model BIT, *supra* note 122. In addition, CETA, the freshly negotiated trade and investment agreement between the European Union and Canada, incorporates into its ISDS structure even more stringent transparency requirements than the U.S. Model BIT, Comprehensive Economic and Trade Agreement, *supra* note 118, art. 8.36, along with a prohibition of parallel proceedings in

main the primary mechanism for solving investor-state disputes, it must develop a novel, workable system for appellate review. As discussed in Part II.B.2, above, the ICS's novel proposition for a bilateral EU-U.S. appellate tribunal could prove dangerous if the judge-selection process were to be captured by state interests. Indeed, any appellate mechanism borne of a bilateral investment agreement risks such capture, given that its terms and procedures must inevitably be decided by a tiny consortium of at least nominally likeminded states. Furthermore, future investor-complainants may not have an opportunity to raise their concerns during the drafting process of a bilateral agreement, especially if, unlike TTIP, it "suffers" from a substantial lack of media attention. The solution, as is so often the case in the realm of international law, is to think bigger.

A multilateral investment appeals court, the rough parameters for which could be based on the Rome Statute of the International Criminal Court,[188] would address each of the foregoing concerns. Broadening the membership of the court by situating it within a multilateral agreement would make the judge-selection process more democratic, thus alleviating some of the concerns over capture. Though judges would still be appointed by the states, the importance of the appointments and the sheer number of states involved in the selections process would both deter the nomination of partisan candidates and encourage investors to lobby their host government regarding its voting decision.[189] Moreover, the court's jurisdiction could be subject to certain limitations, much like the ICC's, in order to ensure that neither states nor investors would be forced into an unfair adjudicatory process. For example, parties to an investor-state dispute might be required to both agree, prior to the initial arbitration, whether or not their eventual settlement will be subject to appellate review.[190] In addition, the appellate court's charter could be drafted so

domestic courts, *id.* arts. 8.22, 8.24, and a fast-track system for rejecting frivolous investor claims. *Id.* arts. 8.32–8.33.

188. *See* Rome Statute, *supra* note 136.

189. Critics will likely argue that adding more States Parties to the court would do little to affect the possibility of capture. They might also claim that, even if investors could affect their host government's nomination and voting decisions, they would not be properly incentivized to spend the time and money to do so. These critiques have some merit, but only if considered in a vacuum. Given the choice between a bilateral appellate court (like the ICS) and a multilateral one, the latter clearly provides a substantially better opportunity at avoiding capture.

190. Such a clause could mirror Rule A-1 of the American Arbitration Association's 2013 Optional Appellate Arbitration Rules. AMERICAN ARBITRATION ASS'N, OPTIONAL APPELLATE ARBITRATION RULES 5 (Nov. 1, 2013), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2016218&revision=latestreleased.

as to respect domestic courts' jurisdiction[191] over strict contractual disputes and require consolidation of related cases,[192] which would both protect state sovereignty and cut down on incidences of parallel proceedings.[193]

Such an investment appeals court would also promote increased consistency and predictability in future investor-state disputes. By beginning the process of developing an international body of investment law, the court could help drive the jurisprudential debate regarding, for example, the scope of the Most-Favored Nation clause and the definition of "unfair and inequitable treatment."[194] The publication and awareness of this body of law would only be helped along by sensible transparency requirements, like those recommended in Part III.C.1, above. In addition, the court's decisions would effectively act as binding precedent on even ad hoc arbitral tribunals, whose settlement decisions could be subject to reversal if antithetical to the court's guidance. This precedential case law would greatly increase the predictability of ISDS awards, while simultaneously incentivizing arbitrators to think twice before basing arbitral decisions on partisan or biased arguments, given the possibility that their decisions could be publicly criticized by a well-respected group of their own peers.

Of course, a multilateral appellate court's precedential value would diminish if states and investors were given the opportunity to opt out of appellate review, as proposed above. Worse, were the court's judges to sense this possibility, they might modulate their decision-making to ensure the court's continued relevance. This problem offers no easy answer, but there are reasons to believe its effect will not be too severe. First and foremost, if a multilateral appellate body is coupled with comprehensive transparency and reporting re-

191. *Cf.* Rome Statute, supra note 136, art. 17(1)(a) (establishing that the International Criminal Court is bound by the principle of complementarity, meaning it may only assert jurisdiction over a criminal matter in the absence of domestic proceedings).

192. *ICC Rules of Arbitration*, INT'L CHAMBER OF COMMERCE art. 10(c), http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/ (last visited Dec. 2, 2016) (providing for the unilateral consolidation of general commercial arbitrations when "the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible").

193. Katia Yannaca-Small, *Improving the System of Investor-State Dispute Settlement* (OECD Working Papers on Int'l Inv., Paper No. 2006/01, 2006), https://www.oecd.org/china/WP-2006_1.pdf (discussing the dangers of parallel proceedings and forum shopping in investor-state dispute settlement mechanisms, and arguing that the consolidation of like cases is a desirable, if logistically challenging, solution).

194. *See supra* Part I.A.

quirements, then arbitral decisions that are unsound or against precedent will be readily identifiable. Though that will not help the affected parties, future disputants will know to avoid those particular arbitrators (or risk aberrant results). In fact, the very presence of a widely accepted body of applicable law will likely dissuade arbitrators from making divergent decisions, lest they torpedo their own career.[195] Additionally, the evidence cited above[196] suggests that both states and investors are predisposed to prefer more consistent and predictable forms of investor-state adjudication. Therefore, so long as the court is not blatantly biased in either states' or investors' favor, most disputants will opt into its jurisdictional purview.

5. Timing and Political Will

Two additional concerns spring to mind when considering the foregoing reforms, especially the multilateral appellate court: timing and political will. As to timing, the relevant question is whether the proposed reforms can make it through the negotiation process in time for the signing of the TTIP agreement. Given that the transparency requirements, cost-reduction strategies, and state regulatory safeguards have some precedent in international negotiations of this type and would require nothing more than bilateral commitments from the TTIP Member States, they should be negotiable in time for TTIP. The multilateral appellate mechanism, on the other hand, is another story entirely.

Negotiations over the ICC took about two and a half years and only began after protracted debates in the U.N. surrounding the "ICC issue."[197] Still, diplomats widely viewed the passage of the Rome Statute as a near-miracle, and after the confirmation vote "abandoned themselves to cheers and chants, tears and embraces, and

195. All ISDS regimes allow the complainant and respondent-state to jointly select their arbitrators, either by agreeing on a single arbitrator or by each appointing one arbitrator to a three-arbitrator panel, then empowering those individuals to appoint a third. LATEK, *supra* note 23, at 3. Thus, arbitrators have very little long-term job security, at least within the arbitration field. Making all arbitral decisions public through comprehensive transparency requirements would, as a result, provide an important check on arbitrator decision-making—an arbitrator's career prospects could very well depend on the quality of his or her reasoning in any given dispute.

196. *See supra* note 153 and accompanying text.

197. John Washburn, *The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century*, 11 PACE INT'L L. REV. 361, 362–63 (1999); *see also* Fanny Benedetti & John L. Washburn, *Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterward on the Rome Diplomatic Conference*, 5 GLOBAL GOVERNANCE 1 (1999).

rhythmic stomping and applause."[198] Even if we assume that a multilateral investment appeals court would have the same diplomatic and popular backing—and given the recent contentiousness of ISDS, that would be quite a stretch—practically speaking there is simply not enough time to get it done for TTIP. President Barack Obama will leave office in January 2017, and the EU's top negotiator, Cecilia Malmström, has publicly stated that she hopes to have completed talks by that time.[199]

As to political will, even if TTIP's negotiators believed the ISDS system could be reformed, they would almost certainly refuse to consider it. ISDS has become an enormously hot-button topic in recent years,[200] and any politician making an even remotely ISDS-oriented proposal to the TTIP agreement risks getting caught up in the cultural and media backlash. Nor has this resistance been limited solely to ISDS. In early 2016, the German Association of Judges came out against the Commission's ICS proposal, arguing that there was "neither a legal basis nor an actual need for such a court," and that "creating special courts for certain groups of litigants would be a mistake."[201] Of course, negotiators could try to rename ISDS or initiate an advertising campaign to rehabilitate its image, but the prevailing political wisdom seems to indicate that the system is a lost cause.[202]

6. Theory Meets Practice

Taken as a whole, the foregoing analysis presents quite a conundrum. Only a very few practicable, common-sense reforms are needed in order for ISDS to answer nearly all of the critiques that have been hurled at it. Adopting new rules on transparency and cost-control would together increase the consistency and independence of ISDS adjudications, while updated language on sovereignty would effectively safeguard states' regulatory rights. If coupled with a multilateral appeals mechanism and rule-of-law ratings, these reforms could usher in a new era of legitimacy and effectiveness in the realm of investment law. But public sentiment regarding ISDS remains at

198. Washburn, *The Negotiation of the Rome Statute*, *supra* note 197, at 361.

199. Christopher Ziedler, *Malmström: We Can Finish TTIP During the Obama Administration*, EURACTIV (Nov. 16, 2015), http://www.euractiv.com/section/trade-society/interview/malmstrom-we-can-finish-ttip-during-the-obama-administration.

200. *See supra* Part I.A.

201. *TTIP Trade Talks*, *supra* note 11 (internal quotation marks omitted).

202. *Id.*

an all-time low,[203] and the world's political leaders have proven themselves unwilling to consider any option even remotely related to the existing system.[204] TTIP's negotiators are therefore stuck in a sort of limbo—though incorporating an updated and reformed ISDS system into the TTIP agreement theoretically presents the best available alternative to the current regime, only a miraculous shift in public perception would render that option practicable.

CONCLUSION

It would be tempting to argue, given the futility of supporting a reformed version of ISDS for TTIP, that the Commission's ICS proposal presents the best available compromise. The analysis in Part II above indicated that the ICS will likely usher in improvements in transparency, cost-control, and regulatory security, and the plan was drafted and has the backing of one of the major diplomatic bodies involved in the negotiations. Might TTIP's negotiators be better off, then, incorporating the ICS into the agreement, securing that progress, and continuing to work towards a more lasting solution to the problems inherent in investor-state dispute adjudications?

Put simply, the answer is no. If ISDS's current straits should teach us anything, it is that public opinion regarding government systems can rapidly deteriorate in the apparently contentious realm of investment protection. And if the ICS—the Commission's appointed standard-bearer for the future of investor-state relations and an intended trial-run for an international investment court—fails to live up to expectations, it might jeopardize similar future diplomatic projects. The risk that ICS's judges would be beholden to state interests, and that the Commission's proposal would thereby unduly reallocate too much adjudicatory power to the states, is simply too great for TTIP's negotiators to chance it.

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203. Simon Lester, *The ISDS Controversy: How We Got Here and Where Next*, INT'L CTR. FOR TRADE & SUSTAINABLE DEV. (June 1, 2016), http://www.ictsd.org/opinion/the-isds-controversy-how-we-got-here-and-where-next; *Commission Staff Working Document, Report: Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, at 9, 14 (Jan. 13, 2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf (detailing the results of an online public consultation regarding TTIP and ISDS, which received responses from an "unprecedented" number of EU citizens and revealed "widespread opposition to [ISDS] in TTIP or in general").

204. Julie Levy-Abegnoli, *No TTIP Deal with ISDS, Warns Parliament*, PARLIAMENT MAG. (May 7, 2015), https://www.theparliamentmagazine.eu/articles/news/no-ttip-deal-isds-warns-parliament.

In the absence of any viable alternative, then, TTIP's negotiators should follow the Osgoode Group's advice and grant courts in the EU and United States primary authority to adjudicate whatever investor-state disputes are cognizable under domestic law, while leaving the remainder to private ordering. They might also attach a clause noting that the agreement's investment protection provisions would be subject to renegotiation if TTIP's member states were to agree to a more permanent solution in the future. After all, in order to be ratified, the TTIP agreement will need a plan for dealing with investment protection and investor-state disputes. And despite the many drawbacks associated with a return to the pre-ISDS era,[205] such a strategy would take arguably the most contentious issue off the table, making it easier for negotiators to come to terms on a bilateral agreement poised to generate overall economic gains in excess of €119 billion (approximately $129 billion) for the EU and €95 billion (approximately $103 billion) for the United States.[206]

Meanwhile, diplomats could begin working on more viable long-term strategies for solving future investor-state disputes, most notably through the creation of an international appellate body. If these efforts prove successful, the reformed version of ISDS laid out above could then be reintroduced into future BITs, assuming the widespread antipathy felt towards the system subsides over time. Despite its current predicament, an updated take on ISDS offers the best prospects for solving the current problems in the investor-state dispute resolution system and represents the optimal path forward for international investment law.

*Robert W. Schwieder**

205. *See supra* Part III.A.3.

206. JOSEPH FRANCOIS ET AL., REDUCING TRANSATLANTIC BARRIERS TO TRADE AND INVESTMENT: AN ECONOMIC ASSESSMENT, at vii (2013), http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf; *see supra* note 83 and accompanying text.

* J.D. Candidate, Columbia Law School, Class of 2017; L.L.M. Candidate, The London School of Economics and Political Science, Class of 2017. The author would like to thank Professor Petros Mavroidis for his invaluable assistance and feedback.