
WHY THE “DEMOLITION DERBY” THAT SEEKS TO DESTROY INVESTOR-STATE ARBITRATION?*

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INTRODUCTION

For nearly six decades, States have entered into approximately 3,000 bilateral investment promotion and protection treaties (“BITs”) and some multilateral treaties (“MITs”), which possess the same dual purposes as the North American Free Trade Agreement (“NAFTA”) and the Energy Charter Treaty (“ECT”). They have been signed, ratified, and entered into force for mutual benefit: investment in the States party to the BIT or MIT is mutually encouraged, in good part by each State party guaranteeing the other State party’s investors an acceptable level of legal protection, usually consisting of “fair and equitable treatment” (“FET”), “full protection and security” (“FPS”), specific rules governing compensation for expropriation, and, via a “most-favored-nation clause” (“MFN”), the same overall level of legal protection as is accorded to nationals of other States with whom the respondent State party to the BIT or MIT has similar treaties in force.

Key to the nationals of each State party who invest in the other State is the mechanism for enforcing those protections, which is known as investor-State arbitration, or investor-State dispute settlement (“ISDS”). As most treaty parties do not wish their nationals investing abroad to be compelled to dispute with the host State over whether the involved treaty has been breached decided by a national court of the host State, the parties agree in the BIT or the MIT that any dispute between a national of one party investing in the other party will be decided by, typically, a three-person arbitral tribunal, to which each party to the dispute—the investor and the host State—appoints one arbitrator. The third person, who is to chair the arbitration, is appointed by the other two arbitrators, or by the parties to the dispute, or—failing success in that effort for a stated period of time—by an agreed “appointing authority.” All three members of the arbitral tribunal are required and pledge to be independent and impartial to the arbitrating parties.

“Demolition Derby”¹ takes several forms:

States, particularly those which have lost ISDS arbitrations or are appalled at the notion that the host States’ national policies can be judged by foreigners even though the host States are acting pursuant to a treaty in force between them and the States of foreign investors, in recent years have:

(1) “Interpreted” a MIT in a way that effectively removed an essential protection and was decried “as an attempted amendment” by a former President of the International Court of Justice (bilateral “interpretations” of BITs are also pursued);²

(2) Denounced the Washington Convention, which established a World Bank International Centre for Settlement of Investment Disputes (“ICSID”) as a special regime for ISDS to which 162 States are today Signatory and Contracting Parties³ and is written into many BITs and some MITs;⁴

(3) Denounced BITs and MITs to which they have been parties;⁵

(4) Offered and negotiated new BITs and MITs that went so far as to eliminate FET or reduce the scope of its protection to the presumably lesser level of protection afforded to aliens by customary international law; eliminate MFN; limit FPS to physical protection, thus excluding “legal” protection; or eliminate ISDS altogether;⁶ and

(5) Reserved to the host State the ability to prevent implementation of ISDS even where it is included in a BIT and allowed the two States to abort the process where an arbitral tribunal has already been constituted.⁷

1. “Demolition Derby” is defined as “a motorsport . . . [typically consisting] of five or more drivers competing by deliberately ramming their vehicles into one another. The last driver whose vehicle is still operational is awarded the victory.” *Demolition Derby*, WIKIPEDIA, https://en.wikipedia.org/wiki/Demolition_derby (last updated Sept. 14, 2018, 1:41 AM) (footnotes omitted).

2. See Second Opinion of Professor Sir Robert Jennings, Q.C. at 6, *Methanex Corp. v. United States*, (NAFTA Ch. 11 Arb. Trib. Sept. 10, 2001); NAFTA Free Trade Comm’n, *North American Free Trade Agreement: Notes of Interpretation of Certain Chapter 11 Provisions*, SICE FOREIGN TRADE INFO. SYS. (July 31, 2001), http://sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp (“The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”); *infra* Section I.A.

3. *Database of ICSID Member States*, INT’L CTR. FOR SETTLEMENT INV. DISPS., <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> (last visited Sept. 20, 2018).

4. See Energy Charter Treaty, art. 26(4), Dec. 17, 1994, 34 I.L.M. 381; North American Free Trade Agreement, Can.-Mex.-U.S., art. 1120(1), Dec. 17, 1993, 32 I.L.M. 289; *infra* Section I.B.

5. See *infra* Section I.B.

6. See *infra* Section I.B.

7. See *infra* Section I.C.

I. WHY DO THE STRONGEST RULE-OF-LAW STATES INSIST ON DESTROYING THE RULE OF LAW PROTECTING THEIR NATIONALS INVESTING ABROAD?

A. *POPE & TALBOT INC. v. CANADA*

Perhaps what opened the eyes of the international arbitration community the earliest was what happened in the NAFTA case of *Pope & Talbot Inc. v. Canada*. The American Claimant commenced arbitration against Canada, claiming that Canada had violated the NAFTA Chapter 11 requirement that investment in Canada be given “fair and equitable treatment.”⁸ Actually, as Professor Kenneth J. Vandavelde, a former attorney in the Legal Adviser’s Office of the U.S. Department of State who was much involved in negotiating treaties on behalf of the United States, has stated in his book, *U.S. International Investment Agreements*,

Full protection and security had been identified as an element of customary international law since the interwar FCNs, [that is, treaties of Friendship, Commerce and Navigation] though it was then called “most constant protection and security.” During the 1950s, with the concept of an international minimum standard under attack, the United States had moved away from references to customary law in its FCNs and sought to establish new standards of a requirement of fair and equitable treatment and a prohibition on arbitrary and discriminatory treatment to complement the most constant protection and security standard.⁹

However, the Canadian Government argued to the *Pope & Talbot* Tribunal that, as written in NAFTA, FET could mean no more than the lower level of treatment accorded to alien investors under customary international law.¹⁰ The Tribunal, deciding whether or not Canada had breached its NAFTA obligation to accord *Pope & Talbot* “fair and equitable treatment,” ruled unanimously for the Claimant, expressly rejecting Canada’s argument as “patently absurd.”¹¹ Just over three months later, that “patently absurd” interpretation was adopted by the three NAFTA State parties as an official interpretation binding under NAFTA¹² pursuant to Articles 2001 and 1131, which promptly was denounced by Judge Sir Robert Jennings, then recently

8. *Pope & Talbot Inc. v. Canada*, Award on the Merits of Phase 2, ¶ 105 (Apr. 10, 2001), 7 ICSID Rep. 102 (2001).

9. KENNETH J. VANDELDELDE, *U.S. INTERNATIONAL INVESTMENT AGREEMENTS* 263 (2009). *See also* TODD WEILER, *THE INTERPRETATION OF INTERNATIONAL INVESTMENT LAW: EQUALITY, DISCRIMINATION AND MINIMUM STANDARDS OF TREATMENT IN HISTORICAL CONTEXT* 250–75, 129–240 (2013).

10. *Pope & Talbot Inc.*, 7 ICSID Rep. ¶¶ 108–09.

11. *Id.* ¶ 118.

12. NAFTA Free Trade Comm’n, *supra* note 2.

President of the International Court of Justice, “as an attempted amendment that has no binding effect.”¹³

In the end, very little, if anything, was achieved by the NAFTA State parties adopting the official interpretation prompted by the *Pope & Talbot* case. Both “fair and equitable treatment” and “customary international law” are what Professor W. Michael Reisman has described as “‘evaluation rules,’ . . . [which] establish a goal that is expressed at some level of generality.”¹⁴ Evaluation rules are contrasted with “[v]erification rules:”

[B]inary, “either-or rules.” Beyond that binary information, the factual and normative universe to which the person charged with applying the rules may turn is strictly confined to a few explicit variables, none of which includes general evaluative concepts such as fairness, equity, justice, minimum order, efficiency, or even common sense.¹⁵

Professor Reisman further concluded that “[b]ecause each instance of application of evaluation rules such as FET and MST [that is, minimum standard of treatment] re-instantiates them in different contexts, they can scarcely avoid evolving, *a fortiori*, as social, economic, technological, moral, and ethical variables change.”¹⁶ In other words, the community of States is constantly making and remaking customary international law. Subsequent NAFTA ISDS tribunals have felt bound to pay official lip service to the so-called “interpretation.”¹⁷ But as was said later in *Mondev v. United States* by Professor James Crawford, Judge Stephen Schwebel, and The Right Honourable Sir Ninian Stephen—an unusually distinguished Tribunal—customary international law evolves:

The Respondent noted that there was some common ground between the parties to the present arbitration in respect of the FCT’s [sic] interpretations, namely, “that the standard adopted in Article 1105 was that as it existed in 1994, the international standard of treatment, as it had developed to that time . . . like all customary international law, the international minimum standard has evolved and can evolve . . . the sets

13. Second Opinion of Professor Sir Robert Jennings, Q.C. at 4, *Methanex Corp. v. United States*, (NAFTA Ch. 11 Arb. Trib. Sept. 10, 2001).

14. W. Michael Reisman, *Canute Confronts the Tide: States vs. Tribunals and the Evolution of the Minimum Standard in Customary International Law*, 109 AM. SOC. OF INT’L L. ANN. MEETING PROCS. 125, 125 (2015).

15. *Id.*

16. *Id.* at 127.

17. See, e.g., *ADF Grp. Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award, ¶ 178, (Jan. 9, 2003), 6 ICSID Rep. 470 (2003); *Grand River Enters. Six Nations, Ltd. V. United States*, Award, ¶¶ 175–76, (Jan. 12, 2011), <https://www.state.gov/documents/organization/156820.pdf>; *Apotex Holdings Inc. v. United States*, ICSID Case No. ARB(AF)/12/1, Award, ¶¶ 9.3–9.4 (Aug. 25, 2014), IIC 661 (2014).

of standards which make up the international law minimum standard, including principles of full protection and security, apply to investments.” Moreover in their written submissions, summarised in paras. 107–108 above, both Canada and Mexico expressly accepted this point. . . .

The Tribunal agrees. For the purposes of this Award, the Tribunal need not pass upon all the issues debated before it as to the FTC’s interpretations of 31 July 2001. But in its view, there can be no doubt that, by interpreting Article 1105(1) to prescribe the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party under NAFTA, the term “customary international law” refers to customary international law as it stood no earlier than the time at which NAFTA came into force. It is not limited to the international law of the 19th century or even of the first half of the 20th century, although decisions from that period remain relevant. In holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for “fair and equitable” treatment of, and for “full protection and security” for, the foreign investor and his investments. Correspondingly the investments of investors under NAFTA are entitled, under the customary international law which NAFTA Parties interpret Article 1105(1) to comprehend, to fair and equitable treatment and to full protection and security.¹⁸

In fact, as will be seen, Canada, the United States, and the European Union (“EU”) are the chief sponsors today of the ISDS “Demolition Derby.”

B. ANTI-ISDS ACTIVITIES AROUND THE WORLD

First, however, there are further examples of various other States’ contributions to the ISDS “Demolition Derby.”

In Bolivia, the Evo Morales government rejected investor-State dispute settlement at its core, and in 2007, Bolivia became the first State to withdraw from the ICSID Convention.¹⁹ In 2009, language was introduced into the country’s Constitution authorizing the denunciation of all international treaties contrary to the constitutional text within a four-year period.²⁰ And,

18. *Mondev Int’l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, ¶¶ 124–25 (Oct. 11, 2002), 6 ICSID Rep. 192 (2004) (footnotes omitted).

19. Damon Vis-Dunbar, Luke Eric Peterson & Fernando Cabrera Diaz, *Bolivia Notifies World Bank of Withdrawal from ICSID, Pursues BIT Revisions*, BILATERALS.ORG (May 9, 2007), <https://bilaterals.org/?bolivia-notifies-world-bank-of&lang=fr>.

20. CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, transitory provision IX (Bol.) (“The international treaties existing prior to the Constitution, which do not contradict it, shall be maintained in

as promised, by 2013, all twenty-one of Bolivia’s BITs had either expired or been denounced.²¹

Venezuela, the second most frequent Respondent State in ISDS cases²² since the rise of the Hugo Chávez (now Maduro) regime, denounced the ICSID Convention on January 24, 2012.²³ Prior to that, it denounced its BIT with the Netherlands on November 1, 2008.²⁴

In 2017, Argentina, Brazil, Paraguay, and Uruguay, as Mercosur members, signed a Protocol on Investment Cooperation and Facilitation, which contains no ISDS provision, leaving their foreign investors to the tender mercies of the host States’ national courts, State-to-State negotiations or, ultimately, State espousal of their nationals’ claims in State-to-State arbitration.²⁵ For the first time in 15 years, Argentina has negotiated a new BIT, however, with Qatar, which, while providing for ISDS,²⁶ expressly restricts FET and FPS to the customary international law standard of such protection.²⁷

Australia has eschewed the inclusion of ISDS in its Free Trade

the internal legal order with the rank of law. Within the period of four years after the election of the new Executive Organ, the Executive shall renounce and, in that case, renegotiate the international treaties that may be contrary to the Constitution.”), translated in *Constitute: Bolivia (Plurinacional State of)’s Constitution of 2009*, CONSTITUTE PROJECT (Jan. 17, 2018, 3:49 PM), https://www.constituteproject.org/constitution/Bolivia_2009.pdf?lang=en.

21. ALDO ORELLANA LÓPEZ, NETWORK FOR JUST. GLOBAL INV., BOLIVIA DENOUNCES ITS BILATERAL INVESTMENT TREATIES AND ATTEMPTS TO PUT AN END TO THE POWER OF CORPORATIONS TO SUE THE COUNTRY IN INTERNATIONAL TRIBUNALS 6 (2014), <http://justinvestment.org/wp-content/uploads/2014/07/Bolivia-denounces-its-Bilateral-Investment-Treaties-and-attempts-to-put-an-end-to-the-Power-of-Corporations-to-sue-the-country-in-International-Tribunals1.pdf>.

22. UNCTAD, *Investment Dispute Settlement Navigator*, INV. POL’Y HUB, <http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry> (last visited Sept. 21, 2018). As of August 2018, Venezuela has appeared as the respondent in forty-four cases, exceeded only by Argentina, which has appeared as the respondent in sixty cases. *Id.*

23. Vera De Brito de Gyarfas & Alberto F. Ravell, *Venezuela’s Exit from the ICSID Convention Casts a Shadow on Foreign Investment*, LEXOLOGY (Sept. 1, 2012), <https://lexology.com/library/detail.aspx?g=5ed0fd84-f857-4935-ab6f-d011b7eb8a93>.

24. UNCTAD, *Netherlands – Venezuela, Bolivarian Republic of BIT (1991)*, INV. POL’Y HUB, <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/2668> (last visited Sept. 21, 2018).

25. Damien Charlotin & Luke Eric Peterson, *Analysis: In New Mercosur Investment Protocol, Brazil, Uruguay, Paraguay and Argentina Radically Pare Back Protections, and Exclude Investor-State Arbitration*, INV. ARB. REP. (May 4, 2017), <https://iareporter.com/articles/analysis-in-new-mercotur-investment-protocol-brazil-uruguay-paraguay-and-argentina-radically-pare-back-protections-and-exclude-investor-state-arbitration>.

26. The Reciprocal Promotion and Protection of Investments Between the Argentine Republic and the State of Qatar, Arg.-Qatar, art. 14, Nov. 6, 2016, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5383>.

27. *Id.* art. 3(4)–(5).

Agreements (“FTA”) with Japan,²⁸ Malaysia,²⁹ and the United States,³⁰ but has included it in BITs with both China³¹ and Korea.³² Moreover, a case has been reported of a U.S. investor requesting the Government of Australia to agree to *ad hoc* arbitration, despite the absence of ISDS provisions in the U.S.-Australia FTA.³³

Brazil, which has a long history of never entering into BITs, has started to negotiate Cooperation and Facilitation Agreements that do not provide ISDS.³⁴ It recently negotiated one BIT with India that eliminates FET and MFN.³⁵

In contrast, Indonesia has remained a Contracting Party to the ICSID Convention but publicly announced in 2014 that it would terminate or renegotiate its investment treaties.³⁶ To date, Indonesia has terminated or let expire twenty-nine of its eighty-three BITs.³⁷

Ecuador, perhaps the most extreme case, denounced the ICSID

28. Japan-Australia Economic Partnership Agreement, Austl.-Japan, July 8, 2014, <https://dfat.gov.au/trade/agreements/in-force/jaepa/full-text/Documents/jaepa-chapters-1-to-20.pdf>.

29. Malaysia-Australia Free Trade Agreement, Austl.-Malay., May 22, 2012, <https://dfat.gov.au/trade/agreements/in-force/mafta/Documents/Malaysia-Australia-Free-Trade-Agreement.pdf>.

30. Australia-United States Free Trade Agreement, Austl.-U.S., May 18, 2004, https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf.

31. Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China, Austl.-China, art. 9, June 17, 2015, <https://dfat.gov.au/trade/agreements/in-force/chafta/official-documents/Documents/chafta-agreement-text.pdf>.

32. Korea-Australia Free Trade Agreement, Austl.-S. Kor., ch. 11, Apr. 8, 2014, <https://dfat.gov.au/trade/agreements/in-force/kafta/official-documents/Documents/KAFTA-chapter-11.pdf>.

33. Douglas Thomson, *Florida Investor to Ask Australia to Arbitrate*, GLOBAL ARB. REV. (Oct. 6, 2016), <http://globalarbitrationreview.com/article/1069026/florida-investor-to-ask-australia-to-arbitrate>.

34. Paulo Macedo Garcia Neto, *Investment Arbitration in Brazil: The Landscape of Investment Arbitration in Brazil and Why Brazil Should Become a More Important Player in the Investment Arbitration Arena*, in INVESTMENT PROTECTION IN BRAZIL 3, 4–8 (Daniel de Andrade Levy et al. eds., 2013).

35. Joel Dahlquist, *Brazil and India Conclude Bilateral Investment Treaty*, INV. ARB. REP. (Nov. 28, 2016), <https://iareporter.com/articles/brazil-and-india-conclude-bilateral-investment-treaty>.

36. Ben Bland & Shawn Donnan, *Indonesia to Terminate More than 60 Bilateral Investment Treaties*, FIN. TIMES (Mar. 26, 2014), <https://ft.com/content/3755c1b2-b4e2-11e3-af92-00144feabdc0>.

37. UNCTAD, *Indonesia: Bilateral Investment Treaties (BITs)*, INV. POL'Y HUB, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/97> (last visited Sept. 21, 2018). Indonesia is, however, revising its model BIT and has maintained several negotiations for bilateral and multilateral economic agreements. See Int'l Trade Admin., U.S. Dep't of Trade, *Indonesia - 2-Bilateral Investment Agreements*, EXPORT.GOV (Aug. 1, 2017), <https://export.gov/article?id=Indonesia-bilateral-investment-agreements>.

Convention in 2009.³⁸ In addition, it has denounced twenty-six BITs.³⁹ Its most recent wave of BIT denunciations was based on a 668-page report the Ecuadorian government had requested on the subject from the Ecuadorian Citizens’ Commission for a Comprehensive Audit of Investment Protection Treaties and of the International Arbitration System on Investments (“CAITISA”), a “citizens’ commission’ established by President Correa in 2013 to perform an audit of the country’s BITs.”⁴⁰ The CAITISA report recommended the termination of all of Ecuador’s BITs. The report noted that Ecuador has not benefited from the BIT regime and has been held liable to pay investors billions of dollars in damages. The BITs in their current form, according to the report, were biased toward investors. The report also recommended the exclusion of ISDS from new treaties, creation of a permanent investment court, exclusion of FET, FPS, and MFN from new treaties, and the inclusion of substantive obligations of investors to respect international human rights and social rights.⁴¹

CAITISA’s findings may be questioned, especially considering that at least two members of the commission are renowned critics of ISDS.⁴² The commission was chaired by none other than Cecelia Olivet, a non-Ecuadorian who co-authored *Profiting from Injustice* (a 2012 anti-ISDS diatribe of Dutch and Belgium non-governmental organizations). Another member of CAITISA, Professor Muthucumaraswamy Sornarajah, is an Australian national, a notoriously anti-ISDS academic, and the C. J. Koh Professor at the National University of Singapore.⁴³

Ecuador’s recent move to terminate its BITs “does not, of course, sweep

38. Tom Jones, *Ecuador Bids Goodbye to BITs*, GLOBAL ARB. REV. (May 17, 2017), <http://globalarbitrationreview.com/article/1141801/ecuadorbidsgoodbyetobits> [hereinafter Jones, *Bids Goodbye*].

39. See *id.* In 2008, Ecuador “terminated BITs with Romania and eight Latin American and Caribbean states.” *Id.* On May 16, 2017, Rafael Correa, the former President of Ecuador, signed a series of decrees that terminated sixteen BITs with Argentina, Bolivia, Canada, Chile, China, France, Germany, Italy, the Netherlands, Peru, Spain, Sweden, Switzerland, the United Kingdom, the United States and Venezuela. *Id.* Correa had also previously terminated a BIT with Finland in 2013. *Id.* See also Javier Jaramillo & Camilo Muriel-Bedoya, *Ecuadorian BITs’ Termination Revisited: Behind the Scenes*, KLUWER ARB. BLOG (May 26, 2017), <http://kluwerarbitrationblog.com/2017/05/26/ecuadorian-bits-termination-revisited-behind-scenes>.

40. Jones, *Bids Goodbye*, *supra* note 38.

41. *Id.*

42. *Id.*

43. For examples of Olivet’s and Sornarajah’s anti-ISDS views, see generally PIA EBERHARDT & CECELIA OLIVET, *PROFITING FROM INJUSTICE* (Helen Burley ed., Nov. 2012) and Muthucumaraswamy Sornarajah, *The Case Against a Regime for International Investment Law*, in REGIONALISM IN INTERNATIONAL INVESTMENT LAW 275 (Leon E. Trakman & Nicola W. Ranieri eds., 2013).

away pending arbitration claims against the government.”⁴⁴

Commentators have criticized the legal justifications behind Ecuador’s recent move to terminate its BITs. In 2008, Ecuador enacted a new Constitution that included Article 422: “Treaties or international instruments where the Ecuadorian State yields its sovereign jurisdiction to international arbitration, in contractual or commercial disputes, between the State and natural persons or legal entities cannot be entered into”⁴⁵

Ecuador’s new constitution and local law require both a binding favorable opinion of Ecuador’s Constitutional Court and approval by the State’s National Assembly in order for Ecuador to denounce certain treaties.⁴⁶ According to Jaramillo and Muriel-Bedoya, “[t]his process was followed and the Constitutional Court considered that all the BITs were incompatible with article 422, a flawed conclusion that would apparently legitimize the termination proceedings.”⁴⁷ Article 422 forbade Ecuador from entering into international treaties that relinquished jurisdiction to international arbitration, but only with respect to “*contractual or commercial disputes*.”⁴⁸ Thus, according to Jaramillo and Muriel-Bedoya:

[T]he Constitutional Court did not consider that international *investment* arbitration is a very different animal from international *commercial or contractual* arbitration. In general terms, the former addresses breaches of international law, particularly of international standards protected by a BIT (e.g. fair and equitable treatment, full protection and security, most-favored-nation treatment, etc.), while the latter focuses on contractual breaches of a commercial nature, which do not necessarily derive in breach of international law. Tribunals have historically pointed out these differences in several awards.

. . . .

The National Assembly replicated the Constitutional Court’s unconstitutionality argument without distinguishing that the Constitution does not forbid international *investment* arbitration. Likewise, the National Assembly considered that the 2008 Constitution represents a *fundamental change of circumstances* and, misunderstanding article 62 of the Vienna

44. Zoe Williams, *Ecuador Round-up: As Remaining Bilateral Investment Treaties Are Terminated, New Developments Come to Light in ICSID and UNCITRAL Cases*, INV. ARB. REP. (May 22, 2017), <https://iareporter.com/articles/27453>.

45. Jaramillo & Muriel-Bedoya, *supra* note 39.

46. *Id.*

47. *Id.*

48. *Id.* (emphasis in original).

Convention on the Law of Treaties, it also justified the termination of the BITs under that provision.⁴⁹

Jaramillo and Muriel-Bedoya note that, contrary to the National Assembly, local Ecuadorian law “does not entirely replace the international obligations that a treaty protects, even if similar standards are conceived.”⁵⁰ Furthermore, they argue that “a neutral dispute resolution mechanism is of utmost importance for foreign investors and, when it comes to Ecuadorian courts, unfortunately they are not particularly known for their celerity, and neither for not being politicized or interventionist.”⁵¹

There are signs that Ecuador now is backpedaling. Ecuador’s new Minister for Foreign Trade, Pablo Campana, has said: “[i]n order to secure private direct investment, we must have BITs.”⁵² Thus, Ecuador has sent a proposal to fifteen countries inviting them to renegotiate the cancelled bilateral investment treaties “and urging them to accept a new model BIT that requires resolution of disputes by arbitration in the region.”⁵³ Also, Ecuador launched a website that highlights the damages it has avoided in every arbitration since 2008:⁵⁴ “[f]rom 2008 to date, the state says it has avoided 83% of the total amount claimed against it – a total of US\$14.7 billion.”⁵⁵ The extent to which Ecuador will reverse its investment protection policy remains to be seen.

India reacted quickly to its loss in *White Industries Australia Limited v. Republic of India*, which determined that the Indian judicial system had not afforded the Australian coal mining claimant “effective means” for enforcing an approximately US\$6 million award from an International Chamber of Commerce (“ICC”) arbitral tribunal.⁵⁶ Most recently, a slew of claims concerning retroactive tax measures have garnered much attention.⁵⁷ India is

49. *Id.*

50. *Id.*

51. *Id.*

52. Tom Jones, *Ecuador in Treaty U-turn Under New Leader?*, GLOBAL ARB. REV. (Oct. 17, 2017), <https://globalarbitrationreview.com/article/1149016/ecuador-in-treaty-u-turn%E2%80%8E-under-new-leader> [hereinafter Jones, *U-turn*].

53. Tom Jones, *Ecuador Begins Talks Over New BITs*, GLOBAL ARB. REV. (Feb. 23, 2018), <https://globalarbitrationreview.com/article/1159285/ecuador-begins-talks-over-new-bits> [hereinafter Jones, *Begins Talks*].

54. *Procesos Internacionales: Arbitrajes de Inversión; Comerciales y Juicios Internacionales*, PROCURADURÍA GENERAL DEL ESTADO, <http://www.pge.gob.ec/index.php/2014-10-01-02-32-39/cifras-relevantes-2> (last visited Sept. 21, 2018).

55. *Id.*; Jones, *Begins Talks*, *supra* note 53.

56. *White Indus. Austral. Ltd. v. Republic of India*, IIC 529 (2011), Final Award, ¶¶ 11.4.19–20, 16.1.1(a) (Nov. 30, 2011).

57. Alison Ross, *India’s Termination of BITs to Begin*, GLOBAL ARB. REV. (Mar. 22, 2017), <http://globalarbitrationreview.com/article/1138510/indias-termination-of-bits-to-begin>.

currently defending twenty-four investment cases as respondent.⁵⁸

India sent “notices of termination” to fifty-eight countries with which it has BITs and proposed to twenty-five other State Parties with which it also has BITs that they issue a “joint interpretation” of those BITs so as to align them with a new Indian Model BIT formulated in 2015.⁵⁹ The Indian Model BIT eliminates FET, applies instead the customary international law standard of treatment of aliens, limits FPS to physical protection (not legal security), and permits ISDS only if local remedies are exhausted and produced no result within five years.⁶⁰ To date, twenty-two Indian BITs have been effectively terminated.⁶¹

India’s move to terminate its network of BITs arguably conflicts with the current administration’s campaign to attract foreign investment. India’s Prime Minister, Narendra Modi, announced his “Make in India” campaign in September 2014, which was pitched as “a new major national programme designed to transform India into a global manufacturing hub.”⁶²

South Africa, a respondent in only two ISDS proceedings,⁶³ has denounced nine BITs⁶⁴ with Western European countries while looking to

58. UNCTAD, *supra* note 22.

59. Ross, *supra* note 57.

60. *Id.*; Gov’t of India Ministry of Fin. Dep’t of Econ. Aff. Inv. Div., Office Memorandum (Feb. 8, 2016), http://indiainbusiness.nic.in/newdesign/upload/Consolidated_Interpretive-Statement.pdf; Joel Dahlquist & Luke Eric Peterson, *Analysis: In Final Version of Its New Model Investment Treaty, India Dials Back Ambition of Earlier Proposals—But Still Favors Some Big Changes*, INV. ARB. REP. (Jan. 3, 2016), <https://iareporter.com/articles/analysis-in-final-version-of-its-new-model-investment-treaty-india-dials-back-ambition-of-earlier-proposals-but-still-favors-some-big-changes>.

61. UNCTAD, *India: Bilateral Investment Treaties (BITs)*, INV. POL’Y HUB, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/96> (last visited Sept. 24, 2018).

62. *Modi’s “Make in India”: Bold Policy or a Mere Rebranding?*, ECONOMIST: INTELLIGENCE UNIT (Oct. 31, 2014), <http://country.eiu.com/article.aspx?articleid=1862448770&Country=India&topic=Economy&subtopic=Forecast> (internal quotation marks omitted). *See also* Nicholas Peacock & Nihal Joseph, *Mixed Messages to Investors as India Quietly Terminates Bilateral Investment Treaties with 58 Countries*, HSF PIL NOTES (Mar. 16, 2017), <http://hsfnotes.com/publicinternationallaw/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries>.

63. Engela C. Schlemmer, *An Overview of South Africa’s Bilateral Investment Treaties and Investment Policy*, 31 ICSID REV. 167, 188–89 & n.108 (2016) (identifying these proceedings as a confidential arbitration in terms of the Switzerland–South Africa BIT, terminated 31 August 2014, and *Foresti v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Award (August 4, 2010), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C90/DC1651_En.pdf).

64. UNCTAD, *South Africa: Bilateral Investment Treaties (BITs)*, INV. POL’Y HUB, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/195> (last visited Sept. 24, 2018). Africa terminated BITs with Austria on Oct. 31, 2014, with Belgium–Luxembourg on Mar. 13, 2013, with Denmark on Aug. 31, 2014, with France on Oct. 31, 2014, with Germany on Oct. 31, 2014, with the Netherlands on Apr. 30, 2014, with Spain on Dec. 22, 2013, with Switzerland on Oct. 31, 2014, and with United Kingdom on Oct. 31, 2014.

revise its policy regarding such treaties. In December 2015, the South African President approved the Protection of Investments Act, 2015 (No. 22) as part of its new policy regarding foreign investments,⁶⁵ raising parallels with the ongoing European debate concerning the Transatlantic Trade and Investment Partnership ("TTIP").

While South Africa has moved to terminate its BITs with Western European countries, such actions should not necessarily be interpreted as a broader revolt against investor-State arbitration. Thus far, no termination policy has been adopted in respect of South Africa's BITs currently in force with other African States including the South Africa-Zimbabwe BIT,⁶⁶ the South Africa-Mauritius BIT,⁶⁷ the South Africa-Nigeria BIT,⁶⁸ the South Africa-Senegal BIT,⁶⁹ and the SADC Investment Protocol.⁷⁰ There are also a number of South African BITs signed with other African countries that at present have not entered into force.⁷¹ The South African Government has not, to date, announced a negative position regarding these BITs either.

Because South Africa is a heavy capital-exporter to neighboring countries,⁷² its Government may conclude that its investors in the African region should have the right to investor-State arbitration. These considerations may not be the same with respect to the Western European treaties it terminated because it may have feared being on the receiving end of an investment treaty claim. In this regard, the South African

65. UNCTAD, *Protection of Investment Act Approved*, INV. POL'Y HUB (Dec. 13, 2015), <http://investmentpolicyhub.unctad.org/IPM/MeasureDetails?id=2828&rgn=&grp=&t=&s=&pg=&c=&dt=&df=&isSearch=false>.

66. UNCTAD, *South Africa*, *supra* note 64 (entered into force on Sept. 15, 2010).

67. *Id.* (entered into force on Oct. 23, 1998).

68. *Id.* (entered into force on July 27, 2005).

69. *Id.* (entered into force on Dec. 29, 2010).

70. UNCTAD, *South Africa: Treaties with Investment Provisions (TIPs)*, INV. POL'Y HUB, <http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/195#iiaInnerMenu> (last visited Sept. 24, 2018) (entered into force on Apr. 16, 2010).

71. UNCTAD, *South Africa*, INV. POL'Y HUB, <http://investmentpolicyhub.unctad.org/iiacountrybits/195#iiaInnerMenu> (last visited Sept. 24, 2018). South Africa has signed BITs that have not yet entered into force with Mozambique, Sudan, Yemen, Ethiopia, Guinea, Madagascar, Congo, United Republic of Tanzania, Gabon, Angola, Democratic Republic of Congo, Equatorial Guinea, Libya, Tunisia, Rwanda, Algeria, Uganda, Egypt, and Ghana. *Id.*

72. GAR *Know-How: Investment Treaty Arbitration 2016 South Africa*, GLOBAL ARB. REV. § 11, <http://globalarbitrationreview.com/jurisdiction/2000154/south-africa> (last visited June 26, 2018).

The termination process will likely follow a regional pattern, starting with BITs with EU States. BITs with Austria, Denmark, France, the UK, Belgium/Luxembourg, Spain, Germany, the Netherlands and Switzerland have recently been terminated and terminations of other EU BITs are expected. There is, however, uncertainty over the fate of South Africa's BITs with other African States as South Africa is a capital exporter to Africa. A political decision on its African BITs has not yet been made.

Id.

Government's behavior does not differ from some of the historically strongest capital-exporting States that have made an "about-face" and are now abandoning the investment legal system they always supported prior to themselves becoming respondents in investor-State arbitrations. This shift exemplifies a larger *Zeitgeist* with States across the macroeconomic spectrum now adopting a "bunker" mentality and denouncing the entire notion of international dispute resolution solely to ward off potential liability.⁷³

EU Member States also have retreated from their dispute settlement obligations under investment promotion and protection treaties. In May 2015, the Italian Government announced its withdrawal from the ECT effective January 1, 2016.⁷⁴ Italy's withdrawal coincided with an increasing wave of ISDS claims against Italy under the ECT challenging modifications to Italy's solar energy programs.⁷⁵ In February 2016, Poland, which has sixty BITs in force⁷⁶ and was at the time involved in eleven reported ISDS arbitrations with claims against it totaling as much as US\$2.3 billion,⁷⁷ announced that it was seeking to cancel its BITs with other EU Member States on the ground that such treaties drive up legal costs.⁷⁸ In March 2016, Denmark, which has forty-seven BITs in force⁷⁹ and which is not involved in any reported arbitrations, proposed mutual termination to its European BIT counterparties.⁸⁰ News reports indicate that Denmark is motivated by fear of future cases against it and that the Danish business community does

73. See generally Charles N. Brower & Sarah Melikian, "We Have Met the Enemy and He Is Us!" *Is the Industrialized North "Going South" on Investor-State Arbitration?*, 31 *ARB. INT'L L* (2015) for the proposition that the current atmosphere of fear and hysteria recalls the New International Economic Order movement, which caught hold but then quickly dissipated over forty years ago.

74. Gaetano Iorio Fiorelli, *Italy Withdraws from Energy Charter Treaty*, *GLOBAL ARB. NEWS* (May 6, 2015), <http://globalarbitrationnews.com/italy-withdraws-from-energy-charter-treaty-20150507>; *Italy No Longer Member of Energy Charter Treaty, Hopes to Avoid More Arbitrations*, *GLOBAL INV. PROTECTION* (June 1, 2016), <http://www.globalinvestmentprotection.com/index.php/italy-no-longer-member-of-energy-charter-treaty-hopes-to-avoid-more-arbitrations>.

75. Fiorelli, *supra* note 74.

76. UNCTAD, *International Investment Agreement Navigator*, *INV. POL'Y HUB*, <http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu> (last visited Aug. 24, 2018).

77. Marta Waldoch & Maciej Onoszko, *Poland Plans to Cancel Bilateral Investment Treaties with EU*, *BLOOMBERG* (Feb. 25, 2016), <https://www.bloomberg.com/news/articles/2016-02-25/poland-seeks-to-end-bilateral-investment-deals-with-eu-members>.

78. *Id.*

79. UNCTAD, *International Investment Agreement Navigator*, *supra* note 76.

80. Joel Dahlquist & Luke Eric Peterson, *Investigation: Denmark Proposes Mutual Termination of Its Nine BITS with Fellow EU Member States, Against Spectre of Infringement Cases*, *INV. ARB. REP.* (May 2, 2016), <https://www.iareporter.com/articles/investigation-denmark-proposes-mutual-termination-of-its-nine-bits-with-fellow-eu-member-states-against-spectre-of-infringement-cases>.

not, to a large extent, depend on BITs for its foreign investments.⁸¹ So far, both Estonia and Slovenia have indicated that in principle they are agreeable to mutual termination of their BITs with Denmark.⁸²

C. THE 2012 UNITED STATES MODEL BIT

Going back to the chief villains in this "Demolition Derby," we have already mentioned the egregious action of the United States, Canada, and Mexico in issuing the famous "interpretation" calculated to bind NAFTA tribunals to apply the interpretation of FET that was unanimously rejected as "patently absurd" by the *Pope & Talbot* Tribunal.

The United States also produced a new Model BIT in 2012 notwithstanding the fact that it has never (thus far) lost a NAFTA arbitration.⁸³ Annex B, titled "Expropriation,"⁸⁴ covers an entire page and defines "direct expropriation,"⁸⁵ "indirect expropriation,"⁸⁶ and what "cannot constitute an expropriation."⁸⁷ Moreover, while Article 21(2) titled, "Taxation," provides that "Article 6 [Expropriation] shall apply to all taxation measures,"⁸⁸ claimants alleging that a taxation measure constitutes expropriation are barred from arbitrating their claim unless they first submit the dispute to the two State parties' respective "competent . . . authorities"⁸⁹ (in the case of the United States, the Assistant Secretary of the Treasury (Tax Policy)), and those authorities fail to "agree that the taxation measure is not an expropriation" within 180 days.⁹⁰ In other words, if the two States agree within 180 days that the claimant has not been subject to expropriation, that is the end of the claim and the claimant is wholly deprived of impartial and independent third-party arbitration of its claim.

Furthermore, Article 14 invites each State Party to list in Annexes I, II, and III any existing measures in that State that do not conform to the BIT's requirements of most-favored-nation treatment and national treatment, its prohibition of certain performance requirements, and its prohibition of

81. *Id.*

82. *Id.*

83. *See generally* OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, 2012 U.S. MODEL BILATERAL INVESTMENT TREATY (2012).

84. *Id.* Annex B.

85. *Id.* Annex B, para. 3.

86. *Id.* Annex B, para. 4.

87. *Id.* Annex B, para. 2.

88. *Id.* art. 21(2).

89. *Id.* art. 21(2)(a).

90. *Id.* art. 21(2)(b).

certain interferences with senior management and boards of directors.⁹¹ Those listed measures then are exempted from application of the BIT. Worse still, Article 31, labeled “Interpretation of Annexes,”⁹² provides that a tribunal “shall, on the request of the respondent, request the interpretation of the Parties on the issue” whenever “a respondent asserts as a defense that the measure alleged to be a breach is within the scope of an entry set out in Annex I, II or III.”⁹³ The Article further provides that the Parties “shall submit in writing any joint decision declaring their interpretation to the tribunal within 90 days”⁹⁴ and that any such joint decision “shall be binding on the tribunal”⁹⁵ whose “decision or award . . . must be consistent”⁹⁶ with it. Thus, once more, the power of decision is returned to the States. Finally, Article 30(3) allows the States party to the BIT to issue a “joint decision” through each State’s respective representative “declaring their interpretation of a provision of this Treaty [that] shall be binding on a tribunal, and [which] decision or award issued by a tribunal must be consistent with that joint decision.”⁹⁷ And those are only three of the more egregious anti-investor provisions in that Model BIT.⁹⁸

D. THE EUROPEAN UNION AND CANADA

Canada and the EU are responsible for giving life to the proposed Investment Court System employing fifteen “Judges,” all to be appointed by the States party to the Comprehensive Economic and Trade Agreement (“CETA”)—so far, other than Canada, only Vietnam has agreed to this type of court with the EU. Of the fifteen Judges, five must be from Canada, five from EU Member States, and five from other States. Moreover, only those five from other States are eligible to serve as President and Vice President. The Investment Court System would include a tribunal of first instance whose decisions on the law and the facts would be subject to review by an appeals tribunal. The tribunal of first instance would consist of three Judges, all selected by the President of the Tribunal—not by the litigants—from the roster of fifteen Judges. There would be increasingly strict requirements for those arbitrators selected to serve on the roster—including a requirement that candidates refrain from participating in other arbitrations in most

91. *Id.* art. 14.

92. *Id.* art. 31.

93. *Id.* art. 31(1).

94. *Id.*

95. *Id.* art. 31(2).

96. *Id.*

97. *Id.* art. 30(3).

98. *See generally* Brower & Melikian, *supra* note 73.

capacities—and additional third-party rights, including the right to intervene through amicus curiae submissions.⁹⁹

Not all Canadians believe that this entirely State-appointed Court is a good idea. Investors have preferred ISDS for decades because they have an equal voice with the Respondent State in composing the tribunal that will decide their claim. As the Honorable Marc Lalonde, holder successively of four Ministerial portfolios in the Cabinet of Prime Minister Pierre Elliott Trudeau (who is the father of Canada’s current Prime Minister Justin Trudeau), declared in 2015,

Canada, which is very keen to achieve a major trade agreement between the EU and Canada before the U.S.—TTIP. And Canada caved in before the EU demands for structural reforms in the decision-making process regarding foreign investors’ claims under investment treaties. . . . For Canada, trade trumped investments.¹⁰⁰

Not all States are enchanted by a permanent court either. For example, according to a Factsheet published by the European Commission on July 10, 2017, the United Nations Commission on International Trade Law (“UNCITRAL”) “has agreed to initiate work on possible multilateral reform of investment dispute settlement including the possible establishment of a multilateral investment court.”¹⁰¹ In an unofficial report of the Fiftieth Session of the UNCITRAL on July 10, 2017 in Vienna, Nikos Lavranos reported that the United States “and in particular Japan, strongly questioned the need for such urgent work on reforming the ISDS in such a radical manner.”¹⁰² Japan views the proposed permanent court as “a ‘world legislator’ being in a position to decide highly sensitive and important issues without any accountability.”¹⁰³ Besides the United States and Japan, there were a handful of States “that, while not openly opposing the mandate, were lukewarm—at least at this point in time—about the idea of moving towards

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

100. Marc Lalonde, Address at the American Society of International Law Annual Meeting: Arbitrating the Public Interest, (Mar. 30–Apr. 2, 2016), <https://www.asil.org/resources/audio/2016-annual-meeting>.

101. EUROPEAN COMM’N, FACTSHEET 1 (2017), http://trade.ec.europa.eu/doclib/docs/2017/July/tradoc_155744.pdf. See also Douglas Thomson, *UNCITRAL to Examine Further Reforms of ISDS*, GLOBAL ARB. REV. (July 12, 2017), <http://globalarbitrationreview.com/article/1144340/uncitral-to-examine-further-reforms-of-isds>.

102. Nikos Lavranos, *The Outcome of the UNCITRAL July 2017 Meeting: The First Steps Towards a Multilateral Investment Court (MIC)*, WÖSS & PARTNERS NEWSLETTER (Wöss & Partners, Washington, D.C.) Aug. 7, 2017, at 5.

103. *Id.* at 6.

a MIC [Multilateral Investment Court].”¹⁰⁴ These States were “China, Russia, Singapore, South Korea, Thailand, Vietnam, New Zealand and Australia,” and they “all stress[ed] that the outcome of the efforts of the UNICTRAL [sic] Working Group should not be prejudged towards the MIC and that all options should be considered.”¹⁰⁵ Russia and South Korea cautioned against throwing away years of ISDS experience, only to replace it with “something which may create new problems.”¹⁰⁶ The United Kingdom (“U.K.”), while not opposing the new UNCITRAL mandate, “was considerably more cautious towards moving forward the reform efforts compared to the other EU member states.”¹⁰⁷

It should be pointed out that the selection of international judges by States or a combination of States is an intensely political affair. In the EU’s overall concept of an International Investment Court, as reflected in CETA, the EU appoints five judges, its treaty partner appoints five, and together they appoint five from other countries. In CETA itself, with ten Provinces in Canada, from the Maritimes to the intensely francophone Québec, through Ontario to the prairie Provinces, all the way to Vancouver, the jockeying for “one’s own” to be appointed, the political trade-offs potentially involved, and the incidental connections that may propel a candidate of little suitability for the appointment to the fore, all bespeak a highly political process. How much more so when the EU’s twenty-seven (after Brexit is complete) Member States compete for five seats on the Court? And the rest of the world, namely, all the countries that are neither Member States of the EU nor its treaty partner? Where will those judges come from? The fact that only the five appointees from outside the EU Member States and the EU’s treaty partner can serve as President or Vice-President of the Court or preside over the three-member tribunals of first instance, gives to such countries a powerful hand within the Investment Court. Make no mistake about it: if you are an investor, you prefer your traditionally equal role in the formation of the tribunal that will judge your case, and do not want your case decided by the retired national judges, retired civil servants, out-of-office politicians, and their friends, who, in the authors’ considered view, are the persons most likely to be selected by States at the end of the process.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 7.

II. CUTTING OFF THE NOSE TO SPITE THE FACE

On May 31, 2017, in the British Virgin Islands, John Beechey, a former Secretary-General of the International Chamber of Commerce's International Court of Arbitration, described the efforts by himself and Lord Goldsmith QC—representative of the London Court of International Arbitration ("LCIA") and the Chartered Institute of Arbitrators, as well as a former Attorney General of the United Kingdom—to persuade the EU institutions to give consideration to the arbitral community's views on ISDS. Paraphrasing Lord Goldsmith QC's remarks, Beechey said,

a "depressing feature" of the debate was that "no one at the European Commission or at the European parliament was even prepared to give the arbitral community a hearing. Their minds were closed. Any solution was weighted in favour of the clamour of an anti-arbitration lobby long on inflammatory rhetoric and emotion and very short on fact and substance."¹⁰⁸

So why is all of this happening? Why are States selling out their own nationals desirous of traditional legal protections when they invest abroad? The answer is that this is a populist trend inspired by fear, by some countries' and their citizens' objections to a rule of law that is not "home-grown," and determinedly by left-wing intellectuals and allied non-governmental organizations who are proceeding in the face of the established facts.

There is also much ado about "fake news" of late that exacerbates certain issues. To be accurate, one must define their terms if they expect to be understood with precision. So-called "fake news" is a label attached to an undeniable truth by a person who refuses to accept that truth. There is also "genuinely fake news" that aims to distract the public as well as legislators and treaty negotiators from the real truth by advancing myths and fairy tales that all too frequently plague the ISDS reform dialogue. Before addressing those tall tales, however, what are the established facts?

A. STATISTICS SHOW THAT STATES WIN A MAJORITY OF ISDS CASES

From 1987 through 2017, 548 ISDS cases were concluded.¹⁰⁹ Of those cases, 37% were decided in favor of the State (the claims were dismissed either for lack of jurisdiction or on the merits) and 28% were decided in favor of the investor.¹¹⁰ Furthermore, 23% of the 548 cases were settled, 10% were

108. *Dark and Light Mood Music*, GLOBAL ARB. REV. (June 20, 2017), <https://globalarbitrationreview.com/article/1143291/dark-and-light-mood-music>.

109. UNCTAD, INVESTOR-STATE DISPUTE SETTLEMENT: REVIEW OF DEVELOPMENTS IN 2017, at 5 (2018), http://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf.

110. *Id.* at 6.

discontinued, and in 2% of the cases there was a finding of liability, but no damages were awarded.¹¹¹

Statistics from ICSID based on cases it administered in the half-century from the first case it registered in 1972 until June 30, 2017 reveal a similar result. Of all of the disputes submitted to ICSID under the ICSID Convention and Additional Facility Rules, claims were upheld in part or in full in 30.6%, all claims were dismissed on the merits in 17%, jurisdiction was declined in 16.2%, the claims were found to be manifestly without legal merit in 0.6%, the parties settled by way of an agreement which was embodied in an award in 5%, the proceedings were discontinued at the request of both parties in 16.8%, the proceedings were discontinued at the request of one party in 9.1%, the proceedings were discontinued for lack of payment of the required advances in 3.2%, the proceedings were discontinued at the initiative of the Tribunal in 0.2%, and 1.3% of the cases were discontinued for failure of the parties to act.¹¹² Thus States came away scot-free in 33.8% of the cases, claimants succeeded (wholly or partially) in 31.3% of cases, while the remaining 35.6% of the cases submitted either resulted in settlements (5%) or were discontinued (30.6%) (which in some cases may have reflected a settlement).

The statistics are even more favorable for EU Member States. Of all of the disputes submitted to ICSID under the ICSID Convention and Additional Facility Rules involving an EU Member State as of April 30, 2017, the tribunal dismissed all claims in 36.6%, the tribunal upheld claims in part or in full in 24.4%, the tribunal declined jurisdiction in 17.1%, the proceedings were discontinued at the request of both parties in 7.3%, the proceedings were discontinued at the request of one party in 2.4%, a settlement agreement was embodied in an award at the parties' request in 4.9%, the proceedings were discontinued for lack of payment of the required advances in 4.9%, and in 2.4% of disputes the proceedings were discontinued for failure of the parties to act. In other words, in 53.7% of disputes the respondent-EU State succeeded in persuading the tribunal either to decline jurisdiction or to dismiss the claims on their merits, whereas claimants succeeded in less than half that number of cases (24.4%), while 21.9% were either settled (4.9%) or discontinued (17%) (which in some cases also may have reflected a settlement).¹¹³

111. *Id.*

112. INT'L CTR. FOR SETTLEMENT INV. DISP., THE ICSID CASELOAD – STATISTICS: ISSUE 2018-2, at 14 (2018), [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-2%20\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-2%20(English).pdf).

113. INT'L CTR. FOR SETTLEMENT INV. DISP., THE ICSID CASELOAD – STATISTICS, SPECIAL FOCUS

B. OVERREACTING TO CASES

Despite these statistics confirming that States win in a majority of investment cases, there frequently is an overreaction whenever a State is sued under an investment agreement. One example of such an overreaction was the first NAFTA arbitration under Chapter 11 against Canada, *Ethyl Corporation v. Government of Canada*. That case involved a bill that was introduced in the Canadian Parliament in May of 1995 and was enacted as the Methylcyclopentadienyl Manganese Tricarbonyl (“MMT”) Act on April 25, 1997. It prohibited the commercial importation of, and interprovincial trade in, MMT, a fuel additive. Ethyl commenced NAFTA arbitration proceedings in April 1997, arguing that the measure was illegitimate and discriminatory. Canada argued that while MMT was designed to increase octane in gasoline, it affected emission control on automobiles, thereby presenting an environmental hazard due to manganese becoming airborne.¹¹⁴

The arbitration was short-lived. Following the Tribunal’s unanimous ruling in June 1998 confirming its jurisdiction,¹¹⁵ the case was settled for US\$13 million.¹¹⁶ The decision confirming the Tribunal’s jurisdiction came less than two weeks after a domestic Canadian panel convened under Canada’s Agreement on Internal Trade (“AIT”) (concluded by the national Government with its Provinces and Territories) undermined Canada’s position in defending the *Ethyl* case. The Government of Alberta had commenced proceedings under the AIT alleging that the MMT Act failed to comply with Canada’s obligations under the AIT. The Governments of Québec, Nova Scotia, and Saskatchewan intervened as complainants in support of Alberta. A majority of the AIT panel hearing the case ruled that the MMT Act was inconsistent with certain provisions of the AIT and recommended that Canada remove the inconsistencies and, pending such removal, “that [Canada] suspend the operation of the *Act* with respect to interprovincial trade.”¹¹⁷ Canada was left without a leg on which to stand

–EUROPEAN UNION: APRIL 2017, at 14 (2017), [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%20EU\(English\)April%202017.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%20EU(English)April%202017.pdf).

114. Luke Eric Peterson & Kendra Magraw, *Looking Back: Ethyl v. Canada Case Drew Early Public Attention to Previously Obscure Arbitration Process, and Settled After Tribunal’s Jurisdiction Ruling*, INV. ARB. REP. (Mar. 21, 2017), <https://www.iareporter.com/articles/looking-back-ethyl-v-canada-case-drew-early-public-attention-to-previously-obscure-arbitration-process-and-settled-after-tribunals-jurisdiction-ruling>. See also John Geddes, *Ethyl Sues Ottawa for US\$200M over MMT Ban*, FIN. POST, Sept. 11, 1996, at 6.

115. See generally *Ethyl Corp. v. Gov’t of Canada*, Award on Jurisdiction (June 24, 1998), 7 ICSID Rep. 12 (1998) (affirming jurisdiction over Canada’s objections).

116. Michael Valpy, *How Free Trade Threatens Democracy*, GLOBE AND MAIL (Apr. 9, 2001), <https://www.theglobeandmail.com/opinion/how-free-trade-threatens-democracy/article760604>.

117. AGREEMENT ON INTERNAL TRADE: REPORT OF THE ARTICLE 1704 PANEL CONCERNING THE

vis-à-vis *Ethyl*. Hence, it entered the US\$13 million settlement.

Despite that fact that it was the AIT panel's preceding decision adverse to the Canadian Government that made the case effectively indefensible, the *Ethyl* case attracted widespread media attention and evoked a vociferous public backlash at the time. *The Financial Post* described the reactions of the supporters of the MMT Act as follows:

Ethyl's opponents in the auto sector were more forthcoming. The NAFTA claim is "a bullying tactic," said Mark Nantais, president of the Motor Vehicle Manufacturers' Association. "It's an attempt [by Ethyl] to intimidate the cabinet of Canada."¹¹⁸

The Globe and Mail wrote in 2001 in *How Free Trade Threatens Democracy*,

[t]hey're going to be marching on the streets at Quebec City's Summit of the Americas within a couple of weeks because, among other things, they oppose "investor-state rights." To free-trade critics, nothing more starkly illustrates the imbalance of power that transnational corporations have acquired over democratically elected governments.

The investor-state rights provision, Chapter 11, of the North American free-trade agreement, permits corporations to challenge governments' sovereignty to make policy regarding public health, the environment, labour standards and other public services.

....

Here is how Chapter 11 works:

The U.S. Ethyl Corp. sued the Canadian government for \$250-million (U.S.) and obtained, in 1998, a settlement of \$13-million for the government's ban on the gasoline additive MMT, labelled a known nerve toxin by reputed scientists. The ban was reversed.¹¹⁹

In another article in *The Globe and Mail*, NAFTA Chapter 11 proceedings were blamed for the settlement:

The chapter has also been used by Virginia-based Ethyl Corp. to force Canada to overturn a ban on gasoline additive MMT that had been motivated by environmental concerns. The Canadian government also paid Ethyl \$13-million in an out-of-court settlement.¹²⁰

DISPUTE BETWEEN ALBERTA AND CANADA REGARDING THE MANGANESE-BASED FUEL ADDITIVES ACT 13 (1998) [hereinafter AGREEMENT ON INTERNAL TRADE], https://www.cfta-alec.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/8_eng.pdf (emphasis in original).

118. Geddes, *supra* note 114.

119. Valpy, *supra* note 116.

120. Mark Mackinnon, *NAFTA Members to Talk Reform*, GLOBE AND MAIL (Apr. 9, 2001), <https://www.theglobeandmail.com/report-on-business/nafta-members-to-talk-reform/article1179774>.

At the time, the media maintained that NAFTA Chapter 11 proceedings constituted a “regulatory chill” restricting Canada’s sovereignty, as demonstrated by the settlement with Ethyl and the repealing of the MMT Act. Contrary to this widespread misconception, Canada was motivated to settle the *Ethyl* case because the MMT Act was inconsistent with the AIT. The complaint against the MMT Act was maintained by four provinces. Faced with the AIT’s decision scuttling the MMT Act, Canada had no alternative but to settle with Ethyl. This is confirmed by Canada’s official governmental website in which it describes the outcome of the *Ethyl* case as follows:

Settlement of the claim

Further to a challenge launched by three Canadian provinces under the *Agreement on Internal Trade*, a Canadian federal-provincial dispute settlement panel found that the federal measure was inconsistent with certain provisions of that Agreement. Following this decision, Canada and Ethyl settled all outstanding matters, including the Chapter Eleven claim.¹²¹

Despite the Canadian Government’s straightforward explanation as to why it settled the *Ethyl* case, local politicians have continued, even decades later, to “remember” the ordeal differently. Elizabeth May, leader of the Green Party of Canada and MP for Saanich-Gulf Islands, held a press conference in September 2012 in which she warned against the adoption of the Canada-China Foreign Investment Promotion and Protection Agreement.¹²² During the press conference, she highlighted the controversy that the *Ethyl* case had caused in Canada:

121. *NAFTA – Chapter 11 – Investment: Cases Filed Against the Government of Canada, Ethyl Corporation v. Government of Canada*, GLOBAL AFF. CAN., <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ethyl.aspx?lang=eng#archived> (last visited Sept. 24, 2018). The authors note that the official Canadian Government website describing the *Ethyl Corp. v. Government of Canada* case identifies “three Canadian provinces.” But according to the AIT Panel decision, four provinces were Complainants:

The Government of Alberta (the Complainant) contends that the *Act* fails to comply with Canada’s (the Respondent) obligations under the *Agreement on Internal Trade* (the *Agreement*), and that the inconsistencies cannot be justified by reference to the *Agreement’s* provisions for measures associated with legitimate objectives. The Complainant contends that the *Act* has impaired internal trade, caused injury to Alberta refiners, and is inconsistent with general and specific provisions of the *Agreement*. *The Governments of Québec, Nova Scotia and Saskatchewan* (also Complainants) intervened in support of Alberta. The Government of Nova Scotia did not file a written submission or present oral arguments.

AGREEMENT ON INTERNAL TRADE, *supra* note 117, at 1 (emphasis in the original and added).

122. Since Elizabeth May’s statement, the treaty entered into force on Oct. 1, 2014 and retained an investor-State arbitration provision. See *Trade and Investment Agreements*, GLOBAL AFF. CAN., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng&country_pays=China&menu_id=147 (last visited Sept. 24, 2018).

We know the experience of Chapter 11 of NAFTA. Everyone believed and including all the groups fighting NAFTA, that Chapter 11 was innocuous. It was never raised in the fight over NAFTA and yet the investor-State provisions of NAFTA have proven to be the most corrosive of democracy, the most undermining of Canadian laws. It's only under Chapter 11 of NAFTA that a U.S. corporation had the right to claim damages against Canada and cause our Governments to repeal laws passed in our Parliament. It was bad enough when it was a US multinational, like Ethyl Corporation of Richmond, Virginia, getting laws against its toxic gasoline additive MMT cancelled. But how much worse is it to imagine that the Communist Chinese Government out of Beijing through its various tentacles of Sinopec and PetroChina and CNOOC will be able to trump Canadian law through complaints in this process that set out in this agreement.¹²³

Despite Elizabeth May's efforts, the Canada-China Foreign Investment Promotion and Protection Agreement retained an ISDS provision, and was signed and entered into force on October 1, 2014.¹²⁴

As explained above, Canada settled the *Ethyl* case because of the AIT decision. "Genuinely fake news" about the *Ethyl* case nonetheless has persisted, twenty years after the event, in a report published by the Canadian Centre for Policy Alternatives ("CCPA") in January 2018 in which it revived the same mythical hue and cry against NAFTA that followed the *Ethyl* case.¹²⁵ The report warns against the "chilling effect" NAFTA's ISDS has on public policy and regulation,¹²⁶ describes Canada's 1998 settlement with Ethyl Corporation as "regrettable"¹²⁷ and dispenses the following misinformation to buttress its outlandish claims:

In one of the starkest examples, the Canadian government repealed its ban on the import and interprovincial trade of the gasoline additive MMT (a suspected neurotoxin) after being sued by the Ethyl Corporation. After a preliminary NAFTA tribunal judgment sided with the company, the

123. Green Party of Canada, *Elizabeth May: Red Carpet for China (Press Conference Q and A)*, YOUTUBE (Sept. 27, 2012), <https://www.youtube.com/watch?v=SjwjBe8tIAo>. The authors have transcribed the block quotation manually by listening to the YouTube clip. Thus, the block quotation is not an official transcription.

124. *Trade and Investment Agreements*, *supra* note 122.

125. SCOTT SINCLAIR, CANADA'S TRACK RECORD UNDER NAFTA CHAPTER 11: NORTH AMERICAN INVESTOR-STATE DISPUTES TO JANUARY 2018, at 11 (2018), http://res.cloudinary.com/lbresearch/image/upload/v1516620972/nafta_dispute_table_report_2018_220118_1137.pdf; Lacey Yong, *NAFTA Claims Have Cost Canada More Than US\$300 Million, Says Report*, GLOBAL ARB. REV. (Jan. 22, 2018), <https://globalarbitrationreview.com/article/1152937/nafta-claims-have-cost-canada-more-than-ususd300-million-says-report>.

126. SINCLAIR, *supra* note 125, at 8–10.

127. *Id.* at 10.

Canadian government reversed the MMT ban, paid Ethyl \$19.5 million to settle the case and formally apologized.¹²⁸

As laid out above, this description of *Ethyl* is fatally incomplete, incorrect, and grossly misleading. It is simply baffling that the same truly fake news continues to be regurgitated and circulated two decades later.

Importantly, no ISDS tribunal has ever found that a legitimate environmental or health law or regulation of a State breached a BIT or a MIT. We of course know why the *Ethyl* case was settled. In *SD Myers, Inc. v. Government of Canada*, Canada issued an order banning the export of polychlorinated biphenyl (“PCB”), and of substances containing PCBs, an environmentally hazardous chemical compound. The American company, S.D. Myers, Inc.—which engaged in the disposal of PCBs found in other substances—commenced NAFTA proceedings in October 1998 against Canada. The Tribunal ruled that Canada had breached Article 1102 (“National Treatment”) and Article 1105 (“Minimum Standard of Treatment”) of NAFTA, concluding that Canada’s prohibition of PCB exports was motivated not by environmental considerations, but rather to protect the then-budding Canadian PCB disposal industry from its more experienced U.S. competitors:

193. Having reviewed all the documentary and testimonial evidence before it, the Tribunal is satisfied that the Interim Order and the Final Order favoured Canadian nationals over non-nationals. The Tribunal is satisfied further that the practical effect of the Orders was that SDMI and its investment were prevented from carrying out the business they planned to undertake, which was a clear disadvantage in comparison to its Canadian competitors.

194. Insofar as intent is concerned, the documentary record as a whole clearly indicates that the Interim Order and the Final Order were intended primarily to protect the Canadian PCB disposal industry from U.S. competition. CANADA produced no convincing witness testimony to rebut the thrust of the documentary evidence.

195. The Tribunal finds that there was no legitimate environmental reason for introducing the ban. Insofar as there was an indirect environmental objective—to keep the Canadian industry strong in order to assure a continued disposal capability—it could have been achieved by other measures.¹²⁹

128. *Id.* at 11.

129. *SD Myers, Inc. v. Government of Canada, NAFTA/UNCITRAL, Partial Award*, ¶¶ 193–95 (Nov. 13, 2000), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/myers-18.pdf> (footnote omitted).

Further comfort that legitimate environmental measures of States are respected by ISDS tribunals can be found in *Chemtura Corporation v. Government of Canada*, in which a unanimous NAFTA Tribunal composed of Cambridge University Professor James Crawford, now a titular Judge of the International Court of Justice, Professor Gabrielle Kaufmann-Kohler of Switzerland (as Presiding Arbitrator), and a co-author of this Article (Judge Brower) ruled that Canada had in no respect breached any provision of NAFTA when it banned the pesticide lindane from use in respect of canola.¹³⁰

The results of the tobacco labeling cases—*Philip Morris Brands Sàrl v. Oriental Republic of Uruguay* and *Philip Morris Asia Limited v. Commonwealth of Australia*—further confirm that no health-protection legislation or regulation has been found by any ISDS tribunal to have breached any provision of any investment treaty. The tobacco cases have attracted particular attention from critics of investor-State arbitration despite the fact that both States—Australia and Uruguay—won those cases. Even when cases come out in favor of States, the critics disregard the result and emphasize the alleged bias toward investors in the ISDS system. When a majority of the tribunal in *Philip Morris Brands Sàrl v. Oriental Republic of Uruguay* found in favor of the State, rather than recognize that ISDS works, the critics turned their attention to the hefty fees collected by ISDS lawyers and how the case should not have been brought in the first place.¹³¹ They look right past the unchallengeable fact, as illustrated by the NAFTA cases cited above and the tobacco cases, that States’ “policy space” universally has been preserved by ISDS tribunals.

Nevertheless, prominent people and publications have spoken out emphatically against ISDS.¹³² The EU itself has not been honest about the situation. In June 2013, EU Member States formally mandated that the EU Trade Delegation include investment protections and ISDS in TTIP.¹³³ All

130. *Chemtura Corp. v. Government of Canada*, NAFTA/UNCITRAL, Award, pt. V (Aug. 20, 2010), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/chemtura-14.pdf>.

131. See Cecilia Olivet & Alberto Villareal, *Who Really Won the Legal Battle Between Philip Morris and Uruguay?*, *GUARDIAN* (July 28, 2016), <https://www.theguardian.com/global-development/2016/jul/28/who-really-won-legal-battle-philip-morris-uruguay-cigarette-adverts>.

132. See *Behind Closed Doors*, *ECONOMIST* (Apr. 23, 2009), <http://www.economist.com/node/13527961>; Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, *WASH. POST* (Feb. 25, 2015), http://wapo.st/1BwJA7H?tid=ss_tw-bottom&utm_term=.2dad5c8d1898; Bill Moyers, *Trading Democracy: A Bill Moyers Special*, PBS (Feb. 1, 2012), http://www.pbs.org/now/transcript/transcript_tdfull.html (“Today, foreign companies are exploiting Chapter 11 to attack public laws that protect our health—and our environment—even to attack the American judicial system.”).

133. COUNCIL OF THE EUROPEAN UNION, DIRECTIVES FOR THE NEGOTIATION ON THE

the while, however, opposition to ISDS was gaining ground. By January 2014, the outgoing EU Trade Commissioner Karel De Gucht responded to this growing opposition by deciding to “pause” the TTIP negotiations concerning ISDS in order to prepare a public consultation on the issue.¹³⁴ In presenting the results of the consultation approximately one year later, the EU Trade Commissioner Cecilia Malmström asserted that “[t]he consultation clearly shows that there is a huge skepticism against the ISDS instrument.”¹³⁵ That “consultation,” however, could hardly be called representative. It was accurately described to Reuters by two EU officials as follows:

[O]ver 95 percent [of the almost 150,000 responses] were from supporters of a small group of organisations hostile to a deal with Washington and who submitted identical or very similar responses [This was a] hijacking of the online consultation Many responses to the EU survey appeared to be automated or generated by forms filled in on campaign websites, encouraging EU citizens to reject arbitration policy in [TTIP].¹³⁶

III. LEADING INTERNATIONAL ARBITRATION ACTORS ENCOURAGE THIS “DEMOLITION DERBY”

What is doubly baffling is that prominent international arbitrators who have led the field for years appear to encourage this “Demolition Derby” and currently do so in league with the UNCITRAL Commission, whose Working Group III considered the pros and cons of a permanent investment court at its session in Vienna from November 27 to December 1, 2017. According to the UNCITRAL Commission Report on the Fiftieth Session in July 2017, Working Group III was entrusted to consider ISDS reform “so as not to burden Working Group II unduly while it continued to fulfil its mandate [of its work on the enforcement of settlement agreements resulting from international commercial conciliation].”¹³⁷ It is curious that this task has

TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP BETWEEN THE EUROPEAN UNION AND THE UNITED STATES OF AMERICA ¶¶ 22–23 (2013), https://www.laquadrature.net/files/TAFTA%20_%20Mandate%20_%2020130617.pdf.

134. Press Release, European Comm’n, Improving ISDS to Prevent Abuse – Statement by EU Trade Commissioner Karel De Gucht on the Launch of a Public Consultation on Investment Protection in TTIP (Mar. 27, 2014), http://europa.eu/rapid/press-release_STATEMENT-14-85_en.htm.

135. Press Release, European Comm’n, Report Presented Today: Consultation on Investment Protections in EU-US Trade Talks (Jan. 13, 2015), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1234>.

136. Robin Emmott & Philip Blenkinsop, *Online Protest Delays EU Plan to Resolve U.S. Trade Row*, REUTERS (Nov. 26, 2014), <https://reuters.com/article/us-eu-usa-trade/exclusive-online-protest-delays-eu-plan-to-resolve-u-s-trade-row-idUSKCN0JA0YA20141126>.

137. UNITED NATIONS, GEN. ASSEMBLY, REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW: FIFTIETH SESSION (3-21 JULY 2017) ¶ 260 (2017),

been assigned by UNCITRAL to Working Group III—which previously has dealt with international legislation on shipping, transport law, and, only most recently, online dispute resolution—and not to Working Group II, which for decades has dealt extensively with arbitration, conciliation, and dispute settlement, and in which, *inter alia*, the 2010 UNCITRAL Arbitration Rules and the 1985 UNCITRAL Model Arbitration Law were incubated. Furthermore, the Commission emphasized that delegations to Working Group III should be government representatives, not the technicians and professionals traditionally attending Working Group meetings, which are largely charged with technical work.¹³⁸ One asks: What is the reason that the UNCITRAL Commission has assigned consideration of the EU-inspired International Investment Court proposal, not to the Working Group with by far the most extensive experience with international arbitration, but rather to one whose exposure to the field has been limited to online arbitration, along with shipping and transport law? Why is it charged to have predominately government delegations? Are the dice being loaded?

It would appear so, as a close look at the relevant UNCITRAL Commission report reveals. The UNCITRAL Commission report of its Fiftieth Session held in July 2017 states:

While a few suggested that Working Group II should be tasked with investor-State dispute settlement reform upon completion of its work on the enforcement of settlement agreements resulting from international commercial conciliation, it was generally felt that it would be preferable to assign that work to another working group so as not to burden Working Group II unduly while it continued to fulfil its mandate.¹³⁹

Working Group II, however, at that moment was on the verge of completing that mandate at its session held in February 2018. Thus, the UNCITRAL Commission proudly has announced the following:

Working Group II (Dispute Settlement) completed its work on the preparation of a draft convention and a draft amended Model Law on international settlement agreements resulting from mediation. Both draft instruments will be considered for finalization by the Commission at its upcoming session in New York (25 June–13 July 2018).¹⁴⁰

So, what was the rush? Why did the UNCITRAL Commission “support for

<http://www.uncitral.org/pdf/english/commission/sessions/unc-50/A-72-17-E.pdf>.

138. *Id.* ¶¶ 250–51, 264.

139. *Id.* ¶ 260.

140. *New Instruments on Settlement Agreements from an UNCITRAL Working Group*, UNCITRAL (Feb. 14, 2018), <http://uncitralcap.org/en/new-instruments-settlement-agreements-uncitral-working-group/?ckattempt=1>.

work to be undertaken with priority in 2017”¹⁴¹

Indeed, Working Group III’s Vienna session from November 27 to December 1, 2017 revealed a telling picture that the work now is political rather than technical—the traditional domain of Working Groups. In two of the five days, the meeting attendees fought over who should chair the meeting, an issue hitherto always resolved by consensus.¹⁴² Incredibly, the many EU Member State Delegations present carried the day for the election of a senior official of Canada,¹⁴³ who by definition is bound to CETA, and hence to the EU International Investment Court imbedded in CETA. There can be no doubt that the dice, in fact, have been loaded. Nevertheless, reluctant delegates grappled with the monumental task of reforming ISDS, and Part I of the Working Group III Report from that session emphasized concerns of some States over the cost and duration of the proceedings.¹⁴⁴ Several of the more sober-minded participants in the session argued that deliberations relating to duration and cost should be fact-based.¹⁴⁵ Working Group III ultimately settled on a compromise, recording that *perceptions* are also relevant in maintaining the “legitimacy” of ISDS, the ubiquitous buzzword that Professor Christoph Schreuer recently decried as “one of those Humpty Dumpty words designed to arouse pleasurable emotions without conveying meaning” in his keynote address at the Investment Treaty Arbitration Conference in Prague on October 26, 2017.¹⁴⁶ Some less radical reforms, including those clarifying a tribunal’s powers of cost apportionment and to order claimants to post security for costs in certain scenarios, were also discussed,¹⁴⁷ mirroring recommendations by Professor Schreuer in his speech.¹⁴⁸

141. UNITED NATIONS, GEN. ASSEMBLY, *supra* note 137, ¶ 261.

142. Anthea Roberts, *UNCITRAL and ISDS Reform: Not Business as Usual*, EJIL: TALK! (Dec. 11, 2017), <https://www.ejiltalk.org/uncitral-and-isds-reform-not-business-as-usual/> (“In the whole history of UNCITRAL [established in 1966], only one issue had ever been put to the vote and that was the decision [by the Commission, not by a Working Group] on whether to move the headquarters of UNCITRAL to Vienna [from New York City]. The premium placed on consensus meant that voting enjoyed somewhat of a mystical taboo. That was, at least, until this meeting when the spell was broken for a second time.”).

143. UNITED NATIONS, GEN. ASSEMBLY, REPORT OF WORKING GROUP III (INVESTOR-STATE DISPUTE SETTLEMENT REFORM) ON THE WORK OF ITS THIRTY-FOURTH SESSION (VIENNA, 27 NOVEMBER–1 DECEMBER 2017) ¶ 14 (2017), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/029/83/PDF/V1802983.pdf?OpenElement>.

144. *Id.* ¶¶ 30–48.

145. *Id.* ¶ 35.

146. Marie Talašová et al., *There’s “No Alternative” to Investment Arbitration, Says Schreuer*, GLOBAL ARB. REV. (Dec. 22, 2017), <https://globalarbitrationreview.com/article/1151619/theres-no-alternative-to-investment-arbitration-says-schreuer>.

147. UNITED NATIONS, GEN. ASSEMBLY, REPORT OF WORKING GROUP III, *supra* note 143, ¶¶ 46–48, 59–60.

148. Talašová et al., *supra* note 146.

The proposal to eliminate ISDS arbitration, which gives investors an equal voice with host States in forming a tribunal to decide their treaty dispute, began with Professor Jan Paulsson, a former President of both the London Court of International Arbitration and the International Council on Commercial Arbitration. In his Inaugural Lecture as holder of the Michael R. Klein Distinguished Scholar Chair at the University of Miami School of Law in April 2010, he proposed the abolition of party-appointments of co-arbitrators (and, at least inferentially, abolition of investors' and host States' equal roles in the appointment of tribunal chairpersons). Subsequently, he published his article titled *Moral Hazard in International Dispute Resolution*¹⁴⁹ (the "Moral Hazard article") based on that lecture. Professor Paulsson's arguments were addressed in the article titled *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*¹⁵⁰ (the "Nightingale article") that was co-authored by one of the authors of this Article, Judge Brower, and his former law clerk, Charles B. Rosenberg. In a public discussion of an earlier draft of the Nightingale article under the auspices of the Institute for Transnational Arbitration, Professor Paulsson commented on the article. The *Global Arbitration Review* report of the event revealed Professor Paulsson retreating from his original position:

Paulsson also said that he *does not dispute the right of parties to agree to appoint arbitrators if they so choose*. His primary suggestion, he explained, is that the existing LCIA rules should be emulated across the board "to the effect that *if the parties stipulate unilateral appointments that is what they get*, but otherwise the default rules [sic] is that all three are chosen by the LCIA".¹⁵¹

Since then, Professor Paulsson published his book titled *The Idea of Arbitration* in 2013¹⁵² and recently delivered two lectures further fanning the flames of the debate over unilateral appointments by arbitrating parties and the investors' equal role in selecting a tribunal chairperson.¹⁵³

149. Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID REV. 339, 339 (2010).

150. Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded*, 29 ARB. INT'L 7, 7 (2013).

151. Alison Ross, *Paulsson and van den Berg Presume Wrong, Says Brower*, GLOBAL ARB. REV. (Feb. 6, 2012), <http://globalarbitrationreview.com/article/1030954/paulsson-and-van-den-berg-wrong-says-brower> (emphasis added).

152. JAN PAULSSON, *THE IDEA OF ARBITRATION* (2013).

153. On March 2, 2017, Professor Paulsson delivered a lecture at the Annual Meeting of the CPR Institute at the Baltimore Hotel, Coral Gables, Florida, titled *Shall We Have an Adult Conversation About Legitimacy?* Soon afterward, on March 17, 2017, he delivered a lecture titled *Sore Losers and What to Do About Them* at the Second Annual ADR Symposium, University of Southern California Gould School

Professor Paulsson’s latest example of why unilateral appointments are undesirable concerns the dissenting opinion of the arbitrator appointed by the claimant in *Supervisión y Control, S.A. v. Republic of Costa Rica*, Joseph P. Klock, Jr., who was sitting in his first ICSID arbitration ever. The dissenter took issue with the ICSID party-appointment procedure, apparently citing his own sensation as a first-timer at ICSID, that party-appointed arbitrators face an awkward tension in distancing themselves from the party that appointed them. The relevant parts of his dissent are set out below:

[A]s far as the impartiality of the panel is concerned, I believe that ICSID should more carefully consider the issue of panel selection. . . . [T]he arrangement whereby two of the panel members are selected by the parties to the agreement creates an uncomfortable aura of conflict which permeates, in my view, the proceedings. It creates a true ethical burden on these other two parties [that is, “panel members”] to separate themselves from the interest of those who have selected them to serve. I know that I have worked hard to neutralize this factor as I am sure my esteemed colleague [co-arbitrator] has done.

However, the dignity and integrity of an ICSID proceeding would be much better served by the selection of panelists from lists where the selection is made wholly by ICSID and where careful screening is done to make sure that any selected panelists do not have conflicts, not only real conflicts which should be identified in the screening process done, but perceived conflicts as well, either by issue or relationship. It ill-behooves ICSID to have anyone unfairly suggest that it is a club where the result can be influenced by relationships that exist by those who serve variously as advocates or arbitrators.

Composition Of The Panel. This panel was assembled in accordance with the terms of the agreement between the parties, with one panelist appointed by each of the parties and the third, by the Chair of ICSID. To the extent that ICSID has the ability to direct the composition of panels that are to arbitrate its claims, I believe that it should consider prohibiting this arrangement. *Of the three of us, the only panelist who did not have an inherent conflict was [the Tribunal President], and I know that both of the remaining two of us were honored to serve under his chairmanship. He*

of Law, Los Angeles, California. The authors received notes on the latter lecture, which is unpublished, from Professor Paulsson. Professor Paulsson’s arguments in his book and lectures are largely repetitive of his original points contained in *Moral Hazard in International Dispute Resolution* (the “Moral Hazard article”). Many of these points have been addressed in *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded* (the “Nightingale article”) and there remain few that deserve a response. The points he makes in his book and lectures overlap somewhat, but they are not identical and cover different grounds.

also was the only panelist who did not labor under any type of conflict burden.

However, as someone who has served on a number of arbitral panels, *I find an appointment by a party of a judge to rule on the party's claim creates an unnecessary barrier to pure objectivity*, except in situations where a high degree of technical or scientific skill and knowledge of a discipline is needed. That clearly is not the case in terms of a contract dispute. If the desire is to have three judges decide an issue, then there should be three completely impartial judges appointed, judges who are not [sic] related to the parties or to their counsel. Those procedures were not in effect in this case, and if they were, perhaps the painful process of reviewing conflict could have been avoided.¹⁵⁴

Professor Paulsson finds that the arbitral community should take the dissenter's comments "to heart, recognize [them] as not being an isolated phenomenon, and take [them] as a compelling reason to consider ways in which this kind of unease can be alleviated."¹⁵⁵ It would seem more pertinent to conclude that the dissenting arbitrator should have resigned from that Tribunal as soon as he became uncertain as to whether he could, fully and without reservation, comply with the mandate laid on him by Articles 14 and 40 of the ICSID Convention¹⁵⁶ and Rule 6 of the ICSID Arbitration Rules, which required him to "be relied upon to exercise independent judgment."¹⁵⁷ Considering that the dissenter had, as he wrote, "served on a number of arbitral panels," presumably commercial ones formed in the same way as ICSID tribunals, he should have stopped accepting party-appointments as co-arbitrator long before he accepted appointment to the ICSID Tribunal.

Despite Professor Paulsson's continued push, "[s]even years on, arbitration users have responded to Professor Paulsson's call for the practice of unilateral appointments to be removed with a resounding no: far from being removed, the practice of unilateral appointments remains standard practice in international arbitrations,"¹⁵⁸ as the arbitral community continues

154. *Supervisión y Control, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Dissenting Opinion of Joseph P. Klock Jr. 13–15 (Jan. 18, 2017), <https://www.italaw.com/sites/default/files/case-documents/italaw8231.pdf> (emphasis in original and added).

155. Jan Paulsson, *Shall We Have an Adult Conversation About Legitimacy?* CPR SPEAKS (Mar. 15, 2017), <https://blog.cpradr.org/2017/03/15/shall-we-have-an-adult-conversation-about-legitimacy>.

156. INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, ICSID CONVENTION, REGULATIONS, AND RULES 15, 23 <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf>.

157. *Id.* at 78.

158. Andrew Battison & Cheryl Teo, *The Call to Remove Unilateral Appointments: Seven Years On*, KLUWER ARB. BLOG (July 3, 2017), <http://kluwerarbitrationblog.com/2017/07/03/call-remove-unilateral-appointments-seven-years>.

to regard the unilateral right of appointment as the preferred method of appointment. The 2012 International Arbitration Survey by Queen Mary University of London revealed that, for three-member tribunals, 76% of those responding to the survey (consisting of arbitrators, private practitioners, and in-house counsel) preferred the "selection of two co-arbitrators by each party unilaterally. This method of selection was favoured by all three categories of respondents, but more by private practitioners (83%) than by in-house counsel (71%) and arbitrators (66%)."¹⁵⁹ The same survey was conducted in 2015, in which respondents were asked "[w]hat are the three most valuable characteristics of international arbitration?" in response to which "'enforceability of awards' and 'avoiding specific legal systems/national courts' were most frequently chosen, followed by 'flexibility' and 'selection of arbitrators'."¹⁶⁰ The support for the right of party-appointment was affirmed in the 2017 Berwin Leighton Paisner survey of 151 participants consisting of "arbitrators, corporate counsel, external lawyers, academics, users of arbitration and those working at arbitral institutions."¹⁶¹ 66% of the participants found the "retention of party appointments to be desirable"¹⁶² and 59% of the participants "believed that not all institutions can be trusted to maintain an inclusive and well-qualified list of arbitrators from whom all appointments to the tribunal can be made."¹⁶³

All the signs point to the value of the unilateral right of appointment. So "how then can it be said that this practice undermines the legitimacy of the arbitral process or its outcome?"¹⁶⁴ Maintaining the unilateral right of appointment allows "all parties to enter international arbitration with an equal sense of confidence in the neutrality of the system."¹⁶⁵ Arbitration has become truly international to the extent that no arbitral institution, no group of governments, and no international organization could ever fully

159. QUEEN MARY UNIV. OF LONDON, 2012 INTERNATIONAL ARBITRATION SURVEY: CURRENT AND PREFERRED PRACTICES IN THE ARBITRAL PROCESS 5 (2012), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2012_International_Arbitration_Survey.pdf.

160. QUEEN MARY UNIV. OF LONDON, 2015 INTERNATIONAL ARBITRATION SURVEY: IMPROVEMENTS AND INNOVATIONS IN INTERNATIONAL ARBITRATION 6 (Oct. 6, 2015), https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf.

161. BERWIN LEIGHTON PAISNER, INTERNATIONAL ARBITRATION SURVEY: PARTY APPOINTED ARBITRATORS – DOES FORTUNE FAVOUR THE BRAVE? 4 (2018), https://res.cloudinary.com/lbresearch/image/upload/v1515581879/BLP_Survey_xasu5i.pdf.

162. *Id.* at 6.

163. *Id.*

164. Battisson & Teo, *supra* note 158.

165. ALFONSO GÓMEZ-ACEBO, PARTY-APPOINTED ARBITRATORS IN INTERNATIONAL COMMERCIAL ARBITRATION 43–44 (2016).

appreciate the intricate cultural, societal, and political sensitivities that go into the selection of arbitrators. It is thus artificial to imagine a single list of arbitrators from which all appointments would be made that would be acceptable to all arbitral disputants. This is especially so for those parties who have no knowledge of or familiarity with those on the list.¹⁶⁶

In fact, there has been serious opposition to the ICC's recent incorporation into its Arbitration Rules of Expedited Procedure Provisions effective as of March 1, 2017 of a new provision enabling the ICC to override the parties' agreement on appointments to the tribunal.¹⁶⁷ These procedures shorten the deadlines for the filing of submissions and the scheduling of hearings, apply to arbitration agreements concluded after March 1, 2017,¹⁶⁸ and apply automatically to disputes involving US\$2 million or less.¹⁶⁹

The new Article 2(1) of Appendix VI of the ICC Arbitration Rules permits the ICC Court to override the parties' agreement on the number of arbitrators: "The Court may, notwithstanding any contrary provision of the arbitration agreement, appoint a sole arbitrator."¹⁷⁰ Such expedited procedures have become "the flavor of the year" with other arbitral institutions worldwide.¹⁷¹

Fabian Bonke, for example, opines that the ICC's reform "took a step too far when empowering the ICC Court to override a contrary agreement between the parties in expedited proceedings."¹⁷² Overriding party agreement may prompt set-aside proceedings that risk prolonging the final resolution of the dispute, which defeats the purpose behind expedited procedures.¹⁷³ This exemplifies—as does the 59% of participants distrusting institutions' ability "to maintain an inclusive and well-qualified list of

166. *Id.* ("The parties with no acquaintances on the list would probably find it more difficult to choose someone they trust.")

167. Int'l Chamber of Commerce, *Expedited Procedure Provisions*, <https://iccwbo.org/dispute-resolution-services/arbitration/expedited-procedure-provisions> (last visited Sept. 24, 2018).

168. INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION RULES art. 30(3)(a).

169. *Id.* art. 30(2)(a), Appendix VI 1(2).

170. *Arbitration Rules: Appendix VI – Expedited Procedure Rules*, ICC, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_expeditedprocedure2 (last visited Sept. 24, 2018).

171. See Singapore International Arbitration Centre, *SIAC Rules 2010*, <http://www.siac.org.sg/our-rules/rules/siac-rules-2010> (last visited Sept. 24, 2018); Hong Kong International Arbitration Centre, *Expedited HKIAC Arbitration*, <http://www.hkiac.org/arbitration/process/expedited-hkiac-arbitration> (last visited Sept. 24, 2018).

172. Fabian Bonke, *Overriding an Explicit Agreement on the Number of Arbitrators – One Step Too Far under the New ICC Expedited Procedure Rules?*, KLUWER ARB. BLOG (May 22, 2017), <http://kluwerarbitrationblog.com/2017/05/22/overriding-an-explicit-agreement-on-the-number-of-arbitrators-one-step-too-far-under-the-new-icc-expedited-procedure-rules>.

173. *Id.*

arbitrators” in the 2017 Berwin Leighton Paisner survey discussed above—Professor Paulsson’s “Kryptonite,” which he describes as follows:

[T]he one argument [that] will defeat me every time . . . [Y]ou look me in the eye and say “*I don’t trust the institution*, and so long as I can name one of the arbitrators I feel that I will reduce the risk of a runaway tribunal doing something crazy—but unappealable.”¹⁷⁴

Ancillary to the assault of Professor Paulsson on unilateral appointments, Professor Albert Jan van den Berg, likewise a past President of the International Council on Commercial Arbitration and General Editor for many years of its Annual Yearbook, has called on “party-appointed arbitrators [to] observe the principle: *nemine dissentiente*.”¹⁷⁵ Professor Van den Berg maintains this view on the ground that in the 22 of 150 published awards and decisions in investment arbitration cases he surveyed in which a dissenting opinion had been issued, it almost invariably had been issued by the arbitrator appointed by the losing Party. He concluded that “dissenting opinions [in investment arbitration] barely serve a legitimate purpose in a system with unilateral appointments”¹⁷⁶ and that “investment arbitration would function better and be more credible if party-appointed arbitrators observe the principle: *nemine dissentiente*.”¹⁷⁷ Professor Van den Berg believes that dissents should be “reserved for those cases where serious procedural misconduct or a violation of fundamental principles occurs; for example, where an arbitrator commits fraud.”¹⁷⁸

The Nightingale article, which was published three years later in 2013, responded to Professor Van den Berg’s observations on dissenting opinions.¹⁷⁹ Two years later, in 2015, Van den Berg published his *réplique* titled *Charles Brower’s Problem with 100 Per Cent—Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*.¹⁸⁰

While Professor Van den Berg took issue with a variety of the arguments in the Nightingale article, his key response is that the Nightingale

174. Paulsson, *supra* note 155 (emphasis in original).

175. Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in *LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN* 821, 834 (Mahnoush H. Arsanjani et al. eds., 2010).

176. *Id.* at 831.

177. *Id.* at 834.

178. *Id.* at 831.

179. See generally Brower & Rosenberg, *supra* note 150.

180. Albert Jan van den Berg, *Charles Brower’s Problem with 100 Per Cent—Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, 31 *ARB. INT’L* 381 (2015).

article has been “unable to give a convincing explanation for the fact that 100 per cent [sic] of the separate opinions issued in investment arbitrations by party-appointed arbitrators have been rendered by the arbitrator appointed by the losing party.”¹⁸¹

Essentially, our response has been “so what?” As the Nightingale article explained, 78% of the approximately 150 cases reviewed by Van den Berg resulted in no dissenting opinions at all, thus “[t]his figure alone serves to minimize any concerns regarding dissenting opinions in investment arbitration.”¹⁸²

The newest and most directly serious threat to ISDS as presently known and favored overwhelmingly by its users, however, comes in the form of a 115-page “research paper . . . prepared for . . . UNCITRAL [at its request] within the framework of a project of the Geneva Center of International Dispute Settlement (“CIDS”)”¹⁸³ (“CIDS Report”) by Professor Gabrielle Kaufmann-Kohler, the Center’s Co-Director, and Dr. Michele Potestà, a Senior Researcher at the Center. The CIDS Report was presented to the UNCITRAL Commission on May 24, 2016,¹⁸⁴ and was discussed

181. *Id.* at 383.

182. Brower & Rosenberg, *supra* note 150, at 28, 32. Moreover, the Nightingale article rhetorically asked:

[D]oes not the 78% non-dissent rate in van den Berg’s survey amply suggest that, contrary to his assumption that party-appointed arbitrators are not neutral, the vast majority demonstrably are, by his own definition? Given these facts, it would seem that dissenting opinions by party-appointed arbitrators should more properly be viewed as ‘the reflection of their shared outlook with the party who appointed them, rather than dependency or fear to alienate such party’.

Id. (footnotes omitted). Van den Berg responded:

It is also argued in the Nightingale article that ‘[t]his figure alone serves to minimize any concerns regarding dissenting opinions in investment arbitration’. My survey of approximately 150 awards and decisions showed that in thirty-four cases the party-appointed arbitrator of the party that had lost the case had issued a separate opinion. That is, 22% of the surveyed investment cases. In the Nightingale article, this figure is presented differently: ‘78% of the approximately 150 cases reviewed by van den Berg produced no dissenting opinions whatsoever.’ This manner of presenting overlooks the fact that 22% compares badly with commercial arbitration, where the percentage is around 8%. It also overlooks the increase of the percentage in investment arbitration, as compared with a decrease in commercial arbitration. The trend in investment arbitration is particularly worrying as it seems to lead to ‘mandatory dissents’.

...
The ‘shared outlook’ may be an explanation for a number of dissenting opinions, but is it an explanation for the 100% score? From that perspective, the expression ‘shared outlook’ becomes a doubtful euphemism.

Van den Berg, *supra* note 180, at 384–86.

183. GABRIELLE KAUFMANN-KOHLER & MICHELE POTESTÀ, GENEVA CTR. FOR INT’L DISPUTE SETTLEMENT, CAN THE MAURITIUS CONVENTION SERVE AS A MODEL FOR THE REFORM OF INVESTOR-STATE ARBITRATION IN CONNECTION WITH THE INTRODUCTION OF A PERMANENT INVESTMENT TRIBUNAL OR AN APPEAL MECHANISM? ANALYSIS AND ROADMAP 5 (2016).

184. Note by the Secretariat, Settlement of Commercial Disputes: Presentation of a Research Paper on the Mauritius Convention on Transparency in Treaty-Based Investor-State Arbitration as a Possible

extensively at the UNCITRAL Commission’s Fiftieth Session in Vienna, held July 3–21, 2017¹⁸⁵ following the holding of an “UNCITRAL-CIDS Government Expert Meeting” in Geneva March 2–3, 2017.¹⁸⁶ Doubtless it will continue to provide a critical frame of reference for the meetings of UNCITRAL’s Working Group III, to which the subject of “Investor-State Dispute Settlement Reform” only very recently has been assigned. The first sessions, following receipt of the Commission’s mandate, was held from November 27 to December 1, 2017.¹⁸⁷

The opening paragraph of the Executive Summary of this “research paper” summarizes its mission as follows:

This research paper seeks to analyze whether the Mauritius Convention on Transparency could provide a useful model for broader reform of the investor-State arbitration framework. To this end, it proposes a possible roadmap that could be followed if States were to decide to pursue a reform initiative aimed at replacing or supplementing the existing investor-State arbitration regime in international investment agreements (IIAs) with a permanent investment tribunal and/or an appeal mechanism for investor-State arbitral awards.¹⁸⁸

Notwithstanding the “research” character of the CIDS Report commissioned by UNCITRAL, it appears to lend considerable support in substance to the “Demolition Derby” threatening ISDS as it presently exists and to point toward the EU’s goal of establishing an Investment Court System, otherwise termed a fifteen-Judge International Investment Court.¹⁸⁹ Specifically, the CIDS Report focuses primarily on whether an award by a hypothetical permanent court could be enforced under the New mentions awards by “permanent arbitral bodies.”¹⁹⁰ By considering the *travaux*

Model for Further Reforms of Investor-State Dispute Settlement ¶¶ 3–5, U.N. Doc. A/CN.9/890 (May 24, 2016).

185. UNITED NATIONS, GEN. ASSEMBLY, *supra* note 137, ¶¶ 240–65; Lavranos, *supra* note 102.

186. Geneva Ctr. for Int’l Dispute Settlement, *UNCITRAL-CIDS Government Expert Meeting* (May 2, 2017), <https://www.cids.ch/events/uncitral-cids-government-experts-meeting>.

187. UNITED NATIONS, GEN. ASSEMBLY, *supra* note 137, ¶ 260; Lavranos, *supra* note 102.

188. KAUFMANN-KOHLER & POTESTÀ, *supra* note 183, at 4.

189. *Id.* ¶ 93.

190. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. I (New York, June 10, 1958) [hereinafter N.Y. Convention] (emphasis added) provides,

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by *permanent arbitral bodies* to which the parties have submitted.

There is an open query as to whether the IUSCT is a “permanent arbitral bod[y]” under Article

préparatoires of “permanent arbitral bodies” under Article I of the N.Y. Convention, the Iran-United States Claims Tribunal (“IUSCT”) and sports-based “arbitral” institutions, the CIDS Report opines that awards by such institutions may be enforced under the N.Y. Convention despite the fact that those bodies were not formed by appointments of the respective nationals who presented the vast bulk of the claims subject to the IUSCT’s jurisdiction and of athletes whose complaints are subjected to the jurisdiction of special sport-based arbitral institutions.¹⁹¹

Turning, then, from what had been posed as an enforcement issue, the CIDS Report concludes that because the IUSCT is an example of “arbitration” in which the U.S. claimants had no say in the appointment of the arbitrators deciding their cases,¹⁹² it justifies more broadly the envisaged International Investment Court. Enforcement of IUSCT awards did not raise issues “about the fact that [the Tribunal’s] composition did not reflect traditional methods of appointment in international arbitration.”¹⁹³ Rather, it was debated whether the IUSCT awards were rendered under the Dutch *lex arbitri* or were “a-national” and whether there was an arbitration agreement in writing.¹⁹⁴ The CIDS Report notes that

[i]f anything, the nature of the Iran-U.S. Claims Tribunal as true arbitration could have been disputed—and has indeed been disputed—in connection with the element of compulsion it entailed, as American

I(2) of the N.Y. Convention. The *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the U.S. of America and the Government of the Islamic Republic of Iran* (“Claims Settlement Declaration”) sets a deadline for filing claims with the IUSCT both by nationals of the U.S. against Iran and nationals of Iran against the U.S., as well as by claims by either of the two States Party to that Declaration against the other based on contracts for the purchase and sale of goods and services. See *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the U.S. of America and the Government of the Islamic Republic of Iran*, in CLAIMS SETTLEMENT DECLARATION 9, 9–12 (1981). Article III(4) of the Claims Settlement Declaration states:

No claim may be filed with the Tribunal more than one year after the entry into force of this Agreement or six months after the date the President is appointed, whichever is later. These deadlines do not apply to the procedures contemplated by Paragraphs 16 and 17 of the Declaration of the Government of Algeria of January 19, 1981.

Id. at 10.

Since the President was appointed on June 4, 1981, the last day on which the noted claims could be filed was January 19, 1982. See *Refusal to Accept the Claim of Mr. Victor E. Pereira*, Decision No. DEC 2-Ref 5-2 (10 Mar. 1982), reprinted in 21 IRAN-U.S. CL. TRIB. REP. 3, 3; CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 95 (1998).

The exception to the January 19, 1982, deadlines are interpretive disputes (or “A” claims) between the United States and Iran (see paragraphs 16 and 17 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981 (“General Declaration”).

191. KAUFMANN-KOHLER & POTESTÀ, *supra* note 183, ¶¶ 95–96, 148–54.

192. *Id.* ¶ 94.

193. *Id.* ¶ 95.

194. *Id.*

claimants had no other choice than to pursue their claims before the Tribunal and were barred from initiating or continuing actions in U.S. courts. But the Tribunal’s arbitral nature was never disputed for reasons linked to its composition.¹⁹⁵

This leap from enforceability to *per se* justification of investor-State arbitration as presently known (not being changed by its replacement by an International Investment Court), however, wholly disregards the fact that the IUSCT was established through negotiations to solve a major international crisis that began only in early November 1980 and ended just two and a half months later with the conclusion of the Algiers Accords on January 19, 1981. The negotiations were conducted via Algeria (as intermediary) and involved English, French, Arabic, and Farsi languages—the principal object of the negotiations was the release of fifty-two American hostages who were held captive for 444 days and all but two of whom were U.S. diplomatic or consular officers.¹⁹⁶ Iran’s seizure of the hostages had resulted in two United Nations Security Council Resolutions,¹⁹⁷ an order of the International Court of Justice¹⁹⁸ compelling the hostages’ release but ignored by Iran, and a failed U.S. Army Delta Force raid at Desert One in Iran which had been mounted to free the hostages.¹⁹⁹ This hostage seizure triggered the severance of diplomatic relations between the two countries. To rely on such a hurried solution of a serious international crisis as a model for normal investor-State arbitration is beyond reason.

It is equally true that neither the American merchant shipowners whose vessels were sunk by Confederate States’ armed raiders during the Civil War, in particular by the CSS Alabama, nor the American cargo owners whose goods were thereby lost, were allowed to appoint any of the arbitrators in the post-Civil War “Alabama Arbitration” between the United States and the United Kingdom. That arbitration forestalled incipient hostilities between the two countries provoked by the United Kingdom’s having allowed those raiders to be built in England in patent violation of the laws of neutrality—the United Kingdom having declared itself neutral in the Civil War.²⁰⁰

195. *Id.*

196. CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 4–5 (1998).

197. *See* S.C. Res. 457 (Dec. 4, 1979); S.C. Res. 461 (Dec. 31, 1979).

198. Case concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Order on Provisional Measures, 1979 I.C.J. Rep. (Dec. 15, 1979); Case concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. (May. 24, 1980).

199. Mark Bowden, *The Desert One Debacle*, ATLANTIC (July 2006), <https://www.theatlantic.com/magazine/archive/2006/05/the-desert-one-debacle/304803>.

200. *The Alabama Claims, 1862–1872*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1861-1865/alabama> (last visited Sept. 25, 2018).

Similar to the IUSCT, the United States and the United Kingdom appointed one arbitrator each and agreed that three others would be appointed from Brazil, Italy, and Switzerland.²⁰¹ It is simply illogical and unreasonable to cite a tribunal formed to resolve an ongoing international crisis between two nations at daggers' points to justify the deprivation of arbitrating parties' historic enjoyment of the right to appoint arbitrators and collaboration in the selection of a tribunal chairperson.

No less inapposite is the CIDS Report's reliance on certain rules that "provide for the institution's sole power to appoint the arbitrators, without any input from the parties."²⁰² As examples, however, the CIDS study cites only²⁰³ the Court of Arbitration for Sport ("CAS") Arbitration Rules for the Olympic Games, which state that the President of the *ad hoc* Division will appoint one or three arbitrators from a preselected list without the disputing parties' input²⁰⁴ and the Arbitration Rules of the Basketball Arbitral Tribunal ("BAT"), which provide that "all disputes before the BAT will be decided by a single Arbitrator appointed by the BAT President on a rotational basis from the published list of BAT arbitrators."²⁰⁵ The CIDS Report states that

[a]lthough the parties have no say in the composition of the panels either before the CAS *ad hoc* division or before the BAT, it is undisputed that these mechanisms are in the nature of arbitration, which was actually confirmed by the Swiss Federal Tribunal, which is competent to review their awards as a consequence of their seat being in Switzerland.²⁰⁶

With respect, these are regulatory and disciplinary bodies whose authority the athletes involved necessarily accept as a condition of competing in the relevant sporting events. They are much like the national or regional authorities regulating the conduct of lawyers, physicians and other professionals. Obtaining a professional license or entering into a competitive sporting event subject to the regulation of CAS or BAT, brings with it automatic subjection of oneself to the relevant regulatory authority. Those subject to CAS or BAT have no more expectation of enjoying the benefits of ISDS as presently known than does a member of the Bar of any country to be able to appoint someone to the disciplinary authority that exists for the profession when that body considers a grievance lodged against that

201. V.V. Veeder, *Essex Court Chambers, The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator - From Miami to Geneva*, Inaugural Charles N. Brower Lecture on International Dispute Resolution at 391 (Apr. 5, 2013), in 107 AM. SOC'Y INT'L PROC. 387, 391 (2013).

202. KAUFMANN-KOHLER & POTESTÀ, *supra* note 183, ¶ 96.

203. *Id.* ¶¶ 97-98.

204. CAS ARBITRATION RULES FOR THE OLYMPIC GAMES, art 11.

205. BASKETBALL ARBITRAL TRIBUNAL, ARBITRATION RULES (2014), art. 8.

206. KAUFMANN-KOHLER & POTESTÀ, *supra* note 183, ¶ 96

professional. All in all, the CIDS Report dwells principally on what can be termed “arbitration,” rather than on the distinctions of genesis, character, and subject matter of the various fora.²⁰⁷

Within the context of enforcement under the N.Y. Convention, the CIDS Report concludes that the unilateral right of appointment is not as important as the parties’ consensual submission to arbitration.²⁰⁸ There is no denying that party freedom is paramount and if parties choose to do away with their right of appointment, that is their prerogative. But the CIDS Report’s conclusion in relation to enforceability does nothing to undermine the long-established right of unilateral appointment, which is a fundamental—if not crucial—feature of arbitration, especially of investor-State arbitration.

The CIDS Report also draws its conclusions within the confines of the N.Y. Convention, which is an important treaty in the history of arbitration but cannot be representative of all that is regarded as “arbitration.” There are a litany of treaties and rules demonstrating the value of the unilateral right of appointment. The N.Y. Convention’s scope being limited to the recognition and enforcement of arbitral awards and arbitration agreements, it “does not provide for any obligation to be met by the parties as to the number of arbitrators or the method of their appointment.”²⁰⁹ Facilitating the recognition and enforcement of arbitral awards and arbitration agreements is undoubtedly vital if arbitration is to have teeth. What constitutes “arbitration” and how the tribunal is to be constituted are, however, equivalently important. These were intentionally left open in the N.Y. Convention. To go from awards by “permanent arbitral bodies” being enforceable under the N.Y. Convention, to concluding that party-appointment is not an essential feature of arbitration goes too far. The party-

207. Given the large number of doping-related disputes in sport arbitrations, one commentator has even queried whether such disputes fall under the N.Y. Convention given their non-commercial nature. Roger Alford, *Are CAS Arbitrations Governed by the New York Convention?* (Mar. 8, 2009) http://kluwarbitrationblog.com/2009/03/08/are-cas-arbitrations-governed-by-the-new-york-convention/?_ga=2.156422331.1237221282.1499359155-1066329609.1481846792. This may explain, according to another commentator, how enforcement under the N.Y. Convention of sports-based arbitral awards is not as important as for commercial-based arbitral awards “because the sport governing bodies have internal enforcement mechanisms that are highly effective.” DANIEL GIRSBERGER & NATHALIE VOSER, *INTERNATIONAL ARBITRATION: COMPARATIVE AND SWISS PERSPECTIVES* ¶ 1875 (3rd ed. 2016). The Swiss Supreme Court criticized “the lack of transparency of who nominated the arbitrators for their position on the list.” *Id.* ¶ 1942. Commentators have described the lack of arbitrators “that represent athletes’ interests, but without transparency, an athlete has no way of knowing who those arbitrators are.” *Id.* This only adds more credence to the significance of unilateral appointments.

208. KAUFMANN-KOHLER & POTESTÀ, *supra* note 183, ¶¶ 97–98.

209. GÓMEZ-ACEBO, *supra* note 165, ¶ 2-40.

appointment procedure—let alone other features of the arbitral process—were simply not in the contemplation of the drafters of the N.Y. Convention.

This is supported by the drafting history of the N.Y. Convention. The Secretary-General of the United Nations Economic and Social Council (“ECOSOC”) recognized that the N.Y. Convention was only one aspect of international arbitration and more work had to be done on arbitration procedures:

It should be noted, however, that the recognition and enforcement of foreign arbitral awards *is but an aspect of international commercial arbitration*. It has long been recognized that progress in the development of arbitration as a means to settle international commercial disputes between persons has been hampered mainly by the existing differences in the legislation of the various countries on the subject of arbitration procedures and the effect of arbitration, the lack of uniformity in the rules of arbitral tribunals, and the complications deriving from conflict of laws in this area. Thus, *in addition to* dealing with the recognition and enforcement of foreign arbitral awards, several public and private organizations interested in the increased use of arbitration in international trade have been actively engaged in *promoting the unification of arbitration laws, encouraging the conclusion of arbitration treaties and advocating the standardization or at least the co-ordination of the rules and procedures of existing arbitral bodies*.²¹⁰

The N.Y. Convention was one initiative amongst others spearheaded by the ECOSOC and others. “The evolution of an effective and trustworthy private international arbitration system over the last half a century has had three major strands,”²¹¹ of which the N.Y. Convention was but one. The 1976 (and 2010) UNCITRAL Arbitration Rules and the 1985 Model Law on International Commercial Arbitration were the others,²¹² and both expressly provide for the unilateral right of appointment by disputing arbitrants.²¹³

210. U.N. ECON. AND SOC. COUNCIL, MEMORANDUM BY THE SECRETARY-GENERAL, RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS ¶ 5 (1956), <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=e/2840&Lang=E> (emphasis added) (footnotes omitted) (The Secretary-General prepared a memorandum for the ECOSOC on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards and whether a conference should be called to address the topic).

211. DAVID D. CARON & LEE M. CAPLAN, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 1–2 (2nd ed. 2013).

212. *Id.*

213. 2010 UNCITRAL ARBITRATION RULES, art. 9(1) (“If three arbitrators are to be appointed, *each party shall appoint one arbitrator*. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.”) (emphasis added); 1985 UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, art. 11(3)(s) (“Failing such agreement, (a) in an arbitration with three arbitrators, *each party shall appoint one arbitrator*, and the

To its credit, the CIDS Report recognizes the fact that appointment of judges to an International Investment Court solely by States or the EU alone necessarily raises justified doubts on the part of investors as to the true impartiality of such judges, and, therefore, emphasizes that the process should not be politicized. They query whether it is desirable that only States participate in the election process or whether the investors should also have a say:

Starting with the election of the members of the ITI, several considerations must come into play. First, speaking of a multilateral tribunal, it is important to provide for an election procedure acceptable to the greatest number of States while preserving the workability of the ITI. In other words, while every State will not have "its" member on the ITI, the composition should nevertheless be acceptable to all States joining the system. One could thus contemplate entrusting the election to a body that is representative of the international community as a whole, so in particular the U.N. General Assembly. In that sense the election would then resemble that of the ICJ judges.

This said, one should mention in this respect the risk that such an election system may become affected by political considerations. This would constitute a step back from the often-praised depoliticization of investment arbitration, one facet of which is the decision-makers' distance from politics. In this connection, it would also seem important that the selection process be transparent and susceptible of being clearly monitored by the various constituencies. Keeping in mind the criticism towards the alleged democratic and transparency deficit of investor-State arbitration, solutions avoiding to the greatest extent possible any opacities in the selection process should be favored. Indeed, transparency in the process would also reduce the risks for politicization.

Furthermore, one can ask whether it is desirable that only States participate in the election process or whether investors should also have a say. *Without reintroducing the system of party appointment of arbitrators, which is currently considered objectionable, a consultation of business organizations, i.e. organizations representative of investor interests, may have its advantages.* Indeed, it would mitigate the risk of shifting from the current model that resembles commercial arbitration to the other extreme, that is to an interstate paradigm. This shift would neglect the fact that

two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6." (emphasis added); 1976 UNCITRAL ARBITRATION RULES, art. 7(1) ("If three arbitrators are to be appointed, *each party shall appoint one arbitrator.* The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.") (emphasis added).

investor-State dispute settlement is asymmetric, i.e. the disputes are between an investor and a State and not between two States.

Such a solution would also strengthen the view that the dispute settlement body meets the characteristics of arbitration and must be treated as such especially for purposes of enforcement.²¹⁴

With respect, the CIDS Report wrongly presumes that the United Nations General Assembly or any other international organization, including the EU, will act utterly devoid of political considerations, in contrast to States themselves making the appointments to an International Investment Court.

One of the co-authors of this Article, apart from experience in the U.S. Senate, the U.S. Department of State, and the White House, has for decades, in The Hague and at the United Nations in New York City, been observing elections to the International Court of Justice (“ICJ”), which in fact are highly political and, hence, do involve tradeoffs and “deals.” From its establishment as the judicial branch of the United Nations in 1946 until the 2017 elections, it was an unbroken practice that each of the five Permanent Members of the Court would have a seat on it. In the last election, however, even that sacred (if unwritten) rule was broken, with the failure of the sitting U.K. Judge to be re-elected.²¹⁵ Thus it is, now more than ever, an illusion to think that the process can be de-politicized.

It is equally misguided to think that “a consultation of business organizations, i.e., organizations representative of investor interests,” will have a significant influence that will reduce the political character of such appointments. There is no obligation on States to follow any recommendation by such organizations on the composition of the hypothetical permanent investment court. It is further presumptuous to think that these organizations would give any consideration to the issue in the first place. Arbitral disputes are not at the top of these organizations’ agendas vis-à-vis their respective governments and any international organizations—let alone individual investors. Disputes may not even transpire until many years later, and there is nothing to suggest that any of the recommendations of business organizations now would be representative of the putative investor that may end up before the permanent investment court in the future. While investors themselves may have a degree of influence, it is not worth much. A right to be consulted is equivalent to a ballot paper with a disclaimer that the vote may not be counted.

214. KAUFMANN-KOHLER & POTESTÀ, *supra* note 183, ¶¶ 166–69 (emphasis added).

215. Owen Bowcott, *No British Judge on World Court for First Time in Its 71-Year History*, *GUARDIAN* (Nov. 20, 2017), <https://www.theguardian.com/law/2017/nov/20/no-british-judge-on-world-court-for-first-time-in-its-71-year-history>.

In November 2017, the authors of the CIDS Report published a Supplemental Report (“Supplemental Report”). The authors of the Supplemental Report augment their initial paper by providing further analysis of the composition of a hypothetical permanent court.²¹⁶ In their Supplemental Report, the authors explain that their proposal in their initial CIDS Report “presuppose[s] the creation of multilateral permanent adjudicatory bodies, the ITI [i.e., International Tribunal for Investments] and/or the AM [i.e., Appeals Mechanism], whereby the former would provide an alternative to the current *ad hoc* system of investor-State arbitration and the latter would supplement it.”²¹⁷

The Supplemental Report identifies three consequences of transitioning from the current “*ad hoc* system”—which is understood to refer to a dispute resolution body constituted on a case-by-case basis for a single dispute²¹⁸—to a permanent or semi-permanent body on the arbitrator-selection process. Of those three, the first is relevant for our purposes. The Supplemental Report acknowledges that the unilateral right of party-appointment would be eliminated if the appointing power rests on exclusively on States:

The first consequence is the transition from a disputing party framework to a treaty or contracting party framework. *Transitioning from an ad hoc system that allows virtually complete control over composition by the disputing parties to a permanent or semi-permanent system necessarily reduces the role for disputing parties and conversely increases that of treaty parties.* As the dispute resolution body must exist before the investment dispute arises, it must necessarily be established *ex ante* by the treaty parties. This entails moving beyond the “historical keystone” of arbitration, namely disputing party appointment, to a different selection method placed entirely or predominantly in the hands of the parties to the instrument establishing the new adjudicatory bodies. *Such dilution of powers concerns all disputing parties, including respondent States who lose the “right” to influence the composition of the body as disputing parties. However, in practice, it will be perceived as affecting the investor-party more heavily, as States will be able to contribute to the composition of the body in their capacity of treaty parties.*²¹⁹

The Supplemental Report acknowledges that the tilting of the scales in favor of States is in no way diminished by the fact that the respondent-State

216. GABRIELLE KAUFMANN-KOHLER & MICHELE POTESTÀ, GENEVA CTR. FOR INT’L DISPUTE SETTLEMENT, THE COMPOSITION OF A MULTILATERAL INVESTMENT COURT AND OF AN APPEAL MECHANISM FOR INVESTMENT AWARDS: CIDS SUPPLEMENTAL REPORT ¶ 2 (Nov. 15, 2017), http://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf.

217. *Id.* ¶ 6.

218. *Id.* ¶ 7.

219. *Id.* ¶ 14 (emphasis added).

in an investment dispute is also deprived of the opportunity to select an arbitrator once the dispute is afoot.

Furthermore, the Supplemental Report seems to acknowledge more clearly the particular hurdles involved in a “selection” process of this type and magnitude:

The guarantees for judicial independence in existing courts provide helpful starting points in this respect. However, *they may not be sufficient or at least not entirely transposable as such to investor-State dispute settlement, in which the asymmetric nature is such that only one type of the future disputing parties controls the selection process.* Designing an appropriate selection process that, *inter alia*, ensures the requisite independence of the adjudicators thus appears to be of even greater concern in a setting of this kind.

As the practice at existing permanent international courts and tribunals shows, *the involvement of States* (and, within the State apparatus, in particular of State governments) *may lead to risks of politicization of the selection process.* . . . Appointment on the basis of political considerations rather than competence and merit may undermine the quality of the decisions and, ultimately, the perception of the adjudicatory body’s independence, credibility and legitimacy.²²⁰

Ensuring that the “selection” process is multi-layered, open to all stakeholders, and transparent sounds good in theory, until one realizes that in substance what is being proposed is that States constitute an advisory panel to sign off on the qualifications of potential candidates and “consult[] . . . national parliaments” to “reinforce the democratic element in the process.”²²¹

IV. THE FUTURE

A. THE EUROPEAN UNION AND ITS BATTLE AGAINST ISDS

The “Demolition Derby” targeting ISDS is flourishing, doubtless confident of victory thanks to the UNCITRAL Commission’s welcoming attitude toward the EU’s relentless campaign to sell to the world its Investment Court System. In our view, however, it is questionable whether this “Demolition Derby” will result in a successful International Investment Court. As Nikos Lavranos’s unofficial report of the Fiftieth Session of the UNCITRAL Commission of last July 2017 confirmed, the proposal to replace the current ISDS regime with a permanent investment court has not

220. *Id.* ¶¶ 107–08 (emphasis added).

221. *Id.* ¶¶ 111–16.

to date received the glowing endorsement of all States as the EU and Canada have hoped.²²²

On September 13, 2017, the Council of the EU “authorised [sic] [the European Commission] to open negotiations, on behalf of the [EU], for a Convention establishing a multilateral court for the settlement of investment disputes.”²²³ Recent developments, however, suggest that there may be some insurmountable obstacles ahead for the EU Commission.

For example, the European Commission experienced a setback in respect to the EU-Singapore Free Trade Agreement (“FTA”). As initially with CETA, the European Commission was confident that the EU-Singapore FTA and all future EU trade and investment treaties would fall within its exclusive competence (Article 207 of the Treaty of the European Union (“TFEU”). This appears no longer to be the case in light of an opinion of the Court of Justice of the European Union (“CJEU”) that issued in May 2017. The issue before the CJEU was “whether the envisaged agreement [that is, the EU-Singapore FTA] [could] be signed and concluded by the European Union alone or whether, to the contrary, it will have to be signed and concluded both by the European Union and by each of its Member States (a ‘mixed’ agreement).”²²⁴ The CJEU “handed a significant victory to the European Union” insofar as it found that the EU had “exclusive competence over almost all aspects of the EU-Singapore FTA, which paves the way for them to enter into such agreements without requiring the approval of all of the Member States.”²²⁵ The CJEU, however, carved out two notable exceptions: First, the EU has exclusive competence over *direct* foreign investment, but not over indirect investments, which are investments undertaken without the intention to influence the management of a company.²²⁶ Second, and most significantly, the EU and its Member States share competence of, *inter alia*, Section B (Investor-State Dispute

222. Lavranos, *supra* note 102.

223. EUROPEAN COMM’N, COUNCIL DECISION: AUTHORIZING THE OPENING OF NEGOTIATIONS FOR A CONVENTION ESTABLISHING A MULTILATERAL COURT FOR THE SETTLEMENT OF INVESTMENT DISPUTES, art. 1, 8 (2017) <http://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-493-F1-EN-MAIN-PART-1.PDF>. See also Lacey Yong, *European Commission Seeks Leave to Begin Negotiations for Multilateral Court*, GLOBAL ARB. REV. (Sept. 13, 2017), <http://globalarbitrationreview.com/article/1147314/eu-to-begin-negotiations-for-multilateral-investment-court>.

224. Opinion 2/15 of the Court (Full Court), Opinion Pursuant to Article 218(11) TFEU ¶ 29, EU:C:2017:376 (May 16, 2017), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=520958>.

225. Anthea Roberts, *A Turning of the Tide Against ISDS?*, EJIL: TALK! (May 19, 2017), <https://www.ejiltalk.org/a-turning-of-the-tide-against-isds>.

226. Opinion 2/15, *supra* note 224.

Settlement) of Chapter 9 of the EU-Singapore FTA.²²⁷ The CJEU noted that the ISDS regime removes disputes from the jurisdiction of the national courts of the Member States and thus is not “of a purely ancillary nature . . . and cannot, therefore, be established without the Member States’ consent.”²²⁸ The outcome of the opinion, in the view of one commentator, makes “[o]ne thing . . . clear: the European Commission did not obtain the full exclusive competence [for] which it was hoping.”²²⁹ The ruling means that EU free trade treaties containing provisions for an International Investment Court “must now be ratified not only by the national parliaments of the 28 EU Member States, but also by nearly a dozen regional parliaments.”²³⁰

On July 6, 2017, the EU and Japan signed an agreement in principle on the main elements of the Japan-EU Economic Partnership Agreement (known as “JEEPA”), which was finalized on December 8, 2017.²³¹ The agreement in principle excludes investment,²³² noting that no agreement has been reached on the whole chapter and that ISDS remains fully open.²³³ The agreement in principle notes that the EU has tabled its permanent investment court proposal in its negotiations with Japan and that “[t]he EU continues to insist that there can be no return to old-style ISDS. Under no conditions can old-style ISDS provisions be included in the agreement.”²³⁴ In a factsheet published on July 1, 2017 by the EU, it added “[f]or the EU ISDS is dead.”²³⁵

Such rhetoric by the European Commission should be taken with a pinch of salt. Japan has included conventional ISDS in its investment agreements. For example, in 2016 Japan signed BITs with Kenya²³⁶ and the Islamic Republic of Iran²³⁷ and, on January 23, 2018, following negotiations

227. *Id.* ¶¶ 227, 305.

228. *Id.* ¶ 292.

229. Nikos Lavranos, *The CJEU’s Opinion on EU-SING FTA: More Confusion Than Clarity*, KLUWER ARB. BLOG (May 30, 2017), <http://kluwerarbitrationblog.com/2017/05/30/cjeus-opinion-eu-sing-fta-confusion-clarity>.

230. Douglas Thomson, *ECJ Says Member States Must Sign Off on ISDS*, GLOBAL ARB. REV. (May 16, 2017), <http://globalarbitrationreview.com/article/1141765/ecj-says-member-states-must-sign-off-on-isds>.

231. *In Focus – EU-Japan Economic Partnership Agreement*, EUROPEAN COMM’N: TRADE, <http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement> (last visited Sept. 25, 2018).

232. EU-JAPAN EPA – THE AGREEMENT IN PRINCIPLE 1 (2017), http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155693.doc.pdf.

233. *Id.*

234. *Id.*

235. EU-JAPAN ECONOMIC PARTNERSHIP AGREEMENT: A NEW EU TRADE AGREEMENT WITH JAPAN 6 (2017), http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155684.pdf.

236. Japan-Kenya Bilateral Investment Treaty, Japan-Kenya, art. 15 (June 28, 2016), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5374>.

237. Islamic Republic of Iran-Japan Bilateral Investment Treaty, Islamic Republic of Iran-Japan,

in Tokyo, Japan announced its agreement with ten countries for the Comprehensive and Progressive Agreement for Transpacific Partnership ("CPTPP").²³⁸ Moreover, Japan may be reluctant to pay for the European Commission's permanent investment court, which may set a precedent for future treaties whereby State-appointed judges may rule on claims by Chinese or Korean investors against Japan.²³⁹ Japan, thus, may not be easily persuaded to sign up to the European Commission's proposal in its current form.

We can expect more from the EU's existential crisis on ISDS. On September 6, 2017, Belgium formally asked the CJEU to assess the compatibility of the CETA's "Investment Court System" with EU law. Specifically, Belgium has asked whether the "Investment Court System" is compatible with EU citizens' right of access to courts, the "general principle of equality," and the CJEU's exclusive competence over EU law and how the proposed court would affect the "right to an independent and impartial judiciary."²⁴⁰

After a little more than two weeks following Belgium's formal request to the CJEU, the EU Advocate General Melchior Wathelet rendered a non-binding (but persuasive) opinion in a parallel proceeding that likely will weigh heavily in the disposition of Belgium's request. The Advocate General's opinion was rendered with respect to a request for a preliminary ruling brought by the German Federal Court of Justice in May 2016 before the CJEU concerning the Netherlands-Slovakia BIT.²⁴¹ The German court had referred a series of questions concerning the compatibility of *intra*-EU BITs with EU law. The German court's questions arose in the context of an application by the Slovak Republic to annul an arbitral award issued in favor of Achmea (formerly Eureko), a Dutch investor, under the Netherlands-

art. 18 (signed February 5, 2016), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3578>.

238. Ceremonial signing of the CPTPP is scheduled for March 2018. Transpacific Partnership Agreement, ch. 9 (February 4, 2016), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3573>.

239. *A New Trade Deal Between the EU and Japan*, *ECONOMIST* (July 8, 2017), <https://www.economist.com/news/finance-and-economics/21724830-besides-slashing-tariffs-cheese-and-cars-it-sends-message-donald-trump>.

240. Douglas Thomson, *ECJ to Rule on CETA Investment Court*, *GLOBAL ARB. NEWS* (Sept. 6, 2017), <http://globalarbitrationreview.com/article/1147140/ecj-to-rule-on-ceta-investment-court>. See also Damien Charlotin, *Analysis: EU's Highest Court Is Asked Once More to Weigh in on International Investment Law Questions—This Time by Belgium in Relation to CETA's "Investment Court System"*, *INV. ARB. REP.* (Sept. 6, 2017), <https://www.iareporter.com/articles/analysis-eus-highest-court-is-asked-once-more-to-weigh-in-on-international-investment-law-questions-this-time-by-belgium-in-relation-to-cetas-investment-court-system>.

241. *Slovak Republic v. Achmea BV*, Case C-284/16, Opinion of Advocate General Wathelet (Sept. 19, 2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CC0284>.

Slovakia BIT.²⁴²

The Advocate General opined that the ISDS provision in the Netherlands-Slovakia BIT was compatible with EU law,²⁴³ which, if confirmed by the CJEU, could have implications for numerous *intra*-EU BITs.²⁴⁴ The intriguing features of the opinion, however, were the Advocate General's observations on the European Commission's and some EU Member States' contradictory ISDS practices.

First, the Advocate General noted that several EU Member States intervened in the proceedings and made both oral and written submissions. He noted that the intervening EU Member States could be divided into two groups. The first group consists of States that "are essentially countries of origin of the investors and therefore never or rarely respondents in arbitral proceedings launched by investors."²⁴⁵ These States are the Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands, the Republic of Austria, and the Republic of Finland. The second group consists of States that "have all been respondents in a number of arbitral proceedings relating to *intra*-EU investments."²⁴⁶ These States are the Czech Republic, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, Hungary, the Republic of Poland, Romania, and the Slovak Republic.

The Advocate General noted that it was "hardly surprising" that the second group of EU Member States "intervened in support of the argument put forward by the Slovak Republic, which is itself the respondent to the investment arbitration at issue in the present case."²⁴⁷ Yet he found it "surprising" that the same States, with the exception of Italy, had not moved to terminate their respective *intra*-EU BITs, which, thus, remained in force

242. *Advocate General of EU Court of Justice Rejects Contentions That Intra-EU Bilateral Investment Treaty is Incompatible with EU Law*, INV. ARB. REP. (Sept. 19, 2017), <https://www.iareporter.com/articles/28492>.

243. *Slovak Republic*, Opinion of Advocate General Wathelet ¶ 273:

Articles 18, 267 and 344 TFEU must be interpreted as not precluding the application of an investor/State dispute settlement mechanism established by means of a bilateral investment agreement concluded before the accession of one of the Contracting States to the European Union and providing that an investor from one Contracting State may, in the case of a dispute relating to investments in the other Contracting State, bring proceedings against the latter State before an arbitral tribunal.

244. Sebastian Perry, *ECJ Adviser Gives Thumbs-up to Intra-EU BITs*, GLOBAL ARB. REV. (Sept. 19, 2017), <http://globalarbitrationreview.com/article/1147460/ecj-adviser-gives-thumbs-up-to-intra-eu-bits>.

245. *Slovak Republic*, Opinion of Advocate General Wathelet ¶ 34.

246. *Id.*

247. *Id.* ¶ 36.

in whole or in part.²⁴⁸ When Slovakia was asked at the hearing why it had not terminated its other BITs with the States in the second group, Slovakia admitted “that its objective was to ensure that its own investors would not be the victims of discrimination by comparison with investors from other Member States in the Member States with which it would no longer have BITs.”²⁴⁹

Second, the Advocate General noted the European Commission’s inconsistent position on ISDS. He noted that “the argument of the EU institutions, including the Commission, was that, far from being incompatible with EU law, BITs were instruments necessary to prepare for the accession to the Union of the countries of Central and Eastern Europe.”²⁵⁰ The Advocate General was unmoved by the European Commission’s attempt to explain its inconsistent position at the hearing:

At the hearing, the Commission attempted to explain that change in its position on the incompatibility of BITs with the EU and FEU [i.e., Treaties on the Functioning of the European Union] Treaties, maintaining that the agreements in question were necessary in order to prepare for the accession of the candidate countries. *However*, if those BITs were justified only during the association period and each party was aware that they would become incompatible with the EU and FEU Treaties as soon as the third State concerned had become a member of the Union, *why did the accession treaties not provide for the termination of those agreements, thus leaving them in uncertainty which has lasted more than 30 years in the case of some Member States and 13 years in the case of many others?*²⁵¹

Third, the Advocate General opined that “the systemic risk” that, according to the European Commission, “intra-EU BITs represent to the uniformity and effectiveness of EU law is greatly exaggerated.”²⁵² For support, the Advocate General referred to UNCTAD statistics that revealed “that out of 62 intra-EU arbitral proceedings which, over a period of several decades, have been closed, the investors have been successful in only 10 cases.”²⁵³ Moreover, the Advocate General also noted that the EU Member States in the second group and the European Commission could only name a single example “which resulted in an arbitral award that was allegedly

248. *Id.* ¶ 37. The Advocate General did, however, note that Italy was the only EU Member State falling within the second group that had moved to terminate its *intra*-EU BITs, with exception of the Italy-Malta BIT. *Id.*

249. *Id.* ¶ 38.

250. *Id.* ¶ 40.

251. *Id.* ¶ 41 (emphasis added).

252. *Id.* ¶ 44.

253. *Id.*

incompatible with EU law,”²⁵⁴ namely, the *Ioan Micula v. Romania* ICSID matter, which is still ongoing. The Advocate General noted that “the fact that there is only a single example reinforces [his] opinion that the fear expressed by certain Member States and the Commission of a systemic risk created by intra-EU BITs is greatly exaggerated.”²⁵⁵

Yet, the Advocate General’s opinion fell on deaf ears as the CJEU ruled on March 6, 2018 that ISDS provisions in *intra*-EU BITs are incompatible with EU law.²⁵⁶ The decision prompted the Netherlands—one of the States falling under Advocate General Wathelet’s first group²⁵⁷—to announce reluctantly its decision to terminate all twelve of its *intra*-EU BITs.²⁵⁸

The full implications of the CJEU’s opinion in *Achmea* are unclear, but it could be viewed as the CJEU forcing EU investors in other EU Member States to accept the EU Commission’s proposal to resolve all investment disputes through the permanent investment court. Other EU actors may have heard the rallying cry because their efforts to establish the permanent court were amped up following the *Achmea* decision.

Two weeks after the *Achmea* decision, the Council of the EU issued a negotiating directive for establishing a permanent investment court for the settlement of investment disputes with the EU Commission designated as the authorized representative.²⁵⁹ All analysis and discussion concerning the proposal, according to the directive, “should be conducted under the auspices of the United Nations Commission on International Trade Law (UNCITRAL).”²⁶⁰

Less than a month later, the EU Commission presented a final text of

254. *Id.* ¶ 45.

255. *Id.*

256. See *Slovak Republic v. Achmea BV*, Case C-284/16, Judgment, ¶ 56 (2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0284> (ruling that such arbitration clauses are incompatible with EU law because they, *inter alia*, threaten the “full effectiveness of EU law”).

257. *Slovak Republic*, Opinion of Advocate General Wathelet ¶ 34.

258. Letter of Sigrid A.M. Kaag, Dutch Foreign Affairs Minister (Apr. 26, 2018). See Lacey Yong, *Netherlands to Terminate BIT with Slovakia in Wake of Achmea*, GLOBAL ARB. REV. (May 2, 2018), <https://globalarbitrationreview.com/article/1168905/netherlands-to-terminate-bit-with-slovakia-in-wake-of-achmea>.

259. Note from the General Secretariat of the Council for the European Union to Delegations, Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes, 12981/17 ADD 1 DCL 1 (Mar. 20, 2018) [hereinafter Negotiating Directives]; Sebastian Perry, *EU Council Gives Go-Ahead for Talks on Multilateral Court*, GLOBAL ARB. REV. (Mar. 21, 2018), <https://globalarbitrationreview.com/article/1167071/eu-council-gives-go-ahead-for-talks-on-multilateral-court>.

260. Negotiating Directives, *supra* note 259, ¶ 4.

its agreement with Singapore to the Council of the EU as well as a new FTA, the latter of which displaces the previously agreed ISDS provision with the Investment Court System promoted by the EU and adopted in CETA.²⁶¹ The Council of the EU will now adopt and sign the agreements before obtaining the EU Parliament’s consent.²⁶² While the FTA will take effect in 2019, the investment protection agreement will take effect following the ratification by each EU Member State²⁶³—a move necessary in light of the CJEU’s ruling concerning the EU-Singapore FTA discussed earlier.

On the heels of announcing the final EU-Singapore agreements, the EU and Mexico unveiled an “agreement in principle” in which the Contracting Parties agreed to establish a permanent investment court to resolve investment disputes.²⁶⁴

It may be wrong to presume that the CJEU is a promoter of the EU Commission’s permanent investment court. As discussed earlier, the CJEU has yet to issue an opinion on the compatibility of the CETA’s “Investment Court System” with EU law. Thus, it remains to be seen whether the CJEU truly joins its fellow EU institutions in preferring the EU-proposed permanent court.

Moreover, the TTIP talks between the EU and the United States are currently on hold pending further clarity from the new U.S. administration on the position of Washington’s trade policy priorities.²⁶⁵

B. THE UNITED STATES’ PLACE IN THE ISDS DEBATE

The United States’ efforts to renegotiate NAFTA may well result in the removal of ISDS from the treaty. Despite early indications from the current administration that ISDS is here to stay,²⁶⁶ doubts among affected businesses have grown, and on August 8, 2017, a score of associations “representing

261. See *EU-Singapore Trade and Investment Agreements (Authentic Texts as of April 2018)*, EUROPEAN COMM’N (Apr. 18, 2018), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>; Lacey Yong, *EU Unveils New Investment Agreements with Singapore*, GLOBAL ARB. REV. (Apr. 19, 2018), <https://globalarbitrationreview.com/article/1168166/eu-unveils-new-investment-agreement-with-singapore>.

262. Lacey Yong, *supra* note 261.

263. *Id.*

264. See *New EU-Mexico Agreement: The Agreement in Principle and Its Texts*, EUROPEAN COMM’N (Apr. 26, 2018), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1833>.

265. *EU’s Malmström Makes Global Investment Court Pitch to Stakeholders*, INT’L. CTR. FOR TRADE & SUSTAINABLE DEV.: BRIDGES (Mar. 2, 2017), <https://www.ictsd.org/bridges-news/bridges/news/eus-malmstr%C3%B6m-makes-global-investment-court-pitch-to-stakeholders>.

266. Benjamin Button-Stephens, *NAFTA Negotiations: US Signals Will Keep ISDS*, GLOBAL ARB. REV. (July 18, 2017), <http://globalarbitrationreview.com/article/1144686/nafta-negotiations-us-signals-will-keep-isds>.

millions of small, medium and large companies across every major sector of the U.S. economy employing tens of millions of U.S. workers” wrote to the Administration urging it to retain ISDS.²⁶⁷ Moreover, minor attacks on ISDS in NAFTA have been intensifying in frequency as renegotiation talks concluded their penultimate round in late January 2018. In addition to the CCPA report debunked above, 230 Professors and six U.S. Senators have added themselves to the phalanx against ISDS. Specifically, on October 25, 2017, 230 law and economics professors sent a letter to President Trump urging him to remove ISDS from NAFTA.²⁶⁸ Their plea was shared and advanced by six U.S. Senators in a February 2, 2018 letter to President Trump in which they stated the “[ISDS] system and the foreign investor protections it enforces . . . must be eliminated.”²⁶⁹

The above letter reveals an alarming collective nationalistic bias to bring investment in-house without considering its consequences. The professors suggest that American investors “purchase risk insurance or look for safer jurisdictions” when investing abroad.²⁷⁰ Not only does this stunt international growth and development by restricting available venues, it embraces elitism by ensuring that only the financially best endowed corporations can afford to invest in high-risk territories while simultaneously shutting the front door to foreign investment for certain developing countries. The Senators’ stilted argument similarly wobbles under closer scrutiny. The crux of their argument against ISDS in NAFTA is stated as follows:

The investor outsourcing protectionism at the heart of NAFTA incentivizes companies to relocate production to low wage venues by locking in preferential treatment. These terms empower multinational corporations to sue governments before tribunals of three private-sector lawyers who can award the corporations unlimited sums to be paid by America’s taxpayers, including for the loss of expected future profits, when corporations claim that our environmental and health policies undermine their NAFTA privileges. Already multinational corporations

267. Tom Jones, *US Business Leaders Warn Trump to Keep ISDS*, GLOBAL ARB. REV. (Aug. 9, 2017), <http://globalarbitrationreview.com/article/1145444/us-business-leaders-warn-trump-to-keep-isds>. The open letter is accessible at http://documents.nam.org/COMM/Business-Letter-on-ISDS-in-NAFTA-2017-08-08.pdf?_ga=2.252476620.411711523.1502215933-340315665.1502215933.

268. Letter from Law and Economics Professors to President Trump (Oct. 25, 2017), https://www.citizen.org/system/files/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf.

269. Letter from U.S. Senators to U.S. President 2 (Feb. 2, 2018), <https://www.sanders.senate.gov/download/senate-nafta-letter-to-trump?id=C3E61283-46F3-4004-853A-D497F7539BAA&download=1&inline=file>.

270. Letter from Law and Economics Professors to President Trump, *supra* note 268, at 3.

have extracted hundreds of millions from North American taxpayers using the ISDS regime.²⁷¹

Treaties such as NAFTA reduce investment risk by protecting investment abroad. There is no preferential treatment as the same level protection is afforded equally to all covered foreign investors and investments. Furthermore, NAFTA does not restrict the tribunal’s composition to “private-sector lawyers.” Public figures, in so far as they satisfy the good character and expertise requirements necessary of arbitrator, are welcome to sit on the bench. Notably, Respondent States consent to all or the majority of any uneven number of appointed arbitrators.²⁷² Moreover, it is plainly preposterous that a tribunal could award “unlimited sums,” as awards of damages adhere to party agreement or basic principles of international law.²⁷³ Furthermore, insofar as the United States is concerned, it is flatly untrue that “multinational corporations have extracted hundreds of millions from North American taxpayers under the ISDS regime,” as not one NAFTA arbitration case against the country has been lost.²⁷⁴ As stated earlier, too, no ISDS tribunal has ever found a legitimate environmental or health law or regulation of a State to breach an international investment agreement. Accordingly, NAFTA does not grant “privileges” to corporations.

Amusingly, one of the six U.S. Senators mentioned above, Senator Elizabeth Warren, has directly benefited from ISDS, earning in the neighborhood of US\$90,000, while acting as an Expert Witness on bankruptcy law for the U.S. Government in the *Loewen v. United States* NAFTA case.²⁷⁵

More alarming is the effect these attacks may be having on NAFTA ISDS renegotiations. In advance of the November 2017 round, the United States uncharacteristically introduced a second set of objectives on ISDS,²⁷⁶ which promoted an enhanced skeptical view toward ISDS, including a

271. Letter from U.S. Senators to U.S. President, *supra* note 269, at 2.

272. ICSID ARBITRATION RULES, art. 37(2).

273. *See generally, e.g.,* Case Concerning the Factory at Chorzów, 1928, P.C.I.J. (ser. A.17) No. 13 (Germany versus Poland).

274. William Mauldin, *Canada, Mexico Reject Proposal to Rework Nafta Corporate Arbitration System*, WALL ST. J. (Jan. 28, 2018), <https://www.wsj.com/articles/canada-mexico-reject-proposal-to-rework-nafta-corporate-arbitration-system-1517179473>.

275. Edward-Isaac Dovere & Doug Palmer, *Warren Was Paid up to \$90,000 as Witness in 2000 Trade Case*, POLITICO (May 21, 2015), <https://politico.com/story/2015/05/warren-was-paid-up-to-90000-as-witness-in-2000-trade-case-118199>.

276. OFF. OF THE U.S. TRADE REP., SUMMARY OF OBJECTIVES FOR THE NAFTA RENEGOTIATION, (2017), <https://ustr.gov/sites/default/files/files/Press/Releases/Nov%20Objectives%20Update.pdf>.

proposal to introduce an “opt-in” system and a culling of the substantive standards of protection.²⁷⁷ Following this fifth round of negotiations, Mexico proposed a permanent investment court mirroring the one found in CETA. Mexican Economy Minister Ildefonso Guajardo explained that Mexico is “considering alternatives by putting the European model on the table to see if it works in North America.”²⁷⁸ Canadian foreign minister Chrystia Freeland similarly acknowledged differences between Canada and the United States on a number of key chapters and stated Canada’s position is to “hope for the best and prepare for the worst.”²⁷⁹

In advance of the sixth round of negotiations in Montreal during January 23–29, 2018, President Donald Trump called NAFTA a “bad joke”²⁸⁰ on his Twitter account and stated to the media that “if [NAFTA] doesn’t work out, we’ll terminate it.”²⁸¹ In turn, Mexico strengthened its position by becoming the 162nd country to sign the 1965 ICSID Convention²⁸² and Canada signaled that NAFTA was not an exclusive source for trade protection, making public its December 2017 World Trade Organization complaint aimed at the United States’ use of anti-dumping and anti-subsidy duties.²⁸³ The political charges against inclusion of ISDS in NAFTA have reached a critical point, and Canada is set to propose its elimination, with the expectation that the United States will echo this pitch.²⁸⁴

Despite this NAFTA ISDS renegotiation rollercoaster, Mexico and Canada are now flirting with the notion of excluding the uncooperative

277. Tom Jones, *NAFTA Talks Make Little Headway as US Updates Objectives for ISDS Reform*, GLOBAL ARB. REV. (Nov. 22, 2017), <https://globalarbitrationreview.com/article/1150788/nafta-talks-make-little-headway-as-us-updates-objectives-for-isd-reform>.

278. Cosmo Sanderson, *Mexico Proposes Permanent Dispute Resolution Body for NAFTA*, GLOBAL ARB. REV. (Nov. 30, 2017), https://globalarbitrationreview.com/print_article/gar/article/1151247/mexico-proposes-permanent-dispute-resolution-body-for-nafta.

279. John Paul Tasker, *Canada ‘Prepared for the Worst’ Amid Squabbles over NAFTA*, Freeland Says, CBC NEWS (Nov. 21, 2017), <http://cbc.ca/news/politics/freeland-nafta-fifth-round-prepare-for-worst-1.4412673>.

280. Donald J. Trump (@realDonaldTrump), TWITTER (JAN. 18, 2018, 3:25 AM), <https://twitter.com/realdonaldtrump/status/953951365532876800?lang=en>. See also Kevin Cirilli, *Trump Says NAFTA Is a ‘Bad Joke!’*, BLOOMBERG (Jan. 18, 2018), <https://bloomberg.com/news/videos/2018-01-18/trump-says-nafta-is-a-bad-joke-video>.

281. David Ljunggren & Anthony Esposito, *NAFTA Negotiators Open Key Round of Talks Amid Upbeat Signs*, REUTERS (Jan. 23, 2018), <https://reuters.com/article/us-trade-nafta/nafta-negotiators-open-key-round-of-talks-amid-upbeat-signs-idUSKBN1FC242>.

282. Alison Ross & Tom Jones, *Mexico Signs ICSID Convention*, GLOBAL ARB. REV. (Jan. 12, 2018), <https://globalarbitrationreview.com/article/1152707/mexico-signs-icsid-convention>.

283. *Id.*

284. *Will the Renegotiated NAFTA Scrap ISDS?*, GLOBAL ARB. REV. (Feb. 21, 2018), <https://globalarbitrationreview.com/article/1159283/will-the-renegotiated-nafta-scrap-isd>.

United States from their own ISDS arrangement,²⁸⁵ and Canada has demonstrated its willingness to move forward without the United States when it concluded the CPTPP on January 23, 2018, just one year after the United States withdrew its participation in the negotiations of the mega-regional treaty.²⁸⁶

C. THE PERMANENT INVESTMENT COURT WILL HAMPER INVESTMENT

Even if the proposal for a permanent court were to become an opt-in institution along the lines of the Mauritius Convention on Transparency, it is possible that not many States would opt in.²⁸⁷

In any event, a permanent court to replace the current ISDS regime would be unlikely to succeed, as major investors would reject it. They would find other ways to protect themselves when negotiating foreign investments. They would return to the days of the 1960s and '70s, even to earlier days, negotiating contracts that would provide satisfactory dispute resolution mechanisms. Or they would not make any investments at all, or would make them at a higher price to the host country in order to cover the risk involved, all to the disadvantage of host States. It is only smaller investors who, lacking the negotiating strength to conclude contracts with host States containing the protection of conventional ISDS clauses, would be materially disadvantaged by their potential subjection to their fate being decided by an International Investment Court composed solely of State-appointed judges. Like so many radical movements devoid of a proper understanding of just how the world really works, the EU's permanent investment court, if it comes about, will not affect the wealthy investors, but will work hardship on "the little guys," who under conventional ISDS are given the treaty right of direct access to international arbitration before tribunals that they have an equal right to constitute. Why does anyone think this is just?

285. Lacey Yong, *Canada Goes Rogue with NAFTA Proposal*, GLOBAL ARB. REV. (Jan. 26, 2018), <https://globalarbitrationreview.com/article/1153129/canada-goes-rogue-with-nafta-proposal>.

286. *Trump Rejects TPP on First Working Day in Office*, GLOBAL ARB. REV. (Jan. 23, 2017), <https://globalarbitrationreview.com/article/1080391/trump-rejects-tpp-on-first-working-day-in-office>.

287. Douglas Thomson, *ECJ Says Member States Must Sign off on ISDS*, GLOBAL ARB. REV. (May 16, 2017), <http://globalarbitrationreview.com/article/1141765/ecj-says-member-states-must-sign-off-on-isds>.

