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M. R. Dahlan

Wolf von Kumberg

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Investor-State Dispute Settlement Reconceptualized: Regulation of Disputes, Standards and Mediation

Erratum

A previous version of this article was incorrectly attributed to Monde Marshall

INVESTOR-STATE DISPUTE
SETTLEMENT
RECONCEPTUALIZED:
*REGULATION OF DISPUTES, STANDARDS
AND MEDIATION*

*M. R. Dahlan, *Professor of International Law and Public Policy*, Queen Mary University of London

*Wolf von Kumberg, Registrar of the International Dispute Registry.

ABSTRACT

This paper argues that the current criticisms of Investor-State Dispute Settlement („ISDS“) are ill-informed, and attempts at reforming the system are misguided. The definition of ISDS itself has been, for a long time, limited to investment quasi-judicial bodies or at best arbitration. Analysis of the roots of the ever growing backlash reveals that the main causes for concern are politically negotiated investment treaties, an inherently biased system, lack of transparency, and inconsistent decision-making. Examination of the core reasons behind these complaints leads to the conclusion that the EU Commission’s solution to reform ISDS through a permanent court raises more issues and will throw ISDS into disarray. A better approach is to accept the premise that the current system needs improvement. However, accepting this premise requires regulating disputes themselves, rather than simply regulating the resolution of cases, and establishing standards when unable to regulate these. The regulation of disputes would allow the work already begun by UNCITRAL through its notes on transparency to continue. This study will review how introducing mediation to regulate the process of Investor State Disputes (“ISD”) can improve and indeed complement the procedural gap evident in the current ISDS system. In particular, while considering more recent investment regimes, it will use the current effort by the Energy Charter Treaty Secretariat to facilitate mediation within the Treaty as an example of how this can be done.

233

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I. INTRODUCTION

In the area of international dispute resolution, Investor-State Dispute Settlement („ISDS“) is a relatively recent phenomenon that has evolved at an unprecedented pace over the last fifty years.¹ It is also a peculiarity within international law, requiring states to waive their immunity and be subject to claims against investors.² In the past decade, the system has seen a surge in cases that brought it into public attention.³ These cases involved issues such as public debt restructuring, public health regulations, and environmental law.⁴ Moreover, some of the cases for the first time included developed states on the receiving end bearing the brunt of the obligations.⁵ The main perceived flaws of the system are: (1) its dangers to state sovereignty; (2) a lack of transparency; and (3) a lack of formal precedent resulting in inconsistent decision making.⁶ Critics have argued that the system is procedurally and substantively illegitimate and have made a variety of calls for reform and abolition.⁷

The most recent cases that have led the EU Commission to scrutinize ISDS involve claims brought by European investors against Member States of the European Union under the Energy Charter Treaty (“ECT”).⁸ These cases saw the first amicus curiae participation of the EU Commission in proceedings as a non-party.⁹ Referencing EU laws, it has so far unsuccessfully attempted to argue that intra-EU Bilateral

¹ See SCOTT MILLER & GREGORY N. HICKS, INVESTOR-STATE DISPUTE SETTLEMENT: A REALITY CHECK 6 (Jan. 2015), https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/150116_Miller_InvestorStateDispute_Web.pdf.

² Deborah Sy, *Warning: Investment Agreements Are Dangerous to Your Health*, 43 GEO. WASH. INT’L L. REV. 625, 630 (2011).

³ RODERICK ABBOTT ET. AL, DEMYSTIFYING INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) 8 (2014), http://www.ecipe.org/app/uploads/2014/12/OCC52014__1.pdf.

⁴ MILLER & HICKS, *supra* note 1, at 13.

⁵ *Id.* at 5.

⁶ 13 Myths About Investment Agreements and Investor-State Dispute Settlement, U.S. CHAMBERS OF COM. (Apr. 13, 2015), <https://www.uschamber.com/issue-brief/13-myths-about-investment-agreements-and-investor-state-dispute-settlement-isds>.

⁷ *International Trade: UN Expert Calls for Abolition of Investor-State Dispute Settlement Arbitrations*, UNITED NATIONS HUMAN RTS. OFF. OF THE HIGH COMMISSIONER (Oct. 26, 2015), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16650&LangID=E>.

⁸ Iana Dreyer, *Brussels Moves Against Bilateral Investment Treaties Within EU, Undermines Energy Charter*, ENERGY POST (Sept. 7, 2015), <http://energypost.eu/brussels-moves-intra-eu-investor-state-arbitration-puts-pressure-energy-charter/>.

⁹ *Id.*

Investment Treaties (“BITS”) and resulting claims in ad hoc investment arbitration tribunals are contrary to EU law.¹⁰

The surge of intra-EU ECT cases occurred at a time of widespread skepticism of the system, as well as a recent shift towards negotiating multilateral free trade and investment agreements.¹¹ Thus, the EU Commission has taken this momentum to change its policy by opting to promote the creation of permanent investment tribunals.¹² Such a move towards establishing permanent courts via regional trade and investment agreements bears much resemblance to the fragmentation that the World Trade Organisation experienced through the increase of regional agreements,¹³ and such a move should be treated as a warning sign. Therefore, a permanent court would be a step backwards and the debate on ISDS must consider other forms of regulation to restructure the process.

This article will examine the limited interpretation of the scope of ISDS, the arguments made in favour of abolishing the current ISDS regime, and why these arguments are not coherent. Specifically, the EU Commission’s proposal would not address the system’s shortcomings, and there are real benefits to ISDS as it exists. The article is then going to assess the potential affects of replacing the current system with a permanent court and whether that resolves the shortcomings critics have raised. The article will go on to argue that ISDS can be reformed within the current framework, for example, through the regulation of disputes, primarily through the addition of mediation to the process.

This article argues that the momentum of the ongoing negotiations of investment treaties, such as Trans-Atlantic Investment and Trade Partnership („TTIP“) and Trans-Pacific Partnership („TPP“), should be taken as an opportunity to re-examine the system holistically with options to include mediation in the process. Therefore, it will argue that there is a procedural gap in ISDS that does not account for interest-based

¹⁰ *Court of Justice to Decide Whether Intra-EU Bits Awards Are Compatible With EU Law*, LEXIS PSL (May 27, 2016), http://www.klgates.com/files/Publication/6e16d091-b289-4707-9da9-6000ac53f08c/Presentation/PublicationAttachment/745eac1f-c528-469b-a470-62db2c4b308d/CoJ_to_decide_whether_intra-EU_BITS_awards_are_compatible%20with_EU_law.pdf.

¹¹ Steven W. Schill, *The European Commission’s Proposal of an “Investment Court System” for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?*, 20 AM. SOC’Y OF INT’L L. (Apr. 22, 2016), <https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping>.

¹² *Id.*

¹³ See SCOTT MILLER & GREGORY N. HICKS, *INVESTOR-STATE DISPUTE SETTLEMENT: A REALITY CHECK* 15 (Jan. 2015), https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/150116_Miller_InvestorStateDispute_Web.pdf

resolution of disputes. We highlight the benefits of dispute regulation in the context of exploring mediated solutions, which ultimately strengthen the relationship between the state and the investor as partners.

The scope of ISDS is far greater than had been traditionally understood and current reform attempts are captive to these traditional conceptions.¹⁴ Furthermore, even progressive scholars and practitioners have narrowly confined their understanding of ISDS provisions to arbitration.¹⁵ ISDS has been the subject of leverage by governments in treaty negotiation, often mishandled, and usually used as a bargaining tool in such negotiations without fully accounting for ultimate function of these provisions.¹⁶

Therefore, the ability for parties to exercise control over proceedings through mediation would serve as a potential to regulate and enhance the attractiveness of ISDS for governments and investors alike. This has become evident at the UN level, as demonstrated by the UN Secretary General circulated Statement E/2016/NGO/36,¹⁷ which recognizes ISDS mediation as a key element to achieving the 2030 sustainable development goals within the framework of the UN Economic and Social Council („ECOSOC“).¹⁸ Furthermore, and beyond the ongoing TTIP negotiations, the recent trend in investment treaties demonstrates that mediation is being introduced to the process.¹⁹ The Comprehensive Economic and Trade Agreement (“CETA”) between the EU and Canada and the treaties concluded by the Association of Southeast Asian Nations (“ASEAN”) include provisions for mediation.²⁰

¹⁴ Schill, *supra* note 11.

¹⁵ *Id.*

¹⁶ This is exemplified by the evolution of U.S.’s Model BITs, and how it used its bargaining power to conclude even its multilateral treaties on this basis. For example, the North American Free Trade Agreement (NAFTA) between Canada, USA and Mexico as well as the recently concluded TPP, amongst 12 countries that make up 40% of the world’s GDP, were modelled on the US Model BIT of its time. Edward J. Sullivan & Kelly D. Connor, *Making the Continent Safe for Investors—NAFTA and the Takings Clause of the Fifth Amendment of the American Constitution*, in CURRENT TRENDS AND PRACTICAL STRATEGIES FOR LAND USE LAW AND ZONING 54 (Patricia E. Salkin ed., 2004).

¹⁷ U.S., Econ. & Soc. Council, Comm. for Soc. Dev., Statement Submitted by Fondation Ostad Elahi, U.N. Doc. E/CN.5/NGO/35 (2016).

¹⁸ Submitted by the International Mediation Institute (IMI).

¹⁹ Esme Shirlow, *The Rising Interest in the Mediation of Investment Treaty Disputes, and Scope for Increasing Interaction between Mediation and Arbitration*, KLUWER ARB. BLOG (Sept. 29, 2016), <http://kluwarbitrationblog.com/2016/09/29/the-rising-interest-in-the-mediation-of-investment-treaty-disputes-and-scope-for-increasing-interaction-between-mediation-and-arbitration/>.

²⁰ See *Comprehensive Economic and Trade Agreement (CETA)*, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/policy/in-focus/ceta/> (last visited Nov. 16, 2016).

There is also interest since the International Bar Association (“IBA”) Rules for ISD Mediation to introduce mediation into dispute settlement under existing investment treaties.²¹ A good example of this is the effort by the ECT Secretariat to introduce guidelines for mediation in claims submitted under its Treaty.²²

The greatest obstacle to the integration of mediation in ISD is arguably the political convenience of accepting an imposed decision and the reluctance of governments and state officials to take ownership over settlements. We draw on examples to provide solutions on overcoming this problem in future practice. Finally, we also aim to demystify commonly perceived obstacles to state related mediation and draw on examples to provide solutions for real barriers.

II. INVESTOR STATE DISPUTE SETTLEMENT (ISDS)

1A) BACKGROUND

ISDS is the fastest growing area of international law today since its emergence during the Washington Convention.²³ The Washington Convention established the International Center for the Settlement of Investment Disputes (“ICSID”) in 1966 to protect foreign investors.²⁴ It has been ratified by 150 states.²⁵ Its most recent signatories include Iraq and the Pacific island nation of Nauru.²⁶ The number of bilateral

²¹ Anna Joubin Bret & Barton Legum, *IBA Rules for Investor-State Mediation*, at 2 (Oct. 4, 2012).

²² Wolf Von Kumberg & Michael Cover, *The Energy Charter Treaty and ADR in the Context of Investor/State and Other Disputes*, INT’L ENERGY CHARTER (2016), http://www.energycharter.org/fileadmin/DocumentsMedia/Occasional/ECT_and_ADR_in_context_of_Investor-State_and_other_Disputes.pdf.

²³ *Book Review*, 20 EUR. J. INT’L LAW 2 471, 471 (2009) (citing RUDOLF DOLZER AND CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW*); ICSID Convention, Regulation, and Rules, INT’L CENTRE OF INV. DISPUTES (2003), https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf.

²⁴ Book Review, *supra* note 23.

²⁵ *Background Information on the International Centre for Settlement of Investment Disputes (ICSID)*, INT’L CTR. FOR SETTLEMENT OF INV. DISP., [https://icsid.worldbank.org/apps/ICSIDWEB/about/Documents/Overview%20of%20ICSID%20\(English\).pdf](https://icsid.worldbank.org/apps/ICSIDWEB/about/Documents/Overview%20of%20ICSID%20(English).pdf)

²⁶ *List of Contracting States and Other Signatories of the Convention*, INT’L CENTRE OF INV. DISPUTES (2016), <https://icsid.worldbank.org/apps/ICSIDWEB/icsidocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf>.

investment treaties (“BITs”) has proliferated to nearly 2000, the bulk of which provide for compulsory investment arbitration.²⁷ There is also a trend for multilateral free trade agreements that include an investment chapter.²⁸ NAFTA and the more recently concluded CETA are examples of such treaties that direct aggrieved investors to potential frameworks for investment arbitration, including ICSID.²⁹ A similar chapter can be found in the Energy Charter Treaty (“ECT”), a multilateral instrument for facilitating and protecting cross-border energy transactions.³⁰ With fifty-one signatory parties, including the member states of the European Union, disputes filed under the treaty have significantly increased in the past year.³¹

1B) THE ORIGINS OF ISDS: ICSID

Before ISDS, investors seeking to obtain remedies had to lobby their governments into negotiating the dispute on a state-to-state level.³² The reason the system was established was in order to avoid such a politicization of conflicts.³³ The system also has its roots in the desire of particularly developing states to attract inward investment.³⁴ Inward investment has grown tremendously since the establishment of ISDS.³⁵ The reason for this is obvious. Investors will weigh risk on the basis of having an adequate neutral dispute resolution system in place, which ISDS was established to provide.³⁶

²⁷ UNCTAD *Bilateral Investment Treaties 1959–1999*, 1, 4, <http://unctad.org/en/docs/poiteiid2.en.pdf> (reporting the increase in the number of BITs from 385 in 1989 to 1,857 by 1999).

²⁸ *Background Information on the ICSID*, *supra* note 25.

²⁹ See, e.g. North Atlantic Free Trade Agreement, Dec. 8th, 1993, <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement?mvid=2>.

³⁰ Energy Charter Treaty (Dec. 1994), <http://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/>.

³¹ Energy Charter Treaty, *supra* note 30.

³² David Schneiderman, *Book Review*, 25 EUR. J. INT’L LAW 935, 942 (2014) (reviewing KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT, AND THE SAFEGUARDING OF CAPITAL* (2013)).

³³ *Id.*

³⁴ UNCTAD *Bilateral Investment Treaties 1959–1999*, *supra* note 26, at 2.

³⁵ Schneiderman, *supra* note 32, at 942.

³⁶ *Id.*

Rise of claims and backlash

Whilst the number of claims filed with ICSID were relatively scarce before 2000, this rapidly changed in the aftermath of the Argentine financial crisis of 2001, resulting in forty-four cases against Argentina alone.³⁷ The number of claims filed against states has since been steadily on the rise and reached one of its highest numbers in 2015 with fifty new cases initiated at ICSID.³⁸ The Argentine cases were the first to highlight the investment arbitration tribunal's ability to take decisions concerning governmental action in light of the public's interest and gave rise to public criticism of the system itself.³⁹ In the following years, the first country to denounce the Convention was Bolivia (2007), followed by Ecuador (2009) and Venezuela (2012).⁴⁰ Many developed countries have increasingly found themselves as respondents in treaty claims concerning health or environmental laws.⁴¹

III. ISDS UNDER CRITIQUE

The most recent example of the backlash against ISDS surrounds the question of whether claimants from EU member states are allowed to avoid EU courts to obtain remedies against other member states.⁴² The EU Commission's involvement in these cases has evolved noticeably over time. In the early cases, the EU Commission filed amicus curiae briefs unsuccessfully objecting to the tribunals' jurisdictions on the basis

³⁷ Lucy Reed, *Scorecard of Investment Treaty Cases Against Argentina Since 2001*, WOLTZER KLUWER (Mar. 2, 2009), <http://kluwerarbitrationblog.com/2009/03/02/scorecard-of-investment-treaty-cases-against-argentina-since-2001/>.

³⁸ *ICSID Caseload -- Statistics (Issue 2015-2)*, INT'L CENTRE FOR SETTLEMENT OF INV. DISPUTES 1, 22 (2015), [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-2%20\(English\).pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-2%20(English).pdf).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Philip Morris Asia Ltd. v. Commonwealth of Australia* (H.K. v. Austl.), UNCITRAL, PCA Case Repository No. 2012-12 (2015) (regarding tobacco packaging); *Vattenfall AB, Vattenfall Europe AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6 (Mar. 2011) (regarding new power plant).

⁴² *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19 (Nov. 25, 2015) (noting that an investor challenged Hungary's introduction of price regulation for electricity generators, but Hungary successfully argued that their policy changes were a direct result of their obligations upon acceding to the EU).

that there was a conflict between intra-EU BITs and EU law.⁴³ Later, the EU Commission began requesting the annulment of ICSID awards, challenging these in domestic courts and threatening to sanction member states who would pay out damages to investors.⁴⁴ Whilst these two stages were motivated by the EU Commission's position on the supremacy of EU law, its latest policy has taken a shift against investment arbitration as a whole. Its recently concluded treaties involve permanent tribunals and its proposal for a permanent investment court in TTIP negotiations are an unequivocal step away from ISDS as a system. This move comes in the wake of the latest surge of over 39 claims under the ECT concerning many EU states' decisions to alter their regulation over subsidies in the photovoltaic sector.⁴⁵ Therefore, arguably the rise in claims and the potentially larger scale of a conflict with the EU's policy objectives has had an impact on the the EU Commission's goals in treaty negotiations.

The wide-ranging criticisms surrounding ISDS in current treaty negotiations involving investment arbitration in free trade and investment treaties goes beyond the EU Commission to labour unions, consumer groups, the press, and academic commentary. Its perceived flaws can be summarised under the following headings:

2A) SOVEREIGNTY AND THE RULE OF LAW

Given the recent trend towards multilateral treaty negotiations, the question of investment arbitration has been increasingly politicised in states' internal political debates on state sovereignty, foreign trade, and investment policy. Whilst in the 2008 Democratic race for the White House, Barack Obama and Hillary Clinton pledged to renegotiate NAFTA, but subsequently abandoned this position when in office.⁴⁶ A more recent example is Hillary Clinton in the 2016 Democratic race

⁴³ *Electrabel S.A.*, *supra* note 42 (noting that this was the first case in which the EU Commission participated in the proceedings by submitting an amicus curiae brief).

⁴⁴ *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.L.R. v. Romania*, ICSID Case No ARB/05/20.

⁴⁵ Energy Charter Treaty, *supra* note 30.

⁴⁶ Amber Phillips, *Hillary Clinton's position on free trade? It's (very) complicated.*, WASHINGTON POST (Jun. 17, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/06/17/tracking-the-many-hillary-clinton-positions-on-trade/>; Transcript at *The Democratic Debate in Cleveland*, N.Y. TIMES (Feb. 26, 2008), http://www.nytimes.com/2008/02/26/us/politics/26text-debate.html?_r=0.

again emphasising the need for a shift that would not allow corporations to be attributed special rights.⁴⁷

This public controversy surrounding investment arbitration is one used as political leverage in domestic debates. It has been argued that investment treaty arbitration compensates investors for every kind of regulatory change that the host state introduces on legitimate public policy grounds.⁴⁸ However, any debate surrounding such vital aspects of trade and investment policies that is centred around an accurate, factual, and legal representation will demonstrate that such concerns are misplaced.

Sovereign rights

The idea of sovereign immunity as absolute is outdated and from a time of politicized conflicts and gunboat diplomacy. International law accepts that sovereign immunity nowadays must be qualified. Actions whereby a state chooses to open up to foreign investments lead to an obligation to honour such commitments by upholding the rule of law. States entering into international treaties is an act of sovereignty in itself and allows them to define the scope of investments that are to be protected—e.g. a state may exclude issues surrounding public health regulations. This can provide a predictable legal environment for states, further international co-operation, and attract foreign investments.

Rule of law

Investment arbitration provides for the accountability of states who violate fundamental norms of international law.⁴⁹ It does not allow foreign investors to change domestic laws.⁵⁰ Instead, investment arbitration allows foreign investors to claim compensation where treaty protections are violated (treaty protections which the state originally

⁴⁷ Hans von der Burchard, *POLITICO Pro's Morning Trade: Clinton Wants To Reform ISDS — France Threatens To Stop TTIP Talks*, POLITICO (Apr. 20, 2016), <http://www.politico.eu/newsletter/morning-trade/politico-pros-morning-trade-presented-by-xy-clinton-wants-to-reform-isds-in-ttip-frances-global-fight-on-food-protection/>.

⁴⁸ See e.g. Jess Hill, *ISDS The Devil in The Trade Deal*, ABC (Sept. 14, 2014) <http://www.abc.net.au/radionational/programs/backgroundbriefing/isds-the-devil-in-the-trade-deal/5734490> (opinion that it is driven by the interests of corporations, and will do little for the wellbeing of citizen).

⁴⁹ David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD PUBLISHING 23 (2012), http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf.

⁵⁰ *Id.* at 13-14.

agreed to by a sovereign act).⁵¹ Many of these are similar to what developed countries' constitutions and afford investors' protection where they were discriminated on the basis of nationality, were not afforded due process or their property was expropriated without compensation.⁵² Therefore, these protections ensure certain global standards which are necessary if one wants to ensure their state's own investors receive fair treatment in their investments abroad.⁵³

The substantive protections used are known to favor states' legitimate right to regulate and the burden is on the investor to demonstrate that the acts were arbitrary, discriminatory, or otherwise violated the protections they agreed on.⁵⁴ For instance, case law shows that states will be penalised if their actions are aimed to protect their own domestic industries,⁵⁵ but will not be penalised if they demonstrate legitimate concerns behind a change of regulation — even if such changes resulted in a loss of profit for investors.⁵⁶

As a result, it is evident that investment arbitration requires states to act in accordance with the obligations they originally entered. It allows states to continue regulating their domestic frameworks, requiring a remedy only when these are not supported by legitimate concerns.⁵⁷

2B.) CONTESTED TRANSPARENCY, CONSISTENCY AND INTERPRETATION

The system's roots lie in international commercial arbitration, which has been argued to be unsuitable for the investment arena.⁵⁸ Commercial arbitration enables businesses to resolve disputes through a third party system that ensures a confidential, quick, and low cost alternative to litigation.⁵⁹ This is suitable for the commercial world, considering businesses seek to keep information about the proceedings confidential to protect ongoing business. However, this inherently private mechanism was transplanted into a public law context which has,

⁵¹ *Id.* at 55.

⁵² *Id.* at 26.

⁵³ *Id.* at 26.

⁵⁴ Gaukrodger & Gordon, *supra* note 49, at 10.

⁵⁵ See *S.D. Myers, Inc. v. Canada*, NAFTA/UNCITRAL, Partial Award, ¶263 (Nov. 13, 2000).

⁵⁶ See *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, Part VI Chapter B-F (Aug. 3, 2005).

⁵⁷ Gaukrodger & Gordon, *supra* note 49, at 43.

⁵⁸ See Chang-fa Lo, *The Legal and Practical Constraints of Using Commercial Arbitration of Using Commercial Arbitration To Handle Investment Dispute*, 3 CONTEMP. ASIA ARB. J. 7, 21 (2010).

⁵⁹ Gaukrodger & Gordon, *supra* note 49, at 37.

as some argue, caused unwelcome discrepancies.⁶⁰ Indeed, proceedings are not quick in ISDS as they are in commercial arbitration and on average last nearly four years.⁶¹ Confidentiality is less important in relation to cases of sovereign activity, considering the public has an inherent right to be informed about awards rendered that are paid through taxpayer funds. Finally, it is also not a low cost option — it is estimated by the Organisation for Economic Co-operation and Development (OECD) that proceedings cost states an average of \$8 million and can exceed \$30 million, all of which they have no chance of recovering, whether they win or lose.⁶²

The system must be viewed as a separate format, that has built on its commercial roots but also evolved significantly as necessary. Investment arbitration is a quasi-judicial process allowing for those with a legitimate interest in the outcome of the proceedings to submit *amicus curiae* briefs to be taken into consideration.⁶³ Awards are often published, and pleadings and procedural decisions are made publicly available in many developed countries, making the process more accessible than through most domestic courts.⁶⁴ In addition, UNCITRAL has now implemented a framework for transparency in investor-state disputes that will aid in balancing the legitimate confidentiality concerns of investors with the need for public scrutiny demanded by states.⁶⁵

Inconsistency

The coexistence of contradictory decisions sheds light on the system's biggest criticism⁶⁶ and “undermines the legitimacy of investment arbitration, particularly where public international law rights are at stake and the legitimate expectations of investors and Sovereigns

⁶⁰ Stephan Wilske et al., *International Investment Treaty Arbitration and International Commercial Arbitration - Conceptual Difference or Only A “Status Thing”?*, 1 CONTEMP. ASIA ARB. J. 213, 213-34 (2008).

⁶¹ Anthony Sinclair et al., *ICSID Arbitration: How Long Does it Take?*, 4 GLOB. ARB. REV. 19, 19-21 (2012).

⁶² Gaukrodger & Gordon, *supra* note 49.

⁶³ *Id.* at 26 n.52.

⁶⁴ *Id.* at 94.

⁶⁵ *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, Art.1-2, (Feb. 2015), <https://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf>.

⁶⁶ Compare *Ronald S. Lauder v. The Czech Republic*, NAFTA, *Final Award* (Sept. 3, 2001) with *CME Czech Republic B.V. v The Czech Republic*, NAFTA, *Final Award* (Mar. 14, 2003).

are mismanaged.”⁶⁷ Some argue that this inconsistency is a result of the investment arbitration process, given its ad hoc composition of tribunals and the lack of binding precedent.⁶⁸

Coherency is a necessary component for legitimacy in investment arbitration. There have been many successful attempts to address this issue. For example, even where parties to the case do not agree to have the case published in full, the ICSID Secretariat reserves the right to publish parts of the reasoning. There is no official system of set precedent in arbitration.⁶⁹ Given the various national interests and jurisdictions that are at play, it was viewed as an attractive forum that would allow arbitrators an examination of cases on an ad hoc basis.⁷⁰ Therefore, the system must find a way to encourage more coherent decision-making from within. Kaufmann-Kohler and other arbitrators have already suggested that a system that contradicts itself risks being perceived as illegitimate.⁷¹ But at the same, Kaufmann-Kohler has highlighted that arguably there is a subtle and growing trend of tribunals using their discretion to apply precedent.⁷² Furthermore, expanding the current form of ISDS into other forms of ADR, such as mediation, would allow for solutions based on consensus and not requiring the use of precedent at all.

Vague and open-ended legal standards

ISDS provisions in treaties include substantive protections involving “a weighing of the Claimant’s legitimate and reasonable expectations on the one hand and the Respondent’s legitimate regulatory interests on the other hand”.⁷³ Investment arbitration does not create the incoherency by virtue of its process, but due to the uncertainty that the diverging approaches to treaty interpretation creates.

⁶⁷ Xian Yu Huang & David Chi Yu Cheng, *Protection of International Investment – The Study of Establishing Appellate Mechanisms in International Investment Arbitration*, 3 INT’L REV. OF MGMT. & BUS. RES. J. 1819, 1822 (2014).

⁶⁸ See generally Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1522, 1582-1622 (2005).

⁶⁹ Gaukrodger & Gordon, *supra* note 49, at 75.

⁷⁰ *Id.* at 11.

⁷¹ Gabrielle Kaufmann-Kohler, *Is Consistency a Myth*, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION (2009) <http://www.arbitration-icca.org/media/4/92392722703895/media01231914136072000950062.pdf>.

⁷² See generally Kaufmann-Kohler, *supra* note 71.

⁷³ Peter Muchlinski, *Caveat Investor? The Relevance of the Conduct of the Investors Under the Fair and Equitable Treatment Standard*, 55 INTL.L. & COMP. L.Q. 527 (2006).

An illustration of divergent interpretations are the strikingly similar cases of *SGS v. Pakistan* and *SGS v. Philippines*. In one, the tribunal interpreted the umbrella clause narrowly and in the latter another held that it must be construed in favour of the investor. A further example took place in determining the applicability of the Most Favoured Nation („MFN“) clause to dispute settlement, which some tribunals interpreted expansively⁷⁴ and others narrowly and on the basis of parties' intentions.⁷⁵ Finally, two factually similar cases in the wake of the Argentine financial crisis gave contradictory reasonings over the doctrine of necessity. Both tribunals in *CME*⁷⁶ and *LG&E*⁷⁷ held in favour of the Claimant, but whilst the first decided that emergency influences do not exempt the state from liability, the latter tribunal recognised that the Respondent's financial crisis constituted a state of necessity. As a result in *LG&E* any losses of profit within a designated period of time⁷⁸ of crisis were subtracted from the general award of damages.⁷⁹

Such flaws should not be traced back to the system's ad hoc nature. Each tribunal's interpretations are guided by different approaches regarding the relationship between the respective treaty provisions and customary international law. Reforms must come from within the system itself by clarifying which doctrine is to be applied in such a balancing act. Therefore, it must be considered that the treaties are still relatively new, and lessons must be drawn for future treaty negotiations.

⁷⁴ *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID (W. Bank) Case No ARB/97/7 para. 54-57, Award (13 Nov. 2000); *Siemens A.G. v. The Argentine Republic*, ICSID (W. Bank) Case No ARB/02/8, Award (17 Jan. 2007); *Gas Natural SDG, S.A. v. The Argentine Republic* ICSID Case No ARB/03/10, *Tecnica Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID (W. Bank) Case No. ARB (AF)/00/2 para 69, 74, Award (29 May 2003); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID (W. Bank) Case No ARB/97/3 para 68, Award (20 Aug. 2007).

⁷⁵ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID (W. Bank) Case No. ARB/02/13, Award (31 Jan 2006); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID (W. Bank) Case No. ARB/03/24, Award (27 Aug. 2008).

⁷⁶ *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID (W. Bank) Case No. ARB/01/8, Award (1 Sept., 2006).

⁷⁷ *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID (W. Bank) Case No. ARB/02/, Award (Oct. 3, 2006).

⁷⁸ It decided that Argentina had been in a state of necessity between December 1, 2001 until April 26, 2003.

⁷⁹ After this subtraction compensation was fixed at US\$ 57.4 million.

I. A PERMANENT INVESTMENT COURT?

As a result of extensive public scrutiny of ISDS that was on the rise over the past decade for the reasons mentioned above, the wider backlash against ISDS has culminated in the EU Commission's heavy involvement in the recent ECT cases.⁸⁰ Since its passive involvement in the arbitrations, it has also begun to take the opportunity to address the perceived flaws of the system and take measures to reform. It has recently concluded the EU-Vietnam Free Trade Agreement (FTA) and CETA, both of which include dispute settlement provisions providing for a permanent investment arbitration tribunal.⁸¹ In the highly publicized ongoing negotiations with the US for the TTIP, the EU Commission has in its most recent proposal put forward the establishment of a permanent investment court.⁸² According to the EU Commission this should be comprising a court of first instance presided over by fifteen publicly appointed judges, and an appeals court with six members.⁸³ In its aim to constitute a system that is seen as procedurally legitimate, arbitrators are to be selected partly by the contracting states and partly by third party neutral states.⁸⁴

To what extent would these reforms address the criticisms mentioned above? Firstly, it appears that the EU Commission's recent proposal is clearly addressing the broadest version of the criticism, involving all three grounds and in the longterm looking to abolish ISDS in its current format. The Court would certainly be able to appease critics over transparency of proceedings. But to what extent would such a development be possible to function in the current environment? And moreover, would such a development be desirable?

*3A) PRACTICAL IMPEDIMENTS**The creation of an appeals body in the ICSID Framework*

A permanent investment court for cases arising under one treaty could do more harm than good. Firstly, a two-tier system contravenes the finality requirement of the ICSID Convention, meaning awards will not be directly enforceable in any of the 150 contracting states.⁸⁵ There

⁸⁰ Kumberg & Cover, *supra* note 22, at 3-4.

⁸¹ *Id.*

⁸² *Id.* at 1.

⁸³ *Id.*

⁸⁴ Gaukrodger & Gordon, *supra* note 49, at 89-91.

⁸⁵ *Id.* at 30-32.

are good reasons why an international appeal body does not currently exist. The most straightforward option in the ICSID Convention's current format would require a wholesale amendment — a move that is unlikely to be successful, at least in the foreseeable future, given the number of stakeholders that would be involved in the negotiations. Judges on appeal, such as Sir David Edwards, hold that such panels, if created, should only look at questions of law, if at all, because the established standards which alternative dispute resolution processes use should be trusted.⁸⁶

Pool of qualified arbitrators

A court of first instance and an appeals body suggests a hierarchy which would allow certain, more senior judges to make a final decision over matters. It is unclear how it would be possible to draw on senior arbitrators with the necessary expertise over the subject matter and sufficient availability to commit full-time for such a position. The two characteristics of experience and availability are mutually exclusive in these circumstances.

Moreover, the proposals in TTIP do not consider the large bargaining power of the US and its history of implementing the US Model BITs to a large extent into multilateral treaties (NAFTA and most recently TPP).⁸⁷ Based on this model, the US appears unlikely to agree on this new global direction. Previously, the U.S. Bipartisan Trade Promotion Authority Act 2002 had enabled the creation of an appellate body for future trade agreements, but was never followed up.⁸⁸ There simply was no appetite for pursuing this route. It therefore seems paramount to first and foremost analyse what causes the incoherent decisions in the first place.

⁸⁶ *Id.*

⁸⁷ *The Trans-Pacific Partnership: Leveling the Playing Field for American Workers & American Business*, EXECUTIVE OFFICE OF THE PRESIDENT: OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/tpp/#text>; *North American Free Trade Agreement (NAFTA)*, EXECUTIVE OFFICE OF THE PRESIDENT: OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta>.

⁸⁸ 19 U.S.C. §3802 (b)(3)(G)(iv).

3B) PROSPECTS FOR EVOLUTION

The proposal for a permanent court is infeasible as it would take away much of investment arbitration's inherent features.⁸⁹ A permanent court or tribunal, made up of judges or arbitrators that were solely elected by states, would rob investors of the party autonomy over the selection of the tribunal which makes it attractive.⁹⁰ The system would lose the neutrality that it strived to establish.⁹¹ This implies that the risk factor for the investment will increase, meaning that either the investment will not be made, or a higher price will be charged to compensate for that risk.⁹²

Incoherencies are not a sign of illegitimacy, and there are often divergent reasonings between judges sitting on the same case.⁹³ Contrary to popular opinion the system is not broken, and does not need to be abolished. Many of its benefits that guided its original purpose remain. It still continues to provide an attractive alternative to the politicization of conflicts.⁹⁴ It provides parties with a flexible forum, allowing both investors and states the same rights in shaping the process through the formation of the arbitral tribunal.⁹⁵ Entirely public proceedings are not as desirable as depicted in the media — they are an overly simplistic remedy for what is a criticism rooted in the incoherent decisionmaking of ad hoc tribunals.⁹⁶ More transparency concerning hearings is not necessarily better, and can unduly affect decisions by

⁸⁹ Athina Fouchard Papaefstratiou, *TTIP: The French Proposal For A Permanent European Court for Investment Arbitration*, KLUWER ARBITRATION BLOG, (July 22, 2015), <http://kluwerarbitrationblog.com/2015/07/22/ttip-the-french-proposal-for-a-permanent-european-court-for-investment-arbitration/>.

⁹⁰ Louise Woods, *Fit for Purpose? The EU's Investment Court System*, KLUWER ARBITRATION BLOG, (March 23, 2016), <http://kluwerarbitrationblog.com/2016/03/23/to-be-decided/>.

⁹¹ *Arbitration*, INTERNATIONAL CHAMBER OF COMMERCE, <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/>.

⁹² Judith Levine, *The PCA & Other International Arbitral Institutions: Developments In Mauritius*, PERMANENT COURT OF ARBITRATION, (May 2, 2012), http://www.arbitration-icca.org/media/1/13371679808210/international_arbitral_institutions_and_their_developments_in_mauritius_judith_levine.pdf.

⁹³ Wang Guigo & He Xialo, *Mediation and International Investment: A Chinese Perspective*, 65 ME. L. REV. 215, 218 (2012).

⁹⁴ *Id.* at 216.

⁹⁵ *Id.* at 235.

⁹⁶ Levine, *supra* note 92.

tribunals.⁹⁷ There is a benefit for both investors and states if the parties maintain a certain discretion over disclosures.⁹⁸

In summary, it appears that the EU Commission's recent direction is misguided and unlikely to succeed in reforming the system in a meaningful way, but instead creates additional problems. The current backlash, the resulting scrutiny of the system, as well as the EU's willingness to exert political influence, must be viewed as an opportunity to identify the procedural gaps in the system.⁹⁹ The increasing debate over intra-EU BITs paired with rising costs and lengthy procedures should be seen as momentum for considering meaningful ways of supplementing the system.¹⁰⁰ The long told hypothesis that arbitration is the sole favourable form of resolving investor-state disputes is no longer true, as the recent trends demonstrate.¹⁰¹ This scrutiny can be used to initiate an outlet empowering parties to consider policy changes, salvage the investment, or come to an agreement on compensation in a settlement.¹⁰²

I. REGULATING THE INVESTOR-STATE DISPUTE PROCESS

4A) DISPUTE-PROCESS GAP IN ISDS

Professor Ury distinguishes between three broad approaches to dispute resolution: power-based (i.e. labour strikes), rights-based (i.e. court systems and arbitration), and interest-based (mediation).¹⁰³ Accordingly, the current investment arbitration system largely focuses on a rights-based structure.¹⁰⁴ In turn, the calls for reform suggest abolishing the system only for it to be replaced by another rights-based structure such as permanent courts.¹⁰⁵

⁹⁷ UNCITRAL *Rules on Transparency in Treaty-Based Investor-State Arbitration*, UNCITRAL: UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, (Apr. 1, 2014), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html.

⁹⁸ *Id.*

⁹⁹ *Commission Asks Member States To Terminate Their Intra-EU Bilateral Investment Treaties*, EUROPEAN COMMISSION: PRESS RELEASE DATABASE, (June 22, 2015), http://europa.eu/rapid/press-release_IP-15-5198_en.htm.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ WILLIAM L. URY, JEANNE M. BRETT, STEPHEN B. GOLDBERG, *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* 3-19 (Jossey-Bass, 1988).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

Mediation has gained in popularity over recent years, as it has been endorsed in the international business world and seen reforms in national laws.¹⁰⁶ Specifically, bringing mediation into the context of ISDS, UNCTAD has recently made many efforts to explore alternatives to arbitration, including mediation, although it fails to mention a plan to successfully implement such.¹⁰⁷ In 2012, the IBA Rules on Investor-State Mediation were published.¹⁰⁸ These comprise twelve articles and notable provisions, such as the requirement to disclose conflict of interests of mediators in ISM disputes via a statement of independence and impartiality.¹⁰⁹ Furthermore, mediation has been included in recent free trade and investment agreement such as CETA, TPP, and features in some Model BITs.¹¹⁰ It has been recognised that standards for IS mediators and credentialing are needed to provide legitimacy to the process.¹¹¹ The International Mediation Institution (“IMI”) is currently working to fill this gap with standards for IS mediators being drafted, which can then be used to train appropriate mediators for ISD.¹¹² With these initiatives and mediation’s increasing overall popularity, it seems to be only a matter of time before it gains in significant momentum.

¹⁰⁶ Claudia Maffettone, *110 Years of Mediation: Principles, Opportunities, and Challenges*, MEDIATE.COM: EVERYTHING MEDIATION, (May 2016), <http://www.mediate.com/articles/MaffettoneC1.cfm>.

¹⁰⁷ *Investor-State Disputes: Prevention and Alternatives to Arbitration*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT 13-16 (2010), http://unctad.org/en/docs/diaeia200911_en.pdf.

¹⁰⁸ See generally *IBA Rules for Investor-State Mediation*, INTERNATIONAL BAR ASSOCIATION: MEDIATION COMMITTEE: STATE MEDIATION, (Oct. 4, 2012), https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjEp7fplbQAhVCAsAKHVZNA8AQFggeMAA&url=http%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3D8120ED11-F3C8-4A66-BE81-77CB3FDB9E9F&usq=AFOjCNGZOCmp9BVxG0-e5W6phCF5FB71-A&sig2=ShKw_wZsLPdEW5gsp1UySg.

¹⁰⁹ See generally *Id.*

¹¹⁰ *Thailand: Bilateral Investment Treaties (BITs) Art. 10.4*, INVESTMENT POLICY HUB, (2013), <http://investmentpolicyhub.unctad.org/IIA/CountryBits/207#iialInnerMenu>; *United States – Chile Free Trade Agreement, Art. 10(14)*, <http://wits.worldbank.org/GPTAD/PDF/archive/UnitedStates-Chile.pdf>; *Agreement Between Japan and the Republic of Chile for a Strategic Economic Partnership Art. 88, 57* (Mar. 2007), <http://www.mofa.go.jp/region/latin/chile/joint0703/agreement.pdf>; *Korea-Australia Free Trade Agreement, Art. 11(15)* (July 6, 2015), <https://dfat.gov.au/trade/agreements/kafta/factsheets/Documents/guide-to-using-kafta-to-export-and-import-goods.pdf>.

¹¹¹ *IMI Introduces Competency Criteria for Investor-State Mediators*, INTERNATIONAL MEDIATION INSTITUTE (Sept. 19, 2016), <https://imimediation.org/imi-introduces-competency-criteria-for-investor-state-mediators>.

¹¹² *Id.*

Arbitration and mediation

The goal of arbitration is to render a final award, emphasising legal rights and remedies and bound by a certain procedural character.¹¹³ By contrast, mediation's objective goes beyond deducing what is right or wrong.¹¹⁴ Instead, it looks to making interest-based, future oriented recommendations and creating possibilities beyond legal remedies.¹¹⁵ Mediation is entirely consensual, and therefore not procedurally bound by any laws, nor a certain procedural character.¹¹⁶ Thus, it gives mediators considerable flexibility, and empowers parties completely.¹¹⁷

The 2015 ICSID Caseload Statistics demonstrate that 64% of the cases were decided by a tribunal, and as many as 36% were disputes settled or otherwise discontinued.¹¹⁸ This is a number too large to be ignored, clearly demonstrating that there is a potential in ISDS for settlements. In order to encourage mediation in this context, it is important to further contrast the types of third party facilitated settlements amongst each other and how they would differ from arbitration. Practical efforts within the ICSID framework have only included the ICSID Conciliation mechanism, which has seen little success. Conciliation, like arbitration, is a rights-based format; therefore, whilst it is consensual and non-binding, it does not explore the parties' interests and relationship in depth.¹¹⁹

¹¹³ *ICC Rules of Arbitration*, INTERNATIONAL CHAMBER OF COMMERCE, <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/>.

¹¹⁴ STEPHEN WALKER, *MEDIATION ADVOCACY: REPRESENTING CLIENTS IN MEDIATION* (Jan. 1, 2015), <http://uk.practicallaw.com/boo.ks/9781780437927/chapter04/>.

¹¹⁵ Fredrike P. Bannink, *Solution Focused Mediation*, *MEDIATE.COM: EVERYTHING MEDIATION* (Mar. 2008), <http://www.mediate.com/articles/banninkF1.cfm>.

¹¹⁶ *ADR and Mediation: About ADR and Mediation*, INTERNATIONAL TRADEMARK ASSOCIATION (2016), <http://www.inta.org/Mediation/Pages/AboutADRandMediation.aspx>.

¹¹⁷ *The Benefits of Mediation*, CEDR (2016), <https://www.cedr.com/articles/?item=Organisational-culture-It-s-how-we-do-things-around-here>.

¹¹⁸ ICSID Caseload Statistics 2015- Issue 2, p.13.

¹¹⁹ Nancy Welsh, *Mediation of Investor-State Conflicts*, 127 *HARV. L. REV.* 2543, 2552 (2014); see Edna Sussman, *The Advantages of Mediation and the Special Challenges to its Utilization in Investor State Disputes*, 27 *DOCTRINA INTERNACIONAL* 54, 56 (2010).

4B) ENHANCING ISDS BY REGULATING DISPUTES

There is a common misconception about the willingness of investors to sue host governments. Often investors will prefer to remain active participants in the host state market. It is understandable that any claims against the respondent state are bad publicity and therefore equally unwelcome. Mediation and its promise of a flexible solution that focuses on parties' long term gains and their relationship could therefore be in both sides' interests.¹²⁰ Investment agreements are characterised by long-term contracts, usually spanning at least twenty years, as well as involving large capital investments. Therefore, in some cases, it will be in both parties' interest to find an alternative to an adversarial system.

This is perhaps best illustrated by the comments made by Metalclad's former CEO Grant Kesler in relation to the award of \$17 million award received by his company against Mexico.¹²¹ Kesler highlighted that he was disappointed with the result, in light of the costs and length of the proceedings and the subsequent breakdown of relations.¹²² He stated how with the benefit of hindsight, he would have preferred to use more informal mechanisms to settle.¹²³ "Neither the aim nor the consequence of arbitration is to repair a broken business relationship."¹²⁴ And perhaps strong efforts to mediate this case could have possibly avoided this dissatisfaction with the process.

*4C) ARGUMENTS AGAINST MEDIATION**Limited track record*

The potential for ISM has been met with considerable skepticism due to its limited track record to date. However, much like mediation's role in domestic litigation, many will be quick to doubt the success rate of a system that has not yet fully matured. Thus, given recently increasing international interest for mediation, especially in the context of ISD, there is a great likelihood that states will include mediation into the ISD process, much like they successfully integrated it into their own domestic litigation frameworks as well.

¹²⁰ Nancy Welsh & Andrea K. Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 HARV. NEGOTIATION L. REV. 71, 77 (2013).

¹²¹ Welsh, *supra* note 119.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ J. Salacuse, *Is There A Better Way? Alternative Methods of Treaty Based Investor-State Dispute Resolution*, 31 FORDHAM INT'L. L.J. 138, 155 (2007).

Political realities

The only barrier for states remains a practical one, involving the political reality of “settling” claims. This is perhaps one of the greatest obstacles to discussions surrounding the subject, as many are quick to suggest that it would be difficult to make a state take ownership over a decision to settle. However, investments can often refer to complex issues across a range of multiple agencies. Given the domestic ramifications of consenting to detrimental settlements without any apparent outside pressure, there is also often no political will to take ownership over settlements. For example, in *SPP v Egypt*, the Egyptian Prime Minister rejected a negotiated settlement of \$10 million in favor of arbitration proceedings which would later issue an award for \$32.6 million against Egypt.¹²⁵

A future format for mediation will have to address this issue. A lesson from the Canadian system in place suggests that the most effective system is the creation of a standing professional body within one of the state departments, vested with the sole responsibility of overseeing settlements.¹²⁶ By not involving the very officials whose actions are assessed in the dispute itself, this system effectively circumvents the problem concerning the political realities. The potential for parties to keep settlement agreements confidential¹²⁷ also helps take the pressure off from politically motivated domestic influences that ultimately cause more harm than good.

Cost and time

Given the consensual nature of mediation, there is a chance that efforts to settle break down and parties may have to resort to arbitration regardless. This potential for further delay therefore substantially increased costs and is another of the worries over ISM.¹²⁸ After all, the

¹²⁵ Southern Pacific Properties (Middle East) Limited (British, Hong Kong) v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award Rendered (May 20, 1992), 8 ICSID Rev. – FILJ 328 (1993).

¹²⁶ Jean E. Kalicki, *Mediation of Investor-State Disputes: Revisiting the Prospects*, KLUWER ARBITRATION BLOG (June 14, 2013), <http://kluwerarbitrationblog.com/2013/06/14/mediation-of-investor-state-disputes-revisiting-the-prospects/>.

¹²⁷ IBA GUIDELINES ON INVESTOR-STATE MEDIATION, Art. 10 (2012).

¹²⁸ Edouard Bertrand, *Arbitration and Mediation: An Impossible Conciliation?*, I.B.L.J. 2 133, 139 (2001).

costs of an arbitration can rise very high.¹²⁹ Such risk is high where a lengthy mediation is not concluded and subsequently followed up by a lengthy arbitration that could extend all the way into annulment. However, it is an informed and marginal risk. In fact, mediation in itself is not a lengthy or costly process when compared to the cost of international arbitration. Even for the most complex cases, mediation will take a fraction of the time that arbitration takes, with resulting lower costs.

Enforceability

Many perceive settlements via mediation as a limited remedy, given that successful outcomes are not directly enforceable as ICSID awards or enforceable in domestic courts like other arbitral awards.¹³⁰ However, this criticism ignores a straightforward option for parties who desire enforceability. By asking an arbitral tribunal to incorporate a settlement agreement into a consent award, parties can ensure that their agreement is directly enforceable (if made under the auspices of ICSID), or enforceable via the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.¹³¹ Another important point to consider is that in the vast majority of cases, parties are prone to honor commercial settlements as they have been voluntarily entered into and not imposed. There is therefore little need for an enforcement mechanism, unlike arbitration awards. Finally, there is already an UNCITRAL working group looking into creating guidelines on the enforcement of mediated settlement agreements.¹³²

Effects of Previous Negotiations

Some argue that there would be little appetite for the self-regulation of disputes through mediation, given that many parties are likely to have made previous attempts at negotiation. It is therefore said that they may consider any further efforts to be a waste of time and resources. However, this thesis ignores two essential aspects. Firstly, any party acting in bad faith can only get as far in mediation as the other party will

¹²⁹ *E.g. Plama Consortium Limited (Republic of Cyprus) v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award Rendered (Aug. 28, 2008).

¹³⁰ Analysis of EU's "Investment Court System", <http://isdsblog.com/category/icsid/>.

¹³¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

¹³² <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V16/040/09/PDF/V1604009.pdf?OpenElement>.

allow it to. Secondly, the thesis fails to distinguish between key points from mediation and direct negotiation. Mediation differs from negotiation because it breaks barriers by bringing a third party dynamic. A qualified mediator is often in a better position to identify impediments to settlement.

III. THE CASE FOR MEDIATION

The rising backlash against investment arbitration causes an oversimplified and needlessly polarized debate. Most alternatives that have been put forward center around abolishing the system or altering it into a permanent court. By establishing the origins of the flaws, it has become evident that a permanent court would not address the concerns voiced by the EU Commission, governments, and the press. Efforts must be made to help the system evolve. Therefore, we put forward that the integrating mediation into ISDS could help achieve a more well-rounded form of dispute settlement. In doing so, it could achieve a regulatory landscape that would allow parties to settle their disputes both through interest-based, consensual formats (mediation), and rights-based adjudicative formats (arbitration). The following chapter will put forward the recent developments that have paved a way to encourage mediation in ISD through provisions in multilateral treaties and institutional guidelines on procedures and mediators.

5A) INTEGRATING MEDIATION INTO ISDS

A system of ISDS that involves arbitration as well as mediation provides for the right balance of flexibility, efficiency, confidentiality, and consensus that is needed to reach settlements.¹³³ Integrating it into ISDS cannot be detrimental as long as it does not mandate strict times at which mediation should occur. Mediation provisions already exist in conjunction with arbitration in commercial dispute resolutions.¹³⁴ Mediation and arbitration clauses are not uncommon and have different uses depending on the respective legal cultures.¹³⁵ A sufficiently flexible and procedurally whole ISDS system would enable parties to move between mediation and arbitration whenever they deem

¹³³ Klaus Peter Berger, *Integration of Mediation Elements into Arbitration, 'Hybrid' Procedures and Intuitive Mediation by International Arbitrators*, 19 *ARBITRATION INT'L* 387, 387 (2003).

¹³⁴ *E.g. Id.*

¹³⁵ *Id.*

necessary.¹³⁶ Institutions in turn could safeguard these provisions from being exploited by parties acting in bad faith. Given the longterm nature of all investment contracts, there is currently a lacuna for a dispute resolution form that can go beyond rights-based adjudication or facilitation.¹³⁷ Mediation can complement ISDs in providing for a system of dispute settlement on the basis of other ADR options, which serves to further empower parties. This would clearly not deal with all cases and would not address the issues raised respecting the arbitration process itself, but would serve to make ISDS more user friendly and acceptable to all stakeholders.

5B) MEDIATION AS PART OF NEW INVESTMENT TREATIES

An Alternative North American Dimension: CETA

Art. 14.5 of CETA provides for mediation with its procedure set out further under Annex III.¹³⁸ The treaty does not identify a particular point when mediation could start, which could be any given point from before the initiation of the dispute to when proceedings are halfway through.¹³⁹ This provision recognizes the flexibility needed to cater for a dispute on an individual basis by allowing parties to move between different alternatives until a settlement is reached.¹⁴⁰

Procedure

The treaty provides that the mediator in investor-state disputes must not be a citizen of either party unless otherwise agreed.¹⁴¹ This is a useful clarification because state officials acting as mediators could be perceived as biased.¹⁴² However, making this a norm would cause considerable disruptions in the process and adversely affect the neutrality that the system strives to achieve.

Art. 4, Annex III provides for the rules of the mediation procedure.¹⁴³ Whilst there is a provision on initial submissions in

¹³⁶ Nancy A. Welsh & Andrea K. Schneider, *Becoming "Investor-State Mediation"* 1 PENN ST. J. L. & INT'L AFF. 86, 95 (2012).

¹³⁷ *Id.* at 86.

¹³⁸ Consolidated CETA Text, Art. 14.5, 2014.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Welsh & Schneider, *supra* note 139.

¹⁴² *Id.* at 95.

¹⁴³ Consolidated CETA Text, Art. 14.5, Annex III, (2014).

writing, the remainder allocates the mediator the necessary procedural freedom that is needed to come to flexible solutions.¹⁴⁴ For instance, the text specifies that mediators are allowed to hold joint and individual meetings and organize these schedules however they deem appropriate.¹⁴⁵ Besides their freedom over procedural matters, mediators are disallowed from commenting or advising on “the consistency of the measure at issue with this Agreement.”¹⁴⁶ They may, however, propose solutions to the parties.

Time Limits, Transparency, and Costs

CETA sets a time limit to reach a mutually agreeable solution within sixty days from the appointment of the mediator.¹⁴⁷ During this period of time, parties may unilaterally terminate the mediation at any point.¹⁴⁸ Regarding the transparency of the proceedings, CETA strikes a fair balance. Whilst it requires for all mutually agreed settlements to be made publicly available, it excludes parts that any party may have designated as confidential.¹⁴⁹ Furthermore, it provides that each party bears its own legal fees and costs incurred over organizational matters are shared jointly.¹⁵⁰

Finally, Art. 9 of Annex III enables the parties to the agreement to review these sets of rules concerning mediation five years after its entry into force.¹⁵¹ This measure demonstrates the state’s understanding that processes may need to be refined over time without overhauling entire system.

An Asian Dimension: TPP

The TPP provides for alternatives to arbitration such as good offices, conciliation, and mediation under Art. 28.6.¹⁵² Although its provisions are much less elaborate than those in CETA, it covers the same essential point that mediation is a consensual procedure that can be unilaterally terminated at any time by any party to the dispute.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Comprehensive Economic Free Trade Agreement annex 29-c art. 4.3.

¹⁴⁷ Art 4.3, Annex III CETA (2014).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Art 9, Annex III CETA (2014).

¹⁵² Art 28.6, TPP (2014).

However, it also includes some notable differences such as the expressly stated right that each party possesses to continue mediation whilst arbitration proceedings continue.¹⁵³ Furthermore, unlike CETA, there is no mandatory rule for publishing of settlement agreements in order to maintain confidentiality.

5C) ESTABLISHING STANDARDS FOR MEDIATORS

The IMI has worked on creating standards for mediators in the context of ISD.¹⁵⁴ The standard for Investor State Mediators was published on the IMI website on September 19, 2016.¹⁵⁵ In doing so, it highlights the distinctive features of ISD to commercial agreements, especially in light of the domestic policy concerns. Additional training for mediators in ISD is important because they must be familiar with disputes involving states, dealing with governments, and have experience concerning investments specifically. Such standards will also ensure that mediators are fit for the relevant dispute regarding non-legal issues. Unlike in arbitration, for mediators to help parties reach mutually agreeable solutions, it is important that they have a broad cultural understanding of all parties that are involved.

A move towards credentialing mediators should be welcomed for several reasons. Firstly, as explained above, a large and neutral body that imposes formal requirements is needed to ensure the systems works effectively. Secondly, it paves the way for creating a registry of credentialed mediators capable of facilitating such disputes. Maintaining such a record would further a transparent image, which is something that investment arbitration failed to establish from the beginning. Thirdly, it will help to ensure consistency in mediator training, which will enable all parties to take advantage of the benefits that mediation has to offer. It is important to establish common standards in light of the predictability, consistency, and legitimacy they will subsequently create.

5D) GUIDANCE FOR MEDIATION: THE CASE OF THE ECT

The ECT Secretariat has recognized states' increasing calls to find alternatives to arbitration, the rising number of its cases resulting in

¹⁵³ Art 28.6, TPP (2014).

¹⁵⁴ Investor-State Mediation Task Force, <https://imimediation.org/investor-state-mediation-taskforce>

¹⁵⁵ <https://imimediation.org/investor-state-mediation-taskforce>

settlement agreements,¹⁵⁶ as well as the momentum for incorporating mediation into ISD. Therefore, it has developed a Mediations Guide, approved in July of 2016, to incorporate and support the use of mediation within the existing treaty.¹⁵⁷ The guidelines make reference to the following provisions and cases to support the use of mediation within the existing treaty.

Amicable Settlement Under the ECT

The ECT provides that parties may request to resort to mediation at any point in time during the three months cooling-off period.¹⁵⁸ Moreover, Article 26.1 of the ECT goes further by stating that parties “shall, if possible, be settled amicably.”¹⁵⁹ The ECT does not specify what form the amicable settlement may take, but in its guidelines it clarifies that this must be read broadly to include the use of “*good offices, structured negotiation, mediation or conciliation* using existing mechanism or even agreeing on a tailor-made mechanism.”¹⁶⁰

This provision should not be read as a mandatory mediation clause. However, previous case law under the ECT has confirmed that for any arbitral tribunal to have jurisdiction over the dispute, parties must demonstrate evidence of seriously attempting to reach an amicable settlement.¹⁶¹ Indeed, tribunals in such cases have shown willingness to deny jurisdiction where a party did not act in good faith by failing to

¹⁵⁶ There have been 8 known settlements in cases under the ECT: *ČEZ v The Republic of Albania* (2013); *Slovak Gas Holding BV et al v Slovak Republic* (2012); *Türkiye Petrolleri Anonim Ortaklığı v. Kazakhstan* (2011); *EVN AG v. The Former Yugoslav Republic of Macedonia* (2010); *Vattenfall AB, Vattenfall Europe AG v Federal Republic of Germany* (2011); *Barmek Holding A.S. v. Azerbaijan* (2006); *Alstom Power Italia SpA, Alstom SpA v. Mongolia* (2004); *AES Summit Generation Ltd. v. The Republic of Hungary* (2002).

¹⁵⁷ Conference Endorses Guide on Investment Mediation (Aug. 1, 2016), <http://www.energycharter.org/media/news/article/conference-endorses-guide-on-investment-mediation>.

¹⁵⁸ Art. 26.2 Energy Charter Treaty.

¹⁵⁹ Energy Charter Treaty, *supra* note 29, at Art. 26.1.

¹⁶⁰ *Draft Energy Charter Treaty Guidelines on Mediation*, Section 2.1 <http://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf> (emphasis added).

¹⁶¹ Award of December 2013, at paras. 828-830, available at http://www.encharter.org/fileadmin/user_upload/Investor-State_Disputes/Ascom_Award.pdf; Award of March 2008, at para. 50, available at http://www.encharter.org/fileadmin/user_upload/Investor-State_Disputes/Amtu_Ukraine_Award.pdf.

address a request to settle the dispute amicably,¹⁶² or its outright unwillingness to do so.¹⁶³

Through its guidelines the ECT Secretariat seeks to highlight the ways in which its institution can potentially be useful in assisting investors and governments in settling disputes amicably.¹⁶⁴ It thus encourages parties to include the Secretariat already before any notification or correspondence occurs regarding mediation proceedings.¹⁶⁵ Accordingly, the Secretariat “can play an important role in proposing and helping to secure the agreement of parties to explore/start mediation proceedings; and even help the parties to overcome initial procedural hurdles, for example facilitating the premises of the Secretariat for the initial meetings, administering the mediation process.”¹⁶⁶

Assessing A Dispute’s Suitability To Mediation

Moreover, the guidelines attempt to provide a non-exhaustive list on when parties to ISD may consider resorting to mediation:

- . both parties prefer to keep control over the outcome of the dispute;
- . the monetary costs of pursuing litigation or arbitration are too high in comparison with what a party can expect to recover by a decision in its favour;
- . a fast resolution is of the utmost importance;
- . maintaining a relationship is more important than the substantive outcome;
- . there is no deep personal hostility and distrust between the parties;
- . parties do not require interim relief;
- . parties do not just seek quantum or a specific technical issue;
- . matters of fundamental principle are not at stake;
- . both parties can involve their respective decision-making authorities;
- . a party would seek some non-monetary relief such as an apology, a public statement or acknowledgment to third parties...; and

¹⁶² Award of March 2005, at page 43, available at http://www.encharter.org/fileadmin/user_upload/document/Petrobart.pdf

¹⁶³ Partial Award on Jurisdiction and Liability of September 2009, at paras. 154-156, available at http://www.encharter.org/fileadmin/user_upload/Investor-State_Disputes/Partial_award_-_Mohammad-Tajikistan.pdf

¹⁶⁴ *Draft Energy Charter Treaty Guidelines on Mediation*, *supra* note 163, at Section 2.

¹⁶⁵ *Id.* at Section 3.

¹⁶⁶ *Id.*

. neither side is certain that it will prevail in litigation or arbitration.¹⁶⁷

Internal and External Systems

Another addition in the Guide which will enrich the wealth of initiatives to facilitate mediation in the context of ISD, concerns the creation of systems on conflict management.¹⁶⁸ This addition aims to complement states' internal approaches to facilitate an assessment on whether to opt for mediation in the first place.¹⁶⁹ Accordingly, such a system could include relevant training in mediation, empowering a designated department for mediations, facilitating the budgeting of costs in such disputes, or "clarifying the process for formal approval of the government consent to a settlement agreement".¹⁷⁰ Adopting such measures could ensure a smoother transition for states to consider the mediation of ISD without changing the framework.¹⁷¹ Finally, the Guidelines also welcome the IMI's initiative to create standards for mediators in the context of ISD in order to complement the Secretariat's efforts.¹⁷²

The ECT Guide on Mediation should be welcomed as a step in the right direction, that clarifies procedures, guides parties' in its assessment on whether mediation is feasible, and points at important ways in which this new area must develop. It is important to bear in mind that this is achieved without amending the existing treaty, nor entering into any new binding obligations. The tools for including mediation in ISD already exist, and any attempts at reforming investment arbitration should carefully assess the opportunities this option creates first.

IV. CONCLUSION

This article rejects the abolition of investment arbitration from trade and investment treaties. The alternative of creating a permanent investment court would result in more problems than it would solve. A debate based on legal and factual evidence demonstrates that concerns over state sovereignty and a contested lack of transparency are wholly

¹⁶⁷ *Id.* at Section 4.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at Section 8.

¹⁷² *Id.*

[Vol. 17: 233, 2017]

Investor-State Dispute Settlement Reconceptualized

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

unfounded. That is not to say that the investment arbitration regime is flawless. It suffers from inconsistent decision making which threatens its legitimacy. However, this could be remedied by letting the relatively new system evolve through more elaborate standards on treaty interpretation. The current calls for reform should be taken as a political opportunity to refine provisions in future treaties. The system also suffers from a procedural gap that does not account for the long-term relationship of parties, both of whom will often have an underlying interest to continue investments. This article recommends a conceptual expansion of ISDS towards encouraging mediation, to be built on the same principles of party autonomy and consensus as investment arbitration is. As a result, mediation would be used as a complementary tool within the same system, creating a practical adjunct to arbitration within existing treaties. Mediation can easily be integrated into ISDS much like it already is integrated into many states' court systems. Moreover, it would allow for parties to self-regulate their disputes in a system providing for a registry of disputes, and transparency and standards to ensure the quality of IS mediators. The real solution to fix the flaws in ISDS lies in finding innovative remedies to the problems and not in reinventing the wheel.