Northwestern Journal of International Law & Business

Volume 39
Issue 1 *Fall*

Fall 2018

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Vol. 39, No. 1
Northwestern Journal of International Law & Business

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Abstract: Robust discussions on standing investment courts are currently taking place at various fora. In particular, negotiations to include bilateral investment courts in IIAs are in full swing and leading to the creation of such courts. On the other hand, negotiation for a multilateral investment court has yet to start. Even if negotiation begins, it is not clear how long it will take and whether it will indeed lead to a successful conclusion. As such, for a significant amount of time in the future, it is bilateral investment courts that states administer to resolve investment disputes. Bilateral investment courts, however, will further deepen the already existing fragmentation of international investment law. They will be unable to issue harmonized and consistent jurisprudence for similar or essentially the same legal issues. In addition, they will more easily stoke sovereignty infringement claims by domestic critics. If legitimacy enhancement is the ultimate objective of the present ISDS reform discussions, it will only be achieved through a multilateral court. This is the only alternative to address the basic concern that has prompted the ISDS reform debates in general and the court proposals in particular. Global efforts should be mobilized to initiate and conclude negotiations for the establishment of a multilateral court as promptly as possible. In the interim, current negotiations to create and adopt bilateral courts should be suspended.

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I. INTRODUCTION

At present, international dispute settlement proceedings are actively being utilized by states. These proceedings have contributed to the development of international law and have become core elements of major treaties; in particular, they play an important role in enforcing those treaties as well as developing and clarifying provisions within those treaties.

In the meantime, as procedural loopholes and inconsistencies are identified with respect to these proceedings, efforts are also being made to fill the loopholes, avoid inconsistencies, and further elaborate procedural rules for the proceedings. Along the lines of these efforts, various suggestions and proposals have been made, triggering lively discussions and debates. These efforts are generally aimed at introducing further procedural rules and adding more detailed steps to the existing dispute settlement mechanism of international law.

For instance, with respect to the World Trade Organization (WTO) dispute settlement proceedings, negotiations have been underway for many years to amend the existing system codified in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").[1] Negotiations have focused on fixing structural problems identified through the application of the DSU since 1995 and introducing more detailed and coherent provisions in the agreement, so as to enhance the rule of law in the global trading regime.[2] Given the relatively strong consensus among the WTO Members, the DSU amendment is regarded as one of the early harvest issues once a new negotiation round begins in the near future.[3]

Likewise, regarding investor-state dispute settlement proceedings ("ISDS proceedings"), new efforts are now being made to upgrade and reform existing proceedings contained in International Investment Agreements ("IIA"), which can be either Bilateral Investment Treaties ("BITs") or Investment Chapters of Free Trade Agreements ("FTA"). Here also, various proposals and suggestions have been made by many states and entities, and have found their way into respective IIAs, one way or another. Most recently, the European Union proposed a new scheme that would potentially change the basic framework of the current ISDS proceedings. Among the new ideas and suggestions is the proposal to introduce a new standing court on a bilateral basis, equipped with an appellate system and coupled with strong ethical rules for appointed judges. The proposal then suggests the creation of a multilateral investment court on a global level. The

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[1] World Trade Organization, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, (April 15, 1994).

[2] *See* World Trade Organization, Ministerial Declarations, WT/MIN(01)/EDC/1 (Nov. 14, 2001), at paras. 30, 47; World Trade Organization, *Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlements of Disputes*.

[3] *See* WTO's website https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations.

EU proposal has since prompted robust discussions in the international community.[4] In many respects, the proposal draws from the successful experience of the WTO's DSU and practice of the Dispute Settlement Body ("DSB"); although the WTO DSU does not adopt a standing "court" system,[5] various practical issues tested in the WTO's DSU such as the constitution of a panel, the relationship between a panel and the Appellate Body, a code of conduct for panelists and Appellate Body members, and their compensation scales appear in the EU proposal in one form or another.[6] In a sense, this exemplifies that the WTO's DSU and its practice have become a beacon for other international dispute settlement proceedings.

Within the specific circumstances of the Trans-Atlantic Trade and Investment Partnership ("TTIP"), the EU proposal submits a bilateral investment court between the EU and the United States, while noting the anticipation of the advent of a multilateral court.[7] The basic format has been adopted in the *Free Trade Agreement between the European Union and the Socialist Republic of Vietnam* ("EU-Vietnam FTA"),[8] the *Free Trade Agreement between the European Union and the Republic of Singapore* ("EU-Singapore FTA"),[9] and the *Comprehensive Economic and Trade Agreement between the European Union and Canada* ("CETA").[10] It is reported that the *Free Trade Agreement between the European Union and Japan* ("EU-Japan FTA") will not follow this path, and will instead adopt existing ISDS proceedings.[11] Therefore, as the situation currently stands,

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[4] *See* Stephan W. Schill, The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law? (EC Proposal of an Investment Court for TTIP), ASIL Insights (2016); *see* M. Sornarajah, An International Investment Court: Panacea or Purgatory?, Columbia FDI Perspectives: Perspectives on Topical Foreign Direct Investment Issues (2016).

[5] It should also be noted that the WTO's own DSU amendment negotiations include as one of the key topics the creation of a standing panel, which may resemble the standing investment court of the EU proposal in core respects.

[6] *See* European Commission, *Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce*, Chapter II—Investment, Commission draft text TTIP—Investment, ("TTIP draft text on investment") (2016).

[7] *Id*.

[8] *See* European Commission, Free Trade Agreement between the European Union and the Socialist Republic of Vietnam (2016).

[9] It should be noted that the *Free Trade Agreement between the European Union and the Republic of Singapore* ("EU-Singapore FTA") does not establish a bilateral investment court officially. However, other major elements of the original EU proposal have been included in the agreement which are closely related to the creation of a court. The EU-Singapore FTA can be said to have adopted a 'hybrid' system. In that regard, the basic format of the recent proposals has still been incorporated by this FTA as well. *See* European Commission, *Free Trade Agreement between the European Union and the Republic of Singapore* (2015).

[10] *See* European Commission, *Comprehensive Economic and Trade Agreement between the European Union and Canada* ("CETA") (2016).

[11] *See* European Commission, *Report of the 16th EU-Japan FTA/EPA Negotiating round* (2016).

proposals for standing investment courts submitted by the EU, other countries, and other entities can be summarized as (i) establishment and operation of 'bilateral' investment courts under IIAs and (ii) mobilization of joint efforts for the creation of a 'multilateral' court in the future. In other words, the proposals envisage multiple courts under respective IIAs and at least one above the IIAs in the foreseeable future – hence this article using the term "international investment courts" in the plural form.

Needless to say, because proposed changes are expected to enhance trust in the decision-making process of the ISDS proceedings, there are obvious advantages gained from these efforts to reform existing investment dispute settlement proceedings and introduce standing international investment courts, both bilaterally and multilaterally.[12] If anything, with this change, it is expected that the legitimate policy space of sovereign governments could be better preserved while guaranteeing the agreed level of protection for foreign investors. Most notably, the new courts will help enhance the legitimacy of the entire procedure.[13]

At the same time, as much as this new idea purports to change the existing paradigm, it may also bring into the equation various legal problems and practical questions. In particular, the possible implication of introducing multiple international investment courts, which would hold a fragmented structure of law based on 3,367 IIAs, has not been adequately discussed.[14] One of the unique characteristics of international investment law is its fragmented regime, and this is also a major source that fosters continuing legitimacy challenges in terms of the rule of law through ISDS proceedings. This is in contrast to the multilateral trade regime under the WTO and its dispute settlement mechanism. Any major reform proposal of the ISDS proceedings, therefore, would be expected to address or at least alleviate the fragmentation problem. Caution is required when considering a major reform, should the introduction of investment courts maintain or even deepen the existing problem. This article argues that the current proposals for investment courts carry the potential for firmer and deeper fragmentation at least for the time being, and possibly for some significant time in the future. It then contends that the fragmentation can only be alleviated through the creation of a multilateral court and ultimately be addressed by the adoption of a multilateral agreement in international investment law. Thus, the critical point is how quickly the international community can (1) establish a

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[12] *See* Giovanni Zarra, *The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?*, 17 Chinese J. Int'l L. 111, 142 (2018).

[13] *See* Gus Van Harten, *A Case for an International Investment Court*, Society of International Economic Law (SIEL) Inaugural Conference 2008 *Working Paper* No. 22/08 (2008); *see also* European Commission, *Why the New EU Proposal For An Investment Court System in TTIP is Beneficial to both States and Investors* ("Why The TTIP Court System is Beneficial") (2015).

[14] *See* U.N. Conference for Trade and Development (UNCTAD) International Investment Agreement (IIA) Database website.

multilateral court and (2) more importantly, reach consensus on a multilateral investment agreement. So, it should be confirmed as much as possible at this juncture that a multilateral court (and ultimately a multilateral agreement) is not merely another option but a 'must' if the global community is to overcome the current structural problem. The local sprawling of bilateral courts would only further complicate the problem. This article proposes a moratorium on bilateral investment court establishment: during the pendency of the negotiation to establish a multilateral court in the international community, while setting aside a more time-consuming and difficult task of adopting a multilateral agreement on investment, establishing bilateral investment courts should not be pursued in new IIAs.

With this in mind, Section II of the article first provides an overview of the EU proposal, the paragon of new proposals for investment courts. Section III then explains the basic operating mechanism of investment courts as envisaged in these proposals. Section IV discusses the implication of investment courts for the fragmentation phenomenon. A suggestion for a future course of action in this regard is provided in Section V and the conclusion then follows in Section VI.

II. 2015 EU PROPOSAL FOR INVESTMENT COURT: AN OVERVIEW AND ASSESSMENT

In September 2015 the European Union proposed a new scheme that would significantly change the framework of the current international investment agreements and ISDS proceedings.[15] The EU proposal particularly submitted new ideas for amending the current ISDS proceedings. Among the new ideas the suggestion to introduce a new standing court to resolve investment disputes stands out.[16] There have been robust discussions in the international community and among scholars regarding a standing investment court. Some countries have agreed to the EU proposal and adopted an investment court and appellate mechanism in their respective FTAs or BITs. Canada[17] and Vietnam[18] offer such examples. The EU

[15] Press release by European Commission, *Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations* ("Commission's Investment Court Proposal for TTIP") (2015); Louise Woods, Fit for purposes? The EU's Investment Court System (2016), Kluwer Arbitration Blog.

[16] *See supra* note 6, at art. 9-12. It is believed that France and Germany have been in strong support of the proposal to introduce standing courts. *See* Marco Bronckers, *Is Investor–State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements*, 18 J. Int'l Econ. L. 656-57 (2015).

[17] *See* Isabelle Michou *et al*., *TTIP: 12th Round of Negotiations Concludes, Investment Protection Remains High on the Agenda; Plus Newly Published CETA Text Includes EU's Investment Court System Proposal* (2016); Government of Canada, *Joint Statement by European Commissioner for Trade and Canada's Minister of International Trade on Canada-EU Trade Agreement* (2016).

[18] *See* European Commission, *The EU and Vietnam Finalize Landmark Trade Deal* (2015); *see* EU-Vietnam FTA, *supra* note 8; *see* Cecilia Malmström, *Done Deal with Vietnam*

submits that this scheme is a "must" for its future IIAs.[19] On the other hand, other countries such as the United States and Japan seem to be rather cautious, if not entirely skeptical, about this EU proposal.[20]

There are obvious merits to introducing a standing investment court, as it will enhance trust in the decision-making process of international investment disputes.[21] Conflict of interest between arbitrators can also be avoided more efficiently under the new scheme. The investment court may also be more open to understanding the need to preserve the legitimate policy space of sovereign governments.[22] Most importantly, international investment courts will help enhance the legitimacy of the ISDS proceedings.[23] The reasons that an international investment court can enhance legitimacy of the procedure are explained as follows:

Firstly, an international investment court can ensure the impartiality of the dispute resolution process. Unlike arbitrators who are appointed for each case, often by the parties or an appointing authority, judges are randomly

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(2015).

[19] *See* European Commission, *Proposal for a Council Decision Authorising the Commission to Negotiate a Convention to Establish a Multilateral Court on Investment on Behalf of the EU in Line with Article 218 of the Treaty Together With Negotiating Directives* (2016); *see* European Commission, *Why the TTIP Court System is Beneficial; European Commission, European Commission—Fact Sheet* (2015).

[20] *See* Krista Hughes & Philip Blenkinsop, *U.S. Wary of EU Proposal for Investment Court in Trade Pact*, Reuters, (Oct. 29, 2015); *see* Stockholm Chamber of Commerce, *The U.S. is Skeptical of the European Commission's ISDS Proposal* (2015).

[21] European Commission, *Reading Guide to the Draft Text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership* (TTIP) (2018); European Parliament, *European Parliament Resolution of 8 July 2015 Containing the European Parliament's Recommendations to the European Commission on the Negotiations for the Transatlantic Trade and Investment Partnership (TTIP)* ("Resolution of 8 July 2015"); Ingo Venzke, *Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication*, 17 J. World Inv. & Trade 394 (2016); European Commission, "Commission's Investment Court Proposal for TTIP" *supra* note 15, ("With our proposals for a new Investment Court System, we are breaking new ground. The new Investment Court System will be composed of fully qualified judges, proceedings will be transparent, and cases will be decided on the basis of clear rules. In addition, the Court will be subject to review by a new Appeal Tribunal. With this new system, we protect the governments' right to regulate, and ensure that investment disputes will be adjudicated in full accordance with the rule of law."); *See* Cecilia Malmström, *supra* note 18 ("What has clearly come out of the debate is that the old, traditional form of dispute resolution suffers from a fundamental lack of trust. However, EU investors are the most frequent users of the existing model, which individual EU countries have developed over time. This means that Europe must take the responsibility to reform and modernise it. We must take the global lead on the path to reform." "We want to establish a new system built around the elements that make citizens trust domestic or international courts. I'm making this proposal public at the same time that I send it to the European Parliament and the Member States. It's very important to have an open and transparent exchange of views on this widely debated issue.").

[22] *See* European Parliament, "Resolution of 8 July 2015", *supra* note 21; *see also* Ingo Venzke, *Investor-State Dispute Settlement in TTIP*, *supra* note 21, at 394.

[23] *See supra* note 13.

assigned to a case and have a secure tenure. International investment court judges will be able to make their decisions without any repercussions and thus will not have any bias toward a party.[24] After all, "no one can say that the judge was predisposed to decide a case or interpreted the law in a way that would increase his or her prospects for future income and career advancement."[25]

Secondly, having a single international investment court will ensure that a uniform standard will be applied to all cases, increasing the predictability of the outcome. Currently, different tribunals grant seemingly contradictory awards in international investment arbitration, a situation that adversely affects both the legitimacy and predictability of awards.[26]

Thirdly, the European Commission's proposal for creating an international investment court also includes creating an appellate court.[27] In contrast to arbitration that normally does not allow an award to be appealed, an appellate court will ensure that errors made in the court of first instance will be corrected.[28]

Fourthly, compared to arbitration, bringing a case to the international investment court will cost less for parties (especially small and medium enterprises). Judges in the international investment court will receive salaries from member states, which decreases the financial burden of private parties.[29] In addition, small and medium enterprises will be able to bring a case to a sole judge if the amount in dispute is relatively small, and will not have to pay all of the other parties' fees even if it loses a case.[30]

At the same time, there are various legal problems and questions relating

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[24] *See supra* note 13, at 16-17 (arguing that "the absence of security of tenure leads to a reasonable judgment that the system is stacked, to put it crudely, in favour of investors and against host states" because the appointing authority is often an institution that represents the interests of "foreign investors and the major capital-exporting states").

[25] *Id.* at 20.

[26] *See generally* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 Fordham L. Rev. 1521 (2005); *see generally* Anders Nilsson & Oscar Englesson, *Inconsistent Awards in Investment Treaty Arbitration: Is an Appeals Court Needed?*, 30 J. of Int'l Arb. 561 (2013).

[27] European Commission, "Commission's Investment Court Proposal for TTIP", *supra* note 15.

[28] José E. Alvarez, *Is the Trans-Pacific Partnership's Investment Chapter the New "Gold Standard"?*, Int'l Inv. L. J. (*Working Paper* 2016/3) (stating that "the Appellate Tribunal in particular is seen as ensuring greater coherency in investment law, while also providing, unlike the limited ICSID annulment process, the possibility for correcting erroneous interpretations of law or egregious errors in fact-finding"); *Cf.* Freya Baetens, *The European Union's Proposed Investment Court System: Addressing Criticisms of Investor-State Arbitration while Raising New Challenges*, 43 *Legal Issues of Economic Integration* 381(2016) (pointing out that the possibility of appeals will ultimately "enhance the acceptability and legitimacy of the resulting decision" by providing a "second opinion").

[29] European Commission, TTIP draft text on investment, *supra* note 6, at art. 9.13, 10.13.

[30] European Commission, Commission's Investment Court Proposal for TTIP", *supra* note 15.

to this proposal. For instance, it is not clear whether the operation and administration of an investment court is compatible with the provisions of the ICSID Convention.[31] It is also questionable whether a standing court stays within the general parameters of an investment arbitration.[32] In addition, to the extent that the core problems of the ISDS proceedings lie in the fragmented nature of the international investment agreements system,[33] and unless this system itself is somehow amended as a result of introducing a multilateral regime in international investment law, the introduction of the court system may not be able to address these problems. Any contribution it makes, if any at all, should be minimal or marginal. If anything, the fragmentation phenomenon can become more acute with the introduction of bilateral investment courts from agreement to agreement.

In consideration of introducing an investment court, all of these related legal and practical issues should preferably be contemplated at the same time. Apparently, the current proposal of the EU has not yet addressed these legal and practical issues in an in-depth manner.

III. BASIC OPERATING MECHANISM OF INTERNATIONAL INVESTMENT COURTS

The proposed investment courts are supposed to be formed by respective FTAs and BITs.[34] While these agreements do mention the possibility of having a multilateral court on a global basis that may have jurisdiction over investment disputes from various FTAs and BITs, the first step is to seek the introduction and establishment of bilateral courts within the rubric of respective FTAs and BITs. It is true that the global community

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[31] *See* Mateus Aimoré Carreteiro, *Appellate Arbitral Rules in International Commercial Arbitration*, 33 J. Int'l Arb. 185 (2016); Barbara Helene Steindl, *ICSID Annulment vs. Set Aside by State Courts*, 4 Yearbook on Int'l Arb. 181 (2015); Gloria Maria Alvarez, et al., *A Response to the Criticism against ISDS by EFILA*, 33 J. Int'l Arb. 1, 10-11 (2016).

[32] J.J. Saulino & Josh Kallmer, *The Emperor Has No Clothes: A Critique of the Debate over Reform of the ISDS System*, in Jean E. Kalicki & Anna Jubin-Bret (eds.), Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century (Boston, Brill Nijhoff, 2015), at 498; Eduardo Zuleta, *The Challenges of Creating a Standing International Investment Court*, in Jean E. Kalicki & Anna Jubin-Bret (eds.), Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century (Boston, Brill Nijhoff, 2015), at 403.

[33] In addition, not only inter-IIA (that is, IIA-to-IIA) fragmentation, but also intra-IIA fragmentation is also being observed as more new rules and procedures are being introduced into an IIA. For instance, recent IIAs now introduce 'mediation' procedures as an alternative to or as an additional option for, standard ISDS proceedings. *See generally*, Chunlei Zhao, *Investor-State Mediation in a China-EU Bilateral Investment Treaty: Talking About Being in the Right Place at the Right Time*, 17 Chinese J. Int'l L. 111 (2018). These additional dispute settlement proceedings certainly provide benefits to disputing parties for a specific dispute in a particular IIA, but may run the risk of further complicating dispute settlement proceedings contained in an IIA.

[34] Gabrielle Kaufmann-Kohler & Michele Potesta, *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?*, CIDS Report (2016).

may initiate negotiations to discuss a multilateral investment court that has jurisdiction over all (or a majority of) investment disputes, such as WTO's dispute settlement proceedings, but any negotiation has yet to take place.[35] Even if a negotiation for the sole purpose of establishing a multilateral court is initiated, it is indeed difficult to predict with reliable precision whether such negotiation will be able to lead to a global consensus and an ensuing convention, or how long it will take to complete such negotiation, and more importantly, how many countries will accede to the convention and how fast.[36]

Should previous experience offer any guidance, a negotiation to establish a multilateral regime in international investment law is both treacherous and time-consuming. As a matter of fact, the idea of an international investment court was submitted as early as 1946 when the aborted International Trade Organization was being discussed.[37] Afterwards, similar discussions also took place in the International Chamber of Commerce ("ICC") and Organization for Economic Co-operation and Development ("OECD"), but failed to produce any tangible outcome.[38] The Unified Agreement for the Investment of Arab Capital, a multilateral investment agreement among Middle East states, actually established an investment court.[39] This court, however, was barely utilized and even contracting parties of the multilateral agreement apparently preferred to utilize the ICSID arbitration proceedings.[40] More recently, Professor Van Harten proposed a similar idea in 2007.[41] The 2008 Model Bilateral Investment Treaty of Germany[42] and 2015 World Investment Report published by the United Nations Conference on Trade and Development ("UNCTAD")[43] also included a similar court proposal. In addition, the ongoing discussion to introduce a dispute settlement proceeding under the

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[35] The UNCITRAL has recently decided to discuss ISDS proceedings reform through one of its working groups. Specific topics and schedules of future discussions are not yet adopted. Possible establishment of investment courts is likely to be included in the discussions, but specific features of the courts—whether it is a single multilateral court such as WTO's panel and the Appellate Body, regional courts combining regional IIAs, or bilateral courts under individual IIAs—have not been discussed yet and are unclear at this stage. *See* U.N.G.A., *Possible Future Work in the Field of Dispute Settlement: Reforms of Investor-State Dispute Settlement (ISDS)* (2017).

[36] *See* Zarra, *supra* note 12, at 178-182.

[37] *See* Omar E. Garcia-Bolivar, *Permanent Investment Tribunals: The Momentum is Building Up*, in Jean E. Kalicki & Anna Jubin-Bret (eds.), Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century (Boston, Brill Nijhoff, 2015).

[38] *Id*. at 404-406.

[39] *Id*.

[40] *Id*. at 406.

[41] *See* Gus Van Harten, *Investment Treaty Arbitration and Public Law* (New York, Oxford University Press, 2007), at 180-182, 184.

[42] *See* Germany Model BIT (2008).

[43] UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* ("World Investment Report 2015") (New York & Geneva, 2015), at 133, 152.

umbrella of the Union of South American Nations also explores a standing investment court idea.[44] So, the investment court idea is not necessarily the brainchild of the EU, but has been discussed on and off for the past several decades. However, none of the previous discussions have actually culminated in a universally multilateral convention. The only investment court in operation failed to secure active utilization by the parties.

The ambitious negotiation of 1997 to adopt Multilateral Agreement on Investment failed to reach a consensus.[45] Negotiations to address investment issues in the context of WTO Agreements also secured a similar fate.[46] The Mauritius Convention, adopted through the initiatives of UNCITRAL on December 10, 2015 and set to go into effect on October 18, 2017,[47] is arguably the first meaningful multilateral achievement in this respect, but as of August 1, 2017 only three states have ratified it.[48] The rather slow pace of ratification of this convention should be understood in the light of the fact that the transparency issue is one of the easiest items in IIAs, as apparently few countries can oppose the concept of transparency in ISDS proceedings.[49]

Viewed from this perspective, future negotiations to introduce a multilateral investment court through an international convention would be

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[44] *See supra* note 37, at 399-401; Catharine Titi, *The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead*, 1 Transnat'l Dispute Mgmt. 2 (2017); *see* Markus Krajewski, *Model Bilateral Investment Treaty with Investor-state Dispute Settlement for Industrial Countries, Giving Consideration to the U.S.*, Project No. 83/15 of the Federal Ministry for Economic Affairs and Energy at 19; *see supra* note 43, at 152; UNCTAD, *Investment Policy Framework for Sustainable Development 2015* ("Investment Policy Framework 2015") (2015); Katia Fach Gómez & Catharine Titi, *International Investment Law and ISDS: Mapping Contemporary Latin America*, in Katia Fach Gomez & Catharine Titi (eds.), *The Latin American Challenge to the Current System of Investor-State Dispute Settlement*, 17 J. of World Inv. and Trade 14, (2016).

[45] The negotiation began in 1995 and it was discontinued in April 1998. *See* OECD, *OECD Begins Negotiations on a Multilateral Agreement on Investment*, SG/PRESS(95) 65 (1995), for the launching of MAI; OECD, *The Multilateral Agreement on Investment Draft Consolidated Text*, DAFFE/MAI(98)7/REV1 (1998), for the last document text drafted in 1998.

[46] In 1996, the Singapore Ministerial Declaration was adopted which contained agreements to establish a Working Group on the Relationship between Trade and Investment. *See* https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm (2018). However, the working group report was published only up to July 2003. The last working group report on the relationship between trade and investment can be found at the WTO website. *See* WTO, *Report on the Meeting Held on 10 and 11 June 2003*, WT/WGTI/M/22 (Jul. 17, 2003).

[47] *See* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html.

[48] Canada ratified on 12 December 2016, Mauritius on 5 June 2015, and Switzerland on April 18, 2017. To check the status of the Convention ratification, *see* the UNCITRAL website at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html.

[49] *See supra* note 34, at 14-15.

by no means simple or be achieved in a short time frame. Even after the completion of the negotiation and adoption of a convention, it would probably take a significant amount of time to see a court in actual operation. Under these circumstances, a more realistic prediction with respect to the proposal of investment courts, at least for the time being, would be bilateral investment courts established under respective IIAs.[50] How this development may affect the existing regime of international investment law and the administration of IIAs merits the immediate attention of the global community at this juncture. At this stage, it is unclear how many states will also be open to the idea of creating a multilateral investment court.[51]

In short, regardless of the desire of the states in the global community, a "bilateral investment court" system is arguably a more likely outcome in the near future. It is a way station to the final destination of a "multilateral investment court" system, but it is not clear how long states will have to stay in the way station.[52] While the states are in the way station, it is most likely that investment disputes will continue to rise in number and scope.[53]

A. Multiplication of International Investment Courts

Assuming a bilateral investment court system will spread or take hold in the immediate future, there will be significant changes in ISDS proceedings. One of the most significant changes will be the multiplication of investment courts. If individual IIAs have separate investment courts, in theory there will be as many investment courts as IIAs. Should this experiment be confined to newly concluded IIAs, the total number of international investment courts will still multiply quickly because new FTAs are being negotiated and old ones amended.[54] The creation and constitution of an investment court are to be carried out by the two contracting parties of

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[50] There are 600 bilateral investment treaties in the world and 191 treaties that separately have investment provisions. Statistics can be checked at the UNCITRAL website. *See* http://investmentpolicyhub.unctad.org/ISDS/FilterByApplicableIia.

[51] *See supra* note 28, at 538 (pointing out that "most of Asia's governments do not *do* international courts").

[52] *See supra* note 12, at 178-81 (arguing that the completion of the adoption of a new system may not be able to be completed in a short timeframe).

[53] According to the statistics from investment policy hub of UNCTAD, the total number of arbitrations initiated in 2016 are 62. Analysis in terms of an annual basis does not clearly show a constant upward surge in the numbers of arbitrations initiated. However, the five-year average shows that there has definitely been an increase in the number of arbitrations initiated: 62.6 between 2012 and 2016, 42 between 2007 and 2011, 34.4 between 2002 and 2006, 12 between 1997 and 2001 and 6.5 between 1993 and 1996. The statistics can be found at the UNCTAD website. *See* http://investmentpolicyhub.unctad.org/ISDS/FilterByYear.

[54] The recent FTAs with investment provisions include the Trans-Pacific Partnership ("TPP") Agreement, Transatlantic Trade and Investment Partnership ("TTIP"), Comprehensive Economic Trade Agreement ("CETA"), Free Trade Agreement between the European Union and the Republic of Vietnam ("EU-Vietnam FTA"), and Free Trade Agreement between the European Union and the Republic of Singapore ("EU-Singapore FTA").

the IIA in question.[55]

Each investment court will then have its own mediators, judges and appellate judges.[56] It will have its own rules of procedure and logistical support mechanism.[57] As a court, judges and appellate judges appointed to it will be subject to stringent ethics codes[58] and most notably precluded from taking cases in their private capacity.[59] Their activities will be monitored closely by a joint committee or commission comprising representatives of the contracting parties.[60] Most importantly, these individual courts will have exclusive jurisdiction over investment disputes arising from their respective IIAs within the framework of "self-contained regimes."[61]

B. Individual Appellate Proceedings

The individualization and ensuing multiplication will extend to the appellate mechanism. The possibility of introducing an appellate proceeding has long been one of the priority topics in discussions on ISDS proceedings.[62] As such, appellate proceedings have become one of the core elements of

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[55] *See supra* note 34, at 6.

[56] The provisions in the TPP Agreement only involves a selection of arbitrators. *See* United States Trade Representative, *Trans-Pacific Partnership Full Text*, ch. 9 Investment ("TPP Investment chapter"), at art. 9.22 *Selection of Arbitrators*. TTIP involves mediators, judges and appeal tribunal members. *See* European Commission, "TTIP draft text on investment", *supra* note 6, at art. 9.2, 10.2; *see* European Commission, "TTIP draft text on investment", *supra* note 6, at ANNEX I of TTIP Investment chapter, art. 3. CETA involves arbitrators and mediators. *See* European Commission, CETA, *supra* note 10, at ANNEX 29. EU-Singapore FTA involves arbitrators and mediators. *See* European Commission, EU-Singapore FTA, *supra* note 9, at ANNEX 9-F. EU-Vietnam FTA involves mediators, members of the tribunal and members of the appeal tribunal. *See* European Commission, EU-Vietnam FTA, *supra* note 8, at ch. 13, sec. 3, art. 5.4, 12.2, 13.

[57] *See e.g.* European Commission, TTIP draft text on investment, *supra* note 6, at art. 11.16-12.15; European Commission, EU-Vietnam FTA, *supra* note 8, at art. 12.18-13.18; European Commission, CETA, *supra* note 10, at art. 8.27.16.

[58] *See e.g.* European Commission, TTIP Draft Text on Investment, *supra* note 6, at art. 11; European Commission, EU-Vietnam FTA, *supra* note 8, at ch. 13, sec. 3, art. 14; European Commission, CETA, *supra* note 10, at ch. 8, art. 8.30.

[59] *See id.*

[60] *See id.*

[61] *See e.g. supra* note 6, at sec. 2, art. 1-13; European Commission, CETA, *supra* note 10, at ch. 8, art. 8.2; EUROPEAN COMMISSION, EU-VIETNAM FTA, *supra* note 8, at sec. 3, art. 1-16; *supra* note 9, at sec. A, art. 9.2; U.S. TRADE REPRESENTATIVE, TPP Investment Chapter, *supra* note 56, at art. 9.2-9.25.

[62] While there are some review features contained in investment arbitrations, they are limited to specific instances requiring such reviews and do not constitute the conventional appeal mechanism where the legal issues of underlying tribunals' decisions are challenged. As for the ICSID Convention, *see* art. 49.2 Measures for Review Mechanism include Rectification, art. 50 *Interpretation*, art. 51 Revision, and art. 52 Annulment. *See also* Jaemin Lee, *Introduction of an Appellate Review Mechanism for International Investment Disputes* 11 Transnat'l Dispute Mgmt. 12 (2014).

investment court proposals.[63] International investment courts are designed to have an appellate mechanism in place. In other words, individual investment courts will have as many appellate proceedings as well.

A standing court, detached from the conventional concept of arbitration, is also closely intertwined with the proposal to introduce an appellate mechanism. Traditionally, ISDS proceedings, despite being of paramount importance to the states and foreign investors concerned, are subject to a singular, one-time decision-making formula and do not contain an appellate review mechanism.[64] As a matter of fact, key characteristics of international investment arbitration are its promptness and simplicity, which has been made possible, to a large extent, through the absence of an appellate review mechanism.[65] Now, this atmosphere is changing and a plea for the introduction of an appellate proceeding is arguably gathering cautious support.[66] Recent proposals for investment courts also come with sub-proposals to introduce appellate mechanisms at the same time.[67]

Each IIA has its own procedures to constitute and administer appellate proceedings.[68] Individual appellate courts are supposed to pronounce jurisprudence that will bind the investment court of first instance.[69] As each appellate court is a supreme interpreter and decision maker for the respective IIA within the framework of a "self-contained regime," appellate courts of various IIAs will be on equal standing and may sometimes compete for jurisprudence for the same or similar issues.

From a practical perspective, enabling appeals will lead to a longer dispute resolution process, as appeals will become the new norm for many

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[63] *See e.g*. *supra* note 6, at art. 10*;* European Commission, EU-Vietnam FTA, *supra* note 8, at ch. 13, art. 13; *see supra* note 10, at ch. 8, art. 8.28.

[64] *See* Katia Yannaca-Small, *Improving the System of Investor-State Dispute Settlement, Working Paper* 2006/01, at 8.

[65] *See id*.

[66] *See id*; UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap* ("Reform of ISDS"), UNCTAD IIA Issues Note (2013); European Commission, *Factsheet on Investor-State Dispute Settlement* (2013); Stephan W. Schill, *Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward* ("Reforming ISDS"), The E15 Initiative, ICTSD.

[67] European Commission, *EU Finalizes Proposal for Investment Protection and Court System for TTIP*, News Archive (Nov. 12, 2015).

[68] *See e.g*. *supra* note 6, at art. 10, art. 29*; see supra* note 8, at ch. 13, art. 13, art. 28; *see supra* note 10, at ch. 8, art. 8.28.

[69] *See supra* note 6, at art. 29; *see supra* note 8, at art. 28; *see supra* note 10, art. 8.28.9. It should be noted, however, that at least in the original EU proposal of September 2015, it is not entirely clear whether the court of first instance is bound by the decision of the appellate tribunal or if the lower court can consider the decision of the appellate court. *See supra* note 6, at art. 29.2. Regardless, it is hard to envisage a situation where the court of first instance issues a judgment, in spite of a conflicting decision or jurisprudence announced by the appellate tribunal. So in practice, there will not be a meaningful difference and the decision of the appellate court will be (virtually) binding on the investment court.

parties.[70] A longer process will lead to an increase in expenses, which will be disadvantageous to parties that are less financially stable.[71]

C. Party-Funded and Party-Operated Courts

A bilateral investment court approach is based on the notion that each court is to be funded and operated by contracting parties.[72] The idea assumes that each party maintains and is able to mobilize the expertise as well as the financial and logistical resources to meet the demand. In other words, this scheme requires a more active engagement and participation of contracting parties on an on-going basis.[73]

There are of course obvious benefits of the introduction and establishment of standing courts which have jurisdiction over investment disputes arising from IIAs. Indeed, the introduction of standing courts will have the effect of facilitating ISDS proceedings and will reduce the logistical burden in that respect. For instance, at present, due to the *ad hoc* nature of an arbitration tribunal, disputing parties usually spend substantial time selecting arbitrators in the initial stage of the ISDS proceedings believing that the fate of the dispute is heavily dependent upon arbitrator selection.[74] So, a permanent court could arguably ensure more efficient proceedings in the early stage of a dispute by dispensing with the time-consuming process of that selection.[75]

At the same time, it is expected that full-time, or at least exclusively employed, judges of a standing court could help introduce higher standards of professionalism and experience, and therefore ensure appropriate fact-finding and application of the relevant jurisprudence of international investment disputes. Having a group of previously designated or appointed adjudicators would also help ensure systemic avoidance of conflict of interest for these adjudicators. This aspect will also facilitate the ISDS proceedings generally in the right direction.

The EU proposal and other proposals for international investment courts underscore these presumed benefits.[76] The benefits stemming from the introduction of an international investment court (or investment courts)

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[70] *See supra* note 28, at 379; Christian J. Tams, *An Appealing Option? The Debate about an ICSID Appellate Structure*, 57 Essays in Transnat'l Econ. L. 15 (2006); But *see also supra* note 15 (proposing that the whole process including appeals to be limited to 2 years).

[71] *See supra* note 70, at 15-16.

[72] *See e.g. supra* note 6, at art. 9.12-10.12; *see supra* note 8, at art. 12.14-13.14; *see supra* note 10, at art. 8.27.12.

[73] Contracting parties are responsible for the constitution, maintenance and monitoring of bilateral courts and appellate proceedings. They are also required to maintain pre-court proceedings such as amicable resolution and mediation proceedings. *See e.g*. *supra* note 6, at art. 2-3, 9-10, 13, 26.

[74] *See supra* note 35.

[75] *Id.*

[76] *See supra* note 34, at 17-18; *see also* note 35, at 5.

should not be discounted. These benefits, once materialized and expanded, would arguably address some of the core concerns over international investment dispute settlement proceedings – namely, strengthening legitimacy for an international dispute settlement proceedings that directly affects the policy space of a government.[77] The benefits notwithstanding, there is also the practical burden of the logistics aspect to be carefully contemplated in advance.

For instance, financial burden is an important element for contracting parties of IIAs in any robust participation in IIAs.[78] The cost of maintaining a standing court (or courts) can also be substantial. As judges of a court of the first instance and an appellate court are supposed to be employed on a full-time basis or at least are required to refrain from taking work that may raise a conflict of interest, they need to be compensated accordingly.[79] The EU proposal suggests a fixed retainer fee each month coupled with a per diem for each day spent on a specific case.[80] Based on this formula, the retainer fees alone for the judges for a year may amount to almost one million dollars.[81] This is just the retainer fee and the amount may go up rapidly if a specific case is assigned to judges.[82] What further complicates this formula is that this cost is for just one set of courts. If multiple sets of courts are adopted through as many IIAs, reflecting the fragmented bilateral system of today's IIAs, the total cost for the maintenance and operation of the courts for the contracting parties can rise dramatically. The increased financial burden as a result of the introduction of courts and appellate tribunals should affect all contracting parties of IIAs. Nonetheless, all things being equal, the increased financial burden is likely to cause a disproportionate impact on certain states such as developing states or least developed countries ("LDCs").[83] As such, in formulating a prospective court system as a reform of the current ISDS proceedings, the new system's potential to dramatically

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[77] *See supra* note 37, at 396-397.

[78] *See supra* note 35, at paras. 52-57. As for the WTO aspect of a similar issue, s*ee* World Trade Organization, *Report by the Chairman, Ambassador Ronald Saborio Soto*, TN/DS/26 ("Report by Chairman 26"), at 8, 72; World Trade Organization, *Report by the Chairman, Ambassador Ronald Saborio Soto*, TN/DS/27 ("Report by Chairman 27"), at 11.

[79] *See supra* note 66; *see supra* note 13; *see supra* note 35, at para. 56.

[80] *See supra* note 6, at art. 9.12.

[81] It is estimated that the average cost of tribunals are approximately USD 500,000-1,000,000 and the typical lawyers' fees for the respondents are approximately USD 1-2 million on average (2005 UNCTAD data). Other data also suggest the cost of US$ 4 million per side in investment arbitrations (2012 OECD data). *See* Susan D. Franck, *Trend in Investment Treaty Disputes: Myth, Reality and Cost* ("Trend in Investment Treaty Disputes"), presentation at the 2013 APEC FTAAP Capacity Building Workshop, hosted by the APEC, held in Seoul, Korea on Nov. 7-8, 2013.

[82] *See e.g. supra* note 6, at art. 9.12-10.12; *see supra* note 8, at art. 12.1413.14; *see supra* note 10, at art. 8.27.12.

[83] *See* John Kingery, *Commentary: Operation of Dispute Settlement Panels*, 31 L. & Pol'y Int'l Bus. 667 (2000).

increase the financial burden for contracting parties should be considered.[84] Proposals should not turn a blind eye to the financial hurdles that these states have to face.

In addition, in a bilateral investment court proposal, contracting parties are supposed to appoint multiple sets of judges for multiple courts under various IIAs. Finding qualified individuals for the position of judges for many sets of courts may be difficult, as individuals may not be willing to commit fully to a six-year term during which they will not be able to act as counsel or expert witness in any investment dispute.[85] This reality presents another logistical challenge of securing and commissioning reliable experts as judges. Recent ISDS proceedings have underscored the chronic problem of a lack of human resources for many states.[86] Under these circumstances, a possibility is presented that some states may find it difficult to find their own national experts to constitute prospective rosters of or conduct the

[84] In a similar vein, arguments can be made that the courts system may also increase total costs for ISDS proceedings in general. The inclusion of new procedural steps for standing courts, such as interim decisions, third-party intervention, transparency requirements and appellate mechanism, may also complicate and prolong the entire dispute settlement proceedings. Of course, efficient management of a specific case by a court may shorten the entire timeframe of the case, but the addition of further procedural steps and their elaboration in the provisions, which seems inevitable for a standing court, may sometimes lengthen and complicate the proceedings. These changes may then lead to an increase of the total cost for the disputing parties. It is no secret that the present ISDS proceedings require commitment of a significant amount of funds. It is estimated that the average cost of tribunals are approximately USD 500,000-1,000,000 and the typical lawyers' fees for the respondents are approximately USD 1-2 million on average (2005 UNCTAD data). Another data also suggests the cost of US$ 4 million per side in investment arbitrations (2012 OECD data). *See* Susan Franck, "Trend in Investment Treaty Disputes", *supra* note 81. Consequently, some of the responding states face significant difficulty in financing their legal defense before reviewing arbitration tribunals with the assistance and advice of private law firms. *See* Mathew Hodgson, *Costs in Investme-nt Treaty Arbitration: The Case for Reform*, in Jean E. Kalicki & Anna Joubin-Bret eds., Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century (Brill Nijhoff, 2015), at 748-749. For the case in trade disputes under the WTO, *see* Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, in Towards a Development-Supportive Dispute Settlement System in the WTO, International Center for Trade and Sustainable Development (2008), at 16. In this new landscape of standing courts, states are more likely to have to bear increased budgetary and financial burden.

[85] *See supra* note 6, at art. 11.1; *see supra* note 28, at 370.

[86] In WTO litigation, it is not surprising that developing states find themselves in a difficult position in terms of securing domestic experts and professionals in this field. *See supra* note 84, at 9; Joseph A. Conti, *Producing Legitimacy at the World Trade Organization: The Role of Expertise and Legal Capacity*, 8 Soc. Econ. Rev. 135, 139 (2010). Outsourcing is always an option under the new scheme of a standing court, but it may further increase a financial burden, as indicated above. *See* Conti, at 143. At the same time, regardless of the possibilities of outsourcing, government officials of the respondent states are required to be conversant with the development of key jurisprudence of international investment law, which may be elusive under the current circumstances of developing states. World Trade Organization, *Dispute Settlement System Training Module: Chapter 11. Developing Countries in WTO Dispute Settlement*.

appointment of judges to serve in prospective courts.[87] As all investment disputes carry significant policy and monetary implications, all contracting parties may prefer to use judges of their own nationalities.[88] According to recent proposals, both parties of an IIA are supposed to appoint the same number of judges for the court, either for the court of first instance or an appellate court.[89] This scheme may work for an IIA between two similarly situated contracting parties such as the United States and the EU, who have similar pools of talents and experts.[90] The two countries may appoint judges of their own nationalities, so that they can ensure a system where the views of both parties are adequately reflected in the decision making process as presumed in the design of the new scheme.[91] In an IIA between states differently situated, however, one party may find it difficult to appoint judges of its own nationality.[92]

A proposed bilateral investment court idea is basically premised on the notion that professionals with top-notch expertise in investment law can be appointed on a virtually full-time basis. It is also based on the notion that both contacting parties of an IIA will have the same opportunity quantitatively and qualitatively. It is critical, therefore, that standing courts are formulated in a way that ensures the validity of these assumptions.[93]

D. Compatible with General Direction of International Investment Law

It should be also noted that the investment court proposal is generally in line with the current trend and future direction of international investment law. The emerging consensus of the international community arguably indicates that the court system is the right direction for the development of the international investment law.[94] In essence, proposals to introduce international investment courts, whether bilaterally or multilaterally, aim to pursue enhanced "legitimatization" of the ISDS proceedings in a global community considering increasing concern over the proceedings.

By way of example, a standing court is compatible with a new trend of international investment dispute settlement proceedings: enhancement of the proceedings' transparency.[95] Shedding the conventional notion of strict

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[87] *See supra* note 83, at 667.

[88] This is observed in the case of Vietnam in the creation and operation of an investment court under the EU-Vietnam FTA.

[89] *See* European Commission, "TTIP draft text on investment", *supra* note 6, at art. 9.2-10.2.

[90] *See id*. at art. 9.4-10.7.

[91] *See id.* at art. 9.6-10.2.

[92] *See e.g.*, *supra* note 8, at art. 23.

[93] One could argue that 'capacity building' should be a critical component of the recent discussion of standing courts proposals in ISDS proceedings.

[94] *See supra* note 34, at 11, 93.

[95] *See supra* note 4. For similar discussions in the WTO DSU negotiation reform, *see* World Trade Organization, *Further Contribution of the United States to the Improvement of*

confidentiality,[96] IIAs are now actively adopting transparency provisions of various types for their ISDS proceedings.[97] These transparency provisions of IIAs include two main elements: (i) opening hearings to the general public, and (ii) allowing public access to Parties' submissions. Proponents have argued that the enhanced transparency of the ISDS proceedings could contribute to greater public confidence in the dispute settlement mechanism. [98] As arbitration has been traditionally based upon the confidentiality of the proceedings, replacing this with a permanent court would arguably support and deepen the transparency trend in ISDS proceedings at the moment. [99] Likewise, recent discussion on the strengthening of ethics rules for arbitrators[100] are also in line with the general direction of the court proposal. A standing court requires stringent rules for the regulation of ethics issues for its full-time or exclusively-assigned members.[101]

The long-standing proposal for the introduction of the appellate mechanism in ISDS proceedings is also compatible with the idea of having standing courts in place.[102] Unlike arbitration, which by nature presupposes an *ad hoc*, one-time adjudicative process, a standing court more naturally fosters the idea of an appellate mechanism.[103] A strong argument can be made that an appellate mechanism, if properly established, will be able to address some of the key concerns harbored by stakeholders in the ISDS proceedings.[104] Most importantly, an appellate mechanism will be able to facilitate and foster "rule of law" in the ISDS proceedings by accumulating and spreading consistent jurisprudence in the international community.[105]

Recent development of these individual items in the circle of international investment law arguably supports the proposition that proposals of international investment courts are proceeding in the right direction.

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the Dispute Settlement Understanding of the WTO related to Transparency-Revised Legal Drafting (2006), at 1; World Trade Organization, *Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO related to Transparency* ("US Contribution to Transparency 13") (Aug. 2002), at 1; World Trade Organization, *Contribution of the European Communities and Its Member States* ("EC Contribution 1"), at 6-7.

[96] A similar trend is also observed in the WTO. *See supra* note 95, at 1-2; *see supra* note 95, at 1; *see supra* note 95, at 6-7.

[97] *See supra* note 6, at art. 18; *see supra* note 56, at art. 9.24; *see supra* note 8, at art. 20; *see supra* note 9, at ANNEX 9-G; *see supra* note 10 at art. 8.36.

[98] UNCTAD, *Transparency*, UNCTAD Series on Issues in International Investment Agreements II, U.N. (2012), at 48.

[99] *See supra* note 66.

[100] *See supra* note 6, at art. 11; *see supra* note 8, at art. 14; *see also* CETA, ch. 8, art. 8.30.

[101] *See supra* note 35, at paras. 19, 28, 33.

[102] *See supra* note 66, at 6-9.

[103] *See supra* note 35, at para. 11.

[104] *Id.*, at paras. 5, 34

[105] *See supra* note 26, at 561; *see also supra* note 64, at 11.

Many, if not all, of the reform proposals could be subsumed by the introduction and operation of courts.

IV. INVESTMENT COURT PROPOSALS' IMPLICATION FOR FRAGMENTATION

On balance, proposals for international investment courts can be evaluated as largely heading in the right direction by reflecting increasing concerns and demands of many states and domestic constituencies.[106] Properly constituted and meticulously operated, these courts will be able to address some of the core problems of investment dispute settlement proceedings that have been identified thus far. Most importantly, a permanent court regime with a set of full-time judges is expected to enhance the legitimacy of the proceedings and their outcomes.[107] In many respects, this idea appears to represent a turning point of the ISDS regime in the global community since its inception in 1966.[108] At the same time, considering the current proposals and prior experience in this area, it is probable that the experiment of the new investment court system will start with a "bilateral" investment court approach at least in the early stage of the implementation, setting the tone ultimately for a multilateral court.[109] The interim period may take several years, or possibly longer.[110] Indeed, the interim period may become permanent if negotiations for a multilateral court fail to reach consensus.[111] Even if a consensus is reached and a convention adopted, the process of ratification and entry into force may take a long time, suffering from the low accession rates, at least initially, as seen in the example of the Mauritius Convention.

The emerging question, then, is what a bilateral investment court system would mean to the current international investment law regime and ISDS proceedings. More specifically, would such a bilateral court scheme help alleviate current problems or worsen them? As noted above, the ultimate establishment of a multilateral investment court through a U.N.-sponsored convention will certainly alleviate these problems. More ambitiously, a WTO-like international organization with a WTO Agreements-comparable multilateral regime equipped with a WTO DSB-type centralized, multilateral dispute settlement mechanism will certainly help us resolve these problems. At this stage, momentum is now being created to aim for the easier objective

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[106] *See supra* note 34, at 11, 93.

[107] *See supra* note 66, at 4-8.

[108] Jean E. Kalicki & Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System*, Brill Nijhoff (Leiden, The Netherlands, 2015), at 255.

[109] *See e.g. supra* note 6, Article 12; European Commission, "EU-Vietnam FTA", *supra* note 8, Article 18; European Commission, "CETA", *supra* note 10, at art. 8.29.

[110] *See supra* note 12, at 182.

[111] *See* Bradly J. Condon, *Does International Economic Law Impose a Duty to Negotiate?*, 17 Chinese J. of Int'l L., 73, 103 (2018) (indicating that sometimes states have less or different incentives in participating in negotiations of a treaty or its successful conclusion.)

of the two – establishing a multilateral court that has jurisdiction over investment disputes without creating a multilateral regime with a multilateral agreement, a task that is more difficult and elusive.[112]

Even this easier version of a multilateral scheme with a multilateral court may take a long time to grow into a global court by absorbing existing investment arbitration regimes and new bilateral courts. Unless and until such a multilateral court operates actively in the future, ISDS proceedings that states and investors will have to utilize include the present system of arbitration and budding bilateral investment courts. The more immediate question, then, is what we can expect from this period – from now to the full operation of a multilateral investment court with the accession of an absolute majority of states.

A. The Problem of Fragmentation

It is suggested that one of the core characteristics of present international investment law is the inherently fragmented nature of its regime in which 3,367 individual IIAs co-exist and create legally binding norms on a (mostly) bilateral basis.[113] There is no multilateral agreement supervising or coordinating these numerous IIAs and the outer parameters of these IIAs are not necessarily adjusted to avoid conflict or inconsistency.[114] Further, no international organization yet exists.[115] These traits are juxtaposed with international trade law where the WTO, an international organization, establishes a single, multilateral regime and provides one set of norms for all parties.[116] FTAs increasingly raise concerns of a "spaghetti bowl" effect but they are still operating in and monitored by the WTO regime.[117]

As a legal regime, such a highly fragmented system creates a problem

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[112] *See supra* note 34, at 27-30; *see supra* note 35, at paras. 63-66.

[113] *See supra* note 66, at 9; *see supra* note 34, at 12-13.

[114] *See supra* note 12, at 141 & ch. III.

[115] ICSID retains standing facilities and human resources in Washington, D.C. As a 'center', it facilitates or otherwise supports state parties of the ICSID Convention in resolving their investment disputes with foreign investors. It does not however possess rights and obligations as a subject of international law, such as the United Nations or the WTO, to monitor and enforce constituting treaties. ICSID is thus not an international organization within the meaning of international law.

[116] Joost Pauwelyn, *At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How it Emerged and How it can be Reformed*, 29 ICSID Rev. Foreign Inv. L. J. 378 (2014) (stating "first, unlike, for example, UN, WTO or EU law, FIL is *not* organized around a single multilateral treaty or central international organization. Instead, FIL is heavily decentralized and composed of a multitude of bilateral, regional and multilateral treaties (BITs, North American Free Trade Agreement (NAFTA), FTAs, the European Energy Charter Treaty (ECT) etc.) … and a diversity of arbitral institutions … and domestic courts and investment agencies, *without* central authority").

[117] There has been 124 RTAs concluded during the GATT period and since the establishment of the WTO, more than 400 RTAs have been notified with conclusion. The list of all the current RTAs notified to the WTO can be found in the WTO website as the following: http://rtais.wto.org/UI/PublicAllRTAList.aspx (last visited on Apr. 14, 2018).

of fragmented norms and a fragmented dispute settlement system.[118] The same issues are sometimes resolved differently.[119] Investment arbitration tribunals adopt different approaches and render non-identical jurisprudence for key issues of IIAs.[120] Fragmented norms and dispute settlement systems producing non-harmonized decisions and awards have been regarded as one of the major sources of fostering challenges to the legitimacy of the entire system.[121] The absence of an appellate system in ISDS proceedings has further confounded the situation.[122] Having seen evidence of varying or even conflicting jurisprudence, aggrieved parties in disputes, unsurprisingly, tend to blame the system. Even if they reluctantly accept their legal responsibilities, they may not have been necessarily persuaded by the rationale and outcome of their arbitration tribunals. In theory, different outcomes and awards are inevitable as governing laws (*i.e.*, IIAs in question) differ. Nonetheless, from the perspective of disputing parties, non-identical or non-harmonized jurisprudence on essentially the same issue (such as the definition of investment or the scope of necessity defense[123]) acts as a

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[118] Stephen W. Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, 12 German Law Journal 1093, (2012); Stephen W. Schill, *From Sources to Discourse: Investment Treaty Jurisprudence as the New Custom?* (2011); *see also supra* note 43, at 126, 128; Karl P. Sauvant & Federico Ortino, *Improving on the International Investment Law and Policy Regime: Options for the Future*, Ministry of Foreign Affairs of Finland (2013), at 27-32.

[119] *See supra* note 35, at paras. 33, 68.

[120] By way of example, the definition of "investment" has been inconsistent among investment tribunals examining this issue. *Compare Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction of July 23, 2001; *Joy Mining Machinery Limited v. Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction of July 23, 2001; *Jan de Nul N.V. v. Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction of June 16, 2006 with *Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on Annulment of November 1, 2006; *L.E.S.I. S.p.A. et ASTALDI S.p.A. v. Algeria*, ICSID Case No. ARB/05/3, Decision of July 12, 2006; *Siemens, A.G. v. Argentina*, ICSID Case No ARB/02/8, Decision on Jurisdiction of August 3, 2004; *Malaysian Historical Salvors SDN BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment of April 16, 2009. Similar inconsistences are also found with respect to the application of MFN provisions. For instance, *compare* tribunals' position in *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award of Nov. 13, 2000; *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction with other tribunals' position in *Renta 4 S.V.S.A et al. v. Russian Federation*, Arb. Inst. of Stockholm Chamber of Commerce, Award on Preliminary Objections (Mar. 20, 2009); *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence of Feb. 12, 2007. These inconsistences and sometimes contradictory positions are not necessarily stemming from the fact that different BIT texts are being interpreted. Rather, they arguably show the fundamental differences of tribunals in approaching these key terms contained in the BITs. *See supra* note 66, at 1.

[121] Catherine Yannaca-Small, Part II, Chapter 7, *Improving the System of Investor-State Dispute Settlement: An Overview*, *in International Investment Perspectives*, OECD (2006), at 185-186.

[122] *Id*., at 189.

[123] The divergent views and incoherent decisions in recent arbitration awards regarding the

hindrance to the ready and whole-hearted acceptance of the outcome of an investment arbitration.[124]

More importantly, different interpretations and dispositions have rendered the accumulation of predictable jurisprudence elusive. [125] Enhancing predictability is the core contribution of any international dispute settlement mechanism.[126] Non-identical or non-harmonized jurisprudence in international investment law has apparently lowered the level of predictability in the international community.[127] Arguably, this situation has not helped the "rule of law" take a deeper root in international investment law.[128] It may instead invite continuing criticism from interest groups of individual states. As such, any prospective reform effort in the international community should be able to address this problem or at least not worsen the current situation. Should a proposed reform be deemed unable to address the problem, a cautious approach is warranted. The proposals for international investment courts should also be evaluated from the same perspective.

B. Enhancing Legitimacy through Standing Courts

Noting the starting points of the investment court proposals in the first place, standing courts under IIAs should help enhance the legitimacy of the ISDS proceedings and their outcomes.[129] If circumstances under the new terrain of standing courts still permit aggrieved parties and/or outside observers to raise serious challenges of legitimacy, the merit of the reform will be questioned and the associated costs and burden will hardly be justified. Current concerns and controversies will continue to intensify, and the function of ISDS proceedings as an effective dispute settlement mechanism will be undermined.[130] In other words, the court proposal should be more than an experiment that may or may not address the current problem. It needs to show the probability, if not the certainty, of addressing the problem.[131] Viewed from this perspective, the court system should be able to

necessity defense under Article 25 of 2001 ILC Draft Articles on State Responsibility has raised concern on the part of stakeholders of international investment law. *See supra* note 12, at 141 & Chapter III.

[124] *See supra* note 34, at 13.

[125] Mark Wu, *The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regim*e, in Zachary Douglas, Joost Pauwelyn, Jorge E. Vinuales (eds.), The Foundations of International Investment Law: Bringing Theory into Practice, (Oxford University Press, Oxford, 2014), at 189; Doug Jones, *Investor-State Arbitration: The Problem of Inconsistency and Conflicting Awards, Presentation at German-American Lawyers' Association Practice Group Day*, (Frankfurt, March 2011), at 2-5.

[126] *See supra* note 35, at 5-6.

[127] *See supra* note 126, at 189; *see also supra* note 126, at 2-5.

[128] *Id*.; *See* Franck, "Legitimacy Crisis in Investment Treaty Arbitration", *supra* note 26.

[129] *See supra* note 37, at 396-397.

[130] *See id*.

[131] *See supra* note 4, at 1-2; *See supra* note 4 ("Despite its visionary nature, the proposed court system suffers from two structural weaknesses that reduce its suitability as a global

enhance legitimacy, and enhance it significantly so that the increased financial and logistical burden is justified.[132]

This basic objective of legitimacy enhancement should permeate the entire discussion of international investment courts, including its establishment, composition, and operation. The initiation of this particular discussion of ISDS reform has not been triggered by a desire to adopt a better dispute settlement system in abstract or in theory; rather, the triggering point was creating a more legitimate dispute settlement regime in international investment law.[133] How much can be achieved on this front from a variety of proposals, as negotiations are in full swing, warrants the continued attention of states and governments. Proposals and counter-proposals would have to be continuously assessed against this yardstick.

C. Multiple Investment Courts in Respective IIAs – Curing or Fixating Fragmentation?

Consideration of these issues arguably causes scholars and observers to have some critical views of a bilateral investment court system as it spreads across the negotiating tables of IIAs. Under this scheme and as it is being negotiated, different IIAs will have individual and independent investment courts including appellate proceedings. As it currently stands, there will not be an apparatus or entity that coordinates among these separate, individual, and independent investment courts.[134] Each individual court is authorized and required to make its own decisions and issue judgments, independent of other investment courts.[135] All things being equal, different interpretations and inconsistent jurisprudence among different investment courts will probably be as common as they are at present.[136]

i. Possibility of Firmer and Deeper Fragmentation

Once the basic scheme of bilateral investment courts is fully implemented through ongoing IIA negotiations, the international community may end up seeing multiple courts equipped with full-time judges and procedural bulwarks as opposed to the more flexible arbitration tribunals of today. Examined in clinical isolation, this certainly represents an improvement and development: more structured and systematized dispute settlement mechanism subject to the possibility of an appellate review with

model, namely its bilateral set-up and its relationship with domestic courts.").

[132] *See supra* note 34, at 17-18

[133] *Id*. Scholars also point out that the more fundamental problem of incoherent awards in investment arbitration is not the status of confusing jurisprudence per se, but rather the 'perception' from stakeholders that this dispute settlement mechanism does not necessarily ensure a just outcome. *See supra* note 12, at 141.

[134] *See supra* note 34, at 12-13.

[135] *See* OECD, *Investor-State Dispute Settlement Public Consultation: 16 May – 9 July 2012*, OECD Investment Division (2012), at 51-62.

[136] *See supra* note 34, at 12.

tighter control of adjudicators' conflict of interest certainly constitutes an evolution of the system. As a matter of fact, what deserves careful attention now is this very structure and effectiveness. The transition from flexible arbitration to rigid, procedural-rule-based adjudication would mean more separation and individuality: an arbitration-turned-court in a respective IIA would now have more fortified walls and castles of its own. As long as separation walls exist in international investment law, which is unfortunately the current situation, strengthening the walls by adding more bolts, nuts, and timber would increase the level of individuality. This is an awkward development if the ultimate objective of the international community is to break down these walls and collapse them into a single castle – *i.e.*, multilateralism – or at least lower the walls and facilitate interaction above the walls so that constituents in each castle can expect a similar outcome from similar disputes – *i.e.*, a multilateral court even in multiple IIAs.

If anything, considering the more prestigious status and higher expectation accorded to a court, a transformation from an *ad hoc* arbitration tribunal to a standing court with full-time judges may further fortify the individual castles of IIAs. It may arguably be more difficult for one court to subscribe to the view of another. Voluntary adjustment is currently difficult but will be more so in the new system. This may be another instance of claiming judicial sovereignty and independence. From the systemic point of view, the multiplication and coexistence of more individualized and effective adjudicating entities in the absence of a coordination mechanism may end up producing further fragmentation.[137] Confusion may be inevitable and legitimacy challenges may not subside.

As such, a plausible argument can be made that a bilateral investment court approach may end up further fixating the bulwark of respective IIAs, which will probably deepen or at least maintain the current fragmentation of international investment law.[138] One of the fundamental problems of international investment law would remain unaddressed.[139] On the contrary, firmer and deeper integration through further bilateralization may make the

[137] Furthermore, recent IIAs are experimenting new dispute settlement proceedings in addition to existing ISDS proceedings. *See supra* note 33, ch. III.A. As such, even in the absence of new standing courts, more dispute settlement proceedings are already emerging in respective IIAs, possibly with different procedural rules and outcomes, a recipe for more fragmentation in the long run.

[138] *See supra* note 4. ("The creation of a permanent investment court system with respect to a given agreement, such as the TTIP Tribunal, would eliminate inconsistent interpretations of that agreement. But such an approach could not address treaty-overarching inconsistencies—that is, inconsistencies in interpretation or application of corresponding provisions in different treaties. Instead, if permanent investment courts were to proliferate on a bilateral basis as a result of the Commission's approach, inconsistencies in the approaches of different investment courts to essentially identical issues and treaty provisions are likely to persist. Only the creation of a multilateral investment court would be able to ensure cross-treaty consistency and predictability in international investment law more generally.").

[139] *See supra* note 32, at 498.

current multilateralization effort more elusive and precarious. It is true that this period of bilateral courts will be brief and temporary. It is also true that the interim period will continue longer than originally hoped for and will be a *fait accompli* that states will have to live with. Continued failure to secure a multilateral solution in international investment law indicates that the latter is still a valid assumption in the absence of a remarkable breakthrough.

In addition, creating multiple investment courts will harm the effectiveness of the policy, since it will be difficult to manage different courts all at once while ensuring the uniformity of court decisions.[140] In short, the most important problem is that it can further balkanize international investment law or deepen fragmentation of existing investment agreements.

ii. Possibility of Another Fragmentation Layer

Further complicating the situation is that the bilateral court system comes into existence in addition to the existing system of investment arbitration. In other words, the idea means that the present investment arbitration and a new bilateral court system will co-exist until a final resolution is reached through a multilateral court regime with the successful subscription of the critical majority of states. As noted above, it will take a significant amount of time, if it is at all possible, before a multilateral solution is found and applied. This reality would mean that under the bilateral court regime, the ISDS proceedings will experience further fragmentation in itself, with some disputes following the present arbitration system while newer ones adopt the new court system.

Therefore, the ISDS proceedings themselves are going to take bifurcated paths. Some countries opposing the court regime will continue to adopt the present arbitration system while those in favor will start to adopt the court option. The international community will encounter two blocks of ISDS proceedings. Even for the states in favor of the court option, two blocks of ISDS proceedings will co-exist and compete internally: existing IIAs' ISDS proceedings cannot be replaced unless a multinational solution is agreed upon, and even then they can only be replaced vis-à-vis another contracting party that is also supportive of the idea. It follows that even those eager to adopt the court system will have to simultaneously handle the present arbitration system as well. The EU member states will have to juggle both the court system and arbitration system in their own IIAs. Further fragmentation even within the ISDS proceedings and for the same state seems inevitable under the circumstances. This phenomenon will thus not help address the fragmented nature of international investment law.

[140] European Commission, *Convention to Establish a Multilateral Court on Investment* (2016); *see supra* note 28, at 384 (stating that "a situation in which each FTA with an investment chapter and each International Investment Agreement (IIA) have their own ICS could lead to even greater fragmentation and unpredictability than the current *ad hoc* arbitration system").

More concerning is the possible reaction from the general public to this dual ISDS environment, specifically the public's perception of the arbitration outcome (awards) if a court system is adopted by some states and explained as a new guardian of rule of law discrediting the old regime of arbitration. The chances are that critics will probably find an easy prey in these awards. Criticism of investment arbitration will further intensify, which will threaten to further undermine the legitimacy of these proceedings, the very objective that initiated the discussion in the first place.

If at all possible, it would be prudent to find a way to avoid dual ISDS proceedings. Or at least, dual ISDS proceedings' unintended consequences should be carefully contemplated in the discussion of the bilateral investment court proposals. The price of an experimental adoption of bilateral courts in hopeful anticipation of a multilateral court may prove to be high.

V. FUTURE COURT OF ACTION – SUSPENSION OF BILATERAL COURT OPTION AND PROMPT ESTABLISHMENT OF SINGLE MULTILATERAL COURT

Consensus is building fast in the global arena that further elaboration and "courtfication" of ISDS proceedings will be able to address core concerns over and challenges against them by enhancing the legitimacy of the proceedings. Strengthened rule of law in international investment dispute settlement through courtification will deepen public trust in the mechanism and its outcome. Consequently, the general direction of the current reform proposals tabled in some of the recent IIAs should be commended and the momentum should be preserved. With that said, however, discussions of reforms should also start by recognizing reality and heeding prior experience, mindful of how proposed reforms may (not) change, for better or worse, the existing dynamics of the dispute settlement system. A worst-case scenario is when a half-baked reform introduces further confusion and raises new concerns. Side effects should not outweigh the intended benefit. If some unintended side effects are expected, it would be wise to guard against them.

The proposed introduction of standing bilateral courts within the larger picture of reform discussions for ISDS proceedings is likely to cause an unintended effect of further deepening the fragmentation problem and putting the system into a new spiral of legitimacy challenges in the post-reform landscape. It is possible that the period facing such consequences will be brief. It is also possible, and perhaps more probable, that the period will be much longer than expected. Worse yet, it cannot be ruled out that future negotiations to agree upon a multilateral court may fail to deliver.[141] Bilateral

[141] In public international law in general, and in international economic law in particular, such as WTO Agreements, there is no specific obligation to 'negotiate' or to produce tangible outcome through such negotiation. ("In a world where the incentives to negotiate vary with the issue and there are few instances in which there is an institutional framework that requires specific and concrete types of cooperation, it cannot be said that there is a general obligation

court proposals should be evaluated with these possibilities in mind.[142]

In contemplating major reforms of the current system, it is essential for the states concerned to be apprised of systemic implications.[143] After all, ISDS proceedings are one of the core elements of an IIA, and facilitating adequate utilization of the proceedings by states for their defense in investment disputes is indeed critical for the long-term sustainability of the international investment regime.[144] In contemplation of these aspects, this Section offers some guidelines for future discussions of this particular matter.

A. Multi-dimensional Consideration of Systemic Implications

As they currently stand, discussions on ISDS proceedings reform so far seem to have been rather compartmentalized and particularized. Individual topics are being discussed on their own, with associated merits and demerits. From the perspective of the overall operation of ISDS proceedings, however, individual topics are interconnected and intertwined with one another.[145] The establishment of standing bilateral courts is not merely about the benefit of having courts to resolve investment disputes, but also about what, if any, practical and legal implications will flow from such courts. Consequently, a holistic perspective examining all these individual issues horizontally and comprehensively is in order; such a perspective could offer a proper picture for reform proposals being tabled and ensure a balanced outcome.

For instance, the creation of standing bilateral courts raises an immediate question of how to deal with a new tendency in IIAs of strengthening and expanding the role of Joint Committees or Joint Commissions in IIAs.[146] Recent IIAs now entrust these committees and

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to negotiate. To insist on the existence of a duty to negotiate in these circumstances, absent clear treaty text, is 'to confuse the desirable with the mandatory'"). *See supra* note 111, at 73, 103. *See also supra* note 111, at para. 65. As such, a prospective treaty proposal based on mere expectation of possible initiation of negotiation and most notably, successful conclusion of such negotiation may not be able to operate as a guarantee for a particular outcome or for a smooth transition. This understanding would arguably counsel against rushing to a hasty conclusion on future contingencies.

[142] *See id*.

[143] *See supra* note 12, at ch. II. C. (pointing out international investment law constitutes a system on its own accord and also operates within the system of public international law.)

[144] This notion can be inferred from similar discussions on the WTO system. *See* John H. Jackson, *Perceptions About the WTO Trade Institutions*, 1 World Trade Rev. 101, 111 (2002); Andrea Greisberger, *Note: Enhancing the Legitimacy of the World Trade Organization: Why the United States and the European Union Should Support the Advisory Centre on WTO Law*, 37 Vanderbilt J. of Transnat'l L. 834, (2004).

[145] *See supra* note 76, at 9.

[146] *See e.g.*, *Free Trade Agreement Between the Government of the Republic of Korea and the Government of Australia* ("Korea-Australia FTA:) (Apr. 2014), (entered into force on Dec. 12, 2014), at art. 21.3.2; *Japan-Australia Economic Partnership Agreement* ("Japan-Australia EPA"), (Jul. 8, 2014), (entered into force on Jan. 15, 2015), at art. 1.13.2; *Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments* ("China-Canada BIT"), (Sep. 9, 2012),

commissions with more substantive and meaningful roles as IIA-monitoring bodies, including most notably the authority to issue legally binding interpretations that bind investment arbitration tribunals.[147] This is a countermeasure on the part of states to protect themselves against unpredictable decisions and awards from investment arbitrations under IIAs.[148] The WTO also has a similar mechanism of binding interpretation of the Ministerial Council in the Marrakesh Agreement,[149] but it is not directly related to a specific case pending at a panel or the Appellate Body. The WTO's binding interpretation is closer to a clarification of the terms of the agreements short of amendment; it does not allow the Ministerial Council, or any other entity for that matter, to direct how a panel or the Appellate Body should interpret a particular provision.[150] Binding interpretation by Joint Committees or Commissions directly bind investment arbitration tribunals in specific cases, which differentiates this authority in an IIA from that of the WTO.

Now, with the introduction of an independent judiciary in an IIA with designation as a court, it is not clear whether this type of a monitoring body of government officials is or should be eligible to issue an interpretation that binds the "court" in a specific case. Interpretation is a critical task for any international adjudicative body. It is the interpretation of specific terms that ultimately determines the outcome of a dispute as codified in Article 31 of the 1969 Vienna Convention on the Law of Treaties. As such, allowing an outside political entity to issue (binding) interpretations would arguably amount to usurping the core authority of an international judicial entity. It can be compared to the executive branch dictating the judiciary branch in a domestic context, upending the separation of powers or infringing upon the independence and integrity of the judiciary. The advent of the bilateral court system will require adjustment and/or shrinkage of the authority of these committees and commissions.

Likewise, in the context of a denial of justice claim, standing bilateral investment courts carry the potential of further intensifying the concern over judicial sovereignty infringement within domestic constituencies of contracting parties of IIAs. A standing bilateral investment court reviewing the decision or judgment of a domestic court with the operation of a provision of an IIA[151] may strengthen the (erroneous) view of the public that an

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at art. 20, 33.3; *Agreement among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment* ("Korea-China-Japan TIT"), (May 2012), at art. 24.

[147] *Id*.

[148] *See, e.g.*, The Parliament of the Commonwealth of Australia, *Report 142: Treaty Tabled on 13 May 2014—Free Trade Agreement Between the Government of Australia and the Government of the Republic of Korea* (Sept. 2014), at 27.

[149] *See supra* note 1, at art. IV.

[150] *See id*.

[151] *See supra* note 34, at 7.

international court overrides the domestic court, catering to the claim of national sovereignty infringement.[152]

In addition, unlike in international investment arbitration, states will not be able to select their own judges if they bring a case to the international investment court. It is debatable whether states prefer permanent courts over arbitration tribunals, as states have historically preferred to exert control over the formation of tribunals.[153]

At the same time, with respect to the impartiality of decision makers, while proponents of international investment courts argue that judges with a secure tenure will be impartial, judges may actually be biased towards states. For instance, while the draft of the Transatlantic Trade and Investment Partnership between the European Union and the United States establishes that "judges shall be chosen from persons whose independence is beyond doubt,"[154] it does not bar government officials from being elected, who can be partial towards states.[155]

B. Avoiding Unnecessary Complication

Similarly, in devising a future court mechanism in ISDS proceedings it is critical that the new mechanism not cause too much procedural complication, nor should it invite further legal complexities in the administration of ISDS proceedings and interpretation of the relevant provisions of IIAs. The benefits of having standing bilateral courts could easily evaporate if the new mechanism somehow leads to more claims and disputes relating to newly introduced procedures and intermediate steps for proceedings. For example, court proceedings would naturally entail wider third-party participation, more enhanced transparency, more expansive participation of the general public, further heightened evidentiary rules, and

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[152] Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. Penn. L. Rev. 171, 225 (2008). ("Among international tribunals, the WTO's [Appellate Body] is arguably the most like domestic courts."). It is increasingly the case that action and inaction of the judiciary become subjects of ISDS proceedings of IIAs. As to the recent ISDS proceedings where domestic courts' decisions and judgments were challenged, *see, e.g., Chevron Corporation and Texaco Petroleum Company v. Ecuador* (Mar. 2010); *Bosh International, Inc, v. Ukraine*, ICSID Case No. ARB/08/11, Award of 25 Oct. 2012; *Pantechniki S.A. Contractors & Engineers v. The Republic of Albania*, ICSID Case No.ARB/07/21, Award of 30 Jul. 2009; *White Industries Australia Limited v. The Republic of India*, In the Matter of UNCITRAL Arbitration in Singapore, Final Award of 30 Nov. 2011; *Mondev International Ltd. v. United States*, ICSID Case No. ARB (AJ)/99/2, Award of 11 Oct. 2002; *Limited Liability Company Amto v. Ukraine*, SCC Arbitration No. 080/2005, Final Award of 26 Mar. 2008; *Apotex, Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility of 14 Jun. 2013; *Saipem v. Bangladesh*, ICSID Case No. ARB/05/7, Award of 30 Jun. 2009.

[153] Catherine A. Rogers, *The Politics of International Investment Arbitrators*, 223 Santa Clara J. Internat'l L. 251 (2013).

[154] *See supra* note 6, at art. 11.1.

[155] *Id.*; *see also* note 6 at art. 11.1; *see also supra* note 28, at 537-538; *see also supra* note 28, at 370.

more thorough scrutiny of conflicting interests and backgrounds of adjudicators. These new insertions in the procedural rules may, in and of themselves, turn out to be the subject of disputes. Flexibility is traded for rigidity to introduce courts, and rigid procedural rules can easily become a topic of contention between the parties. Furthermore, these procedural rules may vary from IIA to IIA as with their substantive provisions, imposing more logistical burden on states.

In devising bilateral investment courts, efforts need to be focused on introducing simple and straightforward procedures to the extent that basic procedural due process can be maintained. If possible, procedural variations among IIAs of the same states can preferably be minimized as much as is feasible. Avoiding unnecessary procedural complication will help avoid unnecessary disputes. Efforts to solve one problem should not generate others.

C. Systemic Support for Capacity-Building

A bilateral court scheme also ultimately requires discussions of how to financially and logistically support under-privileged states participating in the new system. They are now supposed to equally bear the financial and logistical burden of creating and maintaining bilateral courts.[156] If these states are not able to participate in multiple bilateral investment courts with their limited financial and logistical capacity, suggestions need to be made how to support these states. Otherwise, the bilateral court would become an option available to only a certain group of states. Thus, capacity-building programs should be an integral part of the bilateral court discussions between two contracting parties of significantly unequal economic development. Preferably, such support measures might explore general, systemic assistance, independent of specific disputes, that helps foster capacity-building of underdeveloped contracting parties on a long-term basis.[157] An experiment adopted by the WTO may provide a meaningful guidance for this purpose.[158] In the absence of the capacity-building component, the bilateral court proposal will be difficult to implement for quite a few states, because

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[156] *See supra* note 6, at art. 9.12-10.12; *see supra* note 8, at art. 12.14-13.14; *see supra* note 10, at art. 8.27.12. These provisions envisage that both parties are supposed to shoulder equal financial burden.

[157] In fact, this concern is already reflected in the present DSU's Article 27.2. The LDC Group and African Group have pointed out during the DSU amendment negotiations that the impartiality requirement under Article 27.2 lays unnecessary restraints on offering effective assistance to the underprivileged Members and that expert from the Secretariat should play the role of counsel for these Members; World Trade Organization, *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations*, TN/DS/W/42, at 4; World Trade Organization, *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations*, TN/DS/W/92, at 2-3.

[158] *See* Chad P. Bown & Rachel McCulloch, *Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law*, Policy Research Working Paper, No. 5168, at 3 (Sept. 2012). At present, 32 developing countries and 42 LDCs are listed as Members of the ACWL.

the bilateral scheme by definition presupposes the creation and maintenance of as many courts as IIAs.

D. Suspension of the Bilateral Court Scheme

The above three proposals in this section[159] are intended to improve and fine-tune the bilateral court idea being discussed at the moment. If possible, this article submits, it would be more prudent and appropriate to suspend bilateral court discussions in various IIAs. These bilateral courts will be unable to address the fragmentation problem; if anything, fragmentation will likely be further facilitated by these bilateral courts. Different jurisprudence and varying interpretations will be as frequent as observed in the present arbitration format. States will have to scramble to create and maintain these multiple courts, and some states do not possess the financial capacity and/or depth of experts to sustain them.

The problem of the bilateral court scheme is that it will further complicate and fragment the existing ISDS proceedings. In other words, there will be as many investment courts as IIAs. If pushed to the extreme, there will be 3,367 investment courts in the future. If only 10% of the IIAs introduce investment courts, the number of total courts will reach over 300. Only 1% would mean 30 different, fully-operating courts. Apparently, this is not feasible by any account. Few countries, if any, have the resources and experts to deal with these courts simultaneously.

More than anything else, if this is not a final station but merely a way station to the final aim of a multilateral court through a convention, the benefit from the bilateral courts would be, at best, the experience gained from the experiment. This is too high a price to pay in exchange for the possible confusion and complications.

Under these circumstances, a plausible argument can be made to suspend the on-going discussion and negotiation of bilateral courts in respective IIAs. Instead, time and resources could better be directed at the negotiation and preparation of a multilateral court, which will deliver a final resolution of the matter at issue. Having states contemplate both bilateral courts and a multilateral court at the same time will thinly stretch limited human and financial resources, and thus prolong the discussion to ultimately introduce a multilateral court. Against this backdrop, this article suggests that the current exploration of bilateral schemes be suspended.

E. Multilateral Mechanism as the Only Alternative

The above discussion underscores the importance of the prompt establishment of a multilateral court. The current court proposals are apparently aimed at both bilateral and multilateral courts. These proposals

[159] *See* sec. V.

aim to first establish bilateral courts based on IIAs[160] and then, using the momentum and experience gained, adopt a multilateral court in the future. The bilateral scheme, however, does not provide momentum and will probably turn out to be a stumbling block to efficient negotiation of the introduction and operation of a multilateral court. In other words, a bilateral scheme is not and cannot be an alternative or a stimulant. A multilateral scheme is the only alternative that can address the legitimacy problem by harmonizing jurisprudence and offering consistent interpretation of IIAs. Future efforts should be focused on the prompt initiation and conclusion of negotiations to introduce and establish a multilateral court in the global arena. If the ISDS reform is urgent, this task of prompt negotiation of a multilateral court deserves to be given the highest priority.

Due to this structural implication, a standing court (or courts) would have to be a multilateral one if it is to survive in the long run.[161] It is not only practical and feasible, but it may also lessen the burden for developing states. Thus, a prospective court mechanism should preferably be an entity created by a multilateral regime, be it ICSID, OECD, UNCITRAL, or another regime. Arguably, this task could be delicate because IIAs are bilateral in nature. But if the international community forms a consensus to fundamentally reform the ISDS proceedings and introduce a standing court (or courts), a tribunal created under the auspices of a multilateral entity or within a multilateral regime seems to be better equipped to achieve the objective of the system. In order to avoid unnecessary confusion and fallacies in the future, discussions of the court system at the moment should also contemplate this structural aspect of the issue as well.

More specifically, a multilateral court can be established by a convention which purports to replace contracting parties' existing ISDS proceedings of already concluded IIAs with new proceedings of a multilateral court.[162] In addition, newly concluded IIAs will be permitted (or required) to adopt the new multilateral court mechanism. A multilateral court can be a stand-alone entity, or be created under the wings of, or through affiliation with, the ICSID, PCA, UNCITRAL or OECD. Under this scheme, substantive provisions of IIAs remain as they are today, but their ISDS proceedings will discard the existing arbitration scheme and instead incorporate the multilateral court scheme.[163] As this scheme does not aim to harmonize substantive norms, it can be distinguished from the aborted *Multilateral Agreement on Investment* ("MAI").[164]

A more fundamental solution could be found by adopting a MAI-type

[160] *See supra* note 6, at art. 1.

[161] *See supra* note 32, at 403.

[162] *See supra* note 34, at 75-77; *see also supra* note 35, at 1, 14.

[163] *Id.*

[164] Negotiations on a proposed Multilateral Agreement on Investment ("MAI") were launched by member governments at the Annual Meeting of the OECD Council at Ministerial level in May 1995. Negotiations, however, were terminated in April 1998.

multilateral agreement on a global basis. The agreement will be able to adopt substantive norms as well as ISDS proceedings in the form of a multilateral court. Under the umbrella of this multilateral agreement, each state may adopt a bilateral agreement elaborating specific provisions in a way that is consistent with the multilateral agreement as with the WTO regime.[165] Disputes arising from the multilateral agreement and from bilateral elaboration agreements will be referred to the multilateral court, again as with the WTO regime.[166] This path will be more difficult to follow and final consensus will be more elusive, because harmonization of substantive norms would be more challenging and time-consuming than mere ISDS proceedings. As such, it is more practical and realistic to focus on the first option of a multilateral court – *i.e.*, concluding a convention to replace existing ISDS proceedings with multilateral court proceedings and permit new IIAs to subscribe to the new proceedings. It may not offer a complete solution to the fragmented structure of international investment law, but it will still be able to address the current problem effectively.

VI. CONCLUDING THOUGHTS: TOWARDS A SUSTAINABLE REFORM OF ISDS PROCEEDINGS

Since its inception, ISDS proceedings of IIAs have fulfilled their role in settling investment disputes between foreign investors and host states' governments. At the same time, the ISDS proceedings have become the focal point of the global attention: the level of attention directed at ISDS proceedings is increasing rapidly and continuously. Legal complexities and political sensitivities associated with investment arbitration have made both foreign investors and sovereign states realize the acute difficulties of participating in and dealing with this international dispute settlement mechanism. Unique traits of the ISDS proceedings have invited continuing challenges by domestic observers of the legitimacy of the proceedings and their outcome.

In particular, the fact that ISDS proceedings are conducted according to respective IIAs on a one-time basis by party-appointed *ad hoc* arbitrators has recently brought about challenges concerning the legitimacy and appropriateness of the proceedings. It is against this backdrop that discussions on standing investment courts are currently taking place at

[165] *See* GATT 1994, art. XXIV; GATS, art. V.

[166] It is true that FTAs have their own dispute settlement mechanism for trade disputes at the moment, but they are hardly used and FTA parties still prefer to bring their disputes to the WTO dispute settlement proceedings, unless the issues are entirely FTA-specific ones. So even with multiple FTAs, trade disputes still find their way to the WTO's multilateral dispute settlement mechanism, if at all possible. This situation explains why even with bilaterally elaborated agreements, it will not be a particular hurdle for investment disputes to be referred to a multilateral court. This will be particularly true if the bilaterally elaborated agreements are supposed to 'elaborate' the provisions of the multilateral agreement umbrella. The court can then interpret consistently and provide consistent jurisprudence.

various fora. It is believed that the introduction of standing courts with more a systematized structure will be able to address or at least alleviate basic concerns over ISDS proceedings. The proposals table both bilateral courts and a multilateral court. At present, immediate attention is given to bilateral investment courts to be established under respective IIAs. Negotiations to create and insert bilateral investment courts are in full swing and leading to the actual establishment of such courts. On the other hand, negotiation for a multilateral court has yet to start. Even if negotiation begins, it is not clear how long it will take and whether it will indeed lead to a successful conclusion. Prior experience, including the most recent one involving the Mauritius Convention, tells us that such negotiations will take a significant amount of time before a multilateral court enters into full operation, even if consensus is somehow reached in the global community. This means that for a significant amount of time in the future, states will have to deal with their investment disputes through bilateral investment courts.

Bilateral investment courts, however, will further deepen the already existing fragmentation of international investment law. They will also be unable to issue harmonized and consistent jurisprudence for similar or essentially the same legal issues. Bilateral courts will more easily stoke sovereignty infringement claims by domestic critics. If legitimacy enhancement is the ultimate objective of the present ISDS reform suggestions, bilateral courts will hardly contribute to this.

The objective of legitimacy enhancement and "rule of law" permeation will only be achieved through a multilateral court. Negotiations to establish a multilateral court will by no means be easy. But this is the only alternative to address the basic concern that has prompted the ISDS reform debates in general, and the court proposals in particular. Global efforts should be mobilized to initiate and conclude negotiations for the establishment of a multilateral court as promptly as possible. In the interim, negotiations to create and adopt bilateral courts should be suspended. The limited resources of states should be directed at and focused on the introduction of a multilateral court, as opposed to half-fulfilling and further fragmentary bilateral courts. It should be borne in mind that standing bilateral courts, as they are currently proposed, may run the risk of stoking further concerns and imposing additional burdens on states and governments.

There are various practical and legal issues to be contemplated carefully in considering standing courts in ISDS proceedings. What has been absent from the recent discussion, however, is a comprehensive and multi-dimensional analysis of direct and indirect implications from various proposals, in particular from the introduction of standing international investment courts. Discussions on the reform of international investment dispute settlement proceedings should preferably be carried out with a holistic approach in mind, mindful of the interconnection of all individual issues. Otherwise, a reform that cures one problem may inadvertently introduce another, perhaps bigger, one.