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From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court

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ARTICLE

FROM THE TWO-HEADED NIGHTINGALE TO THE
FIFTEEN-HEADED HYDRA:

THE MANY FOLLIES OF THE PROPOSED
INTERNATIONAL INVESTMENT COURT*

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I. INTRODUCTION

Fasten your seatbelts. The flight is about to begin. The title of the present Article is a carry-forward from an article published a few years ago.¹ The two-headed nightingale refers to the views held by Jan Paulsson and Albert Jan van den Berg. Albert Jan van den Berg had called on “party-appointed arbitrators [to] observe the principle: *nemine dissentiente*.”² Jan Paulsson took the first public position advocating abolition of the present system in which two party-appointed arbitrators decide, by one means or another, on someone to preside over the tribunal. Jan Paulsson has not stopped selling his brand of medicine,³ and the same goes for Albert Jan van den Berg.⁴ The purpose of this article is to furnish its reader with more sensible counterarguments to those proposing elimination of conventional investor-State arbitration.

1. See generally Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, 29 *ARB. INT’L* 7 (2013).

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

3. See, e.g., JAN PAULSSON, *THE IDEA OF ARBITRATION* (2013). See generally Jan Paulsson, *Sore Losers and What to Do About Them* (Mar. 17, 2017) (unpublished notes) (The authors received these notes from Paulsson.); Jan Paulsson, *Shall We Have an Adult Conversation About Legitimacy?* (Mar. 2, 2017) in *THE BLOG OF THE CPR* (Mar. 15, 2017), <https://blog.cpradr.org/2017/03/15/shall-we-have-an-adult-conversation-about-legitimacy/>.

Professor Paulsson’s arguments in his book and lectures are largely repetitive of his original points contained in, see generally Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 *ICSID REV.—FOREIGN INV. L. J.* 339 (2010). Many of these points have been addressed in Brower, *supra* note 1 (The points he makes in his book and lectures overlap somewhat, but they are not identical and cover different grounds.).

4. See generally Albert Jan van den Berg, *Charles Brower’s Problem With 100 Percent – Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, 31 *ARB. INT’L* 381 (2015).

*II. THE COMPREHENSIVE ECONOMIC AND TRADE
AGREEMENT – POLITICS ABOUND*

The new head-scratcher is the international investment court proposed by the European Commission and its unlikely survival on the back of a fifteen-headed hydra. Why choose a mythical creature? Because it is not real and the bench of the international investment court is to be filled by fifteen judges “appointed” exclusively by States.

As a yet non-working example, the Comprehensive Economic and Trade Agreement (“CETA”) between the European Union and Canada sets out the appointment procedure prescribes five appointments by Canada, five appointments by some means by the twenty-seven (post-Brexit) Member States of the European Union, and another five appointments from other nationalities commonly agreed by the two treaty parties.⁵ Notably, appointment of these judges will involve a political “scrum.”

There is no way of depoliticizing any process in which States or international organizations are the source of appointments or elections. Even elections to the International Court of Justice (“ICJ”) are politicized. Most recently, there was an almighty heave-to going on between the General Assembly and the Security Council of the United Nations over the re-election of British ICJ Judge Sir Christopher Greenwood and, for the first time in its seventy-one-year history, the ICJ does not have a member from each of the five Permanent Members of the Security Council.⁶ It is political. Even the church hierarchy is well known to be political, as is known well before the smoke rises when a new Pope is chosen.

Simply put, when viewed from a pragmatic and realistic perspective, there is no way of depoliticizing the appointment process of the proposed international investment court. There are twenty-eight, soon to be twenty-seven, Member States of the European Union, which possess a collection of increasingly differing views towards the rule of law. It will be a rough-and-tumble political contest

5. Comprehensive Economic Trade Agreement between Canada, of the One Part, and the European Union and Its Member States, of the Other Part, art. 8.27, Sept. 14, 2016 (entered into force provisionally Sept. 21, 2017) [hereinafter CETA].

6. Owen Bowcott, *No British judge on world court for first time in its 71-year history*, THE GUARDIAN (Nov. 20, 2017, 6:21 PM), <https://www.theguardian.com/law/2017/nov/20/no-british-judge-on-world-court-for-first-time-in-its-71-year-history> [http://perma.cc/6MYG-P4JB].

before they agree on their five judges. Canada is not that much better off, given the Maritime Provinces, Quebec, the Prairie Provinces, and the West Coast. It took Canada almost fifty years to become a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID”)⁷ and for the past thirty-five years Quebec has continued to withhold its consent to Canada’s Constitution for reasons that include, *inter alia*, its desire for constitutionally guaranteed Quebec representation on Canada’s apex court.⁸

And, how will the treaty parties unite on the selection of the five third-country judges? Those third-country candidates are the most important, because only they are allowed to be President or Vice President of the overall court,⁹ and only they are able to preside over a first instance three-member panel.¹⁰ There just is no way of insulating the process from politics.

Similarly, an alarm may be sounded for the appellate instance, which has the power not just to review issues of law but also to re-determine the facts.¹¹ Who are these people going to be?

Undoubtedly, the establishment of such a court also becomes an expensive process. There are numerous historical and contemporary examples of budget concerns affecting public acceptance of an international court or tribunal. The International Criminal Court in The Hague and the International Criminal Tribunal for the Former Yugoslavia are recent examples of unanticipated enormous budgetary hits.¹² Who is going to pay for the international investment court? That is not entirely clear.

7. Canada ratified the 1965 Convention on the Settlement of Investment Disputes between States and National of Other States on November 1, 2013, *see generally* DATABASE OF ICSID MEMBER STATES, <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> [<http://perma.cc/CD2P-D6Y3>] (last visited Jan. 30, 2018).

8. Amy Minsky, *After 35 years, why does Quebec want in the Constitution?*, GLOBAL NEWS (June 2, 2017), <https://globalnews.ca/news/3496355/quebec-canada-constitution-amend-reopen/> [<http://perma.cc/RM6C-GP9L>].

9. *CETA*, *supra* note 5, art. 8.27(8).

10. *Id.* art. 8.27(6).

11. *Id.* art. 8.28(2)(b).

12. *See, e.g.*, John Silverman, *Ten years, \$900m, one verdict: Does the ICC cost too much?*, BBC NEWS (Mar. 14, 2012), <http://www.bbc.com/news/magazine-17351946> [<http://perma.cc/DG7H-TBTZ>] (reporting that the estimated expenditure of the International Criminal Court was around \$900 million for its first ten years with only one verdict and that the annual budget for the International Criminal Tribunal for the Former Yugoslavia had increased 500-fold from its inception until 2010-11).

Lack of security of tenure for appointed judges poses a barrier to attracting competent and qualified individuals. To enhance their independence, judges are barred from being involved in arbitrations otherwise,¹³ but they are to be compensated well below the salaries of judges of other permanent international fora.¹⁴ Thus although the judges are expected to “be available at all times and on short notice,” they would be paid a monthly retainer fee, suggested by the European Union to be around EU€2000,¹⁵ with the President and the Vice President potentially receiving EU€7000 a month.¹⁶ Given these terms of service, the pool of available appointees predictably will be largely comprised of retired civil servants, who may or may not know much, if anything, about the field, retired judges who have limited experience interpreting and applying international law, and other friends of politicians, all seeking an opportunity to augment their pensions. They will be representative of the least common denominator selected through the process of attrition that characterizes political compromise.

III. THE STATES' REPOSSESSION EFFORTS

Proposing the replacement of investor-State arbitration as it currently exists with a permanent court is a paramount example of a larger movement by States actively to “repossess” investor-State arbitration. The chief repo-man is the Government of the United States. This has been occurring irrespective of which party controls the Administration and despite the fact that foreign investor-claimants

13. Commission Press Release IP/15/5651, ch. II, art. 11(1) (Sept. 19, 2015) (“In addition, upon appointment, [the Members of the Tribunal] shall refrain from acting as counsel in any pending or new investment protection dispute under this or any other agreement or domestic law.”). A similarly worded provision is found in CETA itself. *See* CETA, *supra* note 5, at Ch. 8. § F. Art. 8.30 (“In addition, upon appointment, [the Members of the Tribunal] shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement.”).

14. For example, as of 2016, each member of the International Court of Justice received an annual salary of US\$172,978 with a supplementary allowance of US\$15,000 for the President. Upon leaving the Court, judges receive an annual pension, which, after a nine-year term of office, is equal to 50 per cent of the annual base salary. *See Members of the Court, INTERNATIONAL COURT OF JUSTICE*, <http://www.icj-cij.org/en/members> [<https://perma.cc/4B5T-GULW>] (last visited Mar. 14, 2018).

15. Commission Press Release, *supra* note 13, ch. II, art. 9(12).

16. *Id.* ch. II, art.10(12).

are disproportionately US nationals.¹⁷ States, concerned about their own treasury, sacrifice their own nationals who invest abroad by reducing their protections in treaties, by interpreting their way — or wanting to interpret their way — out of treaty protections, and others by denouncing treaties.

As a representative example of States' repossession efforts, one may recall how the United States, Canada, and Mexico banded together following a certain stage of the *Pope & Talbot* case.¹⁸ The US Claimant commenced arbitration against Canada, which it claimed had violated the North American Free Trade Agreement ("NAFTA") Chapter 11 requirement that its investment in Canada receive "fair and equitable treatment."¹⁹ The Canadian Government argued to the *Pope & Talbot* tribunal, however, that as written in NAFTA, fair and equitable treatment ("FET") could mean no more than the level of treatment accorded to alien investors under customary international law, rather than the higher standard, independent of customary international law, generally applied by other, non-NAFTA tribunals.²⁰ The Tribunal ruled unanimously for the Claimant, however, expressly rejecting Canada's argument as being "patently absurd."²¹ Just over three months later that "patently absurd" interpretation was adopted by the three NAFTA State Parties as an official interpretation binding under NAFTA²² pursuant to Articles 2001 and 1131, which fairly promptly was denounced by Judge Sir Robert Jennings, then lately President of the International Court of Justice, "as an attempted amendment that has no binding

17. Of the 806 cases (concluded and pending) listed on UNCTAD's Investment Policy Hub, Americans have acted as Claimants in 152. In other words, 18.9% of all known ISDS cases involved or involve American Claimants. See *Investment Dispute Settlement Navigator*, INVESTMENT POLICY HUB, <http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry> [<https://perma.cc/5B9G-C3NL>] (last updated July 31, 2017).

18. *Pope & Talbot Inc. v. Canada*, UNCITRAL, (Apr. 10, 2001).

19. *Id.* ¶ 105.

20. *Id.* ¶ 108-09.

21. *Id.* ¶ 118.

22. NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, NORTH AMERICAN FREE TRADE AGREEMENT (July 31, 2001), http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp [<https://perma.cc/7FJA-Q4SW>] ("The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.").

effect.”²³ Such actions obviously weaken alien trust in government with respect to the protection of investors abroad.

Remarkably, this position was a complete about-face for the United States, for as Dr. Todd Weiler has demonstrated, it was the United States that had invented FET years before *Pope & Talbot* and NAFTA, and purposefully tailored it to be a higher standard than customary international law, entirely separate from and independent of it.²⁴

In the end, very little, if anything, was achieved by the NAFTA States party to the official interpretation prompted by the *Pope & Talbot* case. Both “fair and equitable treatment” and “customary international law” are what Professor W. Michael Reisman has described as “evaluation rules” that “establish a goal that is expressed at some level of generality.”²⁵ Evaluation rules are contrasted with “[v]erification rules” which:

“are binary, ‘either-or rules.’ Beyond that binary information, the factual and normative universe to which the person charged with applying the rules may turn is strictly confined to a few explicit variables, none of which includes general evaluative concepts such as fairness, equity, justice, minimum order, efficiency, or even common sense.”²⁶

Professor Reisman further surmised that “each instance of application of evaluation rules such as FET and MST [i.e., minimum standard of treatment] re-instantiates them in different contexts, they can scarcely avoid evolving, *a fortiori*, as social, economic, technological, moral, and ethical variables change.”²⁷ In other words, the States are constantly making and remaking customary international law. This was confirmed in part by Professor James Crawford, Judge Stephen Schwebel, and The Right Honourable Sir Ninian Stephen, in the

23. *Methanex v. United States of America*, UNCITRAL, (Sept. 6, 2001), at 6 (referring to the Second Opinion of Professor Sir Robert Jennings, Q.C.).

24. See TODD WEILER, *THE INTERPRETATION OF INTERNATIONAL INVESTMENT LAW: EQUALITY, DISCRIMINATION AND MINIMUM STANDARDS OF TREATMENT IN HISTORICAL CONTEXT* 167 (Martinus Nijhoff ed. 2013). See also KENNETH J VANDEVELDE, *U.S. INTERNATIONAL INVESTMENT AGREEMENTS* 263 (Oxford University Press 2009).

25. W. Michael Reisman, *Canute Confronts the Tide: States vs. Tribunals and the Evolution of the Minimum Standard in Customary International Law* (Apr. 9, 2015), in, 109 *PROC. OF THE ANN. MEETING OF THE AM. SOC’Y OF INT’L L.* 125 (2015) at 125.

26. *Id.*

27. *Id.* at 127.

Mondev NAFTA case, in which it was made clear that customary international law evolves.²⁸

Consider also the 2012 United States Model Bilateral Investment Treaty²⁹ and one will see that the Assistant Secretary of the Treasury and his treaty counterpart can jointly preclude an investor-State arbitration from ever happening. If the two decide that a claimed expropriation based on a tax measure was not an expropriation, the claimant is out of luck.³⁰ And, there is an analogous provision with respect to various defenses.³¹

A. The European Union and its Existential Crisis

While the European Commission is the originator—hence main promoter of a permanent investment court—, it may not be the only EU institution that is contributing to establishing a permanent investment court. The Court of Justice of the European Union (“CJEU”) is taking a conspicuous role in the debate as is evident by a series of decisions.

In 2017, the European Commission was confident that the EU’s Free Trade Agreement (“FTA”) with Singapore, its first, and all future EU trade and investment treaties would fall within its exclusive competence (Article 207 of the Treaty of the European Union (“TFEU”)), including the treaties’ dispute resolution provisions.³² This appears no longer to be the case in light of a CJEU Opinion issued in May 2017. The issue before the CJEU was whether the EU-Singapore FTA required ratification by each of the EU Member States.³³ The CJEU noted that the Investor-State Dispute Settlement (“ISDS”) regime removes disputes from the jurisdiction of the national courts of the Member States and thus is not “of a purely ancillary nature . . . and cannot, therefore, be established without the

28. *See generally* *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002).

29. *See generally* United States Model Bilateral Investment Treaty (2012).

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

31. *Id.* art. 31. *See generally*, Charles N. Brower & Sarah Melikian, “*We Have Met the Enemy and He Is Us!*” *Is the Industrialized North “Going South” on Investor-State Arbitration?* 31 *ARB. INT’L* 19 (2015).

32. Opinion Pursuant to Article 218(11) TFEU, Opinion 2/15 Of the Court, EU:C:2017:376, 2017, ¶¶ 10-16, [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CV0002\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CV0002(01)) [<https://perma.cc/XKE4-7CZ7>].

33. *Id.* ¶ 29.

Member States' consent."³⁴ Inasmuch as the EU-Singapore FTA included a basically conventional ISDS provision, Canada and the European Union have felt constrained to exclude the investment court system contained in CETA from even the provisional application of CETA.³⁵ Thus the CJEU will require all EU Member States' ratification of any EU treaties that include that court provision, including CETA. The EU treaty negotiators may have to be clever and slide some substantive trade benefits into the agreement to encourage ratification.

Rallying all EU Member States to agree on a treaty is challenging as there are different views. The Advocate General Melchior Wathelet at the CJEU has rendered a non-binding (but frequently persuasive) opinion with respect to a request for a preliminary ruling submitted by the German Federal Court of Justice in May 2016 to the CJEU concerning the Netherlands-Slovakia Bilateral Investment Treaty ("BIT").³⁶ The German court had referred a series of questions concerning the compatibility of *intra*-EU BITs with EU law.³⁷ The German court's questions arose in the context of an application by the Slovak Republic to annul an arbitral award issued in favor of Achmea (formerly Eureko), a Dutch investor, under the Netherlands-Slovakia BIT.³⁸

The intriguing features of the opinion, however, were the Advocate General's observations on the EU Member States' contradictory ISDS practices.

The Advocate General noted that several EU Member States had intervened in the proceedings and made both oral and written submissions.³⁹ He noted that the intervening EU Member States could be divided into two groups.⁴⁰ The first group consists of States that "are essentially countries of origin of the investors and therefore

34. *Id.* ¶ 292.

35. *CETA Explained*, EUROPEAN COMMISSION http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/index_en.htm (last updated Sept. 21, 2017).

36. *See generally* Opinion of Advocate General Wathelet, *Slovak Republic v. Achmea BV*, Case C-284/16, [2017] ECLI:EU:C:2017:699, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016CC0284> [<https://perma.cc/YSS9-4CPF>].

37. *Id.* ¶ 30.

38. *See generally* *Advocate General of EU Court of Justice rejects contentions that intra-EU bilateral investment treaty is incompatible with EU law*, IAREPORTER (Sept. 19, 2017), <https://www.iareporter.com/articles/28492/> [<https://perma.cc/WQN9-KG5R>].

39. Opinion of Advocate General Wathelet, *Slovak Republic*, Case C-284/16, ¶¶ 31-35.

40. *Id.* ¶ 34.

never or rarely respondents in arbitral proceedings launched by investors[.]”⁴¹ These States are the Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands, the Republic of Austria, and the Republic of Finland.⁴² The second group consists of States that “have all been respondents in a number of arbitral proceedings relating to *intra*-EU investments.”⁴³ These States are the Czech Republic, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, Hungary, the Republic of Poland, Romania, and the Slovak Republic.⁴⁴

The Advocate General noted that it was “hardly surprising” that the second group of EU Member States “intervened in support of the argument put forward by the Slovak Republic, which is itself the respondent to the investment arbitration at issue in the present case.”⁴⁵ Yet he found it “surprising” that the same States, with the exception of Italy, had not moved to terminate their respective *intra*-EU BITs, which, thus, remained in force in whole or in part.⁴⁶ When Slovakia was asked at the hearing why it had not terminated its other BITs with the States in the second group, Slovakia admitted “that its objective was to ensure that its own investors would not be the victims of discrimination by comparison with investors from other Member States in the Member States with which it would no longer have BITs.”⁴⁷

The Advocate General’s opinion speaks volumes regarding what the other EU organs may think of the European Commission’s campaign to end ISDS.

Yet, the Advocate General’s opinion fell on deaf ears as the CJEU ruled on March 6, 2018, that ISDS provisions in *intra*-EU BITs are incompatible with EU law.⁴⁸ The decision prompted the

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* ¶ 35.

45. *Id.* ¶ 36.

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

47. *Id.* ¶ 38.

48. See generally *Slovak Republic v. Achmea BV*, Case C-284/16, [2018] ECLI:EU:C:2018:158, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0284> [https://perma.cc/HU9S-GFP4].

Netherlands—one of the States falling under Advocate General Wathelet’s first group⁴⁹—to announce reluctantly its decision to terminate all twelve of its *intra*-EU BITs.⁵⁰

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

Two weeks after the *Achmea* decision, the EU Council issued a negotiating directive for establishing a permanent investment court for the settlement of investment disputes with the EU Commission designated as the authorized representative.⁵¹ All analysis and discussion concerning the proposal, according to the directive, “should be conducted under the auspices of the United Nations Commission on International Trade Law (“UNCITRAL”).”⁵²

Less than a month later, the EU Commission presented a final text of its agreement with Singapore to the EU Council as well as a new FTA, the latter of which displaces the previously agreed ISDS provision with the Investment Court System promoted by the EU and adopted in CETA.⁵³ The EU Council will now adopt and sign the agreements before obtaining the EU Parliament’s consent.⁵⁴ While the

49. Opinion of Advocate General Wathelet, Slovak Republic, Case C-284/16, ¶ 34.

50. Letter of Sigrid A.M. Kaag, Dutch Foreign Affairs Minister (Apr. 26, 2018). See Lacey Yong, *Netherlands to terminate BIT with Slovakia in wake of Achmea*, GLOB. ARB. REV. (May 2, 2018), <https://globalarbitrationreview.com/article/1168905/netherlands-to-terminate-bit-with-slovakia-in-wake-of-achmea> [<http://perma.cc/JS8T-V2ZS>].

51. Note from the General Secretariat of the Council for the European Union to Delegations, about Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, 12981/17 ADD 1 DCL 1 (Mar. 20, 2018); Sebastian Perry, *EU Council gives go-ahead for talks on multilateral court*, GLOB. ARB. REV. (Mar. 21, 2018), <https://globalarbitrationreview.com/article/1167071/eu-council-gives-go-ahead-for-talks-on-multilateral-court> [<http://perma.cc/K8MT-WFU6>].

52. Note from the General Secretariat of the Council for the European Union to Delegations, about Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, *supra* note 51, ¶ 4.

53. See *EU-Singapore trade and investment agreements (authentic texts as of April 2018)*, FREE TRADE AGREEMENT (APR. 18, 2018), EUROPEAN COMMISSION, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> [<https://perma.cc/487B-SFG2>]; Lacey Yong, *EU unveils new investment agreements with Singapore*, GLOB. ARB. REV. (Apr. 20, 2018), <https://globalarbitrationreview.com/article/1168166/eu-unveils-new-investment-agreement-with-singapore> [<https://perma.cc/9YF7-3GD3>].

54. Yong, *supra* note 53.

FTA will take effect in 2019, the investment protection agreement will take effect following the ratification by each EU Member State⁵⁵—a move necessary in light of the CJEU’s ruling discussed earlier concerning the EU-Singapore FTA.

On the heels of announcing the final EU-Singapore agreements, the EU and Mexico unveiled an “agreement in principle” in which the Contracting Parties agreed to establish a permanent investment court to resolve investment disputes.⁵⁶

It may be wrong to presume that the CJEU is a promoter of the EU Commission’s permanent investment court. On September 6, 2017, Belgium formally asked the CJEU to assess the compatibility of the CETA’s Investment Court System with EU law. Specifically, Belgium has asked whether the “Investment Court System” is compatible with EU citizens’ right of access to courts, the “general principle of equality,” and the CJEU’s exclusive competence over EU law and how the proposed court would affect the “right to an independent and impartial judiciary.”⁵⁷ The CJEU has yet to issue an opinion on the issue and, thus, it remains to be seen whether the CJEU truly joins its fellow EU institutions in preferring the EU-proposed permanent court.

IV. OTHER ACTORS PROMOTING THE REVOLT AGAINST THE CURRENT ISDS FRAMEWORK

A. The CIDS Report and its Supplement

The newest, and most directly serious threat to ISDS as presently known and favored overwhelmingly by its users, however, comes in the form of a 115-page “research paper . . . prepared for . . . UNCITRAL [United Nations Commission on International Trade

55. *Id.*

56. See *New EU-Mexico Agreement, The Agreement in Principle*, EUROPEAN COMMISSION (Apr. 23, 2018), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1833> [<https://perma.cc/H7YQ-H59P>].

57. See Douglas Thomson, *ECJ to rule on CETA investment court*, GLOB. ARB. NEWS (Sept. 6, 2017), <http://globalarbitrationreview.com/article/1147140/ecj-to-rule-on-ceta-investment-court> [<https://perma.cc/4N6D-H29A>]; Damien Charlotin, *ANALYSIS: EU’s highest court is asked once more to weigh in on international investment law questions – this time by Belgium in relation to CETA’s “investment court system,”* IAREPORTER (Sept. 6, 2017), <https://www.iareporter.com/articles/analysis-eus-highest-court-is-asked-once-more-to-weigh-in-on-international-investment-law-questions-this-time-by-belgium-in-relation-to-cetas-investment-court-system/> [<https://perma.cc/4SKT-BJZ4>].

Law] [at its request] within the framework of a project of the Geneva Center of International Dispute Settlement (“CIDS”)⁵⁸ by Professor Gabrielle Kaufmann-Kohler, that Center’s Co-Director, and Dr. Michele Potestà, a Senior Researcher at that Center (“CIDS Report”). This was presented to the UNCITRAL Commission by way of a note prepared by the UNCITRAL Secretariat dated May 24, 2016,⁵⁹ and most recently was discussed extensively at the UNCITRAL Commission’s 50th Session in Vienna held July 3-21, 2017,⁶⁰ following the holding of an “UNCITRAL-CIDS Government Expert Meeting” in Geneva March 2-3, 2017.⁶¹

The opening paragraph of the Executive Summary of this “research paper” summarizes its mission as being “to analyze whether the Mauritius Convention on Transparency could provide a useful model for broader reform of the investor-State arbitration framework.”⁶² Specifically, it “proposes a possible roadmap that could be followed if States were to decide to pursue a reform initiative aimed at replacing or supplementing the existing investor-State arbitration regime in international investment agreements (IIAs) with a permanent investment tribunal and/or an appeal mechanism for investor-State arbitral awards.”⁶³

Notwithstanding the “research” character of the CIDS paper commissioned by UNCITRAL, it appears to lend considerable support in substance to the “Fifteen-Headed Hydra” threatening ISDS as it presently exists and to point towards the European Union’s goal

58. Gabrielle Kaufmann-Kohler & Michele Potestà, *Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?: Analysis and roadmap*, GENEVA CENTER FOR INTERNATIONAL DISPUTE SETTLEMENT [CIDS], 5 (June 3, 2016).

59. Note by the Secretariat, Settlement of Commercial Disputes: Presentation of a Research Paper on the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a Possible Model for Further Reforms of Investor-State Dispute Settlement, ¶¶ 3-5, U.N. Doc. A/CN.9/890 (May 24, 2016).

60. See Rep. of the U.N. Comm’n on Int’l Trade Law at its Fiftieth Session, Supplement No. 17, ¶¶ 240-65, U.N. Doc. A/72/17 (July 2017); Professor Nikos Lavranos, *The first steps towards a Multilateral Investment Court (MIC)*, EFILA BLOG (July 19, 2017), <https://efilablog.org/2017/07/19/the-first-steps-towards-a-multilateral-investment-court-mic/> [<https://perma.cc/EUV4-UDDH>].

61. See generally Geneva Center for International Dispute Settlement. *UNCITRAL-CIDS Government Expert Meeting*, CIDS – GENEVA CTR FOR INT’L DISP. SETTLEMENT, <http://www.cids.ch/events-2/past-events/634-2/> [<https://perma.cc/PC9N-URJ3>] (last visited Apr. 29, 2018).

62. Kaufmann-Kohler, *supra* note 58, at 4.

63. *Id.* at 4.

of establishing an Investment Court System, otherwise termed a fifteen-Judge International Investment Court.⁶⁴ Specifically, the CIDS Report focuses primarily on whether an award by a hypothetical permanent court could be enforced under the New York Convention (“NY Convention”).⁶⁵

The CIDS Report notes that the NY Convention does not define “arbitration,” “arbitral tribunal” or “arbitral award” but that Article I(2) of the NY Convention mentions awards by “permanent arbitral bodies.”⁶⁶ By considering the *travaux préparatoires* of “permanent arbitral bodies” under Article I of the NY Convention, the Iran-United

64. *Id.* ¶ 93.

65. Kaufmann-Kohler, *supra* note 58, at ¶¶ 138.

66. Article I of the NY Convention:

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

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

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. I, *opened for signature* June 10, 1958 (entered into force on June 7, 1959) (emphasis added). There is an open query as to whether the IUSCT is a “permanent arbitral bod[y]” under Article I(2) of the NY Convention. *See* The Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran art. III, ¶ 4, Jan. 19, 1981 (“Claims Settlement Declaration”) (setting a deadline for filing claims with the IUSCT both by nationals of the United States against Iran and nationals of Iran against the United States, as well as for claims by either of the two States party to that Declaration against the other based on contracts for the purchase and sale of goods and services) (“No claim may be filed with the Tribunal more than one year after the entry into force of this Agreement or six months after the date the President is appointed, whichever is later. These deadlines do not apply to the procedures contemplated by Paragraphs 16 and 17 of the Declaration of the Government of Algeria of January 19, 1981.”); *see also* Re: Refusal to Accept the Claim of Mr. Victor E. Pereira, Decision No. DEC 2-Ref 5-2, Iran-United States Claims Tribunal (Mar. 10, 1982), *reprinted in* 21 Iran-U.S. Cl. Trib. Rep. 3, at 3 (“Since the President was appointed on June 4, 1981, the last day on which the noted claims could be filed was January 19, 1982.”); CHARLES N. BROWER & JASON D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 95 (1998).

The exception to the January 19, 1982, deadline are interpretive disputes (or “A” claims) between the United States and Iran. *See* Declaration of the Government of the Democratic and Popular Republic of Algeria, ¶¶ 16-17, January 19, 1981 (“General Declaration”).

States Claims Tribunal (“IUSCT”) and sport-based arbitral institutions, the CIDS Report opines that awards by such institutions may be enforced under the NY Convention.⁶⁷ This is despite the fact that those bodies were not formed by unilateral appointments of the respective nationals who presented the vast bulk of the claims subject to the IUSCT’s jurisdiction or of athletes whose complaints are subjected to the jurisdiction of sport-based arbitral institutions.⁶⁸

Turning, then, from what had been posed as an enforcement issue, the CIDS Report concludes that because the IUSCT is an example of an “arbitration” in which the U.S. claimants had no say in the appointment of the arbitrators deciding their cases,⁶⁹ it justifies more broadly the envisaged International Investment Court. Enforcement of IUSCT awards did not raise issues “about the fact that [the Tribunal’s] composition did not reflect traditional methods of appointment in international arbitration.”⁷⁰ Rather, it was debated whether the IUSCT awards were rendered under the Dutch *lex arbitri* or were “a-national” and whether there was an arbitration agreement in writing.⁷¹

This leap from enforceability to *per se* justification of investor-State arbitration as presently known now being replaced by an International Investment Court, however, wholly disregards the fact that the IUSCT was established through negotiations that took place starting only early in November 1980 and until the conclusion of the Algiers Accords on January 19, 1981.⁷² The negotiations, conducted via Algeria as intermediary, had as their principal object the release of 52 American hostages. Save for two of the American hostages, all were United States diplomatic or consular officers, and all had been held captive for 444 days.⁷³ The Iranian seizure had resulted in two United Nations Security Council Resolutions,⁷⁴ an order of the International Court of Justice,⁷⁵ long ignored by Iran, compelling the

67. Kaufmann-Kohler, *supra* note 58, ¶¶ 95-96, 148-54.

68. *Id.*

69. *Id.* ¶ 94.

70. *Id.* ¶ 95.

71. *Id.*

72. *Iran-United States Claims Tribunal*, IRAN-UNITED STATES CLAIMS TRIBUNAL, <http://www.iusct.net/> [https://perma.cc/7Q6K-WSUV] (last visited May 23, 2018).

73. BROWER, *supra* note 66, at 4-5.

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

75. See *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), Order on Provisional Measures, 1979 I.C.J. Rep. at 17-18 (Dec. 15); *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), Judgment, 1980 I.C.J. Rep., ¶¶ 75, 91-92 (May. 24).

hostages' release, and a failed US Army Delta Force raid at Desert One in Iran mounted to free the hostages.⁷⁶ To rely on such a hurried solution of a serious international crisis as a model for normal investor-State arbitration is, frankly, beyond reason. It is equally true of the famous Alabama arbitration that benefitted the American shipowners whose vessels were sunk or burned by raiders from Confederate States during the American Civil War, i.e., the CSS Alabama and a number of others, and the American owners of cargos thereby lost. That arbitration forestalled incipient hostilities between the United Kingdom, which against the international laws incumbent on neutral States had suffered those raiders to be built in England,⁷⁷ and the United States, likewise had no arbitrators appointed by the shipowners and owners of lost cargos. Similar to the IUSCT, the United States and the United Kingdom appointed one arbitrator each, and agreed that three others would be appointed from Brazil, Italy, and Switzerland.⁷⁸ It is simply illogical, indeed, unreasonable in the extreme, to cite a tribunal formed to resolve a pending front-page international crisis between two nations who are at daggers' points as justifying deprivation of arbitrating parties' historic enjoyment of the right to appoint arbitrators and collaborate in the selection of a tribunal chairperson.

No less inapposite is the CIDS Report's reliance on certain rules that "provide for the institution's sole power to appoint the arbitrators, without any input from the parties."⁷⁹ As examples, however, the CIDS Report cites only the Court of Arbitration for Sport ("CAS") Arbitration Rules for the Olympic Games, which state that the President of the *ad hoc* Division will appoint one or three arbitrators from a preselected list without the disputing parties' input,⁸⁰ and the Arbitration Rules of the Basketball Arbitral Tribunal ("BAT"), which provide that "all disputes before the BAT shall be decided by a single

76. See Mark Bowden, *The Desert One Debacle*, THE ATLANTIC May 2006, <https://www.theatlantic.com/magazine/archive/2006/05/the-desert-one-debacle/304803/> [<https://perma.cc/VE5Z-E4JL>].

77. U.S. Dep't of State's Office of the Historian, *The Alabama Claims, 1862–1872* (last visited Apr. 29, 2018), <https://history.state.gov/milestones/1861-1865/alabama> [<https://perma.cc/K7RK-R23H>].

78. V.V. Veeder, *The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator - From Miami to Geneva*, in PRACTICING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 134 (David D. Caron et al., eds., 2015).

79. Kaufmann-Kohler, *supra* note 58, at ¶ 96.

80. *Id.*; Court of Arb. for Sport Arbitration Rules for the Olympic Games art. 11.

Arbitrator appointed by the BAT President on a rotational basis from the published list of BAT arbitrators.”⁸¹ The CIDS Report concludes that while the parties have no influence on the composition of the panels before the CAS *ad hoc* division or before the BAT, “it is undisputed that these mechanisms are in the nature of arbitration.”⁸²

With respect, these are regulatory and disciplinary bodies whose authority the athletes involved necessarily accept as a condition of competing in the relevant sporting events. They are much like the national or regional authorities regulating the conduct of lawyers, physicians and other professionals. Obtaining a professional license, or entering into a competitive sporting event subject to the regulation of CAS or BAT, brings with it automatic subjection of oneself to the relevant regulatory authority. Those subject to CAS or BAT have no more expectation of enjoying the benefits of ISDS as presently known than does a member of the Bar of any country to be able to appoint someone to the disciplinary authority that exists for the profession. All in all, the CIDS Report dwells principally on what can be termed “arbitration,” rather than on the distinctions of genesis, character, or subject matter of the various fora.⁸³

Within the context of enforcement under the NY Convention, the CIDS Report concludes that the unilateral right of appointment is not as important as the parties’ consensual submission to arbitration.⁸⁴ There is no denying that party freedom is paramount and if parties choose to do away with their right of appointment that is their

81. Basketball Arbitral Tribunal, Arbitration Rules art. 8.1 (2017).

82. Kaufmann-Kohler, *supra* note 58, at ¶ 96.

83. Given the large number of doping-related disputes in sport arbitrations, one commentator has even queried whether such disputes fall under the NY Convention given their non-commercial nature. See Roger Alford, *Are CAS Arbitrations Governed by the New York Convention?*, KLUWER ARBITRATION BLOG (Mar. 8, 2009), http://kluwerarbitrationblog.com/2009/03/08/are-cas-arbitrations-governed-by-the-new-york-convention/?_ga=2.156422331.1237221282.1499359155-1066329609.1481846792 [https://perma.cc/D5Y2-5VP2]. This may explain, according to other commentators, how enforcement under the NY Convention of sport-based arbitral awards is not as important for commercial-based arbitral awards “because the sport governing bodies have internal enforcement mechanisms that are highly effective.” See DANIEL GIRSBERGER & NATHALIE VOSER, *INTERNATIONAL ARBITRATION: COMPARATIVE AND SWISS PERSPECTIVES* 489 (3d ed. 2016). The Swiss Supreme Court criticized “the lack of transparency of who nominated the arbitrators for their position on the list,” *id.*, at 506. Commentators have described the lack of arbitrators “that represent athletes’ interests, but without transparency, an athlete has no way of knowing who those arbitrators are,” *id.* This only adds more credence to the significance of unilateral appointments.

84. Kaufmann-Kohler, *supra* note 58, at ¶¶ 97-98.

prerogative. But the CIDS Report's conclusion in relation to enforceability does nothing to undermine the long-established right of unilateral appointment, which is a fundamental—if not crucial—feature of arbitration, especially of investor-State arbitration.

The CIDS Report also draws its conclusions within the confines of the NY Convention, which is an important treaty in the history of arbitration, but cannot be representative of all that is regarded as “arbitration.” There is a litany of treaties and rules demonstrating the value of the unilateral right of appointment. The NY Convention's scope being limited to the recognition and enforcement of arbitral awards and arbitration agreements, it “does not provide for any obligation to be met by the parties as to the number of arbitrators or the method of their appointment.”⁸⁵ Facilitating the recognition and enforcement of arbitral awards and arbitration agreements is undoubtedly vital if arbitration is to have teeth. What constitutes “arbitration” and how the tribunal is to be constituted are, however, equivalently important. These were intentionally left open in the NY Convention.⁸⁶ To go from awards by “permanent arbitral bodies” being enforceable under the NY Convention to conclude that party-appointment is not an essential feature of arbitration goes too far. The party-appointment procedure—let alone other features of the arbitral process—were simply not in the contemplation of the drafters of the NY Convention.⁸⁷

The NY Convention was one initiative amongst others spearheaded by the United Nations Economic and Social Council and its successors. “The evolution of an effective and trustworthy private international arbitration system over the last half a century has had three major strands,”⁸⁸ of which the NY Convention was but one. The 1976 (and 2010) UNCITRAL Arbitration Rules and the 1985 Model Law on International Commercial Arbitration (UNCITRAL Model

85. ALFONSO GÓMEZ-ACEBO, PARTY-APPOINTED ARBITRATORS IN INTERNATIONAL COMMERCIAL ARBITRATION 26 (2016).

86. U.S. Dep't of State's Office of the Historian, *supra* note 77.

87. See U.N. Secretary-General, U.N. Economic and Social Council, *Recognition and Enforcement of Foreign Arbitral Awards*, ¶ 5, U.N. Doc. E/2840 (Mar. 22, 1956). The Secretary-General prepared a memorandum for the ECOSOC on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards and whether a conference should be called to address the topic.

88. DAVID D. CARON & LEE M. CAPLAN, *THE UNCITRAL ARBITRATION RULES: A COMMENTARY* 1-2 (2d ed. 2013).

Law) were the others,⁸⁹ and both expressly provide unilateral right of appointment by disputing arbitrants.⁹⁰

To its credit, the CIDS Report recognizes the fact that appointment of judges to an International Investment Court solely by States or the EU alone necessarily raises justified doubts on the part of investors as to the true impartiality of such judges, and, therefore, emphasizes that the process should not be politicized.⁹¹ They query whether it is desirable that only States participate in the election process or whether the investors should also have a say.⁹²

It is unrealistic to believe that international organizations, including the European Union, and States will act utterly devoid of political considerations when making the appointments to an International Investment Court.⁹³

One of the co-authors of this Article, apart from experience in the United States Senate, the United States Department of State, and the White House, has for decades, in The Hague and at the United Nations in New York City, been observing elections to the ICJ. In fact, ICJ elections (excluding elections of nationals of the Permanent Five Members of the Security Council, until most recently, as noted above, the sitting British Judge was denied re-election) are highly political; and, hence, do involve tradeoffs and “deals.” It is an illusion to think that the process can be de-politicized.

89. *Id.*

90. See G.A. Res. 31/98, art. 7(1), U.N. Doc. A/31/17 (Dec. 15, 1976) (“If three arbitrators are to be appointed, **each party shall appoint one arbitrator**. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.”) (emphasis added); G.A. Res. 65/22, U.N. Doc. A/65/465 (2010) (“If three arbitrators are to be appointed, **each party shall appoint one arbitrator**. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.”) (emphasis added); U.N. Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration, art. 11(3), U.N. Doc. A/40/17, annex I (June 21, 1985) (“Failing such agreement, (a) in an arbitration with three arbitrators, **each party shall appoint one arbitrator**, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6.”) (emphasis added).

91. Basketball Arbitral Tribunal, *supra* note 81.

92. Kaufmann-Kohler, *supra* note 58, at ¶¶ 166-69.

93. The authors appear to accept that “some degree of politics in the selection process is unavoidable” as stated in their Supplemental Report issued in November 2017. See Gabrielle Kaufmann-Kohler & Michele Potestà, *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards: CIDS Supplemental Report*, GENEVA CENTER FOR INTERNATIONAL DISPUTE SETTLEMENT [CIDS], ¶ 109 (Nov. 15, 2017).

It is equally misguided to think that “a consultation of business organizations, i.e., organizations representative of investor interests,”⁹⁴ will have a significant influence that will reduce the political character of such appointments. There is no obligation on States to follow any recommendation by such organizations on the composition of the hypothetical permanent investment court. It is further presumptuous to think that these organizations would give any consideration to the issue in the first place. Arbitral disputes are not at the top of these organizations’ agendas vis-à-vis their respective governments and any international organizations—let alone individual investors—and disputes may not even transpire until many years later, when there is nothing to suggest that any of the recommendations of business organizations now would be representative of the putative investor that may end up before the permanent investment court in the future. While investors themselves may have a degree of influence, it is not worth much. A right to be consulted is equivalent to a ballot paper with a disclaimer that the vote may not be counted.

On the day of the keynote address at the 12th Annual Fordham International Arbitration Conference, the authors of this article received a copy of a Supplemental Report to the CIDS Report (Supplemental Report). The authors of the Supplemental Report augment their initial report by providing further analysis on the composition of a hypothetical permanent court.⁹⁵ In their Supplemental Report, the authors explained that their proposal in their initial CIDS Report “presuppose[s] the creation of multilateral permanent adjudicatory bodies, the ITI [i.e., International Tribunal for Investments] and/or the AM [i.e., Appeals Mechanism], whereby the former would provide an alternative to the current *ad hoc* system of investor-State arbitration and the latter would supplement it.”⁹⁶

The Supplemental Report identifies three consequences of transitioning from the current “*ad hoc* system”—which is understood to refer to a dispute resolution body constituted on a case-by-case basis for a single dispute⁹⁷—to a permanent or semi-permanent body on the arbitrator-selection process. Of those three, the first is relevant for our purposes. The Supplemental Report acknowledges that the

94. Kaufmann-Kohler, *supra* note 58, at ¶ 168.

95. Kaufmann-Kohler, *supra* note 93, at ¶ 2.

96. *Id.* ¶ 6.

97. *Id.* ¶ 7.

unilateral right of party-appointment would be eliminated if the appointing power rests exclusively on States:

The first consequence is the transition from a disputing party framework to a treaty or contracting party framework. **Transitioning from an *ad hoc* system that allows virtually complete control over composition by the disputing parties to a permanent or semi-permanent system necessarily reduces the role for disputing parties and conversely increases that of treaty parties.** As the dispute resolution body must exist before the investment dispute arises, it must necessarily be established *ex ante* by the treaty parties. This entails moving beyond the “historical keystone” of arbitration, namely disputing party appointment, to a different selection method placed entirely or predominantly in the hands of the parties to the instrument establishing the new adjudicatory bodies. **Such dilution of powers concerns all disputing parties, including respondent States who lose the “right” to influence the composition of the body as disputing parties. However, in practice, it will be perceived as affecting the investor-party more heavily, as States will be able to contribute to the composition of the body in their capacity of treaty parties.**⁹⁸

The tilting of the scales in favor of States is in no way diminished by the fact that the respondent-State in an investment dispute also is deprived of the opportunity to select an arbitrator once the dispute is afoot. While the authors of the Supplemental Report acknowledge this fact, the consequences of it are indeed minimal, if not infinitesimal.

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

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

98. *Id.* ¶ 14 (emphasis added).

As the practice at existing permanent international courts and tribunals shows, **the involvement of States** (and, within the State apparatus, in particular of State governments) **may lead to risks of politicization of the selection process** Appointment on the basis of political considerations rather than competence and merit may undermine the quality of the decisions and, ultimately, the perception of the adjudicatory body's independence, credibility and legitimacy.⁹⁹

Ensuring that the “selection” process is multi-layered, open to all stakeholders, and transparent, sounds good in theory, until one realizes that in substance what is being proposed is that States constitute an advisory panel to sign off on the qualifications of potential candidates and “consult[] national parliaments” to “reinforce the democratic element in the process.”¹⁰⁰

B. UNCITRAL Working Group III

In July 2017 the UNCITRAL Commission met and decided, on the basis of the CIDS Report, to have Working Group III, as it is called at UNCITRAL — not Working Group II — consider the report at its next meeting.¹⁰¹ The Working Group III was entrusted with the task to consider ISDS reform “so as not to burden Working Group II unduly while it continued to fulfil its mandate [of its work on the enforcement of settlement agreements resulting from international commercial conciliation].”¹⁰² It is curious that this task has been assigned by UNCITRAL just last year to Working Group III, which previously has dealt with international legislation on shipping, transport law, and, only most recently, online dispute resolution, and not to Working Group II, which for the past seventeen years has dealt exclusively and broadly with arbitration, conciliation and dispute settlement, and in which, *inter alia*, the UNCITRAL Arbitration Rules and the UNCITRAL Model Law were incubated. Furthermore, the Commission emphasized that delegations to Working Group III should be government-led, while noting the benefits of involving diverse stakeholders.¹⁰³ One asks, “What is the reason that the

99. *Id.* ¶¶ 106-08 (emphasis added).

100. *Id.* ¶¶ 111-16.

101. *Id.* ¶¶ 106-08.

102. G.A. Rep. of the Comm. on Int'l Trade Law of Its Fiftieth Session, at ¶ 260, U.N. Doc. A/72/17 (July 3-21, 2017).

103. *Id.* ¶¶ 250-51, 264.

UNCITRAL Commission has assigned consideration of the EU-inspired International Investment Court proposal, not to the Working Group with by far the most extensive experience with international arbitration, but rather to one whose exposure to the field has been limited to online arbitration, along with shipping and transport law? Why is it charged to have predominately government delegations? Are the dice being loaded?"

The first Working Group III session following the Commission's July 2017 decision, held in Vienna from November 27 to December 1, 2017,¹⁰⁴ revealed a telling picture of the work now being political, rather than, as is traditional with Working Groups, being technical work of experts. Virtually two of the five days of the meeting were taken up with a fight over who should chair the meeting, an issue hitherto always resolved by consensus.¹⁰⁵ Incredibly, the many EU Member States Delegations present carried the day for the election of a senior official of Canada¹⁰⁶ who by definition is bound to CETA, and hence to the EU International Investment Court imbedded in CETA. Can there be any doubt but that UNCITRAL itself is being politicized and that, as noted above, the dice in fact have been loaded? Nevertheless reluctant delegates grappled with the monumental task of reforming ISDS, and Part I of the Working Group III Report from that session emphasized perceived concerns of some States over the cost and duration of proceedings.¹⁰⁷ Several of the more sober-minded participants in the session argued that deliberations relating to duration and cost should be fact based.¹⁰⁸ The Working Group ultimately settled on a compromise, recording that *perceptions* are also relevant in maintaining the "legitimacy" of ISDS, the ubiquitous buzzword that Professor Christoph Schreuer recently decried as "one of those Humpty Dumpty words designed to arouse pleasurable

104. U.N. Comm. On Int'l Trade Law, Rep. of Working Group III on the Work of Its Thirty-Fourth Session, Part I, U.N. Doc. A/CN.9/930 (2017).

105. Anthea Roberts, *UNCITRAL and ISDS Reform: Not Business as Usual*, BLOG OF THE EUR. J. OF INT'L L. (Dec. 11, 2017), <https://www.ejiltalk.org/uncitral-and-isds-reform-not-business-as-usual/> [<https://perma.cc/97PV-YBYW>] ("In the whole history of UNCITRAL [established in 1966], only one issue had ever been put to the vote and that was the decision on whether to move the headquarters of UNCITRAL to Vienna [from New York City]. The premium placed on consensus meant that voting enjoyed somewhat of a mystical taboo. That was, at least, until this meeting when the spell was broken for a second time.").

106. U.N. Comm. On Int'l Trade Law, Rep. of Working Group III on the Work of Its Thirty-Fourth Session, *supra* note 104, at ¶ 14.

107. *Id.* ¶¶ 30-48.

108. *Id.* ¶ 35.

emotions without conveying meaning” in his keynote address at the Investment Treaty Arbitration Conference in Prague on October 26, 2017.¹⁰⁹ Some less radical reforms, namely those of clarifying a tribunal’s powers of cost apportionment and ordering claimants to post security for costs in certain scenarios, were also discussed,¹¹⁰ mirroring recommendations made by Professor Schreuer in his speech.¹¹¹

V. FEAR AND OVERREACTION

Now, why is this happening? As mentioned earlier, the EU-pursued International Investment Court is just the paramount move in a longstanding series of moves by States to repossess investor-State arbitration and what should be a matter between investors and their host States. It is fear. That is number one. When Franklin Delano Roosevelt was sworn into office the first time early in 1933, the United States was in the depths of the Depression, which greatly affected the generation of people living during that time. President Roosevelt said, “We have nothing to fear but fear itself.”¹¹² Fear is a poor advisor, hence an inappropriate driving force in contemporary international investment arbitration.

Take environmental and health cases, for example. To our knowledge, no ISDS tribunal has ever found a legitimately environmental or health law or regulation of a State to have breached a BIT or a multilateral investment treaty. But there are still outcries. Take the *Ethyl* case,¹¹³ in which one of the authors of this Article was appointed by Ethyl in the late 1990s. It was the first NAFTA case against Canada.¹¹⁴ That case involved a bill that was introduced in the Canadian Parliament in May of 1995 and enacted as the Act on April

109. Marie Talašová Jaroslav Kudrna, Sebastian Perry & Laetitia Nappert-Rosales., *There’s “no alternative” to investment arbitration, says Schreuer*, GLOBAL ARBITRATION REVIEW, (Dec. 22, 2017), <https://globalarbitrationreview.com/article/1151619/theres-no-alternative-to-investment-arbitration-says-schreuer> [http://perma.cc/539Q-DPEQ].

110. Caron, *supra* note 88, at ¶¶ 46-49 & 59-61.

111. Talašová, *supra* note 109.

112. Donald Pohlmeier, *FDR Nothing to Fear But Fear Itself 1933 Inaugural Address*, YOUTUBE (Sep. 23, 2013), <https://www.youtube.com/watch?v=nHFTtz3uucY> [http://perma.cc/QNL4-C6G8].

113. *See generally* Ethyl Corp. v. Canada, NAFTA/UNCITRAL (June 24, 1998).

114. Laura Eggertson, *Ethyl sues Ottawa over MMT law*, THE FINANCIAL POST, Sept. 11, 1996, <http://appletonlaw.com/files/Ethyl/media%20clippings.pdf> [https://perma.cc/Z7E9-QS53]

25, 1997, that prohibited the commercial importation of and interprovincial trade in Methylcyclopentadienyl Manganese Tricarbonyl (“MMT”), a fuel additive (the “MMT Act”).¹¹⁵ Ethyl commenced NAFTA arbitration proceedings in April 1997, arguing that the measure was illegitimate and discriminatory.¹¹⁶ Canada argued that while MMT was designed to increase octane in gasoline, it affected emission control on automobiles, thereby presenting an environmental hazard due to manganese becoming airborne.¹¹⁷

The arbitration was short-lived. Following the Tribunal’s unanimous ruling in June 1998 rejecting some of Canada’s objections to its jurisdiction and joining others to the merits¹¹⁸ the case was settled for US\$13 million.¹¹⁹ The decision confirming the Tribunal’s jurisdiction came less than two weeks after a domestic Canadian panel convened under Canada’s Agreement on Internal Trade (“AIT”), concluded with its Provinces and Territories,¹²⁰ had undermined Canada’s position in defending the *Ethyl* case. The Government of Alberta had commenced proceedings under the AIT alleging that the MMT Act failed to comply with Canada’s obligations under the AIT, whereupon the Governments of Québec, Nova Scotia, and Saskatchewan intervened as Complainants in support of Alberta.¹²¹ A majority of the AIT panel hearing the case ruled that the MMT Act was inconsistent with certain provisions of the AIT and recommended that Canada remove the inconsistencies and, pending such removal, “that the Respondent [i.e., Canada] suspend the operation of the *Act* with respect to interprovincial trade.”¹²² Canada was left without a leg on which to stand vis-à-vis Ethyl, hence, the US\$13 million settlement.

115. See generally *Ethyl Corp.*, NAFTA/CITRAL.

116. *Id.*

117. See Luke Eric Peterson & Kendra Magraw, *Looking Back: Ethyl v. Canada case drew early public attention to previously obscure arbitration process, and settled after tribunal’s jurisdiction ruling*, IAREPORTER (Mar. 21, 2017), <https://www.iareporter.com/articles/looking-back-ethyl-v-canada-case-drew-early-public-attention-to-previously-obscure-arbitration-process-and-settled-after-tribunals-jurisdiction-ruling/> [http://perma.cc/9UF7-DXBR]; John Geddes, *Ethyl sues Ottawa for US\$200M over MMT ban*, THE FIN. POST, Sept. 11, 1996, at 6.

118. See generally *Ethyl Corp.*, NAFTA/CITRAL.

119. Daphne Eviatar, *The NAFTA Edge*, THE AM. LAW. 80, 83 (2005).

120. Gov. of Alberta v. Canada, Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the Manganese-based Fuel Additives Act, 13 (June 12, 1998).

121. See *id.*

122. See *id.* at 1.

Despite the brevity of the proceedings and the AIT panel's preceding decision adverse to the Canadian Government, the *Ethyl* case attracted widespread media attention and evoked a vociferous public backlash at the time.¹²³

At the time, the media maintained that NAFTA Chapter 11 proceedings constituted a "regulatory chill" restricting Canada's sovereignty, as demonstrated by the settlement with Ethyl and the repealing of the MMT Act.¹²⁴ Contrary to this widespread misconception, Canada was motivated to settle the *Ethyl* case because of the AIT panel decision. Faced with the AIT's decision scuttling the MMT Act, Canada had no alternative but to settle with Ethyl. This is confirmed by Canada's official governmental website in which it describes the outcome of the *Ethyl* case as follows:

Settlement of the claim

Further to a challenge launched by three [sic] Canadian provinces under the *Agreement on Internal Trade*, a Canadian federal-provincial dispute settlement panel found that the federal measure was inconsistent with certain provisions of that Agreement. Following this decision, Canada and Ethyl settled all outstanding matters, including the Chapter Eleven claim.¹²⁵

123. See Geddes, *supra* note 117; Michael Valpy, *How free trade threatens democracy*, THE GLOBE AND MAIL (Apr. 9, 2001), <https://www.theglobeandmail.com/opinion/how-free-trade-threatens-democracy/article760604/> [<https://perma.cc/T36X-QTNV>]; SCOTT SINCLAIR, CANADA'S TRACK RECORD UNDER NAFTA CHAPTER 11: NORTH AMERICAN INVESTOR-STATE DISPUTES TO JANUARY 2018 11 (Canadian Centre for Policy Alternatives, 2018) (describing the latest misconceptions on *Ethyl*).

124. See generally *Ethyl Corp.*, NAFTA/CITRAL.

125. We note that the official Canadian Government website describing the *Ethyl Corporation v. Government of Canada* case identifies "three Canadian provinces." See Gov. of Canada, *NAFTA – Chapter 11 – Investment, Cases filed against the Government of Canada: Ethyl Corporation v. Government of Canada*, GLOBAL AFFAIRS CANADA (last modified Dec. 21, 2017), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ethyl.aspx?lang=eng#archived> [<https://perma.cc/5PTW-7XRF>]. However, according to the AIT Panel decision, four provinces were Complainants. *But see* Gov. of Alberta v. Canada, Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the Manganese-based Fuel Additives Act, at 1 (emphasis added).

The Government of Alberta (the Complainant) contends that the Act fails to comply with Canada's (the Respondent) obligations under the Agreement on Internal Trade (the Agreement), and that the inconsistencies cannot be justified by reference to the Agreement's provisions for measures associated with legitimate objectives. The Complainant contends that the Act has impaired internal trade, caused injury to Alberta refiners, and is inconsistent with general and specific provisions of the Agreement. **The Governments of**

Despite the Canadian Government's straightforward explanation as to why it settled the *Ethyl* case, local politicians continue to remember the ordeal differently.¹²⁶

The results of the tobacco labeling cases—*Philip Morris Brands Sàrl, et al. v. Oriental Republic of Uruguay* and *Philip Morris Asia Limited v. The Commonwealth of Australia*—further confirm that no health-protection legislation or regulation has been found by any ISDS tribunal to have breached any provision of any investment treaty.¹²⁷ The tobacco cases have attracted particular attention of critics of investor-State arbitration despite the fact that both Australia

Québec, Nova Scotia and Saskatchewan (also Complainants) intervened in support of Alberta. The Government of Nova Scotia did not file a written submission or present oral arguments.

126. Elizabeth May, leader of the Green Party of Canada and MP for Saanich-Gulf Islands, held a press conference in September 2012 in which she warned against the adoption of the Canada-China Foreign Investment Promotion and Protection Agreement. During the press conference, she highlighted the controversy that the *Ethyl* case brought in Canada:

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

Elizabeth May: Red Carpet For China (Press Conference Q and A), YOUTUBE (Sept. 27, 2012), <https://www.youtube.com/watch?v=SjwjBe8tAo> [<https://perma.cc/ZWY9-F2QW>]. (The Authors of this Article have transcribed the block quotation manually by listening to the YouTube clip. Thus, the block quotation is not an official transcription.)

Since Elizabeth May's statement, the treaty entered into force on October 1, 2014 and retained an investor-State arbitration provision in article 20. See Canada-China Foreign Investment Promotion and Protection Agreement, art. 20; *Trade and investment agreements*, GLOBAL AFFAIRS CANADA (last modified May. 29, 2017), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng&country_pays=China&menu_id=147 [<https://perma.cc/D4WV-U654>].

127. See generally *Philip Morris Brands Sàrl, et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, ¶ 590 (July 8, 2016); *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, sec. VII (Dec. 17, 2015).

and Uruguay won those cases.¹²⁸ Even if cases come out in favor of States the critics disregard the result and emphasize the alleged bias towards investors in the ISDS system.¹²⁹ When a majority of the tribunal in *Philip Morris Brands Sàrl, et al. v. Oriental Republic of Uruguay* found in favor of the State, rather than recognize that ISDS works, the critics turned their attention to the hefty fees collected by ISDS lawyers and how the case should not have been brought in the first place.¹³⁰ They look right past the unchallengeable fact, as illustrated by the NAFTA case cited above and the tobacco cases, that States' "policy space" universally has been preserved by ISDS tribunals.

A. Separating Facts from Fiction

Prominent people, and publications that one might think should know better, had they done the necessary research, have spoken out emphatically against ISDS.¹³¹ States win the majority of cases that are tried to an award. From 1987 through July 2017, 530 ISDS cases have been concluded.¹³² Of those cases 37% were decided in favor of the State (the claims were dismissed either for lack of jurisdiction or on the merits) and 27% were decided in favor of the investor.¹³³ Furthermore, 23% of the 530 cases were settled, 11% were

128. See generally Philip Morris Brands Sàrl, ICSID Case No. ARB/10/7; Philip Morris Asia Limited, UNCITRAL, PCA Case No. 2012-12.

129. See generally Cecilia Olivet & Alberto Villareal, *Who really won the legal battle between Philip Morris and Uruguay?*, THE GUARDIAN (July 28, 2016), <https://www.theguardian.com/global-development/2016/jul/28/who-really-won-legal-battle-philip-morris-uruguay-cigarette-adverts> [<https://perma.cc/EDS3-HEWL>].

130. *Id.*

131. See *Transcript: Trading Democracy -- A Bill Moyers Special*, PBS (Feb. 1, 2012) http://www.pbs.org/now/transcript/transcript_tdfull.html [<https://perma.cc/K5MJ-EJ7V>] ("Today, foreign companies are exploiting Chapter 11 to attack public laws that protect our health – and our environment – even to attack the American judicial system."); *Behind closed doors*, THE ECONOMIST (Apr. 23, 2009), <http://www.economist.com/node/13527961> [<https://perma.cc/MX23-A6R4>]; Elizabeth Warren, *The Trans-Pacific Partnership clause everyone should oppose*, THE WASHINGTON POST (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?tid=a_inl&utm_term=.0b6d9e62172d [<https://perma.cc/7KF7-TB2D>].

132. UNCTAD, *Special Update on Investor-State Dispute Settlement: Facts and Figures*, IIA ISSUES NOTE, ISSUE 3, at 4 (Nov. 2017) http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf [<https://perma.cc/YAJ6-7CQP>].

133. *Id.*

discontinued, and in 2% of the cases there was a finding of liability, but no damages were awarded.¹³⁴

VI. CONCLUSION

ISDS as a dispute resolution system is a service given by States to the benefit of its citizens and corporations in the future. No individual or corporation concerns itself with disputes prior to one arising. In other words, ISDS is not an issue that is at the top of the agenda of corporations. A paragraph from the October 24, 2017, *New York Times* from the article titled, “‘Army’ of Lobbyists Hits Capitol Hill to Preserve Nafta”¹³⁵ encapsulates this point. On that day, more than 130 high executives of large U.S. companies were sent “to ratchet up pressure on lawmakers — many of whose constituents work for companies dependent on Nafta — to keep the deal intact.”¹³⁶ The article further states:

Bill Lane, the chairman of the Trade Leadership Coalition, which advocates preserving Nafta, said that until recently businesses had been largely silent on Nafta because they did not want to undercut other policy priorities, such as rewriting the tax code to secure a lower corporate tax rate.¹³⁷

Lane continues: “‘But they also realize it doesn’t matter what the tax rate is if you’re not competitive, and Nafta makes North American manufacturing competitive.’”¹³⁸ The statement came too little, too late, because bigger priorities let it go.

What is the result going to be? One of two things will happen: An International Investment Court will be established or it will not. Hopefully, it will not be established. If it is, the large corporations that invest in high-risk countries abroad have considerable bargaining strength and, just as they did in the 1960s and 1970s, may opt to negotiate their own dispute-settlement provision via contract, presumably to their satisfaction.

Relatively smaller investors in foreign countries do not have the same clout. One of two things will happen, both to the disadvantage

134. *Id.*

135. Ana Swanson & Natalie Kitroeff, ‘Army’ of Lobbyists Hits Capitol Hill to Preserve Nafta, *N.Y. TIMES* (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/us/politics/nafta-lobby-congress.html>.

136. *Id.*

137. *Id.*

138. *Id.*

of the host States. If this court is established, the smaller investors either will not invest at all — that is a loss for everybody involved — or, if they do invest, when they are determining the return on investment that they need to project to realize from this investment, the risk factor will go up for want of a decent dispute-settlement mechanism available should the host State violate the substantive provisions of an applicable treaty.

The cost of foreign investment will be vastly more expensive, which is largely due to an unnecessarily excessive risk factor. And, the host State loses again. It receives the investment, but at an extravagant rate compared to what it would have had had the investors not been put in this situation. A telling example is the revised position of the new President of Ecuador. Ecuador has and continues to act as a respondent in investment disputes.¹³⁹ Ecuador has taken steps to distance itself from investor-State arbitration in the past, but is now rethinking its stance,¹⁴⁰ and, having recently trashed or set about trashing all of its BITs,¹⁴¹ Ecuador's new Minister for Foreign Trade, Pablo Campana, has said, "In order to secure private direct investment, we must have BITs."¹⁴² So while some people are waking up, nightmarish creatures continue to lie in wait, with the fifteen-headed hydra the latest myth in need of being dispelled.

139. According to UNCTAD's Investment Policy Hub, Ecuador has been a Respondent State in 23 cases, which ranks the country as the tenth most frequent Respondent. See UNCTAD Division on Investment and Enterprise, *Investment Dispute Settlement Navigator*, INVESTMENT POLICY HUB (last updated Dec. 31, 2017), <http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry> [https://perma.cc/5KNW-W9ZU].

140. Tom Jones, *Ecuador in treaty U-turn under new leader?*, GLOB. ARB. REV. (Oct. 17, 2017), <https://globalarbitrationreview.com/article/1149016/ecuador-in-treaty-u-turn%E2%80%8E-under-new-leader> [perma.cc/3KTL-5HWA].

141. See Tom Jones, *Ecuador bids goodbye to BITs*, GLOB. ARB. REV. (May 17, 2017), <http://globalarbitrationreview.com/article/1141801/ecuadorbidsgoodbyetobits> [https://perma.cc/7HUD-KW9K] (In 2008, Ecuador "terminated BITs with Romania and eight Latin American and Caribbean States." On May 16, 2017, Rafael Correa, the former President of Ecuador, signed a series of decrees that terminated seventeen BITs with Argentina, Bolivia, Canada, Chile, China, Finland, France, Germany, Italy, the Netherlands, Peru, Spain, Sweden, Switzerland, the United Kingdom, the United States and Venezuela.); see also Javier Jaramillo & Camilo Muriel-Bedoya, *Ecuadorian BITs' Termination Revised: Behind the Scenes*, KLUWER ARB. BLOG (May 26, 2017), <http://kluwerarbitrationblog.com/2017/05/26/ecuadorian-bits-termination-revisited-behind-scenes/> [https://perma.cc/7MM9-EFHP].

142. Jones, *supra* note 140.