Florida State University Law Review

Volume 47 | Issue 2 Article 1

Winter 2020

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Matthew W. Swinehart

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Recommended Citation
Matthew W. Swinehart, *Institutionalism, Legitimacy, and Fact-Finding in International Disputes*, 47 Fla. St. U. L. Rev. (2022) .
https://ir.law.fsu.edu/lr/vol47/iss2/1

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INSTITUTIONALISM, LEGITIMACY, AND FACT-FINDING IN INTERNATIONAL DISPUTES

MATTHEW W. SWINEHART*

ABSTRACT

Efforts to reform investor-state dispute settlement with an investment court promise to elevate the role of institutions in dispute resolution. The goal of this renewed campaign for institutionalism is to enhance both the legitimacy of arbitrators as individual decision-makers and the legitimacy of legal interpretation. But these reform efforts ignore another core aspect of legitimacy—the legitimacy of the fact-finding process. Ignoring this aspect of legitimacy is a significant oversight, as treaty authors, disputing parties, and practitioners all remain dissatisfied with fact-finding quality and with international law's continued failure to address the factual complexity of today's disputes. Both theory and experience with institutionalism in existing systems predict that an investment court—with a standing administrative apparatus, a standing first-instance tribunal, and a standing appellate mechanism—cannot address this dissatisfaction. At best, an investment court will have only marginal effects on fact-finding. At worst, it will become a potential source of unreliable fact-finding practices and serve only to increase the cost and length of the process. This Article cautions investment-court proponents to consider the aspect of legitimacy that they have missed and points them to an alternative, rules-based approach that would make changes to the evidentiary rules that govern the production, testing, and evaluation of evidence. A rules-based approach offers the opportunity to promote fact-finding practices that increase quality, to discourage practices that do not, and to support consistency and predictability—all without requiring wholesale reform or degrading efficiency. The Article concludes with two rules-based strategies: the establishment of analytical frameworks to increase adjudicator accountability and engagement with the factual record and the appointment of subject-matter experts as adjudicators to inject expertise directly into the decision-making process in factually complex disputes.

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* Matthew Swinehart is the Director of the Office of International Financial Markets at the U.S. Department of the Treasury. The views expressed here are the author's own and not necessarily the views of the Department of the Treasury or the United States government. The author thanks Freya Baetans, Andrea Bjorklund, Christopher Bradley, Susan Franck, Jared Hubbard, Meg Kinnear, William Park, Bruno Simma, John Yoo, and the participants of the Oct. 2017 conference on the Legitimacy of Unseen Actors in International Dispute Resolution at Leiden University in The Hague.

I. INTRODUCTION

The European Union's recent efforts to reform investor-state dispute settlement with an investment court—like their many predecessors over the years—promise to elevate the role of institutions and institutional actors in resolving investment disputes.[1] The goal

1. *See, e.g.*, *Investment Provisions in the EU-Canada Free Trade Agreement (CETA)*, at 1 (Feb. 2016), https://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf [https://perma.cc/Q5AL-4JEN] (promising a "more . . . institutionalised system"). Thomas

of this renewed campaign for institutionalism is to enhance both the legitimacy of arbitrators as individual decisionmakers, by reducing conflicts and apparent and actual bias, and the legitimacy of the legal interpretation process, by providing mechanisms to correct errors and increase the consistency and predictability of legal rules.[2]

But the investment-court movement ignores a third and no less fundamental aspect of legitimacy—the legitimacy of the fact-finding process. Ignoring this aspect of legitimacy is at odds with the outsized contribution of fact-finding to the overall legitimacy of international law.[3] Parties to investment arbitrations and the practitioners who represent them—those in the trenches of actual disputes—know the critical importance of fact-finding processes capable of producing quality outcomes without undue costs to efficiency.[4] They also know that quality and efficiency in fact-finding depend above all on the capacity of a decisionmaker to handle the ever-increasing factual complexity of today's disputes, including with respect to one particular source of facts: expert evidence.

That type of evidence, once rarely seen in international disputes, is now a dominant feature of modern international dispute resolution.[5] International adjudicators rely on expert evidence to understand highly complex subjects, often far outside the domain of legal training. They use it to calculate the amount of damages owed to aggrieved investors,[6] evaluate the scientific bases of environmental and health

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Walde has traced the idea of an appellate mechanism for investor-state disputes, for instance, back to at least 1991. *See* David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 VAND. J. TRANSN'L L. 39, 40 (2006).

2. *See, e.g.*, *Investment in TTIP and Beyond—The Path for Reform*, at 6–9 (2015), https://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF [https://perma.cc/K6MC-BVV6].

3. *See* José E. Alvarez, *What Are International Judges For? The Main Functions of International Adjudication*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 158, 166 (Cesare P.R. Romano et al. eds., 2014) ("Finding facts is as essential as identifying the law."); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 304 (1997) (arguing that the legitimacy of the European Commission of Human Rights "depend[s] in large part on [its] ability to generate an accurate factual record"); *see also* Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1672 (1998) ("[*E*]*pistemic* nonarbitrariness in the process of 'finding' scientifically discerned facts is a necessary condition of the *practical* legitimacy of a decision that relies on that fact-finding.").

4. *See infra* Part I.

5. *See infra* Part I.B.

6. *See, e.g.*, Venez. Holdings B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Award, ¶¶ 265-70 (Oct. 9, 2014), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C256/DC4952_En.pdf [https://perma.cc/39NN-6ZAM].

regulations,[7] draw international boundaries,[8] and apportion natural resources.[9] Expert evidence is routinely the determinative consideration in the highest profile investment arbitrations (like Philip Morris's challenge to Uruguay's plain-packaging rules for cigarettes)[10] and other international disputes (like the arbitration between China and the Philippines over territorial claims in the South China Sea).[11] It is also critical even when liability is conceded, and the only contested issue is the amount of damages owed to an investor.[12]

Despite this reality, international courts and tribunals have failed to adapt to the critical influence of expert evidence in today's disputes, often leading to the use of unreliable expert evidence, unfair rejection of evidence that is reliable, and opaque and confused attempts to resolve conflicting evidence.[13] These are, at base, symptoms of a lack of intellectual rigor and engagement with the substance of the evidentiary record in international disputes. The modest reforms made thus far to fact-finding practices have wrought little improvement, and the usual methods of fact-finding continue to disappoint disputing parties, practitioners, and treaty authors alike.

Against that backdrop, the question raised by an investment court becomes: if such a court is intended as a response to a general legitimacy deficit in investment arbitration, will it address this specific concern about the legitimacy of fact-finding? The answer, very likely, is no. To be sure, today's investment-court movement is in its early days, with no investment court yet in operation under the agreements that the European Union (EU) has negotiated with a handful of treaty partners.[14] But there is already reason to believe that an investment court cannot remedy this dilemma.[15]

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7. *See, e.g.*, Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award (July 14, 2006), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5/DC507_En.pdf [https://perma.cc/WZD5-V6ZZ].

8. *See, e.g.*, Philippines v. China, PCA Case Repository 2013–19, ¶ 133 (2016).

9. *See, e.g.*, Indus Waters Kishenganga Arb. (Pak. v. India), PCA Case Repository 2011–01 (2013).

10. Philip Morris Brands Sàrl v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award, ¶ 9 (July 8, 2016).

11. *Philippines*, PCA Case Repository 2013–19, ¶ 2.

12. *See, e.g.*, Venez. Holdings B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Award, ¶¶ 265-70 (Oct. 9. 2014), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C256/DC4952_En.pdf [https://perma.cc/ZT86-7UB2].

13. *See infra* Part I.B.

14. As of Aug. 2019, the EU had signed four investment protection agreements that contemplate an investment court mechanism, with Canada, Mexico, Singapore, and Vietnam. *See* SONALI CHOWDHRY ET AL., THE EU-JAPAN ECONOMIC PARTNERSHIP AGREEMENT 18 (2018), http://bruegel.org/wp-content/uploads/2018/10/EXPO_STU2018603880_EN.pdf [https://perma.cc/G2FH-EZN6].

15. *See infra* Part II.

This Article looks to the three most viable arguments that an investment court will improve fact-finding quality: (1) that an investment court's higher degree of independence will free decisionmakers to decide cases based on their own views of the facts rather than the views of the disputing parties; (2) that an investment court, especially the introduction of an appellate tribunal, will increase the consistency and predictability of fact-finding practices; and (3) that the standing nature of an investment court will provide decision-makers with the opportunity to become subject-matter experts themselves in frequently encountered topics, better able to tackle the factual complexity of today's disputes. Examining these arguments with the help of rational design, judicial politics, epistemology, and other scholarship, the conclusion here is that an investment court will have only marginal effects on fact-finding, possibly negative on net.

With respect to the first argument, theories of rational design and judicial politics suggest that an investment court will exhibit increased independence.[16] But those theories, coupled with epistemology research on the use of knowledge in legal decision-making, predict that the relative independence of an investment court will have unintended and negative consequences on the production and testing of evidence.[17] Independent decisionmakers are more likely to engage in what this Article identifies as "self-reliance" in the production and testing of evidence, a practice that deemphasizes party participation and depresses the quality of a factual record.[18]

As for the second argument, scholarship on the creation and influence of precedent and studies of judicial behavior predict that an investment court will not instill greater consistency and predictability in fact-finding.[19] The assumptions underlying the introduction of an appellate court in international law, whatever their merit when applied to legal interpretation, do not hold in the case of fact-finding. This is so because evidentiary frameworks are broader and more general than substantive legal rules. Decision-makers follow flexible norms in fact-finding and do not engage in even "soft" rule creation as might be done in legal interpretation, and the scope of appellate review of factual questions is highly circumscribed rather than de novo as with legal questions.[20]

With respect to the third and final argument, an investment court is unlikely to mean that decision-makers reach better factual determinations by accruing subject-matter expertise in the course of

16. *See infra* Part II.A.
17. *See id.*
18. *See id.*
19. *See infra* Part II.B.
20. *See infra* Part II.B.

their duties.[21] This is the prediction of empirical and conceptual studies in epistemology and judicial behavior, given the relatively low frequency of disputes found in any particular mechanism, the lack of an adequate substitute for the rigorous and systematic training that is typically necessary to impart technical expertise, and the highly specialized nature of expertise necessary to provide insights into complex fact questions.

To confirm this conceptual analysis, the Article surveys the effects of institutionalism on existing mechanisms. It finds that the same elements that an investment court would introduce—a standing administrative apparatus, a standing first-instance tribunal, and a standing appellate mechanism—have no demonstrated capacity to improve fact-finding when employed in existing dispute settlement mechanisms. That is the lesson from a diverse array of mechanisms, including the International Court of Justice (ICJ); the World Trade Organization (WTO); the Iran-U.S. Claims Tribunal; the International Tribunal for the Law of the Sea (ITLOS); and state-to-state, investor-state, and commercial arbitrations.

The inability of institutionalism to resolve concerns about fact-finding is a reason for reformers to pause and consider whether less wholesale changes could remedy at least some perceived inadequacies of existing mechanisms. When it comes to the specific case of fact-finding considered here, states have a powerful lever in the form of evidentiary rules—the provisions in treaties, institutional protocols, and arbitration agreements that govern the production, testing, and evaluation of evidence. Targeted changes to those rules could work to address shortcomings of existing mechanisms, including the lack of rigor and substantive engagement with evidence.[22] Unlike reforms based on institutionalism, a rules-based approach would also allow states to engage in incremental and iterative reform, choosing initial rule changes that may meet their objectives and permitting adjustments as needed over time. Rule changes are relatively easy to alter or reverse if they prove ineffective or unworkable. There is no upfront commitment to fundamental reforms as with the creation of an investment court.

This Article sets out two categories of rules-based reforms: the establishment of analytical frameworks to increase adjudicator accountability and engagement with the factual record and the appointment of subject-matter experts as adjudicators to inject expertise directly into the decision-making process in factually complex disputes.[23] Approaches in the first category—analytical

21. *See infra* Part II.C.

22. *See infra* Parts II, III.

23. *See infra* Part III.

frameworks—could both clarify expectations for fact-finding, allowing decision-makers greater freedom to reject unreliable party-presented evidence and impose costs on decision-makers who stray from those expectations, ratcheting up decision-maker accountability. In so doing, analytical frameworks can encourage practices that increase quality, discourage practices that do not, and promote consistency and predictability. Approaches in the second category—appointing subject-matter experts as adjudicators—could increase the intellectual capacity of decisionmakers in confronting complex factual questions and increase engagement with the substance of the factual record.

This Article shows that an investment court is inadequate to the task of improving fact-finding and makes the case for a rules-based approach in three parts. Part I identifies quality and efficiency as the factors underlying the legitimacy of fact-finders, outlines the critical role that expert evidence plays in fact-finding, and explains how international dispute settlement has failed to meet the expectations of stakeholders in the fact-finding process.

Part II then examines the three most viable arguments as to why an investment court might improve fact-finding. Addressing the first argument, Part II.A ranks the EU's investment court on a numerical scale against several other prominent dispute settlement mechanisms, confirming that a court is likely to exhibit a relatively high degree of independence. Theory predicts, however, that independence will actually decrease the fact-finding performance of an investment court. A survey of a wide variety of existing practices at the same time appears to confirm what theory predicts.

Looking to the second argument, Part II.B constructs a three-part model to show that differences between fact-finding and legal interpretation mean that a court will not improve the consistency and predictability of evidentiary practices, even if it happens to improve the consistency and predictability of legal interpretation as investment-court proponents forecast. And Part II.C reviews the third argument, concluding that an investment court is no more likely to impart technical, subject-matter expertise on decisionmakers than today's investment arbitration mechanisms.

In response to the conclusion that an investment court will not improve fact-finding in any of these ways, Part III identifies the most promising rules-based alternatives. In considering reforms to fact-finding practices, states and institutions can mix and match options from this scalable menu and deploy them in any dispute resolution mechanism.

II. THE INADEQUACY OF FACT-FINDING PRACTICES IN MODERN INTERNATIONAL DISPUTE SETTLEMENT

The EU is at the forefront of the investment-court movement, with signed agreements that promise to institute such a mechanism with a handful of trading partners, including Canada, Mexico, Singapore, and Vietnam.[24] The EU has said that its overarching objective in creating an investment court is to provide "fair and transparent dispute resolution," "while ensuring a high level of protection for investments" and preserving "the right of governments to regulate in the public interest."[25] On many occasions, it has framed the issue as simply one of "legitimacy."[26]

Looking beyond these general statements of intent, it is clear that the motivation behind the EU's investment court, like many previous efforts to improve investment arbitration, is limited to two specific questions of legitimacy: the legitimacy of arbitrators as individual decision-makers and the legitimacy of the legal interpretation process.[27] Little is said about the challenges facing fact-finding in international law.[28]

Before considering in this Article what the EU has ignored, it is important to establish a baseline understanding about the current state of fact-finding in international disputes and what a would-be reformer of evidentiary practices ought to set out to achieve. The

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24. CHOWDHRY ET AL., *supra* note 14, at 18 (noting inclusion of an investment court mechanism in EU agreements with Canada, Mexico, Singapore, and Vietnam). Negotiations continue between the EU and Japan on investment protection and the processes for settlement of investment disputes, while negotiation of the remainder of the EU-Japan Economic Partnership Agreement has concluded on a separate track. *EU-Japan Investment Negotiations* (July 11, 2018), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1888 [https://perma.cc/KG9P-YS4Y].

25. *See* Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union and its Member States 2017 O.J. (L 11), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22017X0114(01)&from=EN [https://perma.cc/E56R-243K] [hereinafter Joint Interpretive Instrument on CETA]; *see also, Investment Provisions in the EU-Canada Free Trade Agreement (CETA)*, *supra* note 1, at 1–2, 4 (highlighting a concern for fairness).

26. *See, e.g., Investment in TTIP and Beyond—The Path for Reform*, *supra* note 2, at 9 (highlighting a concern for "legitimacy").

27. *See* José E. Alvarez, *To Court or Not to Court?*, INST. FOR INT'L L. & JUST. (July 15, 2016), http://www.iilj.org/working-papers/to-court-or-not-to-court/ [https://perma.cc/HH2B-UHUJ] (describing the general scope of the debate regarding investor-state arbitration reforms).

28. The lack of focus on fact-finding is not limited to the EU's reform process. *See, e.g.*, U.N. Conference on Trade and Development., *UNCTAD's Reform Package for the International Investment Regime* 48 tbl.6 (2018). It is also not limited to contemporary commentators or designers of dispute settlement systems. As Durward Sandifer explained in his 1974 treatise on evidence in international disputes, "tribunals, as a rule, are preoccupied with the determination of the substantive questions submitted for their decision at the expense of matters of procedure, not infrequently with unfortunate results on the work of the tribunal." DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 8–9 (1975).

following identifies quality and efficiency as the factors that determine the legitimacy of fact-finders, catalogs the critical influence of fact-finding in international disputes—particularly with respect to expert evidence—and reports on the continued failure of fact-finding in international law to live up to expectations of treaty authors, disputing parties, and practitioners alike.

A. Quality and Efficiency as Determinants of Fact-Finding Legitimacy

The emphasis of the investment-court movement on fairness, transparency, and legitimacy corresponds to the consensus view that the primary function of an international dispute settlement mechanism is to provide information about the facts and the law (and specifically, in international commercial and investment arbitration, to render an enforceable monetary award), and to do so in an unbiased manner.[29] That consensus view also holds that, when a reformer like the EU says that the intent behind its reforms is to increase fairness, transparency, and legitimacy, the reformer means that it hopes to increase the quality of the information that a mechanism's decisions provide.[30]

Because states are the makers of international law and the principal designers of dispute settlement mechanisms, it is their perception of quality that primarily drives mechanism design. Each state, in its role as a dispute settlement designer, will weigh quality to varying degrees,[31] and will do so based on a complex calculus that takes into account the perceptions of other states, industry, non-governmental organizations, and the general public.[32] This calculus is all the more

29. Scholars who hold this view of the primary function of international dispute settlement have largely focused on state-to-state disputes. *See, e.g.*, Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171, 208–09 (2008) (noting consensus on the purpose of international dispute resolution); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Posner and Yoo*, 93 CALIF. L. REV. 899, 931–36 (2005); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 17 (2005). The information function observed in state-to-state disputes may, of course, work in parallel or in tandem with additional functions in other systems, such as the function of compensation commissions or investment tribunals, to provide compensation or other monetary award to injured parties. *See* David D. Caron, *International Claims and Compensation Bodies*, *in* THE OXFORD HANDBOOK ON INT'L ADJUDICATION 279, 281 (Cesare P.R. Romano et al. eds., 2014); Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 779 (2012).

30. *See* Susan D. Franck et al., *Inside the Arbitrator's Mind*, 66 EMORY L.J. 1115, 1128 (2017) (arguing that "integrity and quality" is "central to arbitration's legitimacy as a form of dispute settlement" and noting that uncertainty about that quality has "created apprehension and debate" in the public discourse); Guzman, *supra* note 29, at 205.

31. *See* David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 ICSID REV.-FOREIGN INV. L.J. 21, 49 (1992).

32. *See id.* at 49–50.

difficult when popular government policy is at issue, large amounts of money are at stake, or the claims raise sensitive geopolitical concerns.[33]

In addition to the question of design, the practical utility of a dispute settlement mechanism once implemented also depends primarily on the perceptions of state actors.[34] A state's perception of quality affects real-world behavior because the state will react to a decision based on its beliefs about the decision's quality.[35] If a state believes that a decision is of high quality, it will more readily alter its behavior in response to the decision, such as by retaliating against the losing party or by complying with an adverse decision.[36] And, if a state believes that a mechanism as a whole produces high-quality decisions, it will more readily continue to support the mechanism, even though the mechanism may produce decisions adverse to it in the future.[37] There is a wide-ranging debate about the extent to which quality and other characteristics of dispute settlement can affect the real-world responses of state actors, but there is core agreement that increasing the quality of decisions improves the functioning—and corresponds to heightened perceptions of legitimacy—of a dispute settlement mechanism.

To recognize that the practical utility of international dispute settlement rests primarily on the subjective perceptions of state actors is not to say that all forms of international dispute settlement lack objectively meaningful enforcement tools. With their respective focuses on the rational, self-interested behavior of states and adjudicators, rational design and judicial politics scholars emphasize the lack of meaningful enforcement in international law.[38] But that

33. *See id.* at 51.

34. There are many ways to define the practical utility—or "effectiveness"—of a dispute settlement mechanism. Rational design theorists, for example, define effectiveness by reference to some measure of compliance, either with substantive legal obligations or with decisions. *See, e.g.*, Guzman, *supra* note 29, at 209 (defining the effectiveness as a "tribunal's ability to enhance compliance with the associated substantive obligation").

35. *See id.* at 206.

36. *See id.*

37. *See* Born, *supra* note 29, at 859–61, 868.

38. Jeffrey Dunoff and Mark Pollack have provided an excellent summary of these two veins of scholarship, both within the domestic U.S. and international contexts. *See* Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111 AM. J. INT'L L. 225, 229–33 (2017). The rational design literature does not view dispute settlement as capable of changing national interests because it understands international institutions as the products of states' rational pursuits of their own interests, although state behavior may be affected because of reputational and other costs to non-compliance. *See, e.g.*, ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 33–48 (2008) (arguing that states are rational actors and that the reputational consequences of their actions factor into their analysis of their own behaviors); Posner & Yoo, *supra* note 29, at 28 ("[Tribunals] cannot issue judgments that run contrary to the interests of the parties to a dispute. If they do so,

analysis centers on what Gary Born has called "first-generation" mechanisms—including the Permanent Court of International Justice, the ICJ, and ITLOS.[39] Investment arbitration and other "second-generation" mechanisms are enforceable in domestic courts through near-universally applicable treaties such as the New York Convention and the treaty colloquially known as the "ICSID Convention."[40] Enforcement of arbitral awards in domestic courts under these conventions is relatively effective.[41] Even though this ability to enforce international law decisions contributes to the practical utility of investment arbitration, it is still correct to say that the practical utility of investment arbitration depends primarily on the perceptions of states. This is so partly because states do in some cases have the ability to avoid the coercive reach of arbitral awards if they wish to do so, partly because states have the ability to change or abolish an existing mechanism if they are displeased with its results, and partly because the fate and features of future mechanisms depend on the views of states on existing mechanisms.

The perceptions of certain non-state actors about a mechanism's quality will also affect the mechanism's practical utility, which in turn may influence indirectly the choices of states in designing future mechanisms. Unlike a state-to-state mechanism, an investor-state mechanism, once created, has two distinct constituencies: investors, who are potential users of mechanisms but have no direct role in their design, and states, which are both designers and potential users of the mechanism.[42] Investors' perceptions of a mechanism's quality will inform their decisions as to whether to use the mechanism to resolve potential disputes, decisions that may significantly affect the practical utility of a mechanism as they are the only parties that may invoke the mechanism in most circumstances.[43] An investor-state mechanism

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their rulings will be ignored and states will use them less often."). The judicial politics literature focuses on adjudicators as rational actors who seek to maximize their utility within the constraints of political and institutional environments. *See generally* Emilie M. Hafner-Burton et al., *Political Science Research on International Law: The State of the Field*, 106 AM. J. INT'L L. 47 (2012). There are a number of other approaches and variations on approaches to the relationships among states, adjudicators, and institutions. Advocates of the constructivist approach, for example, argue that dispute settlement can redefine state interests. *See* KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS 53 (2014) ("[International courts] influence governments through alliances with compliance constituencies, ever-changing groups of domestic and international actors that actively or tacitly support compliance with international law and [international court] rulings.").

39. *See* Born, *supra* note 29, at 857–58.

40. *See id.* at 857.

41. *See id.* It is true, however, that the scope of enforcement is narrow in some cases because it is limited to assets outside a state's own borders. *See id.*

42. *See id.* at 857–58.

43. *See id.*

is of little or no utility if investors choose not to use it. The perceptions of investors will also influence indirectly the design of future dispute resolution mechanisms to the extent that states take them into account.[44]

Quality is a critical determinant of a mechanism's legitimacy, but it is not the only one. Elements that increase quality may also have negative consequences on the efficiency—especially the cost and length—of the dispute settlement process.[45] In the design and use of an investment dispute mechanism, then, states and investors must "carefully weigh the benefits and costs" of elements that are intended to increase quality.[46]

To put it another way, an element that ultimately makes a decision-maker better—and more legitimate in the eyes of designers and users—is one that contributes toward achieving what they view as optimal outcomes in both quality and efficiency.[47] And so when it comes to the specific case of fact-finding, a *better fact-finder* is more likely to achieve that optimization than others in the production, testing, and evaluation of evidence.

B. The Critical Role of Expert Evidence in International Disputes

Whether a decision-maker is able to optimize quality and efficiency in fact-finding to the liking of designers and users depends in large part on its capacity to deal with one particular type of evidence—expert witness testimony and other expert evidence. After little resort to that evidence in the first two centuries of modern international law, reliance on expert evidence has in the past forty years increased dramatically as human activity itself has become more complex—more scientific, more specialized—and international agreements have tackled progressively more complex and technical issues.[48] Today, the outcome of an investment arbitration or any other international dispute is very likely to depend on the conclusions that the decision-maker reaches based on expert evidence.[49]

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44. *See* Caron, *supra* note 31, at 49–50.

45. *See* William W. Park, *Arbitrators and Accuracy*, 1 J. INT'L DISP. SETTLEMENT 25, 27 (2010).

46. *See* Franck et al., *supra* note 30, at 1171; *see also* Caron, *supra* note 31, at 49.

47. *See* Caron, *supra* note 31, at 49–51.

48. Matthew W. Swinehart, *Reliability of Expert Evidence in International Disputes*, 38 MICH. J. INT'L L. 287, 290–302 (2017) (tracing the history of expert evidence in international disputes from 1794 to 2016).

49. *See, e.g.*, CAROLINE E. FOSTER, SCIENCE AND THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL COURTS AND TRIBUNALS: EXPERT EVIDENCE, BURDEN OF PROOF AND FINALITY 77 (2011); Kate Miles, *Climate Change: Trading, Investing and the Interaction of*

International courts and tribunals rely on expert evidence from a range of sources, including the testimony of expert witnesses, adjudicators' own analysis of complex documentary evidence, and input from specialized international organizations, or resort to non-testifying specialists.[50] Through expert evidence, international adjudicators seek to understand highly complex subjects, often far outside the domain of legal training. Decision-makers are called upon to calculate damages using the valuation methods of professional investors,[51] to evaluate the bases of environmental and health regulations relying on science and statistics,[52] to draw international boundaries using advanced mapping and geolocation technologies,[53] and to apportion natural resources with the help of hydrologists and engineers.[54]

In whatever form it takes, expert evidence has a wide-ranging and significant influence on decision-makers. It influences the outcomes of relatively binary decisions (such as whether a disputing party is liable under a particular claim),[55] decisions of degree (such as the amount of damages),[56] and the tone, terminology, and assumptions of a decision,[57] which may influence the resolution of future disputes. It is, for those reasons, central to resolution of the highest profile and most factually complex disputes, such as the arbitration

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Law, Science and Technology, *in* SCIENCE AND TECHNOLOGY IN INTERNATIONAL ECONOMIC LAW: BALANCING COMPETING INTERESTS 155–56 (Bryan Mercurio & Kuei-Jung Ni eds., 2014).

50. This Article uses the term "expert evidence" to mean evidence produced by a specialist or evidence produced by others in an attempt to substitute for evidence produced by a specialist, not simply evidence formally designated as "expert evidence." *See infra* Part II.A.

51. *See, e.g.*, Venez. Holdings B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Award, ¶ 404 (Oct. 9, 2014), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C256/DC4952_En.pdf [https://perma.cc/KUB4-CFXA].

52. *See, e.g.*, Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶ 442 (July 14, 2006), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5/DC507_En.pdf [https://perma.cc/YK25-Y5RE].

53. *See, e.g.*, Philippines v. China, PCA Case Repository 2013–19 (2016).

54. *See, e.g.*, Indus Waters Kishenganga Arb. (Pak. v. India), PCA Case Repository 2011–01, ¶ V (2013).

55. *See* FOSTER, *supra* note 49, at 177.

56. *See* SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 174 (2008).

57. *See* Caroline E. Foster, *New Clothes for the Emperor? Consultation of Experts by the International Court of Justice*, 5 J. INT'L DISP. SETTLEMENT 139, 140 (2014).

between China and the Philippines over territorial claims in the South China Sea[58] and Philip Morris's challenge to Uruguay's plain-packaging rules for cigarettes.[59]

Despite these developments, international courts and tribunals have largely failed to adapt to the rise of expert evidence. The fundamental deficiency of international law in this regard is that existing practices do not provide a framework to engage meaningfully with the substance of that evidence.[60] Meaningful engagement with a factual record at base requires the evaluation of that record's reliability, but courts and tribunals too often rely on expert evidence without doing that evaluation.[61] Even when they do examine reliability, their assessment routinely lacks rigor and transparency.[62]

This neglect can lead to misuse of unreliable expert evidence, unfair rejection of evidence that is reliable, and opaque and confused attempts to resolve conflicting evidence.[63] The role, if any, that experts play, and the extent to which adjudicators comply with the prohibition against outsourcing of their decision-making function or with requirements to state the reasons for a decision, all too often remain unclear.[64] Adjudicators may also marshal vast amounts of expert evidence simply as a way to lend credibility to an otherwise lackluster intellectual exercise.[65]

There have been efforts to reform fact-finding practices over the years, including many that affect the handling of expert evidence. For one, the mere existence of pre-established rules of evidence was once a rarity in international law,[66] but such rules became common decades ago in both institutional protocols and international agreements.[67] Notable efforts like the "Redfern Schedule" for document production requests[68] and the International Bar Association's 2010 Rules on

58. *See Philippines*, PCA Case Repository 2013–19 at ¶ 2.

59. *See* Philip Morris Brands Sàrl v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award, ¶ 9 (July 8, 2016), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1000/DC9012_En.pdf [https://perma.cc/9BDC-CJPG].

60. *See* Swinehart, *supra* note 48, at 302–17.

61. *See id.*

62. *See* FOSTER, *supra* note 49, at 133.

63. *See* Miles, *supra* note 49, at 160–61.

64. GILLIAN M. WHITE, THE USE OF EXPERTS BY INTERNATIONAL TRIBUNALS 13 (1965).

65. *See* Christophe Bonneuil & Les Levidow, *How Does the World Trade Organization Know? The Mobilization and Staging of Scientific Expertise in the GMO Trade Dispute*, 42 SOC. STUD. SCI. 75, 79 (2012).

66. *See* SANDIFER, *supra* note 28, at 35 (noting that the ICJ was once the exception to the rule that international adjudication "requires new rules of procedure" for each dispute or ad hoc tribunal).

67. *See infra* Part III.

68. *See generally* Sam Luttrell & Peter Harris, *Reinventing the Redfern*, 33 J. INT'L ARB. 353 (2016).

the Taking of Evidence in International Arbitration[69] are more recent additions to the evidentiary practices of courts and tribunals.[70] There is also a clear trend in pending reforms toward greater specificity in rulemaking, as illustrated recently in the proposed amendments to the Rules of Procedure for Arbitration Proceedings of the International Centre for Settlement of Investor Disputes (ICSID).[71]

Past reforms have led to only modest changes, with evidentiary rules remaining quite general and ineffective.[72] Few reforms have improved decision-maker engagement with evidentiary substance,[73] and robust analysis of the reliability of evidence remains the exception.[74] With respect to complex, technical, and scientific facts in particular, "traditional methods of evaluating evidence" in international law remain, in a word, "deficient."[75]

The following analysis, in Part II of the Article, asks whether the institution-enhancing features of the EU's investment court will improve on these existing methods of fact-finding in investment disputes. The conclusion here is that an investment court will not resolve concerns with fact-finding practices, and so, Part III of the Article will return to the topic of evidentiary rules outlined above and identify strategies for improving fact-finding based on reforms to those rules.

III. MEASURING THE EFFECTS OF INSTITUTIONALISM ON FACT-FINDING

An answer to the question about the effects of institutionalism on fact-finding must begin with an accounting of what is meant by

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69. *See* INT'L BAR ASS'N, IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2010); 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, *Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration* 1–4 (2010), https://www.ibanet.org/Document/Default.aspx?DocumentUid=DD240932-0E08-40D4-9866-309A635487C0 [https://perma.cc/FE43-ZQT5].

70. *See* Matthias Scherer, *The Limits of the IBA Rules on the Taking of Evidence in International Arbitration: Document Production Based on Contractual or Statutory Rights*, 13 INT'L ARB. L. REV. 195, 195 (2010).

71. *Compare* ICSID Secretariat, *Volume 2: Proposals for Amendment of the ICSID Rules—Consolidated Draft Rules* 42-43 (Int'l Ctr. for Settlement of Inv. Disputes, Working Paper No. 1, 2018), *with* INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, ICSID CONVENTION, REGULATIONS AND RULES: RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (ARBITRATION RULES) 115–16 (2006).

72. *See* SANDIFER, *supra* note 28, at 44–45.

73. *See* Swinehart, *supra* note 48, at 303.

74. *See id.*

75. *See* Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 18, 108, ¶ 3 (Al-Khasawneh, J. & Simma, J., dissenting); *see also* Lucy Reed, *Confronting Complexities in Fact-Finding and the Nature of Investor-State Arbitration*, 106 AM. SOC'Y INT'L L. PROC. 233, 233 (2012) (arguing that decision-makers "can do a better job" in fact-finding by taking steps to "control and mitigate complexities").

the term institutionalism in general—and an accounting of how an investment court represents a specific application of institutionalism. In other words, what does an investment court change about the institutional nature of investment arbitration, and what does it leave intact? After answering those threshold questions, this Part will turn to what institutionalism will mean for the fact-finding process in investment disputes.

From many angles, the EU's investment court approach does not concern itself with fact-finding practices whatsoever.[76] The EU's trade and investment agreement with Canada, the Comprehensive Economic and Trade Agreement (CETA), illustrates this point and is representative of the EU's overall approach. CETA leaves unchanged today's reliance on basic frameworks of evidentiary rules in traditional investment or commercial arbitration.[77] Those frameworks are for the most part broad and general, imposing few constraints on a decision-maker's choice of evidentiary sources, conduct of the evidence-gathering process,[78] and evaluation of evidence once gathered.[79] The priority of these frameworks is to allow decision-makers to adapt to the demands of each dispute.[80]

When it comes to expert evidence in particular, there is also no indication that the EU and Canada intend for CETA to depart from today's prevailing practices. Most dispute settlement mechanisms—including investment and commercial arbitration, the WTO, ICJ, ITLOS, and the Iran-U.S. Claims Tribunal—allow adjudicators to appoint their own experts and seek input from third-parties, including international organizations.[81] Those mechanisms, with the exception of the WTO, also expressly contemplate that the parties may appoint their own experts and present the testimony of those experts at a

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76. This observation is subject to future negotiation between the EU and Canada on the details of the appellate tribunal and administrative apparatus. *See* August Reinisch, *The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court*, CIGI, Mar. 2016, at 22, https://www.cigionline.org/sites/default/files/isa_paper_series_no.2.pdf [https://perma.cc/Y2RP-SRFE].

77. *See generally* Comprehensive Economic and Trade Agreement, Can.-E.U., Oct. 30, 2016, arts. 8.18–8.45.

78. *See, e.g.*, Anna Riddell, *Evidence, Fact-Finding, and Experts*, *in* THE OXFORD HANDBOOK ON INTERNATIONAL ADJUDICATION 848, 849 (Cesare P.R. Romano et al. eds., 2014) ("At an international level, adjudicative bodies have traditionally been afforded a very significant degree of freedom to ascertain the facts underlying their decisions."); Susan L. Karamanian, *Overstating the Americanization of International Arbitration: Lessons from ICSID*, 19 OHIO ST. J. DISP. RESOL. 5, 28 (2003) ("Like many rules of international arbitrations, the ICSID rules lack detailed evidentiary standards."); SANDIFER, *supra* note 28, at 9 ("[N]o rule of evidence thus finds more frequent statement in the cases than the one that international tribunals are not 'bound to adhere to strict judicial rules of evidence.' ").

79. *See* SERENA FORLATI, THE INTERNATIONAL COURT OF JUSTICE: AN ARBITRAL TRIBUNAL OR A JUDICIAL BODY? 72–77 (2014).

80. *See* SANDIFER, *supra* note 28, at 15.

81. *See* Riddell, *supra* note 78, at 856–57.

hearing, with the other party and the adjudicators able to ask questions, subject to the approval and control of the adjudicators.[82]

Even with this wholesale carryover of existing fact-finding practices, it is possible that the changes that CETA would make—namely, the introduction of elements that would establish an investment court—could affect the quality and efficiency of fact-finding. Both the EU and Canada have cast CETA's investment court provisions, in part, as an attempt to expand the influence that institutions and institutional actors exercise over decision-making—that is, to expand the "institutionalization" or "judicialization" of investment dispute resolution.[83] It would do so through the introduction of at least three new elements: (1) a standing administrative institution; (2) a standing tribunal to decide disputes in the first instance; and (3) a standing appellate tribunal to review first-instance decisions for error.[84]

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82. *See, e.g.*, Statute of the International Court of Justice arts. 63–65, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993; U.N. COMM. ON INT'L TRADE LAW, UNCITRAL ARBITRATION RULES: UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION arts. 27–28 (2013); PERMANENT COURT OF ARBITRATION, ARBITRATION RULES 11–12 (2012); INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, *supra* note 71, at 116.

83. *See, e.g.*, *Chapter Summaries*, GOV. CANADA, http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/chapter_summary-resume_chapitre.aspx?lang=eng#a8 [https://perma.cc/ZC68-W7C6]; *Investment Provisions in the EU-Canada Free Trade Agreement (CETA)*, *supra* note 1, at 1 (asserting that Canada and the EU have: strengthened governments' right to regulate; moved to a permanent, transparent and institutionalized dispute-settlement tribunal; revised the process for the selection of tribunal members; set out additional ethical requirements for tribunal members; and agreed to an appeal system). The parties issued a Joint Interpretative Instrument at CETA's signing, explaining that the inspiration for these efforts include the "principles of public judicial systems in the European Union and its Member States and Canada, as well as and [sic] international courts such as the International Court of Justice and the European Court of Human Rights." Joint Interpretative Instrument on CETA, *supra* note 25, at ¶ 6. Separately, the EU has indicated that an appellate tribunal "could be modelled largely on the institutional set-up of the WTO Appellate Body, with some adaptations both to make it specific for [resolution of investment disputes], and in light of experience in the WTO." *See Investment in TTIP and Beyond—The Path for Reform, supra* note 2, at 6–9. At the same time, the words "court" and "judge," common in earlier EU descriptions of the proposals, do not appear in the signed CETA text. *See* CÉLINE LÉVESQUE, THE EUROPEAN COMMISSION PROPOSAL FOR AN INVESTMENT COURT SYSTEM: OUT WITH THE OLD, IN WITH THE NEW? 3 (2016), https://www.cigionline.org/publications/european-commission-proposal-investment-court-system-out-old-new [https://perma.cc/3QKA-L3UB].

84. *See, e.g.*, Comprehensive Economic and Trade Agreement, supra note 77, at arts. 8.27, 8.28 (concerning the "Constitution of the Tribunal" and), and 8.28 ("Appellate Tribunal"). Because the terms "institutionalization" and "judicialization" have no consistent usage, this Article will not dwell on subtle distinctions between them or other words used to describe the move away from purely ad hoc arbitration and toward mechanisms that more closely resemble domestic courts. *See* Michael Wood, *Choosing Between Arbitration and a Permanent Court: Lessons from Inter-State Cases*, 32 ICSID REV. 1, 2 (2017) (noting that the similarities of arbitral and judicial mechanisms are "perhaps harder to state, but . . . more significant than the differences"); Gilbert Guillaume, *The Future of International Judicial Institutions*, 44 INT'L & COMP. L.Q. 848, 859 (1995) ("The term 'judicial institutions' may be

The first institutional element of the CETA investment court is the introduction of a standing institution, one that is likely to serve an administrative function.[85] If it is to be anything like existing institutions in the investment dispute context—such as ICSID, the Permanent Court of Arbitration (PCA), and the International Chamber of Commerce (ICC)—the CETA institution will offer services to disputing parties, supply a set of default procedural rules, and employ registries, secretariats, legal officers, or other staff.[86] "Institutional" arbitration is distinguishable from "ad hoc" arbitration, which is generally conducted without such an authority; although the parties to an ad hoc dispute may decide to borrow an institution's procedural rules.[87]

The second institutional element of CETA's investment court is the establishment of a standing first-instance tribunal, envisioned as a judicial body in the sense that, like the ICJ, ITLOS, and the WTO, it would involve decision-makers who are part of the institution, appointed for terms, and vested with authority to resolve disputes arising from future events.[88] The tribunal will consist of fifteen "members" who will hear disputes as part of randomly selected "divisions" of three, and who will serve five or six-year terms, renewable once.[89] This structure departs from existing modes of investment

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understood restrictively as applying only to courts established on a permanent basis and rendering, in law, judgments binding on the parties. One may also give to these terms a broader meaning and consider that arbitration, or at least certain kinds of arbitration, is a form of judicial settlement . . . . But international bodies do not always fit neatly into academic categories."); *see also* David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104, 128 (1990) ("In both law and science one can undertake to construct a taxonomy; but in law the categories that can be said to be *naturally* apparent flow from changing circumstances such as the organization of society and the ability of those within the society to interact."). The same terminology used to describe the elements of an investment court is occasionally used to describe a transition in international arbitration from a relatively informal system (where the parties to a dispute establish procedural and other rules for the purpose of that dispute) to one that is more procedurally complex and expensive. *See* Bernard Hanotiau, *International Arbitration in a Global Economy: The Challenges of the Future*, 28 J. INT'L ARB. 89, 99 (2011); Jan Paulsson, *Introduction*, 1 ARB. INT'L 2, 2–5 (1985) (describing the effects of an increase in litigant sophistication); Alan Redfern, *Stemming the Tide of Judicialisation*, 2 WORLD ARB. & MEDIATION REV. 21, 21–24 (2011); Posner & Yoo, *supra* note 29, at 9 (describing "judicialisation" as a process whereby dispute settlement becomes more regularized because certain procedural and other rules are not renegotiated from dispute to dispute).

85. *See* Comprehensive Economic and Trade Agreement, *supra* note 77, at art. 8.28.

86. *See* RÉMY GERBAY, THE FUNCTIONS OF ARBITRAL INSTITUTIONS 11–18 (2016). The ostensible function of CETA's administrative apparatus is to support the appellate tribunal, but presumably the parties will implement the apparatus so that it serves an administrative function with respect to both the first-instance and appellate tribunals. *See* Comprehensive Economic and Trade Agreement, *supra* note 77, at art. 8.28.

87. *See* Wood, *supra* note 84, at 2.

88. *See* Comprehensive Economic and Trade Agreement, *supra* note 77, at art. 8.27.

89. *See id.*

dispute resolution in which the institution, if any, serves only an administrative role, and the decision-makers are not part of the institution or available to resolve future disputes as they arise during a specified term. They are instead appointed for a particular dispute or set of disputes arising from past events.[90]

The third institutional element that CETA would introduce is a standing appellate tribunal, similar in some respects to the WTO Appellate Body.[91] That tribunal is to engage in substantive review of the legal and factual correctness of first-instance decisions and directly modify any erroneous aspects of those decisions.[92] By contrast, in existing investment arbitration mechanisms, awards are reviewable only for an assessment of the procedural legitimacy of the original proceeding, resulting in either validation or invalidation of all or part of the award.[93] These proceedings are also generally conducted by arbitrators appointed,[94] or domestic judges charged,[95] to assess a particular award, not by decision-makers appointed to conduct assessments of all decisions reached within an international institution.[96]

Neither the EU nor Canada has specifically marketed these institution-enhancing elements of an investment court as improvements to the fact-finding process, but others have over the years put forward three basic arguments as to why institutionalism could have positive effects on a system's handling of evidence. Because the debate over institutionalism centers on other questions of legitimacy, these arguments are usually made without any analysis specific to fact-finding.

The first and most prevalent argument is that institutionalization can improve fact-finding quality by increasing the independence of the adjudicators from disputing parties. A second argument focuses on the perceived ability of court systems, especially those with appellate

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90. *See id.*

91. *See* Koorosh Ameli et al., Task Force Paper Regarding the Proposed International Court System (ICS), EUR. FED'N INV. L. & ARB. 39-40 (Jan. 2, 2016) (draft), https://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf [https://perma.cc/UA32-9NNK].

92. Comprehensive Economic and Trade Agreement, *supra* note 77, at art. 8.28(2).

93. Caron, *supra* note 31, at 23.

94. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 52, Mar. 18, 1965, 575 U.N.T.S. 159.

95. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 5, June 10, 1958, 330 U.N.T.S. 38.

96. *See* Caron, *supra* note 31, at 23. CETA does not establish the number or tenure of appellate tribunal members and leaves open the scope of the institution's administrative functions. *See* Comprehensive Economic and Trade Agreement, *supra* note 77, at art. 8.28. Instead, the CETA Joint Committee, composed of representatives of the two parties, will "adopt a decision" on "administrative and organizational matters regarding the functioning of the Appellate Tribunal," including "administrative support," "procedures for the initiation and the conduct of appeals," and "any other elements it determines to be necessary for the effective functioning of the Appellate Tribunal." *Id.* at art. 8.28(7).

review, to enhance the consistency and predictability of fact-finding. And a third argument conceives of standing courts as institutions capable of increasing the technical, subject-matter expertise of its decisionmakers in the course of adjudicating disputes over time. The remainder of this Part examines each of these arguments in turn. The conclusion here is that an investment court is likely to have only marginal effects on fact-finding quality, possibly negative on net, while increasing the cost and length of dispute resolution.

The focus of the analysis is on quality, but it is important to acknowledge upfront—and then set aside—the related issue of efficiency in fact-finding. Regardless of whether an investment court will improve fact-finding quality, there is no serious debate about the negative trade-offs of any gains in quality that an investment court might bring.[97] All else equal, an investment court—especially a more substantial mechanism for review of decisions—will by its own terms introduce more process and delay finality.[98] It will also introduce, because of the standing and institutionalized nature of the court, overhead costs necessary to compensate adjudicators and staff when they are idle and to operate the mechanism's additional facilities and infrastructure.[99] All else equal, that means that disputing parties will spend more time and money resolving their disputes through an investment court than through existing forms of investment arbitration.

It is, of course, possible to mitigate these costs—or even to streamline the process in certain respects—with time limits, fee caps, part-time staffing, or other innovations.[100] But the same innovations are available to mechanism designers with or without the added institutionalism of an investment court. Even the proponents of an investment court do not argue that the court's institutional elements will do anything other than degrade efficiency.[101] In the end, as

97. *See, e.g.*, Joerg Risse, *A New "Investment Court System"—Reasonable Proposal or Nonstarter?*, GLOB. ARB. NEWS (Sept. 25, 2015), http://globalarbitrationnews.com/investment-court-system-20150925/ [https://perma.cc/F3M3-9JS7].

98. Mirjam van de Hel-Koedoot, *The Proposed New Investment Court System for TTIP: The Right Way Forward?*, EUR. FED'N FOR INV. L. & ARB. BLOG (Oct. 14, 2015), http://efilablog.org/2015/10/14/the-proposed-new-investment-court-system-for-ttip-theright-way-forward/ [https://perma.cc/CJ8Z-L3C3].

99. *See* INT'L BAR ASS'N ARBITRATION SUBCOMM., CONSISTENCY, EFFICIENCY AND TRANSPARENCY IN INVESTMENT TREATY ARBITRATION 33-34 (2018), https://www.ibanet.org/Document/Default.aspx?DocumentUid=a8d68c6c-120b-4a6a-afd0-4397bc22b569 [https://perma.cc/WP7J-VRDF].

100. Although the CETA Joint Committee will determine the details of the CETA investment court's procedural framework at a later date, the EU has indicated that it will seek to clarify and reduce procedural deadlines. *See, e.g.*, European Commission Press Release MEMO/15/6060, Why the New EU Proposal for an Investment Court System in TTIP Is Beneficial to Both States and Investors (Nov. 12, 2015).

101. The EU has been clear that it believes rule changes—rather than institutional elements—will lead to efficiency gains. *See id.* ("The system has clear *procedural deadlines* to ensure fast dispute settlement and to keep costs low.") (emphasis added).

discussed in Part I.A, a mechanism's designers and users will weigh to varying degrees these efficiency trade-offs of an investment court against any gains in quality.

A. The Effects of Independence on Fact-Finding Quality

The ongoing debate about the legitimacy of international dispute settlement is, to a significant extent, a debate over the independence of decision-makers from the parties to a dispute. It is no surprise, then, that the most common argument made in support of furthering institutionalism and judicialization in dispute settlement is that it will increase the independence of decision-makers from the disputing parties and, as a result, enhance overall decisional quality.[102] The EU and Canada have themselves touted the increased independence of CETA's investment court as a key selling point.[103]

Although the topic of independence has generated considerable debate among rational design and judicial politics scholars,[104] there is no serious question that independence from disputing parties "makes individual judges or arbitrators more neutral and their decisions less biased."[105] By freeing decision-makers to decide cases based on their own views of the facts and the law, rather than the views of the disputing parties, independence generates higher quality outcomes.[106]

The following analysis first seeks to confirm the claim that an investment court will enjoy a higher degree of independence by creating a framework for scoring independence on a numerical scale. After confirming the claim of the EU and Canada that CETA is likely to increase the independence of investment dispute resolution, the analysis then asks whether that independence will improve fact-finding. The conclusion here, in contrast to what general theories

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102. *See, e.g.*, Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. 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 [https://perma.cc/3T7K-XYGT] (arguing that there is a lack of arbitrator independence in investment arbitration).

103. *See, e.g.*, Joint Interpretative Instrument on CETA, *supra* note 25, at ¶ 6.

104. This debate has been focused on whether independence makes a decision more or less "effective." *See supra* note 29 and accompanying text.

105. *See* Guzman, *supra* note 29, at 209.

106. *See, e.g.*, *id.* at 208-13; Benedict Kingsbury, *Neo-Madisonian Global Constitutionalism: Thomas M. Franck's Democratic Cosmopolitan Prospectus for Managing Diversity and World Order in the Twenty-First Century*, 35 N.Y.U. J. INT'L L. & POL. 291, 296 (2003); Helfer & Slaughter, *supra* note 29, at 901-09. Independence may also free decision-makers to pursue, to the detriment of quality, their own objectives, such as the achievement of particular public policies, attendance to the interests of non-disputing states or interest groups, or the enhancement of the dispute settlement system's authority and prestige. *See, e.g.*, Lawrence Baum, *What Judges Want: Judges' Goals and Judicial Behavior*, 47 POL. RES. Q. 749, 752 (1994).

of independence usually predict, is that independence, especially of the type CETA will provide, is likely to have only marginal effects on fact-finding quality, likely negative on net.

1. Measuring Independence in International Dispute Settlement

There is no precise way to measure independence, but a useful numerical scale of relative independence developed by Eric Posner and John Yoo confirms what the EU and Canada have been saying: that its investment court is likely to exhibit a higher degree of independence than today's investment arbitration mechanisms.[107] In their original assessment, Posner and Yoo scored twelve dispute settlement systems according to the number of independence-enhancing attributes that they possess, with zero representing the lowest degree of independence.[108] An archetypal dependent tribunal—with a score of zero—would lack these characteristics and exist only on an ad hoc basis, with decision-makers closely controlled by disputing parties through the power of reappointment or threats of retaliation.[109]

Posner and Yoo identified five core attributes of independence, roughly defined as: (1) the possibility that a state could be bound to a ruling without its consent in a particular dispute; (2) the possibility that no national of the state parties is on the panel that hears the dispute; (3) the ability of third parties to participate in the proceeding; (4) a permanent body of judges; and (5) judicial tenure that extends beyond a given dispute.[110] Others have identified additional factors, such as (6) an adequately funded administrative apparatus[111] and (7) non-renewable terms,[112] that tend to increase a mechanism's independence, bringing the number of potential characteristics of independence to at least seven. There are likely many others.

A numerical score calculated in this way is an imprecise measure, to be sure. For one, there is disagreement as to what constitutes an independence-enhancing attribute.[113] And a score calculated using simple addition does not attempt to weight attributes based on their relative effects on independence, even though it is clear that some attributes contribute to independence more than others.[114] The scale also does not attempt to account for potentially meaningful differences

107. *See* Posner & Yoo, *supra* note 29, at 52 (measuring the relative independence of state-to-state disputes).

108. *See id.*

109. *Id.* at 8, 27.

110. *See id.*

111. *See* Guzman, *supra* note 29, at 207–09.

112. *See* Dunoff & Pollack, *supra* note 38, at 259.

113. *See id.*; Guzman, *supra* note 29, at 207–09; Posner & Yoo, *supra* note 29, at 52.

114. *See* Dunoff & Pollack, *supra* note 38, at 258–59 (emphasizing the importance of non-renewable terms to independence).

across mechanisms with respect to a particular attribute, such as differences in the length of adjudicator terms.[115] A nine-year term could have more independence-enhancing effects than a four-year term, for example, even if the term is renewable, because threats of retaliation or the prospect of no reappointment may matter less to an adjudicator with a lengthier job contract. Despite these obvious shortcomings, the Posner-Yoo scale nevertheless provides a useful framework for assessing the relative independence of international courts and tribunals.

Using a modified version of the Posner-Yoo scale, Figure 1 below compares the independence of the CETA investment court at both the fact-finding and appellate stages to that of other international courts and tribunals. This "Modified Posner-Yoo" scale examines seven attributes of independence, including the five used in the original Posner-Yoo scale and the two additional attributes identified by others.

Four of the attributes are "rules-based." Whether a third-party can participate in a dispute, for example, is an attribute that depends on the existence of a written provision in an international agreement, institutional framework, or an ad hoc agreement to arbitrate. That provision, or rule, has effect with or without a standing institution. The remaining three attributes are "institution-based" in the sense that they are available only to mechanisms with a standing institution of some kind. A standing body of judges, judicial terms that extend beyond a given dispute, and an administrative apparatus are attributes that each depend on the existence of an institution.

Because the original scale was limited to state-to-state disputes, the Modified Posner-Yoo scale presented here makes one other change, adding three varieties of investor-state dispute settlement—a CETA-style mechanism, ad hoc investment arbitration, and institutional investment arbitration. (It also adds the Iran-U.S. Claims Tribunal because of its relatively high dispute frequency and lengthy tenure.) At the same time, the modified scale omits any mechanism considered in the original that is inactive, confined to regional integration arrangements, or devoted to claims not arising under international economic law.[116]

115. *See* Posner & Yoo, *supra* note 29, at 8, 27, 52.

116. The Modified Posner-Yoo scale omits the Permanent Court of International Justice, the pre-WTO General Agreement on Trade and Tariffs mechanism, the European Court of Justice, the European Court of Human Rights, the Inter-American Commission on Human Rights, and the International Criminal Court. *See* Posner & Yoo, *supra* note 29, at 52.

Mechanism	Posner-Yoo Attributes of Independence			Other Possible Attributes of Independence				Modified PY Independence Score
				Institutional Attributes				
	Compulsory Jurisdiction	No Right to Nationals	Third-Party Intervention	Permanent Body of Judges	Terms Beyond a Single Dispute	Admin. Apparatus	Non-renewable Terms	
CETA	yes	no	yes	yes (yes)	yes (yes*)	yes* (yes)	no (no)	5* (5*)
Ad hoc ISDS	yes	no^	varies	no	no	no	no	1-2
Institutional ISDS	yes	no^	varies	no	no	yes	no	2-3
Ad hoc state-to-state arbitration	no	no	no	no	no	no	no	0
PCA	no	no	no	no	no	yes	no	1
Iran-US Claims Tribunal	no	no	no	no	yes	yes	yes	3
WTO	yes	yes	yes	no (yes)	no (yes)	yes (yes)	no (no)	4 (6)
ITLOS	yes	no	yes	yes	yes	yes	no	5
ICJ-other	no	no	yes	yes	yes	yes	no	4
ICJ-compulsory	yes	no	yes	yes	yes	yes	no	5

Figure 1: Relative Independence of Selected International Courts and Tribunals at the Fact-Finding (and Appellate) Stages According to the Modified Posner-Yoo Scale[117]

According to the Modified Posner-Yoo (MPY) scale, the ICJ, ITLOS, and the WTO are the most independent among existing mechanisms, with scores ranging from four to five at the fact-finding stage (MPY 4-5); ad hoc state-to-state arbitration is the most dependent, with a score of zero (MPY 0); ad hoc investment arbitration and institutional investment arbitration are relatively dependent, with a range from one to three (MPY 1-3); and the Iran-U.S. Claims Tribunal occupies a

117. Asterisks indicate assumptions about CETA's features that are only tentative given that the CETA Joint Committee had not at the time of writing made decisions on many details of the investment court, including the term of the members of the appellate tribunal and the nature of the administrative apparatus. The carrot symbols indicate that, while most investment arbitration mechanisms permit disputing parties to appoint a national of the party (in the case of a government party) or a national of the home government (in the case of an investor), a small minority of mechanisms may prohibit the appointment of such nationals. *See, e.g.*, Agreement Between the United States of America, the United Mexican States, and Canada, art. 14.D.6, Nov. 30, 2018, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between [https://perma.cc/2AVX-9HAD] (Selection of Arbitrators) (following the general approach and allowing disputing parties to appoint nationals, in the investor-state mechanism agreed between United States and Mexico). Information with respect to appellate mechanisms is included in parentheticals.

middle ground, with a score of three (MPY 3). These scores largely coincide with the conclusions of other observers as to the independence or dependence of these mechanisms.[118]

The WTO's score requires additional explanation. Although highly independent at the appellate stage (MPY 6), it is slightly more dependent at the panel stage (MPY 4) because, unlike the WTO Appellate Body, panels are not standing bodies and do not have adjudicators with terms beyond a single dispute.[119] The lack of these two attributes in particular may mean that the parties to a dispute exercise significant control over the appointment of panelists.[120] This has precluded consensus among observers as to the degree of the WTO's dependence or independence.[121] As discussed further below, this lack of theoretical consensus bears out in the fact-finding context at least, as the WTO engages in some hybrid fact-finding practices that defy simple categorization along dependent or independent lines.

As compared to ad hoc investment arbitration (MPY 1-2), CETA adds all three institutional elements that increase independence—a standing body of judges, judicial terms that extend beyond a given dispute, and an administrative apparatus—scoring a five at the fact-finding stage (MPY 5). (CETA does not change the status quo with respect to the rules-based elements of independence.[122]) This confirms that the CETA investment court would transform what is today a

118. For example, most assessments have concluded that the ICJ is relatively independent. *See, e.g.*, Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271 (2003). *But see* Dunoff & Pollack, *supra* note 38, at 259 (concluding that the ICJ is relatively dependent, primarily due to renewable terms staggered so that appointments occur every three years, but acknowledging that "many respected observers concluding that judicial independence at the ICJ is high"). Investment arbitration in its current forms is generally considered relatively dependent. *See* Born, *supra* note 29, at 873.

119. The WTO is widely cited as relatively independent overall. Dunoff & Pollack, *supra* note 38, at 262 ("[M]ost assessments have found that the [WTO] dispute system is highly independent from the litigants and member states."). But the WTO Appellate Body's relatively short terms and the ability of states to associate Appellate Body members with certain outcomes may mean that it is less independent in practice. *See id.* at 271.

120. *See generally* Ryan Brutger & Julia C. Morse, *Balancing Law and Politics: Judicial Incentives in WTO Dispute Settlement*, 10 REV. INT'L ORGS. 179 (2015); *see also* Born, *supra* note 29, at 872-73 (classifying WTO panels as relatively dependent because parties exercise significant control over panel appointments). *But see* Joost Pauwelyn, *The Rule of Law Without the Rule of Lawyers: Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus*, 109 AM. J. INT'L L. 761, 784-87 (2015) (arguing that WTO panels "are more 'neutrally' appointed" than ICSID arbitrators).

121. *See* Dunoff & Pollack, *supra* note 38, at 262, 271.

122. Existing investment arbitration mechanisms vary with respect to the ability of third parties to participate in proceedings. CETA, meanwhile, provides explicitly for a form of third-party participation because it contemplates participation of the non-disputing treaty party (*i.e.*, the home government of the investor) through written and oral submissions "regarding the interpretation of the agreement." *See* Comprehensive Economic and Trade Agreement, *supra* note 77, at art. 8.38.

relatively dependent form of dispute settlement into one that is at the high-end of the independence scale, in line with and possibly even surpassing the high degree of independence associated with the ICJ, ITLOS, and the WTO.

2. *Measuring the Effects of Independence on Fact-Finding Quality*

If an investment court will exhibit higher degrees of independence from disputing parties, what does that mean for the quality of fact-finding in investment disputes? Rote application of the general consensus on independence would lead to a conclusion that greater independence yields higher quality fact-finding. But, such a conclusion would ignore the specific and complicating characteristics of fact-finding.

A theory of independence and fact-finding must take into account a distinction between the two most basic components of the fact-finding process.[123] The first component involves the *production and testing* of evidence.[124] Evidence production and testing leads to the creation of a factual record, based on submissions of documentary evidence, witness testimony, and other sources.[125] As the evidence is produced, the parties and the decision-maker both begin to test the evidence for reliability through information exchanges, cross-examination, written questions, and other forms of adversarial or adjudicatory prodding.[126]

The second component of fact-finding involves the *evaluation* of evidence.[127] The outcome of this fact-finding component is a set of factual determinations that are based on the evidence making up the factual record, ideally as weighted according to the relative reliability of sources.[128]

With respect to the second component, evidence evaluation, applying general theories of independence to fact-finding suggests that an investment court will engage in higher quality evaluations of evidence because decision-makers will reduce "reliance on the parties" at the evaluation stage,[129] allow them to "accept views beyond those of the

123. This is of course just one of many ways to conceptualize the fact-finding process. Especially in common law jurisdictions, there is an argument, for example, that "admissibility" is distinct from production, testing, and evaluation. *See* SANDIFER, *supra* note 28, at 176–96.

124. *See id.* at 1–29 (distinguishing between the evaluation and production components of fact-finding).

125. *See id.*

126. *See id.*

127. *See id.*

128. *See id.* These two components of fact-finding are of course not temporally exclusive. Decision-makers as a practical matter do not wait to evaluate evidence until the evidentiary record is complete.

129. *See, e.g.*, Guzman, *supra* note 29, at 208–09 n.114.

litigants,"[130] and focus the decision-maker on the facts of the case rather than the preferred outcomes of the disputing parties and the potential implications of those preferences on the decision-maker.[131] There is no reason to doubt that these specific applications of general theory hold and that independence will, all else equal, improve the quality of the evaluation component of fact-finding.

With respect to the first component, evidence production, general theory predicts that independence from the disputing parties means independence from their presentations of evidence. Independent decision-makers are thus more likely to "play an active role in the collection of factual evidence,"[132] conduct evidence gathering "without reliance on the parties,"[133] and "discover the truth independently of the information and evidence brought by the parties."[134] Enhancing independence, in other words, may mean that decision-makers become more self-reliant.[135]

The natural result of self-reliance is a decrease in opportunities for meaningful production and testing of party-presented evidence and meaningful party participation in the production and testing of adjudicated-generated evidence. Theory predicts,[136] and experience with actual courts and tribunals confirms,[137] that self-reliant decision-makers are less likely to emphasize the production and testing of party-presented evidence, whether in written or oral form. They are instead more likely to do their own research, perform their own review of complex documentary evidence, and rely on informal input from administrative staff or other non-party sources.[138]

By contrast, in relatively dependent systems, such as existing forms of investment arbitration (MPY 0-2), it is the parties who are primarily responsible for supplying evidence.[139] The system trusts the adversarial process—including the ability of counsel to cross-examine experts

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130. *See* Alvarez, *supra* note 3, at 165–66.

131. *See* Guzman, *supra* note 29, at 209 ("The connection between independence and information is clear: greater independence makes individual judges or arbitrators more neutral and their decisions less biased. Put another way, as tribunals become more dependent, it is more likely that a ruling is the product of political forces rather than a judgment about the relevant legal rules and their application to the facts.").

132. WHITE, *supra* note 64, at 4.

133. *See, e.g.*, Guzman, *supra* note 29, at 208–09 n.114.

134. WHITE, *supra* note 64, at 4.

135. *See id.* at 4–5; *see also* ALTER, *supra* note 38, at 186 (noting that the Iran-U.S. Claims Tribunal "became increasingly legalized and judges increasingly independent" over time).

136. *See, e.g.*, Guzman, *supra* note 29, at 208–09 n.114.

137. *See, e.g.*, WHITE, *supra* note 64, at 4–5.

138. *See infra* notes 146-166 and accompanying text.

139. *See* CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 199–200, 202 (1998); Born, *supra* note 29, at 874–75.

of the other party—as the primary means to explore the reliability of evidence.[140] Theories of independence suggest that this is because dependent decision-makers are reluctant to appear uninterested in the presentations of the disputing parties.[141] In other words, they are less self-reliant in fact-finding than their independent counterparts.

The relative independence or dependence of a decision-maker, then, coincides with a tendency toward or away from self-reliance in the production and testing of evidence. And it is this relationship between independence and self-reliance that leads relatively independent decision-makers astray. The tendency of self-reliance to diminish opportunities for the disputing parties to produce and test evidence and, ultimately, to create a usable and reliable factual record, has negative effects on quality.[142] The parties are, after all, the best sources of evidence because they are the ones that were involved in the situation that gave rise to the dispute.[143] The pull of party self-interest, at the same time, facilitates the exchange and testing of information.[144] For those reasons, most evidentiary rules attempt

140. *See* Swinehart, *supra* note 48, at 303–04.

141. *See, e.g.*, Guzman, *supra* note 29, at 208–09 n.114.

142. *See* MICHELLE T. GRANDO, EVIDENCE, PROOF, AND FACT-FINDING IN WTO DISPUTE SETTLEMENT 307–08 (2009). Self-reliance in the production of evidence may improve quality in limited circumstances such as when the parties are unable or unwilling to produce their own evidence. *See* SANDIFER, *supra* note 28, at 4 & n.7. The tribunal in the *South China Sea Arbitration*, for example, engaged in substantial judicial fact-finding, where China had refused to participate in the proceedings, in fulfilling its duty under Annex VII of the United Nation Convention on the Law of the Sea to "satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law" where a party is absent from the dispute. *See* Philippines v. China, PCA Case Repository 2013–19, ¶¶ 129–42 (2016). The tribunal supplemented the factual submissions of the Philippines by appointing a number of experts and independently obtaining historic survey records, but it provided opportunities for the Philippines (and China if it wished) to participate in the production of that evidence and to comment on it. *See* Harry Ormsby, *Judicial Fact-Finding and the South China Sea Arbitration*, KLUWER ARB. BLOG (Sept. 6, 2016) http://arbitrationblog.kluwerarbitration.com/2016/09/06/judicial-fact-finding-and-the-south-china-sea-arbitration/ [https://perma.cc/T4BW-FA2X].

143. *See* GRANDO, *supra* note 142, at 15.

144. *See id.*; Helfer & Slaughter, *supra* note 3, at 304 & n.122 (highlighting the importance of an adversarial fact-finding process in all domestic legal systems and noting that in both common law and civil law jurisdictions judges are "highly dependent on the parties for presentation of the evidence"); *see also* GEOFFREY C. HAZARD, JR. & MICHELE TARUFFO, AMERICAN CIVIL PROCEDURE: AN INTRODUCTION 86 (1993).

to guarantee,[145] and general principles of international law call for,[146] a central role for the disputing parties in the production and testing of evidence.

It is no surprise, then, that the limited praise that international law has garnered in evidentiary production and testing has been directed toward dependent mechanisms.[147] The focus of dependent fact-finders on the adversarial process and the fact presentations of the parties is widely thought to produce the type of "substantial fact-finding"[148] and comprehensive evidentiary records that provide the minimum necessary basis to tackle the complex questions presented in international disputes.[149]

Similarly, it is no surprise that the widespread criticisms of evidentiary production and testing in international law have focused on relatively independent mechanisms.[150] Observers and even members of the ICJ (MPY 4-5) have repeatedly noted the Court's reluctance to engage with party-produced expert evidence of any sort[151] or to otherwise engage with complex evidence in a manner that affords the disputing parties an opportunity to test any evidence that is produced.[152] The ICJ is known instead for a tendency to rely on documentary evidence rather than oral testimony[153] and for "attach[ing]

145. *See, e.g.*, Statute of the International Court of Justice, *supra* note 82, at arts. 63, 65–66; U.N. COMM. ON INT'L TRADE LAW, *supra* note 82, at art. 27; INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, *supra* note 71, at 115–16; PERMANENT COURT OF ARBITRATION, *supra* note 82, at 11–12.

146. *See* CHARLES T. KOTUBY JR. & LUKE A. SABOTA, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES 179 (2017) ("[D]ue process is denied when the decision is based upon evidence and argumentation that a party has been unable to address."); SANDIFER, *supra* note 28, at 105, 108, 113 ("It is an established principle of modern judicial procedure that judgments can only be based upon allegations fully proved by competent evidence produced before the court or admitted by the parties."); WHITE, *supra* note 64, at 11, 14.

147. *See* Born, *supra* note 29, at 873–76.

148. *See id.*; *see also* Rosalyn Higgins, *The Desirability of Third-Party Adjudication: Conventional Wisdom or Continuing Truth*, *in* INTERNATIONAL ORGANIZATION: LAW IN MOVEMENT 37, 42–46 (James E.S. Fawcett & Rosalyn Higgins eds., 1974).

149. *See* Shari Seidman Diamond, *Psychological Aspects of Dispute Resolution: Issues for International Arbitration*, *in* INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS 327, 340–41 (Albert Jan van den Berg ed., 2003).

150. As José Alvarez has argued, "[i]nternational courts, including the European ones that presumably the EU has in mind as models, have not always issued the well-reasoned decisions that rule of law proponents want nor engaged in the credible fact-finding that is crucial to many [investor-state dispute settlement] disputes." Alvarez, *supra* note 27.

151. *See, e.g.*, Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 18, 108, ¶¶ 3–13 (Apr. 20) (Al-Khasawneh, J. & Simma, J., dissenting).

152. *See* Riddell, *supra* note 78, at 857 (noting this phenomenon with respect to Court-appointed experts).

153. *See* John R. Crook, *Fact-Finding in the Fog: Determining the Facts of Upheaval and Wars in Inter-State Disputes*, *in* THE FUTURE OF INVESTMENT ARBITRATION 313, 315–20 (Catherine A. Rogers & Roger P. Alford eds., 2009).

considerable probative value to reports compiled and communicated by [United Nations] agencies,"[154] including the World Health Organization and other international organizations.[155] The ICJ (MPY 4-5) is also the most well-known example of an institution whose adjudicators rely on informal input from third-parties who are not formally appointed as expert witnesses,[156] while ITLOS (MPY 5) also appears to rely on this type of "unseen expert."[157]

In addition, the decision-makers at the ICJ, ITLOS, and the WTO (MPY 4-6) appear to engage in their own factual research, what is sometimes referred to as "judicial fact-finding."[158] The dangers of judicial fact-finding—or more aptly, "judicial self-study"—are clear. Judicial self-study increases the frequency and effects of errors in evidence production and testing[159] because lawyers are not equipped by virtue of their legal training to assess and weigh complex scientific, economic, or other technical evidence.[160] It also diminishes or prevents any opportunity for the parties to subject expert evidence to critical and transparent assessment, raising a concern that the decision-

154. ANNA RIDDELL & BRENDAN PLANT, EVIDENCE BEFORE THE INTERNATIONAL COURT OF JUSTICE 237 (2009).

155. *See, e.g.*, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. Rep. 66, ¶¶ 23–24 (July 8). This could present a dynamic akin to the special standing observed in the U.S. Supreme Court for the solicitor general's office and other government actors. *See generally* Nancy Morawetz, *Convenient Facts: Nken v. Holder, the Solicitor General, and the Presentation of Internal Government Facts*, 88 N.Y.U. L. REV. 1600, 1606–07 (2013).

156. *See* Girgio Gaja, *Assessing Expert Evidence in the ICJ*, 15 L. & PRAC. INT'L CTS. & TRIBUNALS 409, 413 (2016) ("The Court has often attempted to acquire scientific or technical knowledge by informally consulting experts."); Arg. v. Uru., 2010 I.C.J. at 108, ¶ 14; *but see* SANDIFER, *supra* note 28, at 162–63 (noting in 1975 that the Court's registrar participated in the production of evidence only "to a very limited extent").

157. *See generally* Guillaume Y.J. Gros, *Unseen Experts as Unseen Actors: Ghosts in International Adjudication*, *in* UNSEEN ACTORS IN INTERNATIONAL ADJUDICATION (Freya Baetans ed., 2019).

158. The conclusion that self-reliant adjudicators in the international context are more likely to engage in their own fact-finding is consistent with examinations of U.S. appellate courts. A review of fact-finding in the U.S. Supreme Court, for example, examined instances in which individual justices did their own research using textbooks and other documents, noting certain members of the court had "regularly" conducted their own review of studies and other evidence. *See* Ryan Gabrielson, *It's a Fact: Supreme Court Errors Aren't Hard to Find*, PROPUBLICA (Oct. 17, 2017, 8:00 AM), https://www.propublica.org/article/supreme-court-errors-are-not-hard-to-find [https://perma.cc/W6KG-VQCQ]; *see also* Linda Greenhouse, *How Judges Know What They Know*, N.Y. TIMES (Mar. 29, 2018), https://www.nytimes.com/2018/03/29/opinion/supreme-court-judges-decisions.html [https://perma.cc/5GZ2-JPYD] (describing concerns with fact-finding attempts of U.S. appellate judges).

159. *See* Gabrielson, *supra* note 158 (arguing that, in *Maryland v King*, 569 U.S. 435 (2013), Justice Anthony Kennedy "inaccurately defin[ed] scientific terms" and "overstated the reliability of DNA analysis" after his own review of a textbook and that, in *Shelby County v. Holder*, 570 U.S. 529 (2013), Chief Justice John Roberts included a table of inaccurate voting registration data in his majority opinion).

160. Arg. v. Uru., 2010 I.C.J. at 108, ¶ 4.

maker has relied on "intuition or supposition."[161] And, as with other self-reliant practices, judicial self-study seems in conflict with general principles of international law, namely that "courts and tribunals may take judicial notice of facts" only if they "are of common knowledge or public notoriety."[162]

Experience also suggests that relative independence coupled with a high degree of institutionalization may encourage "institutional fact-finding"—reliance on specialized input from an institution's own in-house team of administrative or research staff. This is a particularly negative consequence of self-reliance. The three most independent existing mechanisms examined here, the ICJ, ITLOS, and the WTO, are all known for engaging in this type of fact-finding.[163] At the WTO, for example, the Secretariat's Economic Research and Statistics Division routinely provides support to panels on economic questions.[164] Decision-makers who consult with institutional staff generally do not make that work available to the parties or the public and do not disclose in their decisions if or how they relied on that work, affording no opportunity for the parties to participate in the selection of "experts," to challenge their conclusions, or to introduce rebuttal evidence.[165]

Taking stock of these experiences as a whole, they appear to confirm what theory would predict.[166] Rational design and judicial

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161. *See* Franck et al., *supra* note 30, at 1171.

162. *See* KOTUBY & SABOTA, *supra* note 146, at 190–91; *see also* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 303 (George W. Keeton & Georg Schwarzenberger eds., 1953) ("Proof may thus be dispensed with as regards facts which are of common knowledge or public notoriety or which, in the circumstances of the case, are self-evident."). Bin Cheng noted that the site visits conducted in many cases, including those involving border disputes, "present[] considerable affinity with judicial notice." *See id.* at 304.

163. *See generally* Gros, *supra* note 157; *see also* Arg. v. Uru., 2010 I.C.J. at 108, ¶ 4.

164. *See* Chad P. Bown, *The WTO Secretariat and the Role of Economics in DSU Panels and Arbitrations* 36 (Aug. 1, 2008) (unpublished manuscript), https://ssrn.com/abstract=1274732 [https://perma.cc/5T9U-RRBD] ("The WTO's DSU adjudication process inherently involves bringing about changes to Member nation's economic policies. Therefore, panellist [sic] and arbitrator's decisions and rulings should be informed by the best available economic analysis and support that the Secretariat can provide.").

165. *See* Gros, *supra* note 157; Gaja, *supra* note 156, at 413.

166. As noted above, application of the self-reliance theory predicts that WTO panels would exhibit certain hybrid fact-finding characteristics that might defy their relatively high Modified Posner-Yoo score of four. *See, e.g.*, Born, *supra* note 29, at 874–75 (arguing that WTO panels engage in more substantial fact-finding based on party-presented evidence than "first-generation" tribunals like the ICJ). For instance, despite a lack of procedural rules providing for the examination of witnesses at panel hearings, parties to a WTO dispute (and third-party participants) often present fact testimony and specialized evidence through delegation members, including lawyers, economists, and scientists. *See* Swinehart, *supra* note 48, at 298–99. This means that they essentially serve as fact and expert witnesses. *See* Joost Pauwelyn, *Expert Advice in WTO Dispute Settlement*, *in* TRADE AND HUMAN HEALTH AND

politics theories suggest that independence should lead to higher quality *evaluations* of evidence, and there is no reason to doubt that conclusion here. But theory, upon closer inspection, also predicts that independence may depress fact-finding quality in a number of ways, because it leads to self-reliant practices in the *production and testing* of evidence that are less transparent, robust, and intellectually sound. A survey of practices at a range of courts and tribunals confirms these predictions, with the added complication that highly institutionalized mechanisms may introduce especially unsound practices.

It is not enough to have "quality" tendencies in the evaluation of evidence. Even the most unbiased and qualified decision-maker cannot come to accurate factual determinations on the basis of an incomplete or faulty evidentiary record. The downsides of self-reliance may explain why even highly independent decision-makers struggle to engage in quality fact-finding as well as why users of dispute settlement remain dissatisfied with fact-finding practices across nearly every mechanism.

None of this is to say that *dependence* resolves concerns about fact-finding quality. There is no doubt that independence generally improves quality, and it is clear that relatively dependent decision-makers today continue to share with their more independent counterparts an inability to handle factual complexity.[167] What this analysis shows is that independence is, at best, an incomplete solution to concerns about fact-finding quality. It is also possibly a source of unintended—and negative—consequences. Reforming fact-finding practices is not so simple, then, as enhancing the institutional character of a fact-finder in an effort to increase its independence. This Article will return in Part III to the question of alternative reforms, identifying non-institutional influences that can improve fact-finding.

B. The Effects of an Investment Court on Consistency and Predictability in Fact-Finding

A second possible benefit of enhancing the role of institutions and institutional actors in fact-finding is that it will—primarily through the introduction of substantive appellate review—promote consistency and predictability.[168] This is a corollary to broader arguments made in support of the increased institutionalization of investment courts. The EU and Canada intend for CETA's appellate tribunal, for example, to

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SAFETY 235, 251–52 (George A. Bermann & Petros C. Mavroidis eds., 2006). Disputing parties, at the same time, remain unable to cross-examine these delegation members. *See id.* at 251.

167. *See supra* Part I.B.

168. *See, e.g.*, Riddell, *supra* note 78, at 849–50.

correct legal errors and instill greater consistency in case law.[169] But fact-finding is distinct from legal interpretation in several ways that likely inhibit any positive effects that institutionalism may have on consistency and predictability in fact-finding.

1. *Consistency and Predictability in Legal Interpretation*

To understand how investment court elements might affect the consistency and predictability of fact-finding, it is important to first review how theories of consistency apply to legal interpretation. Consistency and predictability in legal interpretation are a function of three interdependent elements: (1) the degree to which rules are written into legal texts; (2) the capacity of a mechanism to interpret those rules in a manner that future decision-makers will follow; and (3) the availability and scope of an appellate review mechanism that can reconcile competing interpretations. The efficacy of the second element in achieving consistency and predictability in legal interpretation depends on the first element, while the third element depends on both of the first two elements. A simple stack model, as shown in Figure 2 below, illustrates this hierarchy of dependent relationships.[170]

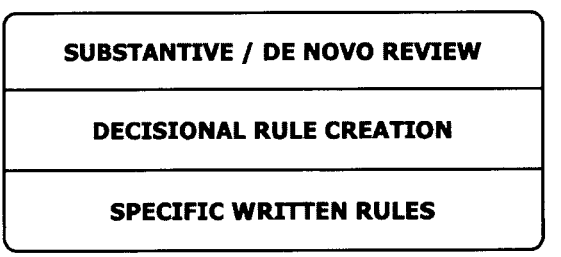

Figure 2: Model of Consistency and Predictability in Legal Interpretation

169. Joint Interpretative Instrument on CETA, *supra* note 25, at ¶ 6(g). Other proposals for appellate review in investment arbitration also center on objectives related to consistency and predictability of legal interpretation. *See, e.g.*, Freya Baetans, *Keeping the Status Quo or Embarking on a New Course? Setting Aside, Refusal of Enforcement, Annulment, and Appeal*, *in* REASSERTION OF CONTROL OVER THE INVESTMENT TREATY REGIME 103, 114–15 (Andreas Kulick ed., 2017); Irene J. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. INT'L L. & POL. 1109, 1111–12 (2012) ("In investment arbitration, . . . proposals call for the creation of a permanent appeals facility that articulates coherent interpretations of substantive terms in investment treaties."); Gantz, *supra* note 1, at 42–45. This Article does not consider whether existing investment arbitration does in fact lack consistency or predictability in legal interpretation. *See* José E. Alvarez, *Implications for the Future of International Investment Law*, *in* APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 29, 33 (Karl P. Sauvant ed., 2008) ("Creating a super-tribunal of investment judges may be a solution in search of a problem—if the lack of consistent results proves not as serious in reality as in prediction.").

170. The stack concept originated in the context of the internet, which is composed of various protocols that build on one another so that hardware can communicate in ways that are intuitive to humans. *See* Henrik Frystyk, *The Internet Protocol Stack*, W3 (July 1994), https://www.w3.org/People/Frystyk/thesis/TcpIp.html [https://perma.cc/A524-NH24].

Specific Written Rules—The first element of this stack model—the existence of specific written rules—is a feature of all international dispute settlement mechanisms. Each mechanism facilitates the resolution of disputes that arise out of one or more legal texts with substantive legal obligations.[171] The legal text serves as a fixed reference point for decision-makers who must justify their interpretations of the plain text, ensuring some degree of consistency and predictability.[172] The more specific the legal text, the more difficult it becomes to justify deviations from prior interpretations.[173]

For the purposes of comparing legal interpretation and fact-finding, it is important to note that the substantive legal provisions in international agreements are specific only in a relative sense. Despite a trend toward greater specificity in the drafting of international agreements, substantive legal rules remain quite general so that their content is often unclear from the face of the agreement.[174] But they are much more specific than the procedural and evidentiary aspects of international law, a key distinction examined further below.

Decisional Rule Creation—The second element of consistency and predictability, unlike the first, does not exist in all mechanisms. It is true that all courts and tribunals, domestic and international, serve at least one of two essential dispute resolution functions: the job of determining whether a party to a particular dispute has violated a legal rule.[175] But not all mechanisms serve a second function of decisional rule creation: the formation of rules in the course of resolving one dispute that indicate the likely outcome of similar disputes in the future.[176] It is this second dispute resolution function that improves the consistency and predictability that is achievable with written legal rules alone.[177]

Most domestic legal systems employ some means of rule creation. Common law jurisdictions necessarily depend on rule creation in the form of precedent, which binds judges to rules set out in previous

171. *See* Helfer & Slaughter, *supra* note 29, at 945–46.

172. *See id.*

173. *See id.* at 945 (arguing that "[c]learly defined substantive rules impose real constraints on tribunals and the parties that wish to use them").

174. *See* Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as* Jurisprudence Constante, *in* INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265, 271 (Colin Picker et al. eds., 2008).

175. *See* William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 236 (1979).

176. *See id.*

177. *See* Park, *supra* note 45, at 49 n.122 ("Within a single jurisdiction, a measure of uniformity can be imposed from the top down so that one case furnishes authority for decisions in similar fact patterns with similar questions of law."); *see also* Landes & Posner, *supra* note 175, at 236 (describing the operation of precedent in a domestic court context).

decisions.[178] Civil law systems do not as a general matter depend on precedent, but nonetheless contain a degree of rule creation because they generally attribute precedential authority to a line of consistent precedents that has crystalized over time.[179]

By their design, international law mechanisms do not formally participate in rule creation because their decisional law is not considered precedential,[180] although decision-makers may of course in appropriate circumstances look to prior decisional law as persuasive authority, and this may promote interpretive consistency to some degree.[181] Achieving the maximum possible consistency and predictability in legal interpretation would require that a mechanism deviate from this default rule and establish a formal system of precedential authority.[182] Nothing in the CETA text, however, indicates that the EU and Canada intend to establish such a framework, leaving the mechanism without the formal ability to impose consistency and predictability in legal interpretation through precedent.[183]

Of course it is widely understood that, even without a formal system of precedent, "soft" rule creation can take hold, as observed in many current mechanisms,[184] through informal adherence to previously settled doctrine.[185] The issue of soft rule creation in international law is a matter of considerable controversy, and there is a range of possible explanations for its pervasiveness in international law despite a lack of formal underpinning.[186] But given that some form of rule creation

178. Landes & Posner, *supra* note 175, at 236.

179. *See generally* Vincy Fon & Francesco Parisi, *Judicial Precedents in Civil Law Systems: A Dynamic Analysis*, 26 INT'L REV. L. & ECON. 519 (2006).

180. *See* Park, *supra* note 45, at 49.

181. *See* Patrick Juillard, *Variation in the Substantive Provisions and Interpretation of International Investment Agreements*, *in* APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 93 (Karl P. Sauvant ed., 2008).

182. *See* Bjorklund, *supra* note 174, at 271 ("In systems of government using stare decisis, there are formal rules or understandings about which decisions are binding and which are merely persuasive.").

183. The CETA text instead provides only that tribunals must interpret the agreement "in accordance with the Vienna Convention on the Law of Treaties." Comprehensive Economic and Trade Agreement, *supra* note 77, at art. 8.31(1).

184. *See* Harlan Grant Cohen, *Lawyers and Precedent*, 46 VAND. J. TRANSNAT'L L. 1025, 1027–28 (2013) (noting precedent's "apparent authority" in international investment arbitration, international trade, international criminal law, and international human rights). Some view the WTO Appellate Body, for example, as exercising its interpretive function, *see* Appellate Body Report, *Understanding On Rules and Procedures Governing the Settlement of Disputes*, art. 3.2, WTO Doc. WT/DS356/AB/R, in a manner that leads panels to follow Appellate Body reports as precedent following some senses. *See* Stephen S. Kho et al., *The EU TTIP Investment Court Proposal and the WTO Dispute Settlement System: Comparing Apples and Oranges?*, 32 ICSID REV. 326, 330 (2017).

185. *See, e.g.*, Wood, *supra* note 84, at 10; Juillard, *supra* note 181, at 101.

186. *See* Bjorklund, *supra* note 174, at 274–80.

is necessary to achieve the objective of increasing consistency and predictability in legal interpretation, it is reasonable to conclude that the EU and Canada silently intend for CETA's dispute settlement system to adhere to some form of rule creation—even if only "soft."

Substantive and De Novo Appellate Review—The third element of the stack model—substantive and de novo appellate review—adds to the ability of a mechanism to achieve consistency and predictability beyond what is possible with the first two elements.[187]

Existing practices of extraordinary review or annulment in investment arbitration lack this design element because they perform only limited error-correction functions. Those practices allow only for an assessment of the procedural legitimacy of the original proceeding and binary validation or invalidation.[188] And they create no formal hierarchy that allows the reviewer to bind future first-instance decision-makers.[189] The ICSID annulment process, typical of other review mechanisms in investment arbitration today,[190] provides for annulment in an enumerated list of circumstances, including where "there has been a serious departure from a fundamental rule of procedure" or where "the award has failed to state the reasons on which it is based."[191]

CETA will deviate from this status quo and establish a hierarchical system of substantive and de novo review. With respect to legal interpretation, the CETA appellate tribunal will have the authority to "uphold, modify[,] or reverse" the first-instance award based on "errors in the application or interpretation of applicable law."[192] This vests the appellate tribunal with substantive and de novo review authority, enabling it to review and modify decisions on legal questions without deference to the reasoning of the first-instance decision-maker.

The belief motivating this change is that this broader scope of authority, as compared to existing review, procedures enhances the reviewer's ability to modify the legal reasoning of first-instance decisions and to standardize underlying legal rules.[193] It is true that

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187. *See* Caron, *supra* note 31, at 23.

188. *See id.*

189. *See* Bjorklund, *supra* note 174, at 271.

190. *See* Caron, *supra* note 31, at 34 ("The ICSID annulment process, like the prototypical annulment process, provides a quite limited remedy.").

191. INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, *supra* note 71, at 124.

192. Comprehensive Economic and Trade Agreement, *supra* note 77, at art. 8.28(2).

193. *See generally id.* The standing nature of an appellate body may have other, ancillary effects on rule creation. One, a standing body may show more deference to its own decisional law than to decisions from other bodies. *See* Christoph Schreuer, *Preliminary Rulings in Investment Arbitration*, *in* APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 209 (Karl P. Sauvant ed., 2008); Wood, *supra* note 84, at 9. And two, a standing body may

CETA will establish a clear hierarchy between the appellate tribunal and the first-instance tribunal and allow the appellate tribunal to correct legal errors without deference to the first-instance tribunals.[194] But as the stack model shows, the ability of appellate review to reconcile competing legal interpretations of first-instance tribunals depends on an ability to impose at least some form of precedent, even if only "soft."

2. Consistency and Predictability in Fact-Finding

Whether or not an investment court will promote consistency and predictability in legal interpretation according to this three-element stack model, the same analysis cannot be transposed neatly to the fact-finding context. Instead, as reflected in Figure 3, the corresponding stack model for fact-finding has none of the same characteristics: (1) fact-finders enjoy broad authority under general written guidelines (and are not subject to the constraints of specific written rules); (2) the production, testing, and evaluation of evidence are subject to flexible decisional norms that are intended to adapt with the demands of individual disputes (and are not subject to precedent or soft rule creation); and (3) first-instance decisions on factual questions are subject at most to narrow substantive review, typically where there has been a clear error (and are not subject to de novo review).

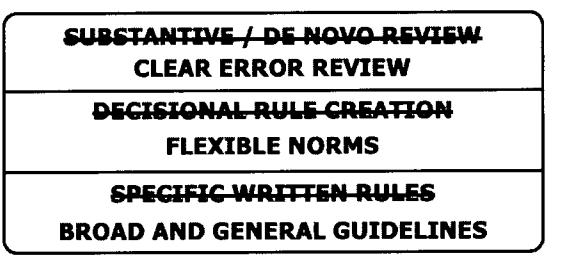

Figure 3: Model of Consistency and Predictability in Fact-Finding

Broad and General Guidelines—In contrast to the relative specificity of substantive legal rules, international agreements and institutional frameworks typically lack prescriptive or otherwise detailed evidentiary rules. As outlined in Part I.B, decision-makers instead engage in fact-finding subject only to modest constraints in the form of broad and general written guidelines. This suggests that the drafters did not intend to require decision-makers within a system to use common fact-finding approaches. The general lack

have increased incentives, beyond the usual duty to state the reasons for a decision, to produce rules rather than narrowly resolving the dispute at hand. *See* Landes & Posner, *supra* note 175, at 239.

194. *See* Bjorklund, *supra* note 174, at 271.

of detailed and binding rules instead affords decision-makers flexibility and limits the constraining influence of written text.[195] As noted previously, CETA does not appear in any way to depart from this prevailing practice.[196]

Flexible Norms—Precedent, and even soft rule creation, also does not apply to evidentiary processes to the same degree. Decision-makers in international disputes eschew adherence to standardized evidentiary processes in favor of adaptive approaches that can respond to the specific circumstances of a dispute and that seek to strike a balance between efficiency and accuracy that is optimal based on those circumstances.[197] These allowances for adaptation may reflect a well-developed consensus within an institution or otherwise among adjudicators to avoid a highly prescriptive approach to fact-finding, consistent with the drafting intent of system designers. There is no sense, after all, in prescribing in advance general rules that would, say, limit each party to two fact witnesses, no matter the complexity of the dispute.

Fact-finders do create their own decisional norms, however, and those norms may give participants in a system a general sense of what to expect in future disputes.[198] But because the norms are general and informal, they are easier to change from dispute to dispute, more susceptible to differences in views among decision-makers, and more likely to lead to processes for the production, testing, and evaluation of evidence that participants are unable to predict in any meaningful sense.[199]

Clear Error Review—Lastly, there is also a diminished opportunity for appellate review to increase the consistency and predictability of fact-finding practices. The CETA appellate tribunal will be able to consider allegedly "manifest errors" in the fact-finding of a first-instance tribunal, affording a significant degree of deference that

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195. Helfer & Slaughter, *supra* note 29, at 945–46 ("Precision in drafting commitments is perhaps the most obvious formal control mechanism that states can exercise *ex ante*.").

196. *See supra* Part I.B.

197. *See* Alvarez, *supra* note 3, at 167, n.48 (referring to "the 'common rules of international procedure' on which some international courts and tribunals rely").

198. These norms may take shape faster and apply more pervasively in circumstances—like CETA's first-instance tribunal—that limit the number of fact-finders who are eligible to decide a given set of cases. Recall that the CETA first-instance tribunal will consist of fifteen members, serving for terms, and appointed to three-person divisions to hear each dispute. If the dispute frequency is high enough, and the members all share the same preferences on fact-finding processes, limiting the universe of decision-makers to fifteen may tend to increase consistency and predictability. But this depends ultimately on the—seemingly unlikely—possibility that the EU and Canada can identify and appoint fifteen decision-makers who share the same strong fact-finding preferences and a willingness to apply those preferences uniformly in every dispute.

199. *See* Helfer & Slaughter, *supra* note 29, at 945–46.

is not required with respect to legal questions.[200] The restricted character of that review indicates that the EU and Canada, like the architects of the WTO and domestic appellate mechanisms, do not believe that those mechanisms are better placed to engage in fact-finding than triers of fact.[201]

Even those who see the value of substantive appellate review in investment arbitration are skeptical that it has the potential to improve factual accuracy[202] and stop short of suggesting that appellate mechanisms should have any substantial opportunity to second-guess findings of fact.[203] This acknowledges the core differences in the presentation and evaluation of legal questions and fact questions. When it comes to legal questions, arbitrators and judges are ultimately responsible for saying what the law is, irrespective of the parties' citations to legal rules and principles (a concept known as *jura novit curia*).[204] In a hierarchical decision-making environment, an appellate decision-maker plays this central role in legal interpretation with the benefit of a process that has distilled legal issues over time.[205] Appellate decisionmakers enjoy the benefit of first-instance decisions that have made an initial attempt to analyze the parties' arguments and to identify and apply relevant legal rules.[206] The parties may also helpfully focus their submissions on appeal, as they respond to opposing arguments and reactions of the first-instance adjudicator.[207]

For fact questions, however, an appellate mechanism's ability to assess many sources of evidence, including witness testimony and other evidence presented at hearings, is diminished because it is further from those sources than the first-instance tribunal. Appellate mechanisms are not, for example, able to assess the credibility of

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200. Comprehensive Economic and Trade Agreement, *supra* note 77, at art. 8.28(2).

201. Factual questions are not within the jurisdiction of the WTO Appellate Body, although the Appellate Body considers that "[w]hether or not a panel has made an objective assessment of the facts before it, . . . is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review." Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶ 132, WTO Doc. WT/DS26/AB/R (adopted Jan. 16, 1998).

202. *See, e.g.*, Caron, *supra* note 31, at 54 ("[T]here is little reason to believe that the review panel's decision would be more accurate.").

203. R. Doak Bishop, *The Case for an Appellate Panel and its Scope of Review*, *in* INVESTMENT TREATY LAW: CURRENT ISSUES VOLUME 1, at 20 (Federico Ortino et al. eds., 2006).

204. Laurent Lévy, *Jura Novit Curia? The Arbitrator's Discretion in the Application of the Governing Law*, KLUWER ARB. BLOG (Mar. 20, 2009), http://arbitrationblog.kluwerarbitration.com/2009/03/20/jura-novit-curia-the-arbitrators-discretion-in-the-application-of-the-governing-law/ [https://perma.cc/TK88-LRGC].

205. *See* Ten Cate, *supra* note 169, at 1146.

206. *See id.*

207. *See id.*

oral testimony in the same fashion or direct questions in real-time to witnesses, unless they repeat the entire fact-finding process.[208]

Most dispute settlement mechanisms, including in domestic systems, do not allow appellate reviewers to duplicate the fact-finding function of first-instance adjudicators, as there is no reason to think that complete repetition of the fact-finding process by different people will produce better results the second time over.[209] The WTO Appellate Body, for example, cannot conduct its own fact-finding, although it may be able to opine on the propriety of fact-finding procedures in the course of identifying serious errors of fact.[210] This limited remit with respect to factual questions means that the Appellate Body has relatively few opportunities to opine on appropriate evidentiary procedures or to demonstrate proper application of those procedures, because it cannot resolve outstanding factual questions or conduct additional evidence gathering.[211] These constraints on an appellate mechanism's capacity to impose evidence-taking norms or rules on first-instance tribunals in any given case[212] will limit the cumulative effect of an investment court on the consistency and predictability of fact-finding.

Of course, the line between fact and law is often blurry, such as with commonly encountered questions about whether governmental action is sufficiently tailored to achieving a public policy objective,[213] and appellate review of those questions may incorporate analysis of the underlying facts and result in critiques of the evidence-taking methods of the first-instance tribunal. But, in the end, those questions primarily generate interpretations of substantive legal provisions and will only incidentally create evidence-taking norms or rules. At most, then, an appellate tribunal's focus on correcting legal errors in specific

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208. *See id.*

209. *See* Bart Legum, *Options to Establish an Appellate Mechanism*, *in* APPELLATE MECHANISMS IN INVESTMENT DISPUTES 231, 237 (Karl P. Sauvant ed., 2008) ("[A] certain level of inconsistency is inevitable in any system of administration of justice. Reasonable judges and juries can reasonably reach different results based on the same facts. And advocacy—how a case is argued and presented—really does make a difference."); Jan Paulsson, *Avoiding Unintended Consequences*, *in* APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 241, 247 (Karl P. Sauvant ed., 2008) ("[S]uch things [like incongruent findings of fact] happen when a story is told in different ways on different occasions to different people.").

210. *See* Appellate Body Report, *supra* note 184, art. 17.6 ("An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."); *see also* ERIC A. POSNER & ALAN O. SYKES, ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW 283 (noting that the WTO Appellate Body "reviews issues of law de novo but defers heavily to panels on findings of fact").

211. *See* POSNER & SYKES, *supra* note 210, at 283.

212. *See* Kho et al., *supra* note 184, at 344.

213. *See, e.g.*, General Agreement on Trade in Services, art. XIV, Apr. 15, 1994, 1869 U.N.T.S. 183.

cases and establishing coherent legal rules might free first-instance tribunals to center their own efforts on developing a factual record and clarifying issues in dispute.[214] But any benefit of such a focus would accrue only in a resource-constrained world, and it is unlikely to help matters if a first-instance tribunal consistently gets the facts right but the law wrong.

In sum, the broad and general nature of evidentiary frameworks, the impediments to rule creation, and the highly circumscribed nature of appellate review of fact questions together limit the capacity of an appellate mechanism to instill consistency and predictability in fact-finding.[215]

C. *The Effects of an Investment Court on Subject-Matter Expertise*

It is possible to construct a third argument in favor of enhancing the influence of institutions and institutional actors in fact-finding: that decision-makers who participate in a standing judicial body, enjoy terms beyond a single dispute, and have access to the resources of an administrative apparatus will develop specialized expertise in—and become better able to handle—complex, routinely encountered subjects.[216]

There is some logic to the argument that an investment court affords decision-makers and institution staff the opportunity to develop specialized knowledge on issues that frequently arise on the court's docket.[217] It seems reasonable to assume that experience gained through handling complex evidence may over time result in improved decisions on complex topics such as damages calculations.[218] Accordingly, adjudicators and their staff might develop this expertise as a simple consequence of performing their duties, or they may do it strategically to attract new cases to a mechanism.[219]

Despite the argument's intuitive appeal, however, designers of dispute settlement mechanisms cannot depend on the organic development of institutional expertise to increase the quality of fact-finding. For one, participation in dispute settlement does not provide

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214. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1607 (2005).

215. *See* Legum, *supra* note 209, at 237.

216. *See* Brewer, *supra* note 3, at 1539; Helfer & Slaughter, *supra* note 29, at 948–49.

217. *See* Posner & Yoo, *supra* note 29, at 25.

218. Brewer, *supra* note 3, at 1680 ("Perhaps some judges, by virtue of background or repeat 'on the bench' experience with scientific evidence, will become sufficiently epistemically competent to render decisions about scientific expert testimony that are epistemically legitimate and that meets the demands of intellectual due process.").

219. *See* Helfer & Slaughter, *supra* note 29, at 948–49.

the type of systematic training that is necessary to obtain meaningful expertise in most specialized areas.[220] This is especially true given that most institutions are unlikely to adjudicate disputes at a frequency sufficient to enable decision-makers to develop expertise over the course of a judicial tenure period, even one that may extend to ten or twelve years, as in CETA.[221] Although CETA contemplates an eventual transition to a multilateral investment court, which would presumably increase the system's workload, any investment court will exist, at least for a time, as a bilateral arrangement with a relatively low frequency of disputes.[222] And relying on experience obtained while acting as an adjudicator in a system means that, even in ideal circumstances, disputes early in an adjudicator's tenure cannot benefit from that experience. A system will realize any benefits only after an initial learning period.

Finally, individual arbitrators participating in existing investor-state dispute settlement mechanisms may already have opportunities to develop subject-matter expertise in frequently encountered subjects like damages calculations—without the enhanced institutionalism of an investment court.[223] If it is possible, then, to gain expertise through repeated exposure to complex subjects in the course of dispute settlement, at least some arbitrators are already operating as experts in some subject matters.[224]

IV. RULES-BASED APPROACHES TO IMPROVING FACT-FINDING

The foregoing analysis finds no clear support for arguments that greater institutionalism in the form of an investment court will improve fact-finding. An investment court is unlikely to lead to reliance on more reliable evidentiary sources and methods, greater consistency and predictability in fact-finding, or enhanced subject-matter expertise in decision-making. A transition to an investment court may instead increase fact-finding quality in certain ways, while detracting from that quality in others. At the same time, an investment court is likely to decrease dispute settlement efficiency.

And yet, as noted in Part I, improvement in fact-finding is needed across the range of dispute settlement mechanisms. If an investment

220. *See* Brewer, *supra* note 3, at 1680 (arguing that judges are unlikely to develop meaningful specialized knowledge unless they are "routinely and *systematically* trained in scientific theories and methods").

221. *Cf.* Guzman, *supra* note 29, at 206 (presenting a similar argument with respect to the possibility of improved reputation over judicial tenure periods).

222. *Cf. id.*

223. *See* Georgios Dimitropoulos, *Constructing the Independence of International Investment Arbitrators: Past, Present, and Future*, 36 NW. J. INT'L L. & BUS. 371, 375–76 (2016).

224. *See* Franck et al., *supra* note 30, at 1119.

court will not address this concern, both investment-court proponents and detractors would do well to examine other ways to improve fact-finding. The remainder of this Article puts forward a menu of alternatives that would focus on changes to the other primary lever—aside from institutionalism— that is available to reformers: the evidentiary rules contained in international agreements, institutional frameworks, and ad hoc arbitration arrangements.

A. Measuring the Efficacy of Rules-Based Approaches

Legal agreements—including international agreements, institutional frameworks, and ad hoc agreements to arbitrate—are written down for many reasons, including a belief on the part of the negotiators that the written text will have a constraining influence on decision-makers when the agreement is later interpreted.[225] As explained in Part II.B, the constraining influence of written text not only promotes fealty to designers of international legal mechanisms in individual disputes, it also tends to support consistency and predictability across disputes in a system. Written text that is relatively specific will exert more constraining influence than relatively general text.[226]

Today's evidentiary frameworks in international law are relatively broad and general as compared, at least, to substantive legal rules, and so have less constraining influence than those rules.[227] Even though the focus of legal scholarship has been on other aspects of international dispute settlement, there is widespread acknowledgment that the constraining influence of procedural and evidentiary rules is a fundamental feature of international law. Laurence Helfer and Anne-Marie Slaughter have argued that procedural and evidentiary rules operate as "structural ex ante controls" that states impose on international dispute resolution.[228] Gary Born has attributed what he perceives as the relatively higher quality of evidence production in international commercial and investment arbitration, the WTO, and the Iran-U.S. Claims Tribunal to rules-based procedures that "have been designed to facilitate the effective presentation and evaluation of

225. *See* Helfer & Slaughter, *supra* note 29, at 945–46 (arguing that written text is a form of ex ante control over international adjudicators).

226. *See id.*

227. *See supra* Part II.B.

228. *See* Helfer & Slaughter, *supra* note 29, at 946–47.

factual evidence."[229] Jeffrey Dunoff and Mark Pollack have emphasized the role that rules play in how decision-makers express their decisions in writing.[230]

The idea is not that evidentiary rules can guarantee that a decision-maker will in all cases adhere to them exactly as a state may have intended.[231] The goal of evidentiary rules is instead to increase the intellectual rigor and quality of the information provided in a decision by requiring decision-makers to justify any deviations from the rules, imposing reputational, reappointment, or other costs on decision-makers for flimsy justifications, and insulating decision-makers when they make decisions consistent with the rules but unpopular with the disputing parties.[232]

The failure of existing procedural and evidentiary rules to address the challenges of today's factually complex disputes is clear, as described in Part I.B. The prevailing practices of existing mechanisms nevertheless confirm the capacity of evidentiary rules to influence fact-finding, while suggesting that the generality of today's rules may limit that influence and help explain their collective shortcomings.

To affect adjudicator behavior, evidentiary rules must overcome competition from other influences on that behavior, including an array of background evidentiary norms against which dispute settlement systems operate.[233] These norms are embodied in both general principles of international law and practices derived from civil law and common law traditions.[234]

As a formal matter, evidentiary norms remain subject to express rules embodied in international agreements, institutional rules, or ad

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229. *See* Born, *supra* note 29, at 846, 851, 874.

230. Dunoff & Pollack, *supra* note 38, at 254–56 (describing the influence of ICJ rules on judicial identifiability in written decisions).

231. *See* Helfer & Slaughter, *supra* note 29, at 946–47.

232. *See id.*

233. *See* ALTER, *supra* note 38 at 11; Park, *supra* note 45, at 35.

234. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 1–2 (2001) (describing evidentiary norms in commercial arbitration). Evidentiary norms may also change as litigants become more sophisticated in their arguments and strategies, and their disputes may become more complex. *See* David J. McLean, *Toward a New International Dispute Resolution Paradigm: Assessing the Congruent Evolution of Globalization and International Arbitration*, 30 U. PA. J. INT'L ECON. L. 1087, 1096 (2009) (describing the effects of an increase in dispute complexity); Paulsson, *supra* note 84, at 2 (describing the effects of an increase in litigant sophistication). Decision-makers and counsel who serve in disputes in more than one mechanism may transmit practices from one to the other, bringing with them their domestic legal traditions as well as their experiences from multiple mechanisms. *See* Born, *supra* note 29, at 835 ("In practice, the procedures used in international commercial arbitration are the model for investment arbitration, including the number and selection of arbitrators, the presentation of evidence, the conduct of hearings, and the awards—in part because of overlaps in the individuals and law firms that serve as arbitrators and counsel in both sets of proceedings.").

hoc arbitration arrangements.[235] Absent a rule to the contrary, those norms provide that decision-makers may generally exercise "complete freedom in the admission and evaluation of evidence."[236] There is, nonetheless, a preference in the background norms of evidence themselves that an international court or tribunal should follow certain guardrails, including by erring on the side of allowing the production of party-produced evidence, including expert testimony,[237] and retaining the ability to seek independent assistance from experts.[238] The influence of domestic civil law traditions may also create countervailing tendencies for adjudicators in some mechanisms to play a more central role in evidence production.[239] But, because these guardrails are also norms or institutional tendencies, they too remain formally subject to the existence of express evidentiary rules that provide otherwise.[240]

A number of examples from existing dispute settlement mechanisms illustrate how evidentiary rules do influence fact-finding in practice, including in ways that have overcome background norms. Take, for example, the observation that the WTO is the only mechanism considered here that does not contemplate the presentation of witness testimony and cross-examination at a hearing.[241] The WTO's highly structured fact-finding procedures instead channel factual development primarily through party-submission of written evidence, rather than oral testimony. As a result, the practical function of oral hearings in the WTO is "mainly to provide an opportunity to clarify issues and focus the discussion on the questions which the panel believes are the most important."[242] ICJ disputes are, and many older state-to-state arbitrations were, also subject to structured rules channeling fact-finding through written procedures.[243] It appears that highly structured rules, then, may have played a role in causing these

235. *See* CHENG, *supra* note 162, at 307.

236. *See id.*

237. *See* SANDIFER, *supra* note 28, at 328 ("A practice that disregards available means of resolving hotly contested questions of fact is not one calculated to inspire the confidence of prospective litigants in international tribunals.").

238. *See* WHITE, *supra* note 64, at 7.

239. Domestic legal traditions may contribute to norm creation, because they may be transmitted organically to international law partly through the "nature of the personnel of the tribunals," SANDIFER, *supra* note 28, at 11–12, and partly through the practitioners representing the disputing parties, Hanotiau, *supra* note 85, at 99. But adjudicators in both common law and civil law jurisdictions are "in the main dependent upon the parties for the presentation and development of the facts essential to the case." *See* SANDIFER, *supra* note 28, at 113; *see also* WHITE, *supra* note 64, at 10; GRANDO, *supra* note 142, at 44.

240. *See* SANDIFER, *supra* note 28, at 7, 335.

241. *See* Born, *supra* note 29, at 874–75.

242. GRANDO, *supra* note 142, at 246–47; *see also* Swinehart, *supra* note 48, at 288–99.

243. *See* Born, *supra* note 29, at 875–76, 876 n.405 (noting, however, that the WTO's evidentiary procedures are nonetheless more effective than those in the ICJ).

decision-makers to deviate from the norms of flexible evidence-taking practices, although there are no doubt other influences at work.

Evidentiary rules that specifically empower adjudicators to rely on adjudicator-appointed experts also appear to increase the likelihood that a decision-maker will actually appoint and rely on one. Although known for using panel-appointed experts more often than other systems,[244] the WTO has appointed experts in only a small minority of cases[245] and usually in cases involving scientific issues under the Sanitary and Phytosanitary Measures (SPS) Agreement,[246] which, unlike most other provisions of WTO agreement text, by its own terms expresses a preference for consultation with panel-appointed experts.[247] Decision-makers in recent PCA state-to-state arbitrations and ITLOS cases have also appointed their own experts, specifically citing the authority to do so under applicable rules.[248]

Similarly, the likelihood of consultations with international organizations and other third-parties is increased when rules specifically permit it, as seen most prominently in the WTO.[249] Adjudicators in investment arbitrations also have increasingly allowed international organizations and other third-parties to make submissions[250] under the authorization of specific rules.[251]

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244. GRANDO, *supra* note 142, at 298–09.

245. *See* Gros, *supra* note 157, at 352–53 (counting 15 panels that appointed experts out of 225 adopted panel reports, "almost exclusively in SPS cases").

246. *See id.*

247. Agreement on the Application of Sanitary and Phytosanitary Measures art. 11.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 ("In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel.").

248. *See, e.g.*, Bay of Bengal Maritime Boundary Arb. (Bangl. v. India), PCA Case Repository 2010–16, ¶¶ 15–17 (2014); Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malay. v. Sing.), Case No. 12, Order of Oct. 8, 2003, 7 ITLOS Rep. 10, 17. Proposed amendments to the ICSID Rules of Procedure for Arbitration Proceedings would specifically authorize tribunals to appoint their own experts and could result in greater use of tribunal-appointed experts in investment arbitration. *See* ICSID Secretariat, *Volume 3: Proposals for Amendment of the ICSID Rules—Working Paper* 202 (Int'l Ctr. for Settlement of Inv. Disputes, Working Paper No. 1, 2018), https://icsid.worldbank.org/en/Documents/Amendments_Vol_3_Complete_WP+Schedules.pdf [https://perma.cc/G8Q4-63HX].

249. *See* FOSTER, *supra* note 49, at 102–06.

250. *See, e.g.*, Philip Morris Brands Sàrl v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award, ¶¶ 74, 87, 91, 141, 306, 362, 391, 394, 404, 407 (July 8, 2016), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1000/DC9012_En.pdf [https://perma.cc/AXD6-6636] (relying on input from the World Health Organization).

251. *See* Philip Morris Brands Sàrl v. Oriental Republic of Uru., Written Submission (Amicus Curiae Brief) by the World Health Organization and the WHO Framework Convention on Tobacco Control Secretariat, ¶ 1 (Jan. 28, 2015), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1000/DC9032_En.pdf [https://perma.cc/3VWR-DAA6] (citing Article 37 of the ICSID Arbitration Rules, which expressly vests a tribunal with the authority to accept and consider non-disputing party submissions).

But the generality of today's evidentiary rules often means that decision-makers continue to rely on norms or to invent their own practices to fill gaps where no rule expressly encourages or discourages a practice and even to justify actions that may conflict with express rules. The continuing influence of these adjudicator-made evidentiary norms may explain practices such as the WTO's tendency to hear expert testimony in the form of party delegates, despite the lack of express rules authorizing party-appointed experts.[252] It may also explain why some adjudicators have appointed their own experts even without express authorization to do so.[253] And the controlling influence of norms—or the influence of domestic legal traditions at least—may contribute to the ICJ's reluctance to produce evidence through oral hearings and witness testimony,[254] despite rules that provide for the examination of witnesses and oral hearings with the full participation of the parties.[255]

B. Implementing Rules-Based Approaches

Because evidentiary rules can influence fact-finding practices, they could serve as tools for reformers hoping to increase the legitimacy of fact-finding. This Part sets out two categories of the most promising rules-based approaches. Approaches in the first category would seek to improve the production, testing, and evaluation of evidence by creating "analytical frameworks"—collections of guidelines or rules for fact-finding that are more specific than those in existence today. Approaches in the second category would seek to enhance the capacity of decision-makers to assess the reliability of complex evidence by encouraging or requiring the appointment of subject-matter experts as adjudicators.

The objective here is to provide mechanism designers with a scalable menu of options to improve fact-finding quality while preserving the flexibility of decision-makers to adapt to the needs of particular disputes and avoiding material efficiency costs. Unlike the decision to create or join an investment court, a rules-based approach is scalable because states can adopt rule changes incrementally, measure their effects, and adjust over time in an iterative process of reform. A

252. Pauwelyn, *supra* note 166, at 235.

253. *See, e.g.*, Guyana v. Suriname, PCA Case Repository 2004–04, ¶ 47 (2007) (noting that the tribunal had appointed its own expert, although the pre-existing rules of procedure under Annex VII of the United Nations Convention on the Law of the Sea state only that a tribunal may follow its own rules of procedure).

254. *See* Born, *supra* note 29, at 875–76. Ad hoc state-to-state arbitrations have often relied on similar practices. *See* James Crawford, *Advocacy Before the International Court of Justice and Other International Tribunals in State-to-State Cases*, *in* THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION 12–13 (R.D. Bishop ed., 2004).

255. *See* SANDIFER, *supra* note 28, at 162.

properly tailored rules-based approach would also remain flexible because it would permit decision-makers to adapt to the particular needs of a dispute but would impose costs on decision-makers for adaptations that it cannot justify.

A rules-based approach is unlikely to impose material efficiency costs because, unlike an investment court's introduction of substantive appellate review, rules can change behavior without adding procedural steps or imposing new costs on disputing parties.[256] Rule changes can even streamline fact-finding processes by harmonizing expectations of disputing parties and decision-makers and discouraging wasteful and unnecessary practices. This is the logic underlying certain existing rules, like page limits on party submissions and adjudicator awards, that mechanisms already employ to some degree.

A rules-based approach will not make sense in every context of course. Mechanism designers will need to weigh whether the benefit of injecting more specificity into evidentiary rules is worth the additional negotiating time that is likely required to reach agreement on the added detail.[257] And they will also need to weigh the benefits of ratcheting up the strictures of rules against the needs of decision-makers to adapt evidentiary processes to the demands of a particular dispute.[258]

1. Establishing Analytical Frameworks

A first category of rules-based approaches would clarify and specify in greater detail expectations for the production, testing, and evaluation of expert evidence.[259] These "analytical frameworks" could improve fact-finding in a number of ways.

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256. *See, e.g.*, Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, 24 AM. REV. INT'L ARB. 487, 514 (2013) (noting that certain procedural steps taken to improve quality "do not take any more time or cost any more money"); Franck et al., *supra* note 30, at 1173 (arguing that the perceived tension between "efficiency and accuracy" may be "more theoretical than real" with respect to "procedural innovations").

257. *See* Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 346–50 (1999).

258. *See* Charles N. Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules*, 28 INT'L LAW. 47, 58 (1994); Born, *supra* note 29, at 874.

259. *See* Franck et al., *supra* note 30, at 1171–73 (outlining a number of procedural rules that may improve the quality of decision-making). Reformers can implement analytical frameworks in a variety of ways. Parties to an investment treaty or an ad hoc agreement to submit a dispute to arbitration could decide in those documents to exercise more control over the fact-finding practices of future adjudicators. Or, institutions might adopt analytical frameworks either as standard procedure or as part of optional facilities, to demonstrate a commitment to competency in fact-finding. An institution could market itself through such a framework as more competent in questions of damages or questions of particular areas of science, competing with other institutions to provide evidentiary rules optimized for particular types of disputes.

First, an analytical framework could encourage fact-finding practices that tend to increase quality by allowing a decision-maker to rely on pre-existing rules in support of decisions that adhere to the intentions of the system's designers; but that might—without a written rule—prove unpopular with a disputing party or appear arbitrary or biased.[260] This might provide a dependent decision-maker (on the lower end of the Modified Posner-Yoo scale) with a type of added "independence" in its handling of evidence.

Second, the added specificity of an analytical framework could also discourage practices that tend to decrease quality by requiring decision-makers to justify in more detail any deviations from the framework's constraints.[261] The enhanced transparency that would result could create incentives for decision-makers, including independent ones with self-reliant tendencies, to adhere to practices that produce higher quality evidence.

Third, an analytical framework could improve consistency and predictability in fact-finding by adding specificity to written rules and guidelines for fact-finding practices.[262] This could fill a gap in promoting consistency and predictability in fact-finding that is left unaddressed through an institution-based approach.[263]

It is possible to divide analytical frameworks along the same lines used before to describe the two components of fact-finding: (1) production and testing and (2) evaluation. Analytical frameworks of one type focus on improving the production and testing component of fact-finding, while frameworks of a second type center on addressing deficiencies in the evaluation component of fact-finding. The following considers the most promising approaches in both of these categories.

Production and Testing Rules—Many earlier rules-based reforms have focused on evidence production and testing, often with a focus on improving a decision-maker's procedural administration of the adversarial process. Those reforms emphasize the use of basic guidelines on the mechanics of evidence production, such as those in the IBA's Rules on the Taking of Evidence in International Arbitration, expansion of expert conflict-of-interest disclosure requirements, and allowance for joint evaluations of competing experts during hearings.[264]

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260. *See, e.g.*, Paulsson, *supra* note 84, at 3 ("[In international commercial arbitration,] the arbitrator's much-vaunted freedom to adopt procedures as he sees fit is cramped by the vehemence of the parties' procedural arguments; in order not to appear biased, arbitrators more and more often prefer to justify procedural rulings by reference to pre-existing rules rather than their own discretion.").

261. *See* Helfer & Slaughter, *supra* note 29, at 994–96; Paulsson, *supra* note 84, at 3.

262. *See, e.g.*, Brower, *supra* note 258, at 47.

263. *See supra* Part II.B.

264. *See* Hanotiau, *supra* note 84, at 101–02.

Proposals for further reform would continue a push toward greater specificity and accountability in the production and testing of evidence. These include proposals to impose additional requirements on the disputing parties in their presentation of evidence. The preeminent example of such an approach is Susan Franck's proposal to require investors "to plead damages with specificity at an early phase (or otherwise provide detailed expert reports in advance) to justify amounts claimed" in order to "minimize the pernicious effect of anchoring"—the tendency of people to rely on an initial value that is readily available, which "anchors" subsequent decisions.[265] The merit of efforts aimed at the production and testing of evidence is that they may increase the transparency of the evidence-gathering process, sharpen points of disagreement, and highlight obvious sources of apparent or actual biases.[266]

Production and testing rules can also calibrate the degree of decision-maker involvement in the production and testing of evidence while preserving the right of parties to participate in the process. This can have either an expansionary or constraining effect on evidence production and testing, depending on the objectives of the rule drafter. Figure 4 below illustrates the effects that "rules of expansion" and "rules of constraint" may have on one stylized aspect of evidence production, the volume of evidence, set against the competing influence of decision-maker independence.

In this stylized universe, "rules of expansion" include any rules that expand the factual record beyond what an evidentiary process would produce in the normal course absent such rules. A mechanism designer might choose a rule of expansion if it considers that the relative independence of a decision-maker, for example, may result in "too little" party-produced evidence. By contrast, "rules of constraint" include any rules that tend to reduce the size of the factual record.[267] A mechanism designer might choose a rule of constraint if it wishes to prevent the parties from producing significant amounts of irrelevant

265. *See* Franck et al., *supra* note 30, at 1171–73 (recommending this change based on an empirical study of the analytical performance of international arbitrators).

266. *See* Swinehart, *supra* note 48, at 303–05. The authority of a decision-maker to appoint its own expert is nothing new, but some recent reforms that fall into this category have included proposals to strengthen or include express appointment authority in evidentiary rules. *See id.* Although a decision-maker's appointment of its own expert may avoid a battle between competing party-appointed experts, that appointment process usually involves a debate between the parties that is just as contentious and fraught. *See* IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW 182 (2009). It also begs the question whether the decision-maker has the capacity to choose an appropriate expert in a subject in which the decision-maker has no expertise. *See* Brewer, *supra* note 3, at 1681. A decision-maker's appointment of an expert witness also heightens concerns of outsourcing decision-making authority. *See* Riddell, *supra* note 78, at 857.

267. GRANDO, *supra* note 142, at 306–07.

information,[268] or the decision-maker from engaging in its own development of evidence without proper due process protections.[269]

In Figure 4, the baseline case for evidence production, P, represents a mechanism with no rules of expansion or constraint, where the volume of evidence is assumed to depend solely on the mechanism's degree of independence, based notionally on the conclusions made about self-reliance in Part II.A. The effects of expansionary rules are illustrated with the case P_E, with the resulting increase in volume labeled Δ_E. The effects of constraining rules are illustrated with the case P_C and the resulting decrease in volume labeled Δ_C.

The point of this illustration is that mechanism designers can use analytical frameworks to calibrate mechanism outputs—like the highly stylized example of evidence volume. In doing so, it might choose to compensate for the countervailing influences of other mechanism inputs, such as elements that increase independence. The illustration does not describe a precise relationship between volume, independence, rules, or any other design inputs or outputs.

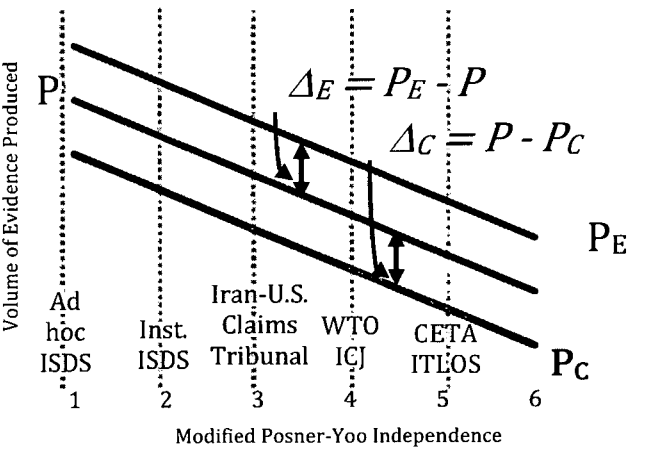

Figure 4: Model of the Effects of Rules of Expansion (Δ_E) and Constraint (Δ_C) on Volume of Evidence Produced

Evaluation Rules—Analytical framework proposals that address the evaluation component of fact-finding center on ensuring that decision-makers assess and accord weight to evidence based on its reliability. The objective of these proposals is to improve the analytical

268. *Id.*

269. A type of constraining rule could provide at least a partial solution to the problem of judicial fact-finding and reliance on unseen actors that Part II.A identified. Such a rule could prohibit expressly the production of any evidence without the agreement and participation of the parties. Similar prohibitions exist in some domestic legal systems, albeit with imperfect success rates. *See generally* Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131 (2008).

rigor of the adjudicator's evaluation of that evidence[270] by requiring more detailed and precise approaches to decision-making[271] and ensuring that decision-makers "really do what they say they will do and consciously weigh the reliability of evidence."[272] It is by now well-recognized that such substantive engagement is critical to the evaluation component of fact-finding, given the challenges associated with party-presentation of evidence[273] and the complexity of the questions presented in today's international disputes.[274]

My own proposal in this category is for adjudicators to use a reliability checklist, a short framework of questions to ask of expert witnesses and others seeking to provide specialized information outside the competency and training of arbitrators and judges.[275] The engineering, medical, and airline industries all use checklists to create analytical processes that receive and make use of information in a careful and efficient manner, without imposing constraints on decision-makers to adapt to new circumstances.[276]

With respect to expert evidence, a checklist approach could provide the basis for an analytical process that is focused on the reliability of an expert's methodology and the application of that methodology to the facts of a dispute.[277] An adjudicator would then determine how much weight to afford expert evidence based on its reliability.[278] Best practices in international disputes over the years suggest a relatively small set of useful questions that adjudicators should ask, such as whether a legal rule obviates the need for expert evidence altogether and whether an expert's methodology was applied within practical and theoretical boundaries as recognized in the expert's field.[279] Each question in the checklist could be designed as a proxy that is accessible to those with legal training and experience, without requiring that the decision-maker become an arbiter of competing claims of truth in specialized areas.[280]

The overall objective of a reliability checklist would be to impose an ex ante structure that makes adjudicators more likely to engage

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270. *See* Swinehart, *supra* note 48, at 318–20.

271. *See* Franck et al., *supra* note 30, at 1172.

272. *See* Sussman, *supra* note 256, at 493.

273. GRANDO, *supra* note 142, at 16 ("[U]nchecked participation is not necessary to achieve accurate outcomes; to the contrary, it might make the proceedings more prone to errors.").

274. RIPINSKY & WILLIAMS, *supra* note 56, at 190–91.

275. *See* Swinehart, *supra* note 48, at 320–46.

276. *See* ATUL GAWANDE, THE CHECKLIST MANIFESTO 39 (2009).

277. *See* Swinehart, *supra* note 48, at 318.

278. *See id.* at 320–21.

279. *See id.* at 318–46.

280. *See id.* at 320–21.

with the substance of complex evidence.[281] When coupled with a requirement to apply the checklist in a reasoned decision, to explain how and why an adjudicator has chosen to rely on certain sources of evidence but not others, a checklist could also improve the rigor and transparency of the evidence-taking process, heighten accountability, and increase the consistency and predictability of fact-finding.[282] One possible model checklist for evaluating the reliability of expert evidence is set out in an appendix to this Article.

2. Appointing Subject-Matter Experts as Adjudicators

A second category of rules-based approaches involves the appointment of one or more subject-matter experts as adjudicators. Scott Brewer endorsed this "two-hat" decision-maker strategy twenty years ago in the U.S. context.[283] This approach draws in part from experience with domestic administrative proceedings, which are thought to benefit from specialized expertise in some circumstances.[284] A variation of the two-hat approach involves the appointment of a "special master" to consider and make determinations on predicate factual questions. Those determinations are then binding on the overall decision-maker.[285]

Appointing subject-matter experts as adjudicators could improve fact-finding in a number of ways. The approach would increase the intellectual capacity of decision-makers to evaluate complex factual questions, without the challenge of training them on the job, as identified in Part II.C. A subject-matter expert appointed as an adjudicator is also more likely to actively participate in fact-finding in a way that streamlines the production and testing processes, enhances engagement with the substance of complex evidence, and focuses the inquiry on the reliability of party-produced evidence.[286]

Existing international law mechanisms already employ subject-matter experts as adjudicators in limited circumstances. Many mechanisms are flexible enough so that parties may appoint one or

281. *See id.*

282. *See id.*

283. *See* Kenneth S. Carlston, *Theory of the Arbitration Process*, 17 L. & CONTEMP. PROBS. 631, 650 (1952); Brewer, *supra* note 3, at 1677, 1681.

284. *See* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 935-36 (1988).

285. *See generally* James R. Dillon, *Expertise on Trial*, 19 COLUM. SCI. & TECH. L. REV. 247 (2018).

286. *See* Brewer, *supra* note 3, at 1677–82 (arguing that "the same person who has legal authority must also have epistemic competence in relevant scientific disciplines" to adjudicate cases centering on scientific questions); *see also* RIPINSKY & WILLIAMS, *supra* note 56, at 190–91; GRANDO, *supra* note 142, at 16, 306–07.

more adjudicators with specialized expertise in a particular dispute.[287] Arbitrators in commercial arbitrations are often appointed for their knowledge of the relevant industry, for example.[288] And WTO panelists are sometimes chosen in part for their backgrounds in economics.[289]

A small minority of existing institutional rules and international agreements also establish in advance requirements to appoint adjudicators with specialized expertise. ITLOS is an example of such an institutional arrangement, with rules specifically providing for subject-matter experts as adjudicators in its special chambers.[290] For its part, ICSID has proposed an Additional Facility on Fact-Finding Procedures that would allow the establishment of a committee devoted to deciding factual questions, either as a standalone procedure or in parallel to an arbitration, and contemplates that the parties may agree that "a member" of the committee will have "particular qualifications or expertise relevant to the subject-matter."[291]

A notable dispute in which an underlying international agreement required the appointment of a subject-matter expert as decision-maker is the *Indus Waters Kishengaga* arbitration.[292] There, a 1960 treaty required the appointment of a "[h]ighly qualified engineer[]" to the seven-member, ad hoc "court."[293] The parties selected a professor and engineer whose focus on hydrology and other complex questions of civil and environmental appears to have matched well with the issues presented in the dispute,[294] and the court's decisions are widely considered to reflect sound evaluation of the parties' evidence.[295]

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287. *See, e.g.*, INT'L CHAMBER OF COMMERCE, 2017 ARBITRATION RULES AND 2014 MEDIATION RULES 20–25 (2017), https://iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf [https://perma.cc/7QRY-B5XR] (containing in articles 11 through 15 provisions on arbitrator appointment that do not prohibit the disputing parties from appointing subject-matter experts as arbitrators in particular disputes).

288. *See, e.g.*, Łukasz Gembiś, *Are We Dealing with the Trend of Specialised Arbitration?*, KLUWER ARB. BLOG (May 9, 2016), http://arbitrationblog.kluwerarbitration.com/2016/05/09/are-we-dealing-with-the-trend-of-specialised-arbitration/ [https://perma.cc/Z5US-TPXH].

289. *See* Bown, *supra* note 164, at 15.

290. *See* Nicolette Butler, *In Search of a Model for the Reform of International Investment Dispute Resolution: An Analysis of Existing International and Regional Dispute Settlement Mechanisms*, *in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 380 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

291. ICSID Secretariat, *supra* note 71, at 167.

292. Indus Waters Kishenganga Arb. (India v. Pak.), PCA Case Repository 2011-01, ¶¶ 7–9 (2013).

293. Indus Waters Treaty, Annexure G, ¶ 4(b)(ii), Sept. 19, 1960, 419 U.N.T.S. 125.

294. *Emeritus Professor Howard Wheater*, IMPERIAL COLL. LONDON, https://www.imperial.ac.uk/people/h.wheater [https://perma.cc/37M9-FL8V].

295. *See, e.g.*, Shashank Kumar, *The Indus Waters Kishenganga Arbitration (Pakistan v. India)*, AM. SOC'Y INT'L L.: INSIGHTS (May 13, 2013), https://www.asil.org/insights/volume/17/issue/13/indus-waters-kishenganga-arbitration-pakistan-v-india [https://perma.

Despite their potential promise, approaches relying on the appointment of subject-matter experts as adjudicators all share a significant limitation. Someone—whether the treaty authors, disputing parties, third-party appointment authority, or, in the case of a special master, the court or tribunal—must still choose a person with appropriate expertise. Appointing subject-matter experts as adjudicators may therefore do nothing more than move the usual debate between the parties about expert input to another juncture.[296] This difficulty may lead parties or institutions to avoid fulfilling treaty or institutional requirements to appoint subject-matter experts as decision-makers. Treaty parties have, in practice, failed to populate specialized arbitral rosters,[297] and disputing parties and institutions have failed to appoint decision-makers with specialized expertise in specific cases when required under treaties or institutional rules.[298]

A further difficulty is that the appointment of subject-matter experts as adjudicators is unlikely to obviate the need for reliable evidence from expert witnesses and other sources, given that a single dispute often involves complex topics in a number of sub-specialties.[299] An expert decision-maker with training or experience in environmental science could help in a case analyzing, say, the effects of climate change, but would encounter a number of unfamiliar sub-specialties. The Intergovernmental Panel on Climate Change, for example, has working groups that draw from such diverse and highly specialized sub-specialties as biogeochemistry, climate modeling, and greenhouse gas removal.[300] Appointment of a subject-matter expert to a court or

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cc/Q6TU-AVAW]; Prakash Pillai, *Kishenganga Arbitration and Viability of Arbitration in Resolving State-to-State Disputes*, CLYDE & CO. (July 17, 2015), https://www.clydeco.com/insight/article/kishenganga-arbitration-and-viability-of-international-arbitration-in-resol [https://perma.cc/B6V7-VSXJ]; Tamar Meshel, *The Indus Waters Kishenganga Arbitration – Reviving the Indus Waters Treaty and Arbitration of Interstate Water Disputes*, KLUWER ARB. BLOG (Jan. 21, 2014), http://arbitrationblog.kluwerarbitration.com/2014/01/21/the-indus-waters-kishenganga-arbitration-reviving-the-indus-waters-treaty-and-arbitration-of-inter-state-water-disputes/ [https://perma.cc/6UT3-AP7P].

296. *See* Brewer, *supra* note 3, at 1681.

297. *Roster for NAFTA Dispute Settlement Panels and Committees*, NAFTA SECRETARIAT, https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Roster-Members [https://perma.cc/38A5-8E5G] (listing no roster for financial services despite the requirement in Article 1414.2 of NAFTA).

298. GATS requires that panelists in disputes involving financial matters "have the necessary expertise relevant to the specific financial service under dispute." General Agreement on Trade in Services art. 29, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183. Yet, in the only financial services dispute to arise under GATS, only one panelist appears to have had any prior experience in financial services. *See generally* Panel Report, *Argentina—Measures Relating to Trade in Goods and Services*, WTO Doc. WT/DS453/R (adopted May 9, 2016).

299. *See* Posner & Yoo, *supra* note 29, at 23.

300. *Working Groups / Task Force*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, https://archive.ipcc.ch/working_groups/working_groups.shtml [https://perma.cc/APZ7-KGKC].

tribunal, then, is unlikely to substitute, or obviate the need, for party-appointed expert witnesses and other expert evidence gathered in an effort to address the specifics of a dispute.

This last Part has set out a menu of rules-based approaches, divided into two categories, for designers of dispute settlement mechanisms that wish to improve fact-finding. Both categories—analytical frameworks that would increase the specificity of evidentiary rules and the appointment of subject-matter experts as adjudicators—offer potential means of improving fact-finding without requiring wholesale reform.

V. CONCLUSION

This Article is not a holistic appraisal of the investment-court movement. But it has raised for the first time a question that is of considerable importance to the legitimacy of any such court: will it be a better fact-finder?

The answer given here is that neither theory nor experience predicts that enhancing the role of institutions and institutional actors through the creation of an investment court will improve fact-finding. An investment court may instead decrease fact-finding quality while imposing financial costs on the disputing parties and delaying final resolution of disputes.

That conclusion standing alone is of course no reason to abandon the idea of an investment court altogether. But, especially given the high stakes intrinsic to such an ambitious reform, it should give movement adherents reason to doubt whether they have fully considered the consequences of their efforts. At least with respect to fact-finding quality, alternatives exist that would not require wholesale changes or degrade efficiency. It is worth examining them.

VI. APPENDIX

Model Analytical Framework on the Reliability of Expert Evidence

1. For the purposes of this framework, the term "expert evidence" means the written or oral testimony of any witness designated by the parties or by the tribunal as an expert witness.
2. In determining whether to rely on expert evidence in its decision-making, the Tribunal shall consider the reliability of that evidence, taking into account the questions set forth in paragraph 4, as well as any other questions as the tribunal may decide. The Tribunal may forego the requirement to take into account one or more of the questions set forth in paragraph 4 after consulting with the disputing parties.
3. In any award issued, the Tribunal shall set forth a description of the expert evidence on which it has relied, the degree of weight that it has afforded that evidence, and the bases for that weighting, including whether and how it has taken into account the questions set forth in paragraph 4. If the Tribunal determines to forego the requirement in paragraph 2, it shall set forth in the award the reasons for that determination.
4. For the purposes of, and consistent with, paragraphs 1 through 3, the questions to be taken into account include the following:
   (a) Will expert evidence usefully aid in answering the question presented?
      (i) Does evidence other than expert evidence, or a legal rule, obviate the need for expert evidence?
      (ii) Does the expert have specialized knowledge beyond that of the Tribunal?
   (b) Does the witness have the requisite experience and training in the chosen methodology?
   (c) What methodologies does the relevant technical field consider reliable in answering the question presented?
   (d) Is the methodology underlying the expert evidence more or less reliable than the methodology underlying other expert evidence presented?
   (e) Did the expert present the expert evidence in a manner that is useful in conveying information to a non-expert and that clearly identifies key points of disagreement with other experts, if any?
   (f) Did the expert apply the chosen methodology within practical and theoretical boundaries?