



2018

Let's Have Soufflé Instead: Selective Reform of the Investor-State Dispute Settlement Regime

Esther-Jane Grenness
esther.grenness@gmail.com

Follow this and additional works at: <https://scholarworks.law.ubalt.edu/ubjil>



Part of the [International Law Commons](#)

Recommended Citation

Grenness, Esther-Jane (2018) "Let's Have Soufflé Instead: Selective Reform of the Investor-State Dispute Settlement Regime," *University of Baltimore Journal of International Law*: Vol. 6 : Iss. 1 , Article 7.
Available at: <https://scholarworks.law.ubalt.edu/ubjil/vol6/iss1/7>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Journal of International Law by an authorized editor of ScholarWorks@University of Baltimore School of Law. For more information, please contact hmorrell@ubalt.edu.

Let's Have Soufflé Instead: Selective Reform of the Investor-State Dispute Settlement Regime

Esther-Jane Grenness¹

Abstract

A network of agreements comprising the investment treaty law regime cover international investments. It is a system rife with abuses made possible by loopholes and an inconsistent body of law. The system is in a legitimacy crisis and many seek to dismantle it entirely. Numerous alternatives and improvements have been proffered but few impactful steps have been taken to mitigate the problems within it. This comment advocates for an incremental approach that keeps the parts of the system that work while removing aspects that enable the most egregious abuses.

ACRONYMS

ADR	Alternative dispute resolution
BIT	Bilateral investment treaty
FET	Fair and equitable treatment
FTA	Free trade agreement
ICS	Investment court system
ICSID	International Centre for the Settlement of Investment Disputes
IIA	International investment agreement
ISA	Investor-State arbitration
ISDS	Investor-State dispute settlement
MFN	Most favored nation
OECD	Organization for Economic Cooperation and Development
TPP	Trans-Pacific Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development

1. Esther-Jane Grenness is a J.D. candidate at the University of Baltimore School of Law in Baltimore, Maryland. She may be reached at esther.grenness@gmail.com.

Introduction

There is a problem child in international law, and its name is investment treaty law. It benefits only foreign investors and allows them to haul sovereign States before three-member arbitral tribunals. The arbitrators determine whether States must shell out public funds, and the decisions may not be appealed. These three arbitrators are not State appointed officials. Indeed, they are not even judges or political appointees. Rather, the arbitrators are private individuals who can tell sovereign States what to do. Known as investor-State arbitration, it is a tool where investors' private interests sometimes overcome sovereign States' public interests, and investor-State dispute settlement (ISDS) is the mechanism that allows it.

Because domestic courts were considered biased toward foreigners, ISDS was created so that wronged foreign investors could have a neutral forum in which to seek redress against States hosting their investment.² ISDS was created in 1966 with the advent of the International Centre for the Settlement of Investment Disputes (ICSID), which is a subsidiary organization of the World Bank. Because investing money is a private affair, ISDS was modeled on the dispute resolution mechanism frequently utilized in disputes between parties in international commercial law, which is arbitration.³ Unlike arbitration in the domestic sphere, which is generally cheaper than litigation and concluded quickly, investor-State arbitration is an arduous and appallingly expensive procedure.⁴

Cases where foreign investors received payouts from States via ISDS were once rare, but they are not rare anymore, and the number

2. See *infra* Section III.A.

3. Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes—Adoption, Adaptation, and NAFTA Leadership*, 54 U. KAN. L. REV. 1339, 1340 (2006).

4. Pia Eberhardt & Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fueling an Investment Arbitration Boom*, CORPORATE EUR. OBSERVATORY & THE TRANSNATIONAL INST. 1, 14-16 (2012). As an illustration regarding the costs of investor-State arbitration, consider that ICSID arbitrators are compensated at \$3,000 per day, and there are three arbitrators to a panel. The costs for the arbitrators does not include any other costs such as the parties' own counsel, institutional costs, administrative costs, etc. Arbitrators in investor-State arbitration cases receive an average of \$200,000 per case. 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, 791 (2015).

of cases exploded over the last ten years.⁵ ISDS is a system riddled with opportunities for abuse because there are thousands of treaties that allow for it,⁶ and most of those treaties have vague language that's ripe for expansive interpretation.⁷ It is a system where inconsistency abounds, and the rationale behind divergent decisions sometimes cannot be explained.⁸ The system desperately needs reform to end abuses and bring consistency. As the number of cases rises, the amount of taxpayer money shed to defend and pay claims skyrockets. Not surprisingly, taxpayer ire and public interest group concern does the same—ISDS is a dirty word in many circles.⁹

“[T]here is widespread consensus . . . something is not quite right with the investor-State arbitration mechanism,”¹⁰ and virtually all stakeholders agree at least *some* change is necessary.¹¹ Instead, the disagreement lies in “the *what, how* and *extent* of such reform.”¹² The ISDS regime is at a critical stage and could wind up collapsing under its own weight. Practitioners within the ISDS regime should not “underestimate the disenchantment” of the taxpaying public or “ignore the power of human ingenuity” to dismantle the distasteful.¹³ There is an opportunity to improve the rule of law in the international sphere, and “[t]he objective of any reform should be to bring certainty to the rules of investment protection and improve legitimacy.”¹⁴

There are many different proposals to reform the system, and each proposal has sub-elements. Some proposals are more feasible than

-
5. See *infra* Section II.B.
 6. See *infra* Section III.B.
 7. See *infra* Part II.
 8. See *infra* Section III.B.
 9. See, e.g., Eberhardt & Olivet, *supra* note 4.
 10. Luis González García, *Making Impossible Investor-State Reform Possible*, in 4 RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 424, 424-25 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).
 11. David Gaukrodger & Kathryn Gordon, *Inter-Governmental Evaluation of Investor-State Dispute Settlement: Recent Work at the OECD-Hosted Freedom of Investment Roundtable*, in 4 RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 597, 599 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).
 12. U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2015, 120 (2015) [Hereinafter WIR15].
 13. Locknie Hsu, *Examining the Formative Aspect of Investment Treaty Commitments: Lessons from Commercial Law and Trade Law*, in 4 RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 221, 221 & n.2 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015) (quoting comments from the Chief Justice of Singapore).
 14. González García, *supra* note 10, at 433.

others, but no one proposal can solve the problem. The solution lies in taking a little bit from each proposal and combining it into a coherent, coordinated approach. The reform options are a bit like a recipe, and only the finest ingredients belong in a quality recipe. Because States are not very keen on change, a judicious approach where only the foulest parts of the system are removed is the most sensible. For States to get on board with reform, they must see that it “is essential in the interest of the rule of law[,]” the benefits must outweigh “any possible adverse effect,” and “reform will not greatly affect the status quo.”¹⁵

Accordingly, this comment advocates for a selective approach to shaping the overall system. Part II provides an overview of the ISDS landscape; its sources of law along with what it is and how it functions.¹⁶ Part III gives context with background and history that will inform the reader of the extent of the decay and which elements are most rotten.¹⁷ Finally, Part IV delves into the selective approach proffered in this comment. Part IV is divided into three sub-sections: (1) substantive reform, (2) institutional/procedural reform, and (3) normative reform.¹⁸

In the Kitchen: ISDS Regime

Ingredient Origin: Sources of Law

International investment law is comprised of a “patchwork of agreements” that is as convoluted as it is voluminous.¹⁹ Indeed, it is often referred to as a “complex spaghetti bowl.”²⁰ As of 2017, there were 3,324 international investment agreements (IIAs).²¹ Most of these are bilateral investment treaties (BITs) but some are free trade agreements (FTAs) with investment chapters.²² The majority of these

15. *Id.* at 425.

16. *See infra* Part II.

17. *See infra* Part III.

18. *See infra* Part IV.

19. Silvia Constain, *ISDS Growing Pains and Responsible Adulthood*, in 4 *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM* 344 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015)

20. U.N. CONF. ON TRADE & DEV., *WORLD INVESTMENT REPORT 2013*, 107 (2013) [Hereinafter *WIR13*].

21. U.N. CONF. ON TRADE & DEV., *WORLD INVESTMENT REPORT 2017*, 111 (2017) [Hereinafter *WIR17*].

22. *Id.*

agreements provide for some form of ISDS, and of those that have an ISDS provision, almost all of them provide for investor-State arbitration.²³ It is investor-State arbitration that is the poster child for the pitfalls of ISDS.

There are three generations of IIAs. The first generation IIAs have broad, sweeping language with “little interpretive guidance.”²⁴ This generation comprises the system’s “era of infancy” from the end of WWII to the mid-1960s and its “era of dichotomy” from the mid-1960s to late 1980s.²⁵ The second generation IIAs span the mid-1990s to about 2007.²⁶ The first and second generation IIAs make up 95 percent of all the IIAs that exist, and of that 95 percent, most are from the 1990s where about three treaties were concluded every week.²⁷ The third generation, the “era of re-orientation,” includes those IIAs concluded after 2008,²⁸ which have tighter language that remedies the amorphous nature of the language in the first generation IIAs.²⁹

Ingredient Quality: Character

By the mid-1990s, the number of ISDS cases brought before investor-state arbitration tribunals began to proliferate, and by 2014, the number of cases had exploded.³⁰ At the end of 2016, the known number of cases climbed to 767, and of those cases, “[i]nvestors won 60 percent of all cases decided on the merits.”³¹ There were only 292 cases from the 1950s to the end of 2007, and that number more than doubled by the end of 2014.³² Although the year-over-year figures for ISDS results appears to favor States, they must still fund their defense even

23. Coe, *supra* note 3, at 1339; Stephen L. Magiera, *International Investment Agreements and Investor-State Disputes: A Review and Evaluation for Indonesia*, ERIA Discussion Paper Series 1 (Jan. 2017), <http://www.eria.org/ERIA-DP-2016-30.pdf>.

24. Jonathan Ketechedon, *Investment Arbitration: Learning from Experience*, in *SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW* 97, 117 (Steffen Hindelang & Markus Krajewski eds., 2016).

25. WIR15, *supra* note 12, at 121-22.

26. *Id.*

27. WIR17, *supra* note 21, at 127.

28. WIR15, *supra* note 12, at 124-25.

29. Steffen Hindelang & Markus Krajewski, *Conclusion and Outlook* to *SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW* 377, 377-78 (Steffen Hindelang & Markus Krajewski eds., 2016).

30. WIR15, *supra* note 12, at 124.

31. WIR17, *supra* note 21, at 114.

32. WIR15, *supra* note 12, at 121.

when they win.³³ The first generation IIAs are the most problematic. “[A]bout two thirds of investment arbitrations in 2016 were brought under BITs, most of them dating back to the 1980s and 1990s.”³⁴

IIAs usually have a 10 to 20 year term which either renews for an additional term or turns into a case where one party may terminate the agreement unilaterally.³⁵ Most IIAs have survival clauses that provide investor protections for a fixed period, usually between 10 and 15 years, but occasionally as long as 20 years.³⁶ “Typically, such clauses cover governmental measures adopted both before and after the date of termination . . . but apply only to investments made before the treaty’s termination.”³⁷ These “sunset provisions”³⁸ can come back and “bite” States who unilaterally or bilaterally terminate their IIAs.³⁹ “Occasionally, the provision in question even extends protection to all or at least certain types of existing investors indefinitely throughout the whole period of investment[,]” and some even cover “commitments to invest.”⁴⁰ Before terminating the old agreements, the United Nations Conference on Trade and Development (UNCTAD) recommends that States enter into new agreements using “transition clauses.”⁴¹ These clauses “effectively modify the operation of the survival clause in the ‘outgoing’ treaty” by “clarifying that upon the new treaty’s entry into force, the old treaty is phased out.”⁴²

33. *Id.*

34. WIR13, *supra* note 20, at 111; WIR15, *supra* note 12, at 146; WIR17, *supra* note 21, at 116-17.

35. U.N. Conf. on Trade & Dev. *Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties*, 2 IIA ISSUES NOTE 1, 3 (2017), http://unctad.org/en/PublicationsLibrary/diaepcb2017d3_en.pdf. [hereinafter *Phase 2 Reform*]

36. *Id.* at 9.

37. *Id.*

38. Karsten Nowrot, *Termination and Renegotiation of International Investment Agreements*, in *SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW* 227, 242 (Steffen Hindelang & Markus Krajewski eds., 2016).

39. WIR17, *supra* note 21, at 127.

40. Nowrot, *supra* note 38, at 243.

41. *Phase 2 Reform*, *supra* note 35, at 9.

42. *Id.*

Ingredient Purpose: Function

The International Centre for the Settlement of Investment Disputes (ICSID) handles most ISDS cases.⁴³ The procedural rules outlined in the ICSID Convention or the ICSID Additional Facility Rules govern ICSID cases.⁴⁴ Other cases are handled at additional arbitral institutions and administered under the procedural rules outlined by the United Nations Commission on International Trade Law (UNCITRAL).⁴⁵

ISDS cases are adjudicated with ad hoc tribunals consisting of a panel of three arbitrators.⁴⁶ Two arbitrators are party-appointed, and each party picks their own arbitrator.⁴⁷ The third arbitrator, as the presiding arbitrator, is the most important.⁴⁸ Under the ICSID Rules, the third arbitrator is agreed upon between the parties, and under UNCITRAL Arbitration Rules, the presiding arbitrator is chosen by the two party-appointed arbitrators.⁴⁹ Because the third arbitrator is least likely to hold any bias, “the role of a third presiding arbitrator is critical to ensuring the integrity of the arbitral process.”⁵⁰ As can be imagined, it may not be easy for two sides to agree on a presiding arbitrator, and in such cases, one is picked for them.⁵¹

43. Eberhardt & Olivet, *supra* note 4, at 14; See WIR13, *supra* note 20, at 111; U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2016, 104 (2016) [hereinafter WIR16]; WIR17, *supra* note 21, at 115.

44. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Oct. 14, 1966, 17 U.S.T. 1270, Art. 25(1) [hereinafter ICSID Convention] (The ICSID Convention is the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which is also known as the ICSID Convention or Washington Convention. Cases administered under the ICSID Rules are for cases between Member States and nationals of other Member States to the ICSID Convention); International Centre for the Settlement of Investment Disputes, *ICSID Additional Facility Rules*, <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Additional-Facility-Rules.aspx> (last visited Jan. 3, 2018) (“Arbitration or conciliation of investment disputes between a State and a foreign national, one of which is not an ICSID Member State or a national of an ICSID Member State.”).

45. David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, 3 OECD WORKING PAPERS ON INT’L INV. 1, 21 (2012), <http://dx.doi.org/10.1787/5k46b1r85j6f-en> [hereinafter OECD WORKING PAPER].

46. *Id.* at 88.

47. *Id.*

48. *Id.* at 89.

49. *Id.*

50. Ketcheson, *supra* note 24, at 106.

51. OECD WORKING PAPER, *supra* note 45, at 89.

Awards are enforceable either under the ICSID Convention or the New York Convention.⁵² Under the ICSID Convention, awards are automatically enforceable within States that are party to the ICSID Convention.⁵³ Under the New York Convention, the prevailing party must seek out an enforcement action in a New York Convention Member State.⁵⁴ States may challenge the enforceability of the award if the circumstances meet certain criteria.⁵⁵

Under the current system, there is no way to appeal an arbitral award because “[r]eview of ISDS awards depends on the forum in which the dispute was initially brought and is almost always on narrow grounds that exclude review for errors of law.”⁵⁶ If the arbitration was conducted under ICSID Rules or ICSID Additional Facility Rules, the party unhappy with the decision may seek an annulment.⁵⁷ The grounds for an annulment are governed by the ICSID Convention and are limited.⁵⁸ Alternatively, a party may seek a set aside under the New York Convention at the seat of the arbitral award.⁵⁹

Because “[o]ne perceived advantage of arbitration [was] confidentiality[,]” ISDS proceedings were confidential for most of their history.⁶⁰ Maintaining such confidentiality when “public interest” is impacted, “presents difficulties[,]” and improvements to transparency began “on an ad hoc basis.”⁶¹ As more awards entered the public realm,

52. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention] (ensuring that arbitral awards issued in one State may be enforced in other States that are also party to the New York Convention.).

53. U.N. Conf. on Trade & Dev., *Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims*, 2 IIA ISSUES NOTE 1, 2-3 (2010) [hereinafter *Denunciation*]; Stephen M. Schwebel, *A BIT About ICSID*, 23 ICSID REV. 1, 4 (2008) (quoting RUDOLPH DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 20 (2008)).

54. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1551 (2005).

55. New York Convention, *supra* note 52, at Art. V.

56. OECD WORKING PAPER, *supra* note 45, at 1.

57. ICSID Convention, *supra* note 44, at Art. 52(1).

58. *Id.* (The grounds listed are: “the Tribunal was not properly constituted,” “the Tribunal manifestly exceeded its powers,” one of the Tribunal members was corrupt, “a serious departure from a fundamental rule of procedure,” or “the award has failed to state the reasons on which it is based.”).

59. New York Convention, *supra* note 52, at Art. V.

60. Ketcheson, *supra* note 24, at 111.

61. *Id.*

it became apparent there was a need for transparency.⁶² ICSID addressed transparency by requiring, at a minimum, the case summary and publication of the full award if the parties agree.⁶³ UNCITRAL took larger strides by issuing the 2014 Transparency Rules that apply to treaties concluded after 2014.⁶⁴ It made further progress with passage of the Mauritius Convention, which, at a State's option, would apply to treaties that entered into force before 2014.⁶⁵

The Rotten Meal: History & Context

The Salvageable Ingredients

ISDS has noble roots. The system was created to fill a hole in international law that needed to be addressed, and its “arbitration entitlement is one of the most progressive developments in the procedure of international law of the last fifty years.”⁶⁶ Before ISDS, foreign investors were limited to two options: (1) bring their case before plausibly biased, ineffective, or non-existent domestic legal avenues; or (2) petition their State of origin to take up the case on their behalf.⁶⁷ If the State of origin provided diplomatic protection, it had no obligation toward the investor of any kind, and “the investor lo[st] control of its claim.”⁶⁸ Even worse, if a State were to recover damages, it had no obligation to forward that money on to the “injured investor.”⁶⁹

Foreign investors could not bring international actions against host States because only States can bring actions against States.⁷⁰ As a result, investors had to rely on their home State to bring an action “on their behalf at the International Court of Justice.”⁷¹ Indeed, the fact that

62. Coe, *supra* note 3, at 1355-56; Kaj Hobér, *Investment Treaty Arbitration and its Future—if Any*, 7 Y.B. ON ARB. & MEDIATION 58, 64 (2016).

63. Ketcheson, *supra* note 24, at 112.

64. *Id.*

65. *Id.*

66. Stephen M. Schwebel, *A BIT About ICSID*, 23 ICSID REV. 1, 4 (2008).

67. OECD WORKING PAPER, *supra* note 45, at 9.

68. Christoph Schreuer, *Do We Need Investment Arbitration?*, in 4 RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 879, 883 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

69. Ketcheson, *supra* note 24, at 102.

70. Daniel Kalderimis, *Back to the Future: Contemplating a Return to the Exhaustion Rule*, in 4 RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 310, 343 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

71. Franck, *supra* note 54, at 1536.

ISDS creates standing for individuals against States is “one of the main advantages of international investment law, as it depoliticizes potential disputes between investors and host States.”⁷² ISDS created a mechanism whereby foreign investors could have their issue adjudicated before a neutral panel adhering to the rule of law—at least that is how it was supposed to work in theory.⁷³

When ISDS was created, there was a distinct “North/South” divide in the world economies.⁷⁴ It was investors in developed countries seeking to protect their investments in countries with judicial systems that functioned poorly, if at all.⁷⁵ Some argue that it was the rich imposing their will on the poor,⁷⁶ but it is a rational motivation—why would one invest in a country if the investment were subject to arbitrary seizure or unstable governance?⁷⁷ Given the lack of protection offered by insufficient domestic remedies and fickle diplomatic protection from one’s home State, it was necessary to have strong protections and a remedy for wronged investors.⁷⁸ The problem, however, was that the first generation’s IIAs, with their “broad and vague

72. Omar E. García-Bolívar, *Permanent Investment Tribunals: The Momentum is Building Up*, in 4 RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 394, 394 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

73. OECD WORKING PAPER, *supra* note 45, at 10.

74. Schwebel, *supra* note 66, at 2-4 (This north/south divide describes the tension between the needs of the developed countries in the northern hemisphere and the developing countries in the southern hemisphere. The needs conflicted, and because the developed countries brought the money, they drafted the agreements and developing countries capitulated to the will of the developed countries.). It is also interesting to note that the majority of ISDS cases are brought against countries with “developing and transition economies.” U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2014, 146 (2014).

75. Schwebel, *supra* note 66, at 6.

76. See, Stephan W. Schill & Heather L. Bray, *The Brave New (American) World of International Investment Law: Substantive Investment Protection Standards in Mega-Regionals*, 5 BRIT. J. AM. LEGAL STUD. 419, 443 (2016) (“the substantive standards of protection in the agreements were formulated with the protection of investors from developed countries in mind (but not necessarily the other way around)”).

77. Luis Miguel Velarde Saffer & Amir Ardelan Farhadi, *Lessons from the Deathbed of the Trans-Pacific Partnership (TPP): Are Recent Critiques of the Investor-State Dispute Settlement (ISDS) System Warranted?*, 11 NO. 1 DISP. RESOL. INT’L 3, 10 (May 2017); Schill & Bray, *supra* note 76, at 443.

78. Schwebel, *supra* note 66, at 3-4.

formulations,”⁷⁹ left too much room for interpretation which often led to results not foreseen when States entered into the agreements.⁸⁰

As time progressed, the “South” modernized with advanced, highly functioning domestic legal systems emerging.⁸¹ This created the perception that a separate venue for foreign investors was no longer necessary.⁸² While that may be true in the majority of cases, even in countries where the domestic legal system is advanced, foreign investors may still not get a fair shake.⁸³ In the infamous *Loewen* case, a Canadian funeral home investor experienced an egregious miscarriage of justice at the hands of a Mississippi jury with extreme bias against outsiders.⁸⁴ Indeed, when interviewed, the jury foreman stated proudly that a “rich, dumb Canadian politician” could not “pull the wool over the eyes of a good ole Mississippi boy.”⁸⁵ Clearly, there is enough concern about bias at the domestic level in all judicial systems that ISDS is warranted. A preference for a neutral international forum is “shared by thousands” and is “a preference that is rationally and decently motivated.”⁸⁶

The Foulest Ingredients

Sadly, somewhere along the line, ISDS went off track, and it now has a distinct dark side that overshadows its noble roots. Entire books

79. WIR17, *supra* note 21, at 127.

80. David N. Cinotti, *How Informed is Sovereign Consent to Investor-State Arbitration?*, 30 Md. J. Int’l L. 105, 111-112 (2015); Ketecheson, *supra* note 24, at 98; Kalderimis, *supra* note 70, at 330; Sean Woolfrey, *The Emergence of a New Approach to Investment Protection in South Africa*, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW 266, 269 (Steffen Hindelang & Markus Krajewski eds., 2016).

81. Schill & Bray, *supra* note 76, at 444.

82. *Id.* (“Mega-Regionals reflect a changed environment in which investment flows are no longer unidirectional; instead they flow both ways. Treaties, in consequence, no longer solely accommodate the offensive interests of capital-exporting countries[.]”).

83. Schwebel, *supra* note 66, at 6; Saffer & Farhadi, *supra* note 77, at 8.

84. *See, O’Keefe v. Loewen Group, Inc.*, 1995 WL 778615 (Miss. Cir. 1995) (\$500M jury award for emotional distress) The \$500M award was *after* the judge “reigned in” the jury. Chris Hamby, *A Homegrown Disaster*, BUZZFEED NEWS, (Sept. 1, 2016, 5:57 AM), <https://www.buzzfeed.com/chrishamby/homegrown-disaster>.

85. Chris Hamby, *A Homegrown Disaster*, BUZZFEED NEWS, (Sept. 1, 2016, 5:57 AM), <https://www.buzzfeed.com/chrishamby/homegrown-disaster>.

86. Schwebel, *supra* note 66, at 6.

are dedicated to the shortcomings of ISDS.⁸⁷ At a high level, the following are major concerns.

Inconsistency

ISDS is notorious for inconsistent decisions. There can be cases with similar facts, but a different outcome occurs under a single IIA because of ad hoc tribunals composed of different members who review the facts of each case standing alone. Any prior decision from a different tribunal on similar facts has no precedential weight. This means that “while arbitral tribunals do consider each other’s opinions, there is no guarantee that the reasoning or conclusions will be determinative in later cases.”⁸⁸ There are many instances where “separate tribunals have reached contradictory results that cannot be explained by factual or legal differences.”⁸⁹ Indeed, it could be argued “that the institutional structure of ISDS with ad hoc panels composed of different arbitrators for each case is not designed to achieve consistency, ha[s] not done so, and [is] not likely to do so in the foreseeable future.”⁹⁰

There are also instances in which cases with almost identical facts are brought under different IIAs, but the outcomes are different because the IIAs are different in substance. The phenomenon of two cases brought under different IIAs is also called parallelism. This is where a single incident can give rise to claims “under two formally different legal instruments.”⁹¹ In such a case, an investor may bring separate claims for the same incident and receive two awards for the single wrong action.

Arbitrator Bias

Arbitrators may have a vested interest in sustaining the current system. As such, there is an economic bias in favor of investors—after all, if there were no investors with an ISDS forum in which to bring cases against States, arbitrators would be out of a job.⁹² Arbitrator rosters also reflect possible bias towards investors because “[g]overnment

87. See OECD WORKING PAPER, *supra* note 45, at 89; Franck, *supra* note 54, at 1521; Eberhardt & Olivet, *supra* note 4.

88. Franck, *supra* note 54, at 1611.

89. Eun Young Park, *Appellate Review in Investor-State Arbitration*, in 4 *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM* 443, 444 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

90. Gaukrodger & Gordon, *supra* note 11, at 608.

91. WIR13, *supra* note 20, at 106.

92. Gaukrodger & Gordon, *supra* note 11, at 606.

backgrounds are less represented[,]” and “[I]awyers in private practice dominate the field, constituting over 60% of ICSID investment arbitrators.”⁹³ Furthermore, arbitrators are not restricted to a single role, and they are free to pursue other avenues of remuneration in the investment law field. As a result, most arbitrators serve a double and sometimes triple role as arbitrator, counsel, and expert witness.⁹⁴ This practice is criticized because “the process of arbitrators’ appointments” leads to the “interchangeable role[s] of some arbitrators—sometimes advocates, sometimes adjudicators.”⁹⁵

The conflict is compounded because each of the parties select their own arbitrator. This means that “[o]nce selected, an arbitrator’s personal incentive is to secure reemployment by providing his or her party with a favorable outcome.”⁹⁶ This is underscored by the fact that “[n]early all dissents are written in favor of the party which appointed that arbitrator.”⁹⁷ Moreover, the Organization for Economic Cooperation and Development (OECD) reported in 2011 that “a group of only 12 arbitrators have been involved . . . in 60% of a large sample of ICSID cases[.]”⁹⁸ With such an amazingly small number of arbitrators handling the majority of cases, the same issues are bound to come up over and over again.⁹⁹ Therefore, it is inevitable that arbitrators are going to face issue bias where there is “either a pre-existing view or a conflicting interest in an issue in a case they are deciding.”¹⁰⁰ As a result, “[i]nvestment arbitration is particularly vulnerable to issue conflicts because of the recurring legal issues under the same or similar legal instruments.”¹⁰¹

Investors’ Bad Behavior

Investors will engage in “nationality planning” whereby they survey the IIA landscape and decide which IIAs provide the best

93. *Id.*, at 604-05.

94. González García, *supra* note 10, at 431.

95. García-Bolívar, *supra* note 72, at 395.

96. Hans Smit, *The Pernicious Institution of the Party-Appointed Arbitrator*, 33 COLUMBIA FDI PERSPECTIVES (2010), http://ccsi.columbia.edu/files/2014/01/FDI_33.pdf.

97. Ketcheson, *supra* note 24, at 106.

98. OECD WORKING PAPER, *supra* note 45, at 45.

99. Gus Van Harten, *The European Commission and UNCTAD Reform Agendas: Do They Ensure Independence, Openness, and Fairness in Investor-State Arbitration?*, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW 128, 134 (Steffen Hindelang & Markus Krajewski eds., 2016).

100. OECD WORKING PAPER, *supra* note 45, at 50.

101. *Id.*

benefits—they go treaty shopping.¹⁰² Investors will then create shell companies, or mailbox corporations, to establish the minimum contact necessary within an IIA party State so that they can get the benefit of a particular IIA should a dispute arise in the host country in which their investment lies.¹⁰³ Investors may also do this after disputes arise.¹⁰⁴ This also provides investors an insurance policy so that if they were to lose their ISDS claim and an arbitral tribunal awarded the State costs, the State can only go after the corporate entity that is party to the dispute, namely, the shell corporation.¹⁰⁵ Because shell corporations tend to have “few assets,” States looking to enforce their costs award may come up short.¹⁰⁶

Investors will also engage in parallel claims and can obtain double payouts. They can do this because there are so many IIAs in existence and because the arbitral tribunals are convened on an ad hoc basis. Through nationality planning, investors can have a single set of facts and bring claims under different IIAs to separate tribunals.¹⁰⁷ Each claimant is a “national” for purposes of the relevant IIA while the respondent is the host country for both cases.¹⁰⁸

The Unpalatable Result

With all the unpleasant outcomes of ISDS, it is not surprising that countries are re-evaluating whether or not they wish to remain parties to IIAs with an ISDS mechanism. It used to be rare for States to terminate their investment treaty obligations; however, “[a] number of

102. Treaty shopping is a tongue-in-cheek term used to describe the way in which multinational corporations strategically organize their business and form subsidiary corporations solely to gain benefits under a particular IIA.

103. Duncan Watson & Tom Brebner, *Nationality Planning and Abuse of Process: A Coherent Framework*, ICSID REVIEW 1, 1 (Jan. 2018), <https://academic.oup.com/icsidreview/advance-article/doi/10.1093/icsidreview/six020/4817698>.

104. For example, after Phillip Morris lost a case in Australia’s domestic courts challenging a public health regulation, it created a subsidiary corporation, Phillip Morris Asia Limited, so that it could get the benefit of the Australia-Hong Kong BIT. Stockholm Chamber of Commerce, *Phillip Morris Asia Limited v. Australia*, ISDS BLOG (May 26, 2016), <http://isdsblog.com/2016/05/26/philip-morris-asia-limited-v-australia/>.

105. Gaukrodger & Gordon, *supra* note 11, at 602.

106. *Id.*

107. *See*, Franck, *supra* note 54, at 1558-68 (discussing the Lauder arbitration cases where similar suits came out with different outcomes with similar facts).

108. Franck, *supra* note 54, at 1558-68.

notifications of termination . . . have recently been given[.]”¹⁰⁹ and the number is on the rise.¹¹⁰ Despite exiting the treaties, most of those eschewed IIAs have survival clauses.¹¹¹ Indeed, of the 1,966 BITs surveyed by the OECD in 2011, if the treaties were terminated when most came up for renewal, “90% would still have some binding effect until at least 2024.”¹¹² As noted by UNCTAD, these first generation treaties have a serious “bite” that can come back to haunt countries for up to twenty years after termination.¹¹³

Nevertheless, ISDS serves its purpose and should not be eliminated. This seems counterintuitive, but the system functions—albeit with some ugly results. Investors also are entitled to a neutral forum in which to seek redress of their grievances. This is particularly necessary in jurisdictions where the judicial system is either undeveloped or ineffective. The issue becomes how to make it a fair forum for all stakeholders, and “[c]riticisms of ISDS should translate into proposals to improve the system rather than to cast it aside.”¹¹⁴ It is unwise for States to shed off the crux of ISDS in a reactionary manner without having examined all the implications of terminating their IIAs or exiting the ICSID Convention.¹¹⁵ States need to review not just the impact ISDS has on their regulatory scheme;¹¹⁶ they also need to examine closely the downstream effects of exiting the ISDS system.¹¹⁷

The Soufflé: Selective Reform

The Recipe: Substantive Reform

To reform the ISDS regime, the rotten ingredients must be emptied out and the bowl washed out. This means shedding the first and second generation IIAs. UNCTAD identifies this as “phase two” of

109. Gaukrodger & Gordon, *supra* note 11, at 611.

110. Nowrot, *supra* note 38, at 229.

111. *Denunciation*, *supra* note 53, at 3.

112. Gaukrodger & Gordon, *supra* note 11, at 612.

113. WIR17, *supra* note 21, at 127-29 & 132.

114. Saffer & Farhadi, *supra* note 77, at 20.

115. *See Denunciation*, *supra* note 53.

116. *See Woolfrey*, *supra* note 80, at 272-276 (South Africa examined the effect ISDS had on its policymaking, but there is no indication it reviewed the impact withdrawing from its BITs would have).

117. *Denunciation*, *supra* note 53, at 6.

reform.¹¹⁸ The system is already entering phase two as language of new IIAs is modernized to close loopholes and clarify meanings and then phase out the old treaties.¹¹⁹ States have also taken strides to increase transparency at the institutional level with the UNCITRAL Transparency Rules and Mauritius Convention, which both introduce requirements that awards and documents from proceedings be made public.¹²⁰

Ingredients: The Terms¹²¹

The new IIAs' substantive measures need to address old-school IIA provisions where foreign investors have brought the most abusive ISDS claims. It is also under these old-school provisions where foreign investors have been most successful.¹²² For substantive treaty reform to be effective, it is imperative that the old treaties be eliminated. The following elements for replacement IIAs will prevent the most egregious ISDS abuses:

a. *Most Favored Nation (MFN)*. Expressly limiting usage of the IIA to nationals of treaty parties ensures that only foreign investors who are nationals of the party States may take advantage of the treaty provisions. This would preclude nationals from third-party countries from free-riding on the IIA.¹²³ When third-party national investors free-ride on IIAs, it expands a State's potential exposure to ISDS actions, which creates huge expenses in both potential liabilities payable in public funds as well as the cost to defend unaccounted for investors' claims.¹²⁴

b. *Fair and Equitable Treatment (FET)*. The FET provision has proven particularly distasteful in its results in ISDS. In fact, of the cases brought to ISDS in 2016 where the States lost, the FET standard was found to be one of the most frequent breaches.¹²⁵ To avoid the

118. WIR17, *supra* note 21, at 126.

119. *Phase 2 Reform*, *supra* note 35.

120. Ketcheson, *supra* note 24, at 112 ("The most recent significant initiative has been adoption of the Rules on Transparency in Treaty-based Investor-State Arbitration . . . by UNCITRAL in July 2013." And remainder of discussion regarding Mauritius Convention mitigating the limitations of the UNCITRAL Transparency Rules).

121. For a more in-depth look at the possible ingredients available, refer to Schill & Bray, *supra* note 76, at 429-40.

122. Gaukrodger & Gordon, *supra* note 11, at 609 (reflective loss claims "substantial" amount of cases); WIR17, *supra* note 21, at 117 (FET standard one of the most frequent claims under which States found at fault).

123. WIR15, *supra* note 12, at 138.

124. Hsu, *supra* note 13, at 227.

125. WIR17, *supra* note 21, at 117.

results seen to date with the tricky FET standard, States can narrow the scope of these provisions to specify that the term means no more than the minimum treatment standard to which nations are already bound under customary international law.¹²⁶

c. Shareholder Reflective Loss Claims. Awards for reflective loss claims should be prohibited via express terms in IIAs. Currently, “[c]laims by company shareholders seeking damages from governments for so-called ‘reflective loss’ now make up a substantial part of the ISDS caseload.”¹²⁷ Reflective loss is where shareholders may bring individual claims for losses to the value of their shares in a corporation. In most developed legal systems, reflective loss claims are prohibited.¹²⁸ By contrast, “ISDS tribunals have found shareholder claims for reflective loss to be autonomous from claims by the company.”¹²⁹ This means that the investing corporation and any of its shareholders may all bring their own claims against a State in ISDS. It is essential that States include such a prohibition to protect themselves from an extraordinary exposure to potentially huge liabilities to multiple parties for a single act.

d. Narrow Definitions. States should eliminate “shares” and “derivatives” from the “investment” definition.¹³⁰ In addition, the definition of “investor” should exclude individual shareholders who can currently bring their own, separate claims on an investor corporation’s behalf when “the value of shares drops and/or dividends are reduced.”¹³¹ In the definitions, the most protective provisions should go to those investors with the biggest stakehold in the host country.¹³² Narrow definitions would also prevent treaty shopping and nationality planning for corporate citizenship.

126. Karen L. Kizer & Jeremy K. Sharpe, *Reform of Investor-State Dispute Settlement*, in 4 *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM* 172, 176 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

127. Gaukrodger & Gordon, *supra* note 11, at 609.

128. *Id.*

129. Gaukrodger & Gordon, *supra* note 11, at 609-10.

130. *Id.*, at 609 (Tribunals allow shareholders access to ISDS because “shares” is part of the definition of “investment.”); Chris Hamby, *supra* note 85 (Eliminating “derivative” from the definition of “investment” would prevent a situation like happened with Sri Lanka when the oil market plummeted when the economic bubble burst, and a bank sued the country in ISDS over “risky oil derivatives,” and it sought and received damages that were “24 times greater than the amount of money it would have lost.”).

131. *Id.*

132. Hsu, *supra* note 13, at 228.

e. *Establish Interpretive Bodies.* Interpretive bodies may issue binding interpretations of treaty provisions that arbitral tribunals will be obliged to follow. To protect investors with pending cases, there could be a blackout period during which the interpretive body may not issue a decision on a matter currently pending before an arbitral tribunal.¹³³ An interpretive body would safeguard against arbitrators interpreting treaties in an expansive manner inconsistent with the way States interpreted the provision when they signed the agreement.¹³⁴ Just as the United States Congress has a say in how courts interpret its laws, States should have a say in the meaning assigned to terms of the agreements into which they entered with other State parties.¹³⁵ It is not the job of the judicial arm to make the law; rather, it is to interpret the law. United States federal courts are guided in their interpretations of the meaning in statutes by legislative history and records of the debates held when the laws were considered in both houses of Congress. Similarly, arbitral tribunals deciding cases with terms established by one of the disputants “should give great deference” to the meaning the State parties assigned to those terms.¹³⁶

f. *Counterclaims & Investor Obligations.* States can strategically create a mechanism whereby investors can themselves be bound under the terms of IIAs into which their home States enter. This would be achieved through a two-pronged approach that each State party to the IIA would have to follow: (1) “promulgate domestic laws of incorporation stipulating that by incorporating in that State, an investor gives his consent to arbitration” in accordance with the relevant IIA; and (2) in the text of the IIA, “stipulate that an ‘investor’ for the purposes of the protection means that the enterprise has complied with laws of incorporation in its home State.”¹³⁷ Such an approach would allow States to hold corporations accountable to substantive obligations such as

133. See Tomoko Ishikawa, *Keeping Interpretation in Investment Treaty Arbitration ‘on Track’: The Role of State Parties*, in 4 RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 115, 139-48 (Jean E. Kalicki & Anna Joubin-Bret, eds. 2015).

134. Schill & Bray, *supra* note 76, at 439.

135. Saffer & Farhadi, *supra* note 77, at 16.

136. Ketcheson, *supra* note 24, at 114.

137. Elizabeth Boomer, *Rethinking Rights and Responsibilities in Investor-State Dispute Settlement: Some Model International Investment Agreement Provisions*, in 4 RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 183, 199 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

adherence to environmental and human rights standards.¹³⁸ To date, only one counterclaim has made it beyond the first phase of ISDS,¹³⁹ but where there is one, there are more to come, and this is particularly the case if more treaties contain such a provision.¹⁴⁰

Recipe Preparation: The Strategy

After shedding the old agreements, instead of entering into a whole new set of IIAs, States should coordinate their efforts and enter into what have become known as “megaregionals.”¹⁴¹ Megaregionals are FTAs with investment chapters that include multiple State parties and cover larger swaths of the global economy. The best example of this is the now defunct Trans-Pacific Partnership (TPP). Representing 40 percent of the world’s trade,¹⁴² the TPP’s investment chapter was reform focused. Out of the eighteen IIAs concluded in 2016, the TPP was one of only two IIAs that hit all eleven categories of UNCTAD’s “reform-oriented provisions.”¹⁴³

Even if megaregional FTAs cannot be worked out, because of the “narrow scope” of the discussion, megaregional investment agreements would be more likely to succeed in those cases.¹⁴⁴ Until recently, there were few multilateral investment agreements.¹⁴⁵ As one commentator put it, “as compared to the number of Multilateral Investment Agreements (‘MIAs’) . . . what one observes is that the ‘MIAs’ are ‘missing in action.’”¹⁴⁶ With the advent of megaregional investment agreements (which one could also call MIAs) the MIAs are no longer “MIA.”

138. *Id.* at 201.

139. WIR13, *supra* note 20, at 111.

140. *See* Saffer & Farhadi, *supra* note 77, at 17-18 (discussing the TPP’s counterclaims provision, which was “likely a response to previous decisions that have excluded counterclaims under the ICSID Convention[.]”).

141. U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2014, xxiii-xxv (2014) [hereinafter WIR14].

142. USTR, <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2011/february/engagement-trans-pacific-partnership-increase-export> (last visited Jan. 4, 2018).

143. WIR17, *supra* note 21, at 119-23 (2017) (Table III.3 on page 121 and surrounding discussion on pages 119-123).

144. Constain, *supra* note 19, at 350.

145. WIR14, *supra* note 141, at xxiii-xxv.

146. J.J. Saulino & Josh Kallmer, *The Emperor Has No Clothes: A Critique of the Debate Over Reform of the ISDS System*, in 4 RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 560, 563 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

The Tools: Institutional/Procedural Reform

We need only beat the eggs in this soufflé to the point of soft peaks, so selecting the tool to achieve this result is very important. There are three sorts of reform focused dispute resolution mechanisms that should be administered through ISDS institutions: (1) alternative dispute resolution (ADR), which includes mediation and conciliation; (2) an arbitral appellate mechanism; and (3) a standing investment court. Which reform works best will depend on the character of the recipe at the time it is made. Currently, ISDS reform is still in its late adolescence; a gentle touch may not be enough to produce the change necessary, while a firm hand may be counterproductive to obtaining an ideal outcome.

Mix by Hand: Alternative Dispute Resolution

There is “burgeoning” scholarship on the suitability of ADR methods in the ISDS realm.¹⁴⁷ Another matter of debate is whether ADR should be mandatory or if it is even suitable to ISDS where there is a “public-private conflict” at stake.¹⁴⁸ When an investor does not want to annihilate a relationship with the host State in an adversarial process that can take years and absorb massive amounts of money, ADR may be an attractive option.¹⁴⁹ Although it is underutilized, the ICSID Convention has a conciliation provision which “provides an important opportunity to reach a settlement without having the dispute become truly litigious.”¹⁵⁰

While ADR is absolutely a good option at the domestic level, it poses significant challenges at the international level. The parties may come to an agreement, but it is unclear whether such agreements may be enforced if one of the parties were to renege.¹⁵¹ In addition, even though ADR is very cost effective at the domestic level, it may not be cost effective in the ISDS sphere.¹⁵² The costs in investor-State

147. Hsu, *supra* note 13, at 230 (“In the ISDS context, the question of whether a shift toward such non-adversarial means is possible forms the focus of now-burgeoning academic and practitioner literature.”).

148. *Id.*, at 234, 242.

149. *Id.*, at 230.

150. *Id.*, at 231.

151. *Id.*, at 243.

152. Given the length of time and costs involved in investor-State arbitration, adding a required ADR layer adds more time and expense to the process. See Hsu, *supra* note 13, at 239 (discussing the criticisms levied against the ICSID conciliation procedures currently in place).

arbitration are jaw dropping. Unless ADR is truly a lower cost option where agreements are enforceable, disputants are unlikely to go the ADR route.¹⁵³ Furthermore, where ADR is made mandatory, it may simply delay the process and increase costs as the parties simply go through the motions to comply with the letter of the IIA law.¹⁵⁴ “[R]eplacing it with mandatory alternative dispute resolution mechanisms . . . may result in increasing the perception of political risk and making foreign investment more costly because it would relegate dispute settlement to untested alternatives.”¹⁵⁵ Investor-State arbitration may not be ideal, but it is the known quantity, and adding major changes via a different dispute resolution paradigm to a system that is in crisis is not advisable.

Electric Beater: Arbitral Appellate Mechanism

The current system allows for a second look at prior awards through ICSID, but it is not an appellate mechanism per se, and it is only available in extreme cases.¹⁵⁶ By utilizing a randomly appointed panel of arbitrators, an arbitral appellate mechanism would do much to improve the current system without a complete overhaul.¹⁵⁷ Instituting such a measure makes sense through ICSID because there is already a procedure for annulling awards. As such, modifying the ICSID Convention to allow for a closer review of cases would be easier than creating a whole new institution. Modification would need to expand reviewing tribunals’ authority to review the facts *de novo*, if warranted, as well as review for errors of law.¹⁵⁸ The appellate tribunal should be able to take partial action so that it is not an all-or-nothing review where either the whole award is upheld or it is entirely overturned.¹⁵⁹

153. Hsu, *supra* note 13, at 243.

154. See Hsu, *supra* note 13, at 238 (discussing measures to use in mandatory mediation that would avoid litigants participating in ADR “as a matter of ‘lip service’ or to delay resolution of the dispute”).

155. Stephan W. Schill, *The Sixth Path: Reforming Investment Law from Within*, in 4 *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM* 621, 627 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

156. Park, *supra* note 89, at 444.

157. Joerg Weber & Catharine Titi, *UNCTAD’s Roadmap for IIA Reform of Investment Dispute Settlement*, 21 *N.Z. BUS. L. Q.* 319, 321 (Dec. 2015).

158. Gabriel Bottini, *Reform of the Investor-State Arbitration Regime: The Appeal Proposal*, in 4 *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM* 455, 460-61 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

159. Jaemin Lee, *Introduction of an Appellate Review Mechanism for International Investment Disputes: Expected Benefits and Remaining Tasks*, in 4 *RESHAPING THE INVESTOR-*

“Alarms have been raised” because first level decisions impact public policy and have “expansive political and economic consequences,” which means questionable awards should be subjected to a searching review as a means of “quality control.”¹⁶⁰ The arbitrators selected in appellate cases should also be randomly appointed from “a fixed body or roster” so as to remove the bias inherent in party appointed arbitration.¹⁶¹ Appellate review proposals have been floating around since 2002 with the passage of the U.S. Trade Act,¹⁶² which “mandated a negotiating objective” for inclusion of appellate mechanisms in all future IIAs where the U.S. was a party.¹⁶³ Treaty-by-treaty establishments of appeals mechanisms, however, are inefficient, and “it would be more desirable to create a single, institutionally managed appeals mechanism to prevent further fragmentation in the system.”¹⁶⁴

Furthermore, ICSID sought public comment on an appellate mechanism proposal in 2004 but did not receive much feedback, and the idea was “shelved.”¹⁶⁵ There are now billions of dollars at stake, so as more States become party to ISDS suits, and as more of them reach the point where they are considering exiting the ISDS system entirely, such an appellate proposal should reach more “fertile ground” than it has in the past.¹⁶⁶ In light of the fact that States are unlikely to upset the apple cart *too* much,¹⁶⁷ a mechanism that builds on the current system even with “at least some contribution . . . would have a considerable chance of, over time, making investment arbitration more

STATE DISPUTE SETTLEMENT SYSTEM 474, 492-93 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

160. Park, *supra* note 89, at 451.

161. *Id.*

162. The main function of the U.S. Trade Act 2002 was to provide the President with fast-track authority in negotiating trade agreements. It established that Congress could only vote yes or no on agreements without authority to make any modifications. The Act also sought to bring coherence to the international investment arena by requiring that future trade agreements with investment chapters include in writing an objective to negotiate the establishment of an appellate mechanism. THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1155-1156 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008) (discussing the aspect of the Act dedicated to appellate mechanisms in international investment treaty law).

163. Park, *supra* note 89, at 451.

164. *Id.*

165. Schill, *supra* note 155, at 625.

166. *Id.*

167. González García, *supra* note 10, at 433.

legitimate.”¹⁶⁸ If an appellate mechanism were pursued alone, it would not be enough. But because there are so many other ingredients that can be added in, an appellate mechanism would have a huge impact without an extreme overhaul, which States are less likely to do when they typically “appear unwilling to embark on such reform projects.”¹⁶⁹

Commercial Mixer: Standing Investment Court

The other option is a standing investment court. Recently, the European Union included an investment court system (ICS) proposal in three FTAs it negotiated. The idea for “a court to settle investment disputes between States and foreign investors . . . is not new” and “can be traced back to the period immediately after the conclusion of World War II.”¹⁷⁰ As ISDS became more controversial, calls to create a permanent international investment court reappeared in the early 2000s.¹⁷¹ The idea did not gain traction, but it was taken up anew in UNCTAD’s 2015 World Investment Report where a standing investment court was listed as one of five reform paths.¹⁷² The EU proposal is a bold step in ISDS reform and turns the current system on its head by adding another layer of complexity to an already overly complex system. The ICS proposal leaves too many questions unanswered and creates serious questions about enforceability of awards,¹⁷³ the role of international law norms where references to them were left out of the text,¹⁷⁴ and creates an appellate mechanism with grounds for review that go only slightly

168. Bottini, *supra* note 158, at 465.

169. Schill, *supra* note 155, at 625.

170. Eduardo Zuleta, *The Challenges of Creating a Standing International Investment Court*, in 4 *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM* 403, 404 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

171. *Id.* at 408, *citing* Gus Van Harten, *A Case for an International Investment Court*, *Soc’y of Int’l Econ. L.*, 2008.

172. U.N. Conf. on Trade and Dev., *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, 2 IIA ISSUES NOTE 1, 4 (Jun. 2013); WIR15, *supra* note 12, at 28 (The five reform paths proffered include: “1. Promoting alternative dispute resolution[;] 2. Tailoring the existing system through individual IIAs[;] 3. Limiting investor access to ISDS[;] 4. Introducing an appeals facility[; and] 5. Creating a standing international investment court.”); WIR15, *supra* note 12, at 152.

173. See AMERICAN BAR ASS’N SECTION OF INT’L L., INVESTMENT COURT SYSTEM PROPOSAL INITIAL TASK FORCE DISCUSSION PAPER 98-114 (Oct. 14, 2016), <http://apps.americanbar.org/webupload/com-mupload/IC730000/newsletterpubs/ExecutiveSummaryDiscussionPaper101416.pdf> [hereinafter A.B.A. WORKING PAPER] (in-depth discussion on the enforcement issues).

174. *Id.*, at 55 & 58.

further than the ones currently available under the ICSID Convention.¹⁷⁵

The proposal is a reactionary response to political pressures to eliminate a flawed system.¹⁷⁶ A task force from the Investment Treaty Working Group of the A.B.A. section of International Law's International Arbitration Committee produced an extensive evaluation of the EU's ICS Proposal. The task force concluded that the ICS proposal contained procedures that were "inchoate and often, incoherent."¹⁷⁷ The task force noted that "many details of the Investment Court appear to not have been fully considered," which underscores the reactionary nature of the proposal.¹⁷⁸ Moreover, the task force recommended the proposal be "carefully considered before its implementation," and it ended by stating that "[r]eplacing a workable arbitration system with an unworkable Investment Court must be avoided."¹⁷⁹

An investment court created at the individual treaty level is also ill advised where the system already suffers from too many layers of complexity. For an investment court to work, it would have to be created at an institutional level through a multilateral effort because "institution building is not simply an exercise on paper."¹⁸⁰ An investment court would be like creating another ICSID because the existing institutions are "ill-adapted" and "antithetical" to a multilateral investment court.¹⁸¹ Until the strands in the "complex spaghetti bowl" of IIAs are straightened out and the portion reduced, an investment court would merely reinvent the wheel.¹⁸² Even more, with all its unanswered questions, implementing an investment court like that proffered in the EU Proposal could bring the system back to this point in the future. With the Proposal's vague language and its reactionary promulgation, who is checking the back door to ensure no goblins ride in on the Proposal's

175. *Id.*, at 76-77.

176. European Commission Press Release IP/15/3201, Report Presented Today: Consultation on Investment Protection in EU-US Trade Talks (Jan. 13, 2015) (The Commission received almost 150,000 comments, and they were *overwhelmingly* against ISDS); A.B.A. WORKING PAPER, *supra* note 173, at 6.

177. A.B.A. WORKING PAPER, *supra* note 173, at 135.

178. *Id.*

179. *Id.*

180. Ketcheson, *supra* note 24, at 127.

181. A.B.A. WORKING PAPER, *supra* note 173, at 9 (discussing a whole new institution better suited to administering judicially decided ISDS disputes).

182. WIR13, *supra* note 20, at 106-7.

coat tails like they did with the broad, sweeping language of the first generation IIAs?

While an investment court is a noble option and one that would surely make great strides in legitimizing the system, for it to be a viable solution, it must be carefully thought out, well crafted, and all stakeholders consulted in its creation.¹⁸³ UNCTAD and the OECD have already taken steps in this regard.¹⁸⁴ With the current system, there is enough experience with the familiar that everyone can at least agree on the precise aspects of the system that need work.¹⁸⁵ One must remember that the first generation BITs and ICSID were all endeavors with pure—or at least rational—intent. Now, look at the mess at hand. As the aphorism goes, the road to hell is paved with good intentions; therefore, a measured approach to overhaul of the ISDS regime is warranted.

Chef's Tip

The appellate mechanism is viable enough that it would be better to put ADR and a standing investment court back on the shelf, pending the outcome of an appellate mechanism. ADR should be pursued if the number of ISDS cases continues to rise after megaregional IIAs take effect and first and second generation IIAs eliminated. A standing investment court is so radical a change that it would require creation of a whole new institution suitable for managing a judicial approach.¹⁸⁶ A standing investment court is therefore best put aside, and it should only be pulled out if the strength of its force is necessary to bring the best out of the recipe. For now, this recipe is best served by an appellate mechanism utilizing the arbitral tribunal model.

The Place Setting: Normative Reform

ISDS has a tremendous normative effect in public international law. The fact that it has been incoherent and inconsistent at times is extremely concerning. According to Stephan Schill, arbitral tribunals “contribute significantly to making international investment law and act as a mechanism of global governance.”¹⁸⁷ Therefore, “all those

183. A.B.A. WORKING PAPER, *supra* note 173, at 9-10.

184. *Id.* at 120.

185. Ketecheson, *supra* note 24, at 120.

186. A.B.A. WORKING PAPER, *supra* note 173, at 120.

187. Schill, *supra* note 155, at 623.

affected by investment arbitration's governance activity" are entitled to an explanation that justifies the system.¹⁸⁸ According to Schill, ISDS "will continue to face challenges and criticism[,] and its survival will depend on States' acceptance "of how investment treaties are interpreted and applied."¹⁸⁹ Most important, "investor-State arbitration has to deliver on the promise of an accountability mechanism to implement the rule of law[.]"¹⁹⁰

Schill argues that investor-State arbitration "can be reformed . . . by arbitrators and parties making increasing use of comparative public law methodology that allows them to draw on the experience of more sophisticated systems of public law adjudication at the national and international level[.]"¹⁹¹ Accordingly, both investor-State arbitration and international investment law as a whole should be reframed under a "public law paradigm."¹⁹² This "requires rethinking arbitration not so much as a dispute settlement mechanism, but as a mechanism of global governance; understanding arbitrators not so much as agents of the parties, but as trustees of the international community[.]"¹⁹³ As a result, "[p]ublic law instead of private law rationales should then guide the practice of investor-State arbitration."¹⁹⁴

The Place Mat: Restatements

To bring public law rationale to the forefront, an international interpretive body with inclusive membership would be invaluable to creating a system that provides input from all those affected by ISDS. Such a body should "benefit[] from regular participation by ICSID and UNCTAD, input from leading experts in relevant fields, and the views of arbitration specialists, business and civil society."¹⁹⁵ This panel would mirror that of a panel created in an individual IIA. Schill emphasized, however, that even in a case where individual IIAs include interpretive bodies that issue binding opinions on what the wording

188. *Id.*

189. *Id.* at 633-34

190. *Id.*

191. *Id.* at 627.

192. Schill, *supra* note 155, at 639.

193. *Id.*

194. *Id.*

195. Gaukrodger & Gordon, *supra* note 11, at 598 (an interpretive body should be like that made up by the OECD's Freedom of Investment (FOI) Roundtable, which examines issues in international investment law).

means, that it “will go only so far in reducing arbitrator discretion; it can never exclude it completely.”¹⁹⁶

An international interpretive panel of members examining international investment law could be one like that for the International Law Commission.¹⁹⁷ Such a commission “would not be very different from what many scholars and eminent practitioners do at the moment” where they issue interpretations of international law and describe trends in issues of public international law.¹⁹⁸ The International Law Commission is an extremely influential body to the development of public international law.¹⁹⁹ This is so despite the fact that there are no precedential effects in international law and interpretations issued by the Commission are merely persuasive authority.²⁰⁰ An international investment law commission could hold similar weight, especially if it were “created by the United Nations General Assembly[,]” and its work would be a “somewhat soft-control mechanism” in which its opinions “would not be binding on arbitral tribunals[.]”²⁰¹ Although “it would be for each tribunal to decide what weight to give to these reports[.]” the reports would “have a considerable effect on the progressive development of international investment law.”²⁰²

If international investment law were to have such “an expert body” with “eminent international lawyers from different jurisdictions[.]” they could “reconcil[e] divergent opinions and bring[] about a general understanding concerning the rules” for international investment law.²⁰³ An international investment law commission would “identify and analyze conflicting approaches to investment protections[.]”²⁰⁴ In particular, because such a body would be created under the auspices of the UN General Assembly, States would have a role in the appointment of the members. As such, States can take advantage of such a panel “at a broad[] international level” and “communicate

196. Schill, *supra* note 155, at 626.

197. González García, *supra* note 10, at 435.

198. *Id.*

199. *Id.* at 436.

200. United Nations, *About the Commission*, INTERNATIONAL LAW COMMISSION (Jul. 31, 2017), <http://legal.un.org/ilc/intro.shtml>.

201. González García, *supra* note 10, at 436.

202. *Id.*

203. *Id.* at 435.

204. *Id.*

their views about how treaties should be interpreted.”²⁰⁵ This would be accomplished via “restatement-type documents. These could help arbitral panels and other users to better understand government intent in crafting various elements of investment treaties, thereby helping to eliminate inconsistencies[]” in defining the meaning and standards in the IIAs that make up international investment law.²⁰⁶ Indeed, “[d]etermining international standards, by definition, involves recourse to comparative law.”²⁰⁷

The Ramekin: A Code of Ethics that Bites

To achieve the comparative public law viewpoint, expectations for treaty interpretation need to be made mandatory and explicit, which should be done at the institutional level to be most effective.²⁰⁸ In addition, the expectations on acceptable conduct must be made explicit with a significant slap on the wrist in the event the code of conduct were violated. A code of conduct of this sort should apply to both arbitrators and counsel. Sanctions could be issued both for unethical arbitrator actions as well as counsel who bring unmeritorious or abusive ISDS cases.²⁰⁹

An institution with a function such as that served by Bar associations with binding authority would be a good option. Such an institution would have the power to “disbar” international investment lawyers and serve an educational function for practitioners. It would do this by ensuring practitioners have the necessary understanding of the relevant public international law and not just treaty and corporate law. This sort of institution could also require continuing education credits so that practitioners are aware of trends in the law. As a result, even if there is little “interest among practitioners” for reform of the system, they must still be responsible for understanding such reform is required of them.²¹⁰ Indeed, if the “attitude of indifference” is not changed, “no

205. Gaukrodger & Gordon, *supra* note 11, at 608.

206. *Id.*

207. Schill, *supra* note 155, at 644.

208. *See Id.*, at 646 (discussing the argument from observers that such mechanisms be “coercive.” While Schill concludes that such mandatory institutionalized expectations are unnecessary, this comment takes the position that they are necessary—at least in the beginning.).

209. *See* Sam McMullan, *Holding Counsel to Account in International Arbitration*, 24 LEIDEN J. INT’L L. 491, 508-510 (no. 2, 2011) (discussing international arbitral tribunals levying sanctions against unscrupulous counsel).

210. González García, *supra* note 10, at 425.

sensible reform will be achieved.”²¹¹ Again, such a governing instrument would need to be a collaborative effort. Either each State would have its own ethics code and managing authority or a multilateral institution such as ICSID or UNCITRAL would supervise it. In any event, authority to issue sanctions for violations would be essential. When the only sources of ethical codes are from varying origins and none are binding, it “can lead to a situation where not everybody knows what they are supposed to do and how to behave.”²¹²

The Utensils: Impartial Decision Makers

It is time to “detach[] adjudicators from the disputing parties” and “establish[] a roster of arbitrators, randomly selected, by lot, for each individual case they are called to hear.”²¹³ It is essential, however, that decision makers be selected “through a transparent process that involves consideration of the interests of relevant stakeholders (including investors).”²¹⁴ This could involve more than just selection of top tier arbitrators already on the ICSID and UNCITRAL lists. Instead, adjudicators can be taught to become truly impartial decision makers. For example, to improve the functioning of its federal court system, the United States has a Judiciary agency that manages the training of court personnel, including judges.²¹⁵ ISDS could benefit from such a program, and if implemented via the ICSID Convention or UNCITRAL Arbitration Rules, most arbitrators and the cases they touch could be reached.

Another ISDS issue is that the current pool of arbitrators is “pale, male and stale”²¹⁶ because the majority are from North American or

211. *Id.*

212. *Id.* at 435.

213. Weber & Titi, *supra* note 157, at 321.

214. A.B.A. WORKING PAPER, *supra* note 173, at 132.

215. The Judiciary agency is the Federal Judicial Center which was established by 28 U.S.C. § 620. According to § 620(b)(3), one of the functions of the Court is “to stimulate, create, develop, and conduct programs of continuing education and training for personnel of the judicial branch of the Government and other persons whose participation in such programs would improve the operation of the judicial branch, including, but not limited to, judges, United States magistrate judges, clerks of court, probation officers, and persons serving as mediators and arbitrators.”

216. Pale, male, and stale is a tongue-in-cheek phrase heard at many different conferences but not one this author has seen in print in the literature about investor-State Arbitration. It appears the phrase originated in a comment referencing the composition of NASA in 1992. *What is the Origin of ‘Pale, Male and Stale’?*, ENGLISH LANGUAGE & USAGE (Jul. 18, 2014), <https://english.stackexchange.com/questions/185731/what-is-the-origin-of-pale-male-and-stale>.

European countries, over 95% are male, and the age range is very narrow with “elite members of the legal profession.”²¹⁷ To promote diversity in membership and background/viewpoints as well as impartiality, arbitrators can be taught to fulfill their mission with training in public international law. If implemented at the multilateral institutional level, States can have a role in shaping who decides the cases. Some of the complaints levied against ISDS are that the pool of arbitrators need no special qualifications or background,²¹⁸ and few have training in public international law.²¹⁹

Instead of going in the opposite direction as advocated in the EU’s ICS Proposal, which mandates a State-picked roster of decision makers, a middle ground may be found.²²⁰ Training arbitrators to think like judges could also alleviate investor concerns that decision makers on a roster would hold pro-State biases.²²¹ Fears that they may lack the necessary expertise to preside over complex areas of law in niche economic sectors would also be addressed.²²² If arbitrators who specialize in corporate law and various economic sectors are given judicial training to harness their expertise, and if they use it to interpret law rather than “conflate technical legal analysis with political and economic policy choices,” there would be a tremendous step forward in alleviating both public and private concerns about the persons who preside over ISDS cases.²²³ After all, “meet[ing] the qualifications for judicial office does not, of itself, result in any guarantee that the candidates will be qualified to decide investment disputes.”²²⁴ But most of all, “it is

217. Gaukrodger & Gordon, *supra* note 11, at 604.

218. González García, *supra* note 10, at 433.

219. OECD WORKING PAPER, *supra* note 45, at 91.

220. A.B.A. WORKING PAPER, *supra* 173, at 23.

221. *Id.*, at 131.

222. See, e.g., Anne van Aaken, *Delegating Interpretative Authority in Investment Treaties: The Case of Joint Administrative Commissions*, in 4 RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 39 (Jean E. Kalicki & Anna Joubin-Bret, eds. 2015) (discussion regarding tension between legal expertise and factual expertise. “Being an expert in the law does not mean that one is an expert on the factual situation which needs to be decided upon. There are clearly always questions that need more factual expertise.”).

223. Liang-Ying Tan & Amal Bouchenaki, *Limiting Investor Access to Investment Arbitration: A Solution without a Problem?*, in 4 RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 309 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

224. A.B.A. WORKING PAPER, *supra* note 173, at 125.

fundamental that justice should not only be done but should be seen to be done.”²²⁵

Conclusion

If ISDS is to enter “responsible adulthood,”²²⁶ then States and stakeholders must coordinate and thrust ISDS into its best self. It must be a cohesive endeavor both in terms of the parties involved as well as the elements incorporated into the solution. “[A]chieving more uniformity and consistency and a widely acceptable view on how investor rights and public interests should be balanced requires consensus-building processes with a multilateral effect and appropriate methods to reach that consensus.”²²⁷ If the approach is strategic and methodical with a long-term solution always at the forefront, the “warts and all” that mar the current ISDS complexion may be eliminated.²²⁸

Although multilateral solutions are extraordinarily difficult to achieve,²²⁹ they would “go farthest in systemically improving investment dispute settlement.”²³⁰ More importantly, “comprehensive reform would require taking into account not only existing IIAs that entail investment dispute resolution but also ISDS instruments, such as the ICSID Convention and UNCITRAL’s Arbitration Rules.”²³¹ Certainly with regard to amending the ICSID Convention with an appellate mechanism, even though it may be “notoriously difficult” and some may say that because a prior attempt failed, “consensus will never be found,” it is a new day in ISDS.²³² Attitudes are changing as the costs of ISDS awards mount into the tens of billions range.²³³ The reform recipe for the ISDS regime requires a delicate balance. The regime is engorged by carb loaded spaghetti, and it needs slimming down with a high protein diet of the most impeccable quality. The solution must be served surrounded by a theoretical approach suitable to the ISDS character, prepared by a tool best suited to the form of the current ISDS

225. González García, *supra* note 10, at 433.

226. Constain, *supra* note 19, at 344-50.

227. Schill, *supra* note 155, at 649.

228. Saffer & Farhadi, *supra* note 77, at 21.

229. Kizer & Sharpe, *supra* note 126, at 174.

230. Weber & Titi, *supra* note 157, at 327.

231. *Id.*

232. A.B.A. WORKING PAPER, *supra* note 173, at 120.

233. WIR13, *supra* note 20, at 111 & n.66 (\$1.77 billion award against Ecuador was the largest award in history at that time.); WIR15, *supra* note 12, at 146 (The largest award to date is now \$40 billion.).

recipe, and filled with ingredients that complement each other in a cohesive whole. It is time to toss out the rotten spaghetti and have soufflé instead.