THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM AMIDST CRISIS, COLLAPSE, AND REFORM

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ABSTRACT

The dispute settlement regime between investors and states through *ad hoc* arbitration has come under heavy criticism in the past few decades. More recently, these critiques have escalated to the extent that the international community is considering replacing it with a completely new scheme that includes a permanent tribunal to settle such disputes. An intermediate approach to reforming the system—the establishment of an appellate body aimed at providing consistency to the numerous ad hoc arbitration awards—is also being considered. As a third option, the arbitration community, as well as other stakeholders interested in maintaining the *ad hoc* regime, are working to reform it by addressing only some of its flaws, while preserving its fundamental characteristics. This article analyzes the main criticisms of the current dispute settlement regime between investors and states and carries out a comparison between the three policy reform options, how they are intended to solve the system's flaws, as well as the implications arising from each of those options.

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I. Introduction

The current Investor-State Dispute Settlement System (ISDS) was created to allow foreign investors to bring claims directly against the states where the investors placed their investments. It began to provide foreign investors with a set of rules for resolving disputes in cases where the states hosting their investments do not comply with the terms of an international investment agreement (IIA). Its purpose is to protect foreign investors by providing them with an enforceable mechanism in the case of discrimination, expropriation, or any other restrictions of their rights under the IIA. Before the ISDS, disputes about foreign investment were settled either through domestic courts or diplomatic channels, where the investor's state of citizenship would bring a case against the state where the investment was located.[3]

The first proposal for an ISDS, known as the Abs-Shawcross

[3] *See* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 Am. J. Int'l Law 179 (2010).

Draft Convention, emerged during the late 1950s as a formulation from a group of European businesspersons and jurists, without any participation from governments.[4] Among the main arguments in favor of the ISDS was the perception that a reliance on domestic systems would only hold merit in countries with sound legal systems, good governance, and effective local courts.[5] Thus, from the investors' perspective, instead of settling foreign investment disputes before often biased and unsophisticated domestic courts in (developing) host states, most IIAs allowed them to move around the national courts of the host state to international arbitration proceedings.[6]

Moreover, the ISDS safeguards the investors' interests in cases where political considerations in their home countries impede that state from confronting the state hosting the investment.[7] From the point of view of the investor's state, the mechanism prevents disputes concerning individuals from becoming a motive for divergence between sovereign states. From the perspective of the host states, the ISDS avoids possible retaliation from the investor's state, which could materialize even in areas outside the scope of the investment.

This proposal, commonly portrayed as a mechanism to protect foreign investors, proved attractive to capital-exporting countries as it served as inspiration for the dispute settlement mechanism in the IIA, as prescribed by the Organisation for Economic Co-operation and Development (OECD).[8] Ever since, this type of IIA has been presented to developing countries as a vehicle for

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4 *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 72 (Oxford Univ.Press 2nd ed. 2012) (ebook).

5 *See* Reform of Investor-State Dispute Settlement: In Search of a Roadmap, 2 UNCTAD 1, 7 (2013) https://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf.

6 *See* Joost Pauwelyn, *At the Edge of Chaos?: Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed*, 29 ICSID REVIEW 372, 394 (2014).

7 *Id*.

8 *See* DOLZER & SCHREUER, *supra* note 4.

attracting foreign investment.

However, after almost six decades of existence, the correlation between Bilateral Investment Treaties (BITs), ISDS clauses and investment attraction is yet to be proven.[9] Yet, the dramatic increase in the number of disputes involving investors and states leaves no room to doubt that the ISDS mechanism has served the alleged purpose of protecting investments.[10] Nonetheless, the ISDS system has garnered numerous criticisms, as shown in the following section, and no longer forms a consensus, even among capital-exporting countries.

The Emergence of a New Paradigm

In the context of the negotiation of the Transatlantic Trade and Investment Partnership (TTIP), the European Union (EU) proposed to address the "fundamental and widespread lack of trust" for the ISDS by introducing an Investment Court System (ICS) to resolve disputes between investors and states.[11] Initially, the ICS was to be

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9 An extensive study recently conducted by the Columbia Center on Sustainable Investment (CCSI) concluded that the "evidence that investment treaties have the effect of increasing investment flows is inconclusive" and the "common assumptions about the role of [bilateral investment treaties (BITs)] in attracting foreign investment are unsupported by a considerable amount of quantitative and qualitative evidence". *See* Lise Johnson *et al*., COSTS AND BENEFITS OF INVESTMENT TREATIES. PRACTICAL CONSIDERATIONS FOR STATES 6 (2018). *See generally* Emma Aisbett, *Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation*, 2255 Munich Personal RePEc Archive (2007); Jason W. Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 LAW & SOC'Y REV. 805-832 (2008).; Lauge Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, Y.B. INT'L INV. LAW & POL'Y 539-574 (2010); Joachim Pohl, *Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence*, OECD Working Papers on Int'l Inv. (2018).

10 *See* KYLA TIENHAARA, *Investor–State dispute settlement*, REGULATORY THEORY: FOUNDATIONS AND APPLICATIONS 676 (Peter Drahos, 2017).

11 Cecilia Malmstrom, *Proposing an Investment Court System* European Commission (Sept. 16, 2015), https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/proposing-investment-court-system_en (last visited Mar 16, 2018).

incorporated in bilateral agreements—as is already the case for the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA), and other treaties between the EU and Vietnam, Mexico, and Singapore. Eventually, the courts created under these agreements would be replaced by the Multilateral Investment Court (MIC).

Discussions over ISDS reform are already ongoing in Working Group III (WG III) of the United Nations Commission on International Trade Law (UNCITRAL), whose mandate is separated into three phases, namely to: i) identify concerns regarding the ISDS;[12] (ii) consider whether reform is desirable in light of any identified concerns;[13] and if the Working Group concludes that reform is desirable, (iii) develop any relevant solutions to be recommended to the Commission.[14]

As stated by the secretariat of WG III during its thirty fourth session in November 2017, the options for reform range from a minor adjustment of the existing *ad hoc* system to the creation of

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12 In the first phase of its mandate, the WG III concluded that the "concerns commonly expressed about the existing ISDS regime include (i) inconsistency in arbitral decisions, (ii) limited mechanisms to ensure the correctness of arbitral decisions, (iii) lack of predictability, (iv) appointment of arbitrators by parties ("party-appointment"), (v) the impact of party-appointment on the impartiality and independence of arbitrators, (vi) lack of transparency, and (vii) increasing duration and costs of the procedure." *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session*, UNCITRAL 1, 5, 7, 10, 16 (2018), https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_wg_iii_for_the_website.pdf (last visited Jan 16, 2019).

13 As of the last session of its thirty-sixth session, the WG III concluded that a reform is desirable. From the thirty seventh session on, the WG III will address the relevant solutions to recommend to the commission. Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session, UNCITRAL (2018), https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_wg_iii_for_the_website.pdf (last visited Jan 16, 2019). *Id.* at 1, 8.

14 *See United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform*), UNCITRAL (2017), 1, 3 https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/067/48/PDF/V1706748.pdf?OpenElement (last visited Jan 16, 2019).

an appellate body, or even establishing a permanent court to settle disputes regarding international investments.[15]

The Establishment Strikes Back

Concurrently, amid ongoing discussions held by the United Nations Commission on International Trade Law (UNCITRAL), the International Centre for Settlement of Investment Disputes (ICSID)—the world's leading institution devoted to international investment dispute settlement—launched an amendment process and invited its Member States and the general public to suggest topics that merit consideration for reform. Among others, the list of topics for possible amendment envisages modifications that enhance transparency, access to justice, the independence and impartiality of arbitrators, the consistency of awards, and the duration and cost-effectiveness of the proceedings.[16] There are similarities between the list of concerns identified by UNCITRAL WG III and the topics for possible amendment from the ICSID, showing that reform is symptomatic and that the ICSID wants to address those concerns and improve its functioning before the crisis intensifies and more damages come to the fore.

Three possible outcomes could arise from the abovementioned ISDS reform initiatives. The success of the ongoing WG III process could result in the creation of a permanent court, which would be a radical departure from the current *ad hoc* system. Extensive support for this prospective court would deliver a significant blow to the existing ISDS mechanism.[17] In turn, the creation of an appellate mechanism responsible for reviewing the awards of *ad hoc* tribunals would represent an intermediate solution, where the *ad hoc* tribunals would maintain part of their adjudicatory authority, while transferring the other part to an appellate body. In the third scenario, an ICSID amendment process

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[15] *See Possible reform of Investor-State dispute settlement (ISDS)***,** *United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform*), UNCITRAL 1, 10-11 (2017), https://undocs.org/A/CN.9/WG.III/WP.142.

[16] *See infra* note 53. The complete list of areas for possible amendment is described in greater detail.

[17] The terms permanent court and International Court System (ICS) are used interchangeably in this paper.

would merely reform the *ad hoc* system, while maintaining its main characteristics.

Each of these reform options presents different solutions to the current ISDS crisis. Consequently, each of them has its advantages and drawbacks. These three reform options affect the interests of stakeholders in different ways, namely investors, states, and the arbitration community. With the aim to assess the adequacy of the reform options in light of identified concerns, the next section of this paper will proceed with an analysis of the most commonly identified flaws of the ISDS. After that, it shifts to assessing the reform options and their likely outcomes, how they would affect ISDS proceedings, and how they would address the system's current challenges.

II. The Investor-State Dispute Settlement Crisis

While many of its benefits are still valid, the ISDS mechanism has presented several flaws that have raised questions about the system. Thus, many initiatives have emerged that aim to cope with some of the problems pointed out by commentators and practitioners of international investment law. Despite several changes to the IIAs and the arbitration institutions throughout the years, central flaws still remain.[18] Some of these weaknesses cast doubt on the system's ability to attract investment or its capacity to benefit both investors and host countries in a sustainable way. Consequently, this section addresses the specific criticisms of the system's capacity to conduct impartial and efficient procedures for the settlement of investment-related disputes.

Same Facts, Similar Treaty Provisions — Different Outcomes

One of the main criticisms of ISDS proceedings is the inconsistency of arbitral decisions. The cases are judged by a variety of *ad hoc* tribunals, which is widely considered the characteristic that most impedes the consistency and interpretive continuity of case law. Therefore, *ad hoc* tribunals are intrinsically inadequate to ensure the consistency of a system of standards or the development of coherent case law. This is because its mission

[18] *See* Pauwelyn, *supra* note 6, at 408.

is to resolve specific cases in a manner that the parties concerned find satisfactory, irrespective of any contradictions within the consolidated understanding or the consequences it could have on future disputes.[19]

Moreover, some legal standards, due to their level of abstraction, allow for different interpretations between arbitral courts. The lack of clarity of the provisions contained in investment agreements and the exponential increase in IIAs containing ISDS provisions have raised the risk of conflicting awards in parallel proceedings. This is because an investor established in multiple countries can claim breaches of the same IIA clause in any of their established countries and the state hosting their investment. Thus, investors can seek relief through multiple *ad hoc* tribunals for the same breach in a single investment, hoping that at least one tribunal will issue an award favorable to their interests.[20]

Under this dynamic, a single dispute can lead to the undesirable situation for the international investment regime in which the same facts and the same treaty provision give rise to inconsistent arbitral decisions in different *ad hoc* tribunals.[21] As a result, the inconsistency of decisions creates uncertainties about the meaning of key investment treaty provisions, leading to a lack of predictability as to how these provisions will be interpreted in the future.

Many Flaws, Little Accountability

Additionally, there are limited mechanisms to ensure the correctness of arbitral decisions, which prevent the system from overturning inconsistencies. ISDS awards are subject to revision or annulment in very limited cases under the ICSID Convention.[22]

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[19] *See* Mark Feldman, *Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power*, 32 ICSID REVIEW 1, 9, N.28 (2017).
[20] *See* Roberts, *supra* note 3.
[21] *See* UNCTAD, *supra* note 5, at 3.
[22] *Post-Award Remedies - ICSID Convention Arbitration*, ICSID, https://icsid.worldbank.org/en/Pages/process/Post-Award-Remedies-Convention-Arbitration.aspx (last visited Nov. 3, 2019).

The only circumstance under which a revision can be required, as stated by Arbitration Rule (AR) 51(1) of the ICSID Convention, is the "discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence."[23]

As for requests for annulment, AR 52(1) of the ICSID convention enumerates five circumstances for its application: a) improper constitution of the tribunal, b) excess of power, c) corruption, d) departure from a fundamental rule of procedure, and e) failure to state the reasons on which the award is based. Therefore, under the ICSID Convention, there is no possibility to annul or correct an award, even after having identified manifest errors of law. Furthermore, given that annulment committees are created on an *ad hoc* basis for the purpose of a single dispute, these may also arrive at inconsistent conclusions.[24]

Party Appointment, Impartiality and Independence

The party-appointment system is another issue that often receives criticism for being inherently contradictory to the obligation of arbitrators to be independent and impartial. The insufficiency of these standards under the ICSID has been identified as the cause of the numerous challenges placed against arbitrators in recent disputes,[25] suggesting that disputing parties often perceive a bias or predisposition among arbitrators toward a specific outcome.[26] The fact that parties do not appear to only choose arbitrators based on their experience and skills, but also based on whether the arbitrator enhances their chances of winning a case has given rise to a category of conflicts of interest known as "issue conflicts."[27] This refers to arbitrators who have repeatedly

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[23] *See* ICSID, supra note 22.
[24] *See* UNCTAD, *supra* note 5, at 3-4.
[25] *See* Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators*, ANALYSIS OF EXISTING REFORM PROPOSALS 188 (2017) (eBook).
[26] *See* UNCTAD, *supra* note 5, at 4.
[27] *See* Cleis, *supra* note 24, at 191; *see also* David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment 24

acted as arbitrators or counsels in cases that raised similar issues, allowing the parties in the dispute to identify an arbitrator's propensity to decide a case according to their interests.

One of the characteristics of the ISDS that promotes this "issue conflict" is the fact that most cases are judged by a small group of individuals, making it much easier for the parties to identify the arbitrators' positions. According to a study conducted between 1972 and 2014, 419 different arbitrators sat on ICSID tribunals throughout that time.[28] Although more than half of these arbitrators were appointed for only one case, 10 percent of them accounted for half of the appointments.[29] Similar research found that 247 of the 450 known ISDS disputes occurring in 2012 (not limited to ICSID) were decided by only 15 arbitrators.[30]

Identifying the propensity of an arbitrator toward certain decisions is made easier by the fact that disputes over international investment agreements repeatedly address a limited and uniform number of legal provisions.[31] In addition to the small group of professionals that act as arbitrators and the reduced number of uniform substantive rules discussed before arbitral tribunals, the fact that earlier arbitration decisions are often used as interpretive norms in subsequent cases further allows parties to foresee arbitrators' arguments for future cases.[32] Therefore, by surveying awards issued by arbitrators in past cases, the parties in the dispute can foresee the position arbitrators are likely to adopt in a future case.

As for the arbitrators, their impartiality is commonly questioned for having incentives to favor either investors or states

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(2012).

[28] Sergio Puig, *Social Capital in the Arbitration Market*, 25 The European Journal of International Law 387, 403 (2014).

[29] *Id*.

[30] Pia Pia Eberhardt & Cecilia Olivet, *Profiting from injustice. How law firms, arbitrators and financiers are fueling an investment arbitration boom*, CORPORATE EUROPE OBSERVATORY AND THE TRANSNATIONAL INSTITUTE 38 (Helen Burley, 2012) (eBook).

[31] UNCTAD, Investor-State Dispute Settlement: A sequel, UNCTAD 96 (2014) (eBook).

[32] *See* Roberts, *supra* note 3.

in their decisions to ensure reappointment in future cases.[33] They are also questioned for an act that could potentially constitute a conflict of interest, known as "double-hatting." This is where an arbitrator also acts as an academic or a legal counsel in a different case. Indeed, their previous position when acting as a counsel, or their argument made in an academic paper, for example, could be a sign of a position they would be likely to defend in a future case.

Opaque Proceedings, Low Legitimacy (Lack of Transparency)

The lack of transparency of ISDS proceedings, with justice being administered "behind closed doors," remains an important criticism levied against the current ISDS regime.[34] Even though this issue has been the focus of some recent reforms, ISDS adjudicatory proceedings can still be kept fully confidential, even in cases that encompass issues of public interest.[35] In order to allow for more transparent proceedings, commentators often suggest measures such as granting public access to arbitration documents and arbitral hearings, as well as allowing the participation of interested third-parties, such as civil society organizations.[36] Such improvements would allow for public participation in the proceedings, which could enhance public understanding of the process and provide all ISDS parties with a greater understanding of the way arbitral tribunals interpret investment protection standards.

Moreover, the lack of transparency, coupled with the accelerated development of international investment law jurisprudence, is considered a factor that prevent states from participating in ISDS disputes on an equal footing. The exponential proliferation of awards and the diffuse nature of the *ad hoc* system, which lacks an organized structure to classify decisions and identify the most important awards for jurisprudence purposes, make it difficult for states to stay up to date with relevant

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[33] *See* Cleis, *supra* note 24, at 191-92.
[34] *See* UNCITRAL, *supra* note 14, at 12.
[35] *See* UNCTAD, *supra* note 5, at 3.
[36] Rob Howse, *Designing a Multilateral Investment Court: Issues and Options*, 36 Y.B. EUR. LAW 209, 235 (2017).

developments in ISDS jurisprudence. This task requires time and expertise. Very often, it is not achieved, because of the states' limited bureaucratic resources and budget constraints.[37]

Long Proceedings, High Costs, and Expensive Awards

As emphasized in the previous paragraph, ISDS arbitration is getting progressively more complex and expensive, which in turn imposes serious barriers to the access to justice. Host countries have faced long-lasting cases with high-value claims and awards that were not expected when the system was created, casting doubt on the idea that arbitration is synonymous with a speedy and low-cost method of dispute resolution.[38] [39]

Complexity of the cases and the open-ended nature of many of the legal issues in dispute lead to high costs and extended lengths of proceedings. Ultimately, this leads to the need to study numerous previous arbitral awards and other legal sources. Due to its complexity, investment arbitration is dominated by big law firms that mobilize large teams of lawyers, employ sophisticated techniques, and charge high fees for their services, further undermining access to the mechanism.[40]

In fact, case law shows that filing and winning an investment claim takes time and requires a considerable amount of money. The average duration of an ICSID arbitration procedure typically takes three to four years.[41] On average, the costs for each party in a single dispute surpasses $8 million,[42] but can exceed $30 million in some cases.[43] Australia, for example, is reported to have spent nearly $40 million on a recent dispute against a cigarette

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[37] *See* Roberts, *supra* note 3.
[38] *See* UNCTAD, *supra* note 5, at 4.
[39] *Id*.
[40] *Id.*
[41] *See Proposals for Amendment of the ICSID Rules*, ICSID 898 (Aug. 2, 2018) (unpublished manuscript) (on file with ICSID).
[42] *See* David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment 24 (2012).
[43] *See* Gaukrodger & Gordon, *supra* note 41, at 19.

company.[44]

Arbitrators' fees alone cost, on average, $700,000,[45] which is estimated to represent just 16 percent of the total cost of arbitration proceedings.[46] Legal counsel represents the largest cost component to the parties which are estimated to represent, on average, 82 percent of the total arbitration cost. Meanwhile, institutional costs payable to organizations that administer the arbitration process amount to about 2 percent of the total.[47]

Therefore, it is understandable that certain respondent States may struggle to come up with the significant resources required to properly defend themselves in the current ISDS system.[48] At the same time, the average cost for arbitration in the ICSID and the average time for the conclusion of a case are also a concern for investors with limited resources, especially small and medium ones.[49] In that sense, the ISDS mechanism, despite allowing foreign investors to have direct access to international arbitration, could be considered an ineffective regime that only protects the wealthiest investors, since only a few could be able to take advantage of it.[50]

Other elements that exacerbate the mechanism's flaws are the high-value claims and expensive awards verified in arbitral proceedings. Many ISDS claims now exceed $1 billion,[51] and have reached $114 billion,[52] which would present a challenge to the public finances of any country, let alone developing ones.[53]

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44 *See id.*
45 *See* Pauwelyn, *supra* note 6, at 394.
46 *See* Gaukrodger & Gordon, *supra* note 41, at 19.
47 *See id*.
48 *See* Howse, *supra* note 35, at 231.
49 *See* Pauwelyn, *supra* note 6, at 380.
50 *See id*.
51 *See* TIENHAARA, *supra* note 10, at 683.
52 *See* UNCTAD, *supra* note 5, at 3.
53 *See* TIENHAARA, *supra* note 10, at 686.

III. The Proposals to Reform the ISDS

Notwithstanding the long-standing criticism over the *ad hoc* ISDS the best way to address the current crisis remains unclear. There are three main courses of action being considered. One is the creation of an ICS, which is the most radical departure from the current system and is being voiced by the EU and its allies. It envisages the comprehensive replacement of the current system with a two-tier permanent court made up of functionally independent judges with fixed terms. An intermediate approach is the simple establishment of an appellate body aimed at enhancing the consistency of the decisions issued by the arbitral tribunals, while maintaining the core principles of the *ad hoc* system. Finally, the third course of action would be the adoption of incremental modifications to the current system in order to address the main concerns that have been voiced against it, all while maintaining its main characteristics.[54]

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[54] The division proposed in this article is envisaged to better assess the current initiatives to reform the ISDS. It differs significantly from the authors who analyze the issue under the criteria of depth of the reform, for whom the reform of the ISDS is divided in three main camps: "1. *Incrementalists* view the criticisms of the current system as overblown and argue that Investor-State arbitration remains the best option available. Hence, they favor retaining the existing dispute resolution system but instituting modest reforms that would redress specific concerns. 2. *Systemic reformers* see merit in retaining investors' ability to file claims directly on the international level, but view Investor-State arbitration as a seriously flawed system for dealing with such claims. They champion more significant, systemic reforms, such as replacing Investor-State arbitration with a MIC and appellate body. 3. *Paradigm shifters* dismiss the existing system as irrevocably flawed and in need of wholesale replacement. They reject the utility of investors' making international claims against states, whether before arbitral tribunals or international courts. They embrace a variety of alternatives, such as domestic courts, ombudsmen, and State-to-State arbitration." Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 Am. J. Int'l Law 1 (2018). *See also* Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L LAW 361, (2018). at 363. They classify the changes under the criteria of institutional alternatives for resolving investment disputes, such as negotiation and mediation; domestic dispute settlement mechanisms such as courts, specialized processes and ombudsman offices; independent interstate adjudicatory mechanisms such as *ad hoc* tribunals and international courts; and international adjudicatory mechanisms as

a. The International Court System

The EU has championed the idea of a permanent court. The majority of EU countries have traditionally been enthusiastic participants of the system. In 2014, however, while reacting to a public consultation[55] on investment protection amid growing concerns over the ISDS in the context of the TTIP negotiations, the Europeans came to advocate for a permanent court to settle disputes between investors and states, first for the TTIP and later for other trade agreements.[56] Even though the TTIP negotiations ended in 2017, the EU managed to implement a permanent investment court in its bilateral agreements with Canada,[57] Vietnam (EU-Vietnam FTA),[58] Singapore (EU-Singapore FTA),[59] and Mexico (EU-Mexico FTA).[60] In 2017, UNCITRAL entrusted its WG III with a mandate to work on a possible reform of the ISDS. One of the reform options being considered by WG III is the creation of a permanent court, whose arbitrators would be tasked with resolving ISDS cases that fall under its jurisdiction.[61] WG III has identified several concerns with the current ISDS system. In the next section, we analyze how a permanent court would be likely to address those concerns.

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complementary, which include the international review of domestic decisions, international claims after domestic proceedings and interpretation at the request of national courts.

55 *See Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, European Commission 25 (Jan. 13, 2015) (on file with European Commission).

56 *The Multilateral Investment Court project*, European Commission (Dec. 21, 2016), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608 (last visited Jan 23, 2019).

57 Comprehensive Economic and Trade Agreement, Can.-EU, Oct. 30, 2016.

58 EU-Vietnam Investment Protection Agreement, EU-Viet, 2018.

59 Free Trade Agreement between the European Union and the Republic of Singapore, EU-Sing, Oct. 19, 218.

60 EU-Mexico Trade Agreement, EU-Mex., Apr. 21, 2018.

61 *See* UNCITRAL, *supra* note 15.

i. *The ICS and the Shortcomings of the ISDS*

Ensuring the Consistency and Predictability of Tribunal Awards

Champions of the ICS argue that a permanent court would address the ISDS concerns in many ways. As for the lack of consistency, predictability, and certainty of tribunal awards, its advocates state that a consistent jurisprudence can only arise when the parties are obligated to use the same court for the settlement of various disputes. A permanent tribunal would thus ensure the performance of a fixed group of judges for a certain period of time, as well as the opportunity for interaction on a repeated basis, which could potentially reinforce the consistency and coherence of awards.[62]

A standing body of jurists—who repeatedly examine a large number of cases and capture the evolution of the doctrine—would likely be in a privileged position to construct a stable jurisprudence based on precedent case law, thus enhancing the predictability of the system as a whole.[63] Moreover, two key characteristics of permanent courts—the exclusive dedication and repeated interactions of its members—provide for a higher level of engagement and a greater responsibility as an institution, which tends to circumscribe their actuation under the constitutive instruments of the body,[64] thus preventing undesirable outcomes, such as the emergence of inconsistent case law. Besides that, a permanent court, by accumulating the competence over a high number of cases, can enact provisions that consolidate parallel proceedings to avoid different outcomes arising from similar facts.[65]

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[62] *See* Feldman, *supra* note 19, at 9.
[63] *See* Howse, *supra* note 35, at 226.
[64] *See* Feldman, *supra* note 19.
[65] *See* Article 8.43 - Consolidation (CETA), Lewik, https://www.lewik.org/term/11197/article-843-consolidation-ceta/ (Last visited Nov. 3, 2019) "When two or more claims that have been submitted separately pursuant to Article 8.23 have a question of law or fact in common and arise out of the same events or circumstances, a disputing party or the disputing parties, jointly, may seek the establishment of a separate division of the Tribunal pursuant to this Article and request that such division issue a consolidation order

The abovementioned improvement carries an important side effect with it: the more consistent and predictable the system is, the more prepared the states will be to self-regulate in a way that avoids future disputes. Consequently, there would be a reduction in the so-called "chilling effect"[66] on new regulations that pursue public policy objectives, given that members would be more aware of their regulatory boundaries than they are today. The final result would be more investment and better-designed public policy measures.

More Mechanisms to Pursue the Correctness of Awards

Apart from enhancing consistency, the ICS proposal also aims to provide additional alternatives to ensure the correctness of arbitral awards. As emphasized in the previous section, the ICSID Arbitration Rules provide very few possibilities for the revision and annulment of arbitral awards, possible only on the grounds of serious events.[67] Proponents of the ICS advocate for more alternatives to revise awards in the event of procedural or substantial errors of law, including the re-examination of the case

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("request for consolidation")." *See also supra* note 57, at 75. Article 3.59.1: "In case that two or more claims submitted under this Section have a question of law or fact in common and arise out of the same events and circumstances, the respondent may submit to the President of the Tribunal a request for the consolidation of such claims or part thereof."

[66] *See* Howse, *supra* note 35, at 235 "… which invites regulatory chill, leading to uncertainty
about the policy space available for States to pursue legitimate regulatory objectives
in the public interest.".

[67] *See* ICSID Convention, *supra* note 22. The only circumstance under which a revision can be required, as stated by the Arbitration Rule 51 of the ICSID convention: [a] party can apply for revision of the award if it discovers a new fact that could decisively affect that award (Article 51 of the ICSID Convention, Arbitration Rules 50, 51, 53 and 54). The new fact must have been unknown to the Tribunal and the applicant when the award was rendered, and the applicant's ignorance of the fact cannot be due to negligence." As for requests of annulment, Arbitration Rule 52 enumerates five circumstances: a) improper constitution of the tribunal, b) excess of power, c) corruption, d) departure from a fundamental rule of procedure and e) failure to state the reasons on which the award is based.

by conducting a comprehensive and fresh analysis of the facts or a limited analysis through checking manifest errors in the appreciation of facts.[68] Therefore, it seems clear that the ICS proposal, encompassing a double-tiered tribunal with an appellate body entrusted with the responsibility of reviewing first-instance awards, would provide a greater possibility of ensuring the integrity of the decisions.

Party Appointment Affecting Arbitrators' Independence and Impartiality

A permanent tribunal is also likely to address the concerns over the lack of independence and impartiality resulting from the party appointment of arbitrators on ISDS *ad hoc* tribunals. Establishing an objective criterion to appoint judges to cases, which would replace the party-appointment system, is already an important step towards adjudicative impartiality.[69] Adjudicators that do not rely on parties to appoint them to a case will naturally enjoy more autonomy to decide the cases, independently of parties' interests.

Besides that, by maintaining a permanent body of adjudicators that is also financially independent from investors' influence, the ICS would be in a better position to implement an ambitious code of conduct that prohibits arbitrators from acting as a counsel in pending or new investment disputes, as well as from being assigned to cases that would create direct or indirect conflicts of interest.[70] Indeed, it is difficult to envisage such a strict code of

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[68] *See Commission staff working document impact assessment. Multilateral reform of investment dispute resolution,* European Union 11 (2017), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017SC0302 (last visited Jan 23, 2019).

[69] *See supra* note 25, 2011-21; *see also* Howse*, supra* note at 235.

[70] Some provisions in this regard are already in place in some agreements negotiated by the EU. See
Article 8.30.1 - Consolidation (CETA), Lewik, https://www.lewik.org/term/11183/article-830-ethics-ceta/ (Last visited Nov. 3, 2019), which prohibits adjudicators from acting as counsel or as a party-appointed expert or witness in any pending or new investment dispute under CETA or any other international agreement—a rule that does not exist in the ICSID convention. The same article also impedes members of the tribunal from being affiliated with any government, from taking instructions from any organization or government with regard to matters related to the dispute, and

conduct in the current ISDS, where arbitrators have no assurance of future income and are thus compelled to find other sources of income. Since those individuals have considerable knowledge about international investment dispute resolution, they naturally tend to use their expertise by acting in other positions in ISDS cases.

Transparency

Given that "the concern over lack of transparency or justice being administered behind closed doors remains an important criticism levied against the current ISDS regime,"[71] it is expected that the prospective ICS is likely to address the issue of transparency. Demands for greater transparency in investment dispute proceedings include the possibility of non-party intervention (*amicus curiae* briefs), disclosure of documents and information from the proceedings, as well as publicly accessible hearings.[72]

One indication that the procedural rules of the prospective ICS would focus heavily on the issue of transparency comes from the permanent investment courts established in the new agreements that the EU recently negotiated with Canada, Vietnam, Singapore, and Mexico. By incorporating the UNCITRAL Transparency Rules—with some modifications—these agreements require that the hearings, written submissions, tribunal awards, and the relevant documents of the dispute be open to the public, unless there is a need to protect confidential and sensible information. Moreover, the transparency provisions of those agreements allow for *amicus curiae* briefs, stipulating the circumstances under which non-disputing parties can participate in the proceedings.[73]

Apart from granting a greater level of transparency, the

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from participating in the consideration of any disputes that would create a direct or indirect conflict of interest. *See also* Article 3.40.1 *supra* note 57 at 53.

[71] UNCITRAL 2017, *supra* note 15, at 7.

[72] *See* Howse, *supra* note 35, at 235.

[73] Transparency provisions are placed on the article 8.36 of the CETA; article 46 of the Dispute Settlement Chapter of EU-Vietnam FTA, and article 19 of EU-Mexico FTA, and annex 8 of the EU-Singapore FTA.

incorporation of those rules by permitting the oversight of the proceedings, would allow for a greater understanding of the adjudicators' judgments. It could represent a paradigmatic shift from a system where case law evolves without proper awareness to one where the relevant stakeholders would be able to better assess the prevailing understandings and doctrines regarding the language of IIAs, thus improving the consistency and predictability of the system.

Reducing the Costs and Duration of Proceedings: The Issue of Access to Justice

The high costs and excessive duration of the proceedings are emphasized by UNCITRAL WG III as the main concerns of the ISDS and are addressed in the ICS. ISDS costs are constructed of fees paid to arbitrators, administrative fees charged by arbitral institutions and fees paid by the parties to their counsels for legal representation and for experts.[74] As highlighted in the previous section, the lion's share of ISDS costs are spent on legal counsel,[75] whereas costs for arbitrators and tribunal fees constitute only a small portion of it.[76] Thus, ISDS tribunal proceedings entail very low overhead costs.[77] A permanent court, on the other hand, would require permanent funding to cover the salary of its permanent body of adjudicators, as well as the maintenance of the tribunal's structure.

This rationale could lead to the conclusion that an ICS would increase ISDS costs. However, it is reasonable to assume that the standardization of adjudication procedures would bring efficiency to dispute resolution and make it less time-consuming. This would

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[74] *See supra* note 14, at 9-10.
[75] *See* Gaukrodger & Gordon, *supra* note 41, at 15.
[76] *See* Matthew Hodgson & Alastair Campbell, *Damages and costs in investment treaty arbitration revisited*, THE INT'L J. COM. TREATY ARB. (2017), https://globalarbitrationreview.com/article/1151755/damages-and-costs-in-investment-treaty-arbitration-revisited (last visited Jan 23, 2019). The authors conclude that the sum of costs paid to legal counsel and experts ($10.9 million) is approximately 9.85 times greater than the average tribunal cost ($1.1 million).
[77] *See* Joerg Risse, *A new "investment court system" Reasonable Proposal or Nonstarter?,* Global Arbitration News (Sept. 25, 2015), https://globalarbitrationnews.com/investment-court-system-20150925.

presumably lead to a reduction in the hours worked by experts and legal counsel, thus decreasing the overall money spent on the largest cost component of the ISDS.[78] A more consistent jurisprudence can reduce discrepancies among the value of awards, bringing more certainty to how much parties are expected to spend to bring a case before an investment tribunal.

Furthermore, an ICS, by concentrating numerous disputes in the same adjudicative body, would increase the economies of scale by consolidating the various claims that have arisen from the same circumstance. Take, as an example, Argentina's response to its financial crises, which generated several disputes with investors from different countries, even though the background and the causes of the claims were the same.[79] In such a case, *ad hoc* tribunals are likely to spend time and energy on each individual claim under a different tribunal, whereas an ICS could consolidate those claims, thus sparing important resources.

Moreover, the ICS would also permit the elaboration of a scheme envisaged to reduce the burden that some users currently face in filing a claim for international investment arbitration. While a permanent court would require permanent funding to cover overhead costs, these could be favorably allocated to certain categories of economically disadvantaged users—taking into consideration their capacity to cover the tribunal's costs. Under such mechanism, both developing countries and small and medium enterprises would benefit.

A more predictable system also tends to reduce the parties' expenses on legal counsel and experts. The lack of a rule of binding precedent may place a burden on parties and their legal counsels to submit all available arguments, irrespective of whether those arguments have been accepted or rejected by earlier tribunals.[80] The fact that many legal issues remain unsettled

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[78] *See* Robert W. Schwieder, *TTIP and the Investment Court System: A New (and Improved?) Paradigm for Investor-State Adjudication*, COLUMB. J. TRANSNAT'L L., 178, 199 (2016).
[79] *See* Howse, *supra* note 35.
[80] *See* Report of Working Group III (Investor-State Dispute Settlement Reform)

imposes the necessity on legal counsel and experts to invest extensive resources into studying numerous previous arbitral wards in order to develop a legal position.[81] Ultimately, all these costs are borne by the parties of the ISDS disputes.

ICS and the Balance of Power

In addition to the points debated above, an ICS would be in a better position to fix the opposing forces that currently threaten the equilibrium of disputes between investors and states. The vague wording of existing IIAs[82] allow adjudicators to make overly broad interpretations, while the *ad hoc* nature of the ISDS system allows the parties to choose arbitrators who are more susceptible to deciding the case according to their interests.[83] This combination exacerbates the risk of an asymmetrical power balance between investors and states. This risk is especially high in disputes involving billionaire multinational companies that are able to devote considerable financial resources to elite arbitrators/counsel who are anchored in commercial law firms.[84] Moreover, the lack of mechanisms to oversee such risks enhances the widespread sentiment of distrust in the ISDS.[85] Therefore, the settlement of disputes in a more institutionalized regime would provide greater levels of independence and create control mechanisms that, in turn, would reduce the risks of adjudicators exceeding their mandates.

ii. Trade-offs and Practical Difficulties of the ICS

The shift from the *ad hoc* ISDS to an ICS implies certain costs and drawbacks that do not exist under the current system. A permanent court would result in overhead costs to maintain its physical facilities, along with the necessity to pay the salaries of a

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on the work of its thirty-fourth session, *supra* note 72, at 8.

81 *See* UNCTAD, *supra* note 5.

82 Charles H. Brower II, *Investor-State Disputes under NAFTA: The Empire Strikes Back*, 43 COLUMB. J. TRANSNAT'L L. 56 (2001), https://digitalcommons.wayne.edu/lawfrp/165 (last visited Jan 23, 2019). He argues that the inclusion of intentionally vague terms in IIAs are "designed to give adjudicators a quasi-legislative authority to articulate a variety of rules necessary to achieve the treaty's object and purpose in particular disputes."

83 *See* Schweider, *supra* note 76.

84 *See* Howse, *supra* note 35.

85 *See* TIENHAARA, *supra* note 10.

standing body of judges—costs that do not currently exist. Another negative aspect of an ICS would be the lack of finality that could result from the adoption of an appellate mechanism. Advocates of this argument opine that the great merits of arbitration—its speed and finality—would eventually be undermined in an appeals system that would likely be frequently invoked.[86] While this criticism merits consideration, it is worth recalling that an appellate body has the function of ensuring the correctness of award decisions and enhancing the legitimacy of the system. Moreover, the extra costs and delays that may arise from an ICS can be compensated and even surpassed by the gains of scale and efficiency achieved through a greater standardization of procedures, as addressed in the previous section.

The ICS also faces criticism over the practical difficulties of its implementation. First, the highly diverse universe of more than 3,000 international investment agreements, each with their different wordings and negotiation histories, would add a high degree of complexity to the operation of the court, especially in the development of consistent jurisprudence.[87] Other issues include the lack of specialized personnel that would form the pool of arbitrators of the ICS, its ability to select high-quality judges,[88] and whether they would really be any different from the experts who regularly intervene in Investor-State arbitrations.[89] Furthermore, as

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[86] *See* Michael Wood, *Choosing between Arbitration and a Permanent Court: Lessons from Inter-State Cases*, 32 ICSID REVIEW 1-16 (2017). *See* also Feldman, *supra* note 19.

[87] *See* Howse, *supra* note 35.

[88] *See* Wood, *supra* note 84.

[89] Nikos Lavranos, *The Shortcomings of the Proposal for an "International Court System" (ICS)* EFILA Blog (2016), https://efilablog.org/2016/02/02/the-shortcomings-of-the-proposal-for-an-international-court-system-ics/ (last visited Jan 23, 2019). "Apart from this danger, it remains doubtful whether a sufficient number of appropriately qualified individuals with the necessary expertise can be found. This is particularly true since many professionals currently working in arbitration may be excluded on the basis that they could be considered to be biased. The pool of TFI and AT judges would seem to be limited to academics, (former) judges and (former) Governmental officials. That might not be sufficient to guarantee the practical experience and expertise needed and/or independence from the State."

is frequently invoked by the arbitration industry, the party-appointment system has the effect of enhancing investor trust in the ISDS. Therefore, in such a system where only the states would be able to establish arbitrators, the investors' trust in the system could be undermined.[90]

Although this shift would certainly bring several collateral effects, as is the case for any paradigm shift, its consequences should not be appraised individually, since they could be compensated by other advantages. Indeed, case studies show that most ISDS cases deal with only a few disciplines, with similar wordings, contradicting the affirmation that the more than 3,000 IIAs would make it difficult for an ICS to develop consistent jurisprudence.

Even though it may be true that there might be a shortage of individuals in the pool of arbitrators in the first years after the implementation of an ICS, its implementation is likely to generate, throughout the years, the specialized personnel required for its proper functioning. As for the overhead costs that would be created by an ICS, it is reasonable to assume that the gains of scale caused by the consolidation of multiple cases under a single tribunal would equal or even surpass this burden. Likewise, investor distrust arising from the elimination of party appointment would be compensated through improving the consistency and the predictability of the system as a whole.

b. Appeals Mechanism

The creation of an appeals mechanism would represent an intermediate reform of the international investment dispute resolution mechanism by creating a standing body of jurists with the competence to review decisions of the arbitral tribunals, while maintaining the functioning dynamics of the *ad hoc* system—in keeping with the interests of the arbitration industry. This reform option is envisaged to address some of the most common concerns over the ISDS, which were already addressed in the previous

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[90] *Id*. "The pre-selection of the TFI and AT judges by the Contracting Parties carries the inherent risk of selecting 'pro-State' individuals, in particular since they are paid by the States (or rather their tax payers) alone."

sections. These include the lack of mechanisms to ensure the correctness of tribunal awards, as well as a lack of consistency and predictability in the system. On the other hand, it does not tackle other issues, such as the impact of party appointment on the impartiality and independence of arbitrators and the lack of transparency.

The idea of the creation of an appellate body in the ICSID emerged within the last decade. Similar schemes were effectively negotiated in some regional agreements—mainly by the United States with the Dominican Republic and Central America (CAFTA-DR), Singapore, Peru, Morocco, Korea, and Chile.[91] Apart from the examples coming from the US, India's newest generation of BITs also indicates an openness to a future appellate mechanism.[92]

In 2004, the ICSID discussed the implementation of an appeals mechanism in a discussion paper on possible improvements to the investment arbitration framework.[93] More recently, this option resurged in discussions on the reform of the international investment regime as a means to achieve greater consistency, coherence, and predictability in investment arbitration case law,[94] and it is frequently suggested even by the arbitration community.[95]

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91 Although an appeals facility was negotiated on these IIAs, they were never implemented.

92 *Model Text for the Indian Bilateral Investment Treaty*, Investment Policy Hub (2015), https://investmentpolicyhub.unctad.org/Download/TreatyFile/3560 (last visited Dec 02, 2018). "Article 29. Appeals Facility. The Parties may by agreement or after the completion of their respective procedures regarding the enforcement of this Treaty may establish an institutional mechanism to develop an appellate body or similar mechanism to review awards rendered by tribunals."

93 *Possible Improvements of the Framework for ICSID Arbitration*, Icsid.worldbank.org (2004), https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf (last visited Feb 3, 2019).

94 *See* Feldman, *supra* note 19. *See also* Elsa Sardinha, *The Impetus for the Creation of an Appellate Mechanism*, 32 ICSID REVIEW - FOREIGN INVESTMENT LAW JOURNAL 503-527 (2017).

95 *See* Nikos Lavranos, *supra* note 87. The European Federation for Investment

The EU also intends for its prospective MIC to possibly serve as the appeals mechanism for some countries that might prefer to settle their investment disputes within the current *ad hoc* system, but nevertheless might want the opportunity to review the decisions it issues. In a paper submitted to WG III in January 2019, where the EU outlines its proposal to establish a permanent Multilateral Investment Court, it proposes an open architecture scheme that ensures a certain level of flexibility to accommodate the interests of such countries.[96]

Theoretically, the establishment of an appeals mechanism would have the advantage of addressing some of the main concerns over the ISDS, while avoiding the abovementioned practical difficulties of an ICS and resistance from stakeholders interested in maintaining the *status quo*. Moreover, it would provide an alternative way to ensure the correctness of arbitral awards and promote the emergence of a consistent set of rules through the repeated examination of similar cases by a permanent group of judges, which is only possible when parties are required to use the same tribunal for dispute resolution.[97] By promoting consistency and predictability, and reducing the risks of conflicting decisions, an appellate mechanism could restore faith in the ISDS, thus enhancing its legitimacy and sustainability over the long term.

Whereas an appeals mechanism would maintain some of the main features of the *ad hoc* regime, it would drastically change other characteristics that have been portrayed as big advantages of the current ISDS. While appellate review could provide an alternative way of ensuring the integrity of arbitral awards, it could also severely undermine some of the great merits of the current

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Law and Arbitration (EFILA), reacting to the European proposal to establish an ICS during the TTIP negotiations, suggested that "the US and the EU should also consider whether it would not be more preferable to modify and Improve existing systems, such as turning the ICSID annulment procedure into a full appeal mechanism."

[96] Submission establishing a standing mechanism for the settlement of international investment disputes, Trade.ec.europa.eu, at 9 (2019), http://trade.ec.europa.eu/doclib/html/157631.htm (last visited Feb 11, 2019).

[97] *See* Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIFORNIA LAW REVIEW, at 24 (2005).

ISDS, which are efficiency and finality.[98] Besides that, as emphasized in the previous section, it is expected that parties would face extra costs and more delays in an appeals system, as it is reasonable to assume that it would be frequently invoked by the losing parties.

c. ICSID Reform—The Establishment Strikes Back

The ICSID was established in 1966 and is the world's leading institution dedicated to international investment dispute settlement, having administered the majority of all international investment disputes, which amounts to more than 600 cases to date.[99] The ICSID Convention, Regulations, and Rules are frequently subject to improvements and have already been amended to address concerns over transparency, independence, the impartiality of arbitrators, and time effectiveness.[100]

In the realm of the current ISDS crisis, the ICSID Secretariat initiated consultations in late 2016 with its Member States and the general public to identify areas where further reform might be needed. A similar invitation was issued to the public in early 2017. This marks the fourth rule-amendment process and is the most extensive review to date.[101] The stated goals of this review are to modernize, simplify and streamline the rules, while also reducing the environmental footprint of ICSID proceedings. However, the process of consultation with Member States and the public resulted in 16 areas for potential amendments, which coincide with several areas for possible improvement already identified by UNCITRAL

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98 *See* Ian Laird & Rebecca Askew, *Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System*, 7 THE JOURNAL OF APPELLATE PRACTICE AND PROCESS, AT 298 (2005), http://lawrepository.ualr.edu/appellatepracticeprocess/vol7/iss2/9 (last visited Jan 25, 2019).

99 *See* ICSID, Icsid.worldbank.org (2018), https://icsid.worldbank.org/en/Pages/about/default.aspx (last visited Jan 25, 2019).

100 ICSID Amendments, Icsid.worldbank.org (2018), https://icsid.worldbank.org/en/amendments/Pages/About/about.aspx (last visited Jan 25, 2019).

101 *Id*.

WG III.[102]

The EU's proposal to establish a two-tier tribunal with a permanent body of adjudicators and an appellate body is a radical departure from the existing ISDS regime. The creation of such a tribunal, with a significant support among states, would be a major threat to the ICSID's existence.[103] Therefore, the launch of such an extensive review process by the ICSID seems to indicate that the ICSID Secretariat is concerned about a radical reshaping of the ISDS regime that could be harmful to its own existence. It is also an indication that the ICSID is not willing to participate in the EU's initiative. Instead, such an initiative shows that the ICSID

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[102] List of Topics for Potential ICSID Rule Amendment, Icsid.worldbank.org (2018), https://icsid.worldbank.org/en/Documents/about/List of Topics for Potential ICSID Rule Amendment-ENG.pdf (last visited Jan 25, 2019). The potential areas for amendment of ICSID rules are: 1. Review Procedure for Appointment and Disqualification of Arbitrators, Explore Feasibility of Code of Conduct for Arbitrators, 2. Clarify Rules on Preliminary Objections and Bifurcation 3. Explore Possible Provisions on Consolidation of Proceedings and Parallel Proceedings 4. Modernize Institution Rules, Means of Communications and Filing of Briefs and Supporting Documentation, and General Functions of the Secretariat 5. Modernize and Simplify Rules concerning the First Session, Procedural Consultation and Pre-Hearing Conference 6. Modernize Rules on Witnesses and Experts and Other Evidence 7. Explore Possible Provisions for Suspension of Proceedings and Clarify Rules on Discontinuance when Parties Fail to Act 8. Reflect Best Practices for Preparation of Award, Separate and Dissenting Opinions 9. Explore Presumption in Favor of Allocating Costs to the Prevailing party, Possible Provisions on Security for Costs and Security for Stay of Enforcement of Awards 10. Review Provisions on Provisional Measures 11. Clarify and Streamline Procedure in Annulment Proceedings 12. Review and Modernize Provisions on Costs, Fees and Payment of Advances, and Discontinuance for Failure to Pay Advances 13. Explore Possible Provisions on Transparency, Clarify Rules on Non-Disputing party Participation 14. Improve Time and Cost Efficiency and Explore Feasibility of Guide for Efficient Conduct of Process 15. Explore Possible Provisions on Third party Funding 16. Streamline Additional Facility Rules for Non-ICSID Convention Cases.

[103] Notwithstanding the natural outcome of the ICS's success being the decline in ICSID's membership, there are still legal options for the ICSID to participate in the EU's initiative, either by providing administrative support, serving as a forum for negotiations, or even serving as the organization onto which the new mechanism might be docked. See N. Jansen Calamita, *The Challenge of Establishing a Multilateral Investment Tribunal at ICSID*, 32 ICSID REVIEW 611-624 (2017).

strives for the continuity of the current regime and aims to solve the concerns that gave rise to dissatisfaction with the ISDS.

ICSID's Effort to Improve Consistency

Much has been discussed about the ability of *ad hoc* tribunals to enhance the consistency of awards. Despite ICSID tribunals using *ad hoc* arbitration to settle international investment disputes on the basis of heterogeneous treaty provisions, there is a tendency among ICSID tribunals to develop a homogeneous methodology regarding international law.[104] However, ICSID could do significantly more to enhance the consistency of the awards issued by its numerous tribunals.[105]

In the current amendment process, ICSID is innovating by introducing options for the consolidation and coordination of claims.[106] The consolidation proceedings include the appointment of the same arbitrators to hear otherwise separate cases, organizing joint hearings, or ensuring that the awards are rendered simultaneously. The consolidation of claims tends to reduce the costs of proceedings and improve the consistency of the awards in cases where the background of the disputes is identical or similar. This novelty in the ICSID Arbitration Rules replicates some provisions on the consolidation and coordination of claims already in place for the permanent courts recently negotiated by the European Union.[107]

Moreover, some of the proposed rules aimed at enhancing transparency indirectly help to prevent inconsistencies. The proposed AR 48, which regulates the submission of non-disputing parties (NDP), states in its paragraph five, that "the Tribunal may provide the NDP with access to relevant documents filed in the

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[104] Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals - An Empirical Analysis*, 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW 301-364 (2008).

[105] *Id*.

[106] *See* Proposals for Amendment of the ICSID Rules — Working Paper, Icsid.worldbank.org (2018), https://icsid.worldbank.org/en/Documents/Amendments_Vol_3_Complete_WP+Schedules.pdf (last visited Jan 26, 2019), AR 38 and 38 bis.

[107] *See* article 8.43.1 of CETA. *See also* article 3.59.1 of the EU – Vietnam FTA.

proceeding, unless either party objects."[108] By allowing the tribunal to order the production of case documents, the parties would better understand case law, focus their arguments more precisely, and predict likely outcomes more accurately. The parties and their legal counsel would be able to enhance their comprehension of similar provisions in other cases. Over time, the disclosure of case law documents would be expected to produce more predictability and consequently more consistent awards.

Revision, Annulment and the Trade-off Between Finality and Correctness

Whereas the ICS discussions on addressing the limited mechanisms to ensure correctness of awards include establishing an appellate tribunal with the competence to review first-instance awards, the ICSID's proposed amendment only aims at streamlining the rules of procedures governing the interpretation, revision, and annulment of awards, as well as codifying ICSID practices, in relation to post-award remedy proceedings.[109]

A more comprehensive reform aimed at ensuring the correctness of tribunal awards, such as the establishment of an appellate body in the ICSID framework, has proved very difficult in the past. Criticisms of these changes range from a loss of finality to the increased cost and duration of ISDS proceedings. Therefore, it is expected that a possible outcome of the current reform, in this regard, would not include comprehensive changes to the current rules. Instead, the proposals unveiled so far show a preference for the improvement of existing mechanisms, rather than the creation of broader mechanisms for the revision and annulment of awards.[110]

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[108] *See* Proposals for Amendment of the ICSID Rules — Working Paper, *supra* note 104, at 212-13.

[109] *See id*., at 270.

[110] It is important to emphasize that the ICSID has received several comments on this issue during the process of consultation with its Member States and the public. A noteworthy opinion from a law firm argues for the necessity of a collegial body to scrutinize awards in order to pressure the tribunal to keep the quality and timing of awards acceptable. According to the commentators, there is a considerable and growing disparity in this regard, which is reinforced by the

Addressing Independence and Impartiality While Maintaining the *Status Quo*

ICSID amendment proposals also envisage addressing the issue of independence and impartiality of adjudicators. The proposed changes do not abandon the current scheme of party appointment, and instead only improve certain provisions that could affect the arbitrators' independence and impartiality. The process of challenging arbitrators, for example, has been revised, including the introduction of an expedited schedule for parties filing a challenge, as well as an enhanced declaration of independence and impartiality.[111] Moreover, ICSID together with UNCITRAL Secretarial are working on a Code of Conduct for arbitrators aimed at ensuring the consistency of ethical requirements across all the major sets of rules used for ISDS.[112] Once final, this Code of Conduct would be added as an amendment to the ICSID rules.

Furthermore, the information disclosure requirements from arbitrators appointed at the start of a case have been increased. The new declaration requires the disclosure of significant relationships within the last five years between the appointee and the parties, the parties' counsel, other members of the tribunal, third-party funders, and any involvement in other Investor-State cases, in any

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absence of scrutiny during the enforcement stage, as well as a lack of review during the annulment stage, which could pressure tribunal members to be more attentive to quality. However, such broader suggestions have not been incorporated to the proposed rules for amendment thus far. *See* Public Comments to Amendment of ICSID's Rules and Regulations, Icsid.worldbank.org (2019), https://icsid.worldbank.org/en/Documents/about/Public%20Comments%20to%20Amendment%20to%20ICSID%20Rules%20and%20Regulations.pdf (last visited Jan 25, 2019), at 155.

111 *See* Backgrounder on Proposals for Amendment of the ICSID Rules, Icsid.worldbank.org (2018), https://icsid.worldbank.org/en/Documents/Amendment_Backgrounder.pdf (last visited Jan 25, 2019).

112 *See* Proposals for Amendment of the ICSID Rules — Synopsis, Icsid.worldbank.org, at 5 (2018), https://icsid.worldbank.org/en/amendments/Documents/Homepage/Amendments-Vol_1_Synopsis_EN,FR,SP.pdf (last visited Jan 25, 2019).

capacity.[113] Those are clearly provisions aimed at reducing the chances of double-hatting and will likely prevent conflicts of interest during the selection process by providing the parties with more complete information on how to instruct a disqualification claim.

The proposed rules, however, do not intend to prohibit double-hatting, but only to provide more detailed information to assess whether a *de facto* conflict exists.[114] Instead, their aim is to enhance transparency and enable parties to consider potential conflicts of interest derived from double-hatting on a case-by-case basis.[115]

Transparency of Proceedings

The current amendment process includes several provisions aimed at increasing the transparency of proceedings. The relations between parties and third-party funders, which have long been an issue of concern in the current system, are further codified to introduce an obligation to the parties to disclose whether they have third-party funding, along with the source of that funding.[116] The identity of the funder is required to be disclosed to potential arbitrators before their appointment, to avoid conflicts of interest. Once more, the proposed rules demonstrate the preference for a less dramatic departure from the existing rules, opting for

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[113] *See* Proposals for Amendment of the ICSID Rules — Working Paper, *supra* note 104, AR 26.

[114] These options tend to preserve the interest of those individuals who frequently act in more than one of such capacities. In its submission to ICSID, Derains & Gharavi International, which "is a network bringing together lawyers who frequently act as arbitrator, counsel and consultant before tribunals" argues that a more restrictive rule in this regard would bring several drawbacks, such as reducing the pool of available ICSID arbitrators. Moreover, they argue, the arbitrator's previous experience as counsel is beneficial to the system, as their practical experience has great value when facing procedural or substantive issues. Furthermore, those arbitrators that act as counsel are less likely to be dependent on future appointments and the risks associated therewith. See Public Comments to Amendment of ICSID's Rules and Regulations, *supra* note 108, at 150.

[115] *See* Proposals for Amendment of the ICSID Rules — Working Paper, *supra* note 104, at 361.

[116] *See id*., AR 21.

enhanced transparency through the mandatory disclosure of information, rather than the prohibition of third-party funding.

The proposed AR 57 aims for a greater participation of non-disputing parties (NDP). The possibility for NDPs to make written submissions has existed in the ICSID rules since 2006. The changes, however, incorporate new provisions based on practice and experience to date and are meant to further codify NDP participation.[117]

AR 57(5) would allow the tribunal to order the NDPs to have access to relevant documents filed in the proceedings. Nonetheless, the parties would still be capable of preventing the NDP from accessing any document that they might classify as confidential.[118] The novelties include additional criteria for consideration when determining whether to allow written submissions from an NDP, such as the identification of its activity or any affiliation with a disputing party, and whether the NDP has received any assistance with its filing. This will allow the tribunal to better assess whether there are any relationships between the NDP and a party.

The amendments also impose the obligation on the parties to inform whether they have third-party funding, the source of the funding, as well as the requirement of keeping such disclosures updated throughout the proceeding.[119] As highlighted above, the proposed rules also state that the name of the funder would have to be provided to the arbitrators prior to their appointment to avoid inadvertent conflicts of interest. Third-party funding is a long-

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117 Although that can be interpreted as an effort to enhance transparency, it is noteworthy that the ICSID has received submissions from organizations linked with the arbitration industry suggesting the adoption of tougher rules regarding *amicus curiae* submissions. The European Federation for Investment Law and Arbitration (EFILA) suggests including the possibility for the tribunal to request that an *amicus* provide security for the parties' reasonable costs in commenting on the submission of the *amicus* as a condition for allowing the *amicus* to make a submission. See Public Comments to Amendment of ICSID's Rules and Regulations, *supra* note 108, at 103.

118 *See* Proposals for Amendment of the ICSID Rules — Working Paper, *supra* note 104, AR 57 (5).

119 *See id*., AR 21.

standing concern that is thought to exacerbate pathologies in the system by fueling speculative claims, as well as asymmetric operation in favor of claimants.[120] Despite all the criticism, the current amendment process, once more, opts for adopting a remedy to its deficiencies rather than a complete prohibition of third-party funding.

The consent of both parties to publish an award would still be mandatory under the ICSID Convention—that remains unchanged. However, the proposed AR 44(2) states that consent to publish an award would be deemed to have been given if a party has not objected to it, in writing, within 60 days.[121] Even if a party objects, the proposed rules would permit the ICSID to publish legal excerpts of the award, leaving the requirement undisturbed. Therefore, although the proposed rules would remain largely similar to the existing ones, transparency would be fostered, as the publication of the award would come to be the general rule, rather than the exception.[122]

Amendments Envisaged to Reduce the Costs of the Proceedings

The ICSID amendments regarding financial provisions also reflect the concerns over the increasing costs of ISDS proceedings. The proposed rules would modify the current one to entitle members to a fixed fee, measured only by hours of work, rather than the current method of a flat daily fee irrespective of the number of hours worked during the hearings.[123] The new rule unifies the fee structure, so that all work performed is compensated transparently, equally and exactly. Moreover, the proposed rule

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120 *See* Howse, *supra* note 35.

121 *See* Proposals for Amendment of the ICSID Rules — Working Paper, *supra* note 104, AR 44 (2).

122 Corroborating the view that enhanced transparency can improve the development of consistent case law, the EFILA contends "that where ICSID Secretariat is prevented from publishing such a decision or order due to lack of party consent, it should have the power to publish extracts, if it considers them important for the development of international law." See Public Comments to Amendment of ICSID's Rules and Regulations, *supra* note 108, at 103.

123 *See* Proposals for Amendment of the ICSID Rules — Working Paper, *supra* note 104, AFR 7.

states that all filings would have to be done electronically, unless there are special reasons to maintain paper filing,[124] in an attempt to make the processes faster and less expensive.[125] Notwithstanding the merits of this modification, its impact on the overall cost of the ISDS proceedings would not be significant.[126]

Furthermore, requests by tribunal members to be paid more than the ICSID fee (currently $3,000/day) are further regulated by Administrative Financial Regulation (AFR) 14. The proposed amendments would simplify the financial administration of proceedings, while ensuring that costs are transparent, predictable, and fair.[127] It therefore would contribute to keeping the parties' expenditures under their control.

AR 19 proposes another modification aimed at reducing the costs of proceedings. It encourages tribunals to make cost orders on an interim basis and not just in the final award, to keep parties cost-conscious during the interlocutory stage and to help parties to gauge the ongoing costs of a case.[128] As a result it may encourage parties to refrain from continuing cases that could give rise to further adverse cost orders.[129]

New Time Limits to Expedite Cases

Another major criticism of the ISDS that the current ICSID amendment process also addresses is the increasing duration of proceedings. The amendment rules set clearer and realistic timeframes and implement options for expedited proceedings, featuring additional and shortened timelines. The proposed AR 59

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124 *See id*., AR 3 (1).
125 *See* Backgrounder on Proposals for Amendment of the ICSID Rules, *supra* note 109, at 2.
126 This is the authors' own assessment. We assume that merely replacing the 'flat daily fee' rule to a criterion that measure by hours do very few to reduce the enormous costs with legal counsel. Likewise, by replacing paper filling by electronic filling has almost 0 effect on reducing costs.
127 *See* Proposals for Amendment of the ICSID Rules — Working Paper, *supra* note 104, AFR 14.
128 *See id*., AR 19.
129 *See* Proposals for Amendment of the ICSID Rules — Synopsis, *supra* note 110, at 4.

sets clear expectations for tribunal members to render the award in a timely manner, while maintaining flexibility, based on individual circumstances of each case.[130] It revises the current AR 46, which deals with the preparation and timing of the award.[131] Under the current rule, the award must be rendered within 120 days after the close of the proceedings. However, since tribunals normally do not close the proceedings until the award is almost finalized, this provision rarely limits the time for deciding a case.[132]

The latest available numbers on ICSID arbitration proceedings demonstrate that the average duration, from the registration of the case until the rendering of the award, is approximately 49 months.[133] The proposed AR 59 states that awards must be rendered within 60 days after the last submission of an application for manifest lack of legal merit, 180 days after the last submission on a preliminary objection, and 240 days after the last submission on all ancillary matters.[134]

However, it is important to emphasize that the 240-day limit is a "best-efforts" obligation under the proposed AR 8(3).[135] Therefore, the amendments seek to ensure that awards be issued more expeditiously and under clearer time limits, based on the complexity of the case and on the amount of information it has to deal with.[136] The ICSID received numerous comments from law

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130 *See* Proposals for Amendment of the ICSID Rules — Working Paper, *supra* note 104, AR 59.

131 *See* ICSID Convention, *supra* note 22, AR 46.

132 *See* Proposals for Amendment of the ICSID Rules — Working Paper, *supra* note 104, at 257.

133 *See id.*, at 257.

134 *See id.*, at AR 59.

135 Proposed AR 8 (3) states that ''Where these Rules prescribe time limits for orders, decisions and the Award, the Tribunal, or the Chairman, where applicable, shall use best efforts to meet those time limits. If special circumstances arise which prevent the Tribunal from complying with a time limit, it shall advise the parties of the reason for delay and the date when it anticipates the order, decision or Award will be delivered.*'' Id*.

136 The ICSID's option for such lax language came despite severe criticism received during the consultation process. In this sense: ''It has become too common for extensive time to lapse, sometimes up to two years, between the hearing and the rendering of the award and to serve standard excuses, ranging from complexity of cases to dissents. In general, it should be made clear that it is

firms and arbitration associations during the consultation period. Most of the comments conveyed suggestions for normative innovations aimed at increasing efficiency and celerity in the conclusion of proceedings, which ranged from introduction of shorter timeframes[137] to best-endeavors provisions.[138] The interpretation of AR 59, alongside AR 8 (3), nonetheless makes it clear that the ICSID has opted for the "best-endeavors" language when amending its rules.

The proposed amendment introduced a new chapter with an optional expedited arbitration procedure that would significantly reduce the timeframes and complexity of proceedings.[139] Another

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unacceptable to receive awards more than a year after the evidentiary hearing, whether or not there are post hearing briefs." Public Comments to Amendment of ICSID's Rules and Regulations, *supra* note 108, at 152.

[137] "To increase efficiency and celerity in the conclusion of proceedings, consider introducing the requirement that the proceedings be declared closed within a specific time period from the end of the final hearing or the filing of the last post-hearing written submissions." *Id*., at 200. Another comment from a law firm suggests a rule "to authorize the Secretary-General to reduce the fees of the arbitrators where, an award has not been drawn up and signed within the specified period of time after closure of the proceedings". *Id*., at 200. Organizations linked with the arbitration community proposed that "ICSID considers issuing guidelines for limiting submission length, volume of document production, and frivolous applications, and ii) prohibition on more than one round of post-hearing submissions." *Id*., at 194. EFILA, in turn, suggests "shortening of the deadlines envisaged in the procedure for constituting the tribunal in the absence of previous agreement." *Id*., at 102.

[138] "To encourage time and cost efficiency, consider introducing a rule expressly adopting the general principle that the tribunal and the parties shall act in an efficient and expeditious manner" *Id*., at 202. The "practice of informing the parties that the arbitrators' fees have been reduced due to a delay in the rendering of the award is not the correct approach. It undermines the authority of the Tribunal in its adjudicatory function. Any process for controlling the delay in rendering the award should remain confidential, and overseen by the ICSID Secretariat, potentially via the Tribunal's secretary, without opening up the issue with the Parties to the extent possible." *Id*., at 152.

[139] Proposed rules allow the parties to expressly opt into an expedited process for the full arbitration within 20 days from the notice of registration. Under the Expedited Arbitration, the parties must select arbitrators within 30 days of registration and can opt for only one arbitrator or three-person tribunal. Under the rules of the expedited process, the first session is held within 30 days. Memorials and counter-memorials are each filed in 60 days and limited to 200

noteworthy modification aimed at reducing the duration of ISDS proceedings is the adoption of an expedited schedule for parties to challenge arbitrators. Mentioned as one of the most prominent causes for delays in the outcomes of ISDS proceedings, challenges to arbitrators are deemed to increase the length of a proceeding by 65 to 82 percent.[140] In order to make this process quicker, the proposed AR 29 would introduce an expedited schedule for parties to file a challenge.[141]

The new rules also require all arguments and supporting documents to be included in the disqualification proposal, thus transforming what could otherwise be a formally lodged challenge into a complete written submission, which reduces the overall time needed for the briefing. With the clear intention to minimize potential delays in proceedings, the proposed AR 29(3) would eliminate the automatic suspension of the proceeding upon the

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pages, while replies and rejoinders may each be filed within 40 days and are limited to 100 pages. The hearing is held within 60 days after the last written submission. The Tribunal can extend the timetable by 30 days to address document disclosure motions, if needed. It may also adjust the schedule if needed for preliminary objection or ancillary claim, but retaining the expedited nature of the process. *See* Proposals for Amendment of the ICSID Rules — Working Paper, *supra* note 104, AR 69-79.

140 This statistic comes from research being conducted by Pluricourts. Though it is not yet finished, the data was unveiled by the delegate of Pluricourts present at the thirty-sixth meeting of UNCITRAL Working Group III, during the session that discussed the concerns of cost and duration of ISDS proceedings on 01\11\2018 during the afternoon. See Malcolm Langford, UNCITRAL WG III (Investor-State Dispute Settlement Reform) - Speakers Log with Audio Recordings (2018), http://www.uncitral.org/uncitral/audio/meetings.jsp (last visited Jan 26, 2019).

141 Under this new schedule, a specific time limit of 20 days for filing a disqualification motion replaces the former requirement that it should be filed "promptly." The challenge may be proposed any time before the award is rendered, since it is made within 20 days after the date on which the party first knew or first should have known of the facts on which the proposal is based. The disqualifications proceeding follows with a reply by the responding party that is filed in seven days, then arbitrator observation within further five days. After that, the parties shall file final observations simultaneously within seven days. Finally, the decision is rendered in 30 days. See Proposals for Amendment of the ICSID Rules — Working Paper, *supra* note 104, AR 29.

filing of a challenge.[142] It gives the parties the ability to decide whether the proceeding will be suspended while the disqualification procedure is pending.

IV. CONCLUSION

The crisis in the ISDS system has reached a stage in which most of its users agree that the system urgently requires reform. While a consensus exists on this necessity, the regulatory options and institutional reforms are still under discussion. So far, three options have taken shape and gained relevance in international debate.

The creation of an ICS in the form of a two-tier tribunal, composed of permanent and financially independent adjudicators with fixed terms, is the most radical departure from the existing system and its successful implementation could pose a major threat to the *ad hoc* ISDS. Although this option presents the best way to address the most remarkable flaws of the ISDS, it also contains several drawbacks in comparison with the current *ad hoc* system, and its implementation presents several practical difficulties.

The simple creation of an appellate body that would be responsible for reviewing the *ad hoc* tribunals' awards responds to only one part of the criticism faced by the ISDS. It neglects other serious problems such as the issue of party appointment and its effect on the independence and impartiality of arbitrators. This alternative implies curtailing some of the most heralded advantages of the ISDS—namely the celerity of the proceedings and the finality of the tribunal awards—but nonetheless leaves the *ad hoc* system unchanged and would thus reduce resistance from the arbitration industry.

Finally, the reform of the current system, represented here by the ICSID amendment process, envisages maintaining the *status quo* and making simple cosmetic changes. Arguments in favor of maintaining the *status quo* are that overhead costs that do not currently exist would not be created and that it promotes an

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[142] *See id*., AR 29 (3).

equilibrium between the rights and interests of investors and states, as opposed to the ICS proposal, which critics say would eventually prevent investors from participating in the composition of tribunals.

The trade-off between the three reform options is clear. All of them have advantages and disadvantages, and discussions about the most appropriate alternative to solve the current crisis is likely to last for years. Nevertheless, discussion on this topic is welcome at this time of grave discontent with the current investment dispute resolution regime. With multiple ISDS reform initiatives ongoing, policymaking in this area is in its most ebullient phase. The next developments will demonstrate the measure of success of each alternative. The preference of the countries for each model will reveal whether any of the three paradigms will prevail or if the investment dispute resolution regime will embrace the coexistence of more than one paradigm.