Challenges To The Credibility Of The Investor-State Arbitration System

Michael Nolan
mnolan@milbank.com

Follow this and additional works at: http://digitalcommons.wcl.american.edu/aublr

Part of the Commercial Law Commons, Comparative and Foreign Law Commons, International Law Commons, and the International Trade Law Commons

Recommended Citation
Available at: http://digitalcommons.wcl.american.edu/aublr/vol5/iss3/6

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Business Law Review by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.
CHALLENGES TO THE CREDIBILITY OF THE INVESTOR-STATE ARBITRATION SYSTEM

MICHAEL NOLAN*

Introduction .............................................................................................................. 429
II. ISDS Criticism .................................................................................................... 430
A. Philip Morris Asia v. Australia ............................................................................. 430
B. Criticism before Philip Morris Asia v. Australia .................................................... 432
C. Criticism after Philip Morris Asia v. Australia ....................................................... 433
D. Criticism in the United States: Trans-Pacific Partnership Negotiations .............. 435
E. Criticism in Europe: Transatlantic Trade and Investment Partnership Negotiations and Micula ................................................................. 436
F. Criticism from the Community of Arbitration Practitioners .................................. 438
G. Criticism of Practical Issues ................................................................................ 440
III. ISDS Will Survive ................................................................................................ 442
Conclusion ............................................................................................................... 444

INTRODUCTION

Investor-state dispute settlement ("ISDS") has been put through the ringer in recent public comment as a system that "threatens domestic sovereignty by empowering foreign corporations to bypass domestic court systems" and "weakens the rule of law."\(^1\) One such foreign corporation is Philip Morris Asia Limited ("Philip Morris Asia"), which brought a claim against Australia in 2012 for compensation based on the state’s cigarette packaging legislation.\(^2\) The case, along with Philip Morris’s similar case

* Michael D. Nolan is a partner in the Washington, DC office of Milbank, Tweed, Hadley & McCloy and a member of the firm’s Litigation & Arbitration Group.

1. Letter from Professor Erwin Chermerinsky et al., to Senator Mitch McConnell et al., Mar. 11, 2015 (letter to United States Congressional leaders signed by nearly 100 law and policy professors) [hereinafter "Chermerinsky Letter"].

2. See generally Philip Morris Asia Ltd. v. Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec. 17, 2015).
against Uruguay, created global controversy over states’ ability to regulate in the public interest. Some critics argued that the cases created a “chilling effect” on other states that were considering similar tobacco regulation. On December 17, 2015, Australia defeated the multibillion dollar claim when the arbitral tribunal declined jurisdiction over the matter. In response to the tribunal’s award, Philip Morris International Inc.’s (“Philip Morris”) general counsel appeared to respond to the controversy: “This case has never been about a government’s undeniable authority to regulate in the public interest.” Nevertheless, the vocal critics of the Philip Morris cases are among many who question whether the ISDS system interferes with democratic regulatory authority.

This Article will describe how the Philip Morris case falls within criticism against the ISDS system over the past decade. Next, the Article will compare similar ideas voiced in the current public debate about the negotiations of the Trans Pacific Partnership and Transatlantic Trade and Investment Partnership. Finally, this Article will assert that the ISDS system will survive in the face of criticism as states begin to reform their ISDS systems.

II. ISDS CRITICISM

A. Philip Morris Asia v. Australia

The Tobacco Plain Packaging Act 2011 became law in Australia on December 1, 2011. Among other requirements, the law mandated certain health warnings and limited branding on cigarette packages. On June 27, 2011, Philip Morris Asia filed a Notice of Claim against Australia pursuant to the Hong Kong-Australia Bilateral Investment Treaty (1993) (“Hong Kong-Australia BIT”). This claim was the first ISDS dispute that was
brought against Australia. Philip Morris Asia argued that Australia's tobacco plain packaging measure constituted an expropriation of its Australian investments in breach of the BIT. Philip Morris Asia further argued that Australia's tobacco plain packaging measure was in breach of its commitment under Article 2(2) of the Hong Kong-Australia BIT, which required fair and equitable treatment to Philip Morris Asia's investments. Finally, Philip Morris Asia asserted that tobacco plain packaging constitutes an unreasonable and discriminatory measure and that Philip Morris Asia's investments have been deprived of full protection and security in breach of Article 2(2) of the Hong Kong-Australia BIT.

The arbitration was conducted under the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules 2010. The tribunal hearing the case was composed of three arbitrators: Australia appointed Professor Don McRae of the University of Ottawa as an arbitrator; Philip Morris Asia appointed Professor Gabrielle Kaufmann-Kohler as an arbitrator; and the Secretary-General of the Permanent Court of Arbitration appointed Professor Dr. Karl-Heinz Böckstiegel as the presiding arbitrator. Over the course of four years, Australia and Philip Morris submitted full statements of claims and defense. On December 17, 2015, the tribunal declined jurisdiction over Philip Morris's claims. On May 16, 2016, the Permanent Court of Arbitration published a redacted version of the award in the Case Repository of the Permanent Court of Arbitration.

Before its arbitral positions were vindicated in this first investor-state case against it, Australia had distanced itself from ISDS. In fact, Australia categorically rejected the inclusion of ISDS provisions in a bilateral investment treaty ("BIT"). In 2011, the Australian Government issued a

Case No. 2012-12, Notice of Claim (June 27, 2011).


12. See Philip Morris Asia Ltd., PCA Case No. 2012-12, Notice of Claim, ¶ 10(c); see also Hong Kong-Australia BIT supra note 11; supra note 6.

13. See supra note 6.

14. See Perry, supra note 3.

15. See Philip Morris Asia Ltd. v. Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, ¶ 588 (Dec. 17, 2015).


Trade Policy Statement, which stated the country would not agree to ISDS in future treaties. Since then, however, the Australian government has stated that it will consider ISDS provisions on a “case-by-case” basis—a policy which it appears to have carried out. Australia included ISDS in the 2014 Korea-Australia Free Trade Agreement but not in the 2014 Australia-Japan Free Trade Agreement.

B. Criticism before Philip Morris Asia v. Australia

Criticism of ISDS began with some South American states in the late 2000s. In 2007, these states began withdrawing their membership in the International Centre for Settlement of Investment Disputes (“ICSID”) as a result of a number of investor-state arbitrations filed against them. On May 2, 2007, Bolivia became the first to withdraw from ICSID by submitting a Notice under Article 71 of the Washington Convention. Ecuador followed with its own withdrawal on July 5, 2009, and Venezuela withdrew on January 24, 2012. Following their respective withdrawals from ICSID, Bolivia, Ecuador, and Venezuela have each terminated at least some of their existing BITs, and the three countries have not signed any new investment agreements.
At the time, withdrawal by Bolivia, Ecuador, and Venezuela seemed to be a regional reaction to the fairness of what was viewed as a foreign-imposed regime. When Bolivia withdrew, Bolivian President Evo Morales said, "Governments from Latin America[,] and I think all over the world[,] never win the cases. The transnationals always win." Yet, this sentiment does not appear to be factually grounded; in an empirical study of investment treaty cases in 2008, Washington and Lee University Associate Professor of Law Susan Franck recently found that governments won in 57.7% of cases whereas investors prevailed in only 38.5% of cases.

C. Criticism after Philip Morris Asia v. Australia

Following the South American state repudiation of ISDS, the next wave of criticism was led by the public in reaction to high-profile cases, including Philip Morris' cases against Australia and Uruguay. Even in current debate about ISDS, commentators complain that Philip Morris is "trying to use ISDS to stop Uruguay from implementing new tobacco regulations intended to cut smoking rates." Following Philip Morris, public commentators continued to criticize investor-state arbitration when Vattenfall AB v. Germany was initiated in 2012.


27. Vattenfall AB v. Germany, ICSID Case No. ARB/12/12, Notice of Arbitration (May 31, 2012). Note that Vattenfall had previously filed a case against Germany in 2009 after a change in Hamburg's environmental regulations caused Vattenfall to claim € 3.7 billion compensation based on increased expenses in a power plant that Vattenfall was building. See generally Vattenfall AB v. Germany, ICSID Case No. ARB/09/6, Award (Mar. 11, 2011). Interestingly, Vattenfall was the first case brought against a Western European country under the Energy Charter Treaty—the prior twenty cases were all brought by investors against the governments of Eastern Europe, the former Soviet Union, and Turkey. See Cesare Romano, Vattenfall v. Germany: Anomaly or New Trend?, KLUWER ARB. BLOG (May 6, 2009), http://kluwerarbitrationblog.com/2009/05/06/vattenfall-v-germany-anomaly-or-new-trend/.
power company, initiated the case against Germany after the German parliament amended the Atomic Energy Act in 2011 to speed up the phase-out of nuclear energy, which required the immediate shutdown of nuclear reactors operated by Vattenfall. The amendment followed the nuclear disaster in Fukushima, Japan as public sentiment in Germany turned against the use of nuclear energy. Critics of Vattenfall’s claim have called it the “exploitation” of “woolly definition of expropriation to claim compensation for changes in government policy that happen to have harmed their business.” Similar to criticisms of the Philip Morris cases, commentators have painted Vattenfall as an attack on environmental and safety regulations.

Although Germany did not react against ISDS in response to Vattenfall, other states limited or withdrew their participation in ISDS around the time that the Philip Morris and Vattenfall cases were initiated. Like Australia’s reaction to the Philip Morris case, South Africa followed suit in 2012 by stating that it would not provide for ISDS in future trade agreements. Most recently, Pakistan rejected a U.S. draft BIT that contained ISDS provisions from the U.S. Model BIT. Instead, Pakistan drafted its own Model BIT under which Pakistan could not be held liable for disputes involving private investors.

South Africa and Indonesia have gone further than Pakistan; these two states have terminated existing BITs that include ISDS provisions. South Africa began terminating treaties in 2012 after a two-year review of its investment treaty obligations. The review followed ISCID arbitration by investors from Luxembourg and Italy in response to South Africa’s 2002 Mineral and Petroleum Resources Development Act. In 2015, South Africa went further by enacting legislation that does not permit investors to
seek recourse through international arbitration. Indonesia has also terminated the Netherlands-Indonesia BIT on its expiration date of July 1, 2015 with commentators proposing that recent investor-state arbitration cases motivated the Indonesian Government to review its treaty portfolio. Indonesia has announced its intention to end all BITs so that those with automatic renewal will be terminated, and the remainder will expire. But, Indonesia has yet to terminate any other existing agreements.

D. Criticism in the United States: Trans-Pacific Partnership Negotiations

The public debate over ISDS reached the United States in 2015. The conversation has focused on the ISDS provision of the Trans-Pacific Partnership ("TPP"), a treaty negotiated by President Barack Obama with eleven Pacific Rim nations. The text of the TPP was released fully to the public on November 5, 2015 and signed by United States Trade Representative Michael Froman on February 4, 2016. United States Senator Elizabeth Warren, a Democrat from Massachusetts, led the conversation in early 2015 by accusing ISDS of being a "rigged, pseudo-court" that permits multinational corporations "potentially to pick up huge payouts from [U.S.] taxpayers." Senator Warren gained the support of law and policy professors who explained how corporations use ISDS arbitration to "challenge[] environmental, health, and safety regulations,


38. See id. India has also announced its intention to review its BIT system to consider excluding ISDS from future agreements. See Kyla Tienhaara, These TPP safeguards won't protect us from ISDS, ABC (Mar. 26, 2015, 1:07AM), http://www.abc.net.au/news/2015-03-26/tianhaara-these-tpp-safeguards-wont-protect-us-from-isds/6350358.

39. See generally The Trans-Pacific Partnership, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, https://ustr.gov/tpp/ (last viewed May 11, 2016). The other participating nations are Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. Id.


including decisions on plain packaging rules for cigarettes, toxics bans, natural resource policies, health and safety measures, and denials of permits for toxic waste dumps.\footnote{Chermerinsky Letter, supra note 1.} In addition to concerns for U.S. legislative measures, Senator Warren and others have bashed ISDS for its lack of independent judges and the absence of an appeal process.\footnote{See id.; Warren, supra note 26.}

If ratified, the TPP will be one of fifty agreements to which the United States is a party that includes an ISDS provision.\footnote{See FACT SHEET: Investor-State Dispute Settlement (ISDS), Office of the United States Trade Representative, https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds (last visited May 11, 2015).} According to the United States Trade Representative Froman, foreign investors rarely pursue arbitration against the United States, and more importantly, they have never been successful in arbitration against the United States.\footnote{Id.}

Still, Senator Warren and other critics not only fear that it is “a matter of time” before the United States loses, but they also cite the resources that states must expend on claim defense without the ability to sue affirmatively.\footnote{Warren, supra note 26; see also Prof. Chermerinsky Letter, supra note 1.} Senator Warren fears that the ISDS regime is only an opportunity for multinational corporations to win at the expense of American taxpayers and small businesses.\footnote{See Warren, supra note 26.}

\section*{E. Criticism in Europe: Transatlantic Trade and Investment Partnership Negotiations and Micula}

Debate over ISDS is raging in Europe, mirroring the concerns raised in the United States. In Europe, the culmination of the public debate on investor-state arbitration could result in policymakers’ decision to forego investor-state arbitration provisions in future treaties.

On July 8, 2015, the European Union Parliament adopted a series of recommendations on the Transatlantic Trade and Investment Partnership (“TTIP”), which included an amendment to the proposed ISDS provision.\footnote{See EU Parliament Adopts TTIP Resolution, ISDS Compromise Language, ICSID (July 9, 2015), http://www.ictsd.org/bridges-news/bridges/news/eu-parliament-adopts-ttip-resolution-isds-compromise-language [hereinafter “EU Parliament ISDS Compromise”].} The amendment calls to replace the ISDS with a new system “which is subject to democratic principles and scrutiny” that requires “publicly
appointed, independent professional judges in public hearings" with an appellate mechanism.\footnote{EU Parliament ISDS Compromise, supra note 48.} As a result of the amendment, some policymakers have concluded that "ISDS is dead."\footnote{Id.}

This new system is the European Commission's ("EC" or "Commission") Investment Court System, which would apply to TTIP and all other E.U. investment treaties.\footnote{See Press Release, European Commission, Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations (Sept. 16, 2015), http://europa.eu/rapid/press-release_IP-15-5651_en.htm.} The EC has described the EC Investment Court System as a permanent court with appointed judges that it will set up with the assistance of other states. The EC envisions that this system will replace the current ISDS arbitration system "over time" to "further increase the efficiency, consistency and legitimacy of the international investment dispute resolution system."\footnote{Id.}

But the EC's attacks on ISDS do not stop at treaty negotiations. It has challenged the appropriateness of BIT-based ISDS between European Union member states in an investor-state case. In an unprecedented move, the EC prohibited a member-state from enforcing the award issued by an ICSID tribunal in *Micula v. Romania.*\footnote{See generally Micula v. Romania, ICSID Case No. ARB/05/20, Final Award, (Dec. 11, 2013).} In 2005, brothers Ioan and Viorel Micula initiated a case against Romania under the Sweden-Romania BIT after Romania withdrew economic incentives that harmed the Miculas' food distribution business.\footnote{See Douglas Thomson, *EU Comes Down Against Micula Award*, GLOBAL ARB. REV. (Apr. 1, 2015), http://globalarbitrationreview.com/news/article/33691/eu-comes-down-against-micula-awa.} Romania, with the support of the EC as *amicus curiae*, argued in part that the ICSID tribunal should refuse jurisdiction because Romania changed its laws for the purpose of complying with European Union competition law when Romania acceded to the EU.\footnote{See generally Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, ¶¶ 40-41 (Sept. 24, 2008).} Nevertheless, in 2013, the ICSID tribunal issued an award in the Miculas’ favor and ordered Romania to pay $250 million compensation.\footnote{See Micula, ICSID Case No. ARB/05/20, Final Award, ¶ 1329.} An ad hoc ICSID committee refused to annul the award, which Viorel Micula has been seeking to enforce in the United States and Belgium.\footnote{See Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Annulment, ¶ 339 (Feb. 26, 2016); see also Alison Ross, *Twin Brothers' Award Against Romania Upheld*, GLOBAL ARB. REV. (Feb. 29, 2016), http://globalarbitrationreview.com/news/} In May 2014, the EC issued an injunction to prevent Romania
from honoring the award. Following a six-month investigation, on March 30, 2015, the EC enjoined Romania from honoring the ICSID award on the basis that it infringes EU law, which prohibits subsidies and ordered Romania to recover any money already paid.

The Miculas have brought a lawsuit against the Commission in the European Court of Justice ("ECJ") to overturn the injunction against Romania. Each of the European Union’s twenty-eight member-states is a signatory to the ICSID Convention, which affords ICSID awards the status of final judgments in the national courts of each signatory. Therefore, in the ECJ proceeding, the Commission is arguing that intra-EU BITs are incompatible with EU law. At least one commentator predicts that this argument will succeed. If the prediction is correct, the commentator believes it will be “a horrific outcome for investors and for legal certainty” with negative repercussions in the global investment arbitration system including “temptation for countries like Argentina not to pay out ICSID awards.”

F. Criticism from the Community of Arbitration Practitioners

The public debate regarding ISDS has identified inequities in the system, including the lack of independent judges and absence of an appeals process. Politicians and academics are not the only commentators concerned about the practical problems of the ISDS arbitration system. The current TPP and TTIP public debates have been accompanied by unprecedented professional criticism of the ISDS system from arbitration “insiders.” Insiders question opaque arbitrator appointment processes, the revolving door between advocates and neutrals, and time constraints faced by arbitrators. These criticisms pair with recent trends in arbitration practice, including a growing number of arbitrator challenges, growing number of dissents that appear to be based in ideology and challenges to arbitral awards based on of arbitrator work delegation.
Former deputy and acting Secretary-General of ICSID Nassib Ziadé and practitioner Hamid Gharavi both recently published concerns about the credibility of ICSID itself and its practices.\(^65\) The President of the International Bar Association ("IBA"), David W. Rivkin, went beyond the system as a whole, chastising arbitrators for failing to dedicate sufficient time and attention to their cases in order to deliver fair and timely awards.\(^66\)

Messrs. Ziadé and Gharavi explained concerns about the annulment committee appointment process, codes of conduct for ICSID, and code of conduct for arbitrators. First, Mr. Ziadé agreed with practitioner Mr. Gharavi that arbitrators who serve on ICSID tribunals should not be appointed to annulment committees.\(^67\) He went further to say that ICSID arbitrators should not act as counsel in ICSID arbitrations. The current practice "creates at least a perception that annulment committee members may be tempted to develop case law that would benefit their pending or potential ICSID arbitration cases."

Second, the ICSID Secretary-General has enormous powers over the annulment committee appointment process and influence over cases. Mr. Ziadé explained that appointments are made in violation of the ICSID Convention because the chairman of the ICSID administrative council (president of the World Bank), who is charged with the appointment, "invariably" relied on the recommendation of the ICSID Secretary-General. The present ICSID Secretary-General "routinely" proposes a list of arbitrators from outside the ICSID panel of arbitrators even though Article 40(1) of the ICSID Convention requires the appointment from the panel.\(^68\) As Mr. Gharavi also noted, in practice, it is the ICSID Secretary-General who makes all appointments, which is an extraordinary power.\(^69\) In addition to appointment powers, ICSID secretaries-general have also expressed their views about the appropriate scope of the annulment mechanism, which can have an impact on proceedings when the ICSID Secretary-General essentially has the exclusive power to appoint annulment

---


\(^{67}\) See Ziadé, *supra* note 65.

\(^{68}\) See ICSID Convention, *supra* note 20, art. 40(1); Ziadé, *supra* note 65.

\(^{69}\) See Gharavi, *supra* note 65.
committees. These recommendations echo those in the TIPP public debate about independent judges.

Third, Mr. Ziadé recommended that ICSID needs its own code of conduct because staff members tend to have close “personal (if not family) links” as well as professional connections to investment arbitration professionals. For example, there is no internal guideline that would prohibit \textit{ex parte} communications about arbitration cases between party’s counsel and ICSID staff. ICSID should create a code of conduct and guidelines for arbitrators and counsel as well. For example, unchallenged arbitrators should have standard guidelines to decide a challenge against their third arbitrator.

Finally, Mr. Ziadé expressed the ultimate concern that ICSID seems unwilling to improve the system: “I decided to speak out in the hope of spurring a debate that the present leadership of ICSID seems to wish to avoid.”

Turning to the arbitrators themselves, Mr. Rivkin recently called out arbitrators in a keynote address at an arbitration conference in Hong Kong. Mr. Rivkin reprimanded arbitrators for failing to allow sufficient time to hear and decide cases, to familiarize themselves with the facts of disputes in advance, to exercise control over counsel, to schedule deliberations soon enough after the hearing, and to deliver timely awards that address the matters in issue. Observers praised Mr. Rivkin for “telling it like it is.”

\textbf{G. Criticism of Practical Issues}

Public concerns about the lack of independent judges in the ISDS system find support in practical challenges that cast doubt on the neutrality of arbitrators. First, a growing number of high-profile challenges to the appointment of arbitrators creates an appearance of bias. The perception

---

70. See id.
71. See id.
72. See Thomson, supra note 66.
73. See id.
74. See id.
exists that ideology affects the appointment process. Challenges rarely succeed, which casts further doubt on the effectiveness of the appointment process and the viability of the investor-state arbitration system. On October 8, 2015, however, Alexis Mourre, President of the International Chamber of Commerce ("ICC") International Court of Arbitration, communicated that the ICC will start communicating the reasons for its decisions on challenges to arbitrators. It remains to be seen whether such increased transparency will alleviate the concerns.

Next, after an arbitrator survives any challenges to appointment, he or she will ultimately be in a position to challenge the final award by writing a dissenting opinion. Dissenting opinions are expressly permitted in ICSID arbitrations pursuant to Article 48(4) of the ICSID Convention. The recent proliferation of dissenting opinions, however, contributes to suspicions that arbitrators are not neutral, particularly when dissenters were almost always appointed by the losing party. In fact, nearly 100% of dissenters favor the party that appointed the dissenting arbitrator which raises questions of arbitrator neutrality.

Skepticism of arbitrators' neutrality as dissents increase is further fed by annulments of arbitral awards—at times based on the rationales given by dissenting arbitrators. A prime example is the very recent annulment in *Occidental Petroleum v. Ecuador* ("Oxy") for reduction in damages of $700 million, the largest amount ever annulled by ICSID, which partly endorsed a dissent from one arbitrator. Reports indicate that arbitrator

---

76. See ICC Court to Communicate Reasons as a New Service to Users, INT'L CHAMBER OF COMMERCE (Oct. 8, 2015), http://www.iccwbo.org/News/Articles/2015/ICC-Court-to-communicate-reasons-as-a-new-service-to-users/.
77. See ICSID Convention, supra note 20, art. 48(4).
78. See Albert Jan van den Berg, Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 823 (Mahnoush Afsanjani ET. AL eds., 2011).
79. See Occidental Petroleum Corp. v. Ecuador, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012) [hereinafter “Oxy”]. In Oxy, the arbitrators agreed that Ecuador inappropriately terminated its participation contract with Oxy for a 200,000-hectare oil block after Oxy breached by “farming out” a 40% interest in the project to another company without approval. *Id.* ¶ 363. The arbitrators disagreed about damages: the majority decided that Oxy right to the oil block’s $2.5 billion value should be reduced by 25% for Oxy’s failure to seek approval for the farmout. *Id.* ¶¶ 876–77. Arbitrator Stern stated in her dissent that the majority’s findings on damages were based on “grossly incorrect legal bases,” with its view on Oxy’s farmout agreement with the third-party “egregious.” See Occidental Petroleum Corp. v. Ecuador, ICSID Case No. ARB/06/11, Dissenting Opinion, ¶ 5 (Sept. 20, 2012). Stern agreed with Ecuador that Oxy’s right to the oil block’s $2.5 billion worth should be reduced by forty percent, the amount that Oxy sought to farm out to the third party, which was void due to its failure to seek the required approval. See Oxy, supra note 73 ¶¶ 876–77. See generally Sebastian Perry, Ecuador Wins Record Reduction of Oxy Award, GLOBAL ARB. REV. (Nov. 3, 2015), http://globalarbitrationreview.com/news/article/34298/ecuador-wins-
Brigitte Stern’s dissent “laid out a roadmap for Ecuador’s annulment arguments.”  The increasing number of annulments can rattle the confidence of investors who are the users of investor-state arbitration. When a string of awards were annulled by ICSID in 2010, some predicted a “crisis of user confidence in the ICSID system.” Concerns were then allayed by a 5-year period without any annulments—until Oxy.

Finally, confidence in investor-state arbitration is undermined with suspicions that arbitrators improperly delegate their duties to arbitral secretaries. In Yukos v. Russia, Russia recently moved to set aside the arbitral awards for the Tribunal’s “impermissible delegation” of its mandate to decide the case. Russia submitted a forensic linguist’s conclusion that the arbitral secretary, Martin Valasek, wrote a large portion of the final award, including much of the substantive analysis on the case. In a system in which “writing” the decision is equivalent to “making” the decision, Russia argued that this delegation is grounds for annulment of the award. Although the award was set aside on other grounds, Russia’s challenge is likely to resonate with other international arbitration professionals, who have voiced strong concerns about the time and attention that arbitrators dedicate to their cases.

III. ISDS WILL SURVIVE

In the face of criticism from politicians, academics, states, and professionals, the ISDS system will shake but not fall. The tide of criticism may encourage states to reform ISDS provisions in future treaties, but most state actions to date demonstrate that ISDS is here to stay.

First, the United States maintained ISDS provisions in the TPP. The

record-reduction-oxy.

80. See Perry, supra note 79.
81. See, e.g., Sempra Energy International v. Argentina, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Application for Annulment of the Award (June 29, 2010); Enron Corp. v. Argentina, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (July 30, 2010); Fraport AG Frankfurt Airport Servs. Worldwide v. Philippines, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide (Dec. 23, 2010).
83. See id.
84. Id. (quoting Klaus Peter Berger).
86. See Thomson, supra note 66 (quoting IBA President David W. Rivkin).
agreement contains baby steps toward addressing concerns over a state’s power to legislate, including a footnote clarifying that expropriation “depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.”88 The agreement also considers that future actions might improve transparency or provide for appeals in ISDS arbitrations.89 Nevertheless, the agreement does not include any revolutionary provisions on these issues.

Second, although Australia distanced itself from ISDS following Philip Morris’s filing of action in 2011, it has cozied back up to ISDS in recent treaty negotiations. In all treaty agreements since 2013, Australia has included an ISDS provision with only one exception. In fact, Australia participated in the negotiations for TPP, which includes a relatively traditional ISDS provision, as described above. And, Australian officials are pushing the passage of TPP for the nation’s economic future: the Prime Minister, Malcolm Turnbull, has lauded TPP as a “gigantic foundation stone for [Australia’s] future prosperity.”90

Australia’s return to ISDS casts doubt on whether other states will continue to keep their distance from ISDS. Indonesia, for example, also appears to have stepped away from the system in 2015, but it has not completely withdrawn from ICSID. Another state to watch is South Africa, which has taken a unique approach to ISDS by permitting only state-state arbitration in lieu of investor-state arbitration as of December 2015.91 Time will tell if Indonesia and South Africa, like Australia, will return when public debate quiets or when ISDS becomes useful in a treaty negotiation.

Finally, even the EC’s actions do not put the final nail in the ISDS coffin. The EC’s proposed investment court represents a reform rather than

88. Id.
89. See id.
91. See Jackwell Feris, Amended Investment Bill is Still a Concern, BDLIVE (Dec. 7, 2015). In December 2015, South Africa’s Parliament passed The Protection of Investment Bill, which represents a compromise between its former ISDS regime and a no-arbitration regime. The first draft of the bill, released in 2013, caused an outcry by precluding international arbitration by foreign investors in disputes with the state, limiting recourse to domestic courts. The final bill provides that the government “may consent” to international state-to-state arbitration when domestic remedies have been exhausted. Rather than reject all international dispute resolution options, South Africa has crafted a new tailored approach.
CONCLUSION

In 2015 and 2016, ISDS suffered an unprecedented wave of criticism from public officials, academics, and arbitration professionals across the globe in highly publicized debate. The criticism spans from questions of procedural fairness to concerns about the democratic power to legislate. In response to this criticism, states will reform ISDS, but the system will remain a crucial piece in international trade treaties. Critics hoping for the demise of ISDS due to democracy concerns can take comfort that Philip Morris Asia v. Australia continues a string of decisions upholding the state’s power to make legitimate policy decisions on behalf of its citizens. While a government that clearly acts to protect its own industry through discriminatory legislation may be sanctioned by an arbitral tribunal, tribunals have consistently upheld states’ legitimate use of their police powers, such as with respect to California’s gasoline additive regulation in

93. See id.; The Trans-Pacific Partnership, supra note 40.
94. The Trans-Pacific Partnership, supra note 40.
95. See id.
96. That criticism of ISDS is not new. For example, there have been criticisms based on reasons related to a State’s power to regulate, notably with respect to public health and environment (see e.g., Ethyl Corporation v. Canada, UNCITRAL, Award on Jurisdiction (June 24, 1998)) where the Canadian Parliament acted to ban the import and transport of a toxic gasoline additive). Other criticisms include the fact that arbitrators are, by and large, commercial lawyers who are less likely to be mindful of the public policy consequences of their awards for developing states than to the plain reading of treaties devised by dominantly developed countries. See Gus Van Harten, Investment Treaty Arbitration and Public Law, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 122–51 (Stephan W. Schill ed., Oxford University Press, 2010). The magnitude of the current criticisms and the fact that ISDS is not an obscure mechanism living outside the public eye is, however, novel.
Methanex\textsuperscript{98} or Canada's agricultural pesticide regulation in Chemtura.\textsuperscript{99} In these cases, like in Philip Morris, the arbitral tribunals dismissed investors' claims in favor of legitimate government acts.

\textsuperscript{98} Methanex Corp. v. United States, UNCITRAL, Final Award (Aug. 9, 2005), http://www.state.gov/s/l/c5818.htm.