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## Creating Consistency Through a World Investment Court

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## ARTICLE

# CREATING CONSISTENCY THROUGH A WORLD INVESTMENT COURT

*David M. Howard\**

### ABSTRACT

*Foreign direct investment is an essential aspect of our global economy, yet the legitimacy of the current investment arbitral system is currently being undermined due to an alleged perception of a lack of arbitrator independence and a growing number of inconsistent and conflicting investment decisions, leading to an incoherent body of international investment law. Unpredictability in either investor protection or state liability leads to increased risk in the investment regime, and risk lowers foreign investment flows. Additionally, large awards against states have led to some countries refusing to consent to investor-state arbitration at all.*

*This Article intends to promote the creation of a World Investment Court. This World Investment Court would increase consistency in the investment regime and remove the perception that investment arbitrators are biased towards investors, thereby promoting the legitimacy of international investment law overall. This Article further provides a look at inconsistent investment arbitral awards, and argues that even though many arbitrators cite prior awards, the current alleged de facto precedent is inadequate, and a “World Investment Court” is necessary for the further development of international investment law.*

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### I. INTRODUCTION

Foreign direct investment (“FDI”) has grown dramatically within the past several decades, and with it, the number of investor-state disputes has risen. Because of the significant political risk taken by investors in foreign states, promoting and protecting FDI requires a judicial institution that can reduce risk to foreign investment and create a consistent body of international investment law.<sup>1</sup> FDI continues to be generally unregulated on a global scale,<sup>2</sup> and without this multilateral cohesion, bilateral investment treaties (“BITs”) have emerged as the primary source of regulation for FDI.<sup>3</sup> At the start of 2016, there were over 3,300 international investment treaties in the world, with more than 2,900 BITs, and that number continues to grow.<sup>4</sup> Concurrently, the number of investor-state disputes has risen to over 600,<sup>5</sup> leading many—including the World Trade Organization (“WTO”)<sup>6</sup>—to criticize the current investment arbitral system and call for solutions to its structural problems,<sup>7</sup> specifically the numerous inconsistent arbitral decisions, the incoherent body of investment law, and alleged lack of independence and impartiality of investment arbitrators.<sup>8</sup>

States have several types of dispute resolution methods that can be used to resolve investor-state disputes: (1) “diplomatic” means such as negotiation, mediation, diplomacy, and conciliation, and (2) “legal” means such as arbitration and judicial settlement.<sup>9</sup> However, investor-state arbitration is unique and distinct from many other forms of

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1. STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* 3 (2009).

2. José E. Alvarez, *The Regulation of Foreign Direct Investment*, 42 COLUM. J. TRANSNAT’L L. 1, 2 (2003).

3. See generally Rachel J. Anderson, *Toward Global Corporate Citizenship: Reframing Foreign Direct Investment Law*, 18 MICH. ST. J. INT’L L. 1 (2009).

4. U.N. CONFERENCE ON TRADE AND DEVELOPMENT, *World Investment Report 2016*, 101.

5. U.N. CONFERENCE ON TRADE AND DEVELOPMENT, *World Investment Report 2015*, 114 (2015). See also Jack J. Coe, Jr., Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge Univ. Press 2008), 113 PENN ST. L. REV. 1369, 1389 (2009) (book review).

6. *World Investment Report 2015*, *supra* note 5, at 120 (asserting “[t]he question is not about whether to reform or not, but about the what, how and extent of such reform.”).

7. See, e.g., Jason Webb Yackee, *Toward A Minimalist System of International Investment Law?*, 32 SUFFOLK TRANSNAT’L L. REV. 303, 318 (2009) (citing scholars who have called for a World Investment Court).

8. STEPHAN W. SCHILL, *REFORMING INVESTOR-STATE DISPUTE SETTLEMENT (ISDS): CONCEPTUAL FRAMEWORK AND OPTIONS FOR THE WAY FORWARD* 1 (2015).

9. See generally J. G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* (5th ed. 2011).

adjudication.<sup>10</sup> International commercial arbitration and investment arbitration present different questions to the tribunal,<sup>11</sup> as arbitrators in commercial arbitration must decide whether there was a breach of the underlying contract while arbitrators in investment arbitration must decide the legality of states' actions regarding foreign investments. Essentially, investor-state arbitration is a form of public law<sup>12</sup> as it involves deciding investment regulatory disputes between states and private investors and is significantly distinct from private commercial international arbitration, which consists of resolving private disputes between private parties.<sup>13</sup> But in international public law, while there is a WTO to regulate and promote coordinated trade policies, there is no supranational organization to regulate or promote international investment.<sup>14</sup> To compound the issue, the proliferation of BITs continues to cause numerous structural problems, particularly inconsistent interpretations of treaty language and an incoherent body of investment arbitral law.<sup>15</sup> Given the recent growth and rising importance of FDI to the international financial world, there is an increasing need for the establishment of a permanent World Investment Court to create consistent investment decisions leading to a coherent body of international investment law, and thereby protect and regulate the growing regime of FDI.<sup>16</sup>

This Article analyzes and promotes the creation of a World Investment Court to resolve international investor-state disputes. One

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10. Joshua B. Simmons, *Valuation in Investor-State Arbitration: Toward a More Exact Science*, 30 *BERKELEY J. INT'L L.* 196, 196 n.1 (2012).

11. See *Compañía de Aguas del Aconquija SA v. Arg. Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶¶ 96, 113 (July 3, 2002).

12. See William Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 *YALE J. INT'L L.* 283, 283-96 (“[M]uch of investment treaty arbitration today must be understood as public regulatory or administrative law.” *Id.* at 289); see also Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 *VA. J. INT'L L.* 57, 61 (2011).

13. GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 4 (2007).

14. Laurence R. Helfer & Anne-Marie Slaughter, *Toward A Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 287 (1997) (noting “The term ‘supranational’ has no canonical definition but is typically used to identify a particular type of international organization that is empowered to exercise directly some of the functions otherwise reserved to states.”).

15. Efraim Chalamish, *The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?*, 34 *BROOK. J. INT'L L.* 303, 340 (2009).

16. *Id.* at 335.

scholar has proposed the idea of a World Investment Court in the past,<sup>17</sup> while most scholars have criticized the proposal.<sup>18</sup> The hope of this Article is to reinvigorate the discussion surrounding the proposal for a World Investment Court, and attempt to persuade critics that a Court composed under the auspices of the WTO and comprised of tenured judges appointed by the WTO contracting states would create a more perfect system to resolve international investment disputes. As discussed here, this World Investment Court would create a more consistent interpretation of international investment treaties and standardize international investment law, which in turn may increase FDI flows due to improved confidence in investment protection<sup>19</sup> and provide states with a predictable framework to base future regulatory actions.<sup>20</sup> It is important to note that this Article will not focus on the claim that the current investment arbitration system is inadequate—though it may be in some respects—but the aim of this Article is to propose a more complete and coherent system to resolve international investment disputes. Furthermore, this Article will discuss a current attempt to place this theory into practice—namely the bilateral investment courts under EU investment treaties.

Part II of this Article will describe the current regulatory framework of FDI, particularly BITs and FTAs as these are the most prevalent agreements relating to investment. Part III will discuss the current enforcement mechanisms for investment arbitration awards. Part IV will focus on the reasons investment arbitration may not be the best forum for deciding investor-state disputes, and will also discuss the conflicts between the legitimacy and sovereignty of the state in

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17. VAN HARTEN, *supra* note 13, at 180-84. Yet even this scholar is starting to back away from his idea of an international investment court due to a growing pessimistic view of practical implementation. Gus Van Harten, *The System of International Investment*, in ALTERNATIVE VISIONS OF THE INTERNATIONAL LAW ON FOREIGN INVESTMENT: ESSAYS IN HONOUR OF MUTHUCUMARASWAMY SORNARAJAH 103, 104-05 (C.L. Lim ed., 2016).

18. See, e.g., José E. Alvarez, *Investment Treaty Arbitration and Public Law*. By Gus Van Harten, 102 AM. J. INT'L L. 909, 914 (2008) (book review); Stephen W. Schill, *The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?*, 20 AMER. SOC'Y INT'L L. 9 (2016).

19. Cf. Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 347 (2007) (noting "[t]here is mixed anecdotal evidence that investment treaties promote FDI.").

20. Christina Binder, *Necessity Expectations, the Argentine Crisis and Legitimacy Concerns*, in FOREIGN INVESTMENT, INTERNATIONAL LAW AND COMMON CONCERNS 198, 208 (Tullio Treves et al. eds., 2013) (noting that unpredictability and unclear guidelines are detrimental to both states and investors).

delegating its power to a supranational organization such as this investment court. Next, Part V will look to the empirical value of the proposed investment court between the United States and the European Union, including critiques of the system. Part VI will discuss several arguments against the World Investment Court and provide responses to these criticisms. Part VII will then discuss the structure and function of the proposed World Investment Court, including its jurisdiction, appellate body, and precedential treatment.

## II. CURRENT REGULATION OF FDI

First, to understand the reasons for this proposal of a World Investment Court, it is necessary to understand the current system of FDI regulation and its dispute resolution in the international sphere. FDI is generally defined as: “a category of cross-border investment made by a resident in one economy (the *direct investor*) with the objective of establishing a lasting interest in an enterprise (the *direct investment enterprise*) that is resident in an economy other than that of the direct investor.”<sup>21</sup> The central purpose of FDI is for the direct investor to acquire influence in the management of the foreign enterprise, generally evidenced by the ownership of at least ten percent of the voting power.<sup>22</sup> This definition covers a broad spectrum of activities, as FDI can be created in many ways, such as establishing a manufacturing plant or expanding an existing business into a foreign state through a joint venture with a local company of that state.<sup>23</sup> Commonly, FDI occurs through a merger or acquisition of an existing firm, but FDI can also occur through the creation of a wholly new enterprise in a foreign country.<sup>24</sup>

However, states and foreign investors—often companies or enterprises<sup>25</sup>—do not have the same international status, and therefore, have unequal bargaining power.<sup>26</sup> Because investors of one country

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21. ORG. FOR ECON. CO-OPERATION AND DEV., OECD BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT ¶ 11, at 17 (4th ed. 2008).

22. *Id.*

23. LONE WANDAHL MOUYAL, INTERNATIONAL INVESTMENT LAW AND THE RIGHT TO REGULATE: A HUMAN RIGHTS PERSPECTIVE 6 (2016).

24. José E. Alvarez, *The Public International Law Regime Governing International Investment* 15 (2011).

25. DAVID COLLINS, AN INTRODUCTION TO INTERNATIONAL INVESTMENT LAW 18 (2017).

26. STEPHEN J. TOOPE, MIXED INTERNATIONAL ARBITRATION: STUDIES IN ARBITRATION BETWEEN STATES AND PRIVATE PERSONS 386 (1990).

and a foreign state in which that investor owns or manages a business have different levels of bargaining power, many investors see FDI as risky.<sup>27</sup> This political risk generally includes the risk of civil unrest, such as armed conflicts, and the risk of changing laws, regulations, or state administrations.<sup>28</sup> Before the twentieth century, FDI was protected primarily through diplomatic means,<sup>29</sup> but as threats of expropriation or nationalization of foreign investments rose, states began creating investment treaties, specifically BITs, to protect their investors.<sup>30</sup> These investment treaties were originally purposed to protect those rights of foreign investors in a host country, as protection generally encourages the proliferation of FDI because foreign investors would view their investments as less risky if they could enforce their rights through a treaty.<sup>31</sup> Outside of investment treaties, most investors have little protection for their foreign investments against acts such as expropriation or nationalization by a host country,<sup>32</sup> but due to international investment agreements between states, investors can bring claims against host governments before an international arbitral tribunal rather than before the host country's domestic courts.<sup>33</sup> Most investment treaties now provide foreign investors a standard set of rights, including fair and equitable treatment and most-favored nation protections.<sup>34</sup> Even though international investment law is still relatively new, there has already been a sharp increase in international investment disputes in the past two decades.<sup>35</sup> However, unlike trade, there is no international institution coordinating or regulating

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27. Anderson, *supra* note 3, at 6.

28. MOUYAL, *supra* note 23, at 7.

29. Bamali Choudhury, *International Investment Law as a Global Public Good*, 17 Lewis & Clark L. Rev. 481, 486 (2013).

30. Kenneth J. Vandavelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 168-69 (2005).

31. *Id.* See also SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 116 (2008) ("Although there is no credible evidence to suggest that BITs have increased the flow of foreign investment from developed countries to developing countries, they certainly have instilled a sense of security in foreign investors."). Cf. Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 468 (2010) (noting the research that has questioned whether investment treaties do increase investment).

32. Vandavelde, *supra* note 30.

33. Christopher M. Ryan, *Discerning the Compliance Calculus: Why States Comply with International Investment Law*, 38 GA. J. INT'L & COMP. L. 63, 67 (2009).

34. Franck, *supra* note 19, at 342.

35. TONY COLE, THE STRUCTURE OF INVESTMENT ARBITRATION xiv (2013).



investment treaties, and the international investment regime remains governed by scattered measures and treaties.<sup>36</sup>

#### *A. Outer Sources of International Investment Law*

There are several sources of international law that influence international investment law. These sources do not bear directly on the discussion here, but are worth noting as they impact investment law in general. The first source is customary international law, often defined as customs that states follow from a sense of legal obligation.<sup>37</sup> There are two general principles in customary international law relating to FDI: (1) principle of territorial sovereignty over which the state has exclusive jurisdiction; and (2) principle of nationality where each state has an interest in appropriate treatment of its citizens, both at home and abroad.<sup>38</sup> These principles of customary international law lay the foundation for FDI policies and are examples of the competing interests giving rise to investment law. Other principles of customary international law play a part in forming investment law, such as the principle of non-responsibility,<sup>39</sup> and the principle that when private property is taken by the state, there must be compensation for that property (known as eminent domain).<sup>40</sup>

A second source of influential regulations on FDI is soft law. “Soft law” is a special category of legal instructions, often perceived as standards.<sup>41</sup> While the definition of soft law is broad and uncertain, it can generally be broken down into three categories: (1) nonbinding decisions of international organizations and bodies; (2) bilateral or multilateral agreements and declarations created together by states; and (3) recommendations by non-governmental organizations (NGOs).<sup>42</sup> These soft law norms are not legally obligatory, but can be part of the

36. GUIGUO WANG, *INTERNATIONAL INVESTMENT LAW: A CHINESE PERSPECTIVE* 16 (2016).

37. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1113 (1999).

38. Rafael Leal-Arcas, *The Multilateralization of International Investment Law*, 35 N.C. J. INT'L L. & COM. REG. 33, 74-75 (2009).

39. Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1277 (2009) (noting that the principle of non-responsibility encompasses where a state has legal obligations only to citizens of other states, and therefore, a claimant who is not a citizen of another contracting state would lack standing to bring a claim).

40. COLLINS, *supra* note 25, at 29.

41. *Id.*

42. Laslo Blutman, *In the Trap of a Legal Metaphor: International Soft Law*, 59 INT'L COMP. L. Q. 605, 608 (2010).

complex framework that regulates international activity and can greatly influence the conduct of international actors.<sup>43</sup> Additionally, soft law is often defined and influenced by non-state actors, such as NGOs, and because of soft law's growing influence over international hard law, these non-state actors are beginning to greatly affect international law as a whole.<sup>44</sup> Some dislike the use soft law in regulating international arbitrators because it introduces uncertainty,<sup>45</sup> but soft law has certain advantages in solving governance problems.<sup>46</sup>

### *B. Proliferation of International Investment Agreements*

While these two sources described above may be influential, the most important regulations of FDI are international investment agreements (“IIA”), including BITs and free trade agreements (“FTA”).<sup>47</sup> While some international treaties either indirectly or tangentially regulate FDI, the first treaty to deal exclusively with investment was the 1959 Germany-Pakistan treaty.<sup>48</sup> Since then, primarily beginning in the 1990s, FDI has become an increasingly essential aspect of the international economy, and many states have liberalized their regulations to promote the flow of FDI, often through the creation of BITs.<sup>49</sup> BITs are essentially treaties between a “home” state—state of the investor—and the “host” state—location of the investment—to establish the terms of investment and protection of FDI.<sup>50</sup> In the past, host countries were deemed open to FDI but generally considered unsafe for investment, and many home countries were concerned about potential discrimination against investors,

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43. *Id.*

44. Avnita Lakhani, *The Role of Citizens and the Future of International Law: A Paradigm for A Changing World*, 8 CARDOZO J. CONFLICT RESOL. 159, 167 (2006). For a more detailed discussion on soft law and international arbitration, see generally Gabrielle Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*. 1 J. INT. DISP. SETTLEMENT 283 (2010).

45. M.W. Reisman, *Soft Law and Law Jobs*, 2 J. INT'L DISPUTE 25, 25-26 (2011).

46. Jiangyu Wang, *State Capitalism and Sovereign Wealth Funds*, in ALTERNATIVE VISIONS, *supra* note 17, 405, 409.

47. JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 1-2 (2d ed., 2015).

48. Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 BROOK. J. INT'L L. 405, 436 (2008).

49. Jürgen Kurtz, *A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment*, 23 U. PA. J. INT'L ECON. L. 713, 720-23 (2002).

50. Natasha Marusja Saputo, *Paradoxical Pacts: Understanding the BIT Phenomenon and the Rejection of a Multilateral Agreement on Investment*, 41 OHIO N.U. L. REV. 121, 123-24 (2014).

including the expropriation, nationalization, or devaluation of investments.<sup>51</sup> From the host country's perspective, a BIT seems essential to attracting foreign investors by providing reassurances against the potential loss of investment, and these converging interests lead to the proliferation of BITs between home and host countries with similar economic interests.<sup>52</sup> Within the past few decades, several multilateral FTAs, including the North American Free Trade Agreement ("NAFTA") and the Association of Southeast Asian Nations ("ASEAN"), have subsequently emerged as regional investment treaties.<sup>53</sup>

Over time, BITs have become more standardized and most contain strikingly similar parts or even identical language,<sup>54</sup> as many IIAs are often drafted from several leading or model investment treaties.<sup>55</sup> While the provisions in most investment treaties are similar in wording, the benefit of a BIT is that it allows for adjustment in each individual agreement.<sup>56</sup> BITs provide some flexibility for each contracting state to tailor the investment treaty to the relationship of the states' economic needs.<sup>57</sup> However, almost all BITs contain four fundamental parts: (1) definition of investment, (2) treatment standard for investors, (3) protections from and compensation for expropriation or nationalization, and (4) a dispute resolution mechanism.<sup>58</sup> Arguably, the most important provision contained in these BITs is the dispute resolution mechanism, discussed more below. Since the 1990s, international arbitration has become the preferred dispute resolution for both commercial and investment agreements.<sup>59</sup> Under these dispute resolution mechanisms, states give their consent generally to submit

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51. See ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 397-403 (2002) (discussing the rule requiring "prompt, adequate and effective compensation" in the event of expropriation by a host country).

52. Chalamish, *supra* note 15, at 308-09.

53. *Id.* at 330.

54. *Id.* at 323.

55. WANG, *supra* note 36, at 21.

56. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1530 (2005).

57. Kevin C. Kennedy, *A WTO Agreement on Investment: A Solution in Search of A Problem?*, 24 *U. PA. J. INT'L ECON. L.* 77, 127-30 (2003).

58. Saputo, *supra* note 50, at 128.

59. See NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN & MARTIN HUNTER, *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* ¶ 810, at 469 (5th ed. 2009) ("Whilst in 1998 ICSID registered eight cases with 19 pending, in 2008 it registered 31 new cases with 128 pending.").

future investment disputes before an arbitral tribunal to resolve actions relating the state's authority over foreign investment.<sup>60</sup>

### *C. Regionalism and FTAs*

Regional multilateral IIAs have initiated a step forward for international investment law. Generally, an FTA is an agreement between several states to reduce barriers to exports while protecting FDI through the creation of a more stable trade and investment setting.<sup>61</sup> Probably the one of the most notable example of this is NAFTA, providing a complete regional agreement specifically protecting FDI.<sup>62</sup> While not strictly an FTA, the European Union has many similar features to a regional investment agreement stemming from the combination of two provisions in the Treaty Establishing the European Community: Article 56—laying the foundation for the free movement of capital<sup>63</sup>—and Article 43—defining the freedom of establishment.<sup>64</sup> The number of FTAs continues to grow, and recently included the negotiation of the Trans-Pacific Partnership.<sup>65</sup> However, it is worth noting that this past year, Great Britain left the European Union<sup>66</sup> and the United States left the TPP,<sup>67</sup> which may be signaling

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60. See, e.g., Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1270 (2009); U.S. DEP'T OF STATE, 2012 U.S. MODEL BILATERAL INVESTMENT TREATY, art. 25 (2012) [hereinafter MBIT], <https://www.state.gov/documents/organization/188371.pdf> [<https://perma.cc/7NNJ-92WM>] (last visited Oct. 21, 2017) (“Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Treaty.”).

61. *Free Trade Agreements*, INT'L TRADE ADMIN., U.S. DEP'T OF COMMERCE, <http://trade.gov/fta/> [<https://perma.cc/764T-96YX>] (last visited Oct. 21, 2017).

62. North American Free Trade Agreement, Can.-Mex.-U.S., art. 1101, Dec. 17, 1992, 32 I.L.M. 289.

63. Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, art. 56, 1997 O.J. C 340/1, 3 (prohibiting “all restrictions on the movement of capital between Member State and between Member States and third countries”).

64. *Id.* art. 43, at 2 (prohibiting “restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State,” including “restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State”).

65. *Free Trade Agreements*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements> [<https://perma.cc/79KD-HYDR>] (last visited Oct. 21, 2017).

66. Stephen Erlanger, *Britain Votes to Leave E.U.; Cameron Plans to Step Down*, N.Y. TIMES, June 23, 2016, <https://www.nytimes.com/2016/06/25/world/europe/britain-brexit-european-union-referendum.html>.

67. Jeremy Diamond & Dana Bash, *Trump signs order withdrawing from TPP, reinstate 'Mexico City policy' on abortion*, CNN (Jan. 23, 2017), <http://www.cnn.com/2017/01/23/>

an international backlash to economic globalization, including that of FDI.

### III. CURRENT ENFORCEMENT MECHANISMS

Without an enforcement mechanism, an investment treaty would be simply a political declaration lacking force.<sup>68</sup> This is one of the revolutionary aspects of IIAs: the mechanism for foreign investors to enforce their rights against a foreign state.<sup>69</sup> Most modern investment treaties now provide a substantive right for foreign investors to submit claims to an international arbitral tribunal.<sup>70</sup> To enforce an IIA in the event of a violation by a state, a foreign investor must initiate the dispute resolution mechanism contained in the IIA.<sup>71</sup> Usually, IIAs provide jurisdiction of investor-state disputes to either the International Centre for Settlement of Investment Disputes (“ICSID”)<sup>72</sup> or ad hoc arbitral tribunals.<sup>73</sup> But *consent* to arbitrate is required for an arbitration to commence, and arbitral tribunals derive jurisdiction solely from the consent of the parties.<sup>74</sup>

As IIAs are the general source of framework for the enforcement of FDI protection, the starting point of its enforcement is the scope of “investment” as defined in the investment treaty. Scholars have identified five generally-accepted characteristics of an investment: an investment (1) has a certain duration; (2) involves regular profit and return; (3) typically involves risk for both investor and host state; (4) requires substantial commitment; and (5) should be beneficial to the host state.<sup>75</sup> Similar to this definition, some investment tribunals have followed the *Salini* test, derived from the decision in *Salini v.*

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politics/trans-pacific-partnership-trade-deal-withdrawal-trumps-first-executive-action-monday-sources-say/ [https://perma.cc/76TS-G927] (archived Oct. 21, 2017).

68. Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT’L L. 471, 477 (2009).

69. Franck, *supra* note 19, at 343 (2007).

70. SCHILL, *supra* note 1, at 244.

71. Stephanie Bijlmakers, *Effects of Foreign Direct Investment Arbitration on A State’s Regulatory Autonomy Involving the Public Interest*, 23 AM. REV. INT’L ARB. 245, 251 (2012).

72. Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT’L L. REV. 1, 9 (2005).

73. Stefan D. Amarasingha & Juliane Kokott, *Multilateral Investment Rules Revisited*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 119, 148-50.

74. RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 131 (1995) (“The consent of the two parties, both the governmental party and the investor, has been called the ‘cornerstone’ of ICSID’s jurisdiction.”).

75. Hamilton & Rochwerger, *supra* note 72, at 12.

*Morocco*,<sup>76</sup> for the definition of “investment” for purposes of investment arbitral jurisdiction.<sup>77</sup> Under this *Salini* test, to be an “investment” the activity must: (1) involve the transfer of fund or the contribution of money or assets; (2) be of a certain duration; (3) have the individual transferring the funds participate in the management and risks; and (4) bring economic contribution to the host state.<sup>78</sup>

The definition of “investment” has become incredibly broad and provides protection for most assets.<sup>79</sup> We can look to the Model U.S. BIT to see that “investment” broadly means “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”<sup>80</sup> Even the letter of submittal of the Mozambique-United States agreement noted that under the treaty “[e]very kind of investment is specifically incorporated in the definition.”<sup>81</sup> While this definition is relatively widespread among international investment treaties, the broad scope of “investment” still sparks controversy and has created divergent ideas of what the definition of investment should actually cover.<sup>82</sup>

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76. *Salini v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001).

77. COLLINS, *supra* note 25, at 5.

78. *Salini*, ICSID Case No. ARB/00/4, ¶ 52 (“The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction.”).

79. Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT’L L.J. 67, 80 (2005) (“Most BITs define the concept of investment broadly so as to include various investment forms: tangible and intangible assets, property, and rights. Their approach is to give the term ‘investment’ a broad, non-exclusive definition, recognizing that investment forms are constantly evolving in response to the creativity of investors and the rapidly changing world of international finance. The effect is to provide an expanding umbrella of protection to investors and investments.”).

80. MBIT, *supra* note 60, art. 1.

81. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Dec. 1, 1998, Mozam.-U.S., Letter of Submittal, art. I, S. Treaty Doc. No. 106-31 (2000), <https://www.congress.gov/106/cdoc/tdoc31/CDOC-106tdoc31.pdf> [https://perma.cc/TE5S-6D9F] (last visited Oct. 21, 2017).

82. COLE, *supra* note 35, at 1-2.

*A. Current Enforcement Regime: ICSID Convention and the New York Convention*

The current international investment regime is primarily enforced through two conventions: the ICSID Convention and the New York Convention.<sup>83</sup> The ICSID Convention is integral to the current investment framework because it has created a forum and set of rules specifically designed to address investor-state disputes.<sup>84</sup> As of 2016, 161 states have signed the Convention and 153 have deposited their instruments of ratification, making this Convention one of the more widely accepted international treaties.<sup>85</sup> ICSID was formed with the purpose to “[p]rovide[] facilities for conciliation and arbitration of international investment disputes,”<sup>86</sup> and the tribunal’s jurisdiction extends to “any legal dispute arising directly out of an investment,”<sup>87</sup> making the definition of investment critical to the ability of the investor to initiate arbitration against a state.<sup>88</sup> As noted above, once the scope of “investment” is determined, the arbitral tribunal would then have jurisdiction to review the dispute and hand down an award.

Arbitration requires party consent for the tribunal to have jurisdiction, normally given in a contract between the parties.<sup>89</sup>

83. SCHILL, *supra* note 1, at 242 n.4.

84. See Thomas L. Brewer, *International Investment Dispute Settlement Procedures: The Evolving Regime for Foreign Direct Investment*, 26 LAW AND POL’Y INT’L BUS. 633, 655-56 (1995) (“One reason ICSID is important is because most bilateral investment treaties designate it as the prospective arbitration center for disputes, refer to it as an appointing authority, or indicate that its rules would be applicable in ad hoc arbitrations.”). See also ICSID Convention: Rules of Procedure for Arbitration Proceedings part F, ICSID, <http://icsidfiles.worldbank.org/icsid/staticfiles/basicdoc/basic-en.htm> [<https://perma.cc/67P7-MX66>] (last visited Oct. 21, 2017).

85. INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES [ICSID], LIST OF CONTRACTING STATES AND OTHER SIGNATORIES OF THE CONVENTION, (2016), <https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf> [<https://perma.cc/9RA9-BU3F>] (last visited Oct. 21, 2017).

86. *ICSID and the World Bank Group*, ICSID, <https://icsid.worldbank.org/en/Pages/about/ICSID%20And%20The%20World%20Bank%20Group.aspx> [<https://perma.cc/7ECS-FHML>] (last visited Oct. 21, 2017).

87. See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 25, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

88. Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1280 (2009) (“One frequently-raised jurisdictional objection is that the dispute in question does not involve an investment and thus fails to satisfy the requirements of the ICSID Convention, the applicable investment treaty, or both.”).

89. Bart L. Smit Duijzentkunst & Sophia L.R. Dawkins, *Arbitrary Peace? Consent Management in International Arbitration*, 26 EUR. J. INT’L L. 139, 140 (2015).

However, unlike commercial arbitration, in investment arbitrations, IIAs provide the contracting state's general consent to submit an investor-state dispute to arbitration, while the source of the investor's consent is found through the request for arbitration.<sup>90</sup> Generally, the parties have broad discretion to constitute the tribunals, usually consisting of an uneven number of arbitrators to decide the dispute.<sup>91</sup> Normally, each party appoints one arbitrator and those two arbitrators elect a third as the presider,<sup>92</sup> and the arbitration proceeds according to the rules provided in the BIT, generally ICSID Rules, ICC Rules, or UNCITRAL Rules.<sup>93</sup> Under the ICSID Convention, states can consent to arbitrate investment disputes through ICSID tribunals,<sup>94</sup> but an arbitral award given by an ICSID tribunal cannot be appealed and is deemed as a final judgment in the courts of a sovereign state.<sup>95</sup> Once the award is given, the prevailing party must enforce the award in a state, and the ICSID Convention requires each Contracting State to recognize the award as binding and enforceable, providing only a very limited set of grounds for annulment of the award.<sup>96</sup> Unlike the New York Convention, the ICSID Convention provides for annulment by application to the Secretary-General and a committee of three ad hoc arbitrators decide whether to annul the award, in full or in part.<sup>97</sup>

However, some investment arbitrations can be resolved through a tribunal other than ICSID, in which the New York Convention<sup>98</sup> would apply to enforcement of the award.<sup>99</sup> Similar to the ICSID Convention, the New York Convention has widespread acceptance, with 156

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90. WANG, *supra* note 36, at 63, 212-13.

91. *Id.* at 37.

92. Ray C. Jones, *NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to Be Embraced or A Sword to Be Feared?*, 2002 B.Y.U.L. REV. 527, 534-35 (2002).

93. Franck, *supra* note 56, at 1543.

94. ICSID Convention, *supra* note 87, art. 36.

95. *Id.* art. 53-54.

96. *Id.* art. 52(1) ("Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.").

97. *Id.*

98. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2520, 330 U.N.T.S. 42 [hereinafter New York Convention].

99. Andrea K. Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law*, 17 LEWIS & CLARK L. REV. 461, 464 n.13 (2013).



contracting states as of 2016.<sup>100</sup> But whether the investor-state arbitration is under the New York Convention or the ICSID Convention, the tribunal is typically conducted in a similar manner and procedure. After the award is given, the New York Convention requires each contracting state to recognize the award as binding and to enforce an arbitral award.<sup>101</sup> While an arbitral award is binding under international law, it is not *necessarily* final, at least not until it is enforced by the state.<sup>102</sup> The New York Convention provides a more permissive set of grounds for refusing enforcement in a state than the ICSID Convention, including refusal to enforce if the award is contrary to the public policy of the country,<sup>103</sup> and the recognition procedure is completed through the domestic courts of the state rather than a centralized body.<sup>104</sup> Taken together, the ICSID Convention and the New York Convention provide the enforcement and recognition procedures for international investment arbitration awards.

#### *IV. ANALYSIS OF INSTITUTING A WORLD INVESTMENT COURT*

At its core, investment arbitration is public international law, as arbitrators of an investor-state dispute analyze and often restrict sovereign governmental action.<sup>105</sup> Investment dispute resolution is functionally different from private commercial arbitration in the parties' obligations at issue (namely the obligations that the host state agreed to in the investment treaty and the investor responsibilities), the parties' relationship (a foreign investor against a state rather than both sides private parties),<sup>106</sup> and the source of authority for arbitration

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100. *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, U.N. COMM. ON INT'L TRADE L. (2017), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) [<https://perma.cc/5LF4-EHBN>] (last visited Oct. 21, 2017).

101. New York Convention, *supra* note 98, art. III.

102. MERRILS, *supra* note 9, at 100.

103. New York Convention, *supra* note 98, art. V (providing that "[r]ecognition and enforcement of the award *may* be refused" on an exclusive and limited list of grounds) (emphasis added). See also Jessica Rodriguez, *Enforcement of Annulled Arbitral Awards in the United States: Is A Return to Chromalloy Warranted?*, 34 REV. LITIG. 379 (2015) (discussing the permissive nature of the annulment grounds in Article V of the New York Convention).

104. New York Convention, *supra* note 98, art. V.

105. Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of A New Public Law Approach*, 52 VA. J. INT'L L. 57, 67 (2011).

106. VAN HARTEN, *supra* note 13, at 140-44. See also René Urueña, *Subsidiarity and the Public-Private Distinction in Investment Treaty Arbitration*, 79 LAW & CONTEMP. PROBS. 99, 105 (2016) ("The public-private division in investment arbitration can be defined in reference

(commercial arbitration arising from private contracts and investment arbitration arising from treaties).<sup>107</sup> Furthermore, investment arbitration is significantly distinct from private commercial arbitration because of the focus on a state's actions, even described as a form of global administrative law.<sup>108</sup> Under these IIAs, states give general consent to resolve disputes with investors as a whole rather than disputes relating to a specific relationship or contract like in private commercial arbitration.<sup>109</sup> In consenting generally to all future investment disputes, the state is acting in its sovereign power, as only the state has the power to regulate FDI within its borders and, in effect, this submits the state to an outside adjudication of its own sovereign regulatory actions, resulting in what can be described as a "governing arrangement."<sup>110</sup>

To determine whether a World Investment Court would be more beneficial to the international investment regime than the current investment arbitral system, this Part will analyze the main reasons this proposed World Investment Court is necessary. The principle focus will be on the continuing conflict between legitimacy and sovereignty in international tribunals, the transparency (or lack thereof) of investment arbitrations, the independence of investment arbitrators, and the necessity of consistent and coherent interpretations. This Article will then make the argument that a World Investment Court would satisfy these principles more sufficiently than the current arbitral system, specifically in reinforcing the legitimacy of the system.

### *A. Legitimacy vs. Sovereignty*

Investment arbitration, like most international tribunals, is criticized for what many deem a "legitimacy crisis,"<sup>111</sup> one where the

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to four variables: (1) the legal regime applicable in investment arbitration; (2) the actors involved in the dispute; (3) the function that investment arbitration fulfills; and, finally, (4) the issues dealt with by the decision of the investment award and their overall impact.").

107. S.I. Strong, *Navigating the Borders between International Commercial Arbitration and U.S. Federal Courts: A Jurisdictional GPS*, 2012 J. DISP. RESOL. 119, 124 (2012).

108. Valentina Vadi, *Global Cultural Governance by Investment Arbitral Tribunals: The Making of A Lex Administrativa Culturalis*, 33 B.U. INT'L L.J. 457, 473 (2015); see also Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 122 (2006).

109. Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232, 232-33 (1995).

110. VAN HARTEN, *supra* note 13, at 63-64.

111. See MOUYAL, *supra* note 23, at 15-16 (citing scholars who have criticized the current international investment law regime).

most severe issue is the unpredictable and inconsistent investment arbitral awards.<sup>112</sup> In investment arbitration, there is a continuing conflict between state sovereignty and the legitimacy of the tribunal, as a sovereign state has the right to regulate foreign investment within its borders, but this regulation can infringe the rights of foreign investors and restrict a liberal economy that is necessary to increase wealth for both the home and the host countries.<sup>113</sup> This conflict may be even more acute in the context of investment arbitration than in commercial arbitration as investment arbitration actually analyzes and determines the legality of a state's sovereign action, which can directly infringe on state sovereignty. Many prominent critics of international judiciaries in general assert that formal international courts threaten state sovereignty and national principles.<sup>114</sup> Even in this proposal for a World Investment Court, the conflict between legitimacy and sovereignty remains equally present.

Sovereignty continues to be a contentious issue when states are asked to delegate powers to a supranational organization, particularly the idea that delegation will erode the powers of nation-states and even impact the legitimacy of the nation-states themselves.<sup>115</sup> International investment law can threaten public law values, including democracy and sovereignty.<sup>116</sup> Investor-state arbitration is one such situation, where investors can bring claims against states before an international arbitral tribunal rather than domestic courts, often directly challenging a state's power.<sup>117</sup> But with the current increase in globalization, state borders are becoming a less significant barrier to cross-border investment,<sup>118</sup> and the traditional principle of state sovereignty is

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112. Brower & Schill, *supra* note 68, at 473. *But see* Irene M. Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 COLUM. J. TRANSNAT'L L. 418, 420 (2013) ("While not everyone subscribes to the assessment that this regime is in the midst of a 'legitimacy crisis,' there is an emerging consensus in the literature that greater consistency in investment treaty arbitration would be desirable.").

113. Stephen E. Blythe, *The Advantages of Investor-State Arbitration As A Dispute Resolution Mechanism in Bilateral Investment Treaties*, 47 INT'L LAW. 273, 274 (2013).

114. Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 4-5 (2005).

115. Julian Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 126 (2000).

116. MOUYAL, *supra* note 23, at 18.

117. Brower & Schill, *supra* note 68, at 497 ("Investment treaties can affect the way host states govern, legislate, and adjudicate and can have a profound impact on local populations.").

118. WANG, *supra* note 36, at 4.

constricting<sup>119</sup> as our world moves more towards what Professor Philip Bobbitt calls the “market-state.”<sup>120</sup>

As described above, international investment arbitration is distinct from the rest of international arbitration in the aspect that investment arbitration focuses significantly on public international law.<sup>121</sup> The nature of an investment arbitral dispute is different than a private commercial arbitration, as the interests in investment disputes expand beyond the parties,<sup>122</sup> including the effect of the award could force a state to alter its regulatory actions.<sup>123</sup> Essentially, arbitrators interpret and apply public law to award damages as a remedy for investors based on the assessment of sovereign acts of a state under a broad standard of review.<sup>124</sup> This far-reaching power of arbitrators in investment disputes can “undermine[ ] basic hallmarks of judicial accountability, openness, and independence.”<sup>125</sup> Because of this perceived threat to the sovereignty of nation-states, the overall legitimacy of international arbitral system can be challenged, and states may become protectionist by refusing to consent to investment arbitration at all. Professor José Alvarez identified several issues related to the legitimacy of the investment regime, and summarized his idea into this: “the international investment regime is the enemy of the state.”<sup>126</sup>

But international tribunals, including investment arbitration and the World Investment Court proposed here, can be legitimate, and the reason for this proposal for a World Investment Court is founded on an

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119. John Linarelli, *How Trade Law Changed: Why It Should Change Again*, 65 MERCER L. REV. 621, 622 (2014) (“While the most sophisticated and developed of these institutions is still at the level of the state, the sovereignty of states is becoming a quaint and outdated idea.”).

120. PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 4 (Alfred A. Knopf ed., 2008) (defining a “market-state” as “[t]he emerging constitutional order that promises to maximize the opportunity of its people, tending to privatize many state activities and making representative government more responsible to consumers”).

121. Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1294 (2009).

122. Anton K. Schnyder & Stefanie Pfisterer, *Features of Trade Law Adjudication and Their Impact on the Development of Legal Concepts and Precedents*, in *ESTABLISHING JUDICIAL AUTHORITY IN INTERNATIONAL ECONOMIC LAW* 188, 209 (Joanna Jemielniak et al. eds., 2016).

123. Dohyun Kim, Note, *The Annulment Committee’s Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away from an Annulment-Based System*, 86 N.Y.U. L. REV. 242, 253 (2011).

124. VAN HARTEN, *supra* note 13, at 5.

125. *Id.*

126. José E. Alvarez & Gustavo Topalian, *The Paradoxical Argentina Cases*, 6 WORLD ARB. & MEDIATION REV. 491, 492 (2012).

enhanced legitimacy claim. Because of the public-private law distinction, consistency plays a significant role in the legitimacy of the supranational institution.<sup>127</sup> The fragmentation<sup>128</sup> of international investment laws—particularly the proliferation of treaties and ad hoc tribunals—seems to threaten unity and coherence in international law,<sup>129</sup> and has even been described as one of the “most worrying of modernity’s concerns’ for international lawyers.”<sup>130</sup>

In our “new international economic order,” the ultimate goal is to enhance human welfare through the benefits of international relations, particularly wealth.<sup>131</sup> Financial stability and international investment law are global public goods specifically because investment law guides FDI policies, promotes stability, and protects the benefits of both investors and states.<sup>132</sup> If we accept Professor Ronald Dworkin’s premise that each state has a general obligation to improve its own legitimacy and promote the status and wealth of their citizens, then because of the increasing growth and importance of FDI in this globalizing world, states have a duty to improve the overall international investment system.<sup>133</sup> The legitimacy of states is then connected to the improvement of international law, including FDI. Because of the public law nature of foreign investment, FDI law is a public good,<sup>134</sup> and even the World Bank provided in its Guidelines on the Treatment of FDI, that a “greater flow of foreign direct investment brings substantial benefits to bear on the world economy and on the

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127. Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have A Bright Future*, 12 U.C. DAVIS J. INT’L L. & POL’Y 47, 77, n.119 (2005).

128. Because there is no vertical hierarchy in international investment law, different investment systems currently exist on an equal plane, and while influential to each other, none can claim control based on hierarchy. See RONNIE R. F. YEARWOOD, *THE INTERACTION BETWEEN WORLD TRADE ORGANISATION (WTO) LAW AND EXTERNAL INTERNATIONAL LAW: THE CONSTRAINED OPENNESS OF WTO LAW (A PROLOGUE TO A THEORY)* 30 (2012) (“Fragmentation implies that faced with two reasons or norms to apply to a single decision, neither reason nor norm can claim ‘hierarchical superiority.’”).

129. NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* 199 (2012).

130. YEARWOOD, *supra* note 128, at 31 (citation omitted).

131. Barnali Choudhury, *International Investment Law As A Global Public Good*, 17 LEWIS & CLARK L. REV. 481, 483 (2013).

132. *Id.* at 484.

133. Ronald Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUBLIC AFF. 1, 17 (2013).

134. Choudhury, *supra* note 131, at 499.

economies of developing countries in particular.”<sup>135</sup> Therefore, if the improvement of international investment law can be done more effectively and efficiently through a supranational investment court, then states should contribute to creating this World Investment Court.<sup>136</sup> In fact, there has been an increasing resistance to how BITs have been interpreted by ad hoc arbitrators far beyond the original meaning, a function which has caused some challenges to the current investment arbitral system.<sup>137</sup>

An international court is legitimate when its authority is perceived as just, possessing some “quality that leads people (or states) to accept [its] authority . . . because of a general sense that the authority is justified.”<sup>138</sup> Therefore, an international court is legitimate when it is “(1) fair and unbiased, (2) interpreting and applying norms consistent with what states believe the law is or should be, and (3) transparent and imbued with democratic norms.”<sup>139</sup> Legitimacy is connected to compliance or obedience,<sup>140</sup> and thus, the international law needs order, as order is essential to a just and stable global society.<sup>141</sup> A World Investment Court would satisfy these legitimacy principles because it would promote consistent awards and a predictable legal framework for international investment law. With a consistent and coherent body of investment law, states would be more willing to accept the Court’s legitimacy and consent to and comply with its “just” authority.

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135. Daniil E. Fedorchuk, *Acceding to the WTO: Advantages for Foreign Investors in the Ukrainian Market*, 15 N.Y. INT’L L. REV. 1, 12 (2002).

136. For a detailed reply to Dworkin’s international theory, see generally, Adam S. Chilton, *A Reply to Dworkin’s New Theory of International Law*, 80 U. CHI. L. REV. DIALOGUE 105 (2013).

137. Muthucumaraswamy Sornarajah, *Evolution or Revolution in International Investment Arbitration? The Descent into Normlessness*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 631, 632 (Chester Brown & Kate Miles eds., 2011).

138. Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT’L L. 596, 600 (1999). See also Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT’L L. REV. 107, 115 (2009) (proposing that “a “legitimate” international adjudicative body is one whose authority is perceived as justified.”).

139. Grossman, *supra* note 138, at 115.

140. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (1990) (concluding “legitimacy is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.”).

141. MALCOLM N. SHAW, *INTERNATIONAL LAW* 1 (6th ed. 2008).

Three principles that support an international court's legitimacy are implicated here: (1) transparency and accountability, (2) impartiality, and (3) consistency or predictability, and many scholars believe investment arbitration suffers in each principles.<sup>142</sup> As discussed in this Part, these legitimacy challenges arise in each of these principles and predominantly lean in favor of establishing a World Investment Court.

### *B. Transparency and Accountability*

One continuing issue with the current investment arbitral system is that proceedings and awards are often confidential.<sup>143</sup> For example, UNCITRAL Rules require the consent of all the parties before an award or proceeding is made public,<sup>144</sup> and ICSID proceedings are likewise private.<sup>145</sup> However, ICSID publishes the arbitral awards on its website,<sup>146</sup> and many non-ICSID investment arbitral awards come to public view when the award is either challenged in domestic courts or when the state has to account for payment of an arbitral award.<sup>147</sup> But the remaining problem is that the investment arbitral *proceedings* are private, even though most investment disputes are effectively public disputes.<sup>148</sup> Investment arbitration deals with international public law—judging the regulatory actions of a sovereign state—and an award against a state would affect that state's citizens as well; therefore, this issue is significantly more pertinent to third parties than in the context of commercial arbitration.<sup>149</sup> Private proceedings and ad hoc awards give limited public understanding of the arbitral procedures

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142. Julia Hueckel, Comment, *Rebalancing Legitimacy and Sovereignty in International Investment Agreements*, 61 EMORY L.J. 601, 606 (2012).

143. Stephanie Bijlmakers, *Effects of Foreign Direct Investment Arbitration on a State's Regulatory Autonomy Involving the Public Interest*, 23 AM. REV. INT'L ARB. 245, 259 (2012).

144. United Nations Commission on International Trade Law, Arbitration Rules, art. 34(5) (2010).

145. Leon Trakman, *The ICSID and Investor-State Arbitration*, in REGIONALISM IN INTERNATIONAL INVESTMENT LAW 270 (Leon Trakman & Nicola Ranieri eds., 2013).

146. *Advanced Search*, ICSID, <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx> [<https://perma.cc/4HDP-L9NJ>] (last visited Oct. 21, 2017).

147. Nigel Blackaby, *Investment Arbitration and Commercial Arbitration (or the Tale of the Dolphin and the Shark)*, in PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 217, 226 (Loukas A. Mistelis & Julian D.M. Lew, eds., 2006).

148. SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 171 (2d ed. 2012).

149. James D. Fry & Odysseas G. Repousis, *Towards A New World for Investor-State Arbitration Through Transparency*, 48 N.Y.U. J. INT'L L. & POL. 795, 804-06 (2016).

and reasoning, and the potential public impact has increased this concern.<sup>150</sup> A state is accountable to its people, and the legality of a state's regulatory actions is a matter of public concern that should not be kept confidential.<sup>151</sup> Additionally, public scrutiny would keep the appearance of accountability and impartiality on the part of the arbitrators, thereby removing some of the concern that arbitrators are generally pro-investor. As a symbol, openness is important as it demonstrates that neither the investor nor the state has something to hide.<sup>152</sup>

A World Investment Court would resolve these transparency concerns, as a centralized investment court would be open in its proceedings to third parties and would publish its decisions and reasoning to the public. While confidentiality in commercial arbitral proceedings often has advantages, it is significantly less beneficial in investment arbitration when an award would affect an entire state and its people. Public proceedings and awards would additionally provide states with a general sense of the consequences for their future regulatory actions, as states could conform future actions to outcomes in decisions by the court in similar disputes.

### *C. Tribunal Independence*

The independence of arbitrators is often a criticism many scholars focus on when discussing the problems of international arbitration.<sup>153</sup> But arbitrator integrity and impartiality in investment disputes is both necessary and possible.<sup>154</sup> In arbitration, independence generally refers to a lack of improper connections, while impartiality refers to a lack of prejudgment, and “an arbitrator in international disputes must be both independent and impartial.”<sup>155</sup> In the context of investment arbitration, because states usually have given a broad and general consent to

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150. Leon E. Trakman, *The ICSID Under Siege*, 45 CORNELL INT'L L.J. 603, 621-22 (2012).

151. VAN HARTEN, *supra* note 13, at 159.

152. Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes - Adoption, Adaption, and NAFTA Leadership*, 54 U. KAN. L. REV. 1339, 1361 (2006).

153. See Gus Van Harten, *Working Paper No. 22/08: A Case for an International Investment Court 2* (SOC'Y INT'L ECON. L. 2008).

154. William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 633-34 (2009).

155. *Id.* at 635-36.



arbitrate, arbitrator integrity is increasingly necessary as awards substantially impact vital state interests.<sup>156</sup>

The rapid growth of investment arbitration has led to increased criticism for an alleged lack of arbitrator impartiality or independence.<sup>157</sup> Some scholars put forth this idea that arbitrators tend to favor investors in their awards, for the very reason that arbitrators only receive appointments when investors bring disputes, and investors will only initiate disputes if arbitrators are willing to award damages to investors.<sup>158</sup> While plausible on its face, there is significant trouble accepting the argument that arbitrators are *actually biased* towards investors, and this assertion seems less persuasive when viewing counters to it. Here, my analysis in this Article, like several other scholars', disagrees with Van Harten in investment arbitration analysis.<sup>159</sup> Particularly, investors will generally only bring claims before a tribunal if there is a significant chance of prevailing, as one has to balance the cost of arbitrating this dispute versus the likely outcome. This could account for many cases resolving in favor of the investor—if empirically cases actually did—as there must be a strong underlying reason for the dispute. In addition to general concerns, investors do not usually bring a suit against a state without due consideration, as states do not easily accept the result of an arbitral tribunal when that tribunal reviews the actions of state.<sup>160</sup>

Investment arbitrations usually arise in extreme situations, and little correlation has been found that when investor protections increase, so do investment-disputes.<sup>161</sup> There is also little empirical evidence to support the assertion that investment arbitrators lack impartiality or independence.<sup>162</sup> However, some evidence points to the opposite, in that investors have won fewer investment arbitrations than

156. *Id.* at 656.

157. MOUYAL, *supra* note 23, at 16.

158. *See, e.g.*, VAN HARTEN, *supra* note 13, at 5-6, 173.

159. *See, e.g.*, Alvarez, *supra* note 18, at 915.

160. Ian A. Laird, *NAFTA Chapter 11 Meets Chicken Little*, 2 CHI. J. INT'L L. 223, 228-29 (2001).

161. Daniel S. Meyers, *In Defense of the International Treaty Arbitration System*, 31 HOUS. J. INT'L L. 47, 56 (2008).

162. Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 90 (2010) (concluding that “the research results still display no tendency by any group of arbitrators to grant compromise awards or to rule in favor of investors”). *Cf.* SUBEDI, *supra* note 31, at 151 (“The jurisprudence of international investment courts and tribunals has expanded the scope and meaning of various principles of investment law in as pro-investment a manner as possible.”).

states.<sup>163</sup> There is even evidence that some investment tribunals are becoming more deferential to states' regulatory actions.<sup>164</sup> Furthermore, a valuable professional reputation of an arbitrator is essential to the arbitrator being appointed,<sup>165</sup> and a biased reputation for either party will not increase the number of appointments.<sup>166</sup>

If arbitrators largely favored investors, states would have little incentive to negotiate BITs with arbitration as the dispute mechanism<sup>167</sup> or states would simply denounce the investment arbitral system, as Bolivia and Ecuador recently did.<sup>168</sup> In fact, Pakistan has stated they will no longer contain investment arbitration provisions in its BITs, and both South Africa and Indonesia have terminated existing BITs that contained investment arbitration provisions.<sup>169</sup> Generally, most scholars disagree with the assertion that arbitrators are pro-investor,<sup>170</sup> and this assertion seems less than likely. Some scholars have even called this argument "myopic," primarily because this view disregards the procedures and mechanisms already within the arbitral system to ensure impartiality.<sup>171</sup>

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163. See Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 49 (2007) (providing that, before 2007, investors had won 38.5% of investment arbitrations while governments had prevailed 57.7% of the time); JÜRGEN KURTZ, *THE WTO AND INTERNATIONAL INVESTMENT LAW: CONVERGING SYSTEMS* 246 n.81 (2016) (citing 2014 United Nations Conference on Trade and Development [UNCTAD] report where 31% of investment disputes were won by investors while 43% of investment disputes were won by states with 26% settled).

164. See, e.g., *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶ 505 (Jan. 14, 2010) (referring to the "high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders," especially in cases when "the purpose of the legislation affects deeply felt cultural or linguistic traits of the community"); *Glamis Gold, Ltd. v. US*, ICSID, Award, ¶ 805 (June 8, 2009) (concluding that it would invalidate a state's measure only if there was a "manifest lack of reasons for the legislation").

165. Valentina Vadi, *Global Cultural Governance by Investment Arbitral Tribunals: The Making of A Lex Administrativa Culturalis*, 33 B.U. INT'L L.J. 457, 485 (2015).

166. Park, *supra* note 154, at 658.

167. See Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 21 (2005).

168. DENUNCIATION OF THE ICSID CONVENTION AND BITS: IMPACT ON INVESTOR-STATE CLAIMS, UNCTAD (2010), [http://unctad.org/en/Docs/webdiaeia20106\\_en.pdf](http://unctad.org/en/Docs/webdiaeia20106_en.pdf) [<https://perma.cc/CQD9-LGTY>] (last visited Oct. 21, 2017).

169. Michael Nolan, *Challenges to the Credibility of the Investor-State Arbitration System*, 5 AM. U. BUS. L. REV. 429, 434-35 (2016).

170. See, e.g., Brower & Schill, *supra* note 68, at 476 ("We argue that investment treaties and investment-treaty arbitration do not unilaterally favor investors' interests over competing public policy choices and do not institutionalize a pro-investor bias.").

171. Brower & Schill, *supra* note 68, at 491.

However, while there are several persuasive arguments that there is no reason to believe arbitrators lack independence or impartiality in investment arbitration, some believe it is “the mere appearance” of a conflict of interest or pro-investor bias that invites criticism of the current investment system.<sup>172</sup> One such concern is that arbitrators are often also lawyers, and can represent a party in one investment dispute while serving as an arbitrator in a different investment dispute. This concerns many critics, including US Senator Elizabeth Warren, who has asserted that investment dispute resolution “could lead to gigantic fines, but it wouldn’t employ independent judges. Instead, highly paid corporate lawyers would go back and forth between representing corporations one day and sitting in judgment the next.”<sup>173</sup> Additionally, recent high-profile challenges to arbitrator appointments have increased concern,<sup>174</sup> and over 200 economists and law professors signed a letter opposing the inclusion of investor-state dispute resolution in future international investment agreements.<sup>175</sup>

Even if this perception is valid, the institution of a World Investment Court would solve this issue and increase the impartiality of the panel as the judges comprising the panel would simply be paid a salary regardless of the number of cases they heard, giving them little incentive to be pro-investor. Additionally, in this proposal, states would appoint these justices, and because states have conflicting interests—need for protection from investment disputes and the need to protect their own investors in foreign states—this would require states to appoint fair and impartial judges rather than judges favoring either side.<sup>176</sup> While the claim that arbitrators are partial to investors is not overly convincing, a panel of duly-appointed judges, ones indifferent

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172. Michael D. Goldhaber, *The Rise of Arbitral Power over Domestic Courts*, 1 STAN. J. COMPLEX LITIG. 373, 407 (2013). See also Van Harten, *supra* note 153, at 2.

173. Elizabeth Warren, *The Trans-Pacific Partnership clause everyone should oppose*, WASH. POST (Feb. 25, 2015), [https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9\\_story.html?utm\\_term=.43d3250b0345](https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?utm_term=.43d3250b0345) [https://perma.cc/3Y7M-TRD8] (archived Oct. 21, 2017).

174. Nolan, *supra* note 169, at 440-41.

175. Luis Miguel Velarde Saffer & Amir Ardelan Farhadi, *ISDS In The TPP: Is The Recent Uproar In The US Merited? – Part I*, KLUWER ARB. BLOG (Nov. 4, 2016), <http://kluwerarbitrationblog.com/2016/11/04/isds-in-the-tpp-is-the-recent-uproar-in-the-us-merited-part-i/> [https://perma.cc/N2TG-6YRX] (archived Oct. 21, 2017).

176. See Posner & Yoo, *supra* note 167, at 7 (“Indeed, states will be reluctant to use international tribunals unless they have control over the judges. On our view, independence prevents international tribunals from being effective.”).

to how many cases they handle, would remove these critiques from the debate, and this perception of partiality—valid or not—would be extinguished. Referring back to the legitimacy principles above, to enhance an international court’s legitimacy, the judges must establish a reputation for neutrality and objectivity,<sup>177</sup> and a World Investment Court would satisfy these principles.

#### *D. Inconsistent and Incoherent Interpretations of Investment Law*

Inconsistent decisions by arbitral tribunals threaten the legitimacy of investment arbitration.<sup>178</sup> The necessity of consistent and coherent decisions is arguably the most persuasive critique of international investment arbitration and the primary reason for instituting a World Investment Court. Inconsistency provides a foundation for allegations of unfairness, in addition to creating a lack of predictability and reliability in the investment arbitral system.<sup>179</sup> With the increase of investment disputes, there has been an increase of inconsistent arbitral decisions, where one tribunal interprets a provision or provides a judgment that conflicts with another tribunal’s decision.<sup>180</sup> When inconsistent decisions arise, FDI is again seen as risky, as unpredictable decisions can bring high costs to both investors and states.<sup>181</sup> Investment treaties were created to promote FDI by providing protection to foreign investment and reducing risk,<sup>182</sup> but inconsistent

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177. Georgios Dimitropoulos, *Constructing the Independence of International Investment Arbitrators: Past, Present and Future*, 36 NW. J. INT’L L. & BUS. 371, 387 (2016); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1586 (2005).

178. William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT’L L. 283, 299 (2010).

179. Franck, *supra* note 127, at 63.

180. *Compare Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, ¶ 154 (May 29, 2003) (defining requirement of “fair and equitable treatment” under NAFTA article 1105 as requiring reasonable expectations of a foreign investor be satisfied), *with* *S.D. Myers, Inc. v. Canada*, UNCITRAL Arbitration, First Partial Award, ¶ 263 (Nov. 13, 2000), [http://www.uncitral.org/res/transparency-registry/registry/data/can/s\\_d\\_myers\\_inc\\_html/myers-18.pdf](http://www.uncitral.org/res/transparency-registry/registry/data/can/s_d_myers_inc_html/myers-18.pdf) [<https://perma.cc/5RNF-WZ8D>] (archived Oct. 21, 2017) (defining the same requirement as necessitating only that a foreign investment not be treated unjustly or arbitrarily).

181. Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 35 (2008).

182. Pascal Lamy, Opening Remarks at the WTO Nongovernmental Organization Symposium: The WTO New Round: Perspectives for Hamburg and Europe, Speech/01/333 (July 6, 2001), [http://europa.eu/rapid/press-release\\_SPEECH-01-333\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-01-333_en.htm) [<https://perma.cc/>]

decisions prevent this purpose from effectuating, making investment treaties less protective of foreign investment, and provide no direction for states to conform regulatory actions in the future.<sup>183</sup>

There are several situations in which inconsistent decisions and interpretations can arise in international investment arbitration, including: (1) disputes involving the same facts, parties, and similar investment rights; (2) disputes involving similar situations and similar investment rights; (3) disputes involving different parties, different situations, but the same investment rights,<sup>184</sup> and (4) explicit disagreements with a prior arbitral award.

The first situation can be shown in the well-known *Lauder* arbitrations, where two arbitral tribunals, one in Stockholm and one in London, came to conflicting decisions on the identical dispute. On the same set of facts, *Lauder* initiated an arbitration proceeding against the Czech Republic under the US-Czech Republic BIT<sup>185</sup> while *Lauder's* investment intermediary initiated an arbitration under the Netherlands-Czech Republic BIT.<sup>186</sup> While the expropriation standards under both BITs were functionally identical, the London tribunal held the investment was not expropriated,<sup>187</sup> while the Stockholm tribunal concluded the investment was expropriated, and ordered the Czech Republic to pay almost US\$270 million.<sup>188</sup>

Another prominent example of inconsistent awards is found in five cases filed by American companies under the Argentina-US BIT.<sup>189</sup> The cases surrounded the same governmental action—the

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8PXW-Z9KD] (archived Oct. 21, 2017) (providing that “by increasing the predictability for potential investors, [this would] lead to more investment with all the benefits it can bring”).

183. Johanna Kalb, *Creating an ICSID Appellate Body*, 10 UCLA J. INT’L L. & FOREIGN AFF. 179, 198 (2005).

184. Franck, *supra* note 56, at 1545-46.

185. See generally Ronald S. *Lauder v. Czech Republic*, UNCITRAL Arbitration, Final Award (Sept. 3, 2001).

186. See generally *CME v. Czech Republic*, UNCITRAL Arbitration, Partial Award (Sept. 13, 2001), <http://www.italaw.com/sites/default/files/case-documents/ita0178.pdf> [<https://perma.cc/GAG7-G73V>] (archived Oct. 21, 2017).

187. *Lauder v. Czech Republic*, Final Award, *supra* note 185, ¶ 201.

188. *CME v. Czech Republic*, Partial Award, *supra* note 186, ¶ 624.

189. See Cont’l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008) [hereinafter *CCS Award*]; *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007) [hereinafter *Sempra Award*]; *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (May 22, 2007) [hereinafter *Enron Award*]; *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006) [hereinafter *LG&E Liability Decision*]; *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005) [hereinafter *CMS Award*].

removal of stabilization measures during an economic crisis in Argentina—and Argentina argued that its actions satisfied the necessity defense under customary international law and the emergency clause under the Argentina-US BIT.<sup>190</sup> Three of the tribunals determined Argentina did not satisfy either defense,<sup>191</sup> but the remaining two tribunals concluded Argentina did satisfy the emergency defense provided in the BIT.<sup>192</sup> But even the two tribunals who held in favor of Argentina applied the emergency defense differently.<sup>193</sup>

Another example of a group of inconsistent decisions begins with *Maffezini v. Kingdom of Spain*.<sup>194</sup> There, an Argentine national brought a request for arbitration against Spain under the Argentina-Spain BIT, but the BIT required the investor to submit the claim to the Spanish domestic courts and allow eighteen months before initiating arbitration.<sup>195</sup> However, the investor claimed the most-favored nation clause in the Argentina-Spain BIT allowed the use of the favorable treatment in the Spain-Chile BIT, which only required a six-month waiting period before arbitration could be initiated.<sup>196</sup> The tribunal agreed with the investor, concluding the most-favored nation clause could extend to procedural matters such as the dispute resolution mechanism, and held the tribunal had jurisdiction over the claim.<sup>197</sup> Some have agreed that this is a defensible reading of the most-favored nation obligation in that the underlying purpose of the clause is to prevent states from discriminating against and between foreign investors.<sup>198</sup>

However, in *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*,<sup>199</sup> two companies initiated arbitration

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190. *Sempra* Award, *supra* note 189, ¶ 388; *Enron* Award, *supra* note 189, ¶¶ 313, 321, 339; *CMS* Award, *supra* note 189, ¶ 331.

191. *Sempra* Award, *supra* note 189, ¶ 388; *Enron* Award, *supra* note 189, ¶¶ 313, 321, 339; *CMS* Award, *supra* note 189, ¶ 331.

192. *CCS* Award, *supra* note 189, ¶¶ 219-22, 266; *LG&E* Liability Decision, *supra* note 189, ¶¶ 257-63.

193. Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. INT'L L. & POL. 1109, 1175 (2012).

194. *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, ¶ 1 (Jan. 25, 2000).

195. *See id.* ¶ 19 (citing Article X.3 of the Argentina-Spain BIT).

196. *Id.* ¶¶ 38-39.

197. *Id.* ¶¶ 64, 99.

198. Jürgen Kurtz, *The MFN Standard and Foreign Investment: An Uneasy Fit*, 5 J. WORLD INVESTMENT & TRADE 861, 861-86 (2004).

199. *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (Nov. 29, 2004),

under the Italy-Jordan BIT, but in trying to avoid less desirable provisions, the companies attempted to invoke the most-favored nation clause to rely on the dispute resolution provisions in the Jordan-US and Jordan-UK BITs.<sup>200</sup> In doing so, the companies argued the most-favored nation clause should apply to procedural provisions, citing the prior arbitral decision in *Maffezini*.<sup>201</sup> But the tribunal determined the companies could not rely on the most-favored nation provision to invoke the dispute resolution mechanisms in other BITs, and dismissed the case for lack of jurisdiction.<sup>202</sup> The arbitral tribunal in *Plama v. Bulgaria* similarly determined that without an express confirmation in the investment treaty, a most-favored nation clause does not incorporate the dispute resolution mechanism of another investment treaty.<sup>203</sup>

Tribunals can come to different conclusions even when interpreting the same provision. For example, *S.D. Myers v. Canada*<sup>204</sup> and *Metalclad v. United Mexican States*<sup>205</sup> were both cases under NAFTA, where the tribunals applied the “fair and equitable treatment” clause of the treaty inconsistently. In *Metalclad*, the tribunal determined the scope of the clause provided companies with a right that existed independent of the minimum standards of customary international law.<sup>206</sup> Similarly, the tribunal in *S.D. Myers* held that for the provision to be violated “an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective,”<sup>207</sup> and therefore, the

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<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/02/13>  
[<https://perma.cc/T4DY-Z48D>] (archived Oct. 21, 2017).

200. *Id.* ¶¶ 21, 102.

201. *Id.* ¶¶ 36, 102.

202. *Id.* ¶ 119.

203. See *Plama Consortium, Ltd. v. Republic of Bulg.*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005), ¶¶ 198, 227 (citing *Maffezini* and attempting to distinguish the decision).

204. *S.D. Myers, Inc.*, Partial Award, *supra* note 180.

205. *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), [https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB\(AF\)/97/1](https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB(AF)/97/1)  
[<https://perma.cc/F2M6-NJR8>] (archived Oct. 21, 2017).

206. *Id.* ¶ 103 (concluding that “[e]xpropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State”).

207. *S.D. Myers, Inc.*, First Partial Award *supra* note 108 ¶ 263.

provision was independent on customary international law.<sup>208</sup> However, the tribunal in *Methanex v. United States* held that the fair and equitable treatment treaty standard did not integrate protections beyond customary law and that “non-discrimination” was not part of that international standard.<sup>209</sup>

Even further confusing this line of decisions, the tribunal in *Genin v. Estonia* held that the “fair and equitable treatment” standard only proscribed a willful neglect of duty that was below international standards or had subjective bad faith.<sup>210</sup> However, the tribunal in *Pope & Talbot, Inc. v. Canada* determined that provision imposed a higher standard of fairness.<sup>211</sup> Yet another tribunal interpreted the clause to protect legitimate investor expectations as well.<sup>212</sup> In fact, *Metalclad* still remains outlier due to its broad expropriation standard.<sup>213</sup>

While generally considered rare,<sup>214</sup> explicit disagreements between tribunals prevent a fully coherent body of investment law. For example, the tribunals in *SGS v. Pakistan*<sup>215</sup> and *SGS Philippines*<sup>216</sup> were presented with the same question: whether an ICSID tribunal has jurisdiction over an investor’s breach of contract claim even when there is an exclusive forum-selection clause.<sup>217</sup> The two tribunals interpreted the construction of the umbrella clauses differently: *SGS v. Pakistan*

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208. Christian J. Tams, *Is There a Need for an ICSID Appellate Structure?*, in THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES 223 (R. Hofmann & Christian J. Tams eds., 2007).

209. *Methanex v. United States*, ¶¶ 16, 25-26, UNCITRAL, Award (Aug. 3, 2005) <https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf> [<https://perma.cc/6TZH-MRN9>] (archived Oct. 21, 2017).

210. *Genin v. Estonia*, ICSID Case No. ARB/99/2, Award, ¶ 367 (June 25, 2001).

211. *Pope & Talbot Inc. v. Canada*, UNCITRAL ¶¶ 110-17 (Apr. 10, 2001) <https://www.italaw.com/sites/default/files/case-documents/ita0678.pdf> [<https://perma.cc/GNF3-8GB2>] (archived Oct. 21, 2017).

212. *Azurix Corp. v. Arg.*, ICSID Case No. ARB/01/12, Award on the Merits, ¶ 372 (July 12, 2006) <https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf> [<https://perma.cc/XC5M-B4UU>] (archived Oct. 21, 2017).

213. Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT’L L. 475, 512 (2008).

214. SCHILL, *supra* note 1, at 342-43. For a more detailed analysis of inconsistent awards, see, e.g., Franck, *supra* note 56, at 1558-1582.

215. *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, ¶ 163-74 (Aug. 6, 2003).

216. *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, Decision on Jurisdiction, ¶¶ 71-88, (Jan. 29, 2004), [http://www.italaw.com/documents/SGSvPhil-final\\_001.pdf](http://www.italaw.com/documents/SGSvPhil-final_001.pdf) [<https://perma.cc/C3NN-FQT9>] (archived Oct. 21, 2017).

217. Matthew Wendlandt, *SGS v. Philippines and the Role of ICSI Tribunals in Investor-State Contract Disputes*, 43 TEX. INT’L L.J. 523, 525 (2008).



followed a restrictive approach where the foreign investor could only seek arbitration for breaches of contract resulting from foreign acts,<sup>218</sup> while *SGS v. Philippines* followed a broader interpretation, allowing foreign investors to use arbitration for relief for any breach of contract with the state, thereby going beyond customary international law.<sup>219</sup> However, the tribunal in *SGS v. Philippines* (which was subsequent to the decision in *SGS v. Pakistan*) did not try to distinguish or avoid inconsistency with the prior tribunal's conflicting interpretation, but rather explicitly disagreed with the decision in *SGS v. Pakistan*.<sup>220</sup> This divergence has only grown more widespread, as several later tribunals followed the decision in *SGS v. Philippines*,<sup>221</sup> and others followed the decision in *SGS v. Pakistan*.<sup>222</sup> In fact, referring back to the *Metalclad* and *S.D. Myers, Inc.* decisions above, tribunals following these awards have explicitly disregarded their reasoning, interpreting the "fair and equitable treatment" clause to constitute obligations only to the extent of customary international law, and not further.<sup>223</sup>

#### *E. Necessity of Consistent and Coherent Interpretations of IIAs*

These are just a few examples of the inconsistencies of investment arbitration, both in substantive and procedural interpretations of investment agreements.<sup>224</sup> While arbitrators are not bound by the decisions of other tribunals or even required to recognize prior awards, many arbitrators respect previous decisions and often integrate the prior award's reasoning into their own judgments.<sup>225</sup> Both parties and

218. *SGS v. Pakistan*, *supra* note 215.

219. *SGS v. Philippines*, *supra* note 216.

220. *Id.* ¶¶ 97, 119-26.

221. *CMS Gas Transmission v. Arg.*, ICSID Case No. ARB/01/8, Award, ¶¶ 300-03 (May 12, 2005); *Noble Ventures*, ICSID Case No. ARB/01/11, Award, ¶ 52 (Oct. 12, 2005); *Fedax N.V. v. Venez.*, ICSID Case No. ARB/96/3, ¶ 29 (Mar. 9, 1998).

222. *See e.g.*, *Pan American Energy LLC and BP Argentina Exploration Company v. Arg.*, *entire*, ICSID Case No. ARB/03/13, ¶ 110 (July 27, 2006).

223. *The Loewen Group, Inc. v. United States*, Case No. ARB(AF)/98/3, Award, ¶ 128 (June 26, 2003) ("To the extent, if at all, that NAFTA Tribunals in *Metalclad Corp v. United Mexican States* ICSID Case No. ARB(AF)/97/1 (Aug 30, 2000), *S.D. Myers, Inc. v. Government of Canada* (Nov 13, 2000) and *Pope & Talbot, Inc. v. Canada*, Award on the Merits, Phase 2, (Apr 10, 2001) may have expressed contrary views, those views must be disregarded.")

224. *See Franck*, *supra* note 56, at 1545 (discussing three typical scenarios of inconsistent decisions).

225. W. Mark C. Weidemaier, *Toward A Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1940 n.216 (2010). *See also* *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction ¶ 36 (Nov. 29, 2004), <http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C218/>

arbitrators frequently cite to prior decisions for guidance or support.<sup>226</sup> Yet it is important to note that citation of a prior investment award does not necessarily mean influence,<sup>227</sup> and tribunals keep away from any strict principle of *stare decisis* to allow flexibility in their decisions.<sup>228</sup> Some scholars argue that arbitrators in investor-state disputes should not adopt precedent solely because it came first, as this would impose a “decisional burden” on arbitrators, and these scholars would rather have arbitrators find the “right” rule rather than a consistent one.<sup>229</sup> This argument is predicated on the dynamic nature of international investment law and the “fragmented” system of BITs.<sup>230</sup> But this current system, where two awards on the same set of facts and under similar BITs can create two separate outcomes such as in the *Lauder* arbitrations, “shocks the sense of rule of law or fairness.”<sup>231</sup>

Consistent and coherent interpretation is essential to legitimacy,<sup>232</sup> and incoherent rules of law have created a challenge to the legitimacy of investment arbitration. One arbitral tribunal’s interpretation of a procedural or substantive right or the scope of “investment” in a BIT has a direct impact on subsequent arbitrations, not only under the same BIT but under other investment treaties with similar language or provisions.<sup>233</sup> Consistency requires that a rule be applied uniformly in every similar or applicable situation,<sup>234</sup> a principle the WTO Appellate Body has embraced.<sup>235</sup> Similarly, coherence

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DC635\_En.pdf [<https://perma.cc/TS7N-6A42>] (archived Oct. 21, 2017) (citing *Maffezini v. Spain* as “ICSID precedent”).

226. WANG, *supra* note 36, at 28.

227. Kyla Tienhaara & Todd Tucker, *Regulating Foreign Investment: Methanex Revisited*, in ALTERNATIVE VISIONS OF THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, *supra* note 17, at 255, 273 (providing that the award in *Methanex v. United States* had been widely cited in 32 of the 101 publicly-available investment awards, yet had gained little traction in subsequent decisions).

228. Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT’L DISP. SETTLEMENT 5, 14 (2011).

229. Irene M. Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 COLUM. J. TRANSNAT’L L. 418, 422 (2013).

230. *Id.* at 422

231. Michael .D. Goldhaber, *Wanted: A World Investment Court*, AM. LAW. (2004).

232. MOUYAL, *supra* note 23, at 57.

233. See Todd Weiler, *NAFTA Article 1105 and the Principles of International Economic Law*, 42 COLUM. J. TRANSNAT’L L. 35 (2003).

234. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 38 (1995).

235. Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 160, WT/DS344/AB/R (adopted April 30, 2008) (concluding that “absent

relates to the principle that the system should *make sense as a whole*, and the principle of coherence is integral to the order of international law because coherence forms a well-organized structure.<sup>236</sup> But different interpretations of essentially identical provisions in similar or the same BIT—such as the scope of most-favored nation provisions discussed above—create a lack of coherence and threaten the legitimacy of the investment dispute system.<sup>237</sup> However, a central World Investment Court would prevent multiple proceedings where investors initiate arbitrations under different BITs hoping to win under at least one. Looking to the *Lauder* arbitrations, this multiplicity problem leads to inconsistent decisions on the same set of facts and denigrates the legitimacy of the system.<sup>238</sup> Due to the public law underpinnings of international investment, consistency should be pursued.<sup>239</sup>

Some have suggested that “inconsistency” actually enhances predictability and allows flexibility in the arbitral system when needed.<sup>240</sup> This inconsistency, it is argued, can identify flaws in the system and allow for improvements leading to positive changes, providing a “more considered jurisprudence,”<sup>241</sup> an assertion similar to the “right decision” argument. While the flexibility argument may pertain to commercial arbitration where consistent rules are not necessary because disputes are fact-driven, based on contract interpretation, and focused only on the isolated dispute between the parties,<sup>242</sup> the argument does not apply equally to international investment arbitration, primarily because disputes are focused on regulatory actions of a state.<sup>243</sup> Private commercial arbitration is solely between the parties, while the investment agreements allow the states to be subject to any future investor-state dispute, and the treaty may be

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cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case”).

236. MOUYAL, *supra* note 23, at 2.

237. Gabriel Egli, *Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favoured-Nation Clauses to Dispute Resolution Provisions*, 34 PEPP. L. REV. 1045, 1079 (2007).

238. *See supra* section IV(d)(i).

239. KURTZ, *supra* note 163, at 247.

240. Franck, *supra* note 127, at 68.

241. *Id.*

242. Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?* 23 ARB. INT'L 357, 376 (2007).

243. W. Mark C. Weidemaier, *Toward A Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1909 (2010).

the subject to many investment arbitrations, such as the Argentina-US BIT after its economic crisis.<sup>244</sup>

Additionally, as described above, most BITs have the same or substantially similar language and the international system of BITs are not as fragmented as some may believe.<sup>245</sup> This convergence in language and protection is influencing a multilateralization of investment agreements.<sup>246</sup> A system of precedent with an appellate body, like the one suggested in this Article, would be able to promote consistency; yet at the same time, precedent can be overturned, which can still allow for the “right” decision.<sup>247</sup> Even domestic courts do not simply apply strict stare decisis to their cases, but can reverse their earlier rulings through careful and clear reasoning.<sup>248</sup> This needs to be done at the international level, as the legitimacy of the investment

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244. See generally *Cont’l Cas. Co. v. Arg.*, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008); *Sempra Energy Int’l v. Arg.*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007); *Enron Corp. v. Arg.*, ICSID Case No. ARB/01/3, Award (May 22, 2007); *LG&E Energy Corp. v. Arg.*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006); *CMS Gas Transmission Co. v. Arg.*, ICSID Case No. ARB/01/8, Award (May 12, 2005).

245. Stephen W. Schill, *The Jurisprudence of Investment Treaty Tribunals: Between Public Good and Common Concern*, in *FOREIGN INVESTMENT, INTERNATIONAL LAW AND COMMON CONCERNS* 9, 9 (Tulio Treves et. al eds., 2014).

246. Stephan W. Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses*, 27 *BERKELEY J. INT’L L.* 496, 566 (2009).

247. Some scholars argue there already is a form of *de facto* precedent in the current investment arbitral system. See, e.g., SCHILL, *supra* note 1, at 321-61; Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 *FORDHAM INT’L L.J.* 1014, 1016 (2006); Jan Paulsson, *International Arbitration and the Generation of Legal Norms*, *TRANSNAT’L DISP. MGMT.* 12 (2006) (“That a special jurisprudence is developing from the leading awards in the domain of investment arbitration can only be denied by those determined to close their eyes.”); Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 *PENN ST. L. REV.* 1269, 1286-94 (“Notwithstanding the general rule in public international law that case law has no precedential value, arbitral awards are increasingly used as persuasive authority both by advocates and by tribunals.”).

However, as Professor Schill notes that with the absence of a principle of stare decisis, there is the potentiality for inconsistent decisions, but the “rarity of such award nonetheless shows that investment jurisprudence is largely consistent.” SCHILL, *supra* note 1, at 356. Even assuming a general *de facto* precedent, these awards are becoming less rare, and the substantial impact and potential future occurrence of unpredictable awards not only greatly affects a state’s economy—with awards reaching the hundreds of millions of dollars—but undermines the legitimacy of the entire investment regime. See generally *supra* Section IV. What is needed is not a “weak” system of precedent followed by many, but not all, of arbitrators. What is needed is a system of strong persuasive precedent that is coherently and consistently applied to investment disputes, as proposed in this Article.

248. KURTZ, *supra* note 163, at 251.

regime matters more than the potential “correctness” of a single result.<sup>249</sup>

The purpose of this proposed World Investment Court would be to create consistency and centralize the Court around tenured judges rather than new arbitrators each dispute. There are many benefits to consistency in international investment law, including equality in investment protection, predictability in award outcomes, and enhanced legitimacy of the international regime.<sup>250</sup> This ideal of consistency promoted here is based on this empirical information and the necessity of consistent interpretation of similar wordings. Arbitrators in a sense are lawmakers,<sup>251</sup> but unlike private arbitration, investment law creates a distinct impact on both the theoretical sphere—state sovereignty—and the practical sphere—as an award against a state likewise affects all people within its boundaries. The legitimacy of these arbitral tribunals can be improved by the creation of a well-developed jurisprudence.<sup>252</sup>

The WTO dispute settlement system is one of the most effective international judiciaries.<sup>253</sup> The Appellate Body of the WTO has already greatly contributed to the coherence of trade law and organizational integrity,<sup>254</sup> and this predictability based on a coherent body of law allows states to rely on past decisions and anticipate the outcome of future disputes.<sup>255</sup> One of the predominant reasons the WTO dispute system is so popular compared to other international courts is the high consistency of the Appellate Body and its coherent

249. Goldhaber, *supra* note 172, at 408.

250. Charles H. Brower II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 *VAND. J. TRANSNAT'L L.* 37, 51 (2003) (“[I]nternational legal regimes depend for their survival on perceptions of legitimacy. . . . To generate perceptions of legitimacy, legal regimes must operate predictably, conform to historical practice, and incorporate fundamental values shared by the governed community.”).

251. D. Brian King & Rahim Moloo, *International Arbitrators As Lawmakers*, 46 *N.Y.U. J. INT'L L. & POL.* 875, 877 (2014) (“We begin from the standpoint that regardless of whether, normatively speaking, one believes that arbitrators should perform a lawmaking function, the fact is that they do. Arbitrators regularly cite to prior awards, appear to consider themselves cabined by them to some extent, and demonstrate concern about the impact that the awards they render may have on the development of the law.”).

252. VALENTINA VADI, *ANALOGIES IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION* 143 (2016).

253. DAVID PALMETER & PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE* 305 (2d ed. 2004).

254. KURTZ, *supra* note 163, at 5.

255. Erin E. Gleason, *International Arbitral Appeals: What Are We So Afraid of?*, 7 *PEPP. DISP. RESOL. L.J.* 269, 274 (2007).

commitment to precedent.<sup>256</sup> As the jurisprudence of the WTO has steadily become consistent, the number of cases brought has also declined.<sup>257</sup> This proposed World Investment Court would be a major leap forward in creating a coherent body of international investment law and enhancing the legitimacy of the international investment framework.<sup>258</sup>

However, the consistency proposed here would not *necessarily* be consistency in substance of awards, as two similar cases can have different outcomes and still be consistent. The benefit of consistency that would be realized by a World Investment Court would be the consistency in procedure in addition to consistency in interpretation of similar or identical provisions. Yet consistency must be in the independent check for legal correctness, not simply consistency itself.<sup>259</sup> This consistency in correct legal procedure and accurate interpretation, but not *necessarily* in substance, would ensure the protection of foreign investments while still maintaining a flexibility towards the substance of disputes. By doing so, the proposed appellate body of the World Investment Court would make international investment dispute resolution more democratic and ensure the independence and impartiality of the judges.<sup>260</sup>

#### V. ARGUMENTS AGAINST WORLD INVESTMENT COURT AND RESPONSES TO THESE CRITICISMS

While a World Investment Court would produce substantial benefits in the rule of law, consistency, and predictability, all vital in

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256. David A. Gantz, *Impact of WTO and Dispute Resolution Mechanisms, in ESTABLISHING JUDICIAL AUTHORITY*, *supra* note 122, at 31, 41.

257. WANG, *supra* note 36, at 571.

258. Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. INT'L L. & POL. 1109, 1204 (2012) (“A permanent appeals facility makes more sense than ad hoc appellate solutions, in light of the stated purpose of promoting the development of a coherent body of law.”). *See also* Steven Donziger et al., *The Clash of Human Rights and Bit Investor Claims: Chevron’s Abusive Litigation in Ecuador’s Amazon*, HUM. RTS. BRIEF, Winter 2010, at 8, 14 (“Indeed, even an “international investment court” of the sort proposed by leading academics would go a long way toward clarifying the proper jurisdiction of investment disputes, the latitude of states to act in the public interest, and the rights available to affected third parties.”).

259. KURTZ, *supra* note 163, at 548.

260. *See* Stephan W. Schill, *Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward*, INTERNATIONAL CENTER FOR TRADE AND DEVELOPMENT 8 (July 2015) <http://e15initiative.org/wp-content/uploads/2015/07/E15-Investment-Schill-FINAL.pdf> [<https://perma.cc/UW7D-WUZP>] (archived Oct. 21, 2017).

international investment law, there may be some trade-offs for these benefits.<sup>261</sup> Many have been critical of Van Harten's proposal for an international investment court,<sup>262</sup> and have put forth several countervailing arguments against this proposed World Investment Court.

#### *A. Policies Against a World Investment Court*

The most concerning of these arguments is the idea that a global investment court would restrict the sovereignty of states more than the current arbitral system.<sup>263</sup> Generally, states prefer international arbitration because it provides at least some control over the appointment of arbitrators on the panel, unlike with permanent courts.<sup>264</sup> Furthermore, some believe this constant pursuit of consistency may lead to a court with little accountability to the states, which in turn could greatly effect a state's economy.<sup>265</sup> The pursuit of consistency may lead to a decrease in accuracy and sincerity, as judges would be more deferential to precedent rather than simply focusing on getting the decision correct,<sup>266</sup> leading some to say we should abandon this principle of consistency to focus on the quality of arbitral decisions.<sup>267</sup>

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261. Frank, *supra* note 127, at 99.

262. See, e.g., José E. Alvarez, *Investment Treaty Arbitration and Public Law*, by Gus Van Harten. Oxford, New York: Oxford University Press, 2007. Pp. Xxxii, 214, 184. Index. \$145, i60, Cloth; \$65, i24, Paper, 102 AM. J. INT'L L. 909, 915 (2008) (book review) ("While there may indeed be cogent reasons to establish an international investment court, Van Harten's book does not articulate them.").

263. Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L.J. 391, 434 (2012) ("A World Investment Court, unless carefully designed as more of a political than a judicial organ, would risk further consolidating the law-making functions of IIL experts while diminishing the ability of states to control system outcomes.").

264. Catherine A. Rogers, *The Politics of International Investment Arbitrators*, 12 SANTA CLARA J. INT'L L. 217, 251-52 (2013) ("States have a long history of preferring international tribunals in which they can control, to some extent, the composition the panel the decision-maker panel. . . . [and arbitration] allow[s] States a degree of control over the adjudicatory decision-maker that eludes them with traditional, independent, permanent tribunals.").

265. See Franck, *supra* note 56, at 1601 ("Although having one permanent court consider issues of public international law would help create a coherent body of investment treaty jurisprudence, there is still no check on the court's discretion should the court simply 'get it wrong.' Where crucial international rights are at stake and a large damage award could wreak havoc with a developing nation's economy, 'getting it right' is vital.").

266. Irene M. Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 COLUM. J. TRANSNAT'L L. 418, 420 (2013)

267. *Id.* at 420-21.

Similarly, while a World Investment Court may create consistency in decisions—beneficial though it may lead to lowering FDI risk and giving states a framework for future actions—it could also enhance legitimacy concerns, as this would increase the concern that an international court would develop international law and create precedent states do not approve.<sup>268</sup> This argument is based on the same idea that a permanent court may be less deferential to state sovereignty, and could make the system less attractive to the states, and in turn, less legitimate.<sup>269</sup> Indeed, Professor Stephen Schill argues that investor-state arbitration is worth keeping despite its flaws because it better balances accountability of states with a limited invasion of their sovereignty.<sup>270</sup> Finally, while a permanent panel of judges may bring an increased sense of impartiality, the problem lies with determining who would appoint the panel that would be considered by all to be legitimate.<sup>271</sup>

### *B. Responses to these Criticisms*

Again, this Article is not proposing that the current system is not legitimate, nor does it suggest the problems international investment law has are too significant to overcome. While the current investment system has some problems that need attention, principally unpredictability and incoherence, many believe “a solution will come with the passage of time.”<sup>272</sup> This Article instead proposes that a World Investment Court with tenured judges would be that solution, resolving many of the criticisms against the current arbitral system and creating a more perfect dispute resolution framework.<sup>273</sup>

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268. Stephen W. Schill, *The Sixth Path: Reforming Investment Law from Within*, in *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY* 621, 632-33 (J. E. Kalicki & A. Joubin-Bret 2015).

269. See Jason W. Yackee, *Controlling the International Investment Law Agency*, 53 *HARV. INT'L L.J.* 391, 434 (2012) (“A World Investment Court, unless carefully designed as more of a political than a judicial organ, would risk further consolidating the law-making functions of IIL experts while diminishing the ability of states to control system outcomes.”).

270. See Schill, *supra* note 268.

271. Park, *supra* note 154, at 658-59.

272. Brower & Schill, *supra* note 68, at 473.

273. See U.N. Conference on Trade and Development, *Reform of the Investor-state Dispute Settlement: In Search of a Roadmap*, 9 (June 2013) (“A standing investment court would be an institutional public good serving the interests of investors, States and other stakeholders. The court would address most of the problems outlined above: it would go a long way to ensure the legitimacy and transparency of the system, facilitate consistency and curacy of decisions and ensure independence and impartiality of adjudicators.”).



The two counterarguments to an investment court above rely on the valid concern that independent judges would infringe on the sovereignty of states because they are no longer directly accountable to the states. If judges are tenured and do not need to satisfy the parties for repeat appointments, this could give little incentive to actually appeal to the states and their sovereignty. These arguments are valid and can give rise to concerns, but there are solutions to ensure there is less chance of this occurring.

But there are many practical benefits to having a World Investment Court with tenured judges, which overcome this perceived disadvantage of less accountability to states.<sup>274</sup> This lesser accountability may actually be beneficial to international law as a whole, because rather than focusing on pleasing the states or investors, the judges will be focused on attaining the right result, as a judge's job is to make the international investment agreement the best vehicle for achieving the purpose it was designed to serve.<sup>275</sup>

But simply because a judge is independent does not mean that judges have no constraints on their actions.<sup>276</sup> Professors Laurence Helfer and Anne-Maurie Slaughter have provided a compelling theory of "constrained independence," where even after the independent tribunal is created, states can still have a second-level control to prevent judicial overreach.<sup>277</sup> There are practical ways to check this court in the structure, including having shorter tenure along with political control mechanisms. Furthermore, just as reputation promotes state compliance with dispute resolution awards,<sup>278</sup> a good reputation is necessary for judges, otherwise states would refuse to consent to the World Investment Court's jurisdiction, just as some have with the current investment arbitration system. Additionally, as proposed in this Article, states would appoint these judges through the WTO, and due to states' conflicting interests in investment protection, they would be

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274. Posner & Yoo, *supra* note 167, at 25. But Posner & Yoo argue that because of the difference with which domestic courts and international courts operate, "effectiveness and independence are, at best, uncorrelated and may be negatively correlated." *Id.* at 28. *But see* Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005) (responding to Posner & Yoo and identifying weaknesses in the argument).

275. *See* LAWRENCE SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF CONSTITUTIONAL PRACTICE* 34 (2004).

276. Helfer & Slaughter, *supra* note 176, at 904. (2005)

277. *Id.* at 942.

278. Rachel Brewster, *Pricing Compliance: When Formal Remedies Displace Reputational Sanctions*, 54 HARV. INT'L L.J. 259, 259-60 (2013).

inclined to appoint impartial judges to the Court. In sum, this Article hopefully demonstrates the benefits outweigh the costs of a World Investment Court and constructs a reliable system, so in the future the WTO can do the same.

#### VI. INTERNATIONAL INVESTMENT COURT OF THE EUROPEAN UNION

Notably, the European Union and Canada recently agreed to develop a permanent investment court under the EU-Canada Comprehensive Economic and Trade Agreement to better protect investment and resolve investment disputes,<sup>279</sup> and the European Union and Vietnam recently concluded a BIT which included an investment court.<sup>280</sup> In 2015, prior to these agreements, the European Commission issued its Concept Paper to the United States proposing the reform of the current arbitral system under the Transatlantic Trade and Investment Partnership (“TTIP”), suggesting the formation of an international investment court.<sup>281</sup> Many, including the European Union, have noted this is a radical change from the current system of international investment dispute resolution, but one the European Union is attempting to spread.<sup>282</sup> The final goal of this proposal is to make this tribunal, along with the E.U.-Vietnam tribunal and the TTIP court, into a multilateral investment court and replace all investment dispute resolution mechanisms in E.U. investment agreements.<sup>283</sup>

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279. European Commission, CETA: EU and Canada agree on new approach on investment in trade agreement, IP/16/399 (Feb. 29, 2016).

280. *The EU and Vietnam finalise landmark trade deal*, EUR. COMM. (Dec. 2, 2015), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1409> [<https://perma.cc/U7VU-ZWLN>] (archived Oct. 21, 2017).

281. European Commission, Concept Paper: Investment in TTIP and Beyond – the Path for Reform: Enhancing the Right to Regulate and Moving from Current ad hoc Arbitration Towards an Investment Court (May 5, 2015), [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF) [<https://perma.cc/N5KU-WX7D>] (archived Oct. 21, 2017).

282. European Commission, A Future Multilateral Investment Court, MEMO/16/4350 (Dec. 13, 2016), [http://europa.eu/rapid/press-release\\_MEMO-16-4350\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm) [<https://perma.cc/9FTL-4923>] (archived Oct. 21, 2017). *See also* Georgios Dimitropoulos, *Constructing the Independence of International Investment Arbitrators: Past, Present and Future*, 36 NW. J. INT’L L. & BUS. 371, 424 (2016). *Cf.* Brower & Schill, *supra* note 68, at 475 (noting this proposal is “less-radical” than a return to state-to-state arbitration).

283. *The Multilateral Investment Court Project*, EUR. COMM. (Dec. 21, 2016), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608> [<https://perma.cc/B8BQ-KMYX>] (archived Oct. 21, 2017). *See also* Belen Olmos Giupponi, *Recent Developments in the EU Investment Policy: Towards an Investment World Court?*, 26 J. ARB. STUD. 175, 210 (2016).

*A. Construction of the TTIP Investment Court System*

This Article will not describe in detail the proposed TTIP or other EU investment court systems, as the actual future construction of the court is yet unknown, as negotiations are ongoing at this time. But it would be useful to look at some of the proposed aspects of the courts and the critiques surrounding them. In the TTIP Concept Paper to the United States, the proposed court would be comprised of a Court of First Instance consisting of fifteen judges total, five nationals of the United States, five nationals of the European Union, and five nationals of third countries.<sup>284</sup> These judges would be tenured for six-year terms renewable once, and all must have the “qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence.”<sup>285</sup> The Court of First Instance will hear cases in panels of three judges randomly appointed by the President of the Tribunal, with one judge each from the United States, the European Union, and a third country, and chaired by the judge from a third country.<sup>286</sup> Additionally, these judges would each be paid a monthly retainer fee, which may be turned into a salary.<sup>287</sup>

In a few respects, the Court of First Instance borrows some its structure from arbitration. For example, the panel would be comprised similarly to an arbitral panel, as one judge each will be from each party’s country, one party will be from the United States and the other from the European Union, with a third-country (presumably neutral) judge presiding. Similarly, the rules of the court do not necessarily differ greatly from that of an arbitration, as the proposal allows claimants to submit disputes to the Tribunal under ICSID Rules, UNCITRAL Rules, or any other rules agreed to by the parties.<sup>288</sup> But where it varies substantially is in the composition of the panel, as the parties have significantly less influence over the appointment process.

But the greatest difference—and arguably the most significant benefit—is the appellate procedure. The Appellate Tribunal would be comprised of six judges, two from the United States, two from the

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284. Giupponi, *supra* note 283, at 219.

285. Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce: Chapter II — Investment, EUROPEAN COMM’N 17 (Nov. 12, 2015), [http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf) [<https://perma.cc/U6SA-S3F5>] (archived Oct. 21, 2017).

286. *Id.* art. 9(2).

287. *Id.* art. 9(12), (15).

288. *Id.* art. 6(2).

European Union, and two from third countries, appointed for six year terms.<sup>289</sup> Like the Court of First Instance, the appellate panel hearing disputes would consist of three justices, one from each category, and chaired by the national of a third country.<sup>290</sup> Either party may appeal the decision of the Court of First Instance within 90 days, but the grounds for appeal are limited to: (1) that the Tribunal erred in the interpretation or application of the applicable law; (2) that the Tribunal manifestly erred in the appreciation of the facts, or (3) those provided for in Article 52 of the ICSID Convention.<sup>291</sup> If the appeal is rejected, the award is final, but the Appeal Tribunal may reverse or modify the legal findings or conclusions.<sup>292</sup> Once the award is final, it is binding and the Parties must recognize and enforce the award, which is not subject to any annulment procedure.<sup>293</sup>

#### *B. Potential Issues of the Proposed E.U. Permanent Investment Court*

While the Permanent Investment Court under the TTIP and EU BITs is a bold move forward, some scholars have noted problems with the forthcoming bilateral investment courts.<sup>294</sup> The most significant issue is that the Court is only bilateral, primarily because, while the hope of the European Commission is to create a multilateral court, the composition of the Proposed Court—third of the justices from European Union and third of the justices from the United States—may actually solidify its bilateral nature and make it increasingly difficult to replace in the future.<sup>295</sup> Additionally, the proposed investment court fails to integrate domestic courts in the dispute resolution, as foreign investors can skip pursuing remedies in the domestic court and simply go to the permanent investment court, giving foreign investors a potential advantage over domestic investors.<sup>296</sup> Other concerns stem

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289. *Id.* art. 10(2).

290. *Id.* art. 10(8).

291. *Id.* art. 29(1).

292. *Id.* art. 29(2).

293. *Id.* art. 30(1-2).

294. See, e.g., Stephen W. Schill, *The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?*, 20 AM. SOC'Y INT'L L. 9 (2016); Gus Van Harten, *Key Flaws in the European Commission's Proposals for Foreign Investor Protection in TTIP*, 12 OSGOODE HALL LEGAL STUD. RES. PAPER SERIES 1 (2016); Szilárd Gáspár-Szilágyi, *A Standing Investment Court under TTIP from the Perspective of the Court of Justice of the European Union*, 17 J. WORLD INVESTMENT & TRADE 701 (2016).

295. See Schill, *supra* note 294.

296. *Id.*; Van Harten, *supra* note 294, at 6.

from the high costs, the institution of the court, and the initiation of the court's jurisdiction.<sup>297</sup> The proposed international investment court under the TTIP and the other EU BITs would need to address these issues, particularly those problems in the structural design, if it does not want to prevent a multilateral permanent investment court in the future. It is an imperfect solution to a difficult problem, but a problem that can be addressed through a multilateral investment court.<sup>298</sup>

A truly World Investment Court would address most of the concerns the TTIP Proposal elicits. Broadening the membership of the investment court would make appointing the judges more democratic, and would resolve the entrenchment or additional obstacle problem noted by Professor Schill. But the World Investment Court must begin as multilateral to address these concerns. Many of the other concerns deal directly with the E.U. BITs rather than the court itself, such as the potential "advantage" of not pursuing domestic remedies first, and these concerns would have to be addressed in the investment agreements. Additionally, the Appellate Panel would be able to satisfy the consistency concern, as over time, the court can develop a consistent and coherent definition and application of provisions such as the most-favored nation clause or the scope of "investment."<sup>299</sup>

### VII. CONSTRUCTION OF THIS PROPOSED WORLD INVESTMENT COURT

As described above, predictability and security in the international regime are beneficial—and arguably necessary—to the formation of international law.<sup>300</sup> This Part will describe an idea of how a World Investment Court in practice could be instituted and operated. While

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297. Giupponi, *supra* note 283, at 228-29.

298. See Anibal Sabater, *Foreign Investment Arbitration in the Global Interdependent Economy*, 1 MICH. ST. J. INT'L L. 131, 136 (2009) (concluding that "with all its imperfections, arbitration still remains an effective way to resolve investment disputes. It may be perfected, it may be replaced with a supranational investment court, but it cannot be credibly buried without having an alternative in place.").

299. Robert W. Schwieder, *TTIP and the Investment Court System: A New (and Improved?) Paradigm for Investor-State Adjudication*, 55 COLUM. J. TRANSNAT'L L. 178, 223 (2016).

300. See Shoaib A. Ghias, *International Judicial Lawmaking: A Theoretical and Political Analysis of the WTO Appellate Body*, 24 BERKELEY J. INT'L L. 534, 552-53 (2006) ("Dispute resolution is considered important because of the need to add predictability and security to the international trading system. However, binding dispute resolution not only strengthens the system, it also remakes the system. The WTO's Appellate Body is remaking international trade by moving into policy areas beyond the WTO Agreement.").

the model proposed under the TTIP provides a viable reference point to begin this hypothetical investment court, this proposed court would be created to address the current concerns over the proposed E.U. investment court system. To begin, the investment court should preferably be created under the auspices of the WTO, as there currently is no supranational entity for regulating FDI, and the closest regulatory organization would be the WTO. Additionally, while history has kept investment and trade from being regulated jointly, both are connected,<sup>301</sup> as our global economy is based on two foundations: international trade and international investment,<sup>302</sup> and FDI plays a fundamental role in the global economy.<sup>303</sup>

#### *A. Structure and Appointment*

Like many modern international tribunals, this World Investment Court would not be a judicial court in the domestic sense. Similar to the court currently under the WTO, this proposed World Investment Court would consist of a Lower Court and an Appellate Body. The total number of judges on the Lower Court is arbitrary at this stage in this hypothetical court, so long as the number is a multiple of three. But due to the multilateral nature of this proposed court and the growing number of investment disputes, the number of judges would need to correspondingly increase. These judges would be appointed through the WTO by the contracting states, as the appointment procedure would need to be controlled by a committee of states to ensure “that the ISDS system is subject to democratic control, to be exercised jointly by the contracting parties.”<sup>304</sup>

Regarding length of term, tenure preferably would be six years, non-renewable and a third of the judges’ terms staggered every other year, similar to the European Court of Justice.<sup>305</sup> A shorter term of service would arguably address the concerns states may have regarding the accountability problem discussed above. States may be concerned that these independent judges would be indifferent to encroachments

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301. KURTZ, *supra* note 163, at 16.

302. Fedorchuk, *supra* note 135, at 6.

303. *See generally* Charles O. Roehrdanz, *Reducing the U.S.-Japan Trade Deficit by Eliminating Japanese Barriers to Foreign Direct Investment*, 4 MINN. J. GLOBAL TRADE 305 (1995).

304. SCHILL, *supra* note 8, at 9.

305. Consolidated Version of the Treaty on the Functioning of the European Union art. 253, 2012 O.J. C 326/47, at 158 (providing judges on the Court have six year terms).

on state sovereignty, but a relatively shorter term would allow the contracting states to appoint judges perceived to be more balanced towards state sovereignty and investor protection.<sup>306</sup> Yet the non-renewable factor will maintain the independence of the judges, as there is little incentive to be partial to either side when there is no way to extend a judge's tenure and no way to remove a judge in retaliation.

The Appellate Body would be comprised of nine justices, with the entire panel hearing appeals from the Lower Court. Its power would be broadened from the current annulment grounds, allowing the Appellate Body to modify or reverse legal findings or conclusions from the Court of First Instance, similar to the current provision in the EU-Vietnam BIT.<sup>307</sup> But another significant deviation from the current system is the appointment process. Presumably, the WTO Secretariat or another position created to oversee the investment court would propose several candidates, and those candidates would be approved by the contracting states to the WTO.<sup>308</sup> The rationale behind requiring a broad consensus is that states give their general consent to all future disputes under investment treaties, and there is no certainty to if and when a state or a state's investor would be before the investment court. Therefore, all the contracting states would have an interest in appointing the judges.

The most significant difference here to the investment courts proposed under the EU BITs would be the multilateral nature of this proposed permanent global investment court. Numerous criticisms towards the proposed investment court under the TTIP and EU BITs are that the court is bilateral and may actually harm future expansions to a multilateral one. The WTO would be the best place to establish this World Investment Court,<sup>309</sup> as most countries are contracting states.

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306. Cf. Charles N. Brower & Sadie Blanchard, *What's in A Meme? The Truth About Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689, 769 (2014) (arguing that "any proposal to 'regulate' arbitrators in a manner that makes states the gatekeepers of who is eligible for appointment will undermine the very purpose of investor-State arbitration and should be rejected.").

307. See Bilateral Investment Treaty, E.U.-Viet., art. 28(3).

308. Cf. World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 8.6 (Apr. 15, 1994) [hereinafter WTO Dispute Settlement Understanding], [https://www.wto.org/english/docs\\_e/legal\\_e/28-dsu\\_e.htm](https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm) [<https://perma.cc/4LUD-FVRD>] (archived Oct. 21, 2017) (providing that the Secretariat shall propose nominations for the panel to only the parties to the dispute, and the parties agree whether to approve).

309. The connection between investment and trade is beyond the scope of this particular Article, but is the subject of my next work. See David M. Howard, *The Need for a Supernational Organization in Foreign Investment*, 8 NOTRE DAME J. INT'L & COMP. L. (forthcoming 2018).

Beginning with a multilateral investment court under the WTO would resolve at least most of these concerns and provide a solid foundation—including establishing the court’s legitimacy—for the future legal disputes brought before the court.

### *B. Rules and Precedent*

Similar to the WTO Appellate Body now, the World Investment Court appellate body would draw up its own working procedures rather than follow the TTIP and EU proposals.<sup>310</sup> Once the Appellate Body is formed, the tenured members of the panel would create its own procedure in consultation with the WTO Secretary-General. This includes setting time-limits and procedures, such as presenting evidence to the Appellate Body, and the procedure for rotation of judges to hear appeals.<sup>311</sup>

Precedent is another issue that needs to be discussed, as this is the foundation for consistency and a coherent body of law. Arbitrators already frequently reference and cite previous investment awards creating a type of *de facto* persuasive precedent,<sup>312</sup> but this still produces inconsistent decisions as not all arbitrators follow this principle.<sup>313</sup> However, in this proposed World Investment Court, the Appellate Body would review the Lower Court’s legal judgments *de novo* and jurisdiction of the Appellate Body would generally be limited to the issues of law. Judgments would be published, and like the WTO,<sup>314</sup> prior decisions would be given persuasive precedential authority for subsequent cases in the Lower Court on issues of the law,<sup>315</sup> providing the Lower Court a framework of legal authority on which to decide disputes brought to the Court.<sup>316</sup> This type of precedent

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For a general discussion of the connection between trade and international investment, see generally KURTZ, *supra* note 163.

310. See WTO Dispute Settlement Understanding, *supra* note 308, art. 17(9).

311. MERRILLS, *supra* note 9, at 207.

312. SCHILL, *supra* note 1, at 321-23.

313. *Supra* section IV(d).

314. Joost Pauwelyn, *Minority Rules: Precedent and Participation*, in ESTABLISHING JUDICIAL AUTHORITY, *supra* note 122, at 141, 146-47.

315. See Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 *FORDHAM INT’L L.J.* 1014, 1017 (2007) (“Precedent, or *stare decisis*, refers the doctrine under which a court, when deciding a point of law, generally follows a holding of a prior court on that point if that prior court is equal or superior in the judicial hierarchy.”).

316. Gary Born, *International Adjudication*, 61 *DUKE L.J.* 775, 847 (2012) (“[T]he tribunal’s awards were published and provide frequently cited authority on a range of international-law issues, including expropriation, nationality, remedies, and procedures.”).



where the Court would stick to its prior decisions absent compelling reasons would contribute to a more consistent and coherent body of investment law, yet would allow the Lower Court to decide or distinguish prior decisions based on the facts and specific issues in the case. Yet when it comes to issues such as whether the most-favored nation clause applies to procedural provisions,<sup>317</sup> there would be a consistent application of this precedent of law to the facts of the specific dispute.

### *C. Will This Court Ever Happen?*

While this World Investment Court may “seem too ambitious to be politically feasible” to some<sup>318</sup> or even impossible,<sup>319</sup> with the recent proposals by the European Union for the creation of bilateral investment courts, there appears to be growing political will for a World Investment Court. FDI flows continue to increase, and many are looking for improvements to the current investment arbitral system. This Article proposes that a World Investment Court is that improvement.

To solve cooperation dilemmas between states, states tend to turn to international courts as functional solutions to overcome problems through collective coordination and to promote the states’ legitimacy.<sup>320</sup> International institutions are created because states will be better off by committing themselves to a set of common rules and principles.<sup>321</sup> While many highly doubt the probability of a World

317. See *supra* section IV(d)(ii).

318. David P. Riesenberg, *Fee Shifting in Investor-State Arbitration: Doctrine and Policy Justifying Application of the English Rule*, 60 *DUKE L.J.* 977, 989 (2011).

319. Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, 35 *U. PA. J. INT’L L.* 431, 463 (2013) (“Gus Van Harten suggests the creation of a permanent international investment court. The reality is that it would be just impossible to negotiate the creation of another permanent court and to find the will and interest to negotiate the creation of a new institution.”).

320. See, e.g., Firew Kebede Tiba, *What Caused the Multiplicity of International Courts and Tribunals?*, 10 *GONZ. J. INT’L L.* 202, 204 (2006); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 *CAL. L. REV.* 899, 904 (2005). But see Suzanne Katzenstein, *In the Shadow of Crisis: The Creation of International Courts in the Twentieth Century*, 55 *HARV. INT’L L.J.* 151 (2014). Cf. Posner & Yoo, *supra* note 176, at 6 (noting “international adjudication can play a useful role by enabling states to overcome a limited set of cooperation problems in international affairs”).

321. Krzyztof J. Pelc, *Welfare Implications of Precedent*, in *ESTABLISHING JUDICIAL AUTHORITY*, *supra* note 122, at 173, 183.

Investment Court's implementation,<sup>322</sup> claiming the political will is just not sufficient for a multilateral agreement on this issue,<sup>323</sup> there is a growing hope that this court could be implemented in the near future.<sup>324</sup> In the past few decades, the political influence and strength of international law has increased, and international courts have exerted significant influence on legal developments.<sup>325</sup>

Certainly, it will be difficult to create this proposed World Investment Court. Practically, this would require the creation of new Secretariat positions and panels to expand the capacity of the WTO.<sup>326</sup> Politically, it may require amendment of the WTO Agreements to include investment under the organization's jurisdiction,<sup>327</sup> and states will not create or consent to the jurisdiction of a court unless they benefit from it, namely by forcing other states to appear before the court.<sup>328</sup> But difficulty in practice should not prevent the implementation of a better system, and as this Article proposes the World Investment Court to be instituted under the WTO, the Court could be created through that process rather than as a free-standing body, at least until a supranational organization is tasked with the regulation of foreign investment.

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322. Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 69 (2011).

323. Giorgetti, *supra* note 319, at 463 ("Gus Van Harten suggests the creation of a World Investment Court. The reality is that it would be just impossible to negotiate the creation of another permanent court and to find the will and interest to negotiate the creation of a new institution."); David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104, 116 (1990) ("[O]n the international level, there often is no alternative to arbitration. In many international situations, neither party will agree to submit all possible disputes to the courts of the other.").

324. See Cecilia Malmström, *The way ahead for an international investment court*, EUR. COMM. (July 18, 2016), [https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/way-ahead-international-investment-court\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/way-ahead-international-investment-court_en) [<https://perma.cc/WJE5-CKG2>] (archived Nov. 2, 2017); Rebecca Lee Katz, *Modeling an International Investment Court After the World Trade Organization Dispute Settlement Body*, 22 HARV. NEG. L. REV. 163-64 (2016).

325. Joanna Jemielniak et al., *Introduction*, in ESTABLISHING JUDICIAL AUTHORITY, *supra* note 122, 1.

326. Greg Tereposky & Laura Nielsen, *Coordinated Actions in International Economic Law as Illustrated by Investment Treaty Arbitration and World Trade Organization Disputes*, in ESTABLISHING JUDICIAL AUTHORITY, *supra* note 122, at 119, 137.

327. José E. Alvarez & Steve Charnovitz, *Triangulating the World Trade Organization*, 96 AM. J. INT'L L. 28, 29 (2002).

328. Posner & Yoo, *supra* note 176, at 25.

There is a strong case for the implementation of a World Investment Court under the WTO.<sup>329</sup> The WTO has broad consensus, and while it has not always been successful in negotiating previous investment agreements,<sup>330</sup> there are several factors that may ignite this “political will.” First, this proposal would give states control over the appointment process rather than giving both investors and states control.<sup>331</sup> And as states have conflicting interests in appointing judges, because states want to protect themselves from suits while simultaneously protecting their own investors against infringements by other countries, this would ensure impartial and independent judges are appointed.<sup>332</sup>

International legal crises play an important role in the formation of an international court due to challenges to an existing legal regime.<sup>333</sup> With the growth of investment disputes and the rising number of inconsistent decisions, the underlying foundation of investment arbitration is currently being challenged. Furthermore, this centralization of investment disputes would provide consistency and coherence for states to know interpretations of their IIAs to better protect themselves from claims. So while “mustering the political will to enact and ratify such a convention might well prove taxing,” it is “by far the most practical approach.”<sup>334</sup> There seems to be at least some will “mustering” as the European Union, Vietnam, and Canada have all agreed to a permanent investment court, so a future multilateral investment court is a more likely proposition than it was a decade ago.<sup>335</sup> But even once the Court is created, the legitimacy of the court

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329. Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 484 (2009) (noting the current research “creates a strong case for the creation of an appellate body or even a stand-alone investment court.”).

330. See Kevin C. Kennedy, *A WTO Agreement on Investment: A Solution in Search of a Problem?*, 24 U. PA. J. INT'L ECON. L. 77, 87–88 (2003) (“Despite the legal and economic arguments for liberalizing national barriers to FDI, the failure of the OECD to conclude the MAI by 1998 should be a sobering reminder that successfully negotiating a comprehensive multilateral agreement on investment is a supremely difficult task.”).

331. Brower & Sadie Blanchard, *supra* note 306, at 768.

332. See *supra* note 176-77 and accompanying text.

333. Suzanne Katzenstein, *In the Shadow of Crisis: The Creation of International Courts in the Twentieth Century*, 55 HARV. INT'L L.J. 151, 153 (2014).

334. Franck, *supra* note 56, at 1625.

335. Cf. Judge Stephen M. Schwebel, [Symposium] *The Overwhelming Merits of Bilateral Investment Treaties*, 32 SUFFOLK TRANSNAT'L L. REV. 263, 269 (2009) (“If the governments of the world preferred an international investment court to arbitration, or saw a need for a court of international arbitral appeals, they could constitute one; they have not.”). This argument, however, simply dismisses the fact that a multilateral agreement on essentially anything is

may still be founded on its continuing success and how the Court accomplishes its proposed functions.<sup>336</sup>

### VIII. CONCLUSION

This Article proposes what is hoped to be a convincing argument for the establishment of a World Investment Court designed to resolve investment disputes brought by foreign investors against states. FDI continues to be a fundamental pillar of our global economy, and consistent and coherent decisions are necessary to protect investor rights and promote the flow of foreign investment while providing states with a framework of laws on which to base future regulatory actions. Because of the public-law nature of investment dispute resolution, consistency is essential to the legitimacy of a dispute resolution body, and a World Investment Court created under the WTO would not only create a more consistent body of international investment law, but would firmly promote the legitimacy of the international investment regime. It would also enhance the multilateralization of the current investment system by further establishing a more uniform international legal framework that is coherent and stable.<sup>337</sup>

While international investment law is still in its infancy,<sup>338</sup> it seems to be moving in the right direction. With the proposal to create a bilateral investment court under the EU treaties, more countries may be enticed to adopt this practice. These proposals have been met with harsh criticisms from scholars, but these critiques can aid in forming a fully-functioning World Investment Court, primarily one that begins as a multilateral court rather than under a single BIT. As international law matures, the visibility of its legitimacy must increase, including the

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incredibly difficult. Just as many have seen a need for a Multilateral Agreement on Investment, yet several negotiations for this Agreement have failed, does not mean that simply because there is not an agreement *so far* means that the current system is the most effective. International agreements take time to negotiate, and with the few proposals under E.U. investment treaties for this international investment court, these negotiations are just beginning. *See, e.g.,* José E. Alvarez, *A Bit on Custom*, 42 N.Y.U. J. INT'L L. & POL. 17, 79 (2009) (“The ideal some would urge in lieu of the status quo—the will-o-the-wisp of a multilateral investment treaty coupled with a single investment court—is politically difficult in a world that has repeatedly failed in prior comparable efforts.”).

336. Geir Ulfstein, *International Courts and Judges: Independence, Interaction, and Legitimacy*, 46 N.Y.U. J. INT'L L. & POL. 849, 866 (2014).

337. *See* SCHILL, *supra* note 1, at 363-64 (arguing that “international investment law is evolving toward a multilateral system based on bilateral treaties”).

338. COLE, *supra* note 82, at xiv-xv.

public perception of arbitrator independence and predictability in its body of law.<sup>339</sup> This proposed World Investment Court will benefit both investors and states, and states would have an interest in this court as it should advance both their individual interests and the legitimacy of international investment law as a whole.<sup>340</sup>

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339. Krista Nadakavukaren Schefer, *Judicial Ethics in International Economic Law*, in *ESTABLISHING JUDICIAL AUTHORITY*, *supra* note 122, at 215, 239.

340. SCHILL, *supra* note 1, at 106. *See also* JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 8 (2d ed., 2015).