THE MULTILATERAL INVESTMENT COURT: ONE STEP FORWARD, TWO STEPS BACK

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ABSTRACT

The recent past has seen the system of investor-state dispute settlement come under heavy fire from all ends of the spectrum. The media and citizens' groups have called into question the legitimacy of private tribunals deciding matters of public importance. States (even those that have historically been avid users of the system) have reacted by calling for a radical change in the system, and in some cases have rejected it in its entirety. The European Union has commenced the implementation of a bilateral investment court in its dealings with states such as Canada and Vietnam, simultaneously also calling for discussions on a multilateral investment court. This paper questions the viability and neutrality of a permanent investment court, especially in a field as ideologically divided as international investment law. It is argued that the implementation of any such proposal is likely to reverse the (significant) progress made by investment arbitration in insulating investment disputes from political considerations. In any case, the investment court may fall prey to the very ills that plague (and are perceived to plague) investment arbitration. Instead, a carefully thought out system of preliminary referrals could be a possible solution to curing the 'crisis of legitimacy' being faced by investor-state dispute settlement.

I. INTRODUCTION

"The illegitimacy of ISDS flows, according to its critics, from the allegation that a select few arbitrators routinely decide disputes in favour

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of multinational enterprises in an ideologically prejudiced manner, articulating doctrines more extensively than agreed upon by governments negotiating the treaties, thereby also curtailing those governments' regulatory functions."[1] This, along with certain other criticisms, has made investor state dispute settlement (investment arbitration) the target of intense public scrutiny and debate. The reaction of countries has varied, with the European Union recently proposing the formation of an investment court in its bilateral treaties. This paper questions the viability of throwing the baby out with the bathwater and transposing such a ham-fisted and half-baked approach to the multilateral context. Instead, a carefully drafted system of referral by tribunals to a higher tribunal is proposed.

This paper is divided into three parts for clarity in expression. The first part assesses the perceived 'crisis of legitimacy' faced by international investment law, and its preferred mode of dispute settlement-investor-state arbitration. The second part of this paper goes on to critique the viability of a shift away from investor-state arbitration to an investment court. The third part of this paper proposes a more nuanced approach to curing any crisis faced by the prevailing system of investor-state arbitration.

[1] M Sornarajah, *An International Investment Court: Panacea or Purgatory*, COLUMBIA FDI PERSPECTIVES: PERSPECTIVES ON TOPICAL FOREIGN DIRECT INVESTMENT ISSUES (COLUMBIA CENTER ON SUSTAINABLE INVESTMENT 2016) 1 (Karl Sauvant ed.) [*hereinafter* Sornarajah on the International Investment Court].

II. THE PERCEIVED CRISIS OF LEGITIMACY

Today, the criticisms of international investment law and investor-state arbitration abound. Some have raised concerns about the decision makers in these cases. They are alleged to be biased in favour of investors, to the detriment of host states. This bias stems from their alleged 'vested interest' in the perpetuation of the system, as they profit from the initiation of arbitral proceedings and desire repeated appointments from parties.[2] Some accuse arbitrators of adopting broad interpretations of treaty language and imposing liability on states to an extent never anticipated by the parties to the treaty.[3] Criticism is also directed towards the phenomenon of 'double-hatting', where arbitrators appear as counsel in some cases and as arbitrator in others.[4] This, it is said, leads to the possibility of bias and conflicts of interest. The system of party appointment in general has also come under fire for possibly leading to bias.[5]

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[2] Gabrielle Kaufmann-Kohler & Michele Potesta, *Can the Mauritius Convention serve as a model for the reform of investor - State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?* 12 (UNCITRAL, 3 June 2016), http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf [hereinafter **Kaufmann-Kohler & Potesta**].

[3] M SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 562 (4th ed. Cambridge University Press 2017) [hereinafter **Sornarajah**].

[4] UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, 4 (June 2013), http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf [hereinafter **UNCTAD Roadmap**].

[5] Sergio Puig, *Blinding International Justice*, 56 VIRGINIA JOURNAL OF INTERNATIONAL LAW 648 (2016). [hereinafter **Puig**].

The system is further condemned because most of the decision makers are drawn from a small homogenous group with largely similar backgrounds.[6] Historically, most International Centre for Settlement of Investment Disputes (hereinafter '**ICSID**') arbitrators have originated from Europe and North America, with around 75% coming from organisation for Economic Co-operation and Development (OECD) countries.[7] Shockingly, 95% of these arbitrators have been male.[8] One study found that out of 263 ICSID tribunals surveyed, a group of 12 arbitrators was involved in 60% of the tribunals.[9]

Moreover, the conduct of arbitral tribunals is often said to lack transparency.[10] Media outlets have come down heavily against these 'secret trade courts' and 'obscure tribunals' deciding issues of public importance.[11] Such ad hoc tribunals are said to lack the legitimacy needed to decide challenges to sovereign state measures that may have been taken

[6] Christopher R. Drahozal, *Private Ordering and International Commercial Arbitration*, 113 PENN ST. L. REV. 1031 (2009); Puig, *supra* note 5, at 655.
[7] David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD, WORKING PAPERS ON INTERNATIONAL INVESTMENT 44 (2012), http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf.
[8] *Id.* at 45.
[9] *Id.* at 45.
[10] Kaufmann-Kohler & Potesta, *supra* note 2, at 14.
[11] Anthony De Palma, *Nafta's Powerful Little Secret: Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say*, NEW YORK TIMES, March 11, 2001, at 1.

in the public interest.[12] Therefore, investor-state arbitration is said to be in trouble in the 'court of public opinion'.[13]

Concerns are also frequently raised that there is little consistency in the awards rendered by these tribunals.[14] As a result of the ad hoc nature of the tribunals making decisions, and the lack of any doctrine of precedent operating in the field, different tribunals often come to different conclusions about similar treaty language. For example, different tribunals have held different views on issues such as the effect of umbrella clauses, the effect of most-favoured nation clauses, the precise scope of the fair and equitable treatment standard, etc. Such inconsistency is perpetuated because of the lack of any appeal mechanism.[15] This lack of an appeal mechanism means that even manifestly incorrect awards may sometimes be left untouched.[16]

Yet another criticism is that the system, as it stands, worries states to the point where they are reluctant to freely regulate state affairs. This worry is said to be motivated by the possibility of foreign investors

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[12] UNCTAD Roadmap, *supra* note 4, 3; J Christopher Thomas & Harpreet Kaur Dhillon, *The Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards*, 32.3 ICSID Review 3 (2017) [hereinafter Thomas & Dhillon].

[13] American Bar Association, *Investment Treaty Working Group Task Force Report on the Investment Court System Proposal*, 123 (2016), https://shop.americanbar.org/PersonifyImages/ProductFiles/262739281/6-Proposed%20EU%20Investment%20Court.pdf [hereinafter ABA Report].

[14] Christoph H. Schreuer, *Preliminary Rulings in Investment Arbitration*, IN APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES, 208 (Karl Sauvant ed. Oxford University Press 2008) [hereinafter "Schreuer"].

[15] Kaufmann-Kohler & Potesta, *supra* note 2, at 13.

[16] Kaufmann-Kohler & Potesta, *supra* note 2, at 14.

bringing claims for obscene amounts of money in response to state regulations. This, it is said, leads to a regulatory 'chill'.[17] Further, these claims are sometimes upheld and even smaller, developing states are required to pay large sums of money as compensation to foreign investors.[18] Apart from amounts actually awarded, concerns are raised about the high costs of the proceedings themselves- one study pegged the average cost per party per case to be 8 million USD.[19] Even where the state prevails in the case, the reimbursement of these costs usually remains at the discretion of the tribunal.

In light of these criticisms, some states are becoming increasingly suspicious of investor-state arbitration. The older investment treaties which were often vaguely worded and did not clearly spell out the scope of obligations on host states are being replaced with newer 'balanced' investment treaties, which specifically preserve the regulatory space of host states and include broader defences to liability (including sometimes restricted or conditional access to investment arbitration).[20] Examples of these newer balanced treaties include the ASEAN Comprehensive Investment Agreement and the new Model Indian Bilateral Investment Treaty (BIT).

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[17] EU Commission Staff Working Document, *Report On Online public consultation on investment protection and investor-to-state dispute settlement in the Transatlantic Trade and Investment Partnership Agreement*, 14 (SWD 2015 3 Final, Jan. 13, 2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.
[18] UNCTAD Roadmap, *supra* note 4, at 4.
[19] UNCTAD Roadmap, *supra* note 4, at 4.
[20] Sornarajah, *supra* note 3, at 562.

Some states like South Africa and Poland have rejected the system and have even begun to terminate some of their existing investment treaties.[21] Venezuela, Bolivia, and Ecuador have rejected the ICSID Convention for a number of years now.[22] India[23] and Indonesia[24] have also begun reviewing their BIT programs. Further, the European Court of Justice has recently held that arbitration clauses in intra-EU BITs are incompatible with EU law.[25] Calls for a more radical change have been made recently by the European Union. The European Union has rejected the traditional model of investor-state arbitration and is pushing for the formation of a permanent investment court with state appointed judges. The EU-Canada Comprehensive Economic and Trade Agreement, the EU-Vietnam Investment Protection Agreement, and the proposed Transatlantic Trade Investment Partnership (being negotiated between the United States and the EU) already contain provisions for the setting up of a bilateral investment court and an appellate mechanism for the settlement of disputes under those treaties. They also mention the possibility of a

[21] Marcin Orecki, *Let the Show Begin: Poland Has Commenced the Process of BITs' Termination*, KLUWER ARBITRATION BLOG (August 8, 2017), http://arbitrationblog.kluwerarbitration.com/2017/08/08/let-show-begin-poland-commenced-process-bits-termination/.

[22] Jose Carlos Bernal Rivera & Mauricio Azuga, *Life After ICSID: 10th Anniversary of Bolivia's Withdrawal from ICSID*, KLUWER ARBITRATION BLOG (August 12, 2017), http://arbitrationblog.kluwerarbitration.com/2017/08/12/life-icsid-10th-anniversary-bolivias-withdrawal-icsid/.

[23] Sujay Mehdudia, *BIPA Talks Put on Hold*, THE HINDU (22 January 2013), https://www.thehindu.com/business/Economy/bipa-talks-put-on-hold/article4329332.ece.

[24] Ben Bland & Shawn Donnan, *Indonesia to terminate more than 60 bilateral investment treaties*, FINANCIAL TIMES (March 26, 2014), https://www.ft.com/content/3755c1b2-b4e2-11e3-af92-00144feabdc0.

[25] Case C-284/16, Slovak Republic v. Achmea B.V., 2018 E.C.R. 158, ¶ 11.

multilateral investment court sometime in the future and contain a reference to it.[26]

While the criticisms of traditional investment arbitration have existed for a while, it is curious that these calls for a radical overhaul of the system have been made by developed states only in the last few years. For example, few seemed sympathetic to the plight of Argentina in the wake of its economic crisis and the numerous consequent awards that were rendered against it. The Argentinian saga embodied some of the very evils that are criticized today, including different tribunals coming to different decisions on similar facts,[27] some tribunals ignoring Argentina's right to regulate its economy in times of necessity,[28] the lack of any external control on the correctness of these decisions,[29] and a (developing) country being asked to pay large sums of money to foreign investors despite its economic turmoil. Despite this, most (developed) countries seemed perfectly fine with the system as it existed.

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[26] *See, e.g.*, Article 8.29, EU-Canada Comprehensive Economic and Trade Agreement & Art. 3.38, EU-Vietnam Investment Protection Agreement.

[27] *See, e.g.*, the divergence between CMS Gas Transmission Company v. Argentina, (ICSID Case No. ARB/01/8, Award, 12 May 2005, 44 I.L.M. 1205) and LG & E Energy Corp, LG&E Capital Corp, and LG&E International Inc v. Argentina, (ICSID Case No. ARB/02/1, Award, 3 October 2006, 46 ILM). This is discussed in greater detail in: Waibel, Michael, *Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E*, 20 LEIDEN JOURNAL OF INTERNATIONAL LAW 637-648 (2007).

[28] *See, e.g.*, CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005, 44 I.L.M. 1205.

[29] In fact, even the annulment proceedings against these award have resulted in different decisions on similar facts: *see, e.g.*, Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, (June 29, 2010) and CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic (Sep. 25, 2007).

Perhaps the reason for this silence is that most investor-state arbitration cases have historically involved a Respondent state from regions other than Western Europe and North America. The ICSID Caseload Statistics are indicative in this regard- only 8% of all ICSID cases have been against Western European nations, and only 4% have been against North American States. This is in stark contrast to the 22% cases brought against South American States and 26% cases against East European and Central Asian States.[30] In 2015, however, the number of cases against Western European States rose to 37% of new cases filed.[31] Clearly, any incentive for these developed States to speak out against the system has existed only in the recent past.

A clear example is that of Germany. At least 64 investment treaty arbitrations have been initiated by German investors against foreign countries.[32] Obviously, Germany was an avid user of the system. By contrast, Germany has only ever been the Respondent in three cases- two of which were settled.[33] Therefore, there was little reason for Germany to complain about the system. Things took an about-turn when Germany decided to phase out its use of nuclear power, in light of the Fukushima

[30] ICSID, The ICSID Caseload- Statistics (Issue 2019-2), INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES p. 12 (2019) https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx.
[31] ICSID, The ICSID Caseload- Statistics (Issue 2019-2), INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES p. 24 (2016) https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx.
[32] Investment Policy Hub, *Germany- as Home State*, UNCTAD https://investmentpolicy.unctad.org/investment-dispute-settlement/country/78/germany.
[33] Investment Policy Hub, Germany- as Respondent State, UNCTAD, https://investmentpolicy.unctad.org/country-navigator/79/germany.

nuclear disaster.[34] The third case against Germany (which was not settled and is still pending) was initiated by a Swedish investor affected by Germany's decision to phase out nuclear power.[35] The amount claimed by the investor is over 5 billion USD. Suddenly, the system of investment arbitration does not seem to be quite as attractive to Germany. It is at the forefront of the European Union's calls to replace the system of investment arbitration with that of an investment court with publicly appointed judges- a system which would preserve and underscore a state's right to regulate.

Whatever the political motivations for this volte-face of some states, it is undeniable that there is some amount of discontent among states about traditional investment arbitration. The next part of this paper describes the European Union's proposed 'bilateral' investment court, and assesses the viability of a 'multilateral' investment court for the settlement of investment disputes.

III. THE VIABILITY OF AN INVESTMENT COURT

The bilateral investment court system proposed by the European Union and included in some of its treaties is a hybrid of investor state arbitration and judicial settlement of investment disputes.[36] At its core, it

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[34] Alison Ross, *Schwebel criticises EU act of "appeasement"*, GLOBAL ARBITRATION REVIEW (May 24, 2016), https://globalarbitrationreview.com/article/1036358/schwebel-criticises-eu-act-of-appeasement [hereinafter Alison Ross].

[35] Vattenfall AB and others v. Federal Republic of Germany (II), ICSID Case No. ARB/12/12 (Decision on 31 Aug, 2018).

[36] August Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID*

consists of a permanent tribunal of first instance, and an appellate tribunal. Appointments to the tribunal of first instance are to be made by a Joint Committee of the Contracting Parties, from people who possess 'qualifications required in their respective countries for appointment to judicial office' or who are 'jurists of recognized competence', and who have recognized expertise in the field.[37] This tribunal is to be populated by an equal number of nationals from each Contracting Party and from third States. For instance, under the EU-Canada CETA, five appointees are to be from Canada, five are to be from member states of the EU, and five are to be from neutral countries.[38]

Actual cases are to be allocated randomly to 'divisions' of three members of the Tribunal by the President of the Tribunal. These divisions shall have one national of either party and shall be presided over by the national of a third party.[39] After a decision is rendered, an appeal may be made to the Appellate Tribunal. The grounds for appeal include the grounds for annulment under the ICSID Convention and also include appeals for errors of law or fact.[40] The Appellate Tribunal may modify, uphold, or reverse the decision on any of these grounds.[41]

Convention and the Nature of Investment Arbitration, (2016) JIEL 761, 766 [hereinafter Reinisch].

[37] The Comprehensive and Economic Trade Agreement (Oct. 30, 2016), Art. 8.27(2) & 8.28(2) [hereinafter CETA]; EU-Vietnam Investment Protection Agreement, (Jun. 30, 2019), Art. 3.38.

[38] CETA, Art. 8.27(2).

[39] CETA, Art. 8.27(6); EU-Vietnam Investment Protection Agreement, Art. 3.38(6).

[40] CETA, Art. 8.28(2).

[41] CETA, Art. 8.28(2).

At first blush, one can see why such a system could be attractive to the critics of traditional investor-state arbitration. The court would consist of publicly appointed judges, thereby giving 'states' a greater say in choosing who decides their disputes (as opposed to allowing investors to also have a say). Appointment by states would also counter perceptions of bias in favour of investors. Additionally, appointment by states and the stringent qualifications for appointment would mean that such a court would possess greater legitimacy, and it would be more palatable for such a court to decide questions of public importance. Permanency would also presumably lead to consistency, with the same court following past precedents on similar facts. Any incorrect decisions could be rectified by way of the appellate mechanism. Lastly, states would have greater freedom to regulate their affairs if they perceive the decision makers to be neutral and lacking the expansionist tendencies that arbitrators are sometimes accused of.

Therefore, *prima facie*, the merits of such a system appear undeniable. Indeed, there are several proponents of this system.[42] In fact, the Court of Justice of the European Union has recently found the dispute settlement system under the EU-Canada CETA to be compatible with European Union law (and has also held that, in principle, a multilateral

[42] Anthea Roberts, *Would a Multilateral Investment Court be Biased? Shifting to a treaty party framework of analysis*, BLOG OF THE EUROPEAN JOURNAL OF INTERNATIONAL LAW (April 28, 2017), https://www.ejiltalk.org/would-a-multilateral-investment-court-be-biased-shifting-to-a-treaty-party-framework-of-analysis/ [*hereinafter* Roberts].

investment court would be compatible with EU law).[43] Despite this, several questions remain unanswered. For instance, the biggest question is whether any resultant decision of this bilateral investment court would qualify as an arbitral award for the purposes of enforcement. The question is not merely academic. An ICSID award qualifies for automatic enforcement within the territories of all Contracting Parties, as per Article 54 of the ICSID Convention. An arbitral award can also qualify for enforcement under the New York Convention, which facilitates enforcement in over 150 countries. There is no similarly uniform system for the enforcement of judgments of a court, which are usually enforced as a matter of comity.[44]

The goal of the EU Treaties was to produce awards that can be enforced under the ICSID Convention and under the New York Convention.[45] These treaties have tried to fit their modified system of dispute resolution within the framework of the ICSID, by allowing investors the option of pursuing their claim under the ICSID Convention, but subject to the court system as envisaged under the EU Treaties. Whether this would work despite the substantial departure from the system envisaged under the ICSID, remains uncertain.[46] Further, it is unclear whether other Contracting Parties to the ICSID Convention (i.e. Parties

[43] Opinion 1/17 of the Court of Justice of the European Union, http://curia.europa.eu/juris/document/document.jsf?text=&docid=213502&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4976548.
[44] ABA Report, *supra* note 13, at 105.
[45] ABA Report, *supra* note 13, at 8.
[46] Reinisch, *supra* note 36, at 773.

who are not also party to the bilateral treaty providing for this system) would be obliged to enforce the 'award' as an ICSID award.[47]

It is also unclear whether the decision pursuant to such a unique mode of dispute resolution would constitute an award covered by the New York Convention. The specific requirements for an award to be covered by the New York Convention (which applies only to certain arbitral awards) may not be met, not least because the system itself is referred to an investment 'court' system.[48] Some have been optimistic and pointed to similarly modelled systems such as the Iran-US Claims Tribunal, whose awards have been enforced under the New York Convention.[49] Others have been more cautious in their assessment and have cast doubts over the enforceability of these 'awards' (rendered pursuant to the EU Treaties) under the New York Convention.[50] These voices have cautioned that reliance on the example of the Iran-US Claims Tribunal may not be appropriate, and enforcement under the New York Convention may not be a given, absent additional clarity in the text of the EU Treaties.[51]

Other questions have been raised about the lack of clarity regarding the seat of the proceedings, the details of any challenge procedure, the appropriateness of wide grounds of appeal, among others.

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[47] ABA Report, *supra* note 13, at 111.
[48] ABA Report, *supra* note 13, at 127.
[49] Kaufmann-Kohler & Potesta, *supra* note 2, at 43.
[50] Sophie Nappert, *The 2015 EFILA Inaugural Lecture: Escaping from Freedom? The Dilemma of an Improved ISDS Mechanism*, EUROPEAN FEDERATION FOR INVESTMENT LAW AND ARBITRATION, 3 (26 November, 2015), https://efila.org/wp-content/uploads/2015/11/Annual_lecture_Sophie_Nappert_full_text.pdf.
[51] ABA Report, *supra* note 13, at 106.

Therefore, a multilateral investment court modelled on the EU Court may not be appropriate. However, if one were to assess the 'in principle' viability of a multilateral investment court 'independent' from the court as proposed by the EU, different considerations would apply. It is submitted that most of the doubts about the EU Court could be addressed by appropriate drafting of the multilateral treaty which would give birth to the multilateral court. For instance, instead of containing vague references to the New York Convention and the ICSID Convention, enforcement under this new treaty could be a matter of primary obligations like it is under the ICSID Convention- i.e. Contracting Parties could be required under the treaty itself to enforce the decisions of the Court. This would eliminate concerns about the enforceability of the Court's decisions.

Consequently, any criticism of a multilateral investment court would need to focus on the inherent features of the system itself and the principles behind it, rather than matters that can be addressed by appropriate drafting. For the reasons set out below, it is argued that a permanent investment court is unsuited to a field like international investment law.

The first problem that is anticipated with respect to a multilateral investment court is the emphasis on appointment of the adjudicators by states. It is submitted that a move towards such appointments would invariably lead to the politicization of the dispute resolution system. One of the achievements of the traditional mode of investment arbitration is that it has led to reduced politics in the settlement of investment disputes.

In fact, one of the goals of the ICSID Convention was to settle disputes on the 'legal plane' and insulate the disputes from 'the realms of politics and diplomacy'.[52] This was the reason for the original shift away from diplomatic protection. States have therefore been free to conduct their foreign policy without the hurdles that would otherwise be caused by investment disputes.[53] The interests of weaker states have not necessarily been subordinated in the dispute resolution 'process' due to their weaker political clout.

All this is likely to change if states begin to appoint the members of the multilateral investment court. The bilateral courts proposed by the EU are able to provide for equal representation of the parties (in terms of nationality), due to the fact that only two parties are involved in those treaties. In a multilateral treaty on a global scale, it would be impossible (or at the very least completely impractical and unrealistic) to provide for equal representation of all parties. Consequently, the investment court would consist of judges of only some nationalities, with others not having their nationals as adjudicators. Choosing which nations are going to have their nationals as members of the Court would therefore be a political exercise. It is inevitable that the interests of politically weaker states would be subordinated or ignored.

The dispute resolution process under the WTO is a case in point. The EU's chief 'investment court negotiator' pointed to the WTO as the

[52] Christoph Schreuer, *Do We Need Investment Arbitration, in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 882 (Jean Kalicki & Anna Joubin-Bret ed., Brill Nijhoff 2015).
[53] *Id.*

benchmark for efficient dispute resolution, and as an inspiration for the investment court system.[54] However, examples of state conduct within the context of WTO dispute resolution are hardly inspiring. Serious concerns have been raised about the conduct of the United States of America in blocking the appointment of highly qualified, but independent minded, persons to the dispute settlement bodies of the WTO. These appointments were blocked because the candidates had earlier participated in cases against the USA. Other countries countered by threatening to block other appointments.[55]

The appointment process in other permanent international courts is equally uninspiring. It is exceedingly rare for a permanent member of the UN Security Council to 'not' have one of its nationals as a member of the International Court of Justice.[56] Further, the voting process for judges of the ICJ usually involves intense political lobbying.[57]

Thus, it is very likely that under the investment court system, smaller and politically weaker states would be pressured into supporting

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[54] ABA Report, *supra* note 13, at 126.

[55] Gregory Shaffer et al., *U.S. Threats to the WTO Appellate Body,* SSRN ELECTRONIC JOURNAL (Dec. 13, 2017), https://ssrn.com/abstract=3087524; Shawn Donnan, *Fears for global trade as Trump fires first shots to kneecap WTO*, FINANCIAL TIMES (Nov. 10, 2017), https://www.ft.com/content/5afbd914-a2b2-11e7-8d56-98a09be71849.

[56] For instance, the US and France have always had a national as a member of the ICJ. Until very recently, the UK always had a national as a member of the ICJ: *see* "All Members", https://www.icj-cij.org/en/all-members.

[57] For instance, the UK's withdrawal of Sir Christopher Greenwood's candidature was attributed, in part, to India being a key post-Brexit trading partner: *see, e.g.,* Owen Bowcott, *No British judge on world court for first time in its 71-year history*, THE GUARDIAN (Nov. 20, 2017), https://www.theguardian.com/law/2017/nov/20/no-british-judge-on-world-court-for-first-time-in-its-71-year-history.

the candidates backed by the bigger states. Any non-conformity could also lead to sanctions in other areas (such as the blocking of developmental aid). Clearly, such a system of appointment also leads to the relegation of merit in appointments, and the predominance of political considerations.

Consequent to the first problem of political appointments, is the second problem of ideological imbalances within the Court itself. Even if smaller developing states manage to get a few members of their choice appointed (against the will of larger, developed states), Professor Sornarajah rightly points out that these members are likely to be in the minority.[58] If any decision of the court is to be taken by the majority of a particular bench or division of the court, it is likely that the members from the developing countries will have little or no say in actual decision making. They could simply be outvoted. Professor Sornarajah points to the few instances where ICJ judges from developing countries were appointed to investment arbitration tribunals and were simply outvoted by their counterparts from developed countries.[59] This is especially dangerous in a field as divisive as investment law, where opposing sides are sharply divided on ideological lines.

In fact, it must be pointed out that it was because of this ideological selfishness that states had initially preferred a system of ad hoc arbitration to a system of judicial settlement by the ICJ or another permanent body. Permanent bodies invariably have a broader focus, including the creation of a body of jurisprudence- which is one of the

[58] Sornarajah on the International Investment Court, *supra* note 1, at 1.
[59] Sornarajah on the International Investment Court, *supra* note 1, at 1.

stated goals of the investment court system.[60] However, there are certain categories of disputes where states are interested in preserving their own interests and asserting their own ideologies by choosing their own adjudicators.[61] These include disputes of political and public importance where high stakes are involved and where the applicable legal standards leave room for adjudicator discretion, such as disputes related to foreign investments. Therefore, it is unlikely that states will be content for too long with the investment court system, where a lot of them may not have a say in the shaping of the law.

One ideological conflict that is anticipated is in the field of human rights. The last few years have witnessed greater prominence of human rights in investment law.[62] This is partly the result of a greater emphasis on investor obligations and corporate responsibility. For example, Article 18 of the 2016 Morocco-Nigeria BIT includes specific provisions requiring foreign investors to respect human rights in the host state. Similar provisions have been made in the Model BIT of the Southern African Development Community. Whether these provisions are ever actually enforced remains to be seen. Nevertheless, some tribunals have taken into account human rights considerations. For example, the tribunal in *Urbaser v. Argentina* recognized that human rights obligations could, in principle, be enforced against foreign investors even in the absence of a

[60] Charles Brower, *The Functions And Limits Of Arbitration And Judicial Settlement Under Private And Public International Law*, 18 DUKE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 259, 296 (2008).
[61] *Id.* at 304.
[62] Sornarajah, *supra* note 3, at 561.

clear provision to that effect.[63] In *SAUR International v. Argentina*, the tribunal acknowledged the need for states to regulate in respect of human rights issues.[64] In *Copper Mesa Mining v. Ecuador* the tribunal reduced the amount of damages paid to the Claimant, indirectly considering the human rights violations committed by the Claimant.[65]

It is submitted that this increased focus on human rights in investment law militates against having a permanent investment court. If appointments are indeed controlled by a handful of powerful states (as stated above), and the court is populated with judges representing a particular ideology, the court will operate (or at the very least be perceived to operate) as a vehicle to impose (mostly) Western notions of human rights on all countries. Several Asian states have, in the past, rejected the idea that all human rights are universal. These critics argued that some human rights are merely western constructs, and may not be a perfect fit in some Asian societies.[66] Once again, the idea of a permanent investment court could eventually lead to discontent and acrimony among states.

Another problem is the questionable suitability of the judges that will be appointed to the Court. As stated above, a lot of these appointments may be made for political considerations rather than considerations of merit. Further, even if these judges were to possess the

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[63] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26.
[64] SAUR International SA v. Republic of Argentina, ICSID Case No. ARB/04/4.
[65] Copper Mesa Mining Corporation v. Republic of Ecuador, PCA No. 2012-2.
[66] However, a discussion on cultural relativism and the 'Asian Values' debate is beyond the scope of this paper: *see* Otto D., *Rethinking the "Universality" of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1, 8 (1998).

highest qualifications in the domestic context, it is not necessary that they will be equally well-versed with public international law, international investment law, and indeed the particular industry involved in the dispute. Therefore, by doing away with party appointed arbitrators, the system may also do away with the expertise that those arbitrators bring to the table.

A related concern is about the possible bias of these judges. As stated above, one of the concerns about the system of investment arbitration was that the arbitrators were perceived to be biased in favour of investors. However, the judges appointed to the investment court may well be equally biased (or perceived to be so) - in favour of states.[67] This is because the judges to the court are proposed to be appointed by states, with little or no participation of investors.

Proponents of the system say that this risk is overstated. It has been said that it would be counterintuitive for states to appoint biased members to the court, because when the appointments are made, states would not know *ex ante* whether they would be the Respondent in proceedings or whether their nationals would be Claimants in the proceedings.[68] Therefore, states would prefer to appoint neutral individuals to the Court, who would uphold the applicable treaty.

However, these arguments appear excessively idealistic. As mentioned earlier, in the context of appointments to the WTO dispute settlement bodies, states routinely prefer judges that will advance the

[67] Alison Ross, *supra* note 34.
[68] ABA Report, *supra* note 13, at 25; Roberts, *supra* note 42.

views held by that state, and go as far as to block the appointment of individuals perceived to hold contrary views. Even in the unrealistic scenario that states abandon political considerations, judges are subject to the same 'cognitive' biases as anyone else.[69] Essentially, it is as difficult for judges to abandon preconceived notions of the law and predispositions towards a party, as it is for arbitrators.[70] In a study of appointments to the ICJ, it was found that judges tend to favour the states that appointed them and states whose wealth level is similar to their own states.[71] The German Association of Judges has reportedly raised similar concerns about the possibility of bias of members of the investment court.[72] Thus, an investment court is not the cure to the problem of adjudicator bias. Adjudicator bias may still prevail, and will be unacceptable to investors and to those states in whose favour the bias is not exercised.

The final problem with an investment court is that its decisions will be binding precedent or will be formalized to the extent that they are *de facto* precedent. Concerns have been raised that the court will propound 'neoliberal' principles (essentially western capitalist ideas) which will then become set in stone and binding in all later cases.[73] The reasoning behind such criticism is valid- why should a handful of judges who are chosen by

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[69] Puig, *supra* note 5, at 648.
[70] Puig, *supra* note 5, at 650.
[71] Eric A. Posner & Miguel F. P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 625 (2005).
[72] Juergen Mark, *German Association of Judges on the TTIP Proposal of the European Commission*, GLOBAL ARBITRATION REVIEW (March 21, 2016), https://globalarbitrationnews.com/german-association-judges-proposal-european-commission-introduction-investment-court-system-settle-investor-state-disputes-transatlantic-trade-investmen/.
[73] Sornarajah on the International Investment Court, *supra* note 1, at 2.

questionable political means and who may be biased or inclined to a particular ideology, decide the principles of international investment law 'binding' on all states? Such a process hardly seems democratic, and is excessively unfair in a field which has seen widespread public acrimony.

It might be argued that several of the foregoing problems could be addressed by allowing for a system of ad hoc judges as under Article 31 of the Statute of the International Court of Justice. In such a system disputing parties who do not have an adjudicator of their nationality on the bench of judges can nominate a judge of their choice to adjudicate that particular dispute. Such a solution cannot work in the present context. First, the whole point of the present debate is about a shift away from ad hoc appointments. Further, concerns about political appointments of biased adjudicators would apply with even greater force if states were to appoint their adjudicators 'after' the dispute were to arise. There would be greater incentive for states to appoint adjudicators who would espouse a particular favourable view point, with little or no consideration given to actual merit. Lastly, even if politically weaker states are given a chance to represent themselves by such ad hoc appointments, such an ad hoc judge will likely be in the minority and is likely to be outvoted by the other members of the tribunal. Thus, the weaker developing countries will still have no say in the shaping of the law.

For all these reasons, a permanent investment court is 'in principle' not suitable for the field in which it would be required to operate.

IV. THE SOLUTION

What then is the solution to international investment law's 'crisis of legitimacy'? The criticisms of investment arbitration are not likely to abate anytime soon. This criticism has been drummed up and sensationalized to such an extent that States will feel the need to appease their public.[74] Moreover, it is undeniable that at least some of the criticism is valid. However, as stated above, the idea of a permanent investment court is a misfit in international investment law. What is needed is a more nuanced approach to curing the ills that plague the system.

In finding the appropriate approach, it must be borne in mind that investment arbitration is not the creation of the devil. As such, it should not be rejected in its entirety. The system works 'reasonably well' on any 'objective analysis'.[75] As stated earlier, some of its criticisms are valid, but some are merely overemphasized fear mongering.

Take for example the criticism raised about the lack of consistency in arbitral awards. While it is true that there is inconsistency, this inconsistency was hardly unanticipated. As early as the 1960's, the drafters of the ICSID Convention had recognized the possibility of contradictory decisions as inherent in an ad hoc system of adjudication in a field with unsettled legal principles.[76] The drafters went ahead with the ad hoc system under the ICSID Convention. Moreover, the earlier investment treaties were so vaguely and broadly worded, that arbitrators

[74] Alison Ross, *supra* note 34.
[75] Alison Ross, *supra* note 34.
[76] Thomas & Dhillon, *supra* note 12, at 10.

'acting in good faith' could 'legitimately' reach different conclusions about the meaning of its provisions.[77] Therefore, it is unfair to blame arbitrators for the inconsistency of their awards- decisions of the most highly qualified judges would have been equally inconsistent. The solution to such inconsistency instead lies in the careful drafting of future investment treaties.

Careful drafting of investment treaties would also eliminate concerns that states cannot freely regulate their affairs. Such a right to regulate can be expressly carved out, as has indeed been done in newer investment treaties like the ASEAN Comprehensive Investment Agreement.[78] States can also consider introducing a cap on their monetary liability under these newer treaties.

Further, practices such as double-hatting are not as prevalent as they are made out to be.[79] Lack of transparency can be cured by the introduction of transparency provisions in investment arbitration rules and treaties. Indeed, the shift towards transparency has already started in the last decade.[80] The homogeneity among arbitrators in investment disputes also seems like a baseless criticism. This homogeneity is not because of the existence of some 'mafia' or pressure tactic. Parties (including states) remain free to choose their own arbitrators. The reason that they choose

[77] Thomas & Dhillon, *supra* note 12, at 2.
[78] ASEAN Comprehensive Investment Agreement, Article 17, (Oct. 7, 1998).
[79] Lacey Yong, *"Double Hatting" Under New Scrutiny*, GLOBAL ARBITRATION REVIEW (June 4, 2017), https://globalarbitrationreview.com/article/1142550/%E2%80%9Cdouble-hatting%E2%80%9D-under-new-scrutiny.
[80] Kaufmann-Kohler & Potesta, *supra* note 2, at 15.

from among this homogenous pool of arbitrators is simply because these arbitrators have unmatched experience and expertise.

It is the remaining concerns that any modified system must address. These remaining concerns are the perceived lack of legitimacy of privately appointed arbitrators deciding questions of public importance, the perceptions of arbitrator bias in favour of investors, and the lack of any external control on the correctness of the decisions of these arbitrators. It is submitted that a system of preliminary reference to a higher body can address these concerns. Such a system can be effected by way of a multilateral 'opt-in' convention.

This system could provide for an interim procedure by which the party-appointed tribunals could stay their own proceedings and refer important and contentious questions of law to a higher tribunal. Such a proposal is not new and has been made in the past.[81] A similar system operates in the context of European Union law. Courts in EU states can refer questions of law to the European Court of Justice.[82] The desirability of such a system should be addressed anew in light of the growing discontent with the system of investment arbitration as it exists today.

However, any such system must not fall prey to the same evils that plague the proposal of a multilateral court system. Accordingly, the structure and functioning of this higher tribunal, and its relationship with the ad hoc tribunal appointed by the parties must be carefully thought out.

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[81] Schreuer, *supra* note 14, at 208.

[82] Treaty on the Functioning of the European Union, Art. 267, (OJ L. 326/47-326/390; 26.10.2012).

Blindly following the European Union's system of referral may not work in the context of international investment arbitration.

It is proposed that this higher tribunal be appointed on an essentially ad hoc basis. All states should be required to nominate a member each to this higher body 'in advance'. In the event of a dispute in which the need of a reference to the higher tribunal arises, a tribunal should be constituted consisting of the nominee of each State involved in the dispute (the home state and the host state). If these two nominees agree on a particular point, the same should be binding on the tribunal making the reference. If the two nominees cannot agree on a particular point, the same should be communicated to the tribunal making the reference and that tribunal should then proceed to make its own decision.

First, such a system addresses the remaining concerns of the naysayers of investment arbitration. Reference to this higher body of state appointed persons not only lends greater legitimacy to the party appointed arbitrators, it also acts as an external check on their decisions. Any obvious defects can simply be prevented by referring the question of law to be decided to this higher body. Such a system will also help counter perceptions of bias, as it will be this permanent body which guides the tribunal on any heavily contested question of law. If the question is so contentious that this higher tribunal cannot settle it, then the tribunal making the reference can legitimately decide it one way or the other.

Second, such a system will not suffer the same defects as a multilateral investment court. It is conceded that appointments to this

higher body, if made by states, will likely be political. However, this will not lead to the politicization of dispute resolution, because each state will have an equal say in appointments and its own nominee will participate in any dispute in which the state is involved. Therefore, each state will be equally represented, and no state will be able to exert pressure on any other state. Further, any ideological or other bias of these state appointed persons will play little or no role in the resolution of the dispute. This is because their opinion will be relevant only if the other state's nominee agrees with that opinion. In the event of disagreement, the tribunal making the reference will make its own decision. Essentially, any ideological or other biases will be balanced out. In any case, such a proposal would be acceptable to the proponents of an investment court who believe that appointments, if made in advance (before a dispute arises), would be apolitical and neutral.

Finally, it is conceded that such a system is ambitious to say the least. It will require careful thought and precise drafting in order to be workable, and political consensus of the kind rarely seen in international relations. Reasonable concerns may also be raised about the additional time and cost of dispute resolution under such a system. However, these are concerns that apply with even greater force to proposals for a multilateral investment court. On balance, the proposal outlined above is substantially less ambitious than the proposal for a multilateral investment court.

V. CONCLUSION

International investment law is in a state of flux. States are increasingly unhappy with the system as it stands today and some are ready to abandon the system. The situation is worsened by intense public scrutiny of a few isolated cases and heated criticism directed at those cases. The European Union has called for a shift away from traditional investment arbitration to an investment court. The proposals for a multilateral investment court seem half-baked and are unlikely to provide long-term contentment to states. A well thought out system of preliminary referrals may be a possible solution. Such a proposal is more workable than the proposals for a multilateral investment court.