



## MegaReg Forum Paper 2016/2 To Court or Not to Court?

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Like Hamlet, states today face a choice about whether tis nobler to continue to suffer the slings and arrows of investor-state arbitration (ISDS) or to finally take arms against its sea of troubles and end them by establishing, as the EU proposes, an international investment court. For governments faced with an onslaught of complaints against ISDS, it is tempting to put its arbitrators finally to bed—and say ‘no more’ to the heartache and the thousand natural shocks of that regime. But, as with Hamlet, the question is whether the dream investment court would really be better than the very mortal ISDS before us. Should states, like Hamlet, worry about shuffling off the mortal coil of ISDS and risk an investment court that may turn into a nightmare? Should they, frightened of what dreams may come, stretch out the long calamitous life of ISDS?<sup>1</sup>

Advocates for an international investment court—as proposed by the EU within the TTIP negotiations and now in place in the CETA and the EU-Vietnam FTA<sup>2</sup>—tell us that only such a mechanism can correct ISDS’s numerous rule of law flaws. Only a first instance chamber and an appellate body of permanent judges, it is said, can put an end to party appointed arbitrators who are biased in favor of investors or of rich developed states, unlikely to have an

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<sup>1</sup> William Shakespeare, Hamlet, Act. 3, Scene I. Of course, some ISDS opponents, like M. Sornarajah, believe that ISDS is already dead and there is no choice but to “start anew.” M. Sornarajah, *Starting anew in international investment law*, Columbia FDI Perspective No. 74, 16 July 2012.

<sup>2</sup> For the EU proposal, see European Commission, Draft Text, Transatlantic Trade and Investment Partnership Trade in Services, Investment and E-Commerce, Chapter 2 Investment, Art. 9 and 10 (establishing a Tribunal of First Instance and an Appeal Tribunal), available at [http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf). See also *Canada-European Union: Comprehensive Economic and Trade Agreement (CETA)*, Can. Foreign Aff., Trade & Dev., available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/index.aspx?lang=eng>; European Commission, EU-Vietnam Free Trade Agreement: Agreed text as of January 2016, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

incentive to clarify the law, not subject to correction if they make either factual or legal mistakes, and prone to conflicts of interest impervious to successful challenge.<sup>3</sup> Only such a court—comparable to the permanent mechanisms in place for the resolution of regional human rights complaints or trade disputes—can really achieve the levels of transparency, participation, enhanced reason-giving, and forms of correction and review that characterizes legitimate global governance. Indeed, one advocate of the EU’s proposal has suggested that the only reason that an international investment court does not already exist is certain states’ (e.g., the U.S.’s) path dependent preference for the mischievous appropriation of commercial arbitration techniques to privatize the adjudication of public disputes.<sup>4</sup> On this view, the TPP’s investment chapter, which continues to rely on ISDS, ignores the “impeccable logic of the EU judicial proposal” and just puts a “bandaid” on the investment regime’s gaping wounds.<sup>5</sup>

But we know little about how an investment court would operate. There are reasons for Hamlet-like angst over the EU dream court.

First, it is important to remember that such a court is dream not fact: it is largely unprecedented. Unless one treats the incipient Arab Investment Court under the Arab League<sup>6</sup> as a precedent, there is no comparable international court. Standing international courts devoted to considering and awarding to private parties what may be substantial monetary awards against states for unknown prospective claims have not existed. The ICJ, is not a body with such a limited jurisdiction and while it has the authority to issue damage awards against states, these do not emerge from claims by private claimants. Notably, that Court has shown hesitation in deploying its authority even to issue inter-state damage awards.<sup>7</sup> Even if one considers claims settlement processes like the U.S.-Mexican Claims Commission or the Iran-U.S. Claims Tribunal to be more like permanent courts than mechanisms for ad hoc arbitration, those instances, like others, were established with known claims in mind; neither had open-ended jurisdiction. Regional human rights courts, like the ECHR, as well as the WTO’s DSU, are systems of

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<sup>3</sup> See, e.g., Robert Howse, *The TPP Investment Chapter: A Bigger Bandaid for the Wounded Legitimacy of Investor/State Dispute Settlement*, 1 July 2016 (copy on file with author).

<sup>4</sup> Robert Howse, *Courting the Critics of Investor-State Dispute Settlement: the EU proposal for a judicial system for investment disputes* (2015) (unpublished manuscript) (on file with author). See also Joost Pauwelyn, *Why the US Should Support the EU Proposal for an “Investment Court System”*, LINKEDIN (16 November 2015), available at <https://www.linkedin.com/pulse/why-us-should-support-eu-proposal-investment-court-system-pauwelyn>.

<sup>5</sup> Howse, *supra* note 3.

<sup>6</sup> See, e.g., Ben Hamida, *The First Arab Investment Court Decision*, 7 JWIT 699 (2006).

<sup>7</sup> See, e.g., *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports 2007, 43. The Court of Justice of the European Union (CJEU), charged with the accountability of EU institutions, operates more like a constitutional court for this purpose.

correction to secure states' continuing compliance with their treaty obligations. The WTO's DSU is not about securing compensation for injured traders. While the ECHR and Inter-American Court of Human Rights are paying increasing attention to providing some tangible remedies to human rights victims, few see those institutions as forums for tort-like damages. They are, like UN human rights treaty bodies, more intent on correcting states' obligations to their citizens – and not creating insurmountable financial obstacles to achieving that end. (Accordingly, the ECHR's Article 41 provides for “just compensation” when this is not provided nationally but only “as necessary.”)

No one knows what is likely to emerge from a permanent court of state-selected judges whose *raison d'être* is to render monetary awards against the very states that appointed them. Foreign investors fear a court, like the WTO's DSU, dominated by a governmental ethos, and perhaps even government functionaries as arbitrators or an influential judicial “secretariat.”<sup>8</sup> Such a court may defer to governments only too well, yielding an underused Court amidst a stampede of business by business to alternatives, including through arbitration clauses in host states' contracts, but at least mollifying, if not quite satisfying, those who oppose “undemocratic” supra-national scrutiny over governments' actions. On the other hand, if the investment court takes on the mantle of a human rights court defending the right to property, proponents of enhanced ‘sovereign policy space’ may be displeased. Those who expect a court deferential to sovereigns may be surprised if its international law judges—like former ICJ Judge (now arbitrator) Bruno Simma in a recent NAFTA case—turn out to be all too ready to overturn an environmental assessment that violates an investor's “expectations” and willing to rewrite a country's rules on how (and whom) should undertake such assessments in the course of doing so.<sup>9</sup> No one knows, in short, whether the proposed court will “correct” the alleged biases of ISDS only too well or create new sources of complaint (e.g., inability to enforce its judgments)—thereby leading to renewed forms of backlash.

Second, no one should be sanguine about the enhanced impartiality or competence of international judges as compared to party-appointed arbitrators. The selection of international judges has been demonstrably political; there is considerable evidence that international judges

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<sup>8</sup> This is one way that the WTO's DSU—a model for some defenders of the investment court idea—is described. See Joost Pauwelyn, *The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Panelists are from Venus*, 109 AJIL 761 (2015).

<sup>9</sup> As the majority ruling is described by the dissenting opinion of Don McRae in *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015.

have sometimes been selected precisely because they are seen as reliable “agents” of the states that select them and not as neutral trustees.<sup>10</sup> The ICJ has operated without an elaborate code of conduct or credible system for transparently considering potential conflicts of interest. Further, even that foremost international court appears to involve a community of litigators who come from a small set of Western states.<sup>11</sup> Judges on the International Criminal Court (ICC) have not always been selected for their relevant experience or expertise. International courts, including the European ones that presumably the EU has in mind as models, have not always issued the well-reasoned decisions that rule of law proponents want nor engaged in the credible fact-finding that is crucial to many ISDS disputes.<sup>12</sup> There are also specific reasons to be skeptical about the EU proposal. The proposed judges for the TTIP court are not the experts in international investment law that one would think would be needed to enhance the credible development of that law; on the contrary it anticipates appointment of general public international lawyers with no connection to the ISDS practice where investment law has developed. Of course, the TTIP’s proposed treaty-specific court will hardly be in a position to produce truly global investment law in any case—and may even diminish that prospect.<sup>13</sup> Moreover, the EU proposal for 21 judges appointed for renewable six year terms does not establish “permanent” judges. It leaves plenty of room for states to refuse to re-appoint judges whose rulings displease them—as has occurred on the ICJ and some claim is now occurring even within the WTO.<sup>14</sup>

Finally, advocates for an investment court need to consider what ISDS is becoming and not only the ghost of its past. The TPP’s ISDS operates within a treaty that conspicuously narrows every investor right (from FET to expropriation to national treatment and MFN) as originally contained in early U.S. BITs, expands considerably on respondent states’ rights to regulate, and subjects arbitral discretion to binding inter-state party interpretations.<sup>15</sup> Its much reformed ISDS makes progress on transparency, participation, reason-giving, and even correction

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<sup>10</sup> See, e.g., Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005).

<sup>11</sup> See, e.g., Kurt Taylor Gaubatz & Matthew MacArthur, *How International is ‘International’ Law?*, 22 MICH. J. INT’L L. 239 (2000-01).

<sup>12</sup> See, e.g., NANCY COMBS, *FACT-FINDING WITHOUT FACTS* (2010); Thomas M. Franck, *Fact-Finding in the ICJ*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS* (Richard B. Lillich ed. 1992); Makane Moïse Mbengue, *International Courts and Tribunals as Fact-Finders: The Case of Scientific Fact-Finding in International Adjudication*, 34 LOY. L.A. INT’L & COMP. L. REV. 53 (2011); José E. Alvarez, *Are International Judges Afraid of Science?: A Comment on Mbengue*, 34 LOY. L.A. INT’L & COMP. L. REV. 81 (2011).

<sup>13</sup> See, e.g., Stephan W. Schill, *The European Commission’s Proposal of an “Investment Court System” for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?*, ASIL Insight, 22 April 2016.

<sup>14</sup> See, e.g., Gregory Shaffer, *Will the US Undermine the World Trade Organization?*, HUFFINGTON POST, 24 May 2016, available at [http://www.huffingtonpost.com/gregory-shaffer/will-the-us-undermine-the\\_b\\_10108970.html](http://www.huffingtonpost.com/gregory-shaffer/will-the-us-undermine-the_b_10108970.html).

<sup>15</sup> See, e.g., José E. Alvarez, *Is the Trans-Pacific Partnership’s Investment Chapter the New ‘Gold Standard’?*, NYU IILJ Working Paper 2016/3 (MegaReg Series), available at [http://wp.nyu.edu/megareg/wp-content/uploads/sites/3134/2016/03/Alvarez\\_IILJ-MegaReg\\_2016-3.pdf](http://wp.nyu.edu/megareg/wp-content/uploads/sites/3134/2016/03/Alvarez_IILJ-MegaReg_2016-3.pdf).

and review. It requires, like the EU's proposal for a Court, a Code of Conduct for Dispute Settlement. It also authorizes amicus and public hearings; adds access to the minutes and transcripts of hearings to its ample transparency provisions; provides the parties with a first look at the proposed award to permit comment and arbitral reconsideration; clarifies that the burden of proof of claims rests with the claimant; provides a procedure for the expeditious handling of frivolous claims and even the awarding of costs for those who file them; requires arbitrators to refer some issues to the Party's Commission which can issue binding rulings in response prior to any arbitral decision; and even anticipates establishment of an appellate body should the parties otherwise establish one.<sup>16</sup> Whether these are only "bandaids" or reforms that will make ISDS a better venue to resolve investor-state claims than an untested international investment court—or a series of them—is anyone's guess.

ISDS or Court? Those willing to kill the former for the latter still need to run the gauntlet of Brexit, U.S. antipathy, and CJEU scrutiny—so we may never get to see the end of this play.<sup>17</sup>

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<sup>16</sup> *Ibid.*

<sup>17</sup> See, e.g., Stephan W. Schill, *Opinion 2/13—The End for Dispute Settlement in EU Trade and Investment Agreements?*, 16 *JWIT* 379 (2015).