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INVESTOR-STATE DISPUTE SETTLEMENT: IS THERE A BETTER ALTERNATIVE?

INTRODUCTION

Investor-state dispute settlement (ISDS) is the legal mechanism that allows multinational corporations a forum, other than the court system of the country in which the dispute arose (“host country”), to arbitrate a controversy between a corporation and the host country.¹ Treaties negotiated by the signatories, the government of the host country, and the country in which the corporation is incorporated, allow corporations to use the ISDS system in lieu of the host country’s domestic court system.² A host country may also give an ISDS tribunal jurisdiction over a dispute through legislation granting it authority or by contracting for that forum with the investor.³ The types of disputes brought through the ISDS mechanism are alleged harms to the foreign corporation caused by the host country.⁴ These claims arise from the substantive rules of trade agreements.⁵ By implementing ISDS, host countries hope to provide foreign investors with a neutral forum to address claims of expropriation by the host country, to prevent discrimination of foreign corporations by offering them the same rights as local corporations or third-country corporations, and to provide fair and equitable treatment to foreign investors.⁶ Foreign investors have the exclusive right to file claims through ISDS.⁷ Therefore, if the government would like to bring an action against a foreign corporation, or if a domestic corporation would like to bring an action

1. Christoph Schreuer, *Investment Disputes*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 22 (Rüdiger Wolfrum ed. 2010).

2. *Id.*

3. *Fact Sheet: Investor-State Dispute Settlement (ISDS)*, OFF. U.S. TRADE REP. (Mar. 2015), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds> (last visited Jan. 27, 2018).

4. Gary Clyde Hufbauer, *Investor-State Dispute Settlement*, ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME I: MARKET ACCESS AND SECTORAL ISSUES, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS 109 (Jan. 2, 2018), <https://piie.com/system/files/documents/piieb16-1.pdf>.

5. *Id.*

6. *Id.*

7. *Id.*

against the government, it must do so through the domestic court system.⁸ Foreign corporations receive this exclusive right because, unlike the host country, the foreign corporations are not signatories to the authorizing treaties.⁹

Before ISDS, if a dispute arose between a foreign individual or corporation and a host country, the dispute would be heard by the domestic legal system of the host country.¹⁰ For example, if Corporation A, operating in Venezuela, brought a suit against the Venezuelan government for lost profits, Corporation A would need to file and argue the case under the Venezuelan legal system.¹¹ For Corporation A to win the case, the Venezuelan judge, or a jury made up of Venezuelan citizens, would need to find that its government violated the law and award Corporation A monetary damages to be paid by Venezuelan taxpayers.¹² The biases implicit in the prior system caused multinational corporations to fear that their grievances were not being heard by a fair and neutral decision maker.¹³ Therefore, ISDS was adopted as the mechanism to remedy these concerns.¹⁴ Under ISDS, a foreign corporation can have its dispute heard by a panel of arbitrators, who are neither employees nor citizens of the host country the suit is against.¹⁵ The arbitrators are required to be independent and impartial.¹⁶

The appointment of arbitrators depends on the procedural rules governing the arbitration.¹⁷ The International Centre for Settlement of Investment Disputes of the World Bank (ICSID) and the United Nation's Commission on International Trade Law (UNCITRAL)¹⁸ are the most commonly used institutions for

8. *Id.*

9. *Fact Sheet: Investor-State Dispute Settlement (ISDS)*, *supra* note 3.

10. *Id.*

11. *Id.*

12. *See ISDS—What's That?*, COMMITTEE ON WAYS AND MEANS U.S. HOUSE REPRESENTATIVES (Apr. 1, 2015), <http://waysandmeans.house.gov/isds-whats-that/> (last visited Jan. 27, 2018).

13. *Fact Sheet: Investor-State Dispute Settlement (ISDS)*, *supra* note 3.

14. *ISDS—What's That?*, *supra* note 12.

15. *Id.*

16. INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) STATE OF PLAY AND PROSPECTS FOR REFORM, EUR. PARLIAMENTARY RES. SERV. 5 (Jan. 21, 2014), [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/130710/LDM_BRI\(2014\)130710_REV2_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/130710/LDM_BRI(2014)130710_REV2_EN.pdf).

17. *Id.*

18. *Id.*

the governing of ISDS and creation of model rules.¹⁹ Parties, however, may elect other organizations, such as the London Court of International Arbitration, the International Chamber of Commerce, the Permanent Court of Arbitration in The Hague, the Hong Kong International Arbitration Centre,²⁰ or international chambers of commerce and regional arbitration centers.²¹ Typically, arbitrators are selected from a pool of names, which includes arbitrators from each host country that is a signatory to the agreement.²² The foreign corporation is responsible for appointing one arbitrator, the host country appoints another, and the third is chosen in a way that complies with the agreement between the parties.²³ If there is no language in the treaty addressing the appointment of a third arbitrator, then the third arbitrator will be selected by the two other previously appointed arbitrators or by the governing authority's rules on appointment.²⁴ Arbitrators are not bound by case precedent, but at their own discretion, may refer to prior tribunal decisions when determining their award.²⁵ Additionally, the arbitrators are not bound by international law, but may interpret and apply both national and international law with their awards.²⁶ The choice of governing law and the scope of the dispute the tribunal may hear are typically articulated in the agreement between the signatories.²⁷ Some agreements use broad language, such as "all disputes concerning investments," while some use very narrow language, listing only specific types of claims that fall under the jurisdiction of ISDS arbitration.²⁸ Since the parties have consented to arbitration through treaty or by bringing the claim to

19. *Id.*

20. *ISDS—What's That?*, *supra* note 12.

21. INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) STATE OF PLAY AND PROSPECTS FOR REFORM, *supra* note 16, at 3.

22. *Id.*

23. Schreuer, *supra* note 1, ¶ 22.

24. INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) STATE OF PLAY AND PROSPECTS FOR REFORM, *supra* note 16, at 3.

25. *Id.*

26. Schreuer, *supra* note 1, ¶ 22.

27. *Id.*; INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) STATE OF PLAY AND PROSPECTS FOR REFORM, *supra* note 16, at 2.

28. INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) STATE OF PLAY AND PROSPECTS FOR REFORM, *supra* note 16, at 2.

the tribunal, as a matter of contract law, any decision rendered by the tribunal is binding on the parties.²⁹

The ultimate goal of ISDS is to continue to drive foreign investment by providing foreign investors with security and confidence that their property and rights will be protected. This is particularly the case in countries with developing economies and unsophisticated or unfamiliar legal regimes.³⁰ The countries most frequently in need of foreign investment are those building their economy. The lack of sophisticated legal systems in developing countries creates an inability to protect the investments of foreign corporations and detracts from interest in investing in that country.³¹ Proponents of ISDS argue that the system achieves this goal by providing neutrality, diplomacy, and protection to foreign investors.³² ISDS prevents conflict between foreign States, provides safeguards to multinational corporations abroad, and offers potential investors greater confidence that the law will be enforced in the host countries.³³ Additionally, ISDS is touted for its ability to aid small and medium-sized businesses that lack the financial resources or legal knowledge necessary to navigate international legal systems.³⁴ Between 1990 and 2015, ISDS panels oversaw 550 disputes involving over 100 different countries.³⁵ Notably, the most common respondents in these arbitrations were developing countries, such as Argentina and Venezuela.³⁶ Cases brought under ISDS arbitration most

29. *Id.*

30. *The Facts on Investor-State Dispute Settlement*, TRADEWINDS (Mar. 2014), <https://ustr.gov/about-us/policy-offices/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors> (last visited Jan. 27, 2018).

31. Hufbauer, *supra* note 4, at 109.

32. *Id.*

33. *Fact Sheet: Investor-State Dispute Settlement (ISDS)*, *supra* note 3.

34. *The Facts on Investor-State Dispute Settlement*, *supra* note 30.

35. *Fact Sheet: Investor-State Dispute Settlement (ISDS)*, *supra* note 3.

36. *Id.* Between 2003 and 2013, Argentina was the respondent forty-three times, while Venezuela was the respondent thirty-three times. *Id.* the Czech Republic, Egypt, Ecuador, and India, collectively, were the respondents fifty-eight times. *Id.* The top five countries with corporate claimants were the United States, Netherlands, the United Kingdom, Germany, and France. *Id.* Between 2003 and 2013, U.S. corporations filed eighty-four claims, the Netherlands filed fifty-three claims, the United Kingdom filed thirty-six claims, Germany filed thirty-one claims, and France filed twenty-seven claims. *Id.*

commonly settle prior to receiving the arbitral tribunal's decision.³⁷ Therefore, only 356 cases have gone to a final decision.³⁸ Of those 356 awards, a government party has prevailed in 37 percent of the claims brought against them.³⁹ When the government wins a case, this does not mean it collects money or damages from the corporation.⁴⁰ It simply means it does not have to pay the corporation for its alleged wrongdoing.⁴¹ Foreign investors have prevailed in 28 percent of their claims in front of an ISDS tribunal.⁴² Each year, as foreign investment increases, the number of cases brought in front of the ISDS tribunals will continue to increase.⁴³

For an award to be given to the foreign corporation, ISDS arbitrators must find that an action or policy of the government of the host country harmed the foreign investor.⁴⁴ The foreign investor can demonstrate harm in the following ways: (1) by providing supporting evidence that the State expropriated property used for the operation of its business in the State, (2) by proving that policies or actions of the State were discriminatory, or (3) by demonstrating that it was treated in a manner that falls below the commonly accepted "international minimum standard" for the treatment of foreign investors.⁴⁵ The first type of claim a foreign corporation can bring is for expropriation.⁴⁶ Typically, expropriation claims arise when a government takes the property of the foreign corporation and develops it for the overall benefit of the public of that country.⁴⁷ Second, ISDS arbitrators may hear discrimination claims alleging that the corporation was discriminated against by the foreign government because of

37. *Don't Buy the Trade Deal Alarmism*, WASH. POST (Mar. 11, 2015), https://www.washingtonpost.com/opinions/dont-buy-the-trade-deal-alarmism/2015/03/11/41575fee-c1d5-11e4-9271-610273846239_story.html.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. Roderick Abbott, Fredrik Erixon & Martina Francesca Ferracane, *Demystifying Investor-State Dispute Settlement (ISDS)*, European Centre for International Political Economy (Oct. 10, 2016), http://www.ecipe.org/app/uploads/2014/12/OCC52014_1.pdf.

44. *Fact Sheet: Investor-State Dispute Settlement (ISDS)*, *supra* note 3.

45. *Id.*

46. *Id.*

47. *Id.*

its nationality.⁴⁸ Specifically, that the government treated the foreign investor differently than a domestic investor or treated two foreign investors from different countries unequally.⁴⁹ The third claim a foreign investor may bring against a host country is for violations of the customary international law when the country divests from the global standard of treatment for foreign investors.⁵⁰ To support this claim, investors must offer evidence showing that the government's policies or actions were arbitrary, manifestly arbitrary, or outrageous.⁵¹ The applicable standard is determined by the rules that the governing ISDS tribunal is adhering to, as well as the treaty the State is governed by.⁵² If the arbitration panel finds that the host government has harmed the investor in one of these ways, a determination will then be made as to how much economic harm the investor has suffered as a result of the government action.⁵³

This Note will argue that although there is no perfect alternative to ISDS, the best proposed solution is to simultaneously implement the Investor Court System (ICS) with the improvements originally intended for the ISDS system.⁵⁴ Part I of this Note will discuss the background and history of ISDS, covering early attempts to resolve international trade issues, the evolution that brought about the current system, and why the need to address these issues only increases in a more globalized economy.⁵⁵ Part II will focus on the United States and their developing stance on ISDS, as well as the prevalence of ISDS in negoti-

48. Simon Lester, *The Rhetoric and Reality of ISDS*, CATO INST. (Nov. 10, 2015), <http://www.cato.org/publications/commentary/rhetoric-reality-isds>.

49. *Id.*

50. *Fact Sheet: Investor-State Dispute Settlement (ISDS)*, *supra* note 3.

51. Lester, *supra* note 48.

52. *Id.*

53. *Id.* Between 2003 and 2013, the most common sector of business to bring claims was the primary sector, which included oil, mining, and hydrocarbon corporations. *Id.* Corporations working in electricity generation accounted for 22 percent of ISDS cases. *Id.* Manufacturing corporations represented 15 percent of ISDS cases, construction represented 12 percent of ISDS cases, and finance and insurance represented 18 percent of ISDS cases. *Id.*

54. Cecilia Malmström, Commissioner for Trade, Discussion on Investment in TTIP at the Meeting of the International Trade Committee of the European Parliament (Mar. 18, 2015), http://europa.eu/rapid/press-release_SPEECH-15-4624_en.htm.

55. Abbott et al., *supra* note 43, at 4.

ations for the Trans-Pacific Partnership (TTP) and Transatlantic Trade and Investment Partnership (TTIP).⁵⁶ Part III will review the criticism ISDS has faced from its opponents and explore notable cases that ISDS arbitral tribunals have presided over. Finally, Part IV will discuss solutions, ideas, and improvements that various parties have made to the ISDS system. These solutions include further defining the types of disputes that can be heard by international tribunals, preventing conflicts of interest through further rules for arbitrators, implementing a transparent decision-making process, publishing and referring to precedent when making a ruling, and creating an appellate system.

I. BACKGROUND AND HISTORY OF ISDS

ISDS is not a new mechanism.⁵⁷ In fact, it is decades old.⁵⁸ Trade disputes arising between host countries and foreign investors have been present since people were capable of moving goods across borders.⁵⁹ One of the earliest forms of investment into foreign countries began when corporations built factories in foreign countries and shipped goods overseas.⁶⁰ During the twentieth century, international trade grew significantly, as wealthy countries became capable of trading with other countries, such as the United States, United Kingdom, Canada, South Africa, Australia, and New Zealand.⁶¹ To address the growing need for a forum to resolve disputes between foreign investors and host countries, several different tribunals were established, including the London Court of International Arbitration in 1903, the Arbitration Institute of the Stockholm Chamber

56. *Fact Sheet: Investor-State Dispute Settlement (ISDS)*, *supra* note 3.

57. Abbott et al., *supra* note 43, at 4. In 1903, the London Court of International Arbitration was established. *Id.* It was the successor to arbitration tribunals in the city of London in the 1880s. *Id.* In 1917, the Arbitration Institute of the Stockholm Chamber of Commerce was established as part of the Stockholm Chamber of Commerce. *Id.* In 1923, the International Court of Arbitration at the International Chamber of Commerce in Paris was established. *Id.* The next significant phase in seeking protection for investors occurred after the end of World War II. *Id.*

58. Linda Dempsey, *ISDS: A Fact- and Experience Based Review*, TRANS-ATLANTIC BUS. COUNCIL (Oct. 10, 2016), <http://www.transatlanticbusiness.org/news/isds-a-fact-and-experience-based-review/>.

59. Abbott et al., *supra* note 43, at 4.

60. *Id.*

61. *Id.*

of Commerce in 1917, and the International Chamber of Commerce in Paris, France in 1923.⁶² There was little progress in international trade law until the end of World War II.⁶³ International trade issues, such as expropriation, became more common with the development of newly independent nationalist governments.⁶⁴

In 1958, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention") was ratified.⁶⁵ With 157 signatories, the Convention is now recognized as fundamental in supporting international arbitration.⁶⁶ The Convention has made arbitral awards enforceable around the globe by requiring the domestic courts of States that are signatories to recognize private arbitration agreements and awards.⁶⁷ Prior to the Convention, if a party received a foreign award, there was no way for the prevailing party to enforce that award outside of that jurisdiction, rendering the award nearly useless.⁶⁸ For the arbitral award to have utility, the prevailing party would need to find a court that had jurisdiction over the losing party and request that the court enforce the arbitral award against them.⁶⁹ To address the continued growth of international trade, the Convention allows the prevailing party to enforce a foreign award in the court system of any country that is a signatory to the Convention.⁷⁰ Even with the Convention as a safeguard, concerns persisted among investors that this alone was an insufficient source of protection for their investments in countries with unfamiliar or unstable legal systems.⁷¹

Several countries utilized bilateral trade agreements in an attempt to further ease the concerns of foreign investors and to

62. *Id.*

63. *Id.*

64. *Id.* Investment treaties were added to allow companies a mechanism to settle disputes in a neutral forum. *Id.* In the 1970s, foreign corporations made approximately forty expropriation claims against the government per year. *Id.* Currently, only three to four expropriation claims are made per year. *Id.*

65. Abbott et al., *supra* note 43, at 4.

66. *Id.*

67. *Id.*

68. *History 1923–1958*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org/travaux+preparatoires/history+1923+-+1958> (last visited Jan. 28, 2018).

69. *Id.*

70. *Id.*

71. Abbott et al., *supra* note 43, at 4–5.

demonstrate that the government valued and intended to protect investors' property rights.⁷² In 1959, the first ISDS clause emerged in a bilateral trade agreement between Germany and Pakistan.⁷³ In the 1960s, the ICSID, an institution committed to resolving disputes between countries and international investors, was created.⁷⁴ The ICSID later developed and ratified the ICSID Convention,⁷⁵ which became the first multilateral agreement to protect investor rights and resolve investor disputes.⁷⁶ The ICSID Convention was a major collaborative effort to address the concerns of foreign investors about expropriation and the difficulty navigating unfamiliar domestic court systems.⁷⁷ Additionally, the United Nations created its own body to address and develop international trade law—UNCITRAL.⁷⁸ UNCITRAL's purpose was to create consistent and uniform rules for international trade issues through the publication of conventions, model laws, and model rules.⁷⁹ These two institutions, the ICSID and UNCITRAL, provided the framework and forum under which international trade law issues are addressed today.⁸⁰ The ISDS language created in 1959 can now be found in more than 3000 agreements, with 180 different countries as signatories.⁸¹

II. THE UNITED STATES AND ISDS

ISDS has appeared in a number of trade agreements that the United States is signatory to.⁸² It is a form of dispute resolution available to U.S. corporations and U.S. citizens investing in foreign countries, as well as foreign citizens or corporations investing in the United States.⁸³ Therefore, with the addition of ISDS in countries that are joint signatories, the appropriate forum for disputes between either U.S. corporations operating in a foreign country or foreign investors operating in the United States, is an

72. *Id.*

73. *Id.* at 5; Hufbauer, *supra* note 4, at 5.

74. Abbott et al., *supra* note 43, at 5.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Don't Buy the Trade Deal Alarmism*, *supra* note 37.

82. *Fact Sheet: Investor-State Dispute Settlement (ISDS)*, *supra* note 3.

83. *Don't Buy the Trade Deal Alarmism*, *supra* note 37.

ISDS arbitration.⁸⁴ Despite pushback and changing administrations, the United States has historically supported the use of ISDS. As of December 2016, the United States was a signatory to fifty trade agreements that included ISDS clauses.⁸⁵ Using ISDS, there have been seventeen claims brought against the United States, with thirteen going to a final decision.⁸⁶ Of the cases that have made it to a final decision, the United States has never had an award against them.⁸⁷

ISDS has become a divisive discussion topic as free trade agreements have been in negotiations, including the Comprehensive Economic and Trade Agreement (CETA), the TTP, and the TTIP.⁸⁸ In February 2008, negotiations began over the TPP, and eight years later, in February 2016, the TTP was signed by the United States and the Pacific Rim countries.⁸⁹ Proponents of ISDS in the TTP, including the U.S. government, argued that it would increase exportation of products manufactured in the United States, aid economic growth, support and retain American jobs, offer greater protection to the middle class,⁹⁰ and advance the United States' interests and values abroad.⁹¹ Additionally, they argued that ISDS would allow small businesses to develop abroad by avoiding the risks and costs of dealing with the foreign court system, without being able to afford the proper resources to navigate through it.⁹² The Obama Administration⁹³

84. *Id.*

85. *Id.*

86. *Fact Sheet: Investor-State Dispute Settlement (ISDS)*, *supra* note 3.

87. *Id.*

88. *Id.*

89. The signatories to the TTP include Australia, Canada, Japan, Malaysia, Mexico, Peru, the United States, Vietnam, Chile, Brunei, Singapore, and New Zealand. *TPP: What is it and why does it Matter?*, BBC NEWS (Jan. 23, 2017), <http://www.bbc.com/news/business-32498715>.

90. *Fact Sheet: Investor-State Dispute Settlement (ISDS)*, *supra* note 3.

91. Press Release, OFF. U.S. TRADE REP., Statement by Ambassador Froman on the Release of the Trans-Pacific Partnership Text (Nov. 2015), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/november/statement-ambassador-froman>.

92. *Id.*

93. *Here's the Deal: The Text of the Trans-Pacific Partnership*, MEDIUM (Nov. 5, 2015), <https://medium.com/the-trans-pacific-partnership/here-s-the-deal-the-text-of-the-trans-pacific-partnership-103adc324500#.o21sp1e8l>.

stated that the TPP is “the highest standard trade agreement in history.”⁹⁴

The European Union is a signatory to more bilateral investment treaties than the United States.⁹⁵ It represents more than half of the international investment tribunals that have met over the past decade.⁹⁶ This makes them the most active users of ISDS.⁹⁷ In July 2013, negotiations began between the United States and the European Union over the TTIP.⁹⁸ The negotiations lasted for one week each, with the location alternating between the United States and Brussels.⁹⁹ The TTIP hopes to further opportunities for American businesses in European markets and create more than thirteen million jobs in the United States and the European Union.¹⁰⁰ The TTIP has many opponents because of the ISDS provision.¹⁰¹ Major criticisms of the ISDS provision include the belief that foreign corporations should not have the opportunity to sue the government in any forum other than domestic courts,¹⁰² as it allows foreign corporations to challenge State laws and potentially pay large settlements, without using the domestic court system.¹⁰³

III. CRITICISMS OF ISDS

In the United States, ISDS has received criticism from liberals and conservatives.¹⁰⁴ Conservatives fear that this type of foreign tribunal will threaten the United States’ sovereignty by giving

94. Daniel Marans & Ben Walsh, *Historic Trade Deal Confirms Critics’ Worst Fears*, HUFFINGTON POST (Nov. 5, 2015, 11:17 PM), http://www.huffingtonpost.com/entry/trade-deal-confirms-advocates-worst-fears_us_563b9061e4b0411d306ff765.

95. Abbott et al., *supra* note 43, at 2.

96. *Id.*

97. *Id.*

98. *EU and US Conclude First Round of TTIP Negotiations in Washington*, EUR. COMMISSION, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=941> (last visited Mar. 2, 2018).

99. *Id.*

100. *Fact Sheet: Investor-State Dispute Settlement (ISDS)*, *supra* note 3.

101. 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?noredirect=on&utm_term=.df3a07e5e896.

102. *Fact Sheet: Investor-State Dispute Settlement (ISDS)*, *supra* note 3.

103. Warren, *supra* note 101.

104. *Id.*

international arbitrators a right typically reserved for the domestic courts.¹⁰⁵ Unlike American judges, international arbitrators lack the ties and responsibility to uphold the U.S. Constitution and common law.¹⁰⁶ Libertarians, on the other hand, fear that ISDS will offer subsidies funded by the U.S. taxpayer to countries that lack sophisticated legal systems to hear these cases themselves.¹⁰⁷ Progressives are concerned that ISDS arbitration will offer multinational corporations greater power than they already have through potentially large awards to corporations from the tribunals.¹⁰⁸ With ISDS, corporations have the opportunity to escape the application of strict environmental regulations and labor standards that typically apply to domestic corporations.¹⁰⁹ ISDS offers an expansion of the enforceability and effectiveness of international law in jurisdictions it would not traditionally reach.¹¹⁰ This tool, however, is only available for a small niche, specifically corporations who have the financial ability to invest abroad.¹¹¹ Domestic investors and individuals will not reap the benefits of the ISDS system.¹¹²

Normally, if a corporation alleged that a grievance was committed against it, the corporation would have to sue in the domestic court system where it was operating.¹¹³ There would be no distinction in access to the court system for a domestic corporation or a foreign corporation.¹¹⁴ Under the ISDS system, however, two corporations operating in the United States, only distinct from one another in their nationality, do not have access to the same legal regime.¹¹⁵ For opponents of ISDS, this has become a significant point of controversy.¹¹⁶ Opponents are concerned

105. *Id.*

106. *Id.*

107. *Id.*

108. Joseph E. Stiglitz & Adam Hersh, *Opinion: The Trans-Pacific Partnership Charade: TPP Isn't About 'Free' Trade At All*, MKT. WATCH (Oct. 5, 2015), <https://www.marketwatch.com/story/the-trans-pacific-partnership-charade-tpp-isnt-about-free-trade-at-all-2015-10-05>.

109. Warren, *supra* note 101.

110. Lester, *supra* note 48.

111. *Id.*

112. *Id.*

113. Warren, *supra* note 101.

114. Lester, *supra* note 48.

115. *Id.*

116. *Id.*

that corporations, under the ISDS system, will avoid the scrutiny given to claims brought in the domestic court system of highly developed and capable countries, yet will still be able to move forward with cases against the government.¹¹⁷ Foreign corporations skirt the U.S. domestic court system by bringing their claims to an arbitration panel.¹¹⁸

If a foreign corporation succeeds in its claims brought to the international tribunal, the host country's taxpayers are ultimately paying for the award through taxes.¹¹⁹ Although the States cannot be forced to alter their laws or change their policies,¹²⁰ the potential for such large awards allows foreign corporations to challenge a participating country's laws and deter governments from passing legislation that is similar, as it may create a potential claim for a corporation in the future.¹²¹ Awards from ISDS arbitration panels are not nominal. For example, in 2012, a Houston-based oil company was awarded \$1.8 billion USD from Ecuador for terminating an oil-concession contract.¹²² The award was roughly half of the country's health budget for the year.¹²³ These potential price tags, and their ability to impact legislation, have caused concern with groups promoting climate change and global health, making them some of the greatest oppositions of ISDS.¹²⁴ For example, under ISDS, companies who make fossil fuels can challenge a legislative ban or limit on energy extraction, which may aid the fight against climate change, while also potentially qualifying as expropriation.¹²⁵ An influential grassroots environmental organization, the Sierra Club,¹²⁶ has estimated that as many as 9,000 more U.S. corporations will

117. Stiglitz & Hersh, *supra* note 108.

118. Warren, *supra* note 101.

119. *Id.*

120. DAVID W. RIVKIN ET AL., INVESTOR-STATE DISPUTE SETTLEMENT: THE IMPORTANCE OF AN INFORMED, FACT-BASED DEBATE, INT'L BAR ASS'N, [TINYURL.COM/L3G5RT9](http://tinyurl.com/L3G5RT9).

121. See Marans & Walsh, *supra* note 94.

122. Claire Provost & Matt Kennard, *The Obscure Legal System That Lets Corporations Sue Countries*, GUARDIAN (June 10, 2015), <https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-ttip-icsid>.

123. *Id.*

124. Hufbauer, *supra* note 4, at 109.

125. Marans & Walsh, *supra* note 94.

126. See generally *About The Sierra Club*, SIERRA CLUB, <http://www.sierraclub.org/about> (last visited Jan. 28, 2018). The Sierra Club is one of the most influential and largest grassroots environmental organizations. *Id.*

be eligible to challenge a country's environmental laws using the ISDS clause of the TPP.¹²⁷ ISDS has not only impacted environmental legislation, as the medical community foresees a problem as well. For example, European States are concerned that they could see a hike in drug prices with the application of U.S. law by ISDS arbitrators, as U.S. law traditionally offers drug companies greater protection against competition by preventing the production of generic drugs.¹²⁸ Applying U.S. law, the European government would need to provide patents to drug companies that, under their own laws, they would not otherwise provide, preventing the publication of the drugs chemical makeup and the ability to create competing versions.¹²⁹

The State signatories have attempted to put safeguards in place to prevent corporations from taking advantage of ISDS arbitration.¹³⁰ For example, the TPP has a provision¹³¹ allowing a country to choose not to offer ISDS arbitration to tobacco companies that bring claims against the government.¹³² ISDS is still the default forum for dispute resolution for corporations.¹³³ Therefore, for a country to deny this forum, the government will need to actively disallow a foreign corporation from using ISDS.¹³⁴ Critics argue that by requiring the government to take this extra step of delineating certain corporations or industries from using ISDS, the door is opened for corporations, like tobacco companies, to intimidate and bribe government officials, forcing them to use the ISDS system.¹³⁵ These fears are not unsubstantiated.¹³⁶ For example, Phillips Morris used ISDS to ar-

127. TPP TEXT ANALYSIS: THE TPP WOULD INCREASE RISKS TO OUR AIR, WATER, AND CLIMATE, SIERRA CLUB 1, <https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/INITIAL%20ANALYSIS%20-%20ENVIRO%20IMPLICATIONS%20TPP.pdf>.

128. Marans & Walsh, *supra* note 94.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. See generally *Philip Morris Sues Australia Over Cigarette Packaging*, BBC NEWS (Jan. 2, 2017), <http://www.bbc.com/news/world-asia-15815311> (Philip Morris brings suit against Australia); Matthew C. Porterfield & Christopher R. Byrnes, *Phillips Morris v. Uruguay: Will Investor-State Arbitration Send Restrictions on Tobacco Market Up in Smoke?*, INT'L INST. SUSTAINABLE

gue a regulation that was implemented as a public health measure on the sale of cigarettes harmed their profits and was expropriation.¹³⁷

Adversaries of ISDS disagree with proponents who claim that arbitrators appointed to the ISDS panel will be independent and unbiased.¹³⁸ Unlike U.S. judges, who have either lifelong or set terms, ISDS arbitrators are private lawyers who are paid to preside over a certain arbitration proceeding, while also maintaining their private businesses.¹³⁹ These arbitrators, on average, are paid \$600–\$700 USD per hour.¹⁴⁰ This level of compensation and hourly rate system gives them little incentive to dismiss a case or resolve it expediently.¹⁴¹ Arbitrators used in ISDS are selected from a pool of potential arbitrators coming from uninterested countries that are signatories to trade agreements that contain ISDS.¹⁴² Unlike judges, these lawyers are not bound by the same conflict of interest rules.¹⁴³ Frequently, the lawyers hired to hear these cases are the same lawyers recruiting them as clients in the future.¹⁴⁴ Not only are they not bound by the same conflict of interest rules, but due to the private nature of arbitration, they are not accountable to the public the way judges are.¹⁴⁵ ISDS arbitrators, unlike judges in domestic courts, are not obligated to make decisions based on U.S. law. Instead, their decisions are based off of the trade agreement and customary international law.¹⁴⁶ Unique to ISDS, arbitrators are not bound by case precedent, giving them the opportunity to make unpredictable decisions.¹⁴⁷ Additionally, they do not face the

DEV. (July 12, 2011) <http://www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/>.

137. Marans & Walsh, *supra* note 94; Stiglitz & Hersh, *supra* note 108.

138. Warren, *supra* note 101.

139. *Investor-State Dispute Settlement: The Arbitration Game*, ECONOMIST (Oct. 11, 2014), <http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration> [hereinafter ECONOMIST].

140. *Id.*

141. *Id.*

142. Warren, *supra* note 101.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

same review as judges go through under the appeals process, as arbitration decisions are final and binding against the parties.¹⁴⁸

The purpose of ISDS was to drive foreign investment during World War II and address concerns that countries lacking developed legal systems would not be able to protect foreign investors.¹⁴⁹ The environment for foreign investment that existed then is not the same facing foreign corporations today.¹⁵⁰ Signatories to the TTP have flourishing economies and sophisticated legal systems that can fairly deal with a case brought by a foreign investor.¹⁵¹ For countries that do not have legal systems that can appropriately handle these cases, the market will appropriately adjust for these risks.¹⁵² Corporations can choose not to invest in those companies if the risk is too great. They can also find a way to invest in the country politically to help them further develop and safeguard their property rights.¹⁵³ As a result of this system, greater value will be placed on investing in countries with a stable legal system, which will incentivize countries to develop legal regimes capable of providing confidence to investors.¹⁵⁴

IV. NOTEWORTHY CASES UNDER ISDS

The number of cases brought for arbitration between countries and private investors under ISDS has increased over the past two decades.¹⁵⁵ Prior to 2003, there were fewer than one hundred cases filed with ISDS.¹⁵⁶ At the beginning of the 2000s, when compared to the 1990s, there was a decrease in the number of ISDS cases.¹⁵⁷ Between 2003 and 2013, there were 461 cases filed for ISDS arbitration.¹⁵⁸ That growth has only increased in recent years.¹⁵⁹ Since 2014, there have been more than sixty cases filed for ISDS arbitration.¹⁶⁰ The most active users of ISDS

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. Abbott et al., *supra* note 43, at 8.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

are investors in the European Union.¹⁶¹ The European Union is the respondent in more than half of the complaints filed with international investment tribunals, making them the most prevalent respondent.¹⁶² Investors from the United States, however, more frequently use ISDS arbitration.¹⁶³ Corporations using the ISDS system frequently work in areas with a high level of government involvement and political patronage.¹⁶⁴ Frequently, these cases are settled before the tribunal has made its ruling.¹⁶⁵

The tobacco industry is infamous for taking advantage of international investment rules to alter government restrictions on the tobacco market.¹⁶⁶ In the 1990s, Canada passed a “plain packing” mandate as a form of tobacco control regulation, requiring the removal of attractive packaging on cigarette cartons.¹⁶⁷ All packages would need to have standardized colors, brand name depictions, size, materials, and opening methods.¹⁶⁸ The goal of the policy was to decrease tobacco purchases.¹⁶⁹ In response, a tobacco company contacted the Canadian Committee on Health, stating it would sue the government for expropriation if the legislation passed, costing taxpayers millions of dollars.¹⁷⁰ The Canadian government moved forward with the legislation but it was ultimately struck down by the Canadian Supreme Court.¹⁷¹ There is speculation, however, that the tobacco company’s threat stopped the government from appealing the decision.¹⁷²

Similarly, Uruguay passed legislation regulating tobacco use in their country.¹⁷³ The tobacco products were required to have a “single presentation” and companies were prohibited from

161. *Id.*

162. Abbott et al., *supra* note 43, at 8.

163. Porterfield & Brynes, *supra* note 136.

164. Abbott et al., *supra* note 43, at 2.

165. *Id.*

166. Rob Cunningham & Ken Kyle, The Case for Plain Packaging, 4 TOBACCO CONTROL 80, 1 (1995), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1759383/pdf/v004p00080.pdf>.

167. *Id.*

168. *Id.*

169. *Id.*

170. Porterfield & Brynes, *supra* note 136.

171. *Id.*

172. *Id.*

173. *Id.*

marketing more than one tobacco product for each brand.¹⁷⁴ The tobacco packages also had to include “pictograms” with graphic images of the health consequences of smoking.¹⁷⁵ Finally, there was a mandate that health warnings must cover 80 percent of the front of a cigarette package.¹⁷⁶ As a result, Phillips Morris moved for ISDS arbitration.¹⁷⁷ Phillips Morris argued that regulations violated the Switzerland-Uruguay Bilateral Investment Treaty.¹⁷⁸ The corporation sought damages totaling \$25 million USD, while also demanding that the application of the regulation be suspended.¹⁷⁹ Phillip Morris claimed the regulations devalued its investment and right to a cigarette trademark.¹⁸⁰ The corporation argued that legislation frustrated its legitimate expectation of a stable and predictable regulatory framework.¹⁸¹ Phillip Morris also claimed it was denied fair and equitable treatment, as required by the World Trade Organization’s Agreement on Trade Related Aspects of Intellectual Property Rights.¹⁸² In July 2016, ICSID found in favor of Uruguay.¹⁸³ Phillips Morris was required to pay Uruguay \$7 million USD in damages, as well as cover all fees and expenses owed to the Tribunal.¹⁸⁴ This decision dealt a significant blow to the tobacco industry.¹⁸⁵ The award will hopefully deter the tobacco industry from

174. *FTR Holdings S.A. (Switzerland) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (Feb. 19, 2010), <http://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf>.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Part II—Standards Concerning the Availability, Scope, and Use of Intellectual Property Rights*, WORLD TRADE ORG. (Jan. 3, 2016), https://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm. The World Trade Organization’s Agreement on Trade Related Aspects of Intellectual Property Rights sets minimum standards for intellectual property regulations for nations that are World Trade Organization members. *Id.*

183. *Phillips Morris v. Uruguay: Will Investor-State Arbitration Send Restrictions on Tobacco Marketing Up in Smoke?*, INV. TREATY NEWS (July 12, 2011), <http://www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/>.

184. *Id.*

185. *Id.*

using ISDS to challenge tobacco control legislation in the future.¹⁸⁶

In 2008, in response to the financial crisis, the Spanish government began to revoke subsidies that it had previously offered to solar companies.¹⁸⁷ The government did so in an attempt to decrease its expenditures and balance the budget.¹⁸⁸ The revocation of subsidies occurred over five years.¹⁸⁹ Between 2011 and 2013, twenty-two different companies sued Spain in response to the revocation of their subsidies.¹⁹⁰ Despite Spain announcing the reversal of subsidies three years prior, a private equity firm and investment fund purchased Spanish solar power plants. They also bought claims against the government for the denial of the subsidies.¹⁹¹ Unlike domestic investors, the foreign investors were able to bring suit in front of an ISDS Tribunal.¹⁹² The foreign investors claimed that despite the announcement indicating subsidies would be reversed, the investors believed that Spain would continue to offer them.¹⁹³ After the financial crisis, Spain halted their distribution of renewable energy subsidies.¹⁹⁴ The government had to expend money and resources to defend its position to the ISDS panel.¹⁹⁵ Previous arbitration decisions favored Spain, but in May 2017, Spain lost its first international arbitration decision over the subsidy cuts.¹⁹⁶ The ICSID tribunal found that Spain had denied the foreign corporation fair and equitable treatment.¹⁹⁷ This is an unfortunate outcome for Spain,

186. Alexandria Nightingale, *The Significance of Uruguay's Win Over Philip Morris International*, INT'L PROP. WATCH (July 21, 2016), <http://www.ip-watch.org/2016/07/21/the-significance-of-uruguays-win-over-philip-morris-international/>.

187. David Dayen, *The Big Problem with the Trans-Pacific Partnership*, HUFFINGTON POST (Aug. 29, 2016), http://www.huffingtonpost.com/entry/isds-lawsuit-financing-tpp_us_57c48e40e4b09cd22d91f660.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. Miguel Ángel Noceda, *Spain Loses First Arbitration Claim Over Cuts to Renewable Energy Subsidies*, EL PAÍS (May 5, 2017), https://elpais.com/elpais/2017/05/05/inenglish/1493988308_857826.html.

197. *Id.*

as it still faces dozens of other arbitrations over the subsidy revocation.¹⁹⁸ In the first case, the Tribunal dismissed the first of twenty investment complaints.¹⁹⁹ The Tribunal argued that the investors could have easily predicted the change in subsidies distribution.²⁰⁰

V. THE SOLUTION

ISDS was developed to address the risks inherent in increased investment abroad and to show a commitment by host countries to enforcing their investment treaties.²⁰¹ Trade agreements, such as the TTP and the TTIP, have faced resistance because of the fundamental distrust in ISDS's ability to appropriately resolve investment disputes.²⁰² Ideas for how to improve dispute resolution between investors and foreign States have ranged from refining ISDS to proposing a completely new forum.²⁰³ Opponents are concerned with the lack of transparency in the arbitral tribunal's decision-making, the inequitable treatment of domestic and foreign investors, the ability of large arbitral awards to influence a State's current and future policies, and the potential disruption of a State's ability to regulate business within its borders.²⁰⁴ The TTP has attempted to maintain the ISDS framework, while simultaneously implementing some improvements. The proposed improvements hope to achieve respect for environmental, health, and safety regulations, while also offering greater transparency through open proceedings and participation by constituents interested in the dispute who are not necessarily parties to the dispute.²⁰⁵ Some countries have taken a different tactic, outright rejecting the use of ISDS in their investment treaties.²⁰⁶ Australia has stated it will no longer support

198. *Id.*

199. Dayen, *supra* note 187.

200. *Id.*

201. INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) STATE OF PLAY AND PROSPECTS FOR REFORM, *supra* note 16, at 1.

202. Warren, *supra* note 101.

203. *ECONOMIST*, *supra* note 139.

204. *Id.*

205. Hufbauer, *supra* note 4, at 110.

206. *ECONOMIST*, *supra* note 139.

ISDS in future trade agreements.²⁰⁷ Brazil has continuously refused to sign trade agreements that contain ISDS.²⁰⁸ South Africa and India have stated that they will withdraw from treaties with ISDS clauses.²⁰⁹ As more countries refuse to sign treaties with ISDS included, making improvements to the current system may no longer be sufficient. Recognizing the growing discontent with the ISDS system during negotiations for the TTIP, the European Union introduced a new proposed solution, the ICS.²¹⁰ Much like ISDS, however, the ICS has faced similar criticisms.²¹¹

There is no perfect solution to the criticisms of ISDS. Many countries have attempted to offer suggestions for how to address the criticisms it has faced. For example, to resolve concerns of conflicts of interest for arbitrators, the South African Development Community (“SAC Model”) suggested disallowing arbitrators from acting as counsel in any other arbitration that involves treaty-based investor-state arbitration.²¹² Additionally, to end concerns of impeding state sovereignty, suggestions have been made to limit the scope of claims by adding specificity to treaty language.²¹³ For example, treaties frequently use language such as foreign investors must receive “fair and equitable treatment.”²¹⁴ This phrase is too broad and lacks predictability.²¹⁵ This issue could be addressed by removing the generality and further defining the meaning of these terms.²¹⁶ Another suggested improvement is to delineate specific types of claims to be brought under ISDS, such as nationality based discrimination and expropriation and clarify that all other disputes are to be brought to

207. *Id.*

208. *Id.*

209. *Id.*

210. Nikolaj Nielsen, *TTIP Investor Court Illegal, Say German Judges*, EU OBSERVER (Feb. 4, 2016, 6:17 PM), <https://euobserver.com/economic/132142>.

211. FROM ISDS TO ICS: A LEOPARD CAN’T CHANGE ITS SPOTS, GREENPEACE 7 (Feb. 11, 2016), http://www.greenpeace.org/eu-unit/Global/eu-unit/reports-briefings/2016/2016_02_11_Greenpeace%20Position%20Paper%20ICS_Final.pdf [hereinafter GREENPEACE].

212. SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE WITH COMMENTARY, SOUTH AFR. DEV. COMMUNITY 62 (July 2012), <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> [hereinafter SOUTH AFR. DEV. COMMUNITY].

213. Lester, *supra* note 48.

214. *Id.*

215. *Id.*

216. *Id.*

the domestic court system of the State.²¹⁷ To keep as many cases in domestic courts as possible and maintain state sovereignty, a requirement that foreign investors exhaust all local remedies before bringing a claim to an ISDS tribunal has been suggested.²¹⁸ To address inconsistencies in decisions and the lack of predictability, an appeal mechanism has been suggested.²¹⁹ Each of these improvements would help address the criticisms against ISDS. Their success, however, may be limited within the ISDS model.

The European Union has found that these refinements alone are not enough to resolve all of the concerns with ISDS, instead proposing the ICS as a better solution.²²⁰ In 2015, after extensive discussions with the European Council and the European Parliament, the European Commission suggested a replacement to ISDS.²²¹ The European Parliament voted in favor of the TTIP, but only if ISDS was replaced with a new system to resolve international investment disputes.²²² The European Parliament was concerned ISDS was not public and transparent, corporations were not subject to public law, and that the interests of foreign investors were taking precedent over the public interest.²²³ The number of judges sitting on the ICS will depend on the number of cases heard by the Court and the number of countries that agree to participate in the ICS.²²⁴ The EU states that the selection of permanent and full-time judges will be independent and objective.²²⁵ To achieve transparency, all documents and hearings would be public and published online.²²⁶ The ICS would

217. *Id.*

218. MODEL TEXT FOR THE INDIAN BILATERAL INVESTMENT TREATY, MY GOV. 15–16 (https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf).

219. Malmström, *supra* note 54.

220. Aline Roberts, European Parliament Backs TTIP, Rejects ISDS, EURACTIV (July 9, 2015), <http://www.euractiv.com/section/global-europe/news/european-parliament-backs-ttip-rejects-isds/>.

221. *Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations*, EUR. COMMISSION (Sept. 16, 2015), http://europa.eu/rapid/press-release_IP-15-5651_en.htm.

222. *Id.*

223. Roberts, *supra* note 220.

224. *Id.*

225. *See* A MULTILATERAL INVESTMENT COURT, EUR. COMMISSION (Sept. 2017), http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf.

226. *Id.*

227. Roberts, *supra* note 220.

have an appeals mechanism to address potential errors in prior judgments and ensure consistency in rulings.²²⁷ The European Union hopes that after implementing the ICS within the United States and the European Union, the ICS will eventually expand into a universal multilateral court for all investment disputes.²²⁸ When introducing the proposed ICS, EU Trade Commissioner, Cecilia Malmström, stated “[w]e want to establish a new system built around the elements that make citizens trust domestic or international courts.”²²⁹

Critics of this solution fear that the ICS has many of the same problems as ISDS.²³⁰ For example, the German Association of Magistrate, a Berlin judicial organization, has stated that it “sees neither a legal basis nor a need for such a court,” and that the ICS would undermine domestic courts, depriving governments of their power.²³¹ There is no restriction in place to stop a judge from acting as counsel for a foreign investor and judge in cases brought by investors.²³² Critics claim the ICS judges will not have the same conflict of interest rules and scrutiny as domestic judges.²³³ ICS courts will still only be available for foreign investors.²³⁴ This divided system will create separate levels of scrutiny for domestic and foreign investors.²³⁵ Since judges will be selected from each perspective government, however, this will at least offer domestic judges an opportunity to apply domestic laws.²³⁶ Domestic case precedent from the European Union and the United States does not bind the ICS.²³⁷ In the alternative, neither European Union domestic courts nor United States domestic courts will need to make consistent rulings with the ICS case precedent.²³⁸ The ICS model, through its proposed appeals

227. *Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations*, *supra* note 221.

228. Malmström, *supra* note 54.

229. *Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations*, *supra* note 221.

230. GREENPEACE, *supra* note 211, at 7.

231. Nikolaj Nielsen, *TTIP Investor Court Illegal, Say German Judges*, EU OBSERVER (Feb. 4, 2016, 6:17 PM), <https://euobserver.com/economic/132142>.

232. GREENPEACE, *supra* note 211, at 2.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 2.

process, addresses some concerns regarding ISDS, specifically its inconsistency and lack of case precedent.²³⁹

Although the ICS has faced criticism, it could be a solution to many of the concerns raised by critics of ISDS by implementing the safeguards and solutions countries have put forth.²⁴⁰ Since the ICS was proposed during the negotiations for the TTIP, it would only apply to the countries that are signatories to that agreement. If the ICS is successful, however, it has the ability to expand into a multilateral system, available to all countries, and create a comprehensive, universal system that provides consistent treatment and a forum for all foreign corporations.²⁴¹ Unlike ISDS, the ICS offers an appellate review board that allows either party to appeal a decision, ensuring that each country and foreign investor is reviewed using the same standards.²⁴² Additionally, the ICS hopes to increase the number of reviewers on a case and as a result, further represent each country's legal system and values.²⁴³ Much like the suggestion proposed in the SAC Model, instead of arbitrators being appointed to hear a specific case, the ICS judges would be permanent appointees.²⁴⁴ Therefore, in hopes of easing concerns of impartiality, the ICS judges would never need to recruit international corporations as their future clients.²⁴⁵ To prevent a flooding of the ICS, as previously suggested, the ICS could require that foreign investors exhaust all legal remedies available to them in their host country prior to bringing a case to the ICS.²⁴⁶ This would address the fear that foreign investors are escaping harsh review by domestic courts and attempting to alter public policy by bringing their case to a foreign court.²⁴⁷ Finally, if the ICS is able to hear only an extremely limited number of cases, this could prevent the concerns that a country's sovereignty is being harmed.²⁴⁸ Although there is no forum that will relieve all parties of their concerns, the ICS

239. *Id.* at 7.

240. SOUTH AFR. DEV. COMMUNITY, *supra* note 212, at 62; Malmström, *supra* note 54.

241. Malmström, *supra* note 54.

242. *Id.*

243. GREENPEACE, *supra* note 211, at 2.

244. A MULTILATERAL INVESTMENT COURT, *supra* note 224.

245. SOUTH AFR. DEV. COMMUNITY, *supra* note 212, at 62.

246. MODEL TEXT FOR THE INDIAN BILATERAL INVESTMENT TREATY, *supra* note 218, at 15–16.

247. Warren, *supra* note 101.

248. Lester, *supra* note 48.

answers many of the issues raised by critics regarding ISDS.²⁴⁹ Many countries have already implemented improvements that could help the ICS, making it the best solution thus far to protect investors abroad.²⁵⁰

CONCLUSION

Despite a rapidly evolving global economy and with it, further international trade disputes, ISDS has evolved little since its inception, more than sixty years ago. Recent trade negotiations over agreements containing ISDS as the selected forum of dispute resolution, such as the TTP, the TTIP, and CETA, have generated new attention, criticism, and evaluation of ISDS. These discussions have fostered ideas for alterations and improvements to the current system, as well as suggestions of completely new forums for addressing these international trade issues, such as the ICS. Opponents continue to argue that the benefits offered by ISDS are not outweighed by the impact the system has on state sovereignty and the ability for States to pass progressive environmental and public health legislation. The concerns do not end there. Dissenters argue that ISDS does not sufficiently prevent conflicts of interest between arbitrators and the parties bringing disputes, lacks a transparent decision-making process, and creates inconsistent and unpredictable rulings. Different constituencies have suggested improvements to address these concerns but even with these suggestions, many continue to argue that ISDS is inherently flawed and a new solution must be found. Responses have ranged from abandoning ISDS all together and leaving these disputes to the States to creating a new, broader multilateral decision-making body. The European Union proposed the ICS as the alternative to oversee the complaints made by international investors against the European Union, with the hope that if the ICS is successful, it would eventually expand into a multilateral and universal court system available to all.²⁵¹ The ICS is intended to create greater transparency, coherency, and fairness through improvements such as, the implementation of an appeals process, further reliance on precedent to create predictability, and further defining

249. Warren, *supra* note 101.

250. Hufbauer, *supra* note 4, at 118–19.

251. Roberts, *supra* note 220.

the ICS's jurisdiction and scope of cases heard.²⁵² The ICS, however, faces many of the same criticisms that were argued against ISDS. With no perfect solution available, the current viable options are to universally adopt the ICS and implement the improvements intended for ISDS to the ICS, creating a piecemeal version of the two or leave foreign investors to fend for themselves in foreign domestic courts, as they did up until the twentieth century.²⁵³ With foreign investment growing each day, despite their flaws, it is necessary to find a compromise between ISDS and the ICS, as they are currently the best alternatives available.

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252. *Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations*, *supra* note 221.

253. Abbott et al., *supra* note 43, at 4.

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