INVESTMENT LAW FOR INVESTORS: A CASE AGAINST MULTILATERAL INVESTMENT COURTS

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ABSTRACT

International investment law is a complicated and controversial field. The proposed creation of multilateral investment courts, however, has furthered both the complications and controversy. But the investment treaties which govern international investment law are, and should continue to be, “about investors.”

This Article seeks to do what many have failed to do in consideration of multilateral investment courts: determine the impact of the courts upon investors. In Part I, this Article provides a greater contextual understanding focused on the rise of international investment as simultaneous and conjunctive with the rise of the global economy. Furthermore, Part I discusses the most frequently used modern investor-State dispute resolution forum, ICSID, and its perceived strengths and weaknesses.

In Part II, this Article discusses the proposed multilateral investment courts and why historical multilateral investment courts have failed. Then, this Article describes the proposed courts’ potential to enact serious harm on investors.

Finally, Part III explores various alternatives to the investment court system, including multilateral binding rules on corporate accountability, the bilateral inclusion of required responsible investment, the multilateralization through Most Favored Nation clauses, and the Alternative Dispute Resolution.

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INTRODUCTION

[S]tand[ing] athwart history, yelling Stop, at a time when no one is inclined to do so, or to have much patience with those who so urge it.1

– William F. Buckley, Jr.

The advent of the bilateral investment treaty transformed international investment law “from a sleepy academic backwater into one of the most dynamic and controversial areas of international law today.”2 It was the proposed creation of multilateral investment courts,3 however, that increased controversy and polarized international investment law in an unprecedented way. While some

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3 See infra Part II.
scholars rightly argue that the field is inherently political, those who have deliberately weaponized the conversation seek only to harm a specific group: investors.

Many in the field forget that “investment treaties are about investors,” and that investors’ funds are often responsible for major economic development in States of the Global South. These scholars and practitioners seek to frame investors as willing actors in a colonial and oppressive legal regime that has spanned centuries. Rather than frame the history of international investment law in the context of colonial oppression, Part I of this Article discusses its history in the context of the development of the global economy. Furthermore, this Article explores how the bilateral investment treaty (BIT) has revolutionized the field; articulates perceived strengths and weaknesses of modern venues for investor-State dispute settlement; and discusses the effect on investors.

In Part II, this Article develops its central thesis by discussing the proposed multilateral investment courts; why historical equivalents of the multilateral investment court have failed; and why these courts deprive investors of essential rights.

Finally, in Part III, this Article steps back and examines whether any proposed alternatives to the multilateral investment court could be plausible and whether they would succeed in securing the rights of investors.

I. A CONTEXTUAL UNDERSTANDING

International investment law is a complicated field. Here, perhaps, is a lens through which to view international investment law that may simplify the subject: In many ways, the current controversies reflect the older controversies. Therefore, thorough contemplation of the history and a greater contextual understanding helps the individual who seeks positive international investment law reform for the benefit of investors. In fact, Professor Kate Miles of the University of Cambridge notes that, “the content and form of foreign investment

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protection law cannot be separated from its sociopolitical context.” She writes further:

There is a detectable ebb and flow to the entwining of politics, commerce, and law in the history of international investment law . . . . It seemed to me that without knowledge of the historical framework, individual incidents, awards, arguments, principles, objections, and developments can only ever be understood in isolation and, therefore, only with a shallow and incomplete perspective.9

To avoid this end, this Article attempts to briefly discuss the history of international investment law in the context of the evolution of the global economy. Moreover, it will focus on international investment since the “BIT revolution.”10 Finally, this Article will explore the strengths and weaknesses of the most popular of modern venues for investor-State dispute settlement (ISDS), the International Centre for Settlement of Investment Disputes (ICSID), and how those strengths and weaknesses affect investors.

A. International Investment Law and the Evolution of the Global Economy

Some scholars attempt to depict international investment law, and international investment in general, as an extension of Western colonialism over the Global South.11 Understanding international investment law as rooted in a North-South conflict, naturally and reasonably leads one to embrace policies that disfavor investors — the alleged abusers — and favor the State — the alleged abused. But, a fuller understanding of international investment law should lead to a more balanced approach.

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8 MILES, supra note 4, at 20.
9 Id. at 386.
1. Before the BIT

   a. Governed by Customary International Law

   While some see the materialization of international investment law as coinciding with the signing of the first BITs,\textsuperscript{12} the reality is that the field is significantly older. The roots of international investment law are found in customary international law, a body of law which protected State’s citizens while abroad. This protection was known as the international minimum standard of treatment.\textsuperscript{13}

   Some modern scholars have framed the international minimum standard of treatment as an oppressive tool of “capital exporting states,”\textsuperscript{14} but contemporaneous sources indicate that the protection of aliens was seen merely as a “fundamental” standard of civilization:

   There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world . . . . If any country’s system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.\textsuperscript{15}

   This standard was the first step in a series of escalating steps that were intended to “safeguard aliens’ enjoyment of life, liberty, and property against arbitrary acts by states.”\textsuperscript{16} The next step — if the standard was not met — was to compensate the alien. If compensation did not occur, then the alien’s home State was entitled to seek reparations on behalf of the alien\textsuperscript{17} as a form of diplomatic protection.\textsuperscript{18}

\begin{footnotes}
\item[12] See MILES, supra note 4, at 19.
\item[13] For a more in-depth treatment on the historical development of the international standard, see ANDREAS H. ROTH, THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS (1949).
\item[14] Howse, supra note 7, at 6.
\item[18] See infra Part I.B.1.c on modern diplomatic protection in international investment law under ICSID.
\end{footnotes}
Any State with a claim for reparations could assert its right, regardless of its status as North or South, colonizer or colonized. In 1924, the Permanent Court of International Justice wrote:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights — its right to ensure, in the person of its subjects, respect for the rules of international law.19

In the context of international investment, the international minimum standard of treatment frequently served to protect the property of foreign investors from arbitrary takings without due process by capricious and unstable governments.20 Many of these governments were the resultant sovereigns after tumultuous political insurrections. They often sought to right the wrongs of previous regimes, and a very tangible wrong was the perceived abuse of local populations by foreign investors. And yet, customary international law did not recognize the new governments’ ability to terminate existing treaties and obligations or defy international standards.21

Many of these revolutionary governments were in Latin America. These regimes were ever-shifting, and even when the resultant governments seemed lawful, they would act in unlawful ways. This led Lord Bryce, the renowned academic and ambassador, to state that “the brand-new constitutions . . . did not correspond to anything real in the circumstances of these new so-called republican States.”22 Tumultuousness was undoubtedly a constant in the region.

It is, therefore, unsurprising that Latin American governments would rebel against the international minimum standard of treatment. They found a voice in Carlos Calvo, the Argentine jurist, who asserted that aliens were entitled only to the same treatment by the government that nationals of the State received.23 This infamous philosophy was called the Calvo Doctrine.24

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20 Falsafi, supra note 16, at 319.
22 James Bryce, Modern Democracies 189 (1921).
23 See Johnson & Gimblett, supra note 17, at 656.
24 Where some have seen the Calvo Doctrine as a robust form of national treatment, Professor Wenhua Shan of Xi’an Jiaotong University has made a strong argument that it “actually
Ultimately, however, international courts did not accept the Calvo Doctrine and maintained an international minimum standard of treatment. States were not malicious in applying the standard. Rather, it was used to “curtail excessive State measures,” ones that frequently harmed investors.

b. Bilateral Success and Multilateral Failure

As the rules of customary international law grew ever more complicated, encompassing more than just the standard of minimum treatment, several States began to negotiate and sign bilateral treaties to protect and encourage investors and their investments. These treaties were commonly called friendship, commerce, and navigation (FCN) treaties, and the United States, specifically, signed several such treaties with various States, including Sweden, the United Kingdom, Nicaragua, and Spain.

These FCN treaties have been called “forerunner[s] of modern bilateral investment treaties” because they codified many of the rules of customary international law and spoke not of specific performance but of general principles. They “fix[ed] ground-rules” and “govern[ed] day-to-day intercourse between two countries,” allowing investors to better navigate certain segments of the sometimes-treacherous global economy in the States of both the Global North and South.

Some have indicated that these early bilateral treaties were merely a reproduction of the imperial economy, where the Global North forcibly imposed
its will upon the less powerful Global South. But it appears that these treaties merely attempted to encourage all States to participate in the global economy.\footnote{Professor Schill sees the incorporation of most-favored-nation clauses as proof of this attempt. SCHILL, supra note 6, at 30. Professor Miles, however, sees the treaties “designed to prise open reluctant non-European territories to Western trade and investment.” MILES, supra note 4, at 25.}

Regardless, the era of the FCN treaty came to an end — at least with respect to American investors — in 1967 when the last treaty was signed between the United States and Thailand.\footnote{See John F. Coyle, The Treaty of Friendship, Commerce and Navigation in the Modern Era, 51 COLUM. J. TRANSNAT’L L. 302, 308–09 (2013).}

In addition to these early bilateral treaties, there were also early attempts at multilateral treaties and multilateralism. One of the most notable attempts was the proposal of the International Trade Organization (ITO). During the winter of 1947–48, representatives of fifty-three States completed the Havana Charter, which provided for the establishment of the ITO.\footnote{See George Bronz, The International Trade Organization Charter, 62 HARV. L. REV. 1089, 1090 (1949).} The ITO was revolutionary in that it “integrated . . . an ambitious and successful program to reduce traditional trade barriers, with a wide-angled agreement that addressed investment, employment standards, development, business monopolies and the like.”\footnote{Daniel Drache, The Short but Significant Life of the International Trade Organization: Lessons for Our Time (Nov. 2000) (unpublished manuscript), http://wrap.warwick.ac.uk/2063/1/WRAP_Drache_wp6200.pdf.}

Ultimately, however, the creation of the ITO became impossible once the United States decided not to sign it.\footnote{See U.S. to Shelve Joining I.T.O., N.Y. TIMES, Dec. 7, 1950, at 40 (“The United States has decided to shelve indefinitely further plans for American participation in the proposed International Trade Organization. President Truman, the State Department announced today, has agreed to recommendations that the proposed charter for the organization should not be resubmitted to Congress.”). The decision by the United States appears to have been based more on a preoccupation with the Marshall Plan, the North Atlantic Treaty Organization, and the Korean War than on shortcomings by the ITO. See William Diebold, Reflections on the International Trade Organization, 14 N. ILL. U. L. REV. 335, 339 (1994).} This “liberal trade order” under a multilateral agreement was not to be, and the General Agreement on Tariffs and Trade/World Trade Organization system that has followed it has also been plagued by “failures in multilateral policymaking in other areas (e.g. climate change, international monetary affairs).”\footnote{Ivan D. Trofimov, The Failure of the International Trade Organization (ITO): A Policy Entrepreneurship Perspective, 5 J. POL. & L. 56, 56 (2012).}
2. The “BIT Revolution”

The first BIT was the 1959 treaty between Pakistan and West Germany,\textsuperscript{38} based heavily on work completed by Dr. Abs and Lord Shawcross.\textsuperscript{39} West Germany was eager to sign such a bilateral treaty to protect its investors and their investments,\textsuperscript{40} and many States saw the Pakistan-Germany BIT as a test case for providing that protection.\textsuperscript{41}

And though BITs did not enter the American political strategy until the 1970s, international State pursuit and acceptance of the BIT burgeoned quickly. Indeed, as Professor Schill writes:

Between 1959 and 1969, the total number of BITs concluded came up to only 75 treaties, another 92 BITs were concluded between 1970 and 1979, and 219 BITs between 1980 and 1989. From 1959 until 1989, the total number of BITs summed-up to 386, and accordingly covered only a relatively small number of bilateral investment relationships worldwide . . . . In the 1990s, however, the situation changed rather drastically. Between 1990 and 2006, the number of BITs rose significantly to a total of more than 2,500, with almost every country having entered into usually several of such treaties.\textsuperscript{42}

The “BIT Revolution” has undoubtedly arrived, and investors have responded to the increased interest in international investment with substantial foreign direct investment (FDI). In 1990, the International Monetary Fund estimated $196.315 billion in FDI net inflows. By 2015, the estimate had grown to $2.136 trillion.\textsuperscript{43}

By 2004, one-fourth of all BITs globally were between States of the Global South.\textsuperscript{44} This point is particularly notable in the refutation of the BIT as an

\textsuperscript{38} Treaty for the Promotion and Protection of Investments, Pak.-Ger., Nov. 25, 1959, 457 U.N.T.S. 23.


\textsuperscript{40} SCHILL, supra note 6, at 40.

\textsuperscript{41} Id. at 41.


\textsuperscript{44} SCHILL, supra note 6, at 42.
imperial economy imposed by the Global North: If States that were formerly adherents to the Calvo Doctrine — hesitant to engage with “imperial powers” and allow foreign investors any form of perceived political privilege — now choose to sign BITs between each other, then surely the BIT cannot exist as merely a tool of oppression.45

Today, FDI is a substantial component of many local economies.46 But the movement of FDI is naturally a two-way street: States want to avoid the “flight of investor capital from [S]tates whose regulatory regimes investors may consider unclear, arbitrary, or capricious,” and investors want to protect their rights and establish long-term relationships with these States.47 Therefore, the signing of a BIT is an imperative step for States of the Global South in securing FDI.48

FDI is clearly valued by both the host State, to improve economic well-being, and by also investors, to grow personal wealth. The modern BIT, therefore, allows foreign investors — the direct contributors of FDI — certain privileges and venues for dispute settlement that are unavailable to local investors.

B. Investors and Modern ISDS Under ICSID

While investment disputes can be resolved State-to-State,49 this Article focuses on the most popular ISDS venue for investors: The International Centre for Settlement of Investment Disputes (ICSID).50 This part will discuss ICSID’s

45 Id. at 41 (“The acceptance of BITs in [Latin America] is particularly noteworthy, since Latin American countries have long relied on the Calvo Doctrine in their foreign relations practice.”).
46 See Laura Alfaro et al., FDI and Economic Growth: The Role of Local Financial Markets, 64 J. INT’L ECON. 89, 108 (2004) (“[The] empirical evidence suggests that FDI plays an important role in contributing to economic growth.”) But see Howse, supra note 7, at 14 (“An active debate exists in the economic policy literature about whether increased foreign investment is a desirable development strategy or whether building efficient domestic capital markets and/or public investment strategies should instead be the emphasis.”).
48 Susan Rose-Ackerman & Jennifer L. Tobin, Do BITs Benefit Developing Countries?, in THE FUTURE OF INVESTMENT ARBITRATION 131, 141 (Catherine A. Rogers & Roger P. Alford eds., 2009) (“We find that BITs do indeed have a positive impact on FDI flows to developing countries. Signing treaties generally appears to send a signal to foreign investors of a welcome investment environment.”).
49 Trakman, supra note 47, at 28. One of the benefits of State consent to ICSID, however, is obtaining assurance that the State will not have a claim brought against it by the investor’s home State. Piero Bernardini, ICSID versus non-ICSID Investment Treaty Arbitration, in LIBER AMICORUM BERNARDO CREMADES (Miguel Ángel Fernández-Ballesteros and David Arias, eds., 2010).
50 While some have differentiated ICSID and ICSID’s Additional Facility, for the sake of simplicity, this Article treats them the same.
most frequently-perceived strengths and weaknesses and comment on each component’s favorability for investors.

Established in 1965, ICSID today most importantly “serves as a dispute resolution protocol that [S]tates can incorporate into their BITs without having to rely on the domestic courts of other [S]tates to resolve FDI disputes.” In addition to providing a physical location at which ISDS can take place, ICSID also provides rules to govern the process.

ICSID is heavily used in investment arbitration. In 2006, of the 290 investment arbitration cases globally, 182 were filed with ICSID. By 2016, ICSID had administered approximately 70% of all investment arbitration cases. And, while ICSID facilities are only available to member States, non-member States can use ICSID’s Additional Facility.

1. Perceived Strengths

Professor Bernardini, a former vice-president of the International Court of Arbitration, enumerates four specific strengths of ICSID for investors: (1) investors have direct access to a form of settlement; (2) settlement can occur beyond the realm of national courts; (3) investors do not need to rely upon home States to exercise diplomatic protection; and (4) it is highly probable that ICSID awards are enforced.

a. Direct Access

Direct access for investors is an invaluable benefit. ICSID assures investors direct access by providing that the “refusal or abstention of the State party to a dispute to participate in the proceedings cannot prevent the institution, conduct, and conclusion of the proceedings.” Consent to arbitration under ICSID binds parties to the ICSID settlement. Additionally, this direct access is

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52 Trakman, supra note 47, at 31.
53 Bernardini, supra note 49.
55 Latin American States constitute a large number of non-member States. Some point to this as an extension of the Calvo Doctrine. E.g., Katia Fach Gómez, Latin America and ICSID: David Versus Goliath?, 17 LAW & BUS. REV. AM. 195, 222 (2011).
56 Bernardini, supra note 49.
unique to ICSID in that it is “an international system of dispute resolution in which [investors] may participate on an equal footing against a State.”

b. Beyond National Courts

One of the great fears investors have is the potential abuse by arbitrary and capricious host State courts of investors and their investments. In response to these fears, ICSID “constitutes a self-contained machinery functioning in total independence from domestic legal systems.” This allows investors who have exhausted national remedies to seek protection in an international forum.

c. Diplomatic Protection Unnecessary

The invocation of diplomatic protection under customary international law is prohibited under ICSID. In fact, consent to arbitration itself requires a waiver of diplomatic protection on the part of the investor’s home State. This is beneficial to investors because reliance upon home State intervention is entirely dependent upon the home State’s willingness to extend that protection, and home States are frequently indifferent to protecting investors’ claims around simple and less egregious host State infraction, such as tax claims.

59 For a discussion on the variety of ways in which host State courts can violate principles of international law, see generally Sameer Sattar, National Courts and International Arbitration: A Double-edged Sword?, 27 J. INT’L ARB. 51 (2010).
61 John Dugard, Special Rapporteur, Diplomatic Protection, ¶ 112, U.N. Doc. A/CN.4/530 (Mar. 13, 2003) (“Where the dispute resolution procedures provided for in a BIT or ICSID are invoked, customary law rules relating to diplomatic protection are excluded. Both BITs and the Convention on the settlement of investment disputes between States and nationals of other States make this clear.”).
63 Thomas Wälde & Abba Kolo, Investor-State Disputes: The Interface Between Treaty-Based International Investment Protection and Fiscal Sovereignty, 35 INTERTAX 424, 426–27 (2007) (“The investor’s home state – traditionally its chief protector both through diplomatic protection and through its contribution to the international investment protection regimes – will be much more ambivalent about providing defence against host state tax claims than against outright expropriation.”).
d. Enforced Awards

State signatories to ICSID are obligated to recognize and enforce the final award. Article 54(1) provides:

Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.64

While “[m]any observers assume that final awards issued by arbitral tribunals organized under the auspices of ICSID in investor-state arbitrations are final and self-executing,”65 hesitant States do have several recourses available,66 including the doctrine of sovereign immunity.67 Ultimately, however, State resistance is minimal and the clear majority of awards against States and in favor of investors are recognized and enforced.68

68 Vasily Shubin, The Enforcement of ICSID Arbitral Awards, Practice and Problems, 11 KOR. U. L. REV. 11, 35 (2012) (“The ICSID recognition and enforcement regime has been used only four times. Though the attempts were unsuccessful, they have spread light on numerous practical issues that the investors should take into account before starting the enforcement . . . . Fortunately, the Contracting States to the ICSID Convention are willingly complying with the awards and resort to the enforcement mechanism is still an exception to the general rule.”).
2. Perceived Weaknesses

a. Stare Decisis

One of the most frequent criticisms of ICSID is that there is no rule of stare decisis binding tribunals to follow precedent. But there are two major flaws to this criticism: (1) the willful following of precedent is not prohibited and is frequently observed; and (2) stare decisis would violate principles of international law.

Firstly, tribunals have noted that the absence of stare decisis does not prevent them from “sharing the interpretation’ given to the provision under examination.”69 In fact, further evaluation of arbitrations indicates that precedent is frequently followed, leading some to refer to the practice as de facto stare decisis.70

Secondly, others have noted that stare decisis would violate the general interpretation rule under the Vienna Convention on the Law of Treaties: “Even in the event that the wording of a particular provision is the same as that of an earlier interpreted clause, investment disputes most often involve different treaty partners.”71 The Convention requires that the “interpretation of a provision . . . is based on its wording in context, supports the object and purpose of the treaty and makes use of the preparatory work when needed.”72 Each BIT must be reviewed on its own individual merits. If ICSID tribunals were bound by stare decisis, then they would be in violation of the Convention.73

b. No Appellate Function

Arguments for the introduction of an appellate function rest on four principles: a lack of consistency,74 accuracy, authority, and investor bias. The call for increased consistency and accuracy rests on the premise that “[h]aving two

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69 Marc Bungenberg & Catharine Titi, Precedents in International Investment Law, in INTERNATIONAL INVESTMENT LAW: A HANDBOOK 1505, 1508 (Marc Bungenberg et al. eds., 2015).
70 Johanna Kalb, Creating an ICSID Appellate Body, 10 UCLA J. INT’L L. & FOREIGN AFF. 179, 217 (2005) (“As the number of arbitrations has grown, a ‘de facto doctrine’ of stare decisis has become apparent in ICSID decisions, despite the lack of any formal system of precedent. A review of recent decisions of ICSID tribunals demonstrates that they are replete with references to other panel decisions, most of which were made based on interpretations of different BITs.”).
71 Bungenberg & Titi, supra note 69, at 1513.
74 This argument is extremely similar to a lack of stare decisis. See infra Part I.B.2.a.
levels of dispute settlement could enhance the prospects of correct decisions.”

This negates the fact that tribunals frequently and willfully follow precedent and that there remain available forms of review within ICSID, notably through the process of annulment in extreme circumstances.

With regards to authority, critics frequently conflate the term with legitimacy. But ICSID is undoubtedly a legitimate body. As stated in this Article previously, ICSID is one of the most frequently used fora for investment dispute resolution, and as of 2016, there were 153 contracting member states. It appears that this criticism is baseless; disagreement with several ICSID awards does not deem the entire body illegitimate and lacking in authority.

Finally, investor bias is perhaps the most harshly levied criticism upon ICSID. But equal footing with investors does not mean that States are disfavored. Additionally, even if that premise was true, “there is no guarantee that a second level instance should favour host States interests over investor interests.”

II. PROPOSED MULTILATERAL INVESTMENT COURTS

There have been several proposed multilateral investment courts that aim to alleviate all the perceived criticisms of ICSID and modern ISDS in general. The Transatlantic Trade and Investment Partnership (TTIP) — which is a proposed trade agreement between the European Union (EU) and the United States — has been held out by the EU as a “starting point for creating a new way of protecting investments.” It is useful, therefore, to focus on TTIP’s proposed multilateral investment court as a model for future courts. This part will discuss TTIP’s structure and then discuss failed historical investment courts like TTIP’s. Finally, it will explore the potential harm modern investors face under multilateral investment courts, using TTIP as an archetype.

A. The Transatlantic Trade and Investment Partnership

The EU’s 2015 draft proposal provides for “an investment court system to replace the existing ISDS mechanism in all ongoing and future European Union investment negotiations, including the TTIP negotiations.” An alleged benefit of

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76 Id. at 30.
77 Id. at 34–35.
the investment court is that there will be “[c]lear rules applied by impartial judges through a transparent and neutral process.”

The proposed investment court consists of two levels: a “Tribunal of First Instance” and an “Appeal Tribunal.” The “Tribunal of First Instance” is to be composed of fifteen judges: five appointed by member States of the EU, five appointed by the United States, and five appointed by nationals of third States. The judges must be qualified and “of recognised competence,” and the Tribunal will “hear cases in divisions consisting of three Judges, of whom one shall be a national of a Member State of the European Union, one national of the United States and one a national of a third country.”

The establishment of the “Appeal Tribunal” will be permanent and composed of six judges: two appointed by member States of the EU, two appointed by the United States, and two appointed by nationals of third States.

B. Historical Courts and Failure

1. The North American Free Trade Agreement

One of the most controversial components of the multilateral investment court is embodied in Chapter 11 of the North American Free Trade Agreement (NAFTA). It provides:

On the date of entry into force of this Agreement, the Parties shall establish, and thereafter maintain, a roster of 45 presiding arbitrators meeting the qualifications of the Convention and rules referred to in Article 1120 and experienced in international law and investment matters. The roster members shall be appointed by consensus and without regard to nationality.

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82 Id. at 17.
83 Id.
84 Id. at 17–18.
85 Id. at 19.
While this is not a court per se, the concept of forming a body of arbitrators that will be approved by members of the treaty is heavily borrowed. Since signing in 1992, the three NAFTA members — the United States, Canada, and Mexico — still have not chosen the 45 “presiding arbitrators.” To think that the 29 State signatories of TTIP, let alone multilateral investment courts composed of many more States, could decide upon a roster is unversed because it fails to recognize the fact that States frequently have competing interests in selection of arbitrators and judges that prevent unanimity.

C. Potential Harm to Modern Investors

Proponents of multilateral investment courts, specifically those that include appellate facilities, are also frequently opponents of investors. Professor Wälde notes:

We can observe strong pressures to develop an appellate facility. These pressures come from governments that have lost or will be losing visible cases, from governments concerned over the prospect of losing prominent cases and from the NGO community which is largely very critical of investment arbitration to the extent it protects property rights and is not used to push the NGO agendas.

This anti-investor sentiment is frequently embodied in the critique that “[m]echanisms have not [been] developed within international investment law for aggrieved individuals harmed by investor activities to make formal claims against foreign investors within an international setting,” but that they have been developed for the benefit of investors to “ensure . . . a hearing on the international stage.”

But, as this Article has discussed previously, a significant portion of the global economy — and more obviously, FDI — is dependent on investors and their cash flow. Multilateral investment courts would severely harm investors, and ultimately, the global economy, by stifling favorable investment conditions.

This Article identifies two specific harms that investors could face if a multilateral investment court were implemented: (1) the elimination of arbitrator choice; and (2) lack of funds for smaller investors.

89 Wälde, supra note 5, at 135.
90 MILES, supra note 4, at 337.
1. Elimination of Arbitrator Choice

In modern ISDS, disputing parties choose arbitrators. The investment court system would eliminate this practice. In TTIP, the United States chooses five arbitrators, the European Union chooses five arbitrators, and other external States choose five arbitrators.\(^{91}\)

While today, “ISDS arbitrator selection also gives rise to bias because each party’s candidate will be selected based upon a belief the arbitrator would be sympathetic to its case,”\(^{92}\) the choice maintains a level playing field. In contrast, the creation of the investment court system would allow only the State parties to choose arbitrators.

2. Lack of Funds

Some have framed the appellate facility in multilateral investment courts as a method to ensure that the fairest outcome for both parties is achieved. Additionally, these proponents frequently see all investors not as individuals, but rather as large and powerful transnational corporations that abuse host States; once again, foreign investors are perceived as an extension of the imperial economy over the Global South. The truth is much closer to the former: individual financing has a significant effect on FDI.\(^{93}\)

Without recognizing this perspective, a sizeable portion of the investor community is negated, as multilateral investment courts would allow for States to delay decisions nearly indefinitely. Professor Wälde writes:

But there are risks [to an appeals facility]: The first is that an appeals facility will further enhance the procedural disequilibrium investors already face . . . For a well-resourced government facing an under-resourced opponent (typically a smaller, entrepreneurial company with shallow pockets), an important strategy is simply to drain away the claimant’s litigation war-chest until it is compelled to give up. Adding an appeal will reinforce the strength of such a litigation-resource based strategy.\(^{94}\)


\(^{92}\) Klett, supra note 79, at 226.

\(^{93}\) Wissam B. Fahed, The Effect of Entrepreneurship on Foreign Direct Investment, 7 Int’l J. Soc., Behav., Educ., Econ., Bus. & Indus. Engineering 1346, 1356 (2013) (“The findings suggest that entrepreneurship is an important determinant of FDI. This suggests that governments seeking to attract FDI inflow must redirect their focus to the foundations of their economy by promoting and encouraging entrepreneurship.”).

\(^{94}\) Wälde, supra note 5, at 139.
This suggests that the real losers in multilateral investment courts will be investors with limited capital, and this ultimately harms the host State and its economy. The powerful transnational corporations — which seem to be the most frequent target for attack — will be harmed the least. Therefore, any proposed reform in ISDS must consider the impact upon smaller investors with limited capital.

III. EXPLORING ALTERNATIVES

While some have suggested eliminating ISDS from all international trade agreements, this does not appear viable in an age of increasing government involvement. Moreover, the entire reason the investment court system has been proposed is that the legitimacy of ISDS is in question. With this context, Professor Miles notes all the following reasons:

Key procedural issues stem from the decentralized system of non-permanent arbitral tribunal, its commercial emphasis, and the confidentiality surrounding proceedings. The lack of any governing framework leads to inconsistent decisions on the same issues, even on essentially the same dispute. The lack of transparency, whereby proceedings are largely held behind closed doors and awards are only published if the parties consent, is in contravention of basic public law principles.

So, this Article explores a variety of positive reform proposals and evaluates whether they would benefit investors.

A. Binding Rules on Accountability in Multilateral Treaties

Many NGOs — including Friends of the Earth International, Greenpeace, Global Justice Now, Christian Aid, and the Alliance for a Corporate-Free U.N. —
have pushed for binding rules on corporate accountability.100 This conversation is typically had in the context of environmentalism and conservation, propelled by both the perceived and real abuses of the environment and vulnerable populations in the Global South by various transnational corporations (TNCs).101

Advocates seek these rules to move corporate accountability from soft law and “corporate social responsibility” to legally-binding standards and procedures.102 Professor Clapp notes:

A legally-binding, externally driven treaty which requires parties to enact laws designed to enforce environmental and social accountability on TNCs, no matter where they operate, has the potential to make an enormous difference to those communities currently facing negative impacts from TNCs. This is especially true for such communities in developing countries where the legal structures may not give them the right to make a claim against corporations that are causing environmental or social damage.103

Typically, these binding rules would be incorporated through a multilateral agreement. Despite not being binding, the United Nations as a multilateral body has made recent efforts to “combat corporate misconduct.”104 With the Protect, Respect and Remedy Framework proposed by Professor John Ruggie and instituted as the United Nations Guiding Principles on Business and Human Rights, the United Nations sought three pillars of corporate accountability:

The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater

100 Jennifer Clapp, Global Environmental Governance for Corporate Responsibility and Accountability, 5 GLOBAL ENVTL. POL. 23, 29 (2005).
102 Id. at 1268.
103 Clapp, supra note 100, at 31.
104 Kishanthi Parella, Outsourcing Corporate Accountability, 89 WASH. L. REV. 747, 773 (2014).
access by victims to effective remedy, both judicial and non-judicial.\textsuperscript{105}

While some have debated the effectiveness of this nonbinding document,\textsuperscript{106} most call it a step in the right direction.\textsuperscript{107} If the Guiding Principles were binding, however, multilateral enforcement would be necessary. And, if the binding rules were not entirely arbitrary and vapid,\textsuperscript{108} then the impact on investors would be minimal.

\textbf{B. Requiring Responsible Investment in BITs}

Professor Miles notes that in seeking to improve the modern BIT, “a significant tangible step would be the incorporation of provisions into new bilateral investment treaties to reflect more responsible investment.”\textsuperscript{109} And while she views this as a step to multilateralization formatted on the International Institute for Sustainable Development Model Agreement,\textsuperscript{110} incorporating “emerging principles of corporate social responsibility and sustainable finance, a stronger emphasis on ecological sustainability, express references to core ethical principles, and the direct application of principles of international environmental law to investors,”\textsuperscript{111} perhaps a reevaluation of currently-enforced BITs is more realistic.


\textsuperscript{106} E.g., Joseph E. Stiglitz, In No One We Trust, N.Y. TIMES (Dec. 21, 2013, 2:39 PM), https://opinionator.blogs.nytimes.com/2013/12/21/in-no-one-we-trust/ (“We need higher norms for what constitutes acceptable behavior, like those embodied in the United Nations’ Guiding Principles on Business and Human Rights. But we also need regulations to enforce these norms — a new version of trust but verify.”).


\textsuperscript{108} The Guiding Principles provide several provisions that seem to be based more on an intellectual plane than reality-based. See, e.g., U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS “PROTECT, RESPECT, AND REMEDY” FRAMEWORK 13 (2011) http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (“Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”).

\textsuperscript{109} MILES, supra note 4, at 382.


\textsuperscript{111} MILES, supra note 4, at 382–83.
Like multilateral binding rules on corporate accountability, bilateral requirements would also be binding, but would be enforced on a significantly smaller scale. Again, impact on investors is minimal if the ideals enforced were lofty, as long as enforcement was not arbitrary.

C. Multilateralization and Most Favored Nation

Multilateralism, or coordinating national policies in groups of three or more States,\footnote{See generally Robert O. Keohane, Multilateralism: An Agenda for Research, 45 INT’L J. 731 (1989) (discussing international institutions in general).} is a process which appears increasingly present in international law. Most Favored Nation (MFN) clauses are frequently held out as the archetypal example of multilateralism: “it forbids discrimination among countries producing the same product — full stop.”\footnote{John G. Ruggie, Multilateralism: The Anatomy of an Institution, in MULTILATERALISM MATTERS: THE THEORY AND PRAXIS OF AN INSTITUTIONAL FORM 3, 11 (John G. Ruggie ed., 1993).}

MFN as a concept has been a component of international law for hundreds of years,\footnote{Jürgen Kurtz, The MFN Standard and Foreign Investment: An Uneasy Fit, 5 J. WORLD INV. & TRADE 861, 863 (2004) (“Whilst the origins of the modern MFN clause can be traced back to the 15th century, it is perhaps most useful for the present purposes to consider the role of the MFN clause in the golden age of European economic liberalism of the mid-19th century.”).} explicit MFN clauses are found in the General Agreement on Tariffs and Trade and other World Trade Organization agreements.\footnote{Henrik Horn & Petros C. Mavroidis, Economic and Legal Aspects of Most-Favored-Nation Clause, 17 EUR. J. POL. ECON. 233, 233–34 (2001).} This has elevated MFN to a higher level of recognition than ever before.

MFN for the protection of the investor is not necessarily a positive reform measure; rather, it is natural, increased protection overtime. As individual States negotiate BITs with other States, a rise in MFN claims is certain. Professor Schill is one of the most prominent advocates for the use of MFN clauses as a tool toward multilateralization. He argues for a broader approach to the interpretation of MFN clauses: “While the restrictive interpretation of MFN clauses understands BITs as expressions of bilateral quid pro quo bargains, the broader approach is closer in line with creating a multilateral order for a single global economy that is based on non-discriminatory and uniform rules for investors in every investment-related aspect.”\footnote{SCHILL, supra note 6, at 195.}

The creation, albeit more of a natural progression, of multilateralization through MFN would provide clarity and uniformity in “the protection of foreign investors in any given host State independent of the investor’s nationality.”\footnote{Id. at 366.} As more States become open to more favorable trade with others, the general protection and investor benefits will increase rapidly. The benefits here for the
investors of this natural progression outweigh any externally-imposed multilateral investment courts.

D. Alternative Dispute Resolution

A potential substitute to multilateral investment courts is the use of Alternative Dispute Resolution (ADR) methods. Benefits of ADR methods include: the preservation of a relationship; saving time and cost; and the potential to continue the use of an investment.118 Naturally, to provide for ADR methods as a viable reform of ISDS and an alternative to multilateral investment courts, individual BITs would need to incorporate provisions that provide for the use of ADR.119 Perhaps BIT drafters and re-drafters can look to ADR provisions under NAFTA.120

As stated above, a benefit to the incorporation of ADR in BITs would be the preservation of the relationship between the disputing State and investors. Some have determined the use of ADR as “most advantageous when the parties have a continuing or past relationship . . . [and] when creative solutions are possible.”121 Here, States eager to maintain the flow of FDI from a specific investor can resolve disputes in a private and amicable manner, and the relationship will be preserved.

Regarding saving time and cost: ADR methods could result in benefits for both the investor and the host State. One of the benefits would be that investors would not need to pay for “substantial legal fees,” and the host State could “save money and prevent damaging its brand as an investor-friendly country.”122

And the potential to continue use of an investment, like the preservation of the relationship, would be incredibly beneficial to investors. After all, initial investment occurs because investors want to transfer FDI and retain the benefits of a prudent investment.

There are, of course, several barriers to the successful implementation of ADR in States of the Global South and as a tool for international investment disputes. As a less structured and less formalized method of dispute settlement, modern ADR carries with it implicit characteristics of the Global North. For implementation to be successful, international ADR must consider pre-existing

119 For a thorough analysis on the renegotiation powers of States and why multilateral agreements are more likely to have low exit costs than bilateral agreements, see generally Timothy Meyer, Power, Exit Costs, and Renegotiation in International Law, 51 HARV. INT’L L.J. 379 (2010).
122 Schäfer, supra note 118, at 1192–93.
traditions, religious codes, and cultural characteristics.\textsuperscript{123} Perhaps this will lead to an individualized and blended ADR structure that better represents the interests of all parties.\textsuperscript{124}

Additionally, Professor Reisman notes:

Ensuring confidentiality in international investment law is much more difficult, not simply because governments are often “leaky” but also because within States there is often popular concern over the possibility of corruption. There are, moreover, intense demands by NGOs and other stakeholders, with very diverse interests, for transparency and even participation in processes leading to decision.\textsuperscript{125}

ADR methods would undoubtedly result in increased levels of scrutiny of investors and continued public disparagement. This is clearly unfavorable for investors.

CONCLUSION

The history of international investment is long and winding, but its story is best told in relation to the evolution of the global economy. And while many have attempted to frame that story as one of colonial oppression of the Global South, this Article has shown that international investment and the flow of FDI is something that benefit both investors and States.

BITs have absolutely revolutionized the field of international investment law and have done the work where multilateralization and multilateral treaties have failed. Because of these consistent failures in multilateral attempts, the proposed multilateral investment courts should be met by society, and specifically academe, with more of a wary eye and less appeasement to the perceived interests of NGOs and other partisan figures. For in reality, the elimination of the rights of investors results in the elimination of FDI, which in turn results in the elimination of a significant portion of the global economy.

Proposed multilateral investment courts, with their appellate systems, deprive investors of significant and vital rights. Therefore, the search for reform must go on.

Various proposals to curb what are perceived as abuses of ICSID and modern ISDS in general have been many. Evaluation of these indicates that some

\textsuperscript{123} See generally Michael Palmer, ADR Missionaries, 12 DISP. RESOL. MAG. 13 (2006).
\textsuperscript{124} See id. at 15–16.
are toothless, others more natural and dependent upon the passage of time rather than positive reform, and others result in a far less structured system that will probably not keep the critics at bay.

And while this Article may be seen as “stand[ing] athwart history, yelling Stop,” further consideration is most assuredly necessary to create a system that does not negate investors’ interests, as “[t]he investor is the key around which international investment law turns.”\textsuperscript{126}

\textsuperscript{126} Wälde, \textit{supra} note 5, at 137.