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**‘Innovation in international arbitration: does the Emperor need new  
clothes?’**

**A Domestic Solution to an International Concern:  
Potential Appellate Options for Investor-State Dispute  
Settlement**

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## **A Domestic Solution to an International Concern: Potential Appellate Options for Investor-State Dispute Settlement**

In May 2015, the European Commission issued a concept paper proposing the creation of a permanent court for the adjudication of investment disputes in the Transatlantic Trade and Investment Partnership (TTIP).<sup>1</sup> According to the proposal, the court can be ‘the stepping stones towards the establishment of a multilateral system’.<sup>2</sup> The purported rationale is to increase the ‘legitimacy’ of the investor-State arbitration,<sup>3</sup> which has been the subject of much criticism,<sup>4</sup> despite the fact that some continue to fervently defend it.<sup>5</sup>

The Chief Justice (CJ) of Singapore, Sundaresh Menon, observes that States are concerned about the current party-appointed arbitrators system deciding issues related to State regulations due to issues of conflicts, the erratic standard of review, as well as the diverging interpretations.<sup>6</sup> Indeed, several States have decided to opt out of the investor-State dispute settlement (ISDS) system.<sup>7</sup> In 2011, Australia announced that it would no longer include investor-state arbitration clauses in its future International Investment Agreements (IIAs), though it has since amended its policy.<sup>8</sup> South Africa and Indonesia took an even more radical step by terminating their Bilateral Investment Treaties (BITs).<sup>9</sup>

I propose an innovation that is targeted to address the two main criticisms against investor-State arbitration, namely 1) the lack of independence and impartiality of arbitrators, and 2) the diverging interpretations issued by different tribunals. Some have suggested that the creation of a multilateral permanent investment court that covers all existing IIAs may be the ideal way to address these concerns.<sup>10</sup> Others have looked towards an appellate system similar to that of the World Trade Organization (WTO).<sup>11</sup> However, achieving multilateral consensus is increasingly difficult and absent such a global institution being established, *ad-*

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<sup>1</sup> European Commission (EC), ‘Concept Paper: Enhancing the right to regulate and moving from current ad-hoc arbitration towards an Investment Court’ (5 May 2015) 1-12.

<sup>2</sup> *Ibid* 4.

<sup>3</sup> EC (n 1) 6-7; see Devashish Krishan, ‘Thinking about BITs and BIT Arbitration: The Legitimacy Crisis that Never Was’ in Todd Weiler and Freya Baetans (eds), *New Directions in International Economic Law in memoriam Thomas Wälde* (Brill Nijhoff 2011) 116,148.

<sup>4</sup> M Sornarajah, ‘A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration’ in Karl P Sauvant, *Appeal Mechanism in International Investment Disputes* (OUP 2008) 39-79.

<sup>5</sup> Jan Paulsson, ‘Avoiding Unintended Consequences’ in Sauvant (n 4) 241-265.

<sup>6</sup> Sundaresh Menon, ‘The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions’ (2015) 5 *Asian Journal of International Law* 219, 232-236.

<sup>7</sup> ‘Venezuela Submits a Notice under Article 71 of the ICSID Convention’ *ICSID News Release* (26 January 2012); ‘Denunciation of the ICSID Convention by Ecuador’ *ICSID News Release* (9 July 2009); ‘Denunciation of ICSID Convention’ *ICSID News Release* (16 May 2007).

<sup>8</sup> Ministry of Trade and Investment, Australia, ‘Gillard Government Reforms Australia’s Trade Policy’ (12 April 2011); see Australia’s recent FTAs (China-Australia and Korea-Australia).

<sup>9</sup> Lendi Kolver, ‘SA proceeds with termination of bilateral investment treaties’ *Engineering News* (21 October 2013); Ben Bland and Shawn Donnan, ‘Indonesia to terminate more than 60 bilateral investment treaties’ *Financial Times* (26 March 2014).

<sup>10</sup> Barton Legum, ‘Options to Establish an Appellate Mechanism for Investment Disputes’ in Sauvant (n 4) 236.

<sup>11</sup> Donald Mcrae, ‘The WTO Appellate Body: A Model for an ICSID Appeals Facility?’ (2010) 1(2) *Journal of International Dispute Settlement* 371, 382-386; Jaemin Lee, ‘Introduction of an Appellate Review Mechanism for International Investment Disputes: Expected Benefits and Remaining Tasks’ in Jean E Kalicki and Anna Joubin-Bret, *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21<sup>st</sup> Century* (Brill Nijhoff 2015) 478, 480.

*hoc* appellate review is unlikely to solve many of the problems. Thus, we should consider other feasible alternatives, including ones that can be done bilaterally or regionally as building blocks to such a permanent court.

I propose that State parties to an IIA could appoint a permanent court to entertain appeals of ISDS arbitral awards under the IIA. Instead of creating a new court, the State parties simply appoint a new type of court found in some States' domestic legal system—a court that can hear international disputes based on the disputing parties' consent—such as the Singapore International Commercial Court (SICC), the London Commercial Court or the Dubai International Financial Centre Courts.

## **I. Why the Discontent?**

There are numerous criticisms against the current investor-State arbitration, but I focus on the following issues: 1) independence and impartiality, and 2) diverging interpretations.

### **A. Independence and impartiality of Arbitrators**

The process of arbitrators' appointments and the interchangeable role of some arbitrators—sometimes advocates, sometimes adjudicators ('double-hat dilemma')—raise concerns about the independence and impartiality of the arbitrators.<sup>12</sup> The investors and the defending States choose the arbitrators on a case-by-case basis, but the system does not prohibit the same individuals from acting as advocates in other ISDS cases, thus potentially giving rise to real or perceived conflicts of interests.<sup>13</sup> The critics also point out that the way the arbitrators are appointed creates either a pro-investor or a pro-State bias, as they are concerned about their reappointment in future cases.<sup>14</sup> While there are suggestions that there should be self-imposed restraint by the community,<sup>15</sup> absent any incentives, this has not been forthcoming.

### **B. Diverging Interpretations of Different Tribunals**

Incoherent and inconsistent arbitral awards have also upset the investor-State arbitration users, particularly States. I borrow Ewing-Chow's description of coherence as being logical, orderly and aesthetically consistent; this is not a single static goal but a dynamic process of refinement and improvement of the law.<sup>16</sup> Consistency for its own sake is not good because bad laws can remain bad laws. However, it is important to ensure that a certain level of predictability exists.<sup>17</sup>

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<sup>12</sup> Omar E García-Bolívar, 'Permanent Investment Tribunals: The Momentum is Building Up' in Kalicki and Joubin-Bret (n 11) 395; Menon (n 6) 233.

<sup>13</sup> EC (n 1) 6-7; James Crawford, 'Challenges to Arbitrators in ICSID Arbitration' PCA Peace Palace Centenary Seminar (11 October 2013). Although there are not many cases on arbitrators' disqualification, in *Blue Bank International & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013, the claimant's appointed arbitrator was disqualified based on perceived lack of impartiality as his law firm elsewhere was acting against Venezuela in a different arbitration with similar issues.

<sup>14</sup> Charles N Brower & Stephan W Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law' (2009) 9(2) *Chicago Journal of International Law* 471, 489.

<sup>15</sup> *Ibid* 492-93.

<sup>16</sup> Michael Ewing-Chow, 'Coherence, Convergence and Consistency in IIA' in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy* (CUP 2013) 230-31.

<sup>17</sup> *Ibid* 232.

I generally agree that the *ad-hoc* nature of investment-treaty arbitration and the different language used in similar provisions of various BITs contribute to a large extent to the incoherence and inconsistency.<sup>18</sup> Paulsson argues that international investment law is a new area, and we need to give some time to allow natural corrections.<sup>19</sup> I doubt this will be the case. In some cases, arbitrators have interpreted the same provision in an IIA differently.<sup>20</sup>

It could also be because they take a narrow private law approach to public law dispute settlement, thus affecting the standard of review that they apply.<sup>21</sup> Investment treaty arbitration is best understood in a public law context.<sup>22</sup> CJ Menon explains that while these arbitrators are widely respected and experienced in commercial and other areas of law, and might have worked and advised governments and international institutions, they are not necessarily attuned to the domestic public interests and policy concerns of sovereign States.<sup>23</sup>

## II. A Permanent Investment Court of Appeal as One Solution

The proposal for an appellate mechanism in investment treaty arbitration is not new.<sup>24</sup> Some States even envisaged the prospect of implementing the mechanism in the future.<sup>25</sup> A proposal to create a new International Centre for the Settlement of Investment Disputes (ICSID) Appeals Facility was made in 2004 but did not get enough traction.<sup>26</sup>

The supporters of an appeal mechanism argue that it can ensure more coherent and consistent awards.<sup>27</sup> By putting this mechanism within a permanent court, we can also address the concerns about the independence and impartiality of the adjudicators. Judges in a permanent court would be institutionally appointed and thus be perceived to be more independent.<sup>28</sup>

Others doubt that the permanent investment court can fulfil that function because the fundamental norms of investment protection are necessarily open textured and depend on the imperfect texts of various IIAs.<sup>29</sup> Although we should not exaggerate the potential of

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<sup>18</sup> Anna Joubin-Bret, 'The Growing Diversity and Inconsistency in the IIA System' in Sauvant (n 4) 137-39.

<sup>19</sup> Paulsson (n 5) 252-53.

<sup>20</sup> While some tribunals found that North American Free Trade Agreement Article 1105(1) and the 2001 FTC Interpretation refer to level of scrutiny of the standard in the 1920s, as found in the *Neer* case, others found that the provision envisages an evolutionary standard; read also Michael Ewing-Chow and Junianto James Losari, "Which is to be the Master? Extra-Arbitral Interpretative Procedures for IIAs" in Kalicki and Joubin-Bret (n 11) 91-114.

<sup>21</sup> William Burke-White and Andreas von Staden, 'The Need for Public Law Standards of Review in Investor-State Arbitrations' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 697-98.

<sup>22</sup> Stephan W Schill, 'The public law challenge: Killing or rethinking international investment law' 58 *Columbia FDI Perspectives* (30 Jan 2012).

<sup>23</sup> Menon (n 6) 232-33.

<sup>24</sup> Katia Yannaca-Small, 'Improving the System of ISDS' (2006) OECD Working Paper on International Investment, 10.

<sup>25</sup> Chile-US Free Trade Agreement (FTA), 6 June 2003, Article 10.19(10); Draft Consolidated Canada-EU FTA Text, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/10.aspx?lang=eng>, Article X.42.

<sup>26</sup> ICSID Secretariat, 'Possible Improvements of the Framework for ICSID Arbitration' Discussion Paper (2004) 14-16.

<sup>27</sup> Lee (n 11) 476-77.

<sup>28</sup> Eduardo Zuleta, 'The Challenges of Creating a Standing International Investment Court' in Kalicki and Joubin Bret (n 11) 410.

<sup>29</sup> Paulsson (n 5) 258-59.

ensuring coherence and consistency overtly, a permanent court of appeal can contribute to developing more consistent jurisprudence. Ewing-Chow explains that at least the judges as part of an epistemic community can create a relational understanding of the texts and awards, thus moving us towards similarity if not uniformity.<sup>30</sup>

### **III. Building Blocks towards a Permanent Investment Court of Appeal**

The criticisms against establishing a permanent investment court of appeal are useful touchstones when thinking about how the court could function. Those who believe that such a court or appeal mechanism is unnecessary argue that such a creation is complicated and will put the current system's reputation at risk.<sup>31</sup>

I acknowledge that creating a permanent investment court of appeal that covers all existing IIAs is complex. Neither the effort to create a regional investment court in the Union of South American Nations nor the TTIP proposal has succeeded. Similarly, the provision of an appeal mechanism in many IIAs has not been implemented.<sup>32</sup>

That said, I propose that States could appoint an existing reliable court to entertain appeal cases arising from their IIAs. This may be a second best alternative, but it will not put the current system's reputation at risk while potentially improving it by providing a corrective mechanism. For this analysis, I take the SICC as an example of such an appointable court.

#### **A. The SICC in a Nutshell**

Singapore is highly regarded as a neutral venue for dispute resolution between parties from different jurisdictions.<sup>33</sup> Its judiciary has been known for its efficiency, competence, and integrity.<sup>34</sup> Recently, the Supreme Court of Singapore introduced the SICC as a division of the High Court of Singapore.<sup>35</sup> The specialist court is close to meeting all the pre-conditions of a permanent investment court of appeal that can address the criticisms against investor-State arbitration,<sup>36</sup> though several challenges must be addressed.

#### **B. Jurisdiction and Scope of Appeal**

We need to begin with an analysis of the current jurisdiction of the SICC according to Singapore law. The jurisdiction of the SICC is satisfied if:<sup>37</sup>

- the action is international and commercial in nature;
- the action is one that the High Court may hear and try in its original civil jurisdiction;
- and

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<sup>30</sup> Ewing-Chow (n 16) 233-34.

<sup>31</sup> Barton Legum, 'Appellate Mechanisms for Investment Arbitration: Worth a Second Look for the Trans-Pacific Partnership and the Proposed EU-US FTA?' in Kalicki and Joubin-Bret (n 11) 442; Kristina Anđelić, 'Why ICSID Doesn't Need an Appellate Procedure, and What to do Instead' in Kalicki and Joubin-Bret (n 11) 498.

<sup>32</sup> Zuleta (n 28) 403.

<sup>33</sup> World Bank, 'Investing Across Borders 2010' (World Bank Group 2010); White & Case, '2012 International Arbitration Survey' <<http://arbitrationpractices.whitecase.com/news/newsdetail.aspx?news=3787>>.

<sup>34</sup> Klaus Schwab, 'The Global Competitiveness Report 2011-2012' (World Economic Forum 2011).

<sup>35</sup> *Supreme Court of Judicature Act* (Cap 322, 2007 Rev Ed Sing) [SCJA], S18A.

<sup>36</sup> Menon (n 6) 242.

<sup>37</sup> SCJA (n 35) S18D; *Rules of Court* (Cap 322, v 2014 Rev Ed Sing) [RoC], O110, R7.

- the action satisfies such other conditions as the Rules of Court may prescribe.

I submit that an investor-State dispute arising out of an IIA is commercial in nature as it concerns investment transactions.<sup>38</sup> It is international in nature because a foreign investor has its place of businesses in its home State, and its investment in the host State.<sup>39</sup> The High Court of Singapore, in its original civil jurisdiction, can hear and try any action where the defendant submits to its jurisdiction.<sup>40</sup> Applying this to investor-State disputes, as long as the State parties to an IIA provide their consent to have an appeal procedure submitted to the SICC, it falls under the jurisdiction of the court. The investor may not have provided his consent to this mechanism. However, when he invokes the ISDS mechanism in the IIA, the investor has also consented to the overall mechanism, including the appeal procedure. The investor cannot cherry-pick only a part of the mechanism. Indeed, this was seen as an acceptable proposal by ICSID.<sup>41</sup>

The SICC does not limit its jurisdiction to hearing disputes only as a court of first instance. Thus, by virtue of consent by the treaty parties of an IIA under which an appeal is sought after, the SICC could entertain the appeal.

In terms of the scope of appeal, the State parties to an IIA should determine whether an appeal is limited to legal issues only or both legal and factual issues. If the scope of an appeal is limited only to legal issues (errors of law) in the underlying arbitration award, the procedure can be done faster.<sup>42</sup> However, some WTO cases demonstrate the difficulty in segregating legal from factual issues in actual disputes.<sup>43</sup> In fact, the recent Singapore case of *Sanum v Lao* demonstrates how a fact-finding process at a later stage could overturn the arbitral tribunal's award.<sup>44</sup> Knowing this, it should be up to the State parties of the IIA to decide the scope of review.

### C. Selection and Qualification of Arbitrators

García-Bolívar proposes that to ensure independence and impartiality, a tribunal should have judges who would be appointed to the tribunal in advance by the dispute resolution centre.<sup>45</sup> Judges of the same nationality of the parties in dispute could be automatically recused from hearing the cases.<sup>46</sup>

The SICC has a panel of judges comprising of Singapore Supreme Court judges as well as associate judges appointed for a fixed period of three years and assigned to cases on an *ad-hoc* basis.<sup>47</sup> These judges are highly eminent jurists in their respective jurisdictions with both civil law and common law traditions and would therefore be perceived as having the experience to adjudicate public law matters.<sup>48</sup> In the future, as the SICC develops further, one

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<sup>38</sup> Ibid ROC, R1(2)(b)(vii).

<sup>39</sup> Ibid R(2)(a)(iii)(B).

<sup>40</sup> SCJA (n 35) S16(1)(b), S18F.

<sup>41</sup> ICSID Secretariat (n 26) Annex, 1-2.

<sup>42</sup> Lee (n 11) 486-487.

<sup>43</sup> Joost Pauwelyn, *Appeal Without Remand*, (ICTSD 2007), Issue Paper No. 1, 16-21.

<sup>44</sup> *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15.

<sup>45</sup> García-Bolívar (n 12) 397.

<sup>46</sup> Ibid

<sup>47</sup> SICC, 'Judges' <<http://www.sicc.gov.sg/Judges.aspx?id=30>>.

<sup>48</sup> Some of the jurists also have experience in international trade and investment law dispute settlement.

way to enhance the SICC is by including judges who have sufficient knowledge of relevant public international law to the panel list.<sup>49</sup>

In order to maintain independence and impartiality, the disputing parties cannot appoint the judges hearing their appeal. The international or associate judges do not seem to be expressly precluded from undertaking other professional activities prior to being assigned to a case, but perhaps the SICC could preclude those who have acted as counsel in investor-State arbitration cases.

#### **D. Permanent Secretariat**

Ewing-Chow opines that the role of a secretariat in contributing to the success of a dispute settlement system should not be underestimated.<sup>50</sup> The clearest example could be seen in the WTO's Legal Affairs and Appellate Body (AB) secretariats, which provide substantive support to the panellists and the AB members.<sup>51</sup> The SICC registry can provide similar support for its judges. This will be critical in ensuring consistency and coherence.

#### **E. Enforcement of the Award**

Without an effective enforcement mechanism, an arbitral award would not be worth the paper it is written on. While, the ICSID Convention has its own enforcement mechanism,<sup>52</sup> other *ad-hoc* arbitrations rely on the New York Convention.<sup>53</sup>

SICC judgments can already be enforced by registration in several countries with which Singapore has signed agreements. However, since that list is not as extensive as the New York Convention, I propose that a mechanism be introduced either by the SICC or the State parties to an IIA to transform the appeal decision of the SICC into a foreign arbitral award so it will be enforceable under the New York Convention.

#### **F. Gaining Support for the System**

One of the main challenges of this proposal is gaining the confidence of other States to opt-in. Many States are already concerned about the current system so the provision of a viable alternative would be seriously considered. What matters most is that the court is reliable and capable of resolving the concerns that States have about the current system.<sup>54</sup> The system is better than the current party-appointed system since it is designed in such a way to ensure impartiality, independence, and the expertise of the judges. Additionally, the opportunity to appeal against problematic interpretations by arbitral tribunals will enhance coherence and consistency.

The fact that the system is located in and operated by one particular State may raise trust issues of whether that particular State will be independent. However, CJ Menon argues that parties are not necessarily as nationalistic anymore, provided there is assurance of

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<sup>49</sup> García-Bolívar (n 12) 397.

<sup>50</sup> Ewing-Chow (n 16) 234.

<sup>51</sup> *Ibid*; McRae (n 11) 387-388.

<sup>52</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (entered into force 14 October 1966), Articles 54.

<sup>53</sup> Convention for the Recognition and Enforcement of Foreign Arbitral Awards (entered into force 7 June 1959).

<sup>54</sup> Menon (n 6) 238.

competence, integrity, and trustworthiness.<sup>55</sup> Regional tensions may also prevent certain States from agreeing to submit to this specialist court, but the existence of highly eminent jurists from non-regional jurisdictions can ease this concern.

### **G. Technicalities of Opting into the System**

The inclusion of this mechanism should ideally be done by the State parties to an IIA, rather than the parties to a dispute. This ensures that all disputes under the IIA have a consistent dispute settlement mechanism.

States can opt-in by issuing a protocol to amend their existing IIAs. The protocol of amendment will contain the express statement of the State parties to the IIA that any investor-State disputes arising under the IIA after the issuance of the protocol of amendment will be subject to the existing dispute settlement provision in the agreement and the appeal procedure to the SICC. As some IIAs and the rules of several existing arbitral institutions provide that an arbitral award shall be final and binding and not subject to any appeal or any other remedy,<sup>56</sup> the State parties to the IIA must make an explicit reservation to this rule.

### **IV. Conclusion**

While many States have criticized ISDS, it remains one of the greatest innovation for foreign investors to obtain guarantees of protection when investing in lands alien to them. Brower observes that with international arbitration, foreign investors no longer have to succumb to ‘internal’ political methods for resolving disputes, thus promoting the rule of law.<sup>57</sup>

The appointment of a reliable permanent court in a domestic legal system to act as an appellate tribunal for ISDS cases may alleviate some of the current concerns of States about the system. This proposal could face some challenges, but I have suggested some ways to address them. In fact, following my proposal, States may even consider an even more radical reform of appointing such domestic courts to hear investment disputes as the adjudicator of first instance.

In light of the current climate against ISDS, the emperor may not need new clothes, but it may be that we need a new emperor.

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<sup>55</sup> Ibid.

<sup>56</sup> Australia-Philippines BIT, Article 13(13); ICSID Convention (n 52) Article 53(1); UNCITRAL Arbitration Rules (revised in 2010), Article 34(2).

<sup>57</sup> Charles N Brower and Sadie Blanchard, ‘What’s in a Meme? The Truth about Investor-State Arbitration: Why it Need Not, and Must Not, be Repossessed by States’ (2014) 52 Columbia Journal of Transnational Law 689, 756-757.