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TPP and ISDS: The Challenge from Europe and the Proposed TTIP Investment Court

Ian A. Laird

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TPP AND ISDS: THE CHALLENGE FROM EUROPE AND THE PROPOSED TTIP INVESTMENT COURT

*Ian A. Laird**

The following is the text of the 9th Annual Canada-United States Law Institute Distinguished Lecture given at Western University Faculty of Law by Ian Laird on November 16, 2015.

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I. INTRODUCTION

The Trans-Pacific Partnership Agreement (“TPP”) is an ambitious trade, services, and investment treaty on which final agreement was reached by the twelve parties from the Asia-Pacific region on Monday, October 5, 2015.¹ The parties completed negotiations during the Canadian federal election, and at the beginning of the U.S. presidential primary process. The agreement is not likely to be signed and ratified for well over a year from the completion of negotiations. In the meantime, there will continue to be heightened political debate about TPP’s costs and benefits. One of the more heated areas of discussion will be the main topic of this paper: the TPP chapter on Investor-State Dispute Settlement (“ISDS”).² In asking whether the TPP is an example of “promise or peril” for Canada, the debate around ISDS will likely play a role.³

* LL.B. (Windsor), LL.M. (Cantab). Partner, Crowell & Moring LLP, Washington, DC. The author wishes to thank Byron Sacharidis for his invaluable help in preparing this article. The views expressed in this chapter are solely attributed to the author in his person capacity and not those of Crowell & Moring LLP or its clients.

¹See Alan Wolff, *What Indonesia’s Support Means for the Trans-Pacific Partnership*, FORTUNE, Nov. 4, 2015, <http://fortune.com/2015/11/04/indonesias-support-tans-pacific-partnership/> (Other major economies in the region have signaled their interest in joining the TPP, including: Indonesia, Philippines, South Korea, Thailand and Taiwan).

²See NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS & TRADE, TRANS-PACIFIC PARTNERSHIP, (released Nov. 4, 2015) <http://www.mfat.govt.nz/Treaties-and-International-Law/01-Treaties-for-which-NZ-is-Depositary/0-Trans-Pacific-Partnership-Text.php> (The TPP

The new Liberal Government in Canada has promised a vigorous review of TPP in Parliament before ratifying it.⁴ U.S. presidential candidate Hillary Clinton has said that she opposes TPP.⁵ Senator Elizabeth Warren has warned that ISDS involves “rigged, pseudo-courts”⁶; while President Obama has responded by saying “those arguments are made up.”⁷ Even comedian John Oliver has brought ISDS into popular culture in his recent commentary on Philip Morris’s investment arbitration claim against Australia over tobacco plain packaging regulations.⁸

During TPP negotiations, another groundbreaking trade agreement that has been under consideration between the United States and the European Union (“EU”) is the Transatlantic Trade and Investment Partnership (“TTIP”). Combined, the members of TPP and TTIP represent almost sixty-four percent of the world’s Gross Domestic Product.⁹ The ISDS has also been equally contentious, if not more so, during the negotiation of TTIP.

The long and winding path to the ISDS provisions in these treaties is in many ways a story grounded in the earlier experience and debate surrounding Chapter 11 of the North American Free Trade Agreement (“NAFTA”). Both sides of the current debate use NAFTA to support or critique TPP and TTIP. The first part of this paper makes a small contribution to addressing the question, how did we get to where we are now with ISDS? We will take a short tour of some vignettes from the last fifteen years of NAFTA experience with ISDS. We will see some of the origins of the debate about the legitimacy of ISDS that continues to inform the current TPP and TTIP discussion.

Parties (as of the date of this paper) are: Canada, United States, Australia, Brunei Darussalam, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

³ The Trans-Pacific Partnership – Promise or Peril for Canada? Address at the 9th Annual Canada-U.S. Law Institute, Western University Faculty of Law, London, Ontario, Canada (Nov. 16, 2015), (This paper is based on this speech).

⁴ Steven Chase *et. al.*, *No Promise to renegotiate 6,000-page TPP Deal*, *New Liberal Trade Minister Says*, THE GLOBE AND MAIL, Nov. 5, 2015, <http://www.theglobeandmail.com/news/national/tpp-to-ease-threshold-for-foreign-takeovers-of-canadian-companies/article27114404/>.

⁵ Sam Frizell, *Hillary Clinton Opposes Trans-Pacific Partnership*, TIME, Oct. 7, 2015, <http://time.com/4065320/hillary-clinton-opposes-trans-pacific-partnership/>.

⁶ Elizabeth Warren, *The Trans-Pacific Partnership clause everyone should oppose*, WASHINGTON 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.

⁷ Matt Bai, *Why Obama is Happy to Tilt Elizabeth Warren on The Trade Deal*, YAHOO! POLITICS, May 9, 2015, <https://www.yahoo.com/politics/why-obama-is-happy-to-fight-elizabeth-warren-on-118537612596.html>.

⁸ See *Last Week Tonight with John Oliver: Tobacco*, (YouTube Feb. 15, 2015), <https://www.youtube.com/watch?v=6UsHHOCH4q8>.

⁹ See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, OVERVIEW OF THE TRANS PACIFIC PARTNERSHIP, <https://ustr.gov/tpp/overview-of-the-TPP> (last visited Mar. 1, 2016) (the United States has repeatedly stated that TPP represents almost forty percent of global GDP); See *The EU in the world – economy and finance*, EUROSTAT, http://ec.europa.eu/eurostat/statistics-explained/index.php/The_EU_in_the_world_-_economy_and_finance (last visited March 1, 2016) (The EU states that its members represent 23.7% of world GDP in 2013).

In the second part of this paper, the arbitral model for dispute settlement in TPP is contrasted with the new proposal of the EU for an international investment “court” in TTIP. The United States has taken its NAFTA experience and produced an investment chapter in TPP rooted in the values and procedures of international arbitration. In contrast, we see a dramatic, new proposal by the EU to include in TTIP a purported court-based model that seeks to repudiate the arbitration model. The justification for this change is based on the accusation that the current arbitration model is illegitimate. We will examine the legitimacy debate, comparing the arbitration and court models.

II. WHERE ARE WE NOW? OR “HOW . . . IS THIS POSSIBLE?”¹⁰

What are the roots of this so-called “legitimacy” debate surrounding ISDS? First, what does it even mean to be legitimate? The word “legitimate” is most properly used as a synonym for lawful.¹¹ In the public realm, for a policy to be legitimate, there needs to be a broader sense of acceptance grounded in understanding and familiarity of that policy by the general public and key stakeholders.

How is this critique of legitimacy applied in the ISDS context? ISDS purports to be an independent, adjudicatory process. From a procedural point of view, ISDS has been effectively held to a standard by its critics based on the familiar procedures and mechanisms of domestic courts. Fundamentally, the parties to a legitimate adjudicatory process must be satisfied that justice is done, and it is seen to be done. In the United States, this process is broadly called due process, while in Canadian law schools we talk about natural justice. Regardless of whether fundamental principles of procedure are followed, no judicial-styled process can be considered legitimate if the parties and other key stakeholders are not supportive of the process – whatever the result for the individual parties. Perception counts a great deal. The particular parties may not be happy with the final result, but they should accept the fundamental fairness of the process that led to the result.

An interesting feature of ISDS is that the issues raised in investment arbitration are frequently of highly charged political nature. This feature is not present in the issues raised in international commercial arbitration (which shares many procedural similarities with ISDS). Generally, non-court dispute mechanism between two private parties, like mediation or commercial arbitration, does not lead to objections by outside stakeholders. In contrast, in

¹⁰ See Last Week Tonight with John Oliver, *supra* note 8 (paraphrasing of a statement made by comedian John Oliver commenting on the efforts by Philip Morris to sue the Australian Government using ISDS mechanisms over plain packaging legislation. In his commentary, Mr. Oliver asked the question: “How the f . . . is this possible?” in reference to the idea that a private corporation could sue a state using ISDS over public health regulations such as those at issue in the arbitration).

¹¹ *Legitimate*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/legitimate>, (Last visited Mar. 1, 2016) (“Legitimacy” comes from the Latin verb *legitimare*, which can be interpreted as meaning “lawful”).

ISDS, when public policy and taxpayer money is at stake, the community of stakeholders is greatly increased and hence the public scrutiny is also heightened.

A number of vignettes from NAFTA Chapter 11 decisions, rendered in the late 1990s and early 2000s, demonstrate the debate over the legitimacy of investment arbitration in the NAFTA context. Much of the NAFTA debate is similar to the TPP and TTIP discussions. Let us start in early 2002, after a small number of NAFTA Chapter 11 cases were launched against the United States:

BILL MOYERS: You write that Chapter Eleven is a ticking time bomb in the politics of globalization. Why?

WILLIAM GREIDER (NATIONAL AFFAIRS CORRESPONDENT, THE NATION): Because I think the public [] will be shocked and quite confused, if any of a number of cases, whether it's Methanex or Loewen, or some of the others, manage to win damages against the United States. People at first are gonna say, Huh? What is that about? And then, as it's explained to them, they're gonna say, we didn't sign on for that. That's not what we think about as a global trade agreement. And then the education process is quickly gonna turn into anger, I believe.¹²

Moyers's report emphasized the lack of public knowledge about Chapter 11 and its "secret courts," a characterization made repeatedly. The report described NAFTA Chapter 11 as an attack on the "public laws that protect our health – and our environment – even to attack the American judicial system."¹³ It also mentioned the possibility of public rebellion a number of times, and the general surprise about the arbitral process and its standards was pervasive in the PBS story. Demonstrated in a dramatic style, the report concluded that NAFTA Chapter 11 is illegitimate.

The *Loewen v USA* NAFTA arbitration was portrayed as a big surprise in Moyers's report because the conduct of U.S. courts was challenged under international law standards. The legal audience understands that the principle of denial of justice, specifically referenced in TPP, is a well-established legal standard under customary international law.¹⁴ In 2002, the U.S. media and public were clearly surprised that such international standards exist. The two were even more surprised that under NAFTA process and remedy, U.S. courts could be held accountable. The idea that state responsibility, properly attributed to domestic courts as organs of a State was very contentious. From a public policy point of view, Moyers questioned the legitimacy of arbitration under NAFTA Chapter 11.

¹² Transcript, *Trading Democracy - A Bill Moyers Special*, PBS (Feb. 1, 2002) http://www.pbs.org/now/transcript/transcript_tdfull.html.

¹³ *Id.*

¹⁴ The Trans-Pacific Partnership, art. 9.6(2)(A), (released Nov. 2015), <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf> (specifically references denial of justice as an element of the fair and equitable treatment standard: "'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."); see also Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005); James Crawford, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 619-20 (2012).

Another notable player in the questioning of NAFTA Chapter 11 was the U.S.-appointed arbitrator in the *Loewen* arbitration against the United States. In 2004, after the completion of the arbitration, Judge Abner Mikva¹⁵ candidly admitted his own initial shock of the NAFTA arbitration model and the international standards included. In his own words:

Not only did I not know about it [NAFTA Chapter 11], I would venture that most of the members of Congress who voted for NAFTA had no idea that there was an arbitration procedure in it or how far that arbitration procedure extended . . . No one ever talked about arbitration or investment disputes . . . It didn't sound too radical until I realized that the dispute that this Canadian company Loewens was talking about involved the judgment of the highest court of the state of Mississippi . . . They were asking this arbitration panel to review the judgment of the Mississippi Supreme Court.¹⁶

Not only was Judge Mikva plainly unfamiliar with the arbitration model, he was unsupportive of any international tribunal holding U.S. courts to account. The Mississippi courts, by Judge Mikva's own admissions, were then known as "tort heaven. . . and judges and juries [w]ere conditioned to give very[,] very large judgments." He goes on to describe the Mississippi court's conduct against Mr. Loewen and his company as "the most god awful trial I have ever read about. It was incredible."¹⁷ Regardless of this finding, Judge Mikva convinced the other tribunal members, while taking credit for "saving American citizens several hundred million dollars," to dismiss the claim on a controversial jurisdictional ground.¹⁸

The U.S. government officials, defending the *Loewen* claim in 2000, closely examined the argument that no U.S. court, even Mississippi's, should be the subject of an international arbitral claim. These officials were as surprised as Judge Mikva that NAFTA provided an international remedy for denial of justice in an action against a U.S. court. Recently released documentation from the Clinton Presidential Library archives shows extensive interdepartmental debate about whether the United States should have challenged the jurisdiction of the *Loewen* tribunal. The basis of this challenge was the fundamental proposition that U.S. courts cannot be the subject of international claims under NAFTA

¹⁵ See Abner J. Mikva, Wikipedia, https://en.wikipedia.org/wiki/Abner_J._Mikva (last visited Mar. 1, 2016) (Former Congressman, White House Counsel to President Clinton, retired Chief Judge of the United States Court of Appeals for the DC Circuit, and longtime Chicago political supporter of President Obama).

¹⁶ J. Mikva, Pace Law School Symposium on Environmental Law and the Judiciary, Pace Law School (Dec. 6-8, 2004) (Judge Mikva's statements have been subjected to significant debate in support of the argument that party-appointed arbitrators in investment arbitration should be abolished); See Jan Paulsson, *Moral Hazard in International Dispute Resolution*, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair University of Miami School of Law (Apr. 29, 2010), http://www.arbitration-icca.org/media/4/69377396990603/media012773749999020paulsson_moral_hazard.pdf.

¹⁷ *Id.*

¹⁸ *Id.*; *Loewen Grp. Inc. & Loewen (Raymond L.) v. United States*, ICSID Case No. ARB (AF)/98/3, Award, (June 26, 2003), 7 ICSID Rep. 442.

Chapter 11. As stated in one memo, titled “Urgent Need for Policy Guidance to Resolve Interagency Litigation Strategy Dispute in Loewen NAFTA arbitration,” addressed to White House Chief of Staff John Podesta:

[the] Justice [Department] believes our strongest defense lies in advancing the broadest jurisdictional argument – that the arbitral tribunal lacks jurisdiction in this case because NAFTA Chapter 11 applies only to ‘measures adopted or maintained’ by the United States and that the judgments of domestic courts are not ‘measures’ as that term is used in NAFTA.¹⁹

Forward to 2015, we see that the United States has never lost a NAFTA case,²⁰ even though twenty cases have been launched against it. In contrast, Canada has been sued thirty-five times, while losing six cases. Looking at the over twenty-one years since the promulgation of NAFTA, the evidence simply does not support the earlier fears of a weakening of democratic values and regulatory power by an allegedly illegitimate system of arbitration.

Despite the absence of evidence, present-day critics, like Senator Warren, continue their pressure to remove ISDS from new treaties, such as TPP and TTIP.²¹ She recently described her opposition to ISDS in TPP as follows:

Agreeing to ISDS in this enormous new treaty would tilt the playing field in the United States further in favor of big multinational corporations. Worse, it would undermine U.S. sovereignty. . . Why create these rigged, pseudo-courts at all? What’s so wrong with the U.S. judicial system?

She then concludes:

¹⁹ Memorandum from Beth Nolan et al, to John D. Podesta, (Feb. 10, 2000), <http://www.italaw.com/sites/default/files/case-documents/italaw4030.pdf> (last visited Mar. 1, 2016) (Notably, at State Department officials and US Trade Representative’s office disagreed with this approach strategically and legally, preferring more nuanced arguments related to exhaustion of local remedies under the denial of justice standard).

²⁰ See Scott Sinclair, *NAFTA Chapter 11 Investor-State Disputes to January 1, 2015*, CANADIAN CENTRE FOR POLICY ALTERNATIVES (Jan. 14, 2015), <https://www.policyalternatives.ca/publications/reports/nafta-chapter-11-investor-state-disputes-january-1-2015> (As of Jan. 2015, twenty (20) NAFTA Chapter 11 claims have been filed against the US, while losing none).

²¹ See *Setting the Record Straight: Debunking Ten Common Defenses of Controversial Investor-State Corporate Privileges*, Public Citizen, <http://www.citizen.org/documents/ustr-isds-response.pdf> (last visited Mar. 1, 2016) (In the United States, Public Citizen has been involved in the anti-ISDS debate); See *More than 100 Legal Scholars Call on Congress, Administration to Protect Democracy and Sovereignty in U.S. Trade Deals*, Alliance for Justice, http://www.afj.org/press-room/press-releases/more-than-100-legal-scholars-call-on-congress-administration-to-protect-democracy-and-sovereignty-in-u-s-trade-deals_ (last visited Mar. 1, 2015) (A group of over 100 law professors under the umbrella of Alliance for Justice (an “association of associations” NGO) released a letter opposing ISDS on Mar. 11, 2015); See *An open letter about investor-state dispute settlement*, McGill University (Apr. 20, 2015), <https://www.mcgill.ca/fortier-chair/isds-open-letter> (last visited Mar. 1, 2016) (A responsive letter from another group of academics criticizing the Alliance for Justice letter was published a month later on Apr. 20, 2015).

Giving foreign corporations special rights to challenge our laws outside of our legal system would be a bad deal. If a final TPP agreement includes Investor-State Dispute Settlement, the only winners will be multinational corporations.²²

Warren's argument demonstrates two main criticisms of the ISDS process: that it is not a court (and does not have all the characteristics of a court), and that arbitrators are biased corporate insiders. The main thrust of Warren's attack on the arbitral process is the allegation that these "rigged, pseudo-courts" do not employ independent judges. As she alleges that "highly paid corporate lawyers" would one day act as judges and the next day represent corporations, she indirectly identifies the fact that arbitrators in international arbitrations are not permanent. They are picked by the parties and are frequently not employed as full-time arbitrators (and may also act as counsel in other arbitrations).²³ The idea that the parties choose their arbitrators is one of the most popular features of international arbitration.²⁴

Warren's blunt attack on the policies of the current U.S. administration has been met with equally assertive support of TPP and its ISDS chapter.²⁵ The White House itself published a vigorous response to Senator Warren:

Senator Warren also questions the integrity of the arbitrators who decide cases, suggesting that they are biased against governments. In fact, ISDS panels more frequently side with respondent governments. The U.S. government, for example, has won every single case concluded against it.

The arbitration rules used under TPP require the independence of arbitrators and provide for challenge and disqualification in the event of

²² Elizabeth Warren, *The Trans-Pacific Partnership clause everyone should oppose*, WASHINGTON 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.

²³ *Id.* (She then goes on to ask what she believes is a rhetorical question: "If you're a lawyer looking to maintain or attract high-paying corporate clients, how likely are you to rule against those corporations when it's your turn in the judge's seat?" Could not the same question be asked about judges appointed by governments and the degree of likelihood they would rule against the states that appoint them and pay their salaries? This is a frequent and well accepted rationale for the preferred use of international arbitration over the use of courts in the jurisdiction of the respondent state).

²⁴ See White & Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, Queen Mary, University of London, School of International Arbitration at 6 (October 6, 2015) ("Queen Mary Survey 2015"), <http://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015.pdf> (In a recent survey of arbitration users, the choice of arbitrators was one of the top 4 attractions of using arbitration).

²⁵ See *Don't buy the trade deal alarmism*, WASHINGTON POST (Mar. 11, 2015), http://www.washingtonpost.com/opinions/dont-buy-the-trade-deal-alarmism/2015/03/11/41575fee-c1d5-11e4-9271-610273846239_story.html (support from the Washington Post directly criticizing Warren in an editorial in support of ISDS and TPP).

conflict of interest or bias. They also provide a central role for the government being sued to determine which arbitrators hear the case²⁶

And on the specific use of arbitration rather than resort to courts:

Unfortunately, foreign courts have not always respected this principle [of compensation for expropriation], and U.S. investors often face a heightened risk of bias or discrimination when abroad. That's why governments have looked to international arbitration to resolve such disputes for centuries. Earlier in our history, the United States used gunboat diplomacy, sending our military to defend our economic interests abroad. The decision was made by our predecessors that it was better to rely on neutral arbitration instead.²⁷

President Obama himself has vigorously defended ISDS:

The other argument you have heard is that [TPP] will weaken regulations, like food safety and financial regulations even. And this is based on something called [investor] dispute settlement provisions, which are basically arbitration provisions that companies use primarily to make sure they are not discriminated against when they are investing in other countries . . . There are 3,000 of [these provisions] in existing trade deals, fifty of them we're party to. We've never been successfully sued, because we already have high standards. . . So those arguments are made up. We don't have any examples of that [weakening of regulations and law] happening in the United States and it won't happen.²⁸

In Europe, the debate has been no less contentious.²⁹ In 2014, the EU organized Internet public consultations on the question of ISDS's inclusion in the

²⁶ Jeffrey Zients, Director of the National Economic Council and Assistant to the President for Economic Policy, *Investor-State Dispute Settlement (ISDS) Questions and Answers*, WHITE HOUSE BLOG (Feb. 26, 2015), <https://www.whitehouse.gov/blog/2015/02/26/investor-state-dispute-settlement-isds-questions-and-answers> (The Q&A goes on further to note that: "ISDS is an arbitration procedure – similar to procedures used every day by businesses, governments, and private citizens across the globe – that allows for an impartial, law-based approach to resolve conflicts and has been important to encouraging development, rule of law, and good governance around the world.").

²⁷ *Id.*

²⁸ Bai, *supra* note 7.

²⁹ See *Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, CORPORATE EUROPE OBSERVATORY (Nov. 27, 2012), <http://corporateeurope.org/international-trade/2012/11/profitting-injustice> ("CEO's Profiting from Injustice Report"), (On the EU side, some of the more critical analysis has been from a group called "Corporate Europe Observatory (CEO)", which published a 2012 report titled *Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, November 27, 2012. The cover page of the report provocatively states: "Profiting from Injustice uncovers a secretive but burgeoning legal industry which benefits from these disputes – at the expense of taxpayers, the environment and human rights. Law firms and arbitrators, who are making millions from investment disputes against governments, are actively promoting new cases and lobbying against reform in the public interest."); See *TTIP: debunking the business propaganda over investor rights*, CORPORATE EUROPE

TTIP. In its 2015 report following the consultations, the EU Commission identified four areas of TTIP's investment chapter that are in need of further improvement:

- the protection of the right to regulate;
- the establishment and functioning of arbitral tribunals;
- the relationship between domestic judicial systems and ISDS; and,
- the review of ISDS decisions through an appellate mechanism.³⁰

The latest manifestation of this debate in the EU was the publication on September 16, 2015 of the EU Commission's new proposal for the TTIP investment chapter and a new TTIP "Investment Court System."³¹ As stated by EU Commissioner Cecilia Malmström on its release:

It's clear to me that all these complaints had one common feature – that there is a fundamental and widespread lack of trust by the public in the fairness and impartiality of the old ISDS model. This has significantly

OBSERVATORY (July 3, 2014), <http://corporateeurope.org/international-trade/2014/07/ttip-debunking-business-propaganda-over-investor-rights> (CEO also published a list debunking ostensible "myths" that summarizes one side of the debate); See, *A response to the criticism against ISDS*, EUROPEAN FEDERATION FOR INVESTMENT LAW AND ARBITRATION (May 17, 2015), http://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the_criticism_of_ISDS_final_draft.pdf (The main response to CEO and other groups supporting ISDS has been from a new lobbying organization called "European Federation for Investment Law and Arbitration" (EFILA)); See Letter of Reply to EFILA by David Schneiderman (*University of Toronto et al., Reply to EFILA, GUS VAN HARTEN* (July 6, 2015), <https://gusvanharten.wordpress.com/2015/07/06/reply-to-efila/>).

³⁰ See *Online Public Consultation in Investment and Investor-To-State Dispute Settlement (ISDS) in The Transatlantic Trade and Investment Partnership Agreement (TTIP)*, EUROPEAN COMMISSION, http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179, (July 13, 2014) (The EU's public consultation resulted in 150,000 responses. The report notes that 145,000 responses were from "various on-line platforms containing pre-defined answers which respondents adhered to"); See Manuel Pérez-Rocha, *When corporations sue governments*, N.Y. TIMES (December 3, 2014), http://www.nytimes.com/2014/12/04/opinion/when-corporations-sue-governments.html?_r=0 (In an article published in the New York Times, author Manuel Pérez-Rocha reviews the EU's positioning on ISDS in the TTIP: "The European Commission president, Jean-Claude Juncker, refuses to accept that European courts be limited by special regimes for investor-to-state disputes." Along the same lines, "Sigmar Gabriel, Germany's vice chancellor and economy minister, warned of states seeing policy objectives circumvented by the threat of damages.").

³¹ Memorandum from European Commission, Reading Guide MEMO/15/5652, *Draft text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP)* (Sept. 16, 2015), http://europa.eu/rapid/press-release_MEMO-15-5652_en.html [hereinafter *Reading Guide*]; See *Transatlantic Trade and Investment Partnership, TRADE IN SERVICES, INVESTMENTS AND E-COMMERCE* (Commission draft text TTIP at ch. 2), http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf; See Press Release IP/15/6059, European Commission, *EU Finalises Proposal for Investment Protection and Court System to TTIP* (November 12, 2015), http://europa.eu/rapid/press-release_IP-15-6059_en.htm ("EU Proposed Investment Chapter" or "EU Proposal"). The proposal was formally submitted to the US on 12 Nov. 2015).

affected the public's acceptance of ISDS and of companies bringing such cases.³²

This proposal is based on instructions from the European Parliament³³ and an earlier working paper published in May 2015.³⁴ One of the key features of the working paper and the new investment chapter are critiques of the arbitration model. The criticism supports the idea that the arbitration model should be jettisoned for a new investment “court,” with government-appointed, permanent judges and an appellate mechanism. The new court model attempts to mimic the World Trade Organization Dispute Settlement Body (“DSB”) and its Appellate Mechanism, with the new investment court judges paid on a similar wage scale as the DSB judges. The new model goes further by calling the new system an “Investment Court System.”

The key features of the new “court” model seem responsive to the legitimacy criticisms of ISDS. The new system includes a Tribunal of First Instance (called the “Investment Tribunal”) with fifteen judges appointed by the TTIP parties, and an “Appeal Tribunal” with six publicly appointed members. Although I will not examine all of the purported procedural improvements of the new Court, noteworthy are the efforts to improve times for the rendering of decisions by the new Court (one-and-a-half years for the Investment Tribunal, and six to nine months for the Appeal Tribunal) and access for small and medium-sized companies.³⁵

The fifteen judges of the first level tribunal will be appointed jointly by the EU and the U.S. governments with five each from the EU and the United States,

³² Cecilia Malmström, *Proposing an Investment Court System*, EU BLOG POST (Sept. 16, 2015), https://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system_en.

³³ European Commission Concept Paper, *Investment in TTIP and beyond – the path for reform, Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court*, (May 5, 2015), http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

³⁴ Eur. Parl., Press Release 20150702IPR73645, *TTIP: ease access to US market, protect EU standards, reform dispute settlement* (July 8, 2015), <http://www.europarl.europa.eu/news/en/news-room/content/20150702IPR73645/html/TTIP-ease-access-to-US-market-protect-EU-standards-reform-dispute-settlement>; See EUR.PARL. RES. 2014/2228(INI) (July 8, 2015), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN> (The Press release indicated the following wording for Parliament's ISDS recommendation for TTIP: “The compromise wording on investor-state dispute resolution tools, hammered out by political groups in long and tense negotiations and inserted in the text with 447 votes in favour, 229 against and 30 abstentions, calls for a new justice system to replace “investor-state dispute settlement” (ISDS) provisions, which rely upon private arbitration and are common in trade deals. This system should be “subject to democratic principles and scrutiny”, in which cases are handled “in a transparent manner”, by “publicly appointed, independent professional judges” and “in public hearings”. It should include “an appellate mechanism”, respect the jurisdiction of EU and member state courts and ensure that private interests “cannot undermine public policy objectives”, says the text.”).

³⁵ Memorandum from European Commission, Fact Sheet MEMO/15/6060, *Why the new EU proposal for an Investment Court System in TTIP is beneficial to both States and investors*, (Nov. 12, 2015), http://europa.eu/rapid/press-release_MEMO-15-6060_en.html.

and five nationals of third-world countries. The “Reading Guide” of the EU Proposal explains:

These judges would be the only ones to hear disputes under TTIP. The judges would have very high technical and legal qualifications, comparable to those required for the members of permanent international courts such as the International Court of Justice and the WTO Appellate Body. Disputes under TTIP would be allocated randomly, so disputing parties would have no influence on which of the three judges will be hearing a particular case.

This is a fundamental change compared to the old ISDS system which operates on an *ad hoc* basis with arbitrators chosen by the disputing parties.

Taken together, the elements proposed for the operation of the Investment Tribunal, are an effective way to insulate judges from any real or perceived risk of bias.³⁶

The EU clarifies that the objective of the Appeal Tribunal is to “ensure that there could be no doubt as to the legal correctness of the decisions of [the lower level] tribunals.”³⁷ The EU proposal emphasizes that the tribunal members will be “prohibited from taking on work as legal counsel on any investment disputes and would be subject to strict ethical rules.”³⁸ This point clearly echoes the criticisms by Senator Warren of the “rigged pseudo-court.” Again, the critique of the arbitration model is that allowing arbitrators to work part time as legal counsel creates an alleged perception of bias.

A. Substantive and Procedural Objections

We have now taken a very brief snapshot of the growth of the legitimacy debate about ISDS. As we have seen, the criticisms of ISDS come in two broad categories of objections: substantive and procedural.

The substantive objections argue that the international standards found in investment treaty provisions are loosely defined and interfere with state sovereignty. Particularly, these provisions are criticized as intruding with the regulatory space of governments in sensitive policy areas such as health, safety, the environment, and financial regulation. In the large EU consultation report, this was classified as “the protection of the right to regulate.” Recently, investment treaty drafters have taken a decidedly defensive drafting stance,

³⁶ *Reading Guide*, *supra* note 31, § 1.

³⁷ *Id.* The standard of the review is much more extensive than the standard found in the New York Convention or in an ICSID Convention allowing for appeals of law and fact. As stated in Article 29(1) of the EU Proposal: “The grounds for appeal are: (a) that the Tribunal has erred in the interpretation or application of the applicable law; (b) that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or, (c) those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b).”

³⁸ *Id.*

designed to shrink, or tighten, the scope of these allegedly loose substantive obligations and protections. The fair and equitable treatment standard and the scope of expropriation with compensation provisions have been subject to the most attention.

The argument has been made that these more recent treaties, like TPP, TTIP and the Canada-EU Comprehensive Economic and Trade Agreement (“CETA”), have become sovereignty protection treaties and not investment protection treaties.³⁹ Judge Schwebel has described the current position of the ISDS’s critics as “more colourful than. . . cogent.”⁴⁰

I do not intend to address the critique concerning the alleged inadequacy of the substantive standards found in TPP or TTIP. This topic has been the subject of much treaty tinkering and adjustment by negotiators, and requires a full and separate paper on its own.

The procedural critiques largely focus on removing the international commercial arbitration model in favor of a model that ostensibly copies many of the features of a western-style court system. As we have seen in TTIP, the EU has adopted a similar view, challenging the arbitration model and proposing a new “investment court” system. The following are sub-categories of procedural criticisms:

Transparency of the process – ISDS arbitral tribunals are criticized for being secret and lacking the transparency of civil courts;

Quality of the decision-makers – arbitrators are alleged to be biased corporate shells, unlike independent and tenured court judges; and

Quality of the decision-making – allegedly biased ISDS tribunals give investor-favoring decisions based on allegedly loose standards. Critics argue that unlike a two tiered court system (with precedent and appellate corrective review), arbitral decision making lacks consistency and predictability.

In the past year, two starkly different dispute resolution models have emerged; one is based on international arbitration, and the other tacks strongly towards a purported institutionalized, court-based model. We have seen the first model through the U.S. and Canadian-model bilateral investment treaties (“BITs”) as evidenced in the TPP and CETA investment chapters. The latter has manifested itself in the most recent proposal by the EU for the TTIP investment chapter.

The issue of transparency is resolved and I will not address it in this paper. Earlier in 2015, the United States, Canada, and the EU thoroughly and finally disposed of this issue with the adoption of the *United Nations Convention on*

³⁹ E.g. Stephen M. Schwebel, *In Defense of Bilateral Investment Treaties*, 31(2) ARB. INT’L 181 (2015); E.g. Charles N. Brower & Sarah Melikian, *We have met the Enemy and He is US!* *Is the Industrialized North ‘Going South’ on investor-State arbitration?*, 31(1) ARB. INT’L 19 (2015).

⁴⁰ Stephen M. Schwebel, *In Defense of Bilateral Investment Treaties*, 31(2) ARB. INT’L 181, 187.

Transparency in Treaty-based Investor-State Arbitration, also known as the *Mauritius Convention*.⁴¹ This Convention, and the accompanying *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*,⁴² adopt rules that in many instances provide for higher transparency than is found in most court systems. For instance, in the new regime, making pleadings, hearings and all decisions are publicly available, providing for rules for submissions by *amici curiae* and by non-disputing parties to the treaty in question. The latter changes are particularly relevant in multilateral treaties like TPP. The rules also include provisions on confidentiality. Accordingly, I will not address that issue further in this paper.

In the remainder of this paper, through the lens of arbitration and a court-based model, I will delve deeper into the conflict between the two international dispute resolution models. I will focus on two issues: the quality of decision-makers and decision-making.

III. TPP - WHERE FROM HERE? ARBITRATION VERSUS COURT – WHICH WILL PREVAIL?

As a common law lawyer, I must admit to some sympathy for, and attraction to, a court-based model. It is familiar and comfortable, and through a thousand years of evolution, it has worked well. The court model is considered “legitimate” in all senses of the word. We have senior practitioners acting as tenured decision-makers, with mechanisms in place designed to assure consistency. If law had a church, it would be the edifice of our common law court systems and court-made law.

If our courts are a church, then arbitration is the competing new religion. The decision-makers are appointed by the parties rather than being tenured, and the decision-making process is focused on efficiency and finality in making one-time decisions, not on consistency and making law. There are no appeals in arbitration. Arbitrations operate based on the outline of commonly applied principles, arbitral “rules”, and guidelines (such as the UNCITRAL Arbitration Rules, or the ICC Arbitration Rules). Despite this, the key point is that the parties to the dispute choose these rules and can, to a degree, modify them to their circumstances. To a person schooled in the court-model system, this type of flexibility seems counter to what would make up a “legitimate” adjudicatory process. Certainly, it would seem to be the opposite of stability, predictability, and a system that would foster the consistency necessary to create law.

⁴¹ See UNCITRAL, U.N. Convention on Transparency in Treaty-based Investor-State Arbitration, *opened for signature* March 17, 2015, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html (Sixteen parties have signed the convention but it is currently only in force in Mauritius); See also Ian A. Laird, *Transparency in investor-state arbitration*, OUP BLOG (Mar. 3, 2014), <http://blog.oup.com/2014/03/transparency-in-investor-state-arbitration/>.

⁴² See UNCITRAL, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (effective Apr. 1, 2014), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html.

International arbitration is based on some significantly different values, developed mainly in the last 150 years. These factors make some common law lawyers very uncomfortable. This lack of comfort is fundamentally based in the consensual nature of the arbitral model (which will be discussed in more detail below) and a suspicion by litigators that arbitration is not based on the same fundamental principles of justice adopted by courts. Arbitration is, in principle, a process guided by the agreement of the parties and is not imposed on them by an outside authority (like a legal system, or code). This leads to an increased level of flexibility and a process tailored to the needs and wishes of the parties. This is one of the fundamental strengths and a basis for criticism of the arbitration model.

From a definitional point of view, under the TPP or TTIP, the use of international arbitration for dispute resolution is as pure an act of sovereignty as there can be.⁴³ The signing and ratification of a treaty is lawful, and it is thus fully legitimate. The problem in the past, and certainly in the negotiation of large and complex free trade agreements, is minimal public understanding of what is being negotiated. This problem was present in 1992-1993, when NAFTA was negotiated. In 2015, transparency in treaty negotiations has only moderately increased. Lack of negotiation transparency undermines the broader definition of legitimacy for something as novel like ISDS. Clearly, the EU has tried to remedy that problem with their public consultation and by effectively negotiating TTIP (and in particular ISDS) with the United States through the media and press releases.

Accommodating diverse legal backgrounds is one of the strengths of procedural flexibility in the international arbitration model. This strength is particularly important in drafting a multinational treaty, such as TPP with twelve parties. The ability to accommodate diversity means the dispute mechanism does not favor one specific legal system, making arbitration a suitable model. Although a strong point, this aspect of the model may lead to the accusation that the process does not have all the well-developed mechanisms of procedural fairness inherent in the ancient court-systems of countries such as Canada, the United States, or the EU.⁴⁴

In sum, we see changes in the new Court Model proposed in the TTIP ranging from the superficial, like naming this a “court” and calling the adjudicators “judges,” to the significant, like removing the ability of claimants to appoint one of the arbitrators on a three-arbitrator panel. Some particular comments:

⁴³ See Stephen M. Schwebel, *In Defense of Bilateral Investment Treaties*, 31(2) ARB. INT’L 181, 189 (quoting in *The S.S. Wimbledon*, Judgment (Merits), Aug. 17, 1923).

⁴⁴ See *WJP Rule of Law Index 2015*, WORLD JUSTICE PROJECT, <http://worldjusticeproject.org/rule-of-law-index> (last visited Mar. 1, 2016) (The fact that legal systems and courts in some of the TPP member States are less than highly ranked in the annual “rule of law” indexes may partly explain the better acceptance of the arbitration model (according to the World Justice Project *Rule of Law Index 2015*, TPP signatories Malaysia, Peru, Vietnam, and Mexico are ranked at 39, 63, 64, and 79, respectively, of 102 countries ranked. That being said, some legal systems in the EU suffer from low rule of law rankings as well (for example, EU members Italy, Romania, and Hungary are ranked 30, 32, and 37, respectively).

Although an important development, the addition of arbitrator ethics rules seems more for show. There has been little evidence that current arbitrators have acted unethically, or have done so any more than judges, if that is the standard. Ethical rules are undoubtedly good to develop, but they could easily be applied in the current ISDS model.

In the new court model, unlike the domestic tenured judges, the new judges are only appointed for a short period (6 years, renewable once). A judge's short tenure is unlikely to eliminate the criticism directed at judge's bias in the decision making process. Under the new system, the judges may make decisions to curry favor with those who appointed them (and will reappoint them). In ISDS, one of the treaty parties is always the respondent, unlike in domestic courts where respondents are not always the government. The TTIP appointment process could be viewed as a significant step back from the arbitration model in TPP, where the claimants at least have the ability to appoint one arbitrator, and agree on the President. The experience in ICSID with government appointments to the ICSID list is not encouraging. We see many of the arbitrators on that list have no actual experience in ICSID arbitration and were appointed ostensibly because of political considerations. The quality of the appointees would be *the* major test for the TTIP system proposed by the EU.

The EU model emphasizes only appointing judges with allegedly high qualifications. This point could be seen as a marketing effort as the current appointees to most ISDS tribunals are of typically high quality and experience. The fact of that experience (and the repeat appointments of arbitrators because of it) ironically has been a major source of criticism of ISDS.⁴⁵

The major changes in the EU court model are two-fold: first, the removal of the arbitral practice of party-appointed arbitrators (and the creation of a "court" appointed for six year terms); and second, the restrictions on any other work as counsel in investment arbitrations outside the judge work. These changes will likely lead to a very small pool of mostly academic and former government employees being appointed as the new judges. This outcome may not eliminate the perception of bias if the pool of qualified judges is not wide enough and is only representative of a defensive, governmental viewpoint.

I will now draw on four ostensibly contrasting areas in arbitration and court models: (i) the values of consistency versus finality, (ii) appeal mechanisms, (iii) the consensual nature of arbitration, and (iv) the sociology of arbitration.

First, the common law system is based on *stare decisis*, precedent, and judge-made law, while international arbitral awards have no binding precedent

⁴⁵ See *CEO's Profiting from Injustice Report*, *supra* note 29, (The CEO "Profiting from Injustice Report" engages in plainly intended personal attacks on counsel and arbitrators working in the ISDS field arguing they are only seeking profit while acting against the public interest. In particular, the repeat appointments of arbitrators attract significant criticism).

on any other future tribunal.⁴⁶ The lack of precedential value of arbitral decisions is quite surprising to the legal mind rooted in litigation, but it is a clear policy choice by ISDS treaty negotiators when they include the arbitration model. Not having precedent makes a great deal of sense when the value at stake is *not* the objective of creating some international law, system-wide consistency and jurisprudence, but rather when the value sought is the efficiency of the process and finality of the decision for the immediate parties to the dispute. Not having precedent also means that one set of arbitrators does not control the decision-making of any other arbitrators. They are not looking to set a precedent. From a State's point of view, this may very well be preferred as each decision, especially ones that are later viewed as outliers, will stand alone. If there is a bad decision, it will not bind later tribunals.

Second, the conscious rejection of the appellate mechanisms underlies the finality value in the arbitration model.⁴⁷ Arbitrators know they are the final and binding decision makers and need to get their decision right. They are also aware that they are not making law. The available remedies in investment arbitration are almost entirely limited to monetary compensation. Courts, in contrast, can compel government action. Investment arbitral tribunals do not have the power to compel a change in government conduct if treaty rules are broken. As such, the policy rationale for a high level of consistency is less critical in investment arbitration.⁴⁸

The TTIP court model may have unintended consequences, one of which may be the risk of creating a *de facto* international legal system. This possibility may be the underlying objective of the EU proposal.⁴⁹ As noted by the EU

⁴⁶ Even the civil law courts have the concept of *jurisprudence constante*, something that we have seen increasingly adopted in international investment law.

⁴⁷ Queen Mary Survey 2015, *supra* note 24, at 8, (users of international arbitration do not favor appellate mechanisms in arbitration with 77% of respondents to the survey rejecting it for commercial arbitration and 61% for ISDS); *See Suggested Changes to the ICSID Rules and Regulations* (Working Paper of the ICSID Secretariat, May 12, 2005), <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf> (ICSID canvassed this issue in 2004 and 2005 and found that most entities consulted considered that it would be premature to attempt to establish such a mechanism at that time); *see also Possible Improvements of the Framework for ICSID Arbitration* (ICSID Secretariat Discussion Paper, Oct. 22, 2004), <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>.

⁴⁸ European Commission Proposal for Transatlantic Trade and Investment Partnership: Trade In Services, Investment and Ecommerce (Draft Text), (Nov. 12, 2015), at art. 28(1) http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (the EU proposal at Article 28(1) states that a TTIP tribunal “may not order the repeal, cessation or modification of the treatment concerned.” One could point to that and say – look this is not like a court, it can't force a respondent to change its conduct. Query whether the more legitimate decisions of the new court will put a chill on any government which does not change its conduct in the face of such a decision. The concern directed at ISDS as creating regulatory chill will certainly apply even more strongly with respect to the new court.)

⁴⁹ *Id.* (This begs the question as to how frequently and likely would it be for the TTIP Parties to adopt a treaty interpretation (as is permitted under the draft at Article 13(5) of the EU Proposed Investment Chapter) that would effectively overrule the Appellate Tribunal); NAFTA Free Trade Commission, *North American Free Trade Agreement: Notes of*

Commission, the Appellate Tribunal in the new court model will ensure the “legal correctness of the decision” by the lower courts, consequently binding the lower courts to the corrective decisions of that body. Unlike the current arbitral model, this new TTIP “Appellate Tribunal” could effectively make law by assuming the interpretive function of the parties.⁵⁰

A major debate has transpired over the past few years as to whether there is a *de facto* form of precedent in investment arbitration. The consensus has been that although there is no court-like jurisprudence, there exists a type of *jurisprudence constante*. This concept means that decisions concerning similar issues addressed by respectable tribunals should be considered as potentially persuasive by subsequent tribunals. This notion is a long way from precedent.

Does it not make sense to have precedent and appellate courts in the context of multilateral treaties like TPP or TTIP? The new EU proposal for a TTIP investment court does not specifically mention precedent (although it is heavily implied in its push for consistency). The drafters seem to have been conscious of the importance of the efficiency and finality values as found in arbitration by putting both the proposed first instance tribunal and appellate process on high speed rails.⁵¹ It remains an open question as to whether or not such an expedited appeal process is functionally workable, especially in light of the fact that government respondents tend to prefer more leisurely paced arbitrations.

A third contrast between the arbitration model and the court model is the concept of “consent,” on which arbitration is said to be based. International arbitration is limited by the specific consent of the parties and to the specific dispute at issue. In domestic court, the unilateral promise in law allows claims to be made in court, enabling the claimant to access the system as he or she finds it.

In TPP, and under all BITs, claimants can only consent to the arbitration process presented to them in the treaty. Investors do not have a say in the rules of the game to which they are consenting. The rules of investment arbitration,

Interpretation of Certain Chapter 11 Provisions, Foreign Trade Information System, (July 31, 2001), http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp (In the NAFTA context, we have seen one major such interpretation of the fair and equitable treatment standard by the NAFTA Free Trade Commission in *Notes of Interpretation of Certain Chapter 11 Provisions*. Some critics accused the NAFTA Parties of effectively engaging in treaty amendment by improper means).

⁵⁰ Reading Guide, *supra* note 31, (The EU drafters seemingly anticipated the potential problem of tribunals impacting domestic law by making interpretations of domestic law a question of fact. As noted in the Reading Guide, “The Investment Tribunal would only be able to take a domestic law of each Party taken into account as a matter of fact. Where the Tribunal would be required to ascertain the meaning of a provision of a domestic law of a Party it would have to follow the interpretation made by that Party’s domestic courts. The draft TTIP text further clarifies that the meaning given to domestic law by the Tribunal would not be binding on domestic courts. This further guarantees that the autonomy of the EU legal order is fully preserved.” This refers to Article 13(3) and (4) of the EU Proposal.)

⁵¹ EU Proposal, *supra* note 48, at art. 28(5) (Article 28(5) of the EU Proposal states a deadline of 18 months for the first award. Article 29(3) of the EU Proposal states that a maximum of 180 days with a permitted extension to 270 days is the time period set for the appeal to be briefed by the parties and finally decided by the Appeal Tribunal. These figures appear much speedier than the current timing of decisions by ICSID Annulment panels or even by domestic courts dealing with the challenges of awards under the New York Convention).

typically under the World Bank’s ICSID Convention or the United Nations’ UNCITRAL Arbitration Rules, are negotiated and determined by governments. The able officials who run the ICSID (and ICSID arbitration makes up a majority of investment arbitrations) are also appointed by the World Bank, a government-run international organization. This setup is in contrast to international commercial arbitration, where there is privity of contract and the parties are viewed as equal players.

“Consent” in ISDS is a much more limited kind than found in international commercial arbitration. The notion of consent in ISDS is like what a claimant is faced with in the proposed TTIP court. As Jan Paulsson states, ISDS is “arbitration without privity” where the claimant initiates ISDS arbitration “on the basis of a unilateral promise.”⁵² The parties and arbitrators must keep in their predetermined lanes. If claimants want the possibility of redressing their claims, they must consent to these State-determined rules. In particular, claimants, as the moving party, have the more onerous burden of evidentiary proof and persuasion.

From a governmental point of view, the arbitration model can be controlled and does not have the potential to take a life of its own. The limited scope of the arbitrators’ powers is wrapped up in a process entirely created by governments. In contrast, if the TTIP court model eventually comes into being, claimants may well embrace the new system because any decision made in their favor, having been subject to appellate review, and receiving the imprimatur of being called a “court” decision, may allow for the growth of an international jurisprudence that could favor them.

In my fourth and final area of discussion, I contrast the make-up of the arbitration and litigation communities. The arbitration community is evolving, whereas the “court” or litigation community is static. The support and belief in the worth and value of each model holds its community together. The court model has the benefit of support and awareness from the broader public. Non-lawyers, having been inundated with movies, books, and television on courts, believe they know all about that model. Arbitration has never had the benefit of a hit TV show, let alone a good Tom Cruise movie. It makes complete sense that the EU Commission wants to take advantage of the long-earned public acceptance of the court model.

The “sociology” of international arbitration, a popular topic of discussion in recent years, helps illustrate how the changing nature of arbitration has been one of its weaknesses that has contributed to the legitimacy complaint. In autumn 2014, Emmanuel Gaillard gave the Freshfields Lecture in London with the title, the “Sociology of Arbitration”.⁵³ One of our most eminent Canadian international arbitrators, David Haigh from Calgary, gave a similar keynote

⁵² Jan Paulsson, *Arbitration without privity*, 10(2) ICSID REV. 232 (1995), http://www.arbitration-icca.org/media/4/38957305473727/media012254614477540jasp_article_-_arbitration_without_privacy.pdf.

⁵³ Emmanuel Gaillard, *Sociology of Arbitration*, 31(1) ARB. INT’L 1 (2015); see also Alison Ross, *Creatures of ritual?*, GLOBAL ARB. REV. (Dec. 2, 2014), http://www.shearman.com/~media/Files/Services/International-Arbitration/Articles/Creatures_of_ritual_Emmanuel_GaillardI_112614_.pdf.

speech in 2013, discussing the make-up of international arbitrators.⁵⁴ The two speeches give great credit to two academics, Yves Dezalay and Bryant Garth, who in 1996, wrote one of the first books on this topic, *Dealing in Virtue*.⁵⁵ Another Canadian, Professor Joshua Karton at Queen's University, has published a book titled, *The Culture of International Arbitration and the Evolution of Contract Law*.⁵⁶ Like Dezalay and Garth, Karton conducted numerous interviews in the arbitration community.⁵⁷ Looking through the lens of international dispute resolution, Dezalay and Garth saw an internationalization of the rule of law dispute resolution. They traced the evolution of a field dominated by the pioneering European grand professors to a new generation of arbitration technocrats, with great influence from U.S. multinational law firms who increasingly became involved in international arbitration.

Gaillard observes that the international arbitration field has evolved from the "solidaristic" model described by Dezalay and Garth to a newly "polarised" one. He also described international arbitration as having become "a field of tension, oscillating between conflict and cooperation." Gaillard's analysis is in contrast to one of the main critiques of the international arbitration model, which described the field as being dominated by a small "mafia" or "club." Rather than an older model of an insular group or "club" with small number of actors performing multiple functions, Gaillard concludes that the polarization of international arbitration has led to a world of multiple actors who occupy specific functions. The "solidaristic" model, which has been the source of much criticism of ISDS, has in fact disappeared in Gaillard's estimation.

Gaillard believes one of the reasons the evolving arbitration community is now "polarized" is the entry of champions of new causes into the field. These new actors, including non-governmental organizations, argue that international arbitration, and in particular international investment arbitration, is not a legitimate means to resolve disputes related to human rights, the environment, or other policy interests. Gaillard observes that international arbitration has evolved from its former "solidaristic" make-up to a community that reflects the diverse

⁵⁴ David R. Haigh, *Two Questions: 'Who is an international arbitrator' or 'What is an international arbitrator?'*, in 7 INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW ch. 7 (Ian Laird et. al. eds., 2014), http://www.jurispub.com/cart.php?m=product_detail&p=15008.

⁵⁵ Yves Dezalay & Bryant G. Garth, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996).

⁵⁶ Joshua D.H. Karton, *THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW* (2013).

⁵⁷ E.g., Thomas Schultz, Robert Kovacs, *The Rise of a Third Generation of Arbitrators: 15 Years After Dezalay and Garth*, 28(2) ARB. INT'L 161-71 (2012) (They describe a new evolution from the grand old men to technocrats to now the managers); See also Sergio Puig, Address at Spring 2014 International Investment Law and Policy Speaker Series, Columbia Center on Sustainable Investment: Social Capital in the Arbitration Market: Network Analysis and International Investment Law, (Mar. 27, 2014), http://media.law.columbia.edu/valecenter/S14/VCC_SergioPuig_140327.mp3; See also Sergio Puig, *Social Capital in the Arbitration Market: Network Analysis and Int'l Investment Law*, <http://ccsi.columbia.edu/files/2014/02/Sergio-Puig-PPT-Presentation.pdf>; see also Sergio Puig, *Social Capital in the Arbitration Market*, 25(2) EUR. J.INT'L L. 387-424 (2014), <http://www.ejil.org/pdfs/25/2/2495.pdf>.

nature of the globalized world. The irony of this change in make-up is that as the new players point to the old make-up of the arbitration community as an example of illegitimacy requiring change, they are now members of a differently constituted community.

IV. CONCLUSION

Our examination of the proposed court and arbitration models reveals that the arbitration model used in TPP is rapidly evolving in a way that the court model is not. The court model has seen its own evolution over the past thousand years. In common law, we have seen experiments with ecclesiastical courts, star chambers, separate courts of common law and equity, and finally the current system. This evolution has been closely connected to the development of western democracy and is a critical element of the growth of responsible government. Throughout the world, the court-model has stabilized into a well-recognized, coherent and legitimized process.

As observed by Gaillard and other students of arbitration sociology, international arbitration does not have the benefit of a thousand years of evolution and development. The ultimate question in this debate is whether the TPP-proposed arbitration model is so unsuitable, so illegitimate, or in the words of EU Commissioner Cecilia Malmström – “untrusted,” that it should be disposed of in favor of a better understood and accepted court model.

There is undoubtedly a hardening view in Europe that the court-like model (or at least something with the word “court” attached to it) is preferable and should be adopted. We have not seen a similar hardening in the United States, Canada, or amongst other TPP member States. Thus, we can see in this paper that some of the legitimacy critiques of international investment arbitration have, on the one hand, criticized ISDS for being *too much* like courts (having the alleged power to determine or chill policy and laws), while, on the other hand, it has been criticized for *not being enough* like courts (as we have discussed – needing more transparency, consistency and the mechanisms typical of the court process). The irony of the new TTIP court model is that the critics may get some of the elements about which they have criticized ISDS. When we compare the dispute resolution provisions in the investment chapters in TPP and TTIP, there appear to be significant differences in the models now espoused by the EU and the United States. In many ways, the differences may be more apparent than real.