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INTRODUCTION

Investor-State Dispute Settlements (ISDS) is a mechanism in investment and trade agreements that allows foreign companies to settle disputes with the hosting country through arbitration.[1] This is intended to protect foreign companies against expropriation or discrimination on the basis of nationality.[2] More than 2,700 bilateral or multilateral investment treaties include the ISDS mechanism.[3] From 1987 through the present, investors have initiated approximately 1,000 ISDS cases against 117 countries.[4] Investors have litigated the vast majority of these cases within the past fifteen years.[5] More than 600 cases were resolved either on the merits or jurisdictional grounds.[6] A statistical breakdown shows that ISDS arbitration tribunals decided 36% of cases in favor of the state and 29% in favor of the investor, the parties settled 23% of cases, the investor discontinued 10% of cases, and arbitration tribunals found in 2% of cases a treaty breach with liability for the state but no damages attributable to the investor.[7]

Common allegations in ISDS cases involve seizures or nationalization of investments; termination or nonrenewal of contracts, licenses, and permits; state harassment through improper criminal prosecution or wrongful detention; and legislative reforms that adversely impact investments.[8] Investors claim damages ranging from several million to tens of billion dollars.[9] More than 500 individuals have served as arbitrators in ISDS cases.[10] The United States is the most frequent home state of investors litigating ISDS cases, which have brought 174 cases against other states to date.[11]

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* MACL, Univ. of Mich. L. Sch. (2019); J.D., Liberty Univ. Sch. of L. (2014).

[1] *ISDS: Important Questions and Answers*, OFF. OF THE U.S. TRADE REPRESENTATIVE (March 2015), https://ustr.gov/about-us/policy-offices/press-office/blog/2015/march/isds-important-questions-and-answers-0.

[2] *Id.* There are two types of expropriation: direct and indirect. "Direct expropriation means a mandatory legal transfer of the title to the property or its outright physical seizure" while "[i]ndirect expropriation involves total or near-total deprivation of an investment but without a formal transfer of title or outright seizure." *Expropriation: UNCTAD Series on Issues in Int'l Inv. Agreements II*, UNITED NATIONS CONF. ON TRADE AND DEV. 6, 7 (2012), https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf.

[3] *Background Info. on the Int'l Centre for Settlement of Inv. Disps. (ICISD)*, INT'L CENTRE FOR SETTLEMENT OF INV. DISP. 1, http://icsidfiles.worldbank.org/icsid/icsidblobs/CaseLoadStatistics/ICSIDOverview-English.pdf.

[4] *Fact Sheet on Investor-State Disp. Settlement Cases in 2018*, UNITED NATIONS CONF. ON TRADE AND DEV. [UNCTAD], 1, (2019), https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4_en.pdf. For a list of all past and current ISDS cases, including pending status or final disposition, *see* UNITED NATIONS CONF. ON TRADE AND DEV. [UNCTAD], *Inv. Disp. Settlement Navigator*, https://investmentpolicy.unctad.org/investment-dispute-settlement (last visited May 20, 2020).

[5] *See* UNCTAD Report *supra* note 4, at 1.

[6] *Id*. at 4.

[7] *Id*. at 5.

[8] *Id*. at 4.

[9] *Id*.

[10] *Id*. at 5.

[11] *See* UNCTAD Report *supra* note 4, at 3.

ISDS is designed to spur investor trust and confidence, especially in countries where the domestic legal system is underdeveloped.[12] However, in recent years many politicians, lawyers, and academics have criticized ISDS as a one-way street that favors foreign corporations.[13] While companies can use the ISDS system to invoke arbitration against the hosting state, the converse is not so.[14] The critics allege that foreign corporations may use the ISDS system to undermine environmental, health, and labor laws.[15] While some countries publish the proceedings of ISDS cases for the public, many countries opt for secretive settlements, which have led to demands for more transparency in the ISDS process.[16]

This article will briefly explore how the ISDS system works and the problems associated with ISDS, but it will then detail and evaluate a number of enacted and proposed changes. Some examples include the reformation of the North American Free Trade Agreement (NAFTA) into the United States-Mexico-Canada Agreement (USMCA) and the European Union's commitment to establish a regional investor court system. ISDS is an area that is ripe for change and practitioners should be kept informed of potential shifts. While there is no "one-size-fits-all solution" to the criticisms leveled at ISDS, certain structural and procedural reforms to ISDS are designed to ease the skeptic's suspicion of potential abuses in the status quo. Each country and region of countries should meticulously consider its own unique circumstances and trade interests prior to adopting any type of sweeping reform. Part II of this paper will provide a brief history on international arbitration, including the emergence of the ISDS mechanism. Part III will discuss the

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[12] *See* OFF. OF THE U.S. TRADE REPRESENTATIVE, *supra* note 1. For a perspective that questions whether ISDS is effective in promoting foreign investment, *see* Lise Johnson, Brooke Skartvedt Güven, & Jesse Coleman, *Investor-State Disp. Settlement: What Are We Trying to Achieve? Does ISDS Get us There*, COLUMBIA CENTER ON SUSTAINABLE INV. (Dec. 11, 2017), http://ccsi.columbia.edu/2017/12/11/investor-state-dispute-settlement-what-are-we-trying-to-achieve-does-isds-get-us-there/.

[13] Senator Elizabeth Warren, a former U.S. presidential candidate, proclaimed that "ISDS provides a huge handout to global corporations while undermining American sovereignty." Press Release from the Office of Senator Elizabeth Warren, Warren Urges U.S. Trade Rep to Remove ISDS Provisions During Next Round of NAFTA Negotiations (Sept. 19, 2017), https://www.warren.senate.gov/newsroom/press-releases/warren-urges-us-trade-rep-to-remove-isds-provisions-during-next-round-of-nafta-negotiations; *see* letter signed by more than 300 state legislators to the Hon. Robert Lighthizer, U.S. Trade Representative (Sept. 12, 2018) https://www.citizen.org/wp-content/uploads/migration/state-legislator-letter-isds-nafta-sept-2018.pdf (urging the end of ISDS provisions in NAFTA); *see also* a letter from 230 law and economics professors to President Donald J. Trump (Oct. 25, 2017) https://www.citizen.org/wp-content/uploads/migration/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf (urging the removal of ISDS provisions from NAFTA and future trade agreements); Paul Aims, *ISDS: The most toxic acronym in Europe*, POLITICO (Sept. 17, 2015) https://www.politico.eu/article/isds-the-most-toxic-acronym-in-europe/ (explaining that the controversy over ISDS is also prevalent in European politics); Simon Lester & Ben Beachy, *Special Courts for Foreign Investors*, CATO INSTITUTE (April 15, 2015), https://www.cato.org/publications/commentary/special-courts-foreign-investors (opining that ISDS only benefits foreign firms and their lawyers).

[14] Nevertheless, states may respond with counterclaims when an investor initiates an ISDS action. Lorenzo Cotula, Brooke Guven, Lise Johnson, & Thierry Berger, *Investor-State Arb.: An Opportunity for Real Reform?*, COLUMBIA CTR. ON SUSTAINABLE INV. (Dec. 7, 2018), http://ccsi.columbia.edu/2018/12/07/investor-state-arbitration-an-opportunity-for-real-reform/.

[15] *See* James McBride and Andrew Chatzky, *How Are Trade Disps. Resolved?*, COUNCIL ON FOREIGN RELS. (Jan. 6, 2020, 7:00 AM), https://www.cfr.org/backgrounder/how-are-trade-disputes-resolved.

[16] *Id.*; Lise Johnson and Brooke Skartvedt Guven, *The Settlement of Inv. Disps: A Discussion of Democratic Accountability and the Pub. Int.*, INT'L INST. FOR SUSTAINABLE DEV. (Mar. 13, 2017), https://www.iisd.org/itn/2017/03/13/the-settlement-of-investment-disputes-a-discussion-of-democratic-accountability-and-the-public-interest-lise-johnson-and-brooke-skartvedt-guven/.

criticisms leveled at ISDS and examine several case studies where ISDS was problematic. Part IV will discuss several proposed and enacted reforms for ISDS.

II. A BRIEF HISTORY OF INTERNATIONAL ARBITRATION

A. Early Concepts of Arbitration

The concept of using arbitration to resolve international disputes has long been a part of history. The Greek city states and early Roman Republic occasionally used arbitration as a mechanism of resolving cross-border disputes.[17] In Greek antiquity, Athens and Sparta drafted an arbitration clause, which essentially stated that both sides should maintain the peace and would submit themselves to an arbitration body to resolve conflicts.[18] Nevertheless when both sides attempted to invoke arbitration to avoid conflict, diplomatic relations broke down and Athens and Sparta blamed each other for refusing to submit to arbitration.[19] The result was the Peloponnesian War, which ended in a colossal defeat for Athens, including the destruction of their navy.[20] Much later, the Romans acted as mediators and arbitrators between the Greek city states.[21] However, the Romans considered themselves dominant in the arena of international affairs, and they were highly reluctant to apply the principles of arbitration to their own cross-border disputes.[22]

In the early fourteenth century, the Normans proposed establishing an arbitration panel to resolve disputes and maintain the peace between European kingdoms and feudal lands.[23] The proposal posited that the panels should consist of nine members: three ecclesiastical members and three from each of the parties. An appeal could be made to the Pope if the parties disagreed with the panel's decision. [24] Although this proposal never came to fruition, it demonstrates that the notion of cross-border arbitration predated the twentieth century. The Enlightenment era philosophers, including Jean-Jacques Rousseau and Jeremy Bentham, favored constructing a mechanism to resolve disputes between European states.[25] The Treaty of Guadalupe Hidalgo in 1848, which settled the Mexican-American War, contained an arbitration clause allowing for the appointment of arbitrators on an ad hoc basis to settle future conflicts between the two countries.[26] The first Hague Conference of 1899 created the Permanent Court of Arbitration as a means for resolving state-to-state disputes.[27]

In the aftermath of the Second World War, with the establishment of the United Nations and decolonization of the old European empires, countries recognized the necessity of entering

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[17] Henry S. Fraser, *Sketch of the History of International Arbitration*, 11 CORNELL L. REV. 179, 185 (1926).
[18] W. L. Westermann, *Interstate Arbitration in Antiquity*, 2 THE CLASSICAL J. 197, 200 (1907).
[19] *Id.*
[20] *Id.*; *see Historical Context for History of the Peloponnesian War by Thucydides*, COLUMBIA COLL. (last visited May 20, 2020), https://www.college.columbia.edu/core/node/1750.
[21] Westermann, *supra* note 18, at 206.
[22] *Id.* at 206.
[23] Fraser, *supra* note 17, at 179.
[24] *Id.*
[25] *Id.* at 183.
[26] *Id.* at 200; Treaty of Guadalupe Hidalgo art. XXI, Mex.-U.S., Feb. 2, 1848.
[27] *Hist.*, PERMANENT COURT OF ARB. (last visited July 31, 2019), https://pca-cpa.org/en/about/introduction/history/.

into trade agreements and having a procedural mechanism for resolving trade disputes.[28] Bilateral and multilateral trade agreements began to emerge.[29] Deals between private parties spurred increased cross-border business transactions.[30] Nevertheless, issues arose regarding the procedures for resolving disputes, including the proper forum and enforcement measures.[31] Slowly, trade agreements and private contracts between international parties permitted the use of arbitration.[32] The advantage of arbitration is that the parties to an international agreement or private contract could perform an arm's length negotiation of how to resolve disputes.[33]

B. The New York Convention

The members of the United Nations began to realize that arbitration would be undermined without a compliance mechanism.[34] In 1958, the United Nations published the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).[35] The signatories to the New York Convention, designated as the contracting states, must recognize and enforce arbitration awards made outside of their respective jurisdictions.[36] Essentially, the purpose of the New York Convention is to enforce arbitration awards made pursuant to cross-border commercial contracts.[37] A contracting state may, on the basis of reciprocity, declare that it will only recognize and enforce arbitration awards made in other contracting states.[38] Furthermore, a contracting state may declare that it will apply the New York Convention only to legal differences that it considers to be commercial under its national laws.[39] The contracting state may refuse to recognize and enforce an arbitration award if the commercial contract was invalid under the parties' choice of law, if there was a procedural violation under the arbitration rules that the parties consented to, or if it would be contrary to the public policy of the contracting state.[40] Currently, there are 163 contracting states to the New York Convention.[41]

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[28] *See* Kenneth J. Vandevelde, *A Brief History of International Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 161 (2005).
[29] *Id.* at 168.
[30] *Id.* at 171.
[31] *Id.* at 174.
[32] *Id.*
[33] *Id.*
[34] *See* Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 MICH. J. INT'L L. 115, 117 (2018).
[35] Conv. on the Recognition and Enf't of Foreign Arbitral Awards (N.Y. Conv.), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S 3, http://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf.
[36] *Id.* at art. I.
[37] Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974).
[38] N.Y. Conv., *supra* note 35, at art. I.
[39] *Id.*
[40] *Id.* at art. V.
[41] *Chapter XXII: Com. Arb. and Mediation*, Conv. on the Recognition and Enf't of Foreign Arbitral Awards, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXII/XXII-1.en.pdf (last visited June 10, 2020). The contracting states include the United States, United Kingdom, Sweden, Ukraine, Russia, China, Brazil, Canada, Mexico, Poland, Germany, France, Egypt, South Africa, Singapore, Nigeria, India, Japan, and many others. *Contracting States*, N.Y. ARB. CONV., http://www.newyorkconvention.org/countries (last visited May 20, 2020). The New York Convention is enforced in the United States under the Federal Arbitration Act as codified in 9 U.S.C. §§ 201-08. "The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." *Id.*, § 207. This section essentially allows for limited judicial review.

C. Emergence of Investor-State Dispute Settlements: The ICSID Convention

With the advent of decolonization, developed countries were concerned that assets of their citizens could be expropriated by their former colonies.[42] Recognizing the need of protecting their overseas assets, developed countries began to include arbitration in bilateral investment treaties with developing countries as a means for resolving disputes between foreign investors and the "hosting state."[43] In September 1966, twenty states ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).[44] It is a multilateral treaty formed under the World Bank.[45] The purpose of the ICSID Convention was to encourage private investments in developing countries and to enumerate procedures on how to resolve disputes between investors and states.[46] Currently, there are 154 countries that are signatories to the ICSID Convention.[47]

ICSID Convention promulgates procedural protections for investors. Any monetary awards made through arbitration under the ICSID Convention are final and binding.[48] Even if a contracting state disagrees with the arbitration result, it may not disregard the judgment.[49] In fact, all contracting states agree to enforce the arbitration decision as if it were a final court judgement in their home jurisdictions.[50] However, written consent between the contracting state and a foreign national of another member state is needed for the ICSID Convention to have jurisdiction over the dispute.[51] The dispute must also arise out of an investment by the foreign national into the contracting state.[52]

The member states may, at their discretion, opt out of the ICSID Convention's jurisdiction over certain classes of disputes.[53] If the parties consent to the jurisdiction of the ICSID Convention, its rules provide the exclusive remedy over the dispute.[54] However, a contracting state may accept

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[42] *See* Vandevelde, *supra* note 28, at 166; *see also* 1 *History of the ICISD Conv.*, INT'L CTR. FOR SETTLEMENT OF INV. DISPS. 2 (1970), https://icsid.worldbank.org/en/Documents/resources/History%20of%20ICSID%20Convention%20-%20VOLUME%20I.pdf.

[43] *See* Vandevelde, *supra* note 28, at 168.

[44] *History of the ICSID Conv.*, *supra* note 42, at 10.

[45] *About ICSID*, INT'L CTR. FOR SETTLEMENT OF INV. DISPS. (last visited July 31, 2019), https://icsid.worldbank.org/en/Pages/about/default.aspx.

[46] *Id.*

[47] *ICSID Conv.*, INT'L CTR. FOR SETTLEMENT OF INV. DISPS., https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx (last visited July 31, 2019). The ICSID member states include the United States, Canada, Mexico, United Kingdom, France, Germany, Switzerland, Spain, Italy, Turkey, United Arab Emirates, Saudi Arabia, Jordan, Israel, Egypt, Kenya, China, Japan, South Korea, Malaysia, Singapore, Australia, Columbia, Peru, Argentina, and many others. *See Database of ICSID Member States*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (last visited May 20, 2020). Although Russia is a signatory, it has not ratified the ICSID Convention. *Id.*

[48] Conv. on the Settlement of Inv. Disps. Between States and Nat'ls of Other States (ICSID Convention) art. 53, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966), https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf.

[49] *Id.*

[50] *Id.* at art. 54.

[51] *Id.* at art. 25.

[52] *Id.*

[53] *Id.*

[54] ICSID Convention at art 26.

jurisdiction on the condition that the aggrieved party first attempts to exhaust the local remedies within the member state.[55] There is no provision for specific performance, so an investor can only request damages.[56] The only remedy for a losing party is to either request revision of the award due to a clerical error or ambiguous provision or request annulment for a due process violation, such as the failure to follow the arbitration rules or corruption of a member of the arbitration panel.[57] A new panel is convened to consider the annulment request.[58] Any resulting award from arbitration may be enforced through the ICSID Convention.[59]

D. The Panama Convention

In January 1975, the member-states of the Organization of American States[60] adopted the Inter-American Convention on International Commercial Arbitration (Panama Convention).[61] The Panama Convention is modeled after the New York Convention but with several key differences.[62] Enforcement through the Panama Convention is generally limited to awards made through international arbitration involving parties from different states. Conversely, the New York Convention allows a party to initiate an enforcement action in a foreign state for awards that arise from either domestic or international arbitration—the parties do not need to be from different states.[63] Furthermore, the Panama Convention only recognizes the procedural rules specified by the Inter-American Commercial Arbitration Commission unless the parties agree to opt out of those rules.[64] In the United States, if a conflict arises between enforcement through the Panama Convention as opposed to the New York Convention, the Panama Convention is enforced if the

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[55] *Id.*
[56] *Id.* at art. 48.
[57] *Id.* at art. 50, 51, & 52.
[58] *Id.* at art. 52.
[59] *See* 22 U.S.C. § 1650a(a). The ICSID Convention is enforced in the United States under 22 U.S.C. § 1650a. However, the Federal Arbitration Act does not apply to the ICSID Convention because courts must give full faith and credit to the arbitration award and cannot engage in judicial review. *See also* Theodore R. Posner, *An App. Mechanism for Inv.-State Disp. Settlement: A Persp. Based on the WTO Body Experience*, CROWELL & MORING LLP 13-14 (undated), https://www.crowell.com/documents/An-Appellate-Mechanism-for-Investor-State-Dispute-Settlement.pdf (last visited May 20, 2020).
[60] *Who We Are*, ORG. OF AMERICAN STATES, http://www.oas.org/en/about/who_we_are.asp (lasted visited May 20, 2020). Founded in 1948, the Organization of American States (OAS) includes all thirty-five independent states of the western hemisphere. The OAS model is analogous to the United Nations because it has its own general assembly, permanent council, and general secretariat. *See Organizational List*, ORG. OF AMERICAN STATES, http://www.oas.org/en/about/organizational_list.asp (lasted visited May 20, 2020).
[61] Inter-Am Convention Int'l Com. Arbitration (Panama Convention), Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245 (Jun. 16, 1976), https://treaties.un.org/doc/Publication/UNTS/Volume%201438/volume-1438-I-24384-English.pdf. (The Panama Convention is enforced in the United States under 9 U.S.C. §§ 301-07).
[62] Albert Jan van den Berg, *The New York Convention 1958 and Panama Convention 1975: Redundancy or Compatibility?*, 5 ARBITRATION INT'L 214, 218 (1989).
[63] *Energy Transp., Ltd. v. Sebastian*, 348 F. Supp. 2d 186, 198 (S.D.N.Y. 2004) (citing John P. Bowman, *The Panama Convention and Its Implementation under the Federal Arbitration Act*, 11 AM. REV. INT'L. ARB. 1, 36 (2000)); Albert Jan van den Berg, *supra* note 62, at 219 **(**However, United States law will not apply the New York Convention if the parties to the arbitration are only citizens of the United States, "unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." 9 U.S.C. § 202).
[64] Panama Convention, *supra* note 61, at art. III.

majority of the parties to the arbitration are from states that ratified or acceded to the Panama Convention.[65]

E. The World Trade Organization

Investor-state arbitration under the ICSID Convention is handled differently than state-to-state disputes under the World Trade Organization (WTO). Founded in 1995, the WTO adjudicates disputes between its 164 member states over generally agreed trade policies, such as lowering tariffs and market barriers.[66] The WTO adjudicates disputes through three-member panels and has a permanent seven-member appellate body.[67] In contrast, investor-state arbitration arises on an ad hoc basis, as provided for in bilateral or multilateral investment treaties, with neither a permanent tribunal nor an appellate body.[68] Through the WTO, an aggrieved state can use a favorable ruling as a justification to impose retaliatory sanctions or tariffs against the offending state.[69] Nevertheless, a state may unilaterally impose sanctions regardless of the WTO ruling and treaty provisions. [70] Furthermore, certain states can stall the appointment of judges on WTO tribunals, which can grind the adjudicatory process to a halt.[71]

The emergence of the ISDS mechanism is a powerful tool for investors to protect their assets. In return, states benefit from foreign investment and development. Nevertheless, there are concerns over potential abuses of the ISDS arbitration process that are worth exploring.

III. PROBLEMS ASSOCIATED WITH ISDS AND INDIVIDUAL CASE STUDIES

There have been many criticisms leveled at the ISDS system over the last several decades. Politicians, academics, and journalists contend that the ISDS mechanism is a handout to foreign corporations looking to exploit legitimate investment treaties.[72] Many view ISDS as a get-out-of-jail-free card for corporations that do not wish to comply with legitimate environmental, health, and labor laws.[73] A corollary issue is that ISDS allows arbitration tribunals, which are not directly accountable to the hosting state, to undermine the hosting state's sovereignty.[74] The state citizenry tend to trust their own domestic courts over ad hoc arbitration tribunals composed of foreign

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[65] 9 U.S.C. § 305.
[66] *Who We Are*, WORLD TRADE ORGANIZATION (last visited July 31, 2019), https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm.
[67] Understanding the WTO: Settling Disputes, *The Panel Process*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm (last visited July 31, 2019); Ian F. Fergusson, *Dispute Settlement in the WTO and U.S. Trade Agreements*, CONG. RSCH. SERV. (Dec. 6, 2019), https://crsreports.congress.gov/product/pdf/IF/IF10645.
[68] McBride and Chatzky, *supra* note 15.
[69] *Understanding the WTO: Settling Disputes: A Unique Contribution*, WORLD TRADE ORGANIZATION (last visited July 31, 2019), https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.
[70] Jeffry Frieden and Joel Trachtman, *U.S. Trade Policy: Going it Alone or Abiding by the World Trade Organization*, ECONOFACT (June 15, 2018), https://econofact.org/u-s-trade-policy-going-it-alone-vs-abiding-by-the-world-trade-organization.
[71] McBride and Chatzky, *supra* note 15.
[72] *See* Senator Elizabeth Warren's press release, *supra* note 13; *see also* letters from state legislators and law and economics professors to President Donald J. Trump and Hon. Robert Lighthizer, *supra* note 13.
[73] *Id.*
[74] *Id.*

lawyers.[75] The cost to a country's taxpayers to defend against an ISDS claim can be just as large, if not larger, than the cost of defending it in a domestic court.[76] In fact, it is estimated that the average amount awarded to investors winning ISDS actions in 2016 was $545 million plus interest.[77]

However, without an ISDS mechanism, foreign investors may be wary of entering the market of the hosting state. Foreign investment is crucial to developing countries that are looking to improve their economies and lift their citizens out of poverty. If oil company X sets up drilling operations in country Y, but country Y nationalizes the oil industry and seizes X's assets, it will scare away potential investors. Furthermore, X would have difficulty in seeking a remedy for Y's expropriation in Y's domestic court system. In effect, without an ISDS mechanism, there is no remedy. With an ISDS mechanism, the best option is a favorable decision through an arbitration tribunal and subsequent enforcement of a damages award through either the ICSID Convention, the New York Convention, the or Panama Convention, if applicable, unless the investment treaty specifies another method of enforcement.[78]

The history of arbitration demonstrates the advantages of creating a process to resolve cross-border disputes. While the ISDS system has been quite successful in spurring investor trust, it has not alleviated the public's concerns in the hosting states. Public skepticism has encouraged governments to move away from the ISDS mechanism and seek out alternatives. There are several prominent cases that demonstrate why the public views ISDS with suspicion.

A. Ethyl Corporation v. Government of Canada

Investors have used ISDS provisions in investment treaties to target laws that protect the environment. Ethyl was a chemical company that was incorporated and headquartered in Richmond, Virginia.[79] It manufactured and sold Methylcyclopentadienyl Manganese Tricarbonyl (MMT), which is a fuel additive that increases the octane level of unleaded gasoline.[80] Ethyl created a wholly-owned subsidiary in Mississauga, Ontario, through which it imported MMT into Canada.[81]

In April 1997, the Canadian parliament passed a law banning the importation and interprovincial sale of MMT.[82] The legislature was concerned that MMT increased the toxicity of

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[75] *Id.*
[76] Lise Johnson, Lisa Sachs, Brooke Skartvedt Güven, and Jesse Coleman, *Costs and Benefits of Investment Treaties: Practical Considerations for States*, COLUMBIA CENTER ON SUSTAINABLE INVESTMENT 11 (Mar. 2018), http://ccsi.columbia.edu/files/2018/04/Cost-and-Benefits-of-Investment-Treaties-Practical-Considerations-for-States-ENG-mr.pdf.
[77] *Id.*
[78] *See* Vincent O. Nmehielle, *Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes (ICSID Convention)*, 7 ANN. SURV. INT'L & COMP. L. 21, 29 (2001) (discussing methods of enforcement).
[79] Ethyl Corp. v. Gov't of Can., NAFTA/UNCITRAL Case, Award on Jurisdiction, ¶ 1 (June 24, 1998), https://www.italaw.com/sites/default/files/case-documents/ita03000.pdf.
[80] *Id.*
[81] *Id.*
[82] *Id.* ¶ 5.

fuel exhaust and that it ran afoul of Canada's goal to reduce automobile emissions.[83] Ethyl invoked arbitration through Chapter 11 of NAFTA,[84] alleging that the restrictions on MMT constituted unlawful expropriation and violated the national treatment performance requirements of NAFTA.[85] While technically the law did not ban the sale and production of MMT in Canada, the import and interprovincial sale restrictions meant that Ethyl could only continue to market MMT by opening new manufacturing plants in each Canadian province.[86] Ethyl claimed $201 million in damages.[87] The Canadian government requested the arbitration tribunal to dismiss the claims based on lack of jurisdiction and that the claims were outside the scope of NAFTA.[88] However, the tribunal allowed the claims to proceed on the merits.[89] Subsequently, Canada settled with Ethyl for $13 million.[90]

B. Philip Morris Asia Limited v. The Commonwealth of Australia

Investors can attempt to use the ISDS mechanism to neutralize public health and safety laws, such as those designed to combat the health risks of smoking. Philip Morris International owned subsidiaries in Asia and Australia.[91] In July 2010, Australia proposed a timeline for passing and enacting a "plain packaging" legislation, which would ban the use trademarks, symbols, and images on tobacco packaging.[92] Tobacco companies would be only allowed to print their name on the packaging, which was problematic because it could cause brand confusion among customers.[93] The Australian government's goal was to pass and implement the law by July 2012.[94]

In September 2010, Phillip Morris began a restructuring process where its Hong Kong subsidiary, Phillip Morris Asia Limited, purchased all of the shares in the Australian subsidiary.[95] Phillip Morris invoked arbitration under the Australia-Hong Kong Bilateral Investment Treaty on the basis that the plain packaging law constituted expropriation and resulted in an unspecified amount of damages that would exceed a billion Australian dollars.[96] The Australian government argued in part that jurisdiction was not proper because Phillip Morris used their restructuring process as a pretext for bringing an arbitration claim.[97]

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[83] *Cases filed against the Government of Canada*, Ethyl Corporation v. Government of Canada, GLOBAL AFFAIRS CANADA, https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ethyl.aspx?lang=eng (last updated Dec. 21, 2017).
[84] Ethyl Corp., *supra* note 79, ¶ 4.
[85] *Id.* ¶ 7.
[86] *Id.* ¶ 6.
[87] *Cases filed against the Government of Canada*, *supra* note 83.
[88] Ethyl Corp., *supra* note 79, ¶¶ 43-45.
[89] *Id.* ¶ 85.
[90] 1 SEAN D. MURPHY, UNITED STATES PRACTICE IN INTERNATIONAL LAW 234 (1999-2001).
[91] Philip Morris Asia Ltd. v. Austl., PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, ¶¶ 95-97 (Dec. 17, 2015), https://pcacases.com/web/sendAttach/1711.
[92] *Id.* ¶ 130.
[93] *Id.* ¶ 7.
[94] *Id.* ¶ 130.
[95] *Id.* ¶ 143.
[96] *Id.* ¶¶ 8, 183.
[97] *Philip Morris Asia Ltd.*, PCA Case No. 2012-12 at ¶ 184.

The arbitration tribunal agreed and noted that Phillip Morris was aware of the plain packaging legislation when it had ordered its Hong Kong subsidiary to purchase shares in its Australian subsidiary.[98] This constituted an abuse of the purpose of the protections within the treaty and the tribunal dismissed the claim.[99] Despite the favorable result for the Australian government, it had spent nearly $39 million over a six-year period to defend against Phillip Morris's claim.[100] Ultimately, Phillip Morris had to reimburse Australia for its legal expenses; however, the Australian taxpayer had to make payments in the intervening years during the pendency of the arbitration action.[101]

C. Phillip Morris Brands Sàrl v. Oriental Republic of Uruguay

Australia was not the only country where Phillip Morris attempted to use the ISDS mechanism to undermine public health laws. Three Phillip Morris subsidiaries, operating from Switzerland and Uruguay**,** brought a similar action against the Uruguayan government under the Switzerland-Uruguay Bilateral Investment Treaty.[102] Uruguay promulgated new regulations in 2008 and 2009 regarding cigarette brands.[103] Particularly, the regulations required cigarette brands to have a "single presentation," with no variation in marketing for each brand.[104] This barred Phillip Morris from marketing different varieties within a brand such as "Marlboro Red," "Marlboro Gold," "Marlboro Blue," and "Marlboro Green (Fresh Mint)."[105] As a result, Phillip Morris had to cease selling all but one of its variants for each brand on the market.[106] Uruguay also imposed an "80/80 regulation" which required 80% of each cigarette package to have warning labels on the dangers of smoking.[107] This left only 20% of the cigarette package for trademarks.[108]

Phillip Morris alleged that these regulations constituted inequitable treatment, impairment of use and enjoyment of investments, and expropriation under the bilateral investment treaty.[109] Uruguay responded that these regulations were "the legitimate exercise of State sovereign police power to protect public health."[110] The arbitration tribunal agreed with Uruguay, declaring that a state's good faith exercise of police power for the purpose of promoting the general welfare, including health and safety, does not constitute expropriation, on condition that it is enacted in a

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[98] *Id.* ¶¶ 584-88.
[99] *Id.*
[100] Gareth Hutchins and Christopher Knaus, *Revealed: $39m cost of defending Australia's tobacco plain packaging laws*, THE GUARDIAN (July 1, 2018), https://www.theguardian.com/business/2018/jul/02/revealed-39m-cost-of-defending-australias-tobacco-plain-packaging-laws.
[101] Philip Morris Asia Ltd. v. Austl., PCA Case No. 2012-12, Final Award Regarding Costs, ¶ 108 (Mar. 8, 2017), https://pcacases.com/web/sendAttach/2190.
[102] Phillip Morris Brands Sàrl v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award, ¶¶ 1-5 (July 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf.
[103] *Id*. ¶¶ 9-11.
[104] *Id*. ¶ 10.
[105] *Id*.
[106] *Id*. ¶¶ 10, 111.
[107] *Id*. ¶ 11.
[108] *Phillip Morris Brands Sàrl*, ICSID Case No. ARB/10/7 at ¶ 11.
[109] *Id*. ¶ 12.
[110] *Id*. ¶¶ 13, 181.

nondiscriminatory and proportionate manner.[111] Economic loss alone is not expropriation.[112] The tribunal ordered Phillip Morris to reimburse Uruguay $I7 million in costs for defending the case.[113]

D. Vattenfall AB v. The Federal Republic of Germany

The Vattenfall case is another illustration of litigants using the ISDS mechanism to challenge environmental reforms. Vattenfall is a Swedish energy firm that planned to construct a coal-fired power plant on bank of the Elbe River near Hamburg, Germany.[114] Although Vattenfall originally planned to construct a single-block plant at the estimated cost of 700 million euros, in 2004, the city of Hamburg requested a dual-block plant which increased the estimated cost to more than 1.8 billion euros.[115] In 2006, Vattenfall agreed and proceeded to file for the requisite permits.[116] Nevertheless at the behest of a German Senator, the city delayed issuing the permits due to concerns with how the power plant may impact climate change.[117] In particular, the city was concerned that the power plant's design system called for the use of cooling water from the river and the power plant would discharge the water back into the river.[118] As a result, the power plant's operation would increase the temperature of the river and jeopardize the ecosystem.[119]

While Vattenfall and Hamburg were negotiating over the permits, in 2008 the Green Party won the local city elections. [120] Under new leadership, Hamburg agreed to issue the permits with severe restrictions.[121] In effect, these restrictions rationed the amount of cooling water that the power plant can use, which meant that the power plant could not run at full capacity.[122] Vattenfall alleged that the power plant would need to shut down for days or even weeks during the summer to accommodate the rationing.[123]

In March 2009, Vattenfall filed for arbitration under the ISDS provision of the Energy Charter Treaty, of which Sweden and Germany are signatories.[124] Vattenfall alleged that Hamburg's permit restrictions impaired the value of their investment in the power plant and constituted expropriation.[125] Furthermore, Vattenfall demanded 1.4 billion euros in damages.[126]

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[111] *Id*. ¶¶ 295-301, 305.
[112] *Id*.
[113] *Id*. ¶ 590.
[114] Vattenfall AB v. Fed. Republic of Ger., ICISD Case No. ARB/09/6, Request for Arbitration to the Convention on the Settlement of Investment Disputes, ¶¶ 8, 11 (Mar. 30, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0889.pdf.
[115] *Id*. ¶ 12.
[116] *Id*. ¶¶ 12, 14.
[117] *Id*. ¶ 16.
[118] *Id*. ¶¶ 13, 17.
[119] *Id*.
[120] *Vattenfall AB*, ICISD Case No. ARB/09/6 at ¶ 29.
[121] *Id*. ¶ 36.
[122] *Id*. ¶¶ 37-38.
[123] *Id*.
[124] *Id*. ¶¶ 56, 58.
[125] *Id*. ¶ 69.
[126] *Id*. ¶ 79.

After two years of expensive proceedings, in March 2011, Germany settled with Vattenfall for an undisclosed amount. [127] The power plant began operating in 2014.[128]

Yet this debacle was not the end of the feud between Vattenfall and Germany. In the aftermath of the nuclear meltdown at the Japan's Fukushima plant in 2011, Germany decided to phase out nuclear power plants by 2022.[129] Again, Vattenfall invoked arbitration under the ISDS provision of the Energy Charter Treaty.[130] Germany's phaseout of nuclear power plants is estimated to cost Vattenfall 1.18 billion euros in damages.[131] The case is still pending.[132]

E. Apotex Inc. v. United States

A litigant can attempt to use the ISDS mechanism to undermine the legitimacy of domestic courts. The Apotex case involved a series of back-to-back claims combined into an ISDS arbitration proceeding.[133] Apotex is a Canadian company that manufactures generic drugs.[134] United States law dictates that a generic pharmaceutical manufacturer does not need to wait for a patent on an equivalent non-generic drug to expire prior to obtaining preliminary approval from the Food and Drug Administration to prepare the generic version for the commercial market.[135] This is a pragmatic measure designed to expedite the bureaucratic red tape, which allows generic drugs to enter the market immediately after the patent of an equivalent non-generic drug has expired.[136]

United States law grants a generic pharmaceutical manufacturer 180 days of market exclusivity during which the Food and Drug Administration will not approve other applications from competitors for the generic version of the drug.[137] However, this 180-day market exclusivity rule is triggered by the earlier of either of the following: (1) the first-filer's commercial marketing of the generic drug, or (2) a court decision holding that the non-generic patent is either invalid or not infringed.[138]

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[127] Vattenfall AB v. Fed. Republic of Ger., ICISD Case No. ARB/09/6, Certified Award, p. 5-6 (Mar. 11, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0890.pdf.
[128] *Moorburg Coal-fired Power Plant, Hamburg*, POWER TECHNOLOGY, https://www.power-technology.com/projects/moorburg-coal-fired-power-plant-hamburg/ (last visited July 31, 2019).
[129] Nathalie Bernasconi-Osterwalder and Rhea Tamara Hoffmann, *The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the new dispute Vattenfall v. Germany (II)*, THE INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT 2 (June 2012), https://www.iisd.org/system/files/publications/german_nuclear_phase_out.pdf.
[130] *Id.* at 3.
[131] *Id.*
[132] Vattenfall AB and others v. Fed. Republic of Ger., ICSID Case No. ARB/12/12, INT'L CTR. FOR SETTLEMENT OF INV. DISP. (describing case status), https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/12/12 (last visited May 20, 2020).
[133] Apotex Inc. v. United States, Award on Jurisdiction and Admissibility, ¶¶ 14-17 & 22-23 (June 14, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw1550.pdf.
[134] *Id.* ¶¶ 5, 12.
[135] *Id.* ¶¶ 56-57, 65.
[136] *Id.*
[137] *Id.* ¶ 66.
[138] *Id.* (citing 21 U.S.C. § 355(j)(5)(B)(iv) (2002)).

Apotex sought approval from the Food and Drug Administration of the generic equivalent to an antidepressant, patented by Pfizer.[139] However, another competitor, Ivax Corporation, had already preserved market exclusivity through a settlement in a separate litigation with Pfizer.[140] Thus, to gain preferred access to the market, Apotex would need to prompt Pfizer to sue it over patent infringement.[141] To that end, Apotex certified to the Food and Drug Administration that its generic version of the antidepressant did not infringe on Pfizer's nonexpired patent.[142] Nevertheless, Pfizer decided to refrain from suing Apotex because Pfizer wanted to bottleneck the market.[143] When Apotex realized that its strategy failed, it filed suit in federal district court seeking a declaratory judgement against Pfizer with the goal of triggering market exclusivity through a court decision.[144] The district court dismissed the case due to lack of subject matter jurisdiction, which was affirmed on appeal.[145] The United States Supreme Court denied Apotex's certiorari petition.[146] As a result, Ivax launched its generic drug with market exclusivity.[147]

Apotex attempted a similar strategy for the generic version of heart medication tablets, patented by Bristol Myers Squibb ("BMS").[148] However, two other competitors were ahead in the queue for market exclusivity for their generic brands when the patent was to expire.[149] When Apotex filed for approval from the Food and Drug Administration, BMS adopted a strategy similar to Pfizer and refused to sue Apotex for patent infringement.[150] Although Apotex obtained oral assurances from BMS that it would not sue Apotex if it marketed the generic drug prior to the patent expiration, BMS refused to sign any written agreement.[151] Therefore, Apotex sued BMS in federal district court seeking a declaratory judgement that BMS's oral assurances prevent it from suing Apotex if it were to commercially launch its product prior to patent expiration.[152] The court dismissed the case.[153]

The Food and Drug Administration initially agreed with Apotex that the dismissal triggered the court-decision prong of the market exclusivity rule.[154] However, Teva, a competitor of Apotex, challenged this conclusion in federal court.[155] After a lengthy litigative process, which involved the Food and Drug Administration reversing its earlier opinion, the court agreed that the dismissal

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[139] *Id*. ¶ 84.
[140] *Id*. ¶¶ 86, 89.
[141] *Id*. ¶¶ 90-91.
[142] *Id*.
[143] *Id*.
[144] *Id*. ¶ 92.
[145] *Id*. ¶¶ 94, 97. Specifically, the U.S. district court found that "Apotex has not shown that Pfizer created a reasonable apprehension of patent litigation, and thus no actual controversy exists." *Apotex Inc. v. Pfizer Inc.*, 385 F. Supp. 2d 187, 193 (S.D.N.Y. 2005).
[146] Apotex Inc., *supra* note 133, ¶ 98.
[147] *Id*. ¶ 102.
[148] *Id*. ¶¶ 105-07.
[149] *Id*. ¶ 108.
[150] *Id*. ¶¶ 112-13.
[151] *Id*. ¶ 114.
[152] *Id*.
[153] *Id*. ¶ 116.
[154] *Id*. ¶¶ 117-18.
[155] *Id*. ¶ 120.

did not trigger the market exclusivity rule, which was affirmed on appeal.[156] Apotex declined to file a certiorari petition to the United States Supreme Court.[157]

Apotex initiated an ISDS arbitration proceeding against the United States government through NAFTA, and alleged that their losses, before the federal judiciary, constituted a breach of fair and equitable treatment regarding Apotex's investments and interfered with and "expropriated Apotex's property rights."[158] In its arbitration pleadings, Apotex asserted the federal courts, including the United States Supreme Court, engaged in conduct that was "*unlawful*," "*wrongful*," "*improper*," "*arbitrary*," "*capricious*," and "*unjust*."[159] Apotex claimed damages in the amount of $8 million for the antidepressant drug and also $8 million for the heart medication drug.[160] Apotex asserted that the federal courts committed an error of law in deciding these cases and that the market exclusivity rule should have been triggered in Apotex's favor.[161] In effect, Apotex was attempting to relitigate cases decided by federal courts and wanted the arbitration tribunal to act as an extraterritorial super court of appeals.

The United States primarily argued that the tribunal lacked jurisdiction over the case because Apotex was not an "investor" with a qualifying "investment" under NAFTA.[162] Apotex has no presence inside the United States because it manufactures pharmaceuticals and then exports them into the United States.[163] Apotex argued that its preparation for filings with the Food and Drug Administration at the cost millions of dollars, the expenditure on litigation, the purchase of raw ingredients from the United States, and its preparation to formulate and manufacture goods all constitute an investment.[164] The tribunal found in favor of the United States on the basis that exports prepared outside of the United States, the costs associated with obtaining regulatory approval, and the purchase of raw ingredients do not qualify as investments.[165] Even if these activities did qualify as an investment, Apotex did not exhaust all of its local remedies as required by NAFTA.[166] The tribunal ordered Apotex to reimburse the United States in the amount of $525,814 in legal representation fees and also 50% for the costs of arbitration.[167]

The foregoing cases illustrate why the public views the ISDS mechanism with skepticism. However, these cases ultimately resulted in a victory to states over investors. In *Ethyl*, the investor claimed $201 million in damages but settled with Canada for a meager $13 million.[168] Phillip Morris lost its claims against Australia's and Uruguay's public health laws, and the arbitration tribunals ordered Phillip Morris to reimburse those governments for the costs in defending the

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[156] *Id*. ¶¶ 120-28.
[157] *Id.* ¶ 219.
[158] *Id*. ¶¶ 100, 132.
[159] *Id*. ¶ 103, 130.
[160] *Id*. ¶¶ 104, 133.
[161] *Id*. ¶¶ 99, 102, 134.
[162] *Id*. ¶¶ 135, 146.
[163] *Id.* ¶ 146.
[164] *Id*. ¶¶ 147-48.
[165] *Id*. ¶¶ 243-46, 358.
[166] *Id*. ¶¶ 298, 358.
[167] *Id*. ¶ 358.
[168] *Cases filed against the Government of Canada*, *supra* note 83; Sean D. Murphy, *supra* note 90, at 234.

claims.[169] In *Apotex*, the arbitration tribunal refused to overrule United States federal courts, but it instead ordered Apotex to reimburse the United States government's legal costs.[170] *Vattenfall* was the most successful because Germany agreed to allow the power plant to operate; however, the settlement amount is not public.[171]

These cases indicate that the ISDS process does not favor investors, or alleged investors, that bring arguably abusive actions. In contrast, the public outrage over ISDS focuses primarily on the potential that a foreign investor may undermine a state's sovereignty to enforce legitimate laws, and the costs for taxpayers to defend cases, rather than the actual results of the ISDS process.[172] Although ISDS arbitration tribunals do not have the authority to strike down laws, they have the potential to render laws ineffective through large damage awards.[173] It is for these reasons that countries are seeking reforms to the ISDS mechanism.

IV. PROPOSED AND ENACTED REFORMS

In the wake of these controversial cases and others, many countries now question the propriety of the ISDS mechanism. There are several proposed reforms regarding the ISDS mechanism. These include redrafting bilateral and multilateral trade agreements to limit the scope of ISDS over certain environmental, health, and labor laws, establishing international or regional investor courts, creating an appellate arbitration panel, creating procedural reforms to ISDS to give the arbitration panels more guidance on adjudicating cases, or entirely eliminating ISDS and returning to adjudication through domestic courts.[174] This part will explain the proposed reforms in the European Union and North America and evaluate their differences and merits. It will also evaluate the proposition floated by commentators that ISDS is generally better with ad hoc appellate panels because they would establish an additional check and balance in ISDS decisions.

A. The European Union Plans to Reorganize ISDS into a Regional Investor Court System

ISDS has been a common mechanism for resolving intra-state disputes between European corporations and the member states of the European Union.[175] However, the European Union is

[169]Philip Morris Asia Ltd. v. Austl., PCA Case No. 2012-12, Final Award Regarding Costs, ¶ 108 (Mar. 8, 2017); Phillip Morris Brands Sàrl v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award, ¶ 590 (July 8, 2016).
[170] Apotex Inc. v. United States, Award on Jurisdiction and Admissibility, ¶ 358 (June 14, 2013).Apotex Inc., *supra* note 133, ¶ 358.
[171] Vattenfall AB v. Fed. Republic of Ger., ICISD Case No. ARB/09/6, Award (Mar. 11, 2011); *Moorburg Coal-fired Power Plant, Hamburg*, *supra* note 128.
[172] *See* Senator Elizabeth Warren's press release, *supra* note 13; *see also* letters from state legislators and law and economics professors to President Donald J. Trump and Hon. Robert Lighthizer, *supra* note 13.
[173] *See* Martin A. Weiss, Shayerah Ilias Akhtar, Brandon J. Murrill, and Daniel T. Shedd, *International Investment Agreements (IIAs): Frequently Asked Questions*, CONGRESSIONAL RESEARCH SERVICE 18 (May 15, 2015) (explaining that ISDS cannot alter law or regulation), https://fas.org/sgp/crs/misc/R44015.pdf; *see also* Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States, *supra* note 47, art. 48 (allowing damages as the only remedy).
[174] *See infra* notes 201-04, 240, 242-43, 249-50, 255.
[175] *See* Christopher A. Casey, *The End of Intra-EU Investor-State Dispute Settlement (ISDS): Implications for the United States*, CRS INSIGHT (Feb. 13, 2019), https://fas.org/sgp/crs/row/IN11041.pdf.

planning to move away from ISDS and establish a regional investor court system.[176] This current proposition by the European Union makes sense because the European Union already has a general court system; however, the establishment of a separate investor court system as a replacement for ISDS will allow for greater specialization of the judiciary.[177]

The writing on the wall for ISDS manifested itself in *Slovak Republic v. Achmea BV* where the European Court of Justice ruled that the Treaty on the Functioning of the European Union foreclosed the use of ISDS in bilateral investment treaties between two member states.[178] The case originated from a dispute between Achmea, a Netherlands company, and Slovakia regarding the sale of private medical insurance services.[179] In 2004, Slovakia reformed its health care system to allow for these services.[180] Afterwards, Achmea entered the market to offer private medical insurance.[181] Nevertheless, in 2006, Slovakia's legislature passed a law that banned companies from garnering profits from these sales.[182] In 2008, Achmea invoked arbitration under a bilateral investment treaty.[183] Slovakia argued that Achmea lacked jurisdiction on the basis that the ISDS provision in the bilateral investment treaty conflicted with the law of the European Union.[184] In 2010, the arbitration tribunal rejected this argument.[185]

In 2011, Slovakia reversed course and decided to permit companies to gain profits on their sales of private medical insurance.[186] However, in 2012, the case proceeded on the merits and the arbitration tribunal ruled that Slovakia must pay Achmea 22.1 million Euros in damages.[187] At first, Slovakia appealed the decision through the German Court system because Germany had been the location of arbitration; however, the Federal Court of Justice in Germany referred the case to the Court of Justice of European Union (CJEU). [188]

CJEU emphasized that the law of the European Union reigned supreme over the laws of the individual member states, including any bilateral investment treaties enacted prior to those

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[176] *Id.*; *A Multilateral Investment Court*: *State of the Union 2017*, COM (2017), http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf.
[177] *See The Multilateral Investment Court project*, EUROPEAN COMMISSION (Dec. 21, 2016), https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en (last updated February 14, 2022); *see also* Céline Lévesque, *The European Commission Proposal for an Investment Court System: Out With The Old, In With The New?*, Investor-State Arbitration Series, Paper No. 10, CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION 8 (Sept. 2016), *available at* https://www.cigionline.org/publications/european-commission-proposal-investment-court-system-out-old-new.
[178] Case C-284/16, Slovak Republic v. Achmea BV, ECLI:EU:C:2018:158, ¶¶ 58-60 (Mar. 6, 2018) (Judgement of the Court), http://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=432158.
[179] *Id.* ¶¶ 2, 7.
[180] *Id.* ¶ 7.
[181] *Id.*
[182] *Id.* ¶ 8.
[183] *Id.* ¶ 9.
[184] *Id.* ¶ 11.
[185] *Id.*
[186] *Id.* ¶ 8.
[187] *Id.* ¶ 12.
[188] *Id.* ¶¶ 10, 12.

states joining the European Union.[189] Slovakia had joined the European Union in 2004; however, it had entered into a bilateral investment treaty with the Netherlands in 1993.[190] The Treaty on the Functioning of the European Union, stated that "[m]ember States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."[191] Although the Treaties of the European Union encompass the courts of the individual member states, they do not refer to the ISDS mechanism in bilateral investment treaties between the member states.[192] Given that the European Union treaties did not cover the ISDS arbitration tribunal at issue, the German courts could not refer any questions of law to CJEU.[193]

The CJEU did not end its analysis there, but examined whether the individual courts of the member states can review the decisions of an ISDS arbitration tribunal without running afoul of the European Union treaties.[194] Although it noted that German law permitted German courts to review ISDS arbitration decisions, German law imposes tight restrictions on review.[195] Limited review "could prevent disputes from being resolved in a manner that ensures full effectiveness of EU law."[196]

The Treaty on the Functioning of the European Union forbids the members states from engaging in actions that could result in the breakdown of mutual trust between neighboring member states.[197] Additionally, the principle of sincere cooperation requires the member states to apply their domestic laws in a manner that respects European Union law.[198] German courts adjudicating a dispute between the Netherlands and Slovakia could wear on the cohesiveness of the European Union.[199] Therefore, the bilateral investment treaty was incompatible with the purpose and structure of the European Union.[200]

The CJEU decision in *Slovak Republic v. Achmea BV* generated uncertainty within European circles regarding the future of the ISDS mechanism in bilateral investment treaties between member states.[201] In response to the CJEU's decision, the European Union member states decided to eliminate the ISDS mechanism in all bilateral investment agreements between the members states, which is essentially a death knell to ISDS. [202] Although there is no immediate replacement for ISDS, since 2015 the European Commission has been calling for an "investor court system" to supplant ISDS.[203] At first, this proposal was slow to gain support because there

[189] *Id.* ¶¶ 33-34, 56
[190] *Id.* ¶ 6.
[191] *Id.* ¶ 37.
[192] *Id.* ¶ 17.
[193] *Id.*
[194] *Id.* ¶¶ 52-53.
[195] *Id.*
[196] *Id.* ¶ 56.
[197] *Id.* ¶¶ 34, 58.
[198] *Id.*
[199] *Id.* ¶¶ 38–60.
[200] *Id.*
[201] Casey, *supra* note 175 ¶ 6.
[202] *Id.* .
[203] *Id.*

was uncertainty regarding its compatibility with the European Union treaties.[204] Despite this reservation, in March 2018 the European Union formally adopted directives to begin negotiations with its members to replace ISDS with an investor court system for intrastate disputes.[205] In April 2019, the CJEU issued an opinion that the proposed investor court system in Comprehensive Economic Trade Agreement was compatible with the structure of the European Union.[206]

The idea of an investor court system was the subject of a separate trade agreement between the European Union and Canada; it was designated as the Comprehensive Economic and Trade Agreement (CETA). At its core, CETA's purpose is to reduce trade barriers between the European Union and Canada by removing almost all customs duties and encouraging investors to invest capital in each respective region.[207] More importantly, it establishes a robust investor court system.[208] The new system will promote transparency as all court decisions will be public information.[209] This is unlike some ISDS decisions, which are not publicly available. All tribunal judges will preside full time over the proceedings, which allow them to gain specialized experience adjudicating cases.[210] This is a stark contrast to ISDS arbitration tribunals, which are convened on an ad hoc basis and arbitrators may not have as much extensive experience.[211] Unlike ISDS, there is a defined appellate process.[212] However, the investor court system only provisionally applies until the European Parliament gives final approval.[213]

The European Union is charging forward to an investor court system as a replacement for the ISDS mechanism in bilateral investment treaties. This makes sense given the purpose and structure of the European Union. Its purpose is to break down trade barriers between the member states.[214] To facilitate this purpose, the European Union has constructed an overarching, governing authority and court system.[215] The next step is to create a more specialized court system to replace ISDS. For those states that existed outside of the European Union, bilateral investment treaties were logical, arm's length agreements because there was no regional authority to govern trade disputes. States had to negotiate trade agreements one-on-one and provide a mechanism for resolving disputes. Nevertheless, the induction of a state into the European Union, in effect, transformed these agreements into arcane relics of the past.

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[204] *Id.*
[205] *Commission welcomes adoption of negotiating directives for a multilateral investment court*, News Archive, EUR. COMM'N. (Mar. 20, 2018), https://policy.trade.ec.europa.eu/news/commission-welcomes-adoption-negotiating-directives-multilateral-investment-court-2018-03-20_en.
[206] *Trade: European Court of Justice confirms compatibility of Investment Court System with EU Treaties*, Press Release, EUR. COMM'N. (April 30, 2019), http://europa.eu/rapid/press-release_IP-19-2334_en.htm.
[207] *One year on EU-Canada trade agreement delivers positive results*, News Archive, EUR. COMM'N (Sept. 20, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5828.
[208] *The EU-Canada agreement explained*, EUR. COMM'N (Last updated September 21, 2017), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement/agreement-explained_en.
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *See* James McBride, *How Does the European Union Work?*, COUNCIL ON FOREIGN RELATIONS (April 17, 2020), https://www.cfr.org/backgrounder/how-does-european-union-work.
[215] *Id.*

While an investor court system may work for the European Union, the rest of the world is much more complex. It is unlikely that a regional or international court system geared toward resolving investor disputes could function outside of the European Union. A condition precedent for such a specialized system would be a strong governing international or regional body. The only one that currently exists is the European Union, but even its future longevity is questionable due to the current political climate.[216]

B. North American Free Trade Agreement vs. United States-Mexico-Canada Agreement

The United States-Mexico-Canada Agreement's (USMCA) reform of the ISDS mechanism from the North American Free Trade Agreement (NAFTA) is quite peculiar. It eliminates ISDS between the United States and Canada after a three-year phaseout period for existing legacy claims from NAFTA, but it provides procedural reforms to limit the scope of ISDS between the United States and Mexico.[217] Understanding these changes requires an understanding of the structure and controversy regarding NAFTA.

NAFTA went into effect in January 1994.[218] Its purpose was to phaseout a variety of tariffs over a five to fifteen year period.[219] It also required its signatories to refrain from discrimination against foreign investors among NAFTA parties.[220] But there were exceptions to this nondiscrimination rule, including allowing Mexico to ban foreign investment in their energy industry.[221] Furthermore, NAFTA strengthened the intellectual property protective measures between the three countries.[222] If a dispute arose through NAFTA, the parties at issue can resolve it through the NAFTA Trade Commission or through arbitration tribunals.[223]

NAFTA's Chapter 11 enumerates the protections for investors from the signatory parties and establishes the ISDS provisions, which allow investors to bind the hosting government through arbitration.[224] Chapter 11 requires the signatory governments to grant foreign investors "most-favored nation status," which means that they must treat foreign investors no less favorably than

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[216] For a skeptical view of the European Union Investor Court System, *see* Hon. Charles N. Brower & Jawad Ahmad, *From the Two-headed Nightingale to the Fifteen-headed Hydra: The Many Follies of the Proposed International Investment Court*, 41 Fordham Int'l L.J. 791 (2018). These authors argue that the proposed Investor Court System for the European Union will not solve the problems created by ISDS. Instead, it will further politicize the appointment of adjudicators as the member states will quarrel over who is selected for the court.

[217] M. ANGELES VILLARREAL & IAN F. FERGUSSON, CONG. RSRCH. SERV., R44981, NAFTA AND THE UNITED STATES-MEXICO-CANADA AGREEMENT (USMCA) 23 (March 2, 2020), https://crsreports.congress.gov/product/pdf/R/R44981.

[218] *Id.* at 2.

[219] M. ANGELES VILLARREAL & IAN F. FERGUSSON, CONG. RSRCH. SERV., R42965, THE NORTH AMERICAN FREE TRADE AGREEMENT *(NAFTA)* 5 (May 24, 2017), https://fas.org/sgp/crs/row/R42965.pdf.

[220] *Id.* at 8.

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] CHRISTOPHER A. CASEY & M. ANGELES VILLARREAL, CONG. RSRCH. SERV., IF11167, USMCA: INVESTMENT PROVISIONS (April 3, 2019), https://fas.org/sgp/crs/row/IF11167.pdf.

they treat their own domestic investors.[225] Moreover, the hosting government must treat the foreign investor in accordance with international law, including "fair and equitable treatment and full protection and security."[226]

More specifically, it bars the hosting government from discriminating against foreign investors; this includes provisions against restricting the nationalities of the employees, imposing certain quotas on imports and exports, inhibiting transfers of investments, and expropriation without just compensation.[227] For example, if a foreign investor from a signatory party establishes a petroleum company, the hosting government cannot seize and nationalize the petroleum company without compensating the investor. In this case, the aggrieved investor may claim that the hosting government has engaged in expropriation of the investor's assets and seek damages equivalent to the fair market value of its assets.[228] Chapter 11 also specifies the procedures for pursuing an ISDS claim, including how to file a claim, the composition of arbitration tribunals, and which rules govern arbitration procedures.[229] NAFTA's trade and ISDS provisions are very similar to provisions found in many bilateral or multilateral trade agreements.[230]

In the United States, NAFTA became highly controversial. Its advocates argued that NAFTA's reduction of tariffs and other market barriers generated an economic renaissance.[231] Its opponents proclaimed that NAFTA encouraged the manufacturing industry to relocate blue collar jobs to Mexico, where the costs of production are cheaper.[232] The criticism of NAFTA reached a high point when the United States compelled Canada and Mexico to renegotiate NAFTA, presumably on terms more favorable to the United States.[233] On November 30, 2018, the parties completed the renegotiation of NAFTA into the USMCA.[234] It took effect on the United States, Mexico, and Canada on July 1, 2020.[235]

The USMCA makes a series of changes regarding the ISDS mechanism. Critics of NAFTA's ISDS mechanism in both the United States and Canada alleged that it gives special procedural protections to foreign investors that are not available for domestic investors, and foreign investors can exploit the ISDS mechanism to undermine benign environmental and health regulations.[236] The greatest number of ISDS disputes under NAFTA were between the United

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[225] North American Free Trade Agreement, ch. 11, art. 1103, Dec. 17, 1992, https://can-mex-usa-sec.org/secretariat/agreement-accord-acuerdo/nafta-alena-tlcan/index.aspx?lang=eng.
[226] *Id.* at ch. 11, art. 1105.
[227] *Id.* ch. 11, art. 1101-1102, 1106, 1107, 1109, & 1110.
[228] *Id.* ch. 11, art. 1110.
[229] *Id.* ch. 11, Section B - Settlement of Disputes between a Party and an Investor of Another Party.
[230] VILLARREAL & FERGUSSON, *supra* note 216, at 22.
[231] VILLARREAL & FERGUSSON, *supra* note 218, at 10.
[232] *Id.* at 11.
[233] *Id.* at 24.
[234] *United States-Mexico-Canada Agreement*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement (last visited May 20, 2020).
[235] *USMCA To Enter Into Force July 1 After United States Takes Final Procedural Steps For Implementation*, Press Releases, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (April 24, 2020), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/april/usmca-enter-force-july-1-after-united-states-takes-final-procedural-steps-implementation.
[236] CASEY & VILLARREAL, *supra* note 224.

States and Canada.[237] There have been approximately fifty-nine ISDS cases between the three countries, including sixteen against the United States, twenty-five against Canada, and eighteen against Mexico.[238] Canada had initiated fifteen of the sixteen ISDS cases against the United States.[239] Although the United States has won every ISDS case, the arbitration tribunals have ruled against Mexico and Canada in several cases and required them to payout more than $100 million in compensation to foreign investors.[240]

Under the USMCA, the ISDS mechanism will be phased out over a three-year period for existing NAFTA legacy claims between the United States and Canada.[241] Investors bringing nonlegacy claims from either country must exhaust the remedies offered by the hosting government.[242] For example, a Canadian company disputing an environmental regulation must exhaust its remedies through the Environmental Protection Agency's administrative review process, and if still dissatisfied, seek judicial review through the United States judiciary.

The ISDS mechanism will continue to exist between the United States and Mexico.[243] However, a foreign investor must first seek to exhaust its local remedies over a thirty-month period prior to filing for ISDS arbitration.[244] Nevertheless, there are some exceptions between the United States and Mexico that allow an acceleration of an ISDS claim, including government issued contracts for specific industries such as oil and natural gas, infrastructure, telecommunications, and transportation.[245]

The revised USMCA provisions also give a much broader definition of what constitutes an investment.[246] Here, "investment" means "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[247] The USMCA then proceeds to list some examples of investments, such as stocks, bonds, intellectual property rights, and enterprises.[248] This is dissimilar to NAFTA's provisions, which only enumerate a list of what constitutes an investment.[249] Interestingly, the USMCA's definition of investment may allow for more legal causes of action compared to NAFTA, but it limits the means by which claimants may pursue them, such as drastically reducing the scope of the ISDS mechanism or, in the case of the United States and Canada, eliminating the ISDS mechanism.

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[237] *Id*.
[238] Geoffrey Gertz, *Renegotiating NAFTA: Options for Investor Protection*, Issue No. 7 BROOKINGS INSTITUTION 1 (Mar. 2017), https://www.brookings.edu/wp-content/uploads/2017/03/global-20170315-nafta.pdf.
[239] CASEY & VILLARREAL, *supra* note 224.
[240] Geoffrey Gertz, *supra* note 237, at 1.
[241] CASEY & VILLARREAL, *supra* note 224.
[242] *Id*.
[243] *Id*.
[244] *Id*.
[245] *Id*.
[246] *Id*.
[247] United States-Mexico-Canada Agreement, art. 14.1 (text as of Dec. 13, 2019), *available at* https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.
[248] *Id*.
[249] North American Free Trade Agreement, *supra* note 224, ch. 11, art. 1139.

The USMCA attempts to provide some clarification regarding the "most-favored nation status," the minimum standard of treatment expected under customary international law, and the enforcement of benign environmental, health, and safety regulations. In the prior NAFTA regime, several ISDS arbitration tribunals decided that the passage of a new regulation, such as one designed to protect the environment, constituted a breach of the provision requiring "fair and equitable treatment" because it was inconsistent with the investor's prior expectations and, as a consequence, diminished the value of the investment.[250] However, the USMCA clarifies the signatories may pass environmental, health, and safety regulations and that their enforcement, in itself, does not constitute a breach of the investor protections.[251]

Moreover, hosting governments do not necessarily need to give foreign investors special treatment over domestic investors. "The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights."[252] Instead, the "treatment [must be] no less favorable than the most favorable treatment accorded, *in like circumstances*, by that government to investors in its territory, and to investments of those investors."[253] Here, "like circumstances" is evaluated under a totality of the circumstances standard, which may include "whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives."[254]

The USMCA's reforms are peculiar but likely warranted. The sheer volume of ISDS cases between the United States and Canada has led to mistrust of the ISDS mechanism. The hosting governments have a duty to promulgate and enforce laws designed to safeguard the environment and public health. Given this mistrust, their choice to abandon ISDS is not irrational. It can be just as expensive for hosting governments to defend against ISDS cases as court litigation.[255] Furthermore, both countries have highly developed and sophisticated court systems. In contrast, the United States and Mexico believe that the ISDS mechanism is salvageable. They struck a reasonable compromise that expands the definition of investor but limit how that investor can challenge benign laws in the hosting government. The USMCA demonstrates that either the elimination of ISDS or reformation to limit its scope are feasible alternatives depending on the circumstances.

C. Restructuring ISDS to include an Appellate Panel

Some commentators have speculated that the ISDS mechanism could be improved if it included an appellate component, which would review decisions and provide more consistency, predictability, and accountability.[256] Countries could rewrite bilateral and multilateral investment

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[250] CASEY & VILLARREAL, *supra* note 224.
[251] United States-Mexico-Canada Agreement, *supra* note 247, art. 14.16.
[252] *Id.* art. 14.6.
[253] *Id.* art. 14.5 (emphasis added).
[254] *Id.*
[255] *Fact Sheet on Investor-State Dispute Settlements in 2018*, *supra* note 4, at 4.
[256] Theodore R. Posner, *supra* note 59, at 13-14; J. C. Thomas QC, *An appellate mechanism for investment treaty disputes?*, NATIONAL UNIVERSITY OF SINGAPORE CENTRE FOR INTERNATIONAL LAW (undated), http://legal.un.org/avl/pdf/ls/Thomas_presentation.pdf (Last visited May 20, 2020); Leon Trakman, *Enhancing Panels in Investor-State Arbitration: The Way Forward?*, 48 GEO. J. INT'L L. 1145, 1186 (2017).

treaties to add another level to the arbitration process. Nevertheless, it is important to flesh out the procedures involved in an ISDS appellate panel, such as the standard of review.

If appellate panels are to be incorporated into the ISDS mechanism, then the corresponding investment treaties will need to enumerate the standards of review for the appellate panel. Administrative agencies in the United States have their own levels of adjudication and enumerate several review standards for their appeals panels.[257] Arbitration panels could adopt similar standards, such as a de novo review for error of law,[258] whether the decision is supported by substantial evidence regarding the factual findings[259] or if initial panel abused its discretion.[260] Appellate panels should have the authority to remand the case back to the initial panel for unresolved issues regarding facts or for abuse of discretion. An appellate panel can act as an additional check and balance against the initial arbitration tribunal.

Some commentators have examined whether an ISDS appellate panel should be a permanent adjudicatory body, like the World Trade Organization (WTO).[261] This arguably opens the door for decisions that have precedential value.[262] It also facilitates a permanent staff to gain expertise on complex issues arising from disputes in investment treaties.[263] The problem with this idea is that the WTO, in its current condition, is broken. The United States has neutralized the WTO's appellate body by blocking the appointment of judges.[264] As a result, the WTO does not have enough judges to hold a quorum to hear cases.[265]

It would be more efficient to form appellate panels on an ad hoc basis, just like the initial arbitration panels. Each party will select their own arbitrators and mutually agree on a third

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[257] *See* 5 U.S.C. § 706 (1966); s*ee also* 20 C.F.R. § 404.900 (2017), specifying a four-tiered administrative review process for Social Security cases, including an Appeals Council. If the claimant is dissatisfied after appealing the case to the final level of administrative review, then the claimant may seek judicial review in federal district court. *See* 20 C.F.R. § 404.970 (2020), specifying the standards of review for the agency's appellate level.

[258] *De novo review*, BLACK'S LAW DICTIONARY, (pocket 3d ed. 2006) (meaning "nondeferential of an administrative decision, usually through review of the administrative record, plus additional evidence that the parties present.").

[259] 20 C.F.R. § 404.901 (2009). "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." This is less than a preponderance of the evidence, but more than a mere scintilla. *See also* SSA Hearings, Appeals, and Litigation Law Manual (HALLEX) § I-3-3-4 (2017), https://www.ssa.gov/OP_Home/hallex/I-03/I-3-3-4.html.

[260] "The standard of review applicable to the evidentiary rulings of the district court is abuse of discretion." *Old Chief v. United States*, 519 U.S. 172, 174, n.1 (1997) (citing *United States v. Abel*, 469 U.S. 45, 54-55 (1984)). *See also* "[A]n abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *Int'l Jensen, Inc. v. Metrosound U.S.A. Inc.*, 4 F.3d 819, 822 (9th Cir. 1993).

[261] Posner, *supra* note 59, at 1-2; Emily Palombo, Comment, Evaluating a Permanent Court Solution For International Investment Disputes 53 U. RICH. L. REV. 799, 825 (2019); *see* U.N Comm'n on Int'l Trade Law, *Possible reform of investor-State dispute settlement (ISDS) appellate and multilateral court mechanisms*, UNITED NATIONS GENERAL ASSEMBLY 9-10 (Nov. 29, 2019), https://uncitral.un.org/sites/uncitral.un.org/files/wp_185e_appeal_court_for_submissionreduced_for_website.pdf.

[262] Posner, *supra* note 59, at 8-9.

[263] *See* U.N. Conference on Trade and Development, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, IIA Issues Note 2, (June 26, 2013), https://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf.

[264] McBride & Chatzky, *supra* note 15.

[265] *Id* (explaining that as of December 2019, the WTO appellate body only has one appellate adjudicator).

arbitrator.[266] This selection process is common in arbitration provisions for tribunals in investment treaties.[267] Additionally, it is not necessary to have a permanent staff because those who are chosen to be arbitrators on current ISDS panels are already experts in corporate and investment law.[268] Finally, ISDS panels are not designed to create precedential value.[269] They only bind the parties to the current case or controversy.[270] Nevertheless, allowing extraterritorial appellate panels to create binding precedent may increase the public's mistrust of the ISDS mechanism and encourage more demands for its abolition.

Even if an appellate panel is formed on an ad hoc basis, it may create more problems than it solves. First, it prolongs the arbitration process and increases its associated expenses. Second, it does not necessarily resolve the issue of inconsistency between arbitration decisions. An appellate panel may rule in favor of one party between Country *A* and Corporation *B*, but a different appellate panel may reach the opposite result in a similar situation between country *A* and Corporation *C*. As eluded to earlier, ISDS cases do not create legal precedent, so there is no common law to bind appellate panels.[271] Instead, they are left to their own discretionary devices. Ultimately, it may be preferable to revise investment treaties to allow a dissatisfied party to seek judicial review of an initial arbitration decision in an actual court, rather than convene an appellate panel.

V. CONCLUSION

The purpose of the ISDS mechanism is to establish trust between foreign investors and the hosting government. This trust encourages foreign companies to invest capital in other countries, which benefits their economic development. Foreign investment should be encouraged, especially if it lifts the population of developing countries out of poverty. While the purpose and benefits of ISDS are laudable, companies have occasionally abused and exploited ISDS for financial gain. These are notable in the cases presented in this article where companies attempted to evade compliance with environmental, health, safety, and labor laws.

To mitigate the problems generated by the ISDS mechanism, countries and regions have prescribed several reforms. The European Union is moving to an investor court system, which will allow greater transparency, consistency in decision-making, and specialization of adjudicators. This is a natural move given the structure of the European Union, which is designed to break down trade barriers between the member states. With the proposed USMCA in North America, the United States and Canada will eliminate the ISDS mechanism, but the United States and Mexico will limit the scope of the ISDS mechanism. Other commentators have floated the idea of an appellate panel. These proposals and reforms illustrate that there is no one-size-fits-all approach to ISDS. The key to the success or failure of these proposals and reforms will revolve around whether they restore trust between the foreign investor, the hosting government, and the public.

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[266] *See* David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD 7, 42 (March 2012).
[267] *Id.*
[268] *Id.* at 43.
[269] Weiss et al., *supra* note 173, at 22.
[270] *See id*.
[271] *Id*.