Politics, Reason, and the Trajectory of Investor-State Dispute Settlement

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INTRODUCTION

This Article reflects on the future of investment treaties and investor-state dispute settlement ("ISDS") in light of failed negotiations for a Trans-Atlantic Trade and Investment Partnership ("TTIP") between the European Union ("EU") and the United States, successful negotiations for a Comprehensive Economic and Trade Agreement ("CETA") between the EU and Canada, and the political environment on both sides of the Atlantic. In so doing, it emphasizes five points. Part I asserts that investment treaty disputes often represent political disputes, at least for respondent states.[1] Drawing on social science literature, Part II considers the possibility that stakeholders and officeholders systematically make

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1. *See infra* notes 6–28 (overviewing the usual nature of disputes that involve respondent states and demonstrating that these disputes are often political); *see also* Charles H. Brower II, *Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2008–2009, 347, 348–56 (Karl P. Sauvant ed., 2009) (asserting that investment treaty disputes are political disputes).

irrational choices on political issues in democratic systems.[2] Part III describes how those forces have arguably shaped the EU's articulation of a dramatically new vision for investor-state dispute settlement in TTIP and CETA.[3] Part IV argues that one must cautiously approach revolutionary changes to ISDS possibly grounded in bliss beliefs and ideology.[4] Finally, Part V addresses concerns that the existing regime for investor-state arbitration replicates the problems of democratic dysfunction, with party-appointed arbitrators indulging the subjective and possibly irrational preferences of appointing parties in order to secure future appointments.[5]

I. INVESTMENT TREATY DISPUTES ARE POLITICAL DISPUTES

Starting with the political character of investment treaty disputes, one should pause to observe that claims under investment treaties almost always involve challenges to the public acts,[6] and often to the public regulatory acts,[7] of host states. In addition, they tend to cluster around

2. *See infra* notes 29–71 (exploring the theory that certain political choices systematically have an irrational component in democratic systems).

3. *See infra* notes 72–96 (applying the irrational choice theory to the European Union's new vision for investor-state disputes); *see also* Ian A. Laird, *TPP and ISDS: The Challenge from Europe and the Proposed TTIP Investment Court*, 40 CAN.-U.S. L.J. 106, 108 (2016) (describing the EU's "dramatic, new proposal" for ISDS in TTIP); Stephan W. Schill, *The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?*, ASIL INSIGHTS (Apr. 22, 2016), https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping (describing the EU's proposal for an international investment court as a "historic turning point" in reorienting ISDS from a private-law to a public-law process); *cf.* Barnali Choudhury, *2015: The Year of Reorienting International Investment Law*, ASIL INSIGHTS (Feb. 5, 2016), https://www.asil.org/insights/volume/20/issue/3/2015-year-reorienting-international-investment-law (asserting that the EU's proposal for an international investment court "completely overhauls the current system of investor-state dispute settlement").

4. *See infra* notes 97–130 (expressing the need for caution with respect to dramatic changes to the current ISDS framework).

5. *See infra* notes 131–209 (addressing concerns about democratic dysfunction within the current ISDS system).

6. *See* Brower, *supra* note 1, at 351 (noting that investment disputes "seek to impose state responsibility based on acts *jure imperii*, for which the respondent states would normally enjoy sovereign immunity under customary international law"); Gus Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 INT'L & COMP. L.Q. 371, 379 (2007) (discussing the nature of investment arbitration claims and the unique position of the State in these disputes); Alexis Blane, Note, *Sovereign Immunity as a Bar to the Execution of International Arbitral Awards*, 41 N.Y.U. J. INT'L L. & POL. 453, 488 (2009) ("Most of the acts that give rise to liability . . . are those that are undertaken by the state in its public character. . . ."); *see also* Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/08, Award, ¶¶ 246–53 (Feb. 6, 2007), https://www.italaw.com/documents/Siemens-Argentina-Award.pdf (explaining that states must normally engage in sovereign activities as opposed to commercial activities in order to incur responsibility under investment treaties).

7. *See* Noam Zamir & Paul Barker, *The Trans-Pacific Partnership Agreement and States' Right*

politically sensitive topics,[8] such as the distribution of energy,[9] allocation of natural resources,[10] environmental regulation,[11] hazardous waste

to Regulate under International Investment Law, 45 DENVER J. INT'L L. & POL'Y 205, 210 (2017) (observing that "most investment treaty claims . . . seek to impugn general regulatory measures directed at environmental protection, public health, prudential economic regulation or other key public welfare interests"); *see also* Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 839–40 (2012) (indicating that "ICSID proceedings frequently involve . . . important issues of . . . national regulatory competence"); Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT'L L. 875, 895 (2011):

> The cases relating to the Argentine economic crisis, [and] also several NAFTA disputes in which investors challenged what the respondent state argued to be legitimate regulatory action to protect the public interest, such as the protection of public health, the environment, or labour standards, raised the concern about how much 'regulatory space' investment treaties left.

8. *See* Laird, *supra* note 3, at 108 (explaining that "the issues raised in investment arbitration are frequently of highly charged political nature").

9. *See, e.g.*, Windstream Energy LLC v. Gov't of Canada, PCA Case No. 2013–22, Award (Sept. 27, 2016), http://www.pcacases.com/web/sendAttach/2036; TransCanada Corp. & TransCanada PipeLines Ltd. v. United States, ICSID Case No. ARB/16/21, Request for Arbitration (June 24, 2016), https://www.state.gov/documents/organization/259329.pdf; Mesa Power Grp. LLC v. Gov't of Canada, PCA Case No. 2012–17, Award (Mar. 24, 2016), http://www.pcacases.com/web/sendAttach/1675; Teco Guat. Holdings LLC v. Republic of Guatemala, ICSID Case No. ARB/10/17, Award (Dec. 19, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw3035.pdf; Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), https://italaw.com/documents/SempraAward.pdf; Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007), https:// italaw.com/documents/Enron-Award.pdf; CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005), 44 I.L.M 1205 (2005); *see also* Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 42 (2007) (finding that energy was "the most heavily arbitrated sector" under investment treaties, likely due to the scale of investments in energy projects, the long time periods involved, and their political sensitivity).

10. *See* Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. INT'L L. & POL. 1109, 1118 (2012) (observing that "a significant portion of investment disputes concern natural resources"); *see also* Georges R. Delaume, *Economic Development and Sovereign Immunity*, 79 AM. J. INT'L L. 319, 339–40 n.76 (1985) (providing "examples of disputes concerning traditional types of investment, . . . [including] disputes arising out of agreements relating to . . . the exploitation of natural resources, such as bauxite mining . . . , oil exploitation and exploration . . . , and forestry exploitation"); Cornel Marian, *Balancing Transparency: The Value of Administrative Law and* Mathews-*Balancing to Investment Treaty Arbitrations*, 10 PEPP. DISP. RESOL. L.J. 275, 281 (2010) ("Historically investment arbitrations involved disputes over natural resources and regulatory issues closely tied to national sovereignty."); *cf.* Josh Vaughan, Note, *Arbitration in the Aftermath of the Arab Spring: From Uprisings to Awards*, 28 OHIO ST. J. ON DISP. RESOL. 491, 494 (2013) (noting that the "procurement of natural resources often requires high levels of foreign investment, and may serve as an area of future investment disputes").

11. *See, e.g.*, Clayton v. Gov't of Canada, PCA Case No. 2009–04, Award on Jurisdiction and Liability (Mar. 17, 2015), http://www.pcacases.com/web/sendAttach/1287; Methanex Corp. v. United States, Final Award on Jurisdiction and Merits (Aug. 3, 2005), http://www.state.gov/documents/organization/51052.pdf.

disposal,[12] taxation,[13] financial regulation,[14] public procurement,[15] official corruption,[16] the integrity of local courts,[17] communications

12. *See, e.g.*, Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf; S.D. Myers, Inc. v. Gov't of Canada, Second Partial Award (Oct. 21, 2002), http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/myers-review-02.pdf; Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0510.pdf.

13. *See, e.g.*, EnCana Corp. v. Ecuador, LCIA Case No. UN 3481, Award (Feb. 3, 2006), http://www.italaw.com/sites/default/files/case-documents/ita0285_0.pdf; Occidental Expl. & Prod. Co. v. Ecuador, LCIA Case No. UN 3467, Final Award (July 1, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf; Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), https://www.italaw.com/sites/default/files/case-documents/ita0319.pdf.

14. *See, e.g.*, Saluka Investments BV v. Czech Republic, Partial Award (Mar. 17, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf.

15. *See, e.g.*, Mesa Power Group, LLC v. Gov't of Canada, PCA Case No. 2012–17, Award, ¶¶ 404–66 (Mar. 24, 2016), http://www.pcacases.com/web/sendAttach/1675; United Parcel Serv. of Am. v. Canada, ICSID Case No. UNCT/02/1, Award on the Merits, ¶¶ 121–36 (May 24, 2007), http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ups-00.pdf; ADF Group, Inc. v. United States, ICSID Case No. ARB(AF)/00/1, Award, ¶¶ 147–74 (Jan. 9, 2003), http://www.state.gov/documents/organization/16586.pdf.

16. *See, e.g.*, ECE Projektmanagement Int'l v. The Czech Republic, PCA Case No. 2010–5, Award, ¶¶ 4.871–4.932 (Sept. 19, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw4258.pdf (considering, but rejecting, investment treaty claims based on allegations of official corruption); EDF (Servs.) Ltd. v. Romania, ICSID Case No. ARB/05/13, Award, ¶¶ 221–237 (Oct. 8, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0267.pdf (considering, but rejecting, claims that Romanian officials solicited a USD $2.5 million bribe); Chevron Corp. v. Ecuador, PCA Case No. 2009–23, Notice of Arbitration, ¶¶ 43, 50–53 (Sept. 23, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0155_0.pdf (alleging political interference, judicial predisposition in favor of local plaintiffs, and solicitation of bribery); World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶¶ 130–88 (Oct. 4 2006), https://www.italaw.com/documents/WDFv.KenyaAward.pdf (finding that the claimant paid a $2 million bribe to secure presidential approval for an investment agreement, finding that bribery violates international public policy, and concluding that the circumstances authorized the host state to void the agreement that formed the basis of the investor's claim).

17. *See, e.g.*, Loewen Grp., Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), https://www.state.gov/documents/organization/22094.pdf; Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), https://www.state.gov/documents/organization/14442.pdf; *Chevron Corp.*, PCA Case No. 2009–23, https://www.italaw.com/sites/default/files/case-documents/ita0155_0.pdf.

services,[18] transportation,[19] preservation of cultural heritage,[20]

18. *See, e.g.*, Rumeli Telekom A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award (July 29, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0728.pdf; Telenor Mobile Commc'ns A.S. v. Republic of Hungary, ICSID Case No. ARB/04/15, Award (Sept. 13, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0858.pdf; Nagel v. Czech Republic, SCC Case No. 049/2002, Final Award (Sept. 9, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0551.pdf; CME Czech B.V. v. Czech Republic, Final Award (Mar. 14, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0180.pdf; Lauder v. Czech Republic, Final Award (Sept. 3, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0451.pdf; *see also* Eric Gottwald, *Leveling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?*, 22 AM. U. INT'L L. REV. 237, 239 n.3 (2007) (discussing a sampling of claims, including "France Telecom's $2.9 billion claim against Lebanon over its contract to construct and run a Lebanese mobile phone network [and] . . . U.S. cellular communications company Motorola's $2 billion claim against the Republic of Turkey over its investment in a Turkish mobile phone system").

19. *See, e.g.*, R.R. Dev. Corp. v. Republic of Guatemala, ICSID Case No. ARB/07/23, Award (June 29, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1051.pdf; Malicorp Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/08/18, Award (Feb. 7, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0499.pdf; Walter Bau AG v. Thailand, UNCITRAL, Award (July 1, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0067.pdf; Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of Philippines, ICSID Case No. ARB/03/25, Award (Aug. 16, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0340.pdf; *see also* Lise Johnson & Oleksandr Volkov, *Investor-State Contracts, Host-State "Commitments" and the Myth of Stability in International Law*, 24 AM. REV. INT'L ARB. 361, 364 (2013) (reporting that 11 percent of investor-state arbitrations administered by ICSID involve the transportation sector).

20. *See* Glamis Gold, Ltd. v. United States, PCA Case No. 2010–5, Award, ¶¶ 50, 80–82, 103–05, 167–77, 795, 804–06 (June 8, 2009), http://www.state.gov/documents/organization/125798.pdf (involving a claim based on regulations requiring backfilling and re-grading of an extensive surface mining facility located in close proximity to Native American cultural sites); United Parcel Serv. of Am. v. Canada, An Arbitration under Chapter 11 of the North American Free Trade Agreement, Award on the Merits, ¶ 169 (May 24, 2007), http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ups-00.pdf (involving the application of the cultural industries exception of NAFTA's investment chapter to measures designed "to connect Canadians to each other through the provision of accessible Canadian cultural products and to sustain and develop the Canadian publishing industry"); S. Pac. Props. (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award (May 20, 1992), 3 ICSID Rep. 189 (1995) (involving a plan to build a tourist village near the Pyramids at Giza).

affirmative action,[21] pharmaceuticals,[22] and tobacco control.[23] Furthermore, the motivations for the regulatory shifts that trigger investment treaty disputes often include some combination of changes in political administration,[24] abrupt changes in policy,[25] as well as political,

21. *See, e.g.*, Foresti v. Republic of South Africa, ICSID Case No. ARB(AF)/07/1, Award (Aug. 4, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0337.pdf.

22. *See, e.g.*, Eli Lilly & Co. v. Gov't of Canada, Case No. UNCT/14/2, Final Award (Mar. 16, 2017), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3544/DC10133_En.pdf; Apotex Holdings Inc. v. United States, ICSID Case No. ARB(AF)/12/1, Award (Aug. 25, 2014), https://www.state.gov/documents/organization/233043.pdf; Apotex Inc. v. United States, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility (June 14, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw1550.pdf; Les Laboratoires Servier, S.A.S. v. Poland, UNCITRAL, Final Award (Feb. 14, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw3005.pdf; *see also* Valentina Vadi, *New Forms of Dialectics between Intellectual Property and Public Health: Pharmaceutical Patent-Related Investment Disputes*, 49 INT'L LAW. 149, 165 (2015) (noting that recent years have seen "a growing number of investor-state arbitrations concerned [with] the way host states govern the pharmaceutical sector").

23. *See, e.g.*, Philip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf; Philip Morris Asia Ltd. v. Australia, PCA Case No. 2012–12, Award on Jurisdiction and Admissibility (Dec. 17, 2015), https://www.pcacases.com/web/sendAttach/1711.

24. *See, e.g.*, Eureko B.V. v. Slovak Republic, PCA Case No. 2008–13, Award on Jurisdiction, Admissibility and Suspension, ¶ 7 (Oct. 26, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0309.pdf (involving a change of government in Slovakia); Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award, ¶ 273 (Feb. 6, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0790.pdf (involving a change in presidential administrations in Argentina); Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award, ¶¶ 37–39 (Oct. 11, 2002), https://www.italaw.com/sites/default/files/case-documents/ita1076.pdf (involving a change in mayoral administrations in Boston, Massachusetts); Revere Copper and Brass, Inc. v. Overseas Private Inv. Corp., Award (Aug. 24, 1978), 56 I.L.R. 258, 269 (1980) (involving a change in government in Jamaica); *see also* Charles N. Brower, Judge, Iran-United States Claims Tribunal, Manley O. Hudson Medal Lecture, The Evolution of the International Judiciary: Denationalization Through Jurisdictional Fragmentation, 103 AM. SOC'Y INT'L L. PROC. 171, 183 (2009) (indicating that investment treaty claims "often com[e] as the result of a change in government"); Luke Eric Peterson, *In Lead-Up to Election, Republic of Georgia Lost One Investor Arbitration, and Settled Another*, INVESTMENT ARBITRATION REPORTER (Nov. 11, 2012), http://www.iareporter.com/articles/in-lead-up-to-election-republic-of-georgia-lost-one-investor-arbitration-and-settled-another (discussing Karmer Marble Tourism Constr. Indus. & Commerce LLC v. Georgia, ICSID Case No. ARB/08/19, in which an ICSID tribunal found that the investor's "contract to develop a highway was illegally terminated following [a] . . . change in government in Georgia").

25. *See supra* note 24 (discussing arbitrations all involving changes of government, with incoming administrations criticizing the policies adopted by their predecessors and seeking to change the rules of the game); *see also* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 22 (2d ed. 2012) (indicating that the "central political risk . . . for . . . foreign investor[s] lies in a change of the position of the host government . . ." and explaining that such changes "become[] more likely with every subsequent change of government . . ."); *cf.* Charles H. Brower II, *Trans-Pacific Partnership: Continuity and Breakthroughs in U.S. Investment Treaty Practice*, 27 AM. REV. INT'L ARB. 145, 147–49 (2016)

economic, and/or social upheaval in host states.[26] In other words, investment treaty disputes often occur in highly politicized contexts,[27]

(describing the development of bilateral investment treaties as part of a response to "the expansion of communism and the process of decolonization[, which] led to changes of government and dramatic shifts in policy across the globe" during the decades leading up to the 1970s).

26. For example, after a financial crisis that provoked riots, inflicted grave economic losses, and caused the succession of five presidential administrations over the course of ten days in Argentina, foreign investors brought dozens of investment treaty claims, seeking damages that exceeded the nation's financial reserves. Brower, *supra* note 1, at 349–50 (discussing the Argentine financial crisis and the ensuing claims brought against the government by foreign investors); *see also* LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 63, 216, 231–36 (Oct. 3, 2006), [hereinafter *LG&E Award*], http://www.investmentclaims.com/IIC_152_(2006).pdf (describing the events that transpired during the financial crisis of 2001 in Argentina); GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 1–2 (1st ed. 2007) (describing the series of events which led to the 2001 Argentine financial collapse and, eventually, the filing of dozens of investment arbitration claims by foreign investors for "an estimated $17 billion in claimed compensation," which was "nearly the entire annual budget of the national government"); William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 309, 311 (2008) (examining the Argentine financial crisis and observing that "Argentina has become subject to no fewer than forty-three ICSID arbitrations brought by investors who assert that Argentina's response to the crisis harmed investments protected by various BITs").

As a second example, Venezuela is in the midst of a longstanding political, economic, and social crisis, in which the country has ceased to be a democracy, per capita GDP has fallen by more than one-third since 2012, the population faces widespread malnutrition due to food shortages, homicides exceed 20,000 annually and go unpunished, looting has become endemic, and armed bands control significant areas of the country. *Power Without the People: Averting Venezuela's Breakdown*, INT'L CRISIS GROUP (June 19, 2017), https://www.crisisgroup.org/latin-america-caribbean/andes/venezuela/b036power-without-people-averting-venezuelas-breakdown; *see* Katia Porzecanski, *Investing in Venezuela Could Be Hugely Profitable or Potentially Lethal*, BLOOMBERG (Aug. 10, 2016), https://www.bloomberg.com/news/articles/2016-08-11/scarier-than-default-risks-loom-for-bond-investors-in-venezuela (describing Venezuela as "one of the globe's most dangerous places," based on a "collapse in oil prices" that "deepened the [country's] economic crisis and exacerbated food shortages," with the result that Venezuela also suffers from "widespread" crime, the world's third-highest murder rate, and a growing practice of vigilante justice that includes "mob lynchings").

Not surprisingly, the political, economic and social crisis rippling through Venezuela has caused dislocations that led to the assertion of at least forty-one investment treaty claims at ICSID, "more than three times that [asserted against] any neighbors save Argentina." *See* Caroline Simson, *A Cheat Sheet to Venezuela's Disputes at ICSID*, LAW360 (July 29, 2016, 7:38 PM), https://www.law360.com/articles/822707/a-cheat-sheet-to-venezuela-s-disputes-at-icsid (discussing the frequent claims brought against Venezuela at ICSID, forty-one in total, second only to Argentina); *see also* UNCTAD, WORLD INVESTMENT REPORT 2017: INVESTMENT AND THE DIGITAL ECONOMY 115 (2017) [hereinafter UNCTAD WIR 2017], http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf (listing Venezuela as the second most frequent target of investment treaty claims, with forty-one claims brought against that state); SCOTT MILLER & GREGORY N. HICKS, INVESTOR-STATE DISPUTE SETTLEMENT: A REALITY CHECK 8 (Ctr. for Strategic and Int'l Studies, Jan. 2015) (indicating that "disputes tend to arise in host economies with poor rule-of-law records," with Argentina ranking as the most frequent respondent state (fifty-three claims) and Venezuela ranking second (thirty-six claims)).

27. Brower, *supra* note 24, at 183 (noting the politically charged nature of issues coming before international tribunals); Jeswald W. Salacuse, *Is There a Better Way? Alternative Methods of*

and can be seen as challenges to the normal operation of political processes of host states,[28] which could be good or bad depending on whether one views those processes as likely to produce rational and beneficial outcomes.

II. STAKEHOLDERS AND OFFICEHOLDERS SYSTEMATICALLY MAKE IRRATIONAL CHOICES ON POLITICAL ISSUES IN DEMOCRATIC SYSTEMS

Turning to political behavior, a growing body of literature indicates that stakeholders and even officeholders systematically make irrational decisions on political issues in democratic systems.[29] One can see this

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Treaty-Based, Investor-State Dispute Resolution, 31 FORDHAM INT'L L.J. 138, 141 (2007) (opining that "investor-State disputes are political in nature and often become highly politicized"); *see* Catherine A. Rogers, *The Politics of International Investment Arbitrators*, 12 SANTA CLARA J. INT'L L. 223, 240 (2013) (opining that investment arbitration "operates in a volatile and politically charged environment"); Jason Webb Yackee, Pacta Sunt Servanda *and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*, 32 FORDHAM INT'L L.J. 1550, 1611 (2009) (concluding that the "creation of foreign investment law and policy is necessarily a political task, entailing in some instances sensitive decisions about the allocation of valuable rights, or about the 'allocation of power'") (quoting Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1, 13 (1959))).

28. *See* CATHERINE A. ROGERS, ETHICS IN INTERNATIONAL ARBITRATION 324 (1st ed. 2014) (recognizing that "investment arbitration is often viewed as pitting investor interests against defenders of State policy interests"); Jeswald W. Salacuse, *The Treatification of International Investment Law*, 13 L. & BUS. REV. AM. 155, 156 (2007) (describing investment treaties in terms of a legal regime that empowers foreign investors to "resist the forces of change often demanded by the political and economic life in host countries"); *see also* Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 146 (2006) (observing that "[i]nvestment arbitration tribunals apply standards that constrain sovereign acts of a state's legislature, judiciary and administration," and thus serve "as a mechanism to control the exercise of public authority").

29. *See generally* JASON BRENNAN, AGAINST DEMOCRACY (Princeton Univ. Press 2016) (critiquing the democratic process and examining numerous theories about the electorate); BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES (Princeton Univ. Press 2007) [hereinafter CAPLAN, THE MYTH OF THE RATIONAL VOTER] (analyzing why democracies choose bad policies); Michael Huemer, *Why People Are Irrational about Politics*, *in* PHILOSOPHY, POLITICS, AND ECONOMICS: AN ANTHOLOGY 456 (Jonathan Anomaly et al., eds. 2016) (arguing that political disagreements are "very *widespread*," "*strong*," and "*persistent*," and concluding that "human beings are highly unreliable at identifying correct political claims" because "individual derive psychological rewards from holding certain political beliefs") (emphasis original); Larry M. Bartels, *The Irrational Electorate*, THE WILSON QUARTERLY (Fall 2008), https://wilsonquarterly.com/quarterly/fall-2008-the-glory-and-the-folly/the-irrational-electorate/ (concluding that voters reward whomever is in power when the country is doing well and thus are irrational when voting); Eyal Winter, *Voting Is Irrational. Emotions Always Win*, THE GUARDIAN (May 7, 2015, 2:11 PM), https://www.theguardian.com/commentisfree/2015/may/07/voting-irrational-emotions-politics-ideology (suggesting that voters are driven by an ideological craving that motivates their choice at the polls); Bryan Caplan, *Rational Irrationality and the Microfoundations of Political Failure* (Indep. Inst., Working Paper No. 7, Oct. 1999), http://econfaculty.gmu.edu/bcaplan/pdfs/rationalirrationalityandmicro.pdf [hereinafter Caplan, *Rational Irrationality*] (building on Bryan Caplan's model of "rational irrationality" and further

phenomenon by comparing politics and religion, both areas in which disagreements are strong, widespread, and persistent.[30] At social events, one tends to avoid discussions of politics and religion because those topics routinely function as gateways to emotionally intense and stubborn disagreements. If people's differences on these topics were mostly cognitive, there would be much less room for debate.[31] When exposed to the same facts, rational people would tend to reach similar conclusions on the benefits and drawbacks associated with policies relating to immigration, economic development, counterterrorism, gun control, and even the protection of foreign investment.[32] The persistence of fierce and widespread debates across a large range of political issues indicates that stakeholders and officeholders do not behave like rational political actors.[33]

To understand why stakeholders do not behave like rational political actors, consider the circumstances that support rational action. In the practical aspects of life, we have strong incentives to gather information and make wise choices. When purchasing computers or automobiles, *Consumer Reports* and other rating services offer easy access to reliable

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examining the rationality of voters).

30. *See* Huemer, *supra* note 29, at 456 (observing that only religion and morality rival politics as a source of disagreement, and pointing out that political disagreements tend to be widespread, strong and persistent); *see also* CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 29, at 100 ("In a secular age, politics and economics have displaced religion itself as the focal point for passionate conviction and dogmatism.").

31. *See* CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 29, at 101 ("If ignorance were the sole cause of error, sufficiently large doses of information would be a cognitive panacea."); Huemer, *supra* note 29, at 457 ("If political disputes had a purely cognitive explanation, we would expect them to be more easily resolvable.").

32. As a British professor of economics explains:

> Imagine a world in which ideology was ruled by rationality without any biases. In such a world there would be little room for political debate among intelligent people. If we were all exposed to the same facts we would end up reaching the same conclusions. We would still need parties and elections since our interests are not identical. But we would never remain split over questions such as which economic policy would benefit the most British people, or which policy would be most effective for tackling terrorism.

Winter, *supra* note 29; *see also* Huemer, *supra* note 29, at 457 (indicating that if rational actors had different information, "they could simply meet, share their information, and then come to an agreement" on political issues).

33. *See* Winter, *supra* note 29 ("The fact that we continue to debate these issues endlessly, and yet never seem to agree, suggests that there is something in ideologies far beyond rationality."); *see also* CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 29, at 115 ("Though initially jarring, it is coherent to assert that people are rational in some areas but not in others. Irrational beliefs probably play a role in all human activities, but politics makes the 'short list' of areas where irrationality is exceptionally pronounced."); Bartels, *supra* note 29 (discussing a study conducted during the early 1950s by researchers at Columbia University, who concluded that "electoral choices 'are relatively invulnerable to direct argumentation' and 'characterized more by faith than by conviction and by wishful expectation rather than careful prediction of consequences'").

information about the options, meaning that we face low information costs. When we make good choices, we actually get the products we want and we experience all the benefits that flow from those choices.[34] When we ignore information or make poor choices, we get bad products and we experience all of the associated losses.[35] The same holds true in the employment context, where systematic errors in judgment entail large personal costs. For example, regular overestimation of job performance while intoxicated vastly increases the likelihood of termination and long-term career setbacks.[36] Similarly, most people think rationally about traffic patterns when crossing streets.[37] When people see a Mack truck approaching, they don't assume they are seeing an optical illusion.[38] The stakes are too high; mistakes will result in serious injury or death.[39] The point is that the correlation between erroneous beliefs and personal costs establishes a discipline that supports rational decisionmaking. Given the ease of making good choices, the rewards for making good choices, and the penalties for making bad choices, we tend to act rationally in the practical aspects of life.

In the non-practical aspects of life, we have much weaker incentives to gather information and make wise choices. When assessing candidates, policies, and officeholders, we do not have the equivalent of *Consumer Reports*, meaning that the costs of becoming informed increase dramatically. Even when we invest in gathering information and make good choices, we don't actually get the candidate or the policy we want.[40]

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34. *See* Huemer, *supra* note 29, at 460 ("If you take the time to read *Consumer Reports* to determine which kind of car to buy, you then get that car."); Jason Brennan, *Trump Won Because Voters Are Ignorant, Literally*, FOREIGN POLICY (Nov. 10, 2016, 2:33 PM), http://foreignpolicy.com/2016/11/10/the-dance-of-the-dunces-trump-clinton-election-republican-democrat/ ("Consider: If you go to buy a car, you do your research. After all, if you make a smart choice, you reap the rewards. . . .").

35. *See* CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 29, at 14 ("When a consumer has mistaken beliefs about what to buy, he foots the bill."); *id.* at 94 ("In markets, if individuals know too little, they pay the price in missed opportunities. . . ."); Brennan, *supra* note 34 (noting that when people make bad choices about automobile purchases, they "suffer the consequences"); Caplan, *Rational Irrationality*, *supra* note 29, at 4 (observing that "systematic errors about non-political issues often have large private, marginal costs").

36. Caplan, *Rational Irrationality*, *supra* note 29, at 4 (noting that one's career will likely be ruined if one engages in "over estimating job performance while intoxicated").

37. BRENNAN, *supra* note 29, at 23 (discussing the rational logic implemented in deciding whether it is safe to cross the street).

38. *Id.*

39. *Id.*

40. *See* Huemer, *supra* note 29, at 460 (observing that "if you take the time to research politicians' records to find out which politician to vote for, you do not thereby get that politician. You still get the politician that the majority of other people voted for. . . ."); Caleb Crain, *None of the Above: The Case Against Democracy*, THE NEW YORKER (Nov. 7, 2016), http://www.newyorker.com/magazine/2016/11/07/the-case-against-democracy (explaining that

We get only one vote and our voice is so small that it makes no difference to the outcome,[41] and therefore it makes no sense to incur the costs of becoming informed.[42] As voters, we rationally choose ignorance.[43]

In addition to ignorance, voters face a number of incentives to act irrationally.[44] When it comes to political issues, most voters have strongly held beliefs about things like terrorism, gun control, immigration, and international trade. While often erroneous or at least not grounded in fact, those beliefs frequently create a strong sense of satisfaction for adherents;[45] for example, by providing an emotional

"even if you read up on candidates for civil-court judge on Patch.com, it may still be the crook who gets elected").

41. *See* BRENNAN, *supra* note 29, at 31 (noting that "the probability a person will break a tie is vanishingly small," and that individuals "are more likely to win Powerball a few times in a row than to cast a tie-breaking vote"); CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 29, at 94 ("One vote is extraordinarily unlikely to change an election's outcome.").

42. *See* BRENNAN, *supra* note 29, at 31–32 ("Individual citizens have almost no power over government, and individual votes have almost zero expected value. Citizens don't invest in acquiring political knowledge because knowledge doesn't pay. Regardless of whether citizens have altruistic or selfish political preferences, it is not worth their time to be well informed about politics."); CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 29, at 2 ("Economists have long argued that voter ignorance is a predictable response to the fact that one vote doesn't matter. Why study the issues if you can't change the outcome?"); *id.* at 94 ("If time is money, acquiring political information takes time, and the expected personal benefit of voting is roughly zero, a rational, selfish individual chooses to be ignorant.").

43. *See* CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 29, at 94 (quoting ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 259 (1957)) (noting that "it is irrational to be politically well-informed because the low returns from data simply do not justify their cost in time and other resources"); Huemer, *supra* note 29, at 460 ("The theory of Rational Ignorance holds that people often choose—rationally—to remain ignorant because the costs of collecting information are greater than the expected value of the information. This is very often true of political information."); Brennan, *supra* note 34 ("Most voters are ignorant or misinformed because the costs to them of acquiring political information greatly exceed the potential benefits.").

Most stakeholders remain ignorant of such things as the party that controls Congress, the number of senators from their state, the names of incumbents and, of course, their voting records. *See* BRENNAN, *supra* note 29, at 25 (indicating that citizens generally cannot identify which party controls Congress); CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 29, at 95 (noting that about half of voters know that each state has two senators, and only a quarter knows the length of their term in office); *see also* Huemer, *supra* note 29, at 460 (indicating that most people cannot identify their congressperson, and that laypeople do not know the last vote taken in Congress); Brennan, *supra* note 34 (noting that voters generally "don't know which party controls Congress, what Congress has done recently, whether the economy is getting better or worse (or by how much)"); Crain, *supra* note 40, at 67 (indicating that about a third of American voters are "incapable of naming even one of the three branches of the United States government," that only half know that their state has two senators, and that less than a quarter can identify their senators by name).

44. *See* CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 29, at 2 ("The central idea is that voters are worse than ignorant; they are, in a word, *irrational*—and vote accordingly."); Huemer, *supra* note 29, at 460 (noting that "[P]eople often think illogically because it is in their interests to do so. This is particularly common for political beliefs").

45. *See* CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 29, at 100 ("Holding fast to beloved opinions increases subjective well-being.").

charge,[46] making sense of the world,[47] or shaping one's sense of personal identity.[48] Many individuals hold their political beliefs so dearly and so personally that they equate disagreement with personal attack.[49]

On the other side of the ledger, for most voters, the cost of holding erroneous views on political issues approaches zero.[50] Because individual stakeholders have only a single vote, they can assume that their views will not change the outcome of any political contest.[51] Even if their choices have outcome-determinative effects and are wrong, individual voters do not experience all of the associated losses, but spread them diffusely across the entire population.[52] Given the difficulties of

46. *See id.* at 2 ("Protectionist thinking is hard to uproot because it *feels good*.") (emphasis in original).

47. *See id.* at 16 ("Like the adherents of traditional religion, many people find comfort in their political worldview, and greet critical questions with pious hostility."); *id.* at 116 ("Worldviews are more a mental security blanket than a serious effort to understand the world. . . .").

48. *See* BRENNAN, *supra* note 29, at 5 (describing a broad group of democratically active citizens, and emphasizing that "[t]heir political opinions form a part of their identity, and they are proud to be a member of their political team"); Huemer, *supra* note 29, at 461 (indicating that people "prefer to hold the political beliefs that best fit with the images of themselves that they want to adopt and to project"); *see also* CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 29, at 14 ("In reality . . . we often have cherished views, valued for their own sake."); Huemer, *supra* note 29, at 460 (explaining that "there are certain things that people *want* to believe, for reasons independent of the truth of those propositions or of how well-supported they are by the evidence").

49. *See* CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 29, at 100 ("In a secular age, politics and economics have displaced religion itself as the focal point for passionate conviction and dogmatism . . . When liberals and conservatives quarrel . . . they have emotional investments in the answer."); *cf.* Huemer, *supra* note 29, at 465 (recognizing that "people accused of irrationality may take the accusation as a personal attack, rather than as a point relevant to the political debate, and respond defensively.").

50. *See* CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 29, at 18 ("In real-world political settings, the price of ideological loyalty is close to zero."); Caplan, *Rational Irrationality*, *supra* note 29, at 3 (noting that the private cost of systematic error with respect to political beliefs is "effectively zero").

51. The chances that a single vote will change the election approaches zero. *See* BRENNAN, *supra* note 29, at 23 ("The chances that an individual's vote will make any sort of difference are vanishingly small."); CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 29, at 5, 131 (noting that "[o]ne vote has so small a probability of affecting electoral outcomes that a realistic egoist pays no attention to politics . . ." and that "in elections with millions of voters, the probability that your erroneous policy beliefs cause unwanted policies is approximately zero"); Caplan, *Rational Irrationality*, *supra* note 29, at 3 (noting that "the probability that one vote will change policy is extremely close to zero"); Winter, *supra* note 29 (explaining that "each of us separately has virtually zero influence on the election outcome"); *see also* Huemer, *supra* note 29, at 460 ("There is a tiny chance that my belief will have some effect on public policy. . . .").

52. *See* CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 29, at 14, 121 (noting that "[w]hen a voter has mistaken beliefs about government policy, the whole population picks up the tab," because "errors with *drastic* real-world repercussions can be cheap for the individual who makes them" when "most or all of the cost of the mistake falls upon strangers"); Huemer, *supra* note 29, at 460 (noting that the costs of irrational beliefs "will be borne by society as a whole; only a negligible portion of it will be borne by me personally").

becoming informed,[53] the strength of subjective beliefs,[54] the absence of rewards for making good choices,[55] and the low incidence of penalties for making bad choices,[56] voters tend to act irrationally in making choices on political issues.[57] This helps explain the widespread tendency to blame foreigners for economic woes[58] and to favor protectionist measures,[59] even though economists of all stripes agree that free trade increases wealth.[60]

One might expect politicians and officeholders to behave more rationally; both have greater access to information, their choices can determine outcomes, and one might expect them to suffer a greater share of the losses associated with disastrous political choices. However, while

53. *See supra* notes 40–43 and accompanying text (noting that because the cost of becoming politically informed is so high relative to how little an individual's vote matters, it is rational to remain ignorant).

54. *See* Huemer, *supra* note 29, at 460 (explaining that "people often think illogically because it is in their interests to do so," that "[t]his is particularly common for political beliefs," and that "there are certain things that people *want* to believe, for reasons independent of the truth . . . or of how well supported they are by the evidence"); *see also supra* notes 44–49 and accompanying text (noting that many voters have strongly held beliefs that, while not rooted in fact, shape their sense of identity).

55. *See supra* note 40 and accompanying text (observing that voters who spend the time becoming politically informed and researching candidates are still stuck with whoever the majority of other people voted for).

56. *See supra* notes 50–52 and accompanying text (noting that for most voters, the cost of holding erroneous views on political issues approaches zero).

57. *See* CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 29, at 133 ("The same people who practice intellectual self-discipline when they figure out how to commute to work, repair a car, buy a house, or land a job 'let themselves go' when they contemplate the effects of protectionism, gun control, or pharmaceutical regulation."); Caplan, *Rational Irrationality*, *supra* note 29, at 9 ("People want to believe what is pleasant, but normally the private costs of acting on those beliefs deter them from indulging this wish. Nothing comparable deters the consumption of irrational *political* beliefs."); Huemer, *supra* note 29, at 461 (opining that "since individuals receive almost none of the benefits from being epistemically rational about political issues, we can predict that people will often choose to be epistemically irrational about political issues"); *see also* Caplan, *Rational Irrationality*, *supra* note 29, at 4 ("The institutional structure of politics tends to peg the price of irrationality at zero. . . . When the price of irrationality is zero, people tend to adhere to their bliss belief, consuming irrationality until they are 'satiated.'"); Brennan, *supra* note 34 (noting that voters "can afford to indulge silly, false, delusional beliefs—precisely because it costs them nothing," and concluding that this encourages voters "to vote expressively, to show their commitment to their worldview and team"). Of course, there is a group of voters who "think scientifically and rationally about politics," but most politically active Americans do not fall within that group. BRENNAN, *supra* note 29, at 5–6 (defining and discussing the political behavior of groups referred to as "hobbits," "hooligans," and "vulcans").

58. CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 29, at 16 (acknowledging that "blaming foreigners for domestic woes is a source of comfort or pride").

59. *Id.* at 1.

60. *Id.*; *see also* Brennan, *supra* note 34 (indicating that President Trump's "anti-trade and anti-immigrant agenda flies against the consensus of economists on the left, right and center").

politicians and elected officials are rational actors,[61] securing votes constitutes their primary goal,[62] which they are more likely to achieve by telling constituents what they want to hear, instead of lecturing them about flaws in their beliefs and worldviews.[63] As a result, politicians tend to make decisions that indulge the erroneous beliefs of voters,[64] a habit that one also finds in media coverage for similar reasons.[65]

Unusually talented politicians do not simply indulge the beliefs and preferences already held by voters.[66] They go even further by trying to anticipate new sets of beliefs and preferences that voters *will* want to hold.[67] Thus, after a steep rise in fuel prices, voters are likely to criticize the greed of oil companies, but unlikely to consider price controls.[68] By contrast, skilled politicians might attempt to shift the preferences of voters by suggesting price controls as a brilliant and emotionally-

61. CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 29, at 167 (recognizing that "[p]oliticians have a[] strong . . . incentive to think rationally about their popularity"); Winter, *supra* note 29 ("Politicians are much more rational than us voters.").

62. *See* Brennan, *supra* note 34 ("After all, politicians need to win elections, and to do so, they have to appeal to voters."); Winter, *supra* note 29 (observing that politicians "are governed primarily by their instinct for political survival").

63. *See* CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 29, at 37 (quoting ALAN BLINDER, HARD HEADS, SOFT HEARTS: TOUGH-MINDED ECONOMICS FOR A JUST SOCIETY 111 (1987)) ("Legislators are out to win votes, not intellectual kudos."); *id.* at 168 ("If voters are committed protectionists, politicians do not win their friendship with patient lectures on comparative advantage.").

64. *See id.* at 168 ("Instead of trying to correct popular errors, [politicians] indulge them."); *see also id.* at 19 (emphasizing that "rational choice theory rightly emphasizes that politicians woo voters by catering to their preferences," which "means one thing if voters are shrewd policy consumers, and almost the opposite if . . . voters are like religious devotees"); Winter, *supra* note 29 ("Our craving for ideology [] means that we like our politicians to be ideologists. . . . Our need for them to follow an ideology means that they will obey it to appease us."); Caplan, *Rational Irrationality*, *supra* note 29, at 10 ("Political competition forces each Congressmen to focus solely on the interests of his constituents.").

65. *See* Caplan, *Rational Irrationality*, *supra* note 29, at 14 (noting that "[t]he media and politicians get attention by saying what individual members of the public want to hear, not by lecturing them about their collective interests," and explaining that news "makes the front page because individuals want to read it"); *see also* BRENNAN, *supra* note 29, at 43 ("Confirmation bias explains how we consume news and information. Most people only read news that supports their preexisting opinions. Left-liberals read *The New York Times.* Conservatives flock to Fox News."); Huemer, *supra* note 29, at 463 (observing that "[m]ost people choose to listen mainly or solely to those [news sources] they agree with").

66. CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 29, at 168 (noting that the shrewd politician goes beyond telling his constituents what they currently want to hear, instead delivering what they are going to want to hear in the future).

67. *Id.*; *see also* J.G, *The Irrationality of Politics*, THE ECONOMIST (Sept. 7, 2011), https://www.economist.com/blogs/blighty/2011/09/behavioural-economics-0 (indicating that "politicians are more conversant with human irrationality than most[;] . . . [t]he best politicians are not the deepest intellects, but those with the intuition to accept human thought and behaviour as it is, and the skill to *shape their ends*") (emphasis added).

68. CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 29, at 168.

satisfying answer to the crisis.[69] Thus, while good politicians indulge the irrational beliefs of voters, outstanding politicians exacerbate them,[70] a hypothesis that helps explain Donald Trump's otherwise improbable rise to the White House on promises to build a wall with Mexico and to enact a so-called "Muslim ban."[71]

As explained in Part III, many stakeholders follow similarly irrational patterns with respect to their beliefs about the politically charged phenomenon of ISDS.

III. DEMOCRATIC DYSFUNCTION AND THE EU'S NEW VISION FOR ISDS

Turning to the manifestation of democratic dysfunction in the

69. *Id.*

70. *See id.* at 180 ("Unfortunately, it is often more rewarding to exacerbate voter irrationality than defuse it.").

71. According to some observers, Trump built his "meteoric rise" to the top of the Republican presidential ticket on a practice of taking controversial and unprecedented positions to win votes, including his proposal for a wall on the border with Mexico, which plays on vague connections among immigration, violent crime, and economic security, and offers an emotionally satisfying solution to people with strong concerns about that cluster of issues. *See* Jordan Fabian, *Obama: Trump Isn't a Populist*, THE HILL (June 29, 2016), http://thehill.com/homenews/administration/286037-obama-trump-isnt-a-populist (indicating that President Obama accused Trump of making controversial statements to win votes, and reporting that "Trump's meteoric rise to become the GOP's standard-bearer was built on a pledge to take drastic measures to curb illegal immigration, including the construction of a giant wall at the U.S. southern border at Mexico's expense"); Francis Wilkinson, Commentary, *Trump's Wall is About Resentment and Fear, Not Immigration*, CHICAGO TRIBUNE (Jan. 27, 2017), http://www.chicagotribune.com/news/opinion/commentary/ct-trump-mexico-wall-illegal-immigration-fear-20170127-story.html (noting that Trump began his presidential campaign by labeling Mexicans "'rapists,'" asserting that his "political formula [for the wall] is partly dependent on white resentment and fear of nonwhites," and concluding that the wall's "construction provides endless opportunities both to exaggerate the threat posed by Mexicans, and to supply a remedy voters can see with their own eyes"). Later, at a campaign rally held on December 7, 2015, Donald Trump drew an unstated connection between immigration and national security by calling for the United States to bar all Muslims from entering the country. Patrick Healy & Michael Barbaro, *Trump Wants to Block Entry of All Muslims*, N.Y. TIMES, A1 (Dec. 7, 2015), https://www.nytimes.com/politics/first-draft/2015/12/07/donald-trump-calls-for-banning-muslims-from-entering-u-s/. The idea was completely unprecedented for a mainstream presidential candidate in the United States, but fit Trump's pattern of making stunning and extreme proposals to lift his standing in opinion polls. *Id.* Although the idea was received with derision by members of the intellectual and political elite across the spectrum, opinion polls indicate that the application of a partial ban by Executive Order drew more support than opposition. *Compare id.* (reporting strongly negative reactions by Gov. Jeb Bush, Sen. Marco Rubio, Secretary Hillary Clinton, as well as law professors), *and* Ed Pilkington, *Donald Trump: Ban All Muslims Entering US*, THE GUARDIAN (Dec. 7, 2015), https://www.theguardian.com/us-news/2015/dec/07/donald-trump-ban-all-muslims-entering-us-san-bernardino-shooting (reporting strongly negative reactions by Gov. Martin O'Malley, Vice Pres. Dick Cheney, and Sen. Lindsey Graham), *with* Jonathan Allen, *Most American Voters Support Limited Travel Ban: Poll*, REUTERS (July 5, 2017), https://www.reuters.com/article/us-usa-immigration-poll-idUSKBN19Q2FW (reporting that six in ten American voters support the recent application of a partial ban, with support rising to 83 percent among Republicans, and falling to 41 percent among Democrats).

evolution of TTIP and CETA, one should begin by observing that investment treaties and ISDS represent tools that allow foreign investors to challenge the outcomes of the normal political processes in host states;[72] in other words, they allow foreign investors to challenge the subjective preferences of domestic stakeholders in host states, which by definition seems unlikely to attract popular support in host states.[73] Concerned by the threat that it poses to their political preferences, stakeholders have articulated narratives that portray investment treaty arbitration as a menace to the public interest,[74] to democracy,[75] to

72. *See supra* note 28 (citing sources explaining that investment treaties and international arbitration often undermines domestic policy by circumventing democratic processes); *see also* Toby Landau Q.C., *Response to the Report, Rethinking the Substantive Standards of Protection Under Investment Treaties*, *in* MIAC 2010: FLAWS AND PRESUMPTIONS: RETHINKING ARBITRATION LAW AND PRACTICE IN A NEW ARBITRAL SEAT 367–68 (Dec. 14, 2010) (explaining that the mandate of arbitrators in investment treaty claims "is to review the exercise of discretion by a sovereign by way of its executive, its legislative even its judiciary," which "may well impact upon a whole community" and "affect the . . . allocation of public funds").

73. *See* Rogers, *supra* note 27, at 258 (indicating that "many commentators seem intent instead on prioritizing States' ability to have their policy decisions and activities unhampered by international investment law").

74. *See, e.g.*, Lise Johnson et al., *Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law*, COLUM. CTR. ON SUSTAINABLE DEV. POL'Y PAPER, at 1 (May 2015) ("Multinational companies are increasingly using ISDS to challenge the legal and regulatory systems and policy choices of the contracting states, posing a serious and growing risk to the ability of states to govern in the public interest."); Vera Korzun, *The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs*, 50 VAND. J. TRANSNAT'L L. 355, 406–07 (2017) ("Multinational corporations have acquired, through ISDS, an unprecedented opportunity to interfere with a government's ability to regulate for the public interest, encroaching on a core feature of state sovereignty.").

75. *See, e.g.*, EUROPEAN COMMISSION, REPORT: ONLINE PUBLIC CONSULTATION ON INVESTMENT PROTECTION AND INVESTOR-TO-STATE DISPUTE SETTLEMENT (ISDS) IN THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP AGREEMENT (TTIP) 14, SWD (2015) 3 final (Jan. 13, 2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf [hereinafter *Online Public Consultation*] (discussing 145,686 responses to a public consultation and noting that most respondents perceive ISDS as a "threat to democracy"); DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE 225 (2008) (arguing that the protection offered to foreign investors under international investment law "destabilize[s] the functioning of democratic processes"); James Surowiecki, *Trade-Agreement Troubles*, THE NEW YORKER: THE FINANCIAL PAGE (June 22, 2015), http://www.newyorker.com/magazine/2015/06/22/trade-agreement-troubles ("However you spin it, it's an infringement on the democratic process."), *see also* José E. Alvarez, *Is the Trans-Pacific Partnership's Investment Chapter the New "Gold Standard?,"* 47 VICTORIA U. WELLINGTON L. REV. 503, 507 (2016) ("To critics, ISDS is the poster child for bypassing the principal mechanism that democracies have for checking the power of their executive branches: namely administrative or constitutional courts."); PUBLIC STATEMENT ON THE INTERNATIONAL INVESTMENT REGIME, OSGOODE HALL L. SCH. (Aug. 31, 2010), http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010 (describing "[t]he award of damages as a remedy of first resort in investment arbitration" as "a serious threat to democratic choice").

sovereignty,[76] and even to the constitutional order in host states.[77] Despite scholarship indicating that host states prevail more often than they lose in investment treaty arbitrations,[78] that damage awards tend to be relatively low,[79] and that no state has ever incurred liability for the adoption or application of bona fide environmental regulations,[80]

76. *See, e.g.*, Ryan Cooper, *How the TPP Boosts Corporate Power at the Expense of National Sovereignty*, THE WEEK (Oct. 7, 2015), http://theweek.com/articles/581609/how-tpp-boosts-corporate-power-expense-national-sovereignty (discussing several "dubious" provisions of the proposed TPP agreement, specifically noting that TPP undermines national sovereignty); Owen Jones, Opinion, *The TTIP Deal Hands British Sovereignty to Multinationals*, THE GUARDIAN (Sept. 14, 2014), https://www.theguardian.com/commentisfree/2014/sep/14/ttip-deal-british-sovereignty-cameron-ukip-treaty (emphasizing the corrosion of British sovereignty due to multinational dispute resolution); Steve Shaff, Op-Ed, *Small Businesses' Fast Track to Ruin*, THE BALTIMORE SUN (June 2, 2015), http://www.baltimoresun.com/news/opinion/oped/bs-ed-tpp-20150602-story.html (asserting that ISDS "represents a major threat to our sovereignty"); Elizabeth Warren, Opinion, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?utm_term=.b6ecbde74d4b (warning that TPP will only benefit the largest multinational corporations, while simultaneously undermining U.S. sovereignty); *see also* Letter from Legal Scholars to Majority Leader Mitch McConnell, Minority Leader Harry Reid, Speaker John Boehner, Minority Leader Nancy Pelosi, and Ambassador Michael Froman (2015), https://www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf (warning that ISDS "threatens domestic sovereignty").

77. *See Bill Moyers Reports: Trading Democracy* (PBS television broadcast Feb. 5, 2002) (describing NAFTA's investment chapter as an "end-run around the Constitution"), *selected clips and transcripts available at* http://www.pbs.org/now/politics/tradingdemocracy.html.

78. *See* UNCTAD WIR 2017, *supra* note 26, at 117 (indicating that 495 investment treaty arbitrations had been concluded by the end of 2016, with states winning completely in 36 percent of the cases, investors prevailing at least in part in 27 percent of the cases, and the parties settling in about 25 percent of the cases); Susan D. Franck & Lindsey Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J. 459, 481, 489–90 (2015) (analyzing investment treaty awards publicly available as of January 1, 2012, and concluding that investors prevailed—meaning that they received some award of damages—in 39.6 percent of cases that did not settle, and that states prevailed—meaning that they were not ordered to pay some damages—in 60.4 percent of cases that did not settle).

79. *See* UNCTAD WIR 2017, *supra* note 26, at 118 (indicating that the median amount claimed by investors was $100 million and that the median amount awarded on successful claims was $20 million); Franck & Wylie, *supra* note 78, at 488, 495 (indicating that the median amount claimed by investors was $100,426,693, that the median amount awarded on successful claims was $10.9 million, and that successful investors received a median 27 percent of requested damages). Average numbers would be much higher (but less representative than) medians, inasmuch as one tribunal awarded $50 billion in Yukos-related claims against Russia, with the result that the massive statistical outlier tremendously skews average amounts claimed and recovered. *See id.* at 478 (indicating that one tribunal awarded $50 billion in damages against Russia as a result of claims relating to the dissolution of Yukos Oil); *see also* UNCTAD WIR 2017, *supra* note 26, at 118 (indicating that the average amount claimed by investors was $1.4 billion, and the average amount awarded on successful claims was $545 million).

80. *See* Hon. Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth About Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689, 728 (2014) ("In no case has a state been ordered to compensate an investor for enacting a generally applicable environmental law or legitimately enforcing a generally

opposition to investment treaty arbitration in its present form continues

applicable environmental law or legitimately enforcing an environmental regulation that caused an investor a loss."); *see also* 2004 U.S. Model Bilateral Investment Treaty, Annex B, ¶ 4(b), at 38, https://www.state.gov/documents/organization/117601.pdf ("Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."); Rahim Moloo & Justin Jacinto, *Environmental and Health Regulation: Assessing Liability Under Investment Treaties*, 29 BERKELEY J. INT'L L. 1, 37 (2011) (opining that "it is hard to conceive of a situation in which a tribunal would award compensation for a taking resulting from a non-discriminatory, legitimate environmental or health regulation," and that "[s]everal investment treaties make this point expressly"). The imposition of liability for the adoption or application of ostensibly environmental measures seems more likely where those measures are not legitimate in the sense that they lack a scientific basis, violate fairly specific commitments made by the host state, or involve some combination of both deficiencies. *See* Moloo & Jacinto*, supra*, at 25, 33 (discussing the appropriateness of compensating environmental takings claims). When such factors are present, it may also be relevant that sub-national authorities have relied on legally irrelevant considerations in applying measures relating to investors and their investments. *See* Metalclad Corp. v. Mexico, ICSID Case No. ARB(AF)/97/1, Award, ¶¶ 32–36, 40–41, 50–52, 78–93 (Aug. 30, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0510.pdf (involving a situation where Mexican federal authorities repeatedly told an investor that it had all the permits required to operate a hazardous waste facility, but where municipal authorities denied the investor a construction permit without citing any construction defects and apparently relied on local opposition and environmental concerns, which were legally irrelevant to the exercise of powers falling within the scope of municipal jurisdiction); *see also* Moloo & Jacinto, *supra*, at 56 (noting that adherence to a "state's typical practice is also significant as an anomalous measure may indicate that the state was motivated by [improper] purposes").

In his contribution to this volume, David Schneiderman refers to Clayton/Bilcon v. Canada, PCA Case No. 2009–04, Award on Jurisdiction and Liability (Mar. 17, 2015), as an "extraordinary" decision in which the tribunal imposed liability for what was at most "arguably a breach of host state law." *See* David Schneiderman, *International Investment Law's Unending Legitimation Project*, 49 LOY. U. CHI. L.J. 229, 267 (2017); *see also Clayton/Bilcon*, No. 2009–04, Dissenting Opinion of Donald McRae, ¶ 34 ("At most, then, the majority is saying that there has been a violation of Article 1105 because of a potential violation of Canadian law. . . ."). During discussion of the author's remarks at the *Loyola University Chicago Law Journal* symposium, Professor Schneiderman expressed the view that *Clayton/Bilcon* provides one example of an investment treaty case in which the tribunal imposed liability based on the application of a legitimate environmental measure. Admittedly, the case falls closer to his description than most, and it is possible that reasonable people could agree with Schneiderman's assessment (as evidenced by Donald McRae's dissenting opinion). *See Clayton/Bilcon*, No. 2009–04, Dissenting Opinion of Donald McRae, at ¶¶ 38, 51 (asserting that the Joint Review Panel took a "principled position" on Canadian law even though it put "more weight on the human environment and on community values than on scientific and technical feasibility"). Nevertheless, the author regards *Clayton/Bilcon* as more on point with *Metalclad* inasmuch as the majority in *Clayton/Bilcon* emphasized a "highly unusual" constellation of factual elements that closely resembled the ones at play in *Metalclad,* namely: specific representations of support for the project by officials at higher levels of government, reliance by the investor on those representations, the lack of a scientific basis for the challenged measure, and the weight that lower-level decisionmakers assigned to local opposition under the rubric of "community core values," a concept that the tribunal regarded as lacking specificity or any grounding in applicable "statutes, regulations, or . . . [g]uidelines." *See Clayton/Bilcon*, No. 2009–04, Award on Jurisdiction and Liability, *supra*, at ¶¶ 447–53, 463, 466–72, 477–87, 492, 503–14, 520–47, 552–55, 583, 589–92, 601, 603–04, 739–40.

to build,[81] often with the unshakable zeal of religious conviction.[82]

For example, a public consultation conducted by the EU in 2014 regarding TTIP, and investor-state arbitration as a part of TTIP, generated nearly 150,000 written responses, literally overwhelming the EU's computer servers and registering widespread opposition to its inclusion in the treaty.[83] Subsequently, in fall 2015, hundreds of thousands of people took to the streets of Berlin and other German cities to demonstrate the strength of their opposition to investor-state arbitration as a part of TTIP.[84] Contemporaneously, over three million people signed an online petition calling on the EU to abandon negotiations for TTIP.[85] Not surprisingly, news outlets have reinforced the concerns of

81. *See* UNCTAD, WORLD INVESTMENT REPORT 2015: REFORMING INTERNATIONAL INVESTMENT GOVERNANCE xi (2015), http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf [hereinafter UNCTAD WIR 2015] (referring to the "heated public debate" about investment treaties and ISDS "in many countries and regions," and concluding that "*[t]here is a pressing need for systematic reform of the global IIA regime*") (emphasis in original); Barry Appleton & Sean Stephenson, *Initial Task Force Discussion Paper: Executive Summary & Conclusions and Recommendations,* Inv. Treaty Working Group of the Int'l Arb. Comm., A.B.A. SEC. ON INT'L L. 6 (Oct. 14, 2016) [hereinafter *Executive Summary of Task Force Discussion Paper*] ("Public enmity to the investor-state process is widespread and rather than abating, it continues to grow, demonstrating impact on electoral politics in the Parties to investment protection treaties such as the members of the EU and the United States."); Schneiderman, *supra* note 80, at 232 (describing a "proliferation of complaints, channeled by media representations that cast doubt on the legitimacy of ISDS or states and sub-regional units expressing doubt about the utility of ISDS"); Dalibor Rohac, *Friends of Free Trade Need to Stand Up and Fight*, AMERICAN ENTERPRISE INST. (Oct. 21, 2016), http://www.aei.org/publication/friends-of-free-trade-need-to-stand-up-and-fight (noting that "both the Transatlantic Trade and Investment Partnership (TTIP) . . . and the Comprehensive Economic and Trade Agreement (CETA) . . . are facing a massive popular backlash across Europe").

82. *See* Nikos Lavranos, *Countering Anti-ISDS Propaganda with Facts: An Uphill Battle*, WOLTERS KLUWER: KLUWER ARB. BLOG (June 8, 2015), http://kluwerarbitrationblog.com/2015/06/08/countering-anti-isds-propaganda-with-facts-an-uphill-battle (indicating "that most, if not all, anti-ISDS criticisms are neither supported by facts nor experience from investment arbitration law and practice"); Rohac, *supra* note 81 ("What makes the current situation disturbing is the one-sided and post-factual nature of the conversation. In a way that is highly reminiscent of Russian propaganda . . . the anti-TTIP and anti-CETA activists are extremely casual with facts.").

83. *Online Public Consultation*, *supra* note 75, at 2–3, 8–10, 14 (summarizing several main objectives and considerations of the online consultation regarding TTIP).

84. *See* Imogen Calderwood, *'No to TTIP!' 150,000 Protesters Fill Streets of Berlin to Demonstrate Against Controversial Europe-US Trade Deal That Would Give Corporations the Right to Sue Governments in Secret Courts*, DAILY MAIL (Oct. 10, 2015), http://www.dailymail.co.uk/news/article-3267936/No-TTIP-150-000-protesters-streets-Berlin-demonstrate-against-controversial-Europe-trade-deal.html (highlighting widespread public protest of TTIP); Chris Johnston, *Berlin Anti-TTIP Trade Deal Protest Attracts Hundreds of Thousands*, THE GUARDIAN (Oct. 10, 2015), https://www.theguardian.com/world/2015/oct/10/berlin-anti-ttip-trade-deal-rally-hundreds-thousands-protesters (discussing the public denouncement of TTIP in Berlin and emphasizing the several hundred thousand protestors).

85. *See* Johnston, *supra* note 84 (noting that three million people signed an online petition calling on the European Commission to abandon TTIP).

stakeholders by regularly publishing content likely to feed or to validate their anxiety about investment treaties and investor-state arbitration.[86]

While states have responded to public concerns by introducing substantial refinements to their model investment treaties over the past ten to fifteen years,[87] talented politicians on both sides of the Atlantic got out in front of stakeholders in late 2015 and early 2016. On this side of the Atlantic, the leading candidates in the U.S. presidential election addressed concerns about trade and investment agreements not by proposing incremental refinements, but by opposing ratification of the Trans-Pacific Partnership in any form,[88] despite several years of

86. *See, e.g.*, *Investor-State Dispute Settlement: The Arbitration Game*, THE ECONOMIST (Oct. 11, 2014) http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration (depicting investor-state arbitration as "a way to let multinational companies get rich at the expense of ordinary people," including by mounting challenges to laws that "discourage smoking, protect the environment or prevent nuclear catastrophe"); *see also* Manuel Pérez-Rocha, Op-Ed, *When Corporations Sue Governments*, N.Y. TIMES (Dec. 3, 2014), https://www.nytimes.com/2014/12/04/opinion/when-corporations-sue-governments.html (accusing corporations of using investment treaties "to bring opportunistic cases in arbitral courts," where the proceedings resemble "soccer on half the field[:] [c]orporations are free to sue, and nations must defend themselves at enormous cost—and the best a government can hope for is a scoreless game"); Claire Provost & Matt Kennard, *The Obscure Legal System That Lets Corporations Sue Countries*, THE GUARDIAN (June 10, 2015), https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid (warning that "the massive financial risks associated with investor-state arbitration will effectively grant foreign investors a veto over government decisions"); Surowiecki, *supra* note 75, at 26 (arguing that ISDS makes free trade "look like exactly what people fear—a system designed to put corporate interests above public ones").

87. *See* José E. Alvarez, *The Return of the State*, 20 MINN. J. INT'L L. 223, 235, 237–38 (2011) (describing how the "2004 U.S. Model BIT . . . shrunk . . . virtually every right originally accorded to foreign investors while at the same time increasing . . . the discretion accorded host states," and explaining how this development influenced treaty practice in other states); *see also* UNCTAD WIR 2015, *supra* note 81, at 124 (indicating that "several countries have embarked on a path of [International Investment Agreement] reform by revising their [bilateral investment treaty] models" as a result of "[m]ounting criticism from civil society"); Charles H. Brower II, *Corporations as Plaintiffs Under International Law: Three Narratives About Investment Treaties*, 9 SANTA CLARA J. INT'L L. 179, 192–96 (2011) (discussing the recalibration of investment treaty practice by the United States, Canada, Norway, and other states in a manner designed to reduce the jurisprudential discretion of tribunals and to increase the regulatory discretion of states); Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 78 (2013) ("While the first generation of investment treaties was characterized by a considerable shift of interpretive power from the treaty parties to investment tribunals, the newly emerging second generation will be characterized by states seeking to recalibrate this balance of power by increasing the specificity of their treaty commitments and reasserting their interpretive rights as treaty parties.").

88. *See* Brower, *supra* note 25, at 145 (discussing Hillary R. Clinton's and Donald J. Trump's mutual opposition to TPP); Jeffrey Rothfeder, *Why Obama Is Still Trying to Pass the T.P.P.*, THE NEW YORKER (Sept. 18, 2016), http://www.newyorker.com/business/currency/why-obama-is-still-trying-to-pass-the-t-p-p (reporting that Donald Trump vowed to "keep America out of the Trans-Pacific Partnership," that Bernie Sanders "hates it with a passion," and that Hillary Clinton switched from a supporter to an opponent of the TPP).

negotiations,[89] a final text that conformed to recent U.S. treaty practice,[90] and a package of undertakings designed to advance the geostrategic interests of the United States along the Pacific Rim.[91] On the other side of the Atlantic, the EU used TTIP negotiations to propose abolition of investor-state arbitration and its replacement with a permanent investment court.[92] Contemporaneously, the EU also forced the last-minute introduction of provisions on an investment court into the already final version of its CETA agreement with Canada.[93] Thus, even though the United States' retreat from multilateral trade and investment agreements has killed the prospects for TTIP,[94] the point is that the EU

89. *See* Don Lee, *Signing of Trans-Pacific Partnership Trade Deal Opens Up Tough Battle in U.S.*, L.A. TIMES (Feb. 4, 2016), http://www.latimes.com/business/la-fi-pacific-trade-agreement-signed-20160204-story.html (indicating that the TPP was concluded after more than five years of negotiations); Rothfeder, *supra* note 88 (indicating that the Obama administration devoted five years to the negotiations).

90. Brower, *supra* note 25, at 189–90 (noting that knowledgeable commentators described the investment chapter provisions of TPP as continuing well-established U.S. treaty practice).

91. *Id.* at 209–14.

92. *See* European Union, *Commission Proposal for Investment Protection and Resolution of Investment Disputes*, at § 3, sub sec. 4, arts. 9–12, (Nov. 15, 2015) http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf [EU's TTIP Draft on Investment] (outlining the Investment Court System); Alvarez, *supra* note 75, at 512 (explaining that "the European Union recently tabled a proposal that would, among other things, replace ISDS in the TTIP with an international investment court with judges appointed for up to 12 years and a process for appeals"); Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States Relating to International Law: United States and Eleven Other Nations Conclude Trans-Pacific Partnership,* 110 AM. J. INT'L L. 384, 388 (2016) (observing that the "European Union now aims to eliminate traditional ISDS from the TTIP and replace it with an 'investment court'"); Laird, *supra* note 3, at 108 (discussing the EU's proposal "to include in TTIP a purported court-based model that seeks to repudiate the arbitration model").

93. *See* Susan D. Franck et al., *Inside the Arbitrator's Mind*, 66 EMORY L.J. 1115, 1119 n.17 (2017) (explaining that the "original, signed version of CETA included arbitration; but in an unprecedented 'scrubbing' process, arbitration was replaced wholesale with a standing court"); James Gathii & Cynthia Ho, *Regime Shifting of IP Lawmaking and Enforcement From the WTO to the International Investment Regime*, 18 MINN. J.L. SCI. & TECH. 427, 500–01 (2017) (noting that that the EU "managed to recently incorporate such provisions in the investment chapter of CETA two years *after* the agreement had already been concluded[;] [t]echnically, the EU was simply scrubbing the document, but it added substantial changes, including a permanent investment tribunal, as well as an appellate tribunal") (emphasis original).

94. Jim Zarroli, *German Official Says U.S.-Europe Trade Talks Have Collapsed, Blames Washington*, NPR (Aug. 28, 2016), http://www.npr.org/sections/thetwo-way/2016/08/28/491721332/german-official-says-u-s-europe-trade-talks-have-collapsed-blames-washington ("Talks aimed at setting up a U.S.-European free trade zone have run aground because of intransigence on Washington's part, a top German politician said Sunday."); *see also* Michelle Chen, *Another Free-Trade Deal Bites the Dust*, THE NATION (Sept. 16, 2016), https://www.thenation.com/article/another-free-trade-deal-bites-the-dust (explaining that while the "presidential campaign trail has been awash in angry backlash against the Trans-Pacific Partnership (TPP)," the TTIP "collapsed silently on the other side of the globe"); *Hard Bargain: Lacking Clear American Leadership, the Global Trade Agenda is Floundering*, THE ECONOMIST (Oct. 1, 2016), https://www.economist.com/news/finance-and-economics/21707940-lacking-clear-american-

has used the idea of an investment court to get out in front of stakeholders, has used CETA to establish a toe-hold for that vision,[95] and remains committed to embedding that vision in its treaty practice.[96]

IV. THE NEED FOR CAUTION WHEN APPROACHING REVOLUTIONARY CHANGE

Turning to the need for caution in assessing TTIP's model for an investment court, one should begin by observing that the EU draft nominally offers investors their choice of arbitration under the International Centre for Settlement of Investment Disputes ("ICSID") Convention, the ICSID Additional Facility Rules, or the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules.[97] However, the text also contemplates that proceedings will be conducted by a permanent Tribunal of First Instance consisting of five judges from the EU, five from the other state party, and five from third

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leadership-global-trade-agenda-floundering-hard (noting that TTIP negotiations are "flailing," and quoting a EU official as saying that "there will be a natural pause" if negotiations were not completed before the U.S. presidential election, and predicting that a "revival would not be imminent").

95. James Crawford, *The Ideal Arbitrator: Does One Size Fit All?*, 32 AM. U. INT'L L. REV. 1003, 1018 (2017) (indicating that the EU intended TTIP to represent the "lodestar" for its investment court proposal, and that negotiations for the TTIP are "de facto dead," but that the investment court proposal remains in play because the European Commission is introducing facets of that proposal in other free-trade agreements, including CETA).

96. *See id.* (explaining that following the de facto demise of TTIP negotiations, the European Commission has been introducing elements of its investment court proposal into other free-trade agreements "as stepping-stones towards the establishment of a permanent multilateral investment court"); Geoffrey Gertz, *Renegotiating NAFTA: Options for Investment Protection*, GLOBAL VIEWS, 1, 7 (2017), https://www.brookings.edu/wp-content/uploads/2017/03/global-20170315-nafta.pdf (reporting that following inclusion of the proposed investment court in CETA, Canada and the EU have "publicly advocated for this court and are actively seeking to recruit new members"); Schill, *supra* note 3 (indicating that the EU's investment court proposal "serves as a basis for negotiations not only with the U.S., but also with any of the EU's negotiating partners").

97. EU's TTIP Draft on Investment, *supra* note 92, at § 3(3), art. 6(2). The ICSID Convention means the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 U.N.T.S. 159 (1966), which establishes a treaty-based regime associated with the World Bank for arbitration of investment disputes between a state party and the nationals of another state party. DOLZER & SCHREUER, *supra* note 25, at 238–39. The ICSID Additional Facility Rules establish a non-treaty-based facility for arbitrating investment disputes between a state and the nationals of another state where only one of the states has ratified the ICSID Convention. *See* ICSID Arbitration (Additional Facility) Rules (2006), https://icsid.worldbank.org/en/Documents/icsiddocs/AFR_English-final.pdf; DOLZER & SCHREUER, *supra* note 25, at 241–42. The UNCITRAL Arbitration Rules means the set of arbitration rules drafted and adopted by the United Nations Commission on International Trade Law, and are regularly used in the contexts of international commercial arbitration and investment treaty arbitration. *See* UNCITRAL Arbitration Rules (2010), https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf; DOLZER & SCHREUER, *supra* note 25, at 243.

states, who will sit in evenly distributed three-member divisions.[98] In addition, the text establishes a six-member Appeals Body, with two members from the EU, two from the other state party, and two from third states, sitting in equally distributed, three-member divisions.[99] At both levels, members are appointed by governments to six-year terms with the possibility of a single renewal.[100]

Internally, the EU's vision for an investment court may face difficulties associated with Byzantine requirements for approval of the EU's trade and investment agreements.[101] Externally, however, the EU's vision for an investment court seems potentially unstoppable because it faces no strong centers of opposition. While the United States had resisted

98. EU's TTIP Draft on Investment, *supra* note 92, § 3(4), art. 9.

99. *Id.*, § 3(4), art. 10.

100. *Id.*, § 3(4), arts. 9(2), 9(5), 10(3), 10(5).

101. *See* Jennifer Rankin, *Belgian Politicians Drop Opposition to EU-Canada Trade Deal*, THE GUARDIAN (Oct. 27, 2016), https://www.theguardian.com/world/2016/oct/27/belgium-reaches-deal-with-wallonia-over-eu-canada-trade-agreement (indicating that the "EU requires all 28 member states to support CETA for the treaty to come into force, but [that] the Belgian federal government, which has always backed the trade treaty, was barred from giving its consent because of opposition from regional parliaments in Wallonia and Brussels"). The Belgian government announced that Wallonia dropped its opposition to CETA as of October 27, 2016. *Id.* That paved the way for signature of the agreement on October 30, 2016, and approval by the EU Parliament on February 15, 2017. *See Developments in Brief*, 59 NO. (8) GOV'T CONTRACTOR, ¶ 54(a) (Mar. 1, 2017). During May 2017, a bill to approve CETA's implementation passed the Canadian Senate and received royal assent. Int'l Ctr. For Trade & Sustainable Dev., *Canadian Senate Approves CETA Implementation Bill*, 21 BRIDGES 1, 16 (May 18, 2017), https://www.ictsd.org/sites/default/files/bridgesweekly21-17d.pdf. While that establishes the conditions required for provisional application of CETA, the agreement's provisions on investment protection and the investment court system will not be in force during the provisional phase and will not be applied until the parliaments of all twenty-eight EU member states approve CETA in accordance with their respective constitutional requirements. *Developments in Brief*, *supra*, ¶ 54(a). On May 16, 2017, the European Court of Justice rendered an opinion in which it held that the European Union has exclusive competence to enter into treaties with third states with respect to protection of foreign direct investment, but that the European Union and member states possess shared competence for treaties with third states with respect to other types of investment (such as portfolio investment), as well as investor-state dispute settlement for claims brought against member states, inasmuch as it displaces the normal competence of national courts to hear claims against member states. Case C-2/15, Judgment of May 16, 2017, ¶¶ 109–10, 238, 243–44, 286, 292–93, http://curia.europa.eu/juris/document/document.jsf?text=&docid=193125&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=414101. This means that, as a matter of EU law, agreements like CETA, TTIP, and the EU-Singapore Free Trade Agreement require ratification by all twenty-eight EU member states. Some observers have questioned whether the requirement for approval by all twenty-eight member states (including states that require approval by regional bodies as a part of their internal law) "might . . . spell the end of the EU's fledgling project to promote a new generation of trade and investment agreements and an international investment court system." *See* Leng Sun Chan SC & Edward Poulton, *EU Court Thwarts Prompt ratification of EU-Singapore Free Trade Agreement*, BAKER MCKENZIE INSIGHT, (May 22, 2017), http://www.bakermckenzie.com/en/insight/publications/2017/05/eu-court-thwarts-prompt-ratification/.

the proposed investment court in negotiations for TTIP,[102] its recent withdrawal from multilateral negotiations on trade and investment agreements means the disappearance of the only external stakeholder with the leverage and the desire to frustrate European goals. As a result, the EU can focus on negotiations with more pliable states,[103] thereby establishing a critical mass of treaties embracing the EU's vision and obligating the other states' parties to pursue the same vision in their own treaty practices,[104] which could shift global expectations about the prospects for an investment court.[105]

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102. *See* Krista Hughes & Philip Blenkinsop, *U.S. Wary of EU Proposal for Investment Court in Trade Pact*, REUTERS (Oct. 29, 2015), http://www.reuters.com/article/us-trade-ttip-idUSKCN0SN2LH20151029 (stating "[t]he United States is wary of a European Union proposal for a new court system to settle investment disputes as part of the world's biggest free-trade agreement, U.S. Trade Representative Michael Froman said"); *see also Investor-State Dispute Settlement: Playing Nicely*, THE ECONOMIST (May 9, 2015), https://www.economist.com/news/finance-and-economics/21650592-europe-suggests-ways-protect-governments-investors-playing-nicely (noting that in the context of TTIP negotiations "America wants investing firms to have the right to haul states off to binding arbitration").

103. In addition to the CETA agreement with Canada, the EU has completed negotiations relating to a free trade agreement with Vietnam, which also contains an investment chapter contemplating the establishment of a permanent investment court. European Commission, EU-Vietnam Free Trade Agreement: Agreed Text as of January 2016, ch. 8(II), § 3(4), arts. 12–13 (Jan. 20, 2016), http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf [hereinafter EU-Vietnam FTA]. The EU has also conducted four rounds of negotiations with Myanmar relating to an agreement on the protection of foreign investment, during the most recent of which the EU presented its proposal on an investment court system. EUROPEAN COMMISSION, REPORT OF THE FOURTH ROUND OF NEGOTIATIONS FOR THE EU-MYANMAR INVESTMENT PROTECTION AGREEMENT (Dec. 22, 2016), http://trade.ec.europa.eu/doclib/docs/2016/december/tradoc_155197.pdf.

104. *See* Comprehensive Economic and Trade Agreement, Can.-EU., art 8.29, Oct. 30, 2016, http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng (obliging the parties to "pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes"); EU-Vietnam FTA, *supra* note 103, art. 15 (obliging the parties to "enter into negotiations for an international agreement providing for a multilateral investment tribunal in combination with, or separate from, a multilateral appellate mechanism applicable to disputes under this Agreement").

105. *See* Laird, *supra* note 3, at 121 (indicating that the underlying objective of the EU's proposal may be the establishment of "a *de facto* international legal system"). On July 6, 2017, the EU and Japan reached "an agreement in principle on the main elements of the EU-Japan Economic Partnership Agreement." However, while the EU placed its proposal for a permanent investment court on the table and has taken the position that "there can be no return to the old-style Investor to State Dispute Settlement System (ISDS)," those topics remain outside the agreement in principle between the EU and Japan. *See* Press Release, European Commission, EU and Japan Reach Agreement in Principle on Economic Partnership Agreement (July 6, 2017), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1686 (indicating that some topics lie outside the agreement in principle, identifying investment protection as an example, and mentioning that the EU had placed on the table its proposal for an investment court system); Memorandum from European Commission, Key Elements of the EU-Japan Economic Partnership Agreement (July 6, 2017), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1687 (indicating that "the EU has

Large multinational investors may not like the EU's vision, but seem unlikely to oppose it, in part because investment treaties do not rank high on their list of institutional concerns,[106] and in part because multinational enterprises have other options in managing disputes with host states.[107] Small- and medium-size investors might oppose the EU's proposal for an investment court, but lack the political capital to influence treaty negotiations.[108] Under these circumstances, conditions arguably favor the

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tabled to Japan its reformed proposal on the Investment Court System," and that "[f]or the EU, it is clear that there can be no return to the old-style Investor to State Dispute Settlement System (ISDS)"). Just as the last-minute introduction of the investment court system into CETA seemed calculated to influence TTIP negotiations, it seems plausible that the extension of the investment court system to the EU-Vietnam Free Trade Agreement and the negotiations with Myanmar may be calculated to influence negotiations with Japan, which—if successful—would shift global expectations about the prospects for an investment court.

106. It is, of course, difficult to quantify the institutional concerns of multinational corporations in a general way. Anecdotally, at conferences involving in-house counsel from multinational corporations, the author has heard the proposition that investment treaties would not get attention at the CEO level, but *might* get attention at the general-counsel level. Somewhat less anecdotally, one might refer to the current list of policy priorities and the most recent list of policy accomplishments of the U.S. Chamber of Commerce as rough proxies for the topics that will get, and have gotten, the most energy from multinational corporations, inasmuch as most large multinationals are members of the U.S. Chamber of Commerce and contribute generously to its advocacy work. *See The Chamber of Secrets*, THE ECONOMIST (Apr. 21, 2012), http://www.economist.com/node/21553020 (indicating that most Fortune 1,000 companies are members of the U.S. Chamber of Commerce and contribute "generous sums" to that organization). For 2017, the U.S. Chamber of Commerce has a thirty-two-page compilation of twenty-three policy priorities. International Trade, Investment, and Regulatory Policy (much broader than investment treaties) makes the list, but ranks well behind (1) Capital Markers, Corporate Governance and Securities Regulation, (2) Energy and the Environment, (3) Health Care, (4) National Security and Emergency Preparedness, (5) Pensions, and (6) Regulatory Affairs in terms of textual coverage. *See* U.S. Chamber of Commerce: U.S. Chamber Policy Priorities for 2017, https://www.uschamber.com/sites/default/files/2017_policy_priorities_-_2.8.17.pdf. (last visited Nov. 13, 2017). For 2016, the U.S. Chamber of Commerce has a forty-five-page list of policy accomplishments in twenty-four areas. International Trade, Investment, and Regulatory Policy makes the list but, if one eliminates a long list of country-specific actions, it ranks well behind (1) Capital Markers, Corporate Governance and Securities Regulation, (2) Energy and the Environment, (3) Immigration and Travel, (4) Intellectual Property, (5) Labor, (6) Legal Reform, (7) National Security and Emergency Preparedness, and (8) Regulatory Affairs in terms of textual coverage. *See* U.S. Chamber of Commerce, U.S. Chamber Policy Accomplishments January-December 2016, https://www.uschamber.com/sites/default/files/2016_policy_accomplishments_-_final_1.17.pdf (last visited Nov. 13, 2017). Somewhat more empirically, certain studies indicate that investors generally do not take investment treaties into consideration when making foreign investments, which suggests that other topics rank higher for multinational corporations even when making foreign investments. *See* Lauge N. Skovgaard Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2009–2010 539, 543 (Oxford Univ. Press 2010) (stating "[f]or the vast majority of investors, BITs do not appear to be important—directly or indirectly—when determining where, and how much, to invest abroad").

107. *See infra* notes 120–22 and accompanying text.

108. As noted below, small- and medium-size investors generally lack the clout to negotiate strong contractual guarantees regarding investment protection with host states. *See infra* note 123

EU's vision for a permanent investment court.

Perhaps for this reason, one senses a *Field of Dreams* mentality around the proposed investment court: Build it and they will come.[109] Here one needs to sound the first note of caution. Many investors would come only kicking and screaming. In a departure from decades of treaty practice, they would lose the opportunity to have any voice in the appointment of tribunal members.[110] Instead, governments would appoint all panelists, who seem likely to reflect the (possibly irrational) sensibilities of elected officials and stakeholders in the relevant states.[111] The realities of political appointments mean that the pool of judges likely will not coincide with any list of the most experienced arbitrators, or investment arbitrators, or international lawyers from any jurisdiction.[112] The

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and accompanying text. It stands to reason that they would similarly lack the clout to drive treaty negotiations that would have significantly wider reaching effects for host states.

109. *See* Theo Merz, *Ten Film Quotes We All Get Wrong*, THE TELEGRAPH (Jan. 14, 2014), http://www.telegraph.co.uk/men/the-filter/10553934/Ten-film-quotes-we-all-get-wrong.html (identifying this as a common error in quoting the voice that Kevin Costner's character repeatedly hears in the movie, *Field of Dreams*, and indicating that while most people remember the phrase "build it and they will come," the voice actually says "build it and he will come").

110. *See* Crawford, *supra* note 95, at 1019–20; Laird, *supra* note 3, at 120.

111. *See* Crawford, *supra* note 95, at 1020 (expressing the opinion that the EU, United States, and Canada are "more cautious to exercise control over the type of decision-maker appointed and have unsurprisingly mandated the selection of arbitrators with qualities and qualifications that the States know and trust"); Alison Ross, *The End of the "Great Compact?" Reisman Declares Investment Law at a Crossroads*, GLOBAL ARBITRATION REVIEW (Feb. 16, 2017), http://globalarbitrationreview.com/article/1081449/the-end-of-the-great-compact"-reisman-declares-investment-law-at-a-crossroads (reporting that Professor Michael Reisman "expressed unease at the counter-strategy of attempting to 'capture the tribunal' [by having an investment court all of whose members are appointed by states and possibly beholden to them]"); *see also Executive Summary of Task Force Discussion Paper, supra* note 81, at 14 (noting that "commentators have raised concerns that the selection of judges will be carried out in a political fashion and carries the risk of the treaty parties appointing individuals who, whilst independent, are more likely to be sympathetic to the interests of State Respondents"); *European Union's Proposed Investment Court Chapter for TTIP: Towards the End of Investment Treaties as We Know Them?* ALLEN & OVERY (Nov. 26, 2015), http://www.allenovery.com/publications/en-gb/Pages/European%20Union's%20Proposed%20Investment%20Chapter%20for%20TTIP%20Towards%20the%20End%20of%20Investment%20Treaties%20as%20We%20Know%20Them.aspx (explaining that the "fear of the investor community has been that an 'investment court' would represent state interests to their detriment").

112. *See* Laird, *supra* note 3, at 120 (opining that "the experience in ICSID with government appointments to the ICSID list is not encouraging[;] [w]e see many of the arbitrators on that list have no actual experience in ICSID arbitration and were appointed ostensibly because of political considerations"); *see also* Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators Are Untrustworthy is Wrongheaded*, 6 WORLD ARB. & MEDIATION REV. 619, 646 (2012) (observing that politicization of "the appointment process militates against the appointment of uniformly high-quality professional arbitrators"); Crawford, *supra* note 95, at 1020–21 (predicting that the appointment criteria for the EU's proposed investment court "will exclude a proportion of investment arbitrators from consideration," including "the Grand Old Men, the

possibility for a second term means that tribunal members may initially conduct themselves to maximize chances for reappointment,[113] by which time they will have locked themselves into positions on recurring issues. Finally, the need for one of the two members from third countries to preside in every case before the appeals body means that just two individuals will have a tremendous influence over the development of international investment law for twelve years at a time.[114] Investors seem

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Technocrats, and the Managers"); Rogers, *supra* note 27, at 251 (observing that those "who advocate for a permanent investment court seem to assume that judges would be drawn from something other than the pool of existing investment arbitrators"). Judge Stephen Schwebel has also questioned whether the modest compensation structure envisioned for members of the investment court was intended to discourage, rather than to encourage, consideration of experienced arbitrators in the appointment process. Judge Stephen M. Schwebel, The Proposals of the European Commission for Investment Protection and an Investment Court System (May 17, 2016), http://isdsblog.com/wp-content/uploads/sites/2/2016/05/THEPROPOSALSOFTHEEUROPEANCOMMISSION.pdf (transcript of remarks given at Sidley Austin in Washington, D.C.).

113. *See* Laird, *supra* note 3, at 120 (noting that "judges may make decisions to curry favor with those who appointed them (and will reappoint them)"); Jonathan Klett, *National Interest vs. Foreign Investment: Protecting Parties Through ISDS*, 25 TUL. J. INT'L & COMP. L. 213, 231–32 (2016) (observing that judges "may lack independence if they are seeking reappointment" to the investment court); Robert W. Schwieder, *TTIP and the Investment Court System: A New (and Improved?) Paradigm for Investor-State Adjudication*, 55 COLUM. J. TRANSNAT'L L. 178, 203 (2016) (indicating that "judges that are up for reappointment will have an incentive to act in accordance with [the] expectations [of appointing states] in order to secure their employment position"); *Executive Summary of Task Force Discussion Paper*, *supra* note 81, at 14 (emphasizing "the real risk of bias presented by the potential for re-appointment of members of the Investment Court"); *see also* Crawford, *supra* note 95, at 1020 (opining that removal of "the agency of the investor from the appointment of arbitrators could pose challenges to the independence of arbitrators in favour of the State").

Later in this Article, the author indicates that arbitrators do not reflexively skew toward their appointing parties, but join unanimous decisions in the overwhelming majority of cases. *See infra* notes 160–62 and accompanying text. However, as also explained later in this Article, one may attribute this at least in part to the countervailing need for arbitrators to maintain credibility and stature within a small and elite group of peers appointed by investors, states, and institutions. *See infra* notes 185–209 and accompanying text. To the extent that the EU's proposed investment court does not draw on the same closely knit professional group, to the extent that the states parties will appoint all judges through a political selection process, and to the extent that investment courts' structure reflects an effort to control the range of discretion that the principals (states) confer on their agents (judges), one may anticipate that judges will in fact show greater sensitivity to the policy preferences of the appointing states. One observer explains this dynamic when applying Principal-Agent theory to investment treaty arbitration:

> The size of the zone of discretion also has implications for the strategic relationship between the Principals and their Agent. The smaller the zone of discretion, . . . the greater the Agent's interest will be in monitoring and anticipating the Principal's assessment of its activities. The analyst assumes that the Agent is more likely to take decisions that conform to the Principals' policy preferences to the extent that the Agent wishes to avoid being censured and punished. . . .

See Alec Stone Sweet, *Arbitration and Judicialization*, 1 ONATI SOCIO-LEGAL SERIES 1, 6 (2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988923.

114. *See* Andrew Cannon et al., *European Commission Publishes Draft Investment Chapter for*

unlikely to embrace this regime because it institutionally shades toward vindicating the political processes of host states,[115] which theoretically skew toward irrational outcomes,[116] and which have been found to cross the threshold of arbitrary and even outrageous conduct with some regularity in arbitral awards,[117] especially with respect to certain

the TTIP, Including Investment Protection Provisions and the Establishment of an International Investment Court, HERBERT SMITH FREEHILLS: ARBITRATION NOTES (Sept. 18, 2015, 11:15 AM), http://hsfnotes.com/arbitration/2015/09/18/european-commission-publishes-draft-investment-chapter-for-the-ttip-including-investment-protection-provisions-and-the-establishment-of-an-international-investment-court/ (noting that the "two third-country members will . . . be the President and Vice President of the [Appeal] Tribunal," and observing that this "places a great deal of responsibility and sway in the hands of two individuals, whose views on Investment Protection would then be very influential in shaping jurisprudence").

115. *See* Laird, *supra* note 3, at 120 (suggesting that the pool of judges might be "only representative of a defensive, governmental viewpoint"); *see also* Crawford, *supra* note 95, at 1021 (warning that the anticipated pool of judges "may result in tribunals of monochromatic experience and uniform views").

116. *See supra* notes 44–71 and accompanying text (discussing a systematic tendency toward irrational decisionmaking on political issues).

117. *See supra* note 80 (discussing the *Metalclad* and *Clayton/Bilcon* cases); *see also* Crystallex Int'l Corp. v. Venezuela, ICSID Case No. ARB(AF)/11/2, Award, ¶¶ 594, 597, 612–14 (Apr. 4, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf (involving a case where the host state denied a mining permit without any scientific evidence and "blatantly ignored" thousands of pages of supporting information submitted by the investor based on years of research that cost millions of dollars, and in which the host state rescinded a contractual agreement while knowing that there was no evidence of breach by the investor, and concluding that the host state's conduct was arbitrary and not based on legal standards or even the reasons put forward by the host state); Copper Mesa Mining Corp. v. Ecuador, PCA Case No. 2012–2, Award, ¶¶ 6.53–6.71, 6.78-6.85 (Mar. 15, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf (involving termination of a mining concession under circumstances in which the host state failed to protect the investor from violent anti-mining protests, ordered the investor to cease mining operations (including the work needed for an environmental impact statement) based on anti-mining sentiment among the local population, and terminated the concession for failure to complete an environmental impact statement, which the tribunal described as arbitrary government conduct); Belokon v. Kyrgyzstan, UNCITRAL, Award, ¶¶ 231–34 (Oct. 24, 2014), https://www.italaw.com/sites/default/files/case-documents/ITA%20LAW%207008_0.pdf (involving temporary administration of a bank during a period of violent regime change and concluding that there was no rational connection between the state's objectives and its actions, in part because deployment of the state's security apparatus would have been the logical response to violent attacks on the banking sector); OAO Tatneft v. Ukraine, Award on the Merits, ¶¶ 147, 155, 165, 167, 396–97, 400, 403, 405 (UNCITRAL Arb. July 29, 2014) https://www.italaw.com/sites/default/files/case-documents/italaw8622.pdf (involving a matter that began as an alleged violation of Ukraine's Labor Code, and escalated to a massive deprivation of a refinery's ownership and control accomplished in part by forcible occupation by Interior Ministry troops, *ex parte* judicial proceedings, and criminal investigations that were not pursued); Gemplus S.A. and Talsud S.A. v. Mexico, ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award, ¶¶ 4–72, 4–73, 4–79, 4–80, 4–81, 4–82, 4–88, 4–175, 4–177, 7–25, 7–28, 7–67, 7–76 (June 26, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0357.pdf (involving the termination on national security grounds of a concession to operate a vehicle registry in Mexico following an outpouring of public opposition, and describing the host state's actions as "manifestly irrational, arbitrary and perverse, being also conducted in bad faith"); Desert Line Projects LLC v. Yemen, ICSID Case No., ARB/05/17, Award, ¶¶ 18, 22, 25–

economic sectors.[118]

Even if investors come to the EU's proposed investment court only kicking and screaming, one response might be, "So what? Where else can they go?" Here one needs to sound a second note of caution; one that may dismay proponents of the EU's plan for an investment court. Investment arbitration has been around for much longer than investment treaty arbitration.[119] For decades before the proliferation of investment treaties, multinational enterprises had the leverage to persuade host states to sign investment contracts,[120] which provided for arbitration and produced

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27, 33, 38, 166–67, 179, 185 (Feb. 6, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0248_0.pdf (involving a host state that laid a military siege to the investor's construction site, the baseless arrest of managerial employees, including the investor's son, and refusal to afford the investor protection from harassment by armed bands); Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award, ¶¶ 3–4, 53, 60, 105–06, 113, 119, 136, 217, 220–24, 237 (June 26, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0470.pdf (involving state-court proceedings in which a Mississippi plaintiff used blatant appeals to prejudice to transform a $980,000 contract claim into a $500 million jury award, and describing the proceedings as a "disgrace," but dismissing the claim on technical grounds); Pope & Talbot, Inc. v. Canada, An Arbitration Under Chapter 11 of the North American Free Trade Agreement, Award in Respect of Damages, ¶ 68 (May 31, 2002), https://www.italaw.com/sites/default/files/case-documents/ita0686.pdf (finding that the host state's administrative organs made "assertions of non-existent policy reasons" for "very burdensome demands" for disclosures, threats, misrepresentations, and unjustified suggestions of criminal investigations, and emphasizing that those actions "did shock and outrage the tribunal"); S.D. Myers, Inc. v. Canada, Partial Award, ¶¶ 122–26, 162, 169, 171, 173, 176–79, 183, 185, 189, 193–95, 256, 268 (UNCITRAL Arb. Nov. 13, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0747.pdf (involving a prohibition on exports of PCBs from Canada for destruction in the United States and imposing liability because the measure increased environmental dangers and seemed transparently motivated by a desire to protect Canadian remediation companies from foreign competition).

118. *See* Poulsen, *supra* note 106, at 8 (asserting that "[h]istorical experience, as well as recent experience in parts of Latin America, shows that resource extraction sectors are particularly prone to discriminatory or even predatory government interference"); *see also* Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT'L L. 825, 829 (2011) (recognizing that energy-sector cases made up the largest portion of investment treaty disputes, and observing that foreign investment in the sector tends to be high-value, long-term, and politically sensitive).

119. *Compare* Yackee, *supra* note 27, at 1574–96 (describing a number of contract-based arbitrations between foreign investors and host states, beginning with the "famous *Lena Goldfields* arbitration of 1930," and continuing with the *ARAMCO* arbitration in the 1950s, the trilogy of arbitrations resulting from Libyan oil nationalizations during the 1970s, the *AMINOIL* arbitration resulting from a Kuwaiti oil nationalization during the 1970s, and other, lesser known arbitrations from the same time periods), *with* José E. Alvarez, *The Once and Future Foreign Investment Regime*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 607, 617 (M.H. Arsanjani et al. eds., 2010) (opining that "[t]he 1990s, not the 1980s and certainly not the 1970s, were the era when the modern[,] [treaty-based] investment regime was born").

120. *See* Yackee, *supra* note 27, at 1612 (explaining that the regime of contract-based investor-state arbitration "has long existed independently" of treaty-based investor-state arbitration); Jason Webb Yackee, *Do We Really Need BITs? Toward a Return to Contract in International Investment*

memorable awards against host states.[121] For multinational corporations involved in large investment projects, that remains a live option, meaning that they can vote with their feet.[122] That, in turn, would transform the proposed investment court into a small claims court reserved only for small- and medium-sized investors,[123] while the real action involving the big players and points of principle takes place elsewhere,[124] in

Law, 3 ASIAN J. WTO & HEALTH L. 121, 122 (2008) [hereinafter Yackee, *Do We Really Need BITS?*] (making the point "that foreign investors engaged in the riskiest investment projects have long had the ability to harness the powers of international law and international adjudication to legally secure their economic relationships with developing country host states . . . through the institution of contract").

121. *See supra* note 119 (describing the long history of contract-based investor-state arbitration, and the more recent emergence of treaty-based investor-state arbitration); *see also* ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 495–510 (2d ed. 2008) (discussing the trilogy of contract-based Libyan oil nationalization cases, as well as the *AMINOIL* arbitration against Kuwait for termination of an oil concession).

122. *See* Poulsen, *supra* note 106, at 8 (indicating that "very large multinationals . . . are . . . able to bargain for investor-state contracts with similar or greater legal guarantees than those provided in BITs"); *see also* Alvarez, *supra* note 119, at 619 (explaining that "[i]t is wrong to assume that BITs constitute the *only* mechanism LDCs have to overcome" the problem of providing foreign investors with credible guarantees; "[e]ven without BITs, LDCs have long had . . . other methods to overcome [that] problem[,] [including] undertaking express commitments to particular investors via contract"); Yackee, *Do We Really Need BITs?*, *supra* note 120, at 123 (opining that "a world without [investment treaty protection] would hardly be a disaster" because "[f]oreign investors would . . . ask developing countries to provide [similar] guarantees in . . . contractual instrument[s]," which "have long served as adequate (or even superior) [treaty] substitutes").

123. *See* Poulsen, *supra* note 106, at 25–26 (recognizing that "smaller investors may have less bargaining power when negotiating contracts with host states compared to large multinationals"); Yackee, *Do We Really Need BITs?*, *supra* note 120, at 140 (acknowledging that "small or medium-sized enterprises (SMEs)[] will not have the bargaining power to convince host states to grant them contract-based rights that are more or less equivalent to those contained in BITs"); *see also* Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 481 (2009) (indicating that "contractual arrangements . . . are . . . available only to investors with sufficient negotiating power," and that "small- or medium-scale investors are . . . in a more difficult position to negotiate for such protections").

124. It seems evident that a clear majority of investment treaty claims are brought by multinational enterprises. *See* David Gaudkrodger & Kathryn Gordon, Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community 18 (OECD Working Papers on Int'l Inv. 2012/03), http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf (indicating that medium and large multinational enterprises account for about half the sample of investment treaty claims, with extremely large multinational companies accounting for another 8 percent). In addition, it seems evident that particularly large multinational companies tend to fare especially well in investment treaty arbitration, both in terms of win-loss ratios and in terms of amounts recovered. *See* Franck & Wylie, *supra* note 78, at 505, 516, 521 (indicating that *Financial Times* 500 companies have achieved higher levels of success than other corporate investors in investment treaty claims); Gus Van Harten & Pavel Malysheuski, *Who Has Benefitted Financially from Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants* 1–2 (Osgoode Hall Legal Studies, Research Paper No. 14, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2713876 (indicating that companies with

accordance with rules directly negotiated by large corporations,[125] and in proceedings conducted outside the public view.[126] That cannot be the

more than $1 billion in annual revenue and individuals with more than $100 million in net worth have received 94.5 percent of the aggregate compensation awarded in investment treaty claims, and that extra-large companies—with more than $10 billion in annual revenue—have enjoyed a success rate in investment treaty arbitration (70.8 percent) that vastly exceeds the success rates of other claimants (42.2 percent)).

125. *See* Poulsen, *supra* note 106, at 25 (indicating that investors may regard contracts as superior legal instruments when compared to investment treaties, inasmuch as contracts allow parties to use much more precise terms and to address a wider range of rights and obligations than covered by investment treaties); Yackee, *Do We Really Need BITs?*, *supra* note 120, at 133 (same). In addition, the decisions might arguably skew more toward investors in contractual disputes, in the sense that contracts often include the sorts of precise undertakings that can restrict the wide range of discretion normally enjoyed by states under international law. *See supra* note 80 (involving cases where tribunals have imposed liability due at least in part to specific representations made by the host state); Yackee, *supra* note 27, at 1597 (concluding that "[a]rbitral tribunals, staffed . . . with highly accomplished Western (or Western-educated) lawyers inherently sympathetic . . . to the notion of *pacta sunt servanda* as a foundational principle of all modern legal systems, had little trouble determining that state promises should readily be upheld"); Yackee, *Do We Really Need BITs?*, *supra* note 120, at 134 (indicating that investors in high-risk sectors often use stabilization clauses in contracts to protect themselves from regulatory changes that would not be foreclosed by investment treaties); *see also* LOWENFELD, *supra* note 121, at 495–511 (discussing the trilogy of Libyan oil arbitrations and the *AMINOIL* arbitration, and describing the "emphasis on contract" as a "striking feature" in the awards, which allowed the tribunals to reject arguments that international law provided host governments with a wider range of discretion).

126. *See* GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 201–08 (2d ed. 2015) (explaining that the "confidentiality provisions in many [investment treaty] arbitrations are different than those in most commercial settings," and that "arbitral proceedings . . . in investment [treaty] arbitrations are significantly more 'transparent,' and less confidential, than in international commercial arbitrations"); Gary B. Born & Ethan G. Shenkman, *Confidentiality and Transparency in Commercial and Investor-State Arbitration*, *in* THE FUTURE OF INVESTMENT ARBITRATION 5, 21, 27, 37 (Catherine A. Rogers & Roger P. Alford eds., 2009) (noting that "[m]ost parties enter into international commercial arbitration agreements with expectations of confidentiality," and that "[c]onfidentiality has played a less significant role in investor-state arbitrations than in international commercial arbitrations," but that "confidentiality obligations remain applicable to states when they enter into international commercial arbitration agreements," as opposed to investment treaties); Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 13 PENN ST. L. REV. 1269, 1287 (2009) (observing that "[c]onfidentiality is one of the distinctive features of international commercial arbitration," but that "procedural aspects of transparency that are starting to characterize investment [treaty] arbitration"); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1603 n.395 (2005) (indicating that "arbitrations brought by investors that involve[] disputes under normal commercial agreements, such as concession contracts . . . do not involve the interpretation of investment treaties and public international law rights" and, therefore, the "policy points which [might] weigh in favor of transparency are absent," meaning that "presumptions of confidentiality should not be displaced"); Diana Marie Wick, *The Counter-Productivity of ICSID Denunciations and Proposals for Change*, 11 J. INT'L BUS. & L. 239, 281 (2012) (opining that "[i]n contrast to the complete confidentiality of international commercial arbitration, . . . [investment treaty] arbitration necessarily requires some transparency"). To the extent that positive international law and international practice have established an emerging norm of transparency in disputes between foreign investors and host states, the relevant instruments expressly apply only to arbitrations brought under investment treaties, as opposed to purely contractual undertakings. *See* UNCITRAL, UNITED NATIONS CONVENTION ON

intent of TTIP's drafters, but it represents a likely consequence of the proposed investment court.

The point is that investment treaty disputes represent political disputes.[127] The political context creates incentives for stakeholders and officeholders to make irrational choices.[128] Traditionally, investment treaties have served as tools that enable foreign investors to challenge irrational outcomes of political processes in host states.[129] Backing away from that function may not represent a good idea, and it may backfire by triggering the reinvigoration of older traditions that more clearly serve the interests of foreign investors and more sharply diverge from the public justice goals embodied in TTIP.[130]

V. ADDRESSING CONCERNS ABOUT DEMOCRATIC DYSFUNCTION WITHIN ISDS

Before closing, one needs to address the potential rejoinder that ISDS, in its present form, shares many of the flaws ascribed to democratic decisionmaking. According to this view, investors may share the propensity for ignorance and irrational beliefs generally attributed to stakeholders with respect to political issues in democratic systems. Likewise, arbitrators may function like politicians, indulging the beliefs and preferences of stakeholders (either investors or respondent states) in

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TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION, art. 1(1), (Dec. 10, 2014), https://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf ("This Convention applies to arbitration between an investor and a State or a regional economic integration organization conducted on the basis of an investment treaty concluded before 1 April 2014."); UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, art. 1(1) (Apr. 1, 2014), http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf ("The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration . . . shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors . . . concluded on or after 1 April 2014 unless the Parties to the treaty have agreed otherwise.").

127. *See supra* notes 1, 6–28 and accompanying text (explaining different political contexts in which investment treaty disputes often occur).

128. *See supra* notes 29–71 and accompanying text (discussing political issues in democratic systems and the systematic making of irrational choices by stakeholders and officeholders).

129. *See supra* notes 28, 72 and accompanying text (explaining the political context of most investment treaties and the challenge they can present to the political processes in host states).

130. *See supra* notes 110–26 and accompanying text (explaining why a retreat from investor-state arbitration might not be a good idea, and why it could backfire); c*f.* Cecilia Malmstrom, *Proposing an Investment Court System*, EUROPEAN COMMISSION: BLOG (Sept. 16, 2015), https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/proposing-investment-court-system_en (describing the EU's proposed investment court as "a public justice system – just like those we're familiar with in our own countries, and the international courts which Europe has so actively promoted in the past"). The author of the blog post is the EU Commissioner for Trade.

order to secure future appointments. Viewed from that perspective, the case for treating investor-state arbitration as a useful counterweight to democratic dysfunction arguably collapses.[131]

As a preliminary matter, it seems unreasonable to ascribe ignorance to the general run of claimants in investment treaty arbitrations. While a handful of cases involve hapless individuals who clearly ventured out of their depth,[132] most claims involve large and sophisticated enterprises.[133] For such entities, foreign investments fall on the practical side of life, where the stakes are high, where enterprises reap the benefits of making good choices about investments, and where enterprises experience the losses associated with making bad choices about investments.[134] Under these circumstances, enterprises planning to make substantial foreign investments tend to devote considerable time and effort to the development of information about anticipated projects, political risk, and the legal environment for the protection of foreign investment.[135] At least

131. The author thanks Professor David Schneiderman for the basic insight, particularly with respect to arbitrators, while emphasizing that Professor Schneiderman might not express himself in exactly the same terms.

132. *See* Azinian v. The United Mexican States, ICSID Case No. ARB(AF)/97/2, Award, ¶¶ 29–30, 32–33, 107 (Nov. 1, 1999), https://www.italaw.com/sites/default/files/case-documents/ita0057.pdf. (expressing the view that the individual claimants did not represent an "inherently plausible group of investors," inasmuch as they had virtually no relevant experience, assets, cash flow, or history of successful business ventures; describing their business plans as something on the order of "fantasy;" and concluding that at least one claimant "may have been well out of his depth in an unfamiliar environment").

133. *See supra* note 124 (demonstrating that a majority of investment treaty claims are brought by multinational enterprises); *see also* JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 33 (Oxford Univ. Press 2010) (noting that "[o]ne of the principal types of foreign investor is the 'multinational corporation' (MNC) or 'multinational enterprise' (MNE)"); Daniel Behn, *Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State of the Art*, 46 GEO. J. INT'L L. 363, 370, 384 (2015) (analyzing 147 investment treaty disputes partially or fully resolved between September 2011 and September 2014, and concluding that the claimant was "a large MNE in fifty-eight cases, an extra-large MNE in thirty-seven cases, and a Global 500 company in twenty-four cases").

134. *Compare supra* notes 34–39 and accompanying text (describing the factors that tend to encourage rational decisionmaking in the practical aspects of life).

135. *See* DOLZER & SCHREUER, *supra* note 25, at 77 (explaining that a "key feature in the design of [long-term, large-scale] foreign investment is to lay out in advance the risks inherent in such a long-term relationship, both from a business perspective and from a legal point of view"); NOAH RUBINS & N. STEPHAN KINSELLA, INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION 25–29 (2005) (describing the elements of, participants in, and sources of information for, a proper investment risk analysis); *see also* Michael R. Reading, Note, *The Bilateral Investment Treaty in ASEAN: A Comparative Analysis*, 42 DUKE L.J. 679, 686 (1992) (explaining that "[f]oreign investors conduct a risk-return analysis, and if the risk outweighs the potential return, they will not make an investment"). *But see* Randall Peerenboom, *Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249, 311 (2001) (opining that the "investment decisions of foreign businesses have not always been based on a rational assessment of the relative risks and gains," inasmuch as "[i]nvestors in China often lack sufficient information to make a rational choice"); Jason Webb Yackee, *Do Bilateral Investment*

on the topic of their own foreign investments, these stakeholders do not choose ignorance.

Similarly, one cannot reasonably ascribe irrational beliefs to the general run of potential claimants in investment treaty arbitrations. Again, these are not individuals likely to be motivated by the desire for an emotional charge or an enhanced sense of identity.[136] Most potential claimants are large corporations,[137] led by experienced officers and directors, who are advised by in-house and outside counsel, and who have fiduciary duties to maximize the wealth of shareholders. If such individuals systematically hold irrational beliefs about investment risk or the legal regime for the protection of foreign investment, they are likely to experience substantial personal costs, including the prospect of termination and long-term career setbacks.[138] In particular, they seem unlikely to initiate and pursue baseless investment treaty claims irrationally,[139] inasmuch as legal costs run into the millions of dollars for

Treaties Promote Foreign Investment? Some Hints from Alternative Evidence, 51 VA. J. INT'L L. 397, 432 (2011) (discussing studies suggesting that "multinational corporations often implement political risk assessment in ad hoc, weakly institutionalized kinds of ways").

136. While individuals do in fact bring investment treaty claims, studies indicate that the proportion of arbitrations brought by individual investors is less than 10 to 15 percent. *See* Franck & Wylie, *supra* note 78, at 459, 482, 500 n.182 (analyzing a data set of 159 concluded investment treaty cases up to January 1, 2012, and concluding that 14.5 percent of final awards involved claims brought only by individual investors); Gaudkrodger & Gordon, *supra* note 124, at 18, fig. 1 (analyzing a data set of fifty investment treaty arbitrations administered by ICSID and forty-five investment treaty arbitrations brought under the UNCITRAL Arbitration Rules, and indicating that individual claimants brought between 5 and 10 percent of the claims in both groups). In bringing claims, individual investors generally do not appear to harbor irrational expectations. To the contrary, individual investors appear to succeed on the merits more regularly than corporations in general. *See* Franck & Wylie, *supra* note 78, at 469 (explaining that "the most robust predictor [of success] was whether the investors were human beings or corporations, with cases brought by people exhibiting greater success than corporations"); Van Harten & Malysheuski, *supra* note 124, at 2–5 (listing eighty-six investment treaty cases in which tribunals had rendered awards on liability and damages, and including twenty-five claims brought by individual investors, suggesting that individual investors have an unusually high success rate).

137. *See supra* notes 124, 133 (stating that a majority of investment treaty claims are brought by multinational enterprises).

138. *Compare supra* notes 35–39 and accompanying text (generally discussing the consequences of making irrational choices in the practical aspects of life, including in the professional and employment contexts).

139. Of course, when the stakes are sufficiently high and involve huge sums or core business interests, rational investors may pursue expensive claims despite relatively low chances of success. *See* Philip Morris Asia, Ltd. v. The Commonwealth of Australia, PCA Case No. 2012–12, Award on Jurisdiction, ¶¶ 8, 89, 96–98, 585–88 (Dec. 17, 2015), https://www.pcacases.com/web/sendAttach/1711 (involving a claim in excess of $4 billion relating to the adoption of tobacco plain packaging laws and regulations, and concluding that the investor abusively sought to engineer jurisdiction through stock transfers to an affiliate located in a jurisdiction having favorable treaty relations after the time at which the dispute became reasonably foreseeable).

each party,[140] and tribunals have come to prefer some version of the "loser-pays" principle in awarding costs.[141] Given the absence of subjective preferences, the rewards for making good choices, and the penalties for making bad choices, it lacks credibility to suggest that potential claimants systematically make irrational choices in asserting or pursuing investment treaty claims.

Even if investors are informed and behave rationally in pursuing investment treaty claims, one could not defend ISDS in its current format if arbitrators acted like politicians by indulging the views of appointing parties in an effort to secure repeat appointments or future appointments.[142] Addressing that concern at a high level of generality, it seems relevant to observe that arbitrators, even party-appointed arbitrators, are not supposed to act like politicians who serve in a representative capacity. To the contrary, they are supposed to function more like judges,[143] who have obligations of independence and

140. *See* Brook K. Baker & Katrina Geddes, *Corporate Power Unbound: Investor-State Arbitration of IP Monopolies on Medicines*—Eli Lilly v. Canada *and the Trans-Pacific Partnership Agreement*, 23 J. INTELL. PROP. L. 1, 17 (2015) (reporting that the "average cost of arbitral proceedings is nearly $8 million, although the Philippines's tribunal costs and legal costs in a single case exceeded $50 million"); Gaudkrodger & Gordon, *supra* note 124, at 19 (indicating that "legal and arbitration costs for the parties in recent ISDS cases have averaged over USD 8 million with costs exceeding USD 30 million in some cases"); Peter K. Yu, *The Investment-Related Aspects of Intellectual Property Rights*, 66 AM. U. L. REV. 829, 874 (2017) (stating that costs in investment treaty arbitrations "remain high with averages of about $8-10 million and amounts as high as over $30 million").

141. *See* DOLZER & SCHREUER, *supra* note 25, at 299–300 (observing that "recently tribunals have shown a growing inclination to adopt the principle that costs follow the event," but explaining that an award of costs against the losing party will "more frequently" be partial and not total); Gaudkrodger & Gordon, *supra* note 124, at 22 (indicating that "[t]he 'pay your own way' rule . . . has been used overall more often than other approaches," but recognizing that "[t]he trend in recent cases is toward the shifting of at least some costs").

142. *See* Sergio Puig, *Blinding International Justice*, 56 VA. J. INT'L L. 647, 663 (2016) ("The practice of each party appointing one of the arbitrators raises concerns that arbitrators will behave as representatives for the interests of the appointer and not as neutral adjudicators.").

143. Viewed from a broader perspective, arbitrators differ from judges in the sense that they receive appointments for only one matter at a time, meaning that they may have to engage in counsel or expert work to supplement income, which can raise concerns that arbitrators may render decisions that support the positions they take as advocates and experts. *See* Michael D. Goldhaber, *The Rise of Arbitral Power Over Domestic Courts*, 1 STAN. J. COMPLEX LITIG. 373, 406–07 (2013) (observing that "[i]nvestment arbitrators are private individuals who sell their services as adjudicators, of a few recurring legal issues, to litigants on the open market," and also may "continue to sell their services as advocates on the open market," which casts doubt upon their independence); William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 648 (2009) (noting that arbitrators sometimes must address "the very same issues presented to him or his law firm as advocate in another case," that "[i]t is not difficult to see why such situations might compromise the integrity of the arbitral process," and that such arbitrators "might be tempted . . . to add a sentence to an award that could later be cited in another case").

As a practical matter, however, few individuals engage in this form of "double-hatting" on any

impartiality,[144] as well as obligations to render decisions on the basis of law.[145] Normally, we expect judges, even elected judges, not to act like

significant scale. *See* Loretta Malintoppi, *Independence, Impartiality, and Duty of Disclosure of Arbitrators*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 789, 825 (Peter Muchlinski et al. eds., 2008) (opining that the "number of practitioners acting as counsel and arbitrators in investment arbitration is still relatively small"); Lacey Yong, *"Double Hatting" Under New Scrutiny*, GLOBAL ARBITRATION REVIEW (June 5, 2017), http://globalarbitrationreview.com/article/1142550/"double-hatting"-under-new-scrutiny (indicating that "the major critiques of investment arbitration based on double hatting would 'evaporate' if some 10 to 15 individuals agreed to forego the practice"). For a variety of reasons, many individuals have chosen to renounce counsel work and to sit exclusively, or almost exclusively, as arbitrators for investment treaty matters. ROGERS, *supra* note 28, at 320; *see also* Jeff Gray, *Norton Rose Loses "Great Leader" Over Merger*, THE GLOBE & MAIL (Oct. 21, 2011), https://beta.theglobeandmail.com/report-on-business/streetwise/norton-rose-loses-great-leader-over-merger/article618477/ (reporting that renowned arbitrator Yves Fortier was leaving the firm to pursue his career as an independent arbitrator); Luke Eric Peterson, *Arbitrator Decries "Revolving Door" Roles of Lawyers in Investment Treaty Arbitration*, INVESTMENT ARBITRATION REPORTER (Feb. 25, 2010) https://www.iareporter.com/articles/arbitrator-decries-revolving-door-roles-of-lawyers-in-investment-treaty-arbitration/ (reporting that Professor Philippe Sands QC "ceased taking on new investment treaty cases as counsel in mid-2007 so that he could begin to accept arbitrator appointments"); Douglas Tomson, *Alexandrov Quits Sidley Austin to Go Solo*, GLOBAL ARBITRATION REVIEW (Aug. 2, 2017), http://globalarbitrationreview.com/article/1145245/alexandrov-quits-sidley-austin-to-go-solo (reporting that Stanimir Alexandrov is leaving the firm to "set up his own practice as an arbitrator").

When certain individuals have chosen to pursue arbitrator and counsel roles simultaneously, courts and appointing authorities have occasionally ordered them to choose one role or the other. *See, e.g.*, The Republic of Ghana v. Telekom Malaysia Berhad, Petition No. HA/RK 2004.667, Decision on Challenge of Prof. Emmanuel Gaillard, ¶ 5 (Hague D. Ct. Oct. 18, 2004), https://www.italaw.com/documents/TelekomMalaysiaChallengeDecision.pdf; Gallo v. Government of Canada, Decision on Challenge to J. Christopher Thomas, Q.C., ¶ 36 (ICSID Deputy S-G Oct. 14, 2005), https://www.italaw.com/documents/Gallo-Canada-Thomas_Challenge-Decision_002.pdf.

144. *See* DOLZER & SCHREUER, *supra* note 25, at 280 (indicating that arbitrators must be independent of the parties, and that conflicts of interest operate as bars to appointment and may lead to disqualification); Puig, *supra* note 142, at 663 (observing that "international lawyers widely believe that arbitrators should act independently, and independent judgment is required by the main international arbitration rules").

145. *See* G.A. Res. 65/22, art. 35(1), UNCITRAL Arbitration Rules (Dec. 6, 2010) ("The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate."); Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 42(1), Oct. 17, 1966, 575 U.N.T.S. 159 [hereinafter ICSID Convention] ("The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."); Hague Convention on the Pacific Settlement of International Disputes, art. 37, 36 Stat. 2199 (Oct. 18, 1907) ("International arbitration has for its object the settlement of disputes between States by Judges of their own choice and on the basis of respect for law."); *see also* 2012 U.S. Model Bilateral Investment Treaty, art. 30(1), https://www.state.gov/documents/organization/188371.pdf (providing that when an investor alleges violations of standards set forth in the BIT, "the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law").

politicians when making decisions,[146] although they may have normative preferences on legal topics where there is no binding precedent and decisions have not yet clustered around a general consensus.[147]

Moving from the level of ideals to practical experience, there is some evidence that elected judges on national and international courts alter their decisionmaking patterns during election cycles in ways that seem calculated to enhance their chances for return to office.[148] Similarly, one has to acknowledge that arbitrators in investment treaty disputes continuously stand for election in the sense that they are always on the market for appointments,[149] and arguably have incentives to conduct themselves in ways that increase their chances for future appointments.[150] According to critics of ISDS, these incentives encourage arbitrators to

146. *See* Sarah C. Benesh, *Judicial Elections: Directions in the Study of Legitimacy*, 96 JUDICATURE 204, 207 (2013) (indicating that "[p]eople in the U.S. like to elect their judges," but that "they also want those judges, once in office, to behave differently from 'mere' politicians"); H.A. "Skip" Walther, *Money and Justice Don't Mix*, 66 J. MO. B. 121, 121 (2010) (observing that "[w]e ask our elected judges to set aside political aspirations and dispense justice impartially").

147. *See* Daniel Freeman, Comment, *One Case, Two Decisions:* Khalid v. Bush, In re Guantanamo Detainee Cases, *and the Neutral Decisionmaker*, 24 YALE L. & POL'Y REV. 241, 242 (2006) (describing how the same motion landed in front of two judges, exploring how and why two judges reached radically different legal conclusions, and opining that in the "absence of clear instruction from higher courts" each judge manipulated authority to conform to his or her normative preferences). This phenomenon may be particularly pronounced in the context of evolving international norms. *See* James Allan & Grant Huscroft, *Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts*, 43 SAN DIEGO L. REV. 1, 56 (2006):

> This is precisely the sort of picking-and-choosing that can be expected with internationalism. In a world of sometimes widely-differing decisions . . . , the normative preferences of the judges hearing particular cases are likely to determine whether or not a particular foreign or international precedent makes its way into a judicial decision.

148. *See* Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 248, 261 (2004) (indicating that elected state-court judges in Pennsylvania impose harsher sentences for crimes when facing reelection campaigns); Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417, 427 (2008) (indicating that judges facing mandatory retirement were 12 percent more likely to vote against their national governments than judges facing reelection to the European Court of Human Rights).

149. *See* Brower & Rosenberg, *supra* note 112, at 646 (explaining that "in the present system . . . , potential arbitrators effectively 'stand for election' by parties every time a new case is brought").

150. *See* Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 85 (2010) (acknowledging that "prospective arbitrators who compete in the market for appointments might wish to behave in a way that increases their chances of appointment"); Catherine A. Rogers, *The Arrival of the "Have-Nots" in International Arbitration*, 8 NEV. L.J. 341, 343 (2007) (recounting arguments to the effect that "arbitrators have an incentive to favor repeat players in the hopes that a favorable award will translate into future appointments"); Rogers, *supra* note 27, at 248 (recounting arguments to the effect that "[a]rbitrators' lack of secure tenure and ensured compensation . . . undermine the administrative independence that protects independence and impartiality in national courts and public international law tribunals").

rule for investors.[151] However, this criticism seems to ignore the fact that investors appoint only one of three tribunal members, that respondent states also get to appoint arbitrators,[152] and that the most notorious case of predisposition involved an arbitrator appointed by a state who was subjected to pressure by officials of the appointing state, and who arguably swung a large and controversial dispute in favor of the state.[153]

While helpful to keep in mind that the perceived incentives for party-

151. *See, e.g.*, VAN HARTEN, *supra* note 26, at 152–53, 172–73.

152. *See* Brower & Schill, *supra* note 123, at 495 (explaining that "the capacity of states to appoint arbitrators in investment-treaty arbitration counters any potential pro-investor bias that the investor-appointed arbitrator might evince"); Park, *supra* note 143, at 659 (observing that "[h]ost states appoint as many arbitrators as investors"); José E. Alvarez, Book Review, *Investment Treaty Arbitration and Public Law by Gus Van Harten*, 102 AM. J. INT'L L. 909, 914 (2008) (emphasizing the fact that "states' ongoing involvement in investor-state dispute settlement is also assured through states' rights to appoint one of the three arbitrators typically designated to hear investment disputes").

153. According to public statements made by Judge Abner Mikva, the U.S.-appointed arbitrator in *Loewen Group, Inc. v. United States* (and also a former congressman, federal appellate judge, and White House counsel), lawyers from the Department of Justice informed him that an adverse ruling could prompt the U.S. government to withdraw from NAFTA. Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 7 WORLD ARB. & MED. REV. 205, 210–13 (2013); *see also* V.V. Veeder, *The Historical Keystone to International Arbitration: The Party Appointed Arbitrator—From Miami to Geneva*, *in* PRACTISING VIRTUE 127, 129–30 (David D. Caron et al., eds., 2015) (addressing the *Loewen* arbitration and Judge Mikva's role); Juan Fernandez-Armesto, *Salient Issues in International Arbitration*, 27 AM. U. INT'L L. REV. 721, 725 (2012) (laying out examples of the "miscarriages of justice" sometimes caused by party appointed arbitrators); David Schneiderman, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*, 30 NW. J. INT'L L. & BUS. 383, 404–05 (2010) (discussing the comments made by Judge Mikva); Jason Webb Yackee, Book Review, *The Reasons Requirement in International Investment Arbitration: Critical Case Studies*, 103 AM. J. INT'L L. 629, 635 (2009) (discussing briefly the *Loewen* award and Judge Mikva's role). At least some well-regarded observers have speculated that this intervention prompted Judge Mikva to convince other tribunal members to dismiss an otherwise meritorious case on rather technical grounds. Paulsson, *supra*, at 7; Schneiderman, *supra*, at 405; *see also* Jose E. Alvarez, *Three Responses to "Proliferating" Tribunals*, 41 N.Y.U. J. INT'L L. & POL. 991, 1008 (2009) (speculating that the arbitrators framed their decision "to avoid the political backlash that would likely have been generated had they overturned the result reached by a Mississippi jury"). *But see* Veeder, *supra*, at 130–31 (concluding that the arbitrator's statements do not reflect a commitment to make improper decisions favoring the United States, and finding it "utterly inconceivable that the two other arbitrators . . . could have been pressured in turn by the American arbitrator into agreeing to that which they were not minded to agree").

More recently, in a boundary arbitration between Slovenia and Croatia, transcripts of wiretaps revealed that Slovenia's agent had engaged in clandestine, ex parte discussions with the arbitrator appointed by Slovenia, which included discussions of how best to influence the tribunal's deliberations in Slovenia's favor and also included advance disclosure that the tribunal would in fact render a decision generally favoring Slovenia. Arman Savarian & Rudy Baker, *Arbitration Between Croatia and Slovenia: Leaks, Wiretaps, Scandal*, EJIL: *TALK!* (July 28, 2015), https://www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal/. More than one observer has expressed the view that this may not represent isolated behavior between states and arbitrators appointed by states. *See* Philippe Sands, *Reflections on International Judicialization*, 27 EUR. J. INT'L L. 885, 898–99 (2016); Savarian & Baker, *supra*.

appointed arbitrators theoretically work both for investors and for states,[154] and would operate differently for presiding arbitrators,[155] the prospect of engrained predisposition seems unsettling, no matter which way(s) it cuts. According to two prominent members of the profession, the problem of predisposition by party-appointed arbitrators is real.[156] While one author uses a limited universe of anecdotes to support the point,[157] the second observer undertook an empirical study, which purports to show that dissenting opinions written by party-appointed arbitrators in investment treaty arbitrations support the appointing party nearly 100 percent of the time.[158] According to the second observer, the results of his study provide a strong indication of bias by party-appointed arbitrators,[159] and even suggest an emerging expectation for party-appointed arbitrators to dissent from awards that rule against the parties who appoint them.[160]

At first blush, the study appears to support the proposition that party-appointed arbitrators behave more like politicians than judges.[161] The

154. *See* Park, *supra* note 143, at 661 (noting that the "incentives to 'repeat player' status can operate just as well for individuals known in the arbitration community to be regularly appointed by host states").

155. *See* Julie A. Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach*, 54 VA. J. INT'L L. 367, 386 n.73 (2014) (assuming that presiding arbitrators wish to maximize their own personal reappointment prospects, but emphasizing that "it is not clear that this would be accomplished by favoring claimants over states, since the overall survival of the regime depends upon continued state support"); Park, *supra* note 143, at 659 (observing that "a presiding arbitrator must be acceptable to both sides").

156. *See* Brower & Rosenberg, *supra* note 112, at 619–20 ("Two of the most well-regarded and distinguished members of our profession—Professors Jan Paulsson and Albert Jan van den Berg—recently authored articles that seemed to presume that party-appointed arbitrators are untrustworthy and will violate their mandate to be and to remain independent and impartial."); *see generally* Paulsson, *supra* note 153 (exploring moral hazards created by the use of party-appointed arbitrators in international arbitration); Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 821 (Mahnoush Arsanjani et al. eds., 2011) (discussing dissenting opinions by party-appointed arbitrators in investment treaty arbitration).

157. *See* Paulsson, *supra* note 153, at 207–16 (discussing three examples of misbehavior by party-appointed arbitrators, one from the early twentieth century and two from the early twenty-first century).

158. Van den Berg, *supra* note 156, at 824–25.

159. *See id.* at 825 ("That nearly 100 percent of dissents favor the party that appointed the dissenter raises concerns about neutrality. . . . The nearly 100 percent score is difficult to reconcile with the neutrality requirement.").

160. *See id.* at 830 ("The practice of dissents in investment arbitration may have even reached the point where a party-appointed arbitrator is now expected to dissent if the party that appointed him or her has lost the case entirely or in part.").

161. *See* ROGERS, *supra* note 28, at 332 (acknowledging that "[v]an den Berg's data does indeed seem at first blush to be a striking indictment of party-appointed arbitrators"); Rogers, *supra* note 27, at 242 (recognizing that 100 percent "is a number that captures attention and, perhaps predictably, has been cited as a source of support for proposed reforms by Jan Paulsson, another

problem is that the individual who conducted the study appears to have over-interpreted the data. At most, the data establishes that when party-appointed arbitrators dissent, they invariably support the appointing party. However, even according to the study, party-appointed arbitrators *rarely dissent*. In fact, the study indicates that party-appointed arbitrators have dissented from only 22 percent of awards.[162] As others have observed, this percentage seems to include several coding errors and almost certainly should be lower.[163] More recent studies indicate a dissent rate in the range of 14.4 percent to 17 percent for investment treaty claims.[164] In other words, the vast majority of awards are rendered unanimously, and dissents occur only rarely in investment treaty disputes.

Others have expressed surprise at the low rate of dissents in investment treaty arbitration.[165] Given the relatively early stage in the development of investment treaty jurisprudence, the presence of ideological divides among stakeholders, and the politically charged nature of the disputes, one might expect to see more routine clashes among the views of arbitrators.[166] However, the low frequency of dissents represents an established fact. It also undermines the proposition that party-appointed arbitrators act like politicians when deciding cases; if party-appointed arbitrators acted purely as agents for the parties who appointed them, all

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leading arbitrator and scholar, that party-appointed arbitrators be abolished altogether").

162. *See* van den Berg, *supra* note 156, at 824 (discussing statistics of dissenting opinions by party-appointed arbitrators in practice). Inverting the same figures, critics have referred to the 78 percent unanimity rate in awards covered by van den Berg's study. Brower & Rosenberg, *supra* note 112, at 653; Rogers, *supra* note 27, at 245.

163. *See* Brower & Rosenberg, *supra* note 112, at 654–58 (indicating that five of the thirty-four "dissents" included in van den Berg's dataset were miscoded in the sense that they are "benign or actually disfavor the party that appointed the dissenter"); Rogers, *supra* note 27, at 245–46 (discussing, and apparently agreeing with, the coding errors identified by Brower and Rosenberg).

164. *See* Audley Sheppard & Daphna Kapeliuk-Klinger, *Dissents in International Arbitration*, *in* THE ROLES OF PSYCHOLOGY IN INTERNATIONAL ARBITRATION 313, 320 (Tony Cole ed., 2017) ("Between 2011 and 2014, ICSID authenticated at least seventy publicly known final awards, in respect of which twelve arbitrators issued dissenting opinions, i.e., in approximately 17% of cases, which means 83% were unanimous."); C. Mark Baker & Lucy Greenwood, *Dissent—But Only If You Really Feel You Must: Why Dissenting Opinions in International Commercial Arbitration Should Only Appear in Exceptional Circumstances*, 7 DISP. RESOL. INT'L 31, 34–35 (2013) ("Since van den Berg concluded his study, there have been approximately 111 further awards, in which there were 16 dissents (i.e., approximately 14.4 percent)."); Anton Strezhnev, *You Only Dissent Once: Re-Appointment and Legal Practices in Investment Arbitration* 2 (Nov. 8, 2015) (unpublished research note), http://scholar.harvard.edu/files/astrezhnev/files/dissent_draft_1.pdf ("Among disputes filed before [ICSID], . . . between January, 1972 and April, 2015, roughly 80% of final awards were unanimous and only about 14.5% of decisions came with a dissenting opinion attached.").

165. *See, e.g.*, Strezhnev, *supra* note 164, at 2 (referring to the low rate of dissents as "one particularly puzzling aspect of investment arbitration").

166. Rogers, *supra* note 27, at 245; Strezhnev, *supra* note 164, at 2, 5–6.

proceedings would end in 2-1 decisions.[167] That clearly does not represent the norm for investment treaty arbitrations.[168]

A more nuanced and tightly controlled experiment studied the behavior of experienced counsel and arbitrators, who were asked to render mock decisions on the allocation of costs in fictional investment treaty arbitrations.[169] Participants were randomly told that they were appointed by the prevailing party, the losing party, jointly by the parties, or appointed without any attribution.[170] The organizers of the study concluded that party-appointed arbitrators were more likely to prefer outcomes that favored the appointing party, and that the increased likelihood amounted to roughly twenty percentage points.[171] Based on that data, the authors generally concluded that party-appointed arbitrators have a substantial bias toward the parties that appoint them.[172]

However, the organizers of the study seem to over-extrapolate from limited data in at least two respects. First, their experiment did not solicit any decisions regarding the substance of investment treaty obligations, but only decisions regarding the allocation of costs.[173] This limitation seems critical because there is a thickening jurisprudence on substantive obligations,[174] and the application of that jurisprudence would have constrained the ability of arbitrators to render decisions based on

167. *See* Strezhnev, *supra* note 164, at 2 (noting that "if each arbitrator was a perfect agent of their appointer, then the typical outcome for an arbitration tribunal would be a 2-1 decision driven by the swing vote of the presiding arbitrator").

168. *See supra* notes 162–164 and accompanying text (discussing the results of van den Berg's and other studies); *see also* Strezhnev, *supra* note 164, at 2 (observing that "this does not appear to be the case").

169. Sergio Puig & Anton Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approach*, Arizona Legal Studies Discussion Paper No. 16-31 (Aug. 2016), at 1, 4–5, 17–22, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2830241.

170. *Id.* at 18–19.

171. *Id.* at 25, 31–32.

172. *See id.* at 1 (asserting that the study confirms that "professional arbitrators suffer from affiliation effects—a cognitive predisposition to favor the appointing party"); *id.* at 44 (concluding that "the frequent use of party-appointed arbitrators is likely to result in litigant-induced biases" because "being appointed by one of the parties . . . directly changes the behavior of arbitrators" in the sense that "the appointment itself causes some of the bias towards one's appointing party").

173. *Id.* at 19–20.

174. *See, e.g.*, José Enrique Alvarez, *The Public International Law Regime Governing International Investment*, 344 RECUEIL DES COURS 195, 353–54 (2011) (observing that even among the large number of famously "inconsistent" decisions relating to measures taken during Argentina's political, economic, and social crisis, "there is a great deal of agreement among the relevant decisions with respect to the relevant law," including "considerable arbitral common ground when it comes to the meaning of the relevant substantive investment guarantees, from fair and equitable treatment to protection against expropriation"); Charles H. Brower II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 66 (2003) (observing that "the awards of [NAFTA] Chapter 11 tribunals have reached a high level of coherence on many issues").

affiliation bias.[175] In fact, the organizers of the study anticipated that mock arbitrators would essentially have reached uniform conclusions if the experiment had focused on well-developed substantive obligations,[176] a position that seems consistent with the proposition that arbitrators generally decide cases on the basis of law as opposed to affiliation bias.[177]

To increase the anticipated diversity of outcomes, the organizers of the study chose to focus their experiment on allocation of costs because the issue is not subject to clear legal rules, because the applicable arbitration rules expressly call for the exercise of discretion in allocating costs, and because the lack of clear standards has given rise to a multiplicity of approaches within the profession.[178] Even in this open-ended environment, the authors found that party-appointed arbitrators favored the parties that appointed them only if the arbitrators *did not already favor the American rule on costs* (parties pay their own costs) as a matter of principle; if they did favor the American rule, even party-appointed arbitrators decided the issue on the basis of principle instead of affiliation bias.[179] Finally, when party-appointed arbitrators proposed allocations of costs that favored appointing parties, they tended to do so incrementally and not decisively.[180] In other words, the study establishes that

175. *See* Stephan W. Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, 12 GERMAN L.J. 1083, 1100 (2011) (discussing the "convergence of investment treaty jurisprudence towards a *jurisprudence constante*," which "increasingly has the effect that investment treaty tribunals perceive themselves as agents of a treaty-overarching regime for the protection of foreign investment, which they feel bound to apply"); Thomas Wälde, *National Tax Measures Affecting Foreign Investors Under the Discipline of International Investment Treaties*, 102 AM. SOC'Y INT'L L. PROC. 55, 57 (2008) ("There is no formal system of precedent in international investment law; nor can there be one given the large number of detailed and quite distinct treaties at stake. But a practice of 'persuasive precedent' is emerging; in several areas, that has reached the level of settled case law ('jurisprudence constante')."); *see also* Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent?*, *in* OXFORD HANDBOOK, *supra* note 143, at 1188–89 ("In actual fact, tribunals in investment disputes . . . rely on previous decisions of other tribunals whenever they can.").

176. *See* Puig & Strezhnev, *supra* note 169, at 20 (explaining that they chose to study behavior with respect to cost allocation because it represents "a question on which there is little preexisting legal guidance . . . and therefore [a] high level of discretion—*otherwise participants would all reach very similar if not identical answers*") (emphasis added).

177. *See* Brower & Schill, *supra* note 123, at 492 ("[I]nvestment-treaty arbitration in its decision making process is an adjudicatory process based on independent fact-finding and legal analysis according to rules of law by neutral, independent, and impartial decision makers.").

178. Puig & Strezhnev, *supra* note 169, at 20.

179. *Id.* at 32.

180. For example, when appointed by the losing party, a plurality of mock arbitrators still allocated all costs to the losing party. *Id.* at 24, fig. 3. A slightly smaller proportion of those mock arbitrators allocated some of the winning party's costs to the losing party, which seems favorable to the losing party, but only in an incremental way. *Id.* Less than one-third of those mock arbitrators would split costs evenly, which represents the most decisively positive outcome for the losing party.

predisposition may appear incrementally on collateral issues where the law is silent, where discretion is at its height, and where the arbitrators are not already wedded to principles that require contrary decisions. The proposition seems unremarkable, and a far cry from the broader claim that party-appointed arbitrators generally incline toward the parties who appoint them.

As a second example of possible over-extrapolation, the organizers of the experiment told mock arbitrators that they were party-appointed arbitrators and solicited their views on the allocation of costs *without making any attempt to replicate the process of deliberation with co-arbitrators*. The scenario is not realistic and ignores a definitive step in the collegial decisionmaking process,[181] which provides a critical check against prejudgment and bias,[182] and also represents the context in which individual opinions are most likely to be challenged and to shift.[183] In other words, the study captures how party-appointed arbitrators might behave if left unchecked. But no matter how party-appointed arbitrators might incline on ancillary, discretionary issues before the start of

Id. Also, when appointed by the winning party, mock arbitrators seemed only 20 percent more likely to allocate all costs to the losing party and only 20 percent less likely to allocate only some of the costs to the losing party. *Id.* at 31–32. While this may represent a meaningful number, it seems to indicate an incremental, as opposed to a decisive, level of predisposition on the relevant topics.

181. *See* Richard M. Mosk, *Deliberations of Arbitrators*, *in* PRACTISING VIRTUE, *supra* note 153, at 486 ("An important component of any dispute resolution mechanism involving more than one decision-maker is the deliberation among those decision-makers.").

182. An arbitrator who seeks to persuade other members of a tribunal has to lay out convincing facts and arguments to support his or her position on the merits. Yves Derains, *The Arbitrator's Deliberation*, 27 AM. U. INT'L L. REV. 911, 922 (2012). In other words, deliberations among co-arbitrators mean that "the 'quality of justice' is likely to be less subject to the predispositions and characteristics of an individual member and ensure a greater testing of points by discussion and debate." NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 250 (5th ed. 2009). To the extent that convincing justifications are lacking, and the arbitrator appears to be motivated by bias, that person's influence on the deliberations will vanish. *Id.* at 266 (warning that appointment of partisan arbitrators tends to be counterproductive because "the remaining arbitrators will very soon perceive what is happening and the influence of the partisan arbitrator during deliberations will be diminished"); ROGERS, *supra* note 28, at 331 ("[T]he party-appointed arbitrator who acts overly aggressive or too overtly partisan will end up alienating other members of the tribunal and undermining their own ability to effectively influence the tribunal's decision-making."); Brower & Rosenberg, *supra* note 112, at 632 ("[A]n arbitrator's reputation for apparent bias will undercut his or her credibility (hence influence) within a tribunal.").

183. *See* Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, 24 AM. REV. INT'L ARB. 487, 510 (2013) (emphasizing that group decisionmaking helps to neutralize cognitive blinders, that groups can remember more facts than individuals, and that deliberations among three people with different backgrounds and insights can provide group members with a more complete picture, which seems likely to result in better decisions than would be reached by any single member of the group). Put in slightly different terms, the "absence of confrontation" inherent in the deliberations of a sole arbitrator entails the twin risks of "prejudging" and also "being superficial." Derains, *supra* note 182, at 922.

deliberations, the fact is that in real situations they do not act as partisans during deliberations. To the contrary, they end up joining unanimous decisions in the overwhelming majority of cases.[184]

This raises the question of why party-appointed arbitrators who are constantly on the market for appointments do not establish voting records that would mark themselves as reliable supporters of appointing parties. Another empirical study begins by hypothesizing that arbitrators act strategically and behave in ways that are calculated to maximize their *overall* professional welfare.[185] In so doing, the study hypothesizes that arbitrators not only have to appeal to appointing parties; they must also behave in ways that will maintain and enhance their stature among a small and tightly knit community of elite arbitrators in which membership represents a key requirement for professional advancement.[186]

Turning to the effects of dissenting opinions on stature in that small and tightly knit community, one should recall that dissents do not just impose direct costs on dissenting arbitrators, who must invest time and effort in drafting persuasive dissenting opinions.[187] Dissenting opinions also impose direct costs on the majority,[188] particularly the presiding

184. *See supra* notes 162–164 and accompanying text (discussing the results of van den Berg's and other studies).

185. Strezhnev, *supra* note 164, at 8.

186. *Id.* at 8–9; *see* Park, *supra* note 143, at 653 (recognizing that "[t]here may be some truth to the . . . assertion that arbitrators want to see cases decided in favor of the parties which appointed them," but explaining that "an even stronger incentive exists to safeguard professional status," and emphasizing that "[i]ndividuals who serve as arbitrators care deeply about the respect of colleagues" and that "few enticements to good behavior are stronger for those who sit regularly as arbitrators than a colleague's appreciation of one's ability and integrity"); *see also* ROGERS, *supra* note 28, at 328–29 (explaining that "the field of international arbitrators continues to be dominated by an elite group of insiders" for whom "[c]ollegiality, familiarity, and agreeability are important professional credentials . . . and important qualities for career advancement"); Kapeliuk, *supra* note 150, at 68 (observing that individuals "who form a part of a close group of elite arbitrators . . . develop interpersonal dynamics that lead them to act collegially," and that "[t]he more these arbitrators serve on arbitration tribunals and the more intermingled they are in arbitration panels, the more one may expect collegiality between them."); *cf.* Yackee, *supra* note 27, at 1611 (observing that the development of international investment law "has been placed primarily in the hands of an exceedingly small pool of super-elite" international lawyers). Multiple studies have concluded that a small group of elite arbitrators overwhelmingly populate investment treaty tribunals. *See* Kapeliuk, *supra* note 150, at 75–76 (explaining that a group of twenty-six elite arbitrators represented just 14.9 percent of arbitrators appointed in a dataset of 131 arbitrations, but that at least one elite arbitrator sat on the tribunal in 80.2 percent of the cases); PIA EBERHARDT & CECILIA OLIVET, PROFITING FROM INJUSTICE 38 (2012) (ebook), https://www.tni.org/files/download/profitingfrominjustice.pdf (asserting that an elite group of just fifteen arbitrators have decided 55 percent of all known investment treaty disputes, 64 percent of disputes with $100 million or more in controversy, and 75 percent of disputes with $4 billion or more in controversy).

187. *See* Strezhnev, *supra* note 164, at 9 (noting that "dissents can be costly," due in part to the "additional mental work [required] to write a defensible dissent").

188. *See id.* at 4 (explaining that dissents force the majority to respond to open attack on its

arbitrator,[189] who may feel embarrassment about the failure to build consensus,[190] annoyance at criticisms directed at his or her award,[191] as well as concern about extra work,[192] delay, increased probability of legal challenges to the award,[193] and decreased likelihood of voluntary compliance by the losing party.[194]

As a result of direct costs imposed on the majority, dissenting opinions also visit indirect costs on dissenting arbitrators, who may find their relationships with co-arbitrators tested; their reputations for cooperation, temperance, analysis, and/or persuasiveness tarnished; and their standing diminished within the small community of elite arbitrators.[195] To the extent that individual arbitrators do not merely dissent, but dissent frequently, one would expect the costs to increase not just arithmetically, but geometrically. In addition to the accumulation of direct and indirect costs in individual cases, a frequently dissenting arbitrator would likely come to be seen as an individual who lacks influence in deliberations.[196]

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reasoning, that they reduce the precedential value of majority decisions, and that they decrease the likelihood of voluntary compliance and enforcement); *id.* at 9 ("[D]issents force majority opinion writers to work harder to credibl[y] justify the decision and respond to the dissenter.").

189. Sheppard & Kapeliuk-Klinger, *supra* note 164, at 332.

190. *Id.*

191. *Id.*; *see* Strezhnev, *supra* note 164, at 4 (explaining that dissents can force the majority to respond to "an open attack on its reasoning"); *id.* at 9 (explaining that "arbitrators on non-unanimous panels must sometimes confront vicious criticism").

192. *See* Sheppard & Kapeliuk-Klinger, *supra* note 164, at 332 (referring to the "majority's efforts to justify the decision in light of the dissenting opinion"); Strezhnev, *supra* note 164, at 9 (indicating that dissents "force majority opinion writers to work harder to credibl[y] justify the decision and respond to the dissenter").

193. *See* Sheppard & Kapeliuk-Klinger, *supra* note 164, at 333 (indicating that the majority "may feel that the dissent is laying the groundwork for a challenge"); Strezhnev, *supra* note 164, at 4, 9 (explaining that dissents can increase the likelihood of annulment, as well as obstacles in enforcement proceedings).

194. *See* Strezhnev, *supra* note 164, at 9 (indicating that dissents can weaken acceptance of the award by both parties).

195. *See id.* at 6, 9 (discussing the social and reputational costs to the dissenter in a professional context where arbitrators "have incentives not to cultivate animosity among their peers"); *see also* RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 120–21 (1990) ("Every dissent is an irritant to the members of the majority; hence a judge who dissents at the drop of a hat jeopardizes the esteem of his colleagues.").

196. Judge Patricia M. Wald has described dissenting opinions as admissions that the authors have "not been able to convince [their] colleagues." Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1412 (1995). *See* Michael Frost, *Justice Scalia's Rhetoric of Dissent: A Greco-Roman Analysis of Scalia's Advocacy in the VMI Case*, 91 KY. L.J. 167, 173 (2002) ("As a rule, dissenters are unhappy. After all, they have not persuaded their colleagues to their point of view."). One author describes the first year of Justice John Paul Stevens on the United States Supreme Court, during which time Justice Stevens set the record for the number of lone dissents by a new justice, and quotes the words that journalist Linda Greenhouse used to describe him, including "unpredictable, maverick, a wild card, a loner." Christopher E. Smith, *The Roles of Justice John Paul Stevens in Criminal Justice Cases*, 39

That would further degrade the person's reputation among peers, as well as his or her appeal to parties eager to appoint someone with the capacity to shape deliberations.[197] A pattern of frequent dissents might also reveal an arbitrator's predisposition to certain types of parties, or prejudgment on certain types of issues, which would increase the arbitrator's vulnerability to challenge and removal based on justifiable doubts about independence or impartiality.[198] Even if not removed, the arbitrator might lose the capacity for influence on tribunals not just as a descriptive matter, but also for normative reasons, which would be much more difficult to rehabilitate.[199]

Taking the analysis one step further, frequent dissents not just by individual party-appointed arbitrators, but by the general class of party-appointed arbitrators, would raise concerns about structural bias.[200] The perception of structural bias might, in turn, generate support for the abolition of investor-state arbitration and its replacement with a permanent investment court staffed by so-called "independent" judges.[201] As outlined above, this is no fantasy, but a key aspiration of the EU's investment policy and the solution actually achieved in

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SUFFOLK U. L. REV. 719, 721 (2006). These are not words that a party or counsel wants to hear when considering appointment of an arbitrator for an important matter.

197. *See* Brower & Schill, *supra* note 123, at 493 (opining that "[n]o discerning party or counsel will want to appoint as arbitrator someone unlikely to enjoy sincere respect for intellectual integrity within a tribunal"); *see also* Park, *supra* note 143, at 658 ("Although teenage boys may . . . attract adolescent girls by showing themselves dangerous and daring, no similar rule works for . . . arbitrators. Rumors of . . . partiality do [not] enhance the credibility of professional decisionmakers, who normally benefit from reputations for reliability and accuracy. Bad arbitrators exist, but their lack of integrity does them no favors.").

198. *Cf.* ROGERS, *supra* note 28, at 325 (explaining that the "polarization of investment arbitration has led to allegations that certain arbitrators are 'ringers' for one side or the other, and that those who are routinely appointed by investors are biased against states," and observing that a "number of high-profile challenges to investment arbitrators have added fuel to this fire").

199. As explained by Judge Brower and Professor Schill: "If an arbitrator becomes branded as distinctly 'pro-state' or 'pro-investor,' party appointments will be channeled accordingly. In the latter case that individual's reputation for such apparent bias will undercut his or her influence within tribunals, which over time inevitably will decrease that individual's market appeal." Brower & Schill, *supra* note 123, at 493; *see also* Sheppard & Kapeliuk-Klinger, *supra* note 164, at 333 (indicating that "when dissents are the result of bias, their costs to dissenting arbitrators might be significant" even for party-appointed arbitrators in future arbitrations because, "even if the arbitrator is selected by a party in future arbitrations, his/her influence among other members of the tribunal will be diminished").

200. *See* Strezhnev, *supra* note 164, at 2, 7 (indicating that if arbitrators were acting as perfect agents for appointing parties, one would see high rates of dissenting opinions and, in fact, 2-1 decisions might come to represent the typical outcome).

201. *See* VAN HARTEN, *supra* note 26, at 167–75, 180–84 (discussing the features of investment treaty arbitration that supposedly create structural impediments to the independence of arbitrators, and proposing an international investment court to remedy those perceived flaws); *see also* Rogers, *supra* note 27, at 241 (describing elimination of investor-state arbitration and its replacement by a permanent investment court as "the most radical reform proposal of all").

CETA.[202] Assuming that party-appointed arbitrators act strategically and think long-term about their own professional welfare, one would expect them to avoid behavior that might imperil the continuation of investor-state arbitration as an institution.[203] For this reason, party-appointed arbitrators have a vested, strategic, and long-term interest in *not* acting like politicians.

Consistent with the preceding analysis, the author of the empirical study on strategic behavior found that dissenting opinions can be costly for the career prospects of arbitrators.[204] Arbitrators who dissent in investment treaty cases are three times less likely to secure future appointments as presiding arbitrator.[205] However, the study did not find that dissenting opinions have a negative effect on future appointments as party-appointed arbitrators, which led the author of the study to hypothesize that appointing parties may view dissenters as reliable advocates and, thus, favor them for unilateral appointments.[206] According to the person who conducted the study, the costs that dissents impose on peer relationships may be offset by the benefits of signaling reliable support for claimants or respondents.[207] To the extent that the hypothesis seems plausible, the fact is that party-appointed arbitrators seem willing to take that gamble only in a small percentage of cases.[208] They must know that regular patterns of affiliation bias would be disastrous for them individually, and for the institution of investor-state arbitration on which they depend.[209]

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202. *See supra* notes 92–96 and accompanying text (discussing the EU's pursuit of an investment court and the implementation of that policy in CETA).

203. *See* Schneiderman*, supra* note 80, at 254 (indicating that the tribunals in *Loewen Group, Inc. v. United States* and in *Methanex Corp. v. United States* rendered decisions based on aberrational reasoning that may have been designed to avoid the "blowback" with which Congress would have greeted decisions against the United States); *see also* Brower, *supra* note 87, at 191–92 (describing two lines of cases decided by tribunals under NAFTA's investment chapter, and concluding that the more recent trend, overlapping with the decisions cited by Schneiderman, "represent[s] a decisive shift away from the promotion of commercial certainty for investors and towards preservation of regulatory space for host states"); Anthea Roberts, *Would a Multilateral Investment Court Be Biased? Shifting to a Treaty Party Frame of Analysis*, EJIL: *TALK!* (Apr. 28, 2017), https://www.ejiltalk.org/would-a-multilateral-investment-court-be-biased-shifting-to-a-treaty-party-framework-of-analysis/ ("If the system is going to endure, there needs to be reasonable concurrence between those who create the law (the treaty parties) and those who interpret and apply the law (investment tribunals). If there is systematic divergence . . . the treaty parties will . . . defect in increasing numbers.").

204. Strezhnev, *supra* note 164, at 5.

205. *Id.* at 5, 14.

206. *Id.*

207. *Id.*

208. *See supra* notes 162–164 and accompanying text (discussing the low frequency of dissents in investment treaty arbitration).

209. *See* Sweet, *supra* note 113, at 21 (declaring it "suicidal for arbitrators to proceed . . . with

In this respect, arbitrators in investment treaty disputes probably act more like elected judges than politicians in democratic systems. While this may still leave room for criticism and debate, the fact is that the traditional format for investor-state arbitration provides a significant counterweight to the problems of democratic dysfunction in host states, and almost certainly does that more effectively than a system controlled solely by the afflicted governments themselves.

CONCLUSION

In the end, the point is that investment treaty disputes often represent political disputes for host states.[210] The central dilemma facing ISDS today involves the fact that the architects of investment treaty arbitration conceived of the process as a means of "depoliticizing" controversies between foreign investors and host states.[211] Evidently, it often is not possible to eliminate the political character or the political importance of those disputes for host states. In fact, "depoliticization" occurs only in the sense of removing controversies from the normal political processes of host states and subjecting them to an international legal process,[212] where

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a heavy thumb pressed permanently down on the investors' side of the scale in cases with very high political stakes").

210. *See supra* notes 1, 6–28 and accompanying text (discussing the political character of investment treaty disputes).

211. *See, e.g.*, Rachel Brewster, *Pricing Compliance: When Formal Remedies Displace Reputational Sanctions*, 54 HARV. INT'L L.J. 259, 295 (2013) ("Part of the political function of bilateral investment treaties is to 'depoliticize' investment disputes."); William S. Dodge, *Investor-State Dispute Settlement Between Developed Countries; Reflections on the Australia-United States Free Trade Agreement*, 39 VAND. J. TRANSNAT'L L. 1, 14 (2006) ("BITs offered foreign investors the benefits of avoiding domestic courts in less developed countries and of using a depoliticized process in which they could press their own claims without intermediation by their home states."); Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future?*, 12 U.C. DAVIS J. INT'L L. & POL'Y 47, 70 (2005) (explaining that "[i]nvestment treaty arbitration was created to provide a depoliticized dispute resolution process for the adjudication of public law rights"); Anna T. Katselas, *Exit, Voice and Loyalty in Investment Treaty Arbitration*, 93 NEB. L. REV. 313, 317 (2014) (indicating that the "goal is often described as the 'depoliticization' of international investment disputes"); Daniel M. Price, *NAFTA Chapter 11—Private Party vs. Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve?*, 26 CAN.-U.S. L.J. 107, 112 (2000) (opining that the intent of BITs was to depoliticize investment disputes); Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 HARV. INT'L L.J. 353, 357 (2015) (describing the depoliticization of investment disputes as one of the two main goals of investment treaties); Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats*, 29 INT'L LAW. 389, 406 (1995) (recognizing that "[d]epoliticization has been the goal of many investment treaties").

212. *See* Brower, *supra* note 1, at 367–68 (quoting Salacuse, *supra* note 28, at 156) (describing depoliticization in terms of "the establishment of a legal regime empowering foreign investors to 'resist the forces of change often demanded by the political and economic life in host countries'"); *cf.* Price, *supra* note 211, at 112 (explaining that BITs and NAFTA's investment chapter empower investors to use arbitration as a means of taking investment disputes "out of the political realm");

the decisionmakers lack direct political accountability,[213] often have little direct experience with the social, political, and economic context for the underlying events,[214] and have no mandate to determine whether the challenged measures have produced beneficial outcomes for the greatest number of people in host states.[215] In this sense, investment treaty arbitration truly is anti-democratic, and one can understand how it tends to provoke indignation among stakeholders bent on having their way in a democratic system.

At the same time, one cannot deny the need for safeguards against the excesses and dysfunctions of political decisionmaking in democratic systems, as evidenced by the existence of constitutions, constitutional courts, and constitutional jurisprudence.[216] The extent of limits on democratic decisionmaking, and the selection of institutions to police those limits, represent important questions for any state, or group of states. However, in choosing among rules and institutions, surely it makes

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Vitalius Tumonis, *Adjudication Fallacies: The Role of International Courts in Interstate Dispute Settlement*, 31 WIS. INT'L L.J. 35, 43 (2014) ("Often, whenever a State brings a case against another State, it will be seen as the escalation of a dispute to the legal plane and not its settlement. After litigation, the loser will usually feel resentful, and this resentment rarely helps settlement of the underlying dispute.").

213. *See* Barnali Choudhoury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 819 (2008) (opining that "[i]nvestment arbitrators . . . are not accountable to the public"); Franck, *supra* note 9, at 76 (indicating that investment treaty "[a]rbitrators make decisions of international significance but are not necessarily accountable to the public"); Anna T. Katselas, *Do Investment Treaties Prescribe a Deferential Standard of Review?*, 34 MICH. J. INT'L L. 87, 148 (2012) (asserting that "[i]nvestment tribunals are not politically accountable").

214. *See* Alvarez, *supra* note 174, at 452 (indicating that "high profile decisions taken by a Government in the midst of a crisis can be second-guessed by persons at some geographical and temporal distance from that crisis"); Schneiderman, *supra* note 153, at 411–12 (quoting YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES 69 (2002)) (describing the inclination of leading international arbitrators to prefer an analytical approach that keeps them "meticulously aside from the place of all the social relations that produced the actual conflict"); *see also* Burke-White & von Staden, *supra* note 26, at 375–76 (expressing support for analytical tools designed to preserve the discretion of states in dealing with public emergencies and to avoid substitution of "a tribunal's determination—often removed from the events and facts—for a state's own analysis").

215. *See* Alvarez, *supra* note 174, at 452 (observing that the mandate of investment treaty tribunals is to decide whether the host state "has injured a single foreign investor," not to determine what the government should have done or whether its "'emergency' actions . . . were the most beneficial to the greatest number" of stakeholders).

216. *See, e.g.*, J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 785 (1971) (opining that the U.S. Constitution "must serve as a 'living' safeguard against certain sorts of excesses on the part of elected officials misled . . . by inflamed emotions and calculations of immediate consequences"); Maria Foscarinis, Note, *Toward a Constitutional Definition of Punishment*, 80 COLUM. L. REV. 1667, 1673 (1980) (opining that certain provisions of the U.S. Constitution are "part of a . . . scheme designed to safeguard individuals from governmental excesses").

sense to consider the possibility that stakeholders and officeholders systematically make irrational choices on political issues in democratic systems.[217]

Even if one concludes that the time has come for rules and institutions that place fewer limits on democratic decisionmaking by host states, it equally makes sense to consider whether the proposed reforms will in fact draw large investors and important disputes into a new public justice system, or whether the reforms will encourage their retreat toward old patterns of private ordering, where large investors seem likely to have more leverage, and where structural arrangements create fewer toeholds for consideration of the public interest.[218]

Viewed from the perspectives outlined above, the escalation of public concerns about investment treaties and investment treaty arbitration makes sense, even though the substance of those concerns appears to have little basis in fact. While a more rational course would be to moderate criticism of investment treaty arbitration, and to exercise greater caution in approaching the EU's proposal for a permanent investment court, those options seem politically implausible given the current environment on both sides of the Atlantic.

217. *See supra* notes 29–71 and accompanying text (explaining that stakeholders and officeholders make irrational decisions on political issues in democratic systems).

218. *See supra* notes 109–126 and accompanying text (explaining why the proposed investment court seems likely to repel large investors, who have the leverage to bargain for contractual terms and dispute settlement clauses more favorable to their private interests and, arguably, less favorable to the public interest).