
INSTITUTIONAL LOCK-IN WITHIN THE FIELD OF INVESTMENT ARBITRATION

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ABSTRACT

This Article examines the likelihood of the emergence of an alternative center for investment arbitration—a very much debated, if not favored, option in some policy circles. We argue that given the current market dominance of the International Centre for Settlement of Investment Disputes (“ICSID”), the emergence of institutional competition from other regions of the world is constrained by network effects.

Network effects arise when the value that consumers derive from a good increases as others also use the good. (Language is the classic example.) As more users adopt the good and its utility is enhanced, additional consumers flock to the good, creating positive feedback. When a market has settled upon a single standard, the market is said to have “tipped.” This gives rise to a monopoly-type situation that

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prevents potential rivals from successfully challenging the market dominance of the prevailing standard, creating what is known as “institutional lock-in.”

After explaining the concept of institutional lock-in, we explore its salience in the investment arbitration realm. We find that this model is robust and its impact discernible in the current investment arbitration environment. Notwithstanding this finding, certain exogenous events could substantially reduce or even annihilate this effect. To this end, potential “disruptive events” — such as the European Union’s push for an investment “court,” potential competition from the Permanent Court of Arbitration (“PCA”) or other arbitration centers, and unforeseen legislative changes — are explored. These events could undermine the market dominance of ICSID and trigger either a large-scale coalescence around an alternative institution or, rather more likely, the parceling out of investment arbitration among multiple competitors until the market again coalesces around a new standard. However, we conclude that in the absence of a strong exogenous shock, the institutional lock-in of ICSID will be difficult to dislodge.

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1. INTRODUCTION

In many ways investment arbitration is a unique form of arbitration in that it involves private entities settling legal disputes with state actors. It is also a relatively new form of arbitration. It only gained wide usage starting in the late 1960s when the first bilateral investment treaties (“BITs”) containing investment arbitration were created,¹ and the first investment treaty arbitration award was not issued until 1990.² Yet investment arbitration has now become the chief means of dispute settlement between foreign investors and states – it is how private actors redress their legal rights beneath the awesome shadow of state power.

Presently, the world of international investment arbitration is dominated by a single center for dispute resolution – the International Centre for Settlement of Investment Disputes (“ICSID”), which is headquartered in the United States in Washington D.C. It

¹ Karl-Heinz Böckstiegel, *Commercial and Investment Arbitration: How Different are They Today?* 28 *ARB. INT'L* 577, 577-78 (2012). Investment arbitrations also were facilitated when the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (i.e., the ICSID Convention), a World Bank sponsored multilateral treaty, was opened for signature in 1965. Investment arbitration can involve an arbitration based on the violation of an investment treaty, it can be based on an investment contract between a host state and a foreign investor, or it can arise from the investment law of the state hosting the investment. See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25, Mar. 18, 1965, 17 U.S.T. 1270 [hereinafter Convention on the Settlement of Investment Disputes].

² Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, (June 27, 1990), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C140/DC676_En.pdf [<https://perma.cc/PK9N-PFX8>].

is, in practice, an institutional near-monopoly in the field of investment arbitration.³ This Article examines the likelihood of the emergence of an alternative center for investment arbitration—a very much debated, if not favored, option in some policy circles—from a law and economics perspective, an analytical tack that provides a great deal of explanatory power, as we will show.

We argue that given the current market dominance of ICSID, the emergence of institutional competition from other regions of the world is constrained by *network externalities* (i.e., what is known as *network effects* in the literature).⁴ Network effects arise where the implicit value of a service (or product) increases as the number of other agents using the same service grows. As more users use the service and its utility is enhanced, additional consumers flock to the service, and on it goes, creating a positive feedback loop. (The process is also captured by the concept of increasing returns.)⁵ When a market has settled upon a single standard for the service with all competitors eliminated or significantly marginalized, the market is said to have “tipped.”⁶ Once a market has tipped, it creates a monopoly-type situation that prevents potential rivals from successfully challenging

³ The term “monopoly” here is carefully deployed. ICSID may be understood as a monopoly in that the network externalities that inhere in the market for investment arbitration inhibit market competition, creating barriers to entry. For all intents and purposes, the dynamic functions as a monopoly. ICSID is not, however, a monopoly in the formal sense of a firm strategically engaging in anti-competitive practices.

⁴ We use the terms “network externalities” and “network effects” interchangeably throughout the Article.

⁵ For the foundational literature on network effects and its focus on path dependence, see Paul A. David, *Clio and the Economics of QWERTY*, 75 AM. ECON. REV. 332 (1985); Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424 (1985); W. Brian Arthur, *Competing Technologies, Increasing Returns, and Lock-In by Historical Events*, 99 ECON. J. 116 (1989); W. Brian Arthur, *Positive Feedbacks in the Economy*, 262 SCI. AM. 92 (1990); W. BRIAN ARTHUR, *INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY* (1994); S. J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In, and History*, 11 J.L. ECON. & ORG. 205 (1995); see also Paul A. David, *Why are Institutions the ‘Carriers of History’?: Path Dependence and the Evolution of Conventions, Organizations and Institutions*, 5 STRUCTURAL CHANGE & ECON. DYNAMICS 205 (1994).

⁶ William Page & John E. Lopatka, *Network Externalities*, in *ENCYCLOPAEDIA OF LAW AND ECONOMICS VOLUME I: THE HISTORY AND METHODOLOGY OF LAW AND*

the market dominance of the prevailing standard. The market for investment arbitration, we argue, has tipped.

Our argument draws on the concept of *institutional lock-in*, first put forward by Douglass C. North, whose work in the area won him a Nobel Prize in 1993.⁷ North argues that institutional lock-in occurs because the constitutive nature of institutions – what North refers to as “the interdependent web of an institutional matrix” – generates massive increasing returns.⁸ This process of increasing returns causes institutional frameworks to gradually become deeply entrenched over time and, as a consequence, more difficult to dislodge.⁹ Consequently, institutions that already enjoy a foothold “generate powerful inducements that reinforce their own stability and further development.”¹⁰ Because ICSID presently dominates the investment arbitration service world, which can be understood as a market for specific legal dispute resolution services, network effects are being generated that bolster and further entrench this market dominance, stymieing and precluding competition from

ECONOMICS 952, 960 (Boudwijn Bouckaert & Gerrit De Geest eds., 2000). For the concept of tipping, see also THOMAS C. SCHELLING, *MICROMOTIVES AND MACROBEHAVIOR* 92–94, 98–99 (1978).

⁷ See DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 73–104 (1990) (positing that institutional development may produce a path-dependent pattern of development over time); see also Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 *AM. POL. SCI. REV.* 251 (2000) (arguing political institutions are particularly vulnerable to this process); Paul Pierson, *Not Just What, but When: Timing and Sequence in Political Processes*, 14 *STUD. AM. POL. DEV.* 72 (2000); Kathleen Thelen, *How Institutions Evolve: Insight from Comparative Historical Analysis*, in *COMPARATIVE HISTORICAL ANALYSIS IN THE SOCIAL SCIENCES* 208–40 (James Mahoney & Dietrich Rueschemeyer eds., 2003) (discussing the “feedback mechanisms” that steer institutional and policy trajectories over time).

⁸ NORTH, *supra* note 7, at 95. North, however, defines institutions in a very expansive manner. See NORTH, *infra* note 11.

⁹ *Id.*

¹⁰ Paul Pierson, *Coping with Permanent Austerity: Welfare State Restructuring in Affluent Democracies*, in *THE NEW POLITICS OF THE WELFARE STATE*, 410, 415 (Paul Pierson ed., 2001).

elsewhere. As a result, the market for investment arbitration services is, we argue, experiencing a form of institutional lock-in.¹¹

While we feel this model is robust and its impact discernible in the current investment arbitration environment, certain exogenous events could occur that may substantially reduce or altogether annihilate this effect. The possibility of such “disruptive events” does not contradict the model; rather, it renders the model more nuanced. Network effects suggest that the robust emergence of an alternative center for investment arbitration would prove extremely difficult; however, given several unknown factors, it remains a possibility. For example, the European Union has succeeded in establishing a “permanent” court and “Appellate Body” in the texts of the EU-

¹¹ The definition of an “institution” as North uses it, however, bears explanation. While the idea encompasses conventional organizations such as universities, trade unions, churches, and corporations, North understands “institutions” in a very expansive sense: “Institutions are the rules of the game in society or, more formally, are the humanly devised constraints that shape human interaction.” NORTH, *supra* note 7, at 3. Institutions, North informs us, “include any form of constraint that human beings devise to shape human interaction They can be either . . . formal constraints—such as rules that human beings devise—and informal constraints—such as conventions and codes of behaviour. Institutions may be created, as was the United States Constitution; or they may simply evolve over time, as does the common law.” *Id.* at 4.

In this sweeping sense, institutions may be better understood as “a special type of social structure that involves potentially codifiable and . . . normative rules of interpretation and behavior.” Geoffrey M. Hodgson, *What are Institutions?*, 11 J. ECON. ISSUES 1, 4 (2006). They are frameworks wherein “[m]embers of the relevant community share tacit or explicit knowledge of these rules.” *Id.* at 3. This broad understanding of institutions can be traced back to Thorstein Veblen in the early literature on institutionalism—Veblen defined institutions as the “settled habits of thought common to the generality of men.” Thorstein Veblen, *The Limitations of Marginal Utility*, 17 J. POL. ECON. 620, 626 (1909). While North clearly distinguishes between organizations and institutions, organizations can be understood as a subset of institutions. See 1 THE ENCYCLOPEDIA OF POLITICAL ECONOMY: A-K 535 (Phillip Anthony O’Hara ed., 1999). We use the term “institution” here in its narrower and more conventional sense (i.e., as a hierarchical organizational arrangement that regulates a form of human interaction) in this particular case, disputes related to investment arbitration. Thus, we diverge from North in that we are not so much concerned with organizations becoming locked into potentially sub-optimal rules and norms—rather, we are interested in how actors become locked into an organization itself—i.e., ICSID.

Vietnam Free Trade Agreement (“FTA”)¹² and the Comprehensive Trade and Economic Agreement between Canada and the European Union (“CETA”) – and has proposed that a similar body be included in the Transatlantic Trade and Investment Partnership (“T-TIP”).¹³

The question is which institution (or institutions) will host these bodies, and whether these agreements ever enter into force. At present, the European Union has proposed either the Permanent Court of Arbitration (“PCA”) or ICSID as administrators in both the T-TIP and the EU-Vietnam FTA, but ICSID alone has been chosen as the administering institution in CETA; however, in principle, any number of institutions may be selected in future agreements. Whether or not the European Union becomes a party to ICSID Convention might play a role in ICSID’s continued dominance. Also considered are regional preferences, for instance, Singapore has taken initiatives to establish itself as a premier center for commercial arbitration and has recently released rules specific to investment arbitration.¹⁴

The Singapore International Arbitration Centre, some similar institution, or even a combination of institutions, may yet succeed in displacing the market dominance of ICSID. Such exogenous factors would short-circuit the network effect pressures in the market for investment arbitration, as would other potentially disruptive events. The conclusion we reach is that network effects are indeed currently at play and powerfully reinforce the market dominance of ICSID. However, while this dominance is likely to continue in the

¹² Catharine Titi, *The European Union’s Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead*, 14 *TRANSNAT’L DISP. MGMT.* 1 (2017).

¹³ See REASSERTION OF CONTROL OVER THE INVESTMENT TREATY REGIME 119 (Andreas Kulick ed., 2016). Now that the Court of Justice of the European Union has determined that investor-state dispute settlement and portfolio investment are subject to shared competence, those portions of the EU’s FTAs will not enter into force until they are approved by the individual EU Member States. See *infra* Section 4.2.

¹⁴ Singapore Int’l Arbitration Centre [SIAC], *SIAC IA Rules 2017*, [hereinafter SIAC, *SIAC IA Rules 2017*] <http://www.siac.org.sg/our-rules/rules/siac-ia-rules-2017> [<https://perma.cc/D5HA-HW98>] (last visited Feb. 9, 2018). For a more general discussion of the increasing importance of commercial arbitration in various Asian countries, see SIMON GREENBERG, CHRISTOPHER KEE & J. ROMESH WEERAMANTRY, *INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE* 36–37 (2011).

foreseeable future, the long-term continuation of ICSID's dominance in the market for investment arbitration is by no means guaranteed.

We develop our argument in three parts. Section 2 outlines how network effects operate, and describes the related concept of institutional lock-in. Section 3—the heart of our argument—argues that network effects are manifest with respect to the dominance of ICSID in the market for investment arbitration. To this end, three sources of increasing returns are examined: the first relates to the impression of institutional legitimacy; the second relates to predictability and familiarity regarding the rules and procedures of an arbitral institution; and the third concerns the general quality and scope of arbitral service. The critical issue of sub-optimal institutional lock-in is also briefly discussed. After constructing the core of our argument, Section 3 considers the variety of exogenous shocks that may disrupt institutional lock-in—what we call “disruptive events.” Several possibilities are considered, such as the European Union's push for an investment “court,” potential competition from the PCA or other arbitration centers, and unforeseen legislative changes. Section 5 concludes the Article.

2. NETWORK EFFECTS AND INSTITUTIONAL LOCK-IN UNPACKED

2.1. *Network Effects*

Network externalities, or network effects, were first discussed as early as 1974 by Jeffrey Rohlfs, who identified the phenomenon in the context of telephone systems.¹⁵ The idea was taken up again in the mid 1980s, with Katz and Shapiro's foundational work on the subject, and has since been further explored in the literature.¹⁶ The

¹⁵ Jeffrey Rohlfs, *A Theory of Interdependent Demand for a Communications Service*, 5 *BELL J. ECON. & MGMT. SCI.* 16 (1974).

¹⁶ See Katz & Shapiro, *supra* note 5.

idea of network effects is relatively straightforward: A network effect occurs where the implicit value of a product or service increases as the number of other agents using the product or service grows, which in turn draws more users.¹⁷ This creates a dynamic of increasing returns. The often-used example of a network effect is language.¹⁸ Language is fundamentally predisposed to a network effect.¹⁹ The more people who, for example, speak English, the more useful English is to each one of its speakers. As English grows in popularity, so too does its value, encouraging further growth in a “snowball-like” fashion.²⁰

There are numerous other examples of network effects – e.g., telephone networks, railway gauges, computer software, credit cards, videotape standards, currencies, electrical outlets, screw thread sizes, or even time zones.²¹ The dynamic reinforces burgeoning

¹⁷ See S.J. Liebowitz & Stephen E. Margolis, *Network Effects and Externalities*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 671, 671 (Peter Newman ed., 1998).

¹⁸ For a very good overview of other network effect examples in a wide range of contexts, see Joseph Ferrell & Paul Klemperer, *Coordination and Lock-In: Competition and Switching Costs and Network Effects*, 3 HANDBOOK INDUS. ORG. 1970 (2006).

¹⁹ Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 489 (1998) (“Language, for example, is the fundamental medium of communication and could be said to have both negligible inherent value to the first speaker and increasing value over the range of additional speakers.”); see also S.J. Liebowitz & Stephen E. Margolis, *Network Externalities: An Uncommon Tragedy*, 8 J. ECON. PERSP. 133, 136 (1994); Amitai Aviram, *A Network Effects Analysis of Private Ordering* (Berkeley Program in Law and Economics, Working Paper Series, 2003) 15. For a more in-depth analysis of the network effects of language, see, e.g., Jeffery Church & Ian King, *Bilingualism and Network Externalities*, 26 CAN. J. ECON. 337 (1993).

²⁰ See Bryan Druzin, *Buying Commercial Law: Choice of Law, Choice of Forum, and Network Externalities*, 18 TUL. J. INT’L & COMP. L. 131, 151 (2009) (arguing that network effects induce standardization in choice of law and choice of forum clauses in transnational commercial contracts).

²¹ For a very good overview of other network effect examples in a wide range of contexts, see Ferrell & Klemperer, *supra* note 18. For other inquiries along these lines, see Dominique Foray, *The Dynamic Implications of Increasing Returns: Technological Change and Path Dependent Inefficiency*, 15 INT’L J. INDUS. ORG. 733 (1997); JAMES SIMMIE, PATH DEPENDENCE AND NEW PATH CREATION IN RENEWABLE ENERGY TECHNOLOGIES 9 (2016).

patterns, causing the patterns to become progressively more entrenched over time, which ultimately gives rise to a monolithic standard. Markets subject to increasing returns will initially exhibit multiple equilibria, but will “finally lock-in to a monopoly with one standard cornering the entire market.”²² Thus one technology that “by chance gains an early lead in adoption may eventually ‘corner the market’ of potential adopters, with the other technologies becoming locked out.”²³ Network effect pressure renders a highly interconnected system unable to sustain multiple equilibria for long periods because the force of network effects invariably pushes the market towards a single dominant standard—in this case, a dominant standard in the market for investment arbitration services. The process may create institutional lock-in.

2.2. *Institutional Lock-in*

First developed by North in the early 1990s, the concept of institutional lock-in applies the concept of increasing returns and path dependency identified in relation to certain technological standards of institutional arrangements.²⁴ North believes that the path de-

²² TIM WEITZEL, *ECONOMICS OF STANDARDS IN INFORMATION NETWORKS* 19 (2004). Such markets are also termed “hyperselective.” RUDI BEKKERS, *MOBILE TELECOMMUNICATIONS STANDARDS: GSM, UMST, TETRA, AND ERMES* 196 (2001).

²³ Arthur, *Competing Technologies*, *supra* note 5.

²⁴ See NORTH, *supra* note 7 (detailing the relationship between organizations and institutions and characterizing the manner in which they evolve alongside technology within the greater economy). While path dependence theory was first formulated as an explanation of technology adoption, the theory has had a conceptual impact on evolutionary economics. See, e.g., RICHARD R. NELSON & SIDNEY G. WINTER, *AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE* 206–07 (1982) (“Firms at any time are viewed as possessing various capabilities, procedures, and decision rules that determine what they must do given external conditions.”). Indeed, it has a wide scope of potential application. As David Grewal opines: “[T]he discussion of network externalities has been largely restricted to problems of technical coordination and the compatibility of different technology products, which can seem to limit its broader relevance. Nevertheless, the insights of this literature may have a

pendence concept has “equal explanatory power in helping us understand institutional change. In both cases increasing returns are the key to path dependence”²⁵ North’s translation of the path dependence thesis to institutions identifies several causes of increasing returns with respect to institutions: (a) the high start-up costs involved in setting up alternative institutions from scratch; (b) the significant learning effects for an organization; (c) direct and indirect coordination effects driven by interconnection with other organizations; and (d) the reduction in uncertainty regarding the permanency of the rules of an organization.²⁶ Taken together, these features, North argues, will produce “massive increasing returns”²⁷ that will channel the development of institutions in a path dependent direction.²⁸

The positive feedback produced will “cause the path of institutional change to be locked in a specific pattern”²⁹ The “increasing-returns characteristics of the institutional matrix and the complementary subjective models of the players suggest that although the specific short-run paths are unforeseeable, the overall direction in the long run is both more predictable and more difficult to reverse.”³⁰ Thus, when institutions generate increasing returns, it becomes very difficult for rival institutions to successfully vie for market dominance.³¹ As G. John Ikenberry explains, “[w]hen institutions manifest increasing returns, it becomes very difficult for

more general application.” DAVIS S. GREWAL, NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION 63 (2008).

²⁵ Douglass C. North, *Institutions*, 5 J. ECON. PERSP. 97, 109 n.10 (1991).

²⁶ See NORTH, *supra* note 7, at 95 (applying W. Brian Arthur’s four self-reinforcing mechanisms to a world in which there are increasing returns to institutions).

²⁷ *Id.*

²⁸ See GRAEME DONALD SNOOKS, THE EPHEMERAL CIVILIZATION: EXPLODING THE MYTH OF SOCIAL EVOLUTION 92–93 (Taylor & Francis 2003) (summarizing North’s application of path dependency to a world of increasing institutional returns and how North believes it explains both inefficient institutional systems and differential economic performance).

²⁹ SHUANPING DAI, NETWORKS OF INSTITUTIONS: INSTITUTIONAL EMERGENCE, SOCIAL STRUCTURE AND NATIONAL SYSTEMS OF POLICIES 43 (2015).

³⁰ NORTH, *supra* note 7, at 104.

³¹ DAI, *supra* note 29.

potential replacement institutions to compete and succeed.”³² Put simply, institutions become, in effect, “monopolies” in the markets within which they operate.

We argue that the world of investment arbitration is experiencing a form of institutional lock-in. Unlike North, however, we are not so much concerned with organizations becoming locked into inefficient rules and norms; rather, we are interested in how actors become locked into the organization itself, specifically, ICSID. We identify three sources of increasing returns with respect to the field of investment arbitration that has produced a high degree of institutional lock-in. It is to these three sources of increasing returns that we now turn.

3. HOW NETWORK EFFECTS REINFORCE THE MARKET DOMINANCE OF ICSID AND CREATE INSTITUTIONAL LOCK-IN

3.1. *Direct Versus Indirect Network Effects*

The network externalities that underpin and reinforce ICSID are a species of network effects known in the literature as *indirect network effects*.³³ Network effects may emerge with respect to a wide variety of goods or services beyond merely physically networked

³² G. JOHN IKENBERRY, *AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS* 70 (2009).

³³ As opposed to direct network effects, which derive their force purely from the synchronization value they provide. For a deeper explanation of the distinction between indirect and direct network effects, see Druzin, *supra* note 20, at 149–53; see also Paul Klemperer, *Network Goods (Theory)*, *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* (2d ed. 2008) (explaining the common mechanism by which one network tends to succeed amid competition between incompatible networks); Katz & Shapiro, *supra* note 5 (outlining three sources of positive consumption externalities—positive consumption externalities being the increase in utility that a user derives from a good due to the increase in the number of total users of that utility); Lemley & McGowan, *supra* note 19, at 488–94 (distinguishing between what they term “actual networks,” “virtual networks,” and “positive feedback effects”).

items, such as telecommunications, or networks that rely on direct interaction between users, as in the case of languages. The literature distinguishes between network externalities that involve direct interaction between network participants (i.e., direct network effects) and those that involve “mediation through the marketplace” in the form of decreased costs, etc. (i.e., indirect network effects).³⁴ While less obvious, indirect network externalities can exert significant pressure on a market.

To illustrate the power of indirect network effects, consider taxi cabs in Hong Kong. Virtually every taxi cab in Hong Kong is the identical car model—a Toyota Crown Comfort YXS10.³⁵ There is, however, no regulatory requirement stipulating that cabbies use this model. The Toyota Crown Comfort YXS10 gained ascendancy as a consequence of indirect network externalities stemming from its widespread use. For instance, because it is widely used, the price of replacement parts for the Toyota Crown Comfort YXS10 is comparatively cheap, auto body shops able to service the vehicle are more numerous, and the automobile is more distinguishable as a taxi to potential patrons. Now consider the position of a new taxi driver plugging into this powerful system of indirect network externalities who is theoretically “free” to select any model of car he or she wishes. The driver will effectively be compelled to purchase the Toyota Crown Comfort YXS10, which in turn further reinforces the car’s market dominance.

³⁴ S.J. Liebowitz & Stephen E. Margolis, *Are Network Externalities a New Source of Market Failure?*, 17 RES. L. & ECON. 3 (1995). For a more formal overview of the concepts of positive feedback and self-reinforcement, see Scott E. Page, *Path Dependence*, 1 Q.J. POL. SCI. 87 (2006).

³⁵ See Yoree Koh, *Toyota Chief: I’ll Take the Taxi*, WALL ST. J. (Mar. 10, 2011, 2:14 PM), <http://blogs.wsj.com/japanrealtime/2011/03/10/toyota-chief-ill-take-the-taxi/> [<https://perma.cc/BHN2-X9S5?safari=1>] (noting success of the Toyota Crown Comfort YXS10 in the taxi market in Japan and Hong Kong); COLIN BAMFORD & SUSAN GRANT, *CAMBRIDGE INTERNATIONAL AS AND A LEVEL ECONOMICS COURSEBOOK* 163 (3d ed. 2014), <https://www.gceguide.xyz/files/e-books/a-level/Cambridge%20International%20AS%20and%20A%20Level%20Economics.pdf> [<https://perma.cc/SB48-QSN9>] (stating the fact that Hong Kong has 15,000, mostly privately owned Toyota taxis).

This network effect is indirect—the effect is “mediated through the marketplace.” Indeed, the advent of the automobile itself is a good example of indirect network effects in action. Initially, the lack of suitable roads during the early days of the automobile was an issue. However, as more people purchased cars, more surfaced roads were built to better accommodate motorized vehicles. With more surfaced roads, the utility of owning a motor vehicle increased, attracting more consumers. And on it went in a self-reinforcing process.³⁶

We argue that indirect network effects are manifest with respect to the dominance of ICSID in the market for investment arbitration. Indirect network effects emerge in three primary ways. To some extent, these mirror North’s argument summarized above, which is based on indirect network effects; however, the sources of increasing returns we cite below are specific to the character of investment arbitration. Together, these three indirect network effects produce increasing returns that push forcefully towards institutional lock-in.

3.2. *Impression of Legitimacy*

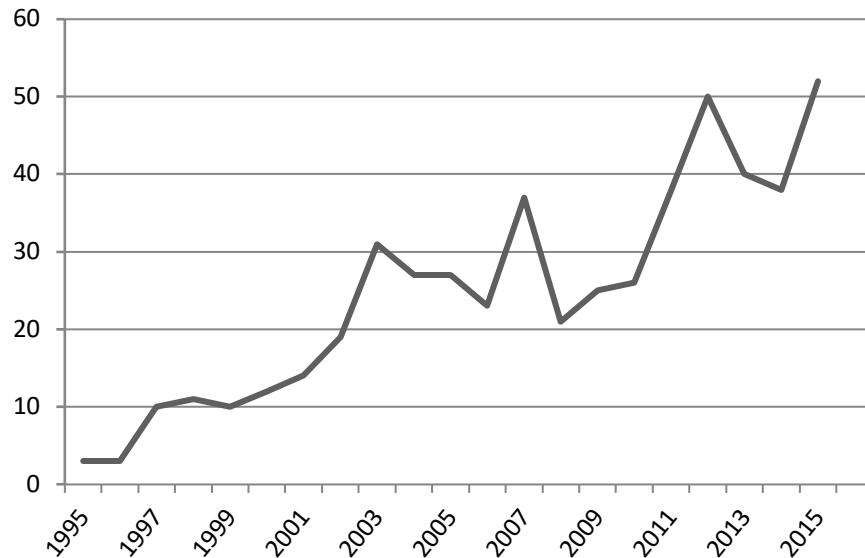
The first relates to a general impression of institutional legitimacy. An arbitration center’s reputation will increase commensurate with growth in its user base. An institution that is a recognized authority will attract more “users” thereby increasing its user base in a self-reinforcing fashion.³⁷ This appears to be the case with

³⁶ Katz and Shapiro argue that positive consumption externalities include indirect support networks. Katz and Shapiro use an example drawn from the American automobile market in the twentieth century where “foreign manufacturers’ sales initially were retarded by consumers’ awareness of the less experienced and thinner service networks that existed for new or less popular brands.” Katz & Shapiro, *supra* note 5.

³⁷ It should be noted, however, that this is not a perfect market, in that, actors’ choices are somewhat constrained by the prescription of specific arbitral institutions under investment treaties. Yet, these selections should also be affected, albeit in a less obvious fashion, by network effects.

ICSID, which has experienced escalating growth over the last two decades.³⁸

Figure 1. The figure shows the total number of ICSID cases registered by calendar year.



These numbers could of course simply reflect growth in the number of investment arbitration cases more generally, and it is true that

³⁸ INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES [ICSID], THE ICSID CASELOAD-STATISTICS 7 chart 1 (2017) [hereinafter ICSID, CASELOAD STATISTICS], [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20\(English\)%20Final.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf) [<https://perma.cc/A5TD-35RG>]. For a general discussion of legitimacy challenges relating to investment arbitration and their implications for ICSID, see Andrea K. Bjorklund, *The Legitimacy of the International Centre for Settlement of Investment Disputes*, in LEGITIMACY AND INTERNATIONAL COURTS 234 (Nienke Grossman et al. eds., forthcoming 2018).

in the past several years the filing of non-ICSID Convention cases³⁹ has also increased. The Pluricourts Centre of Excellence at the University of Oslo has data showing that approximately 41 percent of the 878 known investment cases have *not* been ICSID Convention cases.⁴⁰ The ratio of ICSID to non-ICSID cases varies from year to year. UNCTAD's 2015 Issues Note shows ICSID and non-ICSID cases as having been instituted in approximately equal numbers for some years, but with ICSID cases eclipsing those of its (collective) rivals in others.⁴¹ Overall, however, it is clear that ICSID's market share seems to be holding steady or increasing as the total number of cases has increased. Thus, we believe its market-dominant position – with 59 percent of known treaty cases submitted under ICSID Convention, and even more administered by the Centre under other arbitration rules – is well established.

The fact that ICSID is widely recognized and extensively used provides a certain reassurance to claimants. As of December 2017, ICSID boasted 161 signatory States and 153 States Party to ICSID Convention.⁴² Because contracting member states agree to enforce and uphold ICSID arbitral awards as if they are final judgments of their own courts, actors are confident that ICSID awards will be honored and enforced. This impression of legitimacy only strengthens as its customer base increases – a classic self-reinforcing process.

³⁹ For purposes of this Article the term “ICSID cases” refers to cases submitted under the ICSID Convention and its accompanying arbitration rules but does not encompass other cases administered by ICSID but submitted under other arbitral rules, such as the ICSID additional facility rules or the U.N. Commission on International Trade Law (“UNCITRAL”) rules.

⁴⁰ Daniel Behn, *The Performance of Investment Treaty Arbitration*, in *THE PERFORMANCE OF INTERNATIONAL COURTS AND TRIBUNALS* (Theresa Squatrito et al. eds., 2017).

⁴¹ U.N. Conference on Trade & Dev. [UNCTAD], *Recent Trends in IIAs and ISDS No. 1*, at 5 fig. 2 (Feb. 2015), http://unctad.org/en/Publications_Library/webdi-aepcb2015d1_en.pdf [<https://perma.cc/XQL3-BS6C>].

⁴² *Int'l Ctr. for Settlement of Inv. Disputes [ICSID], Database of ICSID Member States*, <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> [<https://perma.cc/XQL3-BS6C>] (last visited Mar. 4, 2018).

Impressions of legitimacy may be connected to North's argument that "adaptive expectations aris[e] from the prevalence of contracting based on the existing institutions."⁴³ That is, the increasing certainty regarding the permanency of the rules of an institution creates a situation of increasing returns related to that institution.

3.3. *Predictability and Familiarity with the Rules*

The second source of increasing returns we identify relates to predictability and familiarity regarding the rules and procedures of the institution. With widespread use, users gain a greater familiarity with the rules and procedures of that particular institution. Indeed, ICSID Convention arbitration is an option—sometimes the only option—in numerous investment treaties. This creates a positive feedback loop: The more frequently the services of ICSID are utilized, the more familiar these services become to potential users, encouraging more users to opt for ICSID. This is equally true for the lawyers who represent these claimants. The more claimants go to ICSID, the more lawyers advise clients to go to ICSID. The greater the number of cases decided by ICSID Convention tribunals, the more ICSID Convention arbitration is likely to be studied by counsel and recommended as the best option. This dynamic mirrors North's observation that learning effects connected to the institution—namely, users' growing understanding of the institution's rules and complexity of use—is an additional source of increasing returns.⁴⁴

3.4. *Quality and Scope of Arbitral Service*

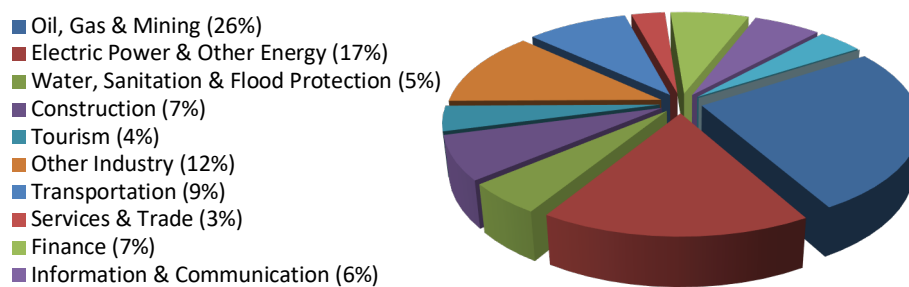
The third source of increasing returns relates to the general quality and scope of arbitral service. Breadth and expertise of arbitral services are powerful considerations for claimants. Institutions vary in terms of their reputation for competence in dealing with a wide

⁴³ North, *Institutions*, *supra* note 25, at 109.

⁴⁴ See NORTH, *supra* note 7, at 95.

array of legal matters. This reputation also builds on itself. If the institution is perceived as possessing a high degree of competence in specialized areas of dispute, the institution will attract more claimants in these areas.⁴⁵ To date, ICSID has administered over 550 cases, some 73.6 percent of which were based on investment treaties,⁴⁶ distributed across an impressively wide swath of economic sectors.

Figure 2. The chart below shows the distribution of all ICSID registered cases by economic sector as of December 31, 2015.⁴⁷



These indirect network effects generate self-reinforcing pressure for claimants to take their matters to ICSID, bolstering the market dominance of the arbitration center. The presence of indirect network effects in the market for arbitration services is significant because network effect pressures will have the peculiar effect of “locking in” a standard, rendering it tenaciously resistant to competition. The result is that institutional lock-in occurs. Ikenberry defines the process thusly: “[M]ore people and more of their activities are hooked into the institution and its operations. A wider array of individuals and groups, in more countries and more realms of activities, have a stake—or a vested interest—in the continuation of the

⁴⁵ While, typically, the disputants jointly agree to the arbitrator, ICSID does have a roster of arbitrators from which the Secretary-General has to appoint absent party agreement.

⁴⁶ ICSID, CASELOAD STATISTICS, *supra* note 38, at 7 chart 1, 10 chart 5.

⁴⁷ *Id.* at 12 chart 12.

institution."⁴⁸ The result is that the "costs of disruption or change in the institutions grow over time. This means that 'competing orders' or 'alternative institutions' are at a disadvantage. The system is increasingly hard to replace."⁴⁹ Any serious assessment of the likelihood of institutional competition from other regions of the globe in the field of investment arbitration needs to consider the implications of this dynamic.

3.5. *Critical Mass and Penguins*

If there are no bounds to increasing returns, a networked market will eventually induce a lock-in situation – "a point is reached after which every agent, regardless of inherent preferences, will select the same technology."⁵⁰ Once a monopoly emerges, it becomes locked in as "no actor is willing to bear the disproportionate risk of being the first adopter of a standard and then becoming stranded in a small network . . ."⁵¹ This inability to challenge a locked-in standard is known as the *start-up problem*.⁵² As one scholar observes, any system that "share[s] the characteristics of lock-in – the presence of network externalities, the absence of entrepreneurs who can induce transition, and the absence of a centralized authority that can mandate simultaneous change – could be as vulnerable to path dependence as technological standards."⁵³ Under such conditions, it is extremely difficult for a new standard to start up and dislodge a standard that is already locked in as a result of powerful network effects.

⁴⁸ IKENBERRY, *supra* note 32.

⁴⁹ *Id.*

⁵⁰ Paul A. David & Shane Greenstein, *The Economics of Compatibility Standards: An Introduction to Recent Research*, 1 *ECON. INNOVATION & NEW TECH.* 3, 6 (1990), <https://www.dl.icdst.org/pdfs/files/03ecaab6441c4ce75bdb187b0e539384.pdf> [<https://perma.cc/X7MT-EP4A>].

⁵¹ WEITZEL, *supra* note 22, at 16.

⁵² North identifies this dynamic as the problem of large initial set-up costs. See NORTH, *supra* note 7, at 95.

⁵³ Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 *B.U. L. REV.* 813, 820 (1998).

It becomes a problem of critical mass. What is termed *hysteresis effect* plays a crucial role here.⁵⁴ The hysteresis effect states that “the product is only interesting for potential customers if a critical mass of consumers is reached such that the sum of original and derivative utility outweighs the respective costs” of adopting a new standard.⁵⁵ A certain chicken and egg paradox emerges: “many consumers are not interested in purchasing the good because the installed base is too small, and the installed base is too small because an insufficiently small number of consumers have purchased the good.”⁵⁶ This makes it very difficult to achieve sufficient critical mass. If only a fraction of the market adopts a new technology, for many users the gains will be below costs.⁵⁷ The market will therefore become locked in with no one willing to bear the costs of switching to a new standard.⁵⁸ This has been termed the “penguin effect”: “Penguins who must enter the water to find food often delay doing so because they

⁵⁴ A. KEMPER, VALUATION OF NETWORK EFFECTS IN SOFTWARE MARKETS: A COMPLEX NETWORKS APPROACH 73 (2010).

⁵⁵ *Id.* at 73–74. For this principle, see Nicholas Economides & Charles Himmelberg, *Critical Mass and Network Evolution in Telecommunications*, in TOWARD A COMPETITIVE TELECOMMUNICATIONS INDUSTRY: SELECTED PAPERS FROM THE 1994 TELECOMMUNICATIONS POLICY RESEARCH CONFERENCE 47 (Gerald W. Brock ed., 1995); Michel Clement et al., *Netzeffekte und Kritische Masse [Network Effects and Critical Mass]*, in MARKETING MIT INTERAKTIVEN MEDIEN: STRATEGIEN ZUM MARKTERFOLG [MARKETING WITH INTERACTIVE MEDIA: STRATEGIES FOR MARKETING SUCCESS] (Sönke Albers et al. eds., 1998); Soon-Yong Choi & Andrew B. Whinston, *The Future of the Digital Economy*, in HANDBOOK ON ELECTRONIC COMMERCE 25 (Michael Shaw et al. eds., 2000).

⁵⁶ Nicholas Economides & Charles Himmelberg, *Critical Mass and Network Size with Application to the U.S. FAX Market* 47, 51 (N.Y.U. Stern Sch. of Bus., Working Paper No. EC-95-11, 1995), <http://www.stern.nyu.edu/networks/95-11.pdf> [<https://perma.cc/E7KG-4BM3>].

⁵⁷ David & Greenstein, *supra* note 50, at 9.

⁵⁸ Joseph Farrell & Garth Saloner, *Installed Base and Compatibility: Innovation, Product Preannouncements, and Predation*, 76 AM. ECON. REV. 940, 940 (1986).

fear the presence of predators. Each would prefer some other penguin to test the waters first.”⁵⁹ This dynamic greatly inhibits competition in the market, keeping a user base locked into a standard.⁶⁰

The danger, of course, is the standard that locks in is sub-optimal.⁶¹ Indeed, the literature on standards suggests that network-effect markets “may exhibit ‘excess inertia’ and remain locked into a standard, even though an objectively ‘better’ standard is available.”⁶² The result of this may be a situation in which an institution grows profoundly Pareto-inferior due to shifting exogenous conditions, yet its market dominance cannot be successfully challenged by more efficient institutional arrangements.⁶³ In this way, institutional development—both within and between institutions—may grind to a pernicious halt, becoming stunted and inefficient.

⁵⁹ *Id.* at 493 n.9.

⁶⁰ For a discussion of the potential hazards of lock-in in relation to law, see Gillette, *supra* note 53, at 813 (positing that lock-in can result in institutional inefficiencies where an institution may become excessively routinized, choice limiting, and slow to adapt); Clayton P. Gillette, *Harmony and Stasis in Trade Usage for International Sales*, 39 VA. J. INT'L L. 707, 711–12 (1999) (discussing lock-in in relation to trade usages standards); see also Bryan H. Druzin, *Why does Soft Law have any Power Anyway?*, ASIAN J. INT'L L. 1, 1–18 (2016) (discussing the possibility of sub-optimal lock-in with respect to soft law); *id.* at 14–16 (noting that locked-in soft law instruments may, in principle, be dislodged by more innovative or more efficient rules). See generally Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 759 (1995) (increasing returns in corporate contract terms, arguing that network externalities can induce standardization in firm contracts); Lemley & McGowan, *supra* note 19, at 481 (suggesting ways “particular legal rules should—and should not—be modified to take account of network effects”). In the political science literature, the idea of network lock-in has been applied more generally to the process of globalization. See GREWAL, *supra* note 24; see also Beth A. Simmons & Zachary Elkins, *The Globalization of Liberalization: Policy Diffusion in the International Economy*, 98 AM. POL. SCI. REV. 171 (2004), https://dash.harvard.edu/bitstream/handle/1/3157884/Simmons_GlobalizationLiberalization.pdf?sequence=2 [<https://perma.cc/9CN8-ZCD7>].

⁶¹ Klausner, *supra* note 60, at 765. But see Lemley & McGowan, *supra* note 19, at 494 (arguing against the assumption that network effects produce suboptimal lock-in).

⁶² Page, *supra* note 6, at 961.

⁶³ KEMPER, *supra* note 54, at 76–77 (discussing Pareto-inferior market results from network lock-in).

4. THE POSSIBILITY OF “DISRUPTIVE EVENTS” AND “INSTITUTIONAL BREAK-OUT”

4.1. *Institutional Break-out*

The effects of lock-in, however, may not be quite as robust as the model projects. Indeed, the inevitability of a lock-in effect is the subject of some debate in the literature. Liebowitz and Margolis question the notion that network effects induce a permanent monopoly, arguing that although there are indeed periods of persistent lock-in where one product dominates the market – they look at the software market – network effect markets will frequently tip towards a new monopoly⁶⁴ in a process which they termed “serial monopoly.”⁶⁵

A variety of considerations can disrupt a lock-in effect. Liebowitz and Margolis, for example, argue that major product innovations and predatory pricing can successfully challenge a locked-in monopoly.⁶⁶ Building on this insight, others have noted that network effects do not inevitably result in natural monopolies, and that “[d]ifferences in the quality of competing network goods, or in their production costs may offset the relative advantage of the larger network.”⁶⁷ Thus, the presence of network effects does “not necessarily

⁶⁴ *But see* STAN J. LIEBOWITZ & STEPHEN E. MARGOLIS, WINNERS, LOSERS, AND MICROSOFT: COMPETITION AND ANTITRUST IN HIGH TECHNOLOGY 227–29 (2001) (stating that their data provides no support for the concept of tipping even though it is reasonable in principle).

⁶⁵ *Id.* at 10; *see* S.J. Liebowitz & Stephen E. Margolis, *The Fable of the Keys*, 33 J. L. & ECON. 1, 2–3 (1990) (refuting the much-cited QWERTY keyboard example of lock-in, claiming that evidence of the superiority of Dvorak, a keyboard competitor to the QWERTY layout, is lacking); *see also* William E. Cohen, *Competition and Foreclosure in the Context of Installed Base and Compatibility Effects*, 64 ANTITRUST L.J. 535, 539–46 (1996); Liebowitz & Margolis, *supra* note 5.

⁶⁶ LIEBOWITZ & MARGOLIS, WINNERS, LOSERS, AND MICROSOFT, *supra* note 64, at 110.

⁶⁷ Aviram, *supra* note 19, at 15; *see also* Liebowitz & Margolis, *Network Effects and Externalities*, *supra* note 17, at 672 (noting that in instances where production costs lead to significant decreasing returns, competing incompatible markets can emerge).

result in a winner-takes-all situation: they can partly or fully be undone by other factors”⁶⁸ Katz and Shapiro contend that if “rival systems have distinct features sought by certain consumers, two or more systems may be able to survive by catering to consumers who care more about product attributes than network size.”⁶⁹ In such cases, multiple equilibria can be sustained and competition may emerge.

However, users in a situation of institutional lock-in face a massive coordination problem: Absent a regulator that can facilitate (or even mandate) a simultaneous jump to a new network by all the members, it is very difficult for users to break away from the prevailing institutional standard. Under such conditions, some inherent feature provided by an upstart competitor or a significant transformation in exogenous conditions is required. We argue that various disruptive events may produce what is termed *institutional break-out*.⁷⁰

4.2. Potential Disruptive Actions by the European Union

Is institutional break-out on the horizon for investment arbitration? That is the question we must ask and seek to answer. Various possibilities could constitute a disruptive event that might knock users into a new equilibrium. To be sure, investment arbitration is in a period of turmoil. The European Union’s proposal for the establishment of an investment “court” that includes an appellate body is

⁶⁸ BEKKERS, *supra* note 22.

⁶⁹ Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 93, 106 (1994).

⁷⁰ The term “institutional break-out” has been applied in a variety of ways but generally connotes the meaning implied here (i.e., undercutting the hold institutional lock-in has on the market). See, e.g., SABINA STILLER, IDEATIONAL LEADERSHIP IN GERMAN WELFARE STATE REFORM: HOW POLITICIANS AND POLICY IDEAS TRANSFORM RESILIENT INSTITUTION 34–36 (2010); Edwin Woerdman, *Tradable Emission Rights*, in THE ELGAR COMPANION TO LAW AND ECONOMICS 364, 368–71 (Jürgen G. Backhaus ed., 2d ed. 2005); Oscar Couwenberg & Edwin Woerdman, *Shifts in Gas Market Governance: Path-Dependent Institutional Innovation in the Netherlands*, in INNOVATION: TECHNICAL, ECONOMIC AND INSTITUTIONAL ASPECTS 25, 37–38 (Aloys Prinz et al. eds., 2006); EDWIN WOERDMAN, IMPLEMENTING THE KYOTO MECHANISMS: POLITICAL BARRIERS AND PATH DEPENDENCE 90–101 (2002).

the most visible example of how investor-state dispute settlement might change over the coming years. Whether this proposal is truly a sea change that will result in a challenge to ICSID's market dominance is unclear. A great deal depends on how broadly the European Union succeeds in implementing its two-tiered investment court and whether, as currently seems likely, ICSID is chosen to be the only or one of the institutions that hosts the court, even if those proceedings do not take place under the auspices of ICSID Convention. Other exogenous factors might come into play as well; other market actors already vie with ICSID to host investment arbitrations, a trend that one can only expect to continue.

The European Union has concluded two free trade agreements whose investment chapters include proposals for a two-tiered investment court, though neither has yet entered into force.⁷¹ Moreover, the investment court aspect of CETA is one piece of the agreement that will not be provisionally applied due to the reservations of Wallonia, and perhaps other European provinces and countries as well.⁷² The European Union has proposed that a similar institution be included in the T-TIP that it had been negotiating with the United States.⁷³ The election of President Trump puts those negotiations in doubt. The EU-Singapore FTA, negotiations for which

⁷¹ Comprehensive Economic and Trade Agreement (CETA) art. 8.18, Sept. 21, 2017, [hereinafter CETA] http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [<https://perma.cc/T84Q-3M36>]; Free Trade Agreement Between the European Union and the Socialist Republic of Vietnam, *opened for signature* Jan. 2016, [hereinafter EU-Vietnam FTA] <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3563> [<https://perma.cc/7ADZ-ZF9B>] (Section 3: "Resolution of Investment Disputes" and Section 3, Sub-Section 4: "Investment Tribunal System").

⁷² Council Decision 10974/16 of Oct. 5, 2016, on the Provisional Application of the Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the one part, and the European Union and its Member States, of the other part, <http://data.consilium.europa.eu/doc/document/ST-10974-2016-INIT/en/pdf> [<https://perma.cc/YQ3D-5KH8>] (last visited Mar. 4, 2018) (excluding most of Chapter 8 from provisional application).

⁷³ Transatlantic Trade and Investment Partnership: European Union's Proposal for Investment Protection and Resolution of Investment Disputes art. 3.4, Nov. 12, 2015, [hereinafter T-TIP Proposal] http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf [<https://perma.cc/G4FH-N8BX>].

were concluded on October 17, 2014, does not yet contain the court,⁷⁴ but one expects that the European Union might re-open negotiations to include a similar mechanism,⁷⁵ or possibly that a parallel agreement addressing investment and any other matters of shared competence will be negotiated in order that the EU-Singapore FTA can be finalized by the European Union alone.⁷⁶

The European Union sees the establishment of these courts as nuclei, which would presumably be merged, for a multilateral invest-

⁷⁴ See EU-Singapore Free Trade Agreement art. 9.1, Oct. 17, 2014, [hereinafter EU-Singapore FTA] <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> [<https://perma.cc/X26X-TFC2>].

⁷⁵ See Michael P. Daly & Jawad Ahmad, *The EU-Vietnam FTA: What Does it All Mean? What Does it Mean for the Future?*, WOLTERS KLUWER: ARB. BLOG (Dec. 14, 2015) <http://arbitrationblog.kluwerarbitration.com/2015/12/14/the-eu-vietnam-fta-what-does-it-all-mean-what-does-it-mean-for-the-future/> [<https://perma.cc/6F6N-5BJU>] (“The EU may seek to propose an Asia-wide permanent investment court to resolve disputes arising under the FTAs that the EU is currently negotiating with some Asian States (Malaysia, Thailand, India, Philippines and Japan). While the EU-Singapore FTA, which is pending signature and ratification, does not provide for the creation of a distinct permanent investment court, it does establish a joint committee (known as the ‘Trade Committee’) comprised of the Parties’ Trade representatives with the task to, *inter alia*, oversee the implementation of the FTA, consider amendments to the FTA and issue binding decisions. With these wide powers, the creation of an Asia-wide permanent investment court is not entirely farfetched. The Trade Committee is tasked, after all, to examine whether an appellate mechanism could be created (Article 9.30(1)(c) of the EU-Singapore FTA.”); see also Simon Lester, *From ISDS to ICS*, WORLD TRADE L.: INT’L ECON. L. & POL. BLOG (Dec. 2, 2015, 12:30 PM) <http://world-tradelaw.typepad.com/ielpblog/2015/12/from-isds-to-ics.html> [<https://perma.cc/33YT-862V>] (“[T]here’s the question of the yet to be ratified pre-ICS [the ‘Investment Court System’] FTAs that still have old ISDS rules in them, such as . . . the EU-Singapore FTA. Can those really be ratified as currently written, when the new and improved version of ISDS is out there, being sold as a better alternative?”).

⁷⁶ Avis 2/15, Opinion 2/15 of the Court (Full Court), ECLI:EU:C:2017:376 (May 16, 2017), http://curia.europa.eu/juris/document/document_print.jsf?jsessionid=9ea7d2dc30dce538338459ff41c3868deb27de5740b9.e34Kax-iLc3qMb40Rch0SaxyNaxf0?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=190727&occ=first&dir=&cid=555503 [<https://perma.cc/VQ5R-79JY>].

ment court to which investor-state dispute settlement in all EU investment agreements, at the least, would be brought.⁷⁷ One way to achieve a multilateral court is gradually, by accretion, such that once the European Union has replaced or has caused its member states to re-negotiate all extra-EU BITs, they would lead to that multilateral court.⁷⁸ A different option, which is being pursued simultaneously, is to establish a multilateral investment court open to all parties.

The potential for reform of investor-state dispute settlement, including the possible establishment of a multilateral investment court, is currently the subject of study by United Nations Commission on International Trade Law's ("UNCITRAL") Working Group III.⁷⁹ The establishment of a multilateral investment court is by no means a foregone conclusion; the first meeting convened to discuss the project, in late November 2017, was marked by an unusual degree of dissension. UNCITRAL ordinarily operates by consensus, but this meeting featured the group's second vote ever—after the 1979 decision to move UNCITRAL's headquarters from New York to Vienna—on the election of a Chair.⁸⁰

The Working Group's mandate encompasses more than the consideration of whether the international community should establish an international investment court, though that is clearly one of the main proposals it will address. The establishment of such a court

⁷⁷ Stephen W. Schill, *Editorial: U.S. Versus EU Leadership in Global Investment Governance*, 17 J. WORLD INVEST. & TRADE 1, 2 (2016) ("The Commission's proposal to create a permanent investment court is a strong vision and the text presented constitutes the first concrete step towards practical implementation. . . . The proposal breathes the right spirit: to transform investor-state arbitration into a truly public, fully transparent, more predictable and balanced system of global adjudication.").

⁷⁸ CETA, *supra* note 71, art. 8.29; European Commission Press Release IP/15/5651, *Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations* (Sept. 16, 2015), http://europa.eu/rapid/press-release_IP-15-5651_en.htm [<https://perma.cc/5Z7E-W65P>].

⁷⁹ U.N. Secretariat, U.N. Comm'n on Int'l Trade Law, *Possible Reform of Investor-State Dispute Settlement (ISDS)*, U.N. Doc. A/CN.9/WG.III/WP.142 (Sept. 18, 2017).

⁸⁰ For a description of some of the discussions, see Anthea Roberts, *UNCITRAL and ISDS Reform: Not Business as Usual*, EJIL: TALK! (Dec. 11, 2017), <https://www.ejiltalk.org/uncitral-and-isds-reform-not-business-as-usual/> [<https://perma.cc/NFQ8-HBPQ>].

would be a far from simple task. Two unofficial background papers prepared by the Geneva Center for International Dispute Settlement cover in some detail the hurdles facing the establishment of an international investment court and mechanisms to enable it at least partially to work within the existing investor-state dispute settlement framework.⁸¹ While some countries, notably the European Union and Canada, favor the creation of a multilateral court, others, such as the United States and Japan, either appear to be opposed or have yet to come out on one side or the other.⁸²

Whether any court under any agreement will ever be established is thus an open question. The European Council's decision to exclude the investment court from provisional application, followed by the decision of the CJEU that the EU-Singapore FTA (and by analogy other European FTAs), means that there will be no CETA investment court until twenty-eight or, more likely, twenty-seven⁸³ member states have ratified the Agreement. The portions of the treaty subject to EU competence have provisional effect as of September 21, 2017, after the European Parliament voted to approve it.⁸⁴

⁸¹ Gabrielle Kaufmann-Kohler & Michele Potestà, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?* (June 3, 2017), http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf [https://perma.cc/69QE-C8D4]; Gabrielle Kaufmann-Kohler & Michele Potestà, *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards* (Nov. 15, 2017), http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html [https://perma.cc/LXK2-CX4Y].

⁸² For a description of some of the debate, see Roberts, *supra* note 80.

⁸³ The reference to twenty-seven, rather than twenty-eight, is based on the assumption that the United Kingdom will indeed leave the EU and, therefore, only twenty-seven member states will be left to ratify the CETA. In some member States, regional parliaments might have to ratify as well. See, e.g., European Council Press Release 623/16, EU-Canada Trade Agreement: Council Adopts Decision to Sign CETA (Oct. 28, 2016), <http://www.consilium.europa.eu/en/press/press-releases/2016/10/28-eu-canada-trade-agreement/> [https://perma.cc/SH64-4CYT].

⁸⁴ CETA: MEPs Back EU-Canada Trade Agreement, EUROPEAN PARLIAMENT: NEWS (Feb. 15, 2017), <http://www.europarl.europa.eu/news/en/news-room/20170209IPR61728/ceta-meps-back-eu-canada-trade-agreement> [https://perma.cc/ZYF6-E8DR]; see also Hans Von Der Burchard & Alberto Mucci, *POLITICO Pro's Morning Trade: TTIP Boggled Down in Feta Cheese – CETA Will be a*

At least for now one can assume that CETA will be put to national and regional Parliaments. (An alternative would appear to be renegotiation of the agreement to exclude those portions of it that are subject to mixed competence, and then to have the revised agreement approved by the relevant European Union institutions.) Given the hostility in many member states to investor-state dispute settlement, it is unclear just how difficult ratification will be. Belgium only agreed to sign the agreement at the European Council after Canada and the European Union negotiated an interpretive statement that, *inter alia*, confirmed the parties' joint intention to work towards the creation of a multilateral investment court.⁸⁵

Notwithstanding the interpretive statement's pledge to establish a multilateral court, it is far from clear that even the insertion of the investment court system will be enough to satisfy the critics; German judges have placed on the record their negative reaction to the T-TIP proposal.⁸⁶ While there might be a fillip of anti-American sentiment motivating that reaction, investor-state dispute settlement in any context would seem to raise the same concerns. The hostility in

'Mixed Agreement', POLITICO (May 12, 2016), <https://www.politico.eu/article/politico-pros-morning-trade-ttip-bogged-down-in-feta-cheese-and-ceta-will-be-a-mixed-agreement/> [<https://perma.cc/4K5Z-THVP>]. This decision follows the Commission's referral to the Court of Justice of the European Union as to whether the EU-Singapore Agreement is a mixed agreement. See European Commission, *Singapore: The Commission to Request a Court of Justice Opinion on the Trade Deal*, EUROPEAN COMM'N: NEWS ARCHIVE (Oct. 30, 2014) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1185> [<https://perma.cc/4WLF-BNU8>].

⁸⁵ *Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union and its Member States*, Doc. No. 13541/16 (Oct. 27, 2016), <http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf> [<https://perma.cc/FLP5-TYN4>].

⁸⁶ *Opinion No. 04/16 on the Establishment of an Investment Tribunal in TTIP – The Proposal from the European Commission on 16.09.2015 and 11.12.2015*, (Feb. 2016), <http://canadians.org/sites/default/files/tpp-deutsche-richterbund-opinion-0216.pdf> [<https://perma.cc/S792-RAZ6>]; see also *Germany's Judges and Public Prosecutors Reject Proposed Investment Court System in TTIP*, INVESTMENT TREATY NEWS (Feb. 29, 2016) <https://www.iisd.org/itn/2016/02/29/germanys-judges-and-public-prosecutors-reject-proposed-investment-court-system-in-ttip/> [<https://perma.cc/5ZFW-TLPB>].

Europe towards FTAs generally and investor-state dispute settlement in particular is unprecedented.⁸⁷ Less widespread, but still marked, opposition can be found in other countries as well. Certainly, President Trump has made no secret of his hostility to multilateral agreements.⁸⁸ But he is not alone—the opposition to FTAs spanned the political spectrum during the recent U.S. Presidential elections. As late as April 2016, every remaining U.S. presidential candidate had spoken against the Trans-Pacific Partnership.⁸⁹

⁸⁷ The European Commission received approximately 150,000 comments when it called for public comment on the proposed inclusion of investor-state dispute settlement in the T-TIP. While a vast majority of those were 'form' comments generated by opponents of investor-state arbitration, some 3,500 were individualized. *Commission Staff Working Document Report: Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, at 3 (Jan. 13, 2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf [<https://perma.cc/4WLF-BNU8>]. It is noteworthy, in addition, that the Netherlands recently demanded a referendum on the T-TIP. See *Dutch Set to Deliver Second EU Bombshell Referendum over TTIP Deal*, SPUTNIK INT'L (Apr. 15, 2016), <http://sputniknews.com/europe/20160415/1038074644/ttip-deal-dutch-referendum.html> [<https://perma.cc/CWU6-SCKB>]; James Crisp, *Dutch Voters now Demanding Referendum on TTIP*, EURACTIV (Apr. 15, 2016), <http://www.euractiv.com/section/trade-society/news/dutch-voters-now-demanding-referendum-on-ttip/> [<https://perma.cc/CWU6-SCKB>].

⁸⁸ John Cassidy, *Donald Trump's New World Disorder*, THE NEW YORKER (Jan. 24, 2017), <https://www.newyorker.com/news/john-cassidy/donald-trumps-new-world-disorder> [<https://perma.cc/SU48-MEK9>] ("Rather than relying on multilateral trade agreements, Trump has said that he will negotiate one-on-one deals with individual countries, beginning, possibly, with the post-Brexit United Kingdom.").

⁸⁹ For instance, Democratic presidential candidate Hillary Clinton said about the TPP: "I want to make sure that I can look into the eyes of any middle-class American and say, 'this will help raise your wages.' And I concluded I could not." David Singh Grewal, *Why Hillary Clinton is Right on the TPP*, THE HUFFINGTON POST: THE BLOG (Oct. 14, 2015) <http://www.huffingtonpost.com/david-singh-grewal/why-hillary-clinton-is-right-on-the-tpp> [<https://perma.cc/SU48-MEK>]. Bernie Sanders was also strongly opposed to the trade deal and stated: "[t]he Trans-Pacific Partnership is a disastrous trade agreement designed to protect the interests of the largest multi-national corporations at the expense of workers, consumers, the environment and the foundations of American democracy. It will also negatively impact some of the poorest people in the world." Bernie Sanders, *The Trans-Pacific Trade (TPP) Agreement Must be Defeated*, (Dec. 29, 2014), <http://www.sanders.senate.gov/download/the-trans-pacific-trade-tpa-agreement-must-be-defeated?in>

Moreover, these hurdles specific to pending FTAs do not take into account the other significant problems facing the world community, including the European Union. In June 2016, the United Kingdom by referendum voted to leave the European Union, right-wing nativist political parties in key European states have seen a surge in popular support, the refugee crisis remains staggering, and the fiscal affairs of Greece and certain other member states are persistently bad, with corresponding threats to the Eurozone, if not to the European Union itself.

Assuming an investment court is established, one significant question is who will host it? If there is more than one, who will host them? ICSID is certainly a possibility. It is the institution chosen in the CETA⁹⁰ and is one of two institutions proposed – the other is the Permanent Court of Arbitration – in the T-TIP and the EU-Vietnam FTA.⁹¹ The proposal for a court with an appeals chamber is not fully compatible with ICSID Convention arbitration. The ICSID Convention stipulates that the only recourse against an ICSID Convention arbitral award is annulment under the ICSID Convention itself⁹² and that only states, which would not include the European Union as such, can be adherents.⁹³ There is some discussion about whether

line=file [https://perma.cc/MN37-J42L]. Republican presidential candidates Donald Trump and Ted Cruz were also generally opposed to the trade deal. See Jon Greenberg, *Ted Cruz: 'I always opposed the TPP (Trans-Pacific Partnership)'*, POLITIFACT (Mar. 10, 2016), <http://www.politifact.com/truth-o-meter/statements/2016/mar/10/ted-cruz/ted-cruz-i-always-opposed-tpp-trans-pacific-partne/> [https://perma.cc/57GA-5N87]; Clayton Youngman, *Trump Says China Gets an Advantage From the Trans-Pacific Partnership*, POLITIFACT (Nov. 12, 2015), <http://www.politifact.com/truth-o-meter/statements/2015/nov/12/donald-trump/trump-says-china-will-take-advantage-trans-pacific/> [https://perma.cc/T3W7-4AZ9]; see also Alex Swoyer, *John Kasich: TPP Trade Deal 'Critical'*, BREITBART (Nov. 10, 2015), <http://www.breitbart.com/big-government/2015/11/10/john-kasich-tpp-trade-deal-critical/> [https://perma.cc/5GZ6-TUNJ] (stating Kasich seemed to be the only presidential candidate in favor of the TPP).

⁹⁰ CETA, *supra* note 71, art. 8.27(16).

⁹¹ T-TIP Proposal, *supra* note 73, art. 9.16 (Tribunal of First Instance); EU-Vietnam FTA, *supra* note 71, sec. 3, subsec. 4, art. 12.18 (Tribunal).

⁹² Convention on the Settlement of Investment Disputes, *supra* note 1, art. 52.

⁹³ *Id.* art. 67.

the ICSID Convention can be amended *inter partes* although, even if it can be, the awards would have only limited enforceability.⁹⁴

This impediment does not mean that ICSID cannot administer the court's proceedings – it certainly can, and its qualifications and market position make it eminently qualified to do so. This is the case whether the arbitration unfolds under ICSID Additional Facility rules – available if either the home state of the investor or the host state of the investment is party to the investment treaty – or under ad hoc arbitration rules, such as the UNCITRAL Arbitration Rules.⁹⁵ That arbitration would not, however, be ICSID Convention arbitration, with its concomitant benefits – the most important of which is the requirement that each ICSID Convention state treat ICSID Convention awards as if they were final judgments of courts of that state.⁹⁶

CETA awards would be enforceable under the New York Convention, but investors could nonetheless face practical hurdles to enforcement. One problem an investor has to overcome, if a state refuses to pay, is the hurdle of “execution immunity”: State assets (and in this context “state” would include the European Union) are

⁹⁴ See August Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19 J. INT'L ECON. L. 761, 782–83 (2016).

⁹⁵ How the EU Court proposal will be integrated with the current system of international arbitration, where the court in the place of arbitration has the potential to set aside the award on grounds specified under local arbitration law, is not altogether clear. The assumption is that once the appellate system is in place it will supplant review in local courts, yet it seems that those arbitrations will still have a “place” for purposes of judicial assistance to arbitration, for example. CETA provides that the disputing party must not seek to set aside the award once the appellate body structure is fully in place: “Upon adoption of the decision [setting out the functioning of the Appellate Tribunal]: (b) a disputing party shall not seek to review, set aside, annul, revise or initiate any other similar procedure as regards an award under this Section . . .” CETA, *supra* note 71, art. 8.28.9(b). Whether parties will necessarily abide by this stricture, and whether local courts will necessarily dismiss a set-aside application if one is made, may well be put into question.

⁹⁶ Convention on the Settlement of Investment Disputes, *supra* note 1, art. 54.1.

entitled to immunity, unless they are used for commercial purposes.⁹⁷ This hurdle must be faced against any state respondent, but might be particularly difficult against the European Union. To be sure, this issue would arise only if the European Union refused to pay an award rendered against it, and the European Union has pledged to honour any such awards.⁹⁸ Yet any potential judgment creditor would likely want to know what its avenue for redress is in the event the European Union did not pay voluntarily.

One question is how many commercial assets the European Union holds outside the Union in states that are a party to the New York Convention. Within the European Union itself, no award against the European Union can be enforced, unless the Court of Justice of the European Union (“CJEU”) approves it: “The property and assets of the Union shall not be the subject of any administrative or legal measure of constraint without the authorisation of the Court of Justice.”⁹⁹

Given the European Union’s view that EU law is primary and its refusal to endorse the payment of any arbitral award that could be construed as giving state aid to an investor, one might well question whether voluntary payment would always be forthcoming. For example, the European Union directed Romania not to pay an award rendered against it in *Micula v. Romania* on the grounds that the award constituted an effective payment of the state aid that Romania withdrew from Micula and for which it was ordered to pay compensation.¹⁰⁰ CETA itself attempts to avoid this potential problem by making explicit that withdrawals or refusals to renew subsidies cannot be the subject of investment arbitrations under the agreement.¹⁰¹ But given likely differences of opinion about what constitutes state aid, it is entirely possible to envision an investment award

⁹⁷ See generally Andrea K. Bjorklund, *State Immunity and the Enforcement of Investor-State Arbitral Awards*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER*, 302 (Christina Binder et al., eds., 2009).

⁹⁸ CETA, *supra* note 71, art. 8.41.2.

⁹⁹ Treaty on the Functioning of the European Union, Protocol [No. 7] on the Privileges and Immunities of the European Union, 2008 O.J. (C 310/261), art. 1.

¹⁰⁰ Commission Decision (EU) 2015/1470, *Micula v. Romania*, Arbitral Award, (Mar. 30, 2015), <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32015D1470> [<https://perma.cc/W6FG-MJ95>].

¹⁰¹ CETA, *supra* note 71, art. 8.9.3–4.

that the European Union, or the CJEU, or both, would regard as un-payable.

At present, it would be difficult for an investment court to be adopted as part of ICSID Convention regime given the Convention's incompatibility with an appellate mechanism and the inability of the European Union to become a member. Should ICSID be able to surmount these incompatibilities, perhaps by amendment or perhaps by the addition of a protocol to ICSID Convention that established a parallel mechanism for investment court arbitrations and which would permit the European Union to become a party (an "ICSID II"), it would reinforce its position of market dominance.¹⁰² Even without those changes, however, ICSID could oversee an investment court system whose awards were enforceable under the New York Convention. Moreover, given the time it is likely to take for any court system to be established, ICSID will continue to administer investment treaty arbitrations under the regime foreseen by existing investment agreements, and investment arbitrations under investment contracts and investment legislation remain an important part of ICSID's workload.

4.3. *Potential Disruption from Other Regional Sources*

ICSID will face competition whether or not the EU proposal comes to fruition. The Permanent Court of Arbitration is one institution that might be expected to challenge ICSID's hegemony in investor-state arbitration. Indeed, the PCA is currently overseeing

¹⁰² It should be noted, however, that similar problems regarding execution immunity would remain, because Article 55 of the ICSID Convention explicitly maintains execution immunity. Convention on the Settlement of Investment Disputes, *supra* note 1, art. 55 ("Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.").

several investor-state arbitrations¹⁰³ and has a long pedigree in administering public-international law based disputes.¹⁰⁴ Another is the Singapore International Arbitration Centre which, under the leadership of its new President, Gary Born, has established specialized rules under which investment arbitrations can proceed as of January 1, 2017.¹⁰⁵ Singapore has already built, in a relatively short time, an outstanding reputation as a center for commercial arbitration. The reasons for Singapore's success include the robust support of the Singaporean government, Singapore's status as an Asian transport and commercial hub, and its strong and predictable legal framework.¹⁰⁶ It is also important to underscore the shift of the

¹⁰³ See Permanent Court of Arbitration, *PCA Case Repository*, [http://www.pccases.com/web/allcases/\[https://perma.cc/HBJ3-44N5\]](http://www.pccases.com/web/allcases/[https://perma.cc/HBJ3-44N5]) (last visited Feb. 9, 2018).

¹⁰⁴ See Permanent Court of Arbitration, *About Us*, [http://www.pccases.com/web/aboutus/\[https://perma.cc/5ACJ-AWZG\]](http://www.pccases.com/web/aboutus/[https://perma.cc/5ACJ-AWZG]) ("Established in 1899 to facilitate arbitration and other forms of dispute resolution between states, the PCA has developed into a modern, multi-faceted arbitral institution that is now perfectly situated at the juncture between public and private international law to meet the rapidly evolving dispute resolution needs of the international community. Today the PCA provides services for the resolution of disputes involving various combinations of states, state entities, intergovernmental organizations, and private parties."); see also BROOKS W. DALY, EVGENIYA GORIATCHEVA & HUGH A. MEIGHEN, *A GUIDE TO THE PCA ARBITRATION RULES* 16–26, ¶¶ 3.01–3.24 (2014).

¹⁰⁵ SIAC, *SIAC IA Rules 2017*, *supra* note 14.

¹⁰⁶ According to the SIAC website, the reasons for Singapore's success are as follows:

An independent neutral third-country venue consistently ranked in the top 5 for the least corrupt public sector in the world in the Corruption Perceptions Index. Singapore is also consistently ranked no. 1 for the least corrupt public sector in Asia in the Corruption Perceptions Index.

- A strong multicultural society, with excellent legal and technological expertise as well as language fluency.
- A central location in Southeast Asia with 6,600 scheduled flights a week to 320 cities.
- An open economy and business environment that is host to over 7,000 multinational firms.
- The UNCITRAL Model Law is the cornerstone of Singapore's legislation on international commercial arbitration which is regularly updated to incorporate internationally accepted codes and rules for arbitration.

global economy to the Asia-Pacific region as businesses tend to think and act regionally; regional disputes are increasingly likely to be settled in the Asia-Pacific region as opposed to Europe or North America.¹⁰⁷

The Kuala Lumpur Regional Center for Arbitration (“KLRCA”)¹⁰⁸ is another potential challenger in the Asia region. The KLRCA is an international organization established in 1978 under the auspices of

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- A party to the 1958 New York Convention (on enforcement of arbitration awards). Singapore arbitration awards are enforceable in over 150 countries worldwide.
 - A strong tradition of the rule of law, supported by a highly skilled judiciary that receives top rankings in international surveys.
 - The Courts offer maximum judicial support of arbitration and minimum intervention granting parties full and consistent support in the conduct of international arbitration.
 - Parties have a freedom of choice of counsel in arbitration proceedings regardless of nationality.
 - There is no restriction on foreign law firms engaging in and advising on arbitration in Singapore.
 - Non-residents do not require work permits to carry out arbitration services in Singapore.
 - There are excellent facilities and services to support the conduct of arbitration at Maxwell Chambers, Asia’s largest fully-integrated dispute resolution complex with state-of-the-art hearing facilities.
 - Lower costs than in almost any other major center of arbitration.

SAIC, *Arbitration in Singapore*, <http://www.siac.org.sg/2014-11-03-13-33-43/why-siac/arbitration-in-singapore> [<https://perma.cc/3MHH-JSES>] (last visited Mar. 5, 2018).

¹⁰⁷ See Julien Chaisse, *The Shifting Tectonics of International Investment Law—Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia-Pacific Region*, 47 G.W. INT’L L. REV. 563–638 (2015); see also Jonathan Choo, *The Rise and Rise of Singapore: Singapore as a Preferred Venue for International Arbitration*, SINGAPORE LAW GAZETTE (June 15, 2015), <https://singaporeinternationalarbitration.com/2015/06/15/the-rise-and-rise-of-singapore-singapore-as-a-preferred-venue-for-international-arbitration/> [<https://perma.cc/4SYN-VGUF>]. Talk of a potential Asian Centre for Settlement of Investment Disputes (“ACSID”) under the aegis of China’s One Belt One Road Initiative illustrates the potential impact of a shift in economic focus.

¹⁰⁸ See Kuala Lumpur Regional Centre for Arbitration, *KLRCA Arbitration Rules of 2017*, <http://klrca.org/> [<https://perma.cc/8D6J-KQXJ>] (last visited Mar. 5, 2018).

the Asian-African Legal Consultative Organisation (“AALCO”).¹⁰⁹ The KLRCA was the first regional center established by AALCO in Asia to provide institutional support as a neutral and independent venue for the conduct of domestic and international arbitration proceedings in Asia. Its caseload has increased considerably in the last five years. In addition, recent investment treaties explicitly refer to the KLRCA for the settlement of investment disputes. In particular, Article 33 of Section B of the 2009 ASEAN Comprehensive Investment Agreement allows them to be referred to, *inter alia*, the KLRCA.¹¹⁰ The KLRCA’s status as an international organization and its location in Malaysia—a multicultural state with a true democracy—might also make it attractive to a number of South East Asian and South Asian states.¹¹¹

The PCA, the Singapore International Arbitration Centre, and the KLRCA are not the only potential rivals to ICSID.¹¹² Indeed, there are far too many to list here. The Arbitration Institute of the Stockholm Chamber of Commerce has some specialty in arbitrations involving Russia and former Soviet and Soviet satellite states and introduced a few investment-treaty-arbitration provisions in Appendix III of its 2017 SCC Arbitral Rules.¹¹³ CIETAC also

¹⁰⁹ See Asian-African Legal Consultative Organization, *About AALCO*, <http://www.aalco.int/scripts/view-posting.asp?recordid=1> [<https://perma.cc/4H95-PRQC>] (last visited Mar. 5, 2018).

¹¹⁰ The 2009 ASEAN Comprehensive Investment Agreement is a multilateral investment treaty between all member States of ASEAN, which comprises Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, and Thailand. Section B of the 2009 ASEAN Comprehensive Investment Agreement provides for the resolution of investment disputes between an investor and a member State. For a detailed commentary on the ACUA, see JULIEN CHAISSE & SUFIAN JUSOH, *THE ASEAN COMPREHENSIVE INVESTMENT AGREEMENT: THE REGIONALIZATION OF LAWS AND POLICY ON FOREIGN INVESTMENT* 265 (Edward Elgar Publ’g, 2016).

¹¹¹ The degree to which the KLRCA is wholly free from political influence remains, however, unclear—a point that should be noted.

¹¹² This is not an “either/or” proposition. These institutions are both competitors and collaborators.

¹¹³ Arbitration Institute of the Stockholm Chamber of Commerce, *2017 Arbitration Rules*, (Jan. 1, 2017), http://sccinstitute.com/media/169838/arbitration_rules_eng_17_web.pdf [<https://perma.cc/TRH5-HRJ2>].

adopted new rules for investment disputes in 2017.¹¹⁴ Dubai and Mauritius have relatively new arbitration centers. The International Chamber of Commerce Court of Arbitration, the London Court of International Arbitration, and the Hong Kong International Arbitration Centre (which has recently invited practitioners to opine on whether it should develop investment arbitration rules)¹¹⁵ are all capable of administering investment disputes, though they are better known for commercial cases.

Several Latin American countries, led by Ecuador, have proposed the establishment of a regional arbitral institution to hear investment arbitrations involving members of the Union of South American Nations (“UNASUR”).¹¹⁶

The UNASUR proposal in particular demonstrates the introduction of a preference for regionally based dispute settlement for disputes emanating from that region. Whether any preference for regionally based *investment* arbitration will emerge in Asia is not clear, given the paucity of investment arbitration cases involving Asian states. One might imagine that China, given its “one belt, one road” policy, would seek to establish an Asian arbitration center. If it were to do so, would it regard Singapore or Kuala Lumpur or Hong Kong as an appropriate venue, or would it prefer a Chinese location?

4.4. Judicial Disruptions

¹¹⁴ Kate Apostolova, *2017 Year-in-Review: Top 5 in International Arbitration*, WOLTERS KLUWER: KLUWER ARB. BLOG (Dec. 28, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/12/28/2017-year-review-top-5-international-arbitration/> [https://perma.cc/UC5T-ECL].

¹¹⁵ *Id.*

¹¹⁶ See International Institute for Sustainable Development [IISD], *News in Brief: UNASUR Arbitration Centre One Step Closer to Being Established*, 7 INV. TREATY NEWS 9, 10 (Feb. 29, 2016), <http://www.iisd.org/itn/wp-content/uploads/2016/02/iisd-itn-february-2016-english.pdf> [https://perma.cc/6Q9]-DZH8].

One of ICSID's primary advantages—the virtual automatic enforceability of ICSID awards—should help it to maintain its position, yet even there some uncertainties exist.¹¹⁷ Romania and the European Union challenged the enforceability of an ICSID Convention Award in the U.S. Court of Appeals for the Second Circuit, after having established at the District Court that they could seek enforcement on an *ex parte* basis, which is the process generally applicable to court decisions of other U.S. courts.¹¹⁸ On appeal the Second Circuit reversed, holding that the Foreign Sovereign Immunities Act required service of process on the foreign sovereign.¹¹⁹ This result does not prevent the enforcement of the award, but makes the process more cumbersome. One of the claims put forward by the European Union in its *amicus curiae* brief is that the act-of-state doctrine should render the ICSID Convention award unenforceable because the award imposes liability on Romania in a manner that violates EU laws on state aid.¹²⁰ If Romania and the European Union were to be successful on their claims, the enforceability of ICSID Convention awards would be undermined even outside EU member states—it is already quite clear that the *Micula* award, for example, will not be enforced in European Union, notwithstanding its status as an ICSID Convention award. Incidentally, should the act-of-state doctrine be found available to be interposed by a state as a defense to enforcement in the ICSID Convention context, logic would suggest that the argument would be available in defenses to the enforcement of New York Convention awards as well. But there are already

¹¹⁷ Execution immunity, discussed above in the context of New York Convention enforcement, is also applicable in the ICSID Convention Context. Article 55 of the ICSID Convention specifically conserves execution immunity. See Convention on the Settlement of Investment Disputes, *supra* note 1; T-TIP Proposal, *supra* notes 73, 91.

¹¹⁸ *Micula v. Romania*, No. 15 Misc. 107 (Part I), 2015 WL 4643180, at *3–4 (S.D.N.Y. Aug. 5, 2015), *rev'd*, No. 15-3109-cv, 2017 WL 4772435 (2d Cir. Oct. 23, 2017).

¹¹⁹ *Micula v. Romania*, No. 15-3109-cv, 2017 WL 4772435, at *6 (2d Cir. Oct. 23, 2017).

¹²⁰ Brief for *Amicus Curiae* the Commission of the European Union, *Micula v. Romania*, (2017) (No. 15-3109-cv), 2017 WL 4772435 (Feb. 4, 2016).

some limited grounds on which states can challenge the enforcement of New York Convention awards, so the effect on enforceability is much greater vis-à-vis the ICSID Convention.

4.5. *Reasons to Expect the Continued Dominance of ICSID*

If and when these challenges to ICSID's hegemony ripen, one might still expect ICSID to remain dominant for many years. The investment treaty network comprises approximately 2,700 treaties currently in force¹²¹ and ICSID Convention arbitration is an option under most of them (and ICSID Additional Facility arbitration is available in some cases as well); whereas the arbitration centers mentioned above are much more rarely included as options although some treaties would permit the disputing parties to select another set of rules even if they were not listed in the treaty. ICSID is thus well entrenched in the existing network of investment treaties. This widespread treaty "pre-installment" only reinforces institutional lock-in. If treaties are unilaterally terminated, most have a survival clause providing that the investor may seek the protection of the treaty for a specified period – often twenty years – which suggests that any wholesale change will not come soon.¹²² In addition,

¹²¹ See UNCTAD, *International Investment Agreements Navigator*, UNCTAD: INV. POL'Y HUB, <http://investmentpolicyhub.unctad.org/IIA> [<https://perma.cc/25AY-GUFQ>] (last visited Mar. 5, 2018). These 2,700 hundred are the BITs and international investment agreements that have entered into force. Others are pending. At the end of 2014, UNCTAD identified a total of 3,271 international investment agreements. UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* 106 (2015), http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf [<https://perma.cc/ZRA4-FYU3>] ("The conclusion in 2014 of 31 international investment agreements (IIAs) – 18 bilateral investment treaties (BITs) and 13 'other IIAs' – brought the total number of IIAs to 3,271 (2,926 BITs and 345 'other IIAs') by year-end . . .").

¹²² An open question is the effect on investors' rights if both states to the treaty terminate the treaty, and in so doing terminate the survival clause. Do states retain that power, or does the investor have vested rights that cannot be ousted by such an agreement? For a provocative study of this issue, see Anthea Roberts, *Triangular*

investment arbitrations brought under the aegis of investment contracts and investments laws are likely to continue.

Second, even if one were to see the shift from the current approach to investment arbitration to the EU court approach, ICSID is likely to play at least some – and possibly a dominant – role there as well. The ICSID Secretariat has already been named as the administrator for CETA investor-state arbitrations even if they do not occur under the auspices of the ICSID Convention.

Third, any shift is likely to be slow in coming. Incremental change will not immediately displace the ICSID Convention, and even the establishment of a multilateral investment court would not immediately displace the existing regime. Countries would have to sign on to the new court regime, and the ratification of international treaties tends to be a slow process. For example, the United Nations Convention on Transparency in Treaty-based Investment Arbitration (the “Mauritius Convention”), which is frequently invoked as a likely model for the establishment of an investment court in order for disputes under existing treaties to feed in to the new system, took nearly three years to enter into force.¹²³ It still has only three state parties.¹²⁴

Fourth, should there be a growing demand for regionally based investment arbitration, it is not necessarily the case that ICSID cannot dominate that market as well. The ICSID Secretariat staff hail from dozens of countries.¹²⁵ ICSID has cooperation agreements with

Treaties: The Nature and Limits of Investment Treaty Rights, 56 HARV. INT’L L.J. 353 (2015).

¹²³ United Nations Convention on Transparency in Treaty-Based Investment Arbitration, Dec. 10, 2014, U.N. Doc. No. 69/116, <https://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf> [<https://perma.cc/G5XX-5H8J>].

¹²⁴ The parties are Canada, Mauritius, and Switzerland. UNCITRAL, *Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html [<https://perma.cc/9ECY-4YSA>] (last visited Mar. 5, 2018).

¹²⁵ See ICSID, *Secretariat*, <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Secretariat.aspx> [<https://perma.cc/93Q3-WEQU>] (“The Secretariat consists of approximately 70 staff of diverse backgrounds and nationalities.”) (last visited Mar. 27, 2018).

multiple institutions around the world, including CIETAC, SIAC, the HKIAC, and the KLRCA,¹²⁶ and many others as well. ICSID thus has venues around the world in which it can administer arbitrations. Indeed, should there be the requisite demand, nothing would stop ICSID from establishing a regional branch, in China or elsewhere.

5. CONCLUSION

Long-term projections are always hard to make. Will investment arbitration even continue as a viable form of dispute settlement at all? Its availability in some 2,700 extant treaties suggests it will last for some time, but the pace of treaty negotiation has slowed and, as discussed, whether the European Union and the United States will continue to negotiate investment treaties and FTAs with investment chapters in them, either with each other or with third states, is not certain. If they do, these treaties will not necessarily offer the possibility of investor-state arbitration. The European Union's proposal to establish a court could be viewed as saving investment arbitration, but by many critics it will be viewed as not going far enough.¹²⁷ On the other hand, "state-friendly" modifications to investment treaties have made it harder for investors to prevail on their claims.¹²⁸ Nonetheless, one should recall that at its founding, ICSID was expected to administer disputes arising under investment contracts, not investment treaties. Thus, while investment treaty arbitration has eclipsed contract arbitration in ICSID's workload,¹²⁹ contractual arbitrations will likely continue. ICSID does not have a

¹²⁶ See ICSID, *Other Facilities*, <https://icsid.worldbank.org/en/Pages/services/Other-Facilities.aspx> [<https://perma.cc/35XZ-B56E>] (last visited Mar. 27, 2018).

¹²⁷ See Andrea K. Bjorklund, *The European Union's Proposal for an Investment Court and its Implications for the Future of International Investment Law* (unpublished manuscript on file with Authors).

¹²⁸ Lars A. Markert & Catharine Titi, *States Strike Back – Old and New Ways for Host States to Defend Against Investment Arbitrations*, in *YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY*, 401, 401-435 (Andrea K. Bjorklund ed., 2015).

¹²⁹ ICSID statistics indicate that overall, the basis of consent invoked to establish ICSID jurisdiction in registered ICSID cases was found in an investment contract

monopoly over them, either, but the same network externalities and market dominance characteristics apply in that area as well.

In sum, if the European Union's proposals for an investment court gain traction, and if eventually that court crystallizes into a multilateral facility that is headquartered in another institution outside ICSID, that institution could eventually rival ICSID for investment arbitration dominance. Such an event would constitute a "disruptive event" sufficient to undermine the institutional lock-in that we posit currently exists. We may thus witness a period of institutional break-out wherein the market dominance of ICSID is destabilized. Even aside from the European Union's activities, other existing and even new institutions will continue to compete with ICSID, and one or more of them could eventually erode ICSID's market dominance. Exogenous factors, such as national court decisions that undermine the enforceability of ICSID Convention awards, could accelerate that process. Other unforeseen events might also undermine the market dominance of ICSID and trigger either a large-scale coalescence around an alternative institution or, rather more likely, the parceling out of investment arbitration among multiple competitors until the market again coalesces around a new standard. Such a scenario might mean ICSID remains the single most dominant market force for a period, albeit without a monopoly or quasi-monopoly. Yet, absent a very powerful exogenous shock, ICSID's institutional strength and its network-effect-reinforced position of dominance will be hard to unseat.

between the investor and the host state in only 17.3 percent of the cases. The basis for consent was found in the domestic law of the host state in 9.3 percent of the cases while the basis for consent in the other cases was found in a BIT (60.3 percent) or another investment agreement. In 2015, the basis of consent invoked to establish ICSID jurisdiction in registered ICSID cases was found in an investment contract between the investor and the host state in only 8 percent of the cases. The basis for consent was found in the domestic law of the host state in 8 percent of the cases while the basis for consent in the other cases was found in a BIT (46 percent) or another investment agreement. See ICSID, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES [ICSID], THE ICSID CASELOAD—STATISTICS (ISSUE 2016-1) 10 chart 4, 23 chart 3 (2016), [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202016-1%20\(English\)%20final.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202016-1%20(English)%20final.pdf) [<https://perma.cc/7XF5-ZGF5>].