



INVESTOR-STATE ARBITRATION SERIES

PAPER NO. 14 — NOVEMBER 2016

INVESTOR-STATE ARBITRATION AND ITS DISCONTENTS: OPTIONS FOR THE GOVERNMENT OF CANADA

ARMAND DE MESTRAL



**INVESTOR-STATE ARBITRATION AND ITS DISCONTENTS:
OPTIONS FOR THE GOVERNMENT OF CANADA**

Armand de Mestral



Copyright © 2016 by the Centre for International Governance Innovation

The opinions expressed in this publication are those of the author and do not necessarily reflect the views of the Centre for International Governance Innovation or its Board of Directors.



This work is licensed under a Creative Commons Attribution — Non-commercial — No Derivatives License. To view this license, visit (www.creativecommons.org/licenses/by-nc-nd/3.0/). For re-use or distribution, please include this copyright notice.

Centre for International Governance Innovation, CIGI and the CIGI globe are registered trademarks.



67 Erb Street West
Waterloo, Ontario N2L 6C2
Canada
tel +1 519 885 2444 fax +1 519 885 5450
www.cigionline.org

TABLE OF CONTENTS

iv	About the Investor-State Arbitration Project
iv	About the Author
v	Acronyms and Abbreviations
1	Executive Summary
1	Introduction
1	Options
8	Conclusions
9	About CIGI
9	CIGI Masthead

ABOUT THE INVESTOR-STATE ARBITRATION PROJECT

Launched in November 2014, this project is addressing a central policy issue of contemporary international investment protection law: is investor-state arbitration (ISA) suitable between developed liberal democratic countries?

The project will seek to establish how many agreements exist or are planned between economically developed liberal democracies. It will review legal and policy reactions to investor-state arbitrations taking place within these countries and summarize the substantive grounds upon which claims are being made and their impact on public policy making by governments.

The project will review, critically assess and critique arguments made in favour and against the growing use of ISA between developed democracies — paying particular attention to Canada, the European Union, Japan, Korea, the United States and Australia, where civil society groups and academic critics have come out against ISA. The project will examine the arguments that investor-state disputes are best left to the national courts in the subject jurisdiction. It will also examine whether domestic law in the countries examined gives the foreign investor rights of action before the domestic courts against the government, equivalent to those provided by contemporary investment protection agreements.

CIGI Senior Fellow Armand de Mestral is the lead researcher on the ISA project. Contributors to the project are Marc Bungenberg, Charles-Emmanuel Côté, David Gantz, Shotaro Hamamoto, Younsik Kim, Céline Lévesque, Csongor István Nagy, Luke Nottage, Ucheora Onwuamaegbu, Carmen Otero, Hugo Perezcano, August Reinisch and David Schneiderman. A conference was held in Ottawa on September 25, 2015. The papers presented at that conference are in the process of being issued as CIGI Papers and will ultimately appear as a collective book.

ABOUT THE AUTHOR



CIGI Senior Fellow Armand de Mestral leads the Investor-State Arbitration project. An expert in international economic law, Armand is professor emeritus and Jean Monnet Chair in the Law of International Economic Integration at McGill University. He has taught constitutional law, law of the sea, public international law, international trade law, international arbitration, European Union law and public international air law.

Armand's current research interest is the law of international economic integration. He has prepared books, articles and studies in English and French on international trade law and on Canadian and comparative constitutional and international law. He has served on World Trade Organization and North American Free Trade Agreement dispute settlement tribunals, as well as public and private arbitration tribunals. He was made a Member of the Order of Canada in December 2007.

ACRONYMS AND ABBREVIATIONS

BITs	bilateral investment treaties
CETA	Comprehensive Economic and Trade Agreement
FIPA	Foreign Investment Protection Agreement
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ISA	investor-state arbitration
NAFTA	North American Free Trade Agreement
RTAs	regional trade agreements
TPP	Trans-Pacific Partnership Agreement
UNCITRAL	United Nations Commission on International Trade Law

EXECUTIVE SUMMARY

This paper sets out the range of options that appear to the author to be reasonably available to the Government of Canada and other developed democracies as they determine the policies to be adopted with respect to the reform of investor-state arbitration (ISA) in existing and future international investment agreements.

INTRODUCTION

On September 25, 2015, at a CIGI conference held in Ottawa, the options facing Canada and other developed democracies were debated by a group of international experts drawn from developed democracies. Each expert presented a paper on the experience of their country with ISA. These papers were complemented by research focusing specifically on the Canadian experience. Papers were presented on criticisms that have been levelled against ISA, as well on the possible reaction of other states should Canada and other developed democracies decide to abandon ISA between themselves while maintaining recourse to ISA for their citizens against third states. A general background paper¹ dealing with the issues posed and the many solutions that have been offered by a range of critics and commentators, was issued for the conference.

This paper, drawing on the papers presented at the CIGI conference and the debate that took place there, seeks to set out the options most discussed and currently available to developed democracies such as Canada. Inevitably this involves judgment by the author of those options that are the most feasible as well as being legally and politically appropriate, given the range of interests the Government of Canada must protect. A number of the suggested courses of action reviewed in Paper No. 1 are set aside as being unacceptable or unworkable. Inevitably, not all the authors of papers presented or participants in the conference will agree with the characterization of all the options outlined below, and some will wish to see other options included.

OPTIONS

Maintain the Traditional Approach to ISA with All States

Should the Government of Canada or other developed democracies refuse to listen to critics of ISA and maintain their support for ISA as it has been traditionally practised in the past? Refusal to listen to critics is hardly consistent with democracy and has seldom been the policy of the Government of Canada. As far as ISA is concerned, the Government of Canada has been listening rather carefully to citizens (long before the European Commission began to do so, in fact) and has often responded to the criticisms with changes in policy and practice. Rather than hewing to the traditional European “gold standard” model, the Government of Canada has chosen to make significant changes to its 2004 Model Foreign Investment Protection Agreement (FIPA)² and to its specific international investment agreements — whether bilateral, regional or multilateral — as they are negotiated. In particular it has responded to criticisms of both the substance and procedure of the investment chapter (Chapter 11) of the North American Free Trade Agreement (NAFTA).³

It would be unwise to discount the critics of ISA: while they do not command the high ground of economic power, their appeal to general public opinion, especially in developed democracies such as Canada, has been persuasive to many. The Canadian Government appears to have chosen to answer critics by making NAFTA Chapter 11 arbitral proceedings much more transparent and by adopting extensive public policy exceptions in new agreements. Whether this will be sufficient to satisfy critics is essentially a political calculus.

1 Armand de Mestral, “Investor-State Arbitration between Developed Democratic Countries” CIGI, CIGI ISA Paper No. 1, 25 September 2015.

2 Canada, 2004 FIPA Model, online: <www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf>.

3 NAFTA, 17 December 1992, Can TS 1994 No 2, 32 ILM 289, 605 (entered into force 1 January 1994), ch 11.

Abandon ISA with All States

One approach that has been urged on the Canadian Government and other democracies by some critics is the complete abandonment of ISA in all existing and future bilateral investment treaties (BITs) and trade agreements. It has been argued that this is the only way to escape a fundamentally flawed system of investment protection. In Canada's case, this would involve the denunciation of NAFTA Chapter 11 (Part B) and any other ISA commitments currently binding on Canada; it would also mean refraining from making any new ISA commitments, such as those in Chapter 8 of the Comprehensive Economic and Trade Agreement (CETA)⁴ or Chapter 9 of the Trans-Pacific Partnership Agreement (TPP).⁵ The numbers for Canada are not insignificant, as Canada is currently party to NAFTA and 29 other FIPAs, as well as seven FIPAs signed but not yet in force. Around the world, this would involve the denunciation of some 3,200 BITs and ISA commitments in the investment chapters of more than 60 major regional trade agreements (RTAs). Legally, one could conceive of abandoning only the ISA commitments in BITs and RTAs, but the partial denunciation of the arbitration provisions in a treaty is very difficult and would require renegotiation of all these treaties. To call for renegotiation of NAFTA with the United States and Mexico, both of which would be opposed, would set Canada on a perilous course. Unless a new global consensus develops in the near future, it would seem chimerical to call for the renegotiation of thousands of treaties: to do so would invite chaos in the rules protecting foreign investors around the world. Whatever the problem, this remedy is arguably worse than the malady. In current circumstances, wholesale denunciation is not an option that can be encouraged. It might be envisaged on an incremental basis, but would still constitute a radical change of policy.

Should Canada refrain from negotiating ISA in BITs or investment chapters in RTAs in the future? This is certainly an option, but abandoning ISA across the board with all countries in the future is not a course of action that can be recommended. The Australian experience, where calls for complete abandonment appear to have been dropped, is a cautionary tale, suggesting the political difficulties of such an approach. A pragmatic approach, based on an assessment of the best form of protection of Canadian interests in the individual case, is arguably the best.

Continue along the Path of Incremental Amendments

The current Canadian policy of making incremental changes to its 2004 Model FIPA and incorporating these changes into its FIPAs and investment chapters in RTAs is a sensible and workable policy. Indeed, it is the only appropriate policy for negotiators unless officials receive instructions from the highest levels of the Government of Canada to change their current approach, or if the international legal climate respecting ISA changes radically — which could conceivably happen if some EU member states continue to maintain their objections against the provisions on ISA in CETA. Should all developed democracies decide to abandon ISA among themselves or should the rest of the world proceed to abandon recourse to ISA and seek to denounce the thousands of BITs currently in place, then the current Canadian approach will have to be abandoned. As neither eventuality is likely to transpire, in the near future the current Canadian policy is clearly the most appropriate available.

Pursuant to the policy of making incremental changes in light of the experience with NAFTA decisions and other major ISA awards around the world, the Government of Canada, in tandem with its NAFTA partners, issued the Notes of Interpretation in 2001⁶ clarifying the interpretation of an important substantive standard in NAFTA Chapter 11 and has presented its views on the interpretation of NAFTA texts in various arbitral proceedings, as well as making a number of procedural changes designed to ensure much greater transparency. In subsequent investment protection negotiations, especially in CETA, Canada has sought to clarify or adopt new treaty wording in order to ensure that legitimate regulatory powers of states are not subject to challenge. Canada and its NAFTA partners have made a number of significant changes to the conduct of NAFTA proceedings with a view to ensuring greater transparency and have written these changes into subsequent treaty texts such as CETA. Canada has also supported efforts for the adoption of greater transparency of ISA proceedings under the rules of the

4 CETA, 29 February 2016, online: European Commission <trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf>.

5 TPP, 4 February 2016, online: Global Affairs Canada <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng>.

6 NAFTA Free Trade Commission, "Notes of Interpretation of Certain Chapter 11 Provisions" (31 July 2001), online: Global Affairs Canada <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng>.

International Centre for Settlement of Investment Disputes (ICSID) Convention⁷ and other treaties and has worked with others for the adoption and early entry into force of the United Nations Commission on International Trade Law (UNCITRAL) Transparency Rules.⁸ It is understood that major changes to the ICSID Convention's Annulment Committee procedure are under consideration and may soon be proposed. Canada would no doubt wish to consider any such proposals seriously as they would potentially cover some two-thirds of all investor-state arbitrations.

One caveat must be entered. The 2004 Canadian Model FIPA is now 45 pages in length. It attempts to correct what were seen as deficiencies with NAFTA Chapter 11 and other Canadian BITs in the past as well as certain controversial arbitral awards, both in terms of procedural and substantive law, in order to remove these deficiencies and respond to public criticism. The European "gold standard" agreements are normally phrased in terms of very general principles and are only some 10 pages long. In trying to correct a range of problems and respond to future eventualities, the Canadian Model FIPA and the approach that it enshrines may be in danger of indulging in too much detail. Highly detailed texts have their disadvantages as well as their advantages. The interpreter may well conclude that matters not explicitly covered by detailed provisions have been deliberately excluded, while interpretation based on general principles may be more flexible in the long run and cover future eventualities better. Related to this issue is the problem posed by the increasing distance between the wording of the older and the newer BITs, and the ensuing difficulty of reconciling overlapping commitments to different states. Do the same or similar words used in both mean the same thing or does the increased detail of the newer BITs and RTA investment chapters imply that they mean something different? Should arbitrators read into the older BITs the caveats and detailed definitions written into the newer agreements? The 2004 Canadian Model FIPA seeks to restrict the interpretative freedom of arbitrators and give explicit direction to them. This is a legitimate policy objective but excessive detail may cause as much difficulty as too little.

Adopt the CETA Model Involving Broad Procedural and Substantive Exceptions and Guarantees

A further step toward responding to many of the criticisms that have been leveled against the past practice of ISA would be for all states negotiating BITs and investment chapters in the future to follow the CETA model, which contains many exceptions and qualifications on the reach of the ISA process, designed to protect public policy-making by states as well as a radical departure with respect to the dispute settlement procedure. This model — based on the 2012 United States BIT and the 2004 Canadian Model FIPA and an EU proposal to replace ad hoc arbitration with a standing investment tribunal — is very much the reflection of the contemporary debate that has taken place in the European Parliament following the transfer of competence over foreign direct investment to the European Union from its member states. The option was open to the European Union to maintain a negotiating stance based on the traditional "gold standard" approach of most member states. But the debate that ensued in the European Parliament quickly demonstrated that this approach was not acceptable to parliamentarians and to the European public. If this approach, involving some kind of permanent tribunal, can be shown to be acceptable to the general public in developed democracies, and to their national governments, this should go far toward establishing a new standard that reflects the concern to protect public policy making by substantive and procedural means.

The CETA text contains extensive guarantees of fair treatment of foreign investors while incorporating a wide range of procedural and substantive guarantees designed to protect the integrity of domestic regulation. States have greater control over ISA proceedings than is the case in earlier BITs negotiated by Canada and most other states. They are empowered to weed out frivolous and unmeritorious claims. They are also empowered to issue binding interpretations of the meaning of standards of protection in the investment chapter and to declare whether a measure is actually covered by the taxation exception. Transparency of ISA proceedings is guaranteed by a number of provisions in the investment chapter

7 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, 575 UNTS 159, 17 UST 1270 (entered into force 14 October 1966).

8 United Nations Commission on International Trade Law, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (New York: UN, 2014), online: <www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> [UNCITRAL Transparency Rules].

and elsewhere in the agreement. CETA incorporates the new UNCITRAL Transparency Rules and it maintains earlier NAFTA decisions to open hearings to the public and makes public all documents filed by parties.

Perhaps the most radical departure in CETA is the agreement to replace traditional ISA ad hoc arbitration with a standing investment tribunal made up of judges named by both parties. ISA disputes are to be decided by this investment tribunal, which is composed of both a tribunal of first instance and an appellate tribunal, the full details of which are still to be fleshed out. Both parties believe that this investment tribunal will inspire greater public confidence. This provision was incorporated in the CETA text at the behest of the European Union as a result of public pressure, long after the conclusion of formal negotiations. It represents a major departure for both the European Union and Canada. But as demonstrated by the political debate in Belgium surrounding the signature of CETA in October 2016 and the decision not to apply ISA provisions during the period of provisional application, this new concept may not satisfy some European governments and their people. The standards of protection of investors are drafted with particular care. The concept of fair and equitable treatment is redefined in a limitative fashion and the indirect expropriation provision is also redefined to restrict overly broad interpretations. The rest of the CETA text is also characterized by this desire to protect areas of particular concern. Thus, water in bulk is taken off the table, as are cultural industries for Canada and audiovisual regulations for the European Union. Because all laws and regulations are covered in principle, the CETA text, like NAFTA before it, contains extensive annexes, including a negative listing of non-conforming legislation that is grandfathered and hence exempt from challenge. The national treatment standard is limited by reading in much of article XX of the General Agreement on Tariffs and Trade,⁹ which is further understood to contain environmental and public health protections. For all these reasons, the CETA text has the potential to serve as a standard against which future BITs and investment chapters in trade agreements may be measured.

The TPP negotiation, which Canada joined only after it was well advanced, takes up some but not all of the procedural and substantive changes found in the CETA text. Canada may thus be involved in two major new agreements that do not follow exactly parallel courses. In particular, the TPP maintains investment arbitration rather than opting for a new procedure. Given the scope and considerable number of TPP parties, this may prove to be a serious obstacle to coherent development of international investment law. Canada will have opted for one decision-making process — and its opposite.

Amend the ICSID Annulment Committee Process to Make It More of an Appeal Process

An important and very practical initiative would be to amend the ICSID Convention articles that currently constitute the Annulment Committee process, with a view to establishing a genuine appeals court for all ICSID arbitrations. An appellate process would be able to bring greater uniformity to the case law, even without establishing a doctrine of strict *stare decisis*. The current Annulment Committee process, which can only lead to annulment, is overly rigid and forces the successful appellant to totally recommence procedures. Given the large number of BITs and investment chapters in RTAs, the ISA law is never likely to be completely unified, but it can reasonably be expected that an ICSID appellate court would be more likely to “get it right” and assist in correcting obvious errors made by arbitrators. A standing ICSID appellate court would have higher status than individual arbitral panels and would thus more likely enjoy greater public support. Given that ICSID has administered approximately 70 percent of all ISA procedures in the past, the creation of an appellate procedure within ICSID would have a considerable impact on the whole ISA system — even if the appeals procedure under the ICSID Convention would not be available for all ISA proceedings. Its establishment might make ICSID an even more attractive venue, except for those advocates and clients who wish to avoid the additional time and cost of an appeal.

Should a formal appellate process under ICSID not be acceptable, it would be possible to consider creating a reference process under the ICSID Convention comparable to that of the Court of Justice of

9 General Agreement on Tariffs and Trade, 30 October 1947, 58 UNTS 187 (entered into force 1 January 1948), art XX.

the European Union. The current inability of the annulment procedure to remand cases to the original arbitral tribunal is seen as one of the rigidities of the current system.

To achieve these changes it would be necessary to negotiate a protocol to the ICSID Convention. This would be politically difficult, as shown by the first tentative efforts in 2002, and would require the consent of two-thirds of the parties to proceed with the amendment process. An amendment to the current treaty articles was indeed discussed within ICSID in 2002 but very few states were willing to support the effort. Today, in a much changed situation, one can imagine that Canada, the United States, all the states of the European Union and many others throughout the world would be willing partners in the search for a generally acceptable treaty renegotiation. Perhaps the greatest challenge facing the adoption of an appeals procedure under the ICSID Convention is that the actual implementation of such a procedure will require the consent of all ICSID parties, unless this requirement of the convention is also amended.

Set up a Global ISA Appellate Court

Several recent BITs, model BITs and Canadian FIPAs, as well as CETA and the TPP, contain references to the possible future creation of a standing appeals court for ISA awards. Adapting a new court to the existing body of treaty law poses many challenges but should other states be willing to embark on such a negotiation to establish a global ISA appeals court, Canada should certainly be a willing partner. A global standing ISA appeals court, comparable to other major international tribunals, would have the capacity to bring greater order and uniformity to international investment protection law and could well contribute to the broader development of international law.

The decision of the European Union to use an investment tribunal rather than ISA in CETA, the EU-Vietnam Free Trade Agreement¹⁰ and in future investment agreements constitutes a variant on the concept of an international investment court or a global appellate court. This is an EU initiative that depends on the willingness of its treaty partners to adopt the approach. It brings the benefits of a standing tribunal to the decision-making process with all the advantages that this entails. The disadvantage is that there may be a proliferation of standing tribunals, each one established by a separate investment agreement. In the long run, this approach may suffer the same problem of fragmentation as ISA.

Pursuant to the debate on the signature of CETA on October 30, 2016, the European Commission was given the mandate to negotiate the establishment of such an international court.

Encourage All Arbitral Administrative Bodies to Enhance Transparency, Expand Review Procedures or Adopt Appellate Procedures

Another practical step would be for states to encourage the various bodies that currently administer ISA procedures to adopt greater transparency in the administration of procedures as part of their governing rules. Some of these bodies are privately created by chambers of commerce, while some have been created with governmental assistance and are subject to a measure of governmental supervision. Only the Permanent Court of Arbitration is established by an international treaty.¹¹ In virtually all cases, with the possible exception of the China International Economic and Trade Arbitration Commission,¹² it would be necessary to convince private associations responsible for the administration of ISA proceedings that it would be in their interest to adopt greater transparency in their proceedings. Not all would agree. The London Court of International Arbitration, to give one example, sets considerable store by its independence and by the rapidity and confidentiality of its proceedings. The International Chamber of Commerce (ICC) might well respond that its court, while in no sense an appellate body, already performs a well understood and effective review function and is in no need of reform. But

10 EC, Commission, *EU-Vietnam Free Trade Agreement* (Agreed Text as of January 2016), online: <trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

11 The Permanent Court of Arbitration was established by *The Hague Convention for the Pacific Settlement of International Disputes*, 18 October 1907, 1 Bevans 577, 2 AJIL Supp 43 (1908) (entered into force 26 January 1910), online: <www.pca-cpa.org/showfile.asp?fil_id=193Treaty>.

12 China International Economic and Trade Arbitration Commission, online: <www.cietac.org/index.cms>.

were some of these bodies to expand the transparency of their procedures, this could enhance their attractiveness and lead to an increase in the ISA cases entrusted to them.

A variation on this approach would be to encourage all administering bodies to follow the course of the ICSID Secretariat¹³ and strengthen the review they can exercise over arbitral awards before their issuance. Not all the agencies would be in a position to do so or might be willing to follow this course. Some, such as the ICC, would doubtlessly point out that the ICC Secretariat Court already performs a careful review of every award before it is issued.¹⁴ Any administering agency with a secretariat could at least perform a careful reading of the draft award before its issuance to ensure coherence, clarity of meaning and fidelity to generally accepted principles of international law applicable to ISA. As is currently the practice in ICSID or the ICC, the secretariat could take on the function, albeit informal, of providing a careful proofreading of every draft award and be willing to refer ambiguities and weaknesses of reasoning back to the arbitrators before the award is made final. Progress can be made with small as well as giant steps.

A separate but related issue would be the encouragement of these administering bodies to adopt their own appeals procedures. Not all would be willing or even legally able to do so. A right of appeal must be a binding treaty right, either enshrined in an investment agreement (whether a BIT or an investment chapter in an RTA) or in a treaty such as ICSID, as discussed above. The difficulty arising out of such an approach by those administering bodies willing to do so is that it fails to deal with the issue of proliferation of approaches. There would be potential for conflicting conclusions on appeal and no guarantee that different appeal courts would reach similar decisions on similar issues.

Adopt the UNCITRAL Transparency Rules 2014

The UNCITRAL Transparency Rules, adopted in 2014,¹⁵ constitute a valuable practical step designed to respond to the many criticisms of ISA concerning alleged secrecy of procedures. These rules can be adopted for all procedures conducted under the UNCITRAL Rules¹⁶ and can also be adopted by parties as they agree on the conduct of individual arbitrations under other rules. The Transparency Rules reflect the desire not just of UNCITRAL but of a large number of states to ensure much greater transparency of ISA procedures. As such, they constitute a considerable step toward answering some of the most serious criticisms that have been made with respect to ISA.

Abandon ISA with Developed Democracies

Should ISA be abandoned in the future between developed democracies? On a bilateral basis its absence in new treaties between developed democracies would be essentially marginal in terms of its impact on foreign investment between developed democracies. This is reflected in the fact that there are still relatively few BITs between developed democracies. But when developed democracies become involved in the negotiation of mega-regional RTAs such as the TPP (or Canada's negotiation of CETA with the European Union and its 28 member states), it may be very difficult to not commit to ISA as part of the total package of trade and investment protections, although the October 2016 decision to restrict provisional application of the ISA provisions in CETA puts this in doubt. A pragmatic case-by-case approach is the only one that can be reasonably recommended. If there is a strong case for abandoning

13 On this question, see generally Thomas W Walsh, "Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?" (2006) 24:2 BJIL 444.

14 See ICC, International Court of Arbitration, *Rules of Arbitration*, ICC No. 808 (entered into force 1 January 1998), art 33:

Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.

15 The UNCITRAL Transparency Rules, *supra* note 8, came into effect on 1 April 2014 and comprise a set of procedural rules that provide for transparency and accessibility to the public of treaty-based ISA.

16 See *UNCITRAL Arbitration Rules* (New York: UN, 2014), as amended in 2013, art 1(4), online: <www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf>:

For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty based Investor-State Arbitration ("Rules on Transparency"), subject to article 1 of the Rules on Transparency.

ISA between developed democracies on a strictly bilateral basis, this will have to be made taking into account the full range of interests of these states.

Restrict ISA to Agreements with Non-democratic Countries

Developed democracies could consider restricting the use of ISA to agreements involving the rest of the world. This would have the advantage of returning ISA to its original purpose of protecting the foreign investments of capital exporting countries — mainly OECD-centred states — in the territory of states where the judicial processes and the legal systems generally do not provide an acceptable level of protection, or leaving it up to the countries of the global South (whose BITs now constitute the majority) to continue to have recourse to ISA. The 190 BITs between EU members would have to be abandoned. ISA could be withdrawn from the CETA text and dropped from the TTIP. Agreements such as the TPP and NAFTA present larger problems, since they involve states in both categories. Canada and the United States would have to convince Mexico that ISA was no longer needed between them under NAFTA Chapter 11 but should be maintained against Mexico. The developed democracies that are parties to the International Energy Charter¹⁷ or the TPP would have to convince their less democratic partners that ISA should be dropped *inter se* but maintained against the other parties. Many other existing agreements would have to be renegotiated.

Renegotiation of an existing agreement is always a perilous process and runs the risk of unravelling existing rights. It might be that the only feasible choice would be to let existing agreements stand and simply apply the policy to renewal of these agreements when and if they are renegotiated by mutual consent. But the principle could be well enunciated for the future: no ISA between developed democracies. Whether this would have a beneficial or a negative effect on the whole ISA system is a matter that would have to be evaluated by developed democracies to determine where their interests lie. As matters now stand, it is difficult to recommend this option and many would view the approach of developed democracies as discriminatory and invidious.

Limit Recourse to ISA to Situations Where Demonstrably No Effective Domestic Remedy Exists

A refinement on the previous option would be to limit recourse to ISA to situations where no remedy exists in the domestic law of the host state of the foreign investment. This solution would respond to the often heard criticism that domestic courts and national law are being unreasonably bypassed by ISA proceedings, and would do much to reassure the public that ISA procedures would not be unfairly invoked by foreign investors to challenge legitimate domestic regulations.

A first question that would have to be answered would be the standard. Options range from “no remedy,” “no effective remedy,” “demonstratively no effective remedy” to the traditional position of “having exhausted local remedies.” A second related question would be that of determining which authority decides whether the standard has been exhausted: the arbitral tribunal, local courts or the state whose citizens are involved in the dispute together with the host state?

Having resolved the above questions, it would remain to be determined to which states this standard would apply. One option would be to restrict the standard to developed democratic states. Another option would be to apply it to all states regardless of status. A further approach would be to negotiate this option on a case-by-case basis or insert a clause allowing the parties to invoke the standard when conditions in the host state are deemed to have become acceptable. As outlined above, this option could be most easily adopted prospectively. The very considerable difficulties of retrospective application of this standard by reopening existing treaties have been discussed above.

17 *International Energy Charter*, 20 May 2015, online: Energy Charter Secretariat <www.energycharter.org/fileadmin/DocumentsMedia/Legal/IEC_Certified_Adopted_Copy.pdf>.

CONCLUSIONS

The preceding conclusions tend to suggest that, while loss of ISA *inter se* would not have a great impact upon them internally, developed democracies would not find it easy to bring about a situation where ISA applied only to others and not to themselves. This approach does not appear to be feasible. A double standard is inherently offensive and would be extremely difficult to justify. A further significant consideration is that the existing network of ISA commitments is already very extensive and may be too strong to break. However, as suggested above, should they wish to do so, a range of options is available to developed democracies in order to refine or restrict the application of ISA.

Finally, rather than viewing ISA as a constraint, it is arguably preferable to view the rules governing the protection of foreign investment as a body of international law common to all categories of states, whatever their situation.

ABOUT CIGI

We are the Centre for International Governance Innovation: an independent, non-partisan think tank with an objective and uniquely global perspective. Our research, opinions and public voice make a difference in today's world by bringing clarity and innovative thinking to global policy making. By working across disciplines and in partnership with the best peers and experts, we are the benchmark for influential research and trusted analysis.

Our research programs focus on governance of the global economy, global security and politics, and international law in collaboration with a range of strategic partners and support from the Government of Canada, the Government of Ontario, as well as founder Jim Balsillie.

Au Centre pour l'innovation dans la gouvernance internationale (CIGI), nous formons un groupe de réflexion indépendant et non partisan qui formule des points de vue objectifs dont la portée est notamment mondiale. Nos recherches, nos avis et l'opinion publique ont des effets réels sur le monde d'aujourd'hui en apportant autant de la clarté qu'une réflexion novatrice dans l'élaboration des politiques à l'échelle internationale. En raison des travaux accomplis en collaboration et en partenariat avec des pairs et des spécialistes interdisciplinaires des plus compétents, nous sommes devenus une référence grâce à l'influence de nos recherches et à la fiabilité de nos analyses.

Nos programmes de recherche ont trait à la gouvernance dans les domaines suivants : l'économie mondiale, la sécurité et les politiques mondiales, et le droit international, et nous les exécutons avec la collaboration de nombreux partenaires stratégiques et le soutien des gouvernements du Canada et de l'Ontario ainsi que du fondateur du CIGI, Jim Balsillie.

For more information, please visit www.cigionline.org.

CIGI MASTHEAD

Executive

President	Rohinton P. Medhora
Director of Finance	Shelley Boettger
Director of the International Law Research Program	Oonagh Fitzgerald
Director of the Global Security & Politics Program	Fen Osler Hampson
Director of Human Resources	Susan Hirst
Director of the Global Economy Program	Domenico Lombardi
Chief of Staff and General Counsel	Aaron Shull
Director of Communications and Digital Media	Spencer Tripp

Publications

Publisher	Carol Bonnett
Senior Publications Editor	Jennifer Goyder
Publications Editor	Patricia Holmes
Publications Editor	Nicole Langlois
Publications Editor	Sharon McCartney
Publications Editor	Lynn Schellenberg
Graphic Designer	Sara Moore
Graphic Designer	Melodie Wakefield

For publications enquiries, please contact publications@cigionline.org.

Communications

For media enquiries, please contact communications@cigionline.org.



67 Erb Street West
Waterloo, Ontario N2L 6C2, Canada
tel +1 519 885 2444 fax +1 519 885 5450
www.cigionline.org

