THE INTERNATIONALIZATION OF TAX DISPUTES ISSUES AND OPTIONS OF A STANDING INTERNATIONAL TAX COURT

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ABSTRACT

With the growing criticisms on the traditional investor-state arbitration mechanism, the European Union has proposed an innovative provision named the Investment Court System ICS, and it has introduced

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it in some significant bilateral investment treaties, like Comprehensive Economic and Trade Agreement CETA and Transatlantic Trade and Investment Partnership TTIP. In the meantime, as taxation is a component of the investment polies, the protection of the rights enjoyed by the foreign taxpayers matters as well. However, the current tax related dispute settlement methods also have several defects. This article attempts to incorporate the ICS in resolving tax related disputes and taking it one step further: creating an international taxation court. With the analysis of the merits of ICS, the international taxation court in addition to the advantages of ICS can have a promising future.

I. INTRODUCTION

Foreign investment is an important resource for economic development in both developed and developing nations, and it is being encouraged to attract as much foreign investment as much as possible.[1] For example, there is a growing number of special economic zones ("SEZs") established in not only the surrounding coastal areas of China, but in the inland places of mainland China.[2] The construction of these areas is aimed at attracting as much foreign investment as possible. With the increasing amount of the foreign direct investment ("FDI"), various disputes arise at the same time. There are around three thousand international investment agreements ("IIAs") which contain a chapter on investment protection.[3] Although there are many who support investor-state dispute settlement ("ISDS") in the resolution of investment disputes, the criticisms are increasing rapidly. The critiques concern mainly the procedural area and the functional area. Faced up with the criticisms, the European Union ("EU") has proposed an innovative dispute resolution mechanism which is called the Investment Court System ("ICS").

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1 *See generally* Miguel-Ángel Michinel Álvarez, *Inversiones Extranjeras y Sostenibilidad*, 10 ANUARIO ESPANOL DERECHO INT'L PRIV. 2010, at 319.

2 *See* Koel RoyChoudhury, *Special Economic Zones in China*, SIES J. MGMT., Aug. 2010, at 114, 115; *see also* Julien Chaisse & Mitsuo Matsushita, *China's 'Belt and Road' Initiative: Mapping the World Trade Normative and Strategic Implications,* 52 J. WORLD TRADE 163, 169 (2018).

3 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?*, U.N. COMM'N ON INT'L TRADE L. 6 (June 3, 2016), http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf; *see also* 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 GEO. WASH. INT'L L. REV. 563, 565 (2015); Julien Chaisse & Christian Bellak, *Navigating the Expanding Universe of International Treaties on Foreign Investments: Creation and Use of a Critical Index*, 18 J. INT'L ECON. L. 79 (2015).

Meanwhile, taxation is very significant for the a state, like GDP.[4] For instance, based on the taxation report of 2016 issued by the Ministry of Finance of the People's Republic of China, the financial income is around sixteen trillion yuan, while the income of taxation is about thirteen trillion.[5] In developed countries, like the United States, taxation mainly comes from personal income taxation.[6] On the contrary, developing countries like China are focused more on taxation from corporations and enterprises.[7] Increased taxation, may however, lead to more disputes, and the dispute resolution methods are essential when tax related disputes arise. The latest article published by the Organisation for Economic Co-operation and Development OECD points out that weak investment has contributed to low productivity growth by illustrating that annual global FDI inflows were down over eighteen percent into the non-OECD countries, while there was a six percent increase in inflows into the OECD countries.[8] It is partly because OECD countries have initiated many measures to provide a predictable and stable investment environment, and to attract FDI, including the mandatory arbitration mechanism in resolving tax related disputes.[9]

However, while the MAP process is the main dispute resolution method in tax related disputes in the bilateral tax treaties, inefficiency problems have ensued and many countries, including BRICS, want to improve its efficiency.[10] Although on October 5, 2015, the OECD released its final report on improving the effectiveness of dispute resolution mechanisms under its Action Plan on Base Erosion and Profit Shifting ("BEPS").[11] Based on the Multilateral Convention on the Implementation of Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the "Convention"), reached and signed in 2017,

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4 Oren Penn et al., *Session 5: Tax Regimes in Other High GDP Countries*, TAX MAG., June 2008, at 87.

5 *2016 Fiscal Revenue and Expenditure,* MINISTRY OF FINANCE OF CHINA (Jan. 23, 2017), http://gks.mof.gov.cn/zhengfuxinxi/tongjishuju/201701/t20170123_2526014.html.

6 *See* Irene Burgers & Irma Mosquera, *Corporate Taxation and BEPS: A Fair Slice for Developing Countries?*, 10 ERASMUS L. REV. 29, 41 (2017).

7 *See id*. at 41-45.

8 *See* OECD Secretary-General, *FDI in Figures*, ORG. FOR ECON. CO-OPERATION & DEV. 1, 2 (Apr. 2017), http://www.oecd.org/corporate/FDI-in-Figures-April-2017.pdf.

9 *See generally id.*

10 Maira de Melo Viera, *The Regulation of Tax Matters in Bilateral Investment Treaties: A Dispute Resolution Perspective,* 8 DISP. RESOL. INT'L 63, 76 (2014).

11 ORG. FOR ECON. CO-OPERATION & DEV. [OECD], MAKING DISPUTE RESOLUTION MECHANISMS MORE EFFECTIVE, ACTION 14 – 2015 FINAL REPORT 1, 9 (Oct. 5, 2015), http://www.oecd-ilibrary.org/deliver/9789264241633-en.pdf?itemId=/content/book/9789264241633-en&mimeType=application/pdf.

mandatory arbitration clauses are regulated.[12] Countries that sign the Convention can make reservations referring to this clause in their respective bilateral tax treaties.[13] What's worse, the mandatory binding arbitration in tax matters has not been accepted by many states around the world.[14]

Through the introduction of the ICS and the analysis of the defects contained in the current tax related dispute resolution mechanisms, the objective of this Article is to propose a totally new dispute resolution method in tax matters: an international taxation court. In order to demonstrate this thesis, the Article approaches the analysis in six parts. Part II states the criticism presented in relation to the current ISDS system; Part III introduces the ICS proposed by the EU; Part IV analyzes the promising innovations contained in the ICS proposal; Part V emphasizes the choices of the sovereign states when the ICS and taxation issues arises; and Part VI proposes the international taxation system and emphasizes the merits it has in improving the current tax related dispute resolution methods.

II. INTERNATIONAL TAX DISPUTES ON THE RISE

A. Tax Disputes: Facts and Figures

At the end of 2013, there were 4,566 open OECD report on mutual agreement procedure ("MAPs") presented by the OECD member countries, representing a 12.1% increase in comparison to the 2012 reporting period.[15] The 2013 benchmark demonstrated a startling 94.1% increase in comparison to the 2006 reporting period.[16] Although MAP is increasingly accepted by the states, it is not an effective dispute resolution mechanism in tax matters. Some experts believe that "MAP is the ideal win-win platform to effectively resolve treaty-related disputes between two countries[;] [h]owever, MAP does not always work effectively, because any party in the dispute could block the MAP unilaterally."[17] Back in 1984, the OECD Committee on Fiscal Affairs ("CFA"),

12 Multilateral Convention to Implement of Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, June 7, 2017, OECD Doc. OECD/LEGAL/0432.

13 *See id*. at 31-32.

14 Michelle Markham, *Mandatory Binding Arbitration – Is This a Pathway to a More Efficient Map?*, ARB. INT'L, Dec. 2015, at 3.

15 *See Mutual Agreement Procedure Statistics for 2013*, ORG. FOR ECON. COOP. & DEV., http://www.oecd.org/ctp/dispute/map-statistics-2013.htm (last visited Feb. 19, 2018).

16 *Id.*

17 Reuven S. Avi-Yonah & Haiyan Xu, *Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight*, 6 HARV. BUS. L. REV. 185, 233 (2016).

examined the MAP and found "[o]verall, [multinational enterprises] consider that owing to the protracted nature of this procedure and the risks involved, most enterprises look at the mutual agreement procedure only as a last resort."[18] It shows that states tend not to make use of MAP when facing disputes. The key reason lies in the fact that there is little trust in MAP. "In 2001 a Global Transfer Pricing Survey revealed that multinational enterprises had so little faith in the MAP, that they sought competent authority relief for double taxation in only 27% of presented cases, resulting in double taxation in over 70% of such situations."[19] It should be noted that some of the "reasons for not seeking MAP relief included that the process was 'too expensive' or 'took too long.'"[20]

Article 25 of MAP contains the dispute resolution mechanism.[21] Article 25(1) states:

> [W]here a person considers that the actions of one or both of the Contracting States result or will result to taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to either competent authority.[22]

The above clause can be seen as a form of progress, as foreign investors may enjoy more freedom in issuing their disputes. However, the MAP has encountered a growing number of criticisms. First, it does not function well in resolving tax related disputes. Some scholars says that "the purpose of a tax treaty is to avoid double taxation, in practice this result is not always achieved."[23] Moreover, Article 25(2) of the Model Tax Convention requires the "competent authorities only . . . to 'endeavor' to resolve the case."[24] Further, "[t]here is no obligation for the two countries to reach [an] agreement effectively removing double taxation."[25] It means that no result is required. What's worse, competent

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18 OECD, TRANSFER PRICING AND MULTINATIONAL ENTERPRISES: THREE TAXATION ISSUES 18 (1984).

19 Markham, supra note 14, at 4.

20 *Id.* at 3.

21 OECD, MODEL TAX CONVENTION ON INCOME AND CAPITAL: CONDENSED VERSION art. 25 (2017). [hereinafter OECD MODEL TAX CONVENTION].

22 *Id.* art. 25(1).

23 Marcus Desax & Marc Veit, *Arbitration of Tax Treaty Disputes: The OECD Proposal*, 23 ARB. INT'L 405, 409 (2007).

24 *Id.*

25 *Id.*

authorities only consider the disputes from their perspectives, regardless of whether the foreign taxpayers are satisfied or not. It is said that

> [a]lthough in practice, agreement is often reached, [and] in some situations the mutual agreement procedure is closed by an agreement to disagree: possibly because two competent authorities are afraid of creating a precedent detrimental to their respective economies or the amount in dispute is simply too large and the competent authorities are reluctant to forgo a substantial amount of revenue.[26]

The other criticisms come from taxpayers.[27] As stated above, the MAP requires time and money, which still may lead to unacceptable results.[28] Secondly, in order to access MAP, taxpayers have to pay their taxes in advance.[29] Lastly, there is a lack of transparency and taxpayers have little participation during the whole process.[30] In other words, the whole process is controlled by the competent authorities and taxpayers have no procedural rights.[31] This creates a lack of transparency for to the entire process. As the competent authorities "can communicate directly to resolve difficulties or doubts regarding the implementation of the Convention," and "[t]he initiative rests entirely with the competent authorities."[32] Furthermore, the decision-making process is unclear.[33] The interests of the taxpayers may be ignored by the competent authorities. Because "it is not uncommon that, if several mutual agreement procedures are pending between two competent authorities, a 'package' deal is struck: one competent authority gives in in some of the cases, the other one in others, and for the third category an agreement to disagree is reached."[34] Ultimately, even though the result is reached, the taxpayers may have no idea what the reasoning is.

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26 *Id.*

27 Hugh J. Ault, *Improving the Resolution of International Tax Disputes*, 7 FLA. TAX REV. 137, 139 (2005).

28 *Id.*

29 *Id.*

30 *Id.*

31 Desax & Veit, *supra* note 23.

32 *Id.*

33 *Id.*

34 *Id.*

B. BEPS and the Internationalization of Tax Disputes

The problem of tax avoidance is increasingly considered by politicians.[35] It is common for technology companies to make use of different tax policies in order to pay less taxes.[36] Both Apple Inc. and Microsoft commit tax avoidance too.[37] Following the development of the internet, the traditional companies as well as the digital mega multinational enterprises ("MNEs") have committed tax avoidance.[38] For instance, the famous digital companies such as Google and Amazon are considered by the EU in the taxation of their turnover.[39] It is believed that those technology conglomerates are routing most of their profits to low tax regions, including Ireland and Luxembourg.[40] In 2016, Google was accused of around 130 million dollars avoidance of tax.[41]

In order to resolve the serious tax avoidance problems, one project was issued by the OECD and G20 countries. "On the corporate tax avoidance front, the OECD and G20 launched the Base Erosion and Profit Shifting (BEPS) project in 2013, and this has in October 2015 culminated with the release of a series of action steps that the OECD and G20 countries have undertaken to adopt."[42] Both the developed and developing states have extensively engaged in the consultation process.[43]

The work on BEPS is likely to further increase the number of treaty disputes.[44] The application of the BEPS project may lead to changes to the OECD model and its interpretations.[45] It requires time to adjust to the changes for both the taxpayers and tax administrations.[46] However, this

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35 *See* Reuven S. Avi-Yonah & Haiyan Xu, *Evaluating BEPS*, 10 ERAMUS L. REV. 3 (2017).

36 *See* Walter Hickey, *It's Not Just Apple: The Ultra-Complicated Tax Measures That Microsoft Uses to Avoid $2.4 Billion in U.S. Taxes*, BUS. INSIDER (May 21, 2013, 10:02 AM), https://www.businessinsider.com/apple-microsoft-avoids-taxes-loopholes-irs-2013-1.

37 *See id.*

38 *See* Matt Brittin, *Google's Tax Affairs: The Players and Questions They Need to Answer*, THE GUARDIAN (Feb. 10, 2016, 1:48 PM), https://www.theguardian.com/technology/2016/feb/10/google-tax-affairs-players-questions-need-to-answer-hmrc-public-accounts-committee.

39 *See Europe's Effort to Raise Tax Bill on Google, Amazon Gains Momentum*, FORTUNE (Sept. 15, 2017), http://fortune.com/2017/09/15/europe-raise-tax-bill-google-amazon-momentum.

40 *See id.*

41 *See* Brittin, *supra* note 38.

42 Avi-Yonah & Xu, *supra* note 17, at 188.

43 Matthew Gilleard, *The BEPS Special*, INT'L TAX REV., Dec.-Jan. 2016, at 18.

44 Markham, *supra* note 14, at 2.

45 Jasmin Kollmann & Laura Turcan, *Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges*, *in* INTERNATIONAL ARBITRATION IN TAX MATTERS 15, 17 (Michael Lang & Jeffrey Owens eds., 2016).

46 *Id.*

may lead to a period of uncertainty.[47] The different interpretations between different countries may result in problems.[48] BEPS can be a global solution, since it is a global mechanism,[49] but the effectiveness of BEPS is questionable since the "project is limited."[50] As a result, between the participating and non-participating states, the tax competitions will proceed.[51] The competitions to levy low or no taxation on the investments in order to attract more foreign investors can hurt all the states.[52] The uncertainty cannot be avoided during the application of BEPS regulations.[53]

In response to the global outrage over BEPS by MNEs, the BEPS Actions (the "Actions") have been initiated by the OECD.[54] Among the fifteen Actions, fourteen of them call for the OECD to make the dispute resolution mechanisms easier for parties to access and utilize.[55] On October 5, 2015, the BEPS Action 14 ("Action 14") was released. It aims to improve the effectiveness of dispute resolution mechanism.[56] This actions shows that the G20 countries and OECD have made a commitment to implement the so-called "minimum standard" in resolving tax related disputes.[57] Unfortunately, Action 14 offers no remedy "for the deadlock of MAP."[58] Action 14 contains no minimum standard of the mandatory arbitration.[59] It requires the timely resolution under MAP and proposes the mandatory arbitration as a dispute resolution mechanism.[60]

Due to the sovereignty concern of the states, arbitration was not chosen as a preferred dispute resolution mechanism.[61] Based on the

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47 *Id*.

48 *Id.*

49 Avi-Yonah & Xu, *supra* note 17, at 210.

50 *Id*.

51 *Id*.

52 *Id*.

53 *Id*. at 232.

54 Pascal Saint-Amans & Raffaele Russo, *What the BEPS Are We Talking About?*, OECD (2013), www.oecd.org/ctp/what-the-beps-are-we-talking-about.htm.

55 ORG. FOR ECON. CO-OPERATION AND DEV., ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING 23 (2013), https://www.oecd.org/ctp/BEPSActionPlan.pdf.

56 Harm J. Oortwijn, *Dispute Resolution in Cross-Border Tax Matters*, 56 EURO. TAX'N 163, 164 (2016).

57 *Id.*

58 Avi-Yonah & Xu, *supra* note 17, at 233.

59 *Id.*

60 Allison Christians, *BEPS and the New International Tax Order,* 2016 BYU L. REV. 1603, 1636 (2016).

61 Oortwijn, *supra* note 56, at 164.

minimum standard, the OECD model should be implemented in "good faith."[62] Furthermore, the competent authorities should not block taxpayers' access to the MAP process.[63] Action 14 requires governments to improve the functions of their competent authorities.[64] However, budget constraints have to be considered by the governments and a successful implementation of Action 14 cannot exist without proper allocation of the budget.[65]

III. CRITICISM OF THE INVESTOR-STATE ARBITRATION SYSTEM

Nowadays, the protection of foreign investment is considered carefully by the countries. There are "around 3000 international investment agreements (IIAs), including bilateral investment treaties (BITs) and . . . free trade agreements (FTAs) containing a chapter on investment protection."[66] However, they have different views towards the investor-state arbitration. Some experts have said that "opinions diverge on the merits and demerits of the foreign investment protection regime and in particular investor-State arbitration."[67] For the proponents, they mainly support foreign investors and foreign investors can enjoy more rights under this system. They "highlight that the foreign investment protection regime is beneficial," especially for "increasing foreign investment flows as well as the functioning of the global market."[68] A great breakthrough in this system is that foreign investors can bring a claim directly against the host state.[69] The investor-state arbitration system is especially beneficial for the foreign investors to protect their legitimate benefits when foreign investors are not familiar with the host states' litigation system or the government is unable to protect them.[70]

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62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.*

66 Kaufmann-Kohler & Potestà, *supra* note 3, at 6.

67 *See id*. ("Investor-state arbitration provisions show variations across the different IIAs . . . .").

68 *See* Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 62 (2011).

69 Kaufmann-Kohler & Potestà, *supra* note 3, at 7.

70 Stephan W. Schill, *Authority, Legitimacy, Fragmentation in the (Envisaged) Dispute Settlement Disciples in Mega-Regionals*, *in* MEGA-REGIONAL TRADE AGREEMENTS: CETA, TTIP, AND TISA: NEW ORIENTATIONS FOR EU EXTERNAL ECONOMIC RELATIONS 111, 132 (Stefan Griller, Walter Obwexer & Erich Vranes eds., 2017).

Despite the positive opinions mentioned above, the criticism against this system is growing rapidly. The critiques concern mainly the procedural and functional areas.

A. Procedural Critiques

There are three main critiques in relation to the procedures. The lack of transparency is the main critique by commentators, as many arbitrations are filed under strict non-disclosure agreements.[71] The fact that a dispute contains matters of public interest is not relevant in determining whether a case should be open to the public or not.[72] For instance, "the investment arbitral *proceedings* are private, even though most investment disputes are effectively public disputes."[73] Also, the appointment of arbitrators in a traditional ISDS is ad hoc, and there are no safeguards to ensure their competence to adjudicate the cases and the conflict of interests.[74] "[A]llowing arbitrators to work part time as legal counsel creates an alleged perception of bias."[75] There is a possibility that the states may choose those who can represent their interests better, not only in the current disputes, but also in the future.[76] As a result, there is increasing concern about the impartiality of the arbitrators.[77] In addition, "the non-continuity of personnel from arbitration to arbitration implies, to some critics, the possibility of inconsistent, arbitrary, and/or unpredictable decision-making, as different arbitrators apply diverging interpretations of the same IIA provisions."[78]

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71 *See* Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?* 41 VAND. J. TRANSNAT'L L. 775, 786 (2008).

72 *See generally* U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2013 (2013), https://unctad.org/en/PublicationsLibrary/wir2013_en.pdf.

73 David M. Howard, *Creating Inconsistency Through World Investment Court*, 41 FORDHAM INT'L L. J. 1, 22 (2017) (citing SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 171 (2d ed. 2012)).

74 Nathalie Bernasconi-Osterwalder, Lise Johnson & Fiona Marshall, *Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel*, INT'L INST. FOR SUSTAINABLE DEV. (2010), https://www.iisd.org/pdf/2011/dci_2010_arbitrator_independence.pdf.

75 Ian A. Laird, *TPP and ISDS: The Challenge from Europe and the Proposed IP Investment Court*, 40 CAN.-U.S. L.J. 106, 116 (2016).

76 Sonja Heppner, *A Critical Appraisal of the Investment Court System Proposed by the European Commission*, 72 DISP. RESOL. J. 93 (2017).

77 William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 633-34 (2009).

78 Anna Joubin-Bret, *Why We Need a Global Appellate Mechanism for International Investment Law*, COLUM. FDI PERSP., Apr. 2015, at 1.

The "Lauder" cases, a dispute between a U.S. investor – Ronald S. Lauder – and the Czech Government, represent what may be one of the most extreme examples of a conflict.[79] The action brought by Lauder in London was under the United States-Czech bilateral investment treaty ("BIT") and the second action brought in Stockholm was by a company owned by Lauder under the Netherlands-Czech BIT.[80] Despite similarity of the two BITs in both cases, each tribunal reached a different result, "[m]ost significantly, the London tribunal declined to find expropriation, while the Stockholm tribunal, on the same facts, determined that expropriation had indeed taken place."[81]

B. Functional Critiques

The most significant functional critique is that the foreign investors can challenge the national interests—e.g., public health, environmental, and social protections—of the host states when the policies published by the states threaten their profits.[82] ISDS "give[s] foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe."[83] Critics claim that this right will create a "chilling effect" on state regulatory powers.[84] Besides, in the ISDS system, the parties to the disputes tend to choose the arbitrators who are more suitable to protect their own interests and special needs.[85]

Many critics have claimed that the traditional ISDS supports foreign investors more.[86] For instance, in December 2014 the Democratic

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79 David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes Prospects and Challenges*, 39 VAND. J. TRANSNAT'L L. 39, 44 (2006).

80 *Id.*

81 David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 VAND. J. TRANSNAT'L L. 39, 62 (2006) (citations omitted).

82 Yannick Radi, *The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the "Trojan Horse"*, 18 EUR. J. INT'L LAW 757 (2007); *see also* Julien Chaisse, *The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*, 11 HASTINGS BUS. L.J. 225 (2015).

83 *The Arbitration Game: Governments Are Souring on Treaties to Protect Foreign Investors*, THE ECONOMIST (Oct. 11, 2014), https://www.economist.com/finance-and-economics/2014/10/11/the-arbitration-game.

84 Robert W. Schwieder, Note, *TTIP and the Investment Court System: A New (and Improved?) Paradigm for Investor-State Adjudication*, 55 COLUMBIA J. TRANSNAT'L L. 180, 188 (2017).

85 *Id.* at 195. *See also* Julien Chaisse & Rahul Donde, *The State of Investor-State Arbitration: A Reality Check of the Issues, Trends and Directions in Asia-Pacific*, 51 INT'L LAW. 47 (2018).

86 GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 4 (2007).

members of the Ways and Means Committee of the U.S. House of Representatives published a letter to President Barack Obama formally critiquing ISDS, arguing that the ISDS provisions in the Transatlantic Trade and Investment Partnership ("TTIP") and other BITs "advantages foreign investors over domestic ones and threatens US laws, regulations, and judicial decisions protecting health and public safety . . . [by] provid[ing] foreign investors the right to either bypass [their] own courts entirely or to undermine them by challenging their results before panels of private arbitrators."[87] What's worse, "some have argued that ISDS, by combining elements of both arbitrative and judicial review systems, forces states to 'consent to arbitration with an unknown number of investors who may have invested or may invest in the future in their countries.'"[88] Although there is no appeal procedure in the traditional arbitration process, referring to ISDS, American critics (the Ways and Means Committee Members notwithstanding) tend to focus on ISDS's lack of a formal, effective appeals process.[89] Because of the critics surrounding the ISDS, the EU has introduced a new proposal, the ICS, and it is applied to mitigate and overcome the shortcomings of the ISDS.

IV. THE INVESTMENT COURT SYSTEM PROPOSAL BY THE EUROPEAN UNION

The ICS has been successfully introduced into the agreement which negotiations have already concluded.[90] The European Commission ("EC") noted that its proposal "builds on the substantial input received from the European Parliament, Member States, national parliaments and stakeholders through the public consultation held on [investor-to-state dispute settlement]."[91] It is the Comprehensive Economic and Trade Agreement ("CETA"), which has been approved by the European Parliament on February 15, 2017 and in a large part, it provisionally

87 Press Release, Pascrell, Ways and Means Democrats Urge President Obama to Exclude Investor State Dispute Settlement Provisions from Trans-Atlantic Trade and Investment Partnership (Dec. 17, 2014), https://pascrell.house.gov/media-center/press-releases/pascrell-ways-and-means-democrats-urge-president-obama-to-exclude.

88 Schwieder, *supra* note 84, at 187 (quoting Markus Krajewski, *Modalities for Investment Protection and Investor-State Dispute Settlement (ISDS) in TTIP from a Trade Union Perspective*, FREIDRICH EBERT STIFTUNG 7 (2014), http://library.fes.de/pdf-files/bueros/bruessel/11044.pdf).

89 Barton Legum, *Appellate Mechanisms for Investment Arbitration: Worth a Second Look for the Trans-Pacific Partnership and the Proposed EU-US FTA?*, *in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 437, 437 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

90 *See* Schwieder, *supra* note 84, at 186-189.

91 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).

entered into force in April 2017.[92] CETA contains precise definitions and criteria of investment protection and explicit notions of States' right to regulate.[93] "By adopting more precise and modern provisions on investment protection standards, it aims to reduce the ambiguities that could possibility lead to abuses of the system."[94] ICS was also formally proposed in 2015 by the European Commission for inclusion into the TTIP with the U.S.[95]

When considering the main features of ICS, the substantive and procedural aspects should be taken into account.

A. Substantive Features

As mentioned above, one of the main criticisms against ISDS is that it restricts the states' sovereignty to regulate.[96] "In investment arbitration, there is a continuing conflict between state sovereignty and the legitimacy of the tribunal, as a sovereign state has the right to regulate foreign investment within its borders, but this regulation can infringe the rights of foreign investors and restrict a liberal economy that is necessary to increase wealth for both the home and the host countries."[97] CETA clearly stipulates that the EU and Canada preserve "their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity."[98] The TTIP states "that the protections given in the TTIP do not constitute a commitment by a Party that it will not change the legal

92 *See* European Commission Press Release IP/17/3121, EU-Canada Trade Agreement Enters Into Force (Sept. 20, 2017).

93 Hyoeun Yang, *The EU's Investment Court System and Prospects for a New Multilateral Investment Dispute Settlement System* 46–47 (Kor. Inst. for Int'l Econ. Pol'y Research Policy References, Paper No. 17-06, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3063843.

94 *Id.* at 47; *see generally Fact Sheet: Investment Provisions in the EU-Canada Free Trade Agreement (CETA)*, EUR. COMM'N (Feb. 2016), http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf.95European Commission Press Release IP/15/6059*,* EU Finalises Proposal for Investment Protection and Court System for TTIP (Nov. 12, 2015).

95 European Commission Press Release IP/15/6059*,* EU Finalises Proposal for Investment Protection and Court System for TTIP (Nov. 12, 2015).

96 Yang, *supra* note 93, at 34.

97 Howard, *supra* note 73, at 18.

98 Comprehensive Economic and Trade Agreement, art. 8.9, Oct. 30, 2016, 2017 O.J. (L11) 23 [hereinafter CETA].

or regulatory framework, including where it impacts on an investor's expectation of profits."[99]

The ambiguity of the standards of treatment of investors and investment usually gives rise to criticism. Consequently, in CETA, standards such as including fair and equitable treatment ("FET"), indirect expropriation, and most-favored nation treatment ("MFN"), are clearly defined such that it is unlikely that claims against the states' public policy measures will be raised.[100] Among the standards, FET is more likely to be applied by foreign investors.[101] There is a trend that the arbitral tribunal tends to expand the scope of this standard.[102] For instance, in the case of *Occidental Exploration v. Ecuador*, the tribunal explained that the FET standard is aiming to provide a stable and predictable environment for the foreign investors.[103] Since the tax regulations issued by the host government has destroyed this predictability, it has breached the FET standard.[104] In order to provide a clear and specific category of applying the standard, the CETA indicates that the "fair and equitable treatment obligation" is breached when there is:

> (a) denial of justice in criminal, civil or administrative proceedings;
>
> (b) a fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
>
> (c) manifest arbitrariness;
>
> (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
>
> (e) abusive treatment of investors, such as coercion, duress and harassment; or
>
> (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.[105]

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99 Andrew Cannon et al., *European Commission Publishes Draft Investment Chapter for the TTIP, Including Investment Protection Provisions and the Establishment of an International Investment Court*, HERBERT SMITH FREEHILLS (Sept. 18, 2015, 11:15 AM), https://hsfnotes.com/arbitration/2015/09/18/european-commission-publishes-draft-investment-chapter-for-the-ttip-including-investment-protection-provisions-and-the-establishment-of-an-international-investment-court.

100 Yang, *supra* note 93, at 49.

101 Julien Chaisse, *Investor-State Arbitration in International Tax Dispute Resolution: A Cut Above Dedicated Tax Dispute Resolution?*, 41 VA. TAX REV. 149 (2016).

102 Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, ¶ 318 (Dec. 1, 2011).

103 Occidental Exploration and Production Co. v. Republic of Ecuador, LCIA Case No. UN 3467, Final Award, ¶ 173 (July 1, 2004).

104 *Id.*

105 CETA, *supra* note 98, art 8.10.

Finally, there is a rule stipulating that:

> "[s]hould the Tribunal determine in accordance with those rules that a State has breached its obligations under TTIP, it will then have the power to issue 'provisional awards' to claimants in the form of restitution of property, monetary damages (not to be 'greater than the loss suffered by the claimant') or a combination of the two. The Tribunal may not, however, issue punitive damages nor "order the repeal, cessation or modification of the treatment concerned."[106]

B. Procedural Characteristics

1. Composition of the Tribunal

The CETA provision mandates that the Appellate Tribunal (the "Tribunal") is composed of fifteen members nominated by each party—the EU and Canada, through the CETA Joint Committee.[107] To secure impartiality, five of the members of the Tribunal must be nationals of an EU Member State, another five must be Canada nationals, and the remaining five members must be nationals of a third country.[108] The Tribunal will hear cases in divisions consisting of three members of the Tribunal, composed of a national of an EU Member State, a national of Canada, and a national of a third country who shall chair the division.[109]

2. An Appellate Mechanism

The CETA, which is the first international investment agreement, establishes an appeals mechanism to review awards rendered by the Tribunal of the first instance to ensure legal correctness.[110] The EU clarified in TTIP that the objective of the Appeal Tribunal is to "ensure that there could be no doubt as to the legal correctness of the decisions of [the lower level] tribunals."[111] Comparable to an appeal mechanism of a domestic legal system,

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106 Schwieder, *supra* note 84, at 191 (citations omitted).

107 CETA, supra note 98, art. 8.27, ¶ 2.

108 *Id.*

109 *Id.* ¶ 6.

110 Yang, *supra* note 93, at 52.

111 European Commission Memorandum MEMO/15/5652, Reading Guide: Draft Text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP) (Sept. 16, 2015).

> [t]he Appellate Tribunal may uphold, modify or reverse a Tribunal's award based on
>
> (a) errors in the application or interpretation of applicable law;
>
> (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; [and]
>
> (c) grounds set out in Article 52(1) (a) through (e) of the ICSID Convention.[112]

To ensure the highest professional and ethical standards of the Appellate Tribunal, the members of the Appellate Tribunal are required to "possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence."[113] The number of members of the Appellate Tribunal is determined by the CETA Joint Committee and three members of the Appellate Tribunal must be randomly appointed to form a division.[114] In the EU's formal proposal text for the investment chapter in TTIP, the EU suggested to appoint six judges for an Appeals Tribunal, consisting of two EU nationals, two U.S. nationals and two nationals of other countries.[115]

3. The Quality of Tribunal Members and the High Standards of Ethics

As previously stated, the CETA requires the member the Appellate Tribunal to possess qualifications for appointment of judicial offices in their respective countries, or be "jurists of recognised competence."[116] However, it is preferred if they "have demonstrated expertise in public international law, international investment law, and resolution of disputes arising under international investment or trade agreements."[117] The members of the Tribunal are paid a monthly retainer fee to ensure their availability, and the parties pay the fees through an account managed by the International Centre for Settlement of Investment Disputes ("ICSID") Secretariat.[118] While the disputing parties pay for the Tribunal in ISDS, the parties in CETA are to finance the operation of the Tribunal so that

112 CETA, *supra* note 98, art. 8.28(2).

113 *Id.* art. 8.27(4).

114 *Id.* art. 8.28.

115 EUR. COMM'N, TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP: TRADE IN SERVICES, INVESTMENT AND E-COMMERCE, CHAPTER II – INVESTMENT art. 10 (2015), http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf [hereinafter TTIP Proposal].

116 CETA, *supra* note 98, art. 8.27(4).

117 *Id.*

118 *Id* art. 8.27.

there is no conflict of interests between adjudicators and disputing parties.[119] At the same time, it is notable that members of the first instance Tribunal and the Appellate Tribunal are prohibited from acting as counsel or experts/witnesses in any other investment disputes during their appointment.[120]

V. INNOVATIONS OF THE INVESTMENT COURT SYSTEM

In the traditional ISDS system, private interests may undermine public policy objectives.[121] What's worse, the fact that a dispute containing matters of public interests does not count in determining whether a case should be open to the public or not?[122] The lack of transparency leads to more critiques against ISDS.[123] With the help of ICS, which adopts the UNCITRAL Transparency Rules, the level of transparency will be improved. On the December 10, 2014, the General Assembly of the United Nations adopted the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration, by recognizing that "rules on transparency in treaty-based investor-State arbitration, would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes, increased transparency and accountability and promote good governance."[124] In this convention, it adopted an opt-in mechanism, and it would be useful as it reduces the risk of failure in negotiations while building a consensus among participants and allowing them to decide when to ratify the convention in consideration of their domestic circumstances.[125]

Members of the Tribunal are selected in a manner notably different from that applied in traditional ISDS, and is clearly intended to minimize investor influence.[126] This can be an advantage of the court system and it

119 Yang, *supra* note 93, at 53.

120 *See CETA to Establish Permanent Tribunal and Appellate Tribunal for Investor-State Disputes*, VOLTERRA FIETTA (Apr. 11, 2016), http://www.volterrafietta.com/ceta-to-establish-permanent-tribunal-and-appellate-tribunal-for-investor-state-disputes.

121 Yang, *supra* note 93, at 37.

122 U.N. Int'l Law Comm'n, Rules on Transparency in Treaty-based Investor-State Arbitration, Annex, U.N. Doc. A/68/17, 52 I.L.M. 1303 (July 11, 2013) [hereinafter UNCITRAL Rules on Transparency].

123 Howard, *supra* note 73.

124 G.A. Res. 68/109 (Dec. 16, 2013).

125 Yang, *supra* note 93, at 60-61.

126 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 Convent ion and the Nature of Investment Arbitration*, 19 J. INT'L ECON. L. 761, 763–64. (2016).

is beneficial to protect the interests of the states. The system of investor-state dispute resolution under CETA is different. Article 8.27(2) of the CETA provision states that "the joint committee shall, upon the entry into force of CETA, appoint fifteen quasi-tenured Members of the Tribunal."[127] The judges with tenures have less accountability to states.[128] Furthermore,

> [t]his lesser accountability may actually be beneficial to international law as a whole, because rather than focusing on pleasing the states or investors, the judges will be focused on attaining the right result, as a judge's job is to make the international investment agreement the best vehicle for achieving the purpose it was designed to serve.[129]

A disputing party may challenge a member (of both the FIT and Tribunal) on the basis of a conflict of interest, which is determined by the president of the Tribunal.[130] Given that the president of the Tribunal is a member of a third country,[131] the awards will be less biased.

Critics of ICS point out that the foreign investors have no say in determining their arbitrators and, consequently, that ICS cannot be treated as a kind of arbitration.[132] Still, "it appears questionable whether the parties' right to nominate their arbitrators is indeed such a central feature of ICSID arbitration."[133] Furthermore, "[i]n order to access [ISDS], the ICSID convention provides for a default appointment procedure, demonstrating that effective dispute settlement prevails over the right of parties to nominate."[134]

It affirms that the damages awarded should represent "the fair market value of the expropriated investment before the expropriatory action was taken or became known, whichever is earlier."[135] With the Appellate Tribunal, the consistency can be insured in recognition of the

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127 Heppner, *supra* note 76.

128 Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 21 (2005).

129 Howard, *supra* note 73, at 40 (citing LAWRENCE SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF CONSTITUTIONAL PRACTICE 34 (2004)).

130 *See* Lucas Pantaleo, *Lights and Shadows of the TTIP Investment Court System* 77, 81, 86 (T.M.C. Asser Instituut, CLEER Paper No. 2016/1, 2016).

131 *Id.*

132 Reinisch, *supra* note 126, at 777.

133 *Id.*

134 *Id.*

135 RUDOLF DOLZER & CHRISTOPH SCHREUR, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 273-74 (2d ed. 2012).

determination of damages and it is beneficial for both the states and foreign investors.

Generally speaking, the right to appeal is an exception rather than the rule in international court cases.[136] The "[e]xisting appellate mechanisms have been justified essentially by two different considerations."[137] For one thing, an appeal mechanism "can be seen as a means to offer an additional remedy to the parties to the dispute."[138] It provides a second chance for both the private entities and the sovereign states involved.[139] For another, an appellate mechanism can serve the purpose of guaranteeing predictability and consistency of the case law developed under a certain regime.[140] Usually, appeal facilities whose main function is to offer a second chance to the parties involved have the power to review both the law and the facts.[141]

An appellate mechanism—such as the WTO Appellate Body—that serves the public purpose of guaranteeing internal consistency, is usually only empowered to review legal questions.[142] The Appellate Tribunal, as envisaged by the EC, could also modify an arbitration award, a power an ICSID Annulment Committee does not possess.[143]

The Tribunal seems to be flawed in many respects.[144] Investment arbitration is traditionally a mixture of private and public legal components.[145] Arbitral tribunals interpret and apply treaties between sovereign entities, and are often called upon to review nations' sovereign acts that are public in nature.[146] Consequently, public interests can be challenged by private entities through the traditional ISDS. While through the ICS, the private autonomy is totally excluded as this system is founded between the sovereign states. As a result, public interests can be better protected.

An advantage to the ICS is that it can improve the consistency of awards.[147] Under CETA, a group of the same adjudicators will decide the

136 *See* Pantaleo, *supra* note 130, at 89.

137 *Id.*

138 *Id.*

139 *See* Ylli Dautaj, *Dissenting Opinions in Investment Treaty Arbitration: The Investment Court System*, 17 U. C. DUBLIN L. REV. 37 (2017).

140 *See* Pantaleo, *supra* note 130, at 89.

141 *See id.* At 90.

142 *See id.*

143 *See* Heppner, *supra* note 76.

144 *See* Pantaleo, *supra* note 130, at 91.

145 *See id.*

146 *See id.*

147 *See* Howard, *supra* note 73.

cases in a fixed period.[148] This has been referred to as personal and institutional continuity, which is generally beneficial for more consistency in the case law.[149] As mentioned above, Tribunal members will serve five years, which already allow at the first instance, more personal continuity.[150] It might be reasonable to have a longer period for the Appellate Body Tribunal Members in order to further emphasize on personal and institutional continuity.[151] The consistency in decisions is beneficial to lower the risks associated with FDI, and give nations a framework for future action.[152]

The CETA text does not explicitly provide that the decisions of the CETA Appellate Tribunal would be considered binding precedent for subsequent awards given by the Tribunal.[153] It is true that judges of other permanent international courts and tribunals typically rely on precedent for the purpose of legal certainty.[154] For instance, neither the ICJ nor the WTO Appellate Body has a rule on stare decisis.[155] However, both repeatedly referred to their precedent in their respective case law.[156] Seven ICJ judges made it very clear by stating that the ICJ "must ensure consistency with its own past case law in order to provide predictability" and, adding that, "[c]onsistency is the essence of judicial reasoning."[157]

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148 Christian J. Tams, *An Appealing Option? The Debate About an ICSID Appellate Structure* 26 (Martin Luther Univ. of Halle-Wittenberg, Essays in Transnational Economic Law Working Paper No. 57, 2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1413694.

149 *Id*. at 25.

150 CETA, *supra* note 98, art. 8.27.

151 Stefanie Schacherer, *TPP, CETA and TTIP Between Innovation and Condition – Resolving Investor-State Disputes Under Mega-regionals*, 7 J. INT'L DISP. SETTLEMENT 628 (2016).

152 Stephen W. Schill, *The Sixth Path: Reforming Investment Law from Within*, *in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM, *supra* note 89, at 621, 632-33.

153 Stefanie Schacherer, *The EU as a Global Actor in Reforming the International Investment Law Regime in Light of Sustainable Development* 19 (Univ. of Geneva, Working Paper No. 01/2017, 2017).

154 Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT'L DISP. SETTLEMENT 5 (2011).

155 *See* Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter ICJ Statute]; *see also* Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

156 *See* Guillaume, *supra* note 154; *see generally* Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996); Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, WTO Doc. WT/DS344/AB/R (adopted May 20, 2008).

157 Legality of Use of Force (Serb. & Montenegro v. Port.), Judgment, Preliminary Objections, 2004 I.C.J. Rep. 1160, ¶ 3 (Dec. 15); *see also* Rudolf Bernhardt, Article 59, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1231, 1244 (Andreas Zimmerman et al. eds., 2006).

Despite the criticism on inconsistent awards in investment arbitration, it is fair to say that tribunals relied many times on previous cases in their decision-making.[158]

A certain "persuasive precedent" occurred based on the idea that a well-established line of cases should be followed.[159] "While acknowledging that ISDS through arbitration established a certain level of *jurisprudence constante*, the CETA Appellate Tribunal has the potential to better guarantee that a truly CETA jurisprudence will be developed."[160] Furthermore, the decisions of the CETA Appellate Tribunal are likely to have a *quasi-stare decisis* effect, since it can be assumed that each time the Tribunal is not following previous decisions of the Appellate Tribunal, the losing party will immediately appeal against the award and the award then has good chances of being overturned by the Appellate Tribunal.[161] Article 30 of the Commission's proposal stipulates that any awards issued by either the Tribunal or the Appeal Tribunal "shall be binding between the disputing parties and shall not be subject to appeal, review, set aside, annulment or any other remedy."[162]

A big disadvantage related to the traditional ISDS mechanism is the high cost. In *Abaclat v. Republic of Argentine*, the claimant had reportedly spent about $27 million USD and Argentina had spent about twelve million dollars even though the case addressed only jurisdiction and not the merits.[163] Undoubtedly, this is a burden on public finance, especially for poorer countries.[164] Even in the case of winning, it is not common that a tribunal decides to make the claimant pay the cost of the other disputing party.[165] Faced with the high financial burden, the ICS Tribunal can dismiss a frivolous claim at an early stage, provided it is clearly without legal merit and/or the facts would not support a case as a

158 *See* Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as* Jurisprudence Constante, *in* INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265 (Picker, Bunn & Arner eds., 2008).

159 *See* El Paso Energy International Company v. Argentina, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 39 (Apr. 27, 2006); *see* Saipem S.p.A. v. Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 67 (Mar. 21, 2007).

160 Schacherer, *supra* note 151.

161 Tams, *supra* note 148, at 23.

162 Schwieder, *supra* note 84.

163 Abaclat v. Republic of Arg., ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011).

164 Schwieder, *supra* note 84, at 195.

165 Yang, *supra* note 93, at 44.

matter of law.[166] There are several measures to prevent delays and increase in costs, and the core movement is that the Tribunal shall render a final award within a limited time period: for the CETA, a final award shall be rendered within twenty-four months of submission of a claim; and the EU-Vietnam FTA provides that; any appeal should not exceed six months, with the exception of extension up to nine months, so that the entire process shall be completed within three years.[167] Finally, the disputing parties may agree that the case be decided by a sole member of the Tribunal if the claimant is a small or medium sized enterprise or the compensation or damages claimed are relatively low.[168] A more efficient dispute resolution mechanism can decrease the financial burden not only for the states, but the foreign investors as well.

Despite the merits of the ICS, there are some concerns with it. Based on CETA, the Appellate Tribunal can not only consider the legal issues, but also the facts.[169] However, how to consider the facts is not clearly defined. In other words, whether the Appellate Tribunal would be free to make its own findings of fact *de novo*, reinvestigate the factual record, and thus substitute its own interpretation of the facts for the FIT.[170] No matter which meaning is correct, it will take much time and the cost can be high. However, the consequence is not always bad. For one thing, the financial burden will be heavy for the contracting parties. For another, faced up with the heavy financial burden, investors may not choose to file the claim to the Appellate Tribunal and it can avoid the abuse of appeals to some extent.

VI. THE CHOICE OF STATES

Since the ICS is still a proposal issued by the EU, the scope it covers is not defined in detail. Taxation is a significant area which the nations should handle with careful attention. The following paragraphs identify and explain two diverse decisions the nations can make in relation to this sensitive area.

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166 Mark Mangan, *The EU Succeeds in Establishing a Permanent Investment Court in its Trade Treaties with Canada and Vietnam*, DECHERT LLP (March 2016), https://www.dechert.com/content/dam/dechert/uploads/documents/The_EU_succeeds_in_establishing_a_permanent_investment_court_in_its_trade_treaties_with_Canada_and_Vietnam_-_Dechert_-_03242016.pdf.167*Id*.

167 *Id*.

168 Yang, *supra* note 93, at 47.

169 CETA, *supra* note 98.

170 Kyle Dylan Dickson-Smith, *Does the European Union Have New Clothes?: Understanding the EU's New Investment Treaty Model*, 17 J. WORLD INV. & TRADE 773, 801 (2016).

A. Inclusion of Taxation in the Investment Court System

When faced with tax related disputes, foreign investors tend to bring "their claims based on the BITs and other international investment treaties instead of the international taxation treaties."[171] "The substantive clauses within the international investment treaties and the international tax treaties are different although they share one common feature of non-discrimination."[172] The principles of international investment law are National Treatment ("NT"), MFN, FET, Full Protection and Security ("FPS") and Umbrella Clause.[173] It is because the international tax treaties and international investment treaties are not for the same purpose.[174] The main purpose of international tax treaties is to prevent the double taxation and double non-taxation and a proper way to allocate the financial revenue, "while the purpose of international investment treaties, particularly BITs, 'is to protect the investments that produce those revenues.'"[175] Therefore, the scope of the international investment tax regime offered to protect the taxpayers, is larger in comparison with that provided by the bilateral tax treaties.[176] The protection offered by the international tax treaties is limited to some standard, like the NT clause.[177] For example, in terms of the discrimination rule in Article 24, Section 1 of the UK-China bilateral tax treaty, it states that

> [n]ationals of a Contracting State shall not be subjected by the other Contracting State to any taxation or any requirement connected therewith, which is more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected.[178]

It means that

171 Julien Chaisse, *Making Tax Dispute Resolution Mechanisms More Effective – The Base Erosion and Profit Shifting Project and Beyond*, 10 CONTEMP. ASIA ARB. J. 1, 27 (2017).

172 *Id.* at 27-28.

173 DOLZER & SCHREUER, *supra* note 135, at 1.

174 Chaisse, *supra* note 171, at 28.

175 *Id.*

176 *Id.*

177 *Id.*

178 Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains, June 27, 2011, Gr. Brit.-China, GR. BRIT. T.S. No. 1 (2014) (Cd. 8783).

> non-residents from a treaty country must not be treated worse than residents of that same country with regard to the subject matters within the scope of the treaty. As for legal entities, it is usually expressly applicable to permanent establishments of foreign firms and to corporations that are wholly or partly owned or controlled by one or more foreign residents.[179]

This concept is considered as the NT provision under the BITs. However, it does not relate to the MFN clause, so either China or the U.K. can offer even better treatment to the nationals of another country while it is not possible for the other contracting party of the U.K.-China bilateral tax treaties to claim the better treatment received by that other country.[180] It suffices to conclude that, at present, the protection offered to the taxpayers in this sense is limited when compared to the BITs.[181]

At the same time, the FET standard is also often used by the taxpayers to protect their profits when faced with the tax related disputes under the BITs. This is because tribunals tends to expand the scope of this standard.[182] For instance, the *Roussalis v. Romania* award expanded the scope of FET principle and it stated that this standard is not precisely defined beyond general principles.[183] In the *Occidental Exploration v. Ecuador* case, the tribunal explained that the FET standard is aiming to provide a stable and predictable environment for foreign investors, as they will make their investment plans based on the expectations that the policies will be stable.[184] Since the tax regulations issued by the host government have destroyed this predictability, it has breached the FET standard.[185] As long as, for instance, the foreign investors are treated worse in the taxation area, they can file the claim based on this standard.

The remedies that investors are offered under the international taxation convention are limited. For instance, Article 25(3) of the 2017 version of the OECD Model Convention states that "[t]he competent authorities of the contracting states shall endeavour to resolve by mutual agreement, any difficulties or doubts arising as to the interpretation or

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179 Maira de Melo Vieira, *The Regulation of Tax Matters in Bilateral Investment Treaties: A Dispute Resolution Perspective*, 8 DISP. RESOL. INT'L 63, 71 (2014).

180 Chaisse, *supra* note 171, at 8-10.

181 *Id.*

182 *Id.*

183 Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, ¶ 318 (Dec. 1, 2011).

184 Occidental Exploration and Production Company v. Republic of Ecuador, Final Award, LCIA Case No. UN3467, ¶¶ 159-92 (July 1, 2004).

185 *Id.*

application of the convention."[186] That means only a threat cannot start up the arbitration. However, no matter whether the taxation is imposed or not, so long as the foreign investors find that this kind of taxation can be a breach of its investors' rights under BITs, they can proceed with arbitration.

Therefore, foreign investors can enjoy broader benefits from the investment protection criteria compared with those regulated in the international taxation area. If the ICS is successfully founded, they will be more likely to file the claims to the ICS when faced up with the taxation disputes. However, there are several disadvantages remaining in resolving the tax related disputes under ICS. First, the tribunal, no matter the first instance or the appellate body, is un professional in resolving tax related disputes. Without a better knowledge of the taxation area, they are unable to fully understand of the disputes. For another, the national sovereignty and interests can be threatened to a great extent when including the taxation in ICS. This creates a regulatory chill effect.[187] That means, because of the high costs of investor-state arbitration, states may be reluctant to enact measures that might even be a breach of their obligations.[188] This chilling effect is exacerbated by arbitration decisions that are inconsistent and that have adopted surprising interpretations of investment obligations.[189] In this situation, even the measures are for public interests, as long as there is a possibility that this kind of measures can be a breach of BITs, the countries are more likely not to initiate them.[190] They will retain their sovereignty in making new policies related to public interests, like the protection of public health and environment, to escape from the intervention of the award initiated by the independent arbitral tribunal.[191] Although these policies may sometimes decrease the interests of foreign investors, and taxation measures are always used to reach the goal, these kind of tax related disputes cannot be resolved by the ICS.

186 OECD MODEL TAX CONVENTION, *supra* note 21, art. 25.

187 Janeba, Eckhard, *Regulatory Chill and the Effect of Investor State Dispute Settlements* 1 (Univ. of Munich, CESifo Working Paper Series No. 6188, 2016).

188 Chaisse, *supra* note 171, at 1.

189 *Id*.

190 *Id*.

191 Agreement between the Government of New Zealand and the Government of Hong Kong for the Promotion and Protection of Investments [1995] NZTS 14 (signed 6 July 1995, entered into force 5 August 1995), art 8.

B. Exclusion of Taxation from the Investment Court System

Apparently, as nations are worried about their own sovereignty, they tend to narrow the scope of taxation disputes to the arbitration under the BITs which they can resolve.[192] Most of the new generation of BITs and MITs contain explicit references to tax exclusions.[193] Many states are limiting the scope of the FET standard. For instance, the *Nations Energy v. Panama* case interprets the BIT to exclude claims stemming from taxation matters based on the FET standard.[194] Meanwhile, if there are no explicit words or interpretations to the FET standard in the BITs, the tax measures are excluded from consideration in this treaty.[195] It can be seen from the North American Free Trade Agreement ("NAFTA") Article 2103(1); that if it is not explicitly set out in the treaties, nothing can be applied to the taxation measures.[196] Further, it does not mention FET standard in the context.[197]

There is a growing trend that the contracting parties tend to limit, or even exclude the taxation part from the whole BIT.[198] For instance, the 2015 Indian model BIT-EU carves out taxation from the scope of the treaty.[199] Another example is the agreement between the government of Hong Kong and the government of New Zealand in the Promotion and Protection of Investments.[200] In this agreement, it states that "[t]he provisions of this agreement shall not apply to matters of taxation in the area of either contracting party."[201] "Such matters shall be governed by the domestic laws of each Contracting Party and the terms of any agreement relating to taxation concluded between the Contracting

192 Chaisse, *supra* note 101.

193 Ali Lazem & Ilias Bantekas, *The Treatment of Tax as Expropriation in International Investor-State Arbitration*, Arb. Int'l 1 (2015).

194 Nations Energy, Inc. and Others v Republic of Panama, ICSID Case No. ARB/06/19, Award 1, 39 (Nov. 24, 2010).

195 Chaisse, *supra* note 101.

196 North American Free Trade Agreement, Can.-Mex.-U.S., art. 2103, Dec. 17, 1992, 32 I.L.M. 289 (1993).

197 *Id.*

198 Model Text for the Indian Bilateral Investment Treaty, GOV'T OF INDIA art. 2.4 (2015), https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.

199 *Id.*

200 Agreement between the Government of New Zealand and the Government of Hong Kong for the Promotion and Protection of Investments [1995] NZTS 14 (signed 6 July 1995, entered into force 5 August 1995), art 8.

201 *Id.*

Parties."[202] In other words, the sovereign nations tend to narrow the scope the investment criteria, covers and maintain their taxation sovereignty.

When disregarding the ICS to resolve tax related disputes, the current tax related dispute settlement mechanisms should be relied upon. When tax related disputes arise, there are several ways to resolve them. The local remedy can be used as a first step. The taxpayers can initiate local litigation or submit their disputes to the related administrative tribunal.[203] However, foreign taxpayers tend not to make use of this method to get their disputes solved. For one thing, they are not familiar with the laws of the host nation.[204] For example, foreign taxpayers and the competent authority of the host state may have different interpretations on the same issue and taxation clause.[205] In another aspect, the court in the host state may be biased. It is therefore inevitable for the host state to protect itself, especially when the disputes arise because of the policies initiated by the host state.[206] Further, if the disputes contain the issues related to national interests of the host state, the related court or administrative tribunal will be more likely to reject the request from the foreign taxpayers.[207]

There is also a clause related to the local remedies in the bilateral tax treaties. Based on the 2014 OECD model convention, it says that:

> The competent authority shall endeavor, if the objection appears to be justified to the authority and if it is not by itself, able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other contracting state, with a view to the avoidance of taxation which is not in accordance with the convention.[208]

That means the MAP process can be initiated only when the competent authority which gets the request from the taxpayers cannot

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202 *Id*.

203 OECD, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL art. 25.20 (2014).

204 Roland Ismer & Sophia Piotrowski, *BIT Too Much: Or How Best to Resolve Tax Treaty Disputes*, 44 INTERTAX 348 (2016) (discussing foreign taxpayers' unfamiliarity with the laws of their own state).

205 Mario Züger, General Report, *in* SETTLEMENT OF DISPUTES IN TAX TREATY LAW 15 (Michael Lang & Mario Züger eds., 2002).

206 INTERNATIONAL ARBITRATION IN TAX MATTERS 15 (Michael Lang & Jeffery Owens eds., 2nd ed. 2015).

207 *Id*.

208 OECD, *supra* note 203, art. 25.

decide and resolve the disputes unilaterally.[209] The unilateral resolution made by the related competent authority can be treated as a kind of local remedy.

Except for the local remedies above, the dispute resolution mechanisms in bilateral tax treaties can be functional. There are two or three main steps to resolve the tax related disputes; the difference is because many bilateral tax treaties do not incorporate a mandatory arbitration clause in the content. At first, the related competent authority to which the taxpayers have submitted their dispute to should resolve the dispute unilaterally.[210] If it cannot get the dispute solved all by itself, the MAP process can be initiated. After the MAP, if there are still unresolved disputes available, the mandatory arbitration clause can be reached.[211] However, some great details are remaining with the mechanisms. First, MAP is controlled by the competent authorities and taxpayers have little legal standing during the process.[212] What they can do is provide some basic information and evidence related to the disputes in written materials.[213] However, before the MAP process, based on the 2017 OECD model convention, either competent authority can be reached when the taxpayers want to submit their disputes and first will attempt to resolve the issue unilaterally.[214] If the disputes can be solved unilaterally, the MAP process will not commence at once. The competent authority has full discretion to reject the submission of the disputes.[215]

The BEPS fourteenth movement and the 2008 version of the OECD model convention are related to the mandatory arbitration.[216] Although they are merely suggestions for the countries, some countries, especially the developed ones, have incorporated this dispute resolution method into the bilateral tax treaties.[217] Although the model convention clearly regulates mandatory arbitration, it provides the flexibility for states to incorporate it.[218] For example, in the US-Germany bilateral tax treaties,

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209 Charles R. Irish, *Private and Public Dispute Resolution in International Taxation,* 4 CONTEMP. ASIA ARB. J. 121 (2011).

210 OECD MODEL TAX CONVENTION*, supra* note 21, art. 25.

211 *Id*.

212 Irish, s*upra* note 209.

213 OECD MODEL TAX CONVENTION*, supra* note 21.

214 *Id.* art. 25.

215 INTERNATIONAL ARBITRATION IN TAX MATTERS, *supra* note 206, at 114.

216 OECD, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL (2008).

217 Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, U.S.-Ger., art. 25, Aug. 29, 1989, 1708 U.N.T.S. 3. [hereinafter U.S.-Ger. Convention for the Avoidance of Double Taxation].

218 *Id.*

the mandatory arbitration has been included.[219] But they have made some restrictions on it. In the treaty, it states that "[i]f a disagreement cannot be resolved by the competent authorities it may, if both competent authorities agree, be submitted for arbitration."[220] When considering the incorporation of the mandatory binding arbitration in bilateral tax treaties, the national sovereignty is the main concern especially for the government of developing states, such as the Chinese government.[221]

Except for the merits of the dispute resolution methods in tax matters mentioned above, there are also several criticisms remaining. First, there is a great shortcoming that the whole deciding process by the related competent authority is not transparent.[222] For instance, if the disputes contain the issues related to national interests of the host state, the related court or administrative tribunal will be more likely to reject the request from the foreign taxpayers.[223] Furthermore, the BEPS initiated by OECD, especially the fourteenth movement and the OECD model convention (2008 version), has released a suggestion called mandatory arbitration to resolve the tax related disputes.[224] However, regarding the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("MLI"), the mandatory arbitration in tax matters is not allowed by some developing countries, like China.[225] In other words, the mandatory binding arbitration in tax matters is not widely accepted by many states as a main mechanism in resolving disputes in tax matters.[226] Meanwhile, the mandatory arbitration in tax matters is still confidential between the contracting states.[227] The whole arbitration process and most of the materials are confidential.[228] Based on the Sample Mutual Agreement on Arbitration, only when both competent

219 *See* U.S.-Ger. Convention for the Avoidance of Double Taxation, *supra* note 217.

220 *Id.*

221 INTERNATIONAL ARBITRATION IN TAX MATTERS, *supra* note 206.

222 *See* Rick Mitchell, *OECD: BEPS Should Include Peer Review Mechanism to Push Arbitration for Disputes*, 23 TAX MGMT. WKLY. REP. 1503 (2015).

223 INTERNATIONAL ARBITRATION IN TAX MATTERS, *supra* note 206.

224 OCED, *supra* note 216. For a commentary of BEPS, see Julien Chaisse & Xueliang Ji, *"Soft Law" in International Law-Making: How* Soft *International Taxation Law is Reshaping International Economic Governance*, 13 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 463 (2018).

225 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, Nov. 24, 2016, https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf [hereinafter MLI].

225 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, Nov. 24, 2016, https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf [hereinafter MLI].

226 *Id.*

227 *Id*.

228 Ismer & Piotrowski*, supra* note 203.

authorities and the taxpayers agree with the publication, a part of the final arbitral award can get published, with no information that leaves a possibility for the public to realize who the disputing parties are.[229] That means the competent authorities can control the publication. Meanwhile, according to the UN Model Convention in relation to the accession to MAP process, only when one of the competent authorities requires it, can the arbitration be initiated.[230] The rights foreign taxpayers can enjoy are still limited.[231] Moreover, the whole process requires significant time and financial resources. Over the past few decades, one of the major concerns with submitting cases to the MAP has been the average time period for the resolution of tax disputes under the MAP, with reports of some cases taking "a staggering 10 to 15 years" to resolve.[232] The whole process will be much longer if the mandatory binding arbitration is combined with the MAP. Lastly, one main criticism of the current tax related dispute resolution mechanism is that it lacks consistency.[233] In the bilateral tax treaties, no matter the unilateral stage, the MAP process, or the proposed mandatory binding arbitration, all the awards or decisions reached lack consistency.[234] It must be noted that there is no mature international taxation treaty, and the dispute resolution mechanisms in tax matters have to rely on the diverse bilateral tax treaties, including the implementation of the final awards. As a result, it is likely that different will to reach diverse awards faced with similar facts and legal issues.

Due to the defects mentioned above, a new tax related dispute settlement system, an international taxation court, may be appropriate.

VII. INTERNATIONAL TAXATION COURT

An international taxation court would have several benefits compared with the current dispute resolution methods in tax matters. First, it would increase consistency. Although ICS is called "court," EU still regards it as a kind of arbitration, and consequently, it has no

229 OCED, COMMENTARIES ON THE ARTICLES OF THE MODEL TAX CONVENTION 381 (2010), https://www.oecd.org/berlin/publikationen/43324465.pdf.

230 U.N. DEP'T OF IN'TL ECON. & SOC. AFF., U.N. MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES (2011), https://www.un.org/esa/ffd/wp-content/uploads/2014/09/UN_Model_2011_Update.pdf.

231 Chaisse, *supra* note 101.

232 Ernst & Young, *Transfer Pricing 1999 Global Survey: Practices, Perceptions, and Trends*, TAX NOTES: SPECIAL REPORT 1073, 1084 (1999).

233 Chaisse, *supra* note 101.

234 Maira de Melo Vieira, *The Regulation of Tax Matters in Bilateral Investment Treaties: A Dispute Resolution Perspective*, 8 DISP. RESOL. INT'L 63 (2014).

precedent values.[235] However, even though the awards issued by the ICS cannot be used as precedents, it can still maintain its consistency in its own way. No absolute uniformity would be achieved under ICS[236] because the applicable law, especially the substantive parts, would continue to vary in different treaties.[237] However, in the application of the same IIA and of different IIAs with identical or nearly identical wordings could still achieve consistency.[238] Even when applying differently-worded IIAs, it must be expected that the permanent court system will pursue consistency more than ad hoc bodies, since the elements of permanent courts are "tradition, continuity and collegiality."[239] By keeping the judges adjudicating disputes relatively consistent through time, the ICS could introduce more consistency and predictability than ISDS currently affords.[240] It can also apply the same experience to the international taxation court. It can resemble the composition of judges in the ICS and nominate them in a fixed period. As mandatory arbitration in tax matters only deals with the remaining issues unresolved after MAP process, no matter whether the disputes resolved during MAP is right or wrong, they cannot be considered in the following arbitral procedure.[241] If there is an independent international taxation court system within the appellate body, maybe these issues can be re-considered. Especially the interpretation issues can be re-considered by the appellate system. Consequently, even though the taxation treaties are divided, the permanent court can be applied to reach the consistency.

Furthermore, because of the ad hoc nature of the current dispute resolution methods in tax matters, there is concern that either the competent authorities or the arbitrators in mandatory binding arbitration in tax matters can be biased to some extent. The chairperson in the mandatory arbitration in tax matters should be decided by the other two arbitrators who have been chosen by the disputing parties respectively.[242] If the decision cannot be reached within this time, the chair will be nominated by the related body.[243] However, as time is limited, it is hard to ensure a chair's impartiality. The impartiality of the arbitral tribunal in

235 Schwieder, *supra* note 84, at 195.

236 Kaufmann-Kohler & Potestá, *supra* note 3, at 31; *see also* Chaisse, *supra* note 171.

237 Kaufmann-Kohler & Potestá, *supra* note 3, at 31.

238 *Id.*

239 *Id.* at 32.

240 Schwieder, *supra* note 84, at 180.

241 OECD MODEL TAX CONVENTION, *supra* note 21.

242 *Id*.

243 *Id*.

ICS mainly depends on the neutral third party-the chairperson.[244] From this perspective, the process in ICS, which strictly ensures the impartiality of the chairperson, will be less biased.[245] Compared with an ICS system, some have suggested an independent appellate system with the existing tax related dispute resolution system. However, compared with the independent ICS system, a combination of existing dispute resolution mechanisms in tax matters with an independent appellate system is not recommended. Because without the mandatory arbitration involved, the current dispute resolution system, mainly MAP, is already time-consuming.[246] If there is one more appellate system, the process will be much longer.[247] As a result, a separate taxation court system may be better.

Meanwhile, the international taxation court can be more efficient than traditional dispute resolution mechanisms for tax matters. To save money and prevent delays, the ICS has proposed that the Tribunal should have a time limit in reaching awards.[248] To prevent delays and cost increases, "the Tribunal shall render a final award within" a limited time period.[249] Per CETA, a final award shall be rendered within 24 months of submission of a claim, and "the EU-Vietnam FTA provides that any appeal should not exceed six months, and in no case can it exceed nine months," so "that the entire process [shall] be completed within three years."[250] Besides, with the consent of the claimant and the respondent state, a single judge may resolve the dispute.[251] The international taxation court system can do the same thing. If the international taxation court system is more efficient than traditional tax related dispute settlement mechanisms, more parties will be likely to opt-in to it.

A significant merit that ICS shares with the traditional ISDS mechanism is that foreign investors can file claims directly to get involved in the dispute resolution process.[252] In current dispute resolution mechanisms for tax matters, including mandatory binding arbitration, foreign taxpayers have limited say in the process.[253] Foreign taxpayers

244 Schacherer, *supra* note 151, at 628.

245 *Id*.

246 Ernst & Young, *supra* note 232, at 1073.

247 *Id*.

248 Yang, *supra* note 93, at 47.

249 Mangan, *supra* note 166, at 5.

250 *Id.*

251 Yang, *supra* note 93, at 46.

252 Ylli Dautaj, *Dissenting Opinions in Investment Treaty Arbitration: The Investment Court System* 17 U.C. DUBLIN L. REV. 37, 49 (2017).

253 *See* OECD MODEL TAX CONVENTION, *supra* note 21.

will be more confident in the dispute resolution process if an international taxation court system allowing their direct participation can be created. Since judges are chosen by the contracting states, sovereignty of states will not decrease.

"Multiple bilateral ICS mechanisms could serve as stepping stones towards a multilateral adjudicatory system for international investment disputes."[254] Therefore, the international ICS should be based on the bilateral ICS mechanisms. The MLI is not accepted by many states, and as of February 12, 2019, just eighty-seven states have signed the MLI.[255] Bilateral tax treaties should be the starting point for the international taxation court as well. The EU and Canada considered CETA to be a bilateral agreement.[256] A bilateral agreement is not only a basis of the taxation related dispute settlement method, but a basis and starting point of an international taxation court. For those whose tax related disputes usually arise, it may be more appropriate to set up a tax court system as an experiment. If it succeeds, the international taxation court can be a possibility. In CETA, as the EU proposed the ICS as a kind of arbitration, its main goal is to make up ICSID and New York Convention to get the awards implemented more smoothly.[257] However, the views about the nature of ICS awards are still not verified and some refused to accept them as arbitral awards.[258] The value of ICSID and New York Convention is to ensure the acceptance and implementation of the awards by the third party other than the disputing parties.[259] Under the ICS, the awards should be binding for the parties.[260] Although it is binding for the contracting parties, third parties may amend the other economic treaties with third parties to the same extent.[261] For those who do not treat ICS awards as arbitral awards, it is less likely for them to agree with the implementation of the awards under ICSID or New York Convention.[262] In this situation, the awards issued can be implemented based on the

254 Freya Baetens, *The European Union's Proposed Investment Court System: Addressing Criticisms of Investor-State Arbitration While Raising New Challenges*, 43 LEGAL ISSUES ECON. INTEGRATION 367, 384 (2016).

255 *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, OECD 4 (Feb. 12, 2019), https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf.

256 Heppner, *supra* note 76, at 42.

257 *See* N. Jansen Calamita, *The Challenge of Establishing a Multilateral Investment Tribunal at ICSID,* 32 ICSD REV. 611 (2017).

258 *See id.*

259 *See id.*

260 *See* Schwieder, *supra* note 84, at 195.

261 *See* Baetens, *supra* note 254.

262 *See* Schwieder, *supra* note 84, at 195.

bilateral treaties among the disputing parties. In terms of the international taxation court, it may face the same situation. For those who agree to apply the mandatory binding arbitration in resolving tax related disputes when signing the MLI, they may be more likely to accept the awards issued by the international taxation court. However, based on MLI, the number of states that are willing to implement the mandatory binding arbitration in tax matters is limited.[263] Only twenty-five signatories adopted mandatory binding arbitration provisions of the MLI.[264] For those that do not accept the mandatory binding arbitration in tax matters, the implementation of international taxation court awards should rely more on the bilateral taxation treaties signed between the disputing parties. Although it is beneficial to create an international taxation court, the implementation of awards should be taken into consideration. Based on MLI, after the award issued by the arbitral panel, it is the competent authorities that reach an agreement to implement it.[265] However, if one party refuses to implement it, there are no punishment measures.[266] Besides, only the contracting states will be bound by the awards issued by the tribunal.[267] As a result, before the creation of an international taxation court system, an *inter se* modification/a regional taxation court system can be issued firstly, like among MLI/G20 states. When it is implemented successfully, there may be more support from the public.

For those who are worried about the derogation of their national sovereignty, when they commit to opt in the mandatory arbitration in MLI, the sovereignty is partly given up.[268] As a result, it is possible to establish an international taxation court system among them. The first stage should resemble the MAP, including the areas which can be considered. Therefore, the appellate system should not only focus on judicial issues, but also on facts, which can resemble the ICS. The appellate system should have the same legal effect as an arbitral award/domestic court decisions except that the taxpayers do not accept it, however, private taxpayers have no say in the current tax related dispute resolution system.[269] Based on the OECD model convention, no matter the stage of the MAP process or the mandatory arbitration, private

263 MLI, *supra* note 225.

264 *Id.*

265 *See id.*

266 *See id.*

267 *See* Aditya Kutty & Sindhura Chakravarty, *A Multilateral Investment Agreement: Poison or Antidote*, 22 SRI LANKA J. INT'L L. 89 (2010).

268 Calamita, *supra* note 257.

269 *See* OECD MODEL TAX CONVENTION, *supra* note 21.

taxpayers have limited legal standing.[270] In this perspective, the OECD model convention is the same with ICS to some extent, as ICS also excludes the private entities.[271] Consequently, the states which have signed the MLI and accepted the mandatory binding arbitration in resolving tax related disputes are more likely to accept the international taxation court mechanism. If the international taxation court can be created, there will be a more professional system dealing with tax related disputes. Besides, without the intervention from other dispute resolution mechanisms, such as mandatory arbitration in BITs, the sovereignty of taxation can be protected.

If the ICS can be introduced into the tax related dispute settlement process, the awards will be more neutral compared with what is issued under the current dispute resolution system. For example, based on the OECD model convention, before granting the disputes access to MAP process it should be decided by the competent authorities first.[272] If the competent authorities deny this submission, no matter what reason they hold, the disputes have no possibility to access to the next stage.[273] In this situation, it is inevitable for the states to deny the submission based on their own interests and the interests of taxpayers will be sacrificed in the end.[274] In the ICS system, however, no matter whether the first instance stage or the appellate stage, states do not have much say during the process and the awards issued will be more neutral as a result.[275] Besides, each state can recommend its own judge and for the specific case, the panel can be chosen from those judges randomly.[276] As there is an appellate body, the bias can be avoided to some extent.[277]

"There should be page and time limits to the third party submissions, in order to limit delays and allow the parties the opportunity to respond to the submission."[278] In the taxation court system, third party participation may be beneficial for the dispute resolution, too. "[I]f judges on such an investment court were appointed not by the contracting parties (eg [sic] the EU and the United States under TTIP), but by a multilateral

270 *See id.*

271 Pantaleo, *supra* note 130, at 77.

272 *See* OECD MODEL TAX CONVENTION, *supra* note 21.

273 Irish, *supra* note 209.

274 *Id.*

275 Stefanie Schacherer, *TPP, CETA and TTIP Between Innovation and Consolidation—Resolving Investor–State Disputes under Mega-Regionals*, 7 J. OF INT'L DISP. SETTLEMENT 632 (2016).

276 CETA, *supra* note 98, art 8.27(7).

277 Schacherer, *supra* note 275 at 635.

278 Baetens, *supra* note 254, at 378.

body representing the entire international community, such as the UN General Assembly and the UN Security Council," the awards issued by the tribunal will be more easily be accepted by the public.[279] The international court system can do the same thing.

The CETA expressly opts-in to the UNCITRAL Rules on Transparency for all the proceedings before the Tribunal and the Appellate Tribunal, which means the same goes for the proceedings governed by the ICSID Arbitration Rules.[280] CETA has a number of transparency measures. First, CETA set out rules to make available to the public any document related to the proceedings, then CETA requires the agreement to mediate to be publicly available.[281] CETA also adds exhibits to the documents that can be requested by any person to the Tribunal.[282] Secondly, under CETA, hearings are to be public.[283] Thirdly, both CETA and ICSID Arbitration Rules allow for *amicus curie* briefs after consultation with the disputing parties.[284] CETA is "similar to the provision on *amicus curie* briefs contained in the ICSID Convention."[285] The ICSID Convention provides that the Tribunal, after consulting with the parties, may allow a non-disputing party to file a written submission within the scope of the dispute.[286] Likewise, a tribunal under CETA, takes into account, a number of elements in deciding the relevance of an *amicus curie* brief. Such elements are: whether the third person has a significant interest in the proceedings, and whether the third person's submission would assist the Tribunal in the determination of a matter of fact or law within the scope of the dispute.[287]

Making reservations can provide flexibility to the country, which might decide to withdraw some of its reservations in the future.[288] Thus, at the starting point/earlier stage, making reservations is essential and beneficial in order to get more concerns.[289] "[T]he opt-in mechanism

279 Schill, *supra* note 70, at 147.

280 CETA, *supra* note 98, art. 8.36(1).

281 CETA, *supra* note 98, art. 8.36(1); *see also id.* art. 3(1).

282 *See id*.

283 *Id.* art. 8.36(5).

284 *Id.*

285 Schacherer, *supra* note 151, at 648.

286 ICSID Rules of Procedure for Arbitration Proceedings, *in* ICSID Convention, Regulations and Rules 117, ICSID Doc. ICSID/15 (Apr. 2006); *see also* UNCITRAL Rules on Transparency, *supra* note 122, art. 4.

287 UNCITRAL Rules on Transparency, *supra* note 122, art. 4.

288 *See generally* Int'l Law Comm'n, Third Rep. on Reservations to Treaties, U.N. Doc. A/CN.4/491 and Adds. 1-6 (1998).

289 Nathalie Bravo et al., *Implementing Key BEPS Actions: Where Do We Stand?,* 45 INTERTAX 852, 860 (2017).

would allow the initiative to start as a plurilateral one, with the possibility for States to join at a later stage, whenever they consider it appropriate."[290] States can first make some reservations for the international tax system to get as much support as possible. When the time is appropriate, they can opt in and delete the reservations.

VIII. CONCLUSION

In summary of the aforementioned, the EU's treatment of the ICS proposed in CETA is still a type of arbitration.[291] Furthermore, in implementing the awards, it counts on the existing rules such as ICSID and New York Convention.[292] In this way, the EU wants the system to garner as much support as possible so the awards issued by the ICS panel can be implemented more fluently.[293] It may be concluded that the ICS system must be based on the existing systems to be successfully implemented. The same should be done for the international taxation court. Bilateral taxation treaties and MLI are the main tools for resolving tax-related disputes and they are the basis of the international taxation court system.

"Small investors . . . or governments of developing countries . . . may be discouraged from using the process by the existence of a more formal appellate process and the greater prospect that it will be used on a regular basis."[294] It will be the same concern when creating an international taxation court system with a formal appellate body. The current tax-related dispute resolution system is more appropriate for the massive MNEs, as the expenses are quite high.[295] The midsize and small companies have little chance to make use of the current system.[296] Thus, a key consideration for change is how to control the expenses of such a system. Entities of all sizes are more likely opt in to the system if it does not present a heavy financial burden.

If an international taxation system can be created, it would present an opportunity for countries to improve the current dispute resolution

290 Kaufmann-Kohler & Potestà, *supra* note 3, at 32.

291 *See* Calamita, *supra* note 257, at 612.

292 *See id.*

293 *See id.*

294 Gantz, *supra*, note 81, at 56; *see also* Julien Chaisse, *Exploring the Confines of International Investment and Domestic Health Protections: General Exceptions Clause as a Forced Perspective*, 39 AM. J. L. & MED. 332 (2013).

295 *See generally* Rifat Azam, *Ruling the World: Generating International Tax Norms in the Era of Globalization and BEPS*, 50 SUFFOLK U. L. REV. 517 (2017).

296 Bravo, *supra* note 289, at 860.

mechanisms in place for tax matters. The relationship between the current dispute resolution mechanisms and the court system should be dealt with carefully. Meanwhile, the international taxation court system may have a chilling effect for the countries that they may be eager to resolve the disputes in the domestic area in order not to be adjudicated by the independent court or tribunal.

In conclusion, an international investment court can be a model for international dispute resolution as there is a trend for an international taxation court. MLI will provide an advanced and comprehensive model, and more countries will commit to it if it can be a taxation court.