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# Evaluating Frameworks for Multilateral Investor-State Dispute Settlement

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Evaluating Frameworks for Multilateral Investor-State Dispute Settlement

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Fall 2017

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**Abstract**

Utilizing both empirical studies of investor-state dispute settlement (ISDS) regimes and the accounts of both public and private practitioners of these processes, this study aims to inform public policymakers, multinational corporation leadership, and academic researchers on some of the key issues to consider when developing a multilateral friendly ISDS regime. By analyzing the procedural and functional details of both traditional arbitration (via the International Centre for Settlement of Investment Disputes and the United Nations Commission on International Trade Law) and investment dispute courts (via those proposed in the Trans-Atlantic Trade and Investment Partnership and the EU Canada Comprehensive Economic and Trade Agreement), this study brings to light some of the most salient critiques of each system relating to accessibility, transparency, and effectiveness. Consideration of legislative texts, policy and economic analyses, and four interviews with practitioners and researchers suggests that although the predominant ISDS arbitration system is deeply flawed, it is the most recognized and accessible format for dispute resolution in a multilateral setting.

**Acknowledgements**

I would like to acknowledge the range of individuals who have contributed either directly or indirectly to the development of this study. I would first like to thank the Office of Investment Affairs at the U.S. Department of State for helping me learn about this important issue and for encouraging me to use my time in Geneva to study it further. I would additionally like to thank all individuals who were interviewed or consulted throughout this process, as their feedback and perspectives have been invaluable to presenting a cohesive account of ISDS. Finally, I would like to thank my parents, Amy and Steve Rosenthal, for their unwavering support.

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## **Introduction**

### *Overview of the Study*

Investor-state dispute settlement (ISDS) has come about as the role of multinational enterprises (MNEs) has evolved over time in the public sphere. As the interests of companies in the energy, weapons, and manufacturing industries have converged with the security priorities of their respective states, new legal precedents must be set to address the incredibly complicated disputes that arise at the convergence of the public and private sectors. ISDS, in its most basic form, refers to the processes through which a state and an investor (a private entity which falls under the jurisdiction of another state) resolve a dispute regarding an investment. A state, for example, may nationalize a piece of land owned by a foreign investor. Should the state which nationalized the land and the state from which the investor comes be parties to either a bilateral or international investment treaty, the investor will often use the means laid out in said agreement to demand justice and retribution for their losses. ISDS in practice can take many forms and can operate through a range of institutions at the bilateral, regional, and multilateral levels, including arbitration proceedings and investment courts. Given the economic, security, and political dimensions of such an agreement and process, it is critical that the international community, at some level, have an agreed upon set of norms and practices for ISDS. Developing frameworks for ISDS within a range of international contexts is a critical issue for the global community as MNEs reach across borders to facilitate trade and investment which aids development and growth efforts of states and their populations.

The task of this study is to explore existing and proposed frameworks for multilateral ISDS, and to critically assess each of these approaches in terms of how accessible and effective each method might be for the entire global community. The study provides a range of both existing

and proposed frameworks for dispute settlement, and presents and evaluates some of the most prominent critiques of these frameworks. Seeing as ISDS has matured significantly over the past several years if not months, it is critical for both public policymakers and private actors to have a better understanding of the multilateral, rather than the national or corporate, ramifications of ISDS proceedings. This study extends upon existing literature and research on ISDS procedures and institutions, which focus almost exclusively on how individual types of actors or regional groups can tailor these institutions to work within their existing economic and legal systems, by focusing on issues such as transparency, accessibility of services, and power structures within ISDS itself. This study aims to provide a clear and concise set of options to better inform policy makers and investors on the requirements and potential outcomes of the various structures on the international system.

### *Literature Review*

It is only in the past several years that the international academic community has been able to collect and analyze meaningful quantitative and qualitative data on ISDS proceedings. Susan Franck's 2007 study entitled "Empirically Evaluating Claims about Investment Treaty Arbitration" offers one of the first insights into the practice of arbitration itself, including the geographic distribution of parties, qualities of arbitrators, and success rates.<sup>1</sup> At the time of the study, Franck concluded, tentatively, that ISDS was functioning rather well according to the available data.<sup>2</sup> In general, Franck, and other researchers at the time, seemed optimistic that the number of arbitrations brought forth would rise as more treaties and agreements including the language came into effect, as well as the "reasonably equivalent investor and state win rates."<sup>3</sup>

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<sup>1</sup> Susan D. Franck, "Empirically Evaluating Claims About Investment Treaty Arbitration," *North Carolina Law Review* 78, no. 1 (2007): 1-88, <https://ssrn.com/abstract=969257>.

<sup>2</sup> Franck, "Empirically Evaluating Claims About Investment Treaty Arbitration," 2007: 83.

<sup>3</sup> *Ibid.*

Since the publication of Franck's study, many individual researchers and institutions have used different methods and criteria to evaluate the development of ISDS, namely Rachel Wellhausen's 2015 study, which explicitly sought to update Franck's results, and regular publications issued by the Organization for Economic Cooperation and Development (OECD).<sup>45</sup>

One of the most comprehensive studies which both updates Franck's results and observations, while critically evaluating many of the recurring critiques of the ISDS regime, was conducted by Mr. Thomas Schultz and Mr. Cedric Dupont of the Graduate Institute of International and Development Studies in Geneva in 2015.<sup>6</sup> Schultz and Dupont's study focused almost exclusively on investment arbitration, and claims that up through the mid-1990s, the process was used as either a "neo-colonial instrument" by developed countries, or a "means to impose rule of law in non-democratic states."<sup>7</sup> Right at the turn of the century, however, the authors argue that the primary purpose of ISDS has been to indicate guidelines and underline the rights for both host states and investors. Despite some of the international community's best efforts however, the authors conclude that based on empirical data on arbitration filings and outcomes, the process still seems to favor 'haves' over 'have nots'.<sup>8</sup> While not universally accepted by any means, a range of other legal and economic experts have identified a wide range

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<sup>4</sup> Rachel L. Wellhausen, "Recent Trends in Investor-State Dispute Settlement," *Journal of International Dispute Settlement* 7, no. 1 (2016): 117-135, doi: 10.1093/jnlids/idv038.

<sup>5</sup> David Gaukrodger and Karen Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03, OECD Publishing, <http://dx.doi.org/10.1787/5k46b1r85j6f-en>.

<sup>6</sup> Thomas Schultz and Cedric Dupont, "Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study," *The European Journal of International Law* 25, no. 4 (2015): 1147-1168, doi:10.1093/ejil/chu075.

<sup>7</sup> Schultz and Dupont, "Investment Arbitration: Promoting the Rule of Law...", 2015: 1147

<sup>8</sup> Ibid.

of procedural and functional issues with ISDS proceedings, including both public and private actors.<sup>9</sup>

### *Research Methodology*

The study presented herein draws from both primary and secondary sources of data to present and evaluate historic and current legislation, legal documents, and academic articles on ISDS. It relies heavily on qualitative data from economists, lawyers, and practitioners of ISDS from around the world. Data was collected in the form of both written articles published in academic journals and law reviews, as well as in person interviews with researchers and former practitioners based primarily in Geneva, Switzerland. By including the contents of in person interviews, this study provides some of the latest, and perhaps yet to be tested, theories and opinions on ISDS practices and feasibility. In addition to the contents of interviews, this study also draws heavily on legal texts and multilateral resolutions of various international organizations, such as UNCITRAL and ICSID. All legal documents and resolutions were derived from their sponsoring organization and reflect the most recent significant changes to their content.

All interviews were conducted in person, before which all subjects were briefed on the goals and objectives of the project, and were asked if they were comfortable with the information they provided being included in the research. Subjects were also asked if they were willing and able to be quoted in the study, to which all subjects agreed and gave their approval. With regards to direct quotes and references to published works, all interviewees were consulted following their interviews to ensure that quotes and references were accurate.

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<sup>9</sup> Robert Schwieder, "TTIP and the Investment Court System...", *Columbia Journal of Transnational Law* 55, no. 1 (2016): 178-228.

## Defining and Contextualizing Investor-State Dispute Settlement

### *Historical Development of Investor-State Dispute Settlement*

Investor-state dispute settlement (herein referred to as ISDS) has historical roots in public international law disputes on protecting foreign property. The issue of international property rights, and consequential disputes, has origins towards the end of the 18<sup>th</sup> century, however the issue became most prevalent and its dispute procedures better codified following the decolonization movement in the late 19<sup>th</sup> and 20<sup>th</sup> centuries.<sup>10</sup> While during imperial rule, European powers were able to ensure their commercial interests via imperial submissions or capitulation systems, following decolonization disputes over investment took place between the ‘home’ and ‘host’ states following diplomatic protection.<sup>11</sup> Diplomatic protection, in different cases and circumstances, could involve or result in “consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retorsion, severance of diplomatic relations, economic pressure and, the final resort, the use of force.”<sup>12</sup> These arbitrations, unlike modern ISDS, relied only on state to state relations and forums to resolve investment disputes, and, furthermore, very few bilateral investment treaties (BITs) enumerating the formal proceedings of such discussions existed during much of the early 20<sup>th</sup> century.

The development of modern BITs between nations significantly contributed to the expansion of more state-state and investor-state arbitration mechanisms. In its early stages, developing countries were skeptical of international arbitration processes, however investors, often from more economically developed nations, viewed it as a necessary, reliable, and neutral medium.<sup>13</sup>

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<sup>10</sup> Sachet Singh and Sooraj Sharma, “Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap,” *Utrecht Journal of International and European Law* 29, no. 76 (2013): 89, <http://doi.org/10.5334/ujiel.bo>.

<sup>11</sup> Singh and Sooraj, “Investor-State Dispute Settlement Mechanism...,” 2013: 90.

<sup>12</sup> John R. Dugard, “First report on diplomatic protection,” *International Law Commission*, April 2000, [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_506.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_506.pdf).

<sup>13</sup> Singh and Sooraj, “Investor-State Dispute Settlement Mechanism...,” 2013: 91.

Furthermore, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, as discussed in 1965, recognized the “right of a State to give consent in a treaty to arbitrate future disputes and also recognized that an investor could accept such consent by submitting a claim to international treaty arbitration, thereby replacing investor-State arbitration under an investor-State agreement with arbitration under a treaty.”<sup>14</sup> What was particularly groundbreaking about this agreement was that foreign investors pursuing arbitration against a state did not have privity of contract in investment treaties.<sup>15</sup> The Convention also led to the establishment of the International Convention for the Settlement of Investment Disputes (ICSID) in 1966.<sup>16</sup> As a result of these negotiations, developing countries eventually agreed to some minimal transfer of sovereignty in the form of submitting disputes between investors and the state to ICSID.

Professor Chen Huiping, Professor of Law at Xiamen University Law School in China, states that despite the eventual willingness of the developing countries to submit cases to ICSID, they were able to maintain ‘four safety valves’ which gave them some control over the dispute resolution process. According to Chen, these safety valves include the exhaustion of local remedies, consent to arbitration only on a case by case basis, that host country law shall be the governing law, and national security and state sovereignty are considered in all steps of the process.<sup>17</sup> The objective of these safety valves, ultimately, was to prevent developing countries from being sued by foreign investors, however they were also among the reasons why only twenty-four cases were submitted to ICSID in its first twenty-five years. In the 1980s however,

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<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> “About ICSID,” *International Centre for the Settlement of Investment Disputes*, January 2017, Web, Accessed November 2017.

<sup>17</sup> Chen Huiping, “The Investor State Dispute Settlement Mechanism: Where to go in the 21<sup>st</sup> Century?” (2008).

there was a dramatic shift in the position of many key developing countries which resulted in them largely giving up the safety valves and adopting the protective dispute settlement requirements in their BITs. One key element which contributed to this shift in position included the growing sense that parties to ICSID were more trustworthy due to their affiliation with the World Bank. Additionally, the trend of the United States signing investment protection agreements (IPAs) rather than investment guarantee agreements in accordance with its recently refined Model BIT also made developing countries more comfortable with the procedure. Finally, the increased number of BITs between developed and developing countries helped to cultivate a better legal environment for foreign investors.<sup>18</sup>

Despite this momentum towards the ICSID approach on dispute settlement in the 1980s and 1990s, the proclamations of several countries (for instance, Bolivia in 2007 and Ecuador in 2009) to withdraw from ICSID have brought forth a range of legal challenges related to the process. The recent trend of developing countries deciding to withdraw from ICSID proceedings and/or terminate BITs with investor-state dispute settlement provisions results from not only increased numbers of arbitration cases against many of these countries, but also the lack of material successes of the ICSID and other arbitration processes.<sup>19</sup>

### *Principles of Modern Investor-State Dispute Settlement*

Investor-state dispute settlement (ISDS) offers mechanisms and a means for multinational companies and corporations to “demand compensation for government policies that they deem unlawful.”<sup>20</sup> According to the Organization for Economic Cooperation and Development

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<sup>18</sup> Christoph Schreuer et al, *The ICSID Convention: A Commentary: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Cambridge: Cambridge University Press, 2009.

<sup>19</sup> Singh and Sooraj, “Investor-State Dispute Settlement Mechanism...,” 2013: 93.

<sup>20</sup> Rachel L. Wellhausen, “Recent Trends in Investor-State Dispute Settlement,” 2016: 119.

(OECD), ISDS, as it has been developed through thousands of bilateral and multilateral investment agreements throughout the 20<sup>th</sup> century, has three primary features which differentiate it from other dispute settlement institutions and frameworks.<sup>21</sup> First, while many dispute settlement procedures are outlined in clearly defined treaties and texts, ISDS is much more legally varied and multifaceted. For example, the legal basis for ISDS draws from nearly 3,000 investment treaties, arbitration rulings, and international conventions.<sup>22</sup>

The second distinguishing feature of ISDS is that it allows not only for private entities to bring forth claims against a sovereign state, but also massive monetary awards for successfully doing so.<sup>23</sup> Finally, institutional arrangements governing ISDS draw significantly from commercial arbitration mechanisms. ISDS is carried out by a range of institutions and through a variety of processes depending upon treaty and contract agreements, as well as national investment and economic policy. According to a 2013 OECD study, the roughly 125 international ISDS bodies, institutions, and strategies included quasi-judicial procedures, implementation control strategies, and international judicial bodies, among others.<sup>24</sup>

Investment treaties are the primary source of dispute resolution instruments which can be used to mediate and resolve disputes between investors and states. Instead of having to resolve a dispute via the International Court of Justice (ICJ) or within the host country's court system, the investor filing the claim can enter directly into arbitration proceedings.<sup>25</sup> Investment treaties, should they include a dispute settlement section, will frequently give investors a choice on where they are able to bring their disputes, including the national court system, as well as a range of

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<sup>21</sup> David Gaukrodger and Karen Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", 2012: 8.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions," *Fordham Law Review* 73, no. 4 (2005): 1539-1540.

multilateral forums such as the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL), or the Stockholm Chamber of Commerce (SCC).<sup>26</sup> According to Susan D. Franck, a Professor of Law at University of Minnesota Law School and an internationally recognized expert on the international arbitration, the dispute process tends to follow a more or less standard procedure which includes “(1) submitting a notice of dispute to the Sovereign, (2) complying with the applicable waiting period, (3) electing where to resolve the dispute, and (4) taking the chosen procedure forward in accordance with the chosen mechanisms articulated in the investment treaty.”<sup>27</sup> Following these preliminary steps, an arbitral tribunal, in most ISDS cases, is appointed, wherein each party selects one arbitrator and the chair is selected jointly with the assistance of the institution through which the case is taking place. The remainder of the process is determined by the respective institutions which carry out ISDS arbitrations, however the process usually includes some form of case statements, exchange of evidence, an oral hearing, and the issuance of an award by the tribunal.

### **Traditional Arbitration and Tribunal Approach**

Arbitration as a form of dispute resolution is a mutually agreed upon, private procedure in which parties present a dispute to a tribunal which is comprised of at least one independent arbitrator. Arbitration results in a binding decision which will affect one or both parties to the dispute, which are either both states, both corporate entities, or one state and one corporation.<sup>28</sup> Although there are a range of advantages and disadvantages to the arbitration approach depending upon the context of the parties and their case, one of the primary distinguishing

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<sup>26</sup> Franck, “The Legitimacy Crisis...,” 2005: 1541.

<sup>27</sup> Franck, “The Legitimacy Crisis...,” 2005: 1543.

<sup>28</sup> Johan Billiet, *International Investment Arbitration*, Brussels: Maklu Publishers, 22 February 2016, print: 25.

features of arbitration is that the parties in a dispute exercise significant control over the composition of the tribunal itself and to which set of laws, national or international, the tribunal will follow. Particularly when compared with the process of international litigation, arbitration is a much more efficient and, frequently, cheaper option.<sup>29</sup> There are three primary types of arbitration including international commercial arbitration, investor-state arbitration, and state-state arbitration, however this study is primarily concerned with the second form. The goal of using arbitration for investor-state disputes rather than litigation or other dispute settlement mechanisms, is that ISDS would have a “swifter, cheaper, and more flexible design” that could lower costs and make international investment agreements easier to enforce in a wide range of contexts.<sup>30</sup>

#### *The International Centre for the Settlement of Investment Disputes (ICSID)*

Perhaps the most well-known institution which sets standards and, to an extent, governs ISDS arbitration proceedings is the International Centre for the Settlement of Investment Disputes (ICSID), as previously mentioned. ICSID comprises one-fifth of the World Bank Group, located in Washington DC, and is tasked with not necessarily conducting arbitrations, but rather administering their “initiation and functioning.”<sup>31</sup> Although ICSID performs a wide range of research and other functions, the primary focus in this context is the rules for arbitration proceedings set out by ICSID. Before an arbitration can take place, there are three criteria which must be fulfilled by all parties. The first criteria is that the parties involved must all give written consent for the dispute’s submission to ICSID arbitration. The second criteria states that the dispute needs to “be between a Contracting State and a national of another Contracting State.”<sup>32</sup>

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<sup>29</sup> Billiet, *International Investment Arbitration*, 2016: 28.

<sup>30</sup> Robert Schwieder, “TTIP and the Investment Court System...,” 2016: 184.

<sup>31</sup> Lucy Reed et al, *Guide to ICSID Arbitration*, New York: Kluwer Law International, 2011: 9.

<sup>32</sup> Reed et al, *Guide to ICSID Arbitration*, 2011: 13.

The third and final criteria for an ICSID arbitration is that “the dispute must be a legal dispute arising directly out of an investment.”<sup>33</sup> Although ‘investment’ is not given a specific definition in the ICSID convention, there has been general agreement on a broad interpretation as cases have presented themselves.

One of the ways in which an ICSID arbitration can come into effect is through what is known as ‘contractual arbitration’. Contractual ICSID arbitration describes the scenario wherein an investor-state contract has explicit language which states that in case of need of dispute settlement, the contract parties shall consult with ICSID.<sup>34</sup> In addition to contractual arbitration, ICSID can accept arbitration cases which are mandated to be submitted to ICSID according to a host state’s investment legislation, a bilateral investment treaty, or a multilateral investment treaty. This is known as non-contractual arbitration, and as of 2010, 73 percent of ICSID registered arbitrations were a result of a BIT or other, similar agreement.<sup>35</sup>

Although there exist other mechanisms and institutions through which parties to a dispute can pursue arbitration, proponents of ICSID arbitration claim that it has several key advantages over frameworks. First, ICSID arbitration is considered neutral and self-contained in that the institution oversees the selection of arbitrators, while the tribunal itself determines provisional measures, and annulment proceedings, when necessary, are directed by an ad hoc committee appointed by ICSID itself. Additionally, Chapter 6 of the ICSID convention outlines that monetary awards resulting from an ICSID arbitration are to be automatically recognized and enforced by the parties to the dispute.<sup>36</sup> Panagiotis A. Kyriakou, a PhD candidate at the Geneva

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<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> “ICSID Convention, Regulations and Rules,” *International Centre for Settlement of Investment Disputes*, April 2006, web, accessed November 2017: 29.

Graduate Institute with extensive experience in investment dispute proceedings across Europe, notes that what is incredibly appealing about the ICSID process, for both investors and states, is that “ICSID awards are enforced automatically.”<sup>37</sup> Rather than leaving enforcement to be carried out by domestic laws and treaties (namely the 1958 New York Convention or the Panama Convention), ICSID requires all parties to carry out their obligations resulting from the decision of the tribunal as if the decision had been made by a domestic court. According to Kyriakou, investors are particularly keen on this aspect of ICSID arbitration, because should they win the case, they will be automatically granted the monetary or other retributions.

Another distinguishing feature of ICSID arbitration is its relative level of transparency compared with other arbitration institutions and structures. While most proceedings of an ICSID arbitration remain private, namely submissions and hearings, several 2006 amendments to the ICSID Arbitration Rules made it “possible for ICSID tribunals to allow non-disputing parties to observe oral hearings (unless either party objects) and file written submissions.”<sup>38</sup> Actors such as the European Commission, the World Health Organization (WHO), and other non-governmental organizations (NGOs) have submitted written observations to ICSID cases in order to provide an outside perspective on the potential outcomes of the case.<sup>39</sup>

Although ISDS is always an incredibly costly process for any party, ICSID, like many forums, maintains relatively low administrative fees and offers a transparent cost structure. What is unique about ICSID’s payment structure, however, is that it provides a fixed rate specifically for the compensation of arbitrators, conciliators, and ad hoc annulment committee members, when necessary.<sup>40</sup> Furthermore, the overall credibility and sense of trust in ICSID stems,

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<sup>37</sup> Kyriakou, Panagiotis A, *Interview*, by Danielle Rosenthal, November 9, 2017.

<sup>38</sup> Reed et al, *Guide to ICSID Arbitration*, 2011: 15.

<sup>39</sup> Kyriakou, Panagiotis A, *Interview*, by Danielle Rosenthal, November 9, 2017.

<sup>40</sup> Reed et al, *Guide to ICSID Arbitration*, 2011: 16.

significantly, from the fact that it is a component of the World Bank system. For all its controversies, the institution of the World Bank, and ICSID by extension, is a critical economic and political actor for both states and multinational corporate entities to contend with.

Particularly for states which receive aid and support from the World Bank, adhering to ICSID awards and standards could have significant consequences in terms of their relationship with other branches of the institution.

*The United Nations Commission on International Trade Law (UNCITRAL)*

Another key institution which has been central to the arbitration and tribunal process in ISDS cases is UNCITRAL, or the United Nations Commission on International Trade Law. While UNCITRAL's mandate extends to many aspects of international commercial law, a significant amount of the organization's work has to do with the 1976 UNCITRAL Rules, which outlines an arbitration process wherein an award is enforced in accordance with the New York Convention.<sup>41</sup> In August 2010, a revised set of UNCITRAL Rules came into effect, which included changes on issues such as arbitrations involving multiple parties, liability, and mechanisms for objecting to experts appointed by the tribunal.<sup>42</sup> The UNCITRAL Rules were first developed within the context of an international legal system wherein a large number of private arbitration institutions, such as the International Chamber of Commerce (ICC), provided their own arbitration procedures and proceedings around the world.<sup>43</sup> Many of the leaders of the UNCITRAL Rules initiative sought to develop proceedings and procedures which would not be so expensive or, as many believed, biased towards Western, developed states.<sup>44</sup>

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<sup>41</sup> Billiet, *International Investment Arbitration*, 2016: 40.

<sup>42</sup> Ibid.

<sup>43</sup> David Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*. Oxford: Oxford University Press, 7 March 2013: 4.

<sup>44</sup> Ibid.

The UNCITRAL Rules often come into play in ISDS arbitrations in a similar manner to how they do with ICSID, via investment chapters of free trade agreements (FTAs) or BITs. International investment agreements (IIAs) are an increasingly important source of cases which can utilize UNCITRAL, ICSID, or any other arbitration system for investor-state dispute.<sup>45</sup> Although not as widely utilized as ICSID, the UNICTRAL rules are reflected in the North American Free Trade Agreement (NAFTA) and the Association of Southeast Asian Nations (ASEAN) Regional Investment Agreement.<sup>46</sup>

### *Critiques of Traditional Arbitration and Tribunals*

Since its inception, ISDS in its traditional form, that being arbitration under either ICSID or UNCITRAL rules, has been critiqued on both its procedural and functional components. One of the most common issues both public and private actors find with the process, is that it lacks transparency, in that most arbitration proceedings are kept confidential in accordance with previously discussed non-disclosure agreements.<sup>47</sup> This lack of transparency, many contend, prevents the public, or even groups and individuals who could be adversely affected by the outcome of the arbitration, from either being aware of the potential challenges to come or trying to prevent them.

The lack of transparency however, some contend, may serve a critical purpose in the unique process that is investor-state arbitration. In a recent interview at Graduate Institute Geneva, Mr. Hsien Wu, a PhD Candidate and Researcher with the Centre for Trade and Economic Integration, discussed how transparency does not always serve to benefit the parties to

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<sup>45</sup> Jeswald W Salacuse and Nicholas P. Sullivan, "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and their Grand Bargain," In *The Effect of Treaties on Foreign Direct Investment*, edited by Karl P. Sauvant and Lisa E. Sachs, Oxford: Oxford University Press, 2009.

<sup>46</sup> Caron and Caplan, *The UNCITRAL Arbitration Rules*, 2013: 7.

<sup>47</sup> Barnali Choudhury, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?" *Vanderbilt Journal of Transnational Law* 41, no. 3 (2008): 775.

the dispute or the process itself. As Mr. Wu stated, “confidentiality helps leave room for negotiation...ISDS was designed through commercial arbitration, which is all confidential to maintain space for negotiation and an agreement.”<sup>48</sup> Mr. Wu continued by explaining how everyone talks about transparency, however there is very little written or defined on what that really means, and what specific objectives it achieves. By keeping arbitral proceedings confidential, furthermore, parties are able to come to a more nuanced agreement, rather than having a legal decision which pits the two parties against each other.

A second common critique of traditional ISDS arbitration is that there seems, even within the ICSID and UNCITRAL frameworks, to be a deficiency of impartiality and independence of arbitrators when compared with judges in a traditional court system<sup>49</sup> Due to arbitrators being appointed on a case-by-case basis, many contend that they are not always sufficiently evaluated for potential conflicts of interest in the case.<sup>50</sup> Charles Brower, a noted critic of ISDS for its perceived favoritism of corporate interests, contends that “arbitrator bias arising from diverse fact patterns and relationships pepper [investor state] disputes, prolonging proceedings and opening ultimate awards up to strong critique.”<sup>51</sup> Brower and many others who have closely followed ISDS development and results claim that the ICSID and UNCITRAL rules, and arbitration practice in general, do not allow for a fair and unbiased evaluation and ruling. Furthermore, the mere idea that arbitrators are selected on a case-by-case basis implies that there is little to no continuity of the tribunals, and therefore it becomes difficult to predict or even understand the different perspectives of a group of arbitrators. What makes this issue worse still,

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<sup>48</sup> Wu, Hsien, *Interview*, by Danielle Rosenthal, November 7, 2017.

<sup>49</sup> Robert Schwieder, “TTIP and the Investment Court System...,” 2016: 186.

<sup>50</sup> Robert Schwieder, “TTIP and the Investment Court System...,” 2016: 187.

<sup>51</sup> Charles H. Brower, “Structure, Legitimacy, and NAFTA’s Investment Chapter.” *Vanderbilt Journal of Transnational Law* (2003): 36.

is that neither ICSID nor UNCITRAL provides an enduring framework for an appeals process for arbitral decisions, which are often called into question given the potential conflicts and biases within the tribunal itself.

ISDS proceedings, simply because they allow for private entities to bring legal cases against a sovereign state, are frequently said to “codify a new colonialism”, wherein massive multinational investors can use ISDS processes to exploit and gain footing over their smaller counterparts.<sup>52</sup> ISDS and IIAs, given their strong ties to liberal economic institutions and regimes, have increasingly focused on building conditions within countries which will lead to more open investment environments. What is missing from this logic, however, is whether a country that is increasingly open to foreign investment by nebulous, corporate entities is best set up for sustainable development, or is more likely to be subjected to neo-colonial influences.<sup>53</sup> If the purpose of investment is to promote development and security of the host nation, then it is inherently problematic, according to many, that private investors are able to bring claims of mistreatment against the state they are, supposedly, working to ‘develop’.

Although ICSID and UNCITRAL provide general frameworks for ISDS arbitration proceedings, issues of transparency, independence, and power dynamics within these processes suggest that perhaps a more institutional ISDS approach is required. In the past several years, both academics and policymakers have considered how to combine the general principles and practices of commercial arbitration used by private entities with the judicial procedures utilized by states.

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<sup>52</sup> Howard Mann, “International Investment Agreements: Building the New Colonialism?” *American Society of International Law* 97 (2003): 248.

<sup>53</sup> Mann, “International Investment Agreements...,” 2003: 250.

## Investment Court Approach

The idea for a multilateral investment court originated, concretely, within the European Union (EU) around 2015 following discussions on how to reform the traditional ISDS process to be more streamlined and less biased.<sup>54</sup> The investment court, according to the European Union, would include features such as, but not limited to, a first instance tribunal, an appeal tribunal, and exceedingly qualified and dedicated judges and secretariat. The European Union has been the primary leader and example of the idea of an investment court, which they claim will allow for “a more transparent, coherent and fair system” for ISDS.<sup>55</sup> The following section provides an overview of the structures of two proposed investment courts, both initiated by the EU, and gives some of the most pervasive critiques of the model.

### *The Transatlantic Trade and Investment Partnership (TTIP)*

Specifically, as it was envisioned for the Transatlantic Trade and Investment Partnership (TTIP), a deal negotiated between the European Union and the United States, the investment court model would contain a permanent tribunal comprised of fifteen judges, which would be appointed by a bi-partisan committee, who would serve for no more than two six-year terms.<sup>56</sup> Five judges would come from each of the two parties (the EU and the United States in the case of TTIP), and five additional judges would be selected from other countries. Although the idea of a permanent investment court strays from traditional notions of ISDS, the investment court model still allows parties involved in a dispute to draw on and use many procedures outlined by ICSID, UNCITRAL, and other agreements. If the tribunal decides, according to these

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<sup>54</sup> “The Multilateral Investment Court Project,” *European Commission*, 20 October 2017, web, November 2017, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>.

<sup>55</sup> “State of the Union 2017: A Multilateral Investment Court,” *European Commission*, 2017, web, November 2017, [http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc\\_156042.pdf](http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf).

<sup>56</sup> Robert Schwieder, “TTIP and the Investment Court System...,” 2016: 190.

agreements and standards, that a state has in fact violated its commitments, the tribunal can issue “provisional awards”, including monetary damages and/or restitution of property, however it can neither issue punitive compensations nor “order the repeal, cessation, or modification of the treatment concerned.”<sup>57</sup>

In his 2016 article in the *Columbia Journal of Transnational Law* giving a critical evaluation of the investment court system under TTIP, Robert Schwieder, a researcher at Columbia University Law School, discusses what he considers to be one of the key innovations—an Appeal Tribunal.<sup>58</sup> Based on the TTIP proposal, the Appeal Tribunal will have the power to modify or reverse the decision of the first tribunal should the initial tribunal have “erred in the interpretation or application of the applicable law... manifestly erred in the appreciation of the facts... or violated one of the many procedural grounds for appeal mentioned in Article 52 of the ICSID Convention.”<sup>59</sup> Furthermore, the decisions handed down by the Appeal Tribunal are considered binding, and are not “subject to appeal, review, set aside, annulment, or any other remedy.”<sup>60</sup> In other terms, the decisions of this court proceeding are adopted by the respective parties, in this case between the EU and United States, as though they were domestic court decisions.

In addition to the TTIP investment court model’s inclusion of an Appeal Tribunal, the proposal also outlines a voluntary mediation process, as well as mechanisms to promote the inclusion of small and medium enterprises (SMEs) in disputes. Seemingly small but not at all insignificant details of the agreement such as the inclusion of language which places some

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<sup>57</sup> “Transatlantic Trade and Investment Partnership: Chapter II—Investment,” *The European Union*, 12 November 2015, web, November 2017, [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf): 29.

<sup>58</sup> Robert Schwieder, “TTIP and the Investment Court System...,” 2016: 191.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

restrictions on the financial costs of legal services and representation with the overall objective of removing or limiting financial barriers to SME participation in the dispute process.<sup>61</sup> In a recent interview, Mr. Manuel Sanchez Miranda, an Associate at King and Spalding, a leading international trade and investment law firm based in Geneva, discussed how in both the trade and investment dispute realms, the barriers to SMEs in dispute settlement can be absolutely debilitating, and furthermore prevent these actors from bringing forward legitimate disputes. Mr. Sanchez Miranda noted how a typical WTO dispute can cost more than one million US dollars in legal fees and other costs, and that the caliber and experience of lawyers for investment disputes are often greater, and therefore more expensive, than those involved in WTO processes.<sup>62</sup> As he noted during the interview, “to have experienced, technical people working on these cases you need to pay them well, and ultimately there aren’t always the resources to do that.”<sup>63</sup> Particularly as investment dispute institutions continue to develop and become more legally rigid, SMEs need to have access to the most up to speed lawyers and professionals working on their cases. Even small measures such as those proposed in the TTIP investment court model, could have critical implications for the long-term engagement of enterprises around the world.

In addition to a more consistent and binding legal procedure with an Appeal Tribunal to give more weight to its decisions, the TTIP investment court agreement specifically addresses concerns over a party’s right to enact policies which serve to protect “public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity.”<sup>64</sup> This clause, particularly as articulated in Section Two, Article Two of the proposal, serves to reaffirm the parties’ commitment to respecting sovereignty with regards to

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<sup>61</sup> Robert Schwieder, “TTIP and the Investment Court System...,” 2016: 193.

<sup>62</sup> Sanchez, Manuel, *Interview*, by Danielle Rosenthal, November 6, 2017.

<sup>63</sup> *Ibid.*

<sup>64</sup> Robert Schwieder, “TTIP and the Investment Court System...,” 2016: 193.

domestic investment policy. This specific mention of the issue of sovereignty in the proposal, and in other investment court set-ups as well, is much more overt and firm than in general, traditional ISDS approaches. Although some contend that this is due more to the existing, stable relationship between the parties in this case, that special attention is being paid to this historical paradox in international investment disputes is a massive step forward in how policy makers view the issue.

*The EU-Canada Comprehensive Economic and Trade Agreement (CETA)*

The European Union-Canada Comprehensive Economic and Trade Agreement (CETA) was the first EU bilateral agreement that has (provisionally) entered into force which includes investment protection, liberalization, and dispute settlement as part of its goals. Following discussions with the United States on potential reforms to the TTIP ISDS mechanism, the EU and Canada decided to revamp their agreement to reflect some of these new frameworks and ideas by establishing its own investment court system.<sup>65</sup> According to Article 8 of the CETA agreement, the investment court system is comprised of a tribunal, consisting of fifteen publically appointed judges, and an appellate tribunal.<sup>66</sup> When analyzing the key institutional features and procedures of the CETA tribunal and appellate tribunal, it becomes clear that there are certain similarities with the ICSID arbitration model. For example, the CETA tribunal utilizes the ICSID administrative structure, wherein there are three judges (one from the EU, one from Canada, and one from a third country), or simply one judge from a third country.<sup>67</sup> Procedurally, the CETA investment court is similar to the traditional arbitration approach,

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<sup>65</sup> Laura Puccio and Roderick Harte, "From Arbitration to the Investment Court System: The Evolution of CETA Rules," *European Parliamentary Research Service* 2017: 1.

<sup>66</sup> Puccio and Harte, "From Arbitration...", 2017: 13.

<sup>67</sup> Ibid.

however both Canada and the EU included a range of protections and innovations in order to prevent ‘forum shopping’ or ‘frivolous claims’ from being submitted.<sup>68</sup>

Should a dispute come up between an investor (a national of one of the parties) and the other party to the agreement, an investor can select one of three courses of action: 1) use domestic or international courts to resolve the dispute; 2) pursue mediation via Article 8.20 of the CETA agreement; or 3) pursue dispute settlement through the mechanisms outlined in Chapter 8 of CETA.<sup>69</sup> If an investor chooses to pursue dispute settlement, they will enter into a three step process which includes, in turn, a consultation, tribunal, and appeal phase. Within three years of the alleged breach of a contract or investment agreement, an investor can request for consultation with the other party, after which the dispute will either go to the tribunal phase or be withdrawn from consideration.<sup>70</sup> Once a case is submitted to the tribunal, the respondent to the dispute must consent to the dispute settlement procedure, after which (following 90 days), the tribunal will be formed and (after another 30 days) respondents will submit their objections to the tribunal.<sup>71</sup> The tribunal will then rule on jurisdictional questions and remaining preliminary objections or questions, which in some cases results in the dismissal of a claim. Should the case be accepted on jurisdictional grounds, the tribunal will issue its award. If no appeal is initiated after ninety days, the tribunal award is regarded as final and its decision is implemented immediately. If an appeal is initiated, an appellate tribunal will be formed and a decision will be reached, which after ninety days is considered final should it not be referred to the first tribunal.<sup>72</sup>

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<sup>68</sup> Puccio and Harte, “From Arbitration...,” 2017: 15.

<sup>69</sup> Ibid.

<sup>70</sup> Puccio and Harte, “From Arbitration...,” 2017: 16.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

According to Ms. Elsa Sardinha, a Research Associate with the Centre for International Law at National University of Singapore, the investment court system created under CETA “creates a hybrid alternative reality, which continues, yet modifies and supplements, existing arbitral rules.”<sup>73</sup> What Sardinha identifies here, is that the CETA investment court system is a new entity that draws significantly on the experiences, and frequent failures, of the traditional ISDS system. Although the court has been carefully crafted and analyzed by academics, lawyers, and policymakers, Sardinha and others have some serious reservations about CETA, or any investment court system, being able to make significant, new contributions to the ways investment dispute is carried out.

#### *Critiques of the Investment Court Approach*

Despite significant reforms of the ISDS process by creating a more institutionalized system with a court structure, many still see some significant issues with their structure and practice. One of the most foundational critiques of the investment court process has to do with the context in which it has been developed, that being Europe, or ‘the West’. In his May 2017 article, Mr. Miroslav Jovanovic, a professor and researcher of international business law at the University of Geneva, discusses how the investment court regime, with the TTIP and CETA models as the most prominent, is only reflective of the stable, Western conception of justice and courts.<sup>74</sup> According to Jovanovic, ISDS has historically, and the court model is no exception, operated “parallel to the embedded existing public court systems in the United States and the European Union, regions that boast having the most developed and exemplary democratic and

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<sup>73</sup> Elsa Sardinha, “Towards a New Horizon in Investor-State Dispute Settlement? Reflections on the Investment Tribunal System in the Comprehensive Trade Agreement (CETA),” 2017: 365.

<sup>74</sup> Miroslav N. Jovanovic, “Investor-State Dispute Settlement Systems in Emerging Mega-Integration Blocs,” *The Australian Economic Review* 50, no. 2 (2017): 152.

public legal and court systems.”<sup>75</sup> That the investment court model has been based so concretely on European and Western justice systems suggests to many that the model may not be so accessible to non-Western regions and countries.

Even within the Europe, there seems to be some hesitation when it comes to the idea of spreading the investment court model to other regions of the world. In a recent interview, Mr. Pierrick Fillon, an ASEAN desk officer at the European Commission who specializes in trade, investment, and innovation policy, noted that the EU, despite its enthusiasm over the investment court, isn't and perhaps cannot be promoted to other regional or multilateral groups. As Mr. Fillon highlighted several structural and practical barriers to setting up or effectively using an investment court system in ASEAN. Among his chief concerns, however, was that ASEAN, and many other regional organizations, legal institutions “are simply not strong enough in each country or together to commit [to a judicial based ISDS regime].”<sup>76</sup> Mr. Fillon, and many others who still largely support the idea of an investment court, admit that it requires significant existing legal structures that are well versed in arbitration and international contracts, which most developing regions have simply not established. Therefore, if we consider a well-founded, non-corrupt legal system to be a prerequisite for participation in an investment court proceeding, then perhaps the TTIP or CETA model is not appropriate for global application.

Another key aspect of the investment court proposal to consider when adapting the program for more multilateral use, is cost structure for the parties. Although the European Commission claims that the court will provide “a more cost effective and faster investment dispute resolution system,” there is thus far little evidence to suggest that the costs will be

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<sup>75</sup> Jovanovic, “Investor-State Dispute Settlement Systems...,” 2017: 160.

<sup>76</sup> Fillon, Pierric, *Interview*, by Danielle Rosenthal, September 26, 2017.

reduced significantly enough to allow new actors to take part in these disputes.<sup>77</sup> One of the advantages of arbitration, although often slower, is that it requires few if no overhead costs, such as administrative fees or start-up costs for the court itself.<sup>78</sup> Furthermore, as Mr. Kyriakou noted, the more institutionalization of ISDS there is, the longer cases will take, which will increase the costs anyway.<sup>79</sup>

In terms of reforming the ways traditional ISDS attracts and retains qualified judges and arbitrators, most practitioners and observers are hesitant to believe there will be any change. As both Mr. Wu and Mr. Kyriakou reflected, based on their time working on ISDS arbitration cases, it is likely that the same people who were arbitrators and judges in arbitration cases will be present in the court.<sup>80</sup> At least during the first ten to fifteen years of the court's existence, most of the qualified individuals will have been trained in the arbitration methods, and will continue to view cases through this lens. As Mr. Wu pointed out, "it isn't that easy to change the culture of ISDS, it's unique... it was born out of commercial arbitration, and the people taking on these cases are often used to this, so the fact that they are 'judges' rather than 'arbitrators' really won't change much in practice."<sup>81</sup> Although the investment court system seems to be an entirely new take on ISDS based on state and not corporate procedures, it is only a function of the individuals who participate and are experienced in this nebulous, complicated sphere of law.

## Conclusion

Investor-state dispute settlement challenges the global community's notions of corporations as 'state-like' actors. Although each dispute is unique and requires special

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<sup>77</sup> Robert Schwieder, "TTIP and the Investment Court System..." 2016: 197.

<sup>78</sup> Joerg Risse, "A New Investment Court System..." *Global Arbitration News*, 23 September 2015: 2.

<sup>79</sup> Kyriakou, Panagiotis A, *Interview*, by Danielle Rosenthal, November 9, 2017.

<sup>80</sup> *Ibid.*

<sup>81</sup> Wu, Hsien, *Interview*, by Danielle Rosenthal, November 7, 2017.

considerations, the international community, via international institutions such as the United Nations and the World Bank, has worked to establish some procedures which are in line with both corporate arbitration practices and state-state judicial disputes. This study has presented some of the most pressing procedural and functional critiques which relate to the multilateral sphere, transparency, high costs, bias of arbitrators, and neo-colonialism. Furthermore, the proposals for an investment court framework within TTIP and CETA, while addressing some of the criticisms of ISDS such as a lack of institutionalization and rule of law, still does not completely remedy many of the issues of inclusion and accessibility.

ISDS arbitration is based not in traditional conceptions of state to state dispute settlement, but rather commercial arbitration, which makes many political scientists and even economists uneasy. The idea of international commercial arbitration is just as much about developing new norms, standards, and agreements as it is resolving disputes over old ones; while the concept of states drawing inspiration for legal proceedings from the private sphere can be discomfoting, it may be in the interest of states to accept a more nuanced approach to these disputes to best reflect the levels of blame in many of these cases, which rarely lies completely on one side.

It is generally understood in the international community that the arbitration processes were mostly developed with the interests and institutions of companies in mind, while the court system more reflects the institutions and norms of states. It is up to a coalition of corporate and state actors in a neutral forum to develop a process which reflects both sets of standards. To prepare for this kind of agreement, research should focus on issues of accessibility, including how the non-profit sector, for instance, may be able to help with providing council and subsidizing costs, as well as how arbitrators, politicians, and investors can best be trained to reflect the changing norms of ISDS procedure.

**Abbreviations**

MNE: multinational enterprise

ISDS: investor-state dispute settlement

BIT: bilateral investment treaty

ICSID: International Center for the Settlement of Investment Disputes

IPA: Investment Protection Agreement

OECD: Organization for Economic Cooperation and Development

ICJ: International Court of Justice

ICC: International Chamber of Commerce

UNCITRAL: United Nations Commission on International Trade Law

SCC: Stockholm Chamber of Commerce

EU: European Union

TTIP: Transatlantic Trade and Investment Agreement

WHO: World Health Organization

NGO: Non-Governmental Organization

ICC: International Chamber of Commerce

FTA: Free Trade Agreement

IIA: International Investment Agreement

NAFTA: North American Free Trade Agreement

ASEAN: Association of Southeast Asian Nations

WTO: World Trade Organization

SME: small and medium enterprise

CETA: Comprehensive Economic and Trade Agreement (between the European Union and Canada)

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