Permanent Court of Arbitration

- Intergovernmental organization with 121 Contracting Parties (including all Member States of the EU)
- Secretariat for inter-State tribunals, investment treaty tribunals, and contractual cases, including various standing tribunals established under international treaties and conciliation/compliance proceedings.
- Has acted as, or designated an, “appointing authority” in 600+ cases

![Pie chart showing case types]

- Investor-State (78)
- Inter-State (8)
- Contractual (40)
- Other (3)
<table>
<thead>
<tr>
<th>Period</th>
<th>Method</th>
</tr>
</thead>
<tbody>
<tr>
<td>Middle Ages</td>
<td>Private Warfare</td>
</tr>
<tr>
<td>Middle Ages – 17th Century</td>
<td>Private Reprisal</td>
</tr>
<tr>
<td>18th Century – 19th Century</td>
<td>Public Reprisal</td>
</tr>
<tr>
<td>19th Century – 20th Century</td>
<td>Diplomatic Protection / Inter-State Adjudication</td>
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<tr>
<td>20th Century</td>
<td>Mixed Arbitration between Private Parties and States</td>
</tr>
</tbody>
</table>
Criticism of ISDS

1. ISDS proceedings lack transparency.
2. Arbitrators lack independence and impartiality.
3. Investors can easily abuse the system, bring frivolous claims, and escape wrongdoing.
4. ISDS leads to lower environmental, public health, and labour standards.
“Remember that referendum about whether we should create a single market with the United States? […] the government wouldn't cede our sovereignty to some shadowy, undemocratic body without consulting us. Would it? […] It would allow a secretive panel of corporate lawyers to overrule the will of parliament and destroy our legal protections. Yet the defenders of our sovereignty say nothing. The mechanism through which this is achieved is known as investor-state dispute settlement. It's already being used in many parts of the world to kill regulations protecting people and the living planet.”

“This transatlantic trade deal is a full-frontal assault on democracy”, George Monbiot, Opinion, The Guardian, 4 November 2013
I. Transparency

• Methanex v. USA (2001)
• NAFTA FTC Notes (2001/2004)
• ICSID Rules (2006)
• UNCITRAL Transparency Rules (2013)
• Mauritius Convention (2014)
• SCC Rules (2017)?
I. Transparency
“Would you go to court with the devil if the court was held in hell? Of course not. But governments have done it hundreds of times. And continue to do so. 

[...]

This report argues that the alleged fairness and independence of investment arbitration is an illusion. [...] Driven by their own profit interests, this ‘arbitration industry’ actively encourages an ever-growing number of corporate claims, while creating the necessary legal loopholes and funding mechanisms for its continued functioning. This industry is also responsible for growing its own business with pro-investor interpretations of the treaties.”

“Profiting from Injustice”, Corporate Europe Observatory, 2012
2. Independence and impartiality

<table>
<thead>
<tr>
<th>ICSID</th>
<th>UNCITRAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>“on account of any fact indicating a manifest lack”</td>
<td>“if circumstances exist that give rise to justifiable doubts”</td>
</tr>
</tbody>
</table>

Contrasting decisions (Nov-Dec 2009):
1. Participaciones Inversiones Portuarias v. Gabon, ICSID (rejected)
2. Perenco v. Ecuador, PCA/IBA (upheld)
3. ICS v. Argentina, PCA/UNCITRAL (upheld)

Recasting ICSID standard: “relates not to the seriousness of the allegation, but to the ease with which the lack […] may be perceived.”
3. Forum shopping

1. **Romak v. Uzbekistan**: simple cross-border sale contract does not meet **inherent definition** of investment

2. **Philip Morris Asia Ltd (Hong Kong) v. Australia**: dismissed case on grounds of “**abuse of process**” due to last-minute restructuring

3. **Guaracachi (US) & Rurelec (UK) v. Bolivia**: Tribunal dismissed first Claimant’s claim under **denial of benefits** clause
4. Investor wrongdoing/windfall

1. **Yukos v. Russia**: accepts claim for contributory fault

2. **Chevron v. Ecuador I**: accepts quasi-tax set off on the basis of “but for” causation

3. **Urbaser v. Argentina**: accepts jurisdiction over counter-claim based on UN Guiding Principles
<table>
<thead>
<tr>
<th>Public concern</th>
<th>CETA</th>
<th>TTIP (EU informal proposal)</th>
<th>TPP</th>
</tr>
</thead>
</table>
| 1. Lack of transparency | Full transparency:  
  - UNCITRAL Transparency Rules  
  - Documents available to public (website)  
  - Hearings open to public  
  - Submissions from interested third parties  
  - Non-disputing party submissions  
  (Investment Chapter, Art. X.33 and X.35; Annexed Rules of Procedure and Code of Conduct, consolidated CETA text) | Full transparency:  
  - UNCITRAL Transparency Rules + additional obligations  
  - Documents available to public (website)  
  - Hearings open to public  
  - Submissions from interested third parties  
  - Non-disputing party submissions  
  (Section 3, Arts. 18 and 23, EU proposal) | Full transparency:  
  - Rules and obligations on transparency of proceedings  
  - Documents available to public  
  - Hearings open to public  
  - Submissions from interested third parties  
  - Non-disputing party submissions  
  (Art. 9.22.2, 9.22.3, 9.23, TPP text released) |
<table>
<thead>
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</thead>
</table>
| 2. Lack of independence and impartiality of arbitrators | • Compliance with International Bar Association Guidelines on Conflict of Interest in International Arbitration  
• Supplemental rules adopted by the Committee on Service and Investment  
• Mandatory Code of Conduct  

(Investment Chapter, Art. X.25.6 and X.42(2)(b), Annexed Rules of Procedure and Code of Conduct, consolidated CETA text) | • Permanent judges  
• Appointed jointly by EU and US  
• Judges assigned randomly to each case  
• High technical and legal qualification  
• Prohibited from working as counsel in investment cases  
• Mandatory Code of Conduct  

(Section 3, Art. 9 and 10, I I (1) + Annex II (Code of Conduct), EU proposal) | • Code of conduct  
• Other relevant rules and guidelines on conflicts of interest in international arbitration on which the Contracting Parties may agree  

(Art. 9.21.6, TPP text released)
### 3. Frivolous or abusive claims

<table>
<thead>
<tr>
<th>Perceived shortcoming</th>
<th>CETA</th>
<th>TTIP (EU informal proposal)</th>
<th>TPP</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>• Cooling-off period of 180 days</td>
<td>• Cooling-off period of 6 months</td>
<td>• Cooling-off period of 6 months</td>
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<tr>
<td></td>
<td>• 3 years statute of limitations to bring a claim (or 2 years after end of proceedings before national tribunal)</td>
<td>• 3 years statute of limitations to bring a claim (or 2 years after end of proceedings before national tribunal)</td>
<td>• 3 ½ years statute of limitations to bring a claim</td>
</tr>
<tr>
<td></td>
<td>• Expedited review of manifestly unfounded claims</td>
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<tr>
<td></td>
<td>• Loser pays principle</td>
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<tr>
<td></td>
<td>• Manipulative and fraudulent claims are excluded</td>
<td></td>
<td>• No jurisdiction when claimant acquired ownership/control of investment for purpose of bringing claim</td>
</tr>
<tr>
<td>(Investment Chapter, Arts. X.17, X.18, X.21, X.29, X.30, X.36, para. 5, CETA text)</td>
<td>(Section 3, Arts. 4.5, 6, 15, 16, 17 and 28(4) , EU proposal)</td>
<td>(Arts. 9.17, 9.18, 9.20.1, 9.22.4, 9.22.5, 9.22.6, TPP text released)</td>
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<td>4. Investors can obtain compensation twice and re-</td>
<td>• Prevention of parallel claims: investors cannot seek remedies in domestic courts or other international tribunals and through ISDS at the same time (Investment Chapter, Art. X.21, X.23, consolidated CETA text)</td>
<td>• Prevention of parallel claims: investors wanting to submit a claim to the Investment Tribunal must withdraw from any domestic proceedings they started (Section 3, Art. 14(1), EU proposal)</td>
<td>• Prevention of parallel claims: investors pursuing a claim under ISDS provisions must waive the right to initiate or continue proceedings in other fora challenging the same measures (Art. 9.20.2 and 9.20.3, released TPP text)</td>
</tr>
</tbody>
</table>
Recent events demonstrate that an adjudication mechanism capable of producing reliable and enforceable results for all stakeholders, including affected populations, may tilt the balance…”
Thank you

www.pca-cpa.org