UDK 347.46:341.62
330.32:341.61
Original scientific paper

THE PATH OF (R)EVOLUTION OF THE INTERNATIONAL INVESTOR STATE DISPUTE SETTLEMENT REGIME

Fahira Brodlija, LLM, Lecturer
International University of Sarajevo
Hrasnička 18, Ilidža, 71 000 Sarajevo, Bosnia and Herzegovina
fbrodlija@ius.ba

Lidija Šimunović, PhD, Postdoctoral Researcher
Josip Juraj Strossmayer University of Osijek, Faculty of Law
Stjepana Radića 13, 31 000 Osijek, Croatia
lsimunov@pravos.hr

ABSTRACT

The idea of reforming the investor-state dispute settlement system (hereinafter: ISDS) has been simmering at the international level with the EU as the most prominent proponent of a complete reconstruction of the ISDS system, and its voice was amplified by the 2018 decision of the ECJ in the Achmea case. The EU has since called for the establishment of a standing body established by means of a multilateral legal instrument investment court (hereinafter: MIC), dedicated to the resolution of treaty-based disputes within and outside of the EU. The MIC has been presented as a matter of urgency by its proponents who claim that the substantive issues in the global investment system – investor liability, the freedom of states to regulate and the interests of third affected parties - cannot be resolved under the existing framework. This proposal was met with some degree of resistance from other parts of the world, as critics find that the MIC would fix the flaws of the existing system, but that it would perpetuate the issues and tilt the scale in favor of the states. In their view, moderate and gradual reform would suffice to remove the major flaws in the existing ISDS system.

Therefore, the ISDS landscape is being shaped in a battle of revolution versus evolution, which will determine whether the EU model will be adopted as the global solution, or will it remain within the boundaries of the EU. The authors give a critical overview of the rise and fall of ISDS as the preferred dispute resolution mechanism for investor claims (1), and the wave of resistance by states which prompted the global ISDS reform process (2). The paper than puts the spotlight on the EU perspective on ISDS reform, regarding intra-EU and extra-EU inves-

tor claims (3). This is followed by a discussion on the MIC which the EU is promoting as the universal replacement for the existing ISDS system (4), and the ISDS reform options developed through the UNCITRAL Working Group III (hereinafter: WG III) (5). Finally, the paper concludes with a discussion on whether the final solution could be compromise (6).

***Keywords**: investment arbitration, investor-state dispute resolution system (ISDS), Achmea decision, Multilateral Investment Court (MIC)*

1. INTRODUCTION

The reputation of ISDS, as the preferred dispute resolution tool selected by foreign investors against host states, has been under attack over the past decade. ISDS grew in popularity through history as an acceptable compromise and neutral forum which levels the playing field between the investor and the state in ISDS proceedings.[1] It was an alternative for dispute resolution through diplomatic channels or domestic courts (both of which could raise issues of state sovereignty) and it offered more procedural flexibility and subject-matter expertise of the decision-makers (arbitral tribunal).[2] However, with the dramatic raise in the number of ISDS claims and the growing success rate of the investors in arbitration, the voices for systematic reform or total abandonment of ISDS grew louder[3] based on concerns about the predictability, reliability, efficiency and fairness of the process.[4]

In Europe, the calls for the abolishment of ISDS escalated after the *Achmea* case of the European Court of Justice (hereinafter: ECJ). Under the Courts ruling the stipulation of the ISDS clauses in intra-EU bilateral investment treaties (hereinaf-

---

1 Born, B. G., *International Arbitration Law and Practice*, 2. ed., Wolters Kluwer, Alphen aan den Rijn, p. 290

2 *Ibid*. For more about arbitration filing in ISDS see: Wellhausen, R., L., *Recent Trends in Investor–State Dispute Settlement, Journal of International Dispute Settlement*, *vol.* 7, no. 1, 2016, pp.12; Kahale, G., *Rethinking ISDS,* Brooklyn Journal of International Law, *vol.* 44, no. 1, 2018, pp. 34

3 Although investors did not indeed start using ISDS more frequently to pursue treaty-based claims with notable success, the notion promoted by some ISDS critics that investors overwhelmingly prevail in ISDS cases is factually incorrect. According to data provided by UNCTAD, out of the 647 cases concluded as of July 31st 2019, states prevailed in 230 and investors prevailed in 190 cases. Source: UNCTAD Investment Settlement Navigator, available at: [https://investmentpolicy.unctad.org/investment-dispute-settlement], accessed 29. April 2020. For more see also: Bronckers, M., *Is Investor–State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements*, Journal of International Economic Law, *vol.* 18, issue 3, 2015, pp. 655; Reinhard, Q., *Why TTIP Should Have an Investment Chapter Including ISDS*, Journal of World Trade *vol.* 49, no. 2, 2015, pp. 199. Gebert, A., *Small and Medium-sized Enterprises in International Economic Law*, Rensmann, Th. (ed.), Oxford University Press, Oxford, 2017, p. 292

4 Note by the UNCITRAL Secretariat, Possible Reform of Investor-State Dispute Settlement, pp.6-10, available at: [https://undocs.org/en/A/CN.9/WG.III/WP.142], accessed 29. April 2020

ter: BITs) is contrary to the EU law.[5] Consequently, the Member states (hereinafter: MS) were pushed engage in the termination of such treaties.[6]

The discussions on the global stage have been broad and geared at systematic reforms addressing the existing concerns related to ISDS. The most consistent and impactful discussions stem from the sessions of the WG III, with the aim of proposing reform options for the existing ISDS system.[7] The discussions and proposals of the WG III are largely government lead, and the participating states provide individual and joint submissions on the developed ISDS reform options. An important contributing factor to the current situation is the fact that most past ISDS disputes were resolved under the provisions of old generation BITs, which lack the nuanced regulation of the substantive and procedural issues which are prominent in modern times.[8] The new-generation BITs have already incorporated modern provisions on investor protection and ISDS, which may lead to more satisfactory outcomes in the future. Therefore, significant improvements may be attainable through the modernisation of the existing BITs, without abandoning ISDS as a whole. The EU has taken the opposite position, by strongly promoting the abolition of ISDS and its replacement with a standing MIC.[9]

Bearing in mind the potentially wide-ranging legal and economic consequences of the developed solutions, it is worth delving into the background of ISDS itself and the issues which gave rise to the current reform process.[10]

---

5 Case 284/16, Slovak Republic v. Achmea B.V., 6. March 2018

6 European Commission - Press release: *Commission asks Member States to terminate their intra-EU bilateral investment treaties*, 18.06.2015 Available at: [http://europa.eu/rapid/press-release_IP-15-5198_en.htm], accessed 20. March 2020. See also: Schill, S., *W., The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?* Available at:[https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping], accessed 14. March 2020

7 United Nations Commission On International Trade Law Working Group III (ISDS Reform) homepage, available at: [https://uncitral.un.org/en/working_groups/3/investor-state], accessed 29. April 2020. For the opposite opinions see: Van Harten, G.; Kelsey, J.; Schneiderman, D., *2019 Phase 2 of the UNCITRAL ISDS Review: Why 'Other Matters' Really Matter*, Available at: [https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1335&context=all_papers], accessed 14. April 2020

8 UNCTAD World Investment Report, Key messages and overview, United Nations, 2019, p. 7. Available at: [https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2460], accessed 29. April 2020

9 Stakeholder meeting on the establishment of a multilateral investment court, European Commission, DG Trade, 9 October 2019. See also: Ginsburg, T., *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance,* International Review of Law and Economics, *vol.* 25, issue 1, 2005, pp. 107

10 See also: Shenkin, T., S., *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty,* University of Pittsburgh Law Review, *vol.* 55, 1993, pp. 573

2. THE RISE AND GOLDEN DAYS OF INVESTOR-STATE DISPUTE RESOLUTION

2.1. Early investment protection mechanisms

Sovereign states have been entering into treaties and regulating international economic and political affairs for centuries. Foreign investments have traditionally been protected by means of multilateral or bilateral investment treaties (BITs) under different names.[11] However, the common thread in all such treaties was the wide range of substantive protections promised by the treaty parties to foreign investors. one treaty party The treaty protections guaranteed to investors have varied in scope over the years, but their nature remains the same.

They have long served as an effective incentive for potential foreign investors to invest in the host states, and therefore the states have been generous in their treaty guarantees, providing little to no qualifications or exceptions in their applicability. The majority of the BITs concluded in the late 20th century (the „old generation treaties") remain in the same form to this day, despite the ongoing global reform process which is aimed at modifying the policy and treaty framework of investment protection to remedy the existing shortcomings. This has resulted in a broad interpretation of the substantive treaty protections and a growing number of investor claims filed against states arises out of „old generation„ treaties[12]. This phenomenon will be addressed in more details below.

The original model of BITs contained dispute resolution clauses envisioning only state-to-state dispute resolution, which meant that the only recourse for foreign investors was a request of their home state to pursue a solution through the existing diplomatic channels. If the government of the home state found it unnecessary or inappropriate to act on behalf of a specific investor, the investors would be left with no remedy whatsoever. This was an untenable framework and it was not easily sustainable, especially considering the expansion and strengthening of international trade.

---

[11] For more about multilateral investment treaties see: Shenkin, T., S., *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty*, University of Pittsburgh Law Review, *vol.* 55, 1993, pp. 593

[12] Most ILAs invoked in 2017 were concluded in the 1990s. UNCTAD, *Special update on investor–statedispute settlement: facts and figures, IIA Issues Note, International Investment Agreements*, 2017, p.4, available at: [https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/uncitral/en/isds_settlement_facts_and_figures.pdf], accessed 29. April 2020

2.2. The emergence of ISDS

States started including a mechanism for the protection of foreign investments, which allowed them to seek redress against the host states for alleged treaty violations.[13] Their initial aim was to increase the attractiveness of the states for the investors. This provided the investors with access to justice and at least an opportunity to present their case in an equitable manner against an opponent which undoubtedly wields more power. With the introduction of ISDS clauses, the investors no longer had to seek redress before the domestic courts. Instead, it provided several alternative options, which were more likely to provide a neutral and acceptable outcome. Namely, with some variations, most BITs allow investors to initiate proceedings directly against the state in judicial or arbitral proceedings (*ad hoc or institutional*), after the mandatory attempt of amicable settlement (during the so-called "cooling-off" period).[14]

Ad hoc investment arbitration entails proceedings which are conducted outside of any established institutional framework, under the procedural rules chosen by the treaty parties. The most commonly used rules are the UNCITRAL Rules on International Arbitration, which provide the generally acceptable procedural rules which are based on international best practices. Institutional arbitration mostly takes place under the auspices of esteemed international arbitration institutions, such as ICSID (61%), ICC (2%) and SCC (6%).[15] Both ad hoc and institutional arbitration were quickly embraced by the investor community, as it equipped them with an effective shield from the harm caused by the state measures, which violated the existing treaty protections. Investors found several of the features of ISDS to be particularly attractive, which are largely in line with the advantages of arbitral proceedings in general[16]. Some of these characteristics are presented below.

3.3. The benefits of ISDS through investment arbitration

Neutrality – in legal disputes where sovereign states appear as parties, the traditional diplomatic or judicial proceedings did not provide a sufficient degree of protection and guarantee of neutrality for the investors. In investment arbitration,

---

13 For more see: Reddie, A., *Power in international trade politics: Is ISDS a solution in search of a problem? Business and Politics*, *vol.* 19, no. 4, 207, pp. 738

14 The full texts of the majority of the global BITs can be found in the UNCTAD Investment Policy Hub Country Navigator, available here: [https://investmentpolicy.unctad.org/country-navigator], accessed 29. April 2020

15 *See* UNCTAD *supra* note 8., p.1; Reed, L.; Paulsson, J.; Blackaby, N.; *Guide to ICSID Arbitration*, 2nd ed., Wolters Kluwer, Alphen aan den Rijn, 2011, p. 48

16 *See* Born *op. cit.,* note 1, p. 71

each party has the opportunity to appoint one member of the arbitral tribunal, and the tribunal is not beholden to any national legal system. Any procedural issue to which the parties cannot agree is resolved by the arbitral tribunal or a neutral appointing authority.[17] Therefore, ISDS conducted in the form of investment arbitration provides the degree of neutrality which leads to the legitimacy and acceptance of the final arbitral award by both sides.

Efficiency – arbitral proceedings have been traditionally perceived as more efficient than court proceedings, especially due to the absence of an appeals mechanism. Over time, with the increasing complexity of the disputes and the evolution of the legal strategies of the disputing parties (including numerous dilatory tactics), arbitral proceedings have become longer and more burdensome on the parties.[18] However, this is not an inherent trait of arbitration, and the disputing parties and the arbitral tribunal can create a procedural framework which will ensure time and cost efficiency. This corresponds with the general principle of party autonomy which applies in arbitral proceedings across jurisdictions and industries.[19]

Expertise of the decision makers – ISDS claims arise from a network of around 3000 BITs and thousands of investments of various kinds and levels of complexity.[20] Therefore, the arbitral tribunal deciding such cases should consist of persons with subject-matter expertise who can deliberate on subject matter of the dispute without excessive outside support.[21] The fact that disputing parties in arbitral proceedings can appoint persons with the necessary level of expertise contributes to their sense of justice and guarantees their ability to fully present their case.[22]

Procedural party autonomy – in ISDS proceedings, where the disbalance of powers of the disputing parties is obvious, arbitration provides a compromise solution, where both parties can influence the structure and features of their proceedings through consensus. However, this will largely depend on the contracting states and the arbitration rules they stipulate in the ISDS clause. Depending on the

---

17 *Ibid*. See also: Joubin-Bret, A.; Legum, B., *A Set of Rules Dedicated to Investor–State Mediation: The IBA Investor–State Mediation Rules*, *ICSID Review - Foreign Investment Law Journal*, *vol.* 29, no. 1, 2014, pp. 19

18 *Ibid*., p. 82

19 Born, G., B, *International Arbitration Law and Practice*, 1. ed., Wolters Kluwer, Alphen aan den Rijn, 2009, pp. 234–40

20 *See* UNCTAD, *op. cit.,* note 14

21 Blackaby, N.; Parastides, C.; Redfern, A.; Hunter, M. *Redfern and Hunter on International Arbitration*, Oxford, 6h edition, 2015, p. 318

22 *See* Born *op. cit.,* note 1, p. 77

level of care and diligence devoted to the drafting of the ISDS clause, the arbitral proceedings can result in a mutually acceptable outcome.[23]

Finality of the decision – a major contributing factor to the efficiency and reliability of arbitral proceedings in comparison to judicial proceedings is the finality of arbitral decisions. Arbitral awards are final and cannot be appealed, wither at a second-instance tribunal, nor at a domestic court. (it can only be challenged under limited circumstances).[24] Therefore, the parties cannot extend the proceedings through appeals, thus adding to the costs and legal uncertainty pending the enforcement of the awards. The added advantage of arbitral awards rendered in ICSID arbitrations (International Centre for Settlement of Investor Disputes), is that, beside their final and binding nature, they can also not be challenged before a national court.[25] Such awards can only be annulled in special proceedings under the ICSID rules.[26]

Enforceability – the enforceability of arbitral awards is one of the main advantages of international arbitration, by virtue of the ICSID Convention[27] and the New York Convention. These two conventions allow the direct enforcement of international arbitral awards in over 170 countries around the world. The enforceability of arbitral awards can only be denied under a narrow set of conditions provided in the two respective conventions.[28]

As the practice of ISDS started to proliferate and investors became increasingly reliant on the ISDS clauses in the applicable BITs, the host states became increasingly weary, especially those which were frequently in the Respondent's seat, and have suffered significant losses. Although statistics do not show any significant trend in favor of one side over the other,[29] the resistance against ISDS became more intensive with each passing year.

---

23 *See* Born *op. cit.,* note 19, pp. 234–240

24 *See* Born *op. cit.,* note 1, p. 81

25 Article 53 of the ICSID Rules. See also: Reed, L.; Paulsson, J.; Blackaby, N.; *Guide to ICSID Arbitration*, 2nd ed., Wolters Kluwer, Alphen aan den Rijn, 2011, p. 48

26 Article 52 of the ICSID Rules. Reed, L.; Paulsson, J.; Blackaby, N.; *Guide to ICSID Arbitration*, 2nd ed., Wolters Kluwer, Alphen aan den Rijn, 2011, p. 165

27 The enforceability of ICSID arbitral awards is provided in Article 54(1) The full text of the ICSID Convention is available here: [https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx], accessed 29. April 2020

28 The UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, the full text of the Convention is available here: [http://www.newyorkconvention.org/new+york+convention+texts], accessed 29. April 2020

29 In 2017, the host states prevailed in one third of the total 530 cases, while the investors were successful in one quarter of the cases. The remaining cases were either settled on confidential terms, discontinued

3. THE BIRTH OF THE RESISTANCE AGAINST ISDS

Although ISDS clauses initially resulted in a modest number of claims, there was an abrupt explosion in the late 20th century which shook the host states out of their comfort zone and made them question ISDS and its perceived qualities. As the number of investor claims grew, it became apparent that the broad investment protection guarantees provided in the various BITs have enabled the investors and the arbitral tribunals to broadly interpret and enforce these provisions against the state.[30]

Claimant investors mostly relied on the fair and equitable treatment (FET) standard and indirect expropriation as the basis for their claims.[31] These were also the most common grounds on which the ISDS tribunals found the state liable for treaty violations.[32] Additional problems were created for states whose BITs contained a so-called „umbrella clause" which extended the liability of the state for any harm caused to the investors, based on any action of the state which otherwise does not violate the treaty provisions.[33] Such clauses allowed the investors to benefit from treaty protections for contract violations as well.[34]

4. THE EU PERSPECTIVE ON ISDS REFORM

4.1. The stance of the EU on ISDS ante-*Achmea*

Any discussion about the EU position on ISDS reform requires a brief reflection on the existing division of competencies within the EU with regards to the BITs. Before the enactment of the Lisbon Agreement, the EU held the exclusive competence in the pre-investment phase for the conclusion of the agreements which implied the access to the single EU market.[35] EU Member States (hereinafter: MS)

---

or the investor was not awarded any monetary relief, ddespite prevailing on the merits of the claim. *See* UNCTAD, *op. cit.,* note 8, p.4

30 Stanivuković, M., *„Umbrella Clause" in Bilateral Investment Treaties* in *Private International Law and Foreign Invensment Protection*, Journal of Private International Law, Open Regional Fund Legal Reform, University of Podgorica, 2008, p. 31

31 The FET clause was invoked in 80% and indirect expropiration was alleged in 75% of the available cases. *See* UNCTAD, *op. cit.,* note 8, p. 5

32 65% for FET claims and 32% for claims of indirect expropriation. *See* UNCTAD, *ibid.*

33 Cervantes-Knox, K.; Thomas, E., International Arbitration Group, DLA Piper UK LLP, *Practice Note on Umbrella clauses in bilateral investment treaties, available at*: [https://uk.practicallaw.thomsonreuters.com/7-3817477?originationContext=document&transitionType=DocumentItem&contextData=%28sc.Default%29&comp=pluk], accessed 29. April 2020

34 *See* Stanivuković, *op. cit.,* note 30, p. 35

35 The Lisbon Treaty entered into force on 1.12.2009. The full name of the Treaty is Treaty on the Functioning of the European Union 2012/C 326/01, Official Journal C 306, 17. 12. 2007. Available at:

held the competence at the post-investment phase, i.e. they were in charge of the investment protection.[36] Such a framework aimed to protect the legal security and a favorable business and investment climate, while the EC maintained a liberal market which facilitated the entry of foreign investors to the EU market.[37]

The foreign direct investments fell into the exclusive jurisdiction of the EU after the conclusion of the Lisbon Treaty.[38] However, the provisions of the Lisbon treaty still left some uncertainties in this regard. Furthermore, questions still existed regarding the jurisdiction over the existing BITs which were concluded between MS, the MS and third countries and those concluded by the EU and acceded to by its MS.[39]

The ECJ had previously established that the EU exercises exclusive jurisdiction over foreign direct investments and that this applies to all investments, regardless of whether they are made by legal entities or natural persons, as long as they serve for the establishment or maintenance of a direct relationship between capital investors and the beneficiary business venture for the purpose of conducting a specific economic activity.[40]

[https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:4301854], accessed 31. March 2020

36 Also see: Miljenić, O., *Zaštita investicija po Ugovoru o energetskoj povelji*, Energetski institute Hrvoje Požar, Zagreb, 2019, pp. 462; Titi, C., *International Investment Law and the European Union: Towards a New Generation of International Investment Argreements,* The European Journal of International Law, *vol.* 26, no. 2, 2015, p. 643

37 *Ibid*, Miljenić, p. 463. See also: Communication from the Commission: *Towards a comprehensive European international investment policy*, COM (2010) 343 final, 7.7.2010., p. 11. Available at: [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0343:FIN:EN:PDF], accessed 31. March 2020. See also: Shan, W.; Zhang, Sh., *The Treaty of Lisbon: Half Way Toward a Common Investment Policy*, European Journal of International Law, *vol.* 11, 2010, p. 1049. See also important cases before Achmea of the ECJ: Case C 402/05, Kadi and Al Barakaat International Foundation vs. Council and Commission, 3. September 2008; Case C 246/06, Commission vs. Sweden, 3. March 2009; Case C 205/06, Commission vs. Austria, 3. March 2009; Case C 118/07, Commission vs. Finland, 19. November 2009; Case C 264/09, Commission vs. Slovakia, 15. September 2011; Case C 171/08, European Commission v. Portuguese Republic, 8. July 2010; Case C 446/04, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, 12. December 2006

38 See art. 207 of the Treaty on the Functioning of the European Union 2012/C 326/01, Official Journal C 306, 17. 12. 2007. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:4301854], accessed 31. March 2020. For more see: Kleinheisterkamp, J., *Investment Protection and Eu Law: The Intra- and Extra-Eu Dimension of the Energy Charter Treaty*, Journal of International Economic Law, *vol.* 15, no. 1, 2012, pp. 85

39 This definition was provided in the Case C 446/04, FII Group Litigation v Commissioners of Inland Revenue, 12. December 2006. For more on this topic, see: Miljenić, *op. cit.,* note 36, p.464

40 Miljenić, *ibid.*; Reinisch, A., *The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and other Investment Agreements*, Santa Clara Journal of International Law, *vol.* 12, iss. 1., 2014., p.

The Court of the EU has taken the position that the EU exercises exclusive competence over indirect investments as well based on its implicit foreign competences, according to Article 63 and 64 of the TFEU. According to most authors, this would include portfolio investments (such as the short-term investments aimed at the acquisition of company stock, without any aspirations to affect the management and control over the business entity).[41]

The Court of the EU held that the BITs concluded with third countries which later became MS had to be amended and harmonized with EU law. If this is not possible, (for example, if the other contracting state rejects such amendments), such treaties must be terminated in compliance with the Vienna Convention on the Law of International Treaties. In this sense, for the MS in transitional phase facing such situations, The Regulation 1219/2012 was adopted.[42] This Regulation obliges the MS to notify the EU on the treaties which preceded the conclusion of the Lisbon Treaty, and which they wish to maintain in force.[43]

The issue with such treaties, which were concluded mostly between the so-called old MS and the so-called newer MS from Eastern and Central Europe prior to their EU accession, was that these were international treaties whose status should not be altered by EU accession, so it could not be determined with certainty whether EU law or international law should prevail.[44]

141; Eilmansberger, Th., *Bilateral Investment Treaties and EU Law*, Common Market Law Review, *vol.* 46, 2009, pp. 383

41 Miljenić, *ibid.*, p. 465. See also: Communication from the Commission: *Towards a comprehensive European international investment policy*, COM (2010) 343 final, 7.7.2010., p. 3. Available at: [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0343:FIN:EN:PDF], accessed 31. March 2020. Schreuer, C., H.; Malintoppi, L.; Reinisch,A.; Sinclair, A., *The ICSID Convention: A Commentary*, Cambridge University Press, Cambridge, 2010, p. 1260

42 Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, Official Journal L 351/40 20.12.2012. Avilable at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1219&from=HR], accessed 31. March 2020

43 Art. 2. of Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, Official Journal L 351/40 20.12.2012. Avilable at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1219&from=HR], accessed 31. March 2020. See also: Miljenić, *op. cit.,* note 36, p., 465-466

44 Miljenić, *ibid.*, p. 471. See also: Pinna, A., *The Incompatibility of Intra-EU BITs with European Union Law, Annotation Following ECJ, 6 March 2018, Case 284/16, Slovak Republic v Achmea BV,* Paris Journal of International Arbitration, Cahiers de l'arbitrage, No. 1, 2018, pp. 73; Pohl, J., *Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?*, European Constitutional Law Review, *vol.* 14, no. 4, 2018, pp. 767

In this sense, arbitral tribunals have upheld their jurisdiction in such cases, and in response, the Commission pressured the five MS which maintained their BITs with other MS in force, by initiating so-called "infringement proceedings". The MS in question proposed the termination of the problematic treaties and their replacement with a treaty among MS which would provide the investment protections which existed under the BITs.[45]

The situation was resolved only in early 2018 in the *Achmea* case, where the ECJ found that dispute resolution clauses in BITs concluded between MS violate the TFEU.[46]This decision of the ECJ has opened the floodgates for the intensive discussions about the viability of the existing ISDS system and the need for its systematic reform.

This case ensued after Slovakia reversed its policy of liberalization of the health market in 2006[47] which lead Achmea to file a claim against Slovakia in 2008, alleging the breach of the provisions of the of the Slovakia-Netherlands BIT. The arbitral proceedings were seated in in Frankfurt, under the UNCITRAL Rules of Arbitration. In 2012, the arbitral tribunal decided in favor of Achmea and found that Slovakia violated its BIT obligations, ordering the payment of approximately EUR 22,1 million in damages. Slovakia challenged the jurisdiction of the arbitral tribunal before the German Courts questioning the compatibility of the arbitration clause in Article 8 of the BIT with EU law. The Higher Regional Court of Frankfurt[48] rejected this claim, so Slovakia appealed this decision before the German Federal Court of Justice. This court referred questions of compatibility to the ECJ for a preliminary ruling,.[49] The ECJ held that matters of EU law can only be adjudicated by EU courts and confirmed the exclusive jurisdiction of EU courts over EU law matters, which made the Achmea claim non-arbitrable. that they not arbitrable. Thus, the ISDS clause in the Slovakia-Netherlands BIT was declared incompatible with EU law.

The MS swiftly moved to action following this decision, negotiating in bilateral and multilateral settings to create an appropriate mechanism for the termination

---

45 European Commission - Press release: *Commission asks Member States to terminate their intra-EU bilateral investment treaties*, 18.06.2015 Available at: [http://europa.eu/rapid/press-release_IP-15-5198_en.htm], accessed 18. January 2018

46 Miljenić, *op. cit.,* note 36, p. 475

47 Thereby, the Slovak government prevented Achmea from distributing the profits it obtained through its insurance acivities in the country

48 Case 26 Sch 3/13 of the *Oberlandesgericht Frankfurt*, decision of 18 December 2014

49 Case I ZB 2/15 of the *Bundesgerichtshof*, decision of 3 March 2016

of the intra-EU BITs.[50] The UK was also among the states which declared their willingness to join the movement, despite the fact that they are on the verge of leaving the EU, upon which they would no longer be bound by EU law.[51]

4.2. The EU position on ISDS post-Achmea

After the *Achmea* decision, the EU continued insisting on the termination of BITs concluded between MS, although some of them resisted this approach. intra-EU BITs, regardless of the resistance from some MS. The Commission emphasized that the availability of ISDS for investors from MS who have concluded BITs with other MS, puts them in a more favorable position than those from MS which have not (the former could choose between national courts and investment arbitration, while the latter could only rely on judicial remedies).[52]

According to the position of the Commission, the arbitral tribunals would thereby exclude the MS national courts and the ECJ, thus denying the full effect of the EU legislature. Furthermore, the position held by the ECJ in *Achmea* questioned the viability of such dispute resolution clauses, because even if arbitral tribunals were established on this basis, the arbitral award could not be recognized and enforced within the EU, as it is contrary to the position of the ECJ.[53]

Therefore, after a series of discussions in early 2019, 21 MS (including the UK) issued a declaration expressing their intent to terminate their intra-EU BITs.[54] This declaration also clarified that the sunset clauses contained in the existing BITs

---

50 For more about intra-EU after Lisabon Treaty see: Borovikov, E.; Crevon-Tarassova, A.; Evtimov, B., *International Arbitration Review Europian Union*, Charter, J., H. (ed.), ed. 8, Law Business Research, London, 2017, pp.188. For more about intra-EU before Lisabon Treaty see: Söderlund, C., *Intra-EU Investment Protection and the EC Treaty*, Journal of International Arbitration, *vol.* 24, No. 5, 2007, p. 455; Marshall, M., *Investor-state dispute settlement reconceptionalized: Regulation of disputes, standards and mediation,* Pepperdine Dispute Resolution Law Journal*, vol.* 17, no. 2, 2017, pp. 234

51 EU member states agree to terminate their intra-EU BITs: is this the end of intra-EU BIT arbitrations and what about Brexit?, available at: [http://arbitrationblog.practicallaw.com/eu-member-states-agree-to-terminate-their-intra-eu-bits-is-this-the-end-of-intra-eu-bit-arbitrations-and-what-about-brexit/], accessed 29. April 2020

52 Miljenić, *op. cit.,* note 36, p. 485. See also: Burkhard, H., *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice,* Max Planck Institute Luxembourg for Procedural Law Research Paper Series Research Paper, No. 3, 2018, pp. 5. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3152972], accessed 14. April 2020

53 Miljenić, *op. cit.,* note 36, p. 48; Hobér, K., *Recent trends in energy disputes, Research Handbook on International Energy Law*, Kim Talus (ed.), Edward Elgar Publishing, Cheltenham, 2014, p. 227

54 Declaration of the Member States of 15 January 2019 on the legal consequences ofthe Achmea judgement and on investment protection, available at: [https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en], accessed 30. March 2020

would also be extinguished once the terminations are effectuated. In addition, the signatories of the declaration took the position that the *Achmea* reasoning also applies to the ISDS provisions provided in the Energy Charter Treaty (ECT), if invoked among EU MS.[55]

In 2019, five MS (namely, Finland, Luxembourg, Malta, Slovenia and Sweden) adopted a declaration which was largely similar to the initial declaration, carving out the ECT ISDS mechanism, stating that it was inappropriate to adopt such a broad interpretation of *Achmea* before this issue was settled by the national courts. On the same day, Hungary released its own declaration, explicitly limiting the application of the *Achmea* reasoning only to intra-EU BITs and not any ISDS proceeding based on the ECT.

Following the declarations of the EU and its MS which determined the path forward for investment protection within the EU, following the *Achmea* decision from January 15th and 16th 2019, the EU MS agreed on a plurilateral treaty for the termination of intra-EU BITs on 24 October 2019.[56] This agreement reflects the decision of the EU and its MS to terminate the BITs between EU MS in a plurilateral manner, rather than bilaterally. This solidified the position of the EU in its determination to eliminate ISDS and to create the platform for its replacement by the MIC, which it has been promoting intensively in international circles, including in the WG III meetings.

Interestingly, in its statement announcing this agreement, the EU referred to some MS which did not endorse the text of the treaty on the termination of BITs between EU MS and once again announced potential infringement proceedings against such states.[57]

4.3. The development of the idea of the MIC at the EU level

In its submissions to the WG III, the EU asserted that ISDS can only be reformed in a systematic way through the introduction of the MIC.[58] They also encouraged

---

55 *See ibid.*

56 Statement: EU Member States agree on a plurilateral treaty to terminate bilateral investment treaties 24 October 2019, available at: [https://ec.europa.eu/info/publications/191024-bilateral-investment-treaties_en], accessed 29. April 2020

57 For more details, *see* Statement *supra* note 56; Delaume, G., *ICSID Arbitration and the Courts,* American Journal of International Law, *vol.* 77, no. 4, 1983, pp. 784

58 UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) Thirty-seventh session New York, 1–5 April 2019, Possible reform of investor-State dispute settlement (ISDS), Submission from the European Union and its Member States, p. 1., available at: [https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1], accessed 29. April 2020

UNCITRAL to develop this concept through further discussion as a matter of priority.[59] However, this idea has been present in the EU discourse since 2015.

Over time, the scope and details of the MIC project of the European Commission has evolved, but it has been consistent.[60] In 2016, the MIC was only a concept, and by 2020 it has become a constant refrain which is repeated in any ISDS reform forum.

Over the span of three years, the EU conducted a number of activities aiming at creating the preconditions for the establishment of the MIC, including an impact assessment process (1 August 2016), public consultations (21 December 2016) and stakeholder meetings on the possibility of the establishment of the MIC (20 November 2017 on 22 March 2019). This resulted in the publishing of the **negotiating directives** for a MIC. One year later, on 22 March 2019, a Stakeholder meeting on the **establishment** of a MIC was held. This is only a brief overview of the progression of the MIC as a future staple of the EU investment protection framework.[61]

Although on the surface it may seem that the ECJ decision in *Achmea* was the catalyst for the campaign of the European Commission for the establishment of the MIC, the reality is that this idea has much deeper roots. Namely, the MIC is not only a conceptual aspiration of the EU, but it is also an obligation which was stipulated in two existing international treaties signed by the EU (which will most likely be included in other agreements in the future).

These provisions can be found in the Comprehensive Economic and Trade Agreement (CETA) concluded between the EU and Canada and the Free Trade Agreement between the EU and Vietnam. The dispute resolution clauses in both these treaties provide for a permanent tribunal of first instance and a built-in appellate mechanism.[62] The tribunal itself does not have an institutional structure, and the

---

59 *Ibid*., p. 14

60 The European Commission, The Multilateral Investment Court Project. Here it is clearly stated that the European Commission has been working on the establishment of a standing multilateral investment court since 2015. Available at: [http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608], accessed. 29. April 2020

61 For more see: Howse, R., *Designing a Multilateral Investment Court: Issues and Options,* Yearbook of European Law, *vol.* 36, 2017, pp. 210; Alvarez Zarate, J. *Legitimacy concerns of the proposed multilateral investment court: Is democracy possible*, Boston College Law Review, *vol*. 59, no. 8, 2017, p. 2770; Bungenberg, M.; Reinisch, A., *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement,* Saarbruecken, Wien, 2018, p. 20

62 CETA, Chapter 8 Section F; EU-Vietnam FTA, Chapter 8.II Section 3. See also commentars in: Bernasconi-Osterwalder, N.; Mann, H., *A Response to the European Commission's December 2013 Document*

Secretariat of ICSID should provide administrative support to the tribunal and the disputing parties.[63]The tribunal itself consists of one national of each disputing state and it is chaired by a person of a nationality different than that of the disputing pa whose nationality differs from that of both parties.[64] The proceedings can be governed by the ICSID Convention (including the Arbitration Rules and the Additional Facility Rules) the UNCITRAL Arbitration Rules or any other procedural rules selected by the parties.[65]

Despite this detailed dispute resolution framework which was designed in accordance with the desires of the parties, these treaties also contain a forward-looking obligation to pursue and negotiate the establishment of an MIC, which would replace the existing treaty mechanism. [66] The EU-Vietnam FTA provides a similar provision in Article 15.

Therefore, although the *Achmea* decision helped accelerate the process of moving towards the termination all intra-EU BITs, including their ISDS clauses, the European Commission had previously undertaken the obligation to contribute to the establishment of the MIC as the alternative for the existing ISDS system with all of its perceived flaws. The strong language of the cited provisions of the CETA and the EU-Vietnam FTA reflect the long-term dedication of the EU Commission with regard to this matter.

Although the EU and its MS are on the verge of banishing ISDS from its legal framework and intensively promoting the establishment of the MIC at the international level, the current proposal for the MIC was met with skepticism in the international fora, particularly at the WG III. The sections below are dedicated to

---

"Investment Provisions in the EU-Canada Free Trade Agreement (CETA), The International Institute for Sustainable Development, 2014. Available at: [http://power-shift.de/wp-content/uploads/2014/06/reponse_eu_ceta.pdf], accessed 11. April, 2020. See also: Schacherer, S., *TPP, CETA and TTIP Between Innovation and Consolidation—Resolving Investor–State Disputes under Mega-regionals*, *Journal of International Dispute Settlement, vol.* 7, no. 3, 2016, pp. 630

63 CETA, Article 8.27.16. The issue is still open in the EU-Vietnam FTA (See Article 12(18)). The full text of the EU – Vietnam FTA is available here: [http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437], accessed 29. April 2020. See also: Hübner, K.; Deman, A., S., Balik.T., *Writing the Rules of 21st Century Trade: The EU and the New Trade Bilateralism,* Journal of European Integration, *vol.* 39, issue 7, 2017, pp. 843

64 CETA, Article 8.27.6; EU-Vietnam FTA, Article 12(6). See also: Kukucha, C., J., *Canadian Sub-federal Governments and CETA: Overarching Themes and Future Trends." International Journal: Canada's Journal of Global Policy Analysis*, *vol.* 68, no. 4, pp. 528

65 CETA, Article 8.23.2; EU-Vietnam FTA, Article 7(2)

66 CETA, Article 8.29. See also: Happ, R.; Wuschka, S. *From the jay treaty commissions towards multilateral investment court: Addressing the enforcement dilemma*, Indian Journal of Arbitration Law, *vol.* 6, no. 1. 2017, p. 113

the international discussions on the major concerns related to the ISDS system as it stands, as well as the current MIC model, as expressed in the government submissions to the UNCITRAL Secretariat.

5. THE ISDS REFORM MOVEMENT AT THE INTERNATIONAL LEVEL

5.1. The situation beyond the EU

Outside the EU, the discussions on the need for ISDS reform have been conducted in a broader and more nuanced manner. A comprehensive study and analysis conducted by UNCTAD showed that various countries are taking different approaches in ISDS reform, primarily through treaty re-negotiation. There were five main approaches taken in treaties concluded in 2018, where some treaties have no ISDS provision, or they provide for a standing ISDS mechanism, or a limited ISDS mechanism. Some treaties provide an improved ISDS procedure, while others rely on the traditional ISDS procedures.[67]

Due to the increasing concerns and demands for reform, the Secretariat of UNCITRAL mandated the WG III to 1. identify he most prominent ISDS concerns, 2. determine the need for reform in such areas and 3. propose viable reform options. The WG III is currently at the third stage, where it is developing and proposing reform options for the identified areas of concern. The entire process is government-lead, with delegations from all over the world gathering twice a year (in Vienna and New York) to discuss and propose various options. In-between sessions, there are numerous regional and bilateral meetings, where delegations exchange their views and positions. It is a gradual and systematic process, which is focused on the procedural aspects of ISDS, while the substantive matters remain outside of its scope.

WG III has grouped the major concerns related to ISDS into three main categories:

1. Consistency, coherence, predictability and correctness of arbitral awards
2. Arbitrators and decision makers
3. Cost and duration of ISDS cases (with focus a on arbitration proceedings),

The global ISDS reform discussions within the framework of the WG III reflect the diversity and specificity of issues which concern individual nations. The nu-

[67] *See* UNCTAD, *op. cit.,* note 8

merous country submissions to the UNCITRAL Secretariat provided by governments reflect their positions on the identified concerns and the reform options which would meet their needs. Aside from the EU MS which promote the MIC, most other countries support a more, targeted approach to ISDS reform, based on the outlined reform framework.[68]However, the option of establishing a standing investment courts and appellate mechanism (stand-alone or integrated in the court) was supposed to be the specific topic of the 39th session of the 39th WG III meeting in New York.[69]

5.2. The MIC as the proposed solution of the EU and its MS

The key benefit of the MIC in the view of the EU is that, just like its FTAs, investment adjudication could be given the features of judicial proceedings in international and domestic courts through the MIC..[70]This has been interpreted by some as another attempt form the EU to impose its position in contradiction to its standing international obligations and those taken by its MS.[71]

The key fetures of the proposed MIC are:

- a first and second instance tribunal
- full-time judges with the requisite qualifications for the highest judicial positions (nominated by the states)
- a specialized secretariat

---

68 Individual and joint submissions by governments to the UNCITRAL Secretariat, including Indonesia (A/CN.9/WG.III/WP.156); European Union and its member States (A/CN.9/WG.III/WP.159 and Add.1); Morocco (A/CN.9/WG.III/WP.161); Thailand (A/CN.9/WG.III/WP.162); Chile, Israel and Japan (A/CN.9/WG.III/WP.163); Costa Rica (A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178); Brazil (A/CN.9/WG.III/WP.171); Colombia (A/CN.9/WG.III/WP.173); Turkey (A/CN.9/WG.III/WP.174); Ecuador (A/CN.9/WG.III/WP.175); South Africa (A/CN.9/WG.III/WP.176); China (A/CN.9/WG.III/WP.177); the Republic of Korea (A/CN.9/WG.III/WP.179); Bahrain (A/CN.9/WG.III/WP.180); Mali (A/CN.9/WG.III/WP.181); Submission from the Governments of Chile, Israel, Japan, Mexico and Peru (A/CN.9/WG.III/WP.182); Kuwait (A/CN.9/WG.III/WP.186); Kazakhstan (A/CN.9/WG.III/WP.187); and the Russian Federation (A/CN.9/WG.III/WP.188 and Add.1). All of these submissions are available on the official website of UNCITRAL WG III: [https://uncitral.un.org/en/working_groups/3/investor-state], accessed 29. April 2020

69 The 39th session of the UNCITRAL WGIII was indefinitely postponed due to the Covid-19 outbreak, and it has not taken place as of the date of the submission of this paper. More information on the most recent developments regarding the UNCITRAL WG III sessions is available here: [https://uncitral.un.org/en/working_groups/3/investor-state], accessed 29. April 2020

70 Statements of Commissioner Malmström at a High Level Event hosted by the Belgian Minister for Foreign Affairs, Didier Reynders

71 Alvarez Zárate, J. M. A., *Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?* Available here: [https://lawdigitalcommons.bc.edu/bclr/vol59/iss8/9/], accessed 29. April 2020

- permanent structure
- transparency in its operations
- resolution of disputes arising under existing investment treaties and future treaties on an opt-in basis
- no new opportunities for an investor to bring a dispute against a state
- the adjudicators will not be appointed by the disputing parties
- effective mechanisms for the enforcement of the decisions.

5.3. Analysis of the identified concerns regarding the proposed MIC model

The EU and its MS have been active in the global ISDS reform discussions, including the sessions of the WG III.[72] Their positions and the proposed model of the MIC were presented in the submissions made to the UNCITRAL Secretariat[73]. However, outside of the circle of the MS, the MIC was met with a substantial degree of skepticism both in terms of its structure and mandate.[74] Some governments have voiced their disagreement with this approach by advocating for a more gradual and targeted reform of the existing ISDS system[75], while others were more ouverte in their explicit disagreement with the MIC proposal.

The Russian Federation[76] was particularly direct in its rejection of the MIC, which it provided in its submission to following the 38th session of WG III.[77] The Russian federation submission particularly outlined the following concerns: (1) Uniform-

---

72 Report of the UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019), available at: [https://undocs.org/en/A/CN.9/1004], accessed 29. April 2020

73 *See* UNCITRAL Working Group III, *op. cit.,* note 58

74 Alvarez Zarate, *op. cit.,* note 71

75 Possible reform of investor-State dispute settlement (ISDS),Submission from the Governments of Chile, Israel, Japan, Mexico and Peru, Note by the Secretariat, available at: [https://undocs.org/en/A/CN.9/WG.III/WP.182], accessed 29. April 2020. In this submission these four governments proposed a „Suite" approach to ISDS reform, where each country should choose the appropriate options and incorporate them into their respective investment protection instruments. The submission provides a list of possible solutions for each identified concern in the current ISDS system

76 Submission from the Government of the Russian Federation, Possible reform of investor-State dispute settlement (ISDS), available at: [https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1] Accessed 29.04.2020. In its submission, the government of the Russian Federation provides a comparative overview of the existing ISDS system and the potential effects of the establishment of the MIC, strongly emphasizing the potential negative effects on the states and investors which would arise out of the MIC as proposed by the EU and its member states.

77 For more about BITs in Russian Feredration see: Alekseenko, A., P., *New Russian Model BIT and the Practice of Investment Arbitration*, Manchester Journal of International Economic Law, *vol.* 16, issue 1, 2019, pp. 79

ity of judicial practice would not be guaranteed, (2) increasing fragmentation of the existing investment protection regime, (3) The diversity of decision makers would not be ensured, (4) Costs would continue to be high, (5) The caseload of the system would determine the duration of the proceedings and (6) The budget and allocation of the costs of the MIC.[78]

In addition, the investor community expressed serious concerns with the MIC model for dispute resolution by enumerating the perceived ways in which the MIC would harm both sides in both parties in the dispute, and severely damage the investment environment. The most important and substantive concerns are summarized below.

RIGID STRUCTURE - The ad hoc nature of ISDS has been the source of main criticisms by those seeking to eliminate ISDS, since in their view, the inconsistency, incoherence of ISDS is created by its ad hoc nature (in the appointment of arbitrators and procedure). Therefore, the EU proposed the MIC as a permanent and reliable institution, which would provide a predictable and trustworthy mechanism for dispute resolution. However, such a rigid structure, in which the investor would have no influence, even in matters of procedure, could significantly decrease the quality of the proceedings, as well as the perception of fairness. Considering the fact that the MIC was envisioned as an institution financed and staffed by states, it is hard to imagine any type of reliance on the side of investors that they will be provided with an effective process.

The ad hoc nature of ISDS proceedings was born out of the fact that it is hard to pre-emptively design an institution and one set of rules which will accommodate the resolution of thousands of disputes arising out of thousands of BITs and investment schemes. Therefore, it is questionable, at best, whether the MIC could contribute to the desired degree of coherence and legitimacy of the final decisions.

In addition, regardless of the perceived benefits of an institution such as the MIC, the costs of the infrastructure, staff and maintenance would be significant, even without adding the costs of the proceedings which the states would also have to pay as disputing parties. It is questionable how these costs could be allocated fairly, and how the state contributions would affect less developed states.

APPELLATE MECHANISM - ISDS has been known as the dispute resolution forum in which the parties satisfy themselves with an efficient process which is concluded with a final award without recourse to a second instance forum. ISDS awards can be challenged and annulled, but they cannot be reviewed on the facts

[78] *See* Submission form the Government of the Russian Federation, *ibid.*, pp. 3-7

or the law before an appellate body. ISDS critics have readily pointed-out the instances where different arbitral tribunals have reached divergent conclusions in the interpretation of the same BIT language. Therefore, it was proposed that the MIC could have a built-in appellate body which would review first-instance decisions on the facts and the law, in hopes to enhance the consistency of the awards.

The open-ended architecture of the MIC appellate body would also allow disputing parties which are not subject to the convention establishing the MIC to appeal arbitral awards before the MIC. However, this proposal fails to address the real danger that the availability of an appellate mechanism would slowly turn appeals proceedings into the rule rather than exception – both states and investors would be duty bound to pursue all options to reverse an unfavorable decision.[79] This applies *a fortiori* for states whose adverse costs and financial penalties are charged to the tax payers. This would inevitably extend the duration and cost of the proceeding. In addition, it is questionable if it is truly possible to develop precedent in ISDS due to the diverse provisions of the applicable BITs, applicable laws and fact-specific claims in each case.

In addition, there is a danger that the binding nature of the appellate decisions would allow the perpetuation of incorrect decisions, turning them into binding interpretation tools for future cases arising out of the same treaty. This would also extend to treaty parties which are disputing parties which may not be able to adopt such an interpretation under their mandatory law.

LACK OF PARTY AUTONOMY – The MIC (as proposed) would have a number of standing judges, nominated by states for a fixed period of time. The judges would receive a salary and they would not be paid directly by the disputing parties. The parties in the dispute would not be able to impact the constitution of the panel of judges deciding their case, which should ensure the independence and impartiality of the judges.

However, this would be a large step backwards, as it would deny the disputing parties the ability to appoint the arbitrators who would approach the case with the desired level of subject-matter expertise and experience. Randomly appointed judges are less likely to possess the knowledge and skills necessary to conduct analysis in certain industry-specific disputes, or in the context of a specific legal

[79] Even in the existing ICSID framework, where annullment proceedings can be initiated under very limited conditions, an extremely high percentage of ICSID awards is subject to the annullment proceedings. See: Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, pp. 11-15., available at: [https://icsid.worldbank.org/en/Documents/resources/Background%20Paper%20on%20Annulment%20April%202016%20ENG.pdf], accessed 29. April 2020

system where the investment took place. Therefore, the judges will either have to seek expert advice to a higher degree, or they will reach erroneous or incorrect decisions in matters of high significance. In addition, the party autonomy exercised in the appointment of arbitrators is what created at least some degree of balance between investors and states in what would otherwise be a severely asymmetrical proceeding. Furthermore, long-term tenures at the MIC would negatively impact the diversity of the institution and it would dispose of a narrow pool of persons who would be willing to accept such a rigid service after practicing under the current ISDS framework.

6. INSTEAD OF A CONCLUSION - THE PATH FORWARD THROUGH COMPROMISE SOLUTIONS

As universal solutions and sweeping reforms are unlikely to lead to an acceptable outcome at the international level, it is worth exploring some effective solutions which may address the existing concerns. Considering the broad scope of the discussions in WG III which is lead by the governments in this process, there is an extensive menu of alternative reform options which may enhance ISDS as we know it. Although the EU and its MS will continue on the path towards establishing a permanent investment dispute resolution body within their jurisdiction, the rest of the world is most likely going to remain on a path of evolution rather than revolution.

Therefore, ISDS and the MIC will continue to co-exist, and the level of consistency in the quality of investment protection can be maintained even within two diverging systems – one institutional and one ad hoc.

The more pragmatic submissions by governments to the UNCITRAL Secretariat have provided an overview of the most effective reform options, and they have proposed an opt-in system, where states could sign a multilateral instrument indicating the reform options they accept. Thus far, the WG III has compiled an elaborate list of reform options which can be implemented independently, or in combination with other reform options. An overview of these proposals reveals the opportunities to resolve some of the existing concerns related to ISDS through targeted and gradual reform.

Concerns related to the correctness and consistency of ISDS awards can be accomplished through the provision of binding interpretation notes[80] and the involvement of the states in the clarification of the treaty provisions to concerned

[80] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session Vienna, 14–18 October 2019, Possible reform of inves-

investors. From the substantive side, the gradual adoption of new-generation treaties and precise protection standards can improve the consistency of treaty interpretation.

The adoption of a strict procedural timetable and mechanisms for the early dismissal of frivolous claims could improve the time and cost efficiency of the ISDS proceedings. Parties can also be ordered to deposit security for costs, which will encourage strategic and well-founded procedural conduct of the parties.[81]

In order to improve the accountability of arbitrators and to ensure their independence and impartiality, a Code of conduct for arbitrators could be adopted, providing the explicit prohibition of "double hatting" of the prospective candidates. The secretariats of UNCITRAL and ICISD have recently published the Draft Code of Conduct for ISDS Adjudicators, which is open for public comment.[82] The Draft Code of Conduct addresses general requirements of independence and impartiality of the adjudicators, as well as ISDS-specific concerns (such as double hatting, issue conflict and repeat appointments).[83] The broad definition of "adjudicator" in the Draft Code of Conduct covers not only arbitrators, but also judges, members of commissions and different standing bodies.[84]

The concerns of the lack of transparency in ISDS can be addressed and resolved through a wide-spread ratification of the Mauritius Convention which extends the application of the UNCITRAL Transparency Rules to treaty-based investment disputes, regardless of whether the respective treaty predates the Rules themselves. The Transparency Rules provide for a procedural framework where all the non-confidential documents and information pertaining to investor-state proceedings will become transparent and accessible (including the party submissions, submissions by non-disputing third parties and introducing public hearings).

The Transparency Convention extends the application of the Transparency rules to the investment protection legal instruments adopted by 1 April 2014, which in-

tor-State dispute settlement (ISDS), Note by the Secretariat, para. 43, available at: [https://undocs.org/en/A/CN.9/WG.III/WP.166], accessed 24. April 2020

81 Some of these proposals are already under consideration in the most recent amendment process for the ICSID Rules of Arbitration. For more details on the reform process of the ICSID Rules, see: ICSID, Proposals for Amendment of the ICSID Rules — Working Paper #4, Volume 1, February 2020, available at: [https://icsid.worldbank.org/en/amendments], accessed 29. April 2020

82 Draft Code of Conduct for ISDS Adjudicators available at: [https://icsid.worldbank.org/en/Documents/Draft_Code_Conduct_Adjudicators_ISDS.pdf], accessed 16. June 2020

83 *Ibid.*

84 *Ibid.*

cludes the old-generation treaties, regardless of the applicable arbitration rules.[85]Its wide adoption would generate the systematic reform without complex multilateral or bilateral re-negotiations of treaties. Therefore, the desired reform effects (including those pursued by the EU in their MIC proposal) could be accomplished though one legal instrument applied to the existing ISDS framework, based on international consensus.[86] Such an instrument should foster the amicable and collaborative resolution of disputes[87] to the possible extent, seeking to leave adverse proceedings as the last resort.

In terms of the pursuit of a permanent institutional solution for the first instance and appellate mechanisms in ISDS, it is difficult to envisions such an outcome at the international level. Due to the numerous doubts and gaps in the concept of the MIC as it stands, it is unlikely that it will be introduced in the near future. Therefore, it may be more realistic to pursue reforms of ISDS at the international level and build upon the framework of ICSID as the most trusted and developed ISDS institution.

Regardless of the approach which will ultimately be chosen, it is most likely to succeed if it is based on compromise which will accommodate the diverse nature of the treaties which give rise to the disputes and subsequent proceedings. The respective benefits of the flexible ad hoc methods and institutional frameworks will have to be harnessed to enhance legal security and to enable the best outcome for all parties involved.

---

85 *The Mauritius Convention on Transparency: A Model for Investment Law Reform?* Available at: [https://www.ejiltalk.org/the-mauritius-convention-on-transparency-a-model-for-investment-law-reform/], accessed 29. April 2020. See also: Calamita, J.; Zelazna, E., *The Changing Landscape of Transparency in Investor-State Arbitration: The UNCITRAL Transparency Rules and Mauritius Convention*, Politics and Governance, *vol.* 8, no. 1, 2020, pp. 344

86 *Ibid*.

87 It may be noted that institutional rules on mediation which could apply to ISDS have been developed. ICSID adopted its Conciliation Rules in 1967, as well as its Fact-Finding Additional Facility Rules in 1978. In 2018, ICSID initiated work on a new, stand-alone set of mediation rules for investment disputes. The Energy Charter Conference adopted a Guide on Investment Mediation in 2016, providing guidance on the conduct of investment mediation under the Energy Charter Treaty. The Mediation Rules of the International Chamber of Commerce (ICC) and Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) were both adopted in 2014 and may apply to Iinvestor-State disputes. Ad hoc Rules for Investor-State Mediation have been adopted by the International Bar Association (IBA) and were released in 2012. For more about mediation in ISDS see: Yong Kyun, K., *States Sued: Democracy, the Rule of Law, and Investor-State Dispute Settlement (ISDS)*, International Interactions, *vol.* 43, no. 2, 2017, pp. 304; Shang, S. *Responding to the ISDS Legitimacy Crisis by Way of Mediation: Implications from CEPA's Dispute Resolution Mechanism,* Journal of International Business and Law, *vol.* 18, no. 2, 2019, pp. 220; Zhao, Ch., *Investor-State Mediation in a China-EU Bilateral Investment Treaty: Talking About Being in the Right Place at the Right Time*, Chinese Journal of International Law, *vol.* 17, no. 1, 2018, pp. 111–135

REFERENCES

BOOKS AND ARTICLES

1. Alekseenko, A., P., *New Russian Model BIT and the Practice of Investment Arbitration*, Manchester Journal of International Economic Law, *vol*. 16, issue 1, 2019, pp. 79-93
2. Alvarez Zarate, J. *Legitimacy concerns of the proposed multilateral investment court: Is democracy possible*, Boston College Law Review, *vol*. 59, no. 8, 2017, pp. 2765-2790
3. Blackaby, N.; Parastides, C.; Redfern, A.; Hunter, M. *Redfern and Hunter on International Arbitration*, Oxford, 6h edition, 2015
4. Born, G., B, *International Arbitration Law and Practice*, 1. ed., Wolters Kluwer, Alphen aan den Rijn, 2009
5. Born, G., B, *International Arbitration Law and Practice*, 2. ed., Wolters Kluwer, Alphen aan den Rijn, 2014
6. Borovikov, E.; Crevon-Tarassova, A.; Evtimov, B., *International Arbitration Review Europian Union*, Charter, J., H. (ed.), ed. 8, Law Business Research, London, 2017
7. Bronckers, M., Is Investor–State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements, Journal of International Economic Law, *vol*. 18, issue 3, 2015, pp. 655–677
8. Bungenberg, M.; Reinisch, A., *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement,* Saarbruecken, Wien, 2018
9. Calamita, J.; Zelazna, E., *The Changing Landscape of Transparency in Investor-State Arbitration: The UNCITRAL Transparency Rules and Mauritius Convention*, Politics and Governance, *vol*. 8, no. 1, 2020, pp 336–347
10. Delaume, G., *ICSID Arbitration and the Courts,* American Journal of International Law, *vol*. 77, no. 4, 1983, p. 784-803
11. Eilmansberger, Th., *Bilateral Investment Treaties and EU Law*, Common Market Law Review, *vol*. 46, 2009, p. 383-429
12. Fach Gomez, K., *Los tribunales arbitrales de inversiones internacionales: algunas reflexiones en torno al mecanismo de recusación de sus árbitros (Investment Arbitration Tribunals: Some Reflections on Arbitrator Challenges),* SSRN Electronic Journal, 2019, pp. 1556-1568
13. Gebert, A., *Small and Medium-sized Enterprises in International Economic Law*, Rensmann, Th. (ed.), Oxford University Press, Oxford, 2017
14. Ginsburg, T., *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance,* International Review of Law and Economics, *vol*. 25, issue 1, 2005, pp. 107-123
15. Happ, R.; Wuschka, S. *From the jay treaty commissions towards multilateral investment court: Addressing the enforcement dilemma*, Indian Journal of Arbitration Law, *vol*. 6, no. 1, 2017, pp. 113-132
16. Hobér, K., *Recent trends in energy disputes, Research Handbook on International Energy Law*, *Kim* Talus (ed.), Edward Elgar Publishing, Cheltenham, 2014

17. Howse, R., *Designing a Multilateral Investment Court: Issues and Options, Yearbook of European Law*, *vol*. 36, 2017, pp. 209–236
18. Hübner, K.; Deman, A., S., Balik.T., *Writing the Rules of 21st Century Trade: The EU and the New Trade Bilateralism,* Journal of European Integration, *vol*. 39, issue 7, 2017, pp. 843-857
19. Joubin-Bret, A.; Legum, B., *A Set of Rules Dedicated to Investor–State Mediation: The IBA Investor–State Mediation Rules*, *ICSID Review - Foreign Investment Law Journal*, *vol*. 29, no. 1, 2014, pp. 17–24
20. Kahale, G., *Rethinking ISDS,* Brooklyn Journal of International Law, *vol*. 44, no. 1, 2018, pp.11-50
21. Kleinheisterkamp, J.*, Investment Protection and Eu Law: The Intra- and Extra-Eu Dimension of the Energy Charter Treaty*, Journal of International Economic Law, *vol*. 15, no. 1, 2012, pp. 85–109
22. Kukucha, C., J., *Canadian Sub-federal Governments and CETA: Overarching Themes and Future Trends,* International Journal: Canada's Journal of Global Policy Analysis, *vol*. 68, no. 4, pp. 528-660
23. Marshall, M., *Investor-state dispute settlement reconceptionalized: Regulation of disputes, standards and mediation*, Pepperdine Dispute Resolution Law Journal, *vol*. 17, no. 2, 2017, pp. 233-262
24. Miljenić, O., *Zaštita investicija po Ugovoru o energetskoj povelji*, Energetski institut Hrvoje Požar, Zagreb, 2019
25. Pinna, A., *The Incompatibility of Intra-EU BITs with European Union Law, Annotation Following ECJ, 6 March 2018, Case 284/16, Slovak Republic v Achmea BV,* Paris Journal of International Arbitration, Cahiers de l'arbitrage, no. 1, 2018, pp. 73-95
26. Pohl, J., *Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?*, European Constitutional Law Review, *vol*. 14, no. 4, 2018, pp. 767-791
27. Reddie, A., *Power in international trade politics: Is ISDS a solution in search of a problem? Business and Politics*, *vol*. 19, no. 4, 207, pp. 738-757
28. Reed, L.; Paulsson, J.; Blackaby, N.; *Guide to ICSID Arbitration*, 2nd ed., Wolters Kluwer, Alphen aan den Rijn, 2011
29. Reinhard, Q., Why TTIP Should Have an Investment Chapter Including ISDS, Journal of World Trade, *vol*. 49, no. 2, 2015, pp. 199-209
30. Reinisch, A., *The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and other Investment Agreements*, Santa Clara Journal of International Law, *vol.* 12, iss. 1, 2014., p. 114-156
31. Schacherer, S., *TPP, CETA and TTIP Between Innovation and Consolidation—Resolving Investor–State Disputes under Mega-regionals*, *Journal of International Dispute Settlement, vol*. 7, no. 3, 2016, pp. 628–653
32. Schreuer, C., H.*; Malintoppi, L.; Reinisch,A.; Sinclair, A., The ICSID Convention: A Commentary*, Cambridge University Press, Cambridge, 2010
33. Shan, W.; Zhang, Sh., The Treaty of Lisbon: Half Way Toward a Common Investment Policy, European Journal of International Law, *vol*. 11, 2010, pp. 1057–1065

34. Shang, S., *Responding to the ISDS Legitimacy Crisis by Way of Mediation: Implications from CEPA's Dispute Resolution Mechanism*, Journal of International Business and Law, *vol.* 18, no. 2, 2019, pp. 220 217-236
35. Shenkin, T., S., *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty,* University of Pittsburgh Law Review, *vol.* 55, 1993, pp. 543-605
36. Söderlund, C., *Intra-EU Investment Protection and the EC Treaty*, Journal of International Arbitration, *vol.* 24, no. 5, 2007, pp. 455-468
37. Stanivuković, Maja, „Umbrella Clause" in Bilateral Investment Treaties in Private International Law and Foreign Investment Protection, Journal of Private International Law, Open Regional Fund Legal Reform, University of Podgorica, 2008
38. Titi, C., *International Investment Law and the European Union: Towards a New Generation of International Investment Agreements*, The European Journal of International Law, *vol.* 26, no. 2, 2015, p. 639–661
39. Wellhausen, R., L., *Recent Trends in Investor–State Dispute Settlement, Journal of International Dispute Settlement*, *vol.* 7, issue 1, March 2016, pp. 117–135
40. Yong Kyun, K., *States Sued: Democracy, the Rule of Law, and Investor-State Dispute Settlement (ISDS)*, International Interactions, *vol.* 43, no. 2, 2017, pp. 300-325
41. Zhao, Ch., *Investor-State Mediation in a China-EU Bilateral Investment Treaty: Talking About Being in the Right Place at the Right Time*, Chinese Journal of International Law, *vol.* 17, no. 1, 2018, pp. 111–135

COURT OF JUSTICE OF THE EUROPEAN UNION

1. Case C 402/05, Kadi and Al Barakaat International Foundation vs. Council and Commission, 3. September 2008
2. Case C 446/04, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, 12. December 2006
3. Case C 205/06, Commission vs. Austria, 3. March 2009
4. Case C 246/06, Commission vs. Sweden, 3. March 2009
5. Case C 118/07, Commission vs. Finland, 19. November 2009
6. Case C 264/09, Commission vs. Slovakia, 15. September 2011
7. Case C 284/16, S*lovak Republic v. Achmea B.V.,* 6. March 2018
8. Case C 171/08, European Commission v. Portuguese Republic, 8. July 2010

JUDICIAL PRACTICE OF GERMAN COURTS

1. Case I ZB 2/15 of the Bundesgerichtshof, decision of 3 March 2016
2. Case 26 Sch 3/13 of the Oberlandesgericht Frankfurt, decision of 18 December 2014

WEBSITE REFERENCES

1. Alvarez Zárate, J. M., *Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?* Available at: [https://lawdigitalcommons.bc.edu/bclr/vol59/iss8/9/], accessed 29. April 2020
2. Bernasconi-Osterwalder, N.; Mann, H., *A Response to the European Commission's December 2013 Document "Investment Provisions in the EU-Canada Free Trade Agreement (CETA),* The International Institute for Sustainable Development, 2014. Available at: [http://power-shift.de/wp-content/uploads/2014/06/reponse_eu_ceta.pdf], accessed 11. April 2020
3. Burkhard, H., *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice,* Max Planck Institute Luxembourg for Procedural Law Research Paper Series Research Paper, No. 3, 2018, pp. 1-20. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3152972], accessed 14. April 2020
4. Communication from the Commission: *Towards a comprehensive European international investment policy*, COM (2010) 343 final, 7.7.2010., p. 11 Available at: [http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0343:FIN:EN:PDF], accessed 31. March 2020
5. Communication from the Commission: *Towards a comprehensive European international investment policy*, COM (2010) 343 final, 7.7.2010., Available at: [http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0343:FIN:EN:PDF], accessed 31. March 2020
6. EU – Vietnam FTA is available here: [http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437], accessed 29. April 2020
7. *EU MS agree to terminate their intra-EU BITs: is this the end of intra-EU BIT arbitrations and what about Brexit?,* available at: [http://arbitrationblog.practicallaw.com/eu-member-states-agree-to-terminate-their-intra-eu-bits-is-this-the-end-of-intra-eu-bit-arbitrations-and-what-about-brexit/], accessed 29. April 2020
8. European Commission - Press release: *Commission asks MS to terminate their intra-EU bilateral investment treaties*, 18.06.2015 Available at: [http://europa.eu/rapid/press-release_IP-15-5198_en.htm], accessed 18. January 2018
9. European Commission - Press release: *Commission asks MS to terminate their intra-EU bilateral investment treaties*, 18.06.2015 Available at: [http://europa.eu/rapid/press-release_IP-15-5198_en.htm], accessed 018. January 2018
10. ICSID, Proposals for Amendment of the ICSID Rules — Working Paper #4, Volume 1, February 2020, available at: [https://icsid.worldbank.org/en/amendments], accessed 29. April 2020
11. Kate Cervantes-Knox and Elinor Thomas, International Arbitration Group, DLA Piper UK LLP, Practice Note on Umbrella clauses in bilateral investment treaties, available at: [https://uk.practicallaw.thomsonreuters.com/7-3817477?originationContext=document&transitionType=DocumentItem&contextData=%28sc.Default%29&comp=pluk], accessed 29. April 2020
12. Note by the UNCITRAL Secretariat, Possible Reform of Investor-State Dispute Settlement, available at: [https://undocs.org/en/A/CN.9/WG.III/WP.142], accessed 29. April 2020
13. Possible reform of investor-State dispute settlement (ISDS), Submission from the Governments of Chile, Israel, Japan, Mexico and Peru, Note by the Secretariat, available at: [https://undocs.org/en/A/CN.9/WG.III/WP.182], accessed 29. April 2020

14. Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between MS and third countries, Official Journal L 351/40 20.12.2012. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1219&from=HR], accessed 31. March 2020
15. Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between MS and third countries, Official Journal L 351/40 20.12.2012. Avilable at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1219&from=HR], accessed 31. March 2020
16. Schill, S., W., *The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?* Available at: [https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping], accessed 14.April 2020
17. Submission from the Government of the Russian Federation, Possible reform of investor-State dispute settlement (ISDS), available at: [https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1], accessed 29. April 2020
18. The European Commission, *The Multilateral Investment Court Project*, available at: [http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608], accessed 29. April 2020
19. The ICSID Convention, Regulations and Rules are available here: [https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx], accessed 29. April 2020
20. The Mauritius Convention on Transparency: A Model for Investment Law Reform? Available at: [https://www.ejiltalk.org/the-mauritius-convention-on-transparency-a-model-for-investment-law-reform/], accessed 29. April 2020
21. The submissions of the governments to the UNCITRAL WG III: [https://uncitral.un.org/en/working_groups/3/investor-state], accessed 29. April 2020
22. The Treaty on the Functioning of the European Union 2012/C 326/01, Official Journal C 306, 17. 12. 2007. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:4301854], accessed 31. March 2020
23. The UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, the full text of the Convention is available here: [http://www.newyorkconvention.org/new+york+convention+texts], accessed 29. March 2020
24. Treaty on the Functioning of the European Union 2012/C 326/01, Official Journal C 306, 17. 12. 2007. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:4301854], accessed 29. March 2020
25. UNCITRAL Working Group III (ISDS Reform), Note by the Secretariat, Possible reform of investor-State dispute settlement (ISDS), Background information on a code of conduct, available at: [https://undocs.org/A/CN.9/WG.III/WP.167], accessed 29. March 2020
26. UNCTAD Investment Policy Hub Country Navigator, available here: [https://investmentpolicy.unctad.org/country-navigator], accessed 29. April 2020
27. UNCTAD Investment Settlement Navigator, available at: [https://investmentpolicy.unctad.org/investment-dispute-settlement], accessed 29. April 2020

28. UNCTAD World Investment Report, Key messages and overview, United Nations, 2019, Available at: [https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2460], accessed 29. April 2020
29. UNCTAD, *Special update on investor–statedispute settlement: facts and figures, IIA Issues Note, International Investment Agreements*, 2017, available at: [https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/uncitral/en/isds_settlement_facts_and_figures.pdf], accessed 29. April 2020
30. United Nations Commission On International Trade Law Working Group III (ISDS Reform) homepage, available at: [https://uncitral.un.org/en/working_groups/3/investor-state], accessed 29. April 2020
31. United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session Vienna, 14–18 October 2019, Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat, para. 43, available at: [https://undocs.org/en/A/CN.9/WG.III/WP.166], accessed 24. April 2020
32. Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, available at: [https://icsid.worldbank.org/en/Documents/resources/Background%20Paper%20on%20Annulment%20April%202016%20ENG.pdf], accessed 29. April 2020
33. Van Harten, G.; Kelsey, J.; Schneiderman, D., *2019 Phase 2 of the UNCITRAL ISDS Review: Why 'Other Matters' Really Matter*, Available at: [https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1335&context=all_papers], accessed 14. April 2020