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„THE FUTURE OF INVESTMENT ARBITRATION – BETWEEN PRESERVING THE *STATUS QUO* AND SETTING UP A MULTILATERAL INVESTMENT COURT“

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List of Abbreviations:

AB	Appellate Body
CETA	EU – Canada Comprehensive Economic and Trade Agreement
CIFA	Brazil's Cooperation and Investment Facilitation Agreement
DSU	Dispute Settlement Understanding
EC	European Commission
ECT	Energy Charter Treaty
EU	European Union
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
ICC	International Chamber of Commerce
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement
LCIA	London Court of International Arbitration
MFN	Most Favoured Nation
MIC	Multilateral Investment Court
New York Convention	1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards
OECD	Organisation of Economic Co-operation and Development
PCA	Permanent Court of Arbitration
SCC	Stockholm Chamber of Commerce
SME	Small and Medium-Sized Enterprise
SOE	State-Owned Enterprise
Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
Transparency Convention	2014 United Nations Convention on Transparency in Treaty-

	based Investor-State Arbitration
TTIP	Transatlantic Trade and Investment Partnership
TPP	Trans-Pacific Partnership
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USMCA	United States-Mexico-Canada Agreement
VCDR	1961 Vienna Convention on Diplomatic Relations
VCLT	1969 Vienna Convention on the Law of Treaties
WTO	World Trade Organization

I. INTRODUCTION

Investor-State Dispute Settlement (ISDS) has emerged as a response to the increased flow of Foreign Direct Investment (FDI) from the 1960s onwards and as a need to confer greater protection to such investments, by the inclusion of a dispute settlement mechanism in International Investment Agreements (IIAs)[1] signed between states. In essence, ISDS provides for an efficient mechanism to ensure that the commitments undertaken by states to protect foreign investors and their investments within the boundaries of national territories are duly complied with. Hence, international arbitration offers an independent and objective judicial forum[2] that can be accessed directly by foreign investors to bring international claims against sovereign states.

Although a recent system, created at the beginning of sixties[3], ISDS started shyly with the first known case registered in 1987[4], but knew an explosive development after mid nineties[5], becoming one of the most attractive fields of international law.[6] Given its international nature and legal guarantees, it serves as an adequate alternative to host state's domestic legal system, where outcomes of the proceedings might be affected by bias, inefficiency or even corruption. The inclusion of ISDS provisions in IIAs contributed to the strengthening of the rule of law on international stage and reduced the risk of interstate conflicts by depoliticization of investment disputes.

Despite such positive effects, during the last years, the ISDS regime has generated intense debate within the international community, including not only the direct beneficiaries of the system (*i.e.* transnational companies and governments), but also the third-parties negatively impacted by the downsides of foreign investments (*i.e.* civil society, various NGOs and intergovern-

[1] For the purpose of the present thesis, the reference to IIAs will cover all the agreements which contain investment provisions, namely Bilateral Investment Agreements (BITs), Free Trade Agreements (FTAs) and Regional Agreements (such as Energy Charter Treaty or North Atlantic Free Trade Agreement).
[2] See for example Article 14 (1) of the ICSID Convention and Article 11 of the UNCITRAL Rules.
[3] Two major events can be considered as setting up the foundation of the contemporary ISDS regime: *firstly*, the enactment of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 10 June 1958 and *secondly*, the creation in 1966 of the International Centre for the Settlement of Investment Disputes (ICSID) through the Convention on the Settlement of Investment Disputes between States and Nationals of other states.
[4] *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, available at: https://www.italaw.com/cases/96.
[5] According to the UNCTAD Investment Dispute Settlement Database at the end of nineties there were more than ten ISDS cases registered per year, the number growing rapidly up to 74 until 2015, available at: https://investmentpolicy.unctad.org/investment-dispute-settlement.
[6] Counting today 942 known treaty-based ISDS cases, according to the same Investment Dispute Settlement Navigator, available at: https://investmentpolicy.unctad.org/investment-dispute-settlement?status=1000.

mental organizations). The discussion outlined the weaknesses of the system and accused an alleged predisposition to favour investors in the detriment of host states.

Among the most important criticisms are the lack of consistency and transparency, limited review instruments to correct erroneous decisions, serious concerns regarding the independence and impartiality of arbitrators due to party-appointment mechanism, costly and lengthy proceedings. All of these issues ultimately led to questioning the legitimacy of the system overall. As a result, demands for reform were voiced and a series of options are under consideration. While some requested the amendment of the current system to address its deficiencies, others proposed to change the overall regime by switching to adjudication, whereas the most adverse opponents urged for the eradication of the system in its entirety.[7] Disregarding the last unjustified aversion, among the advanced ideas for reform, setting up a Multilateral Investment Court (the MIC or the Court) is the most radical solution, as it proposes shifting from international arbitration to international adjudication to solve investment disputes.

Setting up a MIC was suggested for the first time in 2015 by the European Commission,[8] while negotiating the Transatlantic Trade and Investment Partnership (TTIP) with the United States (U.S.), managing so far to include such a mechanism into four recently concluded IIAs between European Union (EU) and Canada[9], Vietnam,[10] Singapore[11] and Mexico.[12] The EU's representatives have argued that the vast majority of criticisms stem from the *ad hoc* nature of arbitration, the chosen dispute settlement method to solve investment cases,[13] and that switching to adjudication would be the best solution to address such criticisms. In essence the reform

[7] A/CN.9/WG.III/WP.171, Submission from the Government of Brazil (State-to-State mechanisms, see paras. 33–36); A/CN.9/WG.III/WP.176, Submission from the Government of South Africa (questioning whether ISDS mechanism is necessary in the first place). In addition, see for example some press articles strongly opposing current ISDS system: *Still not loving ISDS: 10 reasons to oppose investors' super-rights in EU trade deals,* available at: https://corporateeurope.org/en/international-trade/2014/04/still-not-loving-isds-10-reasons-oppose-investors-super-rights-eu-trade; *Is It Time to Say Farewell to the ISDS System*? available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5417151/; *Unfair privileges for investors*, available at: https://www.foeeurope.org/isds.

[8] C. Malmström, the European Commissioner for Trade, proposing an Investment Court System - Blog Post, available at: https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/proposing-investment-court-system_en.

[9] Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA), Chapter Eight Section F Art. 8.27, 30 October 2016, available at: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf.

[10] EU-Vietnam Free Trade Agreement, Chapter II Section 3 Art.12, concluded on 1 February 2016, available at: https://data.consilium.europa.eu/doc/document/ST-6051-2019-ADD-1/en/pdf.

[11] Details are available at: https://ec.europa.eu/trade/policy/in-focus/eu-singapore-agreement/.

[12] Details are available at: https://ec.europa.eu/trade/policy/countries-and-regions/countries/mexico/.

[13] See the Submission from the European Union "*The identification and consideration of concerns as regards investor to state dispute settlement*" to the Working Group III, available at: https://undocs.org/en/A/CN.9/WG.III/WP.145.

would consist in moving from *ad hoc* arbitration to a permanent standing international body vested with the necessary authority to handle the disputes that would arise between foreign investors and host states worldwide.

The reform is currently under way and is conducted under the auspices of the United Nation Commission on International Trade Law (UNCITRAL or the Commission),[14] which "entrusted Working Group III with a broad mandate to work on the possible reform of investor-state dispute settlement (ISDS)."[15] In accordance with the UNCITRAL process, "Working Group III would, in discharging the mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be government-led with high-level input from all governments, consensus-based and be fully transparent."[16]

The mandate comprises three phases and in fulfilling it the Working Group III would proceed as follows: "(i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that the reform was desirable, develop any relevant solutions to be recommended to the Commission."[17] At the time of this writing,[18] the first two phases were completed, during the working meetings held alternatively in Vienna and New York between November 2017 and April 2019,[19] the discussions regarding the third and last phase – the development of relevant solutions – will start at the next working meeting that will be held in Vienna between 14-18 October 2019. As the concerns identified by the Working Group are systemic in nature, a systemic solution for reform is required in order to achieve the best possible result and deliver the best possible outcome given the expressed concerns. In addition, the fragmented nature of the IIAs and the *ad hoc* nature of arbitration demand as well a systemic approach.

Against this background, the present thesis will discuss the current ISDS reform, with the focus on the setting up a MIC. But before addressing the key elements necessary to be taken into account when designing the future international adjudicative body, it would be important to firstly understand the rationale behind such a reform. As the resolution of investor-state disputes will be switched from arbitration to adjudication, MIC would probably result as a mixture between

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[14] https://uncitral.un.org/en/working_groups/3/investor-state.
[15] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017), Part I, para. 6, available at: https://undocs.org/en/A/CN.9/930/Rev.1
[16] *Idem*.
[17] *Idem*.
[18] August 2019.
[19] During this period, the Working Group III met four times at the following sessions: 34th session, 27 November - 1 December 2017, Vienna; 35th session, 23-27 April 2018, New York; 36th session 29 October - 2 November 2018, Vienna and 37th session 1-5 April 2019, New York.

these two methods of dispute settlement, in the sense of combining some essential features of arbitration as have developed so far (especially with regard to some basic procedural rules) with some fundamental characteristics of adjudication (in particular regarding the institutional structure).

The analysis will be divided into three main parts and will address the following points:

- Part I will briefly explore the historical background and will identify the key features of investment treaty and ISDS regimes, before turning to analyse the criticisms raised against the current system;

- Part II is intended to set out the institutional framework, by analysing the key aspects necessary to be taken into account when designing a future MIC. Some short considerations will be given to MIC structure, its actors and their role in the organization. Jurisdiction and applicable law, along with the outcome of the proceedings are also on the agenda, as correctly identifying them is critical for the existence and acceptance of the future adjudicative institution; and finally

- Part III will analyse who are the main supporters and strongest opponents of MIC reform with the aim of determining the chances of success of the reform.

II. DETERMINING THE *STATUS QUO*: FROM HISTORY TO PRESENT-DAY REALITY. MAIN CRITICISMS RAISED AGAINST THE CURRENT ISDS SYSTEM

1. Historical background and present-day statistics

ISDS was established through and is ruled by IIAs, having as main objective to provide for arbitration as an alternative dispute resolution mechanism, and granting foreign investors the right to bring international claims directly against sovereign states. The system has been created not by the business community, who is protected by this mechanism, but by the states, who realized that without a stable legal framework for the protection of investors' rights, the flow of FDI will not grow.[20] The validity of this belief has been confirmed recently by a Dutch study which demonstrates that after ratification of a BIT the FDI flows increased with 35%.[21]

After the end of the second World War, two major events happened in the field of international law, that set up the framework for arbitration to become the preferred method of settling investment disputes: the adoption of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)[22] and the establishment of the International Centre for Settlement of Investment Disputes (ICSID) by the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).[23]

Among others, both instruments offer efficient enforcement tools for arbitral awards. On the one hand, the purpose of the New York Convention is to ensure that "Foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards." On the other hand, ICSID was created and has been operating under the auspices of the World Bank, functions as a full-service arbitration centre, and became the "world's leading institution devoted to international investment dispute settlement."[24] Initially,

[20] World Bank, Doing Business Report 2013, available at: http://www.doingbusiness.org/rankings; World Economic Forum, The Global Competitiveness Report 2013–2014, available at: http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf.

[21] A. Lejour and M. Salfi, *The Regional Impact of Bilateral Investment Treaties on Foreign Direct Investment*, CPB discussion paper 298 (2015), available at: https://www.cpb.nl/sites/default/files/publicaties/download/cpb-discussion-paper-298-regional-impact-bilateral-investment-treaties-foreign-direct-investment.pdf.

[22] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf.

[23] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 14 October 1966, https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx.

[24] https://icsid.worldbank.org/en/Pages/about/default.aspx.

"arbitration was conceived, among other things, as a relatively speedy and low-cost method of dispute resolution."[25] But given its attractive features,[26] States around the world have widely ratified both international instruments (*i.e.* New York Convention counting 160 parties,[27] and ICSID Convention reaching 163 contracting states[28]) and have resorted to this independent judicial mechanism more often and with more complex cases.

After its creation, ICSID issued several BITs models, including ISDS clauses, which basically represented the "birth" of ISDS as a legal institution. It appears that the famous 1959 BIT signed between Germany and Pakistan[29] does not contain explicitly an ISDS clause. Such a mechanism was included for the first time in the 1970 BIT concluded between Holland and Kenya. The ISDS regime has reached its flourishing period in the mid 1990s when the number of BITs concluded per year were more than 200 in 1995.[30] According to the UNCTAD Investment Dispute Settlement Database, presently the total number of concluded IIAs reached the outstanding number of 3.299,[31] with the vast majority of them providing for ISDS mechanism.

The UNCTAD Database provides for a comprehensive analysis of the main indicators of the system and on the applicability of ISDS mechanism.[32] Although quite a recent mechanism, it became to comprise nowadays around 942 known treaty-based ISDS cases,[33] since the first known case registered in 1987.[34] Having a shy beginning, after 1998, more than 10 new cases were submitted per year, growing rapidly to 74 in 2015. The vast majority of cases are handled by ICSID, counting a total number of 750 cases, the remaining 192 being non-ICSID cases, with the majority of them being administered by the Permanent Court of Arbitration (PCA) under UNCITRAL or its own procedural rules. Same statistics show that Argentina is the most sued state, while the U.S. hosts the most corporations that claimed IIAs violations. The alleged breaches of substantive standards refer to FET and indirect expropriation as the most breached

[25] Possible reform of Investor-State dispute settlement (ISDS) Note by the Secretariat, Thirty-fourth session Vienna, 27 November-1 December 2017, available at: https://undocs.org/en/A/CN.9/WG.III/WP.142.
[26] Which will be analysed in the next chapter.
[27] https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.
[28] https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx.
[29] http://www.economist.com/news/finance-and-economics/21623756-governments-aresouring-treaties-protect-foreign-investors-arbitration.
[30] UNCTAD, World Investment Report 2016: Investor Nationality: Policy Challenges p. 115, available at: http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf.
[31] UNCTAD, International Investment Agreements, available at: http://investmentpolicyhub.unctad.org/IIA.
[32] UNCTAD, Investment Dispute Settlement Navigator, available at: https://investmentpolicy.unctad.org/international-investment-agreements.
[33] UNCTAD, Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement.
[34] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3*, available at: https://www.italaw.com/cases/96.

standards of protection. Finally, the majority of ISDS cases refer to infrastructure claims and are related to gas and electricity, construction and civil engineering, telecommunications, water and waste system.

2. Key features of investment treaty and ISDS regimes

2.1. Legal basis and substantive standards of protection

The key features of the current investment treaty regime result from its public international law nature. Traditionally, IIAs encompassing ISDS mechanism, have been created to protect investors from arbitrary treatment, discrimination and unlawful expropriation in various countries in which there were reasons to suspect that judiciary is not completely independent from the government. In such cases, arbitration was considered a more neutral and efficient method to peacefully settle investment disputes.

In time, this mechanism has gained a lot of international recognition and success, leading to the development of international investment law, which is currently based on a network of more the 3.000 IIAs, concluded between states, as public international law actors, acting in their sovereign capacity.[35] These agreements were specifically designed to grant certain rights to foreign investors, along with the power to enforce these treaty-rights against sovereign states. The vast majority of these treaties are Bilateral Investment Agreements (BITs), while others are plurilateral (such as the Energy Charter Treaty (ECT), North American Free Trade Agreement (NAFTA)). At present, there does not exist a multilateral investment treaty, as the attempt to reform the investment law by concluding such an international instrument, conducted under the auspices of the OECD, failed in April 1998.[36]

Apart from establishing protection rights, these treaties also contain special clauses expressing states' consent for arbitration in case disputes would arise from or in connection with IIAs. This innovation is arguably one the main feature of ISDS, as on the one hand, states may express their consent through a treaty, without necessarily signing a direct agreement with each foreign investor which operates within its national boundaries, and on the other hand, investor may accept the offered-consent by instituting arbitration proceedings. Given that states cannot be

[35] A. Roberts, *Clash of paradigms: actors and analogies shaping the investment treaty system*, (2013) American Journal of International Law, 107 (1) 45-94, 58-63.
[36] On negotiations on a proposed multilateral agreement on investment (MAI) please see: https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm.

submitted to foreign or international jurisdiction without expressing their valid consent, [37] IIAs as international instruments were specifically designed to respond to peculiarities of investment disputes. By signing IIAs, the traditional modes of expressing consent under international public law were legally circumvented, as states extensively agreed to international arbitration without knowing the potential claimants at the moment of giving their consent. In addition, the scope of disputes covered by these agreements varies from a broad language covering "all disputes concerning investments" to more narrow wordings limited to only specific types of cases.[38]

Although there are differences in the terminology used by numerous IIAs, the majority of these agreements share common characteristics. Four main guarantees have been identified as being the core principles underlying the protection granted to investors by host state countries through IIAs: (i) protection against discrimination, (ii) protection against unlawful expropriation, (iii) Fair and Equitable Treatment (FET) and Full Protection and Security and (iv) Umbrella Clauses.

(i) Protection against discrimination is ensured under two fundamental principles of investment law: national treatment (NT) and most favoured nation treatment (MFN). Under these rules, a host state is obliged to treat all foreign investors operating within its boundaries equally to national investors[39] and equally to the best-treated foreign investor.[40]

(ii) Expropriation can be both lawful and unlawful.[41] In order for an expropriation to be lawful, four mandatory requirements must be met: made for a public purpose,[42] on a non-

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[37] UNCTAD, Course on Dispute Settlement in International Trade, Investment and Intellectual Property, International Centre for Settlement of Investment Disputes, 2.3 Consent to Arbitration, available at: http://unctad.org/en/docs/edmmisc232add2_en.pdf.

[38] New UNCITRAL arbitration rules on transparency: application, context and next steps/ August 2013, IISD, p. 6. R. Dolzer, C. Schreuer, *Principles of international investment law*, Oxford University Press (2012), pp. 260-262.

[39] *Pope & Talbot v. Canada*, Award 2001, para. 75 and 78, available at: https://www.italaw.com/cases/863; *SD Myers v. Canada*, Partial Award, 13 November 2000, para. 250, 252, 254, available at: https://www.italaw.com/cases/969; *Occidental Exploration v. Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, para. 173, available at: https://www.italaw.com/cases/documents/762; *Feldman v. Mexico*, Award 2002, para. 181, available at: https://www.italaw.com/cases/435.

[40] *Parkerings v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 369, https://www.italaw.com/cases/812 ; *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, paras. 157, 231-232, available at: https://www.italaw.com/cases/131; *Berschader v. Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006, para. 179, available at: https://www.italaw.com/cases/140; *LG&E v Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 158, https://www.italaw.com/cases/621; *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, para. 318, https://www.italaw.com/cases/1026.

[41] *SPP v. Egypt*, Award, 20 May 1992, 3 ICSID Reports 189, at 233, para. 183, https://www.italaw.com/cases/3300 ; *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, paras. 349-352, available at: https://www.italaw.com/cases/1026.

[42] *Liberian Eastern Timber Corporation v Liberia*, ICSID Case No ARB/83/2, Award 1986; *Walter Fletcher Smith Claim (US v Cuba)*, Award, 2 May 1929, 2 RIAA 913, available at: https://www.italaw.com/cases/3545; *Goetz and Others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Decision on Liability, 2 September 1998, 6 ICSID Re-

discriminatory basis,[43] in line with due process of law[44] and made against prompt,[45] adequate and effective compensation.[46] The essential element of a lawful expropriation is the existence of a title based on which the right of property is transferred from investor to host state. Unlawful expropriation or indirect expropriation is considered a host state's action that has similar effects to expropriation. When such a situation occurs, the foreign investor is entitled to damages. Determining whether an indirect expropriation was made and the amount due to investor to compensate for the lost property are in principle one of the main issues standing at the core of investment disputes, but given the scope of this paper, it will not be further analysed.

(iii) Although FET lacks a precise definition, since 2.000 it has been the most frequently invoked standard.[47] Almost always is included in IIAs with very different wording, leaving arbitrators a wide discretion in interpreting this standard of protection. While some tribunals equated FET with the minimum standard under customary international law,[48] others concluded that FET offers greater protection than custom,[49] whereas some held that FET is different that the

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ports 5, 43, para. 126, available at: https://www.italaw.com/cases/508; *ADC v. Hungary*, ICSID Award 2006, para. 432, available at: https://www.italaw.com/cases/41.

[43] *BP Exploration v. Libyan Arab Republic*, Award, 10 October 1973 und 1 August 1974, 53 ILR 297, 329 (1973), available at: https://jusmundi.com/en/document/decision/en-bp-exploration-company-libya-limited-v-government-of-the-libyan-arab-republic-award-wednesday-10th-october-1973; *Amoco International Finance Corp. v. Iran*, 15 Iran-U.S. CTR 189, 232 (1987), para. 142, available at: https://jusmundi.com/en/document/decision/en-amoco-international-finance-corporation-v-the-government-of-the-islamic-republic-of-iran-national-iranian-oil-company-national-petrochemical-company-and-kharg-chemical-company-limited-partial-award-award-no-310-56-3-tuesday-14th-july-1987;

[44] *ADC v. Hungary*, ICSID Case No. ARB/03/16, 2 October 2006, para. 435, available at: https://www.italaw.com/cases/41.

[45] *Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award and Dissenting Opinion, 1 June 2009, para. 435, available at: https://www.italaw.com/cases/1022.

[46] *Ebrahimi v. Iran*, 30 Iran-U.S. CTR 170 (1994), para. 88, https://jusmundi.com/en/document/decision/en-shahin-shaine-ebrahimi-and-others-v-the-government-of-the-islamic-republic-of-iran-final-award-award-no-560-44-46-47-3-thursday-9th-february-1984; *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, 5 ICSID Reports 153, para. 71, available at: https://www.italaw.com/cases/3413; *Goetz and Others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Decision on Liability, 2 September 1998, 6 ICSID Reports 5, 44, para. 130, available at: https://www.italaw.com/cases/508.

[47] Starting with the following famous two cases: *Emilio Agustín Maffezini v. Kingdom of Spain,* ICSID Case No. ARB/97/7, available at: https://www.italaw.com/cases/641; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, available at: https://www.italaw.com/cases/671.

[48] *Mondev International Ltd. v. United States of America*, Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 122, available at: https://www.italaw.com/cases/documents/716; *United Parcel Service of America Inc. v. Government of Canada*, Decision on Jurisdiction, 22 November 2002, para. 97, available at: https://www.italaw.com/cases/1138; *ADF Group Inc. v. United States of America*, Case No. ARB(AF)/00/1, ICSID Additional Facility Award, 9 January 2003, para. 199, available at: https://www.italaw.com/cases/43; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 284, available at: https://www.italaw.com/cases/288.

[49] *CME Czech Republic B V v The Czech Republic*, Partial Award, UNCITRAL Award 2001, para. 156, https://www.italaw.com/cases/281. *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 361, available at: https://www.italaw.com/cases/118.

custom.[50] The legal basis of this standard has been found in the fundamental good faith requirement,[51] encompassing the following mandatory elements:[52] rule of law and due process[53], predictability and stability,[54] transparency,[55] legitimate expectations,[56] with two components - lack of discrimination[57] and arbitrariness and duty to protect.

Full Protection and Security was initially conceived as a protection granted against physical harm,[58] being developed by some arbitral tribunals as going beyond physical harm.[59] The

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[50] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.4.7, available at: https://www.italaw.com/cases/309.

[51] *Technicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB/AF/00/2, Award of 29 May 2003, para. 153, available at: https://www.italaw.com/cases/documents/1088.

[52] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Final Award (Dec. 11, 2013), para. 519, available at: https://www.italaw.com/cases/697.

[53] *Mondev v. USA*, ICSID Add. Facility 2002, para. 127, available at: https://www.italaw.com/cases/documents/716. *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (April 8, 2013), para. 442, available at: https://www.italaw.com/cases/1846; *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (May 6, 2013), para. 278, available at: https://www.italaw.com/cases/920; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (Dec. 19, 2013), paras. 454, 458, available at: https://www.italaw.com/cases/1629.

[54] *LG&E v. Argentina*, ICSID Award 2006, para 124, available at: https://www.italaw.com/cases/621; *Occidental Exploration and Production Company v Republic of Ecuador*, LCIA No. UN 3467, Award, 1 July 2004, para. 183, available at: https://www.italaw.com/cases/761. *Sempra v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 300, available at: https://www.italaw.com/cases/1002*; Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, para. 244, available at: https://www.italaw.com/cases/1108. *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (November 30, 2012), paras. 7.77, available at: https://www.italaw.com/cases/380.

[55] *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 76. *Tecmed v. Mexico*, ICSID AF Award, 2003, para. 154, available at: https://www.italaw.com/cases/671.

[56] *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of May 29, 2003, para. 154, available at: https://www.italaw.com/cases/documents/1088; *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award, 17 March 2006, paras. 302, 304, available at: https://www.italaw.com/cases/961. *International Thunderbird Gaming Corporation v. Mexico,* UNCITRAL (NAFTA), Award, 26 January 2006, para. 147, available at: https://www.italaw.com/cases/571. *Sempra Energy v. Argentina*, ICSID Case No. ARB/02/16, 28 September 2007, para. 298, available at: https://www.italaw.com/cases/1002; *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 331, available at: https://www.italaw.com/cases/812.

[57] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, 290, available at: https://www.italaw.com/cases/288.

[58] *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Partial Award, 17 March 2006, para. 484, available at: https://www.italaw.com/cases/961; *Enron v. Argentina, Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 286, available at: https://www.italaw.com/cases/401; *Asian Agricultural Products Ltd. v. Sri Lanka*, ARB/87/3, Final Award, 27 June 1990, paras. 45-53 – destruction of a shrimp farm by security forces, available at: https://www.italaw.com/cases/96. A*merican Manufacturing and Trading, Inc. v. Zaire*, ARB/93/1, Award, 21 February 1997, paras. 6.04-6.19 – looting by armed forces, available at: https://www.italaw.com/cases/76; *Wena Hotel Limited v. Arab Republic of Egypt*, ARB/98/4, Award, 21 November 2000, paras. 84-95 – seizure of a hotel by employees, available at: https://www.italaw.com/cases/1162.

[59] *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 408, available at: https://www.italaw.com/cases/118. *Aguas del Aconquija S.A. and Vivendi Universal v. Argentina* (Vivendi II), Award 2007, paras. 7.4.15, 7.4.17, available at: https://www.italaw.com/cases/309. *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, para. 303, available at: https://www.italaw.com/cases/1026.

relationship of this standard with FET is controversial, some equated both standards,[60] while others, the predominant side, held that Full Protection and Security and FET are separate, but interrelated standards.[61]

(iv) Not all, but many BITs contain the so-called "umbrella clause", which impose on state a duty to comply with every contractual obligation undertaken with regard to an investment. Otherwise the breach of a contractual obligation would amount to a breach of a treaty and would entail the investor to bring international claims against the non-complying state.[62]

In addition, protection of capital transfers is also presented as an investment law guarantee, representing an interdiction for the local government to restrict in any way the transfer of capital abroad, and its ensures the finality of an investment for investors, which is making profits.

However, these fundamental guarantees granted by states sometime are in conflict with state's right to regulate, especially in fields such as public order, health and security, taxation, subsidies or public procurement. Therefore, some concerns have been expressed about the effects of ISDS on states' regulatory power, especially in relation to FET principle or protection against indirect expropriation, which are very broadly and vaguely defined in arbitral case law and produce a sort of regulatory chilling effect.

2.2. Applicable procedural rules and main stages of ISDS procedure

ISDS may be conducted before various arbitral institutions and may be governed by different arbitral rules as provided by the applicable IIAs. Theoretically, many IIAs grant investors the possibility to choose between a few arbitral institutions, although in practice the options are reduced to ICSID or PCA. The most frequently used procedural rules, specialized in investment arbitration, are: the ICSID Arbitration Rules,[63] ICSID Additional Facility Rules,[64] UNCITRAL Arbitration Rules,[65] and PCA Arbitration Rules.[66]

[60] *Occidental v. Ecuador*, LCIA Administered Case No. UN 3467, Award, 1 July 2004, Award 2004, para. 187, available at: https://www.italaw.com/cases/761.

[61] *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 407 – 408, available at: https://www.italaw.com/cases/118.

[62] *SGS v. Pakistan*, ICSID Decision on Jurisdiction 2003, para. 166, available at: https://www.italaw.com/cases/1009; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, paras. 51, 53, 60, available at: https://www.italaw.com/cases/documents/748; *CMS v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 303, available at: https://www.italaw.com/cases/288.

[63] https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf

[64] https://icsid.worldbank.org/en/Documents/resources/AFR_2006%20English-final.pdf

[65] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf

[66] https://pca-cpa.org/wp-content/uploads/sites/6/2015/11/PCA-Arbitration-Rules-2012.pdf

The vast majority of investment disputes are conducted under the ICSID Arbitration Rules and ICSID Additional Facility Rules.[67] After ICSID, the second international institution that administers investment disputes is the PCA based in The Hague which conducts proceedings under the UNCITRAL rules (as amended in 2010/ 2013) or its own procedural rules. International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA) or Stockholm Chamber of Commerce (SCC) are other institutions which provide facilities for arbitration disputes, however being focused more on commercial arbitration, rather than investment ones.

Although investment disputes can be conducted under various of these sets of procedural rules, there are some common procedural steps that are mandatory to be taken under any of them, listed in broad manner as follows:

- notice of arbitration sent by investors to host states, notifying the intention to institute arbitration proceedings;
- the appointment of arbitrators by the disputing parties and the constitution of the arbitral tribunal;
- the written phase of the proceedings during which the parties present their position, supported by evidence by submitting written submissions;
- the oral phase (or the hearings) organized for the parties to present their case and to examine and cross-examine the witnesses and experts, who submitted testimonies and reports during the written phase;
- rendering the Arbitral Award, the final procedural act involving the arbitral tribunal, which presents the outcome of the proceedings and decides on the allocation of costs. The Award is final and binding upon disputing parties, but does not create a binding legal precedent applicable in future cases,[68] although the practice shows that arbitral tribunals quite often rely on previous decisions rendered in similar cases.

3. Loudest concerns voiced against the current ISDS system

The concerns have represented the starting point for the reform. Although an investment dispute usually implies two actors – the foreign investor as the claimant and the host state as the respondent, given the nature of such a dispute, frequently the conflict has a negative impact upon

[67] From total number of 942 known treaty-based ISDS cases, 750 cases are administered under the ICSID Arbitration Rules and Additional Facility Rules.

[68] International Court of Justice, Land and Maritime Boundary (*Cameroon v. Nigeria*), 1998, Preliminary Objections, Judgement, I.C.J Reports, para. 28.

third parties, who do not hold any capacity in the proceedings. Such an interested third-party is sometimes the civil society[69] (*i.e.* common beliefs of the local communities, traditions and way of life of the indigenous people adversely impacted by investment projects[70]) or various international organizations or NGOs defending fundamental values (such as the World Health Organization (WHO) protecting public health,[71] Center for International Environmental Law (CIE) for the protection of the environment[72]).

Given this state of affairs, the entire ISDS system has been brought into the spotlight. Apart from causing harm to local communities and environment, criticisms have been raised against the ISDS regime itself. It has been argued that the existing system, based on *ad hoc* arbitration as the used method of settling investment disputes, presents major flaws: it lacks transparency, consistency and predictability, it is perceived to be biased due to the party-appointment mechanism, the proceedings are very costly and lengthy and it lacks a control instrument to correct erroneous awards, all these leading to questioning the legitimacy of the system in its entirety.

During the first phase of the ongoing reform process, the UNCITRAL Working Group III discussed extensively the concerns, as identifying them correctly is essential for a successful outcome of the reform. The concerns have been presented as falling into three broad categories: (i) concerns pertaining to lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals; (ii) concerns pertaining to arbitrators and decision makers; and (iii) concerns pertaining to cost and duration of ISDS cases.[73]

In what follows, this section will broadly discuss the main concerns raised against the system, without necessarily following this categorization, but rather neutrally presenting the loudest of them.

[69] *More Than 300 Civil Society Organizations from 73 Countries Urge Fundamental Reform at UNCITRAL's Investor-State Dispute Settlement Discussions*, 30 October 2018, available at: http://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2018/uncitral-global-letter-oct-2018.pdf

[70] See for example the following cases: *Bilcon of Delaware et al v. Government of Canada,* PCA Case No. 2009-04, available at: https://www.italaw.com/cases/1588; *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, available at: https://www.italaw.com/cases/2848.

[71] See for example the following cases: *Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia*, PCA Case No. 2012-12, available at: https://www.italaw.com/cases/851; *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, available at: https://www.italaw.com/cases/460.

[72] See for example the following cases: *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, available at: https://www.italaw.com/cases/783; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, available at: https://www.italaw.com/cases/181.

[73] Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat, available at: https://undocs.org/A/CN.9/WG.III/WP.149.

3.1. Lack of transparency in investment disputes

Arguably, the lack of transparency in investment disputes is one of the biggest criticism advanced against the system. Since ISDS is based on arbitration, the confidentiality and party autonomy are two fundamental principles governing arbitration proceedings. Nonetheless, the secrecy of the proceeding conflicts with the state's accountability, especially when matters of public interest are involved.

Various major players in the field recognized the existence of this issue and the challenges it poses.[74] Therefore, certain measures have been adopted to address it, but the secrecy of the proceedings still remain one of the most important feature this alternative dispute settlement method offers. The proceedings are still conducted behind closed door, if the disputing parties so desire, without the possibility of interested third parties to access procedural documents, attend oral hearings or make submissions. Even *amicus curiae* still have limited access to the proceedings.

Quite recently, following increased public calls, the major ISDS arbitration centres amended their rules in an attempt to address the demands to make the proceedings more transparent. Hence, ICSID amended its Arbitration Rules in 2006 "*Included provisions allowing non-disputing parties to attend oral hearings if the disputing parties do not object, the prompt publication of excerpts of legal reasoning in non-public awards as well as other provisions to make decisions more accessible.*"[75] The aim of these amendments is to give the public access to the legal reasoning of the arbitral tribunals,[76] and ensure that rationale behind a decision is subject to public scrutiny. UNCITRAL implemented similar amendments in 2010/ 2013 and consequently, PCA adopted quasi-identical modifications as well.

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[74] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, available at: https://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf. Please note that one of the opening considerations of the Convention reads: "Recognizing the need for provisions on transparency in the settlement of treaty-based Investor-State disputes to take account of the public interest involved in such arbitrations."; UNCTAD, Investor-State Dispute Settlement - UNCTAD Series on Issues in International Investment Agreements II p. 26 (2014); Factsheet on Investor-State Dispute Settlement, available at: https://investmentpolicy.unctad.org/publications/1202/fact-sheet-on-investor-state-dispute-settlement-cases-in-2018; European Commission, Factsheet on Investment Protection on TTIP p. 3, available at: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153018.pdf ; Productivity Commission of Australian Government, Bilateral and Regional Trade Agreements Research Report. p. 315 (2010).

[75] E. M. Haftner-Burton, *Against International Settlement? Secrecy, Adjudication and the Transformation of International Law*, ILAR Wor. Pap. (2016), available at: https://ilar.ucsd.edu/_files/publications/working-papers/working-paper-26.pdf.

[76] A. Nurnaningsih and P.L. Rija Fatimah, *Confidentiality versus Transparency of ICSID Arbitration Award: Sustainability of The Quality Practice for Good Governance and Investor to Support Public Accountability* (2014), International Journal of Advanced Studies in Humanities and Social Science, Vol.2 Issue 2, p. 223-231.

However, the breakthrough was made in 2014, with the adoption of two important international instruments: the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the United Nations Convention on transparency for investor-state dispute settlement (Mauritius Convention). The new UNCITRAL Rules on transparency are available not only for arbitration proceedings conducted under UNCITRAL Rules, but for all other proceedings, if states opted into them. In principle, the UNCITRAL Rules cover all stages of arbitration proceedings and seek to strike a balance between protecting privacy on the one hand and ensuring openness on the other hand.

Despite these efforts, the parties' autonomy remains the guiding principle within arbitration system, allowing the disputing parties to decide on the level of transparency, preserving thus the possibility to still avoid transparent procedures, and confirming that secrecy is the rule and not the exception in ISDS proceedings, even after the amendments on transparency took effect.

In light of above arguments, it seems fair to admit that ISDS indeed lacks transparency, which is especially problematic in cases where public interest is involved. Given that the facts in such proceedings are frequently linked to the local community, various individuals could intervene and express their approval or disagreement with the measures in question, being granted the opportunity to influence the outcome of the proceedings. The lack of any mechanism which would allow the voice of the local community to be heard directly in the proceedings, the result of which could impact their social life, traditions and habits is a direct consequence of the secrecy of ISDS proceedings. In a democratic society this social dialog must be a viable tool to ensure that the rights of all affected parties are considered when an award is rendered. And it should be allowed not only by granting them access to the proceedings, but also opening the proceedings to the public.

Hence, the lack of transparency can no longer be neglected, as it poses a lot of problems, without a real beneficial effect of such a practice. Therefore, making the new rules on transparency a mandatory part of the procedural rules of the future MIC, could represent a solution to solve this concern.

3.2. Lack of consistency and predictability

Lack of consistency, coherence, predictability and correctness of awards rendered by ISDS tribunals are as well among the most serious concerns expressed with regard to the system, as they preclude the emergence of a consistent body of law.

The *ad hoc* nature of arbitration directly impacts the consistency and predictability of the outcome of the proceedings. There are numerous examples of inconsistent ISDS decisions on essential aspects of investment protection standards. Arguably the most notorious example is the applicability of the MFN clause to dispute resolution provisions. While some arbitral tribunals have held that MFN applies also to procedural matters,[77] other tribunals adopted quite the opposite view.[78] This is currently one of the most controversial institution of investment law and continues to provoke heated debate among scholars and practitioners.[79] Given this uncertainty of the investment case law, states started to include in more recent IIAs provisions clearly determining the scope of the applicability of the MFN clause.[80]

Another sound example refers to the interpretation and the applicability of the so called "umbrella clauses". While some tribunals stated that breaches of certain contractual obligations had amounted to treaty breaches, allowing foreign investor to bring an international claim against the host state,[81] other arbitral tribunals declined to recognized such an effect to traditional commercial contracts.[82]

Other examples can be identified in relation to the interpretation of the state of necessity under Article XI of the US-Argentina BIT, in disputes brought against Argentina after the economic crises of 2001-2002. For example, while the *Continental Casualty* tribunal interpreted the disputed provision by applying a less strict test for "necessity" developed under the World Trade

[77] See for example the following cases: *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, para. 64, available at: https://www.italaw.com/cases/641; *Siemens A.G. v. Argentine Republic,* ICSID Case No. ARB/02/8, Decision on Jurisdiction, para. 103, available at: https://www.italaw.com/cases/1026; *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10), Decision of the Tribunal on Preliminary Questions on Jurisdiction, paras. 31 and 49, available at: https://www.italaw.com/cases/documents/477; *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, paras. 53-66, available at: https://www.italaw.com/cases/1048.
[78] See example the following cases: *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, paras. 184, 223, 227, available at: https://www.italaw.com/cases/857; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, para. 119, available at: https://www.italaw.com/cases/954; *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, paras. 90-100, available at: https://www.italaw.com/cases/documents/1094.
[79] *MFN Clauses: Recent Developments in Investment Arbitration*, available at: https://www.acerislaw.com/mfn-clauses-recent-developments-in-investment-arbitration/.
[80] See for example CETA, Article 8.7 Most-favoured-nation treatment: Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligation, available at: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.
[81] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, para. 12, available at: https://www.italaw.com/cases/documents/1019.
[82] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, para. 166, available at: https://www.italaw.com/cases/1009.

Organization case law,[83] the *Enron* tribunal interpreted this rule by reference to a more stringent test for "necessity" as a circumstance precluding wrongfulness.[84]

The above three examples are the most remarkable in investment case law. However, divergent interpretation can also be found with regard to the notion of investment under Article 25 of the ICSID Convention or the scope of application of Fair and Equitable Treatment and Full Protection and Security, or with regards to the measures that constitute an indirect expropriation.

Considering this lack of consistency in the interpretation and application of the traditional investment standards, in order to act with due diligence, the counsel of both claimant and respondent would have to exploit every possible argument which might support their position. This creates additional costs and increases the duration of the proceedings, giving rise to obvious difficulties of inconsistency and unpredictability of the outcome of the arbitral proceedings.

However, it is worth mentioning that these are the most striking divergences in investment case law. But given the inexistence of a multilateral investment agreement to uniformly regulate the substantive standards of investment protection, it is only a natural consequence that some divergence in treaty interpretation may occur from time to time. As investment law is based on a web of IIAs, with similar, but not identical provisions applied to different factual situations, and considering the amount of investment arbitration cases, it can be concluded that there still exists a high degree of consistency among ISDS decisions, although a permanent standing body should alleviate the current concerns and lead to greater consistency and predictability for the future.

3.3. Limited control mechanisms to correct erroneous decisions

Another criticism raised against ISDS refers to the limited possibility to review the awards rendered by *ad hoc* tribunals, and ensure their correctness and consistency. The lack of an appeal mechanism is basically the rule in international arbitration, both in commercial and investment one, and is justified by the parties' desire to obtain a fast and final solution for their dispute brought before the arbitral tribunal, whereas the existence of an appeal phase would impair the advantages offered by this method of dispute settlement.

Under Article 52 of the ICSID Convention, annulment is the only available mechanism to correct errors in limited circumstances. Pursuant to Article 52 (1) ICSID Convention: "Either

[83] *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, paras. 189-230, available at: https://www.italaw.com/cases/329.
[84] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, paras. 322-345, available at: https://www.italaw.com/cases/401.

party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:(a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers;(c) that there was corruption on the part of a member of the Tribunal;(d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based." Likewise, domestic laws or the New York Convention provide for limited grounds for refusing the enforcement of a foreign award. This means that the current system does not allow for erroneous awards to be corrected. For instance, in *CMS v Argentina,* the Annulment Committee held: "Throughout its consideration of the Award, the Committee has identified a series of errors and defects. The Award contained manifest errors of law. It suffered from lacunae and elisions. All this has been identified and underlined by the Committee. However, the Committee is conscious that it exercises its jurisdiction under a narrow and limited mandate conferred by Article 52 of the ICSID Convention. The scope of this mandate allows annulment as an option only when certain specific conditions exist. As stated already (paragraph 136 above), in these circumstances the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal."[85]

However, there are a few arbitration centres, such as the American Arbitration Association,[86] the International Institute for Conflict Prevention and Resolution,[87] and the Judicial Arbitration and Mediation Services[88] that include appeal in their arbitration rules, offering to the parties the possibility to resort to such a control mechanism.

3.4. Concerns regarding arbitrators and decision-makers

A high number of criticisms are directed towards arbitrators and decision-makers of the system. It was widely questioned "Whether three individuals, appointed on an *ad hoc* basis, have

[85] *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Annulment Decision, para. 158, available at: https://www.italaw.com/cases/288.
[86] American Arbitration Association, AAA/ICDR Optional Appellate Arbitration Rules, available at: https://www.adr.org/sites/default/files/AAA-ICDR_Optional_Appellate_Arbitration_Rules.pdf.
[87] International Institute for Conflict Prevention & Resolution, Appellate Arbitration Procedure, available at: https://www.cpradr.org/resource-center/rules/arbitration/appellate-arbitration-procedure.
[88] Judicial Arbitration and Mediation Services - JAMS, JAMS Optional Appeal Procedures 2003, available at: https://www.jamsadr.com/rules-comprehensive-arbitration/#Rule-34.

sufficient legitimacy to assess the validity of States' acts"[89] raising serious doubts as to the viability of the system.

The situation becomes even more sensitive when the dispute refers to some measures taken by a state to address public policy issues. Great examples illustrating this scenario are the *Philip Morris* cases concerning tobacco plain packaging, initiated by this transnational corporation against Australia[90] and Uruguay.[91] These disputes caused a huge debate about the legitimacy of the ISDS tribunal to quantify the amount of damages produced to the investor by a new regulation enacted to address health problems. Although in both cases the multinational corporation did not succeed to invalidate the legitimacy of the measures adopted by host states, the simple fact that a state sovereignty in relation to public policy was questioned and assessed by an *ad hoc* tribunal generated fierce debate worldwide.

Undoubtedly the measure in question – the enactment of a new plain tobacco packaging regulation - was a measure addressing public health policies, but was challenged by the tobacco company who argued that its investment lost significant value given new regulation and that it is entitled to be compensated for the losses suffered. The cases gained notoriety due to strong resistance that arose against the tobacco producer and its endeavours to preserve profit in the detriment of public health. The outcomes in both cases silenced the audience as the ISDS tribunal dismissed investors' claims. In the case against Australia, the tribunal dismissed the case on jurisdictional grounds, while in the case against Uruguay, the tribunal rejected the investor's arguments, after thoroughly analysing the merits of the case. In the tribunal's view, the measures under consideration were adopted in good faith and on a non-discriminatory basis, with the sole intention to protect public health and being proportionate with goal they intended to reach, concluding that this kind of regulation do not amount to an indirect expropriation, and hence the investor is not entitled to damages.

It must be indeed plausible to admit that arbitrators are not the most suitable candidates to evaluate the legitimacy of public policy measure and their impact on the local community in fields such as health and security, especially considering that they must make this assessment based on IIAs provisions, which are designed pro-investors, granting them certain rights without

[89] UNCTAD, Investor-State Dispute Settlement - UNCTAD Series on Issues in International Investment Agreements II p. 25 (2014).
[90] *Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia*, PCA 2012-12 (16 December 2015), available at: https://www.italaw.com/cases/851.
[91] Philip Morris Brand Sàrl (Switzerland), *Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), available at: https://www.italaw.com/cases/460.

the inclusion of any counter-balancing exceptions in favour of states. But the problem stems from the deficient substantive law provisions which reverberates on dispute settlement mechanism, and not from decision-makers of the system. Thus, it appears that in order to fix this problem, reform have to be made to the substantive provisions in order to limit the scope of protection granted to investors under IIAs in disputes involving public policies questions.[92] However, the resolution of cases addressing public policy issues within the actual IIAs regime appears to be unsatisfactory, in particular from the side of substantive provisions that do not regulate these exceptional situations.

Nevertheless some important steps have been taking in this regard by some countries, as is the case of the 2012 US model BIT which amended its provisions as follows: "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[93] Similar clauses can be identified in other recent IIAs such as EU-Canada CETA Annex 8-A,[94] EU-Singapore Free Trade Agreement Annex 9-A,[95] or ASEAN Comprehensive Investment Agreement Annex 2.[96]

Impartiality is another topic generating fierce debate, being suggested that "if an arbitrator's main source of income and career opportunities depends on the decision of companies to sue, we should wonder how impartial their decisions are."[97] Furthermore, concerns of bias and conflicts of interest in the appointment of arbitrators were expressed, being argued that the arbitrators are chosen from a very small circle of fifteen arbitrators, comprising mostly EU, US and Canada citizens, deciding more than half of known investment-treaty disputes.[98] According to a study conducted by the Corporate Europe Observatory 15 individuals were identified – being called "an elite 15" who "have captured the decision making in 55% of the total investment treaty cases known today."[99]

[92] UNCTAD already supports such a claim. See UNCTAD, World Investment Report 2015 Chapter 4: Reforming the International Investment Regime: An Action Menu, available at: http://unctad.org/en/PublicationChapters/wir2015ch4_en.pdf
[93] U.S. Department of State, Op. Cit., Annex B.
[94] EU-Canada Comprehensive Economic and Trade Agreement (CETA), available at: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf
[95] http://trade.ec.europa.eu/doclib/docs/2015/june/tradoc_153575.pdf
[96] http://www.asean.org/storage/images/2013/economic/aia/ACIA_Final_Text_26%20Feb%202009.pdf
[97] Corporate Europe Observatory, *Profiting from Injustice*: *How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, p. 36, available at: https://www.tni.org/files/download/executive_summary_profiting_from_injustice_-_en.pdf,.
[98] *Idem*.
[99] *Idem*, p. 38. However, the report fails to present how the cases were decided by three members' tribunals, or what was the outcome of these cases.

All these generate a widespread distrust in the current ISDS system, as was properly articulated by the European Commissioner for Trade when referring to the EU proposal for establishing a permanent international court: ”There is a fundamental and widespread lack of trust by the public in the fairness and impartiality of the old ISDS model.”[100]

But this is only one side of the coin. From the other side, arbitration rules ensure adequate mechanisms to bring action against an allegedly predisposed member of the tribunal. Pursuant to Article 14 (1) of the ICSID Convention: “Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.” Thus, ICSID Convention explicitly set high demands with regards to arbitrators, which if not met, can lead to disqualification. Pursuant to Article 57 of the ICSID Convention: “A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification. Convention of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV;” The procedure for disqualification has been further explained in the Rule 9 of the ICSID Arbitration Rules. Indeed, recent ICSID case law proves that arbitrators were successfully disqualified.[101]

Similarly, the 2010 UNCITRAL Arbitration Rules provide in Article 12 (1) that: “Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.” In addition, it needs to be mentioned, that these procedural rules not only provide for efficient mechanisms to challenge an arbitrator, but also include an obligation incumbent upon arbitrators to give statements of independence and impartiality.[102]

Lastly, a strong argument countering the validity of this criticism can be found in relation to the IBA Guidelines.[103] In short, the IBA Guidelines encompasses two parts: the first part sets out the general standards of independence, impartiality and disclosure, while the second part lists

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[100] C. Malmström, the European Commissioner for Trade, proposing an Investment Court System - Blog Post, available at: https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/proposing-investment-court-system_en.

[101] *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Arbitrator Bruno Boesch (March 20, 2014), available at: https://www.italaw.com/cases/2131.

[102] See Rule of the 2006 ICSID Arbitration Rules and Article 11 of the 2010 UNCITRAL Rules.

[103] 2014 IBA Guidelines on Conflict on Interest in International Arbitration, available at: http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

three categories of potential conflicts of interests that might occur in arbitration proceedings, helping thus in identifying potential conflicts of interest. The IBA Guideline are constantly referred to in cases in which arbitrators were challenged by the parties. The recent CETA agreement included an express reference to this soft law document, Article X.25 providing that: "Arbitrators shall comply with the International Bar Association Guidelines on Conflict of Interest in International Arbitration or any supplemental rules adopted pursuant to Article X.42(2)(b) [...]" Hence, there are some safeguards to ensure the independence and impartiality of arbitrators, but these are insufficient to prevent such concerns to be voiced.

3.5. "Regulatory chill" or the limitation of the state's right to regulate

The sovereignty of states is a fundamental principle of international law enshrined in Article 2 (1) of the Charter on the United Nations.[104] Among others, this right comprise also the state right to regulate within its own territory. It has been said that ISDS impair this fundamental right and enhance the power of foreign inventors at the expense of sovereignty and national interests. Hence, critics argue that ISDS is limiting the state's right to enact new legislation irrespective of the field or problems addressed.[105] Since foreign investors could bring various claims against states based on innovative interpretations of IIAs provisions when a new regulation is enacted, the expected reaction on states side would be to refrain from adopting any laws which might have the potential to aversely impact investors. This effect is known in the literature as the regulatory chill and has been defined in plain language as follows: "ISDS provisions can further restrict a government's ability to undertake welfare-enhancing reforms at a later date, a problem known as 'regulatory chill'. Such 'chilling' occurs because the investment clauses that provide protection against 'indirect expropriation' and 'fair and equitable treatment' [...]. These protections [...] can involve such government actions as changes to environmental legislation, taxation

[104] Pursuant to Article 2 (1) of the Charter of the United Nations: "The Organization is based on the principle of the sovereign equality of all its Members."
[105] J. G. Brown, *International Investment Agreements: Regulatory Chill in the Face of Litigious Heat*? 3:1 W. J. of L. Stud., available at: http://ir.lib.uwo.ca/uwojls/vol3/iss1/3 ; S. Shekhar, '*Regulatory Chill': Taking Right to Regulate for a Spin,* Working Paper CWS/WP/200/27, available at: http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2923/DC4716_En.pdf http://wtocentre.iift.ac.in/workingpaper/'REGULATORY%20CHILL%E2%80%99%20TAKING%20RIGHT%20TO%20REGULATE%20FOR%20A%20SPIN%20(September%202016).pdf;
Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal, available at: https://www.italaw.com/cases/1513; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, available at: https://www.italaw.com/cases/181.

arrangements or licensing schemes. 'Chilling' occurs when governments choose not to undertake regulatory action (as opposed to directly expropriating property) for fear of triggering arbitration claims or paying compensation."[106]

Expressed differently, states would be hesitant to pass future legislations that have the potential to be questioned before arbitral tribunals. Canada is given as an example in this regard after supposedly abandoning its initiative to impose plain cigarette packaging after it was threaten with an arbitration proceeding as instituted against Uruguay.[107]

However, the ISDS tribunals have recognized the state's right to regulate in the public interest, without founding a violation of investor's rights, irrespective of the effects the regulatory measures had produced on investment. Notorious in this regard are *Philip Morris* cases analysed above. Other tribunals, endorsed this outcome by expressly confirming that the state is not liable to pay compensations while exercising its regulatory power on a non-discriminatory basis.[108] These cases clearly demonstrate that the trend among arbitrators is to give priority to state's power to regulate in public interest and reject claims challenging such public policy measures.

3.6. Pro-investor regime

Some voices claimed that the entire ISDS system is biased in favour of investors.[109] The rationale for this criticism is simple - as the investors are the ones who have the ability to institute arbitration proceedings, favour awards would encourage any potentially affected investor to pursue its justice in international forums. It has been even said that the proposed reform for establishing a MIC would be in reality a global court for corporations,[110] without any real reason to justify this difference in the treatment of transnational companies than any other potential claimant, be that an individual or a small medium enterprise.

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106 Productivity Commission of Australian Government, p. 271.
107 *Idem*.
108 See for example the following cases: *Saluka Investments B.V. v. Czech Republic*, UNCITRAL case number 2001-04, available at: https://www.italaw.com/cases/961; *Methanex Corporation v. United States of America*, UNCITRAL, 03 August 2005, available at: https://www.italaw.com/cases/683.
109 R. Knottnerus et al., *Socializing losses, privatizing gains: how Dutch investment treaties harm public interest*, available at: https://www.investopedia.com/terms/p/privatizing-profits-and-socializing-losses.asp ; C. Olivet at al., *The Hidden Costs of RCEP and Corporate Trade Deals in Asia*, available at: http://www.foei.org/wp-content/uploads/2016/12/The-hidden-costs-of-RCEP -and-corporate-trade-deals-in-Asia-FoEI.pdf.
New York Times, The Secret Trade Courts (27 September 2004).
110 *A World Court for Corporations. How the EU plans to entrench and institutionalise investor –state dispute settlement*, available at: https://www.tni.org/files/publication-downloads/worldcourt-uk-def.pdf.

The bias is reflected in relation to two main aspects: outcome of the proceedings and the amount of damages awarded in favour of investors. With regards to the first aspect, the criticism is contradicted by the existing statistics of known ISDS cases which demonstrate that the result of the proceedings is quite the opposite, with state holding a significant advance. According to the UNCTAD database, 36.4% of registered disputes were decided in favour of states, with only 26.7% decided in favour of investors. The picture needs to be completed with 10,1 % of discontinued cases, 2,4% decided in favour of neither party and 24,4% settled by the parties.[111] These numbers somehow reaffirm the legitimacy and the efficiency of ISDS system. Regarding the second aspect, the same database reveals that the amount of compensation varies from USD 1 - 9.9 million granted in 36 cases to USD 10 - 99.9 million awarded in 46 cases. These numbers prove that the vast majority of compensations range within reasonable limits expected for investment disputes. The *Yukos* case[112] indicated by the criticism proponent's is only one example of extraordinary compensation granted in favour of investor given its particular circumstances and is not representative for the entire ISDS system.

3.7. Costly and lengthy arbitration proceedings

The costs and duration of the proceedings are among the concerns discussed with the current reform. The problem with this criticism is that it come from the previous ones presented above, especially the lack of consistency and predictability of investment case law, which would determine a diligent counsel to pursue all potential arguments, even though some previous tribunal explicitly rejected them. As arbitrators have broad interpretative powers, it would be possible that another tribunal accept such argument, and hence it worth trying to put it forward. In addition, the nomination of arbitrators and the constitution of arbitral tribunal is also a costly and lengthy stage of arbitration proceedings, which could be very efficiently eliminated through the constitution of a MIC. These issues combined with already considerable costs generating by a dispute, in particular by the parties' counsel, lead to significant costs to bring a claim under the current ISDS regime, generating other subsequent problems: limited accessed of small and medium enterprises, third party founding, or security for costs.

[111] UNCTAD Database, available at: https://investmentpolicy.unctad.org/investment-dispute-settlement.

[112] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation* and *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, in which the arbitral tribunal decided that Russia should pay USD 1.8 billion, USD 9.8 billion and USD 39.9 billion, respectively, as compensation for the indirect expropriation of Yukos Oil Company. These three cases are known altogether as the *Yukos* case.

III. SETTING OUT THE INSTITUTIONAL AND PROCEDURAL FRAMEWORK: DESIGNING A MULTILATERAL INVESTMENT COURT

Setting up a MIC was an innovative idea, launched by the European Commission in 2015,[113] which has been generating strong debate ever since. Opposed by some,[114] embraced by others,[115] the reform in itself, if conceived and implemented properly, might indeed bring notable improvements to the current ISDS system. Therefore, the design of the MIC is one of the biggest challenges that lies ahead on the Working Group III negotiating table.

Keeping this in mind, in what follows, the present Chapter will analyse some key aspects that need to be considered when establishing the new international dispute settlement institution. Given the magnitude of the reform, the analysis is not intended to be a comprehensive one and cover all the aspects that such a project would involve, but rather it aims at addressing the core elements that should form the foundation of the future MIC.

As MIC will bring a change from arbitration to adjudication, when designing it, these two different dimensions need to be reconcile. *Firstly*, the positive features of investment arbitration, specifically conceived and adapted in time to better respond to investment-related disputes, should be preserved and included in the construction works of the future MIC. In this regard, a particular attention should be given to the ICSID Convention, Arbitration Rules and case law, as the self-contained regime provided by the Washington Center is by far the most accessed ISDS forum. *Secondly*, the institutional structure of international adjudicative forums should be replicated by the MIC, in order for it to be set up as a well-organized and functional institution. The ICJ, as the highest rank international adjudicative body, could constitute a leading example for setting up the institutional framework for the future MIC. Hence, a successful reform would require a balanced combination between the most viable features of arbitration with the most vital characteristics of adjudication.

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[113] C. Malmström, the European Commissioner for Trade, proposing an Investment Court System - Blog Post, available at: https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/proposing-investment-court-system_en.

[114] Friends of the Earth Europe, *Multilateral Investment Court: Changing the book cover doesn't change the story*, 7 November 2018, available at: http://www.foeeurope.org/mic-isds-negotiations-071118; *Investment Court System (ICS): The Wolf in Sheep's Clothing*, 4 July 2016, available at: http://www.world-psi.org/en/investment-court-system-ics-wolf-sheeps-clothing.

[115] E. Talbourdet, *The EU's Investment Court System. A possible solution to conflicts of interest in Investment Arbitration*, 10 April 2017, available at: https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1121; *The European Commission and the Canadian Government are working together to establish a multilateral investment court*, 13 December 2016, available at: file:///Users/cristinasolcan/Downloads/MEMO-16-4350_EN%20(1).pdf; CJEU finds ICS in Canada–EU CETA to be in line with EU law, available at: https://www.iisd.org/itn/2019/06/27/cjeu-finds-ics-in-canada-eu-ceta-to-be-in-line-with-eu-law/.

1. Institutional structure. Key actors and their role

Designing the MIC constitutes a complex and laborious exercise, as it aims at conferring legitimacy to the new body by addressing the main criticisms raised against the current ISDS system. The success of the reform will mainly depend on the manner in which the most crucial deficiencies of the existing regime will be remediated. Although at this stage – the beginning of negotiation on all reform options[116] – the roadmap on establishing a MIC is far from being set, some initial thoughts about the institutional structure and procedural principles of such an adjudicative forum can be discussed.

1.1. MIC's founding treaty - contracting parties

The MIC's organizational requirements should be provided in a constituent instrument (MIC Treaty), as a primary law document.[117] The procedural rules and other additional organizational matters should be contained in separate secondary law documents.[118] This separation will facilitate the amendment process and will ensure the functioning of the institution overall.

Based on MIC Treaty, the institution should be established as an international organization,[119] possessing legal personality, its own headquarters, and be granted with privileges and immunities necessary for performing its functions.

States could become MIC members either by signing and ratifying MIC Treaty at the moment of its adoption – founding members, or by acceding to it later on. There should not be any substantial differentiation between the rights of the founding members and the members joining MIC Treaty afterwards. After becoming members, irrespective of the moment, states should be responsible for running the organization. The membership is necessary to ensure at least two crucial elements - legitimacy and financing, as the existence of the Court itself is closely connected to both of them.

Apart from states, who will benefit from the full membership, it should also be considered whether the membership status should be granted to international organizations as well (such as

[116] Annotated provisional agenda, Thirty-eighth session Vienna, 14–18 October 2019, pct. 7 and 10, available at: https://undocs.org/en/A/CN.9/WG.III/WP.165.
[117] M. Bungenberg, A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court Options Regarding the Institutionalization of Investor-State Dispute Settlement*, August 2018, para. 74, p. 26.
[118] *Idem*.
[119] *Idem*, para. 9, p. 2.

the EU, as is the case with the WTO) or they should hold only an observer status (as is the situation of the EU in the UN General Assembly). In addition, it might be useful to consider whether the observer status should be given to representatives of the business community, various NGOs and civil society, in order to ensure the participation of all interested parties. Although observers would have limited rights and would not be granted the right to vote, they would be provided with a platform for discussion, which would allow them to have their voices heard in this new adjudicative body.

As the strongest criticisms have been advanced by the affected third-parties,[120] the observer-tool would allow them to attend the meetings, submit documents and present their position within the MIC decision-making organ. Although the MIC collective body would in principle deal with organizational issues and would not effectively be involved in settling disputes, the observers' participation would enhance the transparency of the MIC' organizational process.

1.2. MIC's vital organs and decision making process

As suggested above, MIC should be an independent international organization, vested with the necessary authority to conduct its activities and, given its multilateral nature, hopefully to become the world's leading court in the field of settlement of investment disputes.

In order to be functional and perform its duties efficiently, the MIC would have to have at least two basic organs: (i) a general collective one – the Collective Body, comprising all MIC members, similar to the General Assembly of the UN or Administrative Council of the ICSID and (ii) a Secretariat.

1.2.1. The Collective Body

In principle, MIC Collective Body should be the governing organ of the organization and should be responsible for running the institution and for making decisions regarding its exist-

[120] Friends of the Earth Europe, *Multilateral Investment Court: Changing the book cover doesn't change the story*, 7 November 2018, available at: http://www.foeeurope.org/mic-isds-negotiations-071118; *Investment Court System (ICS): The Wolf in Sheep's Clothing*, 4 July 2016, available at: http://www.world-psi.org/en/investment-court-system-ics-wolf-sheeps-clothing.

ence, management and functioning.[121] The composition and decision-making process of this body should be established by the MIC Treaty.

The MIC Collective Body will be composed by representatives of each members[122] and will exercise the following main functions:

- adopt administrative and financial decisions for the MIC;
- enact procedural rules for MIC cases;
- approve the headquarters agreement and any other facilities necessary for conducting MIC's activities;
- elect MIC's President and Secretary General;
- appoint MIC's judges and determine their number, internal organization and remuneration;
- adopt reports and MIC' annual budget.

Each MIC member will have one vote and it would be advisable that the adoption of decisions within the Collective Body be taken by qualified majority,[123] as consensus would be very difficult to reach in practice, because each member could veto the decisions it does not agree to.

1.2.2. The Secretariat

The MIC Secretariat is the second vital organ of the institution and should be responsible for carrying out the MIC's daily operations.[124] It could be organized similar to the ICSID Secretariat and its responsibilities should cover two main fields: (i) provide support to the MIC Collective Body and maintain the relation with the public and (ii) provide support in the organization and administration of the dispute settlement system.

(i) With regard to the first category of activities, the Secretariat should have various tasks concerning institutional matters, such as: keeping records of MIC's documents, keeping the public informed about the MIC's internal activities and case law development, sense in which it could publish on the MIC's website procedural documents and any relevant information regard-

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[121] M. Bungenberg, A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court Options Regarding the Institutionalization of Investor-State Dispute Settlement*, August 2018, para. 80, p. 27-28.
[122] *Idem*, para. 13, p. 3.
[123] *Idem*, para. 113, p. 37.
[124] For details please see Organization of ICSID Secretariat, available at: https://icsid.worldbank.org/en/Pages/about/Secretariat.aspx.

ing concluded and pending cases; organizing various conferences, events and trainings, making surveys and keeping records of MIC's statistics.

(ii) The second category of activities is of great importance, as the Secretariat would have to provide support to the dispute settlement investor-state system under MIC procedural rules. The Secretariat should be responsible with the full organization of the hearings, ensuring communication with disputing parties, and keeping records of cases.

For costs reasons, at the establishing of the institution, MIC could use the ICSID or PCA secretariat,[125] to fulfil above mentioned duties, until the workload of the institution would require the establishment of its own internal Secretariat.

1.3. Composition of the MIC – independent and impartial judges

The most radical change the MIC would bring, as opposed to the current ISDS system, would be its composition. In order to ensure the legitimacy and acceptance of the new institution, MIC should have to be composed of independent and impartial judges.

The MIC judges should have to be selected and appointed by the supreme organ of the MIC – the Collective Body,[126] and should be persons of high moral and professional conduct.[127] There are a lot of issues that need to be carefully considered with respect to the election of judges, as the success of the reform will very much depend on their selection. Therefore, some key questions that need to be answered to would be: What should be the appropriate number of judges that would compose the Court? How should be they organized? What should be their term of office, would it be a short and renewable one or would it be better to have a longer non renewable one? How to ensure a high diversity among judges, gender equality and representativeness of all the major legal systems of the world? In this sense, would be appropriate to elect judges from the nominees of the member states or should also be allowed independent candidates to submit their application as well? What should be the most appropriate method for selection in order to diminish the political influence of states' representatives? What attributes should the candidates possess in order to be eligible for election? What kind of guarantees can be put in place in order to ensure the independence and impartiality of MIC judges?

[125] M. Bungenberg, A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court Options Regarding the Institutionalization of Investor-State Dispute Settlement*, August 2018, para. 6, p. 2.
[126] *Idem*, Section 4.1.2.1 Appointment of Judges Through the Plenary Body, p. 29 – 36.
[127] *Idem*, Section 4.1.3.2, p. 40.

In order to answer these questions, it would be recommended to carefully analyse other existing international or regional adjudicative bodies and find the best possible solution.[128] In what follows, this section will refer only to the ICJ as an inspirational example for answering to some of them.[129]

The World Court is composed of 15 judges,[130] having a nine-year term of office, being elected by the UN General Assembly, together with the Security Council.[131] The number of MIC judges would mainly depend on the number of cases that would be submitted for the MIC's resolution. A simple comparison between the cases submitted before the ICJ since its establishment and the investment arbitration cases would reveal that the numbers are far from being equal. While states resorted to ICJ jurisdiction in 160 contentious and advisory cases,[132] since 1947 when the first case was registered, the number of investment disputes is almost 6 times bigger, reaching in total 942 known treaty-based ISDS cases,[133] since 1987 when the first such case was registered.[134] Hence, investors initiated ISDS disputes much more often than states and international organizations asked the ICJ to settle a dispute or issue an advisory opinion. Given this big difference, the number of the ICJ judges could be set as an example only at the constitution of the MIC, when would be expected that the MIC would not have a big workload. However, the MIC Treaty should provide for appropriate mechanisms for increasing or decreasing the number of judges depending on the number of registered cases before the MIC.[135] The nine-year term of office though could constitute a good example to be followed by the MIC judges. In addition, one third of the MIC judges could be elected every three years in order to ensure a high degree of continuity.[136]

The ICJ judges are elected among the candidates proposed by the member states, being persons of high moral character, recognized jurisconsults in international law and possessing the

[128] For a comprehensive analysis of judges at the MIC see M. Bungenberg, A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court Options Regarding the Institutionalization of Investor-State Dispute Settlement*, August 2018, Section 4.1.3, p. 38 – 52.
[129] For useful information see the ICJ Statute or directly on ICJ official website at the following link: https://www.icj-cij.org/en/members.
[130] Article 3 (1) ICJ Statute.
[131] Article 4 (1) ICJ Statute.
[132] https://www.icj-cij.org/en/list-of-all-cases.
[133] https://investmentpolicy.unctad.org/investment-dispute-settlement.
[134] *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka,* ICSID Case No. ARB/87/3, available at: https://www.italaw.com/cases/96.
[135] For a comprehensive analysis of judges at the MIC see M. Bungenberg, A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court Options Regarding the Institutionalization of Investor-State Dispute Settlement*, August 2018, para. 111, p. 37.
[136] https://www.icj-cij.org/en/members.

qualifications for the appointment to the highest judicial office in their countries of origin.[137] Chapter I of the ICJ Statute – Organization of the Court[138] - provides for a detailed procedure with regard to the nomination, election, qualifications and requirements necessary to be fulfilled to be eligible for becoming an ICJ judge.[139] MIC judges should also comply with such high personal and professional requirements. In addition, they should present a proven background in international investment law. The MIC as a whole must ensure the representation of the principal legal systems of the world and the main form of civilization. Therefore, at least at the beginning of its activity, the MIC should not include more than one judge national of the same state.[140]

Once appointed, a MIC judge would not be a delegate or representative of its state of origin, but would exercise an international function consisting of settling investment disputes. In order to ensure the independence and impartiality of the MIC judges, the appointee would have to make a solemn declaration before the MIC Collective Body undertaking the obligation to exercise his/ her powers independently and impartiality. In addition, the MIC Treaty should provide that the members of the Court shall enjoy privileges and immunities comparable with those granted to the head of diplomatic missions, as per the provisions the 1961 Vienna Convention on Diplomatic Relations (VCDR). In case the commitment of acting independently and impartially is broken, the MIC Treaty should provide for a dismissal procedure, either by all the other members of the Court or by its supreme collective organ.

Similarly to the ICJ judges, the MIC judges could be organized in permanent or temporary chambers and committees,[141] preserving certain matters exclusively for the full Court. The MIC should elect a President from among its members,[142] to preside the meetings of the Court and to represent the MIC in relation with third parties. The MIC President should have at least one Vice-President to replace him in case of unavailability (*i.e.* vacancy or inability to perform his/her duties.) The remuneration of the ICJ President, Vice-president and judges could constitute as well a point of reference for the MIC judges.

In its proposal submitted for discussions within UNCITRAL, EU devotes some space to address the issue of adjudicators, giving as example the ICJ judges as well. In EU's view: "Ad-

[137] Article 2 of the ICJ statute
[138] Articles 2-33 of the ICJ Statute.
[139] https://www.icj-cij.org/en/statute.
[140] Article 3 (1) ICJ Statute.
[141] https://www.icj-cij.org/en/chambers-and-committees.
[142] https://www.icj-cij.org/en/presidency.

judicators would be employed full-time. They would not have any outside activities."[143] In addition, adjudicators: "would be subject to strict ethical requirements… and have the qualifications required in their respective countries for appointment to the highest judicial offices or are jurisconsults of recognised competence in international law (see for example, Article 2 of the Statute of the International Court of Justice)."[144]

2. Jurisdiction of the MIC

Pursuant to Article 41 (1) ICSID Convention: "The Tribunal shall be the judge of its own competence." Similarly, the MIC should determine its own jurisdiction.

2.1. Consent to jurisdiction

In order to submit a dispute before the MIC, a valid consent of both parties is mandatory. Consent is the rule in international law and it could not be an exception in case of the MIC. In order to avoid any legal uncertainty, it would be recommended to express the consent in a written form.[145] For its validity, the consent should be given in case of states, by the persons having full powers as per Article 7 of the 1969 Vienna Convention of the Law of Treaties, and in case of investors, by the legal representative of the company, duly empowered by the organization's supreme organ.

With regard to the timing, the consent could be given:

(i) either *ex ante* - prior to the dispute - by states through the three classical ways (*i.e.* (a) through existing and future IIAs; (b) as an offer expressed via domestic legislation; (c) in contracts concluded directly with investors)[146] and by investors at the moment of initiating the proceedings;

[143] Possible reform of Investor-State dispute settlement (ISDS), Submission from the European Union and its Member States, Thirty-seventh session New York, 1–5 April 2019Para. 18 https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1
[144] *Idem*, paras. 18 and 20.
[145] M. Bungenberg, A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court Options Regarding the Institutionalization of Investor-State Dispute Settlement*, August 2018, para. 209, p. 60-61.
[146] Course on Dispute Settlement, UNCTAD/EDM/Misc.232, C. Schreuer, 2.3 Consent to Arbitration, p. 7 – 23, available at: https://unctad.org/en/Docs/edmmisc232_en.pdf.

(ii) or *ex post* – after the dispute has arisen - through a compromis signed by both disputing parties.[147]

2.2. Access to the MIC through three-dimensional jurisdiction: *ratione materiae, personae* and *temporis*

The legal basis for jurisdiction should be clearly provided by the MIC Treaty.[148] Jurisdiction is one of the primary issues that needs to be considered when designing the MIC and a few essential elements must be clarified from the outset.

One such crucial question would be to determine whether the MIC should have exclusive jurisdiction over all investment disputes involving MIC members or whether the possibility to access other forums available under the current system (such as domestic courts or *ad hoc* arbitration provided by various arbitration centres) should be preserved.

If the exclusive jurisdiction of the MIC would be a *sine qua non* condition for acceding to the MIC Treaty, the replacement of the existing regime could indeed be performed and the aim of the reform could be really achieved. In the absence of such a mandatory requirement, the investors would be granted a new option to the already existing ones to submit investment claims against states, which would enhance the forum shopping opportunities for claimants and would not lead to efficient remediation of the current flaws. On the other hand, the main drawback could be the hesitation of states to opt-in for the MIC Treaty given this exclusivity condition, which would limit the available options.

Nevertheless, the Court's mandatory jurisdiction should be without prejudice to the principle of the free choice of means, enshrined in Article 33 of the UN Charter, allowing disputing parties the possibility to resort to other alternative dispute settlement mechanisms stipulated therein before turning to the MIC. Article 33 (1) UN Charter provides that: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." Mediation is only one such example and the MIC could provide proper facilities and personnel to perform such kind of auxiliary activities. In addition, the

[147] M. Bungenberg, A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court Options Regarding the Institutionalization of Investor-State Dispute Settlement*, August 2018, para. 209, p. 61.
[148] *Idem*, para. 195, p. 58.

Court's constituent instrument should explicitly provide that the exclusive jurisdiction of the MIC does not impair in any way the constitutional requirements providing for jurisdiction of domestic courts or to alter the jurisdiction of other international bodies such as the ICJ, European Court of Human Right (ECtHR) or International Tribunal for the Law of the Sea (ITLOS).

Furthermore, the participation of any third party who has a proven legitimate interest in the ongoing proceedings should be regulated, in order to provide for a legal mechanism to be used to hear all interested voices and to approach the dispute in question in a holistic manner.

In case the jurisdiction of the MIC would be kept voluntary (at investors' latitude) and not exclusive, consideration should be given to the inclusion of the fork-in the road or *electa una via* principle in the MIC Treaty. That would impede financially potent investors to submit the same claim at the same time to various competent adjudicative and arbitration institutions, (such as domestic courts, *ad hoc* arbitration under existing IIAs on the one hand and MIC under IIAs/ MIC Treaty on the other hand). Otherwise, left unregulated, it would only increase the forum shopping and the establishing of the MIC would only provide for a new avenue to seek relief and would not really solve the concerns.

In order to have access to the MIC, three jurisdictional requirements should be met.

With regard to the jurisdiction *ratione materiae* – investments[149] - the MIC jurisdiction should cover all disputes arising from or in connection with an investment, but limited only to investment disputes under international investment law. It would not be advisable for the MIC Treaty to try to define the investment, but rather apply this concept as it will be defined in the IIA in question. Although a definition of investment would be desirable, when making this suggestion, one must consider (i) the mandate given by UNCITRAL to the Working Group III to reform only the procedural aspects of the system and not the substantive standards of protection,[150] and also (ii) the failed attempt to reform the substantive investment law currently provided through a network of existing IIAs by conceiving a Multilateral Agreement on Investment conducted under the auspices of the OECD.[151] Given the different views expressed by the negotiating parties involved in the reform process, an agreement could not be reached. In addition, it must be borne in mind the rapid economic development and the necessity to extend the definition

[149] Course on Dispute Settlement, UNCTAD/EDM/Misc.232, A. A. Escobar, 2.5 Requirements *ratione materiae*, p. 13, available at: https://unctad.org/en/Docs/edmmisc232_en.pdf.
[150] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017) Part I*, para. 20, available at: https://undocs.org/en/A/CN.9/930/Rev.1.
[151] See details at:
https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm.

quite often in the future. Therefore, from a practical point of view, it would be more efficient to refer to investment as will be defined by the underlying investment treaties.

Turning now to the jurisdiction *ratione personae* – investors and states[152] – it would be useful to make a distinction between the active and passive procedural capacity. Investors, as claimants, would possess active procedural capacity, meaning the right to initiate proceedings before the MIC. Apart from expressing a valid consent and submitting a claim arising from or in connection with an investment, nationality requirements should also be stipulated, similarly framed to Article 25 of the ICSID Convention, which imposes both active and passive nationality requirements.

The situation would be a bit more complicated with regards to states, as respondents. In order to ensure the reform's success, the rule should be that only disputes against member states of the MIC could be submitted before the Court and benefit from MIC's procedural advantages.

It would be preferred that both states be parties to the MIC Treaty.[153] In such a scenario there would be no problem for the disputing parties to submit a case before the MIC. Cautious consideration should be given to situations, when the Court's jurisdiction will be extended beyond both parties' membership. In principle, such alternative scenario should be allowed only in case the respondent state is a MIC member.[154] Only such capacity would justify the financial contribution of the member state in exchange for the benefits provided by the MIC. In addition, making the MIC accessible to non-member states, would threaten the existence of the MIC itself, as states would not be keen to accede to MIC Treaty, financially contribute to its operation, while having the option to benefit from its advantages without becoming a member, and without all the responsibilities and financial implications that such a status would require.

Finally, regarding the jurisdiction *ratione temporis* – as a rule the Court should have jurisdiction over investment disputes arisen after the entry into force of the MIC Treaty. However, based on an explicit consent of the disputing parties, disputes that arose before that date, could also be submitted before the Court, especially with regard to the accessibility of control mechanisms. Thus, it might be considered whether the cases solved under the current *ad hoc* arbitration system, be provided with the possibility to resort to appeal mechanism under the MIC. That

[152] Course on Dispute Settlement, UNCTAD/EDM/Misc.232, M. Al-Sharmani, 2.4 Requirements *ratione personae*, p. 7-27, available at: https://unctad.org/en/Docs/edmmisc232_en.pdf.
[153] M. Bungenberg, A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court Options Regarding the Institutionalization of Investor-State Dispute Settlement*, August 2018, para. 199, p. 58.
[154] *Idem*, para. 201, p. 59.

would help to better achieve the goals of the reform – reaching consistency and predictability under the new system - more rapidly.

3. Applicable Law

Applicable law is another core issue, as many of the expressed concerns are directed towards divergent interpretation of similar IIA provisions providing for the same standards of protection. Both currently applicable substantive and procedural law were shortly addressed in the previous Chapter when determining the *status quo* of the current system. Therefore, in what follows, some precise provisions will be pointed out that worth being "imported" by the MIC.

3.1. Applicable substantive law

Currently under the ICSID Convention, the disputing parties are entitled to choose the applicable substantive law. Pursuant to Article 42: "(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

With regard to the first sentence, the agreement of the parties is expressed either (i) in a treaty - IIA, in the form of a treaty clause agreed by the signatory states, for claims stemming from that treaty, or (ii) through a contractual clause, if the dispute derive from a contract concluded by the investor directly with the host state.

With regard to the second sentence, in the absence of such an agreement, both legal systems, domestic law of host state and public international law, are situated on an equal footing, being applied in conjunction.[155] The international law is particularly important in matters regarding the state responsibility, attribution and circumstances precluding wrongfulness, due process or unlawful expropriation.

In practice, the vast majority of existing IIAs contain provisions on applicable substantive law, in the sense of substantive standards of protection granted to foreign investors, which will continue to be applied by the MIC. Given the existing network of IIAs (more than 3.000 IIAs), the ultimate goal appears to be a uniform interpretation of these substantive treaty-law provisions by the MIC judges.

[155] *Idem*, para. 378, p. 112.

3.2. Applicable procedural law

Currently investment disputes are solved by *ad hoc* tribunals under various procedural rules provided by different arbitration centres (such as ICSID Arbitration Rules and ICSID Additional Facility Rules, UNCITRAL Rules or PCA procedural rules). Although different, these procedural rules were specifically designed to better satisfy to public law requirements of investment disputes, and using different wording, they basically provide for the same fundamental procedural rights and principles, such as party autonomy, the equality of parties or the equal arms principle, the right to be heard etc.

In practice, the supremacy is held by the ICSID rules given their peculiarities specifically designed to handle investment disputes. *Firstly*, it needs to be mentioned the powerful enforcement mechanism provided by the ICSID Convention.[156] Article 54 states that: "(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." The other procedural rules, in principle, lack their own enforcement mechanism, and resort to the provisions of the New York Convention.

Secondly, the nationally requirements framing the jurisdiction of the Washington Center is another feature that differentiate ICSID from other arbitration rules. Article 25 sets out (i) a negative nationality requirement for natural persons,[157] excluding any "person who on either date also had the nationality of the Contracting State party to the dispute" and (ii) a positive requirement[158] for "any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

And *thirdly*, the annulment mechanism,[159] specific means for earlier dismissal of frivolous claims,[160] provided by ICSID are other arguments that count for the investors' choice to opt in favour of the Washington Center.

In light of the above, it would be recommended to preserve these positive elements by incorporating them *mutatis mutandis* in the MIC procedural rules. However, some of the criticisms

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[156] Course on Dispute Settlement, UNCTAD/EDM/Misc.232, W. Dong, 2.9 Binding force and enforcement, available at: https://unctad.org/en/Docs/edmmisc232_en.pdf.
[157] Course on Dispute Settlement, UNCTAD/EDM/Misc.232, Mona Al-Sharmani, 2.4 Requirements *ratione personae*, Chapter 3, p. 13, available at: https://unctad.org/en/Docs/edmmisc232_en.pdf.
[158] *Idem.*
[159] Article 52 of the ICSID Convention.
[160] Rule 41(5) of the ICSID Arbitration Rules.

were directed towards the arbitral procedure itself (*i.e.* lack of transparency and efficiency, costly and lengthy proceedings, limited means to submit counterclaims by respondent-states or *amicus curie briefs*). Therefore, an implementation *tale quale* of the already existing ICSID arbitration rules, would not suffice. In order to achieve a successful outcome of the reform, the MIC procedural rules should partly encompass the already existing efficient rules, and partly elaborate new rules of procedure.

These partly new-elaborated rules should focus to address the transparency concerns, which dominated the public debate, investment arbitration being accused of performing some kind of justice behind closed door.[161] As a starting point for addressing this concerns should be the incorporation of the UNCITRAL Transparency Rules, recently adopted by UNCITRAL, which due to the Mauritius Convention are applicable not only to future IIAs, but to all existing investment agreements. These rules regulate in principle various issues regarding the publication of procedural documents, public hearing where access to public is unrestricted unless some legitimate interests need to be protected, direct participation of interested third parties in the proceedings, being allowed to submit various submissions.

A recent example of the incorporation of the UNCITRAL Transparency Rules is provided by Article 8.36 of CETA which reads as follows: "(1) The UNCITRAL Transparency Rules, as modified by this Chapter, shall apply in connection with proceedings under this Section. (2) The request for consultations, the notice requesting a determination of the respondent, the agreement to mediate, the notice of intent to challenge a Member of the Tribunal, the decision on challenge to a Member of the Tribunal and the request for consolidation shall be included in the list of documents to be made available to the public under Article 3 (1) of the UNCITRAL Transparency Rules. (3) Exhibits shall be included in the list of documents to be made available to the public under Article 3 (2) of the UNCITRAL Transparency Rules. (4) Notwithstanding Article 2 of the UNCITRAL Transparency Rules, prior to the constitution of the Tribunal, Canada or the European Union as the case may be shall make publicly available in a timely manner relevant documents pursuant to paragraph 2, subject to the redaction of confidential or protected information. Such documents may be made publicly available by communication to the repository. (5) Hearings shall be open to the public. The Tribunal shall determine, in consultation with the disputing parties, the appropriate logistical arrangements to facilitate public access to such hear-

[161] M. Bentham, *Justice behind closed doors is hurting capital's reputation, says top judge*, 30 March 2016, available at: https://www.standard.co.uk/news/uk/justice-behind-closed-doors-is-hurting-capital-s-reputation-says-top-judge-a3214046.html.

ings. If the Tribunal determines that there is a need to protect confidential or protected information, it shall make the appropriate arrangements to hold in private that part of the hearing requiring such protection. (6) Nothing in this Chapter requires a respondent to withhold from the public information required to be disclosed by its laws. The respondent should apply those laws in a manner sensitive to protecting from disclosure information that has been designated as confidential or protected information."

In order to ensure the efficiency of MIC proceedings, new procedural rules should address the concerns regarding the cost and duration of the proceedings.

Currently, the average length of ICSID proceedings is 3.8 years.[162] This duration is explained by the more and more complex cases, requiring recourse to specialized expertise in different fields. In addition, given the lack of biding precedence and the lack of consistency of arbitral decisions, the due diligence obligation would require to address all potential positive arguments and/ or counterarguments, regardless if they were rejected by some previous arbitral tribunals. In comparison with the efficient dispute settlement mechanism provided under WTO Dispute Settlement Understanding (DSU), which in total last for a maximum period of two years,[163] one may conclude that this indeed is a legitimate concern. Properly addressing it would also ensure the acceptance of the new system by the investment community. A solution could be setting up maximal time limits for the proceedings, for both first and second instance, as is currently set by the CETA to 18 months for the first instance and 6 months for the appeal procedure, inspired by the WTO DSU. Prolongation of these deadlines should be permitted only in exceptional circumstances and after a decision by the Court, based on compelling arguments and solid evidence. The main drawback of such a time-limitation could be an improper investigation of complex cases, increasing the possibility of issuance of erroneous decisions. Therefore, it would be advisable to preserve the current time discretion granted to the arbitral tribunals, inserting only some time-limit recommendations, without a sanctioning mechanism in case of non-compliance.

4. Procedural stages before the MIC

Given the fact that the traditional ISDS system has been criticised due to the limited control mechanisms available to the disputing parties to correct erroneous decisions, the procedure

[162] G. Flores, *Duration of ICSID Proceedings*, 10 September 2018, available at: http://uncitralrcap.org/wp-content/uploads/2018/11/2018TLF_Part1_Session-3_3.Gonzalo-Flores.pdf.
[163] A. Reich, *The effectiveness of the WTO dispute settlement system: A statistical analysis*, November 2017, available at: https://cadmus.eui.eu/bitstream/handle/1814/47045/LAW_2017_11.pdf?sequence=1.

before the MIC should be conceived as a two-tiered adjudication, encompassing a first and a second instance proceedings.[164] Similar to the ICSID model, fundamental procedural principles should be enshrined in the MIC Treaty, while detailed procedural rules should be contained in a separate document, likewise the ICSID Arbitration Rules. This differentiation would not signify that the general procedural rules are less important than those contained in the MIC Treaty, but for administrative purposes, it would be easier to have them in separate documents in order to maintain their flexibility in case any future amendments would be necessary.

Given that the proposal for reform have been advanced by the EU, consideration should be given to the EU's suggestions regarding the design and implementation of the reform, as these have been presented to the Working Group III.[165]

4.1. Preliminary negotiations

According to EU's proposal: "It is desirable that disputes be decided amicably. Mechanisms should be provided to encourage such amicable settlements."[166] Hence, it would be recommended that the MIC Treaty would provide for a pre-procedural stage, establishing an obligation for the parties to negotiate and try to solve the conflict amicably. This preliminary phase should aim for time and costs efficiency, in the sense of obliging the parties to try to find a mutually beneficial solution before reaching the litigation phase. Initiation of the negotiation stage should be made through a written notice and a mandatory time limit should be indicated, to allow the parties to efficiently analyse their options. For instance, CETA establishes a 90 day-term for consultations. Pursuant to Article Article 8.21 CETA: "1. If the dispute cannot be settled within 90 days of the submission of the request for consultations, the request concerns an alleged breach of this Agreement by the European Union or a Member State of the European Union and the investor intends to submit a claim pursuant to Article 8.23, the investor shall deliver to the European Union a notice requesting a determination of the respondent. 2. The notice under paragraph 1 shall identify the measures in respect of which the investor intends to submit a claim. 3. The European Union shall, after having made a determination, inform the investor as to whether the European Union or a Member State of the European Union shall be the respondent. 4. In the event that the investor has not been informed of the determination within 50 days of delivering

[164] Para. 13, available at: https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1.
[165] *Idem*.
[166] *Idem*, para. 12.

its notice requesting such determination: (a) if the measures identified in the notice are exclusively measures of a Member State of the European Union, the Member State shall be the respondent; (b) if the measures identified in the notice include measures of the European Union, the European Union shall be the respondent. 5. The investor may submit a claim pursuant to Article 8.23 on the basis of the determination made pursuant to paragraph 3, and, if no such determination has been communicated to the investor, on the basis of the application of paragraph 4. 6. If the European Union or a Member State of the European Union is the respondent, pursuant to paragraph 3 or 4, neither the European Union, nor the Member State of the European Union may assert the inadmissibility of the claim, lack of jurisdiction of the Tribunal or otherwise object to the claim or award on the ground that the respondent was not properly determined pursuant to paragraph 3 or identified on the basis of the application of paragraph 4. 7. The Tribunal shall be bound by the determination made pursuant to paragraph 3 and, if no such determination has been communicated to the investor, the application of paragraph 4."

This pre-procedural phase, could be conducted outside the institutional framework of the MIC. Nevertheless, evidence must be submitted to the file that this preliminary stage has successfully been completed and parties to the dispute have indeed tried, but failed, to reach an amicable settlement.

4.2. First Instance Tribunal

In EU's view: "A first instance tribunal would hear disputes. It would conduct, as arbitral tribunals do today, fact finding and then apply the applicable law to the facts. It would also deal with cases remanded back to it by the appellate tribunal where the appellate tribunal could not dispose of the case. It would have its own rules of procedure."[167]

The procedure before the First Instance Tribunal should be initiated by the investor, as the claimant, by submitting a request before the MIC,[168] arguing an alleged violation of protected substantive standards, by the host state, which should be a MIC member. The registration of the request should be made by the MIC Secretariat. After the registration, the file should be assigned

[167] *Idem*, para. 13.

[168] M. Bungenberg, A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court Options Regarding the Institutionalization of Investor-State Dispute Settlement*, August 2018, para. 271, p. 76.

to a chamber by the MIC President, which should ensure "that the workload of the chambers is equally distributed."[169]

As opposed to the current regime, given that the MIC will be a court, the parties would not be allowed to nominate a judge (as currently happens with arbitrators), but the assignment of cases to specific judges (who will form a chamber for hearing that particular claim), would be performed through administrative channels.

In addition, it would be recommended that the procedural rules address some of the expressed concerns, in particular those referred to: limited tools for earlier dismissal of frivolous claims; submission of counterclaims by respondent states and participation of interested third parties in the proceedings before the MIC.

At this initial stage of the proceedings, the MIC Treaty should provide for an appropriate mechanism allowing the chamber to examine at the outset the submitted claim and dismiss it if the claim is outside the MIC jurisdiction, if the claim is inadmissible or manifestly unmeritorious. In order to save costs and ensure efficiency of the proceedings, only after passing this initial review phase, the request should be communicated to the respondent.

The proceedings could be divided into the written phase – submission of procedural documents and the oral one – conducting the hearings.[170]

Submission of counterclaims is currently a controversial topic, generating controversial debate between the opponents and the advocates of the traditional ISDS system. Basically, counterclaim is a mechanism allowing the assessment of claimant's conduct within the same proceedings, which would allow for a comprehensive analysis of the case, in particular the facts of the case. This mechanism has been successfully used by Ecuador against Burlington, alleging that the investor has caused harm to the environment and has breached certain contractual obligations relating to infrastructure.[171] In order to confer jurisdiction to the Tribunal over counterclaims, in May 2011 the parties entered into an agreement for this precise purpose. The tribunal issued the Decision on Counterclaims on 7 February 2017, ordering Burlington to pay USD 41 million in compensation to Ecuador for environmental harm and infrastructure breaches. The ICSID Tribunal was empowered and thus able to analyse investor's conduct and reach this conclusion based on the parties' express agreement. In absence of such an agreement, only few procedural rules

[169] *Idem*, para. 271, p. 76.
[170] *Idem*, para. 273, p. 77.
[171] *Burlington Resources, Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5.

provide for a legal basis for counterclaims (such as UNCITRAL Rules[172]) that allow the tribunal to hear respondent's arguments. The inclusion of such a mechanism in future procedural rules would allow respondent to enforce obligations directly against the investor in the same proceedings initiated by it. Such mechanism is especially useful and necessary in cases in which the investor's activity produced significant harm and it grants the Tribunal the necessary authority to evaluate the investor's conduct through the host state's counterclaims.

Furthermore, the MIC procedural rules should also include a provision allowing for the participation of interested third parties. Such third party could be any natural or legal person, or even states, MIC members or not, able to demonstrate a legal interest in the ongoing dispute. The intervening third party should take the procedure as it is, without any obligation upon the Court to provide it with copies of documents, but after its acceptance, it becomes a party to the proceedings and all the future procedural steps and documents should be communicated to it as well.

It would be advisable that various NGOs, protecting human rights or environment, be also allowed to access this third-party intervention mechanism to be able to intervene in any pending proceedings. A recent example demonstrating the utility of such a mechanism is the *Pac Rim* case,[173] in which an amicus curiae briefs was submitted by the Center for International Environmental Law (CIEL), several local communities and international organizations, which endorsed El Salvador's decision to decline to authorize the investor to conduct mining activities. This procedural document emphasized the human right to a healthy environment and outlined the risks of exploitation activities for the local habitat. It stressed the state's permanent sovereignty over its natural resources and underlined the necessity to involve the local community in investment activities relating to the exploitation of natural resources, highlighting that the community participation is a fundamental principle of sustainable development. Regrettably, the tribunal did not address at all the arguments presented in the *amicus curiae briefs,* due to the lack of parties' consent to disclose confidential documents related to arbitration proceedings, and that it was not necessary to consider the arguments advanced by *amicus curiae* in order for it to decide the case. Therefore, providing for a legal basis in the new procedural rules to submit such briefs would represent a useful instrument to bring the perspective of the local community into the arbitration proceedings.

[172] UNCITRAL Arbitration Rules (as revised in 2010), available at: https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf
[173] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, available at: https://www.italaw.com/cases/783.

However, if such an intervention would extend the timeframe of the initial proceedings, the chamber should be entitled to disjoin them. Likewise, if the third party intervention increases the costs of the proceedings, it should also bear the burden of covering certain procedural costs.

4.3. Appellate Tribunal

The basic principles governing the appellate body, as envisaged by the EU, are the following: "14. An appellate tribunal would hear appeals from the tribunal of first instance. Grounds of appeal should be error of law (including serious procedural shortcomings) or manifest errors in the appreciation of the facts. It should not undertake a *de novo* review of the facts. 15. Mechanisms for ensuring that the possibility to appeal is not abused should be included. These may include, for example, requiring security for cost to be paid."[174]

Given the brief proposal and the limited existing model, the CETA could constitute a worthy example. This recently concluded trade agreement has included a revolutionary instrument, introducing an appeal mechanism through the provision of Article 8.28 para. 1 CETA: "An Appellate Tribunal is hereby established to review awards rendered under this Section."

An appeal can be lodged against the decision rendered by the first instance tribunal.[175] The applicant will be the loosing party – the claimant or the respondent, and would have the right to criticize the judgment in its entirety or only partially. It should be considered whether the intervening third party should be granted the right to declare an appeal as well. The suggestion would be that in case the judgment affected the intervening third party' personal rights, then the appeal mechanism should be opened to it as well. Conversely, if the intervening third party only supported the position of one of the initial parties (*i.e.* investor-claimant and host state-respondent), then no such direct right should be granted to it.

Apart from final judgements of the first instance, recourse to appeal could also be opened for situations in which the First Instance Tribunal disposed preliminary relief/ irreversible measures, suspension of some rights etc. which have the potential to produce detrimental consequences against one of the litigants.

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[174] https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1.

[175] M. Bungenberg, A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court Options Regarding the Institutionalization of Investor-State Dispute Settlement*, August 2018, para. 343, p. 97.

A mandatory time limit should be established for filing of any kind of appeal[176] (*i.e.* full or partial, against a final judgement or irreversible measure), which would be calculated from the date of the dispatch of the judgement or taken measure became known. If the appeal is not filed within this limit, the interested party loses the right to file an appeal beyond the last day of this period, and the judgment/ measure becomes *res judicata*.

In case the losing party chooses to file an appeal, against the payment of a reasonable bail, calculated as a percentage from the disputed monetary amount, the legal effects of the First Instance Tribunal judgment should be suspended until a final judgment is rendered by the Appellate Tribunal.

The request for appeal should indicate both – the legal grounds for appeal and the arguments supporting them.

Similarly to CETA provisions, the Appellate Tribunal "may uphold, modify or reverse the Tribunal's award [...]."[177] Hence, the second instance body should be empowered to performed a full second judgment, both on facts and law arguments, based on submission and evidence put forward by the disputing parties before the first instance. Thus, the Appellate Tribunal should be vested with extensive investigatory powers.[178]

The grounds for appeal should be clearly stipulated in the MIC Treaty and should be exhaustive. As a starting point, Article 8.28 para. 2 of CETA could be taken as example, which lists the following grounds for appeal:

" (a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; (c) the grounds set out in Article 52 (1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b)."

For the avoidance of any confusion, it should be mentioned that the reference to Article 52 of the ICSID Convention, will not be construed as triggering the annulment procedure, but would also the considered as grounds for appeal under the MIC Treaty. This clarification is important due to the different legal consequences these two control mechanisms entail on the examined judgement.

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[176] *Idem*, para. 347, p. 97.
[177] Article 8.28 para. 2 CETA.
[178] M. Bungenberg, A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court Options Regarding the Institutionalization of Investor-State Dispute Settlement*, August 2018, para. 351, p. 98.

The appeal should be heard by chambers composed by a number of judges bigger than the First Instance Tribunal. The numbers of the Appellate Tribunal would depend as well on the number of disputes brought before the Appellate Tribunal.

It would be maybe useful to provide also for an additional mechanism, to ensure the consistency and predictability, such as advisory opinion before the ICJ[179] or preliminary ruling before the CJEU. Pursuant to Article 267 of the TFEU: “The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.” Such a supreme MIC judicial chamber should be composed of all judges of the Appellate Tribunal, including the President and the Vice-President of the Court, empowered to address only questions of legal nature regarding the interpretation of investment substantive law or MIC Treaty provisions/ secondary law. Such a right should be granted to all MIC members and would enhance the harmonization and development of international investment law.

5. Outcome of the proceedings

5.1. Legal effects - final and binding judgments

Currently pursuant to Article 59 of the ICJ Statute: “The decision of the Court has no binding force except between the parties and in respect of that particular case.” In addition, reference should be made to Article 94 of the UN Charter which reads as follows: “Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Securi-

[179] Chapter IV, Advisory Opinions, Articles 65-68 of the ICJ Statute.

ty Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." Hence, the decisions issued by the ICJ are binding upon the disputing parties, which have an express obligation to comply with it.

Similarly, Article 53 of the ICSID Convention provides that: "(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention."

Hence, the MIC Treaty should provide for similar provisions to ensure the legally binding effects of the MIC judgements.

With regards to the merits of the case, according to the ICSID case law, if a violation is found, Article 34 of the ILC Articles on State Responsibility becomes applicable, which provides as follows: "Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter." Basically, once a violation of an investment protection standard is found, the tribunal can render compensation in case of a lawful expropriation or award damages in case of an unlawful one. So far, the arbitral tribunals refrained to order *restitutio in integrum*, especially in disputes involving national legislation, regardless if it found that that specific legislative act represented a serious violation of investment standard of protection. Otherwise, it could be considered a severe interference with the sovereign legislative powers of states within their national borders.

Considering the peculiarities of investment disputes, which would be maintained after switching from arbitration to adjudication, it would be recommended that the MIC render final and binding decisions finding violations of treaty standards of protection, awarding compensation or damages in conformity with existing case law.

5.2. Recognition and enforcement of MIC judgments

According to EU's proposal: "Effective enforcement of awards of a standing mechanism is vital."[180]

Currently, arbitral awards are enforced in accordance with the enforcement mechanism provided in the ICSID Convention for the ICSID awards and in accordance with the provisions of New York Convention for non-ICSID awards.

[180] Para. 30, https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1

ICSID Convention provides for a particularly powerful enforcement mechanism. Pursuant to Article 54: “(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.” Article 55 provides for only one exception: “Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.”

Apart from state immunity defence, an ICSID award can be enforced in any of 163 contracting state as a final judgement of a court in that state. However, on the basis of the ICSID Convention only pecuniary obligations can be enforced against the losing state. In case the ICSID award provides for other reliefs, of a non-pecuniary nature, resort can be made to the New York Convention.

According to Article I of the New York Convention: “1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. 2. The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.”

Likewise the ICSID Convention, the New York Convention imposes upon member states parties to the Convention an express obligation to recognize and enforce arbitral awards. Pursuant to Article III of New York Convention: “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”

Article V of the New York Convention stipulates more exceptions than the state immunity provided by the ICSID Convention. Pursuant to Article V of New York Convention: “1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country."

Both mechanisms are considered very efficient due in principle to high number of states parties to both conventions.

In order to ensure the efficiency of the MIC, it would be advisable that MIC would have its own enforcement mechanism, enshrined in the MIC Treaty similar to the ICSID enforcement mechanism. However, especially at the beginning, after the MIC Treaty enters into force, when only a few states would have ratified the constituent instrument, it would be recommended to qualify the MIC decisions as awards within the meaning of New York Convention, in order to be able to access the enforcement mechanism of this convention.

In some scholars view "there would be good reason to qualify the ITI [International Tribunal for Investments, with a built-in appeal] as a "permanent arbitral body" under the Convention, both under the "ordinary meaning" of Article I(2), and under an "evolutionary interpretation" of the phrase which would take account of developments in international law and arbitration since 1958."[181]

[181] See also Gabrielle Kaufmann-Kohler and Michele Potestà, *Can the Mauritius Convention serve as a model for the reform of Investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and Roadmap*, CIDS, 2016, para. 154, pp. 56–57, http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf.

This was probably the rationale behind such a provision included into the CETA. However, it would be probably impossible to access ICSID enforcement mechanism, it would be almost impossible to qualify a MIC judgment as an ICSID arbitral award to have access to Article 54. Only an amendment of the ICSID Convention could resolve this problem, although this would be also extremely difficult to realize as the for amendments of ICSID Convention reaching the consensus of all member states is necessary.

Therefore, the MIC should have its own enforcement tool, designed after the ICSID model. Although at the beginning it might be difficult to enforce an award due to the limited number of states parties to the MIC Treaty, in time it could prove itself an efficient enforcement mechanism.

IV. PRO OR AGAINST THE MIC REFORM – MAIN SUPPORTERS AND STRONGEST OPPONENTS

1. Current status of the reform. Beginning of negotiation on all proposed solutions

Given that the current reform is conducted under the auspices of UNCITRAL, the discussions on pros and cons of MIC reform will have as the starting point the ongoing negotiations, the works performed and the decisions adopted by the Working Group III so far.

The Working Group III has now reached the third and last phase of its mandate (*i.e.* the development of any relevant solutions to be recommended to the Commission).[182] According to the Annotated provisional agenda for the thirty-eighth session, programmed to be held in Vienna, between 14 and 18 October 2019, the Working Group is expected *inter alia*: "to continue its consideration of ISDS reform based on the following documents: - Document A/CN.9/WG.III/WP.166, which sets out reform options; […]"[183]

At its previous session: "the Working Group agreed that it would discuss, elaborate and develop multiple potential reform solutions simultaneously."[184] In that regard, it analysed the available options to implement a working plan to address the concerns for which it had decided that reform is desirable,[185] encouraging member states and interested stakeholders to submit their views.

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[182] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017) Part I*, Fifty-first session New York, 25 June–13 July 2018, para. 6: "The Commission entrusted Working Group III with a broad mandate to work on the possible reform of Investor-State dispute settlement (ISDS). In line with the UNCITRAL process, Working Group III would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be government-led with high-level input from all governments, consensus-based and be fully transparent. The Working Group would proceed to: (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view of allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s)" available at: https://undocs.org/en/A/CN.9/930/Rev.1.

[183] Annotated provisional agenda, Thirty-eighth session Vienna, 14–18 October 2019, available at: https://undocs.org/en/A/CN.9/WG.III/WP.165.

[184] A/CN.9/970, para. 81;

[185] Possible reform of Investor-State dispute settlement (ISDS), Information on options for implementing a workplan Note by the Secretariat, Thirty-seventh session New York, 1–5 April 2019, available at: https://undocs.org/en/A/CN.9/WG.III/WP.158.

In addition, it is important to mention, that as a guiding principle, the reform options will be analysed "in light of the 2030 Agenda for the Sustainable Development Goals (SDGs)"[186]

2. Positions expressed by states and other stakeholders. Supporters and Opponents of MIC reform

The success of the reform will very much depend on the position adopted by states with regard to it. Therefore, in what follows this section will briefly investigate what is the trend so far among stakeholders, and who are the main supporters for and the strongest opponents against the MIC reform.

Up to this moment,[187] fifteen states and European Union with its member states made submissions expressing their position either on a working plan or on their concerns regarding ISDS, proposing various solutions for reform. Based on these submissions, the Secretariat prepared the working document "Reform option"[188] with an Addendum "Tabular presentation"[189] which will constitute the basis for the discussions for the next session. Both documents are based on reform proposals received until the date of their issuance (*i.e.* 30 July 2019) and may not be exhaustive, leaving the door open for any further options that could be developed.

The document prepared by the Secretariat presents all of the reform options, among most radical being expressed by the Government of Brazil[190] and the Government of South Africa[191] which suggested "to move away from ISDS altogether."[192]

As an example, some states proposed to focus more on prevention and on building relation, than on dispute resolution. For instance, Brazil adopted a new approach by conceiving and implementing a dispute prevention mechanism under Brazilian Cooperation and Facilitation Agreement (CFIA), composed of two phases, which are mandatory to be followed before resort-

[186] Possible reform of Investor-State dispute settlement (ISDS), Note by the Secretariat, Thirty-eighth session Vienna, 14–18 October 2019, para. 11, available at: https://uncitral.un.org/sites/uncitral.un.org/files/wp166.pdf
[187] 20 August 2019.
[188] Possible reform of Investor-State dispute settlement (ISDS) Note by the Secretariat, Thirty-eighth session Vienna, 14–18 October 2019, available at: https://uncitral.un.org/sites/uncitral.un.org/files/wp166.pdf.
[189] Possible reform of Investor-State dispute settlement (ISDS) Note by the Secretariat, Addendum, available at: https://uncitral.un.org/sites/uncitral.un.org/files/wp166_add1.pdf.
[190] A/CN.9/WG.III/WP.171 Submission from the Government of Brazil (State-to-State mechanisms, see also paras. 33–36), available at: https://undocs.org/en/A/CN.9/WG.III/WP.171.
[191] A/CN.9/WG.III/WP.176, Submission from the Government of South Africa (raising the question whether ISDS mechanisms are desirable or necessary in the first place), available at: https://uncitral.un.org/sites/uncitral.un.org/files/176-e_submission_south_africa.pdf.
[192] Possible reform of investor-State dispute settlement (ISDS) Note by the Secretariat, Thirty-eighth session Vienna, 14–18 October 2019, para. 10, available at: https://uncitral.un.org/sites/uncitral.un.org/files/wp166.pdf.

ing to arbitration. In sum, "the CFIA is an innovative alternative to traditional investment agreements, seeking to overcome its limitations and litigious approach by fostering a more dynamic, constructive and long-term interaction between the Parties and their investors."[193]

Similar to Brazil, Morocco also took some measures at national level, aiming at addressing some of the ISDS flaws. Hence, it "has recently prepared a new model bilateral investment treaty which strikes a balance between rights and obligations, both those of investors and those of the host State, and in which it has opted to maintain the existing ISDS system while updating relevant provisions."[194] As an innovation, the new draft also establishes "an institutional framework for dispute prevention […]"

With a different view, Thailand proposed that UNCITRAL conceptually worked on "a new UNCITRAL ISDS Rules to address the special needs of ISDS cases; […]"[195]

Turning now to MIC reform, it was presented as a third and last option in the Secretariat's Note, under the title: "Standing first instance and appeal investment court, with full-time judges." Being a EU proposal,[196] it "is based on the view that the different concerns identified by the Working Group are intertwined and are systemic, and that addressing specific concerns in a piecemeal approach would leave some concerns unaddressed."[197] Further, the Note briefly summarises the key aspects of the reform[198] and concludes by saying that: "This reform option would cover a number of other suggestions for reform and might make them redundant. It could also be combined with other options, for example, the appellate mechanism referred to in paragraphs 17–20 above."[199]

Within the framework of UNCITRAL process, among the 15 states presenting their position on the reform options, only the EU and its member states proposed such a revolutionary

[193]Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of Brazil Note by the Secretariat, Thirty-eighth session Vienna, 14–18 October 2019, available at: https://undocs.org/en/A/CN.9/WG.III/WP.171.
[194] Possible reform of Investor-State dispute settlement (ISDS) Submission from the Government of Morocco Note by the Secretariat, Thirty-seventh session New York, 1–5 April 2019, para. 8, available at https://undocs.org/en/A/CN.9/WG.III/WP.161.
[195] Possible reform of Investor-State dispute settlement (ISDS) Submission from the Government of Thailand, Thirty-seventh session New York, 1–5 April 2019, para. 3, available at: https://undocs.org/en/A/CN.9/WG.III/WP.162.
[196] Possible reform of Investor-State dispute settlement (ISDS) Submission from the European Union and its Member States, Thirty-seventh session New York, 1–5 April 2019, available at: https://undocs.org/A/CN.9/WG.III/WP.159/Add.1.
[197] Possible reform of Investor-State dispute settlement (ISDS) Note by the Secretariat, Thirty-eighth session Vienna, 14–18 October 2019, para. 21, available at: https://uncitral.un.org/sites/uncitral.un.org/files/wp166.pdf
[198] *Idem*, para. 22.
[199] *Idem*, para. 23.

solution.[200] Still, there were some states that supported a Stand-alone review or appellate Mechanism (*i.e.* Morocco, Chile, Israel and Japan, Ecuador, China).[201]

Outside these negotiation boundaries, EU launched this proposal in 2015 during the negotiation with the US for the TTIP, consisting in the inclusion of a permanent international investment court system for the resolution of investment disputes derived from the agreement[202] and has been its strongest supporter ever since. Although the negotiations with the US on TTIP were discontinued in late 2016, due to strong opposition from various sectors, so far the EU managed to insert such a mechanism in the following four agreements:

(i) UE-Vietnam Free Trade Agreement

(ii) EU-Canada Comprehensive Economic and Trade Agreement (CETA)

and more recently

(iii) EU-Singapore Investment Protection Agreement and

(iv) EU-Mexico Trade Agreement

In addition, proposal to introduce a Investment Court System (ICS) is currently subject to bilateral negotiation between the EU and Japan in the EU-Japan Economic Partnership Agreement.

Supporters of the reform believe that "a single, preferably institutionally-managed and widely-accepted mechanism for reviewing investor-state arbitral awards would be best suited to address the risk of fragmentation of the dispute settlement system that might otherwise ensue."[203]

On the other hand, there are key international actors that took a starkly divergent position regarding the ISDS. Some recent examples are:

(i) Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP), which succeeded the Trans-Pacific Partnership (TPP) after the withdrawal of the US,

(ii) United States-Mexico-Canada Agreement (USMCA)

(iii) Brazil's Cooperation and Investment Facilitation Agreement (CIFA)

(iv) India's model BIT of 2016.

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[200] Possible reform of Investor-State dispute settlement (ISDS) Note by the Secretariat Addendum, Thirty-eighth session Vienna, 14–18 October 2019, Tabular presentation of reform options, point iii, p. 3, available at: https://uncitral.un.org/sites/uncitral.un.org/files/wp166_add1.pdf.

[201] *Idem*.

[202] C. Malmström, *Concept Paper: Investment in TTIP and Beyond – The Path for Reform*, European Commission, 2015, available at: https://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF

[203] E. E. Gleason, *International Arbitral Appeals: What Are We So Afraid Of? Pepperdine Dispute Resolution Law Journal*. vol. 7, 2007, 286, available at: https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1093&context=drlj.

Although all above mentioned agreements seek to increase transparency, enhance efficiency and implement tools to balance the state right to regulate, in line with the concerns identified by the Working Group III, the incorporated ISDS mechanism reflects different views. The US position, which is reflected by the CPTPP and the USMCA, maintain investor-state arbitration, but reform it. India's model BIT introduce the exhaustion of local remedies principle, enhancing thus the role of domestic courts, while Brazil is more keen to inter-state adjudication rather than traditional ISDS.

Given this variety of views, it will be very challenging to reach a multilateral consensus when each proposed model has its own pros and cons. Even more difficult would be to reach a universal support. Most likely, the prevailing model will be the one supported by most of the state and the one that would better fit to achieve the key objectives of the reform, in particular transparency, consistency, coherence and predictability.

Considering that the EU's goal is to include the ICS mechanism in every future trade agreement, the proposal to set up a MIC seems to be feasible. Despite of the opposition received from other states, the EU is the biggest exporter and largest recipient of FDI in the world, being involved in 1.384 of IIAs with third countries from the total 3.328 investment treaties of which a majority contains ISDS provisions.[204] Therefore, the inclusion of ICS in all future EU agreement would very much increase the EU's chances to reach its ultimate objective - the establishment of a Multilateral Investment Court applicable to all investment agreements and trading partners from around the world.

In addition, not only the EU, but also Canada, another important key player, confirmed its interest to set up a MIC in future agreements with its trading partners.[205]

In light of the above, at this point, it is quite difficult to predict the success of MIC reform, given the divergent views expressed by various stakeholders. However, in order to become reality, at the constituent stage, MIC does not need to obtain the approval of all countries, but only of a minimum number of states,[206] willing to ratify MIC Treaty and accept MIC jurisdiction.

[204] European Parliament, Multilateral court for the settlement of investment disputes, November 2017
[205] Article 8.29 of CETA.
[206] M. Bungenberg, A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court Options Regarding the Institutionalization of Investor-State Dispute Settlement*, August 2018, Section 8.4, p. 174-175.

V. CONCLUSIONS

The future of investment arbitration is uncertain. Although the agreement on the need to reform the current system has been reached, the views diverge regarding the best solution to be adopted to address the identified concerns. The one proposed and strongly advocated by the EU, of replacing the existing *ad hoc* arbitration regime with a permanent dispute settlement body is the most radical among the analysed options within the negotiation process conducted under the auspices of UNCITRAL. It is justified by the systemic nature of expressed criticisms which require a systemic solution. In essence, the reform would consist in moving from *ad hoc* arbitration to a permanent standing international body vested with the necessary authority to handle the disputes that would arise between foreign investors and host states worldwide.

Although an innovative idea, if designed and implemented properly, MIC could indeed address the main concerns and restore the legitimacy of the system. So far, the EU managed to include such permanent dispute settlement body in four recent trade agreements, concluded with Canada, Vietnam, Singapore and Mexico. In addition, considering that the EU's goal is to include the new mechanism in every future trade agreement, the proposal to set up a MIC seems to be feasible. However, this new mechanism was accepted only at a bilateral level. Given the multilateral nature of ongoing negotiations, in order to succeed the MIC idea should be embraced by other states too. Meanwhile, key international players, such as the U.S., Brazil and South Africa still strongly oppose the new approach.

In order to gain support MIC should be set up in accordance with the rule of law, and find the best formula to reconcile the positive features of investment arbitration with institutional structure of international adjudicative forums. MIC should be constituted as an independent international organization, based on a constituent treaty and have an international legal personality. Importantly, at the constituent stage, MIC does not need to obtain the approval of all countries, but only of a minimum number of states, willing to ratify MIC Treaty and accept MIC jurisdiction. Other states could accede to MIC Treaty later on.

Whether the MIC reform will succeed or not, only future could tell. One thing is certain though – in a globalized and rapid development society, the existence of an ISDS mechanism, either in the form of arbitration or adjudication, is greatly needed. Not only for the benefits it provides, but more importantly, to confer to foreign investors the necessary safeguards to encourage the flow of FDI and foster the economic growth. On the other hand, states should be recognized the right to regulate in public policy issues, without the threat of being sued or questioning the legitimacy of such regulatory powers.

The concerns need indeed to be addressed in order to restore the lost trust in the system and make it functional on a long term. Therefore, MIC could be a viable solution if design and implemented properly. The EU's proposal does not provide for a roadmap, leaving the design of the new adjudicative body opened to negotiation for interested states. It might be that this approach is only part of EU's strategy to gain more support. If other stakeholders would contribute to ideas and suggestions to the constitution of the MIC, the probability that they would accept eventually MIC jurisdiction increases considerably.

Although the discussion on all proposed solutions are only at the beginning, it seems that there are good changes that the MIC reform would succeed, which considering all the points brushed by this thesis might just be what is needed to reboot the ISDS system and place it on firmer and less assailable grounds.

ABSTRACT

Investor-State Dispute Settlement (ISDS) is a dispute settlement mechanism, specifically designed to solve disputes between foreign investors and host states. Created in mid 60s, it knew a rapid development after 1990 when the number of investment disputes has increased significantly. Given its unique features, stemming from the flexible nature of *ad hoc* arbitration, ISDS has been widely and successfully used by the investment community worldwide. But despite of its valuable characteristics, in recent years traditional ISDS has faced increased public scrutiny and criticisms. Among the most severe concerns expressed with regard to the current system are the lack of transparency, consistency and predictability, the absence of a review mechanism, biased arbitrators due to the party-appointment principle, all of these ultimately leading to questioning the legitimacy of the system overall. As a result, demands for reform have been voiced and various solutions have been proposed, ranging from amending the current system, to shifting from arbitration to an institutionalized form of dispute settlement, or even eradicating the system in its entirety by completely excluding ISDS clauses from international investment agreements (IIAs).

Against this backdrop, the present thesis analysis whether the proposal to set up a Multilateral Investment Court (MIC) is a viable option to reform the traditional ISDS regime. In order to do so, it will firstly determine the *status quo* of the current system by point out the key features and addressing the main criticisms expressed with regard to the ISDS. Further, the analysis will continue with setting out the institutional and procedural framework, by addressing the essential elements that need to be considered when designing the MIC in light of expressed concerns. And finally, the thesis will conclude by discussing the pros and cons of MIC reform, through the eyes of main supporters and strongest opponents.

Keywords: Multilateral Investment Court; investment arbitration; ISDS; Foreign Direct Investment; International Investment Agreements.

ABSTRACT

Investor-Staat-Streitbeilegung (ISDS) ist ein Streitbeilegungsmechanismus, der speziell dafür entwickelt wurde, um Konflikte zwischen ausländischen Investoren und Staaten zu lösen. Der Mechanismus wurde Mitte der 1960er Jahre erschaffen und entwickelte sich nach den 1990er Jahren aufgrund einer deutlichen Zunahme der Investitionsstreitigkeiten rasch weiter. Aufgrund seiner einzigartigen Eigenschaften, die sich aus der Flexibilität der Ad-hoc-Schiedsgerichtsbarkeit ergeben, wurde ISDS von der Investment-Community weltweit in großem Umfang und erfolgreich eingesetzt. Trotz seiner wertvollen Eigenschaften wurde das traditionelle ISDS in den letzten Jahren zunehmend von der Öffentlichkeit geprüft und kritisiert. Zu den schwerwiegendsten Bedenken in Bezug auf das derzeitige System zählen mangelnde Transparenz, Kohärenz und Vorhersehbarkeit, das Fehlen eines Überprüfungsmechanismus und voreingenommene Schiedsrichter aufgrund des Grundsatzes der Parteienbestellung, die letztendlich die Legitimität des gesamten Systems in Frage stellen. Infolgedessen wurden Forderungen nach Reformen laut und verschiedene Lösungen vorgeschlagen. Diese reichten von der Änderung des derzeitigen Systems über die Umstellung von der Schiedsgerichtsbarkeit auf eine institutionalisierte Form der Streitbeilegung bis hin zur gänzlichen Auslöschung des Systems durch den vollständigen Ausschluss von ISDS-Klauseln in internationalen Investitionsabkommen (IIAs).

Vor diesem Hintergrund wird in der vorliegenden Arbeit untersucht, ob der Vorschlag zur Einrichtung eines multilateralen Investitionsgerichts (MIC) eine tragfähige Option zur Reform des traditionellen ISDS-Regimes darstellt. Zu diesem Zweck wird zunächst der Status Quo des derzeitigen Systems ermittelt, indem die Hauptmerkmale aufgezeigt und die Hauptkritikpunkte in Bezug auf das ISDS angesprochen werden. Darüber hinaus wird die Analyse mit der Festlegung des institutionellen und verfahrenstechnischen Rahmens fortgesetzt, wobei die wesentlichen Elemente aufgezeigt werden, die bei der Gestaltung des MIC aufgrund der geäußerten Bedenken zu berücksichtigen sind. Zum Abschluss der Arbeit werden die Vor- und Nachteile der MIC-Reform aus den Sichtweisen der wichtigsten Befürworter und stärksten Gegner erörtert.

Schlüsselwörter: Multilaterales Investitionsgericht; Investitionsschiedsgerichtsbarkeit; ISDS; Ausländische Direktinvestitionen; Internationale Investitionsabkommen.

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