

UNIVERZITA KARLOVA

Právnická fakulta

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**Řešení sporů v mezinárodním
ekonomickém právu – vybrané aspekty**

Diplomová práce

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Katedra Mezinárodního práva

Datum vypracování práce: 1. května 2019

CHARLES UNIVERSITY

Faculty of Law

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**Dispute Settlement in International
Economic Law – Selected Aspects**

Master's Thesis

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Date of submission: 1st May 2019

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I would like to thank my supervisor doc. JUDr. Vladimír Balaš, CSc. for his valuable insight and helpful comments.

I also thank my family and friends for their unyielding support and encouragement.

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List of Abbreviations

ADR	Alternative Dispute Resolution
BIT	Bilateral Investment Treaties
CETA	Comprehensive Economic and Trade Agreement
ECT	Energy Charter Treaty
IBRD	International Bank for reconstruction and Development
ICC	International Chamber of Commerce
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention)
ICSID Centre	International Centre for Settlement of Investment Disputes
ICJ	International Court of Justice
ILC	International Law Commission
ISDS	Investor-state dispute settlement
IIA	International Investment Agreement
MAI	Multilateral Agreement on Investment
NAFTA	North American Free Trade Agreement
TRIMS	Agreement on Trade-Related Investment Measures
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization
WTO DSU	World Trade Organization Dispute Settlement Understanding

Introduction

In certain cases, states abandoned the concept of total state immunity, permitting certain claims against them by private parties in both domestic courts and a variety of international arbitral forums. A striking example of this trend is found in the area of investor-state dispute resolution, where states have consented to claims brought by foreign investors who allege mistreatment within the host state's territory.¹

At the time of the emergence of investor state arbitration, such regulation of states was seen as necessary to protect Western investors from expropriation of their investments by developing states, in which there was an absence of rule of law and the protections that flow from that.² Such conditions have led to increased development globally in sectors included energy, mining, infrastructure, and other areas, where countries seek transfers of capital, knowledge, or technological resources from foreign partners.³

The ICSID Center was established primarily to ensure the availability of an assured impartial and independent dispute resolution service to first world investors who were generally unfamiliar with and, therefore, apprehensive of developing countries' legal system. Under certain conditions, a party can submit a request for conciliation or arbitration under the ICSID Convention.⁴ While the ability of foreign

¹ CHEN, L. *An Introduction to Contemporary International Law. A Policy Oriented Perspective*. Oxford University Press, 2015. ISBN: 978-0-19-022798-2, pg. 141.

² SUSLER, O., WILSON, T. *Restoring Balance in Investor State Dispute Settlement: Addressing Treaty Shopping and Indirect Expropriation Claims and Consistent Approaches to Decision-Making*. The International Journal of Arbitration, Mediation and Dispute Management. Volume 84 Issue 1 February 2018. ISSN: 0003-7877, pg. 39

³ CHEN, L. *Ibid.*

⁴ TAO, J. *Arbitration Law and Practice in China*. Wolters Kluwer International BV, The Netherlands, 2008, ISBN: 978-90-411-2748-8, pg. 14

investors to choose investor state arbitration as a mechanism for settling investment disputes has gained relevance, it has also come under progressively more scrutiny.⁵

The increase in the number of cases over the years, together with sometimes expansive, unexpected and inconsistent interpretations of International Investment Agreement provisions by tribunals, had triggered a worldwide debate and a number of countries had adopted reform measures.⁶ Those problems, subsequent measures and possible future development of investor state dispute mechanism needs to be set into the context of changes in the bilateral and multilateral conventions, and a possibility of introducing a new appellate mechanism or even an independent body of an international investment court.

This thesis intends to provide answers to the question whether the international investment court is a viable possibility for the future of the investment arbitration and explore its advantages, problems, and possible alternatives.

⁵ POLANCO, R. *The Rise of and Backlash against Investor–State Arbitration*. In *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* Cambridge University Press, 2019. oi:10.1017/9781108628983.003, pg. 46

⁶ *Improving Investment Dispute Settlement: UNCTAD Policy*. IIA Issue Note, Issue 4, November 2017. [online]. [accessed on 17.3.2019]. available at https://unctad.org/en/PublicationsLibrary/diaepcb2017d8_en.pdf pg. 6

Structure

The thesis is divided into the Introduction and Methodology, five Chapters and a Conclusion. Chapter 1 will introduce the sources of international investment law, with an emphasis on multilateral conventions and bilateral treaties, and their role in the international investment system. Chapter 2 will focus on the ICSID Convention and ICSID Center, its structure and control mechanism that is currently in place. Chapter 3 will shortly introduce the most important dispute settlement mechanisms between investors and states and importantly a current proposal for Amendment of the ICSID Rules. It will describe the shift from the national court and diplomatic protection towards investment arbitration and describe alternative procedures, such as mediation. Chapter 4 will explore the most significant concerns of investors and states regarding the system of investment arbitration through arbitral jurisdiction and analysis of the negative consequences for the parties involved. Chapter 5 will introduce several possible changes in investor-state arbitration and examine their viability under the current system, e.g. an introduction of a new ICSID appellate mechanism, proposition of an investment court or methods of alternative dispute resolution. The Conclusion of this thesis will evaluate the development of the international investment law, and assess the viability of the newly introduced proposals.

This thesis has a twofold goal. The first one is the description of the proceedings under the Washington Convention with an emphasis on the most significant problems that have emerged in the investor-state arbitration. The second goal is the analysis of the chosen approach, proposal of the independent investment court system and its alternatives. Method of analysis, description, comparison as well as synthesis were used for the work. The sources used for this thesis were book publications by leading foreign experts, scientific articles and arbitration awards. The sources used are listed at the end of the thesis.

1. Sources of the International Investment Law

Today international investment law is not primarily or solely concerned with the private contractual relation between the foreign investor and the host state, but rather is principally founded on fundamental principles derived from international treaty law, and, to a lesser extent, on customary international law and general principles of law.⁷ The customary mechanisms, the bilateral treaties and the increase of regional arrangements have contributed to create a new jurisdiction of the world society.⁸

The regime governing investment that will be mostly explored in this thesis is the international legal instrument granting protection to the foreign investor. This instrument usually takes the form of an international treaty, most often a bilateral investment treaty (BIT), occasionally a multilateral treaty, and increasingly preferential trade and investment agreements.⁹ Examples of treaties authorizing investor-state arbitration include the multilateral international conventions such as Global Energy Charter Treaty (ECT), as well as free trade agreements such as the NAFTA.¹⁰

1.1. Sector-based and Regional International Agreements

The multilateral conventions are often focused on particular regions or economic sectors as is the case of ECT, the NAFTA or the ASEAN Investment

⁷ BRABANDERE, E., *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications*. Cambridge University Press, United Kingdom, 2014. ISBN: 978-1-107-06687-8, pg. 17

⁸ CARMEN, R. *L'Évolution du droit international en matière d'investissements directs étrangers* [online]. Université d'Auvergne Clermont-Ferrand I, 2007, [online]. [accessed on 15.2.2019]. available at <https://tel.archives-ouvertes.fr/tel-00717699>, pg. 574

⁹ BRABANDERE, E., *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications*. Cambridge University Press, United Kingdom, 2014. ISBN: 978-1-107-06687-8, pg. 25

¹⁰ CHEN, L. *An Introduction to Contemporary International Law. A Policy Oriented Perspective*. Oxford University Press, 2015. ISBN: 978-0-19-022798-2, pg. 141

agreement.¹¹ This Section will briefly introduce some of the significant International Investment Agreements (IIA) and their role in the international investment system.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States

The Washington Convention¹² forms the basis for the International Centre for the Settlement of Investment Disputes ICSID, that was founded by the World Bank in 1966 in response to the demand for competent and efficient conciliation and arbitration services for the resolution of disputes between governments and foreign investors.¹³ This convention will be further examined in Chapter 3.

European Energy Charter

It is the most important multilateral treaty providing for Investor State Arbitration. The fundamental objective of the ECT's provisions on investment is to ensure the creation of a "level playing field" for the energy sector, with the purpose of receding to a minimum the non-commercial risk associated with energy-sector investments. Today, the ECT has fifty-four members, including the European Union (EU), and fifty-two states have signed or acceded to it. Therefore, it is the world's largest multilateral investment treaty in substantive issues.¹⁴

Like other investment treaties, the ECT includes ICSID provisions, allowing the arbitration of disputes before ICSID tribunals or those constituted under the

¹¹ BORN, G., *International Arbitration, Cases and Materials*. Kluwer Law International BV, The Netherlands, 2011, ISBN: 978-90-411-3458-5, pg. 40

¹² *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 4 ILM 524 (1965)

¹³ TAO, J. *Arbitration Law and Practice in China*. Wolters Kluwer International BV, The Netherlands, 2008, ISBN: 978-90-411-2748-8, pg. 14

¹⁴ POLANCO, R. *The Rise of and Backlash against Investor-State Arbitration*. In *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* Cambridge University Press, 2019. oi:10.1017/9781108628983.003, pg. 34

UNCITRAL or the Stockholm Chamber of Commerce (SCC) Arbitration Rules. Many disputes have been initiated on the basis of Article 26.¹⁵

Convention Establishing the Multilateral Investment Guarantee Agency

The Convention went into effect on April 12, 1988. As compared to the difficulties faced in the 1960s and 1970s, this process was certainly aided by an increasingly welcoming attitude of many capital-importing countries towards, and, following the various debt crises, increasing need for, foreign investment.¹⁶ The Multilateral Investment Guarantee Agency (MIGA) is an international organization with independent legal personality and a capital-based corporate structure. Its headquarters are located in Washington DC. Being the youngest member of the World Bank Group, its objective is to promote foreign investment between its members by offering insurance against non-commercial risks to foreign private investors who invest in developing countries; by providing technical assistance for countries to develop strategies to promote investment; and by providing information about investment opportunities and investment risk management.¹⁷

¹⁵ POLANCO, R. *The Rise of and Backlash against Investor–State Arbitration*. In *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* Cambridge University Press, 2019. oi:10.1017/9781108628983.003, pg. 35

¹⁶ SCHILL, S., *Multilateral Investment Guarantee Agency (MIGA)*. Max Planck Encyclopedia of Public International Law. [online] [accessed on 12.3.2019]. available at <http://opil.ouplaw.com.ezproxy.is.cuni.cz/view/10.1093/law:epil/9780199231690/law-9780199231690-e520?rskey=nhZzhE&result=1&prd=EPIL>

¹⁷ *Convention Establishing the Multilateral Investment Guarantee Agency Convention* [online] [accessed on 12.3.2019]. available at <http://www.miga.org/sites/default/files/archive/Documents/MIGA%20Convention%20February%202016.pdf>

Arab Investment Convention

The 1974 Arab Investment Convention¹⁸ created a Centre for the Settlement of Investment Disputes between host states of Arab Investments and Nationals of other Arab States, an organization very similar to ICSID, but with some differences as it was circumscribed to a specific type of claimants, provide for limited annulment rules (a second award rendered was considered final) and gave jurisdiction to the same Arab Centre for disputes over the interpretation and application of the Arab Investment Convention.¹⁹ The Arab multilateral treaty was superseded by the Unified Agreement for the Investment of Arab Capital in the Arab States (1980)²⁰ that provides for arbitration before the Arab Investment Court, which became operational only in 2003.

1.2. Free Trade Agreements

International free trade has become one of the central global issues of the 21st century both in terms of fierce political debates and economic significance. The new US administration's policy to call off the EU-US Free Trade Agreement – TTIP, cancel the TPP and renegotiate the NAFTA all prove that the exception of the new era has not been devoid of political upheavals.²¹ Today, investment protection has become an integral part of new generation free trade agreements, some of which are concluded between developed democracies. With this, the guarantee function against the

¹⁸ *Convention on the Settlement of Investment Disputes between Host States of Arab Investments and Nationals of Other Arab States*, 10 June 1974 ('Arab Investment Convention') The contracting states were Iraq, Jordan, Sudan, Syria, Kuwait, Egypt and Yemen; Libya and the United Arab Emirates (UAE) acceded later.

¹⁹ POLANCO, R. *The Rise of and Backlash against Investor–State Arbitration*. In *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* Cambridge University Press, 2019. oi:10.1017/9781108628983.003, pg. 33

²⁰ Unified Agreement for the Investment of Arab Capital in the Arab States, 26 November 1980. The agreement has been ratified by all member states of the League of Arab States except Algeria and the Comoros.

²¹ NAGY, V. *Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty*. In BELOHLÁVEK, A. *Czech Yearbook of International Law*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-7-7, pg. 198

insufficient legal protection in the developing countries was put into the shade and investment protection law fully detached from its original *raison d'être*.²²

North American Free Trade Agreement NAFTA

After some time, investment and related arbitral provisions were also included in some free trade agreements, such as NAFTA. Chapter 11 of NAFTA provides for standards of protection to Canadian, Mexican, and US investors investing in one of these States and allows those investors to commence arbitration if they believe those standards are not respected. It provides for the possibility of seizing ICSID and provides additional guarantees: the binding force and enforceability of the award rendered by the arbitral tribunals.²³

Transatlantic Trade and Investment Partnership TTIP

TTIP was a proposed trade agreement between the EU and the United States, with the aim of promoting trade and multilateral economic growth which eventually failed to materialize. It is one of the largest bilateral trade initiative ever being negotiated, not only because it involves the two largest economies in the world, but also because of its potential global reach in setting an example for future partners and agreements. The European Commission's TTIP team met the US government's negotiators on multiple occasions. They exchanged written proposals on TTIP and draft treaty texts in consultation with stakeholders. All EU text proposals are public.²⁴

²² NAGY, V. *Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty*. In BELOHLÁVEK, A. *Czech Yearbook of International Law*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-7-7, pg. 206

²³ DELANEY J., MAGRAW, B. *Procedural Transparency*. The Oxford Handbook of International Investment Law. 2008. DOI: 10.1093/oxfordhb/9780199231386.013.0019, pg. 741-750

²⁴ *TTIP – a trade agreement between the European Union and the United States*. Government of the Netherlands. [online]. [accessed on 20.3.2019]. available at <https://www.government.nl/topics/ttip/negotiations-ttip>

Due to increasing resistance, especially in Western European countries, to negotiations with the United States, where investment protection and the ISDS mechanism have become one of the most criticized parts, the Commission announced a suspension of investment negotiations in June 2014 and announced a public consultation on the TTIP investment chapter and almost 150 000 responses were received.²⁵ In November 2015, the Commission presented a proposal for a final version in which the ISDS section underwent a radical change. It was replaced by a new mechanism that will be further discussed in Chapter 5.3.

Trans Pacific Partnership TPP/CPTPP

While the US withdrew from the TPP on 21 January 2017, thus bringing to an end the prospect of the twelve-nation trade deal that had originally been envisaged, the TPP is now being pursued by the remaining eleven nations²⁶ in the form of a Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), with a view to maintaining the balance seen to be inherent in the TPP and protecting state rights to regulate.²⁷

On December 30, 2018 the CPTPP entered into force among the first six countries to ratify the agreement – Canada, Australia, Japan, Mexico, New Zealand, and Singapore. On January 14, 2019, the CPTPP entered into force for Vietnam.²⁸

While the EU approach and specifically assessed by CETA represent a break with traditional ISDS, this mechanism is a solid part of other regional multilateral

²⁵ SVOBODA, O. *Investment Court System: European Union's Abrupt Divorce with Investment Arbitrage*. Právník 4/2019, Prague, AV ČR. ISSN: 0231-6625, pg. 393

²⁶ The countries concerned are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

²⁷ SUSLER, O., WILSON, T. *Restoring Balance in Investor State Dispute Settlement: Addressing Treaty Shopping and Indirect Expropriation Claims and Consistent Approaches to Decision-Making*. The International Journal of Arbitration, Mediation and Dispute Management. Volume 84 Issue 1 February 2018. ISSN: 0003-7877, pg. 38

²⁸ *What is the CPTPP?* Government of Canada. [online]. [accessed on 20.3.2019]. available at <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng>

initiatives, such as the Comprehensive and Progressive Transparency Agreement (CPTPP). These contradictory visions lead the ISDS to a historic intersection.²⁹

Comprehensive Economic and Trade Agreement CETA

CETA is a progressive free trade agreement which covers virtually all sectors and aspects of Canada-EU trade in order to eliminate or reduce barriers. For example, prior to CETA's entry into force, only 25 percent of EU tariff lines on Canadian goods were duty-free. With CETA, 98 percent of EU tariff lines are now duty-free for Canadian goods.³⁰ Some believe that the recent developments suggest that the internationalization of free trade cannot be halted. Though after a tumultuous process, the CETA was signed.³¹ CETA is currently applied on a provisional basis, as the ratification by the individual EU Member States is still pending.

The European Parliament gave its consent to CETA on 15 February 2017. Pending Member States' ratification, mixed agreements are applied provisionally. The Council adopted a decision on provisional application on 28 October 2016. This took effect on 21 September 2017 and applies to the majority of CETA provisions, except for a few related mainly to investment.³² Areas that are not yet in force are investment protection, investment market access for portfolio investment (but market access for

²⁹ SVOBODA, O. *Investment Court System: European Union's Abrupt Divorce with Investment Arbitrage*. *Právník* 4/2019, Prague, AV ČR. ISSN: 0231-6625, pg. 404

³⁰ *CETA: A progressive trade agreement*. Government of Canada. [online]. [accessed on 20.3.2019]. available at <https://www.international.gc.ca/gac-amc/campaign-campagne/ceta-aecg/index.aspx?lang=eng>

³¹ NAGY, V. *Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty*. In BELOHLÁVEK, A. *Czech Yearbook of International Law*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-7-7, pg. 198

³² *EU-Canada Comprehensive Economic and Trade Agreement*. [online]. [accessed on 20.3.2019]. available at <http://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-ceta>

foreign direct investment is an exclusive EU competence) and the Investment Court System.³³

1.3. Bilateral Investment Treaties

Bilateral investment treaties or investment protection agreements became Common during the 1980s and 1990s as a means of encouraging capital investment in developing markets. Capital exporting states (including the United States, most Eastern European states, and Japan) were the earliest and most vigorous proponents of the negotiation of BITs, principally with countries in developing regions. More recently, states from all regions of the world and in all stages of development have entered into BITs.³⁴ The initial purpose of these treaties was to project certain constitutional requirements to the level of international disciplines. There was no global agreement and especially no uniformity as to the investment protection standards. The major turning point was when even developed democracies started to give concluding bilateral investment treaties.³⁵

Since the first BIT was signed by Germany and Pakistan in 1959³⁶, more than 2500 such treaties had been listed with the U.N. Conference on Trade and Development (UNCTAD).³⁷ This BIT provided for a dispute settlement mechanism in the event of disputes as to the interpretation or application of the treaty, specifying consultation between the state parties for the purpose of finding a solution in a spirit of friendship. If no solution was possible, the dispute was to be submitted to the ICJ if

³³ *CETA Explained*. European Commission [online]. [accessed on 20.3.2019]. available at http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/index_en.htm

³⁴ BORN, G., *International Arbitration, Cases and Materials*. Kluwer Law International BV, The Netherlands, 2011, ISBN: 978-90-411-3458-5, pg. 40

³⁵ NAGY, V. *Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty*. In BELOHLÁVEK, A. *Czech Yearbook of International Law*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-7-7, pg. 206

³⁶ *BIT Germany - Pakistan (1959)*, signed on 25 November 1959

³⁷ CHEN, L. *An Introduction to Contemporary International Law. A Policy Oriented Perspective*. Oxford University Press, 2015. ISBN: 978-0-19-022798-2, pg. 140

both parties so agreed, or to an ad hoc arbitration tribunal upon the request of either parties. This model of dispute settlement was largely superseded after the rise of investment treaties with investor state arbitration provisions.³⁸

Most BITs provide significant substantive protections for investments made by foreign investors, including guarantees against expropriation and denials of fair and equitable treatments. BIT also frequently contain provisions that permit foreign investors to require international arbitration, typically referred to as „investor-state arbitrations“ of specified categories of investment disputes with the host state – including the absence of a traditional contractual arbitration agreement with the host state.³⁹

The types of claims permitted under bilateral investment treaties include unfair treatment vis-à-vis domestic competitors, and arbitrary or unjust treatment by an instrumentality of the host state.⁴⁰The specific provision for ICSID arbitration is may, however, vary. For example, China has notified the ICSID that the Chinese government will only consider submitting to the jurisdiction of the ICSID disputes over compensation resulting from expropriation and nationalization under Article 25(4)⁴¹. However, since a large portion of all cases brought before the ICSID over the years have in fact demanded compensation for nationalization and expropriation, China has not effectively eliminated the protection of the Convention.⁴²

³⁸ POLANCO, R. *The Rise of and Backlash against Investor–State Arbitration*. In *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* Cambridge University Press, 2019. oi:10.1017/9781108628983.003, pg. 32

³⁹ BORN, G., *International Arbitration, Cases and Materials*. Kluwer Law International BV, The Netherlands, 2011, ISBN: 978-90-411-3458-5, pg. 40

⁴⁰ CHEN, L. *An Introduction to Contemporary International Law. A Policy Oriented Perspective*. Oxford University Press, 2015. ISBN: 978-0-19-022798-2, pg. 142

⁴¹ This article provides that any contracting state may, at the time of ratification, acceptance, or approval of the convention or at any time thereafter notify the ICSID of the class or classes of disputes that it will or will not consider submitting to ICSID jurisdiction.

⁴² TAO, J. *Arbitration Law and Practice in China*. Wolters Kluwer International BV, The Netherlands, 2008, ISBN: 978-90-411-2748-8, pg. 14

In addition to securing such grounds for investors, BITs may require certain actions of contracting states designed to encourage free trade or to promote other policy objectives. For example, a model BIT adopted by the U.S. government in 2012 includes provisions regarding environmental and labor standards, in addition to measures to encourage regulatory transparency within adopting states.⁴³

The possibility of „arbitration without privity“⁴⁴ is an important option in some international disputes and represents a substantial development in the evolution of international arbitration. In addition, many BITs contain provisions dealing with the finality and enforceability of international arbitration awards, issued pursuant to the treaty.⁴⁵ Since many states have developed „model“ investment treaties and considering that the majority of the provisions on the protection of foreign investment are present in all modern BITs, there is certain uniformity both in the content and structure of BITs. The vast majority of contemporary BITs contain a dispute settlement clause granting foreign investors direct access to an international arbitral.⁴⁶

2. ICSID

2.1. Washington Convention

In the early 1960s, the World Bank began to work on an alternative approach to the settlement of investment disputes. The result of around four years of negotiations was the Convention on the Settlement of Investment Disputes establishing the

⁴³ CHEN, L. *An Introduction to Contemporary International Law. A Policy Oriented Perspective*. Oxford University Press, 2015. ISBN: 978-0-19-022798-2, pg. 142

⁴⁴ Jan Paulsson coined the phrase "Arbitration without privity" to express a paradigm shift in the nature of arbitral consent. Although arbitration is always consensual, the typical model – in which the parties agree to arbitrate their disputes – now coexists with other models in which consent is established through a complex, multi-stepped process. This will be further examined in Chapter 3.

⁴⁵ BORN, G., *International Arbitration, Cases and Materials*. Kluwer Law International BV, The Netherlands, 2011, ISBN: 978-90-411-3458-5, pg. 40

⁴⁶ BRABANDERE, E. *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications*. Cambridge University Press, United Kingdom, 2014. ISBN: 978-1-107-06687-8, pg. 25

International Centre for Settlement of Investment Disputes (ICSID).⁴⁷ Other arbitration rules and institutions were already in place or soon would be, though they did not specifically focus on arbitrations by investors against States. The ICSID Convention provides investors with an avenue to initiate an arbitration against the State not only for a breach of contract, but for a breach of any legal instrument, including contract, treaty, or even national investment law, that provides for the resolution of investment disputes by arbitration under the Convention.⁴⁸ By the mid-1970s, the inclusion of ICSID arbitration clauses was a common feature in investment contracts, and a dozen domestic investment promotion law were enacted with reference to the ICSID Convention.⁴⁹

The International Centre for Settlement of Investment Dispute (ICSID) was established on 14 October 1966 to provide facilities for the conciliation and arbitration of investment disputes between states and nationals of other states.⁵⁰ ICSID Center is the most transparent of the commonly used international arbitration institutions and rules. The facilities were established under the auspices of the International Bank for Reconstruction and Development (IBRD).⁵¹

ICSID does not itself conciliate or arbitrate investment disputes. Rather, conciliation commissions and arbitral tribunals may be constituted for particular disputes in accordance with the provisions of the ICSID Convention. The ICSID Secretariat maintains the Panels of Conciliators and Arbitrators and provides

⁴⁷ POLANCO, R. *The Rise of and Backlash against Investor–State Arbitration*. In *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* Cambridge University Press, 2019. oi:10.1017/9781108628983.003, pg. 32

⁴⁸ DELANEY J., MAGRAW, B. *Procedural Transparency*. The Oxford Handbook of International Investment Law. 2008. DOI: 10.1093/oxfordhb/9780199231386.013.0019, pg. 725

⁴⁹ POLANCO, R. *The Rise of and Backlash against Investor–State Arbitration*. In *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* Cambridge University Press, 2019. oi:10.1017/9781108628983.003, pg. 32

⁵⁰ *ICSID Convention* Article 25(1).

⁵¹ TAO, J. *Arbitration Law and Practice in China*. Wolters Kluwer International BV, The Netherlands, 2008, ISBN: 978-90-411-2748-8, pg. 14

institutional support to the initiation and conduct of conciliation and arbitration proceedings under the Convention. In essence, the ICSID Convention provides, *inter alia*, for a „self-contained“ framework for the arbitration of investment disputes, including provisions on the initiation and conduct of arbitration proceedings, the recognition and enforcement of awards, and the interpretation, revision, and annulment of awards.⁵²

The ICSID Secretariat maintains a register containing notices of intent to file an arbitral claim, notices of arbitration, and other important documents relating to disputes. The full register is not online but can be accessed by contacting the Secretariat's office directly. ICSID also posts the most recent development in each case on its website, regularly updating each case.⁵³

Demand for ICSID's dispute resolution services continued to grow in 2018 with a record 56 new registered cases, according to the latest edition of the bi-annual ICSID Caseload—Statistics. The 2018 figure surpasses the previous year's record of 53 registered cases. Overall, ICSID has administered 706 cases since the first was registered in 1972. Notably, ICSID has also seen growth in the number of cases administered under other sets of rules, such as those of the United Nations Commission on International Trade Law (UNCITRAL). In total, ICSID provided services for 20 cases governed by non-ICSID rules in 2018, compared to 13 the previous year. Fifteen of these cases applied the UNCITRAL Arbitration Rules.⁵⁴

2.2. Jurisdiction

The principal provision regarding the jurisdiction of the Centre is article 25(1) of the ICSID Convention: *The jurisdiction of the Centre extends to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent*

⁵² MACKENZIE, R., ROMANO, C. *Manual on International Courts and Tribunals*, Oxford University Press, 2nd edition, first published 2010, ISBN 978-0-19-954527-8, pg. 127

⁵³ DELANEY J., MAGRAW, B. *Procedural Transparency*. The Oxford Handbook of International Investment Law. 2008. DOI: 10.1093/oxfordhb/9780199231386.013.0019, pg. 730

⁵⁴ *ICSID Releases 2018 Caseload Statistics* [online]. [accessed on 18.3.2019]. available at <https://icsid.worldbank.org/en/Pages/News.aspx?CID=314>

*sub-division or agency of a Contracting State designated to the Centre by that state) and a national or another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*⁵⁵

The concept of jurisdiction encompasses the existence of a cause of action under an investment agreement, in addition to a valid legal dispute (*ratione materiae*); an examination as to whether the agreement covers the parties at hand (*ratione personae*); the existence of consent; as well as any preconditions that may need to be satisfied before submitting a dispute to arbitration, such as the exhaustion of local remedies.⁵⁶ The term „national of another Contracting State “ covers both natural and juridical persons. The Rules Governing the Additional Facility have expanded the application of ICSID’s facilities so as to include parties that do not meet the jurisdictional requirement of the ICSID Convention.⁵⁷

The 1965 Report on the ICSID Convention said, that the dispute must consent the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation“.⁵⁸ Upon ratification of the Conventions, states may notify ICSID of the classes of investment disputes that they would or would not consider submitting to the jurisdiction of the Centre.⁵⁹

2.3. Protected investment

One of the key features distinguishing commercial from investment arbitration is the precise nature of the activity under consideration. The protections and guarantees contained in BITs and international investment agreements are only affordable to

⁵⁵ *ICSID Convention* Article 25(1)

⁵⁶ BANTEKAS, I. *An Introduction to International Arbitration*. Cambridge: Cambridge University Press, 2015., ISBN: 781316275696, pg. 283

⁵⁷ MACKENZIE, R., ROMANO, C. *Manual on International Courts and Tribunals*, Oxford University Press, 2nd edition, first published 2010, ISBN 978-0-19-954527-8, pg. 135.

⁵⁸ *Ibid* pg. 126

⁵⁹ ICSID Convention, art. 25(4)

“investments”.⁶⁰ Direct investment is based on an economic definition. Under this definition, foreign direct investment is formally defined as ownership of property by a foreign resident to control the use of that property.⁶¹ Although a number of definitions of „investment“ were considered at the time of the negotiation of the ICSID Convention, none was agreed upon „given the essential requirement of consent by the parties“.⁶² It is left to the parties to determine which types of investments they wish to bring to ICSID.⁶³ Given that the contract between the investor and the host state will not specify whether the undertaking, or parts thereof, qualify as investments, this has to be assessed by reference to an applicable international agreement or the host state’s domestic laws, if any.⁶⁴

On one view, the fact that the Convention does not offer any definition should not be interpreted as allowing parties to define any operation as an „investment. That view suggests that the requirement of an investment is constitutional in nature under the Convention and has an objective meaning. Investment treaties typically define the term „investment“. The term „investment“ may also be defined by the law of the host State.⁶⁵ A number of ICSID tribunals have elaborated upon the definition of „investment“ for the purposes of art. 25. In *Salini v. Morocco*⁶⁶, the tribunals referred to certain criteria implicated by the concept of investment, including a certain duration,

⁶⁰ BANTEKAS, I. *An Introduction to International Arbitration*. Cambridge: Cambridge University Press, 2015., ISBN: 781316275696, pg. 286

⁶¹ ŠTURMA, P., BALAŠ, V. *Mezinárodní ekonomické právo*. 2. vydání. Praha: C.H. Beck, 2013, ISBN: 978-80-7179-069-3, pg. 346

⁶² MACKENZIE, R., ROMANO, C. *Manual on International Courts and Tribunals*, Oxford University Press, 2nd edition, first published 2010, ISBN 978-0-19-954527-8 pg. 126

⁶³ *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11

⁶⁴ BANTEKAS, I. *An Introduction to International Arbitration*. Cambridge: Cambridge University Press, 2015., ISBN: 781316275696, pg. 286

⁶⁵ MISTELIS, L. *Concise International Arbitration*. Kluwer Law International, 2010. ISBN: 978-90-411-2609-2, pg. 69

⁶⁶ *Salini v. Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 23 July 2011

regularity of profit and return, assumption of risk, substantial commitment, and a contribution to the economic development of the host state.

This approach has been followed by a number of other tribunals. Others, however, have treated it with more caution, with the tribunal in *Biwater Gauff v Tanzania*⁶⁷ observing that there was no basis for „overly strict“ application of the five *Salini* criteria in every case. The tribunal observed that strict application of such criteria „risks arbitrary exclusion of certain types of transaction from the scope of the Convention “. While foreign investment scholarship and case law suggests that the concept of “investment” requires the *Salini* criteria, contemporary BITs no longer place such limitation.⁶⁸ It is clear that, even if one accepts these criteria as relevant, their presence has to be evaluated in the entire circumstances of a given case. The terms in which the parties agreed that a given investment should be subject to the Centre’s jurisdiction are of primordial importance. Going beyond, or against, the parties’ agreement in that regard must be highly exceptional, if possible, at all.⁶⁹

2.4. Consent to jurisdiction and applicable law

The ICSID arbitration and conciliation rules provide that ICSID jurisdiction will be established once the parties to the dispute have voluntarily consented to submit to the ICSID for arbitration and/or conciliation. Once the consent has been given, the ICSID will have jurisdiction unless all the parties to the dispute agree to withdraw their

⁶⁷ *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No. ARB/05/22, paras 312, 314.

⁶⁸ BANTEKAS, I. *An Introduction to International Arbitration*. Cambridge: Cambridge University Press, 2015., ISBN: 781316275696, pg. 286

⁶⁹ MISTELIS, L. *Concise International Arbitration*. Kluwer Law International, 2010. ISBN: 978-90-411-2609-2, pg. 70

consent.⁷⁰ Neither party may revoke its consent unilaterally.⁷¹ States, when expressing consent to direct investment arbitration, may condition their consent and, for example, require foreign investors to exhaust local remedies, either generally or for a limited time period, or insert a „for-in-the-road“ clause which obliges investors to choose between international arbitration or domestic courts.⁷²

Consent to investment arbitration may be exhibited in three independent ways, namely by express stipulation in a contract between the host state and the foreign investor; by reference to a provision in the law (usually a foreign investment-related law) of the host state; and by express or implicit stipulation in a BIT or international investment agreement.⁷³

Express stipulation in a contract

Dispute resolution may be authorized by agreements between an entity and the host state as a condition of an investment.⁷⁴ Such consent can relate to future disputes or to a dispute that has already arisen.⁷⁵ Some tribunals have considered, based on the broad language contained in BIT dispute settlement class, that the foreign investor can bring claims for contract breaches against a state before an international tribunal. This may be as noted by the Ad Hoc Committee in *Vivendi I*: „whether there has been a

⁷⁰ TAO, J. *Arbitration Law and Practice in China*. Wolters Kluwer International BV, The Netherlands, 2008, ISBN: 978-90-411-2748-8, pg. 14

⁷¹ MACKENZIE, R., ROMANO, C. *Manual on International Courts and Tribunals*, Oxford University Press, 2nd edition, first published 2010, ISBN 978-0-19-954527-8 pg. 137. See Broches, *supra*, note 52 at 207.

⁷² DOLZER, R., SCHREUER, CH. *Principles of International Investment Law*. Oxford University Press, 2008, ISBN: 978-0199651801, pg. 214

⁷³ BANTEKAS, I. *An Introduction to International Arbitration*. Cambridge: Cambridge University Press, 2015., ISBN: 781316275696, pg. 298

⁷⁴ CHEN, L. *An Introduction to Contemporary International Law. A Policy Oriented Perspective*. Oxford University Press, 2015. ISBN: 978-0-19-022798-2, pg. 141.

⁷⁵ MISTELIS, L. *Concise International Arbitration*. Kluwer Law International, 2010. ISBN: 978-90-411-2609-2, pg.75

breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the concession contract, by the proper law of the contract.⁷⁶

Reference to a provision in the law

A second method is a special arbitration provision in the national law of the host State. The legal provision containing the host State's offer to arbitration must be in force at the time of its acceptance by the investor.

Stipulation in a BIT or international investment agreement

Many states have given consent to ICSID arbitration in investment treaties. Treaty based investment arbitrations currently outnumber contract-based arbitrations under the ICSID Convention.⁷⁷ Such treaties generally provide investors that qualify as a national of the other state broad guarantees against unfair and discriminatory treatment, expropriation, and currency transfer restrictions. This type of general consent to ICSID arbitration has also been included in the investment provisions of several multilateral treaties, including the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty.⁷⁸ In these cases, the arbitration provision represents only an offer of the host State to arbitration. In order to perfect the consent, the investor must accept the State's offer. The investor may accept the offer by simply instituting arbitration.⁷⁹

⁷⁶ *Compana de Aguas del Aconquija SA and Vivendi Universal v Argentina*, ICSID Case No. ARB/97/3, par. 96.

⁷⁷ BRABANDERE, E., *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications*. Cambridge University Press, United Kingdom, 2014. ISBN: 978-1-107-06687-8, pg. 8

⁷⁸ MACKENZIE, R., ROMANO, C. *Manual on International Courts and Tribunals*. Oxford University Press, 2nd edition, first published 2010, ISBN 978-0-19-954527-8, pg. 137

⁷⁹ MISTELIS, L. *Concise International Arbitration*. Kluwer Law International, 2010. ISBN: 978-90-411-2609-2, pg.75

For those cases registered in 2018, bilateral investment treaties were the primary instrument invoked (57%), followed by investment contracts between the investor and the host-State (17%), and the Energy Charter Treaty (10%). Other international treaties accounted for the remaining 16%.⁸⁰

Contract, treaty, or domestic legislation will specify, although perhaps not, the applicable governing law. Host states will naturally make every effort to put forward their domestic law, whereas investors will strive to be bound by a neutral law, such as *lex mercatoria* or general international law, or if the host's domestic law is unavoidable (presumably under pressure they will endeavor to insert suitable stabilization clauses. They effectively freeze the ability of the host state to undertake any legislative changes that produce legal effects on the terms of an agreement with an investor.⁸¹

2.5. Control mechanism

Given the denationalized character of administered internationalized investment arbitration, there is naturally no appeal to local courts, nor set aside proceedings, as is otherwise the case with commercial arbitration. Under this principle of judicial non-intervention, national courts will not review procedural orders or decisions of arbitrators.⁸² Due to the fact that the system excludes any judicial recourse, a minimal control mechanism was required in order to ensure the legitimacy of the arbitration process. For this reason, the post-award remedies were included.⁸³

⁸⁰ ICSID Releases 2018 Caseload Statistics [online]. [accessed on 18.3.2019]. available at <https://icsid.worldbank.org/en/Pages/News.aspx?CID=314>

⁸¹ BANTEKAS, I. *An Introduction to International Arbitration*. Cambridge: Cambridge University Press, 2015., ISBN: 781316275696, pg. 306

⁸² BORN, G., *International Arbitration, Cases and Materials*. Kluwer Law International BV, The Netherlands, 2011, ISBN: 978-90-411-3458-5

⁸³ COBUZ, A., CONSTANTIN, S. *Surviving an ICSID Award, Post-Award Remedies in ICSID Arbitration: A Perspective on Contracting State's Interests*. In BĚLOHLÁVEK, A. *Czech and Central European Yearbook of Arbitration*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-8-4, pg. 44, ICSID Convention, Art. 54 and 27

An ad hoc Committee is not a court of appeal. Yet being a mainly self-contained regime, ICSID's effectiveness requires a functioning internal control mechanism. The ICSID review system poses balance to the automatic recognition and enforcement of ICSID awards within the boundaries of the Contracting States and prohibition of any diplomatic protection.⁸⁴

A general condition for exerting any of the four remedies provided by the Convention is that the awards must be final. Preliminary decisions such as maintaining jurisdiction, cannot be subject to the remedy of annulment, since allowing such measures would seriously delay the whole proceedings.⁸⁵ The ICSID annulment mechanism was initially criticized, on the grounds that it permits unduly extensive appellate review, as well as possibilities for political influence; more recent commentary and experience has been generally favorable.⁸⁶

When a party challenges an ICSID award, the Convention empowers the Chairman of the Administrative Council of ICSID to appoint an ad hoc committee to review, and possibly to annul, awards; if an award is annulled it may be resubmitted to a new arbitral tribunal.⁸⁷ The drafter's intention to ensure the finality of an award can be seen from the choice of remedies offered by the ICSID Convention. In this respect, the only way to review an award is pursuant to the five specific remedies provided by the Convention, namely:⁸⁸

⁸⁴ COBUZ, A., CONSTANTIN, S. *Surviving an ICSID Award, Post-Award Remedies in ICSID Arbitration: A Perspective on Contracting State's Interests*. In BĚLOHLÁVEK, A. *Czech and Central European Yearbook of Arbitration*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-8-4, pg. 44

⁸⁵ In *SPP v. Egypt*, Egypt applied for annulment of the Tribunal's decision which upheld the jurisdiction that the Secretary-General refused stating that kind of decision is not an award for the purpose of Art. 53, but rather an interlocutory decision unable to trigger the annulment process.

⁸⁶ BORN, G., *International Arbitration, Cases and Materials*. Kluwer Law International BV, The Netherlands, 2011, ISBN: 978-90-411-3458-5, pg. 39

⁸⁷ *ICSID Convention*, Art. 52

⁸⁸ BANTEKAS, I. *An Introduction to International Arbitration*. Cambridge: Cambridge University Press, 2015., ISBN: 781316275696, pg. 320

- (i) Rectification (Article 49) – The Tribunal can rectify any clerical, arithmetical or similar error in its award.
- (ii) Supplementary decision (Article 49) – The Tribunal may interpret its award where there is a dispute between the parties as to the meaning or scope of the award rendered.
- (iii) Revision (Article 51) – The Tribunal may revise its award on the basis of a newly discovered fact of such a nature as to decisively affect the award.
- (iv) Annulment (Article 52) – An ad hoc Committee may fully or partially annul an award on the basis of one or more expressly and restrictively specified grounds.

Rectification

The standard for rectification has been assessed by the Tribunal of *Gold Reserve* who found that the purpose of the correction exception is to correct obvious omissions or mistakes and avoid a consequence where a party finds itself bound by an award that orders relief the tribunal did not intend to grant. The purpose is therefore to ensure that the true intentions of the tribunal are given effect in the award, but not to alter those intentions, and the legal analysis, modify reasoning or alter finding. Any purported correction that goes beyond the scope of the Tribunal's limited mandate in this regard is likely to be subject to challenge.⁸⁹

Interpretation

The essential prerequisite for the application for interpretation is the existence of a dispute about the scope and meaning of the award with some practical significance to the award's execution. A sheer argument concerning theoretical suggestions about the clarity of the award would not suffice for a successful application. This request is not time-limited with regard to the long-lasting investor – host State relations. It seems reasonable to submit the application to the very same tribunal that has rendered the original award⁹⁰. However, the precondition is the express willingness of the members

⁸⁹ *Gold Reserve v Bolivarian Republic of Venezuela*. ICSID Case No. ARB(AF)/09/1. Decision regarding the claimant's and the respondent's request for corrections, 16 December 2014, par. 38.

⁹⁰ *ICSID Convention*, Article 50(2)

of the tribunal to take part in the procedure. The accessibility of the original tribunal becomes more complicated with the lapse of time. Therefore, the ICSID Arbitration Rules 51(2) provide for the constitution of a new Tribunal.⁹¹

Revision

The contingency of revision is always dependent on the new element of law or fact discovered which has objectively existed at the time of signature and transmission of the award. The new fact, however, must be decisive, it follows that it shall be able to change the award substantially, for example, the calculation of the damages or even matters relating to the jurisdiction.⁹² The right for application is time-limited for the parties barred by a subjective and an objective term of performance. The applicant shall make his request for revision within 90 days after the finding the decisive fact; but no later than three years after the date the award was dispatched to the parties.⁹³

2.6. Annulment

Annulment is a safeguard mechanism that protects the integrity of the law contained without addressing issues of substantive accuracy of awards. It is an exceptional remedy designed for specific causes. The aim of annulment is to nullify

⁹¹ COBUZ, A., CONSTANTIN, S. *Surviving an ICSID Award, Post-Award Remedies in ICSID Arbitration: A Perspective on Contracting State's Interests*. In BĚLOHLÁVEK, A. *Czech and Central European Yearbook of Arbitration*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-8-4, pg. 46

⁹² COBUZ, A., CONSTANTIN, S. *Surviving an ICSID Award, Post-Award Remedies in ICSID Arbitration: A Perspective on Contracting State's Interests*. In BĚLOHLÁVEK, A. *Czech and Central European Yearbook of Arbitration*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-8-4, pg. 46

⁹³ *ICSID Convention*, Article 49(1)

and invalidate an arbitral award.⁹⁴ Article 52(1) of the ICSID Convention provides just five conditions under which the ad hoc Committee may annul a tribunal's award.⁹⁵

(a) The Tribunal was not properly constituted. This ground is rarely invoked. Questions may arise from dissatisfaction in the manner in which challenges to arbitrators and alleged conflicts of interest have been handled.⁹⁶

(b) The Tribunal has manifestly exceeded its power. This includes a situation when a tribunal lacks competences. As stated in the ICSID Background Paper on Annulment, an ad hoc Committee could only annul an award for manifest excess powers related to jurisdiction if it is obvious, clear or self-evident, without the need for an elaborate analysis of the decisions.⁹⁷ Another example is a complete failure to apply the law to which a Tribunal is directed by Art. 42(1) of the ICSID Convention. If the derogation is manifest, it entails a manifest excess of power.⁹⁸

(c) There was corruption on the part of a member of the Tribunal. It is a serious problem. However, as stated by the World Bank, no case of corruption has ever been alleged in any of the annulment proceedings that have led to published decision.⁹⁹

⁹⁴ VIKTOROVA, N. *Annulment of Arbitral Awards on Investment Disputes between States and Foreign Investors*. n BĚLOHLÁVEK, A. *Czech and Central European Yearbook of Arbitration*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-8-4, pg. 298.

⁹⁵ CHEN, L. *An Introduction to Contemporary International Law. A Policy Oriented Perspective*. Oxford University Press, 2015. ISBN: 978-0-19-022798-2, pg. 142

⁹⁶ VIKTOROVA, N. *Annulment of Arbitral Awards on Investment Disputes between States and Foreign Investors*. n BĚLOHLÁVEK, A. *Czech and Central European Yearbook of Arbitration*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-8-4, pg. 307.

⁹⁷ *Updated background paper on annulment for the administrative council of ICSID*. World Bank, Washington, 2016. [online]. [accessed on 10.3.2019]. available at <https://icsid.worldbank.org/en/Documents/resources/Background%20Paper%20on%20Annulment%20April%202016%20ENG.pdf>

⁹⁸ VIKTOROVA, N. *Annulment of Arbitral Awards on Investment Disputes between States and Foreign Investors*. n BĚLOHLÁVEK, A. *Czech and Central European Yearbook of Arbitration*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-8-4, pg. 307.

⁹⁹ *Ibid*, pg. 308.

(d) There has been a serious departure from a fundamental rule of procedure. The ad hoc Committee in *Total S.A. v Argentine Republic*¹⁰⁰ stated that the violations may relate to the following: suitable opportunity for rebuttal, the right of defense, equality between the parties, deliberation among the members of the tribunal, the independence and impartiality of the members of the tribunal, and the proper handling of evidence and allocation of the burden of proof.

(e) The award has failed to state the reasons on which it is based. The ad hoc Committee in its decision in case *CMS Gas Transmissions Company v Argentine Republic*¹⁰¹ pointed out that annulment under the stated ground should only occur in a clear case. There should be two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision.

It should be noted that the grounds for annulment are exhaustive and restrictive. The most frequently used grounds for annulment of arbitral awards are improper constitution of the tribunal, manifest excess of power and failure to state reasons.¹⁰²

Procedure of annulment

The annulment constitutes a very limited exception to the principle of finality, thus being concerned only with the legitimacy of the process and not with the substantive suitability. To initiate the annulment procedure, any or both parties (separately or jointly) must file an application with the ICSID Secretary-General. This right can be waived after rendering the award, but this waiver must be done explicitly.¹⁰³ The application must identify the award to which it relates, indicate the

¹⁰⁰ *Total S.A. v Argentine Republic*. ICISD Case No ARB/04/01

¹⁰¹ *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8

¹⁰² VIKTOROVA, N. *Annulment of Arbitral Awards on Investment Disputes between States and Foreign Investors*. n BĚLOHLÁVEK, A. *Czech and Central European Yearbook of Arbitration*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-8-4, pg. 307.

¹⁰³ COBUZ, A., CONSTANTIN, S. *Surviving an ICSID Award, Post-Award Remedies in ICSID Arbitration: A Perspective on Contracting State's Interests*. In BĚLOHLÁVEK, A. *Czech and*

date of the application, state in detail the grounds on which it is based pursuant to Article 52(1) of the ICSID Convention and be accompanied by the payment of a fee for lodging the application.¹⁰⁴

An application to annul an award will be referred to a three-member ad hoc committee appointed by the Chairman of the Administrative Council. The committee members must be drawn from the Panel of Arbitrators with limitations on who may become a member of a Tribunal.¹⁰⁵ There is no comparable annulment procedure under the Additional Facility Rules.¹⁰⁶

The fee for lodging an application for annulment is currently USD 25 000. The application must be filed within 120 days after the date on which the award was rendered. In case of corruption on the part of a Tribunal member, 129 days after discovery of the corruption, and in any event within three years after the date on which the award was rendered.¹⁰⁷

In practice, few investor-state arbitral awards have been annulled under the ICSID system, although an increasing number of cases have been appealed under Article 52

Central European Yearbook of Arbitration. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-8-4, pg. 46

¹⁰⁴ Rules of Procedure for Arbitration Proceedings (Arbitration Rules) Rule 50(1)

¹⁰⁵ *ICSID Convention* Article 52(3).

¹⁰⁶ MACKENZIE, R., ROMANO, C. *Manual on International Courts and Tribunals*. Oxford University Press, 2nd edition, first published 2010, ISBN 978-0-19-954527-8, pg. 133.

¹⁰⁷ COBUZ, A., CONSTANTIN, S. *Surviving an ICSID Award, Post-Award Remedies in ICSID Arbitration: A Perspective on Contracting State's Interests*. In BĚLOHLÁVEK, A. *Czech and Central European Yearbook of Arbitration*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-8-4, pg. 48.

over the past decade.¹⁰⁸ Some believe that the small number of annulments may speak to the quality and finality of ICSID tribunals for the settlement of disputes.¹⁰⁹

3. Dispute settlement mechanisms between investors and states

3.1. National Courts and Diplomatic protection

Under traditional international law, nation-states were held to be immune from claims by private parties. Until the last few decades, an individual or corporation investing in a State could not bring a claim against that State in an international forum alleging a breach of international law unless that right was expressly granted by the host State to the investor, which was an extremely rare occurrence.¹¹⁰ Conventionally available dispute settlement mechanisms, in this case the domestic courts of the host state coupled with the possibility of the home state of the investor being able to resort to diplomatic protection, is of limited usefulness to settle investment disputes.¹¹¹

In those circumstances where private claims are settled on the international level through the exercise of diplomatic protection, the individual is nevertheless first required to exhaust all local remedies available in the host state.¹¹² From the perspective of the foreign investor, the obligation to submit disputes with the host state

¹⁰⁸ *Background Paper on Annulment for the Administrative Council of ICSID* 10.8.2012, available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDNewsLettersRH&actionVal=ShoDocument&DocId=DCEVENTSII>.

¹⁰⁹ CHEN, L. *An Introduction to Contemporary International Law. A Policy Oriented Perspective*. Oxford University Press, 2015. ISBN: 978-0-19-022798-2

¹¹⁰ DELANEY J., MAGRAW, B. *Procedural Transparency*. The Oxford Handbook of International Investment Law. 2008. DOI: 10.1093/oxfordhb/9780199231386.013.0019, pg.725

¹¹¹ BRABANDERE, E., *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications*. Cambridge University Press, United Kingdom, 2014. ISBN: 978-1-107-06687-8, pg. 19

¹¹² *International Law Commission. Draft Articles on Diplomatic Protection*. Report on the Work of its 58th Session (1 May-9 June and 3 July-11 August 2006), General Assembly official Records, 61st Session, Supplement no. 10, UN Doc A/61/10/2006, [online]. [accessed on 15.3.2019]. available at <https://www.refworld.org/pdfid/525e7929d.pdf>

to the domestic courts of that state is, for reasons related to a perceived fear of lack of independence or bias of these tribunals, not attractive. Even the resort to diplomatic protection is a cumbersome, lengthy and uncertain procedure.¹¹³

Customary law for the protection of aliens is well developed. Influenced by Emmerich de Vattel's theory that an injury to a national abroad is an injury to the state of nationality, traditional international law regards a state's competence to protect its nationals as independent of the individual's interest, the state thus enjoys discretion whether to espouse claims on behalf of its nationals at the international level.¹¹⁴ The home state of the foreign investor can't then „espouse the claim“ of its national and bring a claim under international law against the host state. The state of the individual's nationality is acting in the right to see the law respected for its nationals. The conflict between the foreign investor and the host state is transformed into an interstate conflict between the host state and the state of nationality of the foreign investor. The individual therefore has no right to diplomatic protection and is thus dependent on the political discretion of its government.¹¹⁵

As noted by the ICJ in the *Barcelona Traction* case: „*Within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks for, for it is its own right that the State is asserting. The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power.*“¹¹⁶

¹¹³ BRABANDERE, E., *Ibid.*, pg. 20

¹¹⁴ CHEN, L. *An Introduction to Contemporary International Law. A Policy Oriented Perspective.* Oxford University Press, 2015. ISBN: 978-0-19-022798-2, pg. 242

¹¹⁵ BRABANDERE, E., *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications.* Cambridge University Press, United Kingdom, 2014. ISBN: 978-1-107-06687-8, pg. 21

¹¹⁶ *Barcelona Traction, Light and Power Company, Limited*, Judgment, International Court of Justice 5 February 1970, pars. 78-79

3.2. Arbitration

The inclusion of arbitration provisions in some concession contracts and investment agreements between individual or corporate investors and the host State provided an avenue for claims to be brought by the foreign investor directly against the host State. The entity against whom the investor can bring an arbitration depends on the terms and on its parties: as the host State is not always a party to the agreement, the arbitration is brought against the State entity or a State-owned or partly owned company that is a party to the Agreement.¹¹⁷

The rise of investor-state arbitration is a process that started with the making of the ICSID Convention concluded in 1965, an agreement that was slowly followed by consent to arbitrate investor-state disputes in bilateral investment treaties concluded in the late 1960s and 1970s. Only by the end of the 1980s did the number of BITs containing investor-state dispute settlement provisions increased dramatically. In the mid-1990s, investment chapters providing for investor-state arbitration started to be included in certain free trade agreements, following the example of the NAFTA.¹¹⁸

Aggrieved investors may bring claims in forum such as ICSID. Other Common arbitration forums include the U.N. Commission on International Trade Law (UNCITRAL), Stockholm Chamber of Commerce, and International Chamber of Commerce. Importantly, although the designated forum will provide the rules and institutional Framework governing a particular arbitration, the proceedings may take place nearly anywhere in the world.¹¹⁹

As noted by the ICSID Arbitral Tribunal in *Maffezini v Spain*. „*International arbitration and other dispute settlement arrangement have replaced these older and frequently abusive practices of the past. These modern developments are essential,*

¹¹⁷ DELANEY J., MAGRAW, B. *Procedural Transparency*. The Oxford Handbook of International Investment Law. 2008. DOI: 10.1093/oxfordhb/9780199231386.013.0019, pg. 725

¹¹⁸ POLANCO, R. *The Rise of and Backlash against Investor–State Arbitration*. In *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* Cambridge University Press, 2019. oi:10.1017/9781108628983.003, pg. 29

¹¹⁹ CHEN, L. *An Introduction to Contemporary International Law. A Policy Oriented Perspective*. Oxford University Press, 2015. ISBN: 978-0-19-022798-2, pg. 142

however, to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded. ¹²⁰

In comparison with diplomatic protection, arbitration has several benefits for the claimant: the investor (and not the home state) has the procedural right to institute arbitration and has exclusive control of the claim; and if the damages are awarded, they are calculated without considering inter-state concerns, and paid directly to the individual claimant. ¹²¹ Because, there is no automatic access to an international dispute settlement mechanism, even when foreign investors are given direct rights under a certain treaty, the express consent of the states is required, as is the case in general international law. ¹²²

3.3. Mediation or Conciliation

Mediation is frequently likened to conciliation. In fact, both the ECT Guide¹²³ and PCA Conciliation Rules¹²⁴ specifically use “mediation” and “conciliation” interchangeably. While these two forms of dispute settlement are similar, they are not entirely identical. One key difference is their level of institutionalization, and the extent to which the third party is empowered to suggest terms of settlement. Mediation

¹²⁰ *Emilio Augustin Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000

¹²¹ POLANCO, R. *The Rise of and Backlash against Investor–State Arbitration*. In *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* Cambridge University Press, 2019. oi:10.1017/9781108628983.003, pg. 30

¹²² BRABANDERE, E., *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications*. Cambridge University Press, United Kingdom, 2014. ISBN: 978-1-107-06687-8, pg. 23

¹²³ *Energy Charter Secretariat Organisation. Guide on Investment Mediation*. [online]. [accessed on 20.3.2019]. available at <https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>

¹²⁴ The Permanent Court of Arbitration has adopted its own Optional Conciliation Rules and Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment, both of which are based primarily on the UNCITRAL Conciliation Rules. The PCA is also available to provide support in conciliations under the UNCITRAL Conciliation Rules.

is easier to distinguish from arbitration and judicial settlement. Mediation is typically facilitative, rather than evaluative, “interests-based” rather than a “rights-based”, and likely to be less formal, placing emphasis upon communication between the parties.¹²⁵

The concept of finding amicable solutions is not new, it is found in many multilateral investment treaties, often referred to as the "amicable settlement period" or "cooling-off period". For example, Article 10.15 of the Central American Free Trade Agreement states that "the claimant and the respondent should initially seek to resolve the [investment] dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures such as conciliation and mediation." Article 26 of the Investment Agreement for the COMESA Common Investment Area¹²⁶ requires a six-month cooling off period, during which the parties "shall seek the assistance of a mediator", unless an alternative method of dispute settlement is agreed upon.¹²⁷

3.4. ICSID Arbitration and Conciliation

Under the Convention, ICSID provides facilities for conciliation and arbitration of investment disputes between contracting states and individuals and companies that are nationals of other contracting states.

¹²⁵ SHIRLOW, E. *The Rising Interest in the Mediation of Investment Treaty Disputes, and Scope for Increasing Interaction between Mediation and Arbitration* [online]. [accessed on 10.2.2019]. available at <http://arbitrationblog.kluwerarbitration.com/2016/09/29/the-rising-interest-in-the-mediation-of-investment-treaty-disputes-and-scope-for-increasing-interaction-between-mediation-and-arbitration/>

¹²⁶ *Investment Agreement for the COMESA Common Investment Area. (Common Market for Eastern and Southern Africa)*. [online]. [accessed on 20.3.2019]. available at <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/rei120.06tt1.pdf>

¹²⁷ *Investor-State Mediation*. ICSID. [online]. [accessed on 10.3.2019]. available at <https://icsid.worldbank.org/en/Pages/process/adr-mechanisms--mediation.aspx>

Arbitration

One of the most unique characteristics of the ICSID arbitration system is its autonomous nature. ICSID arbitration is known as self-contained arbitration because local courts in any particular State have no role in the ICSID proceedings.¹²⁸ Arbitration governed by the Washington Convention is therefore held under the ICSID Arbitration Rules and the Additional Facility Rules that contain all the necessary provisions required for the arbitration of disputes.¹²⁹ The difference is the fact that the ICSID Additional Facility Rules provide for arbitration in the circumstance where only the State of the investor or the respondent State is a party to the ICSID Convention. The ICSID Arbitration Additional Facility Rules are very similar to the ICSID Rules of Procedure quoted above.¹³⁰ The latest amendments of the Additional Facility Rules adopted by the Administrative Council of the Centre came into effect on April 10, 2006.¹³¹ As in past years, the majority of new cases were instituted under the ICSID Convention Arbitration Rules (49 cases), followed by the Additional Facility Rules (six cases) and the ICSID Convention Conciliation Rules (one case).¹³²

The arbitration commences with the submission of the request for arbitration. It shall be addressed to the Secretary-General who may register or refuse the request. As soon as possible after the registration, the Tribunal of a single arbiter or of uneven number of arbitrators is constituted. Once the tribunal has been formed, the arbitration shall be carried under the provisions of the ICSID Convention. The award is rendered

¹²⁸ *ICSID Convention*, Art. 53

¹²⁹ BALAŠ, V., KLÁN, T. *Transparentnost v řešení sporů v mezinárodním ekonomickém právu. Nové trendy odpovědnosti a řešení sporů v mezinárodním právu (vliv nestátních aktérů): studie z mezinárodního práva*. 1st edition. Prague: Charles University in Prague, Faculty of Law, 2012, ISBN: 978-80-87146-73-6, pg. 117

¹³⁰ DELANEY J., MAGRAW, B. *Procedural Transparency*. The Oxford Handbook of International Investment Law. 2008. DOI: 10.1093/oxfordhb/9780199231386.013.0019, pg. 734

¹³¹ *ICSID Additional Facility Rules*. Introduction. [online]. [accessed on 17.3.2019]. available at <http://icsidfiles.worldbank.org/icsid/icsid/StaticFiles/facility/intro.htm>

¹³² *ICSID Releases 2018 Caseload Statistics* [online]. [accessed on 18.3.2019]. available at <https://icsid.worldbank.org/en/Pages/News.aspx?CID=314>

by the majority of votes and shall deal with every question submitted to the Tribunal and shall state the reasons upon which it is based.¹³³

The parties to ICSID arbitration will typically rely on the ICSID Convention, as well as ICSID's Arbitration Rules. Article 44 of the ICSID Convention allows parties, if they so agree, to choose other procedural rules.¹³⁴ The Secretary-General of ICSID also in certain circumstances acts as the appointing authority of arbitrators for ad hoc arbitrations. This has mostly been done in the context of agreements providing for arbitration under the 1976 Arbitration Rules of the United Nations Commission on International Trade Law.¹³⁵

The internationalized nature of investment tribunals means that they are not bound by the judgment or decision of a national court pertinent to the arbitral proceedings under consideration and under the same cause of action. As a result, ICSID tribunals possess competence-competence jurisdiction to decide all matters falling within the sphere of the case at their disposal, constrained no doubt by the ICSID Convention and the terms of the parties' agreements (BIT, contract and, or, national legislation).¹³⁶ An award must be recognized by all ICSID Contracting States and pecuniary obligations imposed by an award are enforceable as a final judgment of the courts of a Contracting State. Due to the self-contained, de-localized nature of the system the only means of appeal available against an ICSID award are the remedies explicitly provided in the ICSID Convention.¹³⁷

¹³³ *ICSID Convention*, Article 36, 37 and 48.

¹³⁴ BANTEKAS, I. *An Introduction to International Arbitration*. Cambridge: Cambridge University Press, 2015., ISBN: 781316275696, pg. 318

¹³⁵ MACKENZIE, R., ROMANO, C. *Manual on International Courts and Tribunals*, Oxford University Press, 2nd edition, first published 2010, ISBN 978-0-19-954527-8, pg. 128.

¹³⁶ BANTEKAS, I. *An Introduction to International Arbitration*. Cambridge: Cambridge University Press, 2015., ISBN: 781316275696, pg. 318

¹³⁷ *ICSID Convention*, Art. 53

Conciliation

The ICSID Convention and the ICSID Additional Facility Rules also envision the settlement of investment disputes through conciliation proceedings. ICSID conciliation and arbitration have a number of similarities. First, consent to ICSID conciliation or arbitration is binding upon the parties and may not be withdrawn unilaterally. While the drafters decided to create largely identical systems, there are, given the nature of the proceedings, considerable differences between the conciliation and arbitration frameworks. The most notable one is reflected in the functions and powers of conciliation commissions and arbitral tribunals.¹³⁸

In contrast to an arbitral tribunal, which is empowered to decide a dispute in accordance with the applicable law, the role of a conciliation commission is to clarify the disputed issues and assist the parties in reaching a settlement. The conciliation commission is to issue a non-binding report which may contain recommendations for settlement.¹³⁹

A party commences a conciliation under the ICSID Convention by submitting a request for conciliation to the Secretary-General. The conditions for access to ICSID are contained in Article 25 of the ICSID Convention. There may be further conditions in the instrument containing the parties' consent to conciliation. As soon as a party has filed a request for conciliation with the prescribed lodging fee, ICSID sends the request to the other party and reviews the request to determine whether it can be registered. This screening process is mandated by Article 28(3) of the ICSID Convention.¹⁴⁰

Parties should agree on the number of conciliators on a Commission and the method of their appointment. If they cannot agree, ICSID's default mechanism will apply.¹⁴¹ The Convention sets forth certain requirements regarding the qualifications

¹³⁸ NITSCHKE, F. *The ICSID Conciliation Rules in Practice. Forthcoming, Mediation in International Commercial and Investment Disputes*. Oxford University Press, 2018, pg. 6

¹³⁹ *Ibid.*

¹⁴⁰ *How to file a Request for Conciliation - ICSID Convention Conciliation* [online]. [accessed on 15.2.2019]. available at <https://icsid.worldbank.org/en/Pages/process/How-to-file-a-Request-ICSID-Convention-Conciliation.aspx>

¹⁴¹ *ICSID Convention Article 29, ICSID Conciliation Rules 2 and 3.*

of appointees to ICSID conciliation Commissions, but the parties are otherwise free to choose whomever they wish. All ICSID conciliators must be persons of high moral character, of recognized competence in the fields of law, commerce, industry or finance and who may be relied upon to exercise independent judgment. There is no nationality requirement in conciliation cases.¹⁴²

The Commission must be constituted as soon as possible after registration of a request for conciliation. It is constituted on the date the Secretary-General notifies the parties that all conciliators have accepted their appointments.¹⁴³

The goal of the Commission is to clarify the issues in dispute between the parties and to endeavor to bring about agreement on mutually acceptable terms. The parties must cooperate with the Commission in good faith to achieve this goal. To that end, the Commission may ask the parties for relevant documents or explanations, hear witnesses and experts, make site visits and issue recommendations at any time during the proceeding. It may also request evidence from other persons.¹⁴⁴

In numerous cases, a settlement had been agreed between the parties and proceedings discontinued by agreement, in some cases proceedings were discontinued where payment required under the ICSID Regulations were not duly made.¹⁴⁵

3.5. Proposal for Amendment of the ICSID Rules

In March 2019, the ICSID Center released an update to the proposed amendment of its procedural rules for resolving international investment disputes. The proposed changes are the most comprehensive in ICSID's history, encompassing the

¹⁴² *ICSID Convention* Article 14(1) and Article 31(2)

¹⁴³ *ICSID Conciliation Rule 6(1)*

¹⁴⁴ *Conciliation Procedure - ICSID Convention Conciliation* [online]. [accessed on 15.2.2019]. available at <https://icsid.worldbank.org/en/Pages/process/Convention-Conciliation-Procedure.aspx>

¹⁴⁵ See Administrative and Financial Regulations, pg 14

existing rules for arbitration, conciliation and fact-finding, and introducing a new set of mediation rules.¹⁴⁶

Numerous changes are suggested to reduce the time and cost of proceedings; for example, making electronic filing the default and enhancing case management by tribunals. Under the proposals, parties would also be able to opt into an expedited arbitration process that would reduce the length of proceedings by half. The proposals also address a range of topics that have been raised by States, legal professionals and other stakeholders since the rule amendment project began in late 2016. These topics include transparency in the conduct and outcome of proceedings (for example, publication of awards, decisions and orders); disclosure requirements for third-party funders; and enhanced declarations of independence and impartiality for arbitrators.¹⁴⁷

4. Criticism of investment arbitration

The motive of the states for giving this consent to investor-state arbitration is often the desire to attract foreign investors, who demand certainty that their economic resources will be safeguarded from hostile actions by the host government.¹⁴⁸ However, while the ability of foreign investors to choose investor state arbitration as a mechanism for settling investment disputes has gained relevance, it has also come under progressively more scrutiny. The criticism can be classified into two main groups, those that question the necessity of the system as such and those focused on the functioning of the arbitral procedure.¹⁴⁹

¹⁴⁶ *Updated Proposals for Amendment of the ICSID Rules* [online]. [accessed on 18.3.2019]. available at <https://icsid.worldbank.org/en/Pages/News.aspx?CID=317>

¹⁴⁷ *Ibid.*

¹⁴⁸ CHEN, L. *An Introduction to Contemporary International Law. A Policy Oriented Perspective*. Oxford University Press, 2015. ISBN: 978-0-19-022798-2, pg. 141.

¹⁴⁹ POLANCO, R. *The Rise of and Backlash against Investor–State Arbitration*. In *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* Cambridge University Press, 2019. oi:10.1017/9781108628983.003, pg. 46

Critics point out that the current system allows foreign investors to give private arbitrators the ability to decide the legality of sovereign acts, and in practice contracting out the judicial function that is embedded in public law. Some have declared that we witness the silent rise of a powerful international investment regime that has ensnared hundreds of countries and put corporate profit before human right and environment. There were concerns about the independence and impartiality of arbitrators, others have stressed the imbalances of the system against developing host states, as they are subject to most claims and at a higher level than their proportion in global investments.¹⁵⁰

The arbitration community cannot afford to be complacent about the criticism levelled at investment arbitration, nor the requirement for reform. Concerns about infringements of state sovereignty, and proceedings brought in abuse of process, might to some extent be mollified by the inclusion of tighter definitions in treaty arrangement and responsible tribunal decisions. However, concerns might remain about how consistently such provisions might be interpreted or how consistently approaches to abuse of process might be applied by arbitral tribunals.¹⁵¹

UNCTAD has summarized some of the most significant problems of investor-state arbitration: transparency, as both disputing parties can keep proceedings fully confidential even in cases in which the dispute involves public interest matters; nationality planning, as investors may gain access to arbitration using corporate structuring; consistency of arbitral decisions, as arbitral tribunals have had divergent legal interpretations of identical or similar treaty provisions; limited powers to correct erroneous decisions, as there is generally no appeal mechanism and ICSID annulment committees have very limited review powers; arbitrators' independence and impartiality as some disputing parties perceive them as biased or profiting from the system through repeated appointments; and financial stakes, the high cost of arbitration is a concern,

¹⁵⁰ POLANCO, R. *The Rise of and Backlash against Investor–State Arbitration*. In *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* Cambridge University Press, 2019. oi:10.1017/9781108628983.003, pg. 47

¹⁵¹ SUSLER, O., WILSON, T. *Restoring Balance in Investor State Dispute Settlement: Addressing Treaty Shopping and Indirect Expropriation Claims and Consistent Approaches to Decision-Making*. *The International Journal of Arbitration, Mediation and Dispute Management*. Volume 84 Issue 1 February 2018. ISSN: 0003-7877, pg. 50

especially small and medium-size enterprises and States.¹⁵² Although the costs are affordable to large multinational corporations, they are prohibitive to developing countries, which ultimately have to reduce their development budgets, e.g. in education or healthcare, in order to meet such costs.¹⁵³

4.1. No appeal in substantive issues

Substantive mistakes of arbitral tribunals, if they arise, cannot be corrected effectively through existing review mechanisms. ICSID annulment committees have very limited review powers. Furthermore, a committee that is individually created for a specific dispute may also disagree with committee(s) examining similar issues in other cases.¹⁵⁴ This issue is further explored in Chapter 5 of this thesis.

4.2. Transparency and public interest

The principle of transparency includes but is not limited to: public hearing and public access to documents used in court proceedings, the possibility of submissions by a third party (*amicus curiae*), not only other entities of international law, but also natural and legal persons, NGOs, experts, resp. expert groups and legal entities.¹⁵⁵

Although the transparency of the investor-state dispute settlement procedures has improved since the early 200s, proceedings can still be kept fully confidential, if

¹⁵² *Improving Investment Dispute Settlement: UNCTAD Policy*. IIA Issue Note, Issue 4, November 2017. [online]. [accessed on 17.3.2019]. available at https://unctad.org/en/PublicationsLibrary/diaepcb2017d8_en.pdf, pg. 6

¹⁵³ BANTEKAS, I. *An Introduction to International Arbitration*. Cambridge: Cambridge University Press, 2015., ISBN: 781316275696, pg. 320

¹⁵⁴ *Improving Investment Dispute Settlement: UNCTAD Policy*. IIA Issue Note, Issue 4, November 2017. [online]. [accessed on 17.3.2019]. available at https://unctad.org/en/PublicationsLibrary/diaepcb2017d8_en.pdf

¹⁵⁵ BALAŠ, V., KLÁN, T. *Transparentnost v řešení sporů v mezinárodním ekonomickém právu. Nové trendy odpovědnosti a řešení sporů v mezinárodním právu (vliv nestátních aktérů): studie z mezinárodního práva*. 1st edition, Prague: Charles University, Faculty of Law, 2012, ISBN: 978-80-87146-73-6, pg. 116

both disputing parties so wish, even in cases where the dispute involves matters of public interest.¹⁵⁶ The critics point out that the investor-state arbitration subjected genuine public-law disputes to an arbitral procedural pattern, initially designed for purely commercial disputes, which is devoid of democratic legitimacy due to its secrecy, non-transparency and ad-hoc nature.¹⁵⁷

The principles of confidentiality and privacy recognized in international commercial arbitration are recognized to some extent in the ICSID Convention. For example, Article 48(5) provides that the Centre will not publish awards without the parties' consent, but that it may publish excerpts of the legal reasoning in the arbitration decisions. Many portions of ICSID arbitration documents are available in the ICSID reports or on the ICSID website. However, ICSID's website only contains the most recent documents from each case. No case's documents are published in their entirety.¹⁵⁸

Several steps have been taken in order to increase transparency in the investor state dispute settlement, aiming to improve the knowledge of the dispute, the access to the proceedings by non-disputing parties, and the publicity of awards and other arbitral documents. A significant departure from the traditional confidential nature was introduced in ICSID arbitration through the 2006 revision of the ICSID Arbitration Rules. Article 37(2) of the Rules enhanced the public interest dimension of investment arbitration by permitting the presence of third parties as *amici* to the tribunal. This is potentially a significant tool for public interest groups to influence arbitral proceedings. However, it is the erosion of the private nature of proceedings by express

¹⁵⁶ *Improving Investment Dispute Settlement: UNCTAD Policy*. IIA Issue Note, Issue 4, November 2017. [online]. [accessed on 17.3.2019]. available at https://unctad.org/en/PublicationsLibrary/diaepcb2017d8_en.pdf

¹⁵⁷ NAGY, V. *Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty*. In BELOHLÁVEK, A. *Czech Yearbook of International Law*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-7-7, pg. 207

¹⁵⁸ DELANEY J., MAGRAW, B. *Procedural Transparency*. The Oxford Handbook of International Investment Law. 2008. DOI: 10.1093/oxfordhb/9780199231386.013.0019, pg. 732

stipulation in many contemporary BITs, through arbitral transparency clauses, that constitutes a radical departure.¹⁵⁹

Further steps towards transparency were achieved on 1 April 2014, with the entry into force of the UNCITRAL Rules on Transparency in treaty-based investor-state arbitration, and on 10 December 2014, with the adoption of the UN Convention on Transparency in Treaty-based Investor-State arbitration¹⁶⁰ (also known as the “Mauritius Convention”) which has been in force since 18 October 2017.¹⁶¹

It should be noted that even after the last revision of the ICSID Arbitration Rules, the prohibition of publication of the arbitration award remains unless the parties to the dispute agree on such disclosure. This adjustment leaves many question marks about what can actually be published (unless the wording effectively disables the publication of some documents). The first case, which was already science-based under the revised ICSID rules, was *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*.¹⁶²

Here, the Tribunal emphasized the fact that public interest is present in investment disputes to an extent that justifies a higher level of transparency throughout the arbitration. There was also a section on the relationship of transparency and the national law of the party to the dispute, and at this level the tribunal is in favor of giving priority to national legislation. The Tribunal also accepted the submission of the parties to the *amici curiae* and was also involved in the arbitration award.¹⁶³

¹⁵⁹ BANTEKAS, I. *An Introduction to International Arbitration*. Cambridge: Cambridge University Press, 2015., ISBN: 781316275696, pg. 319

¹⁶⁰ *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, 17 March 2015, 54 ILM 747–57.

¹⁶¹ POLANCO, R. *The Rise of and Backlash against Investor–State Arbitration*. In *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* Cambridge University Press, 2019. oi:10.1017/9781108628983.003, pg. 50.

¹⁶² *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No. ARB/05/22

¹⁶³ BALAŠ, V., KLÁN, T. *Transparentnost v řešení sporů v mezinárodním ekonomickém právu. Nové trendy odpovědnosti a řešení sporů v mezinárodním právu (vliv nestátních aktérů): studie*

4.3. Treaty shopping

Unacceptable or abusive treaty shopping is a situation where a corporation restructures an investment after a dispute has arisen or become foreseeable, to gain access to favorable investor-state arbitration for that particular dispute. Essentially, abusive treaty shopping involves an investment structure undertaken once a dispute is foreseeable, in order to take advantage of the treaty arrangements in place, amounting to an abuse of process as recognized in *Philip Morris Asia Ltd v Commonwealth of Australia*. Acceptable treaty shopping occurs when an investment structure is planned in advance so that the investment may benefit from a favorable regulatory environment.¹⁶⁴

This concern was highlighted in the arbitration in wherein Philip Morris Asia challenged Australia's Tobacco Plain Packaging Act 2011 as amounting to, among other things, indirect expropriation or a breach of the fair and equitable treatment (FET) standard. Philip Morris Asia acquired all of the shares in Philip Morris Australia, so that a claim could be brought under the 1993 BIT between Hong Kong and Australia¹⁶⁵. The case, therefore, highlighted the possibility of treaty shopping by an investor to secure the protection of an investment treaty. The tribunal's decline of jurisdiction in *Philip Morris Asia Ltd* reflects a willingness on the part of tribunals to examine the motivations for corporate structures in the lead-up to a treaty claim and perhaps gives some reassurance to states that multinational corporations will not be permitted to bring claims where their conduct amounts to an abuse of process.¹⁶⁶

z mezinárodního práva. 1. vydání. Praha: Univerzita Karlova, Právnická fakulta, 2012, ISBN: 978-80-87146-73-6, pg. 118.

¹⁶⁴ SUSLER, O., WILSON, T. *Restoring Balance in Investor State Dispute Settlement: Addressing Treaty Shopping and Indirect Expropriation Claims and Consistent Approaches to Decision-Making*. The International Journal of Arbitration, Mediation and Dispute Management. Volume 84 Issue 1 February 2018. ISSN: 0003-7877, pg. 40

¹⁶⁵ *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12

¹⁶⁶ SUSLER, O., WILSON, T. *Restoring Balance in Investor State Dispute Settlement: Addressing Treaty Shopping and Indirect Expropriation Claims and Consistent Approaches to Decision-*

Those concerns have not been left without a response. For example, the EU proposal on the TTIP provides, for the purpose of bringing greater certainty, the rule of anti-circumvention in the TTIP Art. 15, which allows the tribunal to prevent treaty shopping by declining jurisdiction: in a case where dispute has arisen, or was foreseeable on the basis of a high degree of probability, at the time when the claimant acquired ownership or control of the investment subject to the dispute and the Tribunal determines on the basis of the facts of the case, that the claimant has acquired ownership or control of the investment for the main purpose of submitting the claim under this Section. The CETA is equally explicit in preventing treaty shopping in that investor claims are rendered inadmissible where the claim arises out of conduct amounting to an abuse of process.¹⁶⁷

4.4. Consistency of the decisions

The obligation of arbitral tribunals to render a reasoned award is contained in Article 48(3) of the ICSID Convention: „*the award shall deal with every question submitted to Tribunal and shall state the reasons upon which it is based*“. The requirement is reiterated in the Rule 47(1)(i) of the ICSID Arbitration Rules. This obligation to render a reasoned decision may not be waived by the parties. This is consistent with the public international law dimension of the procedure, but also with modern arbitral practice in international law. In the ICSID system a failure to state the reasons can amount to an annulment of the decision, which reinforces the fundamental

Making. The International Journal of Arbitration, Mediation and Dispute Management. Volume 84 Issue 1 February 2018. ISSN: 0003-7877, pg. 41

¹⁶⁷ SUSLER, O., WILSON, T. *Restoring Balance in Investor State Dispute Settlement: Addressing Treaty Shopping and Indirect Expropriation Claims and Consistent Approaches to Decision-Making*. The International Journal of Arbitration, Mediation and Dispute Management. Volume 84 Issue 1 February 2018. ISSN: 0003-7877, pg. 44

character of the obligation to state the reasons on which the award is based. (Article 52(1) of the ICISD Convention).¹⁶⁸

An important facet of enforcement is the consistency of the case-law and the role of precedents. Investment arbitration has largely preserved its ad-hoc nature, where judgment have persuasive but no binding authority.¹⁶⁹ There is no doubt that there is no binding precedent in investment treaty arbitration, as much as there is no such rules in general international law. This fundamental principle is included in Article 53(1) of the ICSID Convention, which provides that the award rendered by the arbitral tribunal is binding upon the parties, thus implicitly excluding any precedential value to awards rendered under the ICSID Convention. „The ICSID Convention provides only that the awards rendered under it are binding on the parties. ¹⁷⁰

One could argue that the public function of investment treaty arbitration warrants the development of a consistent body of law, in order, *inter alia*, to ensure predictability and stability. The absence of binding precedent in international investment law would, according to certain scholars, undermine the consistency of international investment law, and the need for legal predictability in international business transactions. Some tribunals have even gone further by arguing that tribunals have a duty to contribute to the harmonization of international law. ¹⁷¹

However, the specificity of investment treaty arbitration does not permit an adaptation of the rules applicable to the arbitral procedure, without denaturing the very essence of arbitration. Investment tribunals cannot be expected to act as national

¹⁶⁸ BRABANDERE, E., *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications*. Cambridge University Press, United Kingdom, 2014. ISBN: 978-1-107-06687-8, pg. 90

¹⁶⁹ NAGY, V. *Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty*. In BELOHLÁVEK, A. *Czech Yearbook of International Law*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-7-7, pg. 207

¹⁷⁰ BRABANDERE, E., *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications*. Cambridge University Press, United Kingdom, 2014. ISBN: 978-1-107-06687-8 pg. 95

¹⁷¹ *Ibid*

courts in hierarchical vertical legal system which function with rules on binding precedent or *jurisprudence constant*.¹⁷² As the tribunal in *SGS v The Philippines* noted, „there is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals.¹⁷³

International arbitral tribunals are created only to resolve one specific dispute between two parties. There is no interconnection between various investment tribunals which operate independently of one another. And although the publication has become the standard for investment decisions rendered under the ICSID Convention, this is not the case for arbitration conducted under other rules. As a consequence, not all arbitrators have knowledge of all decisions previously rendered in investment disputes.¹⁷⁴ The recurring experiences of inconsistent findings by arbitral tribunals have resulted in divergent legal interpretations of identical or similar treaty provisions as well as differences in the assessment of the merits of cases involving the same facts. Inconsistent interpretations have led to uncertainty about the meaning of key treaty obligations and lack of predictability as to how they would be read in future cases.¹⁷⁵

¹⁷² BRABANDERE, E., *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications*. Cambridge University Press, United Kingdom, 2014. ISBN: 978-1-107-06687-8 pg. 98

¹⁷³ *SGS v. Philippines*, ICSID Case No. ARB/02/6, par. 97

¹⁷⁴ BRABANDERE, E., *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications*. Cambridge University Press, United Kingdom, 2014. ISBN: 978-1-107-06687-8, pg. 99

¹⁷⁵ *Improving Investment Dispute Settlement: UNCTAD Policy*. IIA Issue Note, Issue 4, November 2017. [online]. [accessed on 17.3.2019]. available at https://unctad.org/en/PublicationsLibrary/diaepcb2017d8_en.pdf

4.5. Arbitrator's independence and impartiality

Under the ICSID Convention, judges are appointed "as the parties shall agree" on an ad-hoc basis, without any requirements as to their expertise.¹⁷⁶ The Convention requires that the arbitrators need to 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.¹⁷⁷ Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators. The requirement of specialization in international arbitration and public international law are not explicitly included as at the time of the drafting and adopting ICSID Convention, dispute settlement forum was mainly crafted in view of contract-based investment disputes.¹⁷⁸

No person who had previously acted as a conciliator or arbitrator in any proceedings for the settlement of the dispute may be appointed as a member of the Tribunal. This is based on the general principle that no person should act more than once in an investigation of the same dispute.¹⁷⁹ This restriction only applies where the previous proceedings have actually taken place and may be waived by agreement. It is applicable whoever makes the appointment; whether the parties, the Chairman or other appointing authority.¹⁸⁰

Challenges have historically been rare and have appeared to set a relatively high burden of proof for the challenging party: a "manifest" lack of independence and impartiality.¹⁸¹ The increasing number of challenges to arbitrators suggests that

¹⁷⁶ *ICSID Convention* Article 37

¹⁷⁷ *ICSID Convention* Article 14

¹⁷⁸ BRABANDERE, E., *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications*. Cambridge University Press, United Kingdom, 2014. ISBN: 978-1-107-06687-8, pg. 77

¹⁷⁹ *ICSID Arbitration Rules* Rule 1(4)

¹⁸⁰ MISTELIS, L. *Concise International Arbitration*. Kluwer Law International, 2010. ISBN: 978-90-411-2609-2, pg. 233

¹⁸¹ HORN, P. *A Matter of Appearances: Arbitrator Independence and Impartiality in ICSID Arbitration*. New York University Journal of Law & Business vol. 11, no. 2, 2014, [online]. [accessed on

disputing parties perceive them as biased or predisposed. Particular concerns have arisen from perceived tendency of disputing parties to appoint individuals sympathetic to their case. Arbitrators' interest in being re-appointed in future cases and their frequent "changing of hats" (serving as arbitrators in some cases and counsel in others) have amplified these concerns.¹⁸² Doubts are particularly pronounced for lawyers employed by international law firms.¹⁸³

It is also problematic that the arbitration community is relatively small and the arbitrators often gain the reputation of being "pro-state" or "pro-investor". On the basis of this reputation, they are then selected by the parties to the dispute they wish to have in the tribunal of an arbitrator, who is more likely to be opposed to their arguments and to defend them in the ruling within the tribunal.¹⁸⁴

Starting with *Blue Bank*,¹⁸⁵ the subsequent cases may have changed the landscape for challenges to arbitrators under Article 14(1) and Article 57 of the ICSID Convention. Recent qualifications have relied on the "appearance" of a "manifest" lack of independence or impartiality, which arguably represents a lower burden of proof.¹⁸⁶

The question is whether these developments are taking ICSID jurisprudence in the right direction. Some may argue that *Blue Bank* and the subsequent

10.3.2019]. available at HeinOnline, <https://heinonline-org.ezproxy.is.cuni.cz/HOL/P?h=hein.journals/nyujolbu11&i=365>, pg. 349

¹⁸² *Improving Investment Dispute Settlement: UNCTAD Policy*. IIA Issue Note, Issue 4, November 2017. [online]. [accessed on 17.3.2019]. available at https://unctad.org/en/PublicationsLibrary/diaepcb2017d8_en.pdf

¹⁸³ SVOBODA, O. *Investment Court System: European Union's Abrupt Divorce with Investment Arbitrage*. Právník 4/2019, Prague, AV ČR. ISSN: 0231-6625, pg. 397

¹⁸⁴ *Ibid*, pg. 399

¹⁸⁵ *Blue Bank International and Trust (Barbados) Ltd. v Bolivarian Republic of Venezuela*

¹⁸⁶ HORN, P. *A Matter of Appearances: Arbitrator Independence and Impartiality in ICSID Arbitration*. New York University Journal of Law & Business vol. 11, no. 2, 2014, [online]. [accessed on 10.3.2019]. available at HeinOnline, <https://heinonline-org.ezproxy.is.cuni.cz/HOL/P?h=hein.journals/nyujolbu11&i=365>, pg. 349

disqualifications turn on a desire to dismiss certain arbitrators rather than trying to find a substantively new approach. A seemingly less demanding standard may suggest that it will be easier to challenge arbitrators going forward. For instance, repeat appointment have been the basis for recent challenges. But the rejected challenges in for example *Abaclat*¹⁸⁷ illustrate that not every alleged conflict of interest justifies disqualification.¹⁸⁸

Against this state of affairs is a regulation in CETA prohibiting members of the tribunals from "acting as a solicitor, expert appointed by a party or witness in an ongoing or new investment dispute under this or other international agreement."¹⁸⁹

4.6. Enforcement of the awards

Current ISDS is one of the few mechanisms in international law that offers effective enforcement. This is guaranteed by the New York Convention and the ICSID Convention, both of which relate to the enforcement of arbitration panel rulings.¹⁹⁰

The ICSID Convention denatures a robust enforcement mechanism and provides at Article 54 that 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.¹⁹¹ Such Courts are prohibited from inquiring into the adequacy of the award, whether for any procedural defect or for any error on the merits. Rather, the sole recourse of an aggrieved award debtor lies in the internal ICSID mechanism for

¹⁸⁷ *Abaclat and others v Argentine Republic* ICSID Case No. ARB/07/5

¹⁸⁸ HORN, P. *A Matter of Appearances: Arbitrator Independence and Impartiality in ICSID Arbitration*. New York University Journal of Law & Business vol. 11, no. 2, 2014, [online]. [accessed on 10.3.2019]. available at HeinOnline, <https://heinonline-org.ezproxy.is.cuni.cz/HOL/P?h=hein.journals/nyujolbu11&i=365>, pg. 394

¹⁸⁹ CETA Art. 8.30

¹⁹⁰ SVOBODA, O. *Investment Court System: European Union's Abrupt Divorce with Investment Arbitrage*. Právník 4/2019, Prague, AV ČR. ISSN: 0231-6625, pg. 402

¹⁹¹ ICSID Convention Art. 54(1)

annulment.¹⁹² Arguments have been raised about the adverse impact of compensation on the performance of duties by the public authorities. Public finance is not unlimited and state liability incurs diversion of public resources to the claimant, which may affect the general public. Furthermore, states do not disappear or become insolvent, which makes them an attractive target for compensation claims.¹⁹³

The proposed Investment Court System, which will be further discussed, raises a question whether it is an arbitration or a judicial authority. The quasi-judicial dispute resolution rightly raises doubts as to whether its decisions will be enforceable under both New York Convention and ICSID Conventions because they may not be seen as arbitration awards. The execution of ICS decisions raises a number of complex questions without certain answers. It is therefore possible that national courts, which ultimately will be the enforcement authorities of these decisions, may have different conclusions, which may cause further uncertainty for investors.¹⁹⁴

4.7. Prohibitive costs of the proceedings

In most cases, advance payments for costs of the Tribunal and ICSID fees and expenses are requested in equal parts from the parties with the exception of annulment proceedings, and the Tribunal decides on the allocation of costs in the award. Unless the parties agree otherwise, a Tribunal can allocate the cost of any part of the proceeding at any stage,¹⁹⁵ without prejudice to its final decision on costs in the award.¹⁹⁶ The costs in cases governed by the ICSID rules consist of: (i) The parties'

¹⁹² AMADO, J., KERN, J., & DOE RODRIGUEZ, M. (2018). *Enforcement*. In *Arbitrating the Conduct of International Investors* (pp. 152-168). Cambridge: Cambridge University Press. doi:10.1017/9781108235051.008, pg. 153

¹⁹³ WONGKAEW, T. (2019). *Protection of Legitimate Expectations in Investment Treaty Arbitration: A Theory of Detrimental Reliance*. Cambridge: Cambridge University Press. ISBN: 9781108675680, pg. 243

¹⁹⁴ SVOBODA, O. *Investment Court System: European Union's Abrupt Divorce with Investment Arbitrage*. *Právník* 4/2019, Prague, AV ČR. ISSN: 0231-6625, pg. 402

¹⁹⁵ *ICSID Arbitration Rules* Rule 28

¹⁹⁶ *ICSID Convention* Article 61(2)

expenses, including the cost of legal representation; (ii) The advances paid to ICSID to cover the fees and expenses of arbitrators, conciliators or Committee members, and the Centre's expenses and administrative charges; and (iii) The lodging fee paid by the party instituting proceedings.¹⁹⁷

At the end of the proceeding, the parties are invited to file statements or submissions on costs. A statement of costs lists the costs reasonably incurred by a party, including the costs of its legal representation, while a submission on costs also contains a party's arguments on how and by whom the costs should be paid.¹⁹⁸

The Tribunal has broad discretion to allocate costs between the parties in the final award. It may allocate costs with regard to the proceeding as a whole or with regard to a particular part of the proceeding. Its decision in the award becomes binding and enforceable.¹⁹⁹ The high cost of arbitrations is a concern for both investors (especially small and medium-size enterprises) and States. From a State's perspective, even if it wins the case, the tribunal may refrain from ordering claimants to pay the government's costs, rendering the average of 8 million dollars spent on lawyers and arbitrators a significant burden on public finances and preventing the use of those funds for other goals.²⁰⁰

4.8. Police Powers

A controversial aspect of investor state arbitration is the fact that it amounts to private regulation of state conduct. At the time of the emergence of investor state arbitration, such regulation of states was seen as necessary to protect Western investors

¹⁹⁷ *Cost of Proceedings*. [online]. [accessed on 10.3.2019]. available at <https://icsid.worldbank.org/en/Pages/services/Cost-of-Proceedings.aspx>

¹⁹⁸ *ICSID Arbitration Rules* Rule 28(2)

¹⁹⁹ *Cost Submissions - ICSID Convention Arbitration* [online]. [accessed on 13.3.2019]. available at <https://icsid.worldbank.org/en/Documents/resources/Backgroundhttps://icsid.worldbank.org/en/Pages/process/Cost-Submissions-Convention-Arbitration.aspx>

²⁰⁰ *Improving Investment Dispute Settlement: UNCTAD Policy*. IIA Issue Note, Issue 4, November 2017. [online]. [accessed on 17.3.2019]. available at https://unctad.org/en/PublicationsLibrary/diaepcb2017d8_en.pdf

from expropriation if their investments by developing states, in which there was an absence of rule of law and the protections that flow from that.²⁰¹

There has, however, been a shift whereby the mechanisms have increasingly been used against developed countries which arguably have robust legal and court systems. This shift has been regarded as threatening the abilities of developed countries to regulate for the public interest, because of the threat of investor claims for indirect expropriation where regulation has adversely affected investment.²⁰² This shift has been regarded as threatening the abilities of developed countries to regulate for the public interest, because of the threat of investor claims for indirect expropriation where regulation has adversely affected investments. This phenomenon has been described as “regulatory chill” whereby governments will refrain from regulating for fear of costly investment arbitration, thus restraining the exercise of state sovereignty with regard to the environment, health, natural resources and human rights, among other policy areas.²⁰³ The imposition of liability may encourage host states to change their priorities and become more risk averse and lead them to adopt administrative practices or policies that are not optimally in the public interest. States are subject to competing demands; therefore, state liability could adversely affect a host state’s regulatory powers.²⁰⁴

While fundamental rights do not appear to be of trade-relevance and there is no global endeavor to create a global regime for these universal values, states have

²⁰¹ SUSLER, O., WILSON, T. *Restoring Balance in Investor State Dispute Settlement: Addressing Treaty Shopping and Indirect Expropriation Claims and Consistent Approaches to Decision-Making*. The International Journal of Arbitration, Mediation and Dispute Management. Volume 84 Issue 1 February 2018. ISSN: 0003-7877, pg. 39

²⁰² SUSLER, O., WILSON, T. *Restoring Balance in Investor State Dispute Settlement: Addressing Treaty Shopping and Indirect Expropriation Claims and Consistent Approaches to Decision-Making*. The International Journal of Arbitration, Mediation and Dispute Management. Volume 84 Issue 1 February 2018. ISSN: 0003-7877, pg. 39

²⁰³ *Ibid.*

²⁰⁴ WONGKAEW, T. (2019). *Protection of Legitimate Expectations in Investment Treaty Arbitration: A Theory of Detrimental Reliance*. Cambridge: Cambridge University Press. ISBN: 9781108675680, pg. 243

realized that compliance with fundamental rights requirements has economic effects because it has cost implications, and domestic producers are put at a competitive disadvantage if they have to comply with higher standards.²⁰⁵ For example, the cases such as *US-Gasoline* highlight the trend that when it comes to arbitration involving environmental regulations it is typically the host state that is fighting to protect the environment against unethical business interests from abroad. This is understandable: states are bound by a social contract with their citizens to protect the natural environment for long-term macroeconomic growth and social welfare, whereas international investors and firms are primarily driven by profit motives.²⁰⁶²⁰⁷

The doctrine of legitimate expectations, deduced from the fair and equitable treatment standard, may raise separation-of-powers issue: a state may be called to account for breaking the promises the executive made also as regards issues coming under the legislative's competence.²⁰⁸ According to the Separate Opinion of Professor Brownlie in *CME v. Czech Republic*, it is not "reasonable" that by signing investment treaties, the country should accept the risk of national economic disaster and "catastrophic repercussion for the livelihood and economic wellbeing of the population. Investment treaties are not "an insurance against business risk".²⁰⁹

²⁰⁵ NAGY, V. *Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty*. In BELOHLÁVEK, A. *Czech Yearbook of International Law*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-7-7, pg. 203

²⁰⁶ HOANG M.V., Major differences in WTO and ICSID dispute arbitration and their implications for environmental protection, Cornell University, available at https://www.academia.edu/10907603/Major_differences_in_WTO_and_ICSID_dispute_arbitration_and_their_implications_for_environmental_protection

²⁰⁷ REDGWEL, C., *International Environmental Law*. Malcolm Evans ed., International Law, 2010, Oxford University Press, pg 687-88

²⁰⁸ NAGY, V. *Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty*. In BELOHLÁVEK, A. *Czech Yearbook of International Law*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-7-7, pg. 207

²⁰⁹ *CME v. Czech Republic, UNCITRAL Case, Partial Award, Separate Opinion on the Issues at the Quantum Phase of Ian Brownlie CME QC* par. 75-79 [online]. [accessed on 10.3.2019]. available at <https://www.italaw.com/sites/default/files/case-documents/ita0181.pdf>

The purpose of the states' margin of appreciation is to preserve regulatory autonomy and the free trade system's legitimacy, since the excessive promotion of free trade may suppress local legitimate regulatory policy considerations.²¹⁰ Yet, other sources show that despite common misperceptions, outcomes in ICSID cases are balanced amongst States and investors—and this remained true in 2018. Half of the thirty-six cases that were concluded in 2018 were settled or otherwise discontinued. Of the remaining 18 cases, the tribunal partly or fully upheld claims in 50% of cases, dismissed all claims in 33% of cases, and declined jurisdiction in 17% of cases.²¹¹

5. Future of the Dispute Settlement

There is no single approach to addressing the criticism against the international investment regime. However, the treaty practice that has been observed in recent years can lead us to the conclusion that the majority of countries do not seem to be against international investment arbitration per se, but against the consequences of having certain standards broadly defined or the way those standards are interpreted in practice by private arbitrators.²¹²

We must consider the importance of correctness and fairness of the dispute resolution. In this respect, in the case of investment arbitration, where the arises from a dispute between a private party and a State or State entity, some scholars believe that legitimacy must prevail. If a decision impacts more than just two private parties, by finally impacting the public at large, the content of the decision and the unfolding of the procedure which led to said decision must be subject to higher levels of scrutiny.²¹³

²¹⁰ NAGY, V. *Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty*. In BELOHLÁVEK, A. *Czech Yearbook of International Law*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-7-7, pg. 208

²¹¹ *ICSID Releases 2018 Caseload Statistics* [online]. [accessed on 18.3.2019]. available at <https://icsid.worldbank.org/en/Pages/News.aspx?CID=314>

²¹² POLANCO, R. *The Rise of and Backlash against Investor–State Arbitration*. In *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* Cambridge University Press, 2019. oi:10.1017/9781108628983.003, pg. 50

²¹³ COBUZ, A., CONSTANTIN, S. *Surviving an ICSID Award, Post-Award Remedies in ICSID Arbitration: A Perspective on Contracting State's Interests*. In BĚLOHLÁVEK, A. *Czech and*

Can the investment court proposal for the TTIP and the independent investment court system under the CETA be applied to investment treaties more generally? The introduction of new remedies with respect to the award rendered in international investment arbitration has been discussed for a long times. However, the legal doctrine shares inconsistent views towards this idea.²¹⁴

Some groups view even the purposed inclusion of investor state dispute settlement in such “mega-regional” agreements as dangerous, because it would give foreign investor access to investor-State arbitration, a forum that is seen as inappropriate in legal systems with a strong tradition of rule of law and independent and impartial courts.²¹⁵

On the other end of the spectrum, some believe that only a global multilateral instrument, generally accepted, could establish the enactment of an international law for foreign directs investments. This instrument should be able to transcend and go beyond the power relationships existing worldwide. Thus, assuring the stability of the multilateral system, it could be the juridical instrument allowing to manage the economic globalization in a different way.²¹⁶ One of the arguments made in favor of an investment court is that investment treaty arbitration is characterized as an international public law system. It consists of adjudicative panel which determines an

Central European Yearbook of Arbitration. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-8-4, pg. 49.

²¹⁴ COBUZ, A., CONSTANTIN, S. *Surviving an ICSID Award, Post-Award Remedies in ICSID Arbitration: A Perspective on Contracting State’s Interests*. In BĚLOHLÁVEK, A. *Czech and Central European Yearbook of Arbitration*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-8-4, pg. 48.

²¹⁵ POLANCO, R. *The Rise of and Backlash against Investor–State Arbitration*. In *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* Cambridge University Press, 2019. oi:10.1017/9781108628983.003, pg.48

²¹⁶ CARMEN, R. *L’ Évolution du droit international en matière d’investissements directs étrangers* [online]. Université d’Auvergne Clermont-Ferrand I, 2007, [online]. [accessed on 15.2.2019]. available at <https://tel.archives-ouvertes.fr/tel-00717699>, pg. 574

issue brought by an individual against the legitimacy of use of power by a sovereign nation and to award compensation for illegal state conduct.²¹⁷

5.1. Appellate Mechanism

References to some kind of a new appellate review mechanism continue to occur in State practice, especially in the recent mega-regional treaties and agreements.²¹⁸ Finding a balance between the award's finality and its legitimacy, along with the entire arbitral process, must be a subjective exercise. On one hand, there is the need for the efficient settlement of disputes and of legal scrutiny. On the other hand, there is the need for the efficient settlement of disputes and of legal security.²¹⁹

Although a creation of an ICSID appellate mechanism has been debated for a long time, it has not come to fruition. ICSID is a well-established and respected institution, however, a central appellate body which is an alternative to ICSID could be, at a minimum, mooted by the international arbitration community. There are doubts about whether such consensus would be achievable, as it would require greater harmonization of international investment laws and a uniform approach to international standards of legal interpretation.²²⁰

The UN Conference on Trade and Development (UNCTAD) has recommended the introduction of such a review for many years. Such a step should then increase the consistency of decision-making, its predictability and the legitimacy of a binding mechanism to resolve investment disputes. However, it would also be at the expense

²¹⁷ SUSLER, O., WILSON, T. *Restoring Balance in Investor State Dispute Settlement: Addressing Treaty Shopping and Indirect Expropriation Claims and Consistent Approaches to Decision-Making*. The International Journal of Arbitration, Mediation and Dispute Management. Volume 84 Issue 1 February 2018. ISSN: 0003-7877, pg. 49

²¹⁸ *Ibid*

²¹⁹ COBUZ, A., CONSTANTIN, S. *Surviving an ICSID Award, Post-Award Remedies in ICSID Arbitration: A Perspective on Contracting State's Interests*. In BĚLOHLÁVEK, A. *Czech and Central European Yearbook of Arbitration*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-8-4, pg. 49.

²²⁰ SUSLER, O., WILSON, T. *Restoring Balance in Investor State Dispute Settlement: Addressing* 2018. ISSN: 0003-7877, pg. 51

of the finality of the finding and the speed of the arbitration as opposed by its opponents.²²¹

The discussion regarding a possible new appeal mechanism can be synthesized into two main issues – a juridical aspect and a political one. The juridical matter stems from the difference between annulment and appeal. It is undisputed that an ad hoc Committee has the discretionary power to annul an award, but it may not modify it in any way. The ad hoc Committee in the *Occidental Petroleum v Ecuador*²²² case endorsed this principle and, after partially annulling the award, it pointed out that the committee was required not to amend the award but rather to “substitute the Tribunal’s figure of damages with the correct one.” They found that the ad hoc Committees should be entitled to do so, provided the substitution could be performed without further submissions from the Parties and without additional marshalling of evidence.

They cited that basic reasons of procedural economy justify this solution. Finally, it reduces the Award by over USD 700 million (approximately 40 percent). The ad hoc Committee put forth the argument regarding “procedural economy”. To avoid having the parties incur additional cost and delay of going through a second investment arbitration, when the correct number could be inserted by the annulment committee, after performing a very simple arithmetic calculation and without further input from the parties.²²³

5.2. Investment Court System under TTIP

The EU has proposed a Permanent Investment Court to be included as a measure under the TTIP to address criticism, aimed at investment arbitration.

²²¹ SVOBODA, O. *Investment Court System: European Union's Abrupt Divorce with Investment Arbitrage*. Právník 4/2019, Prague, AV ČR. ISSN: 0231-6625, pg. 401

²²² *Occidental Petroleum Corporation and Occidental Exploration and production Company v Republic of Ecuador*, ICSID Case No ARB/06/11, par. 299

²²³ SUSLER, O., WILSON, T. *Restoring Balance in Investor State Dispute Settlement: Addressing* 2018. ISSN: 0003-7877, pg. 51

Due to increasing resistance to TTIP, where investment protection and the ISDS mechanism became one of the most criticized parts, the Commission announced a suspension of investment negotiations in June 2014 and announced a public consultation on the investment chapter. In May 2015, the Commission followed up with the concept paper TTIP Investment and Beyond: Strengthening Regulatory Right and Shift from Current Ad Hoc Arbitration to Investment Court.²²⁴

On November 12, 2015, the European Commission submitted to the United States its Official Proposal for the establishment of an “investment court system”. The Proposal provides for a two-tiered Tribunal to hear investor-state disputes, consisting of a Tribunal of First Instance and an Appeal Tribunal. For TTIP, the Tribunal is composed of twenty-one members, who are appointed by the European Union and the U.S. rather than by the disputing parties (investor and host state) and are subject to stricter rules on independence and impartiality. Furthermore, the Proposal’s substantive standards of treatment are designed to ensure policy space for states to regulate in the public interest.²²⁵

Pursuant to the EU’s proposal to the US, 15 members of the arbitral tribunal are to comprise the permanent investment court, and they must be appointed when the TTIP enters into force. The security of the tenure is anticipated to increase independence and impartiality of the judges.²²⁶ In particular, five of the judges are to be appointed by a Member State of the EU, five by the US and five are to be nationals

²²⁴ SVOBODA, O. *Investment Court System: European Union's Abrupt Divorce with Investment Arbitrage*. Právník 4/2019, Prague, AV ČR. ISSN: 0231-6625, pg. 394

²²⁵ SCHILL, S. *The European Court's Proposal of an Investment Court System for TTIP: Stepping Stone or Stumbling Block for Multilateralising International Investment Law?* American Society of International Law. 2016. [online] [accessed on 17.3.2019]. available at: <https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping>

²²⁶ HARTEN, G. *A Case for an International Investment Court*. Society of International Economic Law (SIEL) Inaugural Conference 2008 Paper. [online]. [accessed on 10.3.2019]. available at <http://dx.doi.org/10.2139/ssrn.1153424>, pg. 5

of third countries.²²⁷ Investment disputes will be decided by a three-member tribunal whose composition, like the national courts, will be determined on a rotating basis so that the composition of the Chambers is random and unpredictable. Members of the Tribunal must have the qualifications required in their country for appointment or be recognized lawyers.²²⁸

Similarly, the proposed Appeal Tribunal would be composed of six members appointed jointly by the EU and the United States: two EU nationals, two US nationals, and two nationals of third countries. The scope of the review allowed is not yet clearly defined in the EU textual proposal published online. The following grounds were quoted: (a) that the tribunal has erred in interpreting or applying the applicable law in the TTIP agreement; (b) that the tribunal has manifestly erred in its understanding of the facts; and (c) procedural grounds (i.e. grounds comparable to annulment or set-aside procedures).²²⁹

While the conclusion of TTIP has become unrealistic with new US administration, the ongoing internal EU debate that TTIP has generated has affected all other bilateral investment negotiations that the EU has led.²³⁰ While the TTIP has not materialized, this concept has been also adopted in the CETA, and if successful, is likely to be adopted in other treaty agreements.²³¹ A failure of TTIP might mean

²²⁷ *EU's Proposal for Investment Protection and Resolution of Investment Disputes*. 2015. TTIP Trade in Services, Investment and Commerce. Chapter 2, Investment Court System, Art. 9(2).

²²⁸ SVOBODA, O. *Investment Court System: European Union's Abrupt Divorce with Investment Arbitrage*. *Právník* 4/2019, Prague, AV ČR. ISSN: 0231-6625, pg. 396

²²⁹ *Negotiations on Investment Court System for TTIP* [online]. [accessed on 10.3.2019]. available at <http://www.europarl.europa.eu/legislative-train/theme-reasonable-and-balanced-trade-agreement-with-the-united-states/file-ttip-investment-court-system-for-ttip/03-2017>

²³⁰ SVOBODA, O. *Investment Court System: European Union's Abrupt Divorce with Investment Arbitrage*. *Právník* 4/2019, Prague, AV ČR. ISSN: 0231-6625, pg. 395

²³¹ SUSLER, O., WILSON, T. *Restoring Balance in Investor State Dispute Settlement: Addressing Treaty Shopping and Indirect Expropriation Claims and Consistent Approaches to Decision-Making*. *The International Journal of Arbitration, Mediation and Dispute Management*. Volume 84 Issue 1 February 2018. ISSN: 0003-7877, pg. 49

that unreformed current system persists under existing IIAs between the U.S. and some EU members. Nonetheless, the European Parliament has expressed a preference for the proposed investment court under the TTIP to be included in other free trade agreements.²³²

It should be noted that International investment law is sometimes considered to be a hybrid system that stands at the edge of public and private law. Advocates of the investment justice system claim that the EU proposal returns protection of foreign investment where it originally belongs, back to international public law.²³³

5.3. Investment Court System under CETA

On 30 October 2016, the European Union and Canada signed the Comprehensive Economic and Trade Agreement (CETA), which also includes an investment chapter. This chapter is unique in two ways. This is the EU's first international investment protection adjustment, and it also includes a completely new approach to solving investment disputes known as the investment court system (ICS).²³⁴

Notably, the CETA has created a permanent investment tribunal and appellate tribunal to hear investor-state disputes under that treaty. The tribunal is to be made up of 15 members nominated by Canada and the EU, from which three members will be randomly drawn to hear a particular dispute. Hearings will be open to public. The appellate tribunal will review decisions of the tribunal's panels. To facilitate consistency of interpretation of CETA provisions the EU and Canada will be able to

²³² SCHILL, S. *The European Court's Proposal of an Investment Court System for TTIP: Stepping Stone or Stumbling Block for Multilateralising International Investment Law?* American Society of International Law. 2016. [online] [accessed on 17.3.2019]. available at: <https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping>

²³³ BALAŠ, V., ŠTURMA, P. *Nové mezinárodní dohody na ochranu investic*. Praha: Wolters Kluwer ČR, 2018, ISBN: 978-80-7598-100-4, pg. 100

²³⁴ SVOBODA, O. *Investment Court System: European Union's Abrupt Divorce with Investment Arbitrage*. Právník 4/2019, Prague, AV ČR. ISSN: 0231-6625, pg. 390

adopt binding interpretations of those provisions.²³⁵ This option also implies a standing body with a competence to undertake a substantive review of awards rendered by arbitral tribunals. If the facility were constituted of permanent members appointed by States from a pool of the most reputable jurists, it would have the potential to become an authoritative body capable of delivering consistent and balanced opinions, which could rectify some of the legitimacy concerns about the current regime.²³⁶

In CETA, the EU proposed a very broad scope of review, covering errors in interpretation, manifest errors of application plus the current grounds for annulment under the ICSID Convention (the latter may include: the tribunal was not properly constituted; some fundamental procedural rule was not followed; the tribunal exceeded its powers or it did not state the reasons for its award; and finally the award can be annulled if there was corruption of one of the tribunal members).²³⁷

Fearing that an agreement containing an "old" ISDS system will not be approved in Parliament, the Commission has persuaded Canada to accept the changes that essentially meant the adoption of all essential elements of the new approach.²³⁸ CETA will be fully implemented once all EU Member States ratify the deal according to their respective constitutional requirements. At the time CETA will take full effect, a new and improved Investment Court System will replace the current investor-state dispute settlement (ISDS) mechanism that exists in many bilateral trade agreements

²³⁵ SUSLER, O., WILSON, T. *Restoring Balance in Investor State Dispute Settlement: Addressing Treaty Shopping and Indirect Expropriation Claims and Consistent Approaches to Decision-Making*. The International Journal of Arbitration, Mediation and Dispute Management. Volume 84 Issue 1 February 2018. ISSN: 0003-7877, pg. 50

²³⁶ *Improving Investment Dispute Settlement: UNCTAD Policy*. IIA Issue Note, Issue 4, November 2017. [online]. [accessed on 17.3.2019]. available at https://unctad.org/en/PublicationsLibrary/diaepcb2017d8_en.pdf

²³⁷ *Negotiations on Investment Court System for TTIP* [online]. [accessed on 10.3.2019]. available at <http://www.europarl.europa.eu/legislative-train/theme-reasonable-and-balanced-trade-agreement-with-the-united-states/file-ttip-investment-court-system-for-ttip/03-2017>

²³⁸ SVOBODA, O. *Investment Court System: European Union's Abrupt Divorce with Investment Arbitrage*. Právník 4/2019, Prague, AV ČR. ISSN: 0231-6625, pg. 395

negotiated in the past by EU Member States' governments. The new mechanism will be transparent and not based on ad hoc tribunals.²³⁹

5.4. Renegotiation of the Current IIAs

The failure of the DOHA Round of WTO negotiations suggests that, in global trade, multilateralism reached its limits and pushed pro-free-trade states towards bilateralism (or restricted multilateralism). In parallel to Doha's failure as to further trade liberalization, a complicated network of free trade and investment partnership agreements is emerging.²⁴⁰ Interestingly, investment protection, at least as far as substantive standards are concerned, has always remained bilateral, without a realistic prospect of a multilateral system during this half-century, this pattern brought about a labyrinth network of bilateral arrangements, and investment protection took a life of its own. Instead of a duplicate, it became an independent parallel system.²⁴¹

Some of the criticism against the functioning of investor-state arbitration have been addressed in the negotiation and renegotiation of the new international investment agreements, increasingly conferring an important role on the home state of the foreign investor. This is particularly true in relation to problems of interpretations of treaty provisions, filtering of claims, regulation of the work of arbitrators, and enforcement of awards.²⁴²

²³⁹ *EU-Canada Trade Agreement Enters into Force* [online]. [accessed on 10.3.2019]. available at http://europa.eu/rapid/press-release_IP-17-3121_en.htm

²⁴⁰ NAGY, V. *Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty*. In BELOHLÁVEK, A. *Czech Yearbook of International Law*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-7-7, pg. 199

²⁴¹ NAGY, V. *Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty*. In BELOHLÁVEK, A. *Czech Yearbook of International Law*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-7-7, pg. 206

²⁴² POLANCO, R. *The Rise of and Backlash against Investor-State Arbitration*. In *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* Cambridge University Press, 2019. oi:10.1017/9781108628983.003, pg. 50

The shift from investor protection to, arguably, investor power and privilege has led some Western nations to opt out of the investor-state dispute settlement provisions altogether, or to at least review their investment treaty arrangements with respect to dispute settlement. The response of Australian Government, for example, was to refuse to agree to change in investment treaties in 2011, subsequently moving to a policy of deciding upon dispute settlement provisions in its treaty arrangements on a case by case basis. Countries such as Indonesia, Ecuador, Venezuela and South Africa have terminated investment treaties.²⁴³

The major sources of uncertainty are the investment protection treaties' "treatment provisions" including fair and equitable treatment, security and protection, non-discrimination and national treatment. These principles center around fluid concepts, confer on arbitral tribunals extremely wide powers to review national policy decisions and national administrative and judicial proceedings, entailing far reaching consequences for states.²⁴⁴ We are witnessing a tailored modification of selected aspects. They include setting time limits for bringing claims, increasing the contracting parties' role in interpreting the treaty, establishing a mechanism for consolidation of related claims, providing for more transparency and including a mechanism for an early discharge of frivolous claims. Furthermore, clarifying the scope and content of substantive provisions will enhance the certainty of the legal norms and reducing the margin of discretion of arbitrators.²⁴⁵

The new Investment Court System was introduced in some of the bilateral treaties between the EU and other states. In April 2018, an investment agreement was

²⁴³ SUSLER, O., WILSON, T. *Restoring Balance in Investor State Dispute Settlement: Addressing Treaty Shopping and Indirect Expropriation Claims and Consistent Approaches to Decision-Making*. The International Journal of Arbitration, Mediation and Dispute Management. Volume 84 Issue 1 February 2018. ISSN: 0003-7877, pg. 40

²⁴⁴ NAGY, V. *Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty*. In BELOHLÁVEK, A. *Czech Yearbook of International Law*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-7-7, pg. 207

²⁴⁵ *Improving Investment Dispute Settlement: UNCTAD Policy*. IIA Issue Note, Issue 4, November 2017. [online]. [accessed on 17.3.2019]. available at https://unctad.org/en/PublicationsLibrary/diaepcb2017d8_en.pdf

announced with Singapore after it was separated from the EU-Singapore trade agreement. The most recent country to join the EU in the negotiations with the EU is Mexico in the context of modernizing the global agreement. The only negotiating partner to be The EU is not yet convinced it is Japan. Currently, ICS is the subject of a number of other bilateral investment negotiations conducted by the EU, such as Myanmar, China, Indonesia, the Philippines or Tunisia.²⁴⁶

This also raises new problems. In 2012, only 1.5% of the BITs analyzed contained requirements for arbitration qualifications, a positive trend. Doubts arise whether a sufficient number of people meeting these criteria will be available. Especially for countries like Vietnam or Singapore, it will be difficult to find experts among their own citizens who can appoint them to the tribunal. Perhaps for this reason, in the later version of ICS, it was added, in addition to the TTIP proposal, that the contracting parties may also nominate "their" members of third-country nationals.²⁴⁷

If we analyses this new generation of treaties, we can see that they give more control and stronger involvement to the contracting parties, and notably we find a more active participation of the home state in investment disputes, in several roles such as the prevention or management of such disputes, the filtering of certain claims, in built-in treaty mechanisms for interpreting or clarifying provisions, in the regulation of the work and conduct of arbitrators, and in the enforcement of arbitral awards.²⁴⁸

5.5. ADR

Alternative dispute resolution and dispute prevention policies are considered a complementary rather than stand-alone avenue for investment dispute settlement

²⁴⁶ SVOBODA, O. *Investment Court System: European Union's Abrupt Divorce with Investment Arbitrage*. Právník 4/2019, Prague, AV ČR. ISSN: 0231-6625, pg. 395

²⁴⁷ SVOBODA, O. *Investment Court System: European Union's Abrupt Divorce with Investment Arbitrage*. Právník 4/2019, Prague, AV ČR. ISSN: 0231-6625, pg. 396

²⁴⁸ POLANCO, R. *The Rise of and Backlash against Investor–State Arbitration*. In *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* Cambridge University Press, 2019. oi:10.1017/9781108628983.003, pg. 51

reform. Alternative dispute mechanism may be enshrined in IIAs or implemented at the domestic level, without specific references in the IIA. They help in reducing the number of full-fledged legal disputes, however they probably cannot solve all the key challenges.²⁴⁹ Non-legal methods can be used to resolve a dispute at each stage of the proceedings, even after a final and binding decision is issued.²⁵⁰

There has been some activity within the relevant institutions focusing on investment dispute resolution. As a matter of example, the Energy Charter Conference adopted the Guide on Investment Mediation in July 2016. The recent negotiations related to the trade agreements between the EU, the USA and Canada have further shown that the relevant stakeholders are paying a lot of attention to mediation. It plays, at least nominally, a significant role in the respective investment chapters of the mentioned tools.²⁵¹ For example the text CETA provides for mediation of investor-State disputes: The disputing parties may at any time agree to have recourse to mediation.²⁵²

Under TTIP, the institutionalization of the pre-trial phase would also include the amicable resolution phase before the consultation phase. The TTIP proposal has three articles dedicated to alternative dispute resolution. The first step in dispute settlement is the amicable resolution, before starting consultation proceedings. As opposed to other agreements, the Commission proposes to introduce a notification procedure in the TTIP, whereby the parties have to formally announce any solutions that are

²⁴⁹ *Improving Investment Dispute Settlement: UNCTAD Policy*. IIA Issue Note, Issue 4, November 2017. [online]. [accessed on 17.3.2019]. available at https://unctad.org/en/PublicationsLibrary/diaepcb2017d8_en.pdf

²⁵⁰ BALAŠ, V., ŠTURMA, P. *Nové mezinárodní dohody na ochranu investic*. Praha: Wolters Kluwer, 2018, ISBN: 978-80-7598-100-4, pg. 105

²⁵¹ SVATOŠ, M. *Investment Mediation: Sci-Fi or Prediction* [online]. [accessed on 10.2.2019]. available at <http://mediationblog.kluwerarbitration.com/2016/10/20/investment-mediation-sci-fi-or-prediction/>

²⁵² CETA Article 8.20

mutually agreed to during this amicable resolution phase. The consultation procedure can only start if amicable resolution has failed.²⁵³

The confidentiality of mediation makes it difficult to assess whether it is already playing a role in diverting disputes from arbitration. Depending on the applicable rules, parties may be required to keep confidential documents exchanged during mediation, the outcome or settlement terms, or even the fact that the mediation is taking place.²⁵⁴

Once used in investor-state disputes, mediation might bring substantive advantages for both investors and States. Instead of decision, it brings solutions. Thus, unless the investors are only seeking for satisfaction in punishment, they should appreciate having the compensation in as early stage as possible. Furthermore, settlement usually prevents the complications that are common in relation to the enforcement of an award.²⁵⁵

5.6. Comparison of ICSID and WTO

The Uruguay Round engineered the birth of a new trade system under the aegis of a new justice organization, the WTO. The new dispute settlement mechanism restores and strengthens the original GATT dispute settlement process by making it more automatic and introducing specific time limits on procedures. Requests for panels on alleged violations are approved more automatically, as are the panel reports, the appellate body reports and the authorizations of retaliation. Instead of requiring a positive consensus to proceed, they now need a negative consensus to fail to

²⁵³ *Negotiations on Investment Court System for TTIP* [online]. [accessed on 10.3.2019]. available at <http://www.europarl.europa.eu/legislative-train/theme-reasonable-and-balanced-trade-agreement-with-the-united-states/file-ttip-investment-court-system-for-ttip/03-2017>

²⁵⁴ SHIRLOW, E. *The Rising Interest in the Mediation of Investment Treaty Disputes, and Scope for Increasing Interaction between Mediation and Arbitration* [online]. [accessed on 10.2.2019]. available at <http://arbitrationblog.kluwerarbitration.com/2016/09/29/the-rising-interest-in-the-mediation-of-investment-treaty-disputes-and-scope-for-increasing-interaction-between-mediation-and-arbitration/>

²⁵⁵ SVATOŠ, M. *Investment Mediation: Sci-Fi or Prediction* [online]. [accessed on 10.2.2019]. available at <http://mediationblog.kluwerarbitration.com/2016/10/20/investment-mediation-sci-fi-or-prediction/>

proceed.²⁵⁶ ICSID Investment treaty arbitration is a decentralized ad hoc legal system of dispute settlement. It can be compared with other dispute settlement bodies, such as the system established under the World Trade Organization, which also functions with ad hoc panels but has an appeal mechanism, the WTO Appellate Body.²⁵⁷

The WTO Dispute Settlement System (DSS) and the ICSID investor-state dispute settlement system differ in three main aspects. First while the DSS arbitrates only between States Parties to the WTO, the ICSID allows for individual investors to bring cases directly against signatory states. Second, the DSS is constituted as part of the WTO multilateral regime, which provides more substantive and consistent regulations compared to those generally supplied by the myriad treaties that are the main sources of law applied under the ICSID. Third, the DSS sets up a number of permanent judicial bodies staffed by senior international legal experts who possess greater capacity for building upon precedents, compared to ICSID tribunals where independent arbitrators are appointed on an ad-hoc basis.²⁵⁸

The new investment court system proposed under CETA is designed as a two-stage quasi-judicial system consisting of a first-instance 15-member tribunal and a six-member tribunal. Thus, the structure at first glance recalls the dispute settlement system of the WTO, the top of which is the Appellate Body with seven members

²⁵⁶ TOYE J., *Order and Justice in the International Trade System* in CHEN J., *The Role of International Institutions in Globalization, The Challenges of Reform*, Edward Elgar Pub, 2003, ISBN: 978-1843764694, pg. 68

²⁵⁷ BRABANDERE, E., *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications*. Cambridge University Press, United Kingdom, 2014. ISBN: 978-1-107-06687-8, pg. 97

²⁵⁸ HOANG M.V., *Major differences in WTO and ICSID dispute arbitration and their implications for environmental protection*, Cornell University, pg. 2, available at https://www.academia.edu/10907603/Major_differences_in_WTO_and_ICSID_dispute_arbitration_and_their_implications_for_environmental_protection

appointed by the WTO Membership. Its use as a model for ICS has its advocates and opponents.²⁵⁹

However, under the WTO system, only government can bring cases to the Dispute Settlement Mechanism, and poor governments will be disproportionately deterred by the prospect of antagonizing more powerful countries, on whom they depend in non-trade matters, such as defense or foreign aid. By convention, no compensation is paid by the loser for a violation, after a process that can still take over two years to complete, a fact that bears more heavily on poor states than on rich ones. If a country does not take measures to comply with its WTO obligations, there is no centralized sanction. The only sanction is retaliation. Since all economic sanctions are costly to the initiator, the ability of a poor country to sanction a rich one is much less than in the reverse.²⁶⁰

²⁵⁹ SVOBODA, O. *Investment Court System: European Union's Abrupt Divorce with Investment Arbitrage*. Právník 4/2019, Prague, AV ČR. ISSN: 0231-6625, pg. 396

²⁶⁰ TOYE J., *Order and Justice in the International Trade System* in CHEN J., *The Role of International Institutions in Globalization, The Challenges of Reform*, Edward Elgar Pub, 2003, ISBN: 978-1843764694

Conclusion

Investor-state dispute settlement has been the subject of a complex debate in both the investment community and the general public at large. The current debate tries to describe the interaction between trade and local public interest, the relationship between regulatory sovereignty and the settlement of international trade disputes and the controversial issue of international investment protection and investor-state arbitration. While some states reverted to protectionism, others considered free trade as a way-out from current economic crises. This resulted in a new generation of free trade agreements, such as the TTIP and CETA.²⁶¹

Despite all the criticism against investment arbitration, ICSID remains effective international institution making an important contribution to the international community. It also remains the most popular institution in investment arbitration among both investors and States and, importantly, also the most transparent.²⁶² In the recent years there has been increased attention to procedural and substantive aspects of ICSID's arbitral process and the voices of discontent and the calls for change should not be ignored.²⁶³ On substance, there has been a significant debate as to the desirability of consistency in the findings of arbitral tribunals dealing with similar legal issues, and consideration of whether there may be a need for additional post-award mechanisms to address such considerations.²⁶⁴

²⁶¹ NAGY, V. *Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty*. In BELOHLÁVEK, A. *Czech Yearbook of International Law*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-7-7, pg. 198

²⁶² COBUZ, A., CONSTANTIN, S. *Surviving an ICSID Award, Post-Award Remedies in ICSID Arbitration: A Perspective on Contracting State's Interests*. In BĚLOHLÁVEK, A. *Czech and Central European Yearbook of Arbitration*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-8-4, pg. 51

²⁶³ COBUZ, A., CONSTANTIN, S. *Surviving an ICSID Award, Post-Award Remedies in ICSID Arbitration: A Perspective on Contracting State's Interests*. In BĚLOHLÁVEK, A. *Czech and Central European Yearbook of Arbitration*. Lex Lata, Netherlands, 2018. ISBN: 978-90-824603-8-4, pg. 51

²⁶⁴ MACKENZIE, R., ROMANO, C. *Manual on International Courts and Tribunals*, Oxford University Press, 2nd edition, first published 2010, ISBN 978-0-19-954527-8 pg. 128

The advantages of a new appeal mechanism could prove to silence some of the criticism generally levelled against investment arbitration and with the appropriate design, it could be faster, more transparent, less costly than the current annulment remedy.²⁶⁵ An investment arbitration appellate body could ensure a consistent approach to investor state dispute settlement, drawing on the creation of an independent investment court system under the CETA. These developments are particularly important with regard to issues involving the infringement on state sovereignty or abuse of process by investors. Such feature would be likely to make Investor-State dispute settlement more palatable for States, in part because of the possibility of consistency and predictability with regard to awards.

Another option implies the replacement of the current system of *ad hoc* arbitration tribunals with a standing international investment court, which could also have an appeals chamber. The court would consist of judges appointed or elected by States on a permanent basis, e.g. for a fixed term. The concept of a permanent legal body providing public proceedings and decisions, establishing binding case law to address international investment disputes, is not a novel one, although it has not been put into action yet. This concept has been partially adopted in the CETA, and if successful, is likely to be adopted in other treaty agreements.²⁶⁶ Some scholars believe that such permanent investment court would address most of the problems as it would go a long way toward ensuring the legitimacy and transparency of the system, facilitating the consistency and accuracy of decisions and promoting the independence and impartiality of adjudicators.

²⁶⁵ SUSLER, O., WILSON, T. *Restoring Balance in Investor State Dispute Settlement: Addressing* 2018. ISSN: 0003-7877, pg. 51

²⁶⁶ SUSLER, O., WILSON, T. *Restoring Balance in Investor State Dispute Settlement: Addressing Treaty Shopping and Indirect Expropriation Claims and Consistent Approaches to Decision-Making*. The International Journal of Arbitration, Mediation and Dispute Management. Volume 84 Issue 1 February 2018. ISSN: 0003-7877, pg. 49

However, there are also arguments against such system. Establishing an investment court could take investment arbitration into uncharted waters with uncertain rules. It departs from a private view of investment law. Instead, it fosters the public law model with rules on third party participation, transparency, focus on the entitlement to regulate by states and enhances institutionalization.²⁶⁷ At the same time, the ICS concept raises a number of new doubts. Above all, it is not clear to what extent ICS will be practically usable for investors. With a possibility of an appeal, management can become lengthy and therefore less attractive to investors. In addition, there is a risk that the final decision in favor of the investor will not be enforceable outside the territory of the Contracting Parties. All these uncertainties might lead investors to restructure their investments in such a way as to initiate traditional arbitration under earlier investment agreements.²⁶⁸

Dispute settlement mechanism remains one of the politically most sensitive issues, given the stakes of national regulatory sovereignty and an appeal for substantive investment protection. It will be crucial to have a possibility to analyze the newly introduced elements used in practice.

²⁶⁷ SCHILL, S. *The European Court's Proposal of an Investment Court System for TTIP: Stepping Stone or Stumbling Block for Multilateralising International Investment Law?* American Society of International Law. 2016. [online] [accessed on 17.3.2019]. available at: <https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping>

²⁶⁸ SVOBODA, O. *Investment Court System: European Union's Abrupt Divorce with Investment Arbitrage*. Právník 4/2019, Prague, AV ČR. ISSN: 0231-6625, pg. 405

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Dispute Settlement in International Economic Law – Selected Aspects

Abstract

At the time of the emergence of investor state arbitration, such regulation of states was seen as necessary to protect Western investors from expropriation of their investments by developing states, in which there was an absence of rule of law and the protections that flow from that. The ICSID Center was established primarily to ensure the availability of an assured impartial and independent dispute resolution service. The increase in the number of cases over the years, together with sometimes expansive, unexpected and inconsistent interpretations of International Investment Agreement provisions by tribunals, had triggered a worldwide debate and a number of countries had adopted reform measures. The EU has proposed a Permanent Investment Court to address criticism, aimed at investment arbitration and to be included as a measure under the TTIP. This concept has been also adopted in the CETA, and if successful, is likely to be adopted in other treaty agreements as the European Parliament has expressed a preference for the proposed investment court under the TTIP to be included in other free trade agreements. The concept of a permanent legal body providing public proceedings and decisions, establishing binding case law to address international investment disputes, is not a novel one, although it has not been put into action yet. This option implies the replacement of the current system of ad hoc arbitration tribunals with a standing international investment court, which could also have an appeals chamber. The court would consist of judges appointed or elected by States on a permanent basis, e.g. for a fixed term. The advantages of a new appeal mechanism could prove to silence some of the criticism generally levelled against investment arbitration. It would address most of the problems as it would go a long way toward ensuring the legitimacy and transparency of the system, facilitating the consistency and accuracy of decisions and promoting the independence and impartiality of adjudicators.

Key words

ICSID arbitration, post-award remedies, international investment court

Řešení sporů v mezinárodním ekonomickém právu – vybrané aspekty

Abstrakt

V době vzniku mezinárodní investiční arbitráže byla taková regulace státy považována za nezbytnou k ochraně západních investorů před vyvlastněním jejich investic ze strany rozvojových států. V těchto státech nebyly vytvořeny dostatečné právní normy a ochrana, která z nich plyne. Centrum ICSID bylo zřízeno především proto, aby byla zajištěna dostupnost nestranného a nezávislého řešení sporů. Nárůst počtu případů v průběhu let, spolu s někdy rozsáhlými, neočekávanými a nekonzistentními interpretacemi ustanovení mezinárodních dohod o investicích ze strany ad hoc tribunálů vyvolal celosvětovou diskusi a řada zemí přijala reformní opatření. Evropská unie navrhla Stálý investiční soud, který je reakcí na kritiku mířenou na investiční arbitráži a který by měl být zařazen jako jedno z opatření v rámci Transatlantického obchodního a investičního partnerství. Tato koncepce byla také přijata v Komplexní hospodářské a obchodní dohody mezi EU a Kanadou, a pokud bude úspěšná, bude pravděpodobně přijata v dohodách dalších. Evropský parlament je otevřený tomu, aby byl navrhovaný investiční soud zařazen i do budoucích dohod o volném obchodu. Tento koncept stálého právního subjektu, který poskytuje veřejná řízení a rozhodnutí a zavádí závaznou judikaturu pro řešení mezinárodních investičních sporů, není nový, přestože dosud nebyl uveden do praxe. Tato možnost předpokládá nahrazení stávajícího systému rozhodčích tribunálů ad hoc stálým mezinárodním investičním soudem, který by mohl mít také odvolací senát. Soud by se skládal ze soudců jmenovaných nebo volených státy trvale, např. na dobu určitou. Výhody nového odvolacího mechanismu by mohly být řešením kritiky, která směřuje proti investičnímu arbitráži. Vyřešil by tak mnoho problémů, například zajištěním legitimacy a transparentnosti systému, usnadněním jednotnosti a přesnosti rozhodnutí a podporou nezávislosti a nestrannosti rozhodců.

Klíčová slova

Arbitráž ICSID, opravné prostředky, stálý investiční soud