

## INTERNATIONAL ECONOMIC LAW

DOI: 10.24833 / 0869-0049-2019-2-54-69

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Received 2 May 2019  
Accepted 18 June 2019

# INVESTMENT COURT: REVIEW OF THE EU INITIATIVE

**INTRODUCTION.** *Disputes between investors and States are traditionally resolved through arbitration, However, decades of arbitration practice have revealed some shortcomings and pitfalls of this mechanism. Nowadays, a reform of international investment arbitration is actively discussed on many international platforms. At the same time, there is a completely radical approach to solving the problem: the transition from arbitration to dispute resolution through a permanent judicial institution. In March 2018, the EU Council approved the launch of negotiations on the establishment of a Multilateral investment Court (MIC). Earlier, this idea was supported in the context of drafting agreements between EU and Vietnam and Canada. There is a number of prerequisites for such a court to emerge, including public opinion in the EU. However, the implementation of the project requires that many related issues be solved.*

**MATERIALS AND METHODS.** *The research is based on the theoretical works of scholars of different views on the topic; analytical works of legal practitioners; working materials of the European Commission, which leads comprehensive work on the development and promotion of the MIC project investment; among international legal sources the research used*

*the Investment Protection Agreement between the EU and Vietnam and the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, as well as a recent advisory opinion of the EU Court of Justice on the relationship between the EU law and the new dispute-settlement mechanism. The methodological framework of the research is based on the comparative and historical method, as well as general scientific methods such as analysis, synthesis, analogy, description, deduction.*

**RESEARCH RESULTS.** *This study provides a manifold analysis of the MIC proposal. The reasons for a common interest in that proposal amid decrease of confidence in arbitration procedures are explained. The authors identify strong points of the investment court, which are needed for improvement of the current system of dispute resolution by arbitration. These features comprise the uniformity of approaches; the independence of judges; the legal correctness of the decisions; a facilitated access to justice for more vulnerable economic actors by means of special financial and procedural conditions. The comparison of the arbitration and judicial dispute resolution mechanism allows us to assess how far in reality the current development towards an in-*

vestment court has advanced. Besides, the research provides a characteristic of the appeal mechanism within the investment court, as one of the most compelling arguments in favor of the proposal. Attention is also paid to the technical aspects in organization of the court. The authors point at issues of compatibility of the proposed court with the EU law (using the CETA provisions as an example).

**DISCUSSION AND CONCLUSIONS.** The presented discussions lead to the following conclusions. Indeed, the investment court has characteristics that can meet the basic demands for fair, transparent, independent, consistent, more accessible dispute resolution. For this reason the MIC project has the greatest chance of support, as compared to other possible options for the proposed reformation of the investment dispute settlement. However, the introduction of a judicial institution does not mean a complete rejection of the main elements of arbitration, such as the voluntary submission of the parties to the dispute settlement mechanism, the consensual nature of the recognition and execution of judicial / arbitral decisions, the use of time-tested procedural rules. A two-tier structure of the investment court is bound to become its most prominent distinguishing feature, given that an appellate mechanism within the court would ensure the correctness of the decisions it should render from the perspectives of the law, fact, justice and due process. Internal scrutiny accompanied by strict rules of appointment and remuneration of judges

would significantly strengthen the reliability of that institution. Moreover, the investment court has all the chances to gain popularity thanks to its simplicity of joining via the “opt-in” clause and to greater accessibility. Above all, as a recent opinion of the EU Court of Justice on this issue demonstrated, the introduction of the investment court does not affect the legal order of the Union and its members. In turn, that means that States consider as likely a smooth transition to the settlement of investment disputes within a new system of international justice.

**KEYWORDS:** Multilateral Investment Court (MIC), international investment arbitration and its reform, CETA Agreement, EU-Vietnam IPA, independence and impartiality of judges and arbitrators, consistency of arbitral practice, EU investment policy

**FOR CITATION:** Rachkov I.V., Magomedova O.S. Investment Court: review of the EU initiative. – *Moscow Journal of International Law*. 2019. No. 2. P. 54–69.

DOI: 10.24833/0869-0049-2019-2-54-69

**ACKNOWLEDGEMENTS:** The authors express their deep gratitude and acknowledgment to Mr. Nikita Kondrashov, Arbitration und Litigation lawyer at Luther Rechtsanwaltsgesellschaft mbH, for his valuable remarks on the first draft of our article.

## МЕЖДУНАРОДНОЕ ЭКОНОМИЧЕСКОЕ ПРАВО

DOI: 10.24833 / 0869-0049-2019-2-54-69

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Поступила в редакцию: 02.05.2019  
Принята к публикации: 18.06.2019

# ИНВЕСТИЦИОННЫЙ СУД: ОБЗОР ИНИЦИАТИВЫ ЕС

**ВВЕДЕНИЕ.** Споры между инвесторами и государствами традиционно разрешаются посредством арбитража. Однако за десятилетия арбитражной практики у этого механизма разрешения споров обнаружилось серьезные недостатки. Сегодня на многих международных площадках идет активная дискуссия о реформировании международного инвестиционного арбитража. Вместе с тем выдвигается и совершенно радикальный подход к решению задачи: переход от арбитража к разрешению споров на базе постоянно действующего международного суда. В марте 2018 г. Совет ЕС одобрил начало переговоров об учреждении Многостороннего инвестиционного суда. Ранее идея встретила поддержку при разработке соглашений ЕС с Вьетнамом и Канадой. Для появления такого суда существует ряд предпосылок, включая общественное мнение. Вместе с тем непосредственное воплощение проекта требует решения многих сопутствующих вопросов.

**МАТЕРИАЛЫ И МЕТОДЫ.** В основу исследования положены теоретические труды ученых, занимающих разные позиции по данной теме; аналитические работы юристов-практиков; рабочие материалы Европейской комиссии, ведущей комплексную работу по созданию и продвижению проекта инвестиционного суда; международно-правовые источники: Соглашение ЕС с Вьетнамом о защите инвестиций и Всеобъемлющее соглашение с Канадой, а также материалы Суда ЕС, рассматривавшего вопрос о соотношении права ЕС и нового механизма разрешения споров. В исследовании использовались сравнительно-правовой, исторический метод, а также такие общенаучные методы, как анализ, синтез, аналогия, описание, моделирование.

**РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ.** В настоящем исследовании приводится разносторонний анализ проекта Многостороннего инвестиционного суда и объясняются причины общего интереса к проекту на фоне снижения доверия к арбитражным процедурам. Обозначаются те сильные стороны инвестиционного суда, которых не хватает для усовершенствования нынешнего порядка разрешения споров: соблюдение

единообразия при рассмотрении подобных споров; гарантии независимости судей; обеспечение юридической корректности выносимых решений; облегчение доступа к правосудию для более уязвимых участников экономической деятельности с помощью специальных финансовых и процессуальных условий. Проводится сопоставление арбитражного и судебного порядка разрешения споров, что позволяет оценить, насколько далеко в действительности может продвинулось развитие в сторону инвестиционного суда. Отдельно дается характеристика апелляционного механизма в рамках инвестиционного суда как одного из весомых аргументов в пользу проекта. Кроме того, уделяется внимание техническим аспектам организации суда. Обозначаются вопросы совместимости проекта с действующим правом ЕС (на примере положений Соглашений СЕТА).

**ОБСУЖДЕНИЕ И ВЫВОДЫ.** В результате проведенного исследования можно сделать следующие выводы. Инвестиционный суд, действительно, обладает характеристиками, способными удовлетворить основные требования к справедливому, прозрачному, независимому, последовательному, более доступному порядку разрешения споров. Поэтому среди других возможных вариантов преобразования нынешнего механизма разрешения инвестиционных споров в арбитраже этот проект имеет наибольшие шансы на поддержку. Однако создание судебного учреждения не означает полный отказ от таких базовых элементов международного правосудия, как добровольность обращения за разрешением спора, консенсуальная природа признания и исполнения решения, использование проверенных временем процессуальных правил. Двухзвенная структура инвестиционного суда станет его самой значимой отличительной чертой, поскольку апелляционный механизм внутри самого суда позволит обеспечить правильность выносимых решений с точки зрения права, факта, справедливости и соблюдения самого процесса. Внутренняя система контроля вместе со строгим порядком назначения и оплаты труда судей существенно укрепит авто-

ритет учреждения. Более того, новый механизм имеет все возможности быстро завоевать популярность ввиду простоты присоединения к проекту с помощью клаузулы «opt-in» и большей доступности. Главное, как показало недавнее консультативное заключение Суда ЕС по этому вопросу, появление инвестиционного суда не затрагивает правового порядка этого интеграционного объединения и его отдельных членов. Следовательно, возможен беспрепятственный переход к разрешению инвестиционных споров в новой системе международного правосудия.

**КЛЮЧЕВЫЕ СЛОВА:** Многосторонний инвестиционный суд, международный инвестиционный арбитраж и его реформа, СЕТА, Соглаше-

ние ЕС и Вьетнама о защите инвестиций, независимость и беспристрастность судей и арбитров, единообразии арбитражной практики, инвестиционная политика ЕС

**ДЛЯ ЦИТИРОВАНИЯ:** Рачков И.В., Магомедова О.С. 2019. Инвестиционный суд: обзор инициативы ЕС. – *Московский журнал международного права*. № 2. С. 54–69.

DOI: 10.24833/0869-0049-2019-2-54-69

Авторы выражают благодарность и глубокую признательность Никите Кондрашову, юристу по арбитражным и судебным спорам компании *Luther Rechtsanwaltsgesellschaft mbH*, за ценные замечания по первому проекту их статьи.

## 1. Introduction

In spring 2015, the European Commission published its concept paper on a new European approach to investment disputes settlement – from international investment arbitration towards a permanent investment court. So far, the foundation has already been laid in Comprehensive Economic and Trade Agreement between EU and Canada (CETA), EU-Vietnam Investment Protection Agreement (IPA), and in the Transatlantic Trade and Investment Partnership Agreement (TTIP) between the EU and the US, the latter having been put on ice by the Trump administration. Their relevant provisions suggest creating an Investment Court System (ICS). The proposed two-tier mechanism combines elements of traditional arbitration with entirely new features. As stated by Stephen W. Schill, its most notable characteristic is transition from “private conceptualization” to “public law approach” [Schill 2016]. This is a quite pointed remark given the underlying reasons of the EU initiative. The idea of the Multilateral Investment Court (MIC) is being largely promoted by Germany, which on a sudden assumed a hostile position towards investor-state dispute settlement (ISDS) provisions in the EU economic treaties with the US and Canada. The strong opposition to traditional ISDS procedures was motivated by fear to allow investors

to unduly influence the sovereign state’s right to regulate [Roskopf 2015]. Such concerns were triggered by the claim of Vattenfall, a Swedish power generating company, against Germany after the decision of that state to phase out all nuclear power stations by 2022 in the wake of the Fukushima accident in Japan<sup>1</sup>. After having shut down two power plants (in Brunsbüttel and Krümmel, Germany), the company required compensation of damages amounting to 4.7 billion euro<sup>2</sup>. The investor’s pressure in this case made Germany re-evaluate the protection for foreign investors as compared to national policy and public interests. Thus, it can be said, that the MIC project was driven not by theoretic considerations, but by the internal impetus, primarily in the economically leading EU countries.

The idea of an international investment court has indeed a vigorous theoretic background dating back 1948, when the International Law Association proposed to establish the Foreign Investment Court under the auspices of the UN. Admittedly, its structure and organisation were in the mould of the International Court of Justice, except for its jurisdiction locked in States’ investment obligations. This project remained a draft; however, later on, it found regional implementation into practice: in 1980 the League of Arab States adopted the Unified Agreement for the Investment of Arab Capital in the Arab States, which

<sup>1</sup> Revised Investor-to-State Dispute Settlement Mechanism: New and Improved? URL: <https://www.freetradeagreements.co.uk/publication/test-publication-3/> (accessed date: 01.02.2019).

<sup>2</sup> *Vattenfall v. Germany*. ICSID Case No. ARB/12/12.

provides for a system of dispute settlement by means of the Arab Investment Court. Its first award was rendered only in 2004 in *Tanmiah case (Saudi Company v. Tunisia)* [Hamida 2006]. The idea could get a wider expansion in the OECD framework. During the negotiations on the Multilateral Investment Agreement of OECD some European countries came forward with the initiative to introduce such judicial body<sup>3</sup>.

Since then the concept of an international investment court has been widely discussed by scholars in the world. There are various suggestions as to the form of this institution: independent “world investment court” [Howard 2017:10], “permanent investment tribunal” [Kaufmann-Kohler, Potestà 2017:8], “supreme investment court” [Qureshi 2006:1165] or a court under auspices of an existing international organization (such as the WTO). All these options invariably point at a centralized standing body. The current EU proposal is mostly associated with growing “backlash” against familiar investment arbitration [Waibel et al. 2010]. Procedural contradictions and divergences on principal issues compound a grim mixture of reasons to ever-mounting frustration. Several overarching points of criticism can be distinguished.

## 2. Reasons for search of alternatives to investment arbitration

First of all, legitimacy of the dispute settlement by way of arbitration as such. It is a matter of doubt whether current rules for the appointment of arbitrators can ensure fair unbiased justice. On the one hand, massive use of arbitration mechanisms allowed to depoliticize the ISDS. As a general rule, investment arbitrators may be appointed by the parties to the dispute. Therefore, arbitral awards are mostly based on “operational balance” between international values and national interests. In arbitration the state control is considered to be minimized: at least arbitration rules are the same for any disputing parties. On the other hand, despite the depoliticization of legal protection, the decision-makers independence and/or impartiality still may be put in doubt: next appointment of the arbitrators depends on the tactics of the arbitrators in the course of arbitral proceedings

and on the content of decisions on jurisdiction and on the merits [Usoskin 2013:102]. In simple terms, it is a matter of implicit gradation of arbitrators on “pro-investor” and “pro-State” classes<sup>4</sup>. Although the polarized panel is always balanced by the position of neutral chair, there are still concerns about interpersonal arrangements “behind the scenes”.

Unfortunately, there are reasons to worry about States' fair position, particularly in the light of a scandal which broke out in 2015 around the dispute resolution between Slovenia and Croatia on their sea boundaries. The publication of conversations between an employee of the Slovenian foreign ministry (who acted for Slovenia in that arbitration) and the arbitrator designated by Slovenia on how to secure an award in favour of Slovenia led to withdrawal of Croatia from arbitration treaty 2009<sup>5</sup>. As an author noted in respect to formation of ICJ Chambers, mechanisms allowing parties to “influence composition and size of the Chamber provide States the comfort they seek, <...> that an international court will not venture its assigned mandate” [Cogan 2008:419]. This statement also holds for any other ad hoc panels. When choosing adjudicators, States want to be sure of a “just decision”, which would “take into account” their sovereign interests [Rogers 2013:252]. Otherwise a State would not be interested in such candidates anymore. That is why the arbitrators' independence and impartiality are widely alleged to be only an illusion. To some extent, this explains the roots of the “legitimacy crisis” [Blanchard 2011:421]. Thus, for those who associate the establishment of the MIC with a step back from legal authority to political might, i.e. with *repoliticisation* of investment protection process, it is time to weigh the risks of *undue* State presence in both cases to choose the lesser evil in their judgement.

Other defects are found in the arbitral process and its effects. Inconsistent conclusions have become a sticking point in development of international investment law. Notwithstanding that, international investment law is an extremely fragmented area of public international law: its provisions are mostly contained in bilateral and regional agreements, although their unlike formulations express, at least at the first glance, the same principles and

<sup>3</sup> OECD. Negotiating Group on the Multilateral Agreement on Investment. Documents DAF/MAI/EG1/RD (96)1, dated January 26, 1996; DAF/MAI/EG1/RD (96)5, dated March 5, 1996.

<sup>4</sup> Roberts A. Would a Multilateral Investment Court be Biased? Shifting to a treaty party framework of analysis. – *EJIL: TALK!* April 28, 2017. URL: <https://www.ejiltalk.org/would-a-multilateral-investment-court-be-biased-shifting-to-a-treaty-party-framework-of-analysis/> (accessed date: 01.02.2019).

<sup>5</sup> Sarvarian A., Baker R. Arbitration between Croatia and Slovenia: Leaks, Wiretaps, Scandal. – *EJIL: TALK!* July 28, 2015. URL: <https://www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal/> (accessed date: 01.02.2019).

standards, such as fair and equitable treatment standard or stabilization clause [Howard 2017:10]. From this perspective it is reasonable to expect coherent decisions in instances dealing with similar cases. However, arbitration practice knows not only inconsistent awards (such as with *SGS cases v. Pakistan, Philippines, Paraguay*<sup>6</sup> or with Argentine gas sector cases [Alvarez, Tapolian 2012:29]), but diametrically opposing outcomes in cases with identical factual background (*Kilic v. Turkmenistan, Garanti Koza v. Turkmenistan*<sup>7</sup>). Such precedents have given rise to common clutter around problem of consistency in investment arbitration. Scholars' opinions differ only in magnitude of situation assessment: some are ready to label it as yet another crisis<sup>8</sup>, other optimistically state that rarity of such conflicting decisions underlines general consistency in investment arbitration [Schill 2009:356]. At any rate, "concerns pertaining to consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals" ranks foremost in the report of Working Group III at the thirty-sixth session of UNCITRAL<sup>9</sup>.

The problem of adjudicators' evenhandedness and inconsistency matter are rooted in different mishaps, but both of them come up to necessity of control mechanisms. Current investment arbitration goes without any review procedures. The only option for ICSID's users is recourse to *ad hoc* annulment committees. However, reversal of awards does not contribute to invigoration of legal certainty

[Kaufmann-Kohler, Potestà 2016:14]. Therefore, in 2004 the introduction of appeal procedure was considered by ICSID experts as a possible option for improving ICSID arbitration. However, the discussion bypassed sound structural changes; instead, it was proposed to create an Appeals Panel operating under Appeals Facility Rules<sup>10</sup>. The adjustment work of a kind of appellate body or similar system of awards scrutiny seems the most apparent way to ensure the constant jurisprudence. As unconnected panels are free to adopt their own decisions without regard to others, both disputing parties might fall victims to unpredictability of *ad hoc* arbitration. The reverse of this medal is inevitable extension of legal uncertainty for disputing parties, so the search for legal consistency costs precious time.

Above all substantive issues, number of arbitration defects are derived from the course of the proceedings. Commendable principle of confidentiality results not only in lack of transparency, but also in restricting ways of interaction between adjudicators. Actually, there are situations where entities/persons seek relief in different instances but in relation to the same investment or to the same circumstances. In such cases tribunals need a coordinated exchange of information and other tools of enhancing transparency. This problem is handled at once on different levels, from insertion of transparency provisions in investment agreements to adoption of more global document, such as the UN Convention on Transparency in Treaty-based Investor-State Arbitration,

<sup>6</sup> *SGS* affiliate investors in different countries met divergent decisions on the extent of the umbrella clause. In *SGS v. Pakistan* (2003) arbitrators chose a restrictive approach to its interpretation. The claim was rejected as the investor failed to prove that the parties intended to equate a contract breach to a breach of the treaty. In *SGS v. Philippines* (2004), the broad interpretation won out. In *SGS v. Paraguay* (2010) adjudicators went even further by taking broad interpretation approach and emphasizing the independence of its interpretation from forum selection clause and non-textual limitations. Such approach can be identified as "a plain meaning interpretation" [Gaillard 2005:325–346].

<sup>7</sup> Both cases, *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/1) and *Garanti Koza LLP v Turkmenistan* (ICSID Case No. ARB/11/20), arose out of construction projects in Turkmenistan. The discrepancies in determining ICSID jurisdiction appear around the duty to litigate investors' claims in Turkmen courts. In case of *Kilic* (a Turkish company), the tribunal rejected its jurisdiction referring to the investor's failure to exhaust local remedies or to prove "lack of independence" of national courts. Two other Turkish investors faced to the same outcome (*Muhammet Çap & Sehil İnşaat Endustri v. Turkmenistan* (ICSID Case No. ARB/12/6) and *İçkale İnşaat Limited Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/24)). However, in a similar case – *Garanti Koza LLP* (a UK company), despite lack of explicit State's consent to ICSID arbitration, the tribunal accepted its jurisdiction applying MFN clause to dispute resolution provisions of UK-Turkmenistan BIT.

<sup>8</sup> Butler N. The State of International Investment Arbitration: the possibility of establishing an appeal mechanism. Submitted in accordance with the requirements for the degree of Ph.D. The University of Leeds, School of Law. 2012. P. 103. URL: [http://etheses.whiterose.ac.uk/3361/1/FINAL\\_CORRECTED\\_THESIS\\_%2822\\_jan\\_2013%29.pdf](http://etheses.whiterose.ac.uk/3361/1/FINAL_CORRECTED_THESIS_%2822_jan_2013%29.pdf) (accessed date: 01.02.2019).

<sup>9</sup> UNCITRAL. Possible reform of investor-State dispute settlement (ISDS). United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform). September 5, 2018. URL: [http://www.uncitral.org/pdf/english/workinggroups/wg\\_3/WGIII-36th-session/149\\_main\\_paper\\_7\\_September\\_DRAFT.pdf](http://www.uncitral.org/pdf/english/workinggroups/wg_3/WGIII-36th-session/149_main_paper_7_September_DRAFT.pdf) (accessed date: 01.02.2019).

<sup>10</sup> Possible improvements of the framework for ICSID arbitration. – *ICSID Secretariat Discussion Paper*. October 22, 2004.

commonly known as “Mauritius Convention”. Apparently, states are willing to make up for arbitration credibility undermined by parallel proceeding and relitigation of settled cases, by cherry-picking practices of treaty, forum and nationality shopping [Reinisch 2008:114].

In the meantime, excessive legal expenses and length of proceedings need separate detailed treatment. Statistics shows gradual increase of duration and costs of arbitration: on the average, as of 2017, since 2012 the procedure per one investment arbitration case got longer from 3.7 to 4 years, and more expensive by 21.4%<sup>11</sup>. Unreasonable charges, especially in case of protracted disputes, aggravate economic position of disputing parties. In case of vulnerable category of contestants, such as low-income countries and small and mid-size enterprise (SME) investors, it is a question of access to justice.

As a matter of fact, all these concerns have already been discussed more than fifty years ago during elaboration of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965). The World Bank's Legal Committee, chaired by Aaron Broches, assumed an overwhelming task to work out investment arbitration rules skipping substantive principles; otherwise many sensitive matters would have emerged – that would mean a dead-end job. Back then Broches proposed to make participation in process voluntary and leave choice of substantive rules to consent of disputing parties [Thomas, Dhillon 2017:462]. Genius is simplicity.

When discussions drifted to issue of choice between *ad hoc* and standing tribunals, permanent court was unanimously found “impractical” in those circumstances. It is not as if experts did not preview probable shortcomings of *ad hoc* arbitration; quite the contrary: they recognized the possibility of inconsistent decisions. As Broches constated, “contradictory decisions are inherent in any ad hoc arbitration system” [History... 1968:117]. It is to be recalled that it was the very beginning of a new era of an ever-expanding flow of foreign investments; that is why at that time, for sure, there was a different scale of assessment. Everything is good in its time. Today there are far more reasons and relevant facilities to put a permanent investment court in practice.

### 3. Relevance of a permanent investment court

The creation of a standing dispute settlement body in investment sphere is expected to solve numerous questions. Centralized institution is a guarantee of predictability and consistence of its awards. Hardly can the binding force of precedent satisfy all aspirations about coherent system of international investment law. States will not be glad to be *de facto* bound by rules to which they have not explicitly consented. On the other hand, consistency as an aim constitutes some kind of “decisional burden” for the arbitrators [Howard 2017:33]. The dispute settlement by a permanent body would ensure successive interpretation of general standards due to its natural “continuous collegiality”. That would restore awards’ authority, i.e. the regime’s credibility [Kaufmann-Kohler, Potestà 2016:17]. Moreover, the coherent legal construction can be attained directly with the help of parties to concerned agreements. The EU submission to the UNCITRAL Working group III presents a range of observations in regard of ISDS reform; one of them is to ensure mechanisms for dialogue with treaty parties<sup>12</sup>. Why not to grant them the possibility to adopt binding interpretations? That would considerably ease the problem of consistent law application and simultaneously ensure enough state control over situation to legitimate judicial work in the eyes of recalcitrant sovereigns. The international investment arbitration community can look at the experience of NAFTA countries which introduced a non-judicial body competent to give binding interpretation (Free Trade Commission). Similar mechanisms are inserted in numerous bilateral treaties of NAFTA members with third countries as well.

Another virtue relates to appointment mechanism, that allows to ensure the impartiality and independence of adjudicators. Tenured judges have too scarce relationship with States, whose actions they examine, to render an award based on their personal incentives [Paparinskis 2010:15]. Furthermore, replacement of *ad hoc* arbitrators by full-time judges is considered to entail financial advantages for the parties. Fixed remuneration would be less costly to the parties in contrast to current fee determination, which allows to take into consideration time spent on a separate case. Procedural protraction should

<sup>11</sup> Investment Treaty Arbitration: cost, duration and size of claims all show steady increase. 2017. URL: <http://www.allenoverly.com/publications/en-gb/Pages/Investment-Treaty-Arbitration-cost-duration-and-size-of-claims-all-show-steady-increase.aspx> (accessed date: 01.04.2019).

<sup>12</sup> Possible reform of investor-State dispute settlement (ISDS). Submission from the European Union and its Member States to the United Nations Commission on International Trade Law Working Group III. January 24, 2019. Para. 3.10. URL: <https://undocs.org/en/A/CN.9/WG.III/WP.159> (accessed date: 01.02.2019).

not be the source of unjust profit. For the duration of the ISDS, an advantage to have tenured judges is that it allows to accelerate the appointment stage. Given that average duration from registration of the request for arbitration to constitution of an arbitral tribunal takes 6–8 months (at least according to ICSID statistics)<sup>13</sup>, the skip of this stage could scale back average process duration by 16%.

It is worthwhile to say that a fully-featured permanent court means necessarily a two-tier adjudicative mechanism. Foremost, the appeal procedure is a harmonization method *per se*. Second, the possibility of review is a matter of legal correctness. Today the proponents of appeal in international adjudication can confirm their positive suggestions on appellation by a successful example – the WTO Appellate Body. As it is often marked, the predominant feature of the WTO dispute settlement mechanism is a “high consistency” of its Appellate Body [Howard 2017:37]. Its reports are traditionally binding only upon disputing parties in their particular cases; however, as the Appellate Body recognized in one of its first reports, security and predictability of multilateral trading system belongs to legitimate expectations created by panel reports<sup>14</sup>.

Since the time when the first investment agreement was made in 1959 (Germany-Pakistan) until today, the number of BITs almost reached three thousand (2,932 to be precise)<sup>15</sup>. As a natural result, the last twenty years are marked by investment arbitration boom. As of 1st April 2018, UNCTAD statistics on investment dispute settlement lists 602 concluded and 332 pending cases. Inevitably strong demand for qualified adjudicators engenders imminent proliferation of investment tribunals. Despite tempting availability of legal recourse and flexible terms, this phenomenon brings its own risks. Duplication or even multiplication of proceedings aggravates fragmentation. Even doctrines of *lis pendens* or *res judicata* might be ignored [Reinisch 2008:114]. This combination of factors triggers the necessity to start revising unresolved divergences.

#### 4. Arbitration v. judicial order

As pending issues cannot be arranged at once, creation of a single adjudicative mechanism would at least defend against further needless intricacies. It should be borne in mind that a switch to judicial approach does not necessarily mean a break-off with arbitration features. Investment arbitration and proposed projects of investment court have many features in common. An attentive analysis reveals that the notable differences concern appointment methods and other structural questions, whereas basic features remain unaltered [Lévesque 2016:2]. For instance, *ad hoc* arbitration as well as the investment court are based on consent of the parties, i.e. the voluntary submission to the jurisdiction of the adjudicating forum<sup>16</sup>. That is to say that an investor has a choice for the recourse, and the state cannot be compelled to be a respondent, unless it gives his explicit consent to it. Furthermore, the binding force of awards originates from parties' consent to jurisdiction. In such a way, recognition of award's authority is of consensual nature as well.

Another distinctive feature is detachment of decision-makers from governmental system. Judging investment disputes, adjudicators work in their personal capacity, not as “an emanation of the state” [Jarrosson 1987:372]. Their independent status should be reiterated, as being a judge of a permanent court is not always equal to be free from the State's will. Otherwise what is the point to have in the panel which decides the case a judge who is the national of a disputing State, as it is set forth, for example, in the Statutes of the ICJ or of the International Tribunal for the Law of the Sea (ITLOS)?<sup>17</sup> The most popular arbitration issues can be found in provisions on a permanent investment tribunal, such as: parallel claims, anti-circumvention, interim injunctions, non-disputing party participation, expert reports, consolidation etc. [Lévesque 2016:4]. To certain extent, a standing body is a peculiar form of encapsulation of arbitration achievements.

<sup>13</sup> Flores G. Duration of ICSID proceedings. Presentation. September 10, 2018. URL: [http://uncitralcap.org/wp-content/uploads/2018/11/2018TLF\\_Part1\\_Session-3\\_3.Gonzalo-Flores.pdf](http://uncitralcap.org/wp-content/uploads/2018/11/2018TLF_Part1_Session-3_3.Gonzalo-Flores.pdf) (accessed date: 01.02.2019).

<sup>14</sup> Japan. Taxes on Alcoholic Beverages. AB-1996-2. Report of the Appellate Body. P. 107–108. URL: [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?Query=\(@Symbol=%20wt/ds8/ab/r\\*%20not%20rw\\*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds8/ab/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#) (accessed date: 01.02.2019).

<sup>15</sup> International Investment Agreement Navigator. URL: <http://investmentpolicyhub.unctad.org/IIA> (accessed date: 01.02.2019).

<sup>16</sup> *Mezhdunarodnoe pravo*. Pod red. A.N. Vylegzhanina [International Law. Ed. by A.N. Vylegzhanin]. Moscow: Yurait Publ. 2012. P. 443.

<sup>17</sup> Statute of the International Tribunal for the Law of the Sea. Art. 17.3. URL: [https://www.itlos.org/fileadmin/itlos/documents/basic\\_texts/statute\\_en.pdf](https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf) (accessed date: 18.01.2019).



Texts of CETA Agreement and EU-Vietnam IPA decidedly avoid using the terms “court” and “judges”: instead, they use the term “tribunal” when dealing with the dispute settlement body<sup>18</sup>. The range of available procedure rules includes the ICSID Convention and Rules of Procedure for Arbitration Proceedings, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or any other rules as agreed by and between the disputing parties<sup>19</sup>. Both agreements refer to the New York Convention for the Recognition and Enforcement of Foreign Arbitral Award so far as consent to the submission should be in writing<sup>20</sup>. Enforcement of the Tribunal’s awards are also subject to the rules of the ICSID Convention and the New York Convention<sup>21</sup>. Conversely, formation of the Tribunal can be characterized as typically court-like [Kaufmann-Kohler, Potestà 2016:35]. Contestants do not participate in selection of arbitrators, which are appointed by a Committee comprising representatives of the EU and of the other negotiating State<sup>22</sup>. Their rotating assignment to disputes should be random and unpredictable<sup>23</sup>. That serves to achieve the objective of transparency and impartiality, which – as some authors argue – has gone in the international investment arbitration.

The close interrelation of arbitral and judicial (objectively noticeable) traits in investment court brings up the question on subjective assessment of a new institution. For instance, modern investor-state arbitration is often blamed for being “one-sided” or “asymmetrical” in favour of investor. This is the ordinary position of developing countries (like Argentina, Bolivia, Ecuador, Venezuela) having lost some disputes. This view is based on the observation that under investment treaties investors are accorded substantive rights without assuming any specific obligations as well as on simple statistics demonstrating that 60% cases in which tribunal recognized its jurisdiction were resolved in investor’s favour [Brower, Blanchard 2010:710]. However, it is worth noting

that the ISDS arbitration was initially established in order to protect investors bound by national law of host states and whose assets are firmly attached to host state’s territory. In the same direction it is absolutely logical that the right to bring claims under such an international treaty is granted to investor, as a host state has its own leverages to correct (or to punish) the investor’s conduct on its territory. Still, states are not precluded from bringing their claims in investor-state arbitration<sup>24</sup>. However, the misapprehension on ISDS asymmetry is quite spread. Investment courts are not defended from alike delusions in regard of balance of forces in process.

The other captious question can arise as to whether an investment court could be the only innovative option incorporating the most appropriate elements of dispute settlement? The EU Commission’s “Impact assessment of multilateral reform of investment dispute resolution” presents eight contrasting alternatives<sup>25</sup>. It could be easier to continue current EU’s investment policy in negotiations of investment treaties (baseline scenario), or to alter existing BITs and international arbitration rules (options 2 and 3). However, the ratio between various inputs and final outcomes of these variants is incomparable with opportunities offered by the multilateral investment court (option 5). The establishment of a sole appeal instance (option 4) or reforming system of dispute settlement resolution formed by investment agreements (option 7) will not encompass all controversial points. Despite complexities related to setting up a court, this project seems more *feasible* than the attempts to extend the negotiation framework to new substantive investment rules (option 6) or to make national courts competent to decide on investment disputes (options 8).

However, the quality and a detailed plan of the court’s organization are not sufficient for practical realization. The promotion of any project requires a solid movement of adherents to the idea; otherwise,

<sup>18</sup> CETA. Art. 8.27. URL: <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> (accessed date: 18.01.2019); EU-Vietnam IPA. Art. 3.38. URL: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> (accessed date: 18.01.2019).

<sup>19</sup> CETA. Art. 8.23.2; EU-Vietnam IPA. Art. 3.33.2.

<sup>20</sup> CETA. Art. 8.25.2(b); EU-Vietnam IPA. Art. 3.36.4(b).

<sup>21</sup> CETA. Art. 8.41.3–6; EU-Vietnam IPA. Art. 3.57.3, 7, 8.

<sup>22</sup> CETA. Art. 8.27.2; EU-Vietnam IPA. Art. 3.38.2.

<sup>23</sup> CETA. Art. 8.27.7; EU-Vietnam IPA. Art. 3.38.7.

<sup>24</sup> The ICSID received four claims from states and public entities: *Republic of Peru v. Caravelí Cotaruse Transmisora de Energía S.A.C.* (ICSID Case No. ARB/13/24); *Gabon v. Société Serete S.A.* (ICSID Case No. ARB/76/1); *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others* (ICSID Case No. ARB/07/3); *Tanzania Elec. Supply Co. Ltd. v. Indep. Power Tanzania Ltd.* (ICSID Case No. ARB/98/8).

<sup>25</sup> European Commission. Commission Staff Working document “Impact assessment”, Multilateral reform of investment dispute resolution accompanying the document “Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes”. September 13, 2017. URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0302&from=EN> (accessed date: 18.01.2019).

in case of the EU proposal, the efforts of the initiator would lead to opposite results: instead of legal coherence they would give birth to an even more fragmented system [Roberts 2018:410–432]. Therefore, besides theoretic advertisement of investment court, the EU has to win for its proposal regional opinion leaders (like Singapore and Korea in Asia or Morocco and Mauritius in Africa). Anyway, the transition from habitual arbitration to a new order requires more enthusiasm than approach of “piece-meal” reforms<sup>26</sup>. No wonder that there are many states ready to work at amending their own treaties rather than to engage into something new. In this sense, numerous arbitral elements conserved in the MIC project would be an advantage in negotiations with those states which are not prepared to give up the old-fashioned international investment arbitration.

### 5. Appeal mechanism

The EU’s idea of a permanent court is particularly valuable in its structural aspects. A single first instance dispute resolution forum would not be sufficient to properly address the problems of legitimacy and consistent jurisprudence. In this perspective, two-tiered architecture of multilateral investment court most closely meets this objective.

The necessity of an appeal mechanism seems self-evident, provided that, in domestic law decisive word in law interpretation has always belonged to higher courts. In case of investment law, the interpretation work is even harder, insofar as an appellate body would have to treat not the same norms of the sole legislator, but wide principles contained in different, though similar rules. Within a bilateral adjudicative mechanism, such as CETA tribunal, complexity degree of appellation corresponds to work of dispute settlement bodies in “self-contained” regimes, as WTO law or human rights [Ispolinov 2017:67]. The only source of applicable law would be the appropriate bilateral investment agreement. Thus, the intended outcome of an appellate body’s work is *ante omnia* coherent interpretation of law. When introduction of an appeals facility was disputed within the ICSID,

the weighty argument in its favor was its capacity to “foster coherence and consistency in the case law”<sup>27</sup>. However, coherence does not necessarily mean identical interpretation: it is important to apply a correct rule in a given situation rather than for a single-track jurisprudence. As the UN International Law Commission pointed out: “coherence is a formal and abstract virtue. For a legal system that is regarded in some respects as unjust or unworkable, no added value is brought by the fact of its being coherently so”<sup>28</sup>.

The concept of an appellate mechanism, even as a free-standing instance, has been widely promoted as a sure remedy against legal errors and inconsistencies [Schneider 2013:204]. Appeal can be considered as a “derivative dispute resolution”; its main task is to refine primary awards. Refinement of legal issues is kind of law creation; thus, there is a fundamental difference between appeal procedure and awards annulment [Alvarez 2011:185]. In order to attain a substantive accuracy in rendered decisions, an appellate body has to review them in several aspects: correcting injustice, correcting legal and factual mistakes, ensuring uniform application of law and procedural justice research [Schneider 2013:208]. An appellate body is also charged with the most arduous task – to enhance an authority of arbitral awards. If legitimacy is regarded as an assembly of interrelated factors, they happen to depend on success of the appeal (consistency, accuracy, authority) [Tams 2006]. It is notable that the only fact of presence of an appellation possibility in some spheres signalizes high concentration of social values, which demand protection in the form of review procedure. For example, the work of the Grand Chamber of the ECHR is comparable to activity of an appellate body. On account of such sensible subject matter as human rights the Court’s organization provides for additional guarantees for correct resolution of an exceptionally tough situation. On the contrary, the WTO Appellate Body is widely thought to be a *de facto* final appeal (or cassation) instance: its competence is limited to legal issues, interpretation of applied legal norms, it has no remand authority back to the panel [Van Damme 2009:12]. This remark gives an idea about strong de-

<sup>26</sup> Dahlquist J. As UNCITRAL investor-state arbitration reform enters crucial phase, we preview agenda for upcoming meeting. March 27, 2019. URL: <https://www.iareporter.com/articles/as-uncitral-investor-state-arbitration-reform-enters-crucial-phase-we-preview-agenda-for-upcoming-meeting/> (accessed date: 01.05.2019).

<sup>27</sup> ICSID. Possible Improvements of the framework for ICSID Arbitration for ICSID Arbitration. ICSID Secretariat Discussion Paper October 22, 2004. URL: <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf> (accessed date: 18.01.2019).

<sup>28</sup> Fragmentation of International law: difficulties arising from the diversification and expansion of international law. Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi. April 2006. Para. 491. URL: [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (accessed date: 18.01.2019).

pendence of appeal mechanisms with vital necessity: a proper appellation is too authoritative level of justice to permit formalities.

At the same time, the importance of an appellate body should not be overstated. Its beneficial effect on investment protection regime has a flip side. Making first instance's awards appealable equals to making them vulnerable, less significant in eyes of disputing parties [Dimsey 2008:184–185]. The principle of quality, in the name of which an appeal procedure is introduced, should be balanced with the long-held principle of finality [Kaufmann-Kohler 2004:189–221]. From a different angle of view, an appeal mechanism deprives disputing parties from inherent benefits of one-stage arbitration, such as flexibility, expert decision-making, process speed, enforceability and considerably increases costs [Franck 2005:1598]. Another remarkable suggestion on appellation's efficiency concerns the problem of unnecessary intervention in development of the international investment law. It is necessary to leave space for "natural correction" of investment jurisprudence through gradual consolidation of dominant trends [Paulsson 2008:253]. Though arbitrators are deemed to "take account of the precedents established by other arbitration organs"<sup>29</sup>, the single institution would *de facto* be based on the *stare decisis* doctrine limiting such "correction". Other doubts relate to enforcement of awards pending appeal, precedential effects of appellate decisions, standards of review procedure, prevention of "automatic appeals" [Legum 2006:121].

A brief overview of doctrinal estimations reveals a questionable position of an appeal mechanism. However, these reproofs mostly descend from general uncertainty how to put it all in practice, what order in relationships to establish. The incontestable point is that the appellation's functions can be integrally performed only in hierarchically-structured system of dispute resolution, such as a multilateral investment court. Operability of this project should be examined through different perspectives.

## 6. Certain procedural aspects

The choice of appointment procedure for the Multilateral Investment Court (MIC) is not an issue; however, there are various modes for separate steps, such as number of the MIC members or renewability of their mandate. On the one hand, the number of adjudicators should be equal to the number of High Contracting Parties, if there are more than just two such Parties. Thus, in case of a bilateral institution this should be a tree-fold figure (one third: proposed by the EU, one-third: proposed by the other negotiating Party; one-third: selected from third countries). Typically, collegial tribunals have three or five members. Following the Alabama Claims arbitration, many observers came to favour five-member tribunals including three members not having the nationality of either party. Assuming that the national members would support their appointing States, they regarded such five-member tribunals as more conducive to disinterested analysis of controversies by several minds<sup>30</sup>.

On the other hand, the number of members should be flexible enough to fit to the workload. This approach has been adopted by other international adjudicative bodies (such as the International Criminal Court (ICC) and ITLOS). CETA's<sup>31</sup> and TTIP<sup>32</sup> tribunals are meant to engage 15 members each, EU-Vietnam's one – 9 members<sup>33</sup>, but joint committees "can decrease or increase this number by multiples of three". However, bilateral structure does not address the growing number of EU partners; in future it would be difficult to replace a *status quo* mechanism with a multilateral one [Schill 2016].

Regarding the mandate term, the EU Commission suggested that a long and non-renewable mandate would be "the best guarantee for independence of adjudicators in line with the right to an effective remedy before an independent tribunal"<sup>34</sup>. This statement is premised on the idea of reappointment as a career-related "reward" for "suitable" decision. How-

<sup>29</sup> *El Paso Energy International Co. v. Argentine Republic* (ICSID Case ARB/03/15). Decision on jurisdiction dated April 27, 2006. Para. 39. URL: [https://www.italaw.com/sites/default/files/case-documents/ita0268\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/ita0268_0.pdf) (accessed date: 18.01.2019).

<sup>30</sup> Brower Ch.H. Arbitration. – *Max Planck Encyclopedia of Public International Law*. Ed. by R. Wolfrum. 2006. P. 50. Accessed from the Scientific Library of MGIMO-University on February 3, 2019.

<sup>31</sup> CETA. Art. 8.27.2.

<sup>32</sup> The European Union's proposal for Investment Protection and Resolution of Investment Disputes in Transatlantic Trade and Investment Partnership. November 12, 2015. Art. 9.2. URL: [http://europa.eu/rapid/press-release\\_IP-15-6059\\_en.pdf](http://europa.eu/rapid/press-release_IP-15-6059_en.pdf) (accessed date: 18.01.2019).

<sup>33</sup> EU-Vietnam IPA. Art. 3.38.2.

<sup>34</sup> European Commission. Commission Staff Working document. Impact assessment. Multilateral reform of investment dispute resolution. P. 42. URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0302&from=EN> (accessed date: 18.01.2019).

ever, most of international permanent positions are based on the renewable term. The opportunity of re-appointment ultimately serves as motivation for efficient work. For this reason, all EU's bilateral agreements previewing a tribunal fix a mid-term mandate (4–6 years), renewable once.

Aside from rigorous organization, to a large extent the court's legitimacy depends on personal characteristics of its members. The "high moral character" is precondition. On the next level of admissibility for appointment there are qualification requirements. Most common formulation of eligibility is to have "recognized competence in international law". In terms of institution's specialization necessary expertise is specified. The EU raised a special requirement to arbitrators' juristic qualification: they should demonstrate their expertise not only in public international law, but desirably in "in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements"<sup>35</sup>. Final and the most complicated criterion is doubtless impartiality.

It is generally accepted that problems of biased judging and interest conflicts are rooted in ethics sphere. Today arbitrators are pressed by increasing challenges [Markert 2010:257], formal and informal mechanisms of impartiality control, though these safeguards cannot ensure *conscious* independence of an arbitrator. As Gabrielle Kaufmann-Kohler put it, it is a matter of structural and individual independence [Kaufmann-Kohler, Potestà 2017:49]. That partly correlates with the idea of actual and perceived bias [Van Harten 2010]. As a human being, an adjudicator would always proceed from his own worldview. For this reason, efficient ethical standards can be provided only in form of plainly-fixed incompatibilities, in order to restrict "regulable" aspects of impartiality. For example, it is possible to preclude an arbitrator from exercise of other professional activity beside legal practice or from any legal activity related to other investment disputes, while personal principles could be unveiled only in practice. Another regulable element of impartiality is the question of just remuneration. No doubt, tenured judges are less affected by worries on choice of more "lucrative" legal position [Ispolinov 2015:83].

## 7. Certain administrative aspects

In case of a standing body, financial accent drifts from parties' solvency to system of contributions. In case of equal allocation of costs among members irrespective of financial capacities, weaker disputing party can find itself in a difficult situation. On the contrary, the respect of development factor in case of cost allocation, as in the WTO, the ECtHR and the ICJ, would have "higher budgetary implications for the EU and its Members"<sup>36</sup>. Financial aspect involves hesitance, whether disputing individuals would have to pay a filing fee, as in arbitration process, or these expenses are counted toward member payments. These concerns relate to the question on support of SME investors and developing countries. In the European Commission's assessment, that issue takes a notable place.

At the same time, the financial backing for the court does not dispense from expert and counsel fees. The most suitable way-out would be to insert counsel services into the court's structural organization. The more so since there is a precedent of the legal assistance previewed within the WTO DSB for the least-developed countries. That is the point which the EU specified in its submission to the UNCITRAL Working Group III in January 2019<sup>37</sup>. The proposal is destined to ensure equal chances in international litigation. If further steps could be taken, assistance mechanism would have even wider competence not only for facilitating work of the court itself, but for promoting international cooperation in the investment field. It refers to the so called "preventive function" first advanced during the elaboration of the ICSID convention. In the mindset of the negotiators such function would have involved advising on new investment instruments with clear and fair terms. In other words, they considered the necessity for legal assistance not only for dispute settlement, but also for prevention of disputes through mastered legal terms.

Fortunately, favourisation of economically vulnerable parties is not limited to financial allowances. It can be accorded in form of simplified procedural rules. Furthermore, following the approach of inherent interdependence of form and content, it can be expected that the achievement of legal consistency would also facilitate the dispute settlement process.

<sup>35</sup> CETA. Art. 8.27.4.

<sup>36</sup> European Commission. Commission Staff Working document. Impact assessment. Multilateral reform of investment dispute resolution. P. 56.

<sup>37</sup> Possible reform of investor-State dispute settlement (ISDS). Submission from the European Union and its Member States to the United Nations Commission on International Trade Law. Working Group III. January 24, 2019. Para. 38.

According to European negotiators of the ISDS reform, establishment of definite interpretation of particular norms would spare them from needless re-litigation, as disputing parties would not have to waste their time and finances for search of more favourable interpretation from other adjudicators<sup>38</sup>.

### 8. Certain aspects of the MIC's effectiveness

Whereas theoretical issues of jurisprudence consistency or arbitrators' independence meet robust polemics in academic circles, practical tasks call for coming down to the earth and proposing an exact solution. For this reason, the extension of the MIC option to the existing European investment agreements is discussed more prudently in the light of two concise modes: insertion of a relevant clause in the EU's agreements or adoption of the so-called "opt-in convention".

At the first glance, negotiating new provisions on one-to-one basis is kind of a trodden path. However, in present circumstances this approach would not make much sense: the EU is a party to 69 international investment agreements, amending so many treaties is a time- and work-intensive exercise. Besides, the negotiating process cannot ensure expected transparency and predictability of the outcome<sup>39</sup>. In contrast to complicated renegotiation of arbitration clauses, the opt-in convention appears to be the most reasonable way to submit disputes arising out of investment treaties to the jurisdiction of the MIC [Rachkov 2016:130]. Moreover, there are successful precedents of the UN Mauritius Convention on Transparency and of the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS Convention). This legal instrument allows an automatic application of conventional provisions to all relevant treaties of the States-parties to such convention. The opt-in convention does not affect "the scope of, and requirements for, jurisdiction and admissibility" provided in existing investment treaties

[Kaufmann-Kohler, Potestà 2016:214]. Moreover, if a State wishes to retain investor-State arbitration as an alternative to the MIC or to exclude some its treaties from the Convention's scope of application, such State can make appropriate reservations or opt-in/opt-out declarations. These flexibilities facilitate for other countries opting for jurisdiction of the permanent investment court.

However, even within the EU itself the MIC's jurisdiction can be challenged. In autumn 2017, Belgium requested the European Court of Justice (hereinafter referred to as CJEU) for its opinion on compatibility of CETA provisions with the EU law. It may be arguable whether CETA Tribunal complies with the principle of autonomy of the EU law, specifically, the CJEU's exclusive jurisdiction to interpret EU law<sup>40</sup>. Article 8.31 CETA provides for such autonomy safeguards as (1) limitation of the Tribunal's jurisdiction to the provisions of CETA; (2) prohibition to determine the legality of a measure under domestic legal rules; (3) obligation to consider domestic law only as a matter of fact; (4) non-binding force of the meaning given to domestic law by the CETA tribunal. However, at the hearings before CJEU in June 2018 Slovenia declared that these CETA provisions cannot guarantee that "autonomy of EU law if left intact"<sup>41</sup>. Assessing the EU law as a matter of fact would inevitably entail interpretation of its legal substance. Another point concerns relations between the CETA tribunal proceedings and proceedings before the EU domestic courts in case of Canadian claims.

On 29 January of 2019, the long-awaited Opinion 1/17 of the Advocate General of the CJEU came out. This Opinion held that the Investment Court System under the CETA does not affect the exclusive jurisdiction of the CJEU, as the EU legal order and norms of the CETA are two co-existing legal systems and interference between them has been deliberately limited<sup>42</sup>. It was even emphasised that the establishment of a dispute settlement mechanism does not undermine the credibility of the judicial system of the EU or of its members; on the contrary, it should ensure

<sup>38</sup> Possible reform of investor-State dispute settlement (ISDS). Submission from the European Union and its Member States to the United Nations Commission on International Trade Law. Working Group III. January 24, 2019. Para. 55.

<sup>39</sup> European Commission. Commission Staff Working document. Impact assessment. Impact assessment. Multilateral reform of investment dispute resolution. P. 51.

<sup>40</sup> CETA. Belgian Request for an opinion from the European Court of Justice. URL: [https://diplomatie.belgium.be/sites/default/files/downloads/ceta\\_summary.pdf](https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf) (accessed date: 01.02.2019).

<sup>41</sup> Gesa K. CETA's Investment Court System and the Autonomy of EU Law: Insights from the Hearing in Opinion. 2018. URL: <https://verfassungsblog.de/cetas-investment-court-system-and-the-autonomy-of-eu-law-insights-from-the-hearing-in-opinion-1-17> (accessed date: 01.02.2019).

<sup>42</sup> CJEU. Opinion 1/17 of Advocate General Bot delivered on January 29, 2019. Para. 63. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=210244&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=10951023> (accessed date: 01.02.2019).

neutrality and speciality in resolution of disputes between investors and States<sup>43</sup>. The Opinion further indicates that the investment court complies with the principle of equal treatment and respects the right of access to an independent and impartial tribunal. Subsequently the Court's opinion on 30 April 2019 supported the above ideas of the Advocate General<sup>44</sup>. The conclusion on compatibility of the CETA's provisions with the EU primary law was especially welcomed by the European Commission<sup>45</sup>. This can be viewed as green light to the investment court system in general under all existing and future agreements of EU with third countries.

At the same time the assessment on to what extent the MIC can be efficient should not be limited exclusively to its purely judicial work. The EU suggests broadening the MIC competence by adding conciliatory and mediatory functions<sup>46</sup>. The implementation of such initiative would be innovative in dispute resolution practice, as so far no other forum offers mediation services. Traditionally, disputing parties are strongly recommended to proceed first with consultations or they are directly restricted to comply with timeframes. However, these requirements do not guarantee that true efforts are made in the search of mutually suitable compromise. Dispute

avoidance mechanisms introduced right in adjudicatory institution could replace formal preliminary stages with constructive dialogue from the first moment of a dispute submission. This brand-new option would mark a true transition from conservative arbitration to a new way of resolving investor-state disputes.

## 9. Conclusion

The project of the Multilateral Investment Court emerged at the juncture of old legal dreams and current problems in investment arbitration. In spite of numerous international institutions for dispute settlement, the MIC would be unique in its way. The MIC idea combines best arbitration features and practices with elements compensating for arbitration deficiencies. At the same time the present research work demonstrates that besides good intentions to meet legal aspirations there are issues demanding particular efforts, as the cost of this heal-all remedy may be high. The potential drawbacks of establishing the MIC are the risks of repoliticization in the pursuit of global governance, risks of automatism in the pursuit of "jurisprudence constante", risks of escalating fragmentation in the pursuit of new investment regimes.

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